

“IT AIN’T NECESSARILY SO”: THE GOVERNOR’S “MESSAGE
OF NECESSITY” AND THE LEGISLATIVE PROCESS IN NEW
YORK

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*I think the people of the state said they want something done and they want it done now . . . Let’s act.*¹

—Governor Andrew Cuomo

*The bill was muscled through with disturbing speed after days of secret negotiations and a late-night vote Monday by state senators who had barely read the complicated measure before passing it.*²

—*The New York Times*

*Three days of debate, everyone has an opinion, it’s entirely transparent, [and] we never reach resolution . . . I get 100 percent for transparency. I get zero for results.*³

—Governor Andrew Cuomo

*A legislature that rushes critical, controversial bills to passage is one that deliberately excludes the public. A legislature that cannot wait three days to revise a mission statement governs by crisis. This must stop.*⁴

—*Syracuse Post Standard*

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¹ *Critics Assail Cuomo’s Gun Deal as Secret, Rushed*, DAILY GAZETTE, http://www.dailygazette.com/news/2013/jan/15/0115_rushed (last updated Jan. 15, 2013, 5:40 PM) [hereinafter *Critics Assail*].

² Editorial, *New York Leads on Gun Control*, N.Y. TIMES, Jan. 16, 2013, at A22.

³ *Analysis: NY Gov Chooses Private Deals on Policy*, WALL ST. J. (Dec. 10, 2011, 11:58 AM), <http://online.wsj.com/article/AP56e33640de5c48b69f7a90c2719cb90c.html>.

⁴ Op-Ed., *Urgent Matter*, POST-STANDARD (Syracuse, N.Y.), Jan. 11, 1995, at A8 [hereinafter *Urgent Matter*].

*Among the qualities we use to assess the performance of our state legislature are “high ‘visibility,’ performing its duties responsibly and in such a fashion that the public can oversee and judge its actions; . . . its rules permit majority rule while protecting against arbitrary action; . . . [and] it has sufficient time and resources for informed deliberation.”*⁵

—Patricia Shumate Wirt

*I have come to the conclusion that the making of laws is like the making of sausages—the less you know about the process the more you respect the result.*⁶

—Unnamed Member of the Illinois State Legislature

I. INTRODUCTION

Among the various restrictions on the legislative process found in the New York Constitution,⁷ none has raised more controversy or received more attention than the provision authorizing the governor to issue a message of necessity to suspend the constitutional requirement that legislation be on the desks of legislators in final form at least three calendar days before final passage. Both the three-day requirement and the message of necessity provision were added to the constitution by the 1894 Constitutional Convention.⁸ Following amendments in 1938 and 2001, the section, Article III, section 14, reads as follows:

⁵ Patricia Shumate Wirt, *The Legislature*, in SALIENT ISSUES OF CONSTITUTIONAL REVISION 68, 69 (John P. Wheeler, Jr. ed., 1961).

⁶ Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 FORDHAM L. REV. 573, 579 n.40 (2004) (quoting Frank W. Tracy, *The Report of the Committee on Uniform Laws, of the American Bankers’ Association*, 15 BANKING L.J. 542 (1898)) (internal quotation marks omitted).

⁷ See, e.g., N.Y. CONST. art. III, § 13 (requiring an enacting clause for all bills); N.Y. CONST. art. III, § 14 (requiring bills to be on the desks of the legislators in final form at least three calendar days prior to final passage, unless the governor issues a message of necessity); N.Y. CONST. art. III, § 14 (requiring bills to pass by a majority of members elected to each house of legislature); N.Y. CONST. art. III, § 15 (prohibiting local or private bills from embracing more than one subject, and requiring that subject to be expressed in title); N.Y. CONST. art. III, § 16 (mandating that no law be passed which incorporates by reference existing law); N.Y. CONST. art. III, § 17 (providing a list of situations in which private or local bills may not be passed); N.Y. CONST. art. III, § 20 (requiring a two-thirds majority for any bill appropriating public money for local or private purposes); N.Y. CONST. art. III, § 22 (requiring laws that impose, continue, or revise a tax to distinctly state the tax and the object to which it is to be applied); N.Y. CONST. art. III, § 23 (requiring a quorum of three-fifths for certain matters involving taxation, appropriations, or claims against the state).

⁸ JOSEPH F. ZIMMERMAN, *THE GOVERNMENT AND POLITICS OF NEW YORK STATE* 86 (2d ed. 2008).

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No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon, in which case it must nevertheless be upon the desks of the members in final form, not necessarily printed, before its final passage; nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and the question upon its final passage shall be taken immediately thereafter, and the ayes and nays entered on the journal.⁹

The three-day rule, one of a number of constitutional restrictions imposed on the legislature during the nineteenth century,¹⁰ was aimed at preventing hasty, ill-considered, and one-sided legislation. At the same time, allowing the legislature to bypass the three-day rule through the message of necessity enables the state government to respond quickly when extraordinary circumstances justify a waiver of the required public airing of legislation before final passage.

Unlike several other constitutionally prescribed messages that the governor is authorized to issue,¹¹ the Article III message of

⁹ N.Y. CONST. art. III, § 14.

¹⁰ See PETER J. GALIE & CHRISTOPHER BOPST, *THE NEW YORK STATE CONSTITUTION* 126 (2d ed. 2012) (discussing the three-day rule); see also *id.* at 111–35 (providing commentary on other restrictions on the legislative process).

¹¹ In addition to Article III messages, the New York Constitution authorizes three other types of gubernatorial messages.

The first authorizes the governor to issue a message of necessity bypassing the constitutional prohibition against the legislature considering any appropriation bills until the governor's entire appropriation bill has been acted upon. N.Y. CONST. art. VII, § 5. The message can issue when the governor is "certifying to the necessity of the immediate passage of such a bill." *Id.* This message does not need to be approved by a supermajority of the legislature. See *id.*

The second authorizes the legislature, upon "certificate of necessity . . . reciting facts which in the judgment of the governor constitutes an emergency requiring enactment of such law," to enact special laws regarding the "property, affairs or government" of local governments other than New York City. N.Y. CONST. art. IX, § 2(b)(2). A message pursuant to this section requires a two-thirds vote in both houses of the legislature. *Id.*

The third authorizes a message from the governor permitting the legislature to bypass the prohibition against legislation affecting the abolishment, transfer of functions, qualifications, and removal of certain New York City government officials. N.Y. CONST. art. XIII, § 13(c). A message pursuant to this section must declare that "an emergency exists," and must be concurred in by two-thirds of the members of each house. *Id.*

necessity does not require a vote by the house in question to accept the message.¹² Nor does it require that an “emergency” exists.¹³ Messages allowing suspension of the three-day requirement must certify that facts exist which “necessitate an immediate vote.”¹⁴ The absence of stringent standards for the issuance of messages of necessity has resulted in practices that have frustrated the original intent of the three-day aging requirement. During the thirty-year period from 1975 through 2004, over ten percent of all legislation in New York State was enacted pursuant to messages of necessity,¹⁵ often containing no “facts” other than a description of the bill along with a statement that the bill was passed pursuant to a message of necessity.¹⁶ The overwhelming majority of these messages were issued at the end of the legislative session.¹⁷ Some of these late considerations were for bills that legislators knew had little chance of adoption in both houses. They served to “satisfy” various constituent interests at election time.¹⁸ The laws that did pass through the use of such messages often involved less than “pressing” issues, such as revising the mission statement of the

The differences in wording are instructive. Article IX, section 2 explicitly contains both a substantive requirement, that the governor recite the facts which led him or her to conclude that an emergency exists, and a procedural requirement, a two-thirds vote of both houses. N.Y. CONST. art. IX, § 2(b)(2). Article XIII, section 13 requires that the governor’s message declare that an emergency exists (although it does not require the specific facts justifying the emergency) and mandates a two-thirds vote of both houses. N.Y. CONST. art. XIII, § 13(c). Article III, section 14 requires the governor to state “the facts which in his or her opinion necessitate an immediate vote thereon,” and requires no legislative supermajority. *See* N.Y. CONST. art. III, § 14. The Article VII, section 5 message simply requires the governor to certify the “necessity of the immediate passage,” with no supermajority requirement. *See* N.Y. CONST. art. VII, § 5. The ease by which the requirements of Article VII, section 5 are satisfied makes sense: the restriction on legislation contained within the section is meant to prevent the legislature from interfering with the governor’s budgetary powers and an orderly budget process. Exceptions to the power would be least likely to affect those two when the governor grants them. A search did not find any published cases in which the grounds for any messages issued under any of the three non-Article III sections were challenged.

¹² *See* N.Y. CONST. art. III, § 14.

¹³ *See id.*

¹⁴ *Id.*

¹⁵ During this period, 2488 laws were passed pursuant to a message of necessity in at least one house of the legislature, out of a total of 24,437 total laws enacted. *See infra* Appendix A. During the same time, 534 bills passed one house pursuant to a message of necessity but were not ultimately passed by both houses, and forty bills that passed at least one house of the legislature pursuant to a message were vetoed or pocket vetoed. *See infra* Appendix A.

¹⁶ *See, e.g.*, Act of Aug. 2, 1994, ch. 676, 1994 N.Y. Laws 3540, 3540 (stating simply that the bill was “[p]assed on message of necessity pursuant to Article III, section 14 of the Constitution”).

¹⁷ *See, e.g.*, *Urgent Matter*, *supra* note 4, at A8 (discussing examples of bills which Governor Pataki passed by necessity at the end of his term).

¹⁸ *See id.*

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Office of Mental Retardation and Developmental Disabilities,¹⁹ creating the tattoo and body piercing regulation and permit fund,²⁰ and naming the multipurpose room at the state veterans' home in Batavia.²¹

Although the number of laws enacted pursuant to messages of necessity has decreased during the last ten years,²² controversy over use of the procedure has not. In the last three years, messages of necessity have been used to pass controversial laws that have allowed same-sex marriage,²³ instituted a property tax cap,²⁴ implemented rent control legislation,²⁵ established a redistricting reform commission,²⁶ mandated teacher evaluations,²⁷ and created a new government employees pension tier.²⁸ The most explosive issue, however, has been the passage of the NY SAFE Act,²⁹ a mid-session gun-control bill adopted in January of 2013.³⁰

These developments, along with a judiciary that has declined the invitation to subject the propriety of messages of necessity to

¹⁹ Act of Aug. 2, 1994, ch. 676, 1994 N.Y. Laws 3540.

²⁰ Act of Oct. 2, 2002, ch. 607, 2002 N.Y. Laws 3527.

²¹ Act of Jul. 18, 1994, ch. 293, 1994 N.Y. Laws 2851.

²² See *infra* Appendix A.

²³ Marriage Equality Act, ch. 95, 2011 N.Y. Laws 749.

²⁴ Act of Jun. 24, 2011, ch. 97, 2011 N.Y. Laws 752.

²⁵ Rent Act of 2011, ch. 97, 2011 N.Y. Laws 767.

²⁶ Redistricting Reform Act of 2012, ch. 17, 2012 N.Y. Sess. Laws 253 (McKinney).

²⁷ Act of Mar. 27, 2012, ch. 21, 2012 N.Y. Sess. Laws 322 (McKinney).

²⁸ Act of Mar. 16, 2012, ch. 18, 2012 N.Y. Sess. Laws 258 (McKinney). Underscoring the controversial nature of these laws is the fact that of the six laws listed in this sentence, two of them, same-sex marriage and the property tax cap, were subjected to or are currently undergoing constitutional and other challenges, including for grounds other than the message of necessity. See *New Yorkers for Constitutional Freedoms v. N.Y. State Senate*, 948 N.Y.S.2d 787 (App. Div. 4th Dep't), *leave denied* 979 N.E.2d 813 (N.Y. 2012) (holding that Marriage Equality Act was not passed in violation of Open Meetings Law); Thomas Kaplan, *Teachers' Union Sues Over State's Tax Cap*, N.Y. TIMES, Feb. 21, 2013, at A22 (noting a constitutional challenge to the property tax cap law). Certiorari to the U.S. Supreme Court to review previous rent control laws was being sought at the time the 2011 rent control legislation at issue was adopted. See *Harmon v. Markus*, 412 Fed. App'x 420, 422–23 (2d Cir. 2011); *cert. denied sub nom. Harmon v. Kimmel*, 132 S. Ct. 1991 (2012) (denying certiorari to a rent control challenge). Concerning teacher evaluations, they have bitterly divided school districts and teachers unions, and a lawsuit has since been brought challenging the constitutionality of the state's subsequent budget measure which required the state to revoke any increase in general support aid from any school district that failed to reach agreement with the collective bargaining agents for its teachers and principals and to obtain approval from the commissioner of education on a plan for a new system for annual professional performance reviews of its teachers and principals. See *NYC Parents Challenge \$250 Million Penalty for Teacher Evaluation Impasse*, NAT'L EDUC. ACCESS NETWORK (Feb. 11, 2013), <http://schoolfunding.info/2013/02/nyc-parents-challenge-250-million-penalty-for-teacher-evaluation-impasse>.

²⁹ N.Y. Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013, S. 2230, 236th Reg. Sess. § 20 (N.Y. 2013) (effective Jan. 15, 2013).

³⁰ See *id.*

judicial scrutiny, have intensified the calls for constitutional reform. New York's aging and message of necessity provisions raise several questions. Is a constitutional bill aging requirement needed or should the legislative process be solely governed by legislative rules? Should an aging requirement include a bypass mechanism and, if so, should that mechanism be placed in the hands of the governor? Should a supermajority of legislators be required to bypass an aging requirement? Is there constitutional language that could be used to make the bill aging provision more faithful to its original intent and more amenable to judicial policing?

This article will examine the New York State Constitution's bill aging and message of necessity provisions. First, the constitutional history of these provisions will be examined. Second, the article will review how governors have used the message since 1938, when the last significant changes to the provisions were enacted. The third section of the article will focus on the jurisprudence of the New York Court of Appeals in interpreting the message of necessity provision. The next section provides a case study of the use of a message of necessity in the enactment of the NY SAFE Act. The Article will conclude with an examination of proposals for reforming the procedure.

II. STATE CONSTITUTIONAL HISTORY OF THREE-DAY REQUIREMENT AND MESSAGE OF NECESSITY

The 1846 Constitutional Convention was the first in New York to address the issue of hasty and one-sided legislation. A "[R]eport from [the] [C]ommittee . . . on the [P]owers and [D]uties of the [L]egislature" contained a section that would have required three readings in each house and the presence of two-thirds of all members during the last reading and at the final vote.³¹ Although these recommendations were not adopted, the constitution adopted by the convention included three new requirements to govern the legislative process which remain in the present constitution: no bill could be passed unless approved by a majority of all members elected to each house of the legislature;³² the vote on final passage of a bill was required to be taken immediately upon its last reading;³³ and the ayes and nays of a vote were required to be entered on the

³¹ S. CROSWELL & R. SUTTON, DEBATES AND PROCEEDINGS IN THE NEW YORK STATE CONVENTION, FOR THE REVISION OF THE CONSTITUTION 714 (1846).

³² N.Y. CONST., of 1846, art. III, § 15 (now codified at N.Y. CONST., art. III, § 14).

³³ *Id.*

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journal.³⁴ No convention discussion was reported on these measures. The published accounts of the debates were compiled by reporters for various newspapers of the day, and consist of summaries rather than transcripts. The *Poletti Report* suggests that the purpose of taking a vote immediately after the bill was read was “to prevent the practice of log-rolling, of having three or four bills after their third reading laid upon the table until a group in the Legislature could gather sufficient force and by their combination to ‘log-roll’ them through all at once.”³⁵

1867–1868 Constitutional Convention

The 1867 Constitutional Convention also addressed the problem of bills being passed without sufficient consideration, and debated amendments that would have prohibited bills from being introduced into either house of the legislature during the last five days of the session³⁶ and would have provided that no bill could pass either house of the legislature until five days elapsed after its introduction³⁷ (with one delegate proposing an amendment that would have allowed the waiting period to be bypassed upon the assent of two-thirds of the members of that house).³⁸ The debates over a variety of reform proposals demonstrated to some of the delegates the difficulties involved in attempts to regulate the legislative process by constitutional provision. Reflecting on one of these attempts, delegate James A. Bell expressed the frustration felt by other delegates: “It is impossible to do so by a constitutional enactment. I think we have spent sufficient time in endeavoring to perfect that provision. From the nature of the case, it cannot be perfected.”³⁹ Other delegates thought such provisions manifested an unwarranted distrust of the legislature and, by implication, the people: “May we not safely trust the majority of the Legislature in this matter, as in every other law which they pass?”⁴⁰ Ultimately,

³⁴ *Id.*

³⁵ N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO LEGISLATIVE ORGANIZATION AND POWERS 68 (1938). The New York State Constitutional Convention Committee issued twelve volumes in anticipation of the 1938 Constitutional Convention. These volumes are often referred to as the *Poletti Report*, after the chair of the committee, Charles Poletti.

³⁶ 2 PROCEEDINGS AND DEBATES OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK, 1867–68, at 1294 (1868).

³⁷ *Id.* at 1298.

³⁸ *Id.* at 1301.

³⁹ *Id.* (remarks of James A. Bell).

⁴⁰ *Id.* at 1298 (remarks of Henry C. Murphy). The full debate is found in *id.* at 1294–1302.

the proposed constitution included one provision providing that no law could embrace more than one subject, which was required to be named in the title,⁴¹ and another one that prohibited the revival, alteration, or amendment of a law by reference to its title only.⁴² The proposed constitution was rejected by the voters, but the difficulties involved in regulating the legislative process by constitutional means persists to this day.⁴³

1872 Constitutional Commission

The Constitutional Commission of 1872⁴⁴ recommended a number

⁴¹ AMENDED CONSTITUTION OF THE STATE OF NEW YORK ADOPTED BY THE CONVENTION OF 1867–68, art. III, § 14, *reprinted in* 2 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 435 (1906).

⁴² *Id.*

⁴³ It is instructive to compare the reactions of twentieth-century scholars and reformers to these early attempts to manage the legislature by constitutional provisions. At the opening of the twentieth century, Paul S. Reinsch, in his *American Legislatures and Legislative Methods*, while conceding that some positive results have been achieved, concluded that “a complete solution of legislative difficulties will not be looked for in this direction.” PAUL S. REINSCH, *AMERICAN LEGISLATURES AND LEGISLATIVE METHODS* 155 (1907). *See generally id.* at 129–155 (discussing common limitations and restrictions placed on state legislatures along with the abuses they are meant to address). Patricia Shumate Wirt summed up the case against legislative restrictions as follows:

Any genuine improvement in legislative organization and performance will certainly not come by putting legislators in constitutional straightjackets or by merely tinkering with the legislative article. Legislatures which are restricted can and do often find ways to avoid constitutional restraints but this encourages subterfuge and adds unnecessarily to expense in time and money. Furthermore, hindering provisions impede those legislatures which are trying to do their work effectively and responsibly . . .

Wirt, *supra* note 5, at 79. During the late 1960s, the high-water mark of the movement to strip state constitutions to the bare necessities, Charles Shull wrote of restrictions upon the legislature:

There is little reason for [their] inclusion . . . [State] legislatures should establish their own rules of procedure. Surely if the houses of the Congress of the United States have been trusted with such powers during their entire life, the popular assemblies of the states should be accorded like courtesy and evidence of trust.

Charles W. Shull, *The Legislative Article*, in *MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION* 200, 209 (W. Brooke Graves ed., photo. reprint Greenwood Press, Inc. 1978) (1960). The National Municipal League’s *Model State Constitution*, 1968 edition, included no restrictions on legislative procedure. *See* NAT’L MUN. LEAGUE, *MODEL STATE CONSTITUTION* § 4.09, at 51 (6th rev. ed. 1968) (suggesting that the legislature be allowed to determine its own rules of procedure). A more positive view of these restrictions is to see them as “a collective effort by the people of the several states over a period of two centuries to entrench principles of notice, deliberation, and accountability into the legislative process by stipulating rules of due process for legislative bodies.” Michael E. Libonati, *The Legislative Branch in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM* 37, 57 (G. Alan Tarr & Robert F. Williams eds., 2006).

⁴⁴ In response to concerns that the legislature would not have the time and energy to undertake the constitutional revision necessary in the wake of the defeat of the proposed constitution submitted by the 1867 convention, the legislature, upon the recommendation of Governor John T. Hoffman, created a thirty-two member constitutional commission for the

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of strict procedural requirements, all aimed at ensuring that full and deliberate hearing was given to legislation. These included:

- that every bill introduced into the legislature should be considered and read twice, section by section, in the senate and assembly;
- that every bill should have three readings, no two on the same day;
- that every bill and all amendments to it should be printed and distributed among the members of each house at least one day before the vote upon its final passage;
- that the question on the final passage of every bill should be taken immediately upon the last full reading, and by yeas and nays to be entered upon the journals; and
- that the assent of a majority of the members elected to each house should be requisite to the passage of every bill.⁴⁵

The legislature refused to submit these recommendations to the voters.⁴⁶ This is not surprising: it is a rare legislature that willingly embraces external restrictions on its power to control the legislative process.

1894 Constitutional Convention

A three-calendar day rule, along with the message of necessity provision, was added to the constitution by the 1894 Constitutional Convention.⁴⁷ Supporters argued that the three-day rule was needed “to secure greater publicity and deliberation in the passage of all bills,”⁴⁸ while the message of necessity exception was needed

purpose of proposing amendments to the constitution. Act of June 15, 1872, ch. 884, § 1, 1872 N.Y. Laws 2178, 2178.

⁴⁵ As compiled by J. HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 232–33 (2d ed. 1915).

⁴⁶ *Id.* at 232. Created by statute, the constitutional commission lacked the authority, possessed by a convention, to submit its proposals directly to the voters. The commission’s proposals needed approval by two consecutively elected legislatures, and submission to the voters for ratification. N.Y. CONST. of 1846, art. XIII, § 1, *reprinted in* 1 LINCOLN, *supra* note 41, at 274.

⁴⁷ ZIMMERMAN, *supra* note 8, at 86.

⁴⁸ 1 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, MAY 8, 1894 TO SEPTEMBER 29, 1894, at 671 (July 10, 1894) (statement of Elihu Root). Mr. Root would have required the three-day waiting period unless the governor certified that “a public emergency demand[ed] its immediate passage.” *Id.* at 671.

to “meet any extraordinary contingency that may arise affecting the interests of the State and the people.”⁴⁹ The three-day rule, along with the message of necessity clause, was adopted by a vote of 107–9.

Convention delegates focused most of their attention on two questions: whether constitutionalizing the aging requirement was necessary in light of legislative rules having the same effect; and how much time should lapse between the introduction and passage of a bill.⁵⁰ Three days were deemed sufficient time for the press to publicize the bill’s content to the citizens as well as time for delegates to hear from their constituents. Although extensive deliberations took place concerning the amount of time to be required, very little was said about the provision for a message of necessity and next to nothing as to why it was being lodged in the hands of the governor.⁵¹ Charles Lincoln, himself a delegate at the convention, in his *Constitutional History of New York*, published a decade after the convention, offered this justification:

It is obvious that the power to waive the printing of a bill and the requirement that it be on the desks of members three days before final passage should exist and be vested in some high state authority outside the legislature. The governor, as the chief executive of the state, and also because of his relations to the lawmaking power, was deemed the proper officer on whom to devolve the responsibility⁵²

1915 Constitutional Convention

The constitution proposed by the 1915 Constitutional Convention would have removed the message of necessity clause. Lengthy debate on the proposed amendment took place, most of it devoted to arguments for removal.⁵³ The indictment as offered by a number of delegates consisted of four counts. The message of necessity provision:

⁴⁹ *Id.* at 894 (remarks of William Mullen).

⁵⁰ *Id.* at 478–90.

⁵¹ *See id.* at 478–90, 671.

⁵² 3 LINCOLN, *supra* note 41, at 242–43. The *Poletti Report*, following Lincoln, asserts that the power to waive the printing of the bill and the three-day waiting period was entrusted to the governor “because it was considered that it should be vested outside of the Legislature and the Governor was deemed the proper officer on whom to devolve the responsibility of determining in a particular instance the propriety of waiving the constitutional provision.” PROBLEMS RELATING TO LEGISLATIVE ORGANIZATION AND POWERS, *supra* note 35, at 64.

⁵³ 1 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, APRIL SIXTH TO SEPTEMBER TENTH 1915, at 824–25 [hereinafter REVISED RECORD 1915].

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- gave extraordinary power over the legislative process to the executive;⁵⁴
- was used primarily to promote the convenience of the legislature. A number of delegates said they were unable to discover any examples of its use for the kind of emergencies contemplated, with one delegate going so far as to remark that he “doubt[ed] whether there ever has been, since 1894, a real emergency where it was actually necessary to pass a bill within three days of its introduction;”⁵⁵
- encouraged the legislature to be lax and sloppy in its work. It was believed that eliminating the message would:
 - help the Legislature because it will compel the early consideration of bills of importance which should not be considered in the last two or three days of the sessions when the leaders of both sides are so fatigued that sometimes they would not see a joker if it is there. It will compel the early introduction of bills; it will compel full and complete consideration of them;⁵⁶ and
- defeated the purpose the three-day rule was to serve. Its use to expedite party measures encouraged secrecy by precluding discussion in or out of the legislature. Delegate Henry Stimson claimed the message was being misused
 - for the purpose of allowing the legislative body to crowd everything into the last days of its session where they can be passed without sufficient scrutiny and without that necessary publicity which is important to allow the citizens of the State to know what is going on in regard to financial legislation.⁵⁷Delegate De Lancey Nicoll added:
 - the framers of [the 1894] Constitution in adopting

⁵⁴ *Id.* at 766 (remarks of Lemuel E. Quigg).

⁵⁵ *Id.* at 767 (remarks of H. Leroy Austin). A bizarre example of this questionable use was the message issued to bypass the three-day rule in connection with a bill to institute a whipping post, a device used in public to which offenders are tied to be whipped, a barbaric practice, and an unseemly candidate for adoption, let alone adoption by emergency passage. See Editorial, *Don't Evade the Requirement*, N.Y. TIMES, Mar. 8, 1895, at 4.

⁵⁶ 1 REVISED RECORD 1915, *supra* note 53, at 771 (remarks of H. Leroy Austin). Delegates offered a number of examples of the consequences of using messages of necessity at the end of session rush. *Id.* at 824–25.

⁵⁷ *Id.* at 823 (remarks of Henry Stimson).

that amendment, without knowing it, defeated the very purpose which they had in view, for certain it is that out of the abuse of this provision has come . . . a great mass of hasty, ill-considered, and undigested legislation, costing the State thousands and tens and hundreds of thousands, if not more, of dollars.⁵⁸

Those arguing for retention of the message of necessity claimed there were situations—real necessities—where some mechanism enabling quick action would be needed.⁵⁹ These included situations that could be grouped under the general category “printer’s errors”—errors discovered after final passage in both houses, which required expedited re-passage.⁶⁰ The alternative—extending the session—it was argued, was costly and provided little in the way of benefits.⁶¹

1938 Constitutional Convention

The 1938 Constitutional Convention revisited the message of necessity clause. The Committee on Legislative Powers reported an amendment that required the governor to certify the fact or facts that, in his opinion, created the necessity.⁶² Delegate George R. Fearon presented the case for the amendment.⁶³ He reprised the abuses adumbrated at the 1915 convention,⁶⁴ and added a new dimension to the debate over the continued value of the message when he noted that in “forty or fifty percent of the cases where the measure was certified, the Governor vetoed the bill. What he [the

⁵⁸ *Id.* at 823–24 (remarks of De Lancey Nicoll).

⁵⁹ *Id.* at 823.

⁶⁰ *Id.* at 773.

⁶¹ The convention considered an amendment introduced by future-Governor Alfred E. Smith to eliminate the message for bills appropriating money. 1 PROPOSED AMENDMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, Int. 338, No. 342 (1915) (introduction by Alfred E. Smith). Compare this amendment to the proposal in the Comptroller’s 2006 Report recommending that messages of necessity be eliminated for budget bills submitted as part of the Executive Budget. The former was made before budget reform and centralization in the governor’s office had been accomplished.

⁶² 1 PROPOSED AMENDMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, APRIL FIFTH TO AUGUST TWENTY-SIXTH 3 (1938). The committee did not recommend removing the message. *Id.* A proposal to remove the message was introduced by Irwin Steingut, but no further action was taken. 1 PROPOSED AMENDMENTS OF THE N.Y. STATE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, PROPOSED AMENDMENTS I, Int. 53, No. 53 (1938) (introduction by Irwin Steingut).

⁶³ 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, APRIL FIFTH TO AUGUST TWENTY-SIXTH 1938, at 975 (1938) [hereinafter REVISED RECORD 1938] (statement of George R. Fearon).

⁶⁴ *Id.*

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governor] really meant was that there was some necessity for the immediate consideration or immediate vote on the bill.”⁶⁵

The difficulty of formulating a solution to the abuses claimed by advocates without abolishing the message altogether was evident in the frustration, even resignation, expressed by Fearon in words that would be oft-quoted by courts in later decisions:

[I]t is the *hope* of the members of the committee that if the Governor is required to certify facts which in his opinion constitute an emergency, it will not fall into a pro forma signing of a printed message which reads, in effect, “I hereby certify the necessity for the immediate passage of bill No. so and so.”⁶⁶

[T]he committee is not under any illusions that this is going to solve the problem. The committee is not under any illusions that there are not going to be emergency messages, messages of necessity, because we know that probably some bright fellow down there acting as counsel to the Governor will sooner or later formulate a state of facts which in the opinion of the Governor will necessitated an immediate vote on the measure.⁶⁷

[W]e offer you this proposal not as a perfect proposal, not with any underwriting or guarantee that it is going to solve the problem, but as an honest effort . . . to do something to meet what we think is a problem that ought to be met head on and ought to be attempted to be solved.⁶⁸

[I]t is not going to be perfect, but I think it is a step in the right direction, and that is about as strong a recommendation as I can give it.⁶⁹

Fearon believed the amendment would improve the process in two ways. The governor would not issue a certification of necessity if he were going to veto the bill, which would cut down on the number of messages issued.⁷⁰ Second, the revision would prevent statutory amendments slipped in via a message of necessity under the guise of one subject that were unrelated to the substance of the bill and had consequences not readily apparent to legislators.⁷¹ Fearon

⁶⁵ *Id.*

⁶⁶ *Id.* at 1435 (emphasis added) (statement of George R. Fearon).

⁶⁷ *Id.* at 976 (statement of George R. Fearon).

⁶⁸ *Id.*

⁶⁹ *Id.* at 980 (statement of George R. Fearon).

⁷⁰ *See id.* at 978.

⁷¹ *See id.* at 979.

believed that if a governor had to certify facts requiring immediate passage, such subterfuge would not happen.⁷² Former Governor Al Smith provided some humor in relating the subterfuge involving the Huckleberry Railroad, which, he stated, led the 1915 convention to propose eliminating the message of necessity:

On the closing day, in the closing hour of the Legislature, the Huckleberry Railroad in the Bronx got a franchise to lay down railroad tracks by an amendment to the religious corporations law. . . . And the legislators got home only to find out the next day that that innocent-looking little amendment to the religious corporations law gave a company the right to operate a street railway in the Bronx.⁷³

Fearon claimed that his amendment requiring the governor to certify the facts justifying the suspension of the three-day rule would prevent such subterfuge.⁷⁴ The amendment passed unanimously, and was included in the revisions approved by the voters.⁷⁵

Aside from the gender neutralizing amendment approved by New Yorkers in 2001, no changes to the substance of the bill aging or message of necessity provisions have been made since the 1938 convention.⁷⁶

III. THE MESSAGE OF NECESSITY AND THE GOVERNORS

Prior to the changes effected by the 1938 convention, governors were only required to certify the necessity of immediate passage of a bill.⁷⁷ No reasons or justifications were mandated. Between 1894 and 1915, 502 laws were passed under necessity messages,⁷⁸ and the number of messages issued between 1929 and 1937 totaled 980.⁷⁹ Whatever the intent of the delegates at the 1894 convention, in practice, governors in the years leading to the 1938 convention would issue messages on request of legislative leaders regardless of merit or the existence of a real emergency.

This section will present a statistical portrait of the number of

⁷² *Id.*

⁷³ *Id.* at 977 (statement of Alfred E. Smith).

⁷⁴ *Id.* (statement of George R. Fearon).

⁷⁵ *See id.* at 980.

⁷⁶ *See* N.Y. CONST. art. III, § 14.

⁷⁷ *See* 2 REVISED RECORD 1938, *supra* note 63, at 979, 980.

⁷⁸ PROBLEMS RELATING TO LEGISLATIVE ORGANIZATION AND POWERS, *supra* note 35, at 64.

⁷⁹ *Id.* at 66. The 980 total is not comparable to the 502 figure because the latter is the number of messages that resulted in legislation, while the former is simply the number of total messages issued. *Id.*

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laws enacted pursuant to messages of necessity and an analysis of their use by governors from Herbert Lehman to Andrew Cuomo.⁸⁰

⁸⁰ A year-by-year breakdown of the use of messages of necessity since 1939 may be found *infra* in Appendix A.

TABLE 1: USES OF MESSAGES OF NECESSITY BY GOVERNOR, 1939–2012⁸¹

Governor	Term of Office	Number of Laws Enacted in which at Least One House Used Message of Necessity	Total Number of Laws Enacted	Percentage of Laws Enacted in which at Least One House Used Message of Necessity	Number of Laws Passed Without Message of Necessity
Lehman	1/1/1939-12/3/1942	12	3741	0.321	
Poletti	12/3/1942-12/31/1942	0	0	0	
Dewey	1/1/1943-12/31/1954	118	10286	1.147	
Harriman	1/1/1955-12/31/1958	36	3869	0.93	
Rockefeller	1/1/1959-12/18/1973	715	15471	4.622	
Wilson	12/18/1973-12/31/1974	89	1082	8.226	
Carey	1/1/1975-12/31/1982	696	7284	9.555	
Cuomo, M.	1/1/1983-12/31/1994	1010	10374	9.736	
Pataki	1/1/1995-12/31/2006	838	8299	10.098	
Spitzer	1/1/2007-3/17/2008	18	718	2.507	
Paterson	3/17/2008-12/31/2010	108	1699	6.357	
Cuomo, A.	1/1/2011-12/31/2012	30	1101	2.725	

⁸¹ With respect to Table 1, please note the following:

- This chart does not include multiple messages issued for the same bill or for substitute bills.
- The number of successful messages does not include messages for bills passed during a later session without a message.
- This chart does not include bills which became laws for which a message was issued but not used.
- Both Governor Carey and Governor Pataki each vetoed one bill that was overridden. These bills are included in the veto column.
- Governor Pataki's veto total includes one pocket veto.
- Governor Spitzer's total includes two laws passed by message and twenty-seven total laws passed during the year 2008 before he resigned office.
- Any messages issued during a governor's term, even if they were issued by the lieutenant governor acting in the absence of the governor, are included in the tally for the governor.
- If a bill passed in one house with a message and the vote was reconsidered and restored to third calendar before transmission to the governor, the bill is treated at the time it is reconsidered and restored as if it had not passed that house.
- A recall was a procedure by which the legislature would recall a bill from the governor's desk after it was transmitted. The procedure was declared unconstitutional in *King v. Cuomo*, 613 N.E.2d 950 (N.Y. 1993).
- If a bill passed in at least one house with a message, was recalled from the governor, and the vote was reconsidered, it is treated as a recall.
- If a bill passed in both houses, was recalled, and then was returned to governor, it is treated by whatever the end result was (either passage or veto).

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Governor Herbert H. Lehman

On February 13, 1939, after the changes made at the 1938 convention took effect,⁸² Governor Herbert Lehman issued a message to the legislature in which he reviewed the history of the message of necessity and the abuses that the 1938 changes were meant to correct.⁸³ Lehman informed the legislature that he intended to enforce the letter and spirit of the new requirement.

The purpose of the new procedure is clear. It was adopted to put an end to the practice of sending messages simply on the request of legislators. The Governor must now be satisfied that an actual emergency exists and must so certify.

I know that the members of your Honorable Bodies are as anxious as I to put an end to the practice of introducing bills and amendments on the last day or two of the session. Although we may have sincerely deplored the past practice, we permit it to continue. But now, we have the clear mandate of the Constitution and we must abide by it. The intention to put an end to the old practice should not be thwarted It is my intention, therefore, to send no three day messages in the future except in cases of actual and urgent emergencies

. . . I know that all of the members of the Legislature will cooperate in carrying out the spirit as well as the language of the new constitutional provision.⁸⁴

Lehman made a good faith effort to carry through on his announced policy. He refused to issue a message for an education bill that did not meet his standards:

There would, of course, be no justification whatever for me to give a message of necessity on legislation with which I am completely unfamiliar and which in spite of its importance has received absolutely no study or consideration whatsoever either on the part of the Legislature or the public.⁸⁵

Already in extraordinary session, Governor Lehman suggested that the legislature would “in the regular, normal and orderly

⁸² N.Y. CONST. art XX, § 1. The effective date of the amendments approved by the voters in November, 1938 was January 1, 1939. *Id.*

⁸³ Gov. Herbert H. Lehman, Message to the Legislature (Feb. 13, 1939) in PUBLIC PAPERS OF GOVERNOR HERBERT H. LEHMAN, 1939, at 100, 100 (1942).

⁸⁴ *Id.* at 100–01.

⁸⁵ Gov. Herbert H. Lehman, Letter to Legislative Leaders Declining to Send Request Messages of Necessity (June 29, 1939) in PUBLIC PAPERS OF GOVERNOR HERBERT H. LEHMAN, 1939, at 494, 495 (1942).

course of business be able early next week to consider and act on all bills that have been introduced.”⁸⁶

The difficulty Governor Lehman encountered in adhering to this position became evident when he issued a message of necessity for a legislative supplemental bill appropriating five million dollars that was introduced in the last minutes of the session.⁸⁷ In a stern reproach, the governor stated, “I have had absolutely no opportunity of studying the contents of the bill. I doubt whether the contents are known to more than a very few members of the Legislature.”⁸⁸ Nonetheless, he issued the message “only because if I did not do so, it would require holding the Legislature here in Albany until next week.”⁸⁹

Almost two weeks later, with the legislature in an extraordinary session called by the governor, he issued a message allowing for immediate consideration of an appropriations bill “because if I did not do so it would unnecessarily prolong this extraordinary session.”⁹⁰ The dilemma was obvious: the governor had to issue the message unless he could, or the legislature would, tolerate continuing the extraordinary session. The governor might have announced that in the future he would not sign any bill under such circumstances in the belief (hope) that future legislatures would manage their calendars in ways that would preclude such exigencies. However, there is no reason to believe that taking this stance would have been more successful than his original policy statement.

Lehman did succeed in dramatically reducing the number of laws enacted pursuant to messages of necessity. In the four years from 1939 through 1942, twelve bills, less than one-third of one percent of all legislation enacted, bypassed the three-day requirement.⁹¹ The

⁸⁶ *Id.*

⁸⁷ Gov. Herbert H. Lehman, Emergency Message (May 20, 1939) in PUBLIC PAPERS OF HERBERT H. LEHMAN, 1939, at 385, 385 (1942).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Gov. Herbert H. Lehman, Emergency Message (July 10, 1939) in PUBLIC PAPERS OF HERBERT H. LEMAN, 1939, at 386, 386 (1942).

⁹¹ See *infra* Appendix A (noting that the percentage of laws passed with a message of necessity was .32% during the four year span). See generally Gov. Herbert H. Lehman, Emergency Messages and Messages of Necessity, in PUBLIC PAPERS OF GOVERNOR LEHMAN, 1939, at 385, 385–87 (1942); Gov. Herbert H. Lehman, Emergency Messages and Messages of Necessity, in PUBLIC PAPERS OF GOVERNOR LEHMAN, 1940, at 357, 357–60 (1940); Gov. Herbert H. Lehman, Emergency Messages and Messages of Necessity, in PUBLIC PAPERS OF GOVERNOR LEHMAN, 1941, at 341, 341–44 (1946); Gov. Herbert H. Lehman, Emergency Messages and Messages of Necessity, in PUBLIC PAPERS OF GOVERNOR LEHMAN, 1942, at 371, 371–73 (1947) (illustrating that between 1939 and 1942, Governor Lehman only issued

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relative paucity of messages during this period represents a sharp departure from the pre-convention years of his administration, where it was not uncommon for over one hundred messages per year to be issued.

Governor Thomas E. Dewey

Governor Thomas E. Dewey followed Lehman's practice, generally providing plausible reasons, if not emergency justifications—"facts"—necessitating an immediate vote.⁹² The percentage of laws passed during his administration pursuant to messages, slightly more than one percent, was higher than during the post-1938 Lehman years, but was still significantly lower than during the period before the 1938 convention.⁹³ Only one bill passed under a message of necessity was vetoed by Governor Dewey,⁹⁴ suggesting the 1938 amendment was achieving at least one its intended effects.

Dewey's messages contained a variety of justifications, including "printer's errors,"⁹⁵ financial imperatives and deadlines,⁹⁶ changes involving impending elections,⁹⁷ and situations involving serious dislocations or deteriorating conditions that needed immediate attention.⁹⁸ Dewey also issued messages for bills he thought worthy

approximately three messages of necessity per year on average).

⁹² Governor Lehman resigned the governorship on December 3, 1942, approximately one month before the expiration of his term, in order to accept a position as Director of Foreign Relief and Rehabilitation Operations for the United States State Department. *Life and Legacy of Herbert H. Lehman*, COL. UNIV. LIBR., <http://library.columbia.edu/indiv/rbml/units/lehman/biography.html> (last visited Apr. 26, 2013). Lehman was succeeded by Charles Poletti. Richard Goldstein, *Charles Poletti Dies at 99; Aided War-Ravaged Italy*, N.Y. TIMES, Aug. 10, 2002, at A11. Poletti did not issue any messages of necessity during the month he served as governor. See *infra* Appendix A.

⁹³ See *infra* Appendix A (demonstrating that during Dewey's terms in office, a total of 1.15 percent of laws were passed using a message of necessity, more than triple the percentage of laws passed using a message of necessity during the Lehman years).

⁹⁴ See Gov. Thomas E. Dewey, Message of Necessity (Mar. 16, 1951) in PUBLIC PAPERS OF THOMAS E. DEWEY, 1951, at 311, 312–13 (n.d.).

⁹⁵ *E.g.*, Gov. Thomas E. Dewey, Message of Necessity (Mar. 20, 1954) in PUBLIC PAPERS OF THOMAS E. DEWEY, 1954, at 325, 327 (n.d.) ("A printer's error required amendment of the bill . . .").

⁹⁶ See, *e.g.*, *id.* at 334 ("This bill provides for the division of moneys deposited in the general fund of the State treasury during the fiscal year commencing April 1, 1954, between the State Purposes Fund and the Local Assistance Fund.").

⁹⁷ See, *e.g.*, Gov. Thomas E. Dewey, Message of Necessity (Dec. 5, 1951) in PUBLIC PAPERS OF THOMAS E. DEWEY, 1951, at 314, 314–15 (n.d.) (noting that without the legislation, all congressional representatives would have to be elected at large in the next election).

⁹⁸ See, *e.g.*, Gov. Thomas E. Dewey, Message of Necessity (Feb. 1, 1943) in PUBLIC PAPERS OF THOMAS E. DEWEY, 1943, at 241, 241–42 (1944) ("This bill would amend the War Emergency Act to permit the Governor during the present state of war only, to make State-owned facilities available, for compensation, to private corporations for production, processing, re-processing, altering, or repairing of any goods, materials, or equipment vital to

of passage when such bills could not be acted upon before adjournment or otherwise needed early consideration.⁹⁹ This practice, used reluctantly by Governor Lehman, was more readily embraced by Governor Dewey, especially near the end of his twelve-year administration, which saw more laws passed by message of necessity during the last three years of his term than during the first nine years.¹⁰⁰

Governor W. Averell Harriman

Averell Harriman only served one term as governor, and during that term, less than one percent of all laws passed were done so through messages of necessity.¹⁰¹ In 1956, only two laws were passed with messages, tying the lowest number since the 1938 amendments.¹⁰² Governor Harriman also initiated a new practice concerning his messages. When a message was for a bill corrected by amendment or printer's error, he accompanied the message with the following caveat: "This request does not necessarily reflect any views on my part as to the merits of the bill."¹⁰³ He continued

the war effort.")

⁹⁹ See, e.g., Gov. Thomas E. Dewey, Message of Necessity (Mar. 20, 1952) in PUBLIC PAPERS OF THOMAS E. DEWEY, 1952, at 356, 356 (n.d.) ("Because it was not received from the printer more than three days before the scheduled adjournment of your Honorable Bodies, the legislative leaders of each of your Houses have requested this message so that the bill may be voted upon prior to the date set for adjournment.")

¹⁰⁰ During the last three years of his term, Governor Dewey sent sixty-one messages of necessity to the legislature that resulted in laws being passed. See PUBLIC PAPERS OF THOMAS E. DEWEY, 1952, at 355-61 (n.d.) (listing nine total laws passed with messages of necessity); PUBLIC PAPERS OF THOMAS E. DEWEY, 1953, 375-98 (listing thirty-two total laws passed with messages of necessity); PUBLIC PAPERS OF THOMAS E. DEWEY, 1954, 325-39 (listing twenty total laws passed with messages of necessity). However, during the first nine years of his term Governor Dewey sent only fifty-seven messages of necessity to the legislature which resulted in passed laws. See PUBLIC PAPERS OF THOMAS E. DEWEY, 1943, at 241-44 (1944) (listing three total laws passed with messages of necessity); PUBLIC PAPERS OF THOMAS E. DEWEY, 1944, at 265-70 (1946) (listing seven total laws passed with messages of necessity); PUBLIC PAPERS OF THOMAS E. DEWEY, 1945, at 269-72 (1946) (listing four total laws passed with messages of necessity); PUBLIC PAPERS OF THOMAS E. DEWEY, 1946, at 329-33 (n.d.) (listing three total laws passed with messages of necessity); PUBLIC PAPERS OF THOMAS E. DEWEY, 1947, at 347-50 (n.d.) (listing ten total laws passed with messages of necessity); PUBLIC PAPERS OF THOMAS E. DEWEY, 1948, at 237-42 (n.d.) (listing six total laws passed with messages of necessity); PUBLIC PAPERS OF THOMAS E. DEWEY, 1949, at 343-48 (n.d.) (listing eight total laws passed with messages of necessity); PUBLIC PAPERS OF THOMAS E. DEWEY, 1950, at 441-50 (n.d.) (listing nine total laws passed with messages of necessity); PUBLIC PAPERS OF THOMAS E. DEWEY, 1951, at 313-16 (n.d.) (listing seven total laws passed with messages of necessity).

¹⁰¹ See *infra* Appendix A (noting that during Harriman's four years in office, only 36 messages of necessity were used whereas a total of 3,869 laws were enacted in that time period).

¹⁰² PUBLIC PAPERS OF AVERELL HARRIMAN, 1956, at 453-55 (n.d.).

¹⁰³ Gov. Averell Harriman, Message of Necessity (Mar. 30, 1957) in PUBLIC PAPERS OF

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Dewey's practice of issuing "imminence of the adjournment" messages in which he again did not express any opinion on the merits of the measures.¹⁰⁴ In 1958, twenty-two messages were issued using this language.¹⁰⁵ During his term, Harriman vetoed three measures for which he had issued messages, suggesting that the reason for the messages was legislative convenience.¹⁰⁶

Governor Nelson A. Rockefeller

The governorship of Nelson A. Rockefeller saw a significant rise in the use of messages of necessity. During his fifteen-year tenure, 715 laws were passed by messages of necessity, an average of roughly forty-eight per year.¹⁰⁷ To put this in context, the state averaged ten laws per year upon messages during Governor Dewey's term and nine laws per year during the term of Governor Harriman.¹⁰⁸ The percentage of laws passed by messages expanded dramatically as well. During Rockefeller's administration, 4.6% of all laws were passed with messages of necessity, and in one year, 1970, nearly 9% of laws were passed with messages.¹⁰⁹ Previously, the highest average percentage of laws passed with messages for a governor's tenure post-1938 amendments was less than 1.2%, and the highest year, 1953, saw only 3.6% of laws enacted with messages.¹¹⁰ Rockefeller also averaged close to three vetoes per year of bills passed pursuant to messages of necessity.¹¹¹

In the early years of his governorship, Rockefeller couched messages based on legislative calendar considerations in language that suggested a more open and deliberative process would be fostered by such messages. Here is a typical formulation: "there

AVERELL HARRIMAN, 1957, at 549, 549–50 (n.d.).

¹⁰⁴ Gov. Averell Harriman, Message of Necessity (Mar. 25, 1958) in PUBLIC PAPERS OF AVERELL HARRIMAN, 1958, at 615, 615 (n.d.).

¹⁰⁵ PUBLIC PAPERS OF AVERELL HARRIMAN, 1958, at 611–25 (n.d.).

¹⁰⁶ *Id.* at 618–19, 622–23, 624–25.

¹⁰⁷ See *infra* Appendix A (showing the number of bills enacted with messages of necessity during Rockefeller's tenure from 1959–73).

¹⁰⁸ See *infra* Appendix A (noting that 118 bills were enacted with a message of necessity during Dewey's twelve years in office, and a total of 36 bills were passed pursuant to messages of necessity during the four years Harriman served as Governor).

¹⁰⁹ See *infra* Appendix A (demonstrating that during Rockefeller's time in the Governor's office 715 of 15,471 bills were passed with messages of necessity, and that in 1970 alone 1,048 bills were passed with 94 of those enacted by message of necessity).

¹¹⁰ See *infra* Appendix A (demonstrating the average percentages of bills passed pursuant to messages of necessity during the terms of Governors Lehman, Dewey and Harriman as 0.32%, 1.15%, and 0.93% respectively).

¹¹¹ See *infra* Appendix A (noting that forty-four vetoes were signed during Rockefeller's fifteen years in office).

would be more time for full debate on the bill if the deliberation is held prior to the height of the calendar congestion.”¹¹² By the last few years of his governorship, Rockefeller had dropped that phraseology, issuing a large number of messages simply on the need to meet adjournment deadlines.¹¹³

A large number of the messages issued by Governor Rockefeller were related to the legislative calendar, primarily imminence of adjournment; others stated no necessity beyond the fact that the bill had not yet been on the desks of the legislators for three days.¹¹⁴ For most of these messages, the “facts” necessitating passage had become little more than summaries of the need for the law¹¹⁵ or for the necessity of “orderly and timely implementation of its critical provisions.”¹¹⁶ The extension of the message beyond the categories of technical and printer’s errors, financial exigencies, statutorily imposed deadlines, and other disasters, gave rise to a form of circular reasoning: there is a problem; this bill addresses that problem; the sooner we pass the legislation, the sooner the problem will be alleviated. Such reasoning could of course be applied to most, if not all, legislation.¹¹⁷

Governor Rockefeller’s increased reliance on messages of necessity attracted criticism. In May 1971, when an intricate bill involving unemployment insurance rates for canners that had an effective date of January 1972 came before the legislature upon a message of necessity from Rockefeller, Democratic Assembly members refused to vote on the bill, promising a court challenge instead.¹¹⁸ A 1973 *New York Times* article accused him of obtaining approval for his drug program in the assembly through the use of a “palpably false ‘message of necessity.’”¹¹⁹ These criticisms continued even after he left office. In 1976, a *New York Times* article characterized the 1970 off track betting bill passed by a message of necessity in scathing terms: “[w]ithin 72 hours, the lawmakers had

¹¹² Gov. Nelson A. Rockefeller, Message of Necessity (Mar. 19, 1959) in PUBLIC PAPERS OF NELSON A. ROCKEFELLER, 1959, at 540, 541 (n.d.).

¹¹³ See Gov. Nelson A. Rockefeller, Message of Necessity (Mar. 25, 1959) in PUBLIC PAPERS OF NELSON A. ROCKEFELLER, 1959, at 574, 575 (n.d.).

¹¹⁴ See Gov. Nelson A. Rockefeller, Message of Necessity (Mar. 11, 1959) in PUBLIC PAPERS OF NELSON A. ROCKEFELLER, 1959, at 535, 535 (n.d.).

¹¹⁵ See PUBLIC PAPERS OF NELSON A. ROCKEFELLER, 1973, at 341, 348 (n.d.).

¹¹⁶ See *id.* at 545, 359.

¹¹⁷ As a later example of this circular reasoning, see the Message issued for bills regulating nursing homes. Gov. Hugh L. Carey, Message of Necessity (Jul. 10, 1975) in PUBLIC PAPERS OF HUGH L. CAREY 1975, at 466, 466 (1982).

¹¹⁸ William E. Farrell, *Albany Democrats Rebel at G.O.P. ‘Necessity’ Bill*, N.Y. TIMES, May 28, 1971, at 12.

¹¹⁹ Editorial, *Handcuffing the Police*, N.Y. TIMES, May 5, 1973, at 38.

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passed an OTB measure that read like a discarded draft of Dr. Frankenstein's formula for his monster."¹²⁰

Governor Malcolm Wilson

In December 1973, Governor Rockefeller resigned with approximately one year left in his term,¹²¹ leaving long-serving Lieutenant Governor Malcolm Wilson to finish out the term as governor.¹²² In 1974, eighty-nine laws were passed pursuant to messages of necessity, representing a total of 8.2% of all the legislation that was passed during that year.¹²³ Governor Wilson's willingness to issue a significant number of messages was consistent with what he viewed as a "partnership" between the legislative and executive branches.¹²⁴ This partnership, however, did not extend to an automatic approval of bills passed with messages of necessity. Wilson vetoed nine bills passed by messages of necessity, the highest total for any year since the 1938 amendments.¹²⁵

Governor Hugh L. Carey

At the beginning of his first term in 1975, Governor Hugh Carey was faced with a series of crises involving the imminent default of the Urban Development Corporation and the potential financial collapse of New York City.¹²⁶ His messages justified the need for immediate action with phrases like "restore investor confidence,"¹²⁷ "provide essential services" to New York City,¹²⁸ "unprecedented fiscal crisis . . . lead[ing] to the loss of vital governmental

¹²⁰ Clyde Hirt, *Gambling with Future of New York Horse Racing*, N.Y. TIMES, Jun. 6, 1976, at E2.

¹²¹ ZIMMERMAN, *supra* note 8, at 131.

¹²² *See id.* at 149.

¹²³ *See infra* Appendix A; *see also* PUBLIC PAPERS OF MALCOLM WILSON, 1973–74, at 397–500 (n.d.) (containing all messages of necessity issued by Governor Wilson in 1974).

¹²⁴ *See* ZIMMERMAN, *supra* note 8, at 149–50. In his annual message to the legislature, Governor Wilson pledged to work in cooperation with the legislature. *Id.* Following the dominant style of Governor Rockefeller, the legislature may have been expected to appreciate a more partnership-oriented leadership style. This was not the case, however, as many legislators during Wilson's brief tenure complained about the lack of strong gubernatorial leadership. *See id.*

¹²⁵ *See e.g.*, PUBLIC PAPERS OF MALCOLM WILSON, 1973–74, at 422–28 (n.d.) (containing the nine bills vetoed by Governor Wilson).

¹²⁶ *See e.g.*, Michael D. Utevsky, *The Future of Nonguaranteed Bond Financing in New York*, 45 FORDHAM L. REV. 860, 860–61 (1977).

¹²⁷ Gov. Hugh L. Carey, Message of Necessity (Jun. 9, 1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 445, 445 (1982).

¹²⁸ *Id.*

services,”¹²⁹ and “dire fiscal emergency.”¹³⁰ It would be difficult to quarrel with his characterization of the crises facing the Urban Development Corporation, New York City and, by implication, New York State, as emergencies.¹³¹ But Carey would characterize a number of his program bills as fitting this category. For example, his messages issued on behalf of bills overhauling the public health system in New York spoke of “a major crisis in medical field” and “threat to the public health” that required immediate action.¹³² Both of those bills died in the legislature.¹³³ Carey also issued a message for a bill establishing an Industrial Development Agency, offering as the necessity “to enable the agency to be formed and commence its operations as soon as possible.”¹³⁴

Carey continued the practice of using messages to further his policy agenda, providing as the “facts” that the sooner the legislation was passed, the sooner the problem would be alleviated.¹³⁵ By far, the largest numbers of messages were used for legislative convenience, primarily the imminence of adjournment. Terse phrases like “[since] this bill has not been on your desks . . . three calendar legislative days, this message is necessary to permit its immediate consideration” accompanied some of his messages.¹³⁶ Occasionally, a perfunctory preface would accompany the message: “the Leaders of Your Honorable Bodies have requested this message to permit immediate consideration.”¹³⁷ In these messages, the “facts” necessitating the message were little more than a restatement of the purpose of the bill.

These factors contributed to Governor Carey’s more frequent use of messages of necessity. Twice during the eight years he was in office, more than one hundred laws per year were passed through

¹²⁹ Gov. Hugh L. Carey, Message of Necessity (Jul. 7, 1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 451, 452 (1982).

¹³⁰ Gov. Hugh L. Carey, Message of Necessity (Sep. 5, 1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 513, 514 (1982).

¹³¹ See e.g., Utevsky, *supra* note 126, at 860–62.

¹³² Gov. Hugh L. Carey, Message of Necessity (April 30, 1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 442, 442 (1982).

¹³³ *Id.* at 441, 443.

¹³⁴ Gov. Hugh L. Carey, Message of Necessity (July 9, 1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 460, 460 (1982).

¹³⁵ See e.g., Gov. Hugh L. Carey, Message of Necessity (July 10, 1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 466, 466 (1982) (discussing an act to regulate nursing homes).

¹³⁶ E.g., Gov. Hugh L. Carey, Message of Necessity (July 10, 1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 484, 484–85 (1982).

¹³⁷ Gov. Hugh L. Carey, Message of Necessity (July 11, 1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 485, 485 (1982).

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messages of necessity.¹³⁸ During his tenure, Carey's use of messages was significantly higher than Rockefeller's: Carey averaged eighty-seven laws (9.6%) passed per year with messages, while Rockefeller averaged forty-eight (4.6%).¹³⁹ Like Rockefeller, Carey's messages did not guarantee a commitment that the governor would sign the bills: on twenty occasions, he vetoed bills passed pursuant to messages—one of which was overridden.¹⁴⁰

Governor Mario M. Cuomo

The number of messages of necessity issued by Governor Mario Cuomo closely approximated those of his predecessor Governor Carey. During Cuomo's twelve years in office (1983–1994), an average of eighty-four laws per year (9.7%) were enacted pursuant to messages.¹⁴¹

Governor Cuomo continued the practice of issuing large numbers of messages as a matter of course for the convenience of the legislature. The majority of messages contained little more than the purpose of the bill, along with a statement that the bill had not been on the desks of the legislature for the constitutionally required three-day period.¹⁴² He did, however, make a more systematic use of the message as a means to move his program bills through the legislature: “[t]he elder Cuomo used ‘messages of necessity’ on every major bill to circumvent the three-day period for public scrutiny.”¹⁴³ “[D]uring Cuomo's tenure, . . . [t]he state budget was adopted by a message of necessity every year.”¹⁴⁴ In many of those years, the budget was adopted long after the April 1 deadline, causing

¹³⁸ See *infra* Appendix A; see also Gov. Hugh L. Carey, Messages of Necessity (1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 433, 433–562 (1982); Gov. Hugh L. Carey, Messages of Necessity (1976) in PUBLIC PAPERS OF HUGH L. CAREY, 1976, at 473, 473–647 (1986) (containing in the two volumes over one hundred messages of necessity used to push bills through the legislature in 1975 and 1976).

¹³⁹ See *infra* Appendix A; see also Gov. Hugh L. Carey, Message of Necessity (1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 433, 433–562 (1982) (containing all messages passed by Governor Carey in 1975).

¹⁴⁰ See *infra* Appendix A; see also Gov. Hugh L. Carey, Message of Necessity (July 11, 1975) in PUBLIC PAPERS OF HUGH L. CAREY, 1975, at 490, 491 (1982) (providing a message of necessity for a bill that Carey subsequently vetoed).

¹⁴¹ See *infra* Appendix A; see also Gov. Mario M. Cuomo, Messages of Necessity (1983) in PUBLIC PAPERS OF GOVERNOR MARIO M. CUOMO, 1983 (1987), at 311, 311–562 (containing all messages passed by Governor Cuomo in 1983).

¹⁴² See, e.g., Gov. Mario M. Cuomo, Message of Necessity (Mar. 17, 1983) in PUBLIC PAPERS OF GOVERNOR MARIO M. CUOMO, 1983, at 314, 315 (1987).

¹⁴³ Michael Gormley, *Analysis: Cuomo Chooses Private Deals on Policy*, LONG ISLAND PRESS (Dec. 12, 2011), <http://archive.longislandpress.com/2011/12/12/analysis-cuomo-chooses-private-deals-on-policy>.

¹⁴⁴ *Urgent Matter*, *supra* note 4, at A8.

commentators both to question his unwillingness to wait three more days for an already untimely budget and to denounce the practice of approving budgets in the tens of billions of dollars without careful study.¹⁴⁵ Cuomo also received criticism for issuing a 1987 message of necessity for a bill allowing a thirty-four percent pay raise for legislators.¹⁴⁶

Governor George E. Pataki

By the time Governor George Pataki assumed the governorship in 1995,¹⁴⁷ the message of necessity had become an integral part of the governor's legislative powers. Its use enhanced the ability of leaders to control the legislative process, and contributed to the centralized nature of decision-making and political bargaining that has characterized New York state politics over the last half century. Those who hoped Governor Pataki would curb the use of messages would be disappointed. During Governor Pataki's tenure, usage of messages of necessity would reach the highest level since the 1938 amendment. In 1996, 144 laws, 16.4% of all laws enacted that year, were passed pursuant to messages of necessity.¹⁴⁸ No governor has surpassed this number. Over the course of Pataki's tenure in office, an average of seventy laws annually were enacted with messages, and the percentage of laws enacted using messages—slightly more than ten percent—is a threshold no other governor has eclipsed.¹⁴⁹

Pataki's use of the procedure brought the evolution of the message of necessity full circle. Prior to 1938, no justification was required to certify the immediate passage of a bill and none was given. Pataki's statements: "[these] bills are necessary to enact certain provisions of law" and "[b]ecause the bills have not been on your desks in final form for three calendar legislative days, the Leaders of your Honorable Bodies have requested this message to permit their immediate consideration," signaled a de facto return to

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Haley v. Pataki*, 60 F.3d 137, 139 (2d. Cir. 1995) (noting that Pataki assumed the Governorship on January 1, 1995).

¹⁴⁸ See *infra* Appendix A; *Fast Fact About Message of Necessity for Immediate Vote*, EFFECTIVE N.Y., <http://effectiveny.org/fast-fact/message-necessity-immediate-vote/click-see-all-uses-1995> (last visited July 28, 2013) (containing a list of the laws passed via message of necessity and the respective Governors who passed them). Due to some differences in the criteria for the inclusion of messages between the sources, the number of messages shown in Appendix A and the number shown on the Effective N.Y. website are not the same.

¹⁴⁹ *Fast Fact About Message of Necessity for Immediate Vote*, *supra* note 148.

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pre-1938 practice.¹⁵⁰ Several of Pataki's messages were subject to unsuccessful court challenges.¹⁵¹

During Governor Pataki's third (and final) term, two developments further tarnished the provision. In 2004, the court of appeals decided *Maybe v. State*,¹⁵² which reaffirmed the nonreviewability of a governor's message of necessity.¹⁵³ Notwithstanding the holding, the opinions, and in particular a concurrence by Chief Judge Judith Kaye, portrayed the governor's use of messages of necessity in an unflattering way.¹⁵⁴ In addition, the Brennan Center issued a scathing 2005 report in which it criticized many practices of the New York Legislature, including the excessive use of messages of necessity.¹⁵⁵ While there is no direct evidence that Governor Pataki changed his practice of issuing messages in response to these developments, the decrease in messages issued suggests this conclusion: during his first eight years in office, Governor Pataki averaged approximately eighty-four laws per year (or 12.58% of all laws passed during that time) passed with messages.¹⁵⁶ During Pataki's last four-year term, those numbers were halved, with an average forty-two laws per year and approximately 5.65 percent of legislation by messages.¹⁵⁷

Pataki's veto of two bills—one involving an increase in the minimum wage that was ultimately overridden and the other enabling passage of a very late budget for which he had issued messages—puzzled observers.¹⁵⁸ The byzantine maneuvering in the

¹⁵⁰ As quoted in *Dalton v. Pataki*, 780 N.Y.S.2d 47, 52 (App. Div. 3d Dep't 2004) (alterations in original) (internal quotation marks omitted).

¹⁵¹ See *infra* Part IV (discussing various cases which upheld the use of messages of necessity).

¹⁵² *Maybe v. State*, 828 N.E.2d 975 (N.Y. 2005).

¹⁵³ *Id.* at 977.

¹⁵⁴ See *id.* at 981 (Kaye, C.J., concurring in result).

¹⁵⁵ JEREMY M. CREELAN & LAURA M. MOULTON, BRENNAN CENTER FOR JUST., NYU L. SCH., THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM 5–6 (2004), available at http://brennan.3cdn.net/f5840207f0686a0d02_gyzmvyq4l.pdf (last visited Apr. 15, 2013).

¹⁵⁶ See *infra* Appendix A (showing that from 1995 to 2002, 670 laws were passed using a message of necessity, whereas a total of 5326 laws were enacted during that eight year span); Michelle Breidenbach, *The Safe Act "Emergency": How Cuomo, Past Governors Bypassed Public to Make Laws*, SYRACUSE.COM (updated Mar. 13, 2013, 1:37 PM), http://www.syracuse.com/news/index.ssf/2013/03/state_emergency_gun_law.html (noting that in 2004 Governor Pataki issued eighty-four messages of necessity for bills that were enacted into law).

¹⁵⁷ See *infra* Appendix A (noting that from 2003–2006, 168 laws were passed using a message of necessity, whereas a total of 2973 laws were enacted during that four year span).

¹⁵⁸ Michael Cooper & Al Baker, *Legislature Passes Budget in Late Session*, N.Y. TIMES (Aug. 12, 2004), <http://www.nytimes.com/2004/08/12/nyregion/legislature-passes-budget-in-late-session.html>.

latter case suggests the extent to which the message had become a tool used by governors to shape public policy.¹⁵⁹

Governor Eliot L. Spitzer

Governor Eliot Spitzer served for slightly more than one year before resigning office in March of 2008.¹⁶⁰ During his only full year in office, 2007, Spitzer issued sixteen messages (2.3%) for bills that were enacted.¹⁶¹ These figures represent both the lowest number and lowest percentage of laws enacted with messages since 1965.¹⁶² The reduction from previous administrations reflected his promise to use messages sparingly. Spitzer did, however, come under criticism in early 2008 for negotiating in secret an extension of the New York Racing Association franchise, and ensuring its quick passage with a message of necessity.¹⁶³

Governor David A. Paterson

Governor David Paterson assumed the governorship in 2008 following the resignation of Governor Spitzer.¹⁶⁴ During Paterson's nearly three years in office, 108 laws were enacted pursuant to messages, an average of 6.4% of the total laws enacted.¹⁶⁵ Governor Paterson began the practice of using budget extenders to present his

¹⁵⁹ See *id.*; see also *Governor Pataki's Odd Veto*, N.Y. TIMES (July 30, 2004), <http://www.nytimes.com/2004/07/30/opinion/governor-pataki-s-odd-veto.html>.

¹⁶⁰ Joseph Spector, *Ex-N.Y. Governor Says Exit Amid Scandal Was Right Call*, USA TODAY (Mar. 11, 2013), <http://www.usatoday.com/story/news/nation/2013/03/11/eliot-spitzer-five-years-resignation/1978447>.

¹⁶¹ See *infra* Appendix A (listing the number and percentage of messages of necessity used in 2007); see also Nick Reisman, *How Often are Messages of Necessity Used?*, ST. OF POLS. BLOG (Jan. 17, 2013, 12:48 PM), <http://capitaltonightny.ynn.com/2013/01/how-often-are-messages-of-necessity-used> (noting that Governor Spitzer issued twenty-three messages of necessity for bills in 2007).

¹⁶² See *infra* Appendix A (highlighting that Spitzer's numbers during the year 2007 were the lowest since Rockefeller's 1965 term where sixteen messages of necessity were used out of 1074 laws enacted that year, a percentage of 1.49%).

¹⁶³ Fredric U. Dicker, *Spitzer is Up to Old Pataki Tricks*, N.Y. POST, http://www.nypost.com/p/news/regional/item_mAUPI7WKhPEqb1GNiy8AtK (last updated Feb. 16, 2008). Critics pointed to the similarity of these maneuvers to Pataki's practices: "[w]e all thought Spitzer was committed to changing the way things work around here." *Id.* (internal quotation marks omitted).

¹⁶⁴ David Kocieniewski & Danny Hakim, *Spitzer Resigns: Felled by Sex Scandal, He Says His Focus Is on Family*, N.Y. TIMES, Mar. 13, 2008, at A1.

¹⁶⁵ See Breidenbach, *supra* note 156 (including a chart listing all messages of necessity used to pass bills in years 2002–13); see *infra* Appendix A (showing that 108 of the 1699 laws enacted during Governor Paterson's time in office from 2008 to 2010, or approximately 6.4% of laws, were enacted using a message of necessity).

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budget cuts to the legislature.¹⁶⁶ These extenders, passed by way of messages of necessity, enabled him to use the threat of shutting down the government to force through his policy priorities.¹⁶⁷ The number of extenders was extraordinary: in 2010, fifty laws were passed by messages of necessity, more than double the twenty-two laws enacted by messages the previous year.¹⁶⁸ Of the laws passed with messages in 2010, approximately half were budget bills of some type.¹⁶⁹

Governor Andrew M. Cuomo

During the first two years of Andrew Cuomo's governorship, thirty laws were passed using messages of necessity.¹⁷⁰ Although his use of a midnight session to hurry through major and controversial bills was not unprecedented, and the number of messages issued by Cuomo was lower than most of his predecessors, his use of the device precipitated widespread criticism from all parts of the political spectrum.¹⁷¹ The chorus of criticism, in part, was a function of Cuomo's earlier commitment to transparency and deliberateness in the governing process. After winning the election in 2010, Cuomo promised to "lift the veil of secrecy that is now around Albany because I want you to know what the issues are and

¹⁶⁶ See Reid Pillifant, *Paterson Also Rises: Former Governor Claims a Victory, at Last*, N.Y. OBSERVER (Mar. 30, 2011, 3:46 AM), <http://observer.com/2011/03/paterson-also-rises-former-governor-claims-a-victory-at-last>.

¹⁶⁷ See *id.*

¹⁶⁸ See Breidenbach, *supra* note 156 (showing messages of necessity used to pass bills in years 2009–10).

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* (showing messages of necessity used to pass bills in 2011–12). As of the publication of this article, three laws out of 308 enacted to date in 2013 have been passed by messages of necessity.

¹⁷¹ See Editorial, *New York Leads on Gun Control*, N.Y. TIMES, Jan. 16, 2013, at A22; Michael Gormley, *Analysis: Gov. Cuomo at a Crossroads on Open Government*, SYRACUSE.COM, (updated July 28, 2012, 12:36 PM), http://www.syracuse.com/news/index.ssf/2012/07/analysis_gov_cuomo_at_a_crossr.html. In a joint statement the Citizens Union of the City of New York, Common Cause New York, New York League of Women Voters of New York State (LWNYS) and the New York Public Interest Research Group (NYPIRG) criticized Cuomo's use of the message of necessity provision. Press Release, Citizens Union et al., Good Government Groups Question Use of Message of Necessity (Jan. 15, 2013). The Center for Public Integrity awarded New York a grade of "D" in an evaluation that included, among others things, legislative accountability and public access to information. *New York: Corruption Risk Report Card*, ST. INTEGRITY, http://www.stateintegrity.org/new_york (last visited Apr. 14, 2013); see also Azi Paybarah, *Cuomo Confronts Dicker on Guns and, of all Things, a Question About Process*, CAPITAL N.Y. (Jan. 17, 2013, 6:39 PM), <http://www.capitalnewyork.com/article/politics/2013/01/7212775/cuomo-confronts-dicker-guns-and-all-things-question-about-process>.

who is doing what.”¹⁷² Also contributing was the high profile, controversial nature of a number of the bills passed through the use of such messages: same-sex marriage,¹⁷³ a legislative redistricting commission,¹⁷⁴ pension reform,¹⁷⁵ strict gun control,¹⁷⁶ a property tax cap,¹⁷⁷ rent control regulations,¹⁷⁸ and teacher evaluations.¹⁷⁹

¹⁷² Gormley, *supra* note 143.

¹⁷³ See Marriage Equality Act, ch. 95, 2011 N.Y. Laws 749. The facts justifying the immediate passage of this bill were “[t]he continued delay of the passage of this bill would deny over 50,000 same-sex couples in New York critical protections currently afforded to different-sex couples, including hospital visitations, inheritance and pension benefits.” N.Y. State Exec. Chamber, *Message of Necessity to the Assembly on the Immediate Vote on Assembly Bill Number 8354*, EFFECTIVE N.Y. (June 15, 2011), <http://effectiveny.org/issue-summary/Message-of-Necessity-for-Immediate-Vote>.

¹⁷⁴ See Redistricting Reform Act of 2012, ch. 17, 2012 N.Y. Sess. Laws 253 (McKinney). The message accompanying redistricting reform offered these “facts,” “[i]t is essential that these reforms accompany passage of the legislation setting forth the legislative districts for the senate and assembly to demonstrate that the next time redistricting occurs it will be conducted pursuant to a reformed process.” N.Y. State Exec. Chamber, *Message of Necessity to the Legislature on the Immediate Vote on Assembly Bill Number 9557/Senate Bill Number 6736*, EFFECTIVE N.Y. (Mar. 15 2012), <http://effectiveny.org/issue-summary/Message-of-Necessity-for-Immediate-Vote>.

¹⁷⁵ See Act of Mar. 16, 2012, ch. 18, 2012 N.Y. Sess. Laws 258 (McKinney). The message used to pass this bill stated:

This bill would reform the pension system by creating a new tier which will save public employers and taxpayers tens of billions of dollars over the next 30 years. Immediate passage of this bill is crucial to allowing the state and local governments sufficient time to take the actions necessary for the smooth and efficient implementation of the new tier by April 1 of this year.

N.Y. State Exec. Chamber, *Message of Necessity to the Legislature on the Immediate Vote on Assembly Bill Number 9558/Senate Bill Number 6735*, EFFECTIVE N.Y. (Mar. 15, 2012), <http://effectiveny.org/issue-summary/Message-of-Necessity-for-Immediate-Vote>.

¹⁷⁶ See *infra* Part V.

¹⁷⁷ See Act of June 24, 2011, ch. 97, 2011 N.Y. Laws 752. The message justifying this law stated:

[t]his bill would: (1) amend the General Municipal Law and the Education Law, in relation to establishing limits upon school district and local government tax levies; (2) strengthen and extend the rent regulation laws until June 15, 2015; and (3) enact into law major components of legislation necessary to effectuate mandate relief from statutory and regulatory mandates on local governments.

Record of Proceedings, N.Y. State Assemb. B. 8518, 125–26 (June 24, 2011) [hereinafter Record of Proceedings, N.Y. State Assemb. B. 8518], *available at* <http://assembly.state.ny.us/write/upload/session/2011/20110624.pdf>.

¹⁷⁸ See Rent Act of 2011, ch. 97, pt. B, 2011 N.Y. Laws 767; see Record of Proceedings, N.Y. State Assemb. B. 8518, *supra* note 177, at 125–26 for the text of the message.

¹⁷⁹ See Act of Mar. 27, 2012, ch. 21, 2012 N.Y. Sess. Laws 322 (McKinney). The message accompanying this bill stated:

[t]his bill would create a statewide teacher and principal evaluation system to be implemented by local districts to improve teaching and learning. Immediate passage of this bill would allow school districts to maximize the amount of time they have to implement such a system, as well as demonstrate to the federal government New York State’s strong commitment to an essential condition of its \$700 million Race to the Top grant.

N.Y. State Exec. Chamber, *Message of Necessity to the Legislature on the Immediate Vote on Assembly Bill Number 3554/Senate Bill Number 6732*, EFFECTIVE N.Y. (Mar. 14, 2012),

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Governor Cuomo also made headlines at the end of the 2012 legislative session when he refused to issue messages of necessity on two bills affecting New York City after promising that he would do so.¹⁸⁰ One of the bills extended a popular tax break for condominium and co-op owners, and the other implemented technical changes in certain actuarial assumptions made by the city.¹⁸¹ Both of the messages were requested in writing by Mayor Michael Bloomberg, who detailed the need for immediate consideration of the measures.¹⁸² In a June 21, 2012 letter

<http://effectiveny.org/issue-summary/Message-of-Necessity-for-Immediate-Vote>. This message was not without controversy in the legislature, as this exchange notes:

MS. NOLAN: No, no, the classroom observations. If you look at page 30 -- oh, this is the Article VII language. Let me find it in the bill. But if you look at the bill you'll see in one of the sections it talks about the classroom observations.

MR. JORDAN: Well, I will address that because perhaps if we allowed this to age three days, because I lack the understanding of why this rises to such the level of urgency to warrant a message of necessity, I would have taken my time. Regrettably, we don't get that time so I don't have a chance to read page 30.

Record of Proceedings, N.Y. State Assemb. B. 3554, 117 (March 14, 2012) *available at* <http://assembly.state.ny.us/write/upload/session/2011/20110624.pdf>. Other assembly members were similarly critical of the message:

But I have an additional reason for voting no and that is, with all due respect and gratitude to Ms. Nolan, I don't think there is anyone in this entire Chamber who fully understands what is in this legislation and that's because it has not been allowed to age properly. The Governor, in my opinion, respectfully, has exercised an imprudent use of a Message of Necessity. And I suspect that his reason for doing so has a lot more to do with the press conferences that were referenced earlier than any desire to move this along. If we have, in fact, been working on this legislation for more than two years, there would be absolutely no harm in waiting an additional two days so that we could actually read this legislation, understand it, confer with counsel, confer with our school districts, and make an intelligent decision on very, very important legislation. This is no way to run a Legislature. It's no way to run a State. We should be voting no on this measure for those reasons alone.

Id. at 144 (statement of Assemblyman Sean T. Hanna).

And here's the other thing. Why after two years is this a Message of Necessity? Obviously, there's a lot of consternation about a bill like this, both sides . . . So, why a Message of Necessity? Why is this not being given the respect it deserves and the time it deserves. All the big stuff in this State is suddenly a Message of Necessity. Got to be done right now. Barely read the bill and just jam it through. It's disrespectful to the people of this State. It's disrespectful to this Legislature and it needs to stop. We need to begin to push back a little bit and say we're not going to operate this way. We're going to operate the way we're supposed to. We're going to analyze the bills, we're going to study the bills. They're going to be aged properly unless it's truly necessary to keep the State running. And this isn't. Two years we've been doing this. Another couple of days? We couldn't have debated this next week? This is really frustrating to deal with it.

Id. at 176–77 (statement of Assemblyman Steve McLaughlin).

¹⁸⁰ E.J. McMahon, *Cuomo's Session-Ending Hobgoblin*, NY TORCH (June 22, 2012), <http://www.nytorch.com/?p=6255>.

¹⁸¹ *Id.* For a copy of Mayor Michael R. Bloomberg's June 21, 2012 letters to Governor Andrew Cuomo, see *No Messages of Necessity Tonight*, CAPITOL TONIGHT, <http://capitaltonightny.ynn.com/2012/06/no-messages-of-necessity-tonight> (last visited July 28, 2013).

¹⁸² See *No Messages of Necessity Tonight*, *supra* note 181.

concerning the tax abatement, Bloomberg noted that the abatement was scheduled to expire on June 30, 2012, and that if the abatement was not extended, over 360,000 New York City taxpayers would be burdened by an additional \$430 million in taxes.¹⁸³

Concerning the pension bill, one commentator noted that it “could serve as a classic illustration of why the message of necessity power exists, and of how it properly can and should be exercised.”¹⁸⁴ The bill set forth certain actuarial assumptions and methods by which the City Actuary would fund the New York City pension systems.¹⁸⁵ The funding payments were required to be made no later than June 30, 2012.¹⁸⁶ The bill, which by all accounts was noncontroversial, was introduced on June 13, 2012, but inadvertently failed to attach a required fiscal note that had been completed and available at the time the bill was introduced.¹⁸⁷ On June 19, 2012, the bill was amended to include the omitted fiscal note, but the required three-day aging period made June 22nd the earliest date on which the bill could be passed.¹⁸⁸ The legislative session was scheduled to end on June 22, 2012,¹⁸⁹ so the governor’s refusal to issue a message effectively killed the bill.

By the end of the twentieth century, the message of necessity requirement had been transformed into a message of convenience. Instead of being a vehicle by which emergency legislation could bypass the usual aging period, it had become an integral part of the arsenal of weapons governors use in shaping the public policy, and has contributed to the democratic centralism that characterizes the decision making process in New York.

IV. MESSAGES OF NECESSITY AND THE COURTS

Although uses of messages of necessity have occasioned controversy since the procedure was introduced in 1894,¹⁹⁰ the first reported legal challenges after the addition of the sufficiency requirement in 1938 did not arise until 1972, with the case of *Finger*

¹⁸³ *Id.*

¹⁸⁴ McMahon, *supra* note 180.

¹⁸⁵ *No Messages of Necessity Tonight*, *supra* note 181 (including a copy of Mayor Bloomberg’s letter requesting a message of necessity on the pension plan and detailing the series of events).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Don’t Evade the Requirement*, *supra* note 55, at 4 (noting that there should be no attempt to evade the requirement of the three-day bill aging process).

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*Lakes Racing Ass'n, Inc. v. New York State Off-Track Pari-Mutuel Betting Commission.*¹⁹¹

Finger Lakes Racing Association

In *Finger Lakes*, plaintiffs, racetrack operators, challenged the constitutionality of laws establishing the Off-Track Pari-Mutuel Betting Commission and authorizing off-track pari-mutuel betting.¹⁹² Among the grounds for the challenge was that the messages of necessity issued by Governor Rockefeller for the bills did not comply with the requirements of Article III, section 14.¹⁹³ The messages each provided as facts necessitating suspension of the three-day rule that “the Leaders of your Honorable bodies have requested this message to permit immediate consideration of the bill prior to your anticipated final adjournment.”¹⁹⁴ When the messages were issued on April 19, one day after the pari-mutuel bills were introduced, the legislature had not yet determined a final adjournment date.¹⁹⁵ Ultimately the legislature adjourned on April 22—more than three days after the bills had been introduced.¹⁹⁶

The New York Court of Appeals unanimously rejected the message of necessity challenge, holding that the fact that adjournment did not occur until more than three days after the bills were introduced was of no consequence.¹⁹⁷ In language that would color future opinions on this issue, the court wrote:

The time sequence shows the bill could not have been considered by the Legislature unless the certificate had been

¹⁹¹ *Finger Lakes Racing Ass'n v. N.Y. State Off-Track Pari-Mutuel Betting Comm'n*, 282 N.E.2d 592 (N.Y. 1972).

¹⁹² *Id.* at 593. The laws are found at Act of Apr. 22, 1970, ch. 143, 1970 N.Y. Laws 900 and Act of Apr. 22, 1970, ch. 144, 1970 N.Y. Laws 914.

¹⁹³ *Finger Lakes Racing Ass'n*, 282 N.E.2d at 595. The laws were also challenged on the grounds that: 1) they impermissibly allowed an entity other than the state to derive funds from off track betting and the state did not derive a reasonable revenue from the betting, both in violation of Article I, section 9 of the state constitution; 2) state revenue derived from pari-mutuel betting was being paid out other than pursuant to an appropriation by law in violation of Article VII, section 7 of the state constitution; 3) the laws impaired the obligation of contract in violation of Article I, section 10 of the U.S. Constitution; 4) the system of off-track betting is an unconstitutional and excessive exercise of the police power of the state; and 5) the laws deprived the plaintiffs of their property rights without due process of law. *Finger Lakes Racing Ass'n v. N.Y. State Off-Track Pari-Mutuel Betting Comm'n*, 320 N.Y.S.2d 801, 804 (Sup. Ct. Albany County 1971), *aff'd*, 282 N.E.2d 592 (N.Y. 1972).

¹⁹⁴ *Finger Lakes Racing Ass'n*, 282 N.E.2d at 596 (citation omitted) (internal quotation marks omitted).

¹⁹⁵ *Id.* at 595–96.

¹⁹⁶ *Id.* at 596.

¹⁹⁷ *Id.*

given and the public interest in its consideration is made conclusive by the fact the Legislature decided not only to consider it but to pass it. The request by the leaders of both houses to the Governor for a certificate shortening the time to permit consideration of the bill before adjournment was to make legislative action possible.

This is a compliance in terms and in spirit with article III (§ 14). It is the Governor who must express the opinion that an immediate vote is desirable. The facts on which he forms that opinion must satisfy him. The facts supporting his opinion of April 19, are rational and reasonable. If the proposal is to be considered a certificate must be given. This on its face is a sufficient compliance with the Constitution.

The Legislature could still say the time for consideration was too short. It did not say that, but accepting the Governor's certificate and considering the proposal in the time available, it passed it.¹⁹⁸

In closing, the court adopted a deferential stance to the other two branches of government in matters involving legislative procedures: courts should not nullify acts of the governor addressed to legislative action "which literally and reasonably conforms with constitutional requirements."¹⁹⁹

Norwick v. Rockefeller

In *Norwick v. Rockefeller*,²⁰⁰ decided the same year as *Finger Lakes*, the legislative director of the New York Civil Liberties Union, individually and on behalf of several legislators and other citizens, brought a lawsuit challenging the constitutionality of seventy-nine laws enacted during the 1971 regular session of the legislature pursuant to messages of necessity.²⁰¹ In addition to seeking an injunction against the enforcement of the legislation, Norwick sought a preliminary and permanent injunction restraining future use of the message of necessity unless each such message specified:

- (1) the facts creating a compelling state interest necessitating an immediate vote, rather than a vote after a

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Norwick v. Rockefeller*, 334 N.Y.S.2d 571 (Sup. Ct. N.Y. County), *aff'd*, 338 N.Y.S.2d 384 (App. Div. 1st Dep't 1972), *aff'd*, 301 N.E.2d 422 (1973).

²⁰¹ *Id.* at 572, 573.

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three-day waiting period, (2) the adverse consequences that would flow from delaying the vote for a three-day period, (3) the reasons why the bill was not and could not have been considered and voted upon earlier in the legislative session, and (4) the reasons why less drastic alternatives, such as extending the legislative session or convening a special legislative session, would not suffice; and . . . that the court retain, for five years, continuing jurisdiction over the issues or permit any citizen of the State who feels aggrieved by any law enacted pursuant to a message of necessity to challenge in court the necessity for an immediate vote on such legislation.²⁰²

After finding that the plaintiffs had standing to challenge the enactment of the laws, New York Supreme Court Justice²⁰³ Irving Saypol addressed the message of necessity provision. He began by giving the legislative history of the provision, including the precatory comments of Senator Fearon at the 1938 convention.²⁰⁴ The court conceded that many of the messages issued by the governor contained pro forma language, such as either:

[b]ecause the bill in its final form has not been on your desks three calendar legislative days the Leaders of your Honorable bodies have requested this message to permit its immediate consideration;

or . . .

[b]ecause the bill in its final form has not been on your desks three calendar legislative days, the Leaders of your Honorable bodies have requested this message to permit immediate consideration of the bill prior to your anticipated final adjournment.²⁰⁵

The court, however, noted that governors since Herbert Lehman had issued similar messages.²⁰⁶

In response to the argument that pro forma messages of necessity did not comply with the purpose and spirit of the constitution, the supreme court analyzed in detail the language of *Finger Lakes*. Saypol held that even though the message challenged in that case contained a “fact” offered to justify an immediate vote—i.e., the

²⁰² *Id.* at 573–74.

²⁰³ In New York State, the Supreme Court is the trial court of unlimited general jurisdiction. See N.Y. CONST. art. I, § 7; *Kagen v. Kagen*, 236 N.E.2d 475, 478. (N.Y. 1968).

²⁰⁴ *Norwick*, 334 N.Y.S.2d at 579.

²⁰⁵ *Id.* at 579–80 (internal quotation marks omitted).

²⁰⁶ *Id.* at 580.

anticipated final adjournment of the legislature—the language in the opinion was broad enough to conclude that any facts offered in justification would be accepted by the court.²⁰⁷ *Finger Lakes* underscored the governor’s exclusive role in the process, as judge of the need for immediacy and the sufficiency of the facts that form the basis of the necessity. So long as the governor is satisfied that the facts are sufficient, the courts should not interfere.²⁰⁸ Relying upon language in the earlier decision that a certificate is “on its face is a sufficient compliance with the Constitution,” Saypol counseled judicial self-restraint:

Recognizing the dominant doctrine of separation of powers with concomitant adherence to judicial self-limitation and absent any expressed criterion in the State Constitution defining the phrase “the facts”, which in the Governor’s opinion require his message of necessity, I hold, on the authority of . . . [*Finger Lakes*], that their sufficiency is unassailable.²⁰⁹

Both the appellate division and the Court of Appeals affirmed without opinion.²¹⁰

Maybee v. State

Following several intermediate appellate court decisions in which messages of necessity were upheld against arguments that they lacked any meaningful “facts” as to the need for immediate passage,²¹¹ the Court of Appeals revisited the use of messages of necessity in *Maybee v. State*.²¹² *Maybee* involved a constitutional challenge to a bill that created civil and criminal penalties for persons who sold, shipped or transported cigarettes to people other

²⁰⁷ *Id.* at 581–82.

²⁰⁸ *Id.* at 582.

²⁰⁹ *Id.*

²¹⁰ *Norwick v. Rockefeller*, 338 N.Y.S.2d 384 (App. Div. 1st Dep’t 1972), *aff’d*, 301 N.E.2d 422 (N.Y. 1973).

²¹¹ *See, e.g., Dalton v. Pataki*, 780 N.Y.S.2d 47, 51, 52, 81–82 (App. Div. 3d Dep’t 2004) (upholding legislation enacted pursuant to a message of necessity issued by Governor George Pataki which stated only that “[b]ecause the bills have not been on your desks in final form for three calendar legislative days, the Leaders of your Honorable Bodies have requested this message to permit their immediate consideration,” and that the “bills are necessary to enact certain provisions of law” (internal quotation marks omitted)), *aff’d as modified*, 835 N.E.2d 663 (N.Y. 2005); *Joslin v. Regan*, 406 N.Y.S.2d 938, 940, 942 (App. Div. 4th Dep’t 1978) (refusing to invalidate legislation enacted pursuant to a message which provided as its facts “[e]nactment of this bill is necessary in connection with the Budget for the 1977–78 Fiscal Year, which begins April 1” (internal quotation marks omitted)), *aff’d*, 397 N.E.2d 1329 (N.Y. 1979).

²¹² *Maybee v. State*, 828 N.E.2d 975, 976 (N.Y. 2005).

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than licensed or registered cigarette dealers or agents, thus eliminating the ability of residents to purchase cigarettes via the internet, telephone, or mail order.²¹³ On the day the bill was first printed, Governor George Pataki sent both houses of the legislature a message of necessity that recited the bill's purpose with no specific facts justifying the immediate passage of the bill beyond the fact that it had not been on the legislature's desk for three days.²¹⁴ The message stated:

This bill is necessary to amend the public health law in relation to the shipment and transportation of cigarettes to any person not licensed as a cigarette tax agent or wholesale dealer. This bill also amends the tax law and the administrative code of the City of New York with respect to imposing and enhancing civil and criminal penalties for unlawfully possessing, selling and transporting cigarettes.

Because the bill has not been on your desks in final form for three calendar legislative days, this message is necessary to permit its immediate consideration.²¹⁵

The Senate unanimously passed the bill the same day it was printed; the Assembly, also unanimously, followed suit the next day.²¹⁶ Two months later, Governor Pataki signed the bill into law, and most of the provisions of the law became effective approximately four months after enactment.²¹⁷

A cigarette vendor challenged the law on the grounds that the certified facts did not support the need for an immediate vote.²¹⁸ The trial court dismissed the complaint for failure to state a cause of action, and plaintiff directly appealed to the New York Court of Appeals.²¹⁹

The Court of Appeals, relying on *Finger Lakes* and *Norwick*, affirmed the dismissal.²²⁰ The court held that "the sufficiency of the facts stated by the Governor in a certificate of necessity is not subject to judicial review."²²¹ The court noted that although *Finger*

²¹³ *Id.*; S.B. 8177, § 2, 2000 Leg., Reg. Sess. (N.Y. 2000).

²¹⁴ *Maybe*, 828 N.E.2d at 976.

²¹⁵ *Id.* (internal quotation marks omitted).

²¹⁶ *Id.* The bill was introduced on June 14, 2000, and was passed by the Assembly, the later of the two houses, by June 15. *Id.* The legislative session ended on June 23 of that year, so the bill could have been allowed to age the required three calendar days and still have been passed before the end of the session. *Id.*

²¹⁷ Act of Aug. 16, 2000, ch. 262, § 13, 2000 N.Y. Laws 2905, 2910.

²¹⁸ Brief for Respondents at 5–6, *Maybe v. State*, 828 N.E.2d 975 (N.Y. 2005) (No. 50).

²¹⁹ *Maybe*, 828 N.E.2d at 976.

²²⁰ *Id.* at 976–79.

²²¹ *Id.* at 976.

Lakes left open the possibility that a statement of fact could be found to be inadequate, that possibility was foreclosed by *Norwick*, a holding which the court reaffirmed.²²²

The court reasoned that the Constitution, by using the words “in his or her opinion,” gave the Governor the power to determine whether necessity was required, making irrelevant any court’s agreement or disagreement with that judgment.²²³ Although the court conceded that some contexts might provide justification for determining the reasonableness of a public official’s opinion, the court gave several reasons why such an approach was not warranted in message of necessity cases.²²⁴ First, the governor is in a better position than the judiciary to determine whether speedy passage of a bill is necessary.²²⁵ Second, the circumstances necessitating the haste may make it impracticable to prepare a detailed and persuasive message.²²⁶ Third, the legislature has the power to either not use the message or not consider the bill,²²⁷ so the acceptance and use of the message acts as a further validation of the necessity requiring immediate consideration.²²⁸ Fourth, the court noted the “draconian” “consequences of judicial second-guessing”: “[i]f we accepted plaintiff’s argument here, any statute, no matter how important to the state, would have to be thrown out by the courts if the facts stated in the certificate of necessity that permitted its prompt passage were found insufficient.”²²⁹

The court rejected the argument that there was a difference between *Norwick v. Rockefeller*, in which the message stated that it had been requested by the legislature, and the message *sub judice*, which did not mention such a request.²³⁰ The court thought the distinction insignificant, holding that there was no difference between “facts that support the Governor’s conclusion only weakly and facts that do not support it at all.”²³¹ The court also relied upon the constitutional history of the provision to support the current

²²² *Id.* at 977–78.

²²³ *Id.* at 978.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* See also N.Y. CONST. art. III, § 14.

²²⁸ See *Maybee*, 828 N.E.2d at 978. By using this language, the court made it clear it was unwilling to interfere with the separation of powers by revisiting circumstances that not just one, but both other branches of government had found compelling enough to support the issuance and use of such a message. See *id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

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interpretation, pointing to both the rejection of the proposed 1915 constitution that would have eliminated the practice and the comments of Senator Fearon which underscored the role of the governor in carrying out the purpose of the certification requirement and, by implication, acknowledged the likelihood that the judiciary might not superintend the provision:

The key word is “hope”; Fearon hoped the Governor’s certificates would be more than pro forma, but he evidently did not expect the courts to invalidate the legislation if his hope was disappointed. He presumably recognized, as do we, that invalidation of statutes on grounds like this would do less good than harm.²³²

Although no judges dissented from the court’s judgment, Chief Judge Judith Kaye wrote a concurrence joined by two other judges that that would have invalidated future messages of the kind at issue in the case.²³³ After reviewing the constitutional history of the provision, Judge Kaye argued that “messages of necessity were supposed to be the exception, not the rule.”²³⁴ Unwilling to accept the reasoning of her colleagues that a “failure of the governor to certify facts which . . . necessitate an immediate vote on the bill” was not amenable to a judicially fashioned remedy,²³⁵ Kaye concluded: “facts” that set forth nothing other than the utility of the provisions of the bill were irrelevant to the need for immediate consideration of the bill and therefore did not satisfy the constitutional requirement for necessity.²³⁶

Rejecting the argument that *Norwick* was binding precedent, Kaye noted that the *Norwick* trial court’s interpretation of *Finger Lakes*, which seemed to place all messages beyond the reach of judicial review, was affirmed without opinion, rather than on the reasoning of the trial court.²³⁷ In uncharacteristically blunt language, the chief judge wrote: “[t]o sanction the instant message is to read the provision out of the Constitution.”²³⁸ Despite this conclusion, Kaye voted to sustain the legislation, reasoning that she

²³² *Id.* at 979 (quoting 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1435 (1938)).

²³³ *Maybe*, 828 N.E.2d at 983 (Kaye, C.J., concurring in the result).

²³⁴ *Id.* at 979–81.

²³⁵ *Id.* at 981.

²³⁶ *Id.* Chief Judge Kaye did note that the facts of the message were perhaps evidence in support of the ultimate passage of the bill. *Id.*

²³⁷ *Id.* at 982.

²³⁸ *Id.*

“would give [the] ruling prospective effect only.”²³⁹ Kaye concluded her opinion by making a plea for more dutiful compliance with the requirements of the constitution:

Finally, I note that article III, § 14 of the Constitution does not ask much of the Governor when a message of necessity is in order. Any facts which in the Governor’s opinion necessitate an immediate vote will satisfy the constitutional test. I therefore hope that, despite the Court’s ruling today, the Governor will in the future take the simple step of including in any message of necessity the minimal statement of facts that compliance with the Constitution requires.²⁴⁰

Although *Maybe* foreclosed judicial review of legislation based upon a purportedly defective message of necessity, it has not stopped judges from second guessing, and in some cases criticizing, the use of messages. In an opinion refusing to invalidate the law legalizing same sex marriage in New York State on message of necessity grounds, acting Supreme Court Justice Robert B. Wiggins was openly critical of Governor Andrew Cuomo’s use of a message of necessity to achieve passage of the legislation.²⁴¹ Cuomo’s message contained the following “facts” to justifying the message:

This bill would amend the domestic relations law to grant same-sex couples the long overdue right to enter into civil marriages in New York. The continued delay of the passage of this bill would deny over 50,000 same sex couples in New York critical protections currently afforded to different-sex couples, including hospital visitation, inheritance and pension benefits.²⁴²

The court was not impressed:

Logically and clearly, this cite by the Governor is disingenuous. The review of such concept altering legislation for three days after generations of existing definitions would

²³⁹ *Id.* (citations omitted). Kaye cited precedent for a prospective application of a case that would otherwise invalidate numerous statutes based on a defect in the legislative process. *King v. Cuomo*, 613 N.E.2d 950, 955 (N.Y. 1993) (giving prospective effect to a ruling which invalidated practice where legislature would recall bill from governor’s desk); *Campaign for Fiscal Equity, Inc. v. Marino*, 661 N.E.2d 1372, 1374 (N.Y. 1995) (refusing to apply retroactive application to decision holding unconstitutional the legislature’s practice of withholding bills passed by both houses of legislature from governor).

²⁴⁰ *Maybe*, 828 N.E.2d at 982 (Kaye, C.J., concurring in the result).

²⁴¹ *New Yorkers for Constitutional Freedom v. N.Y. State Senate*, No. 807-2011, slip op. at 2 (N.Y. Sup. Ct. Livingston County Nov. 18, 2011).

²⁴² *Id.* (citations omitted).

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not so damage same sex couples as to necessitate an avoidance of rules meant to ensure full review and discussion prior to any vote. Nonetheless, this Court is reluctantly obliged to rule that the message of necessity submitted by the Governor was accepted by vote of the Senate, and is NOT within this Court's province to nullify.

Parenthetically, this statute [sic] had a legislative history where it had been changed to require more information from the Governor. The [1894] version only requires that the Governor "certifies the necessity of immediate passage" without any explanation of why or what factors constitute the necessities. The present version requires that same certification as well as requiring the facts giving rise to the necessity. Logic would seem to dictate that the additional requirement was added to eliminate the artificial use of necessities meant only to 'strike while the iron is hot' (or while the vote is as desired). Regardless, although the disregard for the statute seem[s] evident, the Court feels constrained to not rule on the Governor's certification of necessities.

It is ironic that much of the State's brief passionately spews sanctimonious verbiage on the separation of powers in the governmental branches, and clear arm-twisting by the Executive on the Legislative permeates this entire process.²⁴³

A request for an injunction preventing enforcement of the New York Secure Ammunition and Firearms Enforcement Act (NY SAFE Act) based on the claim that the message of necessity was obtained on the basis of "falsified statements" as to the need for speed and emergency met a similar fate. The state supreme court in Albany County rejected the request from the bench: "I'm a trial-level court and a trial-level judge and I'm constrained to follow the law as set forth by the Court of Appeals It is clear that judicial intervention, judicial review of a message of necessity, is not allowed."²⁴⁴ On the authority of *Maybee* and *Norwick*, the Third Department affirmed, holding that "[a]s the Governor clearly made some factual statements, judicial review of the certificate of necessity is at an end and NY Constitution, article III, § 14 provides no basis for this Court to intervene."²⁴⁵

²⁴³ *Id.* (citing *Maybee*, 828 N.E.2d at 977 (majority opinion)).

²⁴⁴ Michael Virtanen, *Judge Refuses to Block Tougher N.Y. Gun Law*, DAILY GAZETTE (Albany, N.Y.), Mar. 14, 2013, at A1.

²⁴⁵ *Schulz v. State of N.Y. Exec.*, 2013 N.Y. App. Div. LEXIS 4949, at *4 (App. Div. 3d Dep't

The decisions interpreting the message of necessity requirement are characterized by deference to the governor's determination of "necessity"; an unwillingness to second guess the determination of two branches of government concerning a provision that textually affords wide discretion to the governor; and by a concern about the logistical problems involved in fashioning a judicial remedy in the absence of any clear constitution guidelines or directive to intervene.²⁴⁶ The specter of the upheaval that would occur if laws passed by messages of necessity were subject to *en masse* invalidation was one such problem raised by the court.²⁴⁷ In sum, these decisions have removed the judiciary from any role in superintending the requirements of the clause, leaving its use and operation to the political dynamics involved in legislative-executive relations. The decisions have also strengthened the governor's role in the legislative process. Whether messages will be issued or not, how often, and, for what reasons, if any, are decisions solely in the hands of the governor.

V. THE NY SAFE ACT AND THE MESSAGE OF NECESSITY: A CASE STUDY

The passage of the New York Secure Ammunition and Firearms Enforcement Act provides exemplary evidence of the extent to which the message of necessity has been transformed from a procedure allowing for limited exceptions in exiguous circumstances to the three-calendar day requirement into a device that has enhanced the governor's role in the legislative process.

The NY SAFE Act resulted in significant changes to ten consolidated laws and one unconsolidated law, including, *inter alia*:

1. requiring mental health professionals to report patients likely to engage in serious harm to themselves or others, which may result in the patient's gun license being

July 3, 2013). The court rejected the argument that because the challenged law dealt with a constitutional right, a stricter standard of review was necessary:

Plaintiff's assertion that the SAFE Act's implications with respect to "a constitutionally protected fundamental right" warrants a deviation from the normal standard of review is without merit. Plaintiff offers no support for his apparent proposition that the method of enacting a law could be subject to varying degrees of judicial scrutiny based solely upon certain rights that may be implicated by the enactments.

Id. at *4 n.2.

²⁴⁶ See, e.g., *Maybee*, 828 N.E.2d at 977–78 (citations omitted).

²⁴⁷ *Id.* at 982 (Kaye, C.J., concurring) (citations omitted).

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- suspended and any firearms being removed;²⁴⁸
2. redefining “assault weapons” to include semi-automatic pistols and rifles with detachable magazines and one military style feature, as well as semi-automatic shotguns with one military style feature;²⁴⁹
 3. banning the purchase of assault weapons after the effective date of the law, requiring persons who own assault weapons prior to the effective date of the law to register them and restricting the sale of such “grandfathered” assault weapons;²⁵⁰
 4. limiting the capacity of magazines to seven rounds, reduced from the previous ten round limit, limiting to seven the number of rounds that can be loaded into a “grandfathered” ten round magazine, and banning possession of certain other high-capacity magazines;²⁵¹
 5. requiring owners of handguns or assault rifles to recertify their permit every five years;²⁵²
 6. requiring all gun transfers between private parties other than family members to be conducted through a federal firearms licensee;²⁵³
 7. increasing penalties for certain gun offenses;²⁵⁴
 8. extending and strengthening the ability of judges to require individuals to regularly undergo psychiatric treatment;²⁵⁵ and
 9. requiring the safe storage of firearms in houses having people who are barred from possessing such firearms.²⁵⁶

The final hours before passage of the NY SAFE Act depict a whirlwind of activity.²⁵⁷ On January 14, 2013, the bill, S2230, was

²⁴⁸ N.Y. Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013, S. 2230, 236th Reg. Sess. § 20 (N.Y. 2013) (effective Jan. 15, 2013).

²⁴⁹ *Id.* § 37.

²⁵⁰ *Id.* § 48.

²⁵¹ *Id.* §§ 37, 46-a.

²⁵² *Id.* § 48.

²⁵³ *Id.* § 17.

²⁵⁴ *Id.* §§ 31, 32, 35, 36, 41, 41-a, 41-b, 45, 52.

²⁵⁵ *Id.* § 54.

²⁵⁶ *Id.* § 47.

²⁵⁷ The actions taken on the bill, S2230, as depicted on the Assembly website from earliest to latest action (with the site capitalizing actions taken by the Senate) were:

01/14/2013 REFERRED TO RULES . . .

01/14/2013 ORDERED TO THIRD READING CAL.1 . . .

01/14/2013 MESSAGE OF NECESSITY . . .

01/14/2013 PASSED SENATE . . .

01/14/2013 DELIVERED TO ASSEMBLY . . .

01/14/2013 referred to codes . . .

printed, and Senate Republican Conference Leader Dean Skelos and Independent Democratic Conference Leader Jeffrey Klein agreed to present the bill to the members of the Senate for immediate passage.²⁵⁸ At approximately 11 p.m. that evening, Senators Skelos and Klein released copies of the bill to the Senate, and asked the Senate to vote on it.²⁵⁹ Deputy Republican Conference Leader for Legislative Operations Tom Libous, who was conducting the floor at the time, asked the Senate President, Lieutenant Governor Robert Duffy, if there was a message of necessity at the desk.²⁶⁰ The President responded that there was a message.²⁶¹ No senators requested it and the President did not offer a copy of the message for the senators to review, nor was the message read.²⁶² The Senate Rules require that a message of necessity be approved by a vote of the senators,²⁶³ and so a voice vote was taken.²⁶⁴ Remarkably, the Senate Journal records no response to the question of any opposition to the acceptance of the message of necessity.²⁶⁵ Immediately following the acceptance of the message, the President instructed the Senate Secretary to read the last section of the bill, and the Secretary read:

“THE SECRETARY: Section 58. This act shall take effect immediately.”²⁶⁶

The roll was then called and the bill was approved by a vote of 43–18, with numerous senators explaining both affirmative and

01/15/2013 substituted for a2388 . . .
 01/15/2013 ordered to third reading rules cal.3 . . .
 01/15/2013 message of necessity - 3 day message . . .
 01/15/2013 passed assembly . . .
 01/15/2013 returned to senate . . .
 01/15/2013 DELIVERED TO GOVERNOR . . .
 01/15/2013 SIGNED CHAP.1

N.Y. Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013, S. 2230, 236th Reg. Sess. (N.Y. 2013) (effective Jan. 15, 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=S02230&term=2013&Summary=Y&Actions=Y.

²⁵⁸ *New York State Senate Legislative Session*, Transcript, Jan. 14, 2013, S. 2230, 236th Reg. Sess. [hereinafter Transcript, S. 2230, 236th Reg. Sess.], *available at* <http://open.nysenate.gov/legislation/transcript/regular-session-01-14-2013>.

²⁵⁹ *Id.*

²⁶⁰ *Id.* (statement of Tom Libous, Deputy Republican Conference Leader for Legislative Operations).

²⁶¹ *Id.* (statement of President, Lieutenant Governor Robert Duffy).

²⁶² *Id.*

²⁶³ N.Y. SEN. R. IX. § 1 (“No bill shall be passed pursuant to a message of necessity unless a majority of the Senators vote to approve the use of such message.”).

²⁶⁴ Transcript, S. 2230, 236th Reg. Sess., *supra* note 258.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

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negative votes on the bill.²⁶⁷ The total time that the Senate considered and approved the bill was approximately twenty minutes.²⁶⁸

On Tuesday, January 15, 2013, at approximately 11:20 a.m., the bill was taken up in the Assembly.²⁶⁹ Unlike the Senate, the Assembly actually read the message of necessity issued by Governor Andrew Cuomo, which gave as the “facts” necessitating suspension of the three-day rule the following:

Some weapons are so dangerous, and some ammunition devices so lethal, that New York State must act without delay to prohibit their continued sale and possession in the State in order to protect its children, first responders and citizens as soon as possible. This bill, if enacted, would do so by immediately banning the ownership, purchase, and sale of assault weapons and large capacity ammunition feeding devices, and eliminate them from commerce in New York State. For this reason, in addition to enacting a comprehensive package of measures that further protects the public, immediate action by the Legislature is imperative.²⁷⁰

Debate on the bill was then held, with numerous assembly members objecting to the speed with which the legislation was being pursued.²⁷¹ The most vocal critic of the process was Assemblyman Steven F. McLaughlin, who stated:

We’ve moved too quickly. We have not analyzed this appropriately, and we now find a situation where we’re amending all kinds of law in New York State and already

²⁶⁷ See generally *id.* (detailing that after roll was called numerous senators explained their affirmative and negative votes before the President concluded that Bill Number 2230 had passed). Two senators explained their negative votes against the bill, Senator Greg Ball and Senator Kathleen A. Marchione. *Id.* Senator Ball’s comments were limited to the merits of the bill itself, while Senator Marchione attacked the process as well:

I felt -- I feel that it was a shame that our Governor felt the need to use a message of necessity.

Because we talk about transparency and we talk about wanting our people within our districts to be able to give us their opinions and to have public hearings and to hear about the process, and to make sure it’s open and transparent, yet we get legislation on our desks for less than 20 minutes and we’re voting on something through a message of necessity.

Id. (statement of Senator Greg Ball).

²⁶⁸ See *id.*

²⁶⁹ *New York State Assembly*, Transcript, Jan. 15, 2013, A. 2388, 236th Reg. Sess., at 3, 5–6 [hereinafter Transcript, A. 2388, 236th Reg. Sess.], available at http://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_e154019199755192c41f9f5c398d7269.pdf&view=1&showpdf=1.

²⁷⁰ See *id.* at 6–7.

²⁷¹ See generally *id.* at 167–96.

seeing the flaws in this. We could've and should've waited and given this the proper respect that it deserves. You can tell we're on a three- to four-hour debate here. It's a big deal, people, and we should've given this the respect it deserves and let the people of New York weigh in on this. To do anything other than that was an abuse of power and it was disrespectful. We could have rejected the message of necessity. We have the ability to do it. We could have put the brakes on and just said, *Wait a minute*, and we chose not to. I think that is a mistake that this Legislature has made repeatedly now, where we just move too quickly. All of the big things we do seem to get done on a message of necessity. That is not the essence of good government.²⁷²

At approximately 3:45 p.m., Acting Speaker Jeffrion Aubry asked the Clerk to read the last section of the bill.²⁷³ She read: “[t]his act shall take effect immediately.”²⁷⁴ The vote was then taken, and following several members explaining their votes,²⁷⁵ at approximately 4:30 p.m., the bill was announced as approved by a vote of 104–43.²⁷⁶ The same day, at 5:10 p.m., Governor Cuomo signed the bill into law.²⁷⁷

As noted above, both the Senate Secretary and the Assembly Clerk were instructed to read the last section of the bill. Each of them read the same line: “[t]his act shall take effect immediately.”²⁷⁸ This statement was not entirely accurate. The act contains sixty-two sections, with some sections having letters and numbers, such as 46-a.²⁷⁹ Section 57 of the act is a severability provision and section 58 provides the effective dates.²⁸⁰ Of the remaining sixty sections of the act, fifty-four of them became effective sixty days after enactment, three sections take effect one

²⁷² *Id.* at 166–67 (statement of Assemblyman Steven F. McLaughlin).

²⁷³ *See id.* at 176.

²⁷⁴ *Id.*

²⁷⁵ *See generally id.* at 176–96 (detailing the assembly members explanations of their votes).

²⁷⁶ *See id.* at 196; Dave Greber, *Governor Signs Nation's 'Toughest' Gun Control Bill into Law*, WBNG NEWS LOCAL (updated Jan. 16, 2013, 1:51 AM), <http://www.wbng.com/home/Lawmakers-Could-Vote-Tonight-on-Nations-Toughest-Gun-Bill-186890002.html>; Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES, Jan. 16, 2013, at A15.

²⁷⁷ Greber, *supra* note 276; Kaplan, *supra* note 276, at A15.

²⁷⁸ Transcript, A. 2388, 236th Reg. Sess., *supra* note 269, at 176; Transcript, S. 2230, 236th Reg. Sess., *supra* note 258.

²⁷⁹ New York Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013, § 46-a 2013 N.Y. Laws ch. 1 [hereinafter NY SAFE Act].

²⁸⁰ *Id.* §§ 57, 58.

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year after enactment, and two sections contains multiple effective dates.²⁸¹ The only provision that took effect immediately is the one prohibiting the in-state acquisition of those firearms defined as assault weapons.²⁸² The provision requiring owners of certain firearms to register them within one year was to take effect ninety days after enactment,²⁸³ thus making April 15, 2014 the deadline for registration.

When asked by reporters why the gun control bill had to be passed overnight with no debate or public input, Governor Cuomo responded: “I’m not going to give the public notice, I’m going to do an assault weapons ban in three days. Quick, run out and buy an assault weapon before the ban went into place.”²⁸⁴ In addition to the argument that quick action was necessary to prevent opposition from mobilizing, Cuomo offered another justification, one that, on its face, seemed inconsistent with his initial response to the defense that the legislation was sprung on the public with little publicity or discussion for the purpose of forestalling a large-scale, last minute purchase of such weapons:

“I started talking about this before there was any suggestion that there was any report coming out by . . . vice president [Biden] We were talking about this in December,” and . . . there was speculation in September about having a special session to consider gun-control legislation, “so this predated all of that.”²⁸⁵

Of course, such notice would have had the effect of giving potential gun buyers six months to stock up.

The rolling time frame in which most of the provisions of the SAFE Act would take effect has resulted in a significant rise in the purchase of handguns and the sale of detachable ammunition magazines holding more than seven rounds, as that ban was not made effective until ninety days after passage, or April 15, 2013.²⁸⁶ Richard Azzopardi, a spokesman for the governor, countered: “leaders [of the legislature] asked for a message of necessity

²⁸¹ *Id.* § 58 (omitting section 37 as an exception).

²⁸² *Id.* §§ 38, 58(b).

²⁸³ *Id.* §§ 48, 58(d).

²⁸⁴ Paybarah, *supra* note 171.

²⁸⁵ *Id.* (quoting Governor Andrew Cuomo).

²⁸⁶ NY SAFE Act §§ 38, 58(b). See generally Maki Becker, *Gun-control Laws Create ‘Stampede’ of Weapon Buying*, BUFFALO NEWS, <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20130310/CITYANDREGION/130319957> (last updated Mar. 10, 2013, 8:36 AM) (explaining how a huge number of customers are coming into stores to buy guns before the ban date).

because they agreed with us that the SAFE Act immediate ban on assault weapons should be just that. What you described proves our point that there would have been a run on these dangerous weapons if we delayed action.”²⁸⁷ As with other cases described above, Governor Cuomo’s justification for this message—the facts constituting the “necessity”—amounts to if we want to accomplish the purposes of the bill, the sooner the better.

Cuomo’s response to criticisms of the use of the messages is revealing: “[i]t’s a flawed process.”²⁸⁸ Referring to legislators, he stated that “[o]ne of the dysfunctions of Albany is they never stop . . . They never conclude, they don’t act.”²⁸⁹ He continued: “[g]overnment is supposed to function It’s not a debating society.”²⁹⁰ “Three days of debate, everyone has an opinion, it’s entirely transparent, [and] we never reach resolution I get 100 percent for transparency. I get zero for results.”²⁹¹ Concerning the gun control bill specifically, Cuomo asserted that his actions were justified by the will of the people: “I think the people of the state said they want something done and they want it done now Let’s act.”²⁹²

Governor Cuomo’s “I get things done” defense is not new. Strong governors who “make things happen” have been a part of New York’s constitutional and political tradition from its inception. In the early twentieth century, Governor Al Smith made it a part of his governing style. During a 1938 Constitutional Convention debate involving restrictions on the power of public authorities, Smith said such restrictions would “paralyze the one method we have discovered of getting work done expeditiously.”²⁹³ An equally forceful governor, Nelson Rockefeller, speaking about the power and role of the governor, remarked: “great men are not drawn to small office.”²⁹⁴ The governor’s secretary, William Ronan, put Rockefeller’s remark in the context of New York’s political history: “New York is a big, dynamic, high-powered state . . . and it wants a

²⁸⁷ Becker, *supra* note 286.

²⁸⁸ Michael Gormley, *Analysis: In Big Deals, a Big Deal Law is Lost*, LONG ISLAND PRESS (Mar. 19, 2012), <http://archive.longislandpress.com/2012/03/19/analysis-in-big-deals-a-big-deal-law-is-lost> (emphasis added) (internal quotation marks omitted).

²⁸⁹ *Id.* (internal quotation marks omitted).

²⁹⁰ *Id.* (internal quotation marks omitted).

²⁹¹ Gormley, *supra* note 143 (internal quotation marks omitted).

²⁹² *Critics Assail*, *supra* note 1 (internal quotation marks omitted).

²⁹³ 2 REVISED RECORD 1938, *supra* note 63, at 2268 (remarks of Alfred E. Smith) (internal quotation marks omitted).

²⁹⁴ Nelson A. Rockefeller, Messages to the Constitutional Convention, *in* PUBLIC PAPERS OF NELSON A. ROCKEFELLER (1967), at 207, 209 (n.d.).

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big, dynamic, high-powered man for its governor.”²⁹⁵

The decision making process in New York has been described as “Three Men in a Room,” with the three men being the governor, the Senate Majority Leader and the Speaker of the Assembly.²⁹⁶ It is government where secrecy is not just expected, but relied upon to make the government run. It is a system that the key players from Governor Smith to Governor Andrew Cuomo have defended as the cleanest, most efficient way of doing the business of government. Governor George Pataki once said in defending this secrecy: “[t]he process is the process.”²⁹⁷ For the players, secret ways work and things get done. Democratic centralism is what makes the system work. The upstate-downstate division, the diverse and complex nature of the state, the significant differences between the parties, and even differences within the parties that are not easy to reconcile, make the state ungovernable at least by traditional forms of democratic government. One scholar has articulated just such an “ungovernable polity” defense:

[b]uilding support and legitimacy for compromises within a democracy is difficult, and the process in New York reflects how protracted that process can become . . . [As most members see it,] strong leadership is a self-inflicted “necessary evil” to achieve agreement. As long as the leadership is responsive to member needs, the members are likely to continue to support a strong leadership system.²⁹⁸

Prescinding any consideration of the merits of the NY SAFE Act, the law is a textbook case of the kind of hasty and ill-considered legislation the three-day rule was intended to prevent. Aside from the numerous lawsuits on both substantive and procedural grounds,²⁹⁹ significant problems have been raised by the legislation

²⁹⁵ ROBERT H. CONNERY & GERALD BENJAMIN, *ROCKEFELLER OF NEW YORK: EXECUTIVE POWER IN THE STATEHOUSE* 418 (1979) (footnote omitted) (internal quotation marks omitted).

²⁹⁶ SEYMOUR P. LACHMAN WITH ROBERT POLNER, *THREE MEN IN A ROOM: THE INSIDE STORY OF POWER AND BETRAYAL IN AN AMERICAN STATEHOUSE* 5, 24 (2006).

²⁹⁷ James C. McKinley Jr., *Health Bill Is Rejected In Assembly*, N.Y. TIMES, Jan. 15, 2002, at B1.

²⁹⁸ Jeffrey M. Stonecash & Amy Widestrom, *The Legislature, Parties, and Resolving Conflict*, in *GOVERNING NEW YORK STATE* 165, 168, 180 (Robert F. Pecorella & Jeffrey M. Stonecash eds., 5th ed. 2006).

²⁹⁹ In February 2013, Robert Schulz brought a lawsuit challenging the accuracy of the facts offered by Governor Cuomo in justification of the message of necessity issued by him for the act. Verified Complaint-Petition at 27, *Schulz v. New York State Executive*, No. 001232/2013 (N.Y. Sup. Ct. Albany County, Feb. 28, 2013). Schulz claimed that:

The senators were **mised** . . . into believing they had to immediately vote on a bill they were given minutes before, with no time to study and digest, and no time for public input, because of a falsified statement of need for speed or emergency that was included

that can be fairly traced to the lack of transparency or deliberation that characterized its passage.³⁰⁰ The New York State Sheriffs' Association, in response to the "confusion about whether existing law enforcement exemptions continue to apply" to the SAFE Act, published a statement requesting to be part of future discussions concerning the modification of the law.³⁰¹ Lamenting its lack of involvement in the original law, the association stated:

It is the view of the Sheriffs' Association that anytime government decides it is necessary or desirable to test the boundaries of a constitutional right that it should only be done with caution and with great respect for those constitutional boundaries. Further, it should only be done if the benefit to be gained is so great and certain that it far outweighs the damage done by the constriction of individual liberty. While many of the provisions of the new law have surface appeal, it is far from certain that all, or even many, of them will have any significant effect in reducing gun violence, which is the presumed goal of all of us. Unfortunately, the process used in adoption of this act did not permit the mature development of the arguments on either side of the debate, and thus many of the stakeholders in this important issue are left feeling ignored by their

in a Message of Necessity from the Governor that they had not seen.

Id. Schulz also claims that "neither the vast numbers of 'weapons' nor the vast numbers of 'ammunition devices' already in existence in N[ew] Y[ork] and not scheduled to be phased out for at least 15 months are so 'dangerous' and 'lethal' that the bill had to be voted immediately" especially in light of the delay in effective date for most of the law's provisions. *Id.*

On March 13, 2013, the Supreme Court, believing itself bound by court of appeals' precedent refusing to disturb messages of necessity, rejected the request for a temporary injunction preventing the enforcement of the law: "I'm a trial-level court and a trial-level judge and I'm constrained to follow the law as set forth by the Court of Appeals . . . It is clear that judicial intervention, judicial review of a message of necessity, is not allowed." Virtanen, *supra* note 244, at A1 (internal quotation marks omitted). The Appellate Division, Third Department affirmed the Supreme Court's denial of the injunction. *Schulz v. State of N.Y. Exec.*, 2013 N.Y. App. Div. LEXIS 4949 (App. Div. 3d Dep't July 3, 2013). In doing so, the Third Department, citing *Maybee* and *Norwick*, found no probability of success on the merits. *Id.* at 3-4. In addition to the procedural challenge to the law filed by Schulz, challenges to the law on Second Amendment and other constitutional grounds have also been initiated. *See, e.g.*, Tom Precious, *NRA Group Files Suit Here Against Gun Law*, BUFFALO NEWS, Mar. 22, 2013, at A1; Jerry Zremski, *Gun-Rights Experts Call Local Suit 'Significant'*, BUFFALO NEWS, Mar. 31, 2013, at A1.

³⁰⁰ *See* Jimmy Vielkind, *Gun Law Change is Goal*, TIMES UNION (Albany, N.Y.), Mar. 8, 2013, at A1.

³⁰¹ *Sheriffs' Response to NY SAFE Act*, N.Y. ST. SHERIFFS' ASS'N, <http://www.nysheriffs.org/articles/sheriffs%E2%80%99-response-ny-safe-act> (last visited July 28, 2013).

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government.³⁰²

Moreover, the U.S. Department of Veterans Affairs has stated that it will not comply with the provisions of the act that require mental health providers to report potentially dangerous individuals to state authorities.³⁰³ Mental health professionals have expressed concern that the SAFE Act could deter mental health patients from discussing thoughts of suicide or harm, and the reporting requirements imposed upon doctors may actually strain the doctor-patient relationship, and potentially exacerbate the problem the new law is trying to address in the first place.³⁰⁴

In addition to the lack of discussion or hearings on the negative impact that certain aspects of the law may have on mental health patients, mistakes in and unintended and unanticipated consequences of the law have come to light. For example, the law may effectively ban popular pump action shotguns, even though these guns were clearly meant to be outside the scope of the prohibition; there was a specific exemption for pump action shotguns and other manual firearms included in the definition of an “assault weapon,” but no companion exception applies to the magazine capacity restrictions.³⁰⁵ The act also did not include exemptions for police officers, so an armed police officer responding to a call at a school may have been in violation of the law.³⁰⁶ Moreover, the gun ban did not exempt film productions, thus eliminating a lucrative source of revenue for the state from the production of films in New York that use as props otherwise banned weapons.³⁰⁷ An exception for police officers has been added to the

³⁰² *Id.*

³⁰³ Curtis Skinner, *VA Defies Gun Statute*, TIMES UNION (Albany, N.Y.), Mar. 12, 2013, at A1. Mark Ballesteros, spokesperson for the Department of Veterans Affairs, issued a “statement that ‘federal laws safeguarding the confidentiality of veterans’ treatment records do not authorize VA mental health professionals to comply with this NY State law.’” *Id.*

³⁰⁴ Sy Mukherjee, *Why Mental Health Professionals Are Concerned About New York’s New Gun Safety Law*, THINKPROGRESS (Jan. 16, 2013, 2:20 PM), <http://thinkprogress.org/health/2013/01/16/1455721/mental-health-ny-gun-safety/?mobile=nc>. As Dr. Paul Appelbaum of Columbia University stated, “[The SAFE Act] **undercuts the clinical approach to treating these impulses, and instead turns it into a public safety issue**” *Id.* Further underscoring this point, Dr. Steven Dubovsky, chairman of the psychiatry department at the University at Buffalo, stated that “**no patient is going to tell you anything if they think you’re going to report them.**” *Id.* (internal quotation marks omitted).

³⁰⁵ Compare NY SAFE Act, § 37 (g)(i) (excepting manually operated pump action guns from the definition of assault weapons), with *id.* § 46-a (banning large capacity feeding devices that accept more than ten rounds of ammunition, without distinguishing by type of gun).

³⁰⁶ See *id.* § 41 (making possession of a gun on school grounds by any person a crime).

³⁰⁷ Tom Precious, *Skelos Against Movie Waiver from Gun Law*, BUFFALO NEWS, Mar. 22, 2013, at D1.

law,³⁰⁸ and changes to the law to correct additional oversights are being discussed, but their existence raises questions as to whether a more deliberative process would have eliminated these errors or produced a more effective bill.³⁰⁹

Along with the unintended consequences of the bill noted above, there are certain provisions of the act from which Governor Cuomo himself has retreated. After insisting that New York needed to ban the sale of larger-sized bullet clips, the governor supported and ultimately obtained an amendment to the act that allows gun dealers to sell magazines that hold up to ten bullets.³¹⁰ This change in position was prompted by criticism of the provision and the discovery that gun manufacturers do not and would not manufacture magazines that hold less than ten cartridges.³¹¹

The confusion about what the legislation did or did not require is manifested at the highest levels. Here is Governor Cuomo's response to one of these criticisms.

Q: The VA has said that it won't be able to abide by the SAFE Act in terms of reporting the mental health difficulties of veterans. Is that something your administration has been apprised of, and what's your reaction?

Cuomo: You know, I really don't know the specifics, but first of all what the law says is it leaves it totally up to the

³⁰⁸ Act of Jan. 22, 2013, ch. 57, pt. FF, § 1, 2013 N.Y. Laws. This amendment was included on page 129 of a 227-page budget bill. *See generally id.* (including the amendment).

³⁰⁹ Senate Republican Conference Leader, Dean Skelos, has indicated he will not support an amendment for movies, claiming such a provision would send a mixed message to the public. "Critics have said the idea of letting film companies use now-banned assault weapons . . . in movies filmed in New York sends a confusing signal, especially to children, at a time when new gun restrictions are being put into law." Precious, *supra* note 307, at D1.

The American Academy of Pediatrics Gun Violence Policy Recommendations includes the following:

Exposure to violence in media, including television, movies, music, and video games, represents a significant risk to the health of children and adolescents. Extensive research evidence indicates that media violence can contribute to aggressive behavior, desensitization to violence, nightmares, and fear of being harmed. Media violence is often characterized in the public domain as a values issue rather than what it truly is: a public health issue

AM. ACAD. OF PEDIATRICS, AMERICAN ACADEMY OF PEDIATRICS GUN VIOLENCE POLICY RECOMMENDATIONS 6 (2013), *available at* http://www.aap.org/en-us/advocacy-and-policy/federaladvocacy/Documents/AAPGunViolencePreventionPolicyRecommendations_Jan2013.pdf (footnote omitted).

For reports of the confusion among gun owners and gun dealers, see Jon Alexander, *Confusion Reigns Over State's Gun Law*, POST STAR (Glens Falls, N.Y.), Jan. 19, 2013, at A1.

³¹⁰ Act of Jan. 22, 2013, ch. 57, pt. FF, § 2, 2013 N.Y. Laws.

³¹¹ Notwithstanding the amendment to the law to allow larger-sized magazines to be sold, it is still illegal for gun owners to place more than seven bullets in the magazine unless they are at a gun range or a competition. Thomas Kaplan & Danny Hakim, *Cuomo Favors Easing Part of Newly Passed Gun Law*, N.Y. TIMES, Mar. 21, 2013, at A25.

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mental health provider if they want to come forward or not—totally up to them. It's volitional on their part. And then depending on the institution or the organization, they may have preexisting legal parameters. Some organizations just say, beginning of the day, all communications are confidential, period, all information is confidential, period. So it's going to have to be viewed in the light of their legal structure in the first place. But it's up to them.³¹²

Notwithstanding the governor's statements, the mental health reporting requirement of the law does not appear to be voluntary in any respect. The newly-added section 9.46 of the Mental Hygiene Law reads:

(b) [n]otwithstanding any other law to the contrary, when a mental health professional currently providing treatment services to a person determines, in the exercise of reasonable professional judgment, that such person is likely to engage in conduct that would result in serious harm to self or others, he or she **shall be required** to report, as soon as practicable, to the director of community services, or the director's designee, who shall report to the division of criminal justice services whenever he or she agrees that the person is likely to engage in such conduct.³¹³

Governor Cuomo has defended his use of messages by pointing out that he has used them much less than his recent predecessors.³¹⁴ This reasoning, though factually accurate, sidesteps the costs involved when the three-day calendar rule is

³¹² Casey Seiler, *State Briefs Mental Health Providers on SAFE Law*, CAPITOL CONFIDENTIAL BLOG, (Mar. 12, 2013, 3:24 PM), <http://blog.timesunion.com/capitol/archives/181427/state-briefs-mental-health-providers-on-safe-law> (emphasis removed).

³¹³ N.Y. MENTAL HYG. LAW § 9.46(b) (McKinney 2013) (emphasis added). There are two other provisions in the NY SAFE Act which bear on the reporting requirement:

(c) Nothing in this section shall be construed to require a mental health professional to take any action which, in the exercise of reasonable professional judgment, would endanger such mental health professional or increase the danger to a potential victim or victims.

(d) The decision of a mental health professional to disclose or not to disclose in accordance with this section, when made reasonably and in good faith, shall not be the basis for any civil or criminal liability of such mental health professional.

Id. § 9.46(c), (d). These sections do provide some exceptions to the mental health reporting requirement in specific, limited situations, but do not make the act voluntary. *See id.*

³¹⁴ Alexander, *supra* note 309, at A1. In response to criticisms about his use of messages of necessity, Governor Cuomo has stated: "If you look at the number of messages of necessity, I've done less than Spitzer, Pataki, Paterson; I've done less, . . . [s]o to say it's becoming standard operating procedure is wrong. I don't mind a passionate debate. But when people change the facts, I do mind." *Id.* (internal quotation marks omitted).

suspended. If the purpose of the rule is to prevent hasty and ill-considered legislation by giving legislators time to debate and review the bill, and allowing public input, then *a fortiori*, the need for the requirement is stronger when controversial and complicated legislation is under consideration. When that legislation touches on constitutional rights, as is the case with the NY SAFE Act and many other bills which have been passed during this administration pursuant to messages of necessity, the rule, absent a real emergency, is, arguably, indispensable.

In sum, the law exhibits all the problems that the delegates at the 1894 convention sought to avoid. A significant piece of legislation affecting constitutional rights became law less than twenty-four hours after it was introduced. There were no hearings held, and no testimony was obtained (e.g., from law enforcement officers or mental health professionals). Statements made by some legislators at the time of the law's adoption indicated their concerns about their unfamiliarity with the content of the bill. Even the need to bypass the three-day requirement was problematic. A few commentators have suggested that the motivation on the part of the governor for speedy action was, as much a reflection of his desire to build a national reputation, as it was to save the state from imminent harm.³¹⁵

VI. THE MESSAGE OF NECESSITY AND CONSTITUTIONAL REFORM: WHAT NEXT?

The message of necessity has been subject to critical commentary almost from its inception. Twenty years after its adoption, delegates at the Constitutional Convention of 1915 concluded that the message clause was subject to abuse, had little redeeming value and recommended its removal.³¹⁶ A half-century later, a report from the Citizens Conference on State Legislatures called the message of necessity a "much-abused practice," and also recommended its removal.³¹⁷ The Brennan Center's report on New York State's legislative process recommended that no message of necessity

³¹⁵ See, e.g., Kieran Lalor, *Our New Gun Law: Rushed and Wrong*, N.Y. DAILY NEWS, Jan. 23, 2013, at 22 (describing enactment of the law as done in "haste to win political headlines"); Laura Nahmias, *Cuomo Signs Gun Laws*, WALL ST. J., Jan. 16, 2013, at A15 ("[T]he governor's gun-control efforts would play well with Democratic primary and general election voters.").

³¹⁶ See 1 REVISED RECORD 1915, *supra* note 53, at 823–24.

³¹⁷ CITIZENS CONFERENCE ON STATE LEGISLATURES, STATE LEGISLATURES: AN EVALUATION OF THEIR EFFECTIVENESS 265 (1971).

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should be requested or approved without at least a two-thirds vote of the elected members of the chamber in question.³¹⁸ The Citizens Union appeared to call for an end to the use of messages of necessity in 2007.³¹⁹ However in its *New York State Budget Reform Report Card: 2012*, the group recommended that “[t]he use of messages of necessity should be limited to when it is evident that a delay in the Legislature’s action would have significant adverse consequences and the governor presents documentation of such need.”³²⁰

Bill Samuels, one of the founders of Effective NY, a non-partisan organization dedicated to helping New Yorkers create a more effective State Constitution, has called for “a constitutional amendment limiting messages of necessity to “real emergenc[ies].”³²¹ The New York State Comptroller recommended that messages of necessity be eliminated for budget bills submitted as part of the Executive Budget.³²²

At the time of this article, no bills have been introduced to repeal the message. A number of legislators, however, have introduced resolutions to increase transparency. One proposal, introduced in the current session, S3498-2013/A4762-2013, would amend the constitution to restrict legislative proceedings from midnight until 8 a.m., absent a two-thirds vote of the elected members of the respective house, and would require the same supermajority in order to accept a message of necessity from the governor.³²³

If New Yorkers wish to amend their constitution to address the concerns raised by the state’s experience with messages of necessity, they have several options. These options draw upon the wealth of

³¹⁸ JEREMY M. CREELAN & LAURA M. MOULTON, BRENNAN CTR. FOR JUST. AT N.Y.U. SCH. OF L., *THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM* 55 (2004), available at http://www.brennancenter.org/sites/default/files/legacy/d/albanyreform_finalreport.pdf.

³¹⁹ Press Release, Citizens Union, Statement Urging New York State Leadership to Discontinue the Use of Messages of Necessity (Mar. 3, 2007), available at http://www.citizensunion.org/www/cu/site/hosting/news_release/03_28_07.html.

³²⁰ CITIZENS UNION OF THE CITY OF N.Y., *NEW YORK STATE BUDGET REFORM REPORT CARD: 2012 AN IMPROVEMENT BUT STILL AN INCOMPLETE* 6 (2012), available at http://www.citizensunion.org/www/cu/site/hosting/Reports/CU_BudgetReformReportCard_April2012.pdf.

³²¹ Press Release, Bill Samuels, Effective N.Y., Chairman Bill Samuels: Applauds Governor Cuomo’s Decision to Forego Further Use of Message of Necessity this Legislative Session Urges Governor to Permanently Ban its Future Use Unless There is a Real Emergency (Jun. 14, 2012), available at <http://effectiveny.org/press-release/chairman-bill-samuels-applauds-governor-cuomo%E2%80%99s-decision-forego-further-use-message-ne>.

³²² ALAN HEVESI & KIM FINE, N.Y. STATE OFFICE OF THE STATE COMPTROLLER, *FISCAL REFORM FOR NEW YORK STATE: IMPROVING ACCOUNTABILITY, TRANSPARENCY AND FISCAL RESPONSIBILITY* 15 (2006), available at <http://www.osc.state.ny.us/reports/budget/fiscalreform.pdf>.

³²³ S.B. 3498, 236th Leg. Sess. (N.Y. 2013).

experience other states have in addressing the issue,³²⁴ and include eliminating the three-day requirement, maintaining the aging rule and message exception with additional substantive and procedural requirements, and keeping the aging requirement but foreclosing any bypass procedure.

A. Eliminate the three-day rule and allow legislative rules to govern the calendar.

In this approach, the constitutional restriction on bill aging would be removed, and the legislature would have complete control over the timing of the legislative process. The use of this method would represent either an agreement with the principles popular during the 1960s that state legislatures should establish their own procedures or grudging acceptance of the fact that aging provisions are difficult, if not impossible, to superintend and that often times

³²⁴ A list of the state-by-state aging and reading requirements are attached as Appendix B. New York's aging requirement is rare in that it has a specific calendar day requirement by which bills must be in final form. This is unusual in two respects: 1) most other states that have aging requirements have them in the form of a reading requirement, such as that a bill must be read on a certain number of calendar days before it can be enacted; and 2) in most states, an amendment, unless it changes the purpose of the bill, does not restart the reading process. See, e.g., *Opinion of the Justices*, 335 So. 2d 373, 375 (Ala. 1976) (holding that amendments to a bill were not required to be read on three separate days); *Van Brunt v. State*, 653 P.2d 343, 345 (Alaska Ct. App. 1982) (holding that reading requirement does not apply to amended bills, even those which have been "substantially alter[ed]," unless the subject matter of the bill is changed); *People ex rel. County Collector v. Jeri, Ltd.*, 239 N.E.2d 777, 779-80 (Ill. 1968) (holding that constitutional requirement that bills be read three times does not extend to an amended bill); *People v. Clopton*, 324 N.W.2d 128, 130 (Mich. Ct. App. 1982) (holding that when an original bill has met the procedural constitutional requirements for passage, an amended version or substitute bill need not also meet those requirements in its later form so long as the amended version or substitute serves the same purpose as the original bill, is in harmony with the objects and purposes of the original bill, and is germane thereto); *Blume v. County of Ramsey*, 1989 Minn. Tax LEXIS 27, at *37 (Minn. Tax Ct. 1989) (holding that three separate readings of bill in amended form were not required); *State ex rel. Martin v. Ryan*, 139 N.W. 235, 239 (Neb. 1912) (holding that where amendments have been made to a bill after its first or second reading, it is not required that the bill be read on three separate days); *Frazier v. Bd. of Comm'rs*, 138 S.E. 433, 437 (N.C. 1927) (rereading of a bill is only necessary when the bill is amended "in a material matter"); *Hoover v. Bd. of County Comm'rs*, 482 N.E.2d 575, 579 (Ohio 1985) (holding that amendments which do not "vitaly alter the substance of a bill do not trigger a requirement that the amended bill be reconsidered three times"); *Stilp v. Commonwealth*, 905 A.2d 918, 959 (Pa. 2006) (holding that a bill does not have to be considered on three separate days if amendments added to the bill during the legislative process are germane and do not change the general subject of the bill). For example, if a bill in a state that requires three readings has been read twice and then amended in a manner that does not change its purpose, most states hold that it only needs to be read once more. See *infra* Appendix B. This is in contrast to New York, where any amendment restarts the three-day clock. See *infra* Appendix B. New York's method is more effective at limiting last minute amendments, which was an important reason why the provision was passed. See *infra* Appendix B. For purposes of this section, aging requirements and reading requirements that have a calendar element to them are treated the same.

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the exception to an aging requirement swallows the rule. The national Constitution and the constitutions of twelve states, a majority of which are located in the northeast, have adopted this approach.³²⁵ Repeal of the provision would not be an unprecedented step. For over a hundred years and three constitutions, the New York functioned without this provision.³²⁶

B. Retain the three-day rule and eliminate the message of necessity.

This option, which would require all bills to age the specified statutory period regardless of their urgency, was included in the constitution that was proposed by the 1915 convention and rejected by the voters.³²⁷ All of the arguments offered at that convention for the elimination of the message apply as strongly today. By requiring a consideration period for all bills, this proposal would: 1) increase transparency and deliberation; 2) decrease the likelihood of hastily passed and mistake-ridden legislation; and 3) eliminate the possibility that the legislative process could be abused by either a governor or legislature seeking to rush through legislation.³²⁸

³²⁵ See STANDING RULES OF THE SENATE, Rule XIV, Cl. 2, 3, 113th Cong. (2013) (requiring that bills and resolutions have three readings before passage, and that they be read twice before being referred to committee). Although a Senator may demand that the readings occur on three different legislative days, bills and joint resolutions may be read twice on the same day “for reference” if there is no objection. *Id.* at Cl. 3. The U.S. House of Representatives provides that passage shall be had after the third reading, but there is no minimum time limit between readings. RULES OF THE HOUSE OF REPRESENTATIVES, Rule XVI, Cl. 8, 113th Cong. (2013). The states which have no constitutional time requirement are Connecticut, Delaware, Iowa, Maine, Massachusetts, Montana, New Hampshire, Rhode Island, Vermont, Washington, Wisconsin, and Wyoming. See *infra* Appendix B. Included in this group are the only three states whose current state constitutions were adopted during the eighteenth century—Massachusetts, New Hampshire, and Vermont. *Organic Legal Documents*, LONGANG INST., <http://www.lonang.com/exlibris/index2.htm> (last visited June 22, 2013) (noting that the Massachusetts, New Hampshire, and Vermont Constitutions were ratified in 1784, 1780, and 1777 respectively).

³²⁶ See PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE* 1, 6, 10, 17–18 (1991).

³²⁷ *Id.* at 23.

³²⁸ This concern would exist in New York regardless of whether the power is vested in the hands of the governor or in the hands of a supermajority of the legislature, unless the supermajority was set a higher level than two-thirds. See *infra* Part VI.C. In New York, Democrats have controlled over two-thirds of the seats in the Assembly in five of the last six legislatures. See Robert Brodsky, *Dems Have Edge in Numbers*, NEWSDAY (N.Y.), Nov. 4, 2012, at K2 (noting that the Democrats held a fifty-one seat majority over Republicans in the assembly prior to the 2012 election); Jonathan P. Hicks, *Republicans Pick Up 2 Seats in the Assembly*, N.Y. TIMES, Feb. 14, 2002, at B2 (noting that Republicans controlled 53 of the 150 seats—more than one-third); Cara Matthews, *Assembly Republicans Try to at Least Keep What They Have*, N.Y. TIMES, Oct. 27, 2008, at 1B (noting that Republicans controlled 42 of the 150 seats—less than one-third before the 2008 election); Morgan Pehme, *The End of the GOP?*, CITY & ST. (Manhattan, N.Y.), Nov. 12, 2012 (noting that Democrats controlled 106 out of 149 seats after the 2012 elections with one election still being contested); Nick Reisman, *As*

Under such a provision there is no circumstance urgent enough to warrant bypassing the constitutional requirement. There are seventeen states that currently have a constitutional reading or aging requirement that cannot be bypassed on some, or all bills,³²⁹ supporting the position that the state could function effectively and efficiently without a bypass procedure.

C. Retain the three-day rule, eliminate the message of necessity, and require a supermajority vote to suspend the three-day rule.

With this option, New York would retain the three-day rule, but instead of residing in the governor, the authority to bypass the three-day rule would rest with a supermajority of the legislators of the house seeking to suspend the requirement. By keeping the three-day provision, the purpose of avoiding hasty, ill-conceived legislation manifest in the 1894 Constitution is retained, as well as the understanding of that document that some occasions may justify circumventing the provision. Replacing the governor with a supermajority of legislators would better serve the goal of separation of powers as the governor's formidable role in the legislative process would be reduced, and the supermajority would make it more likely that controversial bills, such as gun control and same sex marriage, are enacted only after the requisite time has passed. Among the states, twenty of them allow the reading or aging requirement to be bypassed or abbreviated upon supermajority of the legislature.³³⁰ Of the states having

Assembly GOP Re-elects Leader, Budget Worries Grow, POUGHKEEPSIE J., Nov. 16, 2010, at 6 (noting that it appeared that Democrats controlled 100 of the 150 Assembly seats, though elections were still contested afterwards); Yancey Roy, *Silver is Down But Don't Count Him Out*, POUGHKEEPSIE J., Sept. 24, 2004, at 8A (noting that Democrats held a 102–47 advantage in the Assembly); Joseph Spector, *Cakewalking Back to Albany*, ROCHESTER DEMOCRAT AND CHRON., Nov. 13, 2006, at 1B (noting that Democrats controlled the Assembly 108–42 after the 2006 election).

³²⁹ These states are Alabama, Colorado, Florida (for certain types of financial bills), Georgia, Hawaii, Illinois, Louisiana, Michigan, Missouri, Nebraska, New Mexico (excluding bills for public peace, health, safety and the codification or revision of law), North Carolina (for certain kinds of revenue bills), North Dakota, Oklahoma, Pennsylvania, South Carolina, and Tennessee. See *infra* Appendix B.

³³⁰ The states are Alaska (three-fourths), Arizona (two-thirds), Arkansas (two-thirds), California (two-thirds), Florida (two-thirds except for certain financial bills, which cannot be bypassed), Idaho (two-thirds), Indiana (two-thirds), Kansas (two-thirds), Kentucky (majority of elected members), Maryland (two-thirds of elected members), Minnesota (two-thirds), Mississippi (two-thirds), Nevada (two-thirds unless placed on consent calendar), New Jersey (three-fourths), Ohio (two-thirds of elected members), Oregon (two-thirds), Texas (four-fifths), Utah (two-thirds), Virginia (four-fifths), West Virginia (four-fifths). See *infra* Appendix B. Most of these states permit the requirement to be bypassed in its entirety, while others, such as Alaska and Arkansas, only allow the second and third readings to be held on the same day.

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supermajorities, most of them allow the aging requirement to be bypassed or suspended by a two-thirds vote of the house; a minority require either a three-fourths or four-fifths majority. One state, Kentucky, requires a simple majority of the elected members of the house to bypass the reading requirement, and another, Nevada, allows uncontested bills to be placed on a consent calendar, thus avoiding the requirement entirely.

D. Retain the three-day rule and message of necessity, but limit it to “emergencies.”

Although the debates at the 1894 and 1938 constitutional conventions make it clear that delegates expected Article III messages to be used sparingly and for emergencies, the clause itself does not use the word emergency. Rather it uses the words “necessitate an immediate vote thereon.”³³¹ One of the factors contributing to the proliferation of messages is the absence of demanding standards for the issuance of a message.³³² If more demanding language such as “emergency” or “urgency” were used, and/or if specific examples of emergencies were included in the section as in Article III, section 25 of the constitution, providing for the continuity of government operations “in periods of emergency,”³³³ governors would be required to give more scrutiny to requests for messages. Moreover, New York courts, guided by the precedent interpreting section 25,³³⁴ would be more likely to take a

effectively reducing the maximum time between introduction and final passage from three days to two days. *See infra* Appendix B.

³³¹ N.Y. CONST. art. III, § 14.

³³² The requirements of an Article III message are not as demanding as other gubernatorial messages. *Compare* N.Y. CONST. art. IX, § 2(b)(2) (“[E]xcept in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency . . . with the concurrence of two-thirds of the members elected to each house of the legislature.”), *and* N.Y. CONST. art. XIII, § 13(c) (containing a requirement that a message that an “emergency exists,” as well as a two-thirds requirement), *with* N.Y. CONST. art. III, § 14 (“[U]nless the governor . . . shall have certified . . . the facts which in his or her opinion necessitate an immediate vote thereon.”).

³³³ N.Y. CONST. art. III, § 25. The section offers examples of the kind of emergencies it was contemplating—enemy attack and disasters (natural or otherwise)—but concludes that “[n]othing in this article shall be construed to limit in any way the power of the state to deal with emergencies arising from any cause.” *Id.*

³³⁴ In contrast to the courts’ deference to determinations of necessity as found in Article III, section 14, courts interpreting section 25 of the same article have not been reluctant to invalidate actions of the legislature taken based on some purported “emergency.” *See* GALIE & BOPST, *supra* note 10, at 135.

When the federal courts [struck down] . . . New York’s apportionment plans [as] unconstitutional, this provision was rejected as a basis for suspending section 2 of . . . article [III]. Similar attempts to invoke this section were made in connection with the

more active role in superintending the provision by making a more searching review of the facts behind any messages.³³⁵ If New York added such language, it would not be alone. Of the twenty states having bypass provisions, seven use the term “emergency” to describe the situations in which the reading requirement can be suspended,³³⁶ and three use the term “urgency.”³³⁷

various fiscal crises . . . fac[ing] local governments [in] the 1970s. In all cases, the courts rejected these arguments

Id. (citation omitted). An intermediate appellate court deciding one of these cases, relying on a court of appeals’ decision involving police powers, gave some insight into what could constitute an emergency:

Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war [citation omitted], earthquake, pestilence, famine and fire * * * may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions.

Bethlehem Steel Corp. v. Bd. of Education, 402 N.Y.S.2d 655, 661 (App. Div. 4th Dep’t 1978) (quoting *People ex rel. Durham Realty Corp. v. La Petra*, 130 N.E. 601, 606 (N.Y.), *dismissed sub nom. New York ex rel. Durham Realty Corp. v. La Petra*, 257 U.S. 665 (1921)).

³³⁵ Emergency language has found its way into statutes as well. For example, the Local Finance Law provides:

Any municipality or district corporation, other than a fire district, may issue budget notes during any fiscal year for any unforeseeable public emergency during such year such as epidemic, conflagration, riot, storm, flood, earthquake, or other unusual peril to the lives and property of the citizens of such unit of government in such amount as the finance board shall determine to be necessary, but no municipality may issue such notes for emergencies in behalf of any local improvement district. Any school district may issue budget notes during any fiscal year to provide temporary school buildings or facilities in such year when such buildings or facilities are necessitated because of an unforeseeable public emergency during such year such as epidemic, conflagration, riot, storm, flood, earthquake, or other unusual circumstance preventing the use in whole or in part, of the buildings or other facilities used by such school district.

N.Y. LOCAL FIN. LAW § 29.00(a)(1) (McKinney 2013). A clear, explicit, statement of legislative intent would also make it more likely that courts would review the message. The case law interpreting the 1938 changes made much of the ambivalence and tentativeness expressed by the supporters of the amendment.

³³⁶ These states are Arizona, Indiana, Kansas, Nevada, New Jersey, Oregon and Virginia. *See infra* Appendix B.

³³⁷ These states are Idaho, Minnesota, and West Virginia. *See infra* Appendix B. One state, Texas, allows its requirements to be suspended upon a vote of four-fifths for any reason, as well as different procedures which allow the requirements to be suspended in cases of disaster caused by enemy attack. *See infra* Appendix B.

This requirement would be considerably less onerous than that proposed by the plaintiffs in *Norwick*, who sought an injunction requiring all future messages to include:

(1) the facts creating a compelling state interest necessitating an immediate vote, rather than a vote after a three-day waiting period, (2) the adverse consequences that would flow from delaying the vote for a three-day period, (3) the reasons why the bill was not and could not have been considered and voted upon earlier in the legislative session, and (4) the reasons why less drastic alternatives, such as extending the legislative session or convening a special legislative session, would not suffice; and . . . that the court retain for five years, continuing jurisdiction over the issues or permit any citizen of the State who feels aggrieved by any law enacted pursuant to a message of necessity to challenge in court the necessity for an immediate vote on such legislation.

Norwick v. Rockefeller, 334 N.Y.S.2d 571, 573–74 (Sup. Ct. N.Y. County), *aff’d*, 338 N.Y.S.2d 384 (App. Div. 1st Dep’t 1972), *aff’d*, 301 N.E.2d 422 (1973).

E. Retain the three-day rule and the message of necessity, and require a supermajority vote to accept the message of necessity.

This alternative, which has been introduced in the legislature in 2013, would keep the three-calendar day rule and the message of necessity, but would add an extra layer of protection by requiring a supermajority of legislators to accept a message.³³⁸ By doing so, it would resemble procedurally the gubernatorial messages contained in Article IX, section 2(b)(2) and Article XIII, section 13(c), both of which require a two-thirds vote of the members elected to both houses of the legislature.³³⁹ Similar to the supermajority option described in subsection 3 above, this option would likely reduce the number of messages used to pass legislation, and would almost certainly eliminate the use of messages for controversial legislation. In addition, by maintaining the governor's role in the process, such an amendment would remain faithful to the intent of the 1894 convention that there should be a separate branch, independent of the legislature, involved in deciding whether a message should be issued. This alternative would retain the source of the power in the governor, but would give the legislature a formal constitutional role in the acceptance of these messages.³⁴⁰

F. Retain the three-day rule, eliminate the message of necessity, and require a supermajority vote to suspend the three-day rule in cases of "emergency."

This option is a hybrid of two separate measures described above—a limitation on the use of messages to only emergency situations and a required supermajority of the legislature. Similar provisions are currently used by nine states.³⁴¹ This proposal would seek to provide the benefits of a more searching review hoped for by the use of the "emergency" language, while also shifting the

³³⁸ See S.B. 3498, 236th Leg. Sess. (N.Y. 2013).

³³⁹ N.Y. CONST. art. IX, § 2(b)(2); N.Y. CONST. art. XIII, § 13(c).

³⁴⁰ This option could also be implemented by a legislative rules change, and implementation of such a change has been discussed during the last twenty years. See, e.g., Shirin Parsavand, *Reforms Supported by Half of Assembly Republicans, Some Democrats Agree*, DAILY GAZETTE (Schenectady, NY), Nov. 18, 2004, at A11. If done by rules change, it would have neither the permanence nor the stature of a constitutional amendment, but it would also be quicker and easier to adopt than an amendment, which requires passage by two consecutive, separately-elected legislatures, and approval by the voters. N.Y. CONST. art. XIX, § 1.

³⁴¹ See *infra* Appendix B (including Arizona, Idaho, Indiana, Kansas, Minnesota, Nevada, Oregon, Virginia, and West Virginia).

responsibility for bypassing the three-day requirement from the governor to the legislature. One practical difference between this alternative and the immediately preceding one is that this option may reduce the likelihood of the legislature bypassing the three-day requirement for non-controversial, end of session, legislation. Because these laws frequently pass almost unanimously, in the absence of “emergency” language, it would not be difficult to garner the supermajority necessary to bypass the aging requirement. Requiring an emergency would give legislators a strong incentive to see that their bills are introduced and acted upon in a timely fashion, thus avoiding the need for an end of session bypass of the aging requirement.

G. Retain the three-day rule and the message of necessity, but limit it to “emergencies” and require a supermajority vote to accept the message of necessity.

By requiring both the assertion that an emergency exists and a supermajority vote of the legislature, this option replicates the procedural and substantive requirements of Article IX, section 2(b)(2) and Article XIII, section 13(c).³⁴² This is the most demanding option for retaining the message of necessity and would limit legislation passed without the three-day waiting period only for those situations in which: 1) an emergency requires the immediate passage of the bill; 2) the governor has issued a message of necessity certifying the existence of the emergency (and possibly certifying the facts constituting the emergency); and 3) the message of necessity has been accepted by a supermajority of the legislature. These procedures would limit the use of messages of necessity to only those situations involving non-controversial legislation that, for unavoidable exigencies, needs to be passed immediately.

VII. CONCLUSION

The message of necessity exception to the three-day rule in the New York Constitution is a textbook case of a constitutional reform measure written in such a way as to invite failure. Its wording made it likely that courts would defer to the judgments of the political branches. It is a rare court that will subject a decision

³⁴² The difference between these two sections turns on whether the governor is required to state specific facts constituting an emergency, such as in Article IX, section 2(b)(2), or whether he or she is required only to state that an emergency exists, which is what Article XIII, section 13(c) requires. See N.Y. CONST. art. IX, § 2(b)(2); N.Y. CONST. art. XIII, § 13(c).

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made within the discretionary power of the governor, all with the approval or acquiescence of the legislature, to any kind of searching review. Outside the arena of rights or in the presence of a constitutional directive to do so, courts are not likely to superintend such provisions. By the same token, the discretionary and vague language of the clause has provided governors and legislatures with the opportunity to allow political rather than constitutional necessity to govern its use.

The authors believe that the use of the message exception to the three-day rule has not served the purposes for which it was intended. Rather, it has given rise to unintended consequences that have not served our polity or its citizens. Armed with the history of the provisions' operation in New York, the experience of other states, and cognizant of the courts' decisions involving the legislative process, we are in a position to act. But transparency and thoughtful analysis are the necessary precursors to action. To sacrifice these indispensable prerequisites on the altar of action threatens our constitutional republic with a Potemkin Village.³⁴³

³⁴³ The definition of Potemkin is something "having a false or deceptive appearance." NEW OXFORD AMERICAN DICTIONARY 1368 (Angus Stevenson & Christine A. Lundberg, eds., 3d ed. 2010).

**APPENDIX A: USES OF MESSAGES OF NECESSITY BY
YEAR, 1939–2012³⁴⁴**

Year	Governor	Number of Laws Enacted in which at Least One House Used Message of Necessity	Total Number of Laws Enacted	Percentage of Laws Enacted in which at Least One House Used Message of Necessity	Number of Bills which Passed One House with Message of Necessity but were Not Passed By Both Houses	Number of Bills which Passed at Least One House with Message of Necessity but were Vetoed	Number of Bills which Passed at Least One House with Message of Necessity but were Recalled
1939	Lehman	2	963	0.208	0	0	0
1940	Lehman	4	880	0.455	0	0	0
1941	Lehman	3	955	0.314	0	0	0
1942	Lehman	3	943	0.318	0	0	0
1943	Dewey	3	712	0.421	0	0	0
1944	Dewey	7	798	0.877	0	0	0
1945	Dewey	4	911	0.439	0	0	0
1946	Dewey	3	1002	0.299	0	0	0
1947	Dewey	10	908	1.101	0	0	0
1948	Dewey	6	876	0.685	0	0	0

³⁴⁴ With respect to Appendix A, please note the following:

- This chart does not include multiple messages issued for the same bill or for substitute bills.
- The number of successful messages does not include messages for bills passed during a later session without a message.
- This chart does not include bills which became laws for which a message was issued but not used.
- The total number of laws passed by message for Governor Rockefeller in 1972 includes two laws that were passed at extraordinary session in 1971 but were chaptered in the Laws of 1972.
- Both Governor Carey and Governor Pataki each vetoed one bill that was overridden, Carey in 1981 and Pataki in 2004. These bills are included in the veto column.
- Governor Pataki's veto total in 2002 includes one pocket veto.
- Governor Spitzer's total includes 2 laws passed by message and 27 total laws passed during the year 2008 before he resigned office.
- Any messages issued during a Governor's term, even if they were issued by the Lieutenant Governor acting in the absence of the governor, are included in the tally for the governor.
- If a bill passed in one house with a message and the vote was reconsidered and restored to third calendar before transmission to the governor, the bill is treated at the time it is reconsidered and restored as if it had not passed that house.
- A recall was a procedure by which the legislature would recall a bill from the governor's desk after it was transmitted. The procedure was declared unconstitutional in *King v. Cuomo* (1993).
- If a bill passed in at least one house with a message, was recalled from the Governor, and the vote was reconsidered, it is treated as a recall.
- If a bill passed in both houses, was recalled, and then returned to the Governor, it is treated by whatever the end result was (either passage or veto).

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Year	Governor	Number of Laws Enacted in which at Least One House Used Message of Necessity	Total Number of Laws Enacted	Percentage of Laws Enacted in which at Least One House Used Message of Necessity	Number of Bills which Passed One House with Message of Necessity but were Not Passed By Both Houses	Number of Bills which Passed at Least One House with Message of Necessity but were Vetoed	Number of Bills which Passed at Least One House with Message of Necessity but were Recalled
1949	Dewey	8	858	0.932	0	0	0
1950	Dewey	9	825	1.091	0	0	0
1951	Dewey	7	841	0.832	0	1	0
1952	Dewey	9	835	1.078	0	0	0
1953	Dewey	32	895	3.575	0	0	0
1954	Dewey	20	825	2.424	0	0	0
1955	Harriman	11	872	1.261	1	0	0
1956	Harriman	2	951	0.21	0	1	0
1957	Harriman	9	1054	0.854	1	0	0
1958	Harriman	14	992	1.411	0	2	0
1959	Rockefeller	49	881	5.562	5	3	0
1960	Rockefeller	43	1089	3.949	1	8	0
1961	Rockefeller	56	980	5.714	3	2	0
1962	Rockefeller	29	1013	2.863	0	3	0
1963	Rockefeller	26	1022	2.544	2	3	0
1964	Rockefeller	28	984	2.846	1	3	0
1965	Rockefeller	16	1074	1.49	1	0	0
1966	Rockefeller	44	1025	4.293	3	0	0
1967	Rockefeller	41	817	5.018	11	1	0
1968	Rockefeller	56	1096	5.109	13	3	0
1969	Rockefeller	48	1155	4.156	1	2	0
1970	Rockefeller	94	1048	8.969	23	2	0
1971	Rockefeller	94	1214	7.743	4	6	0
1972	Rockefeller	41	1016	4.035	4	5	0
1973	Rockefeller	50	1057	4.73	5	3	0
1974	Wilson	89	1082	8.226	20	9	1
1975	Carey	89	895	9.944	10	1	0
1976	Carey	112	966	11.594	10	5	2
1977	Carey	83	983	8.444	16	2	0
1978	Carey	75	793	9.458	25	0	0
1979	Carey	71	751	9.454	11	4	1
1980	Carey	69	904	7.633	20	1	0
1981	Carey	103	1061	9.708	33	5	1
1982	Carey	94	931	10.097	31	2	0
1983	Cuomo, M.	104	1021	10.186	17	3	3
1984	Cuomo, M.	101	1018	9.921	15	0	0
1985	Cuomo, M.	92	934	9.85	19	2	1

Year	Governor	Number of Laws Enacted in which at Least One House Used Message of Necessity	Total Number of Laws Enacted	Percentage of Laws Enacted in which at Least One House Used Message of Necessity	Number of Bills which Passed One House with Message of Necessity but were Not Passed By Both Houses	Number of Bills which Passed at Least One House with Message of Necessity but were Vetoed	Number of Bills which Passed at Least One House with Message of Necessity but were Recalled
1986	Cuomo, M.	74	939	7.881	10	0	2
1987	Cuomo, M.	65	860	7.558	9	0	1
1988	Cuomo, M.	56	794	7.053	19	0	0
1989	Cuomo, M.	63	779	8.087	17	2	0
1990	Cuomo, M.	112	952	11.765	20	0	1
1991	Cuomo, M.	85	750	11.333	19	0	1
1992	Cuomo, M.	89	858	10.373	12	0	2
1993	Cuomo, M.	69	731	9.439	11	1	0
1994	Cuomo, M.	100	738	13.55	19	0	0
1995	Pataki	100	694	14.409	17	2	0
1996	Pataki	120	731	16.416	18	2	0
1997	Pataki	93	687	13.537	14	1	0
1998	Pataki	68	657	10.35	29	2	0
1999	Pataki	86	659	13.05	28	0	0
2000	Pataki	67	609	11.002	16	0	0
2001	Pataki	62	591	10.491	18	0	0
2002	Pataki	74	698	10.602	23	4	0
2003	Pataki	41	698	5.874	17	0	0
2004	Pataki	71	755	9.404	11	1	0
2005	Pataki	26	770	3.377	8	0	0
2006	Pataki	30	750	4	9	0	0
2007	Spitzer	16	691	2.315	5	0	0
2008	Spitzer	2	27	7.407	0	0	0
2008	Paterson	36	625	5.76	2	0	0
2009	Paterson	22	507	4.339	19	0	0
2010	Paterson	50	567	8.818	7	0	0
2011	Cuomo, A.	26	610	4.262	3	0	0
2012	Cuomo, A.	4	491	0.815	0	0	0

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**APPENDIX B: CONSTITUTIONAL BILL AGING
REQUIREMENTS IN STATES OTHER THAN NEW YORK***Alabama*

Every bill shall be read on three different days in each house, and no bill shall become a law, unless on its final passage, it be read at length, and the vote be taken by yeas and nays, the names of the members voting for and against the same be entered upon the journals, and a majority of each house be recorded thereon as voting in its favor, except as otherwise provided in this Constitution.³⁴⁵

Alaska

The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.³⁴⁶

Arizona

Every bill shall be read by sections on three different days, unless in case of emergency, two-thirds of either House deem it expedient to dispense with this rule. The vote on the final passage of any bill or joint resolution shall be taken by yeas and nays on roll call. Every measure when finally passed shall be presented to the Governor for his approval or disapproval.³⁴⁷

Arkansas

Every bill shall be read at length, on three different days, in each house; unless the rules be suspended by two-thirds of the house, when the same may be read a second or third time

³⁴⁵ ALA. CONST. art. IV, § 63.

³⁴⁶ ALASKA CONST. art. II, § 14.

³⁴⁷ ARIZ. CONST. art. IV, pt. 2, § 12.

on the same day; and no bill shall become a law unless, on its final passage, the vote be taken by yeas and nays; the names of the persons voting for and against the same be entered on the journal; and a majority of each house be recorded thereon as voting in its favor.³⁴⁸

California

(b) The Legislature may make no law except by statute and may enact no statute except by bill. No bill may be passed unless it is read by title on 3 days in each house except that the house may dispense with this requirement by rollcall vote entered in the journal, two thirds of the membership concurring. No bill may be passed until the bill with amendments has been printed and distributed to the members. No bill may be passed unless, by rollcall vote entered in the journal, a majority of the membership of each house concurs.³⁴⁹

Colorado

Every bill shall be read by title when introduced, and at length on two different days in each house; provided, however, any reading at length may be dispensed with upon unanimous consent of the members present. All substantial amendments made thereto shall be printed for the use of the members before the final vote is taken on the bill, and no bill shall become a law except by a vote of the majority of all members elected to each house taken on two separate days in each house, nor unless upon its final passage the vote be taken by ayes and noes and the names of those voting be entered on the journal.³⁵⁰

Connecticut

No constitutional requirement.

Delaware

No constitutional requirement.

³⁴⁸ ARK. CONST. art. 5, § 22.

³⁴⁹ CAL. CONST. art. IV, § 8(b).

³⁵⁰ COLO. CONST. art. V, § 22.

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Florida

Any bill may originate in either house and after passage in one may be amended in the other. It shall be read in each house on three separate days, unless this rule is waived by two-thirds vote; provided the publication of its title in the journal of a house shall satisfy the requirement for the first reading in that house. On each reading, it shall be read by title only, unless one-third of the members present desire it read in full. On final passage, the vote of each member voting shall be entered on the journal. Passage of a bill shall require a majority vote in each house. Each bill and joint resolution passed in both houses shall be signed by the presiding officers of the respective houses and by the secretary of the senate and the clerk of the house of representatives during the session or as soon as practicable after its adjournment sine die.³⁵¹

. . . State revenues allowed under this subsection [the determination of which are set out earlier in the subsection] for any fiscal year may be increased by a two-thirds vote of the membership of each house of the legislature in a separate bill that contains no other subject and that sets forth the dollar amount by which the state revenues allowed will be increased. The vote may not be taken less than seventy-two hours after the third reading of the bill.³⁵²

Georgia

The title of every general bill and of every resolution intended to have the effect of general law or to amend this Constitution or to propose a new Constitution shall be read three times and on three separate days in each house before such bill or resolution shall be voted upon; and the third reading of such bill and resolution shall be in their entirety when ordered by the presiding officer or by a majority of the members voting on such question in either house.³⁵³

³⁵¹ FLA. CONST. art. III, § 7.

³⁵² FLA. CONST. art. VII, § 1(e).

³⁵³ GA. CONST. art. III, sec. V, ¶ VII.

Hawaii

No bill shall become law unless it shall pass three readings in each house on separate days. No bill shall pass third or final reading in either house unless printed copies of the bill in the form to be passed shall have been made available to the members of that house for at least forty-eight hours.³⁵⁴

Idaho

No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon: provided, in case of urgency, two-thirds [2/3] of the house where such bill may be pending may, upon a vote of the yeas and nays, dispense with this provision. On the final passage of all bills, they shall be read at length, section by section, and the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members present.³⁵⁵

Illinois

(d) A bill shall be read by title on three different days in each house. A bill and each amendment thereto shall be reproduced and placed on the desk of each member before final passage.³⁵⁶

Indiana

Every bill shall be read, by title, on three several days, in each House; unless, in case of emergency, two-thirds of the House where such bill may be pending shall, by a vote of yeas and nays, deem it expedient to dispense with this rule; but the reading of a bill, by title, on its final passage, shall,

³⁵⁴ HA. CONST. art. III, § 15.

³⁵⁵ IDAHO CONST. art. III, § 15.

³⁵⁶ ILL. CONST. art. IV, § 8(d).

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in no case, be dispensed with; and the vote on the passage of every bill or joint resolution shall be taken by yeas and nays.³⁵⁷

Iowa

No constitutional provision.

Kansas

No bill shall be passed on the day that it is introduced, unless in case of emergency declared by two-thirds of the members present in the house where a bill is pending.³⁵⁸

Kentucky

No bill shall be considered for final passage unless the same has been reported by a committee and printed for the use of the members. Every bill shall be read at length on three different days in each House, but the second and third readings may be dispensed with by a majority of all the members elected to the House in which the bill is pending. But whenever a committee refuses or fails to report a bill submitted to it in a reasonable time, the same may be called up by any member, and be considered in the same manner it would have been considered if it had been reported. No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each House, and a majority of the members voting, the vote to be taken by yeas and nays and entered in the journal: Provided, Any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each House.³⁵⁹

Louisiana

(D) Each bill shall be read at least by title on three separate days in each house. No bill shall be considered for final passage unless a committee has held a public hearing

³⁵⁷ IND. CONST. art. 4, § 18.

³⁵⁸ KAN. CONST. art. 2, § 15.

³⁵⁹ KY. CONST. § 46.

and reported on the bill.³⁶⁰

Maine

No constitutional provision.

Maryland

(a) Any bill may originate in either House of the General Assembly and be altered, amended or rejected by the other. No bill shall originate in either House during the last thirty-five calendar days of a regular session, unless two-thirds of the members elected thereto shall so determine by yeas and nays, and in addition the two Houses by joint and similar rule may further regulate the right to introduce bills during this period. A bill may not become a law until it is read on three different days of the session in each House, unless two-thirds of the members elected to the House where such bill is pending determine by yeas and nays, and no bill shall be read a third time until it shall have been actually engrossed or printed for a third reading.

(b) Each House may adopt by rule a “consent calendar” procedure permitting bills to be read and voted upon as a single group on first, second and third readings, provided that the members of each House are afforded reasonable notice of the bills to be placed upon each “consent calendar.” Upon the objection of any member, any bill in question shall be removed from the “consent calendar.”³⁶¹

Massachusetts

No constitutional provision.

Michigan

No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of the members elected

³⁶⁰ LA. CONST. art. III, § 15(D).

³⁶¹ MD. CONST. art. III, § 27.

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to and serving in each house. On the final passage of bills, the votes and names of the members voting thereon shall be entered in the journal.³⁶²

Minnesota

Every bill shall be reported on three different days in each house, unless, in case of urgency, two-thirds of the house where the bill is pending deem it expedient to dispense with this rule.³⁶³

Mississippi

Bills may originate in either House, and be amended or rejected in the other, and every bill shall be read by its title on three (3) different days in each House, unless two-thirds (2/3) of the house where the same is pending shall dispense with the rules; and every bill shall be read in full immediately before the vote on its final passage upon the demand of any member; and every bill, having passed both Houses, shall be signed by the President of the Senate and the Speaker of the House of Representatives during the legislative session.³⁶⁴

Missouri

The style of the laws of this state shall be: "Be it enacted by the General Assembly of the State of Missouri, as follows." No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose. Bills may originate in either house and may be amended or rejected by the other. Every bill shall be read by title on three different days in each house.³⁶⁵

Montana

No constitutional requirement.

³⁶² MICH. CONST. art. IV, § 26.

³⁶³ MINN CONST., art. IV, § 19.

³⁶⁴ MISS. CONST. art. 4, § 59.

³⁶⁵ MO. CONST. art. III, § 21.

Nebraska

Every bill and resolution shall be read by title when introduced, and a printed copy thereof provided for the use of each member. The bill and all amendments thereto shall be printed and presented before the vote is taken upon its final passage and shall be read at large unless three-fifths of all the members elected to the Legislature vote not to read the bill and all amendments at large. No vote upon the final passage of any bill shall be taken until five legislative days after its introduction nor until it has been on file for final reading and passage for at least one legislative day. No bill shall contain more than one subject, and the subject shall be clearly expressed in the title. No law shall be amended unless the new act contains the section or sections as amended and the section or sections so amended shall be repealed. The Lieutenant Governor, or the Speaker if acting as presiding officer, shall sign, in the presence of the Legislature while it is in session and capable of transacting business, all bills and resolutions passed by the Legislature.³⁶⁶

Nevada

1. Every bill, except a bill placed on a consent calendar adopted as provided in subsection 4, must be read by sections on three several days, in each House, unless in case of emergency, two thirds of the House where such bill is pending shall deem it expedient to dispense with this rule. The reading of a bill by sections, on its final passage, shall in no case be dispensed with, and the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays to be entered on the journals of each House. Except as otherwise provided in subsection 2, a majority of all the members elected to each house is necessary to pass every bill or joint resolution, and all bills or joint resolutions so passed, shall be signed by the presiding officers of the respective Houses and by the Secretary of the Senate and Clerk of the Assembly.

....

³⁶⁶ NEB. CONST. art. III, § 14.

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4. Each House may provide by rule for the creation of a consent calendar and establish the procedure for the passage of uncontested bills.³⁶⁷

New Hampshire

No constitutional requirement.

New Jersey

All bills and joint resolutions shall be read three times in each house before final passage. No bill or joint resolution shall be read a third time in either house until after the intervention of one full calendar day following the day of the second reading; but if either house shall resolve by vote of three-fourths of all its members, signified by yeas and nays entered on the journal, that a bill or joint resolution is an emergency measure, it may proceed forthwith from second to third reading. No bill or joint resolution shall pass, unless there shall be a majority of all the members of each body personally present and agreeing thereto, and the yeas and nays of the members voting on such final passage shall be entered on the journal.³⁶⁸

New Mexico

No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose. The enacting clause of all bills shall be: "Be it enacted by the legislature of the state of New Mexico." Any bill may originate in either house. No bill, except bills to provide for the public peace, health, and safety, and the codification or revision of the laws, shall become a law unless it has been printed, and read three different times in each house, not more than two of which readings shall be on the same day, and the third of which shall be in full.³⁶⁹

³⁶⁷ NEV. CONST. art. 4, § 18.

³⁶⁸ N.J. CONST. art. IV, § IV, ¶ 6.

³⁶⁹ N.M. CONST. art. IV, § 15.

North Carolina

Except as provided by subsections (2) through (6) of this section [all of which have a similar reading requirement as this section], all bills shall be read three times in each house and shall be signed by the presiding officer of each house before being presented to the Governor. If the Governor approves, the Governor shall sign it and it shall become a law; but if not, the Governor shall return it with objections, together with a veto message stating the reasons for such objections, to that house in which it shall have originated, which shall enter the objections and veto message at large on its journal, and proceed to reconsider it. If after such reconsideration three-fifths of the members of that house present and voting shall agree to pass the bill, it shall be sent, together with the objections and veto message, to the other house, by which it shall likewise be reconsidered; and if approved by three-fifths of the members of that house present and voting, it shall become a law notwithstanding the objections of the Governor. In all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the members voting shall be entered on the journal of each house respectively.³⁷⁰

....

No law shall be enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and shall have been agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.³⁷¹

North Dakota

Every bill must be read on two separate natural days, and the readings may be by title only unless a reading at length is

³⁷⁰ N.C. CONST. art. II, § 22(1).

³⁷¹ N.C. CONST. art. II, § 23.

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demanded by one-fifth of the members present.³⁷²

Ohio

Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement, and every individual consideration of a bill or action suspending the requirement shall be recorded in the journal of the respective house. No bill may be passed until the bill has been reproduced and distributed to members of the house in which it is pending and every amendment been made available upon a member's request.³⁷³

Oklahoma

Every bill shall be read on three different days in each House, and no bill shall become a law unless, on its final passage, it be read at length, and no law shall be passed unless upon a vote of a majority of all the members elected to each House in favor of such law; and the question, upon final passage, shall be taken upon its last reading, and the yeas and nays shall be entered upon the journal.³⁷⁴

Oregon

Every bill shall be read by title only on three several days, in each house, unless in case of emergency two-thirds of the house where such bill may be pending shall, by a vote of yeas and nays, deem it expedient to dispense with this rule; provided, however, on its final passage, such bill shall be read section by section unless such requirement be suspended by a vote of two-thirds of the house where such bill may be pending, and the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays.³⁷⁵

³⁷² N.D. CONST. art. IV, § 13.

³⁷³ OHIO CONST. art. II, § 15(C).

³⁷⁴ OKLA. CONST. art. V, § 34.

³⁷⁵ OR. CONST. art. IV, § 19.

Pennsylvania

Every bill shall be considered on three different days in each House. All amendments made thereto shall be printed for the use of the members before the final vote is taken on the bill and before the final vote is taken, upon written request addressed to the presiding officer of either House by at least twenty-five percent [25%] of the members elected to that House, any bill shall be read at length in that House. No bill shall become a law, unless on its final passage the vote is taken by yeas and nays, the names of the persons voting for and against it are entered on the journal, and a majority of the members elected to each House is recorded thereon as voting in its favor.³⁷⁶

Rhode Island

No constitutional requirement.

South Carolina

No Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives: *Provided*, That either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only.³⁷⁷

South Dakota

Every bill shall be read twice, by number and title once when introduced, and once upon final passage, but one reading at length may be demanded at any time before final passage.³⁷⁸

Tennessee

A bill shall become law when it has been considered and

³⁷⁶ PA. CONST. art. III, § 4.

³⁷⁷ S.C. CONST. art. III, § 18.

³⁷⁸ S.D. CONST. art. III, § 17.

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passed on three different days in each House and on third and final consideration has received the assent of a majority of all the members to which each House is entitled under this Constitution, when the respective speakers have signed the bill with the date of such signing appearing in the journal, and when the bill has been approved by the Governor or otherwise passed under the provisions of this Constitution.³⁷⁹

Texas

No bill shall have the force of a law, until it has been read on three several days in each House, and free discussion allowed thereon; but four-fifths of the House, in which the bill may be pending, may suspend this rule, the yeas and nays being taken on the question of suspension, and entered upon the journals.³⁸⁰

Utah

Every bill shall be read by title three separate times in each house except in cases where two-thirds of the house where such bill is pending suspend this requirement. Except general appropriation bills and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title. The vote upon the final passage of all bills shall be by yeas and nays and entered upon the respective journals of the house in which the vote occurs. No bill or joint resolution shall be passed except with the assent of the majority of all the members elected to each house of the Legislature.³⁸¹

Vermont

No constitutional requirement.

Virginia

No bill shall become a law unless, prior to its passage:
(a) it has been referred to a committee of each house,

³⁷⁹ TENN. CONST. art. II, § 18.

³⁸⁰ TEX. CONST. art. III, § 32; *see also* TEX. CONST. art. III, § 62(b)(3) (noting that reading may be waived in cases of disaster caused by enemy attack).

³⁸¹ UTAH CONST. art. VI, § 22.

considered by such committee in session, and reported;

(b) it has been printed by the house in which it originated prior to its passage therein;

(c) it has been read by its title, or its title has been printed in a daily calendar, on three different calendar days in each house; and

(d) upon its final passage a vote has been taken thereon in each house, the name of each member voting for and against recorded in the journal, and a majority of those voting in each house, which majority shall include at least two-fifths of the members elected to that house, recorded in the affirmative.

Only in the manner required in subdivision (d) of this section shall an amendment to a bill by one house be concurred in by the other, or a conference report be adopted by either house, or either house discharge a committee from the consideration of a bill and consider the same as if reported. The printing and reading, or either, required in subdivisions (b) and (c) of this section, may be dispensed with in a bill to codify the laws of the Commonwealth, and in the case of an emergency by a vote of four-fifths of the members voting in each house, the name of each member voting and how he voted to be recorded in the journal.³⁸²

Washington

No constitutional requirement.

West Virginia

No bill shall become a law, until it has been fully and distinctly read, on three different days, in each house, unless, in case of urgency, by a vote of four fifths of the members present, taken by yeas and nays on each bill, this rule be dispensed with: Provided, in all cases, that an engrossed bill shall be fully and distinctly read in each house.³⁸³

Wisconsin

No constitutional requirement.

³⁸² VA. CONST. art. IV, § 11.

³⁸³ W. VA. CONST. art. VI, § 29.

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Wyoming

No constitutional requirement.