The Next New York

Renewing and Reforming the Empire State

EMPIRE CENTER

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Contents

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Introduction

By Tim Hoefer
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One hundred years ago, New York already was well established as the most populous and economically vibrant state in the nation. Yet even in the booming 1920s, state leaders weren't resting on their laurels. Looking towards the future, Governor Alfred E. Smith spent much of that decade successfully campaigning for constitutional reforms to make state government more efficient and effective.

In the decades that followed, under Smith's successors in both parties, the Empire State overcame the challenges of the Great Depression and World War II to scale new heights of prosperity and broad opportunity, accommodating a burgeoning postwar population and the new enterprises and industries that would employ them.

As time wore on, however, the state lost its way. High-minded ambition gave way to undisciplined excess.

The Rockefeller era began in the late 1950s with grand visions of a big government-driven future. By the early 1970s, the Empire State was struggling with bloated budgets, high taxes, declining services, growing welfare dependency, rising urban crime rates, and crumbling infrastructure. Millions of people and countless businesses left the state, the decennial census of New York's population declined for the first time ever, and its largest city sank into virtual bankruptcy and rampant disorder.

To their credit, in the 1980s and 1990s, New York politicians in both parties grasped the sobering lessons of the Seventies. The era of recovery and renewal wasn't always steady; sometimes, every forward step seemed to be followed by another in the opposite direction. But little by little, New York regained its edge.

In public finance, taxes were reformed and reduced; debt was curbed; spending was controlled.

In education, there was a new emphasis on quality, measuring pupil performance, and expanding choice through charter schools.

In healthcare, the state took steps to deregulate its hospital system and control Medicaid costs.

"Luxury decontrol" was introduced to New York City's market-distorting rent regulations.

And the over-arching achievement, previously thought impossible: a decades-long crime wave was broken. City streets became safe again.

As the 21st century approached, the once-failing Empire State could fairly be described as a comeback story.

More recently, though, we've experienced yet another turn towards stagnation and decline—which the COVID-19 pandemic has only accelerated. Seemingly unaware of the lessons taught by New York's not-so-distant past, a rising generation of activists and advocates seem intent on repeating old mistakes in new forms.

The time is overdue to embrace new approaches—and to dust off some proven approaches that can work again. It's time to shape the Next New York.

In the Next New York, we need a fresh commitment to unleashing the genius and energies of the private sector.

In the Next New York, the focus must return to results-oriented programs, to spending better rather than simply spending more.

This volume features the insights of 11 policy experts who have spent years deeply engaged in the study and analysis of the major issues facing our state today: budget and tax policy, criminal justice, education, health, energy, transportation, housing, public employment, government accountability and—capping it off—the laws by which we choose the elected officials to make decisions in these areas.

Our chapter headings are by no means meant to suggest an all-inclusive list of needed reforms. For example, an entire additional volume might be devoted to the burdens state regulation has placed on business. This book focuses on a set of priorities that would begin to set the right course, and that should be added to.

The Next New York is in part a briefing book on key aspects of the public policy status quo. But as its title suggests, each of the 11 chapters of The Next New York ultimately focuses on the future—on what needs to be done, and what needs to change, to allow the Empire State to move forward again.

We've done it before, and we can do it again.

Reform Priorities Summary

1. Getting a Grip on the State Budget

- *Reduce projected spending*
- *Roll back tax increases*
- *Move the fiscal year start date to July 1*
- *Mind the GAAP*
- *Establish a Legislative Budget Office*
- *Shut the borrowing backdoor*
- *Ban lump sum appropriations*
- *Enforce financial plan deadlines*

2. Restoring Public Safety

- *Make public safety the central concern of pretrial release decisions*
- *Restore balance in criminal prosecutions.*
- *Mitigate the unintended, if predictable, consequences of "Less Is More"*

3. Rethinking K-12 Education—and Beyond

- *Expand school choice*
- *Rein in and redirect school spending*
- *Align graduation and proficiency standards with real-world needs and expectations*
- *Expand community college trade and workforce preparation program*
- *Reform educational governance to build accountability*

4. Medicaid and health care

- *Make commercial coverage more affordable and accessible*
- *Tighten income-screening procedures for Medicaid enrollees*
- *Improve the state's public health system*

5. Addressing Mental Health

- *Fund more inpatient psychiatric beds*
- *Target workforce investments to areas of greatest need*
- *Expand Kendra's Law*
- *Increase supervision of the seriously mentally Ill*
- *Reduce the mental illness burden on other systems*

6. Heading off New York's Home-Made Energy Crisis

- *Scrap the current Climate Leadership and Community Protection Act*
- *End the de facto natural gas pipeline moratorium*
- *Repeal the fracking ban*
- *Rethink renewable and zero-emission energy credits*
- *Repeal the post-2035 ban on selling new internal combustion engines*
- *Stop legislation likely to further increase costs and undermine reliability*
- *Encourage investment in hydrogen, renewable natural gas, and advanced nuclear power*

7. Transportation and Transit: Back to Basics

- *Reconsider priorities for highway spending*
- *Identify highway funding sources before spending*
- *Link tolls to reasonable costs*
- *Reset dedicated taxes*
- *Adopt a more realistic MTA capital plan*
- *Rethink the Penn Station project*
- *Control transit and commuter rail labor costs*
- *Push for more transparent, productive capital contracts*
- *Find substitutes for fuel taxes*
- *Make a fast, final decision on congestion pricing*
- *Appoint independent experts to the MTA board*

8. Housing New York

- *Reverse rent regulation*
- *Encourage New Private Housing Development*
- *Reform and Repurpose Public Housing*
- *Cut red tape barriers to housing construction*

9. Taming a "Taylor Made" Public-Sector Workforce

- *Make collective bargaining more transparent*
- *Rejuvenate PERB to focus on the broad public interest*
- *Repeal the Triborough Amendment*
- *Set limits on binding arbitration settlements*
- *Limit the scope of collective bargaining*

10. Opening a Wider Window on New York Government

- *Set firmer deadlines for FOIL responses*
- *Improve the dispute resolution process*
- *Fix bad judicial and administrative FOIL precedents*
- *Increase access to public meetings*
- *Define "meetings" in 21st century terms*

11. Voters Access, Election Integrity

- *Require voters to provide proof of identification*
- *Reaffirm and strengthen absentee balloting restrictions*
- *Prevent ballot harvesting*
- *Scale back the nine-day early voting period*
- *Repeal the John Lewis Voting Rights Act*
- *Reject public campaigning financing*
- *Create a path for limited citizen initiative and referendum*

1.
Getting a Grip on the State Budget

By E.J. McMahon

New York has the nation's second largest state budget, exceeded only by California's. By any measure, New York State taxes and spends considerably more than Florida or Texas, whose populations are larger and have been growing faster.[1] In fiscal 2022, bolstered by extraordinary injections of federal aid, the total New York State budget exceeded $200 billion for the first time.

Even more than most states, New York experienced a severe economic and fiscal disruption following the COVID-19 outbreak in March 2020. Governor Cuomo's broad emergency-order lockdown of "non-essential" business and social activity triggered the virtually overnight loss of nearly 2 million payroll jobs and a double-digit spike in unemployment among New Yorkers. For a time, the shock waves seemed very likely to vaporize a chunk of tax revenues and precipitate a fiscal crisis. But early predictions of massive deficits quickly dissipated amid waves of federal relief aid—along with unexpected increases in the state's tax revenues in fiscal year 2021.[‡]

Two years later, the pandemic crisis and its fiscal aftermath have given rise—temporarily—to a state budget trend unique in New York's history: rapid growth in revenues, spending, *and* surplus reserves. Within two years of the pandemic's start, New York's state spending had been inflated by tens of billions of dollars in federal pandemic COVID-19 relief aid, further buttressed by surging income tax payments on capital gains generated by a strong stock market recovery—topped off by the proceeds of significant tax increases, enacted in the spring of 2021, targeted at New York's highest-earning individuals and corporations.

After growing by slightly more than two percent a year between fiscal years 2011 and 2021, cash disbursements from state operating funds surged 13 percent in FY 2022 and were projected to increase by an additional 20 percent over the next four years.[2]

Albany's supercharged post-pandemic spending trend is unsustainable in the long run. How this fiscal cycle ends—in a soft landing, or a crash that prompts even more tax increases—will be determined by the budgets of the next few years. Before it's too late, New York's governor and Legislature should embrace fiscal policies grounded in the three Rs of restraint, responsibility, and reform.

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‡ New York's state government fiscal year runs from April 1 to March 31; fiscal year or "FY" notations throughout this volume refer to the calendar year in which the fiscal year ends.

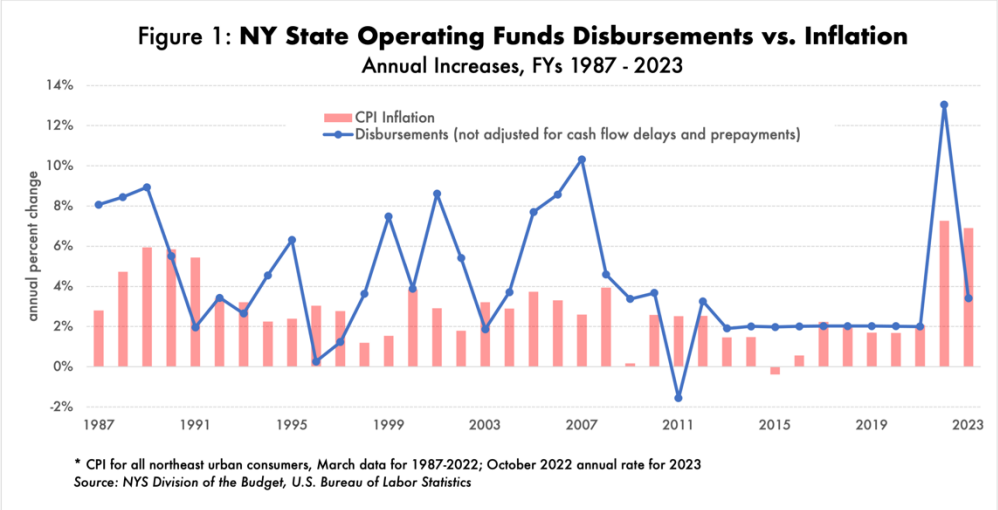
Spending should be reined in, taxes reduced, and economic competitiveness restored as a top priority.

The state's budget-making process—rushed, secretive, and increasingly cluttered with extraneous issues in recent years—needs to be more efficient, more transparent, and more accountable to taxpayers.

THE STATUS QUO

From fiscal years 1987 through 2023, New York's state operating funds spending increased by a compound average of 4.2 percent a year, considerably above the average inflation rate of 2.8 percent during the same period. As shown in Figure 1, state spending exceeded inflation in 27 of those 36 fiscal years, including a dozen years in which disbursements grew at least two to three times inflation as measured by the Consumer Price Index.

The longest stretch of relative budgetary restraint in Albany since the early 1980s was the decade leading up to the pandemic, when state operating funds disbursements increased an average of 2.1 percent a year, compared to average annual inflation of 1.5 percent. The budget's nearly flat inflation-adjusted trajectory from FY 2011 to FY 2021 reflected Governor Cuomo's avowed commitment to holding state operating funds spending growth to two percent a year.



To be sure, the official numbers are misleading, since the two percent benchmark was not achieved without the help of book-keeping gimmickry—most notably through the pre-payment of debt service and some other expenses in most years. In addition, starting in the spring of 2018, the Medicaid program was beginning to burst the limits of the program's supposed "global cap." To conceal that over-spending, the Cuomo administration delayed some Medicaid payments from March, the end of the fiscal year, to April, the beginning of the next.[3] However, even adjusting for debt prepayments and Medicaid cash-flow rollovers, the average spending increase before the pandemic appeared relatively low by historical standards, in the neighborhood of three percent.

Rising capital debt

Not included in the state operating funds budget is capital projects spending, largely funded by long-term bonds. Article VII, section 11 of the state Constitution explicitly prohibits the issuance of state debt unless approved in a voter referendum, and further limits such referendums to one "single purpose" at a time. Yet generations of governors and legislatures have circumvented this requirement by authorizing public authorities to borrow on the state's behalf without involving voters, and the Court of Appeals has upheld such arrangements.[4] Out of $62 billion in state debt outstanding as of FY 2022, only $2 billion (three percent) consisted of voter-approved general obligation bonds.[5]

Although New York's constitutional restriction on state debt is exceptionally stringent, the state's total long-term debt burden measured as a share of state GDP is 50 percent heavier than the national average, and more than those in seven of 10 DOB-designated "peer states," as shown in Table 1.

Table 1: **State Government Debt Burdens**
New York Compared to Peer States[a], 2020-21

	All State Long-Term Debt[b]		State Tax-Supported Debt[c]	
	GDP Share	Per Capita	GDP Share	Per Capita
California	4.1%	$2,902	3.0%	$2,144
Connecticut	10.9%	$7,792	9.7%	$6,971
Florida	2.2%	$1,054	1.5%	$ 710
Illinois	4.9%	$3,100	4.6%	$2,861
Massachusetts	10.4%	$8,092	8.0%	$6,240
Michigan	4.4%	$2,037	1.4%	$661
New Jersey	9.0%	$5,566	7.4%	$4,569
New York	6.4%	$5,134	3.6%	$2,915
Ohio	3.7%	$1,996	2.1%	$1,146
Pennsylvania	4.9%	$2,670	2.6%	$1,448
Texas	2.9%	$1,637	0.6%	$365
All U.S.	*4.2%*	*$2,459*	*2.6%*	*$1,535*

[a] as classified by NYS Division of the Budget
[b] Fiscal 2020 values from Census Bureau including state public authorities, excluding public debt for private purposes (such as IDA bonds)
[c] Fiscal 2021 values from NYS Division of the Budget, Moody's Investor Service
Sources: U.S. Census Bureau, 2020 Annual Survey of State & Local Government Finances; Bureau of Economic Analysis; NYS Division of the Budget

Relative to population, New York's total long-term debt load of $5,134 per capita was more than double the national average. Even using DOB's narrower measure of tax-financed "state-related" debt, New York's total is higher than six of its peers and almost twice the national average. New York's relatively heavy state debt load by both measures is noteworthy given the unusually large, separately financed capital budgets of its county and municipal governments—especially New York City, which is fiscally and demographically larger than all but a few states.

New York State's 2023 capital financing plan forecasts a significant increase in state-related debt over the next several years. Having averaged $55 billion over

the previous decade, outstanding state-related debt jumped to $62 billion in FY 2022 and is forecast to hit nearly $88 billion in FY 2027.

The largest share of the state government's capital spending perennially has been devoted to transportation, principally the Department of Transportation (DOT) five-year capital program for highways and bridges (see Chapter 7).

Governor Hochul's FY 2023 Capital Program and Financing Plan projected a big increase in capital spending, with the average annual total rising from $14.3 billion in FY 2020 to FY 2023 to $18.6 billion from FY 2024 through FY 2027. Transportation capital spending was projected to average of $8 billion a year, a 28 percent bump from the FY 2020-2023 average of $6.5 billion.

In a notable shift, economic development is projected to displace higher education as the second largest capital projects category in FY 2023-27, averaging $2.2 billion in annual disbursements, more than double the average from 2010 to 2022. Most of this money will be funneled through the Empire State Development Corp. (ESDC), New York's umbrella agency for economic development, whose five-year projected spending through FY 2027 comes to nearly $11 billion, with the lengthy list of planned ESDC capital disbursements including $1.4 billion for urban and rural broadband access, $500 million for offshore wind development, and a $600 million state contribution to the $2 billion cost of building a new Buffalo Bills stadium.

Capitalizing the pork barrel

During the late 1990s, the Legislature began creating new, wide-ranging categories of comprehensive capital project funding for a variety of state and local projects, many (but not all) supporting economic development grant subsidies. By 2005, these programs—essentially slush funds—had funneled more than $1.7 billion on capital grants benefitting a wide range of recipients including "professional sports teams, corporations, local governments, universities, churches, libraries and Little League groups," with another $1.5 billion allocated but not yet spent at that point, as the Center for Governmental Research reported.[6]

The FY 2012 state budget included a new lump-sum pot, the State and Municipal Facilities Program (SMFP), initially with an appropriation of $385 million, which was repeatedly increased until it reached nearly $2.4 billion in FY 2022.[7]

As state Comptroller Thomas DiNapoli pointed out in a 2016 report, lump-sum appropriations for SMFP "include little or no detail regarding the process for allocating funds, or the purposes for which such funds are to be used, and the agency or authority that will ultimately administer the funds is not identified."[8]

Reshuffling the tax deck

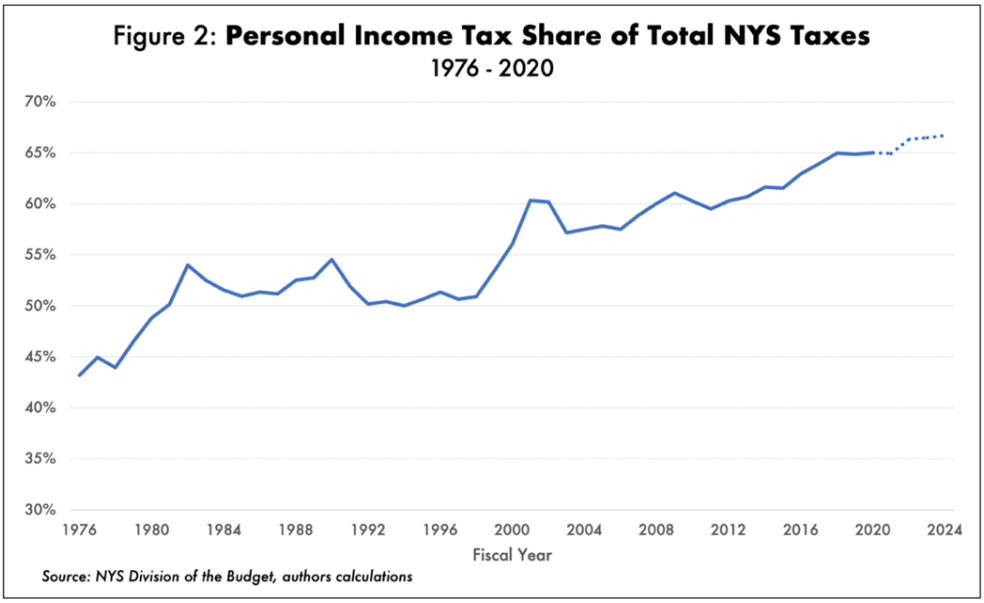
From FY 2011 to 2021, the state enacted several high-profile state tax cuts, including a reduction in personal income tax rates in middle- and upper middle-income brackets, and reductions in corporate taxes that included the elimination of tax on incorporated manufacturing operations in upstate New York. The net change in New York's total tax burden during this period was minimal, however,

because the revenue lost to tax cuts was effectively offset by repeated extensions of New York's single largest state income tax increase since the early 1970s.

In 2009, as part of the FY 2010 budget deal between then-Governor Paterson and the Legislature, the top income tax rate was raised from 6.85 percent to 8.97 percent. Although the rate took effect at incomes of $500,000, it was widely referred to as a "millionaire tax," and scheduled to expire at the end of 2011. However, in a December 2011 special session, Governor Cuomo and the legislature agreed to extend the tax increase in modified form, as an 8.82 percent rate applied to incomes starting just over $1 million for singles and $2 million for married joint filers. This extension was linked to rate cuts on incomes between $40,000 and $300,000 and "indexing" of tax brackets to reflect inflation.

The 2011 millionaire tax extension, initially set to expire in 2014, was extended three more times, most recently to 2024. Meanwhile, the initial tax rate cuts for middle- and upper middle-income brackets were succeeded by a broader plan of rate cuts enacted in 2016. That tax cut was to be phased in over eight years, from 2018 through 2025.[9]

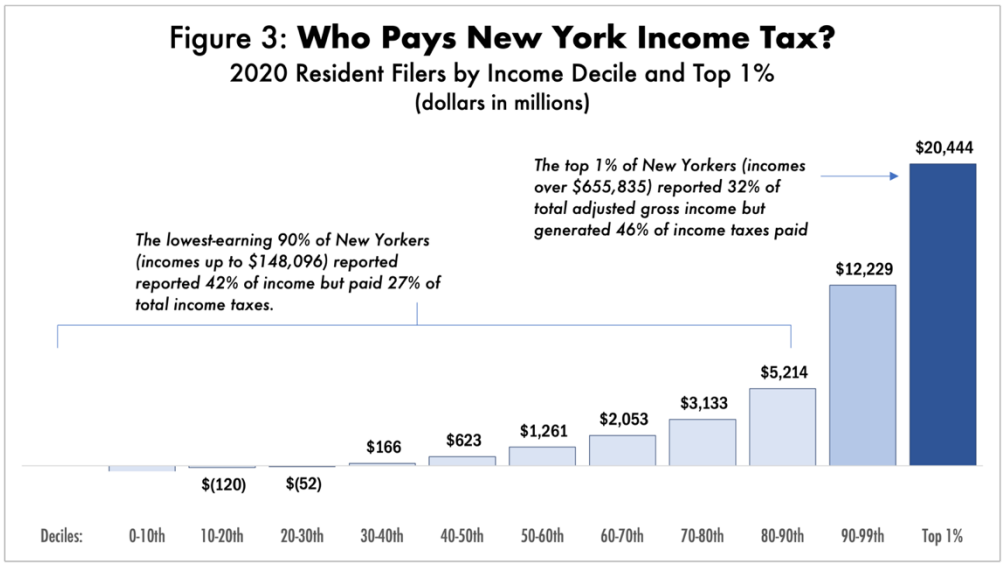
By shifting a larger share of the state income tax to millionaire earners, the state accelerated a longer-term trend. Over the past 35 years, New York State's budget has become more reliant than ever on personal income tax revenue disproportionately generated by a relatively small number of very high earners whose incomes are both volatile and highly portable. The upshot: personal income taxes now make up fully two-thirds of the state's total tax revenue, up from 50 percent when Governor Mario Cuomo left office in the mid 1990s (see Figure 2).



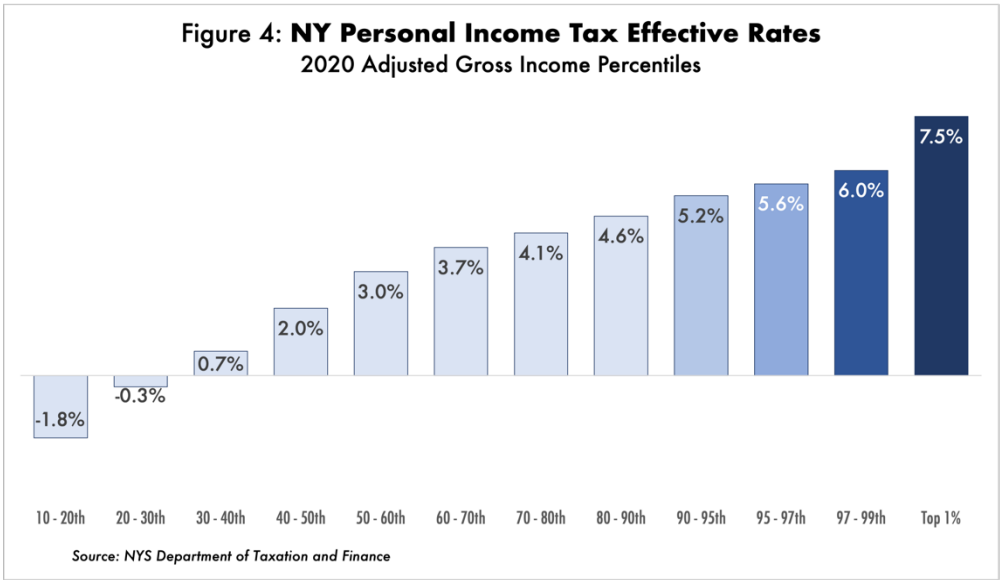
Progressive taxation

New York's personal income tax code has long been among the most progressive of any state's, placing a much heavier burden on high incomes than low- or moderate-income households.[10] In 2020, the highest-earning one percent of New Yorkers (with incomes starting at $655,835) reported 32 percent of adjusted gross

income but paid 46 percent of income taxes paid by full-year state residents, as shown in Figure 3. And as shown in Figure 4, even prior to the most recent increases for top earners and cuts in lower brackets, the effective tax rate paid by the highest-earning one percent of all New Yorkers was more than double the rate paid by middle-income filers.



The state raised marginal tax rates further in 2021, as part of the changes enacted with the FY 2022 state budget.[11] As detailed below in Table 2, the personal income tax changes added three new brackets on incomes starting just above $2 million for married joint return filers (or $1 million for singles), translating into higher tax payments of nine percent to 24 percent. For New York City residents, the combined rates on millionaire incomes are now the highest in the country, exceeding California's statewide rate of 13.3 percent.



New York's higher income tax rates, originally projected to generate $4 billion a year in added revenue by 2025, are scheduled to expire in 2027. The FY 2022 revenue bill also eliminated the 2024 sunset on the 2011 millionaire tax hike, making it permanent. This change by itself constituted New York's most significant permanent-law income tax increase since the 1960s.

Table 2: Top Income Tax Brackets
NYS, NYC, Selected States*
(married joint filer brackets, effective 2021)

Taxable Income Threshold	Prior Law	New Rates	Post-2021 Combined NYS - NYC	AK, FL, NH[c], NV, SD, TN, TX, WA, WY
$323,000	6.85%	6.85%	10.73%	0
$2,155,000	8.82%[a]	9.65%[b]	13.53%	
$5,000,000		10.30[b]	14.18%	
$10,000,000				
$25,000,000		10.90%[b]	14.78%	
$50,000,000				
$100,000,000				

[a] Expires end of 2024
[b] Permanent post-2027 rate = 8.82%
[c] NH imposes 5% tax on interest and dividends

High-earner erosion

The state financial plan assumes that high-income households will remain literally and figuratively unmoved by the most significant hike in marginal rates since the early 1970s. In fact, however, between 2010 and 2020, Internal Revenue Service data show New York's share of the nation's millionaire earners decreased from 12.7 percent to 8.9 percent, the lowest level on record.[12]

State personal income tax data from the first tax year affected by the pandemic disruption indicate that New York was continuing to lose high earners in the wake of the March 2020 Covid-19 outbreak.[13] In 2020, the state's personal income tax base included 54,824 full-time New York resident with incomes of $1 million or more, which was down slightly from the 2019 total of 55,308. During the same period, the number of full-year nonresident and part-year resident New York taxpayers rose from 70,222 to 73,899 filers in the $1 million-and-up bracket.[14] Millionaire earners living in Florida accounted for the largest share of new full-year nonresident filers; there were 7,218 Floridians who owed some New York income tax in 2020, compared to 6,471 in the previous year.

Despite the continuing decline in the number of high-earning New York residents, and massive job losses in the early months of the 2020 pandemic, the Empire State's personal income tax collections rose a healthy $1.3 billion, or 2.4 percent, in the fiscal year ending March 31, 2021. The higher-than-expected tax revenues were due mainly to the unexpectedly strong recovery of stock prices in the second half of 2021, which boosted the capital gains component of New York's income tax base to $132 billion—up 58 percent from the previous year to a new all-time high, exceeding the previous record set in 2007. The increased net capital

gains of New York's income millionaires generated at least $3 billion in added state tax revenue, more making up for the decline in total taxes paid by lower-earning households.

But investment income is highly volatile. For example, New Yorkers' net capital gains fell by 67 percent, from $62 billion to $20 billion, in the two years following the dot-com crash of 2000. Over the next five years, the S&P 500 recovered to just above its peak 2000 level, and the capital gains component of the state tax base soared to $116 billion. But stock prices then fell 56 percent from October 2007 to March 2009, and New Yorkers' net capital gains crashed by 75 percent. In FY 2023 terms, a capital gains decline of even half that magnitude would translate into a revenue decline of roughly $4 billion.

The pinch of SALT

The impact of state tax increases in high-income brackets has been compounded by the $10,000 cap on federal deductions for state and local taxes (SALT), enacted as part of the Tax Cuts and Jobs Act (TCJA), which took effect in 2018. Despite New York's higher average SALT deductions under previous law, the other major provisions of the TCJA resulted in net tax cuts for most New York taxpayers, including a majority of middle-income residents who previously could claim a SALT deduction for their high property taxes. The negative impact of the SALT cap is overwhelmingly concentrated among New York's highest earners—especially those with incomes topping $1 million a year, nearly 30 percent of whom are paying higher taxes under the new law.[15]

For taxpayers claiming it, the pre-2018 SALT deduction functioned as a discount, reducing the effective impact of the statutory state and local rate. In 2011-17, for example, the SALT cap reduced New York's top rate 8.82 percent to 5.3 percent; even in the early 1970s, when the state's top income tax rate was 15.35 percent, its effective cost was just 4.6 percent. With no federal deduction, the state's current top rate on the same earners starts ranges from 9.65 percent to 10.9 percent, by far the highest effective rates in New York's history.

The state sought with a series of workarounds designed to preserve the deduction for at least some taxpayers. The most significant by far has been the Pass-Through Entity Tax, or PTET, created by the FY 2022 budget, which effectively allows owners of many closely held businesses to claim federal tax deductions and state tax credits for net profits that "pass through" to them as personal income.

Where the buck stops

Under New York's Executive Budget system, the governor shapes budget priorities and is the dominant, agenda-setting player in the budget-making process.

The governor's budget authority is laid out in Sections 1 through 6 of Article VII of the state Constitution. The first two sections require the governor to assemble departmental budget requests, to present a budget ("a complete plan of expenditures … and all monies and revenues estimated to be available therefor") by certain dates early each year.

Section 3 describes the governor's responsibility for submitting budget bills, his or her ability to "amend or supplement" those bills within 30 days of submission, and his or her ability, with the consent of the Legislature, to submit budget amendments or "supplemental bills" after the budget has been adopted. Budget bills are a unique category of legislation, introduced automatically without sponsorship in the Assembly and Senate.

Section 4 prevents the Legislature from altering appropriations language "except to strike out or reduce items therein." It further provides that, once passed, appropriation bills become law without further action by the governor—except that both the legislative and judiciary budget "and separate items added to the governor's bills by the Legislature" are subject to the governor's approval or veto.

Section 5 restricts the Legislature's ability to appropriate money before the governor's executive budget bills have been "finally acted upon." Section 6 includes a crucial "anti-rider" clause, which stipulates that the provisions of the governor's appropriations bills must be "specifically" related to "some particular appropriation" in those bills.

The constitutional provisions are buttressed by State Finance Law, which requires the governor to update the state's financial plan within 30 days of the close of each fiscal quarter.[16] The Budget Reform Act of 2007[17] further amended the Finance Law to ban the Legislature from adding lump-sum appropriations, to require the governor and Legislature to meet by mid-November for a "quick start" release of revenue projections; and to require the Legislature to present its members with reports detailing the impact of changes to the governor's budget before the final adoption vote. The 2007 law also required the governor to provide more itemization of some programs in budget bills and banned the Legislature from making lump sum appropriations.

While the Legislature cannot alter appropriations bill language, it can add separate line items for any purpose—and if the governor vetoes these items, a two-thirds majority can override those vetoes. In addition, the Legislature effectively has its own budget veto, in the form of its Section 4 power to "strike out or reduce items" in an Executive Budget appropriations bill before the bill is passed.

The extent of the governor's authority under the Executive Budget law has been tested in a series of court battles between the governor and the Legislature, dating back to the late 1920s. The latest two landmark rulings by the Court of Appeals stemmed from two of Governor George Pataki's second-term budgets.[18]

The first, *Silver v. Pataki*, arose when the Legislature followed up its adoption of the governor's 1998-99 appropriation bills by enacting single-purpose, non-appropriation Article VII language bills changing the purposes for which the money could be spent. The second case, *Pataki v. Assembly*, stemmed from Pataki's 2001-02 budget bills, which among other things incorporated the governor's proposed changes to the local school aid formula in appropriations language, rather than following the previous practice of putting formula changes in a non-appropriations budget bill.

The two cases were jointly decided by the Court of Appeals in December 2004, with a 5-2 majority upholding the governor's executive budget powers in both cases. Within the majority, there was broad agreement with Judge Robert Smith's opinion that, in both budgets, the Legislature had "altered the Governor's appropriation bills in ways not permitted by the Constitution."

Over-reaching budget bills

Any changes in state law required to implement the annual Executive Budget—for example, creation of a new fee, or an increase or decrease in an existing tax—are submitted by the governor in what are commonly referred to as "budget language bills," or "Article VII bills." Typically organized by subject matter, these measures are strictly separate from appropriations bills, which are a constitutional category unto themselves.[19]

To a far greater extent than any of his predecessors, Governor Andrew Cuomo sought to include non-budget items—including such major policy changes as a statewide $15 minimum wage—within his non-appropriation Article VII bills. He and legislative leaders also negotiated budget deals in which non-budget policy items were added to the bills before passage. A particularly glaring example of this practice was the inclusion of controversial criminal justice "reforms"—including elimination of cash bail for many crimes (see Chapter 2)—in a 266-page Revenue Bill enacted with the FY 2020 budget in April 2019.[20] Likewise, three years later, amendments to those criminal law changes were bundled with numerous other non-budget items in FY 2023 budget legislation, this time as subparts of the 313-page Education, Labor and Family Assistance budget language bill.[21]

Critics of New York's executive budget system cite such instances as evidence that the governor has too much power to change state laws through the budget-making process. However, neither the original Executive Budget law nor the more recent Court of Appeals decisions empowered the governor to force legislative action or insist the Legislature act on *any* supposedly budget-related measure outside of appropriation bills. The Legislature remains free to reject, rewrite or supplement *any* non-appropriations Article VII bill provision, as long as the effect is not to alter language in appropriations bills.

Legacies of lateness

For an almost unbroken period of 25 years prior to 2011, New York State's budget was not enacted before the start of the April fiscal year. In some years, the final deal was not reached until several months past the March 31 deadline. Unlike some other states and the federal government, New York State never experienced an actual government shutdown due to its failure to enact a timely budget, since Governors Mario Cuomo and George Pataki routinely submitted temporary budget extender bills to meet payrolls while negotiations dragged on.

While the budget delays created some cash-flow stress for local governments dependent on state aid payments, they had little noticeable impact on the vast majority of New Yorkers. But the chronic lateness fed the impression of terminal gridlock and dysfunction in Albany, adding to the negative financial factors holding down the state's credit rating.

The last significantly late budget came in 2010, when state finances were stressed in the wake of the Great Recession and the impending fade-out of temporary federal stimulus aid. Like his predecessors, Governor Paterson had sent the Legislature temporary extender bills once the state began the 2011 fiscal year without adopting a final budget.

When the Senate and Assembly refused to drop spending demands beyond what the governor thought the state could afford, the governor began using the extender process to force-feed large chunks of the full annual budget bills calling for lower spending levels. A complete budget effectively was enacted in this piecemeal fashion, largely on the governor's terms, by the end of June. Most budgets since then have been adopted by April 1 or within two weeks of that date.

Self-inflicted "extortion"

A new twist in New York's 2019-20 budget process was the unprecedented linkage between "timely" passage of the budget and a legislative pay raise—a condition imposed by a committee on compensation created by the Legislature in 2018 as part of the 2018-19 budget.[22] The governor's added ability to pressure lawmakers into a budget deal was compared by one member, not unreasonably, to "extortion."[23] But the Legislature itself set the stage for this situation by delegating the salary issue to a compensation committee.

The Legislature passed up an opportunity to permanently veto the resulting committee report and recommendations at the end of 2018. Even now, the entire compensation scheme—as well as the 1998 law temporarily withholding legislators' pay when a budget is late—could be repealed by the Legislature at any time, although its constitutionality recently was upheld by the state's highest court.[24]

MOVING FORWARD

Flattening the curve of spending to put New York State's finances on a more sustainable footing—while also, crucially, adjusting taxes to a more competitive level—will be a stiff multi-year challenge. Under the state's nearly century-old Executive Budget system, the procedural and institutional tools exist to make these goals a reality, but both the governor and the Legislature must be willing to play their parts in using them. The to-do list of necessary policy changes and reforms is long, but would start with these priorities:

- **Reduce projected spending.** Efforts to find savings in a $121 billion state operating funds budget necessarily must start with Education and Medicaid, which already consume half the operating budget and are on track to grow faster than all other areas combined. As noted in Chapter 3, New York's per-pupil spending on public schools is higher than any state's and approaching double the national average, yet educational results are generally mediocre. The still-unfolding $4 billion increase in Foundation Aid should be suspended, reconsidered, reduced, and restructured to favor poorer districts and to programs offering more educational choice, starting with additional charter schools. The Medicaid budget has ballooned by 76 percent in 10 years, and the program badly needs the kind of structural reforms discussed in Chapter 4. There should be a renewed effort to modernize and right-size government through a revived version of the Spending and Government Efficiency Commission created in 2011, this time focusing on remote-work implications for agency operations. Additional

resources can be freed through repeal of corporate tax subsidies and loopholes—starting with the $420 million a year Film Production Credit, which is the biggest giveaway of its kind in any state.

- **Roll back tax increases.** In early 2009, before enactment of the first temporary millionaire tax, Assembly Ways and Means Committee staff described the state's dependence on high-income taxpayers as "inherently unstable," "volatile" and "unsustainable."[25] Subsequent tax policies have only made it worse. The latest income tax hike on high earners, enacted in 2021, is projected to raise $4 billion a year before its scheduled expiration in 2027—but the history of previous supposedly temporary tax hikes suggests pressure will grow for extension of the increases as the sunset date gets closer. To prevent further erosion in the tax base, the tax hikes should instead be phased out at a steady rate, starting in tax year 2023.

- **Move the fiscal year start date to July 1**. New York's unusually compressed budget-making schedule, allowing barely two months for legislative consideration and airing of the Executive Budget, has contributed to the hastiness and secrecy surrounding the process. Moving the start date from April 1 to July 1 would match the existing schedule in 46 states and the City of New York. It also would restore the state fiscal calendar in effect during New York's first 15 years under the executive budget system, allowing more time for legislative analysis and consideration of a budget that the Constitution requires the governor to submit between mid-January and Feb. 1. Extending the budget process through most of the session also would eliminate any rationale for packing non-budgetary program items into Article VII budget bills, and it would allow the budget to be finalized after the final settlement on personal income tax receipts in mid-April.

- **Mind the GAAP.** The Constitution requires the governor to propose a balanced budget, and the 2007 Budget Reform Act requires the Legislature to adopt one. By statute, however, New York's financial plans are calculated on a cash basis, which recognizes receipts when money is received and disbursements when money is paid out. This accounting standard makes it easier to manipulate the budget's perceived fiscal integrity and sustainability by, for example, rolling one year's expenditures into the next. A better standard for budgeting would be the "modified accrual" method consistent with Generally Accepted Accounting Principles (GAAP), which requires revenues to be recognized when earned, and expenditures to be recognized when a liability is incurred. The standard was imposed on New York City during the mid-1970s financial crisis to minimize the kind of accounting gimmicks that had helped drive the city into virtual bankruptcy.

- **Establish a Legislative Budget Office (LBO).** A nonpartisan and professionally staffed LBO, modeled on the Congressional Budget Office, could provide a much-needed source of economic and policy analysis for the public and lawmakers alike. The new agency could be funded primarily

through a combination of existing appropriations for four separate fiscal committee staffs, as proposed in a bill introduced in 2019 by Sen. Liz Krueger, chair of the Senate Finance Committee.[26] As summed up in her bill, the LBO's core mission would be to "increase the legislature's understanding of the budget and how it affects New Yorkers." Similar joint nonpartisan committees exist in California and in New Jersey, among other states.

- **Shut the borrowing backdoor.** The constitution should be amended to clearly require voter approval of state capital debt issues backed by a pledge of state revenue. This would include the creation of any new categories of state-backed bonds, such as the personal income tax-backed "PIT bonds" that have proliferated over the past 20 years, which should also require voter authorization subject to borrowing caps that could only be lifted with voter approval. The constitutional amendment should also allow submission of multiple bond issue propositions in a single year.

- **Ban lump sum appropriations.** As proposed by the comptroller, the State Finance Law should be amended to prohibit the Executive, as well as the Legislature, from introducing or continuing any form of lump-sum appropriations, such as those used to support the State and Municipal Facilities Program. All funds should be allocated, up front, to a specific list of grantees through an open, competitive process with clear, measurable criteria, subject to regular audit by the comptroller and pre-released pursuant Freedom of Information Law at every stage.

- **Enforce financial plan deadlines.** Governor Cuomo routinely failed to meet his Oct. 30 Mid-Year Financial Plan update deadline, and after releasing the FY 2022 Mid-Year Update on schedule in October 2021, Governor Hochul did not release the FY 2023 mid-year report until 11 days past the due date. The Legislature, meanwhile, has in the past disregarded its own deadlines for issuing revenue estimates and meeting with the governor and comptroller to "quick start" the process. The governor and the Legislature—both houses and both conferences in each house—should live up to their responsibilities under the law, period.

ENDNOTES

[1] See National Association of State Budget Officers, State Expenditure Report, Table A-1, page 122, at https://www.nasbo.org/mainsite/reports-data/state-expenditure-report.
NASBO's data for 2022 fiscal years pegged state funded expenditures excluding bonded capital at $121 billion in New York, compared to $309 billion in California, $60 billion in Florida and $70 billion in Texas. The Census Bureau's Annual Survey of State Government Finances similarly shows New York's state tax collections exceeding those of all states except California. https://www.census.gov/programs-surveys/state.html.

[2] New York's budgetary accounting system has four different categorical approaches to measuring cash disbursements (spending) and receipts (revenues): All Funds, the most inclusive, which includes spending from all revenue sources including federal grants and the proceeds of capital bonds; State

Funds, which covers spending from all revenue sources except for federal grants; State Operating Funds, which excludes capital projects but includes all disbursements supported by state revenues (taxes, fines, fees, and tuition), including revenues dedicated to a particular purpose, such as Lottery aid to schools; and the General Fund, which is spending funded by all state revenues except those statutorily earmarked for a particular purpose.

[3] By early 2020, Medicaid was running 16 percent over budget—opening a $4 billion deficit in the state's financial plan. See "Albany's Self-Inflicted Medicaid Crisis" by Bill Hammond, *City Journal*, January 2020. https://www.city-journal.org/new-york-medicaid-crisis

[4] The court rulings effectively upholding backdoor borrowing came in a series of unsuccessful legal challenges filed in the 1970s by Leon Wein, a Brooklyn Law School professor and, most recently, in *Schulz v. State of New York*, 84 N.Y.2d 231 (1994)

[5] State of New York, FY 2023 Enacted Capital Program and Financing Plan, p. 98.

[6] Kent Gardner and Erika Rosenberg, "Capital Pork: How State Politicians Divvy Up Billions for Favored Capital Projects," Center for Governmental Research, March 2006. www.cgr.org.

[7] Most SMFP grants fund local amenities such as skateboard parks, walking trails, school athletic fields, and improvements to municipal buildings, along with some large economic development grants to private developers and corporations, but some of the largest have been steered to private businesses.

[8] "Unfinished Business: Fiscal Reform in New York State," Office of the State Comptroller, May 2016. https://www.osc.state.ny.us/files/reports/budget/pdf/budget-fiscal-reform-2016.pdf

[9] As part of the FY 2023 budget, the remaining phases of this tax cut were accelerated to take full effect in calendar year 2023.

[10] Frank Sammartino and Norton Francis, "Federal-State Income Tax Progressivity," Tax Policy Center, June 2016. https://www.taxpolicycenter.org/sites/default/files/publication/131621/2000847-federal-state-income-tax-progressivity.pdf

[11] The same revenue bill included a temporary three-year increase, from 6.5 percent to 7.25 percent, in state tax on business income above $5 million and increase in the capital base tax estimation method for non-manufacturers.

[12] E.J. McMahon, "New York lost more high-earning taxpayers in pandemic-wracked 2020," Dec. 19, 2022, post at https://www.empirecenter.org/publications/new-york-lost-more-high-earning-taxpayers-in-pandemic-wracked-2020/

[13] NYS Department of Taxation and Finance, Personal income tax summary datasets through tax year 2020, https://www.tax.ny.gov/research/stats/statistics/pit-filers-summary-datasets-beginning-tax-year-2015.htm

[14] Nonresidents must pay New York income tax on any wage, salary or net profits earned from work or business activity in the Empire State, but not on capital gains and other investment- and savings-related income.

[15] See summary of Empire Center analysis on the SALT cap's impact in New York, "The SALT Story: Washing Away the Brine," at https://www.empirecenter.org/salt/

[16] Finance Law Section 24.3

[17] Chapter 1 of the Laws of 2007.

[18] *Pataki v New York State Assembly*, 2004 NY Slip Op 09320 [4 NY3d 75] December 16, 2004. A video of the arguments before the Court of Appeals is posted at https://www.nycourts.gov/ctapps/news/Pataki-vNYSAssembly.html.

[19] At the time of introduction by the governor, appropriations bills customarily are grouped into five categories: State Operations, Aid to Localities, Capital Projects, and Legislature and Judiciary (in the latter case, the governor cannot alter appropriations sought by the other branches of government). Separate Article VII bills typically are introduced in at least five core subject areas: Revenue; Education, Labor and Family Assistance; Public Protection and General Government; Health and Mental Hygiene; Transportation, Economic Development and Environmental Conservation.

[20] The changes were contained in Parts JJJ and LLL, respectively, of Ch. 59 of the Laws of 2019, available at: https://www.nysenate.gov/legislation/laws/CPL/A245

[21] Ch. 56 of the Laws of 2022.

[22] Ch. 59 of the Laws of 2018, Part HHH.

[23] "Assemblyman says Cuomo's using pay-raise 'extortion' to pass budget," New York Post, March 3, 2019.

[24] *Delgado v. State*, opinion at https://caselaw.findlaw.com/ny-court-of-appeals/2022923.html.

[25] New York State Assembly Revenue report, February 2009, p. 40, http://www.assembly.state.ny.us/comm/WAM/2009RevRep/2009RevRep.pdf

[26] S.3287/A.1835 of 2019-20.

2.
Restoring Public Safety

By Rafael Mangual

New York was the site of what was surely one of the most significant government-led achievements in urban American history: a steep drop in serious violent crime, continuing across a 25-year period from the early 1990s well into the second decade of the 21st century.

As of 1990, New York State's violent crime and murder rates per 100,000 residents had reached 1,180.9 and 14.5, respectively. By 2015, those measures had plummeted to 379.7 and 3.1—respective declines of 68 percent and 79 percent. The statewide reduction in criminal violence was concentrated in New York City, which had accounted for nearly 87 percent of the 2,605 murders reported to the FBI by New York State in 1990. Then as now,[1] violent crime was significantly concentrated within small slices of the city's neighborhoods, whose black and Latino residents[2] benefitted most from the decline.

As crime plummeted, New York City blossomed. Over the course of a single decade, the once crime-ridden, under-developed city depicted in gritty vigilante and gangster movies[3]—whose northern-most borough was infamously observed in flames by horrified viewers of the 1977 World Series[4]—rebranded itself as the safest big city in America.[5]

In recent years, however, the previously steady decline in violent crime in New York has ground to a halt—and even begun to reverse. An uptick in violent crime, concentrated in the state's urban centers and accelerating during the first year of the COVID-19 pandemic, constitutes perhaps the most serious challenge for policymakers. Successfully meeting that challenge and addressing those concerns will require an understanding of what lies at the root of the problem.

THE STATUS QUO

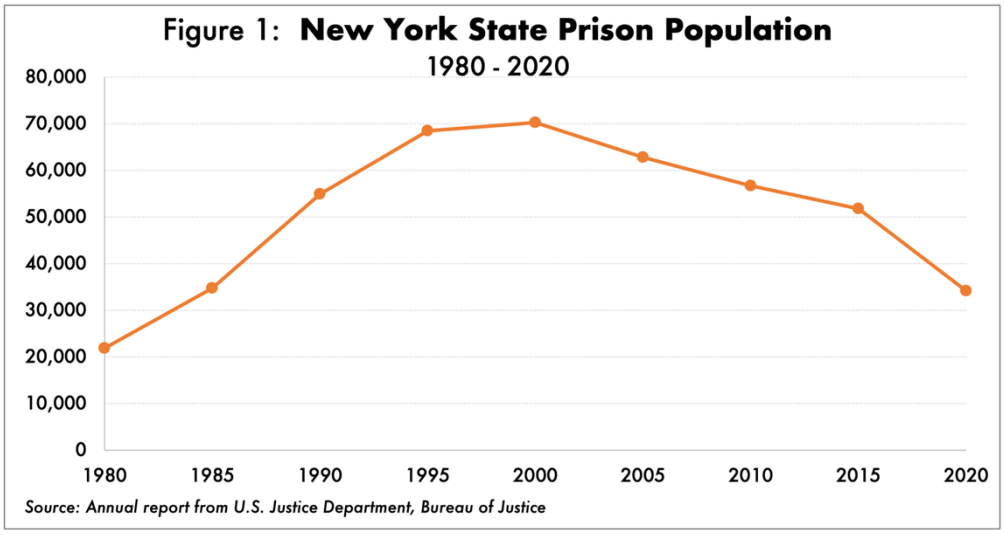
New York's success on the crime control front coincided with meaningful changes to policing and criminal justice policy. Informed by (1) the insights of the Broken Windows theory[6] advanced by James Q. Wilson and George L. Kelling, and (2) a better understanding of (and a deeper appreciation for) crime data, policing in New York City became more responsive to the concerns of residents regarding both serious crime and quality-of-life offenses.

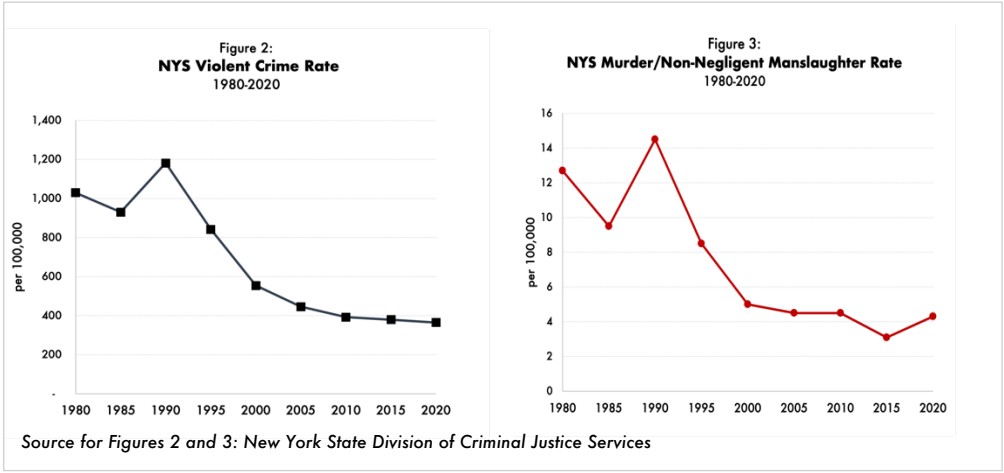
Led by a bold new Commissioner in William J. Bratton, who was appointed by Mayor Rudolph Giuliani in 1993, the New York Police Department also adopted a more aggressive mission aimed at preventing, rather than merely responding to, serious crime.[7] For the first time ever, the NYPD—through its development and use of CompStat,[8] which is now used by police departments around the world—was, in the 1990s, using data to deploy officers, gather intelligence, and measure

its effectiveness. Those efforts were boosted when, thanks to the federal Violent Crime Control and Law Enforcement Act of 1994, the department received grant money to facilitate the hiring of new officers, augmenting a build-up funded by the Dinkins-era "Safe Streets, Safe Cities" dedicated tax, as well as the redeployment of officers that had been tasked with clerical and administrative duties.[9]

New York's new approach to policing, which featured tactics like Stop, Question, and Frisk[10] and "flooding the zone"[11] was backed by a broader criminal justice system committed to taking (and keeping) a great many of those arrested and convicted of crimes off the street. That commitment is illustrated by the data on statewide incarcerations, which reflect a sharp upward trend in imprisonment beginning in 1980 and continuing through the year 2000 (see Figure 1, below), which was made possible by a major state prison expansion that started in the 1980s.

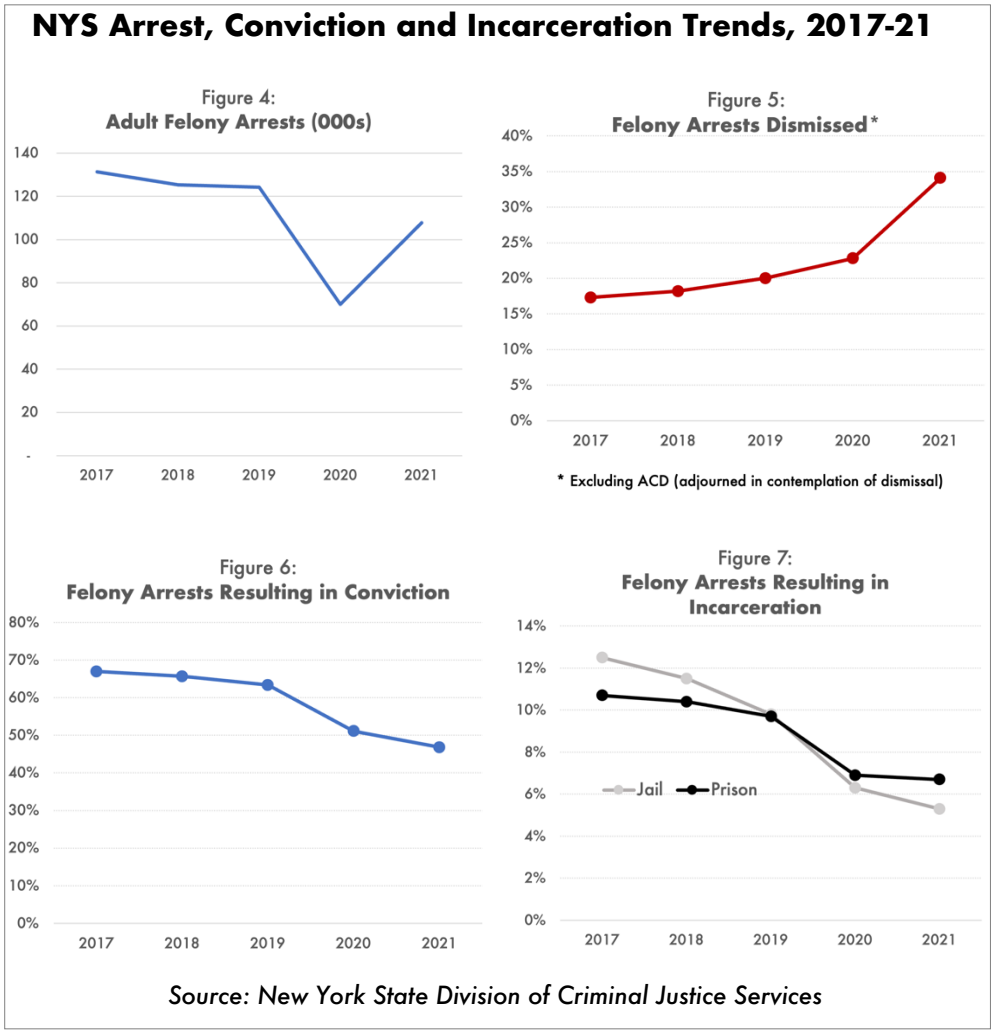
That uptick in incarceration was, perhaps not coincidentally, accompanied by sharp declines in violent crime from 1990 to 2000, as shown in Figures 2 and 3. The more recent increase in crime seems to be a predictable result of criminal justice "reforms" that undermined or even deliberately reversed the successful policies of the 1990s and early 2000s. Restoring public safety will require a reorientation of the criminal justice system around a public safety, rather than a reform-centric, mission. This worked in the past and can work again.





After back-to-back nationwide spikes in homicides in 2015[12] and 2016,[13] many parts of the country saw their public safety pictures deteriorate significantly. New York experienced smaller murder increases those years,[14] but the state (for a time) quickly recovered. Just 547 homicides were reported statewide in 2017 (a 40-year low)—including only 292 in New York City (an all-time low).[15]

Recent research suggests that the post-2010 decline in gun violence that took place in New York City may have been driven in significant part by enforcement efforts that targeted high-risk offenders with an eye toward securing their incapacitation, leading to fewer victimizations in some of the city's pockets of concentrated crime.[16] Despite that progress, however, New York City would see homicides rise every year from 2018 to 2021. Statewide, murders rose in 2015, 2016, 2018, and 2020. The state's 2020 homicide spike was 46.7 percent, which was identical to New York City's 2020 murder spike.[17] In 2020 and 2021, respectively, Buffalo saw 65 and 67 homicides—significantly more than the 46 homicides the city had averaged between 2015 and 2019.[18] Syracuse recorded its worst year for homicides in 2020,[19] a level repeated in 2021.[20] Albany also has experienced a homicide spike[21] since 2020, a year when shooting incidents in the state's capital city more than doubled.[22]

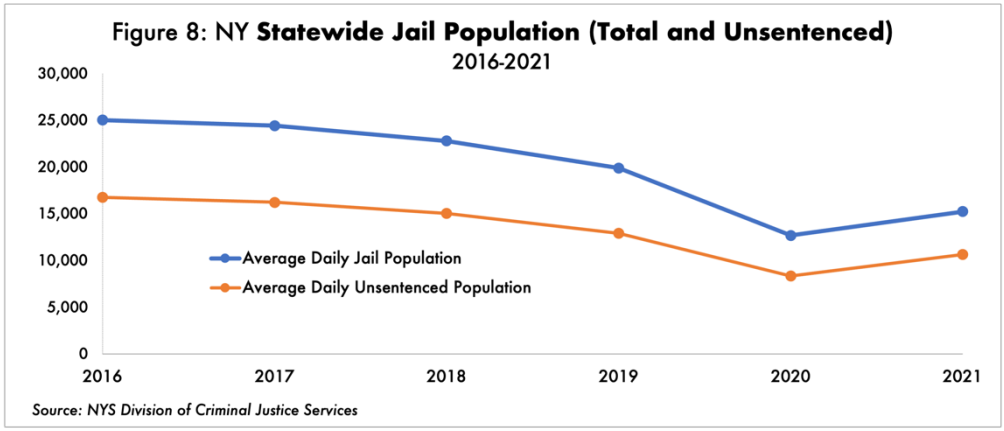


The sharp downward trendline in the state's violent crime and homicide rates illustrated by Figures 2 and 3 leveled off shortly after the turn of the century; and, in the case of the state's murder rate, the trendline began to turn upward in the second half of the decade.

The end of what had been a decades-long downward trend in violence was preceded by the start of a sustained downturn in the state's incarceration rate. After New York's violent crime numbers plummeted, the state began imprisoning fewer and fewer offenders after 2000. That trend toward decarceration—i.e., reducing the number of people imprisoned—has continued through the time of this writing, as shown in Figure 1.

New York's post-2000 prison decarceration trend followed a decrease in the number of arrests, as well as in the share of arrests resulting in convictions and incarcerations. The decreases seem to be driven in part by a recent upswing in the share of adult arrests resulting in dismissals depicted in Figure 5—to say nothing of the 2020 releases and diversions related to efforts to reduce the spread of Covid-19 in correctional facilities.[23]

The sustained decline in New York's prison population (persons serving at least one-year sentences for felonies) has been accompanied by a steady decline in the state's jail populations (persons detained while awaiting trial or serving lesser sentences). Total jail populations in the state have gone from a daily average of 25,000 in 2016 to just over 15,000 in 2021—bottoming out in 2020 at just over 12,600, as shown in Figure 8. As with crime statistics, this statewide decrease trend was driven primarily by trends in New York City.



Change of directions

As New York streets got safer, tolerance for aggressive (and effective) law-enforcement practices began to erode and calls for reforms aimed at addressing "mass incarceration" and "police brutality" grew louder. Those calls informed a movement that grew in strength in the 2010s in New York and throughout the nation in the wake of high-profile examples of the criminal justice system's excesses—such as the jailing and subsequent suicide of Kalief Browder[24] in New York—as well as cases of alleged police abuses.

After the murder of George Floyd by a Minneapolis police officer and ensuing riots in many cities in 2020, the national criminal justice and police reform movements went into overdrive. New York was no exception.

Following a surge in crime beginning in the 1960s, changes to criminal justice policies in New York during the final quarter of the 20th century almost uniformly signaled a tougher approach to crime. But the criminal justice "reforms" of the 2000s have run in the opposite direction—easing restrictions and penalties for those suspected and accused of crimes. Collectively and on their own, these more recent changes have undermined policing, prosecution, and public safety.

The bail rollback

In line with the national push among many criminal-justice reform advocates to cut the nation's incarceration rate (in jail and prison), a push to curtail cash bail with the hope of depopulating the Empire State's jails gained steam in the mid-2010s—particularly after Browder's tragic case came to represent the alleged injustices inherent in the state's pretrial detention policies.[25] Signed into law as a provision of state budget legislation[26] in April of 2019 and taking effect in January 2020, the new bail regime placed new limits on judicial options regarding the release of pretrial defendants.

The legislation drastically shrank the scope of criminal cases in which judges are allowed to require bail or remand defendants to pretrial detention.[27] It also placed limits on the conditions (such as electronic monitoring) that judges can impose on a defendant "who poses a risk of flight to avoid prosecution." In such cases, the law stipulated, "the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court." This language thus retained the state's longstanding prohibition on the judicial consideration of the public safety risk posed by a given defendant when making any decisions related to pretrial release.

New York's exceptionalism

New York State is the only state imposing a blanket ban on the judicial consideration of dangerousness in all aspects of the pretrial release decision-making process.[28] The law also requires judges to "explain … on the record or in writing" their rationale for imposing conditions on pre-trial release, effectively an added hurdle to pretextually imposing high bail amounts in order to secure a defendant's detention based on perceived risks.

For all intents and purposes, the 2019 changes to bail laws (despite modest amendments in 2020 and 2022[29] required release on recognizance for all defendants not deemed a flight risk. Bail is now limited to cases involving "qualifying offenses"—almost all of which are high-level felonies involving violence, the threat of violence, or sexual exploitation.

Those exceptions in themselves amount to a tacit admission that dangerousness ultimately does matter, reflecting a glaring incongruity between the law's plain language and how it is structured.

The impact

As illustrated by Figure 8 above, the primary impact of New York's bail reform was to reduce the jail population constituted by pretrial defendants. This shift could impact crime primarily through the erosion of two mechanisms through which public safety benefits can be secured: incapacitation and deterrence.

By allowing a larger share of accused criminal defendants to spend the pretrial period on the street, New Yorkers became more vulnerable to crimes committed by this population. Perhaps the most pertinent statistics to illustrate the bail reform's effect on crime via reduced incapacitation are those regarding the sharp upticks in shares of total arrests and violent felony arrests constituted by offenders with pending cases in the state's largest city.

In 2019, 19.5 percent of total arrests and 20.2 percent of violent felony arrests by the NYPD were of offenders with pending "open" cases. In 2020, those figures jumped to 24.4 percent and 25.1 percent, respectively—precisely what one would expect to see if pretrial release reform harmed public safety.[30]

While no analyses of New York's bail reform law have been done with an eye toward assessing the reform's impact on deterrence, a large body of research shows that immediacy is one of the most important determinants of a given sanction's deterrent effect.[31] Given that New York State's new bail law meant an arrest was much less likely to be accompanied by immediate financial consequences (or a trip to jail), the costs associated with certain criminal activity are likely now perceived to be lower by criminal actors, who, in turn, may be less likely to be deterred by the prospect of an arrest today than they would have been prior to the law's implementation.

Seeking to minimize the negative impact of the new law, advocates of minimizing bail often cite an Albany *Times Union* analysis of data released in January 2022 by the state Office of Court Administration and Division of Criminal Justice Services.[32] The main finding: between July 2020 and June 2021, "just two percent of released defendants were rearrested for a violent felony during the pretrial period."

But that report was flawed and misleading in three crucial respects.

First, the fact that a defendant was not rearrested does not in itself demonstrate that he or she did not commit a new crime, since most crimes are neither reported nor solved.

Second, the report focused on defendants rearrested for violent felonies, but did not count total rearrests of pretrial releasees. In particular, the data did not tabulate rearrests after a defendant's first rearrest. This would lead to an undercount of violent felonies committed by defendants who had already been rearrested on less serious charges while awaiting trial.

Third, the baseline denominator for the analysis was the total number of defendants released, rather than the subset who might have been detained or subject to more restrictive release standards based on a dangerousness standard.

One such subset is the population of defendants placed in supervised release programs—many of whom, under previous law, might have been detained based on an inability to make bail. In fact, a January 2022 analysis by *The City*, based on the same state data sources cited in the *Times Union* report, found that 41 percent

of supervised release program participants were rearrested, with 23 percent rearrested for a felony.[33]

The new discovery burden

In addition to changing bail laws, other provisions enacted in 2019 significantly elevated the compliance burden for prosecutors by expanding the information that must be shared with defense attorneys as part of the pre-trial discovery process, and compressing the time period in which this sharing must take place.[34] Key provisions of the new law require prosecutors to assemble and deliver to defense attorneys 21 types of materials, including:

- names and contact information of all those with information relating to the case, with limited exceptions for confidential informants, members of criminal enterprises, 911 callers, and victims or witnesses of certain sex offenses;
- all relevant electronic recordings (again with very limited exceptions), including body camera footage of responding officers (which prosecutors would first have to review and appropriately redact);
- information regarding any expert witnesses and their qualifications; and
- the results of any relevant scientific or physical tests, examinations, or reports completed by investigators.

New York's pre-2020 discovery rules only required that materials other than exculpatory evidence be turned over to defense counsel prior to trial—a relatively rare occurrence, given the rate at which criminal cases were disposed of via plea bargains. But under the new law, prosecutors must comply with these requirements within 20 days of arraignment for cases involving defendants detained pretrial, and within 35 days of arraignment for defendants who are released while awaiting trial. Significantly, plea bargains are not allowed until at least three days after discoverable materials have been turned over.

Failure on the part of the prosecution to fully comply with these new discovery burdens can be met with sanctions including a ban on presenting certain evidence, a mistrial, or even case dismissal (which, as shown in Figure 9, has become a more common occurrence since 2020). These new rules could force prosecutors to delay bringing certain cases, or to avoid pressing some charges in light of the additional information-gathering burden, which prosecutors were not given new funding to meet. District attorneys unable to do substantially more with less must simply do less.

Beyond putting more cases in jeopardy, and potentially leaving more offenders on the street, the new discovery provisions have left prosecutors unable to assure witnesses that their cooperation will remain a secret.[35]

Finally, complying with the new discovery rules has drastically increased the amount of time prosecutors must devote to menial "paper-chasing" tasks. This has led to widespread reports of what one New York district attorney called "a marked increase in attrition" among staff.[36]

Leniency for parolees

The "Less Is More: Community Supervision Revocation Reform Act," signed by Governor Hochul in September 2021, was a response to claims that minor "technical" violations of parole conditions were fueling "mass incarceration"[37] in New York. Specifically, that (1) when parolees commit a minor infraction of the conditions of their paroles—such as missing an appointment with a parole officer or failing a drug test—they are too often reincarcerated; and (2) those incarcerations are costly, unnecessary for public safety, and racially inequitable.

Evidence from other jurisdictions, including the federal system,[38] suggests why policymakers should have been more skeptical of such claims by illustrating that many violators who had their releases revoked (i.e., who were sent back to prison) had, in fact, racked up multiple "technical" infractions prior to revocation, were charged with new crimes that triggered the enforcement of a violation, or chose incarceration over an alternative such as drug treatment.[39]

Without seeking to carefully document advocates' claims, state lawmakers heeded calls for drastic changes to how parole conditions are enforced in New York.[40] The Less Is More Act made three particularly dramatic revisions to prior law. First, it drastically limited the availability of reincarceration as a sanction for "technical" violations. Second, it limited the state's ability to detain even those accused of both "technical" and criminal violations to only those cases in which (in the case of "technical" violators) the violators abscond or (in the case of criminal violators) are found by a judge to pose a risk of absconding—in essence, incorporating the same "least restrictive means" standard featured in bail law changes. Third, the Act raised the bar the state must clear to revoke a convicted criminal's parole.[41]

More risk

As with the state's bail reform, Less Is More risks the public's safety by increasing the population of offenders likely to commit new crimes on the street. This risk is illustrated by national data presented in a Bureau of Justice Statistics study of violent felons convicted in America's 75 largest counties between 1990-2002, which found that eight percent of the felons captured by the analysis were out on parole at the time of the violent felony offenses for which they were convicted.[42] In New York City, a 2011 analysis by the Center for Court Innovation found that 53 percent of parolees were rearrested at least once over a three-year period, and 42 percent were reconvicted.[43]

Further illustrating the public safety risk posed by this measure, data highlighted in a Manhattan Institute report show that parolees are more likely than defendants not on parole to be rearrested following a release without bail.[44] The same data also show that parolees were 1.7 times as likely as non-parolees to be rearrested for a violent felony.

The extent of the added risk created by Less Is More is highlighted by state data showing that, between September 2021 and October 2022, the number of technical parole violators in New York State jails on any given day decreased by more than 70 percent, or 500 parolees.[45]

Other challenges

While the changes to bail, discovery, and parole enforcement laws may have had the greatest impact on public safety, they are by no means the only "reforms" to have recently and systematically lowered the transaction costs of criminal conduct while raising the transaction costs of law enforcement.

The state "Raise The Age" law, passed in 2017, made it more difficult to charge certain teenage criminal offenders as adults, thereby making it less likely that even the most serious violent crimes will lead to lengthy terms of incarceration when committed by 16 and 17 year-olds. A recent study done by the New York City Criminal Justice Agency found significantly higher rates of rearrest for teenagers eligible for youthful offender treatment under the new law, compared to similarly situated defendants prior to the law going into effect.[46]

In 2009, the state revamped the so-called Rockefeller Drug Laws, lowering penalties for certain drug offenses and sharply increasing the rate of diversion for eligible defendants.[47]

And in 2020, Governor Cuomo signed into law a package of 10 bills affecting police practices, tactics, and conduct. Among other things, the package gave the state Attorney General the ability to prosecute officers in certain cases involving fatal uses of force, publicized police disciplinary records (including unsubstantiated allegations), and made the application of "chokeholds" by police a felony offense, punishable by up to 15 years in prison.[48]

But changes to state law don't tell the whole story, given that many cities within the state have enacted reforms of their own.

In New York City, there was a sharp curtailment of the police tactic known as "stop, question, and frisk," which research had linked to reduced offending in the city's pockets of concentrated crime.[49]

The City Council passed legislation mandating the ultimate closing of its jails on Rikers Island, as well as the creation of a new borough-based jail system with a maximum capacity of 3,300—40 percent below the already reduced average daily population in New York City jails in 2021.[50]

The Council has also approved a host of other local laws affecting police activity, including the Right to Know Act[51] (requiring officers to affirmatively apprise those they contact of their right to refuse consent to a search), a workaround to the legal defense of qualified immunity for police officers,[52] and the so-called "diaphragm bill," criminalizing the placement of pressure on the diaphragm, neck, back, or chest of a suspect being arrested by police.[53]

Coupled with the election of progressive prosecutors in Manhattan[54] and Brooklyn[55] who have explicitly oriented their office's policies toward decarceration, all of the reforms discussed above have either favored those who have committed or been accused of crimes or have disfavored those charged with enforcing the law.

MOVING FORWARD

Reestablishing order and safety on New York State streets will require decisive action on the following urgent priorities:

- **Make public safety the central concern of pretrial release decisions**.[56] This effort must begin by explicitly authorizing judges to remand defendants to pretrial detention on the basis of the risks those defendants pose to the public. Such determinations can and should be aided by a validated, algorithmic risk-assessment tool of the sort already in use in New York City to determine risk of flight. Next, judges should be given the discretion to revoke the releases and amend the release conditions of defendants rearrested while on pretrial release. This could be buttressed by the creation of a rebuttable presumption of pretrial detention for defendants with a history of reoffending while on pretrial release, as well as those accused of certain offenses. Finally, because the bail debate is largely a function of how long defendants stand to spend in pretrial detention, and the potential length of detention for those remanded pretrial is almost entirely a function of resources available to prosecutors, consideration should be given to a large-scale funding effort aimed explicitly at facilitating the more-speedy disposition of criminal cases in New York State.

- **Restore balance in criminal prosecutions.** District attorneys agree the new discovery rules for criminal cases went too far.[57] Among the more general changes that should be considered are:

    - limiting the materials that must be acquired and turned over prior to the setting of a trial date, while maintaining a requirement for the immediate disclosure of any exculpatory evidence the state has knowledge or possession of;
    - lifting or loosening the limits on plea bargaining prior to full compliance with current disclosure rules;
    - funding the hiring of more administrative staff to assist with compliance with discovery rules; and
    - expanding the timeframe for compliance.

- **Mitigate the unintended, if predictable, consequences of "Less Is More**."[58] As in the case of pretrial release decisions, judges in New York must be given the discretion to remand to detention any parolee accused of a violation found to pose a threat to public safety. A reform effort should focus on re-examining the evidentiary burdens with respect to parole violations and subsequent revocations, minimizing the trauma for victims of parolees charged with committing new crimes, and fortifying the ability of corrections officials to properly enforce parole violations.

In addition to these proposals aimed at specifically addressing the heightened risks created by changes to criminal procedure laws since 2019, the following general steps would help fortify New York against resurgent crime:

- Adopt a determinant sentencing regime for cases involving repeat offenders minimum sentences as felony prosecutions that lead to convictions mount;

- Revise the state's "Raise The Age" law to restore a presumption of prosecution as an adult in criminal court in cases involving 16 and 17-year-old offenders charged with certain gun-related and violent offenses, or with conduct engaged in as part of a criminal enterprise (i.e., gang); and

- Fund additional police hires and training programs with an eye toward attracting and retaining more highly educated recruits.

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3.
Rethinking K-12 Education —and Beyond

By Ray Domanico

New York State's system of public elementary and secondary schools is in steep decline, but it is salvageable. The roots of its problems pre-date the onset of the coronavirus pandemic in early 2020, but the system's response to that challenge accelerated discontent with the schools and harmed students. The damage of those years will not be undone if the state blindly continues to throw money at schools — unless there is a fundamental re-thinking of the purpose and governance of public education.

New York consistently leads the nation in K-12 school spending, yet by 50-state standards, student outcomes are mired in the middle. An $11 billion (55 percent) increase in annual state education aid over the last 10 years has failed to move the needle on student achievement. Meanwhile, during the same period, enrollment in the state's public-school districts has decreased by over 300,000 students, or 11.7 percent. (See *Organization of Education in New York State* below.)

If higher spending automatically led to higher quality, New York would be a model for the nation. Unfortunately, this model has demonstrably failed, and it is time for state leaders to fundamentally rethink their approach to education.

THE STATUS QUO

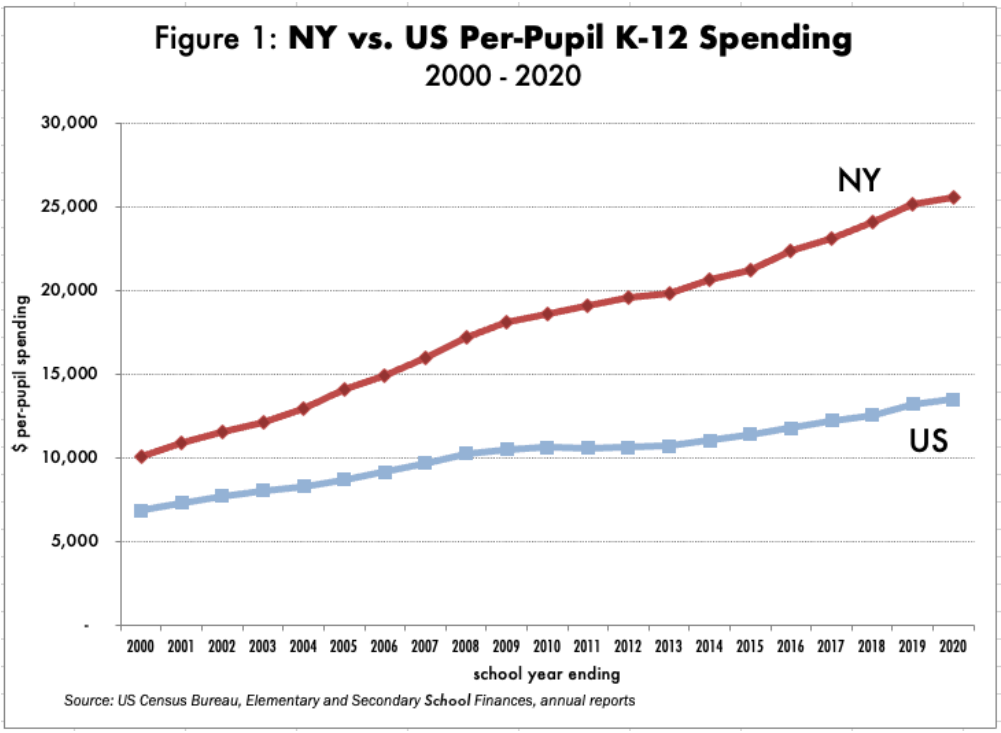
According to the latest U.S. Census data, New York's K-12 public school spending for 2019-20 came to $25,519 per pupil—89 percent more than the 50-state (plus D.C.) average of $13,494. New York State also continues to considerably outspend neighboring northeastern states: 23 percent more than New Jersey, 20 percent more than Connecticut and 36 percent more than Massachusetts. As reported by the Empire Center, even New York's poorest, least well-funded districts spend more per pupil than the national average.[1]

The education spending gap between New York and the national average has roughly doubled over the past 20 years, as illustrated by Figure 1 below. Noteworthy school spending benchmarks from the annual census data include:

- New York's spending on instructional salaries and benefits (commonly considered "money in the classroom") was $17,813 per pupil—more than double the national average of $8,176 and exceeding the *total* per-pupil school spending in all but six other states and the District of Columbia.
- In the category of "support services," which measures the bureaucratic overhead of central district and school building administration, New

York ranked sixth with spending of $7,213 per pupil. That was 50 percent above the national average—unsurprising, given New York's relatively large number of (roughly 700) independently administered local districts. However, if New York had spent the national average in the support category, it *still* would have ranked first in overall per-pupil spending among states.

- New York City's spending of $28,828 per pupil was by far the highest among the nation's 100 largest school systems.



Based on the state Education Department's own detailed database, which measures spending by somewhat different standards than the Census Bureau, a categorical breakdown of school finance trends over the past 20 years is presented in Table 1. Key trends emerging from state data for 1994-95 to 2019-20:

- Total public-school expenditures across the period more than tripled, from just under $25 billion to more than $75 billion.
- Fringe benefits, including teacher pension fund contributions and health insurance, were the fastest rising component of compensation—more than quadrupling from $4.2 billion to nearly $17 billion, while salaries rose at a still-healthy pace of 175 percent.
- Debt service also increased significantly, reflecting extensive state-subsidized capital investment in new and renovated school buildings.

All of the data, whether state or federal, point to the same conclusion: as outcome measures confirm, New Yorkers are not getting educational results commensurate with their significantly higher spending on schools.

Table 1. **Education Expenditures by Category, 1994-95 to 2019-2020**
(millions of dollars)

	1994-95	1999-00	2004-05	2009-10	2014-15	2019-20	Growth '95-'20
Teacher Salaries	9,791	12,326	15,474	19,062	19,548	21,838	123%
Pupil Personnel Services salaries	486	494	587	700	748	919	89%
Curriculum Development & Supervision	614	809	1,053	1,146	1,158	1,731	182%
BOCES Instructional Services	970	1,325	1,655	2,142	2,295	2,776	186%
Other Instructional Salaries	1,779	2,325	2,524	3,334	3,558	4,910	176%
Other Instructional Expenditures	1,041	1,905	2,843	3,847	5,137	8,256	693%
Community Service	49	55	67	104	95	120	145%
sub-total Instruction	14,730	19,239	24,203	30,335	32,539	40,550	175%
Board of Education	90	115	144	182	193	208	132%
Central Administration	478	570	749	896	895	1,223	156%
sub-total Board and Central	568	686	893	1,078	1,088	1,431	152%
Teacher Retirement	1,005	360	1,753	3,179	5,387	4,709	369%
Health Benefits	1,495	1,985	3,440	4,888	5,943	7,519	403%
Other Fringe Benefits	1,709	2,081	3,104	3,777	4,208	4,683	174%
sub-total Fringe	4,208	4,427	8,298	11,844	15,538	16,912	302%
Tuition Paid to Other School Districts	205	270	402	526	292	334	63%
Tuition, All Other	421	396	768	1,055	1,535	1,482	252%
Other (Including CharterSchools)	363	599	651	927	928	1,056	191%
sub-total Tuition	989	1,266	1,821	2,509	2,755	2,872	190%
Operations and Maintenance	1,862	2,348	2,923	3,511	3,738	4,531	143%
Transportation	1,261	1,573	2,126	2,785	3,018	3,209	154%
sub-total Operations and Transportation	3,123	3,922	5,048	6,297	6,756	7,740	148%
Debt Service Principal	580	818	1,355	1,931	2,405	3,631	526%
Debt Service Interest	536	854	1,021	1,241	1,061	1,809	237%
sub-total Debt Service	1,116	1,673	2,376	3,172	3,466	5,440	387%
Other (Includes Intra-fund Transfers)	123	384	187	321	474	721	486%
Total Expenditures	$24,857	$31,594	$42,826	$55,555	$62,616	$75,665	204%

Source: New York State Education Department Fiscal Profiles

Steps forward and backward

Elementary and secondary education policy trends in New York over the past quarter-century have mixed effective, forward-looking reforms with some degradation of standards in the established system. On the reform side of the ledger, the outstanding educational policy achievement was the 1998 law[2] making New York the 34th state to expand its definition of "public schools" to include independently operated charter schools. The opening section of the charter school law set forth its purposes in clear, compelling terms:

> (a) Improve student learning and achievement;
> (b) Increase learning opportunities for all students, with special emphasis on expanded learning experiences for students who are at-risk of academic failure;
> (c) Encourage the use of different and innovative teaching methods;
> (d) Create new professional opportunities for teachers, school administrators and other school personnel;
> (e) Provide parents and students with expanded choices in the types of educational opportunities that are available within the public school system; and
> (f) Provide schools with a method to change from rule-based to performance-based accountability systems by holding the schools established under this article accountable for meeting measurable student achievement results.[3]

Simply adapting the law to New York's established educational governance structure in 1998 would have left the issuance and regulation of charters to the Board of Regents (which is selected entirely by the Legislature) and to local school boards, which would have had strong political and financial incentives to minimize the competition. Crucially, however, the law's designated charter-authorizing entities also included the State University of New York (SUNY), which is controlled by appointees of the governor—who, from 1998 through 2006, was the chief proponent of charter schools, George Pataki.

As of August 2022, according to data posted with the state Education Department 's Charter School Directory,[4] there were 360 charter schools serving more than 150,000 students in New York State, the majority (287, serving 142,500 students) in New York City, and the rest mainly in other large cities and older inner suburbs. More than 60 percent of charter schools were authorized by SUNY. Charter schools are financed through the state's funding formula, which sets charter tuition by dividing district's Approved Operating Expenditures by Total Allowable Pupil Units. By any standard, charters spend less per-pupil than standard public schools.

As detailed below, charter schools have produced better outcomes than traditional public schools. Parental demand for more charters has remained high, especially in New York City, where charter enrollment expanded during the pandemic even as enrollment in the main public system was declining. As of 2020-21, the waiting list for charter school seats in New York City was estimated at 50,000. However, the total number of charters in the city has reached its maximum limit allowable by state law. Proposals to raise the cap have been strongly opposed by the United Federation of Teachers (UFT) and allied groups, which have backed proposed legislation that would make the Board of Regents the sole charter authorizer.

Mayoral control

A few years after passage of the charter school law, another major positive education reform came in New York City. Through 2001, the city's vast centralized school system—by far the largest in the country—had been run by an independently elected Board of Education, which appointed the system's chancellor. In 2002, the state Legislature changed the law to shift control of the system to the city's mayor—then Michael Bloomberg, who had made the change one of his top priorities upon taking office that year.

The results were dramatic. Achievement on state tests improved in the city from 2002 through 2019, the last pre-COVID year of testing, pushing the city's levels above the state average for the first time in memory.

The city's high-school graduation rate, which had been stuck at 50 percent since the early 1980s, rose dramatically during Mayor Michael Bloomberg's tenure (2002-13) years and kept rising under Mayor Bill de Blasio, reaching 77 percent by 2019.

For the first 12 years of mayoral control, Mayor Bloomberg and his schools chancellors, Joel Klein and Dennis Walcott, engineered a complete overhaul of the city's public high schools. They streamlined the central bureaucracy, largely

eliminated the power of the many corrupt local school boards and ushered in a well-functioning system based on local control, innovation and accountability. Those changes would have been impossible under the old Board of Education, where powerful interest groups controlled the purse, and parents and students had no voice.

Bloomberg's team took the extraordinary step of closing many schools for low performance, replacing them with both teacher/community-designed district schools and public charter schools. Overall, Bloomberg's team did much to increase the supply of good schools in all communities in the city, offering city parents extensive choice within the district and charter school sectors.

The high-water mark of choice-focused education reform efforts in New York came in 2014, when then-Governor Cuomo initially endorsed and promised to push for passage of a bill establishing state tax credits for contributions to private school scholarship funds, as well as "public education entities."[5] Over a three-year phase-in period, the credits would have totaled $300 million annually and were projected to incentivize another $333 million in contributions to eligible education and scholarship funds. Those were and are exceedingly modest amounts by New York public education standards, but potentially represented enough funding to significantly boost the ability of non-public schools to offer educational choice to families of modest means.

Despite including public school support funds among eligible recipients, the tax credit proposal was strongly opposed by teachers' unions and allied interest groups. When then-Assembly Speaker Sheldon Silver threatened to hold up a FY 2015 budget deal rather than pass the tax credits, Governor Cuomo backed away from his support for the proposal, which has gone nowhere since.

Retrograde reset for New York City

Twenty years after the historic shift to mayoral control of the New York City schools, the Legislature moved to undermine that reform in two crucial respects. In Spring 2022, the State Legislature unwisely chose to tinker with Mayoral Control of New York City's schools, despite the success that had occurred in the system since 2002.

Faced with some constituents wary of mayoral control, lawmakers have created a mishmash that will bring only paralysis to a system that badly needs strong leadership. Fortunately, their destructive changes were delayed by a year, giving the Governor and Legislature time to reconsider and rescind or amend the changes. If the legislative program goes forward, Mayor Adams and Chancellor Banks will have to deal with a 23-member Panel for Educational Policy, even as they keep their eyes on the Legislature itself, from which they will need to secure an extension of mayoral control by 2024.

Moreover, the Legislature places an elected official, the city comptroller, on the panel as a nonvoting member. The comptroller has a large staff and incumbent Brad Lander may be inclined to organize opposition to mayoral initiatives. Yet Adams was elected by the people to control the school system; Lander wasn't.

Finally, the Legislature recently mandated lower class sizes in New York City over the next five years. If this policy is enforced, it will prove incredibly expensive

and needlessly hamstring school administration when flexibility is crucial, particularly at a time when the city is losing enrollment across the board and dramatically in some individual schools.

Assessing educational outcomes

As the reform momentum of the 1990s and 2000s faded in New York, decline has more commonly been the theme of major trends in the state's traditional public school system. While the state has been leading the nation in spending, overall achievement levels New York students have remained mired at the national average for the past 20 years. This is true for the state's students as a whole and for those from lower-income families, whose needs are often used as the rationale for greater spending.

Because the state has made changes to its English Language Arts (ELA) and mathematics tests, effectively moving the goalposts on any attempt to compare trends over time, the most consistent measure of pupil performance over the past 20 years has been scores on the National Assessment of Education Progress (NAEP) tests, which are administered every other year in every state to representative samples of students in grades 4 and 8.[6] As shown in the Exhibit charts below, the NAEP results in a national context don't come close to aligning with New York's much higher spending. The NAEP results point to the inescapable conclusion that higher spending on education in New York State has not moved the needle on overall student achievement. But this cannot be blamed on COVID lockdowns; it was as true in 2019 as in 2022.

The story is about the same when NAEP score comparisons are limited to students from lower-income families. In grade 4 reading, the 2022 performance of low-income students in New York was statistically the same as in 2002, no different from the national average. On each test between 2002 and 2013, New York's poorer students in grade 4 did better than the national average for poor students nationwide—but that has not been true in recent years. The same is true for the grade 8 reading test, with New York's lower income children scoring above their peers nationally between 2005 and 2011, but then losing that advantage in more recent tests.

In grade 4 mathematics, New York's low-income students scored below their peers nationally in 2019 and 2022, after scoring above average from 2003 to 2009, and at the national average in all other years. In grade 8 mathematics, New York's low-income students matched the national average for peers in each of the last three years, after scoring above the average for their peers in 2003-2009 and 2015.

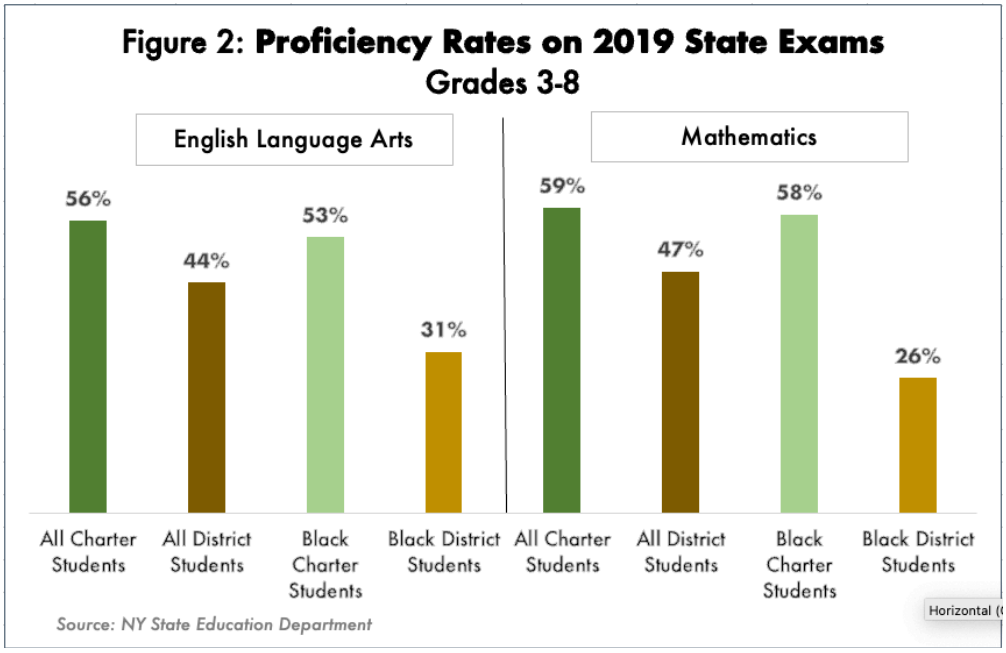
The charter school outcome edge

As shown in Figure 2, however, a bright spot on the achievement landscape in New York has been the performance of charter schools. On the most recent administration of the state's annual exams in grades 3 through 8 in English Language Arts, students in charter schools outperform those in district-run schools by about 12 percentage points.

Exhibit: **Average NAEP Scores, New York vs. National**

*-denotes statistically significant difference from U.S.

- In grade 4 Reading, New York's average score in 2019 was statistically unchanged from 2002, indicating no improvement. The national average during the same period was a statistically significant increase of one point. In 2022, after pandemic shutdowns, the state's scores declined to a statistically significant eight points below the 2002 level, while scores nationally were unchanged from 2002.
- In grade 8 Reading, New York scores improved to significantly above average in 2003, 2005 and 2007, but by 2022 were statistically unchanged from 2002.
- In grade 4 Mathematics, the relative performance of New York pupils has worsened in the post-pandemic period, plunging 10 points from 2019 to 2022, to a level nine points lower than in 2003. By comparison, during the same period, the nation's scores dropped by four points, to a level statistically unchanged from 2003.
- In grade 8 Mathematics, New York scores essentially equaled the national average, after fluctuating in a narrow range in tests administered between 2003, when it was above average. Both the state and the nation lost ground from 2019 to 2022, ending up at a significantly lower point than in 2003.



Charter schools manage to stack up well against state average results for all school districts—rich and poor—even though charters are typically found in lower income communities. Considered as if a separate district, New York City's largest charter school network, Success Academies, would be the highest-scoring district in the state.

As also shown in Figure 2, the charter school advantage is even more dramatic for black students, who outperform the ELA and Mathematics scores of black students in traditional district schools by 21 points and 31 points, respectively. More than 31 percent of black students in charter schools score at the highest level (Level 4) on the mathematics test—higher than the 26 percent share of black students attaining scores in Levels 3 and 4 *combined* in traditional public schools.

The misguided college-for-all push

In the mid- to late-1990s, the state began phasing in a requirement that all students must take and pass five Regents exams as a minimum requirement for a high school diploma. The exams had been in place since the late 19th century, intended for the subset of students who were deemed able to pursue a college-preparatory track in high school. Other students were placed on a "general" or vocational track and were awarded a local diploma after successfully completing their course of study and passing a single minimum-competency test.

The introduction of the Regents exam graduation requirement for all students paralleled a wave of national school reform efforts that culminated with passage of the federal No Child Left Behind Act of 2001,[7] which was aimed at promoting the broad standards of greater accountability, higher standards, and expanded choice for parents of children in failing schools.[8] To comply with that law's stepped-up assessment mandate as a condition for federal aid to states, New York

State in 2006 began administering annual English Language Arts (ELA) and Math tests in Grades 3 through 8.[9]

In 2010, the Board of Regents adopted the multi-state Common Core Standards Initiative, which effectively measured all students against a college-readiness standard. Within a few years, the combination of stepped-up annual testing in elementary grades and controversial Common Core standards had prompted a mini-rebellion among New York parents, who began to exercise their right to withhold their children from taking part in assessments. This "opt-out" movement was particularly strong in suburban and upstate districts, while rates of withdrawal from testing were lower in New York City, other large cities, and in charter schools.[10] By 2016, the opt-out rate had reached 22 percent (including 51 percent of white students, according to one study). It declined to 16 percent by 2019, still a fairly strong indicator of parental discontent even before the onset of the COVID-related school closures.

Prior to the pandemic, the Board of Regents announced it would begin considering changes to high school graduation standards. Such a review is clearly necessary: as of 2019, thanks to the increasingly college-focused emphasis of the preceding two decades, only six percent of all students had completed one of five approved multiple pathways in fulfillment of the high school graduation requirement, including career and technical education.

The state's community college systems, contained within the State University of New York and City University of New York systems, reflect this over-emphasis on academics over preparation for the workforce. Both systems have low graduation rates, and both have few students enrolled in the types of certificate programs being used in other states to quickly prepare students for jobs in the current labor market. As Tamar Jacoby of Opportunity America found in a recent study of community colleges and workforce preparation:

> At community colleges nationwide, the mix of programs skews slightly in favor of job-focused instruction. Students preparing for the world of work account for 54 percent of enrollments; those studying traditional academic subjects account for 46 percent. In New York State, the ratio is reversed: 55 percent academic education to 45 percent vocational programs. [11]

Given recent policies, there are grounds for concern that the Regents' review of graduation requirements will result in generally lower standards rather than a mix of more realistic goals for students.

For example, the state Education Department suspended the use of Regents exams at the end of the 2020 and 2021 school years and continued the suspension of some exams in 2022 as well. In September 2022, the department extended a policy allowing students who scored below the traditional passing score of 65 on a Regent's exam to appeal the grading if they scored a minimum of 50 on that test. This followed years of evidence that the test themselves had been "dumbed down" to maximize the number of passing students. Requiring all students to take examinations that were once only required of college-bound students, and then creating loopholes for students to earn credit for lesser scores, has served only to breed further mistrust in the system.

MOVING FORWARD

The State's approach to education over recent decades has been to steadily increase spending while nominally raising standards. That approach has failed to deliver on its promises of higher achievement and greater equality of outcomes. Meanwhile, New York's public school system has been experiencing steep enrollment declines.

Local decisions to keep schools closed to live instruction over the past two years have eroded the trust between families and schools that is so necessary for success. The situation cries out for strong gubernatorial and legislative leadership to rethink educational policy in the state. The guiding principle should be to earn and maintain the trust of families who are their children's first educators. Mandates from Albany, and the passing on of mandates from Washington must be curbed in favor of local, democratic governance of school districts and expanded choice for parents outside the school district system.

Families differ in what they expect of schooling. Some fully expect their children to attend and succeed in college. Others see their child's future in the trades or other forms of work. Some believe that the primary goal of education should be to prepare children for economic success in life. Others believe that the purpose of schooling is to mold adults of strong moral character and emotional well-being, particularly when it conforms to their own beliefs, religious or otherwise.

State officials should not respond to all of these legitimate beliefs about the purpose of education with a top-down, one-size fits all approach. Rather, they should embrace the concept of educational pluralism, reflecting the pluralistic nature of the state's population. There are five broad areas in which the governor, in particular, can lead a change in approach to education:

- **Expand school choice.** The cap on new charter schools in New York City should be abolished. In addition, the state should respect parental choices and acknowledge the value that many parents hold for religious education. In implementing the Board of Regents' latest regulations on "substantial equivalency" in private and religious schools, local school districts should tread lightly and only intervene in the extreme cases of educational neglect. In addition to reviving the Educational Investment Incentives Credit, the state should enact a program diverting a portion of local school aid to Education Savings Accounts for parents and guardians who choose to withdraw their children from state-funded public or charter schools in favor of private schools. Funds in the savings account could be used to pay private school tuition or supplementary education services such as private tutoring or online learning.[12]

- **Rein in spending.** State aid increases have served mainly to subsidize generous teacher salaries and costly fringe benefits, as reflected by long-term spending trends. Going forward, however, unrestricted Foundation Aid to local districts should be strictly linked to enrollment, with no mandatory minimum increases for districts with declining pupil counts. A portion of

funding should instead support innovations such as Educational Savings Accounts and incentive credits, which could save the state and local school districts between $158 and $301 million per year.[13]

- **Align graduation and proficiency standards with real-world needs and expectations.** The Regents should back away from its exclusive college-readiness goal and re-establish high school curriculum and assessment tracks oriented toward preparation for entry to the workforce, creative arts, or any number of other valid outcomes of high school.

- **Expand community college trade and workforce preparation programs.** Too few students entering the state's community college emerge with a two-year degree. More than half do not even return to school for their second year. While the ability to begin work towards a bachelor's degree in community college should be maintained, that approach works for too few. SUNY and CUNY community colleges need to embrace a new approach and ramp-up short-term certificate programs aligned with industry standards in various fields and create more associate degree programs also aligned to industry standards. These efforts must be planned and developed with the full participation of industry and labor leaders.

- **Reform educational governance to build accountability.** Nineteen of the 20 executive branch departments of New York State government are run by gubernatorial appointees. The exception is the State Education Department, whose commissioner and staff are answerable solely to the Board of Regents, constitutionally designated as New York's pre-eminent educational policy-making and professional credentialing body. Under current law, the board consists of 17 members serving five-year terms—one representing each of the state's judicial districts, and four selected an at-large basis—all appointed by concurrent resolution of the Legislature. While the governor plays a lead role in shaping the finances of the education system through the Executive Budget, legislative control of Regents appointments unduly limits the education policy input of New York's elected chief executive. This can be remedied by amending Education Law to require the Legislature to select all four at-large Regents solely from lists of nominees advanced by the governor, and to require that the Regents elect their chancellor from the at-large group.[14]

Governance reform is needed at the local level as well. In districts outside the state's five largest cities, the odd timing of school board elections and budget votes limits voter turn-out and makes it easier for organized local interest groups, particularly teachers' unions, to dominate the process. Shifting these votes to November (while keeping board elections nonpartisan) would serve to increase turnout and broaden the base of local groups involved in the process. Further, the State Education Department and Board of Regents should promulgate guidance on the true purpose of school boards, which is to mediate discussion between the larger community and the local school system's leadership on policy matters.

APPENDIX

The Structure of Schooling in New York State

New York's education sector is large and diverse. In the most recent year, 2021-22, over 2.8 million students attended one of 6,520 district, charter, and private religious schools in the state.

Table A-1: **Organization of New York State K-12 Education, 2021-22**

	New York City		*Rest of New York State*		*Statewide Total*	
	Schools	Students	Schools	Students	Schools	Students
District*	1,582	819,488	2,824	1,457,845	4,406	2,277,333
Charter	271	139,520	59	33,185	330	172,705
Private & Religious	833	220,991	951	162,308	1,784	383,299
Total	2,686	1,179,999	3,834	1,653,338	6,520	2,833,337

*There are a total of 686 school districts statewide—including New York City, a single central district with 32 geographic sub-districts whose local boards have limited authority under the mayoral control system.

Source: New York State Education Department, 2021-22 enrollment files

Outside of New York City, the average school district includes 6.4 schools, with average enrollment of 517 students per school and total enrollment of 3,320 students. In all but the largest cities, public school districts cover parts of multiple municipalities and have a separate tax base and tax-collection calendar. These mostly suburban and urban districts are very local in nature, each with their own elected school board and budget levies subject to local votes.

The cities of Buffalo, Rochester, Syracuse, and Yonkers are governed by separate school boards but funded out of municipal budgets, without separate budget votes or tax levies. New York City is the outlier, with a single district and a 15-member school board, known as the Panel for Education Quality, whose majority is controlled by eight mayoral appointees. Its budget is set through negotiations between the Mayor and City Council.

Between 2012-13 and 2021-22, New York State's school enrollment across all sectors decreased by 200,931 students, or 6.5 percent, as detailed in Table 4 below. A loss of 301,678 students in district schools (-11.7 percent) was partially offset by growth in the charter school sector, which gained 95,379 students in those years—a 10-year growth rate of 122 percent. Private and religious schools lost 30,404 students, a drop of 7.3 percent. The smallest sector—home schooling—was also the fastest growing. The number of home-schooled children nearly tripled, from 18,642 in 2012-13 to 54,414 by 2021-2122, with most of that increase starting after the pandemic.

These enrollment trends have changed the mix of schooling in the state, as traditional district-run public schools now enroll 78.8 percent of all K-12 students, down from 83.5 percent ten years ago. Charter school enrollment has increased rapidly, to six percent of all students. Charter growth has been much more rapid in New York City than in the rest of the state; 11.8 percent of the city's students now attend charter schools, though the creation of new charter schools in the city is currently halted under a state-imposed cap on the number of such schools in the city.

State-wide enrollment in private and religious schools has remained constant at 13.3 percent of all students, but the percentage of home-schooled students has more than doubled since 2018-19, to 1.9 percent of all students. New York City has a higher percentage of students in private and religious schools, 18.7 percent, and 47 percent of those students are in the growing Jewish school sector.

Table A-2: **New York K-12 School Enrollment by Sector**

School Years 2012-13 to 2021-22

	District schools		*Charter schools*		*Private / Religious*		*Home School*		
	total	*share*	*total*	*share*	*total*	*share*	*total*	*share*	**TOTAL**
2012-13	2,579,011	83.5%	77,956	2.5%	413,703	13.4%	18,642	0.6%	**3,089,313**
2013-14	2,560,356	83.0%	91,927	3.0%	411,391	13.3%	19,567	0.6%	**3,083,242**
2014-15	2,542,687	82.4%	106,352	3.4%	412,443	13.4%	24,329	0.8%	**3,085,812**
2015-16	2,522,632	82.0%	117,617	3.8%	410,451	13.3%	23,875	0.8%	**3,074,576**
2016-17	2,501,186	81.7%	128,784	4.2%	407,091	13.3%	25,323	0.8%	**3,062,385**
2017-18	2,483,316	81.4%	139,563	4.6%	401,799	13.2%	25,541	0.8%	**3,050,220**
2018-19	2,451,499	81.1%	147,422	4.9%	398,228	13.2%	26,805	0.9%	**3,023,955**
2019-20	2,421,858	80.6%	159,211	5.3%	390,734	13.0%	33,013	1.1%	**3,004,817**
2020-21	2,342,473	79.5%	170,500	5.8%	381,660	13.0%	52,052	1.8%	**2,946,686**
2021-22	2,277,333	78.8%	173,335	6.0%	383,299	13.3%	54,414	1.9%	**2,888,382**

Source: New York State Education Department

ENDNOTES

[1] Ken Girardin, "NY's stratospheric school spending," Empire Center report, July 26, 2017. https://www.empirecenter.org/publications/nys-stratospheric-school-spending/
[2] Article 56 of state Education Law.
[3] Ibid.
[4] http://www.nysed.gov/charter-schools/charter-schools-directory
[5] The Education Investment Incentives Act, S. 6808 of 2013-14.
[6] Because NAEP is based on a sample of students, its estimate of a state's average score contains a margin of error. Fortunately, the NAEP data site allows one to test the statistical significance of the differences in average scores across jurisdictions or years. An observed difference is interpreted as no difference if it is within the standard error of the estimates.
[7] P.L. 107-110, 20 U.S.C. § 6319 (2002)
[8] The NLCB was replaced in 2015 by the federal Every Student Succeeds Act, which reduced assessment mandates on states, but New York did not change its testing program.
[9] Prior to 2006, ELA and Math tests had been administered only in 4th and 8th grades.
[10] A more detailed description of the school reform efforts and parental pushback is found in "New York's Parents are Exercising Their School Options". R. Domanico, Manhattan Institute for Policy Research, June 2022.
[11] "Training Tomorrow's Workers: Next Steps for New York's Community Colleges" T. Jacoby, Manhattan Institute for Policy Research", March 2022.
[12] For a fuller description of ESAs, see: "Educational Savings Accounts: How ESAs can promote Educational Freedom for New York's Families and Improve State and Local Finances" M. Lueken, Manhattan Institute for Policy Research, October 2021.
[13] See Lueken.
[14] This could be accomplished within the next gubernatorial term, since the current terms of all four at-large Board of Regents members, including Chancellor Lester Young, expire by 2025.

4.
Medicaid and Health Care

By Bill Hammond

New York State's Medicaid program has ballooned to an unprecedented scale over the past decade—and so, too, has its long-standing dysfunction.

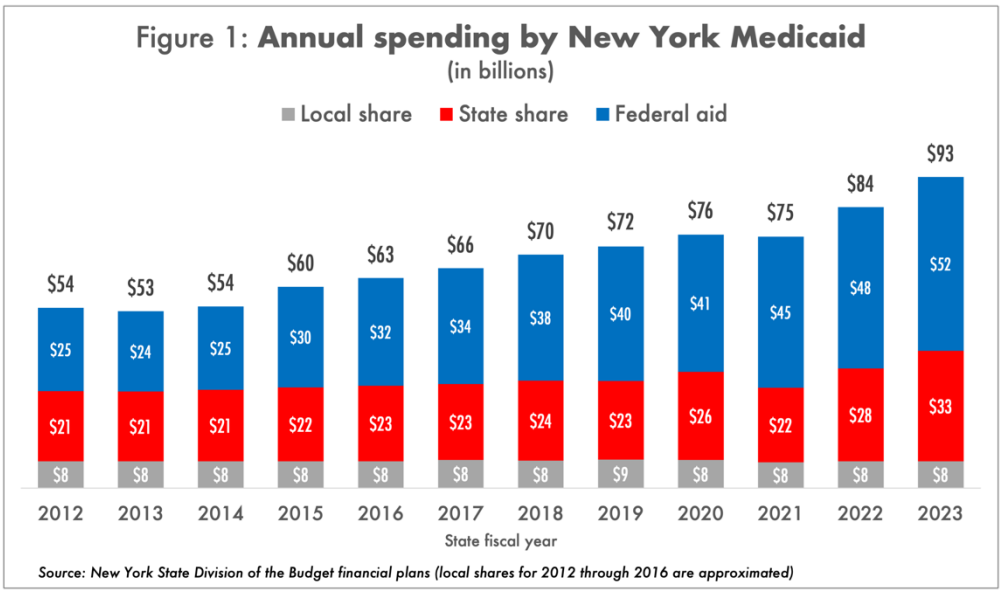
Enrollment has surged to cover more than a third of the state's population and almost half of New York City's. Its budget has soared to more than $90 billion, a 76 percent increase in 10 years, as shown in Figure 1.

Much of this growth occurred before the coronavirus pandemic, a period when unemployment was generally low and poverty was declining. In effect, the state stretched what was meant to be a safety net for the poor and disabled to cover people further up the income scale, many of whom were able-bodied and gainfully employed. As of 2019, in fact, New Yorkers above the federal poverty level accounted for more than half of Medicaid enrollment.[1]

The program's broadening scope has magnified the effects of its pre-existing structural flaws. Its practice of paying substandard fees now compromises access and care quality for millions more of the state's residents. Its vulnerability to inept management, fraud and political manipulation puts billions more of the public's money at risk.

Medicaid's massive growth has introduced a new danger of mission creep. The burgeoning cohort of non-poor and non-disabled recipients are now competing in Albany for Medicaid's money and attention. That will inevitably distract from care for the needier individuals, who ought to be top priority.

The growing challenge of running Medicaid is also a distraction from the Health Department's other duties, such as inspecting hospitals and nursing



homes, regulating the quality of drinking water and monitoring the spread of infectious diseases. As the department's Medicaid-related staffing climbed over the past decade, the number of personnel devoted to public health functions shrank[2]—which helps to explain why the state was so ill-prepared for the coronavirus pandemic *(see Figure 2)*.

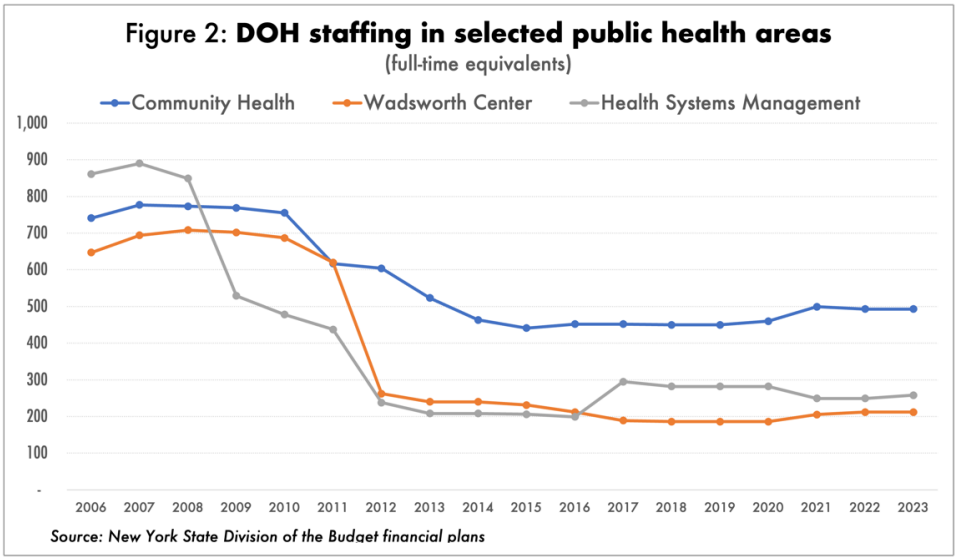
Meanwhile, the state contributes to the demand for government-funded health coverage through heavy regulation and taxation that drive up New York's commercial premiums, which are the highest in the continental U.S.[3] Especially counterproductive is New York's practice of financing Medicaid in part through billions in surcharges on commercial health plans—an approach that exacerbates the problem it's meant to solve.

In a better-balanced health-care system, the state would repeal its insurance taxes, roll back regulations and otherwise work to make basic medical coverage as affordable and accessible as possible. More New Yorkers would be enrolled in commercial insurance that pays market-based fees, improving the bottom lines of providers who treat them.

As Medicaid gets smaller—and refocuses on its neediest recipients—the state could reinvest a portion of its savings to pay more competitive fees, boosting reimbursement for safety-net caregivers. The Health Department could devote more resources to public health functions, and the program's overall pressure on state finances and taxpayers would be relieved.

Beyond Medicaid, other aspects of the state's oversight of health care need attention:

- The state's pandemic defenses—whose critical weaknesses were exposed by COVID-19—should be repaired and strengthened based on a thorough study of recent events. Although Governor Hochul has announced the hiring of a consultant for an after-review, that task would be better assigned to a special commission of independent healthcare and health policy experts insulated from political interference.



- The average rankings of New York's hospitals consistently fall near the bottom of major quality report cards.[4] The Health Department should be studying why this happens and pushing the industry to do better–by gathering and publishing data on hospital performance and identifying and promoting best practices.

- The state's "certificate of need" law—which regulates the creation or expansion of hospitals, nursing homes, clinics, and other health-care facilities—is one of the most restrictive in the U.S.[5] This process inhibits marketplace competition that can broaden consumer choice, control cost, and encourage better quality of care.

THE STATUS QUO

The governor administratively oversees a Medicaid system that has grown dramatically over the past decade, both in size and cost, on top of what were already high levels relative to other states. Since 2012, enrollment has risen 49 percent to 7.3 million—about half of that during the pandemic—and spending has increased 76 percent to $93 billion.[6]

Other states' Medicaid programs were also expanding rapidly during this period, as President Obama's Affordable Care Act gave them an incentive to adopt broader eligibility standards, similar to what New York had been using before the ACA's passage. Yet New York remained at the top in terms of spending, with per-capita Medicaid expenditures 69 percent above the national average and 9 percent higher than the No. 2 state, New Mexico.[7]

New York's No. 1 status is not readily explained by demographic or economic factors. Among the 50 states, it ranks 19th for poverty,[8] 25th for median age[9] and 37th for the share of its population with a disability.[10]

In fact, New York's poverty rate was declining as enrollment surged, leading to a profound shift in the program's makeup: As of 2019 half or more of its enrollees were living above the poverty level.[11] What began as a "safety net" health plan for the indigent and disabled has evolved into an increasingly mainstream form of insurance for people who are able-bodied and employed.

Compounding this trend is the federal government's "continuous enrollment" policy during the pandemic, which has required states to keep people on their Medicaid rolls regardless of changes in employment or income. Before COVID, New York's enrollment was hovering around 6 million or 30 percent of the state's population. As of July 2022, those figures had surged to 7.6 million and 37 percent.[12]

When the federal emergency ends—which is expected in 2023—officials in New York and other states face the challenge of conducting millions of backlogged eligibility reviews even as they handle routine enrollments and dis-enrollments, a process that could take a year or more.

Unusually expansive enrollment is not the only driver of the New York's high Medicaid spending. It also spends more on a per-enrollee basis than all but five other states. This is due in part to relatively generous benefits, including exceptionally high and rapidly rising expenditures on personal assistance—which

provides non-medical support, such as help with bathing, eating, and housekeeping, to disabled enrollees in their homes.

"Dishing" out supplemental money

Another stand-out feature of New York's Medicaid program is heavy use of supplemental funds that are distributed to providers as grants rather than compensation for care. Much of this money flows through Medicaid's Disproportionate Share Hospital program, or DSH, which was originally designed to compensate facilities that treated a disproportionate number of Medicaid patients. Because allocations to states have been effectively frozen since 1992, and because Albany officials had aggressively exploited the program earlier in its history, New York receives more DSH funding that any other state—almost $2 billion a year, or $3.9 billion with state and local matching money included. That $2 billion is 15 percent of the federal total, when New York has six percent of the nation's population.[13]

Need-based—or not

As with the federal allocations to states, the state's distribution to hospitals is not consistently related to need. Nominally, the state distributes about half of this money based on the amount of "charity care" hospitals provide to uninsured, indigent patients. However, the formula caps how much each facility's grant can change from year to year, resulting in significant distortions. Some hospitals providing relatively little charity care receive disproportionately large grants, while some of the true safety-net hospitals are short-changed.

The fraud issue

Fraud is a chronic problem in New York's Medicaid program. The true cost of fraud is inherently hard to measure, but it has likely grown along with its overall size and budget. Despite this risk, New York's anti-fraud efforts in some areas have been relatively weak. From 2012 to 2015, for example, the state's Medicaid Fraud Control Unit conducted only 21 investigations of personal care fraud—0.3 percent of the national total—even though New York accounted for a third or more of Medicaid spending on that benefit.[14]

Meanwhile, state lawmakers are debating a measure that would weaken enforcement by the Office of the Medicaid Inspector General by restricting how much restitution it can require from providers based on auditing a sample of claims.[15]

Despite heavy spending, the coverage provided by Medicaid is substandard. Based on the Empire Center's analysis of New York hospital data from 2015, Medicaid paid rates that averaged five percent lower than Medicare and 43 percent lower than commercial insurance.[16] Providers that treat large numbers of Medicaid patients typically have less money to pay staff, buy equipment or maintain facilities, which tends to undermine their quality of care and threaten their financial viability.

The reimbursement disparity compromises access to care. A study of medical records from 2014 to 2017 found that only 63 percent of New York's physicians were accepting new Medicaid patients, the fifth-lowest rate in the U.S.[17]

The role of Obamacare

Medicaid's transformation from narrow safety-net to a broad catch-all insurance program—and the resulting spike in enrollment and spending—was largely a byproduct of the Affordable Care Act, President Obama's signature health-care reform law, which passed Congress in 2010 and took effect in 2014.

The law aimed to move toward universal coverage with a combination of two basic strategies: expanding Medicaid for the poorest group of the uninsured and subsidizing commercial coverage for a swath of middle-income Americans who lacked employer-sponsored health benefits.

The law called for states to lift their Medicaid eligibility threshold to 138 percent of the poverty level, with the federal government initially covering 100 percent of the cost of newly eligible enrollees, phasing down to 90 percent after five years. This was more generous than Medicaid's traditional formula for federal matching aid, which ranged from 50 percent to 80 percent of a state's costs. (The ACA originally required states to expand Medicaid. A Supreme Court ruling later made it optional.)

When the law was enacted, New York was one of a handful of states whose Medicaid programs already covered most of the target population. For those states, the ACA provided enhanced federal matching aid for a portion of their previously eligible adult enrollees.

For people with incomes just above the Medicaid threshold—from 138 percent to 400 percent of the poverty level—the ACA offered tax credits and other subsidies that limited the cost of coverage to 9.5 percent of their annual income. To qualify for credits, consumers had to purchase standardized plans offered through government-operated insurance exchanges.

The law initially included an "individual mandate," meaning that people without insurance were obliged to obtain coverage or face possible tax penalties. These penalties were later reduced to zero by Congress.

New York established its insurance exchange, known as the New York State of Health, as a unified portal for both public and private coverage options. After the system went into effect, an unexpectedly large number of applicants flowing through the exchange were determined to be eligible for Medicaid. Although poverty was declining and New York's Medicaid enrollment was already large by national standards, the program grew by more than 900,000 or 18 percent over the first two years. Less than half that number, or 415,000, signed up for commercial coverage through the exchange.[18]

Enrollment gradually rose to about six million and stayed there for several years, even as the poverty rate declined. By 2019, the Census Bureau estimated that the number of non-elderly New Yorkers living below 138 percent of the poverty level had dropped to 2.9 million, or less than half of Medicaid's enrollment, as shown in Figure 3.[19]

The reasons for this disparity—among the widest in the U.S.—deserve an official investigation. One factor may be that Medicaid eligibility extends above 138 percent of poverty for certain targeted groups, such as pregnant women and new mothers. Also, the ACA threshold is based on "modified adjusted gross income," drawn from tax law, while the Census Bureau uses a broader definition of income. At the same time, the disparity might mean ineligible applicants are slipping through the state's screening process at a greater rate than previously known.

Exceptionally "essential"

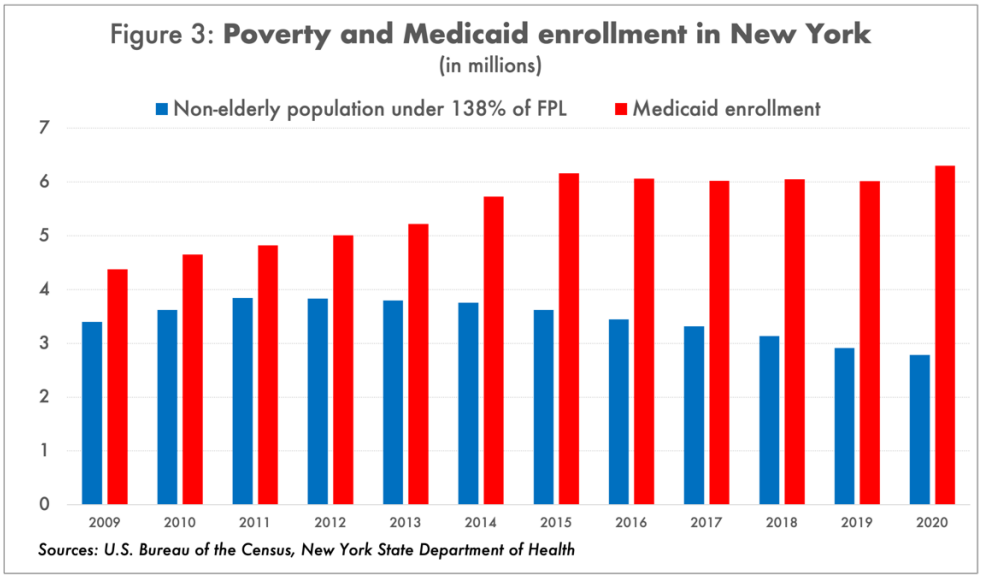
The reach of government-funded coverage surged further in 2016 when New York launched its Essential Plan, an optional benefit under the ACA that was exercised by only one other state, Minnesota.

Under this option, states can establish government-operated Medicaid-like plans for residents up to 200 percent of the poverty level. To finance these plans, the federal government supplies 85 percent of the money it otherwise would have spent on insurance tax credits and other subsidies for the enrollees. This formula has proven to be unexpectedly generous, consistently providing more than aid than necessary to cover the program's entire cost.

As of June 2022, the Essential Plan trust fund had built up a surplus of more than $8 billion.[20] The state initially charged a portion of the program's enrollees a modest $20 a month, but those premiums were eliminated in 2021. More predictably, the offer of free or nearly-free health coverage has been popular with eligible consumers. As of this year, its enrollment has risen to almost one million.[21]

The Essential Plan is technically separate from Medicaid and the state is responsible only for administrative costs, which are about 1 percent of its budget. Like Medicaid, however, it pays substandard fees to providers and diverts potential consumers out of the commercial marketplace.

The mandates of the ACA—and its drive towards universal coverage—meshed with Albany's long-standing tendencies with respect to Medicaid. Hospitals, nursing homes, and unionized health-care workers are some of the Capitol's



biggest spending and most influential interest groups, and most lawmakers of both parties are eager to win their favor. Many lawmakers have come to view Medicaid as way of drawing federal aid to the state, where it benefits their favored constituents and generally boosts the health-care economy. For every $1 the state spends, they reason, the state's health-care system collects $2 or more. Elected officials who oppose spending more on Medicaid run the risk of being accused of putting people's health at risk.

Governors have sometimes tried to rein in the program, notably including former Governor Andrew Cuomo during his first term. However, Cuomo's focus on taming Medicaid dissipated over time and the program returned to a pattern of rapid spending growth, leading to multi-billion-dollar budget overruns before the pandemic arrived in the middle of his third term. During her first year in office, Governor Hochul has promoted or acceded to expensive Medicaid rate increases, worker bonuses and wage hikes while putting little emphasis on trimming rolls or containing costs.

High-cost private health insurance

Another factor behind Medicaid's sprawl is the unaffordability of commercial insurance in New York, which is due in large part to policies set by Albany.

According to a federal survey, New Yorkers and their employers pay the highest premiums in the continental United States. In 2021, the average premium for single coverage in New York was almost $1,200 or 16 percent above the national norm—the widest gap since the survey began in the mid-1990s.[22]

The state directly adds to premium costs by imposing unusually heavy taxes on insurance through a law called the Health Care Reform Act. The law's two surcharges raise $5.2 billion a year,[23] making them the state's third largest source of revenue after income and sales taxes and adding hundreds of dollars to a typical family's premium.[24]

Albany also makes insurance more expensive by continually imposing additional coverage mandates without a sober analysis of costs and benefits. A recent example, enacted in 2019, requires large group plans to cover at least three cycles of in vitro fertilization, a costly procedure for inducing pregnancy.

"Redesign" and relapse

The prelude to Medicaid's expansion over the past decade was former Governor Cuomo's Medicaid "redesign," an unusually sweeping and aggressive effort to contain the program that unfolded during his first term.[25]

As Cuomo took office in 2011, the state faced a $10 billion projected budget gap, much of which he attributed to Medicaid.

The state's finances were still suffering the effects of the Great Recession, but extra federal Medicaid money that Washington had forwarded to states as a temporary relief measure was phasing out. Albany's share of the Medicaid budget was due to jump by $6 billion in a single year

Cuomo proposed a combination of immediate spending cuts—including the elimination of automatic "trend factors" that annually boosted provider fees—

along with a set of structural reforms, all of which were approved by the Legislature. His reforms included:

- Imposing a "global cap" on the state share of Medicaid spending, limiting the rate of annual growth to the 10-year rolling average of the medical inflation rate.
- Appointing a 25-member Medicaid Redesign Team of state officials and industry stakeholders to find the savings necessary to live within the cap.
- Empowering the health commissioner to unilaterally cut provider fees if cost-cutting fell short and the program began to go over budget.

Taken together, these steps transformed the political dynamics surrounding Medicaid. The cap brought a measure of restraint to spending growth, especially in the context of rising enrollment. The redesign team provided a calmer, more collaborative venue to hash out the complexities of Medicaid reform—a contrast to the politicized annual stand-offs in the Legislature, which often led to late budgets while achieving limited progress. The commissioner's additional budget powers, although never invoked, gave industry officials an incentive to collaborate on finding savings.[26]

The redesign team agreed on 79 proposed changes to the program, nearly all of which were formally approved by the Health Department and the Legislature. The most significant involved outsourcing more recipients into private health plans, a system known as Medicaid managed care. Enrollment in this program became mandatory for nearly all recipients, including groups that had previously been exempted, such as nursing home residents and people with lifelong mental or physical disabilities.

A second major reform added prescription drugs to the set of benefits overseen and reimbursed by Medicaid managed care plans. Pharmacy claims had previously been directly paid by the Health Department. After adoption of this pharmacy "carve-in," the average cost per Medicaid prescription plunged by one-fifth in two years.[27]

In 2012, Cuomo and the Legislature agreed to freeze the Medicaid contributions paid by New York City and the 57 other county governments—leaving the state to absorb any increase in the non-federal share of Medicaid costs going forward. That freeze took full effect in 2015.

In another significant development of Cuomo's first term, the state won an additional $8 billion in federal funding over five years to establish the Delivery System Reform Incentive Payment program, or DSRIP. This money was allocated to regional consortiums of hospitals and other health-care providers and social service groups, who were tasked with improving the coordination of services for Medicaid patients and reducing avoidable hospital visits.

For several years, Cuomo's redesign showed signs of working as intended to contain costs. Overall Medicaid spending—which historically had risen faster than inflation—stayed virtually flat until fiscal 2014-15, when the advent of the ACA caused enrollment to spike. Even then, a surge of additional federal aid tied to the ACA kept the state's share of expenses in relative check.

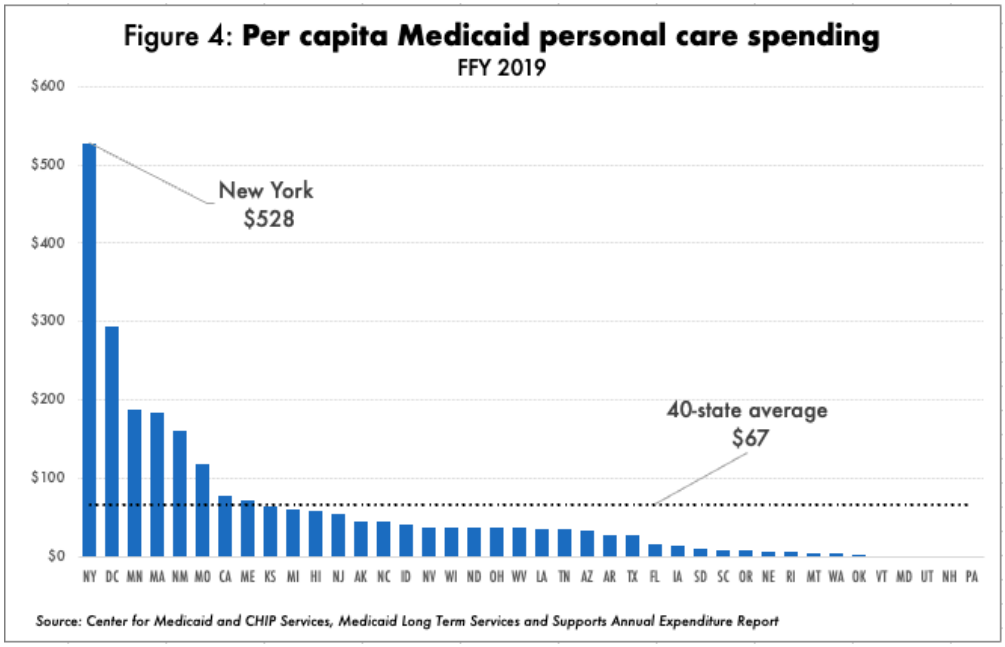
Eroding discipline

Towards the middle of Cuomo's second term his administration's focus on Medicaid cost control began to wane.

The governor and Legislature weakened the global cap by adding loopholes, the most significant of which exempted the costs of a 2016 hike in the state's minimum wage, which lifted the rate from $9 to as high as $15 an hour over the ensuing three years. The state committed to reimburse providers for their minimum wage-related expenses, which mushroomed much faster than officials initially estimated and quickly rose into the billions. The state's share alone is now estimated at $2.2 billion per year,[28] an amount which is added on top of the inflation-based increases authorized under the cap.

In the middle of the last decade, the state also began to see explosive growth in Medicaid's spending on home-based care for the elderly and disabled—especially in the category known as personal care, which refers to non-medical services such as help with eating, bathing, shopping and housekeeping.

New York's spending on this optional benefit has long been exceptionally high—amounting to $3.2 billion, or one-quarter of the national total, when Cuomo took office in 2011. By 2016, the tab had risen to $5.6 billion or 40 percent of the national total—and over the next five years it nearly doubled to $11.4 billion.[29] Although recent nationwide figures are not readily available, it's likely that New York is currently spending more on personal care than the other 49 states combined.



The Local Medicaid Share Issue

A unique feature of New York's Medicaid program is the so-called local share paid by New York City and the other 57 counties.

New York shifts more of its Medicaid costs to local governments than any other state, amounting to about $8 billion or nine percent of the program's overall budget.

The amounts owed by each locality are based not on ability to pay, but historic patterns of Medicaid demand – which puts a disproportionate burden on counties with poorer residents and weaker tax bases. Even for wealthier counties, Medicaid is one of Albany's most onerous unfunded mandates—a major, ongoing expense over which local officials have no control.

Local officials have long argued, with some merit, that they should be fully relieved from Medicaid costs. That plea has been stymied by the price tag: $7.6 billion, including $5.3 billion to offset New York City's contribution and a combined $2.3 billion for the other 57 counties.

Offsetting the loss of that much revenue would require either an enormous state-level tax hike, deep cuts to health care spending or, most plausibly, a concerted, multi-year push to squeeze efficiency from the Medicaid program.

Further complicating the task is the lopsided regional distribution of the burden. New York City accounts for fully two-thirds of the local cost, and poorer upstate areas pay proportionally more than the wealthier downstate suburbs. A comprehensive solution would necessarily skew in the opposite direction, with New York City residents reaping most of the benefit, and downstate suburban taxpayers taking a financial hit.

Instead of eliminating the local contributions, the response of Governors Pataki and Cuomo, approved by the Legislature, was to limit the local share growth and finally freeze the amounts as of 2015. If not for those steps, local governments would be paying an estimated $5.2 billion more per year than they do now.[3]

Although the burden is still substantial, especially for lower-income counties, it is effectively shrinking both in inflation-adjusted terms and as a share of total Medicaid spending.

In recent years, state takeover plans have been put forward by members of Congress, state legislators and multiple candidates for governor. However, these proposals have either excluded New York City or offer it only partial relief—which would be hard to justify as a matter of fairness—and none fully addressed the question of financing.

Regardless of how approached, such a takeover would represent a major change in a program affecting the lives and livelihoods of millions of New Yorkers. The cost and complexity of the task should not be underestimated, and all options would require difficult trade-offs.

As of 2019, the last year for which comparable data are available, New York's per capita Medicaid spending on personal care was an outlier at almost eight times higher than the average for the 40 states offering the benefit (see Figure 4, above).

The recent surge appears to have been sparked by the Medicaid redesign and its shift of long-term care patients into managed care, under which plans have an incentive to sign up as many potential clients as possible and thereby collect monthly premiums from the state. Another factor has been the rapid proliferation of the "consumer-directed" form of personal care, which allows patients to bypass traditional home care agencies and directly hire the caregiver of their choice, which can be a friend or family member. Hundreds of companies devoted to supporting this program, known as fiscal intermediaries, have sprung up across the state.

The state has proposed some efforts to contain personal care costs, such as attempting to tighten regulation of fiscal intermediaries, but it has run into well-organized and heated opposition from the industry, its disabled clientele and their supporters in the Legislature. After dipping during the pandemic, demand for personal care has bounced back to its previous levels and beyond.

The goal of containing Medicaid costs was further undermined by raw politics. As Governor Cuomo approached his third term re-election campaign in 2018, he used Medicaid to finance an expensive deal with New York City-area hospitals and nursing homes and their major labor union, 1199 SEIU. The deal began with the governor extracting $2 billion from the sale of non-profit Fidelis Care health plan, which was controlled by the state's Catholic bishops, to for-profit Centene Corp. The money was deposited in a newly created Health Care Transformation Fund, which the governor could effectively spend on any health-related purpose without further consulting the Legislature.[30]

Shortly before Election Day, the governor quietly allocated a portion of that fund to finance Medicaid rate hikes for hospitals and nursing homes—rate hikes the Greater New York Hospital Association had sought to finance its members' labor contract with 1199. It was later revealed that the hospital association had contributed more than $1 million to the state Democratic Party, which was controlled by Cuomo, in the months before the governor's unilateral action.[31]

Even before that rate hike, Medicaid spending had begun chronically running over its budget—and administration officials failed to raise an alert about the problem or invoke their authority to cut spending under the global cap. Instead, they papered over the shortfall by secretly delaying $1.7 billion in Medicaid payments from March to April 2019, shifting the spending from one fiscal year to the next. This threw the newly passed state budget immediately out of balance, yet officials did not notify the Legislature or the public until May.[32]

The governor eventually acknowledged that the maneuver had triggered a $2.2 billion deficit and in January 2020 delegated the job of closing it to a reconstituted Medicaid Redesign Team.

That process was still unfolding when the coronavirus began sickening and killing thousands of New Yorkers in March 2020.

The COVID complication

The coronavirus pandemic disrupted Medicaid in complicated and conflicting ways.

On one hand, the crisis prompted the federal government to boost Medicaid funding for states—sending an extra $3 billion per year to New York on top of billions in other emergency relief. The earlier phase of the crisis also slowed demand for medical care across the board, causing a rare dip in Medicaid spending in the 2020-21 fiscal year and temporarily easing pressure on the state's finances.

On the other hand, the extra Medicaid money from Washington came with strings attached—federal "maintenance of effort" rules that bar states from routinely disenrolling recipients who lose eligibility or making certain other cost-cutting moves.

In Albany, this has prevented the Cuomo and Hochul administrations from fully implementing some of the second Medicaid Redesign Team's proposed reforms. The pandemic-induced economic crisis also triggered a surge of new enrollment in Medicaid as people lost their jobs and employer-based health benefits.

After the brief slowdown in 2020-21, Medicaid costs have bounced back at ferocious rates. Since then, overall spending has jumped 23 percent and the projected state share is up 48 percent—from $22 billion to $33 billion in just two years.[33]

Given the very real pressures and sacrifices much of the health-care system has experienced during the crisis, the governor and lawmakers emphasized catering to the industry's requests and perceived needs rather than squeezing it for budget savings.

In her first full year as governor, Hochul for the most part` positioned herself as the health-care industry's ally in Albany. She pushed through Medicaid-financed pay bonuses for a large swath of health-care workers, authorized rate hikes for hospitals, nursing homes and other providers, agreed to a $3 hike in the minimum hourly wage for home care workers, further weakened the "global cap" on spending, and committed herself to the dubious goal of growing the health-care workforce by 20 percent over five years—in a state that already has 28 percent more health-care workers per capita than the national average.[34]

Looking ahead, the state is likely to face a fiscal reckoning on Medicaid. When President Biden formally ends the federal pandemic emergency, which is expected in 2023, that will mark the end of extra Medicaid funding that has been flowing to New York at the rate of almost $3 billion a year.[35]

On top of filling that budget hole, the governor's financial plan must also address the effects of a slowing economy, which has weakened revenue forecasts and created billions in projected deficits for the years ahead.

Meanwhile, the minimum wage for home health workers is due to increase by $2 an hour this October and another $1 next year—a hike approved in this year's budget that is projected to cost Medicaid an estimated $7.7 billion over the next four years.[36]

MOVING FORWARD

The overarching goal of Medicaid reform should be a rebalanced health-care system—with a smaller, more efficient Medicaid program that delivers higher-quality care for the truly needy, combined with a larger commercial insurance market that's affordable and accessible to everyone else.

An immediate priority is to slow the growth of the state's share of Medicaid spending, which spiked by 18 percent in fiscal 2023 and is on track to balloon by another 20 percent over the next four years.

The usual solution of across-the-board cuts to provider payments should be avoided, because it would further widen the unhealthy gap between Medicaid reimbursements and market rates. Instead, the state should look for systemic reforms that make the program more efficient and sustainable, perhaps by reinvigorating the Medicaid Redesign Team process.

As a minimum first step, officials should expeditiously follow through on cost controls that lawmakers adopted in 2020 but were put on hold during the pandemic emergency. These include tighter medical and financial eligibility limits on home-based personal care for the elderly and disabled.

In other areas of health policy, New York leaders should develop state-of-the-art systems to detect and contain future pandemics, push to improve the low average quality of New York's hospitals, and foster consumer-friendly competition in the health-care industry by rolling back the "certificate of need" law.

The list of needed reforms starts with the following priorities:

- **Tighten income-screening procedures.** This will help ensure that existing Medicaid eligibility standards are consistently enforced. In addition:
    - Crack down on the legal maneuvers that allow people to conceal or shield substantial assets when applying for benefits.
    - Strengthen the "global cap" by tying it to a need-based benchmark, closing loopholes and following through with consistent enforcement.
    - Restructure the managed long-term care program to ensure that participating health plans are incentivized to control spending.
    - Tighten eligibility for personal care benefits. Establish personal care as a discretionary benefit rather than an entitlement, allowing officials to target services to the neediest individuals.
    - Strengthen controls on consumer-directed personal care to assure that patients are getting necessary services and to prevent fraud.
    - As Medicaid rolls decline, use a portion of the savings to boost provider payments closer to the market standard.
    - Reduce or eliminate supplemental grants and reallocate the money to pay for services rendered.

- **Make commercial coverage more affordable and accessible.** Essential steps towards realizing this goal would include eliminating taxes on health insurance under the Health Care Reform Act; establishing a commission to review all insurance coverage mandates, both existing and proposed;

repealing or rejecting mandates that are not clearly cost-effective and supported by independent medical research; and considering the establishment of state-based consumer and employer subsidies to supplement the federal tax credits available through the Affordable Care Act.

- **Improve the state's public health system.** This can start with establishment of an independent pandemic review commission to investigate strengths and weaknesses of the state's COVID-19 response, study best practices in other states and countries, and design defenses that best protect the state from future outbreaks.

  Further improvement steps would include:

  - Replenishment of funding and personnel for public health functions.
  - Promotion of improved quality of care in hospitals and other health-care facilities through improved oversight, including gathering, analyzing and publicly reporting on performance benchmarks.
  - Consideration of a plan to reorganize the Health Department to separate its public health functions from the management of Medicaid.
  - Roll-back or elimination of the "certificate of need" law, to make it easier to establish or expand health facilities and to promote competition that responds to consumer demand, improves quality and controls costs.

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5.
Addressing Mental Health

By Stephen Eide

High-profile tragedies linked to serious mental illness, such as the May mass shooting in Buffalo and subway platform shovings in New York City, have prompted mounting concern about the effectiveness and adequacy of New York State's mental health system. Media coverage of crimes committed by what police sometimes term "EDPs" (emotionally disturbed persons), as well as the growing number of homeless people with apparent psychiatric issues, have highlighted the question of whether New York's mental health system has sufficient capacity to meet the demand for crisis care.[1] New York City Mayor Eric Adams, as part of his broader pushes to reduce crime and subway disorder,[2] has called for more state action on mental health.[3]

New York's mental health system consists of a sprawling network of benefit programs and service providers, with city and county governments, community healthcare and hospital systems, nonprofits, and other private organizations playing important roles. But no one entity has more responsibility for this system than state government. Thus, to the extent that public dissatisfaction with mental health policy persists and increases, in New York City and elsewhere, the onus ultimately is on Albany to do something about it.

The leading goal of mental health policy should be providing effective treatment to people with mental disorders—especially those with serious mental illness.

Though it is not technically a diagnosis-based category, most people with serious mental illness have schizophrenia, bipolar disorder, or major depressive disorder. Only 4 to 5 percent of the general adult population falls into this category, but according to state Office of Mental Health (OMH) data, they represent most users of New York's public mental healthcare system. New York State's public mental health system—meaning programs either funded or authorized by the OMH—serves about 900,000 individuals annually. The vast majority (86 percent) of those served have a serious mental illness.[4] The seriously mentally ill also drive most of the demand for system reform, such as through their involvement in high profile tragedies.

Public mental healthcare systems, to be effective, require many "inputs" such as public investment and an adequate supply of mental health professionals to provide treatment. On input measures, New York's mental health system tends to look strong. In terms of outcomes, New York's mental health system looks less impressive.

THE STATUS QUO

One reason why people who need treatment don't get it is their inability to access a provider, such as a therapist or psychiatrist. In the broader mental health debate, access to providers is now a top concern. The federal government deems mental health one of three official "Health Workforce Shortage Areas."[5] Increasing spending on compensation for mental health workers, as part of a broader initiative to "Rebuild Our Healthcare Economy," was the top mental health priority highlighted by Governor Hochul in her January 2022 State of State speech and FY 2023 Executive Budget.[6]

In fact, ranked against other states, New York boasts an above average concentration of mental health professionals.[7] In terms of psychiatrists—the profession of greatest relevance to untreated serious mental illness—the New York City metropolitan area ranks, by some measures, first in the nation.[8] New York County (Manhattan) has more psychiatrists than any other county in the nation, whereas over half of counties in the U.S. don't have one psychiatrist.[9] The state as a whole ranks second in psychiatrist concentration, after California.[10]

However, the concentration of mental health professionals is not evenly distributed throughout the state. The number of mental health "providers" per 100,000 residents ranges from over 900 in the borough of Manhattan to less than 100 in the case of Greene, Montgomery, Herkimer, Hamilton, and Orleans counties.[11] However, political pressure to spend more on compensation for the mental health workforce, coming from advocates and legislators, is, if anything, greater in New York City than elsewhere in the state.[12]

Total Spending and Capacity

In a 2017 federal analysis of state mental health agency spending, New York ranked second in absolute terms and fifth on a per capita basis.[13] In fiscal 2022, state spending on the OMH's budget was about $3.4 billion.[14] That figure does not account for expenditures made through other programs, such as Medicaid, and expenditures at the city and county level. The state Medicaid program spent $2.6 billion on mental health in 2020.[15] The "mental hygiene" portion of the New York City Department of Health's budget last year was $680 million.[16]

In addition to spending and workforce, inpatient capacity is another mental health metric where New York has, in recent years, looked more robust than other states. But whereas state officials have been working to increase spending and the number of trained professionals, they have been working to *reduce* use of inpatient psychiatric services.

Hospital-based psychiatric care can be delivered through specialized hospitals or through general hospitals. Traditionally, New York's public mental health system consisted almost exclusively of specialized hospitals run by state government. These "asylums" or "mental institutions" were, at their mid-1950s peak, host to over 90,000 beds. Since then, state government has shifted away from hospital-based care in general and also shifted hospital-based care from specialized hospitals to acute care general hospitals.

State-run institutions, now known as "psychiatric centers," are host to a total 2,000 adult beds and another 1,000 beds for forensic patients (such as those ruled mentally incompetent to stand trial on criminal charges) and children.[17] Acute care ("Article 28") general hospitals are host to about 4,500 adult beds. There are about 150 inpatient psychiatric programs statewide, about two-thirds of which operate out of a general hospital.[18] Of the roughly 900,000 total clients served by the state mental health system ("organizations and programs licensed, funded and/or operated by OMH") in 2022, only about 70,000 of them used inpatient programs.[19]

During the 2010s, state officials made deliberate pushes to reduce beds in both state psychiatric centers and acute care general hospitals. State psychiatric center bed reductions were driven by the "Transformation Plan" for the OMH, launched in 2014. Cuomo administration officials criticized New York's "disproportionately large" "inpatient footprint" and the harm done by "costly" and "unnecessary" spending on hospital-based programs.[20] From 2014 through mid-2022, New York State has lost over 600 beds in adult non-forensic psychiatric centers.[21] As recently as the FY22 budget cycle, the last of the Cuomo era, 200 state hospital beds were cut,[22] justified as part of an urgent need to "right size" the system,[23] and policymakers seriously considered shutting down one facility, the Rockland's Children Psychiatric Center.[24]

Reductions in psychiatric beds in acute care general hospitals were brought about through changes to New York's Medicaid program. Though Medicaid generally cannot be used for care for adults in specialized psychiatric centers, it is the chief funding source for psychiatric services in acute care general hospitals.[25] In 2010, the state health department argued that Medicaid-funded general hospitals had "[n]o incentives for length of stay reduction" when it came to psychiatric care.[26] Accordingly, state government restructured Medicaid reimbursement to reduce the daily rate the longer that someone stayed hospitalized.[27] This change has been criticized for incentivizing hospitals to release patients regardless of their clinical needs and to eliminate inpatient services altogether.[28] Inpatient care is one of the least-profitable services a hospital can offer.[29] According to the New York State Nurses Association, in 2018, psychiatric care generated $88,000 "net patient revenue" per bed for hospitals whereas the average figure across all beds was $1.6 million.[30]

Psychiatric beds converted for COVID overflow, it was widely feared in 2020 and 2021, might not be brought back at all.[31] To allay those fears, Governor Hochul authorized an increase in the Medicaid reimbursement rate to incentivize more provision of inpatient psychiatric care by private hospital systems.[32]

Pressure for deeper bed cuts in psychiatric centers and outright hospital closures have recently eased somewhat, particularly with respect to facilities serving children and teenagers.[33] The Western New York Children's Psychiatric Center, another facility threatened with closure under the Cuomo administration[34] (with support from then-Lieutenant Governor Hochul[35]), is now receiving $55 million in upgrades.[36]

In early October, the Hochul administration announced that it would pursue a waiver from the IMD Exclusion to authorize Medicaid funding for state-run specialized psychiatric hospitals.[37] The waiver proposal argues that the increased Medicaid funds will help continue the previous Cuomo-era efforts to "aid in the

state's efforts to continue to transform the behavioral health service system." That will mean "transforming selected (pilot site) state-run psychiatric hospitals, facilities, and campuses from long-term care institutions to community-based enhanced service delivery systems" towards the goal of "reducing the statewide average length of stay."[38] In general, the administration remained supportive of minimizing the footprint of state-run specialized psychiatric hospitals.[39]

The standard promise of cutting inpatient beds has always been better care at a lower cost. But, during the 2010s, that promise was not fulfilled in New York. Between 2015 and 2019, statewide, the average daily adult census for all inpatient facilities declined from 6,894 to 6,111. In the New York City Region, it declined from 3,676 to 3,135.[40] Those reductions coincided with a rise in mental health-related costs and pressures in other systems, such as homeless services, police departments, and corrections.[41]

Insurance

Debate over expanding access to treatment, in mental health, sometimes centers around insurance, another area where "on paper," New York looks strong. New York has the eighth-lowest rate of uninsured in the nation[42] and its Medicaid program is the most expensive in the nation on a per capita basis.[43] In its most recent annual rankings, which examine states' prevalence rates of mental illness and rates of access to mental healthcare, Mental Health America ranks New York fifth overall.[44] New York has one of the lowest rates of "Adults With [any mental illness] Who Are Uninsured."

Mental health advocates, in addition to promoting expanded access to health insurance, have emphasized tightening regulations on insurers, to require them to provide more mental health benefits. "Parity" regulations exist at both the federal ("Mental Health Parity and Addiction Equity Act," 2008) and state ("Timothy's Law," 2006) levels. New York has recently strengthened reporting requirements for parity ("Mental Health and Substance Use Disorder Parity Reporting Act," 2018) and parity has also been a focus of enforcement actions taken by the state Attorney General.[45]

Involuntary Care

Seriously mentally ill people sometimes decline to accept or submit to treatment that would benefit them. They do so for a few reasons, including a distaste for medication's side effects and/or failure to accept that they have a mental illness ("lack of insight" or "anosognosia"). In such cases, involuntary treatment can become necessary.

Committing someone to a hospital, for their benefit but against their will, is the best-known form of involuntary treatment. New York State has one of the highest inpatient civil commitment standards in the nation.[46]

It's also possible to pursue involuntary treatment in an outpatient context. Kendra's Law is a state program, administered by local health authorities, that allows courts to order treatment for seriously mentally ill individuals.[47] Named after Kendra Webdale—a young woman killed when she was pushed into the path

of a subway train by a schizophrenic man who was off his meds—the law was enacted in 1999 with support from families of individuals with the most serious mental illnesses as a way to help their loved ones while simultaneously keeping society safer.[48] To be eligible for court-ordered involuntary outpatient treatment, someone must have a record of non-compliance with treatment that has led to a recent history of psychiatric hospitalization, violence and/or incarceration.[49]

Guardianship (also sometimes referred to as "conservatorship") is another important intervention that relies on the involvement of courts. With guardianship, courts transfer authority over life decisions, such as pertaining to personal finances, from a seriously mentally ill individual to a third party.[50]

Outcomes

Despite New York's high spending, concentration of expertise, and robust insurance programs, mental health outcomes in the Empire State are not impressive, particularly when it comes to the seriously mentally ill. Two important outcomes are incarceration and homelessness. If one standard of effectiveness in mental health is keeping the seriously mentally ill out of homelessness and reducing their involvement with the criminal justice system, New York's mental health system performs no better than the much more poorly funded and less sophisticated systems found in other states.

In the state prisons, 25 percent of inmates have some sort of mental disorder.[51] In New York City jails, 17 percent have a serious mental illness.[52] These figures are comparable to other states.[53] New York City's jail system is host to over 1,000 inmates with a serious mental illness.[54] No hospital in the state has a patient census of over 340.[55] Statewide, homeless adults are estimated to be 25 percent severely mentally ill; that figure is also 25 percent in New York City and nationwide.[56]

MOVING FORWARD

To cope with the quality of life and public safety challenges posed by the seriously mentally ill, and to provide humane and effective treatment of those who most urgently need it, New York State officials should embrace these priority goals and principles.

- **Fund more inpatient psychiatric beds.** It is essential to relieve pressure on other service systems, reduce hospitals' fiscal incentives to discharge patients before clinically appropriate, reduce incentives to avoid admitting troubled patients in the first place, and reduce waits for beds.[57] Though the Hochul administration has taken some positive steps to build in-patient capacity, such as applying for a waiver from the IMD Exclusion and increasing Medicaid reimbursement, it also assigned a priority to reducing "unnecessary" spending on state psychiatric hospitals.[58] Inpatient psychiatric services can either be publicly-funded and privately provided, or entirely funded and provided by the public sector. The former model cannot be relied on since private health systems' commitment to inpatient care is likely to remain questionable. As of late November, *Gotham Gazette* reported, only

200 of the more than 1,000 former psychiatric beds repurposed during COVID had been restored.[59] Thus more focus should be placed on adding more staffed psychiatric beds within the OMH-run hospitals the state controls. A modest start to expanding the use of state psychiatric center space was made in October, with the opening of two "Transition to Home Units." Comprising 50 total beds, these will be operated out of state hospitals and are dedicated for "individuals aged 18 years or older with severe mental health illnesses who are experiencing homelessness."[60]

New York operates more traditional state-run mental hospitals than any state in the nation.[61] That should be viewed less as a problem to be solved (the Cuomo administration's view) than as a valuable asset to be preserved and enhanced. Unfortunately, the metrics needed to estimate the full cost of an expanded in-patient system are not readily available—but the cost of continued neglect in this area have become all too apparent.

- **Pass Mayor Eric Adams' "Psychiatric Crisis Care Legislative Agenda."** In late 2022, New York City's mayor unveiled a plan to expand access to involuntary care and make the experience of hospitalization more effective from a treatment perspective. It clarifies that the state's civil commitment standard authorizes involuntary hospitalization when someone's "basic living needs" are not being met, requires doctors to consider patients' past histories before releasing them, and requires hospitals to evaluate all discharges for Kendra's Law. Most elements of this plan will require state legislation.[62]

- **Target workforce investments to areas of greatest need.** Increased spending on mental health should flow primarily to rural areas and to programs that serve seriously mentally ill adults. However, the Hochul administration's planned spending on compensation for mental health workers leaves unclear whether the money will be spent effectively. How much will go towards psychiatrists? How much will be targeted towards those regions outside of New York City that have a more compelling claim to be facing a shortage of professionals? How much will go towards professionals who will be serving the seriously mentally ill— those who, without treatment, are the greatest risk of violence, incarceration, and homelessness? In each case, if the answer does not boil down to "most of the money," those investments will not address the crisis.

- **Expand Kendra's Law.** Because of the Kendra's Law's success in reducing homelessness and incarceration for participants in the program, among other positive outcomes,[63] there is perennial interest in expanding the program. As of September, the number of people in Kendra's Law is up about 20 percent compared with the same time last year, though it's not clear that the recent legislation caused the increase.[64] The most promising route to further expansion lies through identifying more people who meet current eligibility criteria and who would benefit from the program but are not in it.

Over 80 percent of court orders are filed by hospitals, as part of the discharge planning process.[65] Tens of thousands use inpatient services every year.[66] But statewide, only about 3,500 people are in Kendra's Law, 1,600 in New York City.[67] Local governments or the state could exercise more oversight over hospitals to ensure that they are identifying the maximum number of discharged patients who would qualify for Kendra's Law.

- **Increase supervision of the seriously mentally ill.** Seriously mentally ill individuals routinely "fall through the cracks" of the public mental health system. They stop engaging with a program they had been receiving treatment or services from, decompensate, and wind up homeless or incarcerated. In a community setting, supervision can be provided in multiple ways: regular attendance at a clubhouse program, supportive housing, a "step-down" residential program, Kendra's Law, conservatorship, and probation-style diversion programs such as mental health courts. The desired intensity of the supervision will vary, depending on the individual. But in caring for the seriously mentally ill, there should always a presumption in favor of supervision to reduce the risk of adverse outcomes. At the community level, separate programs serving the seriously mentally ill should coordinate more than they do now, such as through formal data-sharing agreements, to avoid losing track of troubled cases.[68]

- **Reduce the mental illness burden on other systems.** Untreated serious mental illness continues to burden various agencies such as homeless services, police departments, courts, corrections systems, and transit systems.[69] This reality, just as much as any other outcome OMH is tracking, indicates that the state is not meeting its official goal of "better care, better health and better lives for those whom we serve at lower costs."[70] A public mental health system with more integrity would burden other systems less.

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6.
Heading off New York's Home-Made Energy Crisis

By James E. Hanley

Within the next 10 years, New York will confront an increasingly serious energy supply problem of its own making. A series of policy initiatives culminating in 2019's Climate Leadership and Community Protection Act (CLCPA) have committed the state to an unrealistic goal of 70 percent renewable electricity by 2030 and zero-emissions electricity generation by 2040. Reliable sources of fossil-fuel powered electricity are scheduled to be taken off-line faster than new reliable sources are brought on-line, pointing towards a tipping point where demand for electricity outstrips supply. This creates an added risk of blackouts that will be costly in both economic and human terms.

More than any other state aside from California, New York's energy sector is driven by the goal of transitioning to 100 percent greenhouse gas emissions-free electricity. The movement toward clean energy began under Governor George Pataki when the Public Service Commission (PSC) created Renewable Portfolio Standards, a utility bill surcharge used to fund renewable energy projects. Then, under Governor David Paterson the state became a founding member of the Regional Greenhouse Gas Initiative, a CO2 emissions reduction and trading consortium of 13 northeastern and mid-Atlantic states.

Governor Andrew Cuomo expanded the state's efforts to promote renewable energy via the NY-Sun program, which subsidizes residential, commercial, and industrial solar installations. This was later incorporated into a policy called "Reforming the Energy Vision," which sought to reduce greenhouse gas emissions by 80 percent by 2050. To achieve this goal Cuomo crafted the "50 by 30" concept, which was to have 50 percent of the state's electricity come from renewable sources by 2030. Cuomo also directed the PSC to craft a Clean Energy Standard that combined 50 by 30 with subsidies for unprofitable nuclear power plants via required utility purchases of Zero-Emission Credits. However, Cuomo also forced the premature shut-down of the Indian Point nuclear power plant, making it more difficult to reach the state's zero-emissions electricity goals.

In 2019 Cuomo signed into law the CLCPA, which requires 70 percent renewable electricity generation by 2030 and 100 percent emissions-free electricity by 2040. It also requires 6,000 megawatts of solar energy, 3,000 megawatts of battery storage, and 9,000 megawatts of offshore wind. In 2022 Governor Hochul expanded the solar energy goal to 10,000 megawatts and the battery storage goal to 6,000 megawatts.

Also in 2019, the Department of Environmental Conservation finalized its "Peaker Plant" rule, which imposes increasingly strict air-pollution standards on

fossil-fuel plants currently needed to provide extra generating capacity on days when usage peaks at above-normal levels.

THE STATUS QUO

New York's energy supply is governed and managed by multiple entities, including the Public Service Commission (PSC), the Department of Environmental Conservation (DEC), the New York State Energy Research and Development Authority (NYSERDA), the New York Independent System Operator (NYISO) and the New York State Reliability Council.

The primary agency governing New York power producers and distributors is the PSC, whose seven members are appointed by the governor and confirmed by the Senate to six-year terms.[1] The PSC can create policies, approve or deny utility rate increases, and approve or deny cost recovery for capital projects such as new power plant or transmission line construction.

The DEC has authority over air quality permits, which all pollutant-emitting entities are required to obtain. The DEC is headed by a commissioner appointed by and serving at the pleasure of the governor.

NYSERDA primarily offers technical expertise and funding to increase energy efficiency and shift to renewable energy. NYSERDA has a 13-member board, including four *ex officio* members from other agencies and nine appointed by the governor and confirmed by the Senate. There are statutory requirements for representation of specified interests and areas of expertise.[2] The President and Chief Executive Officer of NYSERDA is appointed by and serves at the pleasure of the governor.

NYISO is not a state agency but a not-for-profit corporation which began operating in 1999 when New York shifted to a competitive electricity generation market. It operates the state's bulk electricity grid, administers the wholesale electricity markets, and conducts long-term planning for the state's electrical infrastructure. NYISO is subject to regulation by the state Legislature, the Federal Energy Regulatory Commission, and the New York State Reliability Council.

The New York State Reliability Council is also a not-for-profit corporation. To ensure the reliability of electrical service in New York it develops rules that must be complied with by NYISO, including reserve capacity requirements that ensure there is sufficient installed electricity generation capacity to meet peak demand. The 13-member executive committee is composed of representatives of the state's six transmission owners, the wholesale electricity production sector, various sets of power purchasers, and four unaffiliated members. The governor and legislature have no role in selecting members of this commission.

Markets, Participants, Prices, and Major Public Authorities

In the 1990s New York largely shifted from traditional utilities—regulated monopolies which combined both electricity generation and transmission—to a competitive market in which transmitting utilities bid competitively for electricity from independent power producers. This led to the creation of NYISO as the entity administering the electricity sales, both in day-ahead and real-time markets.

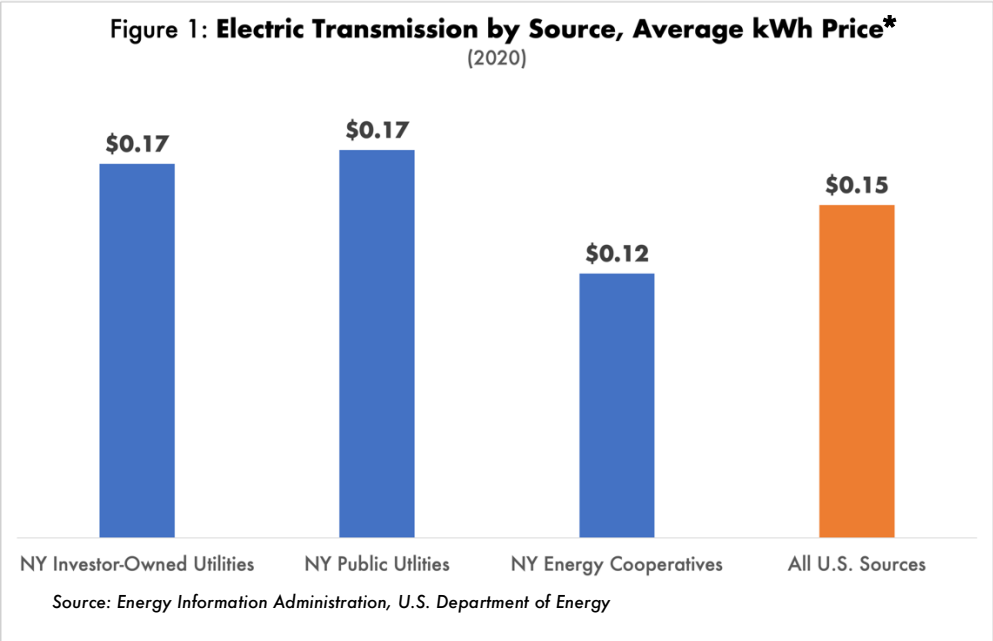
These utilities sell electricity to their customers at cost, making their profits on PSC-approved delivery fees.

The actual transmission providers include 18 investor-owned utilities, 48 public power agencies and 5 cooperatives. Of these, cooperatives average the lowest cost of electricity on a kilowatt-hour basis, followed by investor-owned utilities, then public power agencies, with only cooperatives on average providing electricity below the national average price (Figure 1). Dozens of independent power producers sell electricity on the wholesale market to these entities, and in some cases directly to large industrial energy users.

The two largest municipal power producers in the state are the Long Island Power Authority (LIPA) and the New York Power Authority (NYPA).

LIPA serves most of Long Island and a portion of Queens. It was created in response to dissatisfaction with the private utility Long Island Lighting Company's high prices and ill-fated decision to construct the never-opened Shoreham nuclear power plant, which left the company with billions in debt. LIPA issued over $7.5 billion in bonds to take on that debt[3] and took over ownership of the company's transmission lines in 1998.[4] Almost a quarter-century later, LIPA's debt has increased to over 9 billion,[5] or over $8,000 per customer.

LIPA's nine-member Board of Trustees has five members appointed by the governor, two by the Senate Majority Leader and two by the Assembly Speaker. It is unique in the country in being a utility that owns transmission lines but does not operate and maintain them itself, contracting that out to the private firm PSEG. Currently there is a legislative commission tasked with providing the legislature with "the specific actions, legislation, and timeline necessary to restructure LIPA into a true publicly owned power authority."[6] This commission is required to produce a final report by April 2030.



*Larger, full-color chart available at www.NextNewYork.net

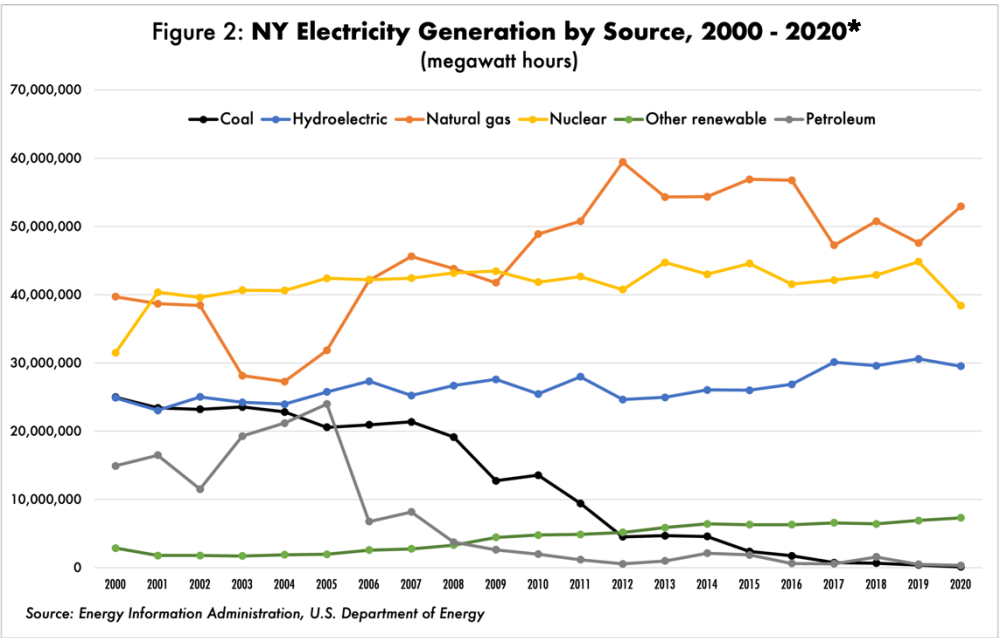
The largest public power authority in the United States is the New York Power Authority, a public-benefit corporation established in 1931. NYPA's seven trustees are appointed by the governor with the approval of the Senate to five-year terms.

NYPA generates around one-quarter of New York's electricity.[7] In addition to selling into the wholesale electricity markets, NYPA sells power to businesses, not-for-profit organizations, public power systems and government agencies. This includes selling power to the subways, airports, public schools, and public housing in New York City. Over 80 percent of its electricity generation comes from its seven upstate hydropower plants,[8] with the remainder coming from natural gas or dual-fuel power plants.[9]

Currently proposed legislation, the "Build Public Renewables Act," would require NYPA to divest itself of its non-renewable energy portfolio and build only renewable power in the future.[10] While NYPA has invested in nuclear power in the past (but since divested from it), this proposed legislation would not allow investment in or purchases from that emissions-free source. NYPA itself has opposed this bill, preferring the flexibility to ensure it can meet customer's needs reliably. However, under the CLCPA, NYPA, along with all other utilities, will ultimately be forced to divest itself of any emission-producing generating facilities and use only clean energy.

New York's Electricity Grid

New York relies heavily on hydropower and nuclear power and has replaced all coal-fired plants and most petroleum-fired plants with cleaner burning natural gas (see Figure 2, below).[11] This significantly reduced the state's greenhouse gas emissions (see Figure 3 on next page) and gives New York one of the cleanest electricity sectors in the country even before current clean air policies begin to take effect.



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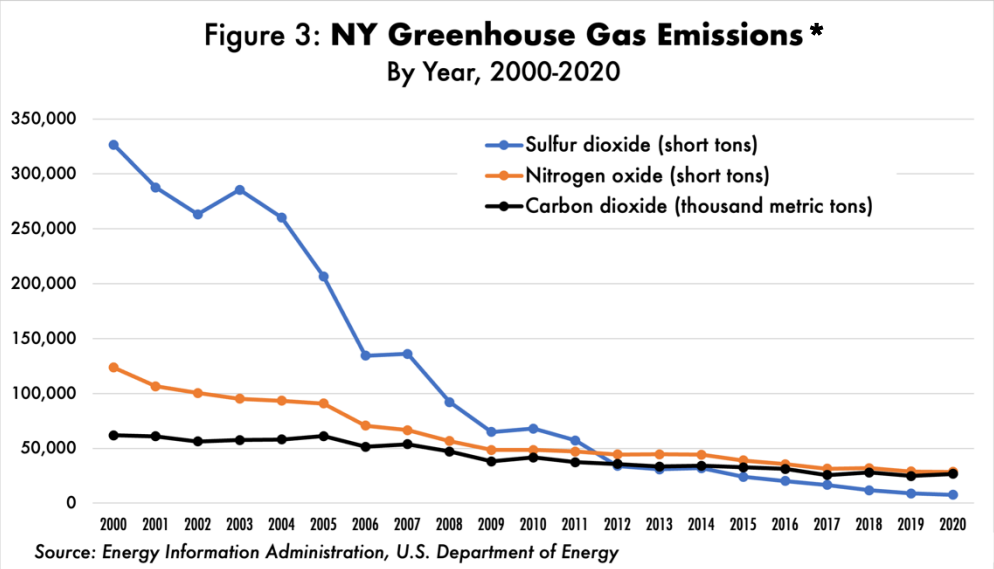


*Larger, full-color chart available at www.NextNewYork.net

Overall, the state is frequently described as "a tale of two grids," an upstate grid that is over 90 percent emissions-free electricity and a downstate grid that is almost 90 percent fossil-fuel electricity.[12] In addition, the two grids are constrained by limited high-voltage transmission connections between them, but progress is being made on several major transmission projects, both East-West and North-South, that will help connect upstate generation with downstate demand.

The state's clean air improvements were partially reversed by the 2021 shutdown of the Indian Point nuclear plant in Westchester County and its replacement with dual-fuel power generation downstate. However, the emissions-free component of generating capacity serving the New York City area is supposed to increase with the projected 2025 completion of Champlain Hudson Power Express, bringing Quebec hydropower via underground and underwater cable from Canada to Queens, and the projected 2027 completion of the Clean Path NY project, a 175-mile underground transmission line linking upstate wind and solar generators to the city's grid. Additionally, offshore wind power—when eventually built—is supposed to replace fossil-fuel generation in the downstate region.

Clean Energy Policy

New York's greenhouse gas emissions have dropped substantially due to the replacement of coal with natural gas, which produces roughly half the carbon dioxide of coal. However, this improvement has not been enough to satisfy clean energy advocates. New York State officials have embraced policies fueling the push toward an idealized zero-emission electricity future:

- **The Regional Greenhouse Gas Initiative** (RGGI) —New York is one of 11 states to have opted into the Initiative, which dates to 2005. Member states commit to a regionwide cap on carbon dioxide emissions, declining by 3 percent a year through 2027, with each state assigned its own

CO2 quota. As part of this process, NYSERDA administers New York in-state auctions of CO2 permits, directing proceeds toward energy efficiency and renewable energy programs. The effects of RGGI in New York are hard to assess because, independently of the carbon dioxide cap, cheaper natural gas replaced coal since the Initiative was launched.

- **Renewable and Nuclear Energy Subsidies**—Under Governor Andrew Cuomo, New York established subsidies for renewable energy through the mandated ratepayer-subsidized purchase of renewable energy credits, as well as subsidies for nuclear power plants via zero-emission credits. Utilities must purchase these credits from either NYSERDA, the renewable or nuclear electricity generators, or third-party intermediaries[13] with costs passed onto utility's ratepayers. The state, however, forbids line itemization of these renewable energy credits and zero-emission credits, so ratepayers cannot know just how much they are paying for them. Solar energy is now alleged to be cheaper than fossil fuels, and onshore wind nearly equal to fossil fuels in price.[14] If so, the renewable energy credits are no longer needed.
- **Opposition to natural gas pipeline projects**—The Cuomo administration also established a *de facto* moratorium on natural gas pipeline construction, with the DEC denying permits for multiple pipelines[15] that would have expanded natural gas delivery capacity. The DEC was overruled by the Federal Energy Regulatory Commission (FERC) and in federal court on its denial of a permit for the Northern Access pipeline,[16] but has not yet granted permits,[17] FERC also overruled a permit for the Constitution Pipeline,[18] which has since been canceled by the developer.[19] The Northeast Supply Enhancement pipeline was also canceled after DEC denied permits.[20] Constraints on the amount of gas that can be delivered create shortages that are one of the causes of higher winter heating prices in the state. In some cases, natural gas is intended to replace the use of fuel oil for electricity production, which would substantially reduce greenhouse gas emissions from current levels while maintaining high levels of grid reliability.

Fracking Ban

Nearly two dozen upstate New York counties, including the entire Southern Tier region, sit atop rich natural gas deposits in the Marcellus and Utica Shales. The six-state Marcellus Shale formation is one of the largest in the world, containing trillions of dollars worth of recoverable natural gas, which is already being extracted by extensive fracking operations in neighboring Pennsylvania, as well as Ohio and West Virginia.[21]

Opponents of fracking have expressed concern about greenhouse gas emissions and groundwater contamination. However, fracking occurs thousands of feet below aquifers and properly encased well shafts minimize the risk of impacting groundwater. Nonetheless, in December 2014, Governor Andrew Cuomo cited "significant public health risks" as grounds for imposing a regulatory ban on the process of injecting specially treated water under high pressure into deep-

underground sedimentary rock formations as a means of accessing natural gas deposits. The ban was codified in April 2020 in legislation packaged with the state's FY 2021 budget.[22]

Fracking's potential to ignite broad economic development in New York is more limited than many industry advocates often imply,[23] because many jobs are captured by experienced industry workers from other states and because the gas industry has experienced pronounced boom-bust cycles. However, the potential wealth effect for leasing landowners is undeniably significant, with inevitable local spinoff effects.[24] In addition, fracking-related fees and income taxes accruing to local and state governments could run into the hundreds of millions of dollars a year.[25]

The CLCPA

New York's flagship energy policy is the Climate Leadership and Community Protection Act (CLCPA), enacted in 2019.[26] The CLCPA is a "whole of economy" policy, targeting energy production, transportation, buildings, industrial processes, agriculture and forestry, and waste management.

The CLCPA's overarching goal is an 85 percent reduction in greenhouse gas emissions and a net-zero state economy by 2050. Intermediate steps on the way include 6,000 megawatts of installed solar and 185 trillion BTU savings in energy efficiency by 2025, 70 percent renewable energy production and 3,000 megawatts of battery storage by 2030, 9,000 megawatts of offshore wind production by 2035 and 100 percent zero-emissions electricity production by 2040.

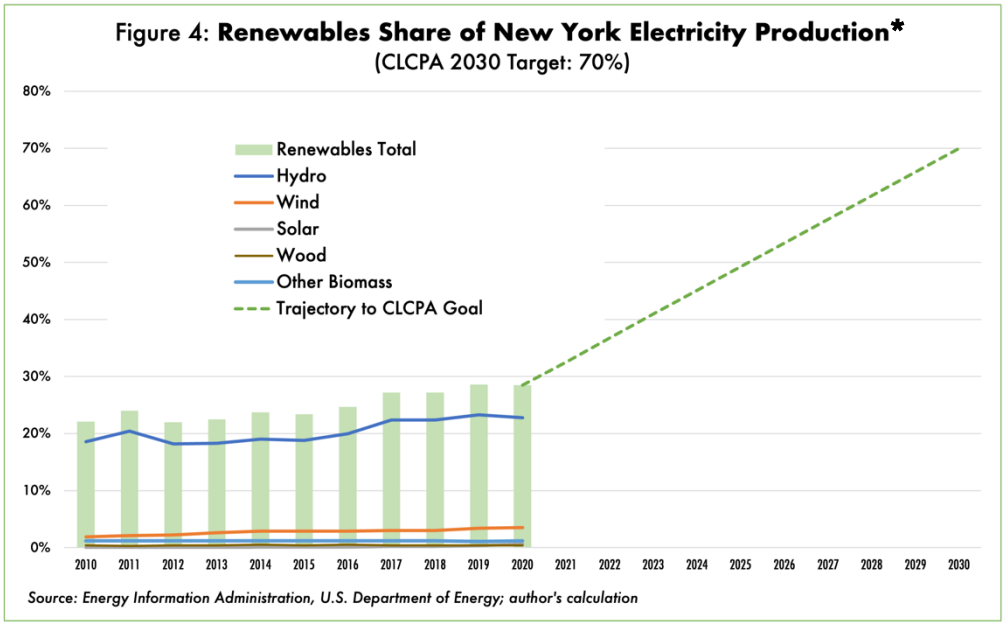
The CLCPA created a "Climate Action Council" to create a "Scoping Plan" to help guide legislative and regulatory activity in each of these areas." This Council is required to produce a Scoping Plan to guide legislation and rulemaking by the end of 2022.

The Fundamental Challenge

To say the CLCPA's goals are ambitious is an understatement, and yet they will not be adequate to provide the state with sufficient clean energy to ensure the continuing reliability of the electrical grid.

The pace of building renewables will have to increase dramatically, as can be seen in Figure 4, below. NYISO estimates that the state needs an additional 20 gigawatts of renewable generation to meet the 70 percent renewables by 2030 goal. But just under 13 gigawatts of new generating capacity has been developed in the past 20 years, and over the past five years just 2.6 gigawatts of renewable and fossil-fuel generation have come one line, while 4.6 gigawatts have been deactivated, for a net loss of 2 gigawatts.[27] In short, the state is currently regressing from, rather than moving toward, meeting its clean and reliable energy goals.

In addition, the challenge of having enough generating capacity is going to be badly exacerbated by the DEC's Peaker Plant Rule. Peaker plants are normally natural gas or dual-fuel plants that provide dispatchable electricity (on demand). Some operate daily for a few hours in the afternoon and evening to meet peak



*Larger, full-color chart available at www.NextNewYork.net

daily demand, while others operate only a few hours per year, during periods of abnormally high demand generally caused by extremely hot or cold weather.

The express purpose of the rule is to tighten air quality standards over time to protect the low-income communities where many peaker plants are located. However, the effect will be to force many plants, particularly older ones, to be shut down completely as they will not be able to meet the standards. Ultimately, the goal of 100 percent emissions-free energy will force the shutdown of all peaker plants—but the risk is that reliable alternative sources won't be available to fill the gap. The NYISO predicts that approximately 950 megawatts of capacity will become unavailable beginning in 2023, with 1,600 megawatts unavailable by summer 20025.[28] Due to future increases in electrical demand from electric vehicle charging and a transition to electric heating, "the New York grid may cross a 'tipping point' in future years such that the transmission system and resources may not fully serve the demand," the NYISO warned.[29]

The Climate Action Council's own consultants anticipate that the amount of offshore wind power needed by 2050 will be between 16,000 and 19,000 megawatts, double what is called for in the CLCPA. The first offshore wind turbines are currently scheduled to come online in 2024, leaving 26 years for complete buildout. At least 1,500 turbines will be required, necessitating the construction of more than one offshore turbine per week between 2024 and 2050.[30] And by 2050 the earliest ones will need to be replaced.

The risk is exacerbated by the potential shutdown of three of the state's remaining nuclear reactors—the Fitzpatrick and Nine Mile Point plants near Oswego, and the Ginna plant northeast of Rochester—scheduled for relicensing between 2029 and 2035. Many clean energy advocates oppose nuclear power, although it is an emissions-free electricity source.[31] But if these three reactors are not relicensed, another 2,000 megawatts of electricity generation must be found to replace them.

Finally, and most importantly, except for hydropower, renewable energy sources pose a fundamental problem for grid reliability. Natural gas can be turned on and off as needed, and nuclear reactors provide a nearly uninterrupted base-load power supply, but the same is not true of solar and wind power. Daily demand generally peaks from mid-afternoon to late evening—precisely when solar power becomes less available, particularly during the winter. Excessively cloudy and stormy weather radically diminishes the generating capacity of solar panels even during daytime.

At a minimum, this means wind and solar resources must be substantially overbuilt. If a solar array has a potential capacity of 1,000 megawatts, but due to weather conditions is only producing half that, then it will take 2,000 megawatts of installed capacity to produce 1,000 megawatts of power. The same is true for wind; as wind speed drops, it takes more wind turbines to produce the same amount of electricity that fewer wind turbines would produce at ideal wind speed.

Because of this need to overbuild, renewable energy costs are not as cheap as advertised. In California, which is New York's primary competitor in the race to achieve 100 percent emissions-free electricity, retail electricity prices have increased faster than the average increase across the U.S., and by 2016 had become 50 percent higher than the U.S. average.[32] And states—such as New York—that passed renewable portfolio standards to promote renewable energy production had energy prices that on average were 11 percent higher after seven years and 17 percent higher after 12 years.[33]

But even overbuilding isn't sufficient—because the sun doesn't always shine, and the wind doesn't always blow. It doesn't matter how many gigawatts of installed solar panels the state has if none of them are receiving sunshine, and it doesn't matter how many wind turbines there are if the wind isn't blowing. At the extreme, there can be insufficient wind and sun simultaneously, a condition Germans call a *dunkelflaute*. While often overbuilding of wind power will enable wind to make up for low solar output, and vice versa—even if the cost of the necessary overbuilding is exorbitant—in the case of a *dunkelflaute*, neither resource can compensate for the other.

This problem is recognized by both the Climate Action Council and NYISO. The Climate Action Council's Draft Scoping Plan admits that there are "many weeks in the year—especially during the winter—in which the contributions from renewables and existing clean firm resources are not sufficient to meet demand."[34] And NYISO estimates that under the state's current plans to shut down fossil fuel-fired power plants, 10 percent of the needed winter supply by 2040 will be missing.[35]

The Search for Dispatchable Backups

The plan to phase out natural gas and dual-fuel power plants—both highly reliable source of dispatchable power—threatens to leave New Yorkers at the mercy of highly *un*reliable wind and solar. But energy sources that are both dispatchable and emissions-free, or DEFRs,[36] are not yet cost-effective or available at utility scale. In any case, they likely would serve as forms of energy storage rather than primary sources. This means public and private utilities will need to

build out even more of the unreliable renewable sources to produce the extra energy that will be stored for when the renewables are unavailable.

Storage can include batteries, as required by the CLCPA, but current battery technology cannot provide electricity for more than a few hours. Even batteries storing 100 hours or roughly three days' worth of energy (the current holy grail of zero-emissions advocates), may be insufficient during extended periods of low wind and sun. Chemical battery costs will have to decline from current level by more than 90 percent before they become cost-competitive with existing forms of electricity production. Because of limited mining for the required elements, and the extensive control by China over the refining process of these elements, future supply-chain issues are expected, which may significantly delay the otherwise-expected price decreases that come with maturing technologies.[37]

Two other prospective dispatchable options are natural gas and hydrogen produced from renewable sources, although both depend on immature technologies that currently have very high costs. Renewable natural gas, produced from methane originating primarily in animal waste, would have the advantage of being a "drop-in" fuel that can directly replace conventionally produced natural gas using the existing natural gas pipeline system. However, opponents of fossil-fuel based natural gas also tend to oppose renewable natural gas, preferring to eliminate or sequester agricultural methane.

Hydrogen can be made from either natural gas or water. Made from natural gas, it is called "grey hydrogen," because it releases significant amounts of carbon dioxide, and is not considered environmentally friendly. The environmentally preferred method is to produce hydrogen from water, using either renewable energy ("green" hydrogen) or nuclear energy ("pink" hydrogen). When combusted to produce electricity or heat, the only waste product is water.

There are two specific difficulties with hydrogen that will be difficult to overcome. First, as a very small molecule, it is more susceptible to leaking than is natural gas. Second, it tends to make metals brittle, shortening their lifespan.[38] For these reasons, the current approach to generating electricity with hydrogen is to blend it with natural gas. Blends of 5 to 10 percent have been achieved in electricity generation, with some seeing the potential for blends of up to 30 percent.[39] However, some clean air advocates are opposed to all combustible gases, even clean hydrogen.

Putting aside high costs, technological hurdles, and political opposition, whether any dispatchable emission-free resources will be available on the required scale within just 18 years—meeting the CLCPA's 2040 deadline for 100 percent emissions-free electricity—is currently unknowable.

MOVING FORWARD

Energy policy must struggle to balance three factors: reliability, affordability, and low emissions. The fundamental error in New York policy is to over-emphasize low emissions over affordability and, especially, reliability. Policy goals are repeatedly stretched even before the original goals are achieved. The ideal of perpetually being at the national and international forefront of the clean energy movement has taken the place of ensuring benefits outweigh costs.

The Climate Action Council claims the benefits of the CLCPA do outweigh the costs. But by the Council's own accounting, most of the benefits are global, and the portion of the benefits that accrue to the state are outweighed by the costs its citizens will pay.[40] Further, if this economy-wide transition effort follows the general pattern of such state-sponsored megaprojects, the benefits are likely to be far less than predicted, and the costs multiple times what has initially been claimed.[41] In short, the costs may be many times more than the benefits.[42]

New York produces less than one-half of one percent of global greenhouse gases, and most greenhouse gas emissions do not directly affect human health. Energy policy should aim to keep New York on its gradual and steadily lower-emissions path rather than rushing towards an idealized goal that cannot possibly be met on the current schedule.

The following reform priorities will protect New Yorkers from the very real risks of a costly and unreliable electricity supply:

- **Scrap the current Climate Leadership and Community Protection Act.** The CLCPA does include an escape clause for fossil-fuel fired plants and related infrastructure to meet reliability needs, but the conditions are stringent and to date the DEC has been reluctant to approve such projects. At a minimum, this escape clause should be strengthened to emphasize that energy reliability *and* affordability are of equal importance to emissions reductions. After all, metropolitan New York City area customers already pay some of the highest utility rates in the country, and in the wake of the pandemic, more than one million New York customers statewide were collectively nearly $2 billion in arrears on their energy bills.[43] Reliability is even more crucial because power outages in extreme weather can kill people by the hundreds, particularly the poor and elderly.[44] In a related move, the DEC's peaker plant rule should be modified to encourage progressively cleaner emissions while allowing the plants to remain online until suitable replacement power projects are developed.

- **End the *de facto* natural gas pipeline moratorium.** As opposed to all other currently available technologies, the benefits of natural gas are obvious: gas is a more reliable, affordable and efficient energy source for electricity and heating reliability, especially as compared to fuel oil, which remains a heavily relied upon heating fuel in much of the state. The next DEC Commissioner should approve needed pipelines.

- **Repeal the fracking ban.** The fracking ban prohibits the beneficial development of natural gas fields, constrains the development of property-owner wealth, and causes local governments, as well as the state, to forgo hundreds of millions in fees and income tax receipts. And as a geopolitical matter, in the wake of the Russia-Ukraine war, increased natural gas production is a major national strategic priority as well as a goal serving the best interests of New Yorkers.

- **Rethink renewable and zero-emission energy credits.** Renewable energy advocates increasingly boast that solar energy is cheaper than natural gas and nuclear, and that onshore wind is nearly down to the price of those resources and expected to be equal to them soon. If that's true, they should no longer require subsidies from ratepayers. Subsidies supporting extremely expensive offshore wind projects should be phased out as soon as possible. And with the goal of requiring all sources to meet a true market test, zero-emissions credits for nuclear power plants ideally should be phased out in the long run. In the short-term, however, as more unreliable wind and solar sources come online, the credits may be required to keep reliable nuclear power in place. In a system ultimately free of subsidies, nuclear plants may yet prove be more cost-effective than solar, wind and other low- and zero-emission renewables.

- **Repeal the post-2035 ban on selling new internal combustion engines.** A troubling mandate on its own merits, the forced increase in battery-electric vehicles will increase the strain on the state's power grid at a time when it is facing unprecedented challenges from unreliable renewable sources of electricity. The market is likely to create a sufficient growth in electric vehicles to achieve much of the goal of reducing greenhouse gas emissions from the transportation sector, but for grid reliability purposes, that growth should not be artificially increased.

- **Stop legislation likely to further increase costs and undermine reliability.** Among the most potentially damaging bills to have been introduced in the last two years are the Build Public Renewables Act,[45] requiring NYPA to prematurely take reliable fossil fuel-fired power plants offline and invest only in renewable energy, reducing the reliability of the electric grid; and the All-Electric Building Act,[46] which would prohibit new buildings from having natural gas hookups for appliances or space heating.

- **Encourage investment in hydrogen, renewable natural gas, and advanced nuclear power.** Recent governors have tended to view all economic development incentives largely as a matter of tax breaks and increased taxpayer subsidies for business. In the energy field, however, effective incentives can be crafted through regulatory reform. The Hochul administration effort to position New York as a federally supported hydrogen research hub should be continued—but beyond that, the state should aim to create a more welcoming regulatory environment for innovative technologies. Advanced next-generation nuclear energy, in particular, relying on small modular reactors, could potentially provide New York with plentiful safe, reliable, emissions-free electricity.[47] The first experimental reactors are expected to come online in other states by the end of the decade, and rapid buildout could come in the two decades after that to help New York meet its 2050 clean energy goals.[48]

ENDNOTES

[1] By law, no more than four members of thrseven-member PSC can belong to the same political party.
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7. Transportation and Transit: Back to Basics

By Nicole Gelinas

From Buffalo to Brooklyn, New Yorkers have inherited well-planned, well-built transportation infrastructure, from New York City's subway to the state Thruway. These assets are the backbone of New York's economy, with mass transit enabling New York City's density and the downstate region's commuting wealth, and with highways enabling major industry such as manufacturing, farming, and modern-day research and development.

Yet over the past two decades, New York State has lost its way in managing these assets. The state has diverted scarce funding to multi-billion-dollar signature megaprojects at the expense of safeguarding the long-term condition of existing transportation and transit properties. Even as the state has lost sight of prioritizing maintenance and repairs, it gets less return on each dollar deployed, due to the increasing cost of constructing, maintaining, and operating transportation and transit projects, already higher in New York State than elsewhere in the country and the developed world.

Beyond re-establishing sound transportation management, New York faces new challenges. The proliferation of electric vehicles (EVs), encouraged by federal and state subsidies, presages a long-term decline in fuel-tax revenues, following years of erosion due to greater fuel efficiency. The persistence of the work-from-home phenomenon heralds a long-term decline in transit-fare revenues. Lastly, if the state does not soon either implement a long-delayed congestion-pricing program to support the Metropolitan Transportation Authority's capital-improvement budget, it must find an equivalent source of revenue.

Looking ahead from 2023 to the mid-decade, the governor and state lawmakers should reassert key principles:

- First, major new transportation and transit new-construction projects should pay for themselves (after federal grant money), if not entirely through direct user revenues such as tolls or fares, then through bonds approved by voters and/or through dedicated tax revenues.
- Second, revenues derived from transportation infrastructure should not pay for non-transportation projects, and vice versa. General state tax revenues should not subsidize large-scale transportation construction, and transportation-related revenues should not support unrelated projects.
- Third, the state must prioritize repair and maintenance of existing assets over new construction.
- Fourth, the state must control construction costs, and, in the case of mass transit, operational costs.

- Fifth and finally, New York's governor should recognize that the state eventually must replace fuel-tax revenues. The state should consider a voluntary pilot to test a vehicle-miles-traveled fee.

THE STATUS QUO

Before the current era, New York's modern transportation history falls into three periods. The first, between the turn of the 20th century and the late 1950s, was a period of major construction, initially of mass-transit projects such as the New York City subway, and later of limited-access highways such as the Thruway. Though the city raised municipal bonds to fund subway construction in the early 1900s, the state generally funded other such projects through debt repaid by a mix of state and federal tax revenues (including, after 1929, the two-cents-a-gallon state gas tax)[1] and by direct project-derived revenues (such as tolls on the Thruway). When the state borrowed money for a large-scale project whose expected future user fees wouldn't fully fund its construction, as in the case of the Thruway, the state secured voter approval for such debt, as its constitution requires.

The second, from the 1960s through the mid-1980s, was a period of relative inactivity. The state and its cities cancelled several planned highways. The state neglected mass-transit assets and, to a lesser extent, existing highway assets.[2]

The third period dates roughly to the early 1980s, when the state, under Governors Hugh Carey and, later, Mario M. Cuomo, formalized a fiscal regime to put both transit and transportation funding on a long-term sturdy footing.

Dedicated transportation revenues

Starting in 1980, the state Legislature approved a series of dedicated taxes for the state-controlled Metropolitan Transportation Authority, which runs New York City's subway, bus, and commuter-rail networks. The most substantial package was the "mass transportation operating assistance" bundle of taxes reserved for the MTA, including a ¼-of-one percent sales tax in the downstate region served by the authority, a regional franchise-tax surcharge, a transportation and transmission business tax, and a petroleum-business tax. The taxes were designed to meet the MTA's capital-infrastructure and operating-subsidy needs.

As the initial tax package proved insufficient in light of the MTA's growing costs, though, the Legislature has approved added taxes and fees roughly every decade to supplement it. The most recent series of MTA-dedicated revenues include 2018's congestion charge on for-hire vehicles within core Manhattan, which raised more than $300 million in the year after its enactment. This was preceded in 2009 by the MTA's biggest new revenue source since the 1980s—the payroll-mobility tax, a 0.34 percent levy on most downstate payrolls, which was generating $1.6 billion annually by 2019. (See Table 1 on next page.)

Along with new revenues came a requirement for long-term planning. In the early 1980s, the Legislature directed the MTA to devise five-year, multi-billion-dollar "capital plans" to prioritize investments in repair, replacement, and, starting in the 2000s, new construction.

Table 1
Metropolitan Transportation Authority Dedicated Taxes & Fees, 2019
(in millions)

Metro mass transit operating assistance (MMTOA)[a]	$1,824
Payroll mobility tax	$1,561
Petroleum business tax (separate from MMTOA)	$649
For-hire-vehicle congestion-pricing fee	$336
MTA aid package[b]	$311
Mortgage recording tax	$462
Urban tax[c]	$668
Total MTA 2019 revenues from dedicated taxes	**$5,810**

Source: author's calculations based on MTA BudgetWatch report

a Sales, regional franchise, transportation/transmission, petroleum business taxes
b License, vehicle registration, taxi and automobile rental fees
c NYC-only mortgage recording tax, property transfer tax

In the early 1990s, the state Legislature took a similar approach to highways and bridges: enacting dedicated taxes to fund transportation infrastructure that could not pay for its capital costs through toll revenues (Table 2, below). In 1991, the state created its dedicated highway and bridge trust fund. The goal, as state comptroller Thomas P. DiNapoli puts it, was to fund "critical transportation infrastructure" on a "consistent, reliable basis." The trust fund takes in revenues from six taxes, namely the petroleum-business tax, motor-vehicle registration fees, the motor-fuel tax (now eight cents a gallon), highway and fuel use taxes (including a mileage fee on trucks), the auto-rental tax, and transportation and transmission business taxes.[3]

Unlike with mass transit, the state Legislature chose not to create a dedicated tax to support operating costs for highways and bridges. One reason is that operating costs are much lower, as highway transportation is far less labor-intensive than mass transit. The state's Department of Transportation (DOT), for instance, employs 8,147 full-time employees, and spends just $2 billion in operating costs.

Table 2
NY State highway & bridge trust fund dedicated taxes, FY2020
(dollars in millions)

Petroleum business tax	$644
Motor-vehicle registration fees	$638
Motor-fuel tax	$386
Highway use tax	$140
Auto-rental tax	$74
Transportatin/transmission tax	$10
Total highway& bridge trust revenues from dedicated taxes	$1,892

Source: Office of the State Comptroller

By contrast, the MTA employs nearly 70,000 full-time workers, and, not including debt service, has a $15.5 billion annual budget.[4]

By the turn of the 21st century, the state enjoyed dedicated tax streams for construction, repair, and maintenance of mass-transit and highway-transportation assets and enjoyed such streams for mass-transit operating costs, as well.

The dedicated funding stream for mass transit has, in the aggregate, more than kept up with general cost inflation over the broad time frame. Due to economic growth (as well as the gradual addition of new dedicated taxes), dedicated taxes brought in nearly $6 billion annually to the MTA by 2019, the year before the COVID-19 pandemic hit New York State, compared to $500 million in 1985 (the equivalent of $1.2 billion in 2019 dollars). In the highway and bridge trust fund, revenues reached more than $2 billion by 2019, although the taxes have not kept pace with inflation over the past decade, due to greater fuel efficiency. [5]

Distracted driving

Despite these dedicated taxes, the state's highway and bridge transportation funding is increasingly strained and must rely on general state revenues for major capital projects as well as for maintenance and repairs. The state's transportation trust fund long ago stopped fulfilling its purpose, to fund transportation repair and replacement from its dedicated taxes. In recent years, estimated spending has recently begun to fall short of estimated needs, especially on bridges.

The biggest problem is an overreliance on borrowing not envisioned in the original legislation. As the state comptroller has noted, a 1993 amendment to state law allowed for borrowing against the highway and bridge trust fund's dedicated revenues, marking "a shift in the state's transportation capital program from being a self-funded system … to one that has become substantially debt-financed."

That is, rather than using the dedicated tax revenues to fund capital projects on a pay-as-you-go basis, the state borrowed against those future revenues. By 2019, debt service was consuming $1.4 billion annually, or nearly three-quarters of the highway and bridge's trust fund's dedicated-tax revenues.

A smaller problem is that, though the initial plan for the trust fund was for the money solely to fund large-scale capital projects, the state further amended the law in 2001 to allow the trust fund to subsidize transportation operating costs, just as dedicated taxes subsidize such deficits at the MTA. By 2019, the trust fund was spending nearly $1.3 billion annually on state transportation-related operations costs, rivaling the amount spent on debt service.

Because payments on debt service and payments for operations now exceed dedicated-tax revenues, the trust fund must rely on $800 million in annual transfers from the state's general fund, paid for by general tax revenues.

Because of these strains, the trust fund has not increased its investment in infrastructure. Over the past half-decade, the trust fund has spent just $560 million annually, or fewer than 30 percent of its dedicated tax revenues, on the purpose for which the trust fund was created: direct capital expenditures. Even as construction-cost inflation has soared, the trust fund's capital expenditures have remained steady, meaning each dollar buys less capital.

Running into potholes

The result is that, despite the existence of the highway and bridge trust fund, the physical state of highway and bridge infrastructure has not improved much over the past two decades.

The state's goal is to maintain pavement conditions on its 42,742 lane miles of roads between a federally recognized rating of 6.7 and 7.2 on a scale of 1 (very poor) to 10 (excellent). Though New York has indeed achieved that goal, it has not significantly improved road conditions in two decades, as shown in Figure 1. The state has also achieved its goal of keeping structurally deficient bridges below 15 percent of the total 7,700 highway bridges. However, it has improved bridge conditions slowly, reducing the percentage of structurally deficient bridges from just under eight percent to just above seven percent over a half-decade.

These ratings may grow worse. Thanks to borrowing against the trust fund and federal grants under Obama-era stimulus, the state's highways and roads enjoyed a decade and a half of robust investments until 2017.

Yet since then, from fiscal years 2018 through 2020, despite a $23.4 billion, five-year transportation capital plan during that period, the state has failed to spend enough money to keep up with the estimated amount needed to maintain highways, roads, and bridges in their current state, as shown in Figures 3 and 4 on the following page. In 2019, the state DOT warned that "to achieve a state of good repair … in ten years, [the agency] would require approximately $2.5 billion per year for pavements and bridges from all levels of government, as compared to the current annual funding level for these assets of $875 million."[6]

The state's latest, $32.8 billion, five-year transportation capital plan, enacted in April 2022 as part of FY 2023 state budget[7], relies disproportionately on borrowing (see Table 3 below). It contemplates $16.5 billion in new transportation-related debt, nearly all of it issued through public authorities and underwritten by personal income tax collections—a form of "backdoor borrowing" designed to avoid the constitutional requirement for voter approval of general obligation debt, rather than through voter-approved general-obligation debt.

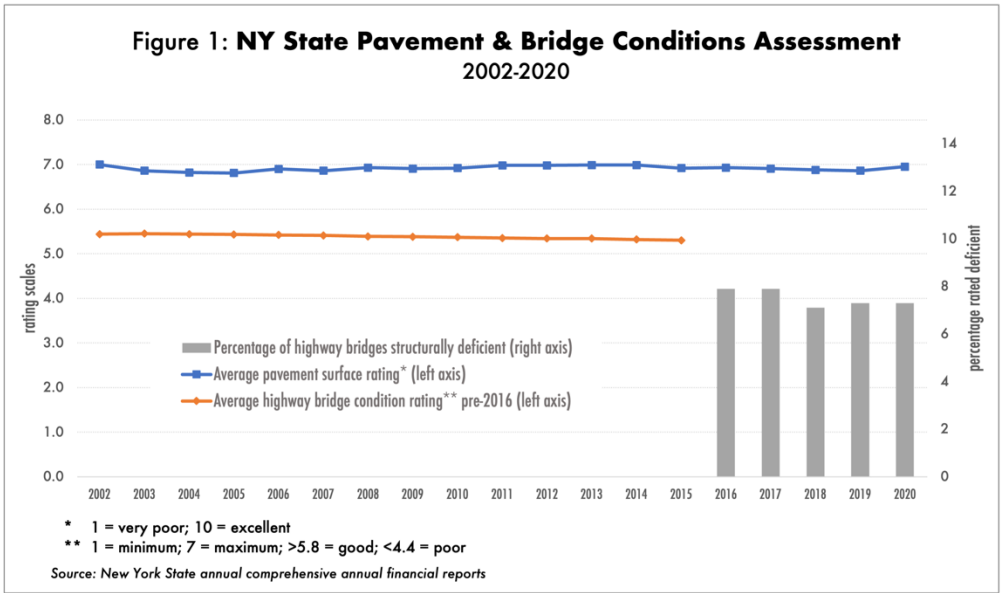


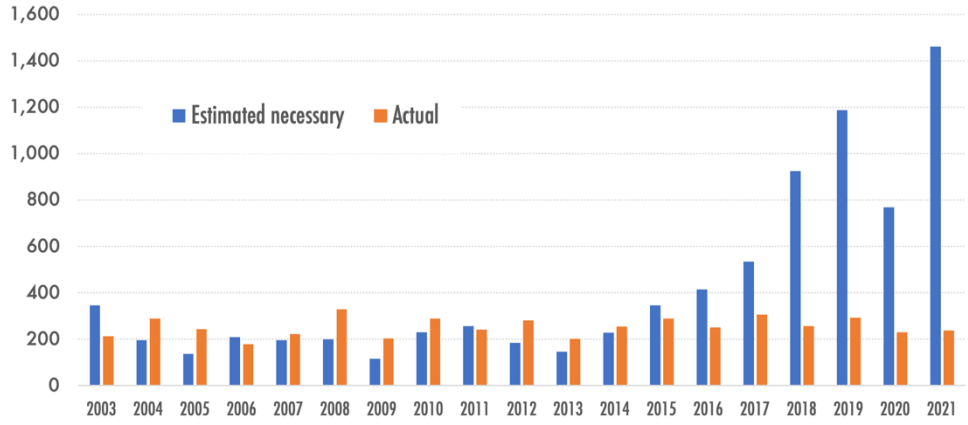
Table 3
Department of Transportation Capital Plan Funding, FY2022-27
(dollars in millions)

	2022	2023	2024	2025	2026	2027
Public authority bonds[a]	1,894	3,105	3,297	3,180	3,438	3,447
Federal grants	1,988	2,424	2,706	2,907	2,949	2,946
State pay-go grants	1,018	858	1,317	1,377	927	953
Potential debt share	38.7%	48.6%	45.0%	42.6%	47.0%	46.9%

[a] Classified as "Personal Income Tax Revenue Bonds" generally issued by the Thruway Authority

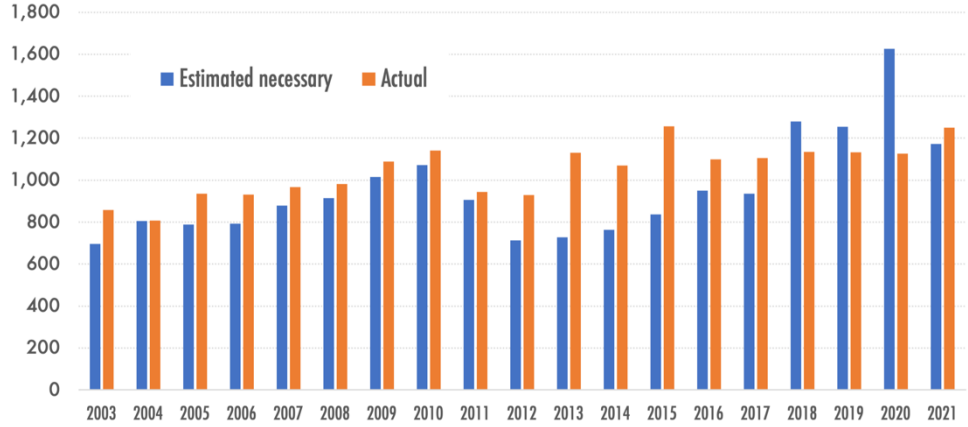
Source: FY 2023 Capital Program and Financaing Plan, State of New York

Figure 2: **Estimated necessary vs. actual roads spending**
FY 2003-2021 ($ millions)



Source: Author's calculation based on FY2023 Enacted Capital Program and Financing plan, State of New York

Figure 3: **Estimated necessary vs. actual bridge spending**
FY 2003-2021 ($ millions)



Source: Author's calculation based on FY2023 Enacted Capital Program and Financing plan, State of New York

The projected debt from the DOT capital plan alone would increase the state's outstanding total debt, which was $66.5 billion as of FY 2021, by 25 percent. The state risks a future in which day-to-day maintenance and repair work falls further behind as more future resources, both general revenues and dedicated taxes, goes toward servicing past debt.

The state plans to increase its transportation-related debt even as a key source of transportation revenue, the motor-fuel tax, has stagnated, thanks to better fuel efficiency.

Case study: the New York State Thruway

The New York State Thruway is a case study of how New York State has lost its way. In the fall of 1951, then-Governor Thomas Dewey presented the proposed New York State Thruway Authority as "self-liquidating," modeled on Robert Moses' Triborough Bridge and Tunnel Authority. That is, the toll revenues the Thruway would produce would fund the costs of both operations and, over time, the $500 million capital construction cost. Voters approved $500 million in state-guaranteed debt for the project based on this prospect.[8]

Yet as the state began Thruway construction, the cost of the project nearly doubled, to almost $1 billion, and the Thruway's revenues fell short.[9] In the mid-1950s, the Thruway thus had to borrow $472 million in revenue-backed bonds in addition to its state-guaranteed debt.[10]

Nevertheless, the state turned the situation around. By 1969, thanks to toll increases as well as increased volume, the Thruway was funding itself.[11] By the early 1980s, the Thruway was taking in $155 million annually, and expected that it could retire its debt within a decade-and-a-half.[12] By 1996, the Thruway still "receive[d] no state tax dollars and depend[end] entirely on toll revenues," even after an eight-year toll freeze.[13]

By the new century, however, the state government was taking advantage of the Thruway's self-sufficiency, using it to subsidize non-related costs that should have been borne by the general New York State budget. In 1992, then-Governor Mario Cuomo had forced the authority to take on the state's money-losing canal network.[14] By 2002, the canals comprised a $39 million operating expense, rising to $64 million by 2017.

Though forcing the Thruway to subsidize non-Thruway costs was bad policy, in the mid-2000s, Governors George Pataki, Eliot Spitzer, and David Paterson did at least allow the nominally independent Thruway enough freedom from politics to maintain its finances to absorb these non-related costs. In 2005, for example, the Thruway raised tolls in different segments by 25 to 35 percent. In 2009 and 2010, the Thruway once again raised tolls, by 10 percent.

Yet toll hikes were not sufficient. "From 2002 through 2011, Thruway-generated revenues grew by 4.0 percent on average annually, while [annual] expenses grew by 5.0 percent," the state comptroller reported.[15] Between 2010 and 2020, tolls remained stagnant, with the passenger toll on the Tappan Zee Bridge remaining at $4.75.[16]

The Thruway might have been able to withstand a stagnant toll for some time, as its budget is lean. Between 2011 and 2021, its operating costs (excluding asset

deprecation) rose from $482 million to $511 million, a cut in real (inflation-adjusted) terms, thanks in part to the conversion to automatic tolling.

A bridge to more borrowing

But as operating costs were dropping, Governor Andrew Cuomo saddled the Thruway with a substantial added expense: most of the $3.9 billion cost of replacing the outmoded original Tappan Zee Bridge (opened in 1955) with a twin-span structure named after former Governor Mario M. Cuomo. The authority has borrowed $2.5 billion to fund its portion of the project, substantially increasing its debt.[17] As of year-end 2021, the Thruway owed $6.8 billion,[18] well more than double the $3.2 billion that it owed a decade earlier.[19]

The Thruway Authority's annual debt costs rose from $116 million in 2012 to $195 million by 2021, or 24 percent of revenues. Its debt-service costs are set to jump again significantly, to $308 million, a more than 50 percent increase, in 2022, and to $362 million by 2023, peaking at $419 million by 2031.[20]

Despite shedding the Canal Corporation in 2017, receiving state cash infusions under a Cuomo-era "stabilization" plan, and approving two recent toll increases,[21] to a base rate of $5.75 on the new bridge in 2021, the Thruway is unable to cover projected cost increases. In its financial plan, it estimates an "additional [annual] revenue need" of $82 million.[22]

The construction of the new Tappan Zee crossing, moreover, diverted resources from other capital spending. The Thruway's figures show a decrease in pavement conditions since 2018.

A pile of mass-transit "priorities"

Unlike the Thruway Authority, the MTA has not enjoyed two decades of flat operating costs, relative to inflation. In nominal terms, operating costs doubled between 2003 and 2019, before the pandemic, far outpacing inflation (39 percent growth), growth in fares and tolls (99 percent) and growth in tax subsidies (200 percent). Payroll costs have risen from $3.3 billion in 2003 to $5.6 billion in 2022, growth of nearly 70 percent.

With growth in operating costs outpacing revenues, the MTA has also seen escalation in its capital budget for infrastructure. As the Permanent Citizens Advisory Committee to the MTA has written, the authority's first capital plan, beginning in 1981, totaled nearly $8 billion,[23] or $24 billion in today's dollars; the current five-year capital plan, which runs through 2024, projects to spend $52 billion, more than twice as much in real terms.[24]

The MTA's capital plans have increased in both ambition and cost per unit since the early 1980s—graduating from a repair and replacement phase from the early 1980s until the early 2000s, to a greater concentration on substantial new projects, including the $12 billion East Side Access project, the $5 billion first phase of the Second Avenue Subway, and the $1.4 billion Fulton Street subway station in lower Manhattan. Though the MTA received partial federal grants for such projects, escalating costs after those grant awards forced the authority to bear a far greater share of the burden.

This escalation has forced the MTA to rely increasingly on debt. During its first decade, the MTA funded 29 percent of its capital plans with debt and 33 percent with federal grants, the remainder coming from state and city support, according to the Permanent Citizens Advisory Committee. By 2004, the capital funding mix was 47 percent with debt and 27 percent federal support. [25] The current capital plan projects $12 billion in federal grants, up from $7.6 billion in the previous plan. But because of the growth in the capital plan, federal revenues would comprise just 21 percent of resources; the plan would depend on a record 63 percent debt (the remainder would come from state and local contributions).[26]

Because of this trend, the MTA's debt has risen from $32.7 billion in 2012 to $47.8 billion.[27] Annual debt costs, just under $650 million in 2003, have escalated to $3.1 billion, or 20 percent of revenues (including COVID federal rescue aid to replace fare revenues), and are projected to increase to $3.5 billion by 2026.[28]

The COVID-19 pandemic has exacerbated the MTA's financial problems, with fare and toll revenues down 36 percent from 2019 levels. Nearly 40 percent of pre-2020 weekday subway and commuter-rail riders have yet to return. The MTA faces indefinite annual deficits above $2.5 billion, papered over until 2025 by $14.5 billion in federal rescue funds.

An extra challenge: high construction costs

By any standard, the cost of building new transportation infrastructure in New York State exceeds national averages. As the *Engineering News Record* (ENR) reports, New York City's construction-cost index is 67 percent above the 20-city national average.[29] A 2018 study put the state's highway-construction costs at $65,712 per mile, fifth highest in the nation, and nearly twice the national average.[30] New York subway costs are multiples of those in the rest of the developed world.[31]

Costs are high due to a variety of factors, including:

- the state's "prevailing-wage" law (mandating union-scale hourly benefits as well as wages) adds 13 to 25 percent to a project's cost, and effectively mandates expensive union work rules as part of the deal;[32]
- New York State's longstanding contractual set-aside preferences for minority- and women-owned contractors and subcontractors;
- a shallow bidding pool for large projects; and
- expensive, politically-driven "change orders" to design and engineering specifications after a contract is awarded, such on the Tappan Zee Bridge replacement project.

Inflation is making the problem worse. As of September 2022, New York's construction costs were up 12.4 percent above 2019 levels, according to ENR. Though materials costs are abating as global demand slows, construction workers will likely request double-digit raises to account for increases in the cost of living, and to cover investment shortfalls in their pension funds.

MOVING FORWARD

The complex issues described here won't be fixed overnight. To begin addressing them, priority reforms include the following:

- **Reconsider priorities for highway spending.** Though most of the state's five-year, $32.8 billion highway- and road-transportation capital plan is devoted to repairing and replacing existing assets, it also contains a list of new "signature" projects worth $4.4 billion. And many of the priorities outlined in the capital plan, such as decking over sections of the Cross-Bronx Expressway come without cost estimates. Under the 2021 federal Infrastructure Investment and Jobs Act, New York will receive an additional $4.6 billion in federal aid highway money over a half decade. Yet absent clear prioritization and full cost estimations, federal grant money will fall short of covering costs, and the projects will consume money earmarked for repair and replacement, when such planned spending is already flat. To ensure rational signature-project prioritization, the governor should pause such projects and instead fast-track development of a 20-year "needs assessment."[33] As with the initial MTA mass-transit capital plans of the early 1980s, this review should prioritize projects based on the need to ensure existing assets are in good condition before embarking on new projects. The assessment also should feature a trade-off analysis; e.g., for every large-scale new-construction capital project moved forward, include an estimate how many miles of existing road repairs that must be delayed.

- **Identify highway funding sources before spending.** Before launching new-construction projects, the state should outline a clear revenue stream to repay their construction costs (after federal grants), whether it be direct user revenues (tolls), indirect revenues (dedicated taxes), or general state revenues. For projects to be funded out of borrowing, the state should refrain from its current practice of raising bonds backed by personal income taxes, and should put such proposed borrowing to general voter approval.

- **Link tolls to reasonable costs.** The governor should give the Thruway the political freedom it needs to raise its identified $82 million in annual "revenue needs." In practice, this means additional toll increases. The Thruway should consider indexing tolls automatically to general cost inflation, with an annual cap of 3 percent.

- **Reset dedicated taxes.** The highway and bridge trust fund should significantly increase its pay-as-you-go capital spending rather than embark upon the full new borrowing proposed in the new capital plan. The trust fund could more than double the current $560 million it is spending on pay-as-you-go projects were the state to transfer even a portion of the responsibility for state transportation operations, as opposed to capital, back to the state budget and away from the trust fund. At least a portion of any surplus funds should be transferred to the trust fund to make up for the past

funding of state operations cost, thus allowing the trust fund to build a reserve for future capital expenditures. This would not eliminate the need to borrow, but the state would be on its way to returning to the trust fund's original purpose: paying for repairs and maintenance. The state gradually could reserve new debt for large-scale projects that create new assets or extend the life of existing assets.

- **Adopt a more realistic MTA capital plan.** The current five-year capital plan, running until 2024, contemplates fewer new big-ticket capacity projects than previous plans since 2000. Just as with the state's highway-transportation capital plan, 82 percent of the new plan's resources, or $42.7 billion, go toward investments in existing core assets. Two of the capital project's most ambitious commitments are $9.2 billion for elevator and escalator construction and replacement, and $7.1 billion to modernize subway signaling. The biggest single-ticket expansion item is phase two of the Second Avenue Subway to Harlem ($6.3 billion). Though its mix of projects is sound, the MTA has not proven itself capable of committing such a large amount of funding, 53 percent larger than its previous five-year capital program, by 2024. The new governor can buy some time for the MTA in asking it to make a more realistic schedule of capital commitments.

- **Rethink the Penn Station project.** New York State has a role in two major projects related to Penn Station: renovating the station itself and expanding train capacity. On the first project, the MTA has not produced a firm cost estimate to renovate Penn Station, a cost to be paid for (in part) by large-scale commercial-real-estate development on the West Side, subsidized by city tax incentives. The current capital plan includes only design funding, but no formal cost estimate, although informal estimates put the figure at $7 billion.[33] This project must be reconsidered before it goes any further. By allowing light and air into the existing train station below Madison Square Garden, the changes it makes may be beneficial from a cosmetic perspective—but they do not add train capacity. [34]

  The state should also reconsider its role in funding part of the cost of the second, related multi-billion-dollar Penn South project to increase commuter-track capacity under Penn Station, managed by the Amtrak federal railroad. Before investing in track capacity, the state should conduct a full assessment of the MTA's expected commuter-train schedules into Penn Station after the scheduled late 2022 opening of the Long Island Rail Road (LIRR) East Side Access terminal underneath Grand Central. ESA should redirect at least half of the LIRR's trains away from Penn Station, thus freeing up track space. The new governor also should explore whether smaller-scale changes that could be made by other government agencies, including Amtrak's redirecting Albany trains to and from Grand Central Terminal using existing infrastructure, would reduce the need for track capacity under Penn Station. New York needs a full mock-up timetable of train arrivals and departures circa 2030.

- **Control transit and commuter rail labor costs.** The MTA's subway and bus division's contract with its biggest bargaining unit, Local 100 of the Transport Workers Union, expires next year. The stakes are enormous; for example, raises linked to inflation over the past two years would add more than $500 million to the MTA's annual payroll costs. Any such increases across the MTA's workforce must be in return for productivity enhancements.[35] The MTA also should assert state jurisdiction over LIRR labor agreements, which anachronistically are still treated as subject to federal railway law. Since the LIRR is not an interstate railroad, its workers should fall under the state Taylor Law—which, unlike federal railroad law, prohibits strikes by public employees and thus removes a point of leverage from unions during contract negotiations.

- **Push for more transparent, productive capital contracts.** The Legislature should mandate that all contracts subject to the so-called prevailing wage law be made public, with such transparency facilitating ideas for productivity enhancements. Similarly, the state should compile performance statistics on contractors and subcontractors participating in minority- and women-contractor set-aside programs. The state should also require all contractors to provide bonded long-term warranties for work quality, common in Europe.[36] Finally, the state should consider modifying the requirement that contracts go to the lowest responsible bidder, allowing for a full value and past-performance assessment.[37]

- **Find substitutes for fuel taxes.** As autos and trucks have become more fuel-efficient, the amount of money that the state collects from motor-fuel taxes has stagnated. Electric vehicles will exacerbate this stagnation. New York should decide how it might replace, or significantly supplement, motor-fuel taxes. In doing so, the state can take advantage of federal grant funds for pilot projects to test a mileage-based user fee. The Eastern Transportation Coalition, which includes New York as a member state, has worked with four states–Delaware, New Jersey, North Carolina, and Pennsylvania—in testing such pilots, with programs designed for heavy trucks and for passenger vehicles.[38] A pilot program goal would not be immediately to raise money; rather, it would be to assess voluntary participants' experience of the pilots for improvement. The state also might consider whether, over the long term, it could devote some vehicle-miles traveled revenues to create a dedicated tax to fund transportation operations.

- **Make a fast, final decision on congestion pricing.** New York State's congestion-pricing program, enacted by the state Legislature in 2019, faces potential pitfalls. Expected to raise $1 billion for the MTA's future capital-program debt service via a $9 to $23 cordon toll for cars and trucks below Manhattan's 60th Street, the program would create a burden on both the Bronx and Staten Island in terms of additional "vehicle miles travelled," including hundreds of additional trucks daily to the Cross-Bronx Expressway.[39] If New York does not go forward with congestion pricing, however, it will need $1 billion in revenue replacement for the MTA, even assuming

cost reforms. A large-scale rethink might include a vehicle-miles-travelled-fee surcharge within Manhattan below 60th Street, or a pilot test of fees for loading and parking within core Manhattan, with the money to be shared between the MTA and the city.

- **Appoint independent experts to the MTA board**. The governor controls the plurality of the MTA's board via seven appointments, including the chairperson. The governor's goal in appointing members should be independence, to further the principle of checks and balance. Gubernatorial MTA board appointees should not hold agency jobs reporting to the governor's office, but should have experience in the transportation, project management, or financial sectors.

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8.
Housing New York

By Howard Husock

To a far greater extent than any other state, New York has made substantial public investments in its housing sector—both through direct financial support and indirect tax subsidies. The state's subsidies aim to create what is often referred to as "low-income" or "affordable" housing, but might better be described as income-*restricted* housing.[1] Governors Andrew Cuomo and Kathy Hochul doubled down on this approach, launching a new multibillion-dollar wave of government-backed affordable housing construction and preservation, financed by a combination of federal grants and billions of dollars in new state borrowing administered by agencies answerable solely to the governor's office.

State-authorized regulation of local rental markets has also been significantly extended in recent years. In 2019, then-Governor Cuomo signed the Housing Stability and Tenant Protection Act, making permanent New York City's long-standing "emergency" rent control system, in the process rolling back a modest "decontrol" reform enacted in the late 1990s.[2] The law also extended rent regulations and a local rent-control option to upstate communities that already have ample affordable housing. Some state lawmakers have continued to push for more widespread rental regulations, including laws capping rent increases on all private market-rate properties and requiring landlords to show "good cause" for failing to offer automatic lease extensions to their tenants.

In a bid to boost housing supply in suburbs, Governor Hochul's fiscal 2023 budget bills included a provision that would have effectively overridden local zoning laws by requiring towns and cities to allow accessory dwelling units (ADUs) in neighborhoods now limited to single-family homes. That proposal ultimately was dropped but seems likely to emerge in new forms.

For all the political focus on housing issues, however, New York's policies have produced meager or counterproductive results—when they haven't arguably undermined supply and affordability.

On Long Island and in the lower Hudson Valley, little new housing has been built, and the existing supply is both scarce and expensive.

New York City added a rising annual total of housing before the 2020 pandemic lockdown disruption, but not enough to compete with demand. The city's housing market remains hobbled by counterproductive regulations, inequitable taxes, high prices, and a massive but dysfunctional public housing complex.

Upstate urban areas, by contrast, have higher vacancy rates and more affordable housing stock—reflecting generally stagnant economic conditions. They, too, nonetheless have been targeted for expensive state-subsidized development—and, under the 2019 state law, upstate rental markets may now also be subject to disruption by local adoption of state-authorized rent regulation.

THE STATUS QUO

As of 2021, according to federal Department of Housing and Urban Development (HUD) estimates, New York had 591,065 units of publicly "assisted housing," or three units for every 100 state residents, which is double the national average relative to population and by far the most of any state. The total included 187,699 apartments in public housing projects, the vast majority owned and managed by the New York City Housing Authority, as well as some 271,000 privately owned units whose tenants qualified for government housing vouchers, and 108,000 units whose development was subsidized by the federal Section 8 Low Income Housing Tax credit, which requires a percentage set-aside of units for low and moderate-income households.

Even excluding publicly owned projects, New York's stock of 403,366 subsidized units (2.03 per 100 residents) far exceeded the total in every state except California, which had 475,341 units for a population nearly twice as large (or 1.2 per 100 residents). Notably, the HUD figures do not include the roughly one million rent-regulated apartments in New York City, which are also insulated from the private housing market, although not income-restricted.

New York State's housing finance debt of $18 billion is roughly six times larger than those of two states with larger populations, Texas and Florida, where state housing finance agencies most recently reported indebtedness of $2 billion[3] and $2.1 billion[4] respectively.

In recent years, the Empire State has committed itself to subsidizing even more "affordable housing," as well as renewing existing housing subsidies due to lapse. In 2017, then-Governor Cuomo launched what was described as "a landmark $20 billion, five-year plan to combat homelessness and advance the construction of affordable housing in New York State," including creation or preservation of "more than 110,000 units of affordable and 6,000 units of supportive housing" over five years, which his office touted as "the largest investment in the creation and preservation of affordable housing and efforts to end homelessness in the history of New York."[5]

Incorporating and expanding on this program, the FY 2023 state budget included what Governor Hochul called "a bold $25 billion, five-year housing plan that will create or preserve 100,000 affordable homes across New York, including 10,000 with support services for vulnerable populations."

The latest version of the state plan includes $5.7 billion in capital resources (funded by legislatively authorized but non-voter-approved state bonds, also known as backdoor borrowing), $8.8 billion in State and Federal tax credits and other federal allocations, and $11 billion to operate shelters and supportive housing units, and to provide rental subsidies.

While they are billed as affordable to low- or moderate-income renters, subsidized apartment complexes have been expensive to construct—typically ranging between $250,000 to upwards of $400,000 per unit even in low-cost upstate metro areas, depending on the extent of added amenities and "supportive" services included in each package.[6] By contrast, as of mid-2022, median single-family home

prices in the largest upstate New York cities ranged from $174,900 in Syracuse to $242,700 in Albany.[7]

Rent regulation

New York State (principally New York City) contains the vast majority of the nation's rent-regulated apartments—some 1,048,860 "rent-stabilized" units, plus a dwindling 16,400 apartments with pre-1971 tenants grandfathered into older, more stringent "rent control" provisions.

State law requires owners of rent-regulated apartments to apply annually for any increase in unit rent. Requests for higher rents must be based on demonstrated higher costs to landlords, rather than any assessment of what the rental market would bear. Rent-regulated units, in contrast to government-subsidized "affordable" units, do not require an income test for potential tenants.

Like all forms of government price control, rent regulation has had the counter-productive effect of creating what the political scientist Peter Salins has termed "scarcity by design."[8]

First, rent regulation discourages the normal turnover that makes way for newcomers to a city. A 2014 study found that more than three times as many rent-regulated tenants (23.1 percent) as market-rate tenants (7.1 percent) have lived in their units for 20 years or more.[9] Long-time tenants who may no longer need as much space naturally cling to their good deal rather than moving and making way for new arrivals, as they do in normal housing markets. Compared to tenants in market-rate units, twice as many rent-regulated tenants are over 65 in New York City.

Moreover, rent regulation does nothing to ensure that regulated units will serve those of modest means—just the opposite, in fact. When property owners face limits on how much rent they can charge, they have more incentive to seek tenants who are financially able to pay in full and on time. Indeed, the same 2014 study found that less than half of rent-regulated tenants in core Manhattan could be classified as low-income or "rent-burdened."[10]

Rent regulation also discourages capital investment and long-term building maintenance—a problem exacerbated by 2019's Housing Stability and Tenant Protection Act, which sharply limited maintenance-related investments that may be used to justify rent increases.[11] Specifically, the law capped non-capital upgrades at $15,000 to three separate units over a 15-year period; it also capped major capital improvements at two percent, amortized over 12 years for buildings with 35 or fewer units, or 12.5 years for those with more than 35.

By explicitly trading off building upkeep for limits on rent increases, regardless of tenants' ability to pay, state law creates a recipe for the long-term decline or "shabbification" of New York City's housing stock. The questionable changes in the 2019 law notably included an indefinite extension of rent regulation, which had previously been linked to a finding that a housing "emergency" continued to exist, as indicated by census data on rental vacancies. As a practical matter, the law—including its deterrent effect on new investors and new construction, concerned about the possibility of further expansion of regulation—will perpetuate the "emergency."

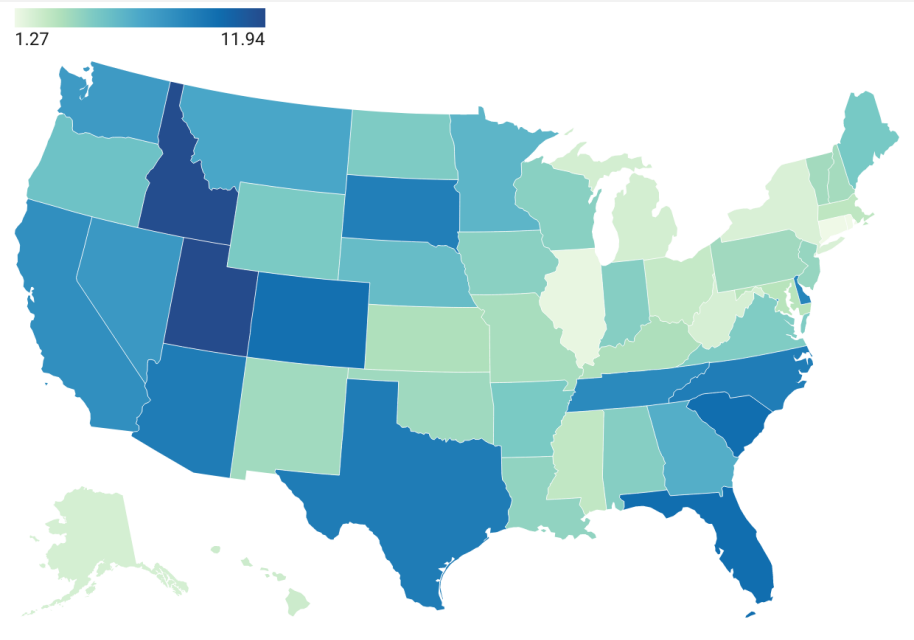
Supporters of added rent regulation are pushing to go further via a "just-cause eviction" law, proposed in the 2022 state legislative session and likely to be reintroduced in 2023.[12] That proposal would bar the initiation of eviction proceedings if an apartment rent had been increased by more than three percent (or 150 percent of the Consumer Price Index as measured at a set point in the calendar year). The proposal would effectively extend rent regulation statewide—and pose a particular problem during a period of increasing overall inflation.[13] In fact, rising rents in many of the state's older cities would actually be a positive sign—of rising demand and returning prosperity. The idea that property owners should be compelled to provide low-cost housing is distinct from the markets for virtually all other goods and services.

Big investments, scant return

New York state's ongoing public investment in financing housing construction has not significantly boosted growth in housing supply, especially when compared to other states, even in the expensive, slower-growing northeast, according to Census Bureau data illustrated in Figure 1, below.

In 2021, when new housing starts surged across the country in the wake of the pandemic, New York State municipalities issued building permits for 40,135 residential units in single- and multi-family homes, a ratio of just 1.99 units per 1,000 residents. This was well below the 50-state median, which was 4.4 units per 1,000. Only three states—Connecticut, Illinois, and Rhode Island—authorized fewer new housing units relative to population, while neighboring Massachusetts (2.82), New Jersey (3.99) and Pennsylvania (3.68) approved more housing construction.

Figure 1: **Housing Units Authorized, 2021**
Building permits issued per 1,000 residents



Source: U.S. Census Bureau

A similar pattern had been in place for years before the pandemic; in 2019, for example, the New York residential permits ratio was 2.09 per 1,000, just over half the national ratio of 3.75.[14] Only eight states issued fewer new housing permits per 1,000 in the seven years leading up to the pandemic.[15]

In 2021, New York residential building permits were concentrated in just two residential categories: single-family homes (11,099 units) and apartments in buildings of five or more units (27,510) units. Across the Empire State, only 908 two-family homes were issued permits in 2021—just three percent of the total—effectively limiting the range of housing types available, repeating a pattern from recent years.[16] This "missing middle" in the new multi-family housing market is less reflective of tenant preferences than of the strict, single-family zoning prevailing in many municipalities across the state.

On a regional basis within the state, permits for new housing units were concentrated in the four largest boroughs of New York City, particularly in buildings of five or more housing units. But even in a city where housing variety abounds, fully 25 percent of Queens and 22 percent of Staten Island remains zoned exclusively for single-family dwellings.[17] In those areas, a single-family home could neither be replaced by a two or three-family home nor converted into one.

The situation is more extreme in downstate suburbs such as Suffolk County, where single-family homes account for more than 81 percent of the housing stock.[18] Among the nation's 100 most populous counties, between 2008 and 2018, Suffolk and neighboring Nassau County ranked near the bottom in measures of new residential building permits per 1,000 residents, even amid continuing political talk and media reporting of an affordable housing "crisis." This was not just a northeastern phenomenon; most notably, Hudson County, NJ, part of the metropolitan New York City market, authorized nearly 48 residential permits per 1,000 during, the fifth largest ratio among the 100 most populous counties.

This pattern also continued as pandemic restrictions were being lifted. In 2021, among the nation's 281 most populous counties (those with 250,000 or more residents) the median rate of new housing permits was 43.5 per 1,000. But four large New York counties—Nassau, Onondaga, Suffolk, and Richmond—were among only a dozen out of the 281 issuing fewer than 10 permits per 1,000.

Stifling opportunity

Limiting the variety of housing stock also limits homeownership opportunities for individuals who could otherwise offset their costs with rental income. It not only limits buyer choice but inhibits the construction of what has been called naturally occurring affordable housing—homes within a variety of price ranges, reflecting modest size and rental income.

Government's "affordable" housing solution doesn't come cheap to taxpayers. New York's per-unit cost of developing subsidized housing, financed through federal and state tax credits and administered by the state's Housing Finance Authority, is among the highest in the nation—ranging as high as $450,000, with medians of $282,000 in New York City and $264,000 in the rest of the state, according to a 2018 federal study based on data from 2011-15.[19]

If government-subsidized housing were the best way to alleviate housing shortages and economic burdens, New York State should have done better in approaching those problems than any other state. Not only does it have a greater number of subsidized units, but it has invested more capital, as reflected by bonded indebtedness, than any other state. Moreover, it has facilitated the highest amount of subsidized housing during the same post-1960 period in which its population has persistently declined in relationship to other states.

As older New York cities and neighborhoods struggle with vacant housing units, it's important to recognize that new subsidized housing competes with privately-owned, unsubsidized but still relatively affordable units—and thus actually can *encourage* more abandonment of older housing in marginal neighborhoods. New subsidized units with contemporary amenities, priced below what the unsubsidized market would otherwise demand, logically divert demand from older but adequate private housing—just as subsidized steak would divert demand from ground beef, or subsidized lobster from catfish.

More space for fewer tenants

A more subtle problem with the New York housing market is its failure to make the best use of existing public housing units. Many tenants, particularly in subsidized complexes, effectively are "over-housed," epitomized by apartments with one resident and multiple, unused potential bedrooms. What HUD defines as "more bedrooms than people" characterizes 17 percent of all subsidized housing nationwide—but 27 percent of public housing households in New York State. Among tenants of the New York City Housing Authority (NYCHA), the nation's largest, nearly one-third of residents are over-housed by HUD standards.[20]

The over-housing syndrome reflects a larger problem stemming from state policies: low rates of tenant turnover. The limited supply of new market-rate housing, combined with the rules surrounding subsidized and regulated rents, encourages renters to continue to avail themselves of what they inevitably regard as a good deal. For many prospective tenants, landing an apartment in a public complex or state-subsidized system is akin to hitting the housing lottery, providing subsidized rent without a time limit even when income or assets increase.

Compounding the problem, the 2019 rent regulation law repealed a key provision of the Rent Regulation Reform Act of 1997[21] lifting price controls from units whose regulated rents moved above a "luxury" threshold (initially $2,000, most recently $2,744 a month), or whose tenants earned more than $250,000 a year. The so-called luxury decontrol provision served as gradual means of returning high-rent units to the free market, inducing turnover and investment that, indirectly, can benefit tenants of all income levels.

New York's current subsidized housing regulations not only limit turnover but also discourage upward mobility on the part of low-income households in public or voucher-subsidized housing. Like most similar agencies around the country, NYCHA and other authorities in New York link rent to tenant's incomes (typically pegged at 30 percent), rather than offering fixed-rent leases, which is the private-sector norm. This discourages subsidized households from increasing their income—which, after all, will only lead to higher rent.

Low turnover also leaves low-income newcomers, many of them immigrants, figuratively out in the cold. Asian-Americans, for instance, comprise 11.1 percent of New York City's households in poverty, based on median income, but make up only 4.7 percent of households in subsidized housing.[22] Many have no alternative but to turn to informal, illegal arrangements, as reflected by the estimated 100,000 people living in non-legal basement apartments across the five boroughs, many concentrated in immigrant-magnet neighborhoods such as Jackson Heights in Queens.[23]

Excluded from property tax assessments and uninspected by the city Buildings Department, these units are more likely to pose safety hazards to their inhabitants—as evidenced by the 11 drowning deaths in such units following the Hurricane IDA storm surge in the fall of 2021. However, safe and legal basement units could also provide much-needed additional housing.

Rethinking policy

It is time for a sharp departure from New York's past housing policy focus on subsidies and regulations, shifting to an approach aimed at harnessing private market forces by encouraging more new construction and renovation of existing vacant units.

Given the extent of debt financing for housing subsidies, and the much higher-than-average cost of construction of subsidized units, the state should adopt a moratorium on new subsidized housing construction. However, this need not preclude investment in maintenance and repairs in existing subsidized housing, such as that of the New York City Housing Authority, whose capital needs have been estimated at $40 billion. A good start is the New York City Public Housing Preservation Trust, created by 2022 legislation,[24] which has assumed responsibility for NYCHA renovations through a 99-year ground lease of the housing authority's properties. The Trust structure gives NYCHA access to twice as much federal funding, which will be used to leverage bond financing for capital projects. There is no justification, however, for a provision requiring the Preservation Trust to contract with NYCHA for property management, given the abysmal record NYCHA's unionized workforce. At the very least, the authority's staff should have to compete with private contractors.

It is also worth re-examining the promise of long-term affordability—up to 30 years—for current tenants, in the context of re-imagining public housing as a means of transition up and out of poverty, rather than remaining indefinitely in subsidized units. The state should seek federal permission to participate in the Moving to Work program, which permits local housing authorities to give preference to potential tenants who agree to a time limit, as well as to adopt fixed rents so as not to discourage earnings. Adoption of the Moving to Work approach in one California housing authority (San Bernadino), has led to striking results, including an average increase in earned income among program participants of 45.5 percent following a voluntarily adopted five-year stay in public housing. During the same period, full-time employment of participating tenants increased by 25 percent.[25]

There are other potential ways to make better use of existing housing stock, both subsidized and non-subsidized. New York state households, according to Census data, average 2.55 persons per household,[26] That is slightly smaller than the US average of 2.60, which itself has been in long-term decline, as households have come to have fewer members.[27] The prevalence of "over-housing" reflects that trend. While New York state is not an outlier in this regard, it can make better use of housing by encouraging somewhat larger households. To do so, local housing authorities could consider permitting tenants to sublet empty bedrooms to lodgers or single parents, without being penalized by paying higher rent. This also would also increase income for the subsidized tenants.

Allowing Accessory Dwelling Units (ADUs) in single-family neighborhoods could both increase household size and spur housing construction. These so-called "granny flats" may take the form of an additional small building on a single-family home lot, or the carving out of a small apartment in an existing home. This is an especially practical option for the lower levels of the raised-ranch and split-level houses common in New York City suburban subdivisions.

Expansion of ADUs throughout the state was among the non-budget items packaged with legislation presented to the Legislature in January 2022 as part of part of Governor Hochul's FY 2023 Executive Budget. Her supporting memorandum for the proposal emphasized the potential benefit of ADUs to elderly residents living in multi-generational homes.[28] However, the governor's original bill language would have taken a coercive approach, forcing localities to authorize creation of at least one ADU per residential lot, overriding local single-family zoning statewide.

Unsurprisingly, the proposal ultimately ran into opposition from suburban legislators in both parties. The governor amended her bill to eliminate the statewide mandate, focusing instead on an authorization for New York City to establish a program to legalize pre-existing ADUs; the final budget, however, contained no new ADU language. Widely viewed as interference with local zoning, the governor's approach of wrapping an ADU mandate in the massive budget package squelched a statewide debate that would have clarified the issue on all sides. Nonetheless, ADUs remain a housing option deserving of consideration in many suburban areas, especially downstate communities.

Local-control issues aside, another obstacle to housing development in New York's suburbs, and to ADUs in particular, is a lack of municipal water and sewer infrastructure—especially on eastern Long Island, as well as in New York City's further northern suburbs. For example, as *Newsday* reported in 2018, "nearly 75 percent of homes in Suffolk County—some 360,000 residences—are not connected to sewers and rely instead on septic tanks and/or cesspools, through which wastewater flows into the ground and Long Island's bays, rivers and the Sound."[29]

Another obstacle to housing development is New York State Environmental Quality Review Act (SEQRA), which is among the most expansive and restrictive environmental planning laws in the nation. For decades, in countless cases across the state, SEQRA has been employed by development opponents to delay and ultimately stifle new construction of all types, including housing, as explained in a 2013 Empire Center report.[30]

MOVING FORWARD

New York State faces a seemingly perennial "housing crisis" which political and policy intervention has not solved. Rent regulation rewards the affluent and inhibits the housing turnover a dynamic city like New York City relies on to accommodate ambitious newcomers and their innovative idea. Public housing—including the nation's largest such system, in New York City—is structured to discourage increased household earnings and upward mobility, while making poor use of what could be valuable development sites. Single-family zoning—the norm in most suburbs—acts as a straitjacket, limiting housing choices and making home ownership more difficult for households of modest means. So, too, does large-lot zoning (one-acre or more), which increases cost by limiting density.

Each of these problems cries out for common-sense reform. As priority steps, policymakers should:

- **Reverse rent regulation.** To prevent the spread of "scarcity by design," the Legislature should repeal provisions of the Housing Stability and Tenant Protection Act that allowed adoption of local rent regulations in municipalities not already covered by the pre-2019 rent law.31 In New York City and other communities that were already subject to rent control and regulation, the law ideally should be amended to provide for a phase-out to protect existing tenants but restore and broaden vacancy decontrol of regulated units. Short of that, state law at a minimum should restore the vacancy decontrol provisions of the pre-2019 law, which affected only the highest-priced units and the most affluent tenants and repeal those provisions capping rent hikes related directly to capital investments. Additionally, the Governor and Legislature should reject the proposed "just cause eviction" law, which would effectively extend rent regulation statewide by limiting rent increases to a cost-of-living adjustment. In a period of high inflation, such a measure quickly becomes outdated. Moreover, any rule restricting rent increases will spread the distortions of the New York City housing market statewide.

- **Encourage New Private Housing Development**. The ADU issue can be revisited without resorting to the coercive, top-down mandate proposed by Governor Hochul in 2022. Rather, the state should develop and promote a model ADU law for local governments, including guidelines for housing types and neighborhoods most appropriate for the change. To head off community opposition, this should be approached with the goal of minimally disrupting existing neighborhood housing patterns and streetscapes. For instance, ADUs close to commercial and transit hubs make more sense than mandating them in areas further away. These can be coupled with local financial incentives including but not limited to added grant money for road improvements, expanded transit networks, and—last but not least—water and sewer infrastructure in areas that lack it. More broadly, similar state financial incentives should be linked to more relaxed local zoning that would accommodate the natural affordability of small, multi-family homes,

such as two- and-three-unit structures. Historically, in the era before draconian single-family zoning, even affluent communities had a "poor side of town", where younger families, public employees and service workers could afford to live. Far-sighted zoning would recognize the need for such "workforce" housing.

- **Reform and Repurpose Public Housing.** Municipal housing authorities, especially NYCHA, should be encouraged (including through conditional state financial assistance) to seek participation in the federal Moving to Work program, giving preference to potential residents who agree to a tenancy time limit, as well as to adopt fixed rents so as not to discourage higher earnings. Housing Authorities should also be encouraged to sell properties on very high-value sites that could be used for other purposes. To do so, tenants should qualify for buyouts based on their years in a unit. Many public housing developments, especially in New York City, stand on extremely valuable real estate sites that could generate revenue sufficient to buy out tenants, on a voluntary basis. Both zoning changes and public housing site repurposing should be thought of as tools to unfreeze local housing markets whose constraints and distortions have combined to create, not resolve, a never-ending housing "crisis."

- **Cut red tape.** Zoning is not the only barrier to new housing construction. New York should streamline State Environmental Quality Review Act to curb undue delay of housing developments that otherwise comply with all relevant state and local environmental standards. This should include a fixed time-limit for review, so as not to discourage developers concerned about open-ended regulatory delay. More broadly, an open-minded state administration should consult with housing developers as to what they consider to be the chief deterrents to new construction, including zoning, permitting and regulation. The question should be asked of housing providers: what would it take for you to build more? Their answers should not be dispositive—but they should not be overlooked.

CONCLUSION

Viewing developers and property owners as a special interest, while viewing tenant "advocates" as representing the public interest, has led to a distorted and dysfunctional housing market in New York State. The time is right for a new, fairer balance—one that will broaden access to housing for New York State residents and potential newcomers.

Appendix
The Structure of New York State Housing Agencies

The state Division of Housing and Community Renewal (HCR) stands at the top of an organizational chart including a series of housing-related financial entities, all with the capacity to issue implicitly state-backed bonds and which rely on the interest income from developers, tenants, homeowners, and others to repay its bondholders.

Despite its high-profile role, statewide footprint, and extensive investments, HCR (now calling itself "Homes and Community Renewal") is not among the 20 cabinet-level agencies authorized by the state Constitution. Rather, it is an outsized division within the Executive Department, directly controlled by and answerable to the governor, who appoints its commissioner without a requirement for legislative confirmation. As of FY 2023, HCR had a $1.37 billion budget, funded overwhelmingly by federal grants, and all but $66 million was distributed in grants to local public chousing agencies. (As its name implies, HCR's Office of Rent Administration also administers rent regulations in all cities subject to them.)

The main sources of subsidized housing finance in New York state are a series of agencies grouped under the HCR umbrella but operating independently, directed by their own boards of gubernatorially-appointed directors. Operating like independent public authorities and formally categorized as public benefit corporations, these entities include State of New York Mortgage Agency (SONYMA) and the New York State Affordable Housing Corporation, both of which subsidize home ownership by using their bond-financed appropriations for such purposes as providing lower-income borrowers with financial assistance for home mortgage down payments.

By far the largest entity under the HCR umbrella is the New York State Housing Finance Agency (HFA), which is in the business of floating "social bonds" to finance subsidized, income-restricted multifamily apartment complexes. HFA has issued more than $31 billion in bonds since 1960, including $1.1 billion in 2020 alone.[32] Its accumulated liabilities total some $18 billion, as of February 2021. In effect, the HFA functions as a state-owned bank dedicated to allocating capital for a single purpose—subsidizing housing.

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9.
Taming a "Taylor Made" Public-Sector Workforce

By Ken Girardin

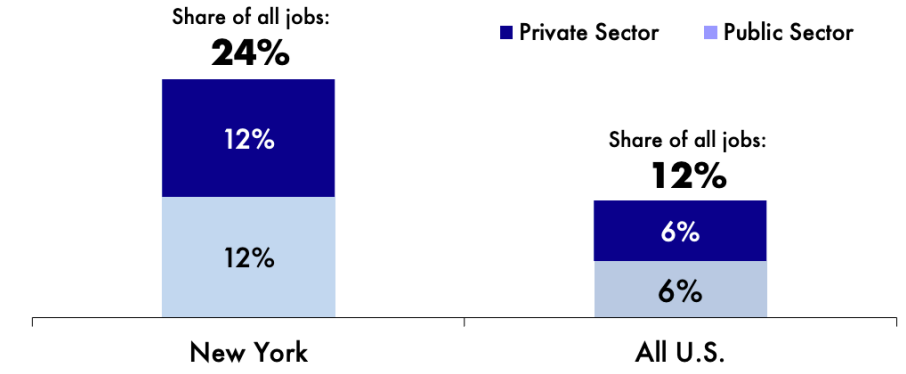
The size and composition of state and local workforces is a major contributor to the exceptionally high cost of New York's public sector. The fiscal challenges faced by state and local governments, along with many operational challenges, stem directly from made-in-Albany public employment policies.

New York has more state and local government employees per capita (55 per 1,000 residents) than any other large state, and more than the nationwide average (45 per 1,000), as shown in Figure 1. In 2021, about 1.2 million of payroll jobs in New York—one in every seven—were in state and local government.[1] About half of these public employees work for one of three entities: the City of New York, the State of New York, or the Metropolitan Transportation Authority (MTA). Measured by program category, public elementary and secondary schools accounted for close to half of New York's public payroll jobs (504,000).

The rules around public employment affect more than just the cost or quality of services. Organized labor's political power in New York is rooted in extensive unionization of the public sector, both in isolation and as a share of the total.

Twenty-four percent of all public and private payroll jobs in New York were covered by collective bargaining agreements in 2021—more than all but one state, and double the national union coverage rate of roiughly 12 percent.[2] Fully half of New York's unionized jobs were in the public sector, including many middle-management and supervisory titles.

Figure 1: **Union-covered employment, NY vs. US, 2021**



Source: www.unionstats.com

Nearly 71 percent of all public-sector jobs in New York were unionized, more than double the national median of 28 percent. The resulting flow of taxpayer-supported union dues nourishes a political apparatus that champions both increased government spending and expanded intervention in the private economy. But this situation is not irreversible. Legislative and administrative remedies exist that would allow New York's governor to meaningfully reduce both the cost of government—and labor's stranglehold on the Empire State.

THE STATUS QUO

Personnel costs are the single biggest expense at nearly every level of government—with the exception of the state government, whose operating expenditures consist largely of support for Medicaid and aid to school districts (which, in turn, spend mostly on salaries and benefits). For local governments outside New York City, the average share of expenditures covering employee wages, salaries and benefits range from just over one-third for counties to nearly two-thirds of total budgets for school districts (Table 1).

Table 1
Employee Compensation
Share of Spending by NY Government Level

School districts[a]	64%
Cities[a]	59%
Villages	47%
Towns	43%
New York City	48%
County governments	36%
State government	16%

[a] Excluding New York City

Source: Office of State Comptroller, author's calculations

Subject to federal and state mandates, local officials get to decide how much they spend for services, but the bang-for-buck quotient is ultimately shaped by the state Civil Service Law, including provisions governing unionization and collective bargaining law.

The New York State Constitution requires most government jobs be assigned based on "merit and fitness,"[3] underpinning civil service rules that require the use of written exams to measure qualifications, set hiring and layoff procedures, and give due-process rights in discipline matters. State civil service law applies to most employees of state agencies, public authorities, local governments, and school districts. K-12 teachers and administrators and state university professors are covered by separate but similar rules.

The civil service system, which dates to the late 19th century, has been slow to adapt to 20th and 21st century needs. Prior to major reforms under the Pataki administration in the 1990s, state agencies struggled to modify or eliminate positions without having to also lay off employees. More recently, the drawn-out hiring process complicated recruitment amid the tighter labor market as exam-takers moved on to other employment and would-be applicants were skeptical about taking a job from which they might be fired if three other people outperformed them on a future exam.

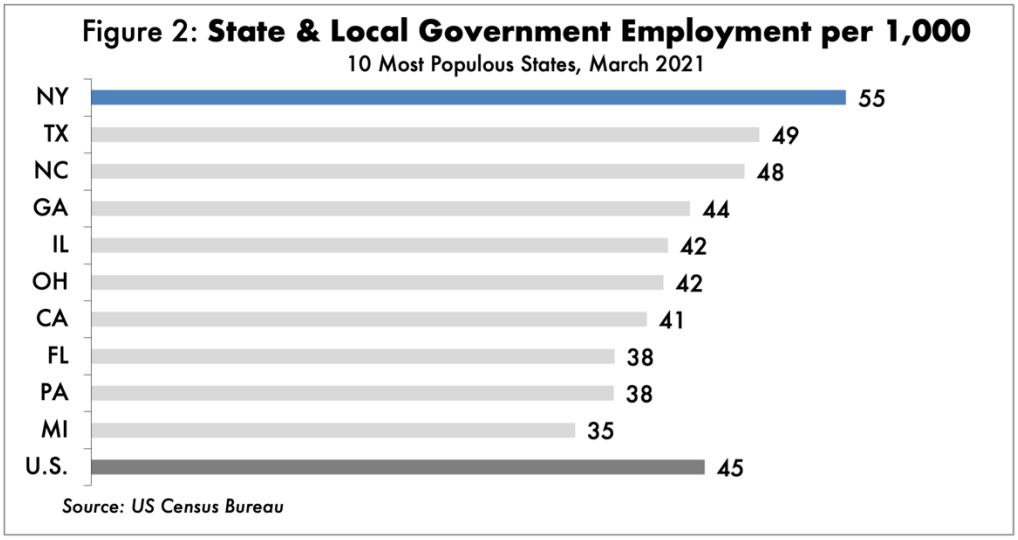
An appreciation of this system is necessary because it represents the baseline on which union agreements (discussed in detail below) are made. With few exceptions, New York public employees enjoy greater job security and safeguards than any of their private-sector peers–and this is without considering the protections that have been layered on top by union contracts.

Beyond pressing for more favorable contract terms, public employee unions are regularly pushing for advantageous changes to the civil service law. Because such changes raise the floor from which they negotiate. For instance, a 2020 proposal would have required almost any public employee facing discipline to be put on paid leave while charges were pending, unless the union contract required otherwise.

While the civil service law is a complex and important system, it does not affect public employment to nearly the same extent as the collective-bargaining regime the Legislature has grafted on top of it.

The Taylor Law

New York routinely ranks among the most unionized states, in no small part because of the size, and extensive unionization, of its public-sector workforce. Relative to population, as shown in Figure 2 below, New York has significantly more total state and local employees than any of the nation's largest states, and is well above the national average.



Virtually all public school teachers, approximately 94 percent of New York state government employees,[4] and 95 percent of New York City employees[5] are unionized, with nearly all the remaining workers in positions that make them ineligible. Police officers, corrections officers, and paid firefighters are almost universally unionized, as are the general municipal employees in most cities and counties. All told, about 71 percent of all public employees in New York are represented by a labor union.[4]

While federal law controls labor relations in the private sector, New York's state and local public employees bargain under its public-sector collective bargaining law, the Taylor Law. (Most New York City employees are covered by the city's own bargaining rules, with the city's teachers being the most notable exception subject to the Taylor Law).

The difference between public- and private-sector union relations, particularly in New York, cannot be overstated. Public employee unions in many cases arrived at the bargaining table in the 1960s and 1970s far ahead of their private-sector peers, already enjoying job security, retiree healthcare, and defined-benefit pensions, among other things.

While the right of private-sector workers to form and join labor unions was guaranteed by the state constitution in 1938, New York State law over two decades following World War II did not establish any guidelines for dealing with the burgeoning union movement in government. It allowed managers to fire strikers, and stripped strikers of any tenure protections and barred them from getting any immediate financial benefit from the strike. This made settlements more difficult.

In 1958, then-Mayor Robert Wagner issued an executive order granting collective bargaining rights to New York City employees — although the order did not initially cover teachers, whose newly formed union won the same rights after staging a walkout in 1960. The city's crippling transit strike of 1966, staged by a union that had organized subway workers when much of the system was still privately controlled, was cited by Governor Rockefeller as justification for rethinking state laws on public-sector collective bargaining.

Under Rockefeller's prodding, the Legislature in 1967 adopted the Public Employees' Fair Employment Act (Article 14 of the Civil Service Law). The state's previous draconian strike penalties were eased (though strikes remained illegal), and a system was created for holding elections and recognizing employee unions, requiring public employers to negotiate with them, and for resolving disputes. The law became known as the Taylor Law, after Wharton professor George Taylor, who helped craft it.

The Taylor Law obligates employers to deduct union dues from the paychecks of workers covered by union contracts.[5] In recent years, these deductions have totaled about $700 million annually. The Taylor Law framers viewed dues privileges as a lucrative incentive to discourage strikes. The money collected under the Taylor Law feeds a continual cycle in which the unions use political influence (and money) to win more favorable provisions from the Legislature, which in turn gives them more influence and resources.

As explained below, instead of requiring employers to bargain specifically over wages and benefits, the Taylor Law treated union negotiations as an open-ended proposition—anything that wasn't expressly determined by state law was figuratively on the table, in hopes of keeping talks from breaking down. With little by

way of legal guardrails, New York's elected leaders were free to trade away their managerial authority in the name of "labor peace."

The regulatory structure

The Taylor Law created the state Public Employment Relations Board (PERB) to regulate the negotiation process, oversee unionization elections, and provide mediation services. PERB's three members, appointed by the governor subject to Senate confirmation, serve six-year terms. The governor designates one board member as the PERB chairperson, who acts as chief executive of an agency staff of about 30.

PERB's most important function is arguably its ability to decide which terms and conditions of employment must be negotiated, may be negotiated, or may not be negotiated, the last case being when such negotiations would conflict with another section of state law.

For instance, an employer *must* negotiate when it wants to change a unionized employee's rate of pay. An employer *may* negotiate how overtime is assigned. And an employer may *not* negotiate over pension benefits, which since the early 1970s have been determined solely by state law. (A separate agency, the New York City Office of Collective Bargaining, performs a subset of PERB's duties for New York City unions).

PERB for its entire history has taken a position that more negotiation is better than less, leaving management with less discretion. Over the course of 55 years, the Taylor Law has been expanded beyond anything its framers had in mind. What follows is a description of some areas in which the playing field has tilted most decisively to favor unions and against the interests of management and taxpayers.

- **Disciplinary procedures**—Union contracts are allowed to have disciplinary matters decided by unelected arbitrators instead of elected officials, going far beyond the already-strong due process protections granted by the civil service law. A 2011 *New York Times* investigation of state homes for the developmentally disabled found the state's arbitration rules had prevented officials from firing employees in 99 out of 129 reviewed cases.[6] More recently, union records revealed that arbitration had prevented termination of workers who had forged time records, violently attacked a resident in a state-run home, viewed pornographic material at work, and committed other serious offenses.[7] Disciplinary arbitrations can be slow and extremely costly, prompting officials to avoid trying to terminate bad actors altogether. While state courts have affirmed that elected officials and their appointees, not contract provisions, have the last word in police discipline cases in the City of New York and some municipalities, state agencies would face arbitration in attempting to terminate many if not most employees.
- **"Unit work"—**PERB has given unions veto power over any effort that would transfer work done exclusively by members of a particular public-sector union to a private contractor or even other public employees who are not represented by the same union. This means even if an employee

retires, employers often must hire a new union-represented person rather than shift responsibilities to other employees or vendors. The New York City Transit Authority, which operates the city subway, had to get permission from the Transport Workers Union merely to have stations deep-cleaned by a contractor. PERB has explicitly ruled that "improved service" does not justify taking away work from unionized employees.[8]

- **Minimum staffing—**Union contracts, particularly for police and fire employees, sometimes require municipalities to employ a minimum number of uniformed employees or to have a minimum number working at any time. This is an especially costly requirement for municipalities where the need for fire protection has changed as populations have declined and building standards have improved.
- **Union privileges—**PERB (enabled by the state Legislature) has gone far beyond allowing unions to negotiate for employee benefits by allowing unions to demand—and friendly officials to grant—benefits for the union itself. PERB allows contracts to require paid union release time for union officers and their designees, allowing them to perform union work (or campaign for political candidates) during work hours without having to reimburse the employer. Other contract provisions force employers to deduct and remit funds to union political action committees, meaning taxpayers absorb the administrative cost of their political fundraising.

In addition, PERB has held that an employer must continue providing a benefit, even if that benefit was being conferred improperly or without legal authorization, if employees have a reasonable expectation that it will continue. Moreover, both PERB and state courts have together developed a complex patchwork of instances when policies affecting retired government workers must be negotiated. Applying union contracts to former employees presents myriad practical issues: retirees, for one thing, don't vote on the deals.

The Legislature excluded pension benefits from union negotiations in 1973, but PERB has ruled unions and employers can still negotiate over retiree health benefits—an open-ended proposition with costs far outlasting any one contract.

Pushbacks and poor data

New York's adversarial approach to public-employee labor relations is fundamentally biased against smaller local governments, which lack the resources to adequately challenge the state's worst rules. When a local government pushes back and tries to assert management's rights on a particular issue, it must assume the legal costs, and risks, of rolling the dice on challenging PERB in court. Officials must go it alone, even if other municipalities would benefit if they prevail. But when local disputes arise, large parent unions have an interest in pushing for more favorable precedents that can benefit hundreds of bargaining units all at once.

For example, in 2007, former Mayor Brian Stratton of Schenectady (population 67,000) launched what would become a decade-long battle to reclaim disciplinary powers over the city's troubled police department. Forced to keep several suspended officers on the payroll while the dispute was litigated in state courts, the

city's eventual victory at the Court of Appeals came at a price of well over $1 million in combined payroll and legal costs. And the small city of Watertown (population 25,000) spent four years and more than $850,000 in legal costs fighting to overturn a contract provision that required the city to have 15 firefighters on duty.[9] The city ultimately had to pay an additional $130,000 penalty.[10]

PERB's discretion is quite broad. Any effort to make either the state workforce or New York's public sector in general more efficient runs through PERB. The PERB chair, a gubernatorial designee, has significant discretion over the agency's staff and operations.[11]

Besides making rulings about the Taylor Law, PERB has a statutory responsibility to "make studies and analyses of, and act as a clearinghouse of information relating to, conditions of employment of public employees throughout the state."[12] But in recent years it increasingly has failed to live up to this mandate.

PERB's budget in fiscal 2023, just under $3.8 million, is more than 33 percent below its fiscal 1999 level on an inflation-adjusted basis—even though, in that time, the board has absorbed the responsibilities of a smaller agency that adjudicates private-sector labor matters, increasing its workload without a commensurate increase in resources. Under former Chair Michael Cuevas, who left the post in late 2006, PERB reviewed contracts and identified trends, giving public employers a better read on the reasonableness of union demands. But the board ceased compiling and releasing such information; indeed, its research capabilities are so diminished that the agency presently cannot say how many unions in New York are covered by the Taylor Law.[13]

The lack of data and transparency at the state level puts municipalities at a disadvantage. About half of the state's roughly 5,300 union contracts in force today were negotiated by local chapters of two large unions, CSEA and NYSUT. This means union negotiators arrive at the bargaining table already possessing necessary information about regional trends and emerging issues.

PERB regulations require employers to submit ratified agreements to the board within 15 working days. Yet out of more than 1,000 contracts that appear to have been ratified during 2021, PERB has so far added just two to its online contract database.

Triborough Trouble

PERB in 1972 held that the Triborough Bridge and Tunnel Authority could not suspend or change mandatory subjects of bargaining, such as pay and benefit levels, after a contract expired.[14] This became known as "Triborough doctrine."

With favorable contract provisions effectively locked in place, the Triborough doctrine meant unions no longer had an incentive to come to the table before a deal expired. However, a crucial portion of the administrative finding was rolled back under a 1977 ruling by the state Court of Appeals, which held that employers could not be required to pay longevity-based raises, sometimes known as "step increases" or "increments," after expiration of a contract.

"To say that the *status quo* must be maintained during negotiations is one thing; to say that the *status quo* includes a change and means automatic increases in salary is another," Chief Judge Lawrence Cooke wrote for a unanimous court.[15] Cooke's

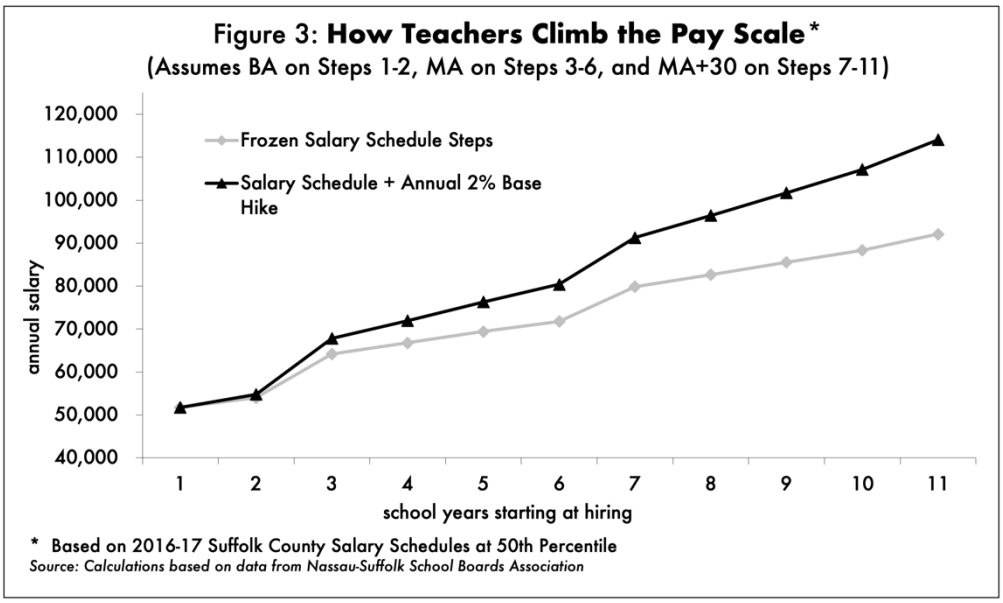
opinion also warned that "in times of escalating costs and diminishing tax bases, many public employers simply may not be able in good faith to continue to pay automatic increments to their employees."[16]

In 1982, however, following heavy lobbying by public employee unions, the state enacted what became known as the Triborough Amendment to the Taylor Law, requiring employers to continue all terms and conditions of expired contracts, including seniority-based raises.[17] The amendment weakened union incentives to settle on new contracts before the expiration of an existing agreement—especially in the case of teachers' unions, whose contracts typically include 20 or more years of longevity-based step increases of two to four percent in addition to any negotiated base pay increases. (See Figure 3, below.)

The Triborough Amendment gives public employees an incentive to hold out when management is seeking contract concessions. As one state worker put it when his union was asked to ratify contract givebacks in 2011: "We have Triborough … [so] why do this to yourself?"[18] In Buffalo, for example, public school teachers enjoyed raises for over a decade during a prolonged contract impasse between 2004 and 2016—holding out, among other things, against demands that they give up their free elective cosmetic surgery benefit. Thanks to step increases and other contract provisions, Buffalo educators (primarily unionized teachers, with a smaller group of administrators) had pay increases averaging 33 percent between 2007-08 and 2015-16—even though their contract had expired.[19] When a successor deal was ratified in 2016, teachers got between $2,000 and $9,000 in backpay as well as immediate 10 percent raises.[20]

Binding arbitration

Beginning in 1974, in "temporary" statutory provisions that have been renewed every few years since, the Legislature authorized unions representing police, firefighters, New York City transit workers and certain corrections officers the right to seek binding "interest arbitration" to settle contract impasses.[21]



Binding arbitration, like the Triborough Law, gives unions added reason to hold out for more in negotiations. The result: pay for uniformed police and fire employees increased at roughly three times the rate of other general government employees in the 38 years after they received arbitration privileges.[22]

Arbitration chairs—whose livelihood depends on the willingness of unions to go along with their selection—have discretion in choosing the "comparables" against which each municipality's terms and conditions are evaluated. Unions naturally seek to have their contracts compared with the most generous terms found in other jurisdictions. This led to a ratcheting-up effect, especially in downstate suburbs where town and village police departments are more numerous. Long Island departments, in particular, face constant cost pressures due to such comparisons and the specter of arbitration. Salaries in some years have averaged over $200,000 in a handful of small downstate police departments.

Governor Cuomo in 2013 proposed significant reforms for fiscally distressed municipalities that would have capped at two percent the pay raises arbitrators could award, with a similar cap on the employer share of healthcare costs. But the governor ultimately abandoned that proposal, instead settling for token changes to the law including a vague requirement for arbiters to give greater consideration to a municipality's ability to pay.[23]

The second major problem with binding arbitration is that awards tend to be limited to basic questions on pay and benefits. While managers may be looking to negotiate work rule changes, any union with arbitration privileges can be confident that an impasse will result in raises with little else changing as arbiters avoid being seen as too tough on labor. The binding arbitration provision is set to expire in July 2023 for transit employees and in July 2024 for uniformed police and fire departments employees statewide. Allowing it to expire would give mayors and other local leaders greater power to demand not only fiscal reforms but also improvements to how departments run.

Between Triborough and impasse arbitration, the Legislature has tipped the tables heavily in labor's favor, making it more difficult for elected officials to efficiently deliver public services.

Cones of silence

Collective bargaining negotiations are conducted behind closed doors, meaning the public is unaware of contract demands, proposals and counter-proposals by either side. Contracts are often ratified before the public can understand or even view them. Employers bringing a tentative agreement to a local legislative body need not provide an estimate of the deal's added costs. The rush to ratification means officials sometimes make mathematical and other errors in legally binding documents, on which the state places no maximum duration.

A 2005 Suffolk County grand jury, investigating financial irregularities in local districts, found "an abject lack of transparency regarding the issue for which school districts spend the overwhelming majority of their funds—salaries and benefits for their employees."[24] The grand jury recommended that state law require that "copies of all proposed school district collective bargaining agreements, employment contracts or amendments to those contracts be placed on the school

district web site, if existing, and within the local public libraries and school district offices, at least one month prior to the board of education's vote upon the contracts or amendments."[25]

What's more, the grievance adjustments and disciplinary determinations that flow from the agreements—and essentially set government policy—are almost never made public. The Taylor Law essentially imposes a second lawmaking process on New York state and local government—without the accountability that comes with elections.

MOVING FORWARD

The Taylor Law and administrative rulings have been major contributors to New York State's exceptionally high state and local taxes. Public-sector contracts also stand as a major obstacle to efforts to improve the efficiency and quality of public services. Reform priorities for the governor and Legislature:

- **Make collective bargaining more transparent.** Tentative agreements should be published on the internet, along with detailed cost estimates and fiscal impacts, for at least one month before they are ratified. For state government itself, the Office of Employee Relations should promptly publish all documents relating to labor union grievances, past negotiations, and disciplinary disputes.

- **Rejuvenate PERB to focus on the broad public interest.** The governor and state lawmakers should insist that the board lives up to its mandate to provide research and analysis that can inform employers and the public. This includes, first and foremost, collecting contracts as its regulations already require.

- **Repeal the Triborough Amendment.** Triborough and impasse arbitration make it difficult, if not impossible, for elected officials to make reasonable changes to how government operates. The Triborough Amendment should be repealed to prevent pay raises from taking effect after a contract has expired.

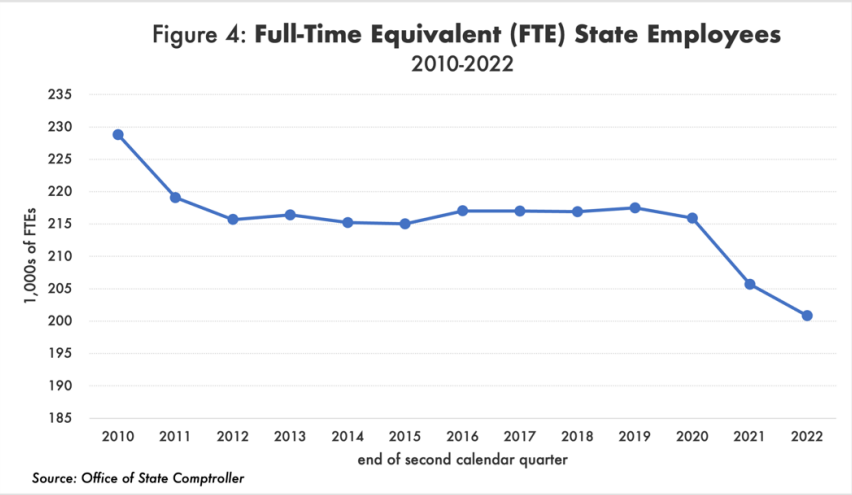
- **Set limits on binding arbitration settlements**. Before extending the law past currently scheduled sunsets, the Legislature at a minimum should enact Governor Cuomo's original 2013 proposal to cap at two percent the cost of pay and compensation increases, which would give unions more incentive to negotiate in good faith.

- **Limit the scope of collective bargaining.** New York's experiment with open-ended bargaining has been not only expensive but has caused contracts to co-opt decisions that should be made by elected officials. Matters that aren't directly related to wage and benefit levels, including discipline and work rules, should be excluded from bargaining, as pension benefits were in 1973.

Appendix:
The State Government Workforce

State agency headcounts of full-time equivalent employees (FTEs) as measured in mid-calendar year peaked at more than 256,000 under Governor Mario Cuomo in the early 1990s, but declined to just over 224,000 during the first two terms of Governor George Pataki, who took office in 1995. The FTE count began rising again in the final years of Pataki's third term, and continued increasing under Governors Eliot Spitzer and David Paterson, hitting its most recent peak of 232,000 in 2009, early in a two-year fiscal crisis brought on by the Great Recession.

Taking office in 2011, Governor Andrew Cuomo undertook a credible effort to restructure state agencies and reduce payrolls. Among other things, he consolidated back-office functions performed by separate department-based operations such as travel, accounting, and human resources. Agencies instead became clients of a new Business Service Center at the Office of General Services. A year later Cuomo centralized IT personnel, then scattered across 37 agencies, into the Office of Information Technology Services.[26] The state by 2020 had reduced its I.T. headcount by nine percent and was operating with one- third fewer I.T. managers.[27] In the spring of 2020, Cuomo ordered a hiring freeze (with exceptions) that remained in effect until it was suspended by Governor Hochul in September 2021. During the freeze period, FTE headcounts dropped substantially, to a new low of just over 200,000 FTEs in mid-2022, as illustrated below.



Excluding State University, City University and State Police employees, the headcount most directly controlled by the governor hovered around 149,000 for several years, but sank below 142,000 by January 2021 and bottomed out at less than 134,000 a year later. Governor Hochul this year is aiming to add back about 12,000 state employees to these agencies.[28]

The biggest employee relations challenges faced by New York's governor in 2023 will include:

- *Managing remote work*. A significant portion of the state's white-collar workforce continues telecommuting on a part-time basis under rules determined by each agency. It's unclear how performance is being measured, but given the state's longstanding challenges with employee discipline, it is likely there are areas that require immediate—and resolute—attention.

- *Ongoing negotiations with unions*. Excepting the Civil Service Employees Association and AFSCME Council 82 (senior corrections officers), all state union contracts will have expired by the end of 2023. CSEA secured across-the-board raises of 3 percent for fiscal years 2024 through 2026 in addition to one-time bonuses, and is generally seen as setting the pattern for other unions.

- *Implementing COVID lessons*. The inflexibility of the state workforce was on display in the early days of the pandemic as the state struggled to retask employees to urgent matters such as processing unemployment claims. With agency headcounts down, the governor will have an opportunity to further restructure and potentially centralize state functions such as customer-service operations that remain distributed across agencies.

The state workforce is not managed in a vacuum. It is constrained in many ways by the same policies that affect counties, school districts, cities, towns and villages. Any change to the Taylor Law or civil service regulations increase the flexibility of the state workforce would have separate—if not larger—benefits for local officials eager to reduce property taxes and improve service delivery.

ENDNOTES

[1] Quarterly Census of Employment and Wages, U.S. Bureau of Labor Statistics
[2] New York's sole union coverage rival among all states was Hawaii, whose travel and leisure sector is heavily unionized. Hawaii's union ocverage rate of 24.1 percent was statistically indistinguishable from New York's 24 percent.
[3] NYS Constitution, Article V, Section 6
[4] Hirsch, Barry and David Macpherson, "Union Membership, Coverage, and Earnings from the CPS," UnionStats.com
[5] CSL §208(1)(b)
[6] Hakim, Danny, "At State-Run Homes, Abuse and Impunity," New York Times, 12 Mar 11 nytimes.com/2011/03/13/nyregion/13homes.html
[7] Girardin, Ken, "Double Insulation," Empire Center, 2020. empirecenter.org/publications/double-insulation
[8] 25 PERB ¶3081 (1992)
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[10] Higgins, Oniqua, "Watertown and Fire Union Staffing Battles End," Spectrum News, 14 Nov 19. spectrumlocalnews.com/nys/buffalo/news/2019/11/14/watertown-fire-department-settlement-
[11] As of the fall of 2022, it appeared all three members of PERB had "holdover" status, meaning they have not been confirmed by the Senate to full terms. The last Senate confirmation of a PERB member appears to have taken place in June 2016, when former NYSUT attorney John Wirenius was confirmed as board chair.
[12] CSL §205(5)(e)
[13] A statistical table on the agency's own website, which presented complete numbers for negotiating units and negotiable contracts as recently as 2018-19, has the notation "data not provided by public employers and employee organizations" for the last three years. https://perb.ny.gov/perb-by-the-numbers/
[14] 5 PERB ¶3037 (1972)
[15] Board of Cooperative Educational Services v. New York State Public Employment Relations Board, 41 N.Y.2d 753, 363 N.E.2d 1174, 395 N.Y.S.2d 439 (N.Y. 1977)
[16] Board of Cooperative Educational Services v. New York State Public Employment Relations Board, 41 N.Y.2d 753, 363 N.E.2d 1174, 395 N.Y.S.2d 439 (N.Y. 1977)
[17] CSL §209-a(1)(e)
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[19] Girardin, Ken, "Buffalo's Murky Teacher Pact," Empire Center, 18 Oct 16. empirecenter.org/publications/buffalos-murky-teacher-pact
[20] Lankes, Tiffany and Jay Rey, "Teacher contract boosts pay, ends cosmetic rider," The Buffalo News, 17 Oct 16. buffalonews.com/news/local/education/teacher-contract-boosts-pay-ends-cosmetic-rider/article_a9661016-ab84-5f19-991e-a7bfce898cb7.html
[21] CSL §209(4) and (5). The Taylor Law did not originally provide for compulsory binding arbitration of contract impasses. The panel of labor experts who drafted the original law said that "would be detrimental to the cause of developing effective collective negotiations," and predicted: "The temptation in such situations is simply to disagree and let the arbitrator decide." (See State of New York, Governor's Committee on Public Employee Relations, *Final Report*, March 31, 1966, as reprinted in Jerome Lefkowitz, Melvin H. Osterman and Rosemary A. Townley, eds, Public Sector Labor and Employment Law, Second Edition, New York State Bar Association (1998), 60.
[22] McMahon, EJ and Michael Wright, "Police and Fire Pay Keep Rising, Benefits Sticky Under Arbitration," Empire Center, 9 May 13

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[24] Suffolk County Court Special Grand Jury, Sept. 19, 2005 Term IE, CPL Section 190.85(1)(C), Grand Jury Report Dated: June 26, 2006, page 188.
[25] Suffolk County Court Special Grand Jury, Sept. 19, 2005 Term IE, CPL Section 190.85(1)(C), Grand Jury Report Dated: June 26, 2006, page 195.
[26] "Testimony of Brian D. Digman, State Chief Information Officer and Director NYS Office of Information Technology Services," NYS Senate, 6 Feb 13. nysenate.gov/sites/default/files/articles/attachments/6-%20Office%20for%20Technology.pdf
[27] "New York State Workforce Management Report," NYS Dept. of Civil Service, 2020. cs.ny.gov/businesssuite/docs/workforceplans/2020.pdf#page=101
[28] "FIRST QUARTERLY UPDATE TO THE FY 2023 ENACTED BUDGET FINANCIAL PLAN," NYS Division of the Budget, p. 138. budget.ny.gov/pubs/archive/fy23/en/fy23en-fp-q1.pdf#page=138

10.
Opening a Wider Window on New York Government

By Cameron Macdonald

Accountable government starts with transparency. Voters cannot evaluate their government without knowing what it is doing, and why.

To prevent elected officials and government agencies from avoiding accountability, New York's transparency laws should be reformed to increase transparency—using the latest technological tools—and to eliminate practices that discourage public participation in government.

New York took its first significant step towards greater transparency in 1974 with the enactment of its Freedom of Information Law (FOIL). In the law's opening paragraph, the Legislature declared:

> "[A] free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government..."
>
> "The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have unimpaired access to the records of government …"[1]

Two years after becoming one of the first states to pass a government transparency law in the wake of the Watergate scandal, New York was among the last two states to pass an Open Meetings Law.[2]

Here again, the Legislature began with the best of intentions, declaring it "essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."[3]

The FOIL statute and the Open Meetings Law taken together marked a strong presumption of public access to government records and decision-making. But both laws required amendments over time as agencies resisted disclosure and technology changed.

STATUS QUO

The 1974 version of FOIL focused on categories of records state and local government agencies needed to make available for public inspection and copying. Those categories included final opinions in adjudicatory matters, policy statements or interpretations and documents and data underlying them, minutes of meetings and public hearings, internal and external audits and statistical or factual tabulations, staff manuals and instructions to staff that affect the public, and police blotters. The law also required each agency to create an itemized record containing the name, address, title, and salary of every agency officer and employee, with certain access restrictions to law enforcement records.[4]

Repeal and replacement

By 1977, the Legislature had recognized the limits of transparency under the existing law and repealed and rewritten the original FOIL to presume that all records would be publicly available unless one of enumerated exceptions applied.[5] The core exceptions from disclosure remain in place today, covering records that:

- are exempt from disclosure under state or federal law;
- if disclosed would be an unwarranted invasion of personal privacy;
- if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
- are trade secrets or sensitive commercial information submitted to an agency;
- are compiled for law enforcement purposes;
- if disclosed could endanger the life or safety of any person;
- are inter-agency or intra-agency materials which are not statistical nor factual data, instructions to staff that affect the public, final agency policy or determinations, or external audits, or
- include examination questions or answers for an exam not yet administered and final.[6]

Unfortunately, agencies aiming to avoid disclosure of certain information have taken aggressive approaches to claiming records fall under one of these exceptions, causing records to be withheld entirely or redacted to a point of being useless to the public.[7]

Notable amendments since 1977

In making all records available to the public, the 1977 update to FOIL added timeframes for disclosure that assumed agencies would disclose records within five business days. If unable, agencies were to provide an approximate date for a response.[8]

The Legislature amended FOIL in 2005 to codify case law that had established the approximate date for responding to a request must "be reasonable under the circumstances of the request." Further, any agency requiring over 20 business days

to respond after acknowledging a request needed to explain the reason for delay and provide a date certain for the response.[9]

The 2005 FOIL changes also codified the concept of constructive denial, which permits a requester to take an administrative appeal and resort to the courts if an agency does not meet FOIL's deadlines.[10]

Courts have always been the ultimate arbiter of FOIL disputes. The Legislature added a provision in 1982 to allow them to award prevailing requesters attorney's fees and other litigation costs "to create a clear deterrent to un-reasonable delays and denials of access [and] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL."[11] The Legislature noted that "[c]ertain agencies have adopted a 'sue us' attitude in relation to providing access to public records."[12]

Amendments to FOIL's attorney's fees provisions in 2006 and 2017 were designed to increase the likelihood of attorney's fee awards.[13] But resorting to the courts is a significant financial commitment, even for a self-represented individual, at a risk of a court in its discretion not awarding fees and costs. Thus, agencies can take a "sue us" attitude with little downside risk.

Changing technology

FOIL contains a broad definition of "record" to include "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever." The information's content or purpose is irrelevant to being within FOIL's scope.[14] But an agency need not create records from information it possesses, including from electronically stored data.

In 2008, the Legislature codified case law and updated FOIL's provisions to reflect the new electronic age to counter government arguments that retrieving data was creating a record. The amendments clarified that any programming required to retrieve electronic records is not the creation of a record.

MOVING FORWARD

Records received too late for them to be useful or so heavily redacted as to not convey meaningful information frustrate government accountability. To live up to the promise of making government "responsive and responsible to the public," New York's FOIL provisions should be updated and reformed to:

- **Mandate more proactive disclosure.** The original 1974 FOIL contained a version of proactive disclosure requiring every state and local agency to have six categories of records ready for inspection and copying by the public. It also required agencies to create a record of agency employee names, titles, and salaries for the public to access. The Legislature should go back to the beginning and codify more proactive disclosure in FOIL, especially given today's technology. Lawmakers took a related step in 2021 with passage of the Metropolitan Transportation Authority Open Data Act,[15] which gave the MTA 180 days to create a catalogue of its "publishable data" and schedules for publishing such data. Since the law went into effect, MTA has

added 50 new databases to the state's open data website.[16] The MTA law is a "win-win" approach, since posting documents and data on agency websites obviates the need for the public to request them via FOIL. It also reduces the volume of FOIL requests an agency must handle.[17] Taking advantage of free, widely available Internet programs or even social media services, a government agency or local government of any size can preemptively disclose a wide variety of records. For larger amounts of data, terabytes of cloud storage can be obtained for less than $100 a year.[18] And some agencies can add proactive disclosure by enhancing their existing systems; for example, the state comptroller maintains a searchable database of state contracts at Open Book New York[19] that can be improved with links to electronic copies of the contracts themselves.

Every level of New York government should index and post its contracts and bidding for those contracts online. Agencies should also disclose payrolls and budgets on their websites. Florida posts its state government payroll online and so should New York.[20] Every local government should have prominent links on their homepages to updated payroll information and current budgets. Agencies and municipalities should further post and regularly update their organizational charts.[21]

- **Set firmer deadlines for FOIL responses.** The requirement that agencies at first respond to FOIL requests within five business days hasn't had the intended effect. On-time acknowledgments often precede months of delay. FOIL should provide more time for an initial response—for example, two weeks—but make it tougher for agencies to impose delays beyond that initial period. Within two weeks, agencies should be requirement to either disclose the records, or certify that none exist, or highlight shortcomings in the request. Additional time periods should be limited to 20 business days from receipt of the request, with any additional delay requiring a written explanation and a firm date certain for a response—not (to cite a frequent current stalling tactic) a time in the future for an update on the status of the request. Imposing firm deadlines on agencies draws obvious lines for requesters to seek remedies in court and judges to award attorney's fees when lawsuits become necessary. Accountability can be enhanced by mandating that agencies track FOIL requests and responses in real time in an online database.

- **Improve the dispute resolution process.** In 1982, FOIL was amended to allow judges to award attorney's fees and litigation costs to requestors who take agencies to court and win if unreasonably denied access to records.[22] But getting to court currently begins with a flawed process because the initial, administrative adjudication is done by the agency denying the request. To avoid this, appeals should be routed directly to a third-party agency tasked with promoting government transparency. Such an agency can mediate disputes, provide consistent determinations, and flag issues that may require FOIL amendments.[23]

- **Fix bad precedents.** The Legislature recognized transparency can't be absolute when it repealed and replaced FOIL in 1977. Agencies may need to assert legitimate exceptions at times. Over time, however, FOIL exceptions have been distorted into loopholes used to keep valuable information from the public. Vendors contracting to provide goods and services to the state, for example, have critical contract terms withheld from the public as confidential commercial information. Agencies also abuse FOIL's "deliberative" intra- or inter-agency materials exception. Intended to encourage the free flow of ideas in decision-making, it's now used to withhold entire drafts of government documents, including reports and data analyses. FOIL should limit the exception to objectively candid opinions necessary to the free flow of ideas and should not include records like consultant reports that underpin decision-making. The Legislature needs to make clear within FOIL to agencies and the courts that exceptions to disclosure should be rare through revisions to the exceptions that make them harder to apply.

- **Increase access to public meetings.** The Open Meetings Law only requires state agencies to broadcast or transmit public meetings "to the extent practicable and within available funds." An executive order issued in the early stages of the Covid-19 pandemic required all public bodies to broadcast or transmit their meetings.[24] The result: public bodies at all levels, not just the state, demonstrated that available technology makes broadcasting or transmitting public meetings possible for every type of agency. Broadcasting or transmitting public meetings should be mandatory for all bodies under the Open Meetings Law's jurisdiction.

  In a provision set to expire on July 1, 2024, the Legislature has permitted public bodies to use videoconferencing as allowed by a local law or resolution, provided the public body has a quorum present in a physical location or locations where the public can attend. Members of public bodies may attend via videoconference in extraordinary circumstances,[25] and the public must be able to view a videoconference meeting by video. Video conferencing must allow for the same public participation through public comment or testimony as in person.[26] The Committee on Open Government is supposed to report on the videoconferencing provisions of the law and make further recommendations by January 1, 2024.[27] Ideally before but no later than 2024, the Legislature should mandate videoconferencing for public meetings at all levels of government to encourage greater public participation.

- **Define "meetings" in 21st century terms.** The Open Meetings Law defines a meeting as "the official convening of a public body for the purpose of conducting public business."[28] That made sense when "meeting" meant an in-person gathering. But in 2022, group emails, texts, and messaging platforms are among the places where deliberations can happen hidden from the public. Consistent with its stated purpose of making sure citizens can "attend and listen to the deliberations and decisions that go into the

making of public policy,"[29] the Open Meetings Law needs to be revised to adapt to such new technologies, and to cover all the ways in which "meetings" can now occur.

ENDNOTES

[1] L. 1974, ch. 578, § 2.
[2] Bill Jacket, L. 1976, ch. 511, Assembly Mem. In Support, p.1.
[3] L. 1976, ch. 511, § 1.
[4] L. 1974, ch. 578, § 2.
[5] L. 1977, ch. 933, § 1.
[6] Public Officers Law, § 87(2).
[7] For example, in 2020, bidders on a multi-billion-dollar offshore wind project submitted proposals so heavily redacted the bids were impossible for the public to compare and evaluate. See 2020 Offshore Wind Solicitation (Closed), NYSERDA, State of New York, accessed October 10, 2022, https://www.nyserda.ny.gov/All-Programs/Offshore-Wind/Focus-Areas/Offshore-Wind-Solicitations/2020-Solicitation.
[8] L. 1977, ch. 933, § 1.
[9] L. 2005, ch. 22, § 1.
[10] Id.
[11] Bill Jacket, L. 2006, ch. 492, Senate Introducer's Mem. in Support, p. 5.
[12] Bill Jacket, L. 1982, ch. 73, Assembly Mem. in Support, p. 1.
[13] L. 2006, ch. 492, § 1; L. 2017, ch. 453, § 1.
[14] Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen, 69 N.Y.2d 246, 253 (1987).
[15] L. 2021, ch. 482, § 3.
[16] "Open NY," State of New York, accessed October 10, 2022, https://data.ny.gov/browse?Dataset-Information_Agency=Metropolitan%2BTransportation%2BAuthority&category=Transportation&utf8=%E2%9C%93&sortBy=newest.
[17] Another example of proactive disclosure can be found on the website of Florida governor's office (https://www.flgov.com/open_government/) which provides links to its responses open records requests, organized by month. What the website may lack in user friendliness it makes up in the time saved on record searchers, which can be completed in minutes or hours versus days or weeks under a FOIL request.
[18] Steven J. Vaughan-Nichols, "Best Cloud Storage 2021: Expert Services and Pricing," ZDNet, July 7, 2022, accessed October 10, 2022, https://www.zdnet.com/article/best-cloud-storage.
[19] https://www.osc.state.ny.us/open-book-new-york
[20] "State of Florida Employee Salaries," State of Florida, accessed October 10, 2022, https://salaries.myflorida.com.
[21] See, eg., "Executive Office of the Governor Organizational Chart," State of Florida, accessed October 10, 2022, https://www.flgov.com/wp-content/uploads/2022/08/EOG-Org-Chart-7-28-22.pdf; "Governor's Office Organizational Chart, "State of California, accessed October 10, 2022, https://www.gov.ca.gov/orgchart.
[22] L. 1982, ch. 73.
[23] See, e.g., "About the Office of Open Records," Commonwealth of Pennsylvania, accessed October 10, 2022, https://www.openrecords.pa.gov/AboutOOR.cfm.
[24] Executive Order No. 202.1: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, Governor Andrew M. Cuomo, March 12, 2020, accessed October 10, 2022, https://govt.westlaw.com/nycrr/Document/I6f220a46e23411ea942fb02e02de8851?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)
[25] Public Officers Law § 103-a(2).
[26] Id.
[27] Public Officers Law §103-a(4).
[28] Public Officers Law § 102.
[29] Public Officers Law § 100.

11.
Voter Access, Election Integrity

By Kenneth Moltner

New York State's long-standing voting rules, campaign finance guidelines, and election schedules have been modified significantly in the past 20 years. Although New York voters in 2021 rejected constitutional amendments proposed by lawmakers to rewrite election rules, other changes they have enacted in recent years could pave the way for still more radical changes disrupting the always-delicate balance of voter access, ballot security and election fairness.

The current era of election law changes began in 2002 with passage of the federal "Help America Vote Act," which prompted New York to end its long-standing reliance on mechanical-lever voting machines and shift to computer-scanned paper ballots, a transition that began in 2003.[1]

More significant—and costly—moves by New York lawmakers would follow.

THE STATUS QUO

In 2019, New York State enacted a series of changes in its election calendar, including nine days of early voting[2] and the establishment of a single June primary date for both state and federal elections.[3]

In response to the COVID-19 pandemic starting in the spring of 2020, Governor Cuomo issued an emergency order suspending and modifying a wide range of state laws, including those governing elections. The most significant, in terms of its measurable outcome, affected the rules for absentee voting.

Prior to the pandemic, the casting of absentee ballots as an alternative to in-person voting has been treated in New York as an exception permissible only under limited conditions.[4] Article II, Section 2 of the state Constitution authorizes the Legislature to "provide a manner" for the casting of ballots when voters are either "absent" from their home county on election day or "unable to appear personally at the polling place because of illness or physical disability."

However, notwithstanding the constitutional provision, Governor Cuomo's pandemic emergency order allowed New Yorkers to apply for absentee ballots in primary and general elections without having to cite any justification or excuse. The unsurprising result: while absentee ballots typically made up four to 10 percent of the total cast in contested races in years prior to the pandemic, that percentage jumped sharply in 2020—to record levels of more than 20 percent in many jurisdictions, including 24 percent of all votes cast in New York City.

Meanwhile, via joint resolutions of the Assembly and Senate, the Legislature proposed permanent fundamental changes to both election rules and the decennial legislative redistricting process via amendments to the state Constitution.

Submitted for voter approval in the November 2021 general election, the amendments included:

- Proposal 1, which would have weakened the bipartisan apportionment and redistricting reforms approved by voters in 2014.
- Proposal 3, which would have deleted the Constitution's requirement that citizens be registered to vote at least ten days before an election, allowing the Legislature to enact different deadlines.
- Proposal 4, which would effectively have authorized an unlimited absentee ballot option for all voters in all elections, without requiring any justification or excuse.

On election day, the three proposals were rejected by pluralities of 54 to 56 percent.

Just two months after no-excuse absentee balloting had been rejected by voters, and nearly two years since the start of the pandemic, Governor Hochul cited the continuing spread of COVID-19 as justification for signing an election law amendment[5] that extended, through 2022, access to absentee ballots to anyone worried about the "risk of contracting or spreading a disease that may cause illness to the voter or other members of the public." That change and others in the amendment were unsuccessfully challenged in subsequent lawsuits filed in state Supreme Court by, among others, the state Republican and Conservative Party chairs. At least some absentee ballots cast under the more permissive rule were counted in New York's November 8 elections.

A few months later, in June 2022, the governor signed the John R. Lewis Voting Rights Act of New York,[6] the stated purpose of which was to "ensure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political process of the state of New York, and especially to exercise of the elective franchise."[7] Under the new law, ranked-choice voting, which had been implemented in New York City beginning with the June 2021 primary election, would qualify as an "alternative" method of election that a court could impose on the state upon finding a violation of that act.[8]

In a spring 2020 move with a delayed impact, the Legislature and Governor Cuomo enacted a voluntary public campaign finance program[9] under which candidates for state legislative and statewide offices can receive multiple taxpayer-funded matches of small donor contributions, starting with legislative races in 2024 and statewide elections in 2026.

Amid these significant changes, one key aspect of New York election law was left unchanged: New Yorkers are not required to provide proof of identify when they show up at the polls on election day, unless voting for the first time without having provided valid identification at the time of registration. The standard measure for confirming a voter's identification remains a simple visual comparison of signatures.

On another election-related issue, Governor Hochul used her first State of the State address in January 2022 to express support for a two-term limit for statewide elected officials, which would require amending the state Constitution. This was a purely symbolic stance, however, since (other than at a constitutional

convention) proposed amendments can only be initiated by joint legislative resolutions of the state Assembly and Senate, with no involvement by the governor. Hochul's term-limit proposal was ignored by the Legislature, where majority conferences have never given serious consideration to any such proposed limitation for any state office.

MOVING FORWARD

Advocates of New York's recent series of election law changes continue to push for more changes they say are needed to make it easier to vote—although there is scant evidence that the Empire State's previous laws were suppressing voter access to any degree.

Such changes, however, also make it easier for all sides in political campaigns to exploit the rules, undermining the equally necessary and salutary right of election integrity, or needlessly expending citizen tax dollars.

As priority steps to address such problems, lawmakers should statutorily:

- **Require voters to provide proof of identification.** Thirty-five other states require voter I.D. or allow election officials to request it at the polling place.[10] Such a rule is even more defensible considering that New York State makes available to all residents a Non-Driver Photo ID card for a person with lawful status in the United States[11], which would need to be augmented by proof of citizenship to vote, and other forms of identification for other purposes.

- **Reaffirm and strengthen existing absentee balloting restrictions.** Barring a constitutional amendment, the law should be amended to permanently disallow issuance of absentee ballots for any reason other than (a) election day absence from the voter's home county, or (b) illness or physical disability making it impossible for the voter to appear at the polling place in person. It should never again be possible for the Legislature to authorize what amounts to no-excuse absentee balloting based on the supposed risk posed by a public health "emergency" that, as reflected by the governor's own policies on issues such as indoor masking, had rendered no-excuse absentee voting gratuitous well before Election Day.

- **Prevent ballot harvesting.** The early stages of the state's 2020 general election campaign produced two instances of alleged efforts by both Democrats and Republicans to exploit the ambiguity created by current law combined with easier absentee ballot requirements.[12] After the November election, a Staten Island grand jury issued a report citing "numerous instances of ballot harvesting fraud in a race for City Council last year—including a ballot submitted on behalf of a dead person and signature fraud involving dozens of other absentee ballots," as the *New York Post* reported.[13] The grand jury reportedly recommended election law reforms to curb abuse of the absentee ballot application and counting process.[14] In general, the remedy for all such cases would be an election law provision

expressly forbidding third parties from submitting an absentee ballot application for any voter, with criminal penalties for violations.

- **Scale back the nine-day early voting period.** Studies have found that early voting does not boost voter participation.[15] A voting period stretching over nine days ties up space at schools and other public facilities commonly used as polling places. It's also costly: the state Budget Division allocated $10 million for the initial round of early voting in 2020, and a Citizens Union study found that early voting will cost New York taxpayers $85.4 million over ten years.[16] A less costly alternative, addressing the concerns of those whose work schedules prevent in-person voting on Tuesdays, would be a modified schedule allowing early voting on the Friday and Saturday preceding Election Day.

- **Repeal the John Lewis Voting Rights Act.** The law is deeply flawed. For example, criteria for judging the validity of existing voting methods include "the extent to which members of the protected class have been elected to office in the political subdivision"—a result-oriented standard that encroaches on the bedrock principle that the propriety of an election is determined by its procedural fairness, not "who wins." The law is impermissibly ambiguous (by, for example, prohibiting any procedure that "may enhance the dilutive effects of the election scheme"), overly broad (giving legal standing to "any … organization whose membership includes … members of a protected class, [or] organization whose mission, in whole or in part, is to ensure voting access and such mission would be hindered by a violation of this section") and impinges on legislative authority (by, for example, allowing a court to "reasonably increase the size of the governing body" and implement "additional means of voting such as voting by mail" as remedies for violations).[17]

- **Reject public campaigning financing.** The stated purpose of such laws is usually described as reducing the role of big money by multiplying the impact of small donors. But the New York City system is hardly an encouraging precedent--at best it might be described as a mixed blessing, the main beneficiaries of which have been political consultants. A far better—and less expensive—alternative would be to boost transparency through strengthened campaign finance disclosure requirements, including mandatory weekly online updates of campaign finance reports beginning at least four weeks before start of voting, and daily updates starting the day before the early voting period through primary or election days. In addition, state law should bar the use of campaign funds to pay candidates' personal expenses. And to dispel Albany's thick cloud of "pay to play," state law should prohibit campaign contributions by individuals doing business with the state.

- **Create a path for limited citizen initiative and referendum.** Twenty-six states have some form of I&R which, experience elsewhere and in New

York City suggests, is the only route by which New Yorkers will ever have an opportunity to decide on whether to establish term limits for state officials. A balanced model can be found next door in Massachusetts, which provides for review of citizen petitions by the attorney general, followed by legislative input.[18] The Massachusetts process is more thorough and deliberative than, for example, California's—which allows for a confusing plethora of ballot proposals funded by interest groups end-running the normal legislative process.[19]

Appendix
Key Election Policy Guidelines: New York vs. Other States

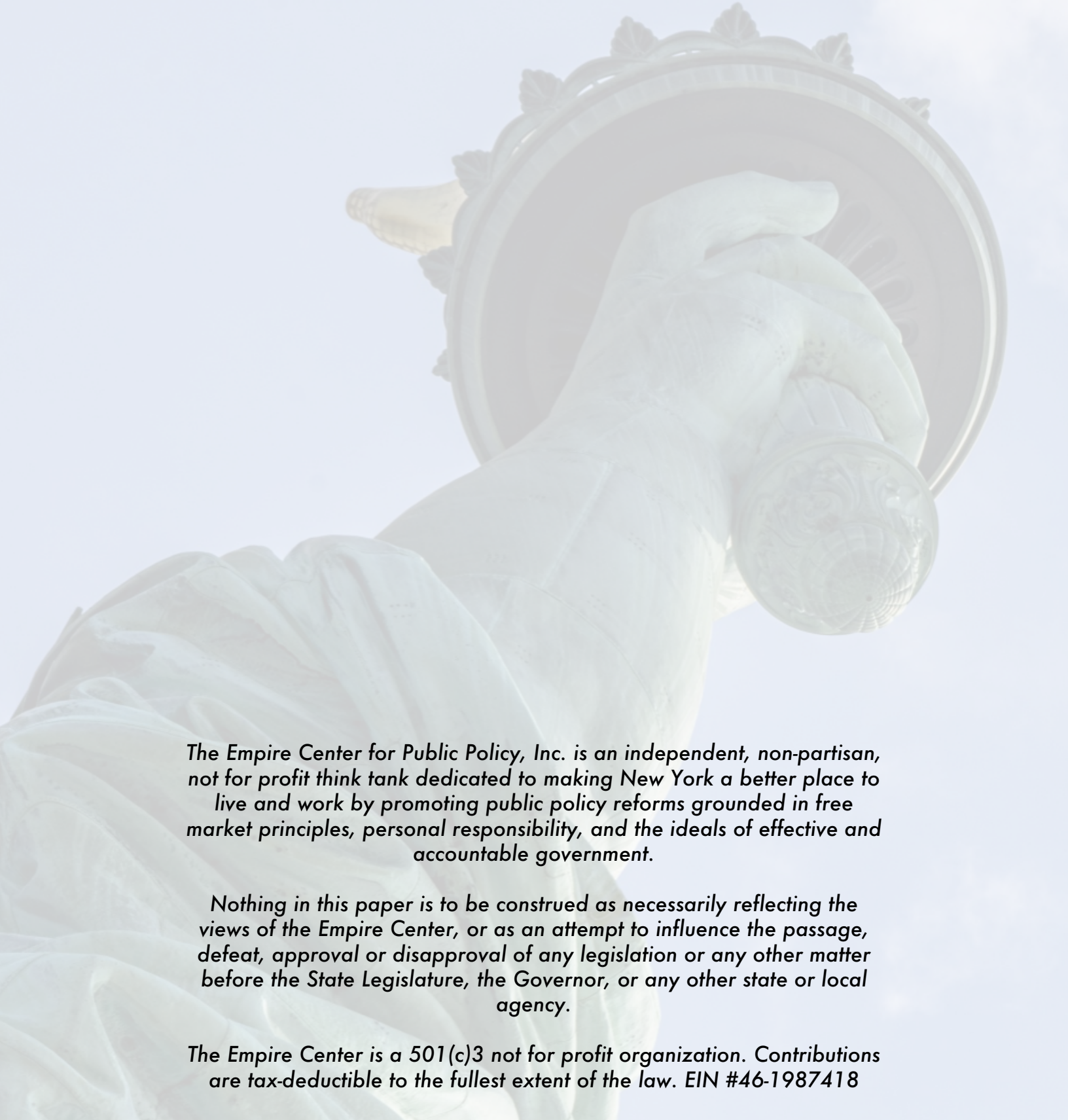
Issue	New York	Others
Early Voting	Nine days	45 other states and District of Columbia offer in-person early voting for 3 to 46 days.
Absentee Voting	Permitted only under limited circumstances	27 states and District of Columbia offer "no-excuse" absentee voting; eight states conduct elections entirely by mail
Voter Identification	A voter cannot be asked for proof of identification at a polling place to vote	35 states require voters to show photo ID or a non-photo-bearing identification document (e.g., utility bill) at a poll site
Public Campaign Finance	Voluntary taxpayer-funded matches of small donor contributions starting with legislative races of 2024	14 other states had enacted some form of public financing as of 2019
Initiative and Referendum	No provision	24 states allow citizens to bypass the legislature and place a proposed law or constitutional amendment on the ballot; 23 states allow voters to approve or repeal an act of the legislature

Source: National Conference of State Legislatures

ENDNOTES

[1] See New York State Help America Vote Act, State Implementation Plan Draft, New York State Board of Elections August 2003, and Amended State Implementation Plan 2009.
[2] Chapter 6 of the Laws of 2019,
[3] In 2022, an additional primary (held August 23) was necessitated when the state Court of Appeals found that New York's legislatively drawn congressional and state Senate maps violated the 2014 New York constitutional amendment to the redistricting process. [In the Matter of Harkenrider, et al, v. Hochul et al, 2022 NY Slip Op 02833, April 27, 2022.]
[4] Testimony of New York State Board of Election Co-Chairs Brehm and Kellner to State Senate and Assembly Committees, August 11, 2020, p.4.
[5] Chapter 2 of the Laws of 2022.
[6] Chapter 226 of the Laws of 2022
[7] Id.
[8] Id.
[9] Chapter 58 of the Laws of 2020, see also Id.

[10] National Conference of State Legislatures ("NCSL"), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.
[11] dmv.ny.gov.
[12] The state Democratic Committee acknowledged having mailed partially pre-filled absentee ballot applications to an unspecified number of Democratic voters [see "'Dirty tricks': Hochul boosters accused of 'deceit' in pre-filled ballot applications," New York Post, Sept. 12, 2022]. Also in September, a Republican elections commissioner in Rensselaer County was indicted on federal charges of unlawfully using the names and birth dates of voters to apply for absentee ballots submitted to the New York State Board of Elections web site back in 2021 [see U.,S. Attorney's Office press release at https://www.justice.gov/usao-ndny/pr/rensselaer-county-elections-commissioner-indicted].
[13] "Grand jury finds numerous instances of ballot fraud in NYC council race on Staten Island," *New York Post*, Nov. 23, 2022. https://nypost.com/2022/11/22/grand-jury-finds-numerous-instances-of-ballot-fraud-in-nyc-council-race-on-staten-island/
[14] "Staten Island grand jury calls for election law changes after finding alleged fraud in '21 race," *Staten Island Advance*, Nov. 22, 2022. https://www.silive.com/politics/2022/11/staten-island-grand-jury-calls-for-election-law-changes-after-investigating-fraud-charges-in-21-race.html
[15] The Cost of Progress for New York's Voters, May 2018 (the "CU Report"), Appendix B (citation omitted, bolded heading in original). Also, Heritage Foundation, "The Cost of Early Voting" 2017 https://www.heritage.org/election-integrity/report/the-costs-early-voting).
[16] CU Report, p. 18 and Appendix B.
[17] Chapter 226 of the Laws of 2022.
[18] See Amendment Article 48 to the Massachusetts Constitution and www.mass.gov.
[19] oag.ca.gov/initiatives.



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