Protections in the New York State Constitution Beyond the Federal Bill of Rights

Edited by Scott N. Fein and Andrew B. Ayers

with contributions invited by
the Government Law Center at Albany Law School and
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ALBANY LAW SCHOOL
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Cover illustration: First New York State Constitution being read by Secretary to the Legislature Robert Benson. (Image courtesy of the New York City Public Library, Astor, Lenox and Tilden Foundations.) Cover design by Rita Petithory.

Dedicated to the late Hon. Judith S. Kaye,
Chief Judge of the New York Court of Appeals,
who championed our State Constitution

and to the late Hon. Sheila Abdus-Salaam,
Associate Judge of the New York Court of Appeals,
who as a justice of the New York Supreme Court
authored the trial court decision affirmed in Aliessa v. Novello,
on which a section of this publication is based

Foreword

Our State Constitution, like every human endeavor, is susceptible to improvement. One of the unique features of our State Constitution is the ability of our citizens to actively shape and improve it—an opportunity they get beginning this November. The desire to improve the document should not overshadow its distinctive value for 240 years in safeguarding the rights and liberties of our State's citizenry and institutions. Less heralded than its Federal counterpart, our State Constitution has often been interpreted to more broadly protect and supplement key fundamental rights and protections. This is not happenstance, but rather a reflection that the Federal Constitution, while establishing minimal standards for the protection of individual rights, allows each state to exceed these standards and fashion broader rules. New York's Constitution has done so in many areas, including public education, environmental protection, and labor rights, just to name a few. As important, should the protections afforded by the Federal Constitution be interpreted in an unduly constrained manner, our State Constitution with the aid of our judiciary may offer safe harbor.

Scott Fein
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INTRODUCTION:

THE IMPORTANCE OF OUR STATE CONSTITUTION

Christopher Bopst and Peter Galie

Context

State constitutions, like their national counterpart, provide the framework for governance, distribute and limit powers, and protect liberties. In addition, they complete the national document. States are referred to fifty times in forty-two sections of the national Constitution. When the states felt it necessary to join and form a union, a constitutional convention was held in Philadelphia in 1787. State constitutions, especially the constitutions of New York and Massachusetts, were influential in the drafting of the national Constitution and the formation of the national government. For example, most state constitutions at the time of the federal convention created bicameral legislatures and provided for separation of powers.

Unlike the state governments, however, the national government was to have powers limited to those enumerated in the Constitution and those that were necessary and proper to carry out the enumerated powers. All other powers were to be reserved to the states or to the people. By dividing powers between those delegated to the national government and those reserved to the states, the founders created a federal union consisting of a national Constitution and fifty state constitutions. Federalism is the foundation on which our tradition of dual constitutionalism rests.

These two constitutional traditions share some important features: separation of powers; protection of rights; and representative institutions in which the people select members of the legislature directly or indirectly. There are, however, important differences. The states have the power to do anything not prohibited by their respective constitutions or by the national Constitution; the national government is permitted to exercise only those powers granted by the U.S. Constitution. For the states, all is permitted that is not forbidden; for the national government, all is forbidden that is not granted.

Since the 1930s, the power of the federal government has expanded. It has reached into areas such as education, housing, health care, and social welfare—all policy matters that have been traditionally of state concern. Even with this expansion, however, it is still the case that in the ordinary course of our lives we are more likely to be dealing with state agencies than federal: birth, education, driving, marriage, death, workers' compensation, wills, and inheritance are all matters primarily in the hands of state and local governments. Over 225 years after the Constitutional Convention in Philadelphia, state governments continue to complete the national government and remain indispensable partners in the federal Union.

State constitutions are significant, not only because they complete the U.S. Constitution and are the pillars of the federal system, but also because they address dimensions of the polity left untouched by the national Constitution. Within the limits set by the national document, state constitutions establish the rules governing the conduct of public business and policy-making in the state. The national Constitution does not: contain a "forever wild" provision governing New York's Adirondack and Catskill regions;[1] mandate New York to pay prevailing wages on all public works jobs;[2] or require a vote every twenty years on whether to hold a convention to revise and amend the constitution,[3] a noteworthy and enduring example of popular sovereignty.

New York has actually had four constitutions. The first New York State Constitution was adopted on April 20, 1777, by the Fourth Provincial Congress acting as a constitutional convention. Subsequent constitutions were adopted in 1821, 1846, and 1894. The current state constitution has been amended over 200 times since 1894, including substantial revisions by the constitutional convention of 1938.

A State of Independence

Nowhere is the importance of the tradition of dual constitutionalism more evident than in the protection of

[1] N.Y. CONST. art. XIV, § 1.

[2] N.Y. CONST. art. I, § 17.

[3] N.Y. CONST. art. XIX, § 2.

individual liberties and civil rights. The tradition of dual constitutionalism has enabled the state to chart its own path with regard to these vital protections. From its inception, New York has created a state of independence by offering rights protections based on its constitution beyond those found in the U.S. Constitution. Chief Judge Charles Desmond reminded us of this deep history when he wrote: "In our discussions of New York statutes and of the modern constitutional constructions by the United States Supreme Court, we must not forget that in our State the right to counsel was announced and insisted upon in much older case law."[4] The nature and extent of protections like these are the focus of this publication.

The protection of rights at the national level has expanded and contracted over time. To the extent that the state's political culture and understanding of rights creates different expectations, rights derived from these expectations can be insulated from changes in national policy. Whatever happens concerning due process protections, right to counsel, search and seizure protections, environmental protections, abortion rights, same-sex marriage, equal protection and the like, New York, through its constitutional and statutory law, can provide a "safe harbor" for their continued, even expanded protection. Surely, that is the genius of federalism.

Twin Bills

The national and state constitutions each contain a Bill of Rights. The purpose of these bills is to give fundamental legal status to civil and personal liberties by placing limits on the exercise of government power. The U.S. Constitution's Bill of Rights is found in the first ten amendments to the document; New York's Bill of Rights makes up the first article of the constitution, a position symbolizing its importance. Some of the protections in the two bills of rights overlap. For example, both constitutions prohibit excessive bail and fines and outlaw cruel and unusual punishment;[5] both prohibit unreasonable searches and seizures.[6]

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[4] *People v. Witenski* 15 N.Y.2d 392, 396-97 (1965).

[5] U.S. CONST. amend. VIII; N.Y. CONST. art. I, § 5.

[6] U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

This may seem duplicative, but for the first 140 years after the U.S. Constitution was ratified the protections found in the national Bill of Rights were held to apply only to actions of the federal government—they did not apply to the actions of state governments. During this period the only protections New Yorkers had against their state government were found in the state constitution. Twentieth century decisions of the U.S. Supreme Court have gradually applied most of the protections of the U.S. Bill of Rights to state governments, but for a long time, this was not the case.

The fact that most of the rights protections found in the national Bill of Rights apply to the states does not render the state's bill of rights superfluous. The protections afforded in the U.S. Bill of Rights provide a floor beneath which neither the state nor the national government may go. They do not, however, provide a ceiling. In other words, New York's courts may interpret the state bill of rights to provide greater protection than the floor set by the U.S. Supreme Court's interpretation of the federal Bill of Rights. The words in the Fourth Amendment to the U.S Constitution regarding limitations on searches and seizures are identical to those in Article I, section 12 of the New York Constitution. Do we need both? Scott Weaver and Benigno Class would say "Yes."

Mr. Weaver was accused of burglary. The prosecution attempted to use evidence against him that had been gathered from a GPS system attached to the outside of his car without a warrant. Even though the U.S. Supreme Court had not yet spoken on the issue, the New York Court of Appeals, relying on the state constitution, barred the use of the evidence. Because the court based its decision on independent and adequate state grounds, no further appeal to the U.S. Supreme Court was possible. Some years later the Supreme Court held the use of these devices to be searches requiring a warrant.

Mr. Class was stopped for traffic violations. The police, having no reason to believe the car was stolen, reached into the vehicle to move papers on the dashboard to view the vehicle's VIN number. In doing so, the officer noticed a gun, and arrested Mr. Class. The New York Court of Appeals ruled that the officer's nonconsensual entry into the vehicle based on a traffic infraction was a violation of the U.S. and New York Constitutions. A sharply divided U.S. Supreme Court ruled that

the entry did not violate the Fourth Amendment, leaving Mr. Class's only argument that the search was barred by the state constitution. On remand, the court of appeals re-affirmed its original decision that the search violated the New York Constitution, and the evidence was suppressed.

The New York Court of Appeals, New York's highest court, has granted more protections in areas of criminal procedure, freedom of speech and the press, freedom of religion, and due process under the state constitution than the U.S. Supreme Court has granted when interpreting the U.S. Constitution.

In addition to rights we normally associate with the Bill of Rights, such as freedom of speech, press, and religion, the right to counsel, and freedom from self-incrimination, the New York Constitution contains affirmative or social rights not found in the national document. These rights, unlike the provisions prohibiting the government from interfering with individual actions or requiring that the state observe certain procedures when a person is accused of a crime, are positive: they mandate that the state provide its citizens with certain social goods.

The New York Constitution recognizes certain rights of workers, such as the right to organize and collectively bargain[7] and the right of workers on public jobs to be paid a prevailing wage[8], that are not found in the U.S. Constitution. The New York Court of Appeals has interpreted the Education Article of the state constitution[9] to require the state to provide students with the opportunity for a "sound basic education." The state constitution requires the state to provide for the care of the needy [10] and encourages the state legislature and local governments to offer low-rent housing and nursing-home accommodations to low-income citizens. [11] Some of these positive-rights provisions are not located in Article I; some are not couched in traditional rights language; and some have not been established as "individual," as opposed to "collective" rights. For example, the state can be required to provide

[7] N.Y. CONST. art. I, § 17.

[8] N.Y. CONST. art. I, § 18.

[9] N.Y. CONST. art. XI.

[10] N.Y. CONST. art. XVII, § 1.

[11] N.Y. CONST. art. XVIII.

additional funding to a school district if its students are not receiving the opportunity for a sound basic education, but an individual student likely does not have a legal claim that the state is liable to him or her personally for failing to obtain that education.

The chapters that follow provide snapshots of the panoply of rights, individual and collective, found in New York's Constitution.

I. STATE RIGHTS THAT ARE BROADER THAN THEIR FEDERAL PARALLELS

The New York Constitution and the United States Constitution overlap in many ways. Many of the rights protected by the federal Constitution are also protected in New York. But New York's constitution goes beyond the federal constitution in its protections of a variety of different kinds of rights. This section lists some of the areas in which New York's constitution goes further than the federal constitution in protecting rights.

A. Criminal Procedural Rights

Christopher Bopst and Peter Galie

Jury Trial

Both the New York and U.S. Constitutions provide for trial by jury. The New York jury-trial provision is more protective than the U.S. Constitution in several aspects:

- The New York Constitution specifies that a jury in a felony case must be composed of 12 members, while the U.S. Constitution has been interpreted to allow felony juries of as few as six members.[12]

- The New York Constitution has been understood to require unanimous juries in criminal cases, while the U.S. Constitution does not impose a

[12] N.Y. CONST. art. VI, § 18(a); *Williams v. Florida*, 399 U.S. 78 (1970).

unanimity requirement on the states (although unanimity is required in federal cases).[13]

- The New York Constitution specifies stringent requirements for the waiver of a jury trial in criminal cases that are not required under the U.S. Constitution, including that the defendant must personally sign a written waiver in open court before the judge.[14]

Grand Jury

Like the Fifth Amendment, New York requires a grand-jury indictment for all felony prosecutions.[15] The New York Constitution allows a defendant to waive indictment on charges other than ones punishable by death or life imprisonment by filing a written instrument signed by the defendant in open court in the presence of his or her counsel. The U.S. Constitution does not require the presence of counsel to waive the right to a grand jury.[16]

Right to Counsel

Considered indispensable to a fair trial, the right to counsel has appeared in every one of New York's four constitutions. Under the state constitution, the right to counsel is more extensive than the protection afforded by the U.S. Constitution. For example, New York courts treat the right to counsel as "indelible," meaning that once the right attaches, it cannot be waived except in the presence of counsel.[17] Subject to certain limitations, the U.S. Constitution allows a represented individual to waive his or her right to counsel outside the presence of counsel.

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[13] *People v. DeCillis*, 14 N.Y. 203 (1964); *Johnson v. Louisiana,* 406 U.S. 356 (1972); *Apodaca v. Oregon,* 406 U.S. 404 (1972).

[14] N.Y. CONST. art. I, § 2.

[15] N.Y. CONST. art. I, § 6.

[16] *See* Fed. R. Crim. P. 7(b).

[17] *People v. Arthur,* 22 N.Y2d 325 (1968).

The right to counsel in New York indelibly attaches in two separate situations: (1) upon the commencement of formal criminal proceedings; and (2) when an individual in custody requests the assistance of an attorney or an attorney enters the case.

Concerning the first situation, federal and New York law both provide that the right to counsel attaches upon the commencement of criminal proceedings but differ as to when commencement occurs. In New York, the filing of a felony complaint, a necessary step to obtain an arrest warrant, signals the commencement of criminal proceedings; at that point, the indelible right attaches regardless of whether the suspect has requested counsel, and police may not question him or her absent an attorney. [18] Under the federal rule, criminal proceedings do not necessarily start when a complaint is filed or an arrest warrant is issued, so police may interrogate a suspect without a lawyer after an arrest made pursuant to a warrant without violating his or her right to counsel.

Regarding the second situation, the Court of Appeals has extended the right beyond what is required by the U.S. Supreme Court, by prohibiting questioning of a suspect:

- in custody not yet represented by counsel but who has requested counsel;[19]

- not in custody and who is questioned about a matter under investigation, where officials know counsel has been obtained;[20] and

- whose attorney in other matters appeared at the police station and identified himself, even though he had not been retained by the defendant before his arrival and took no positive action to protect

[18] *People v. Settles,* 46 N.Y.2d 154 (1978); *People v. Samuels,* 49 N.Y.2d 218 (1980).

[19] *People v. Cunningham,* 49 N.Y.2d 203 (1980).

[20] *People v. Skinner,* 52 N.Y.2d 24 (1980).

> the defendant's rights once he arrived on the scene.[21]

The right to counsel in New York extends beyond the crime for which the defendant is charged. Once a defendant in custody on a particular matter is represented by or requests counsel, custodial interrogation about any subject, whether related or unrelated to the charge upon which representation is sought or obtained, must cease.[22] In addition, a police officer wishing to question a person in custody about an unrelated matter must make a reasonable inquiry concerning the defendant's representational status when the circumstances indicate that there is a probable likelihood that an attorney has entered the custodial matter, and the accused is actually represented on the custodial charge.[23]

The right to counsel extends to post-conviction proceedings. The state constitution mandates counsel at final parole-revocation hearings,[24] while under federal law, these determinations are made on a case-by-case basis.

Effective Assistance of Counsel

The Court of Appeals has been more protective of a defendant's right to effective assistance of counsel than the U.S. Supreme Court. The Supreme Court requires an individual challenging a conviction on grounds of ineffective assistance of counsel to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." New York courts do not require such a showing.[25]

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[21] *People v. Arthur,* 22 N.Y.2d 325 (1968).

[22] *People v. Rogers,* 48 N.Y.2d 167 (1979).

[23] *People v. Lopez,* 16 N.Y.2d 221 (2011).

[24] *People ex rel. Donohoe v. Montanye,* 35 N.Y.2d 221 (1974).

[25] *Strickland v. Washington,* 466 U.S. 668 (1984); *People v. Benevento,* 91 N.Y.2d 708 (1998).

Searches and Seizures

New York did not have a provision comparable to the Fourth Amendment's prohibition against unreasonable searches and seizures until 1938. Before 1938, New Yorkers had to rely on a statutory protection. Search-and-seizure law has been the most extensively developed area of independent, state-based constitutional law:

- The New York Court of Appeals has refused to adopt the U.S. Supreme Court's exceptions to the exclusionary rule for evidence obtained in "good faith" reliance upon a deficient search warrant, or for primary evidence that would have inevitably been discovered through normal police investigation.[26]

- New York generally bans full searches of persons incident to arrests for traffic violations. Such searches are permitted under federal law.[27]

- New York requires the state demonstrate the presence of "exigent circumstances" (e.g., danger to the officers or the possibility of destruction of evidence) to sustain a warrantless search of a closed container on a person conducted incident to an arrest,[28] which are *per se* constitutional under federal law.

- In *People v Scott*,[29] the New York Court of Appeals rejected the Supreme Court's "open fields" doctrine, which permitted warrantless searches of open fields.

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[26] *People v. Bigelow,* 66 N.Y.2d 417 (1985); *People v. Stith,* 69 N.Y.2d 313 (1987).

[27] *People v. Marsh,* 20 N.Y.2d 98 (1967); *People v. Adams,* 32 N.Y.2d 451 (1973).

[28] *People v. Jimenez*, 22 N.Y.3d 717 (2014).

[29] *People v. Scott*, 79 N.Y.2d 474 (1992).

- In evaluating whether information supplied by an informant to police is sufficient to provide probable cause for a search and seizure, New York courts evaluate both the basis of the informant's knowledge and the reliability or veracity of the informant himself.[30] Federal law uses a less stringent "totality-of-circumstances" test for judging the worth of an informant's tip.

- The New York Court of Appeals has held that random, warrantless administrative searches of businesses to uncover evidence of criminality violated the state constitution, although the Fourth Amendment does not prohibit such searches.[31]

- The New York Court of Appeals has rejected the "plain touch doctrine," a doctrine accepted by the U.S. Supreme Court allowing officers to make warrantless seizures of evidence recognized by touch during a lawful pat down.[32]

- New York law provides that warrantless canine sniffs are "searches," under the state constitution.[33] Such activity is not considered a search such under the U.S. Constitution.

- In New York, police are not permitted to conduct a more intrusive search of an automobile's interior following a limited protective frisk of the occupants absent probable cause.[34] Such a search is permitted under federal law.

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[30] *People v. Johnson,* 66 N.Y.2d 398 (1985).

[31] *People v. Scott,* 79 N.Y.2d 474 (1992).

[32] *People v. Diaz,* 81 N.Y.2d 106 (1993).

[33] *People v. Dunn,* 77 N.Y.2d 19 (1990).

[34] *People v. Torres,* 74 N.Y.2d 224 (1989).

- New York requires that inventory searches be conducted pursuant to an established procedure that clearly limits the conduct of individual officers—assuring the searches are consistent and reasonable.[35]

- Under New York law, a police officer who approaches a citizen to request identifying information must have an objective, credible reason for doing so. An officer who exercises the common law right of inquiry regarding matters that would lead a reasonable person to believe he or she is suspected of criminal behavior must have a founded suspicion of criminal activity.[36] Such encounters are not considered Fourth Amendment seizures under the Federal Constitution and can be undertaken without any evidentiary justification. A suspect's refusal to answer police questions and flight from the officer, absent any other evidence of criminal activity, are not sufficient grounds for search, seizure, or pursuit of the suspect.[37]

- The New York Court of Appeals does not allow the use at trial of any statements obtained from an accused after an arrest in his or her home without a warrant or consent to enter.[38] The U.S. Supreme Court has allowed the admission into evidence of such statements.

Self-Incrimination

The privilege against self-incrimination in the New York Constitution is worded similarly to the privilege found in the Fifth Amendment. Nonetheless, there are some areas in which

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[35] *People v. Johnson,* 1 N.Y.3d 252 (2003).

[36] *People v. De Bour,* 40 N.Y.2d 210 (1976).

[37] *People v. Howard,* 50 N.Y.2d 583 (1980).

[38] *People v. Harris,* 77 N.Y.2d 434 (1991).

New York courts have found the state constitution's version more rights-protective:

- When a defendant, in a closely timed sequence, makes statements under interrogation without *Miranda* warnings and repeats those statements after being Mirandized, the later statements will be inadmissible.[39] The U.S. Constitution allows admission of such statements.

- The attempt to use a defendant's post-arrest silence for impeachment purposes at trial is a violation of due process.[40] Such evidence is allowed under federal constitutional law.

Double Jeopardy

New York's constitutional prohibition against being required to answer for the same crime twice resembles that of the U.S. Constitution. Under federal law, double jeopardy claims are waived if not raised at trial; New York allows such claims to be raised for the first time on appeal.[41]

Due Process

New York was the first state to add a due-process clause to its state constitution. The clause has been used to invalidate many practices otherwise permissible under federal law:

- A lengthy and unjustifiable delay between the commission of the crime and the time of trial is a violation of the defendant's due process rights, even in the absence of prejudice to the defendant.[42] The federal Due Process Clause requires a showing of actual prejudice.

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[39] *People v. Bethea,* 67 N.Y.2d 434 (1986).

[40] *People v. Pavone,* 26 N.Y.3d 629 (2015).

[41] *People v. Michael,* 48 N.Y.2d 1 (1979).

[42] *People v. Staley,* 41 N.Y.2d 789 (1977); *People v. Singer,* 44 N.Y.2d 241 (1978).

- The state clause provides a higher burden of proof upon the state in proving that a defendant's confession was voluntary. Under state law, voluntariness must be proved beyond a reasonable doubt;[43] federal law only mandates a preponderance of the evidence.

- New York's death-penalty statute requiring the jury to be instructed that if there was a deadlock on the penalty to be imposed (death or life imprisonment without the possibility of parole), the trial judge could sentence the defendant to as little as twenty years to life or as much as life without parole. The New York Court of Appeals held this instruction violated the due process clause of the state constitution because it had the potential to coerce jurors who believed life imprisonment was the appropriate sentence but feared that if they stuck to their vote and a deadlock resulted the defendant could be eligible for parole in as little as twenty years. The court also held that it would be a violation of the state due process clause to provide no deadlock instruction at all.[44] No such deadlock instruction is required by the federal Constitution.

- A regulation restricting prisoners' contact visits (where inmates are allowed to touch or hug their visitors) was struck down on state due-process grounds.[45] The U.S. Constitution requires no such visitation.

- The New York Court of Appeals has extended the speedy-trial protection afforded to criminal defendants under the due-process clause of the

[43] *People v. Valerius,* 31 N.Y.2d 51 (1972).

[44] *People v. LaValle,* 3 N.Y.3d 88 (2004).

[45] *Cooper v. Morin,* 49 N.Y.2d 660 (1979).

state constitution to juvenile delinquency proceedings.[46]

- Unlike the federal Due Process Clause, the state provision contains no state-action requirement. In *Sharrock v. Dell-Buick Cadillac, Inc.*, [47] the Court of Appeals applied the protection of the state clause to a situation held to be private action by federal courts.

B. **Religious Liberty**

Christopher Bopst and Peter Galie

Like the U.S. Constitution, New York's Constitution contains a "Free Exercise Clause," guaranteeing all New Yorkers the right to freely exercise their religious beliefs without governmental interference. Applying this clause, the New York Court of Appeals has afforded more extensive protections to religious liberty than is forthcoming under its federal counterpart. The court of appeals has sustained a Muslim prisoner's right to be free from frisk searches by women guards.[48] Federal courts have not required a similar restriction under the Free Exercise Clause of the U.S. Constitution.

The Court of Appeals has been more deferential to religious beliefs than the U.S. Supreme Court in situations where the restriction on the exercise of religion is the incidental effect of a generally applicable, valid statute. The Supreme Court has allowed restrictions on the exercise of religion where the prohibition "is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision."[49] New York does not look solely at the object of the legislation; rather, it has adopted a balancing test, in which the interest

[46] *In re Benjamin L.,* 92 N.Y.2d 660 (1999).

[47] *Sharrock v. Dell-Buick Cadillac, Inc.*, 45 N.Y.2d 152 (1978).

[48] *Rivera v. Smith,* 63 N.Y.2d 501 (1984).

[49] *Employment Division v. Smith,* 494 U.S. 872, 878 (1990).

advanced by the legislation is weighed against the incidental burden imposed on the free exercise right.[50]

C. **Freedom of Speech and the Press**

Christopher Bopst and Peter Galie

Freedom of speech and the press are essential conditions for self-government. New York has more zealously safeguarded these rights than the U.S. Constitution:

- New York courts require that a private citizen suing for defamation over a comment on an issue of legitimate public concern must prove gross irresponsibility on the part of the defendant, as opposed to the mere negligence standard required by federal law in such circumstances.[51]

- The New York Court of Appeals has required more constitutional protection for opinions that the U.S. Supreme Court. The state constitution provides for absolute constitutional protection of pure opinion;[52] the Supreme Court has not adopted that standard.

- New York law provides that journalists possess a qualified right to withhold sources, even though those sources are not gained in confidence.[53]

- The standard for determining obscenity under the New York Constitution is a statewide standard, rather than the local community standard permitted by federal law.[54]

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[50] *Catholic Charities of the Diocese of Albany v. Serio,* 7 N.Y.3d 510 (2006).

[51] *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196 (1975).

[52] *Immuno A.G. v. Moor-Jankowski,* 77 N.Y.2d 521 (1991).

[53] *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521 (1988).

[54] *People v. Calbud, Inc.*, 49 N.Y.2d 389 (1980).

- The New York Court of Appeals has protected topless dancing as a form of expression,[55] even though the U.S. Supreme Court has not given this activity constitutional protection.

- The court of appeals has given greater protections under the state constitution to materials deemed obscene than that afforded by the U.S. Constitution. The court did not allow a municipality to use a public-health law to close an adult bookstore without resorting to less restrictive remedies,[56] even though such a closure would have been consistent with the Supreme Court's interpretation of the First Amendment. The court has also required a higher probable-cause standard under the state constitution for warrants issued to search and seize allegedly obscene materials because of the presumptive First Amendment protection enjoyed by such materials.[57]

D. Immigrants' Rights

Andrew Ayers

The New York Constitution does not mention immigration or immigrants. But New York courts have interpreted the state constitution to protect immigrants in ways the federal constitution does not.

The Equal Protection Clause of the U.S. Constitution provides that no state "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[58] The Supreme Court applies different degrees of scrutiny to laws,

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[55] *Bellanca v. New York State Liquor Authority,* 54 N.Y.2d 228 (1981).

[56] *People ex rel. Arcara v. Cloud Books,* 68 N.Y.2d 553 (1986).

[57] *People v. P. J. Video, Inc.*, 68 N.Y.2D 296 (1986).

[58] U.S. Const. amend. XIV § 1.

depending on what kind of group a challenged law singles out for disadvantageous treatment. If a law disadvantages a group on the basis of their race, for example, "strict scrutiny" applies, meaning that the law is highly unlikely to survive the challenge.[59] But if a law draws distinctions without singling out members of a "suspect class," the law will generally survive the challenge as long as there is a "rational basis" for it.[60]

The U.S. Supreme Court held, in a series of cases in the 1970s and 80s, that alienage is a "suspect class."[61] If this principle were applied to federal immigration laws, they would all be unconstitutional, because all immigration laws disadvantage people who lack citizenship. But the Supreme Court held that *federal* laws affecting noncitizens do not receive strict scrutiny.[62] Strict scrutiny applies only to *state* laws affecting noncitizens—and not to all of them.[63]

Some state laws affecting noncitizens receive less-than-strict scrutiny under the U.S. Constitution. For example, under the federal constitution, undocumented people are not treated as a suspect class, and laws that target them generally receive only rational-basis scrutiny.[64] New York courts have not applied a different principle to undocumented people. But there are many different categories of lawfully present noncitizens, and New York's Constitution has extended strict-scrutiny protection to some whom the federal constitution may not cover.

Lawfully present noncitizens can be divided into several groups. First, *legal permanent residents* are those entitled to long-term status, or what is colloquially known as a "green card."[65] Under the federal constitution, state laws targeting

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[59] *See Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

[60] *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

[61] *Graham v. Richardson*, 403 U.S. 365 (1971).

[62] *Matthews v. Diaz*, 426 U.S. 67, 83-84 (1976).

[63] Rational-basis scrutiny applies to state laws that exclude noncitizens from participating in certain sovereign functions of government, like voting or jury duty, or from employment as "officers who participate directly in the formulation, execution, or review of broad public policy" like police officers, *Foley*, 435 U.S. at 296, and public-school teachers, *Ambach v.Norwick*, 441 U.S. 68, 80 (1979).

[64] *See Plyler v. Doe*, 457 U.S. 202, 223 (1982).

[65] *See* USCIS, "Green Card," at https://www.uscis.gov/greencard.

permanent residents are subject to strict scrutiny.[66] Under the Supremacy Clause, no state can give lesser protection to green-card holders. But if the U.S. Supreme Court should ever reverse its position, the New York Constitution independently requires strict scrutiny for green-card holders.[67]

Another group of noncitizens is lawfully present in statuses that are temporary—like student visas or temporary work visas (like H1-Bs).[68] The protection to which this group is entitled is unclear under federal law. While the Second Circuit—the federal court of appeals that covers New York—has applied strict scrutiny to laws affecting this group,[69] other federal courts of appeals have applied only rational-basis scrutiny.[70] It is likely that the U.S. Supreme Court will have to resolve the controversy. But in New York, noncitizens on temporary visa will continue to receive strict-scrutiny protection no matter what the Supreme Court decides, because the Court of Appeals has held that the State Constitution requires it.[71]

Still another group of noncitizens has no lawful status, but are nonetheless allowed to remain in the United States by federal immigration authorities. This group includes beneficiaries of President Obama's "Deferred Action for Childhood Arrivals" program. It also includes other noncitizens whom federal authorities decline to deport.[72] The federal courts have not determined what level of scrutiny applies to these noncitizens, but in New York, they receive strict scrutiny under the state constitution.[73]

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[66] *See Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

[67] *See Aliessa v. Novello*, 96 N.Y.2d 418 (2001).

[68] Many temporary statuses fall within the general category of "nonimmigrant" statuses. See 8 U.S.C. 1101(a)(15); Elkins v. Moreno, 435 U.S. 647, 665 (1978).

[69] Dandamudi v. Tisch, 686 F.3d 66 (2d Cir. 2012).

[70] See LeClerc v. Webb, 419 F.3d 405, 415 (5th Cir. 2005), *reh'g en banc denied*, 444 F.3d 428 (2006) (per curiam); League of United Latin Am. Citizens (LULAC) v. Bredesen, 500 F.3d 523, 536-37 (6th Cir. 2007).

[71] Aliessa v. Novello, 96 N.Y.2d 418 (2001).

[72] See generally Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U.L. Rev. 1115 (2015).

[73] See Aliessa v. Novello, 96 N.Y.2d 418 (2001).

In sum, the New York Constitution extends strict scrutiny to noncitizens who may never receive that protection under the federal constitution. While the equal-protection status of many noncitizens remains in flux in the federal courts, it is solidly assured in New York.

II. STATE RIGHTS THAT HAVE NO FEDERAL PARALLEL

International human-rights law has long recognized "economic, social and cultural rights," including rights to social security, an adequate standard of living, adequate food and housing, health, and education.[74] The U.S. government has not ratified the treaty that codifies these rights.[75] And the United States Constitution does not include parallel rights. Historically, many Americans have believed that "rights" can include only "negative" rights—that is, limits on government's power to intrude on certain spheres of life and activity. But the New York Constitution, like international human-rights law, protects affirmative rights as well: not just freedoms *from* things, but rights *to* things as well.[76]

The following discussion of state rights that have no federal parallel is illustrative, not comprehensive. There are important provisions that are not discussed here, including labor rights and protection for pensions.[77] They are omitted not to minimize their significance, but simply for reasons of space.

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[74] *See* International Covenant on Economic, Social and Cultural Rights, (entered into force Jan. 3, 1976), articles 9 (social security), 11 (adequate standard of living, including food and housing), 12 (health), and 13 (education).

[75] For a history of the United States government's attitude toward the Covenant on Economic, Social and Cultural Rights, see Amnesty Int'l, *Economic, Social and Cultural Rights: Questions and Answers*, http://www.amnestyusa.org/pdfs/escr_qa.pdf.

[76] The New York Constitution is not unique in this. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) ("Unlike the Federal Constitution, every state constitution in the United States addresses social and economic concerns, and provides the basis for a variety of positive claims against the government.").

[77] See N.Y. CONST. art. 1 § 17 (right to organize and bargain collectively); *id*. art. 5 § 7 (pensions).

A. Education

Thomas Gais and Cathy Johnson

Initially adopted in 1894, Article XI of the New York Constitution directs the state to maintain and support a system of free common schools to educate all children of the state. It also recognizes a longstanding governing arrangement in New York, by which the University of the State of New York serves as an umbrella organization with control over all of the state's public and private educational institutions. Finally, in what is commonly called the Blaine amendment, it prohibits the state and its subdivisions from using public resources to support religious schools, with the exception of examination, inspection, and transportation.

The article is grounded in the principle "that the first great duty of the State is to protect and foster its educational interests." It requires "not simply schools, but a system", one whose foundation "must be permanent, broad and firm."[78] At the time of adoption, New York had elementary schools throughout the state, but high schools were relatively uncommon, especially in rural areas. If the state did not establish public high schools, it would "soon have class education in its most vicious form."[79] One could not build a system only from the ground up. Sustaining education in elementary schools required both strong high schools and higher education.

Laws prohibiting tuition charges for public schools and requiring school attendance established individual access to public schools. Expanded state aid enhanced a system of education. In 1982, the Court of Appeals ruled in *Levittown* v. *Nyquist* [80] that the state constitution did not require that education be equal or substantially equivalent in every district across the state. But Article XI did require a statewide system of education that provided minimally acceptable facilities and

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[78] DOCUMENTS AND REPORTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1894, at 117-118 (1895).

[79] *Id*. at 122 (quoting Superintendent Kennedy).

[80] *Levittown v. Nyquist*, 57 N.Y.2d 27 (1982).

services constituting a "sound[,] basic education."[81] Although this phrase is not in Article XI, the Court of Appeals ruled in *Campaign for Fiscal Equity* v. *State of New York* (2003) that a "meaningful high school education" that prepares students "to function productively as civic participants" was the acceptable constitutional floor.[82] The courts and the legislature have struggled over the level of school funding needed to satisfy the minimum standard and how and when to implement financial remedies. But the principle—that a sound, basic education is a right available to all students—is well established and serves as a significant political lever for underserved communities.

Giving constitutional status to the Board of Regents of the University of the State of New York strengthened its authority over education in the state. The University was originally established by statute in 1784 to oversee King's College—now Columbia University, a private institution—and represented the first state system of education in the United States. It evolved into a licensing and accreditation body that sets standards for both public and private schools operating in New York, from pre-kindergarten to professional and graduate schools.

Initially, in *Judd v. Board of Education* (1938), the Court of Appeals held that the article established a strict separation of church and state. Religious schools were not part of the system of common schools, the Court concluded, and language of the Constitution clearly proscribed direct or indirect aid or support to such schools.[83] In the wake of this ruling, the article was amended to allow public funds to cover transportation costs. The Court of Appeals overturned *Judd* in 1967 when it decided that the Constitution did not prohibit programs that provided benefits directly to children who attended such schools. Any benefit to the schools that arose from such a program, in this case loaning textbooks to children, was collateral rather than intended effect, the Court reasoned.[84] The Constitutional Convention of 1967 recommended repealing this section of the

[81] *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982).

[82] *Campaign for Fiscal Equity v. New York*, 801 N.E. 2d 326 (N.Y. 2003).

[83] *Judd v. Board of Education*, 15 N.E.2d 576 (N.Y.1938).

[84] *Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967).

article. But the proposed revisions were rejected by the voters in part because of opposition to its removal.

B. Social Welfare

Thomas Gais and Cathy Johnson

Article XVII was one of several progressive measures adopted in 1938 aimed at strengthening state support for the economically disadvantaged. It was intended to remove constitutional doubt about the state's responsibility to the needy and to "set[ting] down explicitly in our basic law a much needed definition of the relationship of the people to the government."[85] The article mandates that the state provide "aid, care and support" to the needy. It also declares that the state has an interest in the health of the people and care of those with mental disorders and defects.

Although other states have constitutional provisions regarding public welfare, New York State's article is one of the strongest and most influential. The Court of Appeals has ruled that both the legislative history and the plain words of the provision make it clear that "assistance to the needy is not a matter of legislative grace" but is mandated by the Constitution.[86] This duty extends to all needy persons, including immigrants not eligible for federal assistance, able-bodied low-income persons without dependent children, teenage mothers, and families who have been on public assistance for long periods of time. Article XVII is one reason why New York State's public assistance and Medicaid programs are offered to so many economically needy persons, whatever the circumstances in which they find themselves.

In contrast to the education article, however, courts have shied away from identifying a minimal level of assistance that the state must provide to persons defined as needy. The Court of Appeals has held that Article XVII does not apply to the "absolute sufficiency of the benefits distributed to each eligible recipient."[87] The legislature has discretion to define "needy" and

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[85] REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, Vol. 3, at 2126 (1938).

[86] *Tucker v. Toia*, 371 N.E.2d 449 (N.Y.1977).

[87] *Bernstein v. Toia*, 373 N.E.2d 238 (N.Y. 1977).

determine the amount of aid provided. Complicated exceptions concern the quality of emergency shelters for homeless individuals in New York City and the adequacy of shelter allowances. In both of these areas, courts have insisted on minimal standards. But they have avoided a straightforward declaration of a right to shelter and relied on grounds other than Article XVII to reach their decisions.

C. Housing

Thomas Gais and Cathy Johnson

Article XVIII was motivated by a concern with crowded and substandard housing that "endangers the health, safety, and morals of those living there and impairs the welfare of the entire community."[88] It affirms the authority of the legislature to provide and prescribe the terms and conditions for the development of "low rent housing and nursing home accommodations" for persons of low income, and to pursue projects that clear, replan, reconstruct and rehabilitate "substandard and insanitary areas." Unlike the mandate in Article XVII to provide aid, care, and support for the needy, the housing article creates no entitlement to assistance.

When the provision was formulated in the 1938 constitutional convention, there was no question that the legislature had authority to clear slums and provide for low-income housing—and use eminent domain for those purposes. The article was designed to prevent other constitutional limits—such as restrictions on state credit to public or private corporations or local debt—from interfering with governments' exercise of this public function. Although Article XVII gave constitutional legitimacy to the goal of decent housing for all New Yorkers, some of its other provisions may have inhibited such efforts. For example, only cities, towns, villages, and public corporations—and not counties—are constitutionally recognized entities that the legislature may use to achieve this purpose.

[88] REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, Vol. 2, at 1531 (1938).

D. Conservation

Claiborne Walthall[89]

The New York State Constitution's Conservation Article, Article XIV,[90] has no federal constitutional counterpart, but has had a tremendous impact on conservation and public lands protection in the State, nation and world—most notably through the "forever wild" clause, which strictly protects the State's nearly three million acres of Forest Preserve.

The Conservation Article began as a series of efforts and statutes in the 1870s and 1880s to create a State Forest Preserve, protecting forest lands in the Catskills and Adirondacks.[91] Although the creation of the Forest Preserve was groundbreaking for the time, it soon became clear that continued illegal logging and destruction of wilderness required greater, more absolute protections. In 1894, as delegates met to consider a new State constitution, the idea of a constitutional protection was born, leading to the "forever wild" language and providing for judicial enforcement of its protections. The Article has been amended several times to add sections, most notably a Conservation Bill of Rights in 1969.

Article XIV today has five sections. Section 1 contains the "forever wild" language, under which the state lands "constituting the forest preserve" must be "forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed." Although the rest of Section 1 contains various minor exceptions for lands that have been removed from the protection, the overall wild forest acreage has grown to encompass nearly three million acres.

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[89] This informational discussion expresses the personal views of the author, and not those of Whiteman Osterman & Hanna LLP, its partners, clients or employees. This discussion is for informational purposes only and is not intended to advertise legal services or make any representation as to the quality of such services, nor provide legal advice, nor form an attorney-client relationship; nor should any action be taken in reliance on it. For guidance on the issues discussed here, please consult legal counsel.

[90] N.Y. CONST. art. XIV.

[91] N.Y. STATE BAR ASS'N COMM. ON THE N.Y. STATE CONST., REPORT & RECOMMENDATIONS CONCERNING THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV) 8-17 (August 3, 2016), *available at* http://www.nysba.org/ArticleXIVreport/.

Courts have interpreted "forever wild" restrictively, prohibiting incursions into the Preserve that would result in significant tree removal or impair its wild forest character.[92]

Section 2 was added in 1913 and permits use of a small portion of the Forest Preserve for the construction of reservoirs. It has been little used and vigorously contested.

Section 3 provides for acquisition of additional lands for forest and wildlife conservation, announcing these practices as state policy. Section 3 also permits use or disposition of certain minor areas of Forest Preserve lands outside the Adirondack and Catskill Parks.

Section 4 was added in 1969 include a "Conservation Bill of Rights" and provides for the state to create a nature and historical preserve. Although its practical effect has been more limited than the "forever wild" section, it remains a bold statement of conservation policy and a potential source of rights for New Yorkers.

Section 5 provides that violations of Article XIV can be enforced with injunctive relief in the courts either by the New York State Attorney General, or, in certain conditions, by any citizen. Section 5 has primarily been used for suits enforcing "forever wild" and anticipated by many decades the "citizen suit" provisions of federal environmental laws such as the Clean Water Act.

Article XIV's impact on public-lands management and protection in New York is unparalleled. "Forever wild" is recognized as one of the toughest and most absolute wilderness protections for public lands in the nation. Nearly three million acres of public lands are protected in the Forest Preserve by the "forever wild" section,[93] with ongoing acquisitions adding to the total nearly every year. This State-owned and -protected

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[92] *Ass'n for Prot. of Adirondacks v. MacDonald*, 228 A.D. 73, 81 (3d Dep't), *aff'd*, 253 N.Y. 234 (1930); *Helms v. Reid*, 90 Misc. 2d 583, 602 (Sup. Ct. Hamilton County 1977); *Balsam Lake Anglers Club v. Dep't of Envt'l Conservation*, 199 A.D.2d 852, 853 (3d Dep't 1993); *Protect the Adirondacks! Inc. v. N.Y. State Dep't of Envt'l Conservation*, 42 Misc. 3d 1227(A) (Sup. Ct. Albany County 2013).

[93] N.Y. STATE DEP'T OF ENVTL. CONSERV., NEW YORK'S FOREST PRESERVE, http://www.dec.ny.gov/lands/4960.html.

resource is the centerpiece of land management and planning in the Adirondack and Catskill Parks for lands both inside and outside the Forest Preserve. These protections constitutionally enshrine wildlife habitat, timber resources, watersheds and wilderness recreational opportunities.

The impact of Article XIV beyond New York has been profound. Early in our nation's history, public policies encouraged exploration, domination, and privatization of lands, causing the exploitation of millions of acres of lands by states, railroads, logging and mining companies, and private individuals. However, with excessive logging, road building, deforestation, and damming and flooding of river valleys, the public's concern grew.[94] Looking to New York's "forever wild" clause, the proponents of the 1964 federal Wilderness Act[95] found a framework for protection of the nation's public lands. The Wilderness Act created the legal definition of "wilderness" and provided for wilderness management on more than 109 million acres of federal lands.

The Wilderness Act defines "wilderness" as "an area where the earth and its community of life are untrammeled by man . . . an area of undeveloped Federal land retaining its primeval character and influence,"[96] almost a paraphrase of Article XIV and a leading court interpretation of "forever wild" as "a wild resort in which nature is given free rein. . . [which] must always retain the character of a wilderness."[97]

Similarly, other states throughout the nation have adopted "forever wild" statutes or constitutional amendments to permanently protect public wilderness areas.[98]

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[94] David Gibson, *The Adirondack Park: A Wilderness Preservation Legacy*, 21 INTERNATIONAL JOURNAL OF WILDERNESS 18, 19-20 (April 2015).

[95] Public Law 88-577 (Sept. 3, 1964), 78 Stat. 890, *codified at* 16 U.S.C. §§ 1131-1136 (hereinafter, "Wilderness Act").

[96] Wilderness Act § 2 (c), 16 U.S.C. § 1131 (c).

[97] *Ass'n for Prot. of Adirondacks v. MacDonald*, 228 A.D. 73, 81, 239 N.Y.S. 31, 40 (3d Dep't), *aff'd*, 253 N.Y. 234, 170 N.E. 902 (N.Y. 1930).

[98] *See, e.g.,* ALA. CONST. amend. 543.

Now, over 50 years after the Wilderness Act's passage,[99] why do New York's "forever wild" and other provisions of the Conservation Article remain important? First, Article XIV protects State lands, while the Wilderness Act protects only federal lands. Areas of public lands owned by the State of New York dwarf those owned by the federal government, and therefore State protections are vital. Second, the protections of the Wilderness Act are only statutory and subject to changing political winds, as recently controversies over mining, oil and gas exploration, and pipelines have shown. In contrast, our State public lands in New York have Article XIV's constitutional protections—fixing the values and protections of environmental conservation and protection in a foundational document that is difficult to amend. Third, Article XIV provides other environmental conservation policies and protection mechanisms beyond "forever wild," particularly for areas of State lands beyond the Forest Preserve. These other provisions, which have no federal counterparts, provide for wildlife conservation, a State nature and historical preserve, and a Conservation Bill of Rights, all of which do not rely on federal law, appropriations, or courts.

[99] Notably, in 2014, the Rockefeller Institute of Government, in partnership with Adirondack Wild and other educational institutions across the State, marked the 50th anniversary of the Wilderness Act with various celebrations and educational activities highlighting the connection between the federal act and New York's Article XIV. *See* www.rockinst.org/newsroom/news_releases/2015/2015-10-07_News_Release.pdf.

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