

## APPENDIX

### OBJECTION TO THE CITY BAR'S POSITION

#### **THE CITY BAR SHOULD NOT RECOMMEND CONVENING A CONSTITUTIONAL CONVENTION BECAUSE THE PROSPECTS FOR ACHIEVING DESIRED REFORMS ARE OUTWEIGHED BY RISKS TO EXISTING RIGHTS, AND AN ALTERNATIVE ROUTE FOR REFORM EXISTS THAT PRESENTS NO RISK TO EXISTING RIGHTS**

Nine committees of the New York City Bar Association—Capital Punishment, Civil Rights, Family Court and Family Law, Immigration and Nationality Law, International Human Rights, Lesbian, Gay, Bisexual and Transgender Rights, Pro Bono and Legal Services, Social Welfare Law, and State Courts of Superior Jurisdiction—as well as the Council on Judicial Administration, urged the City Bar either to oppose a Constitutional Convention or to make no recommendation on the issue.<sup>1</sup> Those Committees that urged active opposition believe that a Constitutional Convention poses a greater risk to the unique protections that our State Constitution provides to all New Yorkers than it offers in the promise of beneficial reform. In their view, a Constitutional Convention poses the greatest potential harm to New Yorkers who have historically lacked political power, including low-wage workers and other low-income people, immigrants, people of color, LGBT people, and others whose interests are currently under attack on the federal level.

The City Bar determined that the views of these committees and Council (the “Objecting Committees”) are a significant and valuable contribution to the debate regarding whether New York should hold a Constitutional Convention, and therefore invited the Objecting Committees to prepare this statement so that the public would have the advantage of seeing a wider range of views on whether to support or oppose the calling of a convention.

#### **I. SUMMARY OF THE OBJECTION**

If the only issue before the voters were whether to vote for a convention to achieve a reorganized judiciary, ethics reforms and expanded voting rights—even if these reforms have a low chance of being adopted—the Task Force Report would be persuasive.<sup>2</sup> These are laudable goals that have proven difficult to change through the ordinary political process. While the same forces that have made these goals difficult to achieve through legislation would make them hard to achieve in a Convention, the chance to do so would likely be worth the energy and expense. However, the issue is more complicated. Not only is there no guarantee of achieving the desired reforms, but as the Task Force acknowledges, every provision of the State Constitution would be placed at risk of amendment or repeal if a Convention is called.

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<sup>1</sup> The International Human Rights Committee—which urged the City Bar to make no recommendation on the issue and instead remain neutral—joins this objection to the extent that the statement opposes the City Bar’s recommendation that New Yorkers vote to hold a Constitutional Convention and identifies significant risks to existing constitutional guarantees that implement international human rights law standards to which the United States has committed and historically given its support.

<sup>2</sup> References to the “Task Force view” or “Task Force Report” are to the Report of the New York City Bar Association Task Force on the New York State Constitutional Convention, dated June 14, 2017.

New Yorkers cannot afford to take this risk. The New York State Constitution includes important provisions that have no parallel in the federal Constitution, and other provisions that establish significantly broader protections than their federal counterparts. A Convention would therefore allow the amendment or repeal of provisions that include:

- Article I, § 17, providing a bill of rights for labor
- Article V, § 7, protecting public employee pensions
- Article XI, § 1, ensuring the right to a free public education
- Article XIV, protecting the state’s natural resources
- Article XVII, § 1, guaranteeing assistance to the needy

The Objecting Committees believe that the mere possibility of achieving important reforms through a Convention is likely outweighed by the risks of diminishing existing constitutional guarantees. The existing process for electing delegates to a Convention—a process that has not changed since 1997, when its flaws persuaded the City Bar to urge a “no” vote on a Convention—is unlikely to result in a Convention that would adopt the hoped-for reforms. What is more, the combination of a volatile electorate, the projected impact of federal policies under the current administration, and the outsized influence of money in politics—including “dark money” collected and contributed by organizations from anywhere in the country who have no obligation to disclose their contributors—raises an unacceptable risk of regressive amendments that would profoundly damage the state and its people.

This is not the moment in the life of the body politic to subject the New York State Constitution to the influence of unlimited contributions on an unpredictable Convention and highly stressed electorate in the optimistic hope that they will keep what is good in our State’s foundational charter and improve what is not. The risks to precious constitutional rights are too high. Indeed, a diverse array of organizations and individuals from across the political spectrum have gone on record opposing a Convention. The energies of the City Bar and the many proponents of reform to the state’s voting laws, its ethics rules, and its judiciary should instead unite behind a sustained campaign to achieve these goals through ordinary legislation and, where needed, the legislative constitutional amendment process.<sup>3</sup>

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<sup>3</sup> Pursuant to Article XIX, § 1 of the State Constitution, the Constitution can be amended by a majority vote of two successive Legislatures followed by ratification by a majority of voters in a referendum. The State Constitution has been amended more than 200 times using this method, and campaigns to see it amended through this less risky route are underway today. For example, Environmental Advocates of New York is supporting a constitutional amendment now in the legislature to establish a right to clean air and water and a healthy environment. *See* Environmental Advocates of New York, Final Push for Senate Passage of Constitutional Right to Clean Air, Water, <http://www.eany.org/our-work/press-release/final-push-senate-passage-constitutional-right-clean-air-water>.

## II. A CONSTITUTIONAL CONVENTION WOULD PLACE PRECIOUS RIGHTS AT RISK

Were the only downside of a Constitutional Convention the possibility that judicial, voting and ethics reforms would not pass despite the effort and expense of mounting a Convention, there would be no objection. The chance to achieve these reforms would be worth it. However, the downside is far greater. Existing rights under the State Constitution would be placed at risk by holding a Convention.

### A. The State's Obligation to Care for the Needy - Article XVII, § 1

One of the most important rights that a Constitutional Convention would put at risk is the right every New Yorker can now claim to the State's help when needed to avoid destitution. This right is established by Article XVII, § 1, which establishes the State's duty to care for the needy.<sup>4</sup> Adopted in the aftermath of the Great Depression,<sup>5</sup> Article XVII makes it a duty of the State to meet basic needs even when the political branches are indifferent or opposed. The federal Constitution contains no similar right, and the Supreme Court of the United States is not likely to recognize such a right in the foreseeable future. "When it comes to constitutional protection, the poor of New York do not have the luxury of a belt and suspenders. For the poor, it's Article XVII or nothing at all."<sup>6</sup>

Article XVII serves as a bulwark of hope when New Yorkers fall on hard times.<sup>7</sup> Helen Hershkoff is a Professor at the New York University School of Law who is perhaps the leading authority on the role that Article XVII has played in the well-being of the people of our state. In

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<sup>4</sup> N.Y. Const. art. XVII, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.").

<sup>5</sup> See Helen Hershkoff, *Rights and Freedoms under the State Constitution: A New Deal for Welfare Rights*, 13 *Touro L. Rev.* 631, 643–44 (1997) (recounting history).

<sup>6</sup> Helen Hershkoff, *Statement in Opposition to a Constitutional Convention at 2* (submitted to City Bar March 22, 2017) (citations omitted) (hereinafter "Hershkoff"), <http://documents.nycbar.org/files/HershkoffConConStatement.pdf>.

<sup>7</sup> Article XVII also contains provisions consistent with international human rights norms, such as a right to income, health care, and housing. See *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 999 U.N.T.S. 3 (signed by the United States on Oct. 5, 1977); *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc/A/810 (Dec. 12, 1948); see generally Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 20 *N.Y.U. L. & Soc. Change* 359 (2006) (discussing importance of state constitutional provisions like Article XVII as tools to implement international human rights law standards). Retrogressive measures that eliminate or curtail the guarantees in Article XVII and elsewhere in the State Constitution could run afoul of human rights principles that the U.S. has historically supported. See Michael H. Posner, Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, *Address to the American Society of International Law, "The Four Freedoms Turn 70"* (Mar. 24, 2011), <https://2009-2017.state.gov/j/drl/rls/rm/2011/159195.htm>; U.N. High Comm'r for Human Rights, *Report on Progressive Realization of Economic, Social, and Cultural Rights*, U.N. Doc. E/2007/82, ¶ 19 (June 25, 2007), <http://undocs.org/E/2007/82>.

testimony opposing a Constitutional Convention at this time, Professor Hershkoff wrote, “Make no mistake: Article XVII has protected thousands of New Yorkers from destitution, disease, and death. The courts have power to enforce Article XVII—the welfare right is judicially enforceable—and the Court of Appeals repeatedly has held that the duty to provide assistance is mandatory and that assistance cannot be withheld for reasons unrelated to need . . . .”<sup>8</sup> The Legal Aid Society, which relies on Article XVII to protect the rights of low-income people, agrees.<sup>9</sup>

Article XVII also protects low-wage and even middle class New Yorkers, many of whom qualify for food assistance and assistance with their mortgage or rent and cannot afford health care.<sup>10</sup> The Task Force Report acknowledges the importance of Article XVII, recognizing, for example, that it has secured State-funded Medicaid for immigrants’ health care at a time when federal welfare reform made many immigrants ineligible for federally-funded Medicaid, SNAP (Food Stamps) and Cash Assistance.<sup>11</sup> Less clear in the Task Force Report, but of even wider impact, are the landmark decisions holding that Article XVII establishes a state constitutional right to shelter, which now keeps nearly 60,000 residents of New York City alone off the streets every night.<sup>12</sup> Courts continue to apply Article XVII to protect the people of our state.<sup>13</sup> Finally, Article XVII serves as a powerful deterrent when the State considers cutting subsistence benefits and/or imposing draconian conditions on their receipt.<sup>14</sup>

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<sup>8</sup> Hershkoff at 6.

<sup>9</sup> Adriene Holder, Attorney-in-Charge of The Legal Aid Society, Civil Practice, Statement in Opposition to a Constitutional Convention (submitted to City Bar March 22, 2017), <http://documents.nycbar.org/files/HolderConConStatement.pdf>.

<sup>10</sup> Hershkoff at 3, n.10 (citing The United Way of New York, ALICE: Asset Limited, Income Constrained, Employed — New York at 6, [http://unitedwayalice.org/documents/16UW%20ALICE%20Report\\_NY\\_Lowres\\_11.11.16.pdf](http://unitedwayalice.org/documents/16UW%20ALICE%20Report_NY_Lowres_11.11.16.pdf); CEO Poverty Measure 2005-2014: An Annual Report from the Office of the Mayor at 3 (April 2016), <http://www.nyc.gov/html/ceo/downloads/pdf/CEO-Poverty-Measure-2016.pdf>).

<sup>11</sup> Task Force Report at 24 n.29, citing *Aliessa v. Novello*, 96 N.Y.2d 418, 428-29 (2001).

<sup>12</sup> *See, e.g.*, *Eldredge v. Koch*, 98 A.D.2d 675, 676 (1983); *see also* *McCain v. Koch*, 117 A.D.2d 198, 214 (1986).

<sup>13</sup> Just last year, for example, a State Supreme Court judge in Buffalo held that denying state-funded cash assistance to New York residents with Temporary Protected Status would violate their rights under Article XVII, § 1. *See Karamalla v. Devine*, slip op. at 8, Index # 107-2015 (Sup. Ct. Erie County, Feb. 23, 2016). After initially appealing the decision, the State withdrew the appeal and conformed its policies to the ruling, making thousands of immigrants potentially eligible for cash assistance and the benefits that flow from it, including child care, eligibility for housing subsidies that prevent evictions and homelessness and access to education and training.

<sup>14</sup> For example, at times when proposals were made for imposing “full family sanctions” for welfare rule infractions—that is, cutting off benefits to both parents and their children as a penalty for the parents’ rule violations—the prospect of litigation under Article XVII was enough to dissuade proponents from moving forward. Likewise, were New York State to consider or enact a lifetime limit on how long New Yorkers could receive subsistence benefits, as Congress has for federal welfare benefits, Article XVII, § 1 could be used to block it.

Article XVII, § 1 is essential to the fabric of New York State. The Task Force Report expresses confidence that “appropriate education” and “proper attention” during delegate elections and the Convention itself will mitigate the recognized risk to this provision and others.<sup>15</sup> But the historical record offers no basis for this confidence. In fact, Article XVII, § 1 has already come under repeated attack, including by the last Constitutional Convention, held in 1967. That convention proposed an amendment that would have stripped the state’s obligation to care for the needy out of the Constitution and replaced it with aspirational but unenforceable language calling on the state to “foster and promote the general welfare and to establish a firm basis of economic security.”<sup>16</sup> The voters ultimately rejected all of the changes that came out of the 1967 convention. Then, in 1993, Assembly members introduced a resolution to change the word “shall” to “may” in Article XVII, which would have significantly weakened the rights that have evolved under it.<sup>17</sup> Legislators continue to make proposals every year to weaken this provision.<sup>18</sup>

The wisdom of holding a Constitutional Convention must also take into account national politics. In the past, the Legislature has been able to count on federal financial support in the cooperative effort of providing social welfare assistance. However, the President’s recent budget proposal, characterized by the National Center for Law and Economic Justice as a “savage attack” on the populace, would make \$610 million cuts to Medicaid and the Children’s Health Program; slash SNAP and TANF by \$272 billion; and cut Social Security Disability and Supplemental Security Income for poor seniors and people with disabilities.<sup>19</sup> Tax changes, such as those proposed by the President, are likely to decrease federal revenues, causing additional budgetary pressures on the state. These short-term budgetary pressures could generate extreme pressure by the spring of 2019, when the Convention delegates would meet, to modify or eliminate the rights Article XVII protects, especially if outside interests who are ideologically opposed to public support for the needy were to train their sights on Article XVII. Thus, not only is a convention unlikely to improve upon Article XVII, it could generate a rollback of its protections.

To quote Professor Hershkoff: “Concerns about cutting back our Constitution’s welfare

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<sup>15</sup> Task Force Report at 5.

<sup>16</sup> Hershkoff at 8 (citing Gerald Benjamin & Melissa Cusa, *Social Policy*, in *Decision 1997: Constitutional Change in New York* 302, 303 (Gerald Benjamin & Henrik N. Dullea, eds., 1997) (quoting the Proposed New York State Constitution, 1967, art. I, § 10).

<sup>17</sup> Assembly Bill A.6787-A, 1993 Legislative Session (same as S.3426).

<sup>18</sup> The Assembly and Senate have repeatedly introduced identical bills which would authorize the legislature to impose a residency period on needy persons applying for certain social services. *See, e.g.*, Senate Bill S.5365, 2005-2006 Legislative Session (same as A.7952); Senate Bill S.3290, 2007-2008 Legislative Session (same as A.5909); Senate Bill S.2991, 2009-2010 Legislative Session (same as A.6644); Senate Bill S.2494, 2011-2012 Legislative Session (same as A.2281); Senate Bill S.1124, 2013-2014 Legislative Session (same as A.2028); Senate Bill S.2493, 2015-2016 Legislative Session (same as A.6358).

<sup>19</sup> *See* National Center for Law and Economic Justice, *Trump’s Budget: Savage Attack on Ordinary Folks in Favor of Tax Breaks for the Rich*, May 24, 2017, <http://nclej.org/news/trump-budget-savage-attack>.

right do not reflect a politics of fear—they reflect a politics of realism. As lawyers we should act with humility before recommending a course of action that imposes a risk of harm on others but not on ourselves.”<sup>20</sup>

## **B. Other Constitutional Rights**

The State Constitution also offers strong protection for other vital rights that are under substantial and sustained attack on the national level, making their protection of vital importance.

Article XI, § 1, titled “Education,” provides for free public schools and is the foundation for the right to a “sound basic education,” as recognized by the state’s highest court in the education funding litigation brought by the Campaign for Fiscal Equity.<sup>21</sup> A Convention would risk exposing this right to the powerful forces that are attempting to undermine and discredit public education across the country, forces that include a federal Secretary of Education who has championed transferring public funds to private schools through vouchers and other programs. Indeed, the 1967 Constitutional Convention proposed eliminating Article XI, § 3, which prohibits state funding of religious schools. It is no surprise, then, that public school teachers in New York State have taken a strong stance against a Constitutional Convention, fearing that this article will be weakened, such that basic educational standards in New York State will be reduced or lost.<sup>22</sup>

Article XIV, titled “Conservation,” includes what is known as the “forever wild” clause, which protects the three million acres of state forest preserve in the Adirondack and Catskill mountain regions from development and depletion. Article XIV also commits the state to “conserve and protect” its forests, wildlife and natural resources.<sup>23</sup> As the Task Force Report recognizes, courts have consistently enforced Article XIV to protect New York’s natural resources. And while the voters have approved some limited intrusions into the forest preserve through the legislative constitutional convention process,<sup>24</sup> a Convention would risk the wholesale rewriting of these critical protections. Many advocates for the environment oppose a convention for this reason.<sup>25</sup>

The State Constitution contains strong protections for labor in Article I, § 17, often

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<sup>20</sup> Hershkoff at 11.

<sup>21</sup> *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 317 (1995) (quoting *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48 (1982)).

<sup>22</sup> See New York State United Teachers, Why we must say NO to a constitutional convention, <https://www.nysut.org/news/nysut-united/issues/2016/february-2016/why-we-must-say-no-to-a-state-Constitutional-Convention>.

<sup>23</sup> N.Y. Const. art. XIV.

<sup>24</sup> See Adirondack Wild: Friends of the Forest Preserve, Forever Wild, Article XIV, New York State Constitution at 5-6, [http://www.adirondackwild.org/pdf/pdf\\_article-XIV-booklet/Article%20XIV%20Booklet.pdf](http://www.adirondackwild.org/pdf/pdf_article-XIV-booklet/Article%20XIV%20Booklet.pdf).

<sup>25</sup> Adirondack Council, Adirondack Wild: Friends of the Forest Preserve, and the Adirondack Mountain Club, are among the organizations opposed to a Constitutional Convention.

referred to as the “bill of rights” for labor. This section provides that labor is not a commodity, sets wage-and-hours standards, and guarantees employees the right to organize and bargain collectively. These protections for working people are considered some of the strongest in the nation.<sup>26</sup> Article V, section 7, protects public employee pensions.<sup>27</sup> The federal government’s increasing hostility to collective bargaining rights and the decimation of public employee pensions in multiple jurisdictions hint at the vulnerability of these rights in a Convention. This is a primary reason that labor groups comprise some of the most well organized and vocal opponents of a Convention.<sup>28</sup>

This list is far from exhaustive. The New York State Constitution has evolved many unique rights over its 200 plus years of life. The New York Civil Liberties Union (NYCLU) opposes a Constitutional Convention in part because it risks changing constitutional guarantees that give New Yorkers stronger protection than those afforded by the federal Bill of Rights in areas that include free expression and the rights of criminal suspects and defendants.<sup>29</sup> These are all critical and contentious rights that a Convention would throw open to debate and alteration.

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<sup>26</sup> Deborah Wright, President of the Association of Legal Aid Attorneys, UAW Local 2325 (AFL-CIO), Comments for Consideration by the Association of the Bar of the City of New York at 1 (submitted to the City Bar March 22, 2017), <http://documents.nycbar.org/files/ALAAUAW2325ConConTestimony.pdf>.

<sup>27</sup> Opinions differ on whether pension rights are also protected by the federal contract clause. *Compare* Evan Davis, N.Y.’s democracy needs an overhaul, Daily News (Feb. 25, 2017) (asserting that federal contract clause protects pensions) *with* Hershkoff at 4, n.11 (opining that the contracts clause prevents states from impairing contracts, not rescinding them, so does not protect pension rights). The Task Force “did not consider any potential risk to public employee pensions, as it did not consider that to be a core issue within the City Bar’s mandate.” *See* Task Force Report at 3 n.7.

<sup>28</sup> *See, e.g.*, New York State AFL-CIO, Vote NO on the NYS Constitutional Convention, <http://nysaflcio.org/noconcon/>; *see also* Public Employees Federation, NYS Constitutional Convention Vote NO Toolkit, <http://www.pef.org/Constitutional-Convention-toolkit/ConstitutionalConventiontoolkit-2/>.

<sup>29</sup> *See* Preliminary Draft Memorandum on NYCLU Opposition to a New York State Constitutional Convention, June 13, 2017 (hereinafter “Draft NYCLU Memo”), appended hereto. The NYCLU memo explains that under current case law, the State Constitution extends greater protection for opinions in defamation claims than does the First Amendment. Draft NYCLU Memo at 3 (citing *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 521 (1991)). New York law also provides journalists a qualified right to withhold sources, even where not gained with an assurance of confidentiality. Draft NYCLU Memo at 3 (citing *O’Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521 (1988)). New York law is also more protective than federal law with regard to searches and seizures. Draft NYCLU Memo at 4 (citing *e.g.*, *People v. Bigelow*, 66 N.Y.2d 417 (1985) (exceptions to the exclusionary rule); *People v. Marsh*, 20 N.Y.2d 98 (1967) (searches incident to traffic violation arrests); *People v. Scott*, 79 N.Y.2d 474 (1992) (warrantless administrative searches to uncover evidence of criminality); *People v. Johnson*, 66 N.Y.2d 398 (1985) (informant-information standard for probable cause); *People v. Diaz*, 81 N.Y.2d 106 (1993) (the “plain touch” doctrine in pat-downs); *People v. Dunn*, 77 N.Y.2d 19 (1990) (warrantless canine sniffs); *People v. Torres*, 74 N.Y.2d 224 (1989) (automobile searches); *People v. De Bour*, 40 N.Y.2d 210 (1976); *People v. Howard*, 50 N.Y.2d 583 (1980) (questioning and ordinary inquiries by the police)). Moreover, the New York Constitution specifies stringent requirements for waiver of a criminal jury trial and requires a 12-member jury in a felony case. Draft NYCLU Memo at 4 (citing, *e.g.*, N.Y.S. Const., Art. I, § 2 (waivers); *People v. DeCillis*, 14 N.Y. 203 (1964) (12-person jury)). New York courts also treat the right to counsel as being unwaivable in counsel’s absence once the right has attached, and apply the

### **C. The Risk of New Amendments**

A Constitutional Convention would not only allow revisions to existing constitutional protections, but also proposals for new amendments. The convention process is, to some extent, analogous to a referendum process, in which a short-term campaign can stir the public to adopt a lasting policy without sufficient deliberation or debate about its potential consequences. For example, opponents of immigrants' rights could mount a campaign to require local enforcement of federal immigration law, forcing cities such as New York to expend local resources for federal purposes and to compromise public safety. Or, proponents of a death penalty could seek a constitutional amendment to authorize it; New York lacks a death penalty only because it was held unconstitutional. Nuanced consideration of weighty issues is extremely difficult in a campaign-style setting, such as New York's convention process would be, in contrast to the lengthy deliberations inherent in the legislative constitutional amendment process. Particularly because of the rising influence of money in politics, a Convention could give rise to well-funded drives to arouse public passion in favor of constitutional amendments that would threaten precious civil rights and civil liberties.

## **II. STRUCTURAL DEFICITS IN THE CONVENTION PROCESS MAKE PROGRESSIVE REFORM UNLIKELY AND RAISE THE RISK TO EXISTING RIGHTS**

The Objecting Committees cannot share the Task Force's optimism about the likelihood of achieving progressive reform through a Constitutional Convention because of structural deficits in the Convention process. These deficits include the flawed delegate selection process, the inability to control the rules the Convention adopts, the timing of the votes pertaining to the Convention, and the vulnerability of delegate elections and constitutional proposals to be backed by massive spending that originates outside the state. Not only do these flaws reduce the likelihood of achieving judicial, ethics or voting reform through a Convention, but they also heighten the risk to the rights outlined above upon which New Yorkers depend.

### **A. The Delegate Selection Process Is Flawed**

If the Constitutional Convention receives a "yes" vote in November 2017, the next step will be an election of delegates to the Convention in November 2018. Current law directs that three delegates will be elected from every State Senate district, and that an additional fifteen delegates will be elected statewide.

Twenty years ago, the City Bar Task Force on a Constitutional Convention opened its report to the public by stating that the legislature's failure to "improve fairness" in the delegate

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right to post-conviction proceedings and to questioning on unrelated charges. Draft NYCLU Memo at 4 (citing, e.g., *People v. Arthur*, 22 N.Y.2d 325 (1968) (right to counsel); *People ex rel. Donohoe v. Montayne*, 35 N.Y.2d 221 (1974) (post-conviction proceedings); *People v. Rodgers*, 48 N.Y.2d 167 (1979) (questioning for unrelated charges)). The Court of Appeals has also been arguably more protective of a defendant's right to effective assistance of counsel than the Supreme Court. Draft NYCLU Memo at 4 (citing, e.g., *People v. Benevento*, 91 N.Y.2d 708 (1998)).



selection process “weigh[ed] heavily against calling a constitutional convention . . . .”<sup>30</sup> The 1997 Task Force concluded that the existing delegate selection process “dilutes minority representation and favors political incumbents,” and that “[a] convention organized under current delegate selection procedures would likely be controlled by the same forces that now control the political status quo.”<sup>31</sup> The delegate selection process has not changed since the City Bar issued that assessment in 1997.

In 2016, the current City Bar Task Force on a Constitutional Convention again endorsed changes in the delegate selection process, changes that it asserted were necessary to “make the process more open, less subject to the control of political leaders and more likely to result in a Convention reflective of the will of the State’s population.”<sup>32</sup> The recent recommendations repeat the call from 1997 to reduce the number of petition signatures that delegate candidates are required to collect, noting that “[c]ollecting such a large number of signatures can be a particular burden on individuals not backed by a party’s establishment.”<sup>33</sup> They also repeat the 1997 recommendation that the fifteen at-large delegates be elected individually, not by slates identified by party, in an apparent bid to open the delegate selection process to people who would not owe a debt to vote the party line.<sup>34</sup>

In a break from the 1997 report, the City Bar Task Force in 2016 dropped its stance against district-wide voting for delegates, despite the recognized tendency of district-wide voting to dilute the ability of minority groups to elect delegates of their choice, stating, “the Task Force believes that the greatly increased influence of money in the political process during the past 20 years, bolstered by the U.S. Supreme Court’s *Citizens United* decision, creates a greater risk of well-financed single issue candidates.”<sup>35</sup>

As of today, the Legislature has taken no action to change the delegate selection rules. While the Task Force Report expresses hope that the Legislature will reform the delegate selection process before an election for delegates, it does not suggest how that will be achieved

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<sup>30</sup> New York City Bar Association, Report of the Task Force on the New York State Constitutional Convention, 52 *The Record* 523, 540 (June 1, 1997), <http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>.

<sup>31</sup> *Id.* at 535.

<sup>32</sup> New York City Bar Association, Task Force on the State Constitutional Convention, Report on Delegate Selection Procedures (hereinafter “Delegate Selection Report”) 1-2 (Feb. 11, 2016), <http://www2.nycbar.org/pdf/report/uploads/20073044-DelegateSelectionProceduresConConReportFINAL2.9.16.pdf>.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 3-4. The Delegate Selection Report noted that in the past, the names of at-large delegates did not even appear on the ballot. *Id.* at 4. This left voters no option but to blindly choose a party-identified slate or forego any voting on at-large delegates.

<sup>35</sup> *Id.* at 3.

by the same Legislature whose inaction on ethics, judicial and voting reform motivates the call for a Constitutional Convention.<sup>36</sup>

For some, the failure to change the delegate selection rules is, in itself, sufficient reason not to support a Constitutional Convention today. Noted election law expert Jerry H. Goldfeder supported a convention in 1997, but now does not. He concludes that “a Constitutional Convention under the current delegate selection process would either fail to enact change or, worse, undermine if not eviscerate existing protections in the constitution.”<sup>37</sup> Instead, he predicts that “the realities of the inherently flawed delegate procedures outweigh any hoped-for reform.” Mr. Goldfeder reasons that there is no evidence that concerns about single issue politics, PAC money and special interests that motivated the City Bar to recommend against a convention in 1997 have diminished in the last 20 years; rather, they have become “more dominant.”

### **B. Voters May Not Be Permitted to Choose Among a Convention’s Proposals**

The Task Force Report concludes its discussion of the risks to existing constitutional guarantees by stating, “[a]s a final check, voters will have the opportunity to either accept or reject any proposed amendments that emerge from a convention, an important backstop against undesired results.”<sup>38</sup>

While it is true that a Convention’s proposals would be put to a popular vote, there is no certainty that voters would have the option of choosing among the constitutional changes that a Convention would recommend. The Convention itself determines the rules of its proceedings, and prior Conventions have generally presented groups of amendments for approval, without individualized voting on each. Thus if unwanted amendments are part of a package recommended by a Convention, voters may well face an up or down vote on the entire package—hardly the “backstop” that the Task Force envisions. This sets the stage for considerable mischief—for example, the possibility that special interests that, for reasons described below, are likely to be a significant force in the Convention process may find it to their perceived advantage for the Convention to (a) combine in one ballot vote an otherwise unpopular amendment that the special interests favor with other provisions that are popular or (b) support a regressive amendment to the state constitution (such as a “tough on crime” measure), not because the special interests really care about it but in order to gain support for some other less popular measure.

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<sup>36</sup> Compare Task Force Report at 10 (opining that the current legislature can be counted on to enact “[s]tatutory revisions to the delegate selection process . . . . And, should the electorate call for a Convention in November 2017, statutory changes can be enacted in 2018, prior to the election of delegates.”) with *id.* at 2 (“the legislative and executive branches appear collectively unable or unwilling to sufficiently address public concerns that our elective processes need to be updated and fixed, that corruption continues to be a serious problem in State government and that reform of our judicial system is long overdue”).

<sup>37</sup> See Letter of Jerry H. Goldfeder dated May 29, 2017 submitted to the City Bar Executive Committee.

<sup>38</sup> Task Force Report at 5.

### **C. The Predictably Low Turnout for a Vote on a Convention’s Proposals Could Sway Results in Unpredictable Directions**

An assessment of probable voter turnout should be paramount in any prediction related to the outcome of a popular vote. If there is a Convention, the delegates who are elected in the fall of 2018 will meet in the spring of 2019, with the expectation that the Convention’s proposals will be on the ballot for a statewide vote in the fall of 2019. The possibility of achieving reform through a Constitutional Convention depends on an electorate that cares enough about those changes to actually go to the polls in the fall of 2019 and vote for them. However, as an off-year for presidential and statewide elections, 2019 is likely to draw few voters to the polls, especially in New York City where it will also be an off-year for the mayoral election. Areas with hotly contested county or local elections outside of New York City may have higher turnout. Concerted drives for what some would consider regressive constitutional changes could augment this effect, as the motivation to reach the polls would be considerably stronger for proponents of, say, a state constitutional right to bear arms than for proponents of court reform.

### **D. *Citizens United* and the Rise of “Dark Money” in Elections Threaten the Integrity of the Convention Process**

Aside from a few brief mentions of the increasing influence of money in politics, the Task Force Report fails to grapple with the overwhelming role of uncontrolled contributions in today’s electoral politics. The Report points to voter education as the antidote to delegate elections’ vulnerability to outside forces, stating that “with appropriate education before this November’s vote and next November’s delegate election, voters will be motivated to elect delegates determined to protect—and possibly enhance—constitutional rights and mandates . . . .”<sup>39</sup> Yet “voter education” most often takes the form of paid political advertising. Esoteric subjects like court, voting, and ethics reform are hardly amenable to ad campaigns, especially when compared to potential voter “education” on topics like immigration, the benefits of fracking, and pitting the needs of homeless families against everyone who pays rent or a mortgage.

Recognizing this hazard does not reflect distrust of New York voters. To the contrary, it reflects the reality of today’s state elections—captured in this headline from 2014: “Mega-Donors Give Big in State Elections.”<sup>40</sup> It would be imprudent to ignore the danger that “outside money” will target a Convention as an opportunity to roll back constitutional protection and change the legal infrastructure of the state.<sup>41</sup> Even with small-donor matching, outside money

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<sup>39</sup> Task Force Report at 5.

<sup>40</sup> Rachel Baye et al., Mega-Donors Give Big in State Elections, *Time* (Oct. 30, 2014), <http://time.com/3548313/mega-donors-give-big-in-state-elections/> (“In New York, wealthy individuals can donate through multiple limited liability corporations to dodge the state’s \$60,800 per cycle contribution limit for such businesses.”).

<sup>41</sup> See Brennan Center for Justice, New Analysis: 2016 Judicial Elections See Secret Money and Heightened Outside Spending (Sept. 14, 2016), <https://www.brennancenter.org/press-release/new-analysis-2016-judicial-elections-see-secret-money-and-heightened-outside-spending> (reporting that “secret spenders predominated” and “outside spending dominated” in 2016 state supreme court elections).

could easily eclipse other available funding and dominate public discourse.<sup>42</sup> It is hard to imagine how good-government groups and bar associations could counter well-funded campaigns by individuals or organizations that are now effectively free to spend without limits on whatever causes they adopt.

It is also impossible to predict what issues might attract attention and influence, including from outside the state. Consider, for example, last fall's election in Maine, in which wealthy individuals outside the state and organizations outside the state that were not required to disclose their donors (so-called "dark money"), contributed almost all the funds spent on a successful referendum campaign to adopt "ranked choice" voting for all state and federal candidates.<sup>43</sup> The point here is not the merits of ranked choice as a voting method. Instead, the fact that this critical issue for Maine voters attracted huge funding from both identified and unidentified donors outside the state drives home the point that current election law would allow anyone in the country with money to spend and an agenda to pursue to wield an outsized influence on delegate elections as well as the ultimate constitutional amendment vote.<sup>44</sup> Such contributions can neither be predicted nor controlled.

#### IV. CONCLUSION

A Constitutional Convention could achieve worthy goals, including the judicial, ethics and voting reforms that the Task Force Report endorses. It could also destroy crucial protections for the people of New York State—protections for the environment, for the public welfare, for education and labor and others—protections that in some respects already have been lost at the federal level and are certain to come under tremendous threat in the months between now and 2019. We live at a time of great volatility in the electorate, which is fed by unending and sometimes untraceable streams of money that have made elections of all kinds into virtual playgrounds for special interests. There is no reason to put the State Constitution up for grabs in this environment, particularly when each of the reforms the Task Force Report endorses can be achieved through ordinary legislation or the legislative amendment process. For these reasons,

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nationwide). *See also* Brentin Mock, The Damaging Influence of Outside Money on Local Elections, The Atlantic CityLab (June 9, 2016), <http://www.citylab.com/politics/2016/06/the-damaging-influence-of-outside-money-on-local-elections/486407/>.

<sup>42</sup> *See* Brennan Center for Justice, The Faces of Small Donor Public Financing (June 9, 2016), <https://www.brennancenter.org/video/breaking-down-barriers-faces-public-financing>; *see also* Jane Mayer, The Reclusive Hedge-Fund Tycoon Behind the Trump Presidency (March 27, 2017), <http://www.newyorker.com/magazine/2017/03/27/the-reclusive-hedge-fund-tycoon-behind-the-trump-presidency> (reporting extraordinary sums of money donated to "neutralize" the mainstream media).

<sup>43</sup> Darren Fishell, "Bloomberg, NRA and other 'dark money' groups fueling Maine's referendum campaigns," Bangor Daily News (Nov. 2, 2016), <http://bangordailynews.com/2016/11/02/the-point/bloomberg-nra-and-other-dark-money-groups-fueling-maines-referendum-campaigns/>.

<sup>44</sup> Interestingly, the Supreme Judicial Court of Maine issued an advisory opinion last month concluding that ranked choice voting conflicts with the Maine Constitution. Questions Propounded by the Maine Senate in a Communication Dated Feb. 2, 2017, No. OJ-17-1, 2017 ME 100, slip op. at 45 (May 23, 2017).

the committees listed above object to the City Bar's support for a Constitutional Convention at this time.

June 14, 2017

*Appendix*  
*Objection to the City Bar's Position*  
*June 14, 2017*

**Exhibit: Draft NYCLU Memo dated June 13, 2017**

In 1995, the NYCLU Board adopted a policy in opposition to the 1997 state constitutional convention question.<sup>1</sup> That opposition rested upon a pair of key ideals:

- Core civil liberties principles embodied in the state constitution could be subject to great risk if the text were to be amended through a “transient majority” process that is “not sufficiently deliberative to protect adequately individual freedom and rights of the minority.”
- There is much to preserve, in that the state constitution offers protections beyond those contained in the federal Bill of Rights, and in light of any potential weakening of federal constitutional protections.

With regard to process, the Board’s opposition focused on the rushed and transitory character of the convention, and on the tendency of such a process to crystallize the “public passions” of the political moment, rather than to produce appropriately balanced amendments that maintain enduring “constitutional equilibrium” in the government. The Board stated a strong preference for the legislative amendment process, which contains more inherent opportunities for debate and deliberation, without “excessively insulating constitutional change from the democratic process.” The Board also expressed concern that amendments could impair the ability of future courts to interpret the state constitution as more protective than federal constitutional provisions.

The Board’s final articulated position was opposition to the delegate selection process set forth in the state constitution itself.<sup>2</sup> Then as now, that process positioned each Senate district as a three-delegate district, with at-large elections for district delegates. The 1995 Board expressed concern that this may amount to unconstitutional minority vote dilution, in violation of Section 2 of the federal Voting Rights Act (VRA); this concern remains and current observers also note the probability of litigation.<sup>3</sup>

The analysis and positions in that policy are still sound in 2017. There have been no changes to the processes critiqued in that policy, and there is no cause to suspect that a convention held in the immediate future would be any more deliberative or any more representative than a convention held at that time. In fact, one might expect this convention-question cycle to be even less deliberative, as there has been no advance commission considering the merits or best practices of a convention – a departure from past cycles. It is also likely that moneyed special interests from across the political spectrum could exert more influence than a generation ago. Finally, while intervening case law has addressed remedies for vote dilution under VRA Section 2, unmodified multimember voting districts - like those used to elect convention delegates - are frequently found in violation.

This memo offers a brief analysis of the potential impact of a 2019 convention on civil liberties, and provides a current summary of protections in the state constitution that have been interpreted by our highest court to exceed those in the U.S. Constitution. An attached overview document supplies basic information on the mechanics and history of the state constitutional convention.

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<sup>1</sup> Policy of the NYCLU Board of Directors, *New York State Constitutional Convention* (approved Dec. 5, 1975).

<sup>2</sup> See N.Y.S. Const. Art. XIX, § 2. “[T]he electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large.”

<sup>3</sup> See, e.g., N.Y. S.B. 5609 of 2017, Sponsor’s Memo in Support (“Currently, Article XIX, section 2 is more than likely in violation of the Federal Voting Rights Act.”), available at <https://www.nysenate.gov/legislation/bills/2017/s5609>; J.H. Snider, *The Best Delegate Election Process for a New York Constitutional Convention*, Gotham Gazette (Nov. 17, 2016) (“...[F]ederal courts could rule that the delegate election system approved by the Legislature for the three-member districts violates the proportional requirements under Section 2 of the Voting Rights Act... If the Legislature doesn’t change the type of system it approved in early 1966, it is likely to be sued under that law.”), available at <http://www.gothamgazette.com/opinion/6628-the-best-delegate-election-process-for-a-new-york-constitutional-convention>.

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ACLU policy on the wisdom of a national constitutional convention is brief, but provides some guiding principles for a civil liberties analysis of the merits of a state constitutional convention.<sup>4</sup>

- The principal question is whether a convention would be likely to weaken or advance civil liberties.
- The rules governing convening and conduct of a convention must be fair – assuming that such rules are predetermined and subject to analysis.
- It is preferred that a convention call be limited in scope; at minimum, a convention should be confined to the scope of its call.
- Delegate selection should be fair and proportionate, such that it will yield a body capable of representing the interests of the entire state.

As the NYCLU likewise determines and evaluate all factors relevant to a state convention in light of the principal question – what is to be gained and what is at risk in the realm of civil liberties, should a convention be held – it makes sense to address the remaining principles in light of New York’s established convention process.

The state constitution provides that the convention “shall determine the rules of its own proceedings.”<sup>5</sup> These rules would, along with selection of leadership and division of committees, naturally be among the first matters settled by the convention body. In the democratic spirit conveyed by the constitution’s wholesale delegation of such broad power to the convention itself, one would hope, and might presume, that a body accountable to its electors should produce rules that are fair. However, there is no mechanism for containment or oversight of the convention’s rules, and thus no means beyond a presumption of democratic fiat to determine whether they are likely to be drawn in a way that promotes the advancement of civil liberties.

Likewise, the state constitution provides for an inherently unlimited call: “Shall there be a convention to revise the constitution and amend the same?”<sup>6</sup> The convening body could conceivably limit itself to one question or one area of inquiry, but past conventions have instead tackled an extremely broad array of issues. While a legislative constitutional amendment is limited to its text, and a legislative call for a convention may be limited in scope, there is no means to limit the call of the constitutional convention popular referendum at its outset.

The remaining principle for consideration is the need for a fair and representative body of delegates to the convention. Much has been said and written on the issues with delegate selection as set forth in the state constitution, including the NYCLU Board’s 1995 statement of opposition. In addition to concerns about at-large voting articulated both in that policy and above, the analysis rests upon a simple question: how fair and representative are the state Senate districts that serve as the delegate selection districts?

Unfortunately, New York’s state Senate districts cannot be described as representative and fair. One key change has been made since 1995: for the purpose of state Senate districts, New York’s prisoners must now be counted at their address of residence prior to incarceration rather than at the facility where they are held.<sup>7</sup> Despite this improvement - and even without regard to partisan makeup of districts - upstate, suburban, and rural interests

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<sup>4</sup> The ACLU recognizes the right to amend the Constitution by convention under Article V, but opposes the calling of any constitutional convention when it will result in weakening civil liberties. Regarding a national convention, the ACLU cautions that no standards exist to govern how a constitutional convention should be convened and conducted; and in the absence of such standards, there are no ways to assure, among other things, that delegates are fairly representative; that rules governing conduct of a convention will be fair; that a convention would confine itself to the subject or subjects of the call; and that a convention does not otherwise infringe on civil liberties.

<sup>5</sup> N.Y.S. Const. Art. XIX, § 2.

<sup>6</sup> *Id.*

<sup>7</sup> Ch. 57, L. 2010, Part XX.



remain over-represented through the gerrymandered drawing of district lines, and downstate and urban interests remain under-represented.

While this poses difficulties with regard to the fundamental fairness of state Senate representation, it might not necessarily be unfair in itself for state constitutional convention purposes. One might even argue that amplifying interests that are in fact minority interests when viewed through a statewide lens is a wise balance when the final product of a convention's deliberation is to be put to a statewide popular vote. However, at-large voting compounds the problem of unfair representation: where particular factions have outsize influence *among* Senate districts, and at-large voting prevents minorities *within* those districts from obtaining representation at the convention, that already-outsize influence becomes further amplified on the convention stage. This has become a special concern for those who fear that moneyed interests, proxies for the powerful and single-issue delegates will run the day at a constitutional convention.

In summary, absent any constraints upon either the scope or rules of a convention, the built-in protections of democratic structures must carry even more weight in contemplating a convention's potential civil liberties outcomes. The current delegate selection process in New York ought not be viewed as so inherently fair and representative that it would adequately assure fair and representative outcomes – especially with regard to the protection of important minority interests and civil liberties, and in light of the absence of other checks.

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The scope of what is to be protected in the New York State constitution is vast enough to warrant an inquiry in itself. In such crucial areas as free expression, religious liberty and the rights of criminal suspects and defendants, the state constitution has been consistently interpreted to outpace the Bill of Rights. In addition, the state constitution provides for some rights that the U.S. constitution never contemplates.

The following are some areas in which the state constitution has been interpreted more protectively than the Bill of Rights.<sup>8</sup> This summary is comprehensive but far from exhaustive.

**Free Expression:** The New York Court of Appeals requires more protection in defamation lawsuits for “opinion” than the U.S. Supreme Court provides under the First Amendment.<sup>9</sup> New York law provides journalists a qualified right to withhold sources, even where not obtained with an assurance of confidentiality.<sup>10</sup> The obscenity standard under the New York Constitution is a statewide standard, rather than the local standard permitted by federal law.<sup>11</sup> In addition, the Court of Appeals has given greater protections under the state constitution to materials deemed obscene than those afforded by the U.S. Constitution.<sup>12</sup> The New York Court of Appeals has also protected topless dancing as a form of expression.<sup>13</sup>

**Religious Education and Public Funds:** Unlike the U.S. Constitution, New York's constitution explicitly bars spending public dollars on religious education, which in turn impacts how and what children are taught about civic matters including civil rights and civil liberties.

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<sup>8</sup> Scott N. Fein & Andrew B. Ayers, Eds., *Protections in the New York State Constitution Beyond the Federal Bill of Rights* (Apr. 18, 2017), available at <https://www.albanylaw.edu/centers/government-law-center/publications/Documents/Protections-in-the-New%20York-State-Constitution.pdf>.

<sup>9</sup> *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 521 (1991).

<sup>10</sup> *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521 (1988).

<sup>11</sup> *People v. Calbud, Inc.*, 49 N.Y.2d 389 (1980).

<sup>12</sup> *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553 (1986); *People v. P. J. Video, Inc.*, 68 N.Y.2d 296 (1986).

<sup>13</sup> *Bellanca v. N.Y.S. Liquor Authority*, 54 N.Y.2d 228 (1981).

**Search and Seizure:** New York law is more protective than federal law on exceptions to the exclusionary rule;<sup>14</sup> searches of persons incident to arrests for traffic violations;<sup>15</sup> warrantless administrative searches of businesses to uncover evidence of criminality;<sup>16</sup> the informant-information standard for probable cause;<sup>17</sup> the “plain touch doctrine” in pat-downs;<sup>18</sup> warrantless canine sniffs;<sup>19</sup> automobile searches;<sup>20</sup> questioning and ordinary inquiries by police;<sup>21</sup> and inventory searches<sup>22</sup>, among others.

**Criminal Jury Trials:** The New York Constitution specifies stringent requirements for waiver of a criminal jury trial.<sup>23</sup> It also requires a 12-member jury in a felony case, while the U.S. Constitution allows felony juries of as few as six members.<sup>24</sup> The New York Constitution has been interpreted to require unanimous juries in criminal cases; the U.S. Constitution does not require this of the states.<sup>25</sup>

**Right to Counsel:** New York courts treat the right to counsel as “indelible;” once the right attaches, it cannot be waived except in the presence of counsel.<sup>26</sup> In New York, the filing of a felony complaint signals the commencement of criminal proceedings; at that point, the indelible right attaches.<sup>27</sup> New York also extends the right by prohibiting questioning of suspects beyond the federal limitation.<sup>28</sup> The right extends to post-conviction proceedings,<sup>29</sup> and to questioning for unrelated charges.<sup>30</sup> The Court of Appeals has also been more protective of a defendant’s right to effective assistance of counsel than the U.S. Supreme Court.<sup>31</sup>

Finally, there are also areas in which the state constitution affirms rights unaddressed in the U.S. Constitution, such as education,<sup>32</sup> social welfare,<sup>33</sup> public health,<sup>34</sup> immigrants’ rights,<sup>35</sup> and environmental conservation<sup>36</sup>.

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<sup>14</sup> *People v. Bigelow*, 66 N.Y.2d 417 (1985); *People v. Stith*, 69 N.Y.2d 313 (1987).

<sup>15</sup> *People v. Marsh*, 20 N.Y.2d 98 (1967); *People v. Adams*, 32 N.Y.2d 451 (1973).

<sup>16</sup> *People v. Scott*, 79 N.Y.2d 474 (1992).

<sup>17</sup> *People v. Johnson*, 66 N.Y.2d 398 (1985).

<sup>18</sup> *People v. Diaz*, 81 N.Y.2d 106 (1993).

<sup>19</sup> *People v. Dunn*, 77 N.Y.2d 19 (1990).

<sup>20</sup> *People v. Torres*, 74 N.Y.2d 224 (1989).

<sup>21</sup> *People v. De Bour*, 40 N.Y.2d 210 (1976); *People v. Howard*, 50 N.Y.2d 583 (1980).

<sup>22</sup> *People v. Johnson*, 1 N.Y.3d 252 (2003).

<sup>23</sup> N.Y.S. Const. Art. I, § 2.

<sup>24</sup> N.Y.S. Const. Art. VI, § 18(a); *Williams v. Florida*, 399 U.S. 78 (1970).

<sup>25</sup> *People v. DeCillis*, 14 N.Y. 203 (1964); *Johnson v. La.*, 406 U.S. 356 (1972); *Apodaca v. Or.*, 406 U.S. 404 (1972).

<sup>26</sup> *People v. Arthur*, 22 N.Y.2d 325 (1968).

<sup>27</sup> *People v. Settles*, 46 N.Y.2d 154 (1978); *People v. Samuels*, 49 N.Y.2d 218 (1980).

<sup>28</sup> *People v. Cunningham*, 49 N.Y.2d 203 (1980); *People v. Skinner*, 52 N.Y.2d 24 (1980); *Arthur*, note 29 *supra*.

<sup>29</sup> *People ex rel. Donohoe v. Montanye*, 35 N.Y.2d 221 (1974).

<sup>30</sup> *People v. Rogers*, 48 N.Y.2d 167 (1979).

<sup>31</sup> *People v. Benevento*, 91 N.Y.2d 708 (1998); cf. *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>32</sup> Fein & Ayers, note 8 *supra*, at 25-27.

<sup>33</sup> *Id.* At 27-28; see also N.Y.S. Const. Art. XVII.

<sup>34</sup> N.Y.S. Const. Art. XVII, §§ 3-4.

<sup>35</sup> Fein & Ayers, note 8 *supra*, at 21-24.

<sup>36</sup> *Id.* at 29-32.