Statement of Helen Hershkoff
In Opposition to a Constitutional Convention[1]

Association of the Bar of the City of the New York
Yes or No in November? Discussing a Constitutional Convention for New York

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Introduction

This statement addresses Article XVII of the New York Constitution—our state's unique social welfare right—and explains why we should "vote no" to a Constitutional Convention in November 2017.

Article XVII imposes an affirmative duty on the state to provide assistance to the needy.[2] Moreover, Article XVII bars the state from withholding assistance for reasons unrelated to need, such as citizenship.[3] No constitution is perfect. But among state constitutions, New York's social welfare provision is one of the strongest in the country.[4] By constitutionalizing a right to

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[2] 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.").

[3] See Tucker v. Toia, 43 N.Y.2d 1, 371 N.E.2d 449 (1977).

[4] Elizabeth Pascal, Welfare Rights in State Constitutions, 39 Rutgers L.J. 863, 864 & 869 (2008) (noting that "twenty-three state constitutions, unlike the Federal Constitution, either implicitly or explicitly empower the government to provide for the poor or indigent of the state," but "[o]nly four states' constitutions—Alabama, Kansas, New York, and Oklahoma—command the state or their subunits to provide for the poor").

assistance, 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,[5] and the Supreme Court of the United States is not likely to recognize such a right in the foreseeable future.[6] When it comes to constitutional protection, the poor of New York do not have the luxury of a belt and suspenders.[7] For the poor, it's Article XVII or nothing at all.

My message is this: if reformers want to help New Yorkers who are struggling to make ends meet, then it is imperative to oppose a Constitutional Convention. In today's political climate, we cannot predict the direction that constitutional change will take. A convention can lead to progress—but it also can lead to retrenchment. State history shows that proposed

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[5] See Helen Hershkoff, Privatizing public rights: Common law and state action in the United States, in Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations 129 (Tsvi Kahana & Anat Scolnicov eds., 2016) ("[T]he US Supreme Court has consistently interpreted the federal Constitution as affording no right to government-provided assistance of the sort included in many national constitutions adopted after World War II."); see also Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1133 (1999) (discussing the view that the federal Constitution is a charter of "negative" liberty).

[6] See Mark A. Graber, The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory, 58 Ohio St. L.J. 731, 734 (1997) (predicting that "no jurist who supports constitutional welfare rights is likely to be appointed to the Court in the near future").

[7] "Belt and suspenders" is a metaphor for double protection on the view that one system will provide a backup if the other should fail. Commentators frequently refer to the dual system of rights enforcement provided by the federal Constitution and the constitution of a single state on behalf of residents of that state. Because the federal Constitution does not contain an analogous right to the social welfare right guaranteed by Article XVII of the New York Constitution, the model of dual enforcement does not apply. The federal Constitution likewise does not include a right to a basic education, see San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (rejecting the district court's finding that there is "a fundamental right to education" encompassed within the Fourteenth Amendment), and this state guarantee also could be put in jeopardy by the holding of a Constitutional Convention. For a collection of essays on the theme of dual constitutional enforcement, see James A. Gardner & Jim Rossi eds., New Frontiers of State Constitutional Law: Dual Enforcement of Norms (Oxford University Press, 2011), including my own contribution to the volume, see Helen Hershkoff, State Common Law and the Dual Enforcement of Constitutional Norms, 151–72 in id. (urging that state common law, informed by a state's constitution, provide backup protection).

amendments to Article XVII consistently have tried to cut back and not to extend its protection. Holding a convention puts Article XVII at risk and risks leaving our state's most vulnerable residents—those who lack money and political clout—without any source of protection. Unintentionally, a Constitutional Convention could hurt the very groups that a convention is being summoned to protect. It risks harm to youth who identify as LGBTIQ and cannot afford social services.[8] It risks harm to students who are non-citizens and are hungry or homeless when they come to school.[9] It risks harm to low-wage and even middle class workers who face cuts in federal health care and food assistance, and cannot pay the mortgage or the rent.[10] And,

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[8] See Legal Services NYC, Poverty is an LGBT Issue: An Assessment of the Legal Needs of Low-income LGBT People, available at: http://www.legalservicesnyc.org/storage/PDFs/lgbt%20report.pdf , at 1(reporting that "62% of low-income LGBT New Yorkers had difficulty paying for a basic need in the past year" and that violence and harassment—experienced by at least 50% of the low-income LGBT community—"create major legal needs" that are not adequately met). Indeed, the proportion of LGBT persons living alone with income below $12,000 is higher than that of non-LGBT persons. Id. at 8. For nationwide studies, see Taylor N.T. Brown et al., Food Insecurity and SNAP Participation in the LGBT Community (July 2016), available at: https://williamsinstitute.law.ucla.edu/research/lgbt-food-insecurity-2016/; Andrew Burwick et al., Human Services for Low-Income and At-Risk LGBT Populations: An Assessment of the Knowledge Base and Research Needs, available at: https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/human-services-for-low-income-and-at-risk-lgbt-populations-an-assessment-of-the-knowledge-base-and-research-needs/.

[9] See Hua-Yu Sebastian Cherng et al., Demographic Change and Educating Immigrant Youth in New York City: White Paper Prepared for NYU's Metropolitan Center for Research on Equity and the Transformation of Schools Conference on Immigration and Education (Dec. 2015), available at: http://steinhardt.nyu.edu/scmsAdmin/media/users/sl1716/Announcements/2015_Dec_Demographic_Change_and_Educating_Immigration.pdf, at 2 (discussing incidence of poverty among Mexican and Central American youth in New York); see also Asian American Foundation, Working but Poor: Asian American Poverty in New York City, available at: http://www.aafny.org/doc/WorkingButPoor.pdf, at 13 (reporting poverty and low-income rates, and observing "[c]ompared with the general immigrant population, poverty was somewhat more common for Asians arriving from 2000-2006" than earlier; and at 17 ("Asian children experienced an increase in poverty from 2000 to 2006, while poverty rates fell for all the other groups").

[10] Middle class financial concerns are very real in our state. See The United Way of New York, ALICE: Asset Limited, Income Constrained, Employed—New York, available at: http://unitedwayalice.org/documents/16UW%20ALICE%20Report_NY_Lowres_11.11.16.pdf, at 6 ("Traditional measures hide the reality that 44 percent of households in New York struggle to support themselves."); CEO Poverty Measure 2005–2014: An Annual Report from the Office of the Mayor

although my focus in this statement is Article XVII, holding a Constitutional Convention risks harm to those of the middle class who have worked as public employees—picking up the garbage, policing our streets, educating our children—by putting retirement pensions in jeopardy. Any dilution to the rights established under the New York Constitution, art. V, § 7, could leave workers and retirees without any constitutional protection—as public employees in Detroit learned firsthand.[11]

Article XVII in Historical Context

Without venturing too far into historical comparison, today's political climate is quite unlike the climate that existed in New York when Article XVII was adopted. Article XVII was

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(April 2016), available at: http://www.nyc.gov/html/ceo/downloads/pdf/CEO-Poverty-Measure-2016.pdf, at 3 (reporting that the Center for Economic Opportunity poverty rate for 2014 was 20.7% and the near-poverty rate, 45.2%).

[11] See Alan M. Klinger, et al., Public Sector Pensions Under Attack, N.Y.L.J. (Nov. 7, 2016), available at: http://www.newyorklawjournal.com/id=1202771508573/Public-Sector-Pensions-Under-Attack?slreturn=20170213185448 (stating that "[b]ecause of its stronger constitutional protections, New York public employees have had more security" than workers in other states with constitutions that do not afford protection). Ironically, proponents of a convention argue that they seek to benefit the middle class. See Committee for a Constitutional Convention, "Needed Constitutional Changes," available at: http://www.concon19.org/take_action. Yet they wrongly dismiss concerns that a convention would threaten public-employee pension rights. A recent article calls fears that a convention would eliminate pension rights an "alternative fact," a "scare tactic," and merely "worry about threats to their entrenched clout." Evan Davis, N.Y.'s democracy needs an overhaul, Daily News (Feb. 25, 2017), available at: http://www.nydailynews.com/opinion/n-y-s-democracy-overhaul-article-1.2981747. The article further asserts that "[t]he protection for public employee pensions in the state Constitution cannot be eliminated without violating the contract clause of the federal Constitution, which bars states from rescinding contract rights." The assertion is incorrect. The federal Constitution prevents states from impairing contracts, not rescinding them. See U.S. Const. art. I, §10, cl. 1 ("No State shall ... pass any ... Law impairing the Obligation of Contracts."). Moreover, the Contracts Clause is not an absolute source of protection; rather, the test is whether the legislation is reasonable and necessary to serve an important public purpose. See U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 22–25 (1977). Finally, federal bankruptcy courts are not bound by the Contracts Clause, states are. See, e.g., In re City of Detroit, Mich., 504 B.R. 97, 150 (Bankr. E.D. Mich. 2013) (moreover, "state constitutional provisions prohibiting the impairment of contracts and pensions impose no constraint on the bankruptcy process"). If proponents truly wish to protect the middle class, they should seek reform through pathways that do not put public pensions at risk.

proposed at the 1937 Constitutional Convention and ratified in 1938.[12] Delegates were deeply concerned that the economic crisis of the Great Depression would lead to totalitarianism, and they believed that democracy could survive only if the state forged a new social contract that went beyond civil and political rights and guaranteed a right to welfare assistance. One delegate explained that the goal of the convention was to meet "the threat to freedom" that comes "from poverty and insecurity."[13] Faced with challenges to the legislature's authority to provide aid to the needy, Article XVII affirmed the legislature's power to administer welfare and obliged the legislature to do so.[14] Infused with the spirit of the New Deal—a time of great experimentation, reform, and initiation of critical social welfare benefits—Article XVII was written in open-ended terms to allow the legislature flexibility to adapt to future challenges.[15]

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[12] See Gerald Benjamin & Melissa Cusa, Social Policy, in Decision 1997: Constitutional Change in New York, 302–03 (Gerald Benjamin & Henrik N. Dullea, eds., 1997) (discussing convention) [hereinafter, Decision 1997]. During this period, wages were falling, and unemployment was pervasive. The state's industrial and agricultural base had been profoundly eroded: between 1929 and 1933, 300,000 industrial jobs vanished, and by 1933, more than 1.5 million New Yorkers were receiving some kind of assistance. 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).

[13] See Hershkoff, supra note 12, at 643. See also id. (quoting Fredrick Crane, President of the Convention as saying that the purpose of the convention was as to prove that our form of government could "meet the problems of the day and the necessities of the times.").

[14] Several of the reforms adopted at the 1938 convention had already been adopted by the legislature; in a sense they were conservative for the time. See Peter J. Galie, A Pandora's Box? Holding a Constitutional Convention, in Decision 1997, supra note 12, at 363 (citing Vernon A. O'Rourke and Douglas W. Campbell, Constitution-Making in a Democracy Theory and Practice in New York State (1943)).

[15] See Helen Hershkoff, Welfare Devolution and State Constitutions, 67 Fordham L. Rev. 1403, 1427 (1997) ("The amendment used an open-ended phrase—'in such manner and by such means'—to make clear that the state has broad power to meet the needs of the poor.").

Undeniably, economic need today is great; our poor are in distress and our middle class is struggling.[16] But a Constitutional Convention could dial back welfare rights, not move them forward, leaving struggling New Yorkers without any safety net just when the federal government is cutting back on critical assistance. No one knows with certainty how the new Administration in Washington, DC will seek to reshape federal assistance programs for the poor and middle class. But reports as of this writing predict broad and deep cuts to federal funding for Medicaid, food stamps, public housing, legal services, education, the arts, and heating subsidies.[17]

Judicial Enforcement of Article XVII

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, such as alienage or years of residency. Consider two examples.

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[16] See NYSCAA New York State Community Action Association, From Poverty to Opportunity, 2016 Executive Summary and NY State Profile, at 2–3 (2017), available at: https://nyscommunityaction.org/poverty-in-new-york/povertydata/ (reporting 15.7% state poverty rate; 38.4 poverty rate for families with female heads of household and children present; no health insurance among 12.0% of employed and 26.4% unemployed persons; 46% participation rate in free/reduced lunch program). See also National Public Radio, Ari Shapiro, Middle Class Earners Struggle to Pay Rent in New York City (July 6, 2016), available at: http://www.npr.org/2016/07/06/484987315/middle-class-earners-struggle-to-pay-rent-in-new-york-city.

[17] See Steven Mufson & Tracy Jan, If you're a poor person in America, Trump's budget is not for you, The Washington Post (March 16, 2017), available at: https://www.washingtonpost.com/news/wonk/wp/2017/03/16/if-youre-a-poor-person-in-america-trumps-budget-is-not-for-you/?utm_term=.a562c29d8621; see also Michael D. Shear, Trump Takes a Gamble in Cutting Programs His Base Relies On, The New York Times (March 16, 2017), available at: https://www.nytimes.com/2017/03/16/us/politics/trump-budget.html (reporting that low-income workers "rely on many of the programs that [the President] now proposes to slash").

Tucker v. Toia, 43 N.Y.2d 1, 371 N.E.2d 449 (1977), involved a state law, adopted in 1976, that withheld assistance from New Yorkers who were younger than age 21 and met the definition of need, unless the applicant presented what is known as an order of disposition against a responsible family member. Going through a disposition hearing could delay receiving benefits for weeks or even months. Worse still, the state enforced the requirement even when a child could not locate a parent. The Court of Appeals struck down the requirement as violating Article XVII's affirmative duty to assist the needy. Although the legislature had discretion to define eligibility for assistance, it could not refuse to aid persons who met the state's criteria for need for reasons unrelated to that need.

Aliessa v. Novella, 96 N.Y.2d 418, 754 N.E.2d 1085 (2004), applied the *Tucker* principle on behalf of legal immigrants who were denied critical health assistance. In the late 1990s, New York passed a law excluding certain legal immigrants from Medicaid and requiring other legal immigrants to reside five years in the state before they could be eligible. In 2001, a group of legal immigrants, all suffering from life-threatening illnesses, challenged the statutory exclusion. The Court of Appeals reaffirmed that the legislature could not withhold benefits for reasons unrelated to need, so conditioning benefits on alienage status or length of residency was impermissible.[18]

Attempts to Contract Social Welfare Rights

Do not dismiss me as Chicken Little for raising concerns that a Constitutional

[18] In 1996, the federal government eliminated Medicaid benefits for many legal immigrants. Legal immigrants in many states outside of New York were not able to obtain essential medical assistance. See Helen Hershkoff & Stephen Loffredo, Tough Times and Weak Review: The 2008 Economic Meltdown and Enforcement of Socio-economic Rights in US State Courts, in Economic and Social Rights after the Global Financial Crisis 234, at 252 & n. 116 (Aoife Nolan, ed. Oxford University Press, 2014) (discussing federal cutbacks to assistance and collecting cases involving non-citizen efforts to obtain medical assistance in states other than New York).

Convention could lead to constitutional retrenchment. These concerns are grounded in our state's history and the experiences of other states—both of which caution against holding a convention if we truly want to help our state's needy residents. State history demonstrates that delegates and legislators generally have wanted to make the state's duty optional, not to mandate an expansion of the social welfare right. Nor have there been any recent successful campaigns in other states to establish a constitutional right to welfare.

As you know, the most recent New York convention was held in 1967.[19] Several proposals were made to repeal or to amend Article XVII. The resulting proposal would have eliminated any "actionable right," substituting instead aspirational but non-enforceable language that called on the state to "foster and promote the general welfare and to establish a firm basis of economic security."[20] Voters ultimately rejected the proposal.[21] Legislators also have proposed amending Article XVII to cut back its protections. In 1993, for example, Assembly members introduced a resolution to change the word "shall" to "may," which would have gutted the state's welfare duty.[22] Each session since 2009, the Assembly and Senate have introduced identical bills which would authorize the legislature to impose a residency period on needy persons applying

[19] Peter J. Galie & Christopher Bopst, The Constitutional Commission in New York: A Worthy Tradition, 64 Alb. L. Rev. 1285, 1286 (2001) (noting that since 1938, New York has only amended its constitution via legislatively proposed amendments).

[20] Gerald Benjamin & Melissa Cusa, Social Policy, in Decision 1997, supra note 12, at 303 (quoting the Proposed New York State Constitution, 1967, art. I, § 10).

[21] Burton C. Agata, Amending and Revising the Constitution, in Decision 1997, supra note 12, at 340 ("The Convention decided to submit the proposal as a whole to referendum and to provide no opportunity to vote for one or more changes individually.").

[22] Gerald Benjamin & Melissa Cusa, Social Policy, in Decision 1997, supra note 12, at 303 (citing S.3426 (1993); A.6787-A (1993); A.6709 (1989)). See also Constitutional Amendment Proposed by Legislators, N.Y.L.J. (Mar. 11, 1993), at 1 col. 5.

for certain social services.[23]

Other states have seen similar efforts to cut back on welfare rights. Montana is a case in point. In the early 1970s, voters approved a clause that "[t]he legislature *shall* provide" assistance."[24] Subsequently, the Montana legislature enacted a statute restricting state aid to able-bodied individuals under age 35 with no minor dependents. The Montana Supreme Court held that the law violated the constitution.[25] The legislature then revised the statute to limit the same class of persons to a maximum of two months of relief in a 12-month period, which the Montana Supreme Court also held violated the state constitution.[26] Montana voters then amended the constitution to make the provision of aid optional, changing the obligatory "shall" in the welfare clause to the discretionary "may." [27]

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[23] See, e.g., Senate Bill S.4293, 2015–2016 Legislative Session (same as A.6538), available at: https://www.nysenate.gov/legislation/bills/2015/S4293.

[24] Mont. Const. art. XII, § 3(3) ("[t]he legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society"), as quoted in Zempel v. Uninsured Employers' Fund, 282 Mont. 424, 430, 938 P.2d 658, 661 (1997).

[25] Butte Cmty. Union v. Lewis, 219 Mont. 426, 434, 712 P.2d 1309, 1314 (1986) (holding that "[t]he State has failed to show that misfortunate people under the age of 50 are more capable of surviving without assistance than people over the age of 50"), superseded by constitutional amendment.

[26] Butte Cmty. Union v. Lewis, 229 Mont. 212, 220 745 P.2d 1126, 1133 (1987) (holding that the state "may not limit its expenditures by the expedient of eliminating classes of eligible individuals from public assistance without regard to their constitutionally grounded right to society's aid when needed, through misfortune, for the basic necessities of life").

[27] Mont. Const. art. XII, § 3(3) ("[t]he legislature may provide such economic assistance and rehabilitative services for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need"), as quoted in Zempel v. Uninsured Employers' Fund, 282 Mont. 424, 430, 938 P.2d 658, 662 (1997).

Nor do the experiences of other states provide much hope for an expansion of social welfare rights.[28] Of the amendments that other states have adopted in recent years, none have sought to advance social welfare. The closest analogs involved attempts to entrench rights to publicly-funded healthcare, which were universally unsuccessful.[29] Instead, voters have entrenched rights like the right to hunt and fish,[30] rights against state governments with respect to eminent domain,[31] and versions of the individual right to bear arms stronger than that found in

[28] The last period of sustained state constitutional convention activity was in the late 1960s and early 1970s. See Robert F. Williams, Evolving State Constitutional Processes of Adoption, Revision, and Amendment: The Path Ahead, 69 Ark. L. Rev. 553, 572–73 (2016) (citing Robert F. Williams, Michigan State Constitutionalism: On the Front of the Last Wave, 60 Wayne L. Rev. 1, 2 (2014)). Rhode Island was the last state to hold an unlimited state constitutional convention, in 1984. See Sanford V. Levinson & William D. Blake, When Americans Think About Constitutional Reform: Some Data and Reflections, 77 Ohio St. L.J. 211, 215 (2016) ("[O]ver the past twenty years[,] no electorate in the country has demanded a new constitutional convention with regard to [its] state's own constitution.").

[29] Elizabeth Weeks Leonard, State Constitutionalism and the Right to Health Care, 12 U. Pa. J. Const. L. 1325, 1388–89 (2010) ("Several states recently considered constitutional amendments expressly recognizing broad, individually enforceable rights to health. In all cases, the proposals failed."). For a detailed study of why these amendments failed, see Kathrin Rüegg, Working Paper, Embedding the Human Right to Health Care in U.S. State Constitutions: A Progress Review and Lessons for Advocates, available at: http://www.nesri.org/sites/default/files/Constitutional_amendment_report.pdf (accessed February 3, 2017).

[30] See John Dinan, Council of State Governments, State Constitutional Developments in 2015, The Book of the States 6 (2016), available at: http://knowledgecenter.csg.org/kc/system/files/Dinan%202016.pdf (noting that 18 such amendments were approved in the last 20 years).

[31] See John Dinan, Council of State Governments, State Constitutional Developments in 2009, The Book of the States 5 (2010), available at: http://knowledgecenter.csg.org/kc/system/files/01_Cr.pdf. Several states amended their constitutions in response to the Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469 (2005), which held that the federal Constitution does not bar the use of eminent domain for economic development purposes. The decision did not bar states from imposing heightened restrictions on their own governments, and at least nine states have done so.

the U.S. Constitution.[32] Several have approved amendments to limit affirmative action, and prior to the U.S. Supreme Court's decision *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), which found a right to marriage equality, thirty states had adopted amendments to ban same-sex marriage.[33]

Concerns about cutting back our Constitution's welfare 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. Nor does opposition reflect distrust of New York voters. To the contrary, opposition reflects the reality of today's state elections—captured in this headline from 2014, "Mega-Donors Give Big in State Elections."[34] 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 our state.[35] Even with small-donor matching, outside money would eclipse other

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[32] See John Dinan, Council of State Governments, State Constitutional Developments in 2014, The Book of the States 5 (2015), available at: http://knowledgecenter.csg.org/kc/system/files/Dinan%202015.pdf (noting that such amendments were passed in Alabama and Missouri in 2015).

[33] See John Dinan, Council of State Governments, State Constitutional Developments in 2015, The Book of the States 7 (2016), available at: http://knowledgecenter.csg.org/kc/system/files/Dinan%202016.pdf (noting that 18 such amendments were approved in the last 20 years). See also Kenneth P. Miller, Defining Rights in the States: Judicial Activism and Popular Response, 76 Alb. L. Rev. 2061, 2089 (2013).

[34] Rachel Baye et al., Mega-Donors Give Big in State Elections, Time (Oct. 30, 2014), available at: 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.").

[35] See Brennan Center for Justice, New Analysis: 2016 Judicial Elections See Secret Money and Heightened Outside Spending: Politicized and High-Dollar Races Threaten Fair and Impartial Courts (Sept. 14, 2016), available at: 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 nationwide). See also Brentin Mock, The Damaging Influence of Outside Money on Local Elections, The Atlantic (June 9, 2016), available at: http://www.citylab.com/politics/2016/06/the-damaging-influence-of-outside-money-on-local-elections/486407/. As an early signal of efforts to restructure the legal system to the detriment of the poor, see Reuters Legal, Daniel Wiessner, Trump budget

available funding and dominate public discourse.[36] Nor can we comfortably assess the depth of commitment to the state's social welfare right, given delegate-selection practices and stereotypes about government assistance programs. Consider the fact that during the 2016 Presidential election campaign, none of the candidates focused on the question of poverty or the needs of the poor.[37] The Pew Research Center, in 2014, found that the nation was evenly divided in its support of government aid for the poor, and that although Americans may sympathize with the poor, they resist funding programs that assist them—even when they themselves would benefit.[38] Support for social welfare programs often turns on the way in which questions are framed—but negative advertising fueled by outside money would distort responses.[39] The stakes are high. If a convention weakens the legislature's obligation under Article XVII, there will no federal backstop—the federal Constitution contains no welfare right. Unlike with free speech rights, the

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would defund Legal Services Corporation (March 16, 201&), available at: https://1.next.westlaw.com/Document/I2d8e81b00a8d11e78b1b9786f569fea0/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default).

[36] See Brennan Center for Justice, The Faces of Small Donor Public Financing (June 9, 2016), available at: 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), available at: 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).

[37] See Binyamin Appelbaum, The Millions of Americans Donald Trump and Hilary Clinton Barely Mention: The Poor,' The New York Times (Aug. 11, 2016). available at: https://www.nytimes.com/2016/08/12/us/politics/trump-clinton-poverty.html (reporting that neither candidate Trump not Clinton "has said much about helping people while they are not working").

[38] Pew Research Center, Jens Manual Krofstad, Public is sharply divided in views of Americans in poverty (Sept. 16, 2014), available at http://www.pewresearch.org/fact-tank/2014/09/16/public-is-sharply-divided-in-views-of-americans-in-poverty/.

[39] See Harvard Kennedy School, Shorenstein Center on Media, Politics and Public Policy—Journalist's Resource: Research on Today's News Topics, Negative political ads and their effect on voters: Updated collection of research, available at: https://journalistsresource.org/studies/politics/ads-public-opinion/negative-political-ads-effects-voters-research-roundup.

rights of criminal defendants, and now, presumably, the right to marriage,[40] social welfare litigation would be limited to due process and equal protection claims, subject to the weakest form of review which almost invariably is fatal to the litigant's claim.[41] If the federal government eliminates social welfare programs,[42] procedural claims will be illusory.

Safer Pathways to Reform

For more than three decades I have litigated cases to enforce Article XVII, I have studied and written about Article XVII, and I have compared Article XVII to social assistance provisions in other state constitutions and in constitutions in foreign countries. I repeatedly have urged that state constitutions include a welfare right.[43] Article XVII was enacted at a unique time in history

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[40] See Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (holding the right to marry to be a fundamental right).

[41] See Dandridge v. Williams, 397 U.S. 471, 486–87 (1970) (applying rationality review to legislative classifications even in cases involving "the most basic economic needs of impoverished human beings"). See generally Stephen Loffredo, Poverty, Democracy and Poverty Law, 141 U. Pa. L. Rev. 1277 (1993), criticizing this standard, and observing:

> In the winter of 1987, M. A., a homeless man in poor health, challenged the constitutionality of a federal law that barred him from receiving food stamps because he slept in a city-run shelter. The shelter did not provide Mr. A. with the meals that his medical condition required and it often ran out of food altogether so that he frequently went hungry. After repeated hospitalizations, Mr. A. died of renal failure brought on by malnourishment and dehydration. A federal district court subsequently found nothing irrational about a legislative classification that withheld food assistance from a starving man.

Id. at 1277, citing Chavis v. Lyng, No. 87 Civ. 1500 (S.D.N.Y. 1987) (footnotes omitted) (unreported decision, and explaining that plaintiff "was a member of a class composed of approximately 10,000 men and women who resided in municipal shelters in New York City").

[42] I have no crystal ball, but see Sabrina Tavernise & Trip Gabriel, Trump Budget Cuts Put Struggling Americans on Edge, The New York Times (March 17, 2017), available at: https://www.nytimes.com/2017/03/17/us/trump-budget-cuts.html?smid=nytcore-iphone-share&smprod=nytcore-iphone ("Trump's new budget proposal ... would inflict the deepest pain on the most vulnerable Americans—a great number of whom voted for him").

[43] See G. Alan Tarr & Robert F. Williams, eds. State Constitutions for the Twenty-first Century: The Agenda of State Constitutional Reform, Volume 3—The Agenda of State

distinguishable from today's political climate. Together with the fact that no other states have adopted social welfare rights provisions since the 1970s, realism counsels that a convention is unlikely to result in stronger protection for the poor. And if Article XVII is weakened, the consequences in today's political climate could be severe given the lack of a federal backstop.

The New York Court of Appeals has established a strong and clear framework for assessing claims under Article XVII and for ensuring that the constitutional provision plays the counter-majoritarian and counter-cyclical role that its drafters intended. However, this is not to deny that New York courts could and should be more robust in their enforcement of Article XVII when faced with legislative cutbacks.[44] In numerous lawsuits, the legislature has claimed unfettered discretion to carry out Article XVII and the judiciary has not always provided a check when these policy decisions undermine and do not effectuate the constitutional right.[45] Nevertheless, we do not need a constitutional convention to give New York courts tools to enforce Article XVII more expansively—they can do so now, guided by the provision's legislative history that shows "a clear intent" to make "State aid to the needy . . . a fundamental part of the social contract," and the constitutional text that expresses the fundamental values of

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Constitutional Reform, at 26 (State University of New York Press, 2006) (observing that "Professor Helen Hershkoff has provided a strong case for the inclusion of positive rights in state constitutions").

[44] See Helen Hershkoff & Stephen Loffredo, State Courts and Socio-Economic Rights: Exploring the Underutilization Thesis, 115 Penn St. L. Rev. 923, 957 & 960 (2011) (criticizing as judicial error the conflating of "the question of judicial power to interpret constitutional socio-economic rights with the question of judicial deference to legislative choices in implementing such rights" and in treating the legislature's establishment of a program as a bar to judicial action).

[45] See, e.g., Brownley v. Doar, 12 N.Y.3d 33, 903 N.E.2d 1155 (2009) (upholding level of housing allowances although shown to be insufficient to keep families in their homes); Bernstein v. Toia, 43 N.Y.2d 437, 373 N.E.2d 238 (1977) (upholding regulation that set maximum shelter allowances for recipients of public assistance without provision of special needs grants). Similarly, the Court of Appeals has held that Article XVII cannot compel enactment of a new public assistance program. See Khrapunskiy v. Doar, 12 N.Y.3d 478, 909 N.E.2d 70 (2009).

New York State.[46] When a welfare law is challenged, state courts can effectuate these values by taking a "hard look" at the legislative record to determine whether a challenged law rests on empirical support or on speculation and stereotype. Separation of powers does not require reflexive judicial deference to the legislature, but rather a principled assessment that the legislature's choices reasonably effectuate Article XVII to meet legitimate need.[47]

My point is that Article XVII is sufficiently capacious to meet current needs without a Constitutional Convention—and the Bar Association can help by encouraging enforcement of Article XVII, in the statehouse as well as in the courthouse. Article XVII must be a part of budget discussions and policy development. Moreover, it is critical to urge that our state and city law offices firmly resist any weakening of Article XVII and to maintain Article XVII as a robust source of protection for struggling New Yorkers—the middle class as well as the desperately poor. Finally, as the Bar Association did in 1997, it should encourage a no vote on whether to hold a Constitutional Convention, but promote positive change through specific reform proposals that the legislature can consider and enact.[48]

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[46] See Hershkoff, supra note 15, at 1415–16 (1999) (discussing Article XVII's history and text as interpretive resources). In particular, in Doe v. Dinkins, 192 A.D.2d 270, 276, 600 N.Y.S.2d 939, 943 (App. Div. 1st Dept. 1993), relying on Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588 (1984), the Appellate Division, First Department, held that the State's duty is mandatory despite a purported claim of insufficient funds, since a lack of resources is not a defense to violating an individual's constitutional rights.

[47] Chief Judge Kaye, throughout her tenure on the Court of Appeals, emphasized a functional approach to separation of powers, particularly in lawsuits aimed at enforcing state constitutional substantive provisions. See Helen Hershkoff, Chief Judge Kaye's Dynamic Legacy, 92 N.Y.U. L. Rev. 101 (2017, anticipated) (discussing Chief Judge Kaye's approach to separation of powers in cases involving the state constitutional right to a basic education).

[48] Compare Report of the Task Force on the New York State Constitutional Convention, 52 The Record 522, available at: http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf (setting forth the Association's opposition to the 1997 Constitutional Convention). The Report explained:

I emphasize that opposing a Constitutional Convention in no way prevents individuals or groups from seeking constitutional change. To the contrary, New Yorkers may pursue reform through the alternative device of referendum.[49] Given this safer pathway for amendment, there is no justification for putting Article XVII at risk, especially during this time of severe federal cutbacks and terrible economic insecurity.

Conclusion

Thank you for your consideration and for letting me explain why it is imperative to vote no to a Constitutional Convention. Our state's most disadvantaged residents—and I include in that category the middle class—deserve the law's protection and support. A Constitutional Convention will put the needs of those without economic and political power at risk. As lawyers, we vow to uphold the federal and state constitutions. Let us also draw inspiration from the doctor's oath: first, do not harm. A convention now is unlikely to produce a social welfare right equal to that of Article XVII, and at its worst it risks retrenchment and harm to struggling New Yorkers.

> In preparation for the referendum, the Association has analyzed the substantive provisions of the State Constitution and concluded that important areas genuinely need change. We have concluded, however, that for a variety of reasons a constitutional convention held under the present circumstances … might ultimately do more harm than good. Accordingly, we recommend a "no" vote in the upcoming constitutional convention referendum ….
>
> The Social Welfare Article imposes mandatory obligations on the State to care for the needy and provide for the public health. These provisions, which would be at risk of amendment by a constitutional convention, should be preserved. … [T]he risk of adverse change to the more essential provisions of this Article outweighs any potential gain that might be achieved by a convention.

Id. at 523 & 530.

[49] Since 2013, the electorate has approved seven individual constitutional amendments. See Arthur "Jerry" Kremer, et al., Patronage, Waste, and Favoritism: A Dark History of Constitutional Conventions 1–2 (Empire Government Strategies 2015).

Appendix I:

Selected Decisions Interpreting the New York Constitution, art. XVII, § 1

Appendix II:

Presenter's Selected Writings about State Constitutions

Appendix I: Selected Decisions Interpreting New York Constitution, art. XVII, § 1

- ***Lee v. Smith* (1977):** Petitioners, disabled and unable to work, challenged a state policy denying them aid based on their status as Supplemental Security Income (SSI) recipients.[1] The petitioners received less in SSI than they would have under the state aid program.[2] The Court of Appeals held that the State could not satisfy its Article XVII duty to aid the needy by "assigning the aged, disabled and blind to the Federal program without recourse to State aid, when in many cases this means that they must survive on lesser amounts than are granted to other needy persons in the State."[3]
- ***Tucker v. Toia* (1977):** Plaintiffs challenged a requirement that state residents under age 21 and determined to be in need of public assistance had to obtain orders of disposition against their parents or legally responsible relatives before they could become eligible for home relief benefits from the state.[4] The requirement replaced an earlier law allowing the state to sue the parent or responsible relative to recoup the relief provided, but the burden was not on the young person.[5] The Court of Appeals held that the statute violated Article XVII because effectively denied aid to persons under the age of 21 "who [met] all the criteria developed by the Legislature for determining need, solely on the ground that they ha[d] not obtained a final disposition in a support proceeding."[6]
- ***Bernstein v. Toia* (1977):** Plaintiffs challenged a regulation that set maximum shelter allowances for recipients of public assistance (a "flat grant" concept).[7] The Court of Appeals held that Article XVII does not require that "public assistance must be granted on an individual basis in every instance. . . . [nor that] the State must always meet in full measure all the legitimate needs of each recipient."[8] Thus, the state was free to use flat grants, which used statistical and qualitative analysis to set one amount determined to be adequate in general to meet the needs of individuals.[9]
- ***Ram v. Blum* (App. Div. 1980):** Petitioners challenged the adequacy of welfare payment levels.[10] They argued that the Legislature was constitutionally required to adjust welfare benefits based on inflation such that the benefits would "meet subsistence needs."[11] The Court held that the legislature had discretion to determine the "amount of aid" provided to the needy.[12]
- ***McCain v. Koch* (App. Div. 1986):** Plaintiffs, who were classified as needy, were denied emergency shelter and provided only cash and information about available housing.[13] The Court held that this violated Article XVII because it was tantamount to an outright denial of

[1] See Lee v. Smith, 373 N.E.2d 247, 248 (N.Y. 1977)
[2] See id. at 249.
[3] See id. at 252.
[4] See Tucker v. Toia, 371 N.E.2d 449, 450 (N.Y. 1977).
[5] See id.
[6] See id. at 452.
[7] See Bernstein v. Toia, 373 N.E.2d 238, 240 (N.Y. 1977)
[8] See id. at 244.
[9] See id. at 241.
[10] See Ram v. Blum, 432 N.Y.S.2d 892, 893 (App. Div. 1980).
[11] See id. at 893.
[12] See id. at 894 (citing Bernstein v. Toia, 43 N.Y.2d 437, 449 (N.Y. 1977)).
[13] See McCain v. Koch, 502 N.Y.S.2d 720, 730 (App. Div. 1986), rev'd in part on other grounds, 511 N.E.2d 62 (N.Y. 1987).

aid, and granted a preliminary injunction barring New York City from denying emergency shelter to homeless families.[14]

- ***Palmer v. Cuomo* (App. Div. 1986):** Homeless young adults who had been foster children argued that the State failed to prepare them for independent living or follow up after their discharge.[15] The Court held that the state's affirmative duty to provide aid to the needy under Article XVII includes the duty to provide aid to children requiring foster care.[16]
- ***Thrower v. Perales* (Sup. Ct. 1987):** Plaintiffs were deemed ineligible for Home Relief and Medicaid because they were homeless and resided in emergency shelters.[17] The shelters did not provide adequate clothing, basic toiletries, or sufficient food, which inhibited Plaintiffs from searching for jobs or permanent housing.[18] The Court, noting the affirmative duty to aid the needy imposed by Article XVII held that the denial of Home Relief and Medicaid based on Plaintiffs' exercise of their right to emergency shelter was "fundamentally at odds with the non-punitive and rehabilitative policy underlying New York's social welfare laws."[19] Thus, the state could not interpret the social welfare laws — which guaranteed assistance to "people who are unable to provide for themselves and do not have other sources of assistance" — to exclude adults in shelters from assistance.[20]
- ***Davis v. Perales* (App. Div. 1989):** Plaintiff applied for public assistance because she had no money to pay for food for her children or to pay her rent.[21] State agents told her to return with certain documents in five days, but did not inform her that she could receive an immediate grant or expedited food stamps.[22] The court held that the failure to provide notice to applicants for state assistance that they could receive immediate assistance for emergency needs violated Art. XVII.[23]
- ***Lovelace v. Gross* (1992):** Plaintiffs were infant children of minor mothers residing with the mothers' parents.[24] They challenged the constitutionality of a law requiring that a portion of the grandparents' income be deemed available to the infants in determining their eligibility for state relief (the "grandparent-deeming" rule).[25] The court held that there was no violation of Article XVII, finding that the heart of the challenge was how the legislature had defined "needy," which *Tucker* had left to legislative discretion.[26] Moreover, the rule was not a complete bar to public assistance, since it only applied to cash assistance and the infants could still access aid if the available income fell below a certain threshold.[27]
- ***Minino v. Perales* (App. Div. 1992):** Plaintiffs, legal aliens admitted to the U.S. under sponsoring affidavits, challenged the State's denial of benefits based on a rule that deemed the income of their sponsor available to them for three years after their entry into the United

[14] See id.
[15] See Palmer v. Cuomo, 503 N.Y.S.2d 20, 21 (App. Div. 1986).
[16] See id.
[17] See Thrower v. Perales, 523 N.Y.S.2d 933, 934 (Sup. Ct. 1987).
[18] See id. at 934–35.
[19] See id. at 936.
[20] See id. at 936–37.
[21] See Davis v. Perales, 520 N.Y.S.2d 925, 927 (Sup. Ct. 1987), aff'd as modified, 542 N.Y.S.2d 772 (App. Div. 1989).
[22] See id.
[23] See Davis v. Perales, 542 N.Y.S.2d 772, 776 (App. Div. 1989).
[24] See Lovelace v. Gross, 605 N.E.2d 339, 340 (N.Y. 1992).
[25] See id.
[26] See id. at 343.
[27] See id. at 342.

States, regardless of whether that income was actually available.[28] The Court held that the deeming rule violated Article XVII because it denied benefits based on criteria having nothing to do with need.[29]

- ***Doe v. Dinkins* (App. Div. 1993):** The court held that the government's purported lack of funding was not a defense to a potential violation of Article XVII.[30]
- ***Crawford v. Perales* (App. Div. 1994):** Petitioner, a resident in a public shelter, challenged the state's decision to grant him less monthly public assistance ($45) than a non-shelter resident ($137.10).[31] The Court held that this did not violate Article XVII because the aid to the needy provision does not "mandate the provision of any particular care."[32] Citing *Bernstein v. Toia*, the court noted that the Legislature has "broad discretionary power" to determine the "manner" and "means" of aid provided to the needy.[33]
- ***Hope v. Perales* (1994):** Plaintiffs challenged New York's Prenatal Care Assistance Program (PCAP), which funded prenatal care for women with incomes up to 85% over the Federal poverty level, but excluded medically necessary abortions from that coverage.[34] Plaintiffs argued that this exclusion violated Article XVII because it was not premised on the women's financial or medical need.[35] The Court held that this did not violate Article XVII because the court was "bound to accept the legislative determination that PCAP-eligible women are not indigent or in need of public assistance to meet their medical needs."[36]
- ***Mark G. v. Sabol* (1998):** Children injured while in New York's foster care system argued that they had a right to reasonable care and safety while in foster care.[37] Citing *Tucker v. Toia*, the court explained that Article XVII leaves the extent of aid and the manner in which it is provided to the discretion of the legislature.[38] In this case, the legislature had met Article XVII's mandate that it provide aid to the needy by enacting the child-welfare statutes in question, so the children had no constitutional claim.[39]
- ***Aliessa v. Novello* (2001):** A group of aliens challenged a law excluding them from state Medicaid benefits based on their alienage status and the length of time they had resided in New York State.[40] But for the exclusion, the plaintiffs would have received Medicaid benefits funded by the State.[41] The Court of Appeals held that the law violated Article XVII because its eligibility criteria were based solely on alienage, not need.[42]
- ***Brownley v. Doar* (2009):** *Brownley* involved families with dependent children who faced eviction for nonpayment of rent despite receiving housing allowances from the state's Safety Net Assistance (SNA) program.[43] The families resided in New York City, and the amount

[28] See Minino v. Perales, 562 N.Y.S.2d 626, 627 (App. Div. 1990), aff'd, 589 N.E.2d 385 (N.Y. 1992).
[29] See id.
[30] See Doe v. Dinkins, 600 N.Y.S.2d 939, 943 (App. Div. 1993).
[31] See Crawford v. Perales, 612 N.Y.S.2d 573, 575 (App. Div. 1994).
[32] Id.
[33] Id.
[34] See Hope v. Perales, 634 N.E.2d 183, 184 (N.Y. 1994).
[35] See id.
[36] See id. at 188.
[37] Mark G. v. Sabol, 247 A.D.2d 15, 30 (App. Div. 1998), aff'd as modified, N.E.2d 1067 (N.Y. 1999).
[38] See id.
[39] See id.
[40] See Aliessa v. Novello, 754 N.E.2d 1085, 1088 (N.Y. 2001).
[41] See id. at 1088.
[42] See id. at 1093.
[43] See Brownley v. Doar, 903 N.E.2d 1155, 1160 (N.Y. 2009).

they received was less than their actual rents.[44] They argued that Article XVII mandated that the SNA allowance be "adequate" to meet their housing needs.[45] Relying on *Bernstein v. Toia*, the court explained that Article XVII does not require the state to "always meet in full measure all the legitimate needs of each recipient."[46] Thus, Article XVII does not provide a right to a minimum shelter allowance since "it is the prerogative of the Legislature to 'determine who is needy and allocate the public dollar accordingly.'"[47] Since the plaintiffs had not claimed that they were wrongfully excluded from eligibility for benefits — only that the benefits were inadequate —they had no claim under Article XVII.[48]

- ***Khrapunskiy v. Doar* (2009):** Plaintiffs were aged, blind or disabled persons and legal resident aliens of New York State who became ineligible for federal Supplemental Security Income (SSI) due to new federal legislation.[49] They received some state benefits, but those benefits amounted to less than half of the total benefits received by New Yorkers eligible for SSI — a group that, because of their SSI eligibility, was also eligible for supplemental state payments.[50] Plaintiffs argued that Article XVII obligated the State to make up for the lost benefits, such that Plaintiffs would receive the same amount as the SSI-eligible residents.[51] The Court of Appeals held that Article XVII does not require the State to assume the federal government's obligation when an individual becomes ineligible for federal benefits.[52]
- ***Graves v. Doar* (App. Div. 2011):** New York's Group Home Standardized Benefits Program set a fixed allocation of food stamps for group-home residents based on their geographic region and their income source — either public assistance or Social Security Income (SSI).[53] The SSI recipients received less than those of public assistance recipients, and challenged the program under Article XVII.[54] The Court held that neither the unequal allotment of benefits, nor the facial sufficiency of benefits presented a cognizable claim Article XVII.[55] Relying on *Bernstein v. Toia*, Article XVII does not require the state to "'always meet in full measure all the legitimate needs of each recipient' of State aid."[56] And, relying on *Tucker v. Toia*, Article XVII allows the Legislature the discretion to determine the means by which it effectuates its duty to provide aid, care, and support to the needy and to define the term "needy."[57]

[44] See id.
[45] Id. at 1162.
[46] Id. at 1162–63 (quoting Bernstein v. Toia, 373 N.E.2d 238 (N.Y. 1977).
[47] Id. at 1163 (quoting Aliessa v. Novello, 754 N.E.2d 1085 (N.Y. 2001) (internal quotation marks omitted)).
[48] See id.
[49] See Khrapunskiy v. Doar, 909 N.E.2d 70, 73 (N.Y. 2009).
[50] See id.
[51] See id. at 74.
[52] See id. at 75–76.
[53] See Graves v. Doar, 928 N.Y.S.2d 774, 776 (App. Div. 2011).
[54] See id.
[55] See id. at 778.
[56] Id. (citing Bernstein v. Toia, 373 N.E.2d 238 (N.Y. 1977)).
[57] Id. (citing Tucker v. Toia, 371 N.E.2d 449 (N.Y. 1977)).

Appendix: Presenter's Selected Writings about State Constitutions

Book Chapters

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