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IJA BRENNAN LECTURE

STATE CONSTITUTIONAL AMENDMENTS AND THE DYNAMICS OF DEMOCRATIC CHANGE

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It is daunting enough to be invited to deliver the Brennan Lecture; doing so on its thirtieth anniversary is especially so. Chief Judge Judith Kaye began the inaugural lecture by noting that among Justice Brennan's greatest achievements was teaching us that the basic elements of our humanity—dignity, empathy, passion—cannot be strangers to judicial decisionmaking; that the most rigorous, most admirable legal thinking is guided not only by the head, but the heart.[1]

Twenty years before that inaugural lecture, Justice Brennan issued a call to action to state high courts. As the power of the federal government had inconceivably broadened over the course of his lifetime, Justice Brennan worried that the United States Supreme Court had retreated from giving full effect to the Bill of Rights and the Fourteenth Amendment, the core safeguards against, in his words, "arbitrary action by governments more powerful and more pervasive than any in our ancestors' time."[2] He beckoned state high courts to "step into

* Chief Judge, State of New York and the New York Court of Appeals. I am deeply indebted to my brilliant and indefatigable law clerks, Chad Borgman, Gabriela Torres-Lorenzotti, and Isabelle Wechsler, for their skillful transformation of the bare skeleton of an idea into a fully realized (and heavily researched and footnoted) lecture. Copyright © 2026 by Rowan Wilson.

[1] *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 2 (1995).

[2] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) ("The thread of this series of Bill of Rights holdings reflects

the breach" by construing their state constitutions independently of the Supreme Court.[3] He continued: "[T]he genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America."[4] That work of adaptation requires the courts to breathe life into constitutions, both federal and state.

In her lecture, Chief Judge Kaye observed that state courts across the country had begun to expand their own state constitutional protections beyond those offered by the Federal Constitution—although in decisions exposing "close, heated divisions unusual in the jurisprudence of those courts."[5] On occasion, those decisions set an example for the Supreme Court to follow in its interpretation of the Federal Constitution.[6]

Chief Judge Kaye then offered a crucial insight: Because state courts are "literally and figuratively closest to the people," and because state courts (unlike federal courts) have the capacity to shape the common law, they are especially suited to the task of adapting law to meet modern problems.[7] In an age of statutes that often failed to capture "the complex interplay between human facts and abstract laws,"[8] Chief Judge Kaye explained that state courts can lean on their unique common law powers to be courageous legal innovators, taking comfort in the fact that common law decisions can be corrected by statute. Put simply, she believed that the "open dialogue" between state legislatures and state judiciaries means that state court judges should feel no compunction about crafting the common law to meet modern problems.[9] Indeed, given that state courts are often the first to confront the newest, most vexing gaps between our legal ideals and hard realities, innovation is precisely what the people expect us to do.[10] She concluded by offering that she would be "delighted if [her]

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a conclusion . . . that there exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors' time.").

3 *Id.* at 503.

4 *Id.* at 495.

5 Kaye, *supra* note 1, at 13.

6 *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 82 n.1 (1986) (relying on the observation that multiple federal courts had "[f]ollow[ed] the lead of a number of state courts construing their State's Constitution" with respect to Sixth Amendment challenges to the racially discriminatory use of peremptory strikes).

7 Kaye, *supra* note 1, at 5.

8 *Id.* at 11.

9 *Id.* at 23.

10 *See id.* at 33–34 (contending that the volume of state-court litigation, the constant emergence of novel fact patterns, and legislative delay requires state courts to fill legal gaps and develop law).

comments about the unique tradition, competence, and role of the state courts stimulated others to focus attention on state courts and state lawmaking."[11]

Whereas Chief Judge Kaye's focus was on the common law, mine is on state constitutional law. I propose to you that the insights she raised apply with comparable force, although for somewhat different reasons, to the interpretation of state constitutions. For, just as state courts are closest to the people in the senses she identified, they are also close to the people in a constitutional sense: A common feature of state constitutions is that they are more readily amendable than their federal counterpart, such that constitutional decisions by state high courts are, relative to federal constitutional decisions, more readily revisable by state legislatures or the people.[12] Just as Chief Judge Kaye believed state courts' proximity to the people should encourage them to innovate boldly in the arena of the common law, that proximity should inspire a similar courage to innovate in the constitutional arena—similar in kind if not in degree.

Specifically, when compared to present-day federal constitutional adjudicative principles, state high courts should feel at greater liberty to depart from rigid adherence to stare decisis when interpreting a state constitution because those constitutions are more readily amendable and more directly shapeable by the people and their representatives. The possibility of dialogue via the amendment process between the people and their state high courts—something the U.S. Supreme Court lacks—endows state courts with a backstop, empowering them to render innovative decisions without eroding judicial legitimacy. Correspondingly, state legislatures and citizens should feel more comfortable amending state constitutions to encompass new positive rights to be fleshed out by state courts because those interpretive decisions can be altered by future amendments.

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11 *Id.* at 35.

12 Many states provide for constitutional amendments to be proposed to voters after a simple majority vote in a single legislative session; others require a two-thirds vote (or more) in each legislative house or require approval by a majority vote in consecutive sessions. Nearly every state requires voters to approve constitutional amendments. In some states, citizens can propose ballot initiatives by collecting enough signatures to support a constitutional amendment. In Delaware, for example, an amendment becomes law if it passes both legislative chambers by a two-thirds vote in consecutive sessions. *See* John Dinan, *Constitutional Amendment Processes in the 50 States*, St. Ct. Rep. (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/U2EE-XFFC].

I

To understand how the amendability of a constitution should inform principles around judicial interpretation, I begin with a brief examination of the first written constitutions. The written constitution, a single document that sets forth the organizational principles of a government in a form different from and superior to a statute, is an American invention.[13] The American colonists, influenced by the Roman Republic's detailed codification of laws and by the Enlightenment philosophers and political theorists who rested governmental legitimacy on variations of an implied contract justification,[14] set out to establish the structure of government in a written form akin to a contract.[15]

The first four colonies to create written constitutions did so before the Declaration of Independence was signed, and the first three did not call them "constitutions." The first was New Hampshire in January of 1776.[16] That constitution contained no statement of individual rights: It merely established the composition of the government and certain features of its operation. For example, it provided that all bills to raise revenue must originate in the House of Representatives, no acts would be valid unless passed by both legislative houses, and the two houses could not adjourn more than from Saturday until Monday unless both houses consented.[17] In March 1776, South Carolina created a document setting forth the structure of its new government; like New Hampshire

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[13] *See* Kim Lane Scheppele, *Perspectives on the Constitution: Constitutions Around the World*, NAT'L CONST. CTR., https://constitutioncenter.org/education/classroom-resource-library/classroom/perspectives-on-the-constitution-constitutions-around-the-world [https://perma.cc/73MJ-DZGX] (last visited Apr. 24, 2026) (explaining that the U.S. Constitution was the first complete written national constitution, while noting that earlier governments had customary or partially written constitutions and that American state constitutions predated the Philadelphia Convention).

[14] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION § 95 (Mark Goldie ed., 2016) ("Men being, as has been said, by Nature, all free, equal, and independent, no one can be put out of this Estate, and subjected to the political Power of another, without his own Consent."); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT § 6 (Wordsworth Editions Ltd. 2013) ("Each of us puts in common his person and his whole power under the supreme direction of the general will; and, in return we receive each member as an indivisible part of the whole. . . . [T]his act of association produces a moral and collective body . . . . "). *See generally* Thad W. Tate, *The Social Contract in America, 1774–1787: Revolutionary Theory as a Conservative Instrument*, 22 WM. & MARY Q. 375 (1965) (describing how Americans translated social-contract theory into constitution-making procedures that would render popular consent concrete and legally authoritative).

[15] The word "constitution" was borrowed from the Latin "constitutio," which Cicero used to refer to edicts issued by the Roman Republic. Those decrees and edicts, together with customary law, set out the structure of the Roman government. *See* JED W. ATKINS, ROMAN POLITICAL THOUGHT 11–36 (2018).

[16] N.H. CONST. of 1776.

[17] *Id.*

before it, South Carolina set out the structure of its government without any enumeration of individual rights.[18]

But in June 1776, Virginia adopted two documents: a "declaration of rights" and a "future form of government of Virginia."[19] The Virginia Declaration of Rights—which strongly influenced the Federal Bill of Rights—articulated some rights as positive rights held by individuals (e.g., "all men . . . have the right of suffrage") and some as restrictions on the power of government (e.g., "general warrants . . . ought not to be granted").[20] On July 2, 1776, New Jersey adopted an integrated document, which it called a "Constitution," containing both a set of positively stated individual rights and restrictions on governmental authority, as well as portions setting out the structure of its new government.[21] New York followed suit in April 1777.[22]

New Jersey's was the first constitution specifically to adopt the common law of England,[23] allowing that it could be changed legislatively. New York's, Delaware's, and Maryland's subsequent constitutions did the same.[24] Other states imported the English common law via reception statutes, which deemed English law (as of a certain date) to be integrated into the state's laws.[25] Some of the rights

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18 S.C. CONST. of 1776.

19 VA. CONST. of 1776.

20 *Id.* §§ 6, 10.

21 N.J. CONST. of 1776.

22 N.Y. CONST. of 1777. Many of the colonies' organic documents after New Jersey's, however, followed Virginia's structure, in which one document contained a statement of rights, and a separate document (or portion) was labeled the "constitution" and contained a mix of positive rights, restrictions on governmental power, and separate portions setting out the structure of the government. *See, e.g.*, MD. CONST. of 1776 ("A Declaration of Rights," followed by "The Constitution, or Form of Government"); N.C. CONST. of 1776 (same); PA. CONST. of 1776 ("A Declaration of the Rights of the Inhabitants of the Commonwealth," followed by "Plan or Frame of Government for the Commonwealth"); VT. CONST. of 1777 ("A Declaration of the Rights of the Inhabitants of the State of Vermont," followed by "Plan or Frame of Government").

23 New Jersey's Constitution did not adopt the English common law when doing so would be incompatible with any provision of its Constitution. *See* N.J. CONST. of 1776, art. XXII.

24 *See* N.Y. CONST. of 1777, art. XXXV ("That all such parts of the said common law . . . shall be considered as making part of the laws of this State."); DEL. CONST. of 1776, art. 25 ("The common law of England, as-well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force . . . excepted as are repugnant to the rights and privileges . . . in this constitution, and the declaration of rights, &c., agreed to by this convention."). Other states, like Massachusetts, used continuance clauses providing that "[a]ll the laws which have heretofore been adopted, used, and approved in . . . Massachusetts Bay, and usually practiced on in the Courts of law, shall still remain . . . until altered or repealed by the Legislature, such parts only excepted as are repugnant to the rights and liberties contained in this Constitution." MASS. CONST. of 1780, pt. 2, ch. VI, art. VI.

25 William T. Utter, *Ohio and the English Common Law*, 16 MISS. VALLEY HIST. REV. 321, 323 (1929). For example, Virginia's reception statute incorporated English common

expressly guaranteed in those first constitutions were even expressed as common law rights that, because of their natural law origins, could not be abridged, even legislatively.[26]

These colonial constitutions form an important background leading up to the U.S. Constitution. They reflect the revolutionary sensibility, forcefully stated in the Declaration of Independence, that certain rights were natural and inalienable. The colonial constitutions were principally devoted to establishing governmental structure. They isolated a few specific actions as beyond even governmental incursion and otherwise left the common law in place, allowing both the legislative and judicial branches the power to alter the law, subject to the restraints placed by natural law.

II

When initially adopted, both the various state constitutions and the Federal Constitution were expected to be amendable. As the 1776 Virginia Constitution announced, all people "have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity . . . . [A]ll power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."[27] The 1784 New Hampshire Constitution went the furthest, stating that when the constitution fails to work for the common good, "the people may, and of right ought to reform the old, or establish a new government."[28] And the Declaration of Independence itself rests on the premise that the people have an inalienable right to cast off an existing government and form a new one.[29]

Now, because it has become virtually impossible to amend the U.S. Constitution, the decisions of the U.S. Supreme Court have become the exclusive source of constitutional change. But the Founders envisaged a more popular and more lively culture of

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law back as of the year of the founding of Jamestown: "That the common law of England . . . prior to the fourth year of the reign of King James the first . . . shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony." *Id.*

[26] *See, e.g.*, N.J. CONST. of 1776, art. XXII ("[T]he inestimable Right of Trial by Jury shall remain confirmed, as a Part of the Law of this Colony without Repeal forever."); N.Y. CONST. of 1777, art. XLI ("[T]rial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever.").

[27] VA. CONST. of 1776, §§ 1, 2.

[28] N.H. CONST. of 1784, pt. 1, art. 10 (right of revolution).

[29] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (asserting that the people may abolish government and institute a new one).

amendment. Their vision was one whereby the U.S. Constitution was not only more amendable by the people, but also mostly concerned with establishing the structure of the government and delineating its powers, leaving the articulation and protection of individual rights against legislative and executive incursion to courts via the common law, which incorporated a natural rights element. Understanding why that vision has not borne out helps clarify why I believe state courts should be more innovative in their constitutional decisionmaking than their federal counterparts now are.

What was the Founders' original vision? For starters, they wanted a document that was mutable. When drafting the Constitution, they had learned from the practical immutability of the Articles of Confederation, which required unanimous consent of all thirteen states to make any amendments.[30] Recognizing the unworkability of a constitution that proved impossible to change, the Founders eschewed it in favor of one that balanced an "extreme facility which would render the Constitution too mutable" against "that extreme difficulty [of amendment] which might perpetuate its discovered faults."[31] Madison emphasized that the States would be a crucial source of constitutional innovation: He thought a strength of the new Constitution was that it "equally enables the . . . State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other."[32]

In addition to creating an amendable constitution readily able to meet future challenges, the Founders also preferred to leave individual rights largely unarticulated. The original draft of the Constitution did not contain a bill of rights,[33] following the example of states like New York, whose constitutions were basically dedicated to setting out the structure of government rather than enumerating fundamental rights.

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30 ARTICLES OF CONFEDERATION OF 1781, art. XIII ("[T]he Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration . . . be made in any of them, unless such alteration be agreed to in a Congress of the United States, and . . . confirmed by the legislatures of every State.").

31 THE FEDERALIST NO. 43 (James Madison); *see also* Letter from Thomas Jefferson to "Henry Tompkinson" (Samuel Kercheval) (July 12, 1816), *reprinted in* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/03-10-02-0091 [https://perma.cc/VKY4-9X8R] (last visited May 21, 2026) ("Some men look at constitutions with sanctimonious reverence, . . . too sacred to be touched. They ascribe to men of the preceding age a wisdom more than human, . . . forty years of experience in government is worth a century of book-reading: and this they would say themselves . . . .").

32 THE FEDERALIST NO. 43 (James Madison).

33 *See* Jeffrey Rosen & David Rubenstein, *The Declaration, the Constitution, and the Bill of Rights*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/white-papers/the-declaration-the-constitution-and-the-bill-of-rights [https://perma.cc/K5LR-U43M] (last visited Apr. 8, 2026).

In the Federalist Papers, Hamilton specifically praised New York's 1777 Constitution for its lack of a bill of rights.[34] Georgia, New Jersey, and South Carolina also chose not to affix a bill of rights to their original constitutions.[35] Even in states like Virginia, which had a Declaration of Rights drafted by George Mason, that document was separate from the state constitution.[36] Because of the prevailing notion that people possessed certain inalienable, natural rights,[37] some feared that enumerating rights might imply that all others were excluded.[38] Additionally, because the Bill of Rights operated against only the federal government,[39] it was assumed at the time that states themselves would enforce fundamental rights.[40]

Thus, the Founders held both a dynamic vision of popular constitutional amendment and a more pronounced role for States in defining the rights that enjoyed the highest level of protection. Both state and federal courts would play important roles in articulating those

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[34] *See* THE FEDERALIST NO. 84 (Alexander Hamilton) (comparing New York's constitution to the proposed federal Constitution and arguing that the lack of a listed bill of rights was a strength inasmuch as the inclusion of such a list would imply that certain powers were reserved to the government, not the people).

[35] *See* GA. CONST. of 1777; N.J. CONST. of 1776; S.C. CONST. of 1776.

[36] VA. CONST. of 1776; *The Virginia Declaration of Rights*, NAT'L ARCHIVES (Sep. 29, 2016), https://www.archives.gov/founding-docs/virginia-declaration-of-rights [https://perma.cc/CU9A-H9Z5].

[37] Robert Emery, *New York's Statutory Bill of Rights: A Constitutional Coelacanth*, 19 TOURO L. REV. 363, 366 (2003) (describing the common colonial era view that the "American Revolution placed the people 'in a state of nature' such that the new fundamental instrument the people themselves created, the constitution, 'would operate as a bill of rights'" (quoting Robert Yates, *To the Citizens of the State of New York*, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1789 229 (Paul Leicester Ford ed., 1892))).

[38] THE FEDERALIST NO. 84 (Alexander Hamilton) ("[B]ills of rights, . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and . . . would afford a colorable pretext to claim more than were granted.").

[39] *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Fifth Amendment's Takings Clause limits only the federal government and not the states).

[40] William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1203 (2024) ("For the most part, the Constitution left the enforcement of general fundamental rights to state institutions."); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 537 (1986) ("[A]t the time the Bill of Rights was adopted . . . it was believed that personal freedom could be secured more accurately by decentralization than by express command. In other words, the states were perceived as protectors of, rather than threats to, the civil and political rights of individuals."). With respect to the role of the federal judiciary, Hamilton wrote, "It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." THE FEDERALIST NO. 78 (Alexander Hamilton).

rights,[41] and if they erred, the federal and state constitutions provided many different routes to enacting formal constitutional amendments.

The earliest amendments (after the Bill of Rights) illustrate the dynamic process of amendment the Founders imagined. When the Supreme Court held in 1793 in *Chisholm v. Georgia* that Article III granted federal courts jurisdiction over suits between a state and an individual of another state, the States were outraged.[42] Two years later, in 1795—in a remarkably swift amendment process—the Eleventh Amendment was ratified to overturn that decision.[43] Then, when the electoral crisis of 1800 revealed a blind spot for the Founders—they did not anticipate the rise of political parties that could splinter a presidential ticket[44]—it took only four years to ratify the Twelfth Amendment, which required electors to cast separate ballots for President and Vice President.[45] On both occasions, the founding generation proved ready and eager to change the Constitution according to the needs of the nation.

Over time, however, partisanship fractured national politics in a way that has rendered constitutional consensus extremely hard to attain. After the Twelfth Amendment, it would be sixty years before the next federal constitutional amendments came as a result of the Civil War.[46] The Reconstruction Amendments were adopted only because they were a required condition of the reentry of the Confederate States, then controlled by Reconstruction governments, into the Union. It would be forty-three years after those amendments before the next one—which

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41 Indeed, historical evidence indicates that state courts in particular played a much more vibrant role in articulating and enforcing constitutional rights than is generally known. Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 3 (2007) ("[E]arly state courts regularly did apply the Federal Bill of Rights to invalidate state laws and otherwise constrain state government."); *id.* at 23 ("State court reliance on the Federal Bill of Rights was an important mechanism for protecting individual rights in the antebellum era.").

42 *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); *see also* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction,* 35 STAN. L. REV. 1033, 1058–59 (1983).

43 U.S. CONST. amend. XI.

44 Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2321 (2006) ("[T]he rise of partisan politics worked a revolution in the American system of separation of powers, radically realigning the incentives of politicians and officeholders."); *see also* Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIA. L. REV. 475, 490 (2010) (explaining that the Constitution's original voting mechanism proved unworkable in a partisan contest, since a unified party slate could produce an unintended tie at the top of the ticket).

45 U.S. CONST. amend. XII; Colvin & Foley, *supra* note 44, at 490.

46 U.S. CONST. amends. XIII, XIV, XV.

constitutionalized the federal income tax—was passed.[47] Save for the Nineteenth and Twenty-Sixth Amendments, granting women and 18- to 20-year-olds the right to vote,[48] the post-Reconstruction amendments concern the operation of the federal government, not individual rights. Even the Nineteenth and Twenty-Sixth Amendments did not create new rights but merely extended voting rights to a broader group of citizens.

Although the formal amendment process has broken down over time,[49] the country's need for constitutional change has not abated. As Chief Judge Kaye observed thirty years ago, the inevitable gap between the limited foresight of law and the reality of experience will always call out for revision. In her words: "so long as human language remains imprecise and the human capacity to predict the future limited, the cascade of cases that call upon judges to fill the gaps . . . will unquestionably continue."[50] Over time, as the federal constitutional amendment process became unusable except for minor changes to the operation of government (such as the two-term limit on the Presidency or rules about Presidential disability and succession), that pressure for change has become increasingly channeled through the Supreme Court. As Justice Brandeis observed, "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."[51] By the middle of the twentieth century, the U.S. Supreme Court emerged as the primary locus of federal constitutional change concerning individual rights. Landmark decisions like *Brown v. Board of Education*,[52] *Gideon v. Wainwright*,[53] *Mapp v. Ohio*,[54] and *Baker v. Carr*[55] were comparable in significance to constitutional amendments, bypassing the practically unavailable formal amendment process. For a time, that development

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47 U.S. Const. amend. XVI.

48 U.S. Const. amends. XIX, XXVI.

49 Richard Albert, *The Constructive Unamendability of the U.S. Constitution*, N.Y.U. J. Legis. & Pub. Pol'y Quorum (2023), https://nyujlpp.org/quorum/albert-constructive-unamendability-constitution [https://perma.cc/SC83-P4ZN] ("It is quite simply a fact of current American life that the Constitution is unamendable.").

50 Kaye, *supra* note 1, at 34.

51 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting).

52 347 U.S. 483 (1954) (invalidating school segregation under the Equal Protection Clause).

53 372 U.S. 335 (1963) (requiring appointed counsel for indigent criminal defendants in state felony cases).

54 367 U.S. 643 (1961) (applying the exclusionary rule to the states).

55 369 U.S. 186 (1962) (holding malapportionment claims justiciable under the Equal Protection Clause).

appeared to offer a functional substitute by which the living promise of the Constitution could be carried into modern times.

However, a government that makes its highest court the exclusive source of constitutional change is precarious. The system of government, both state and federal, rests on political legitimacy: not on divine right or brute force, but on popular consent and trust. When the practical expositions of the highest principles are arrogated to one branch of government and protractedly unresponsive to the popular will, the fundamental precept on which our governments are based falters. That is especially true when the branch is the least democratic of the three.[56] The Founders' vision was, inherently, a dialogic one—courts would decide cases that resolved specific articulations of a constitutional principle, and the people could respond through a dynamic process of constitutional change. That is what happened with the Eleventh Amendment.

But once the avenue for formal constitutional amendment closed, the Supreme Court was left isolated, without any democratic interlocutor to respond to or correct its constitutional decisions. The Court had to rely on itself and its adherence to its prior decisions—that venerable principle of stare decisis—as the main source of legitimacy.[57] So, as the U.S. Supreme Court has increasingly reversed many of its landmark constitutional decisions with hastening pace in recent years, it has sawed away at the main branch upon which its legitimacy rests.

State courts do not labor under the same lonesome burden as the U.S. Supreme Court. The simple reason for the difference is that we have an active interlocutor in our decisionmaking process: the people. With state constitutions that can be, and are, regularly amended through avenues such as the popular referendum or constitutional

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[56] Professor Alexander Bickel referred to the tension between judicial review and democratic (legislative) action as the "counter-majoritarian" difficulty and encouraged the Supreme Court to embrace "passive virtues" of judicial decisionmaking that would effectively distribute the responsibility to decide core questions to the more democratic branches. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16, 111 (1962). Even as its influence has expanded, the Supreme Court has become less democratic over time, as the rate of retirement has dropped and general life expectancies have risen. *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 770–71 (2006) ("[T]he average tenure of a Supreme Court Justice from 1789 through 1970 was 14.9 years, for those Justices who have retired since 1970, the average tenure has jumped to 26.1 years."). Thus, to the extent the democratic process is reflected to some degree in the nomination and confirmation process, the opportunities for that democratic involvement have been markedly reduced. By comparison, few, if any, state courts have life tenure, and some have mechanisms to submit sitting apex court jurists to popular recall.

[57] *See generally* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 749–53 (1988) (arguing that stare decisis helps sustain confidence in the lawfulness of fundamental features of the political order by keeping certain settled constitutional questions off the agenda).

convention, state courts operate with a reliable democratic backstop when performing the work of constitutional adjudication. Justice Robert Jackson once said of the Supreme Court, "[w]e are not final because we are infallible, but we are infallible only because we are final."[58] Yet state courts can act with the courage to be, sometimes, fallible, because their decisions are final only when the people allow them to be. That makes all the difference.

III

New York has a vibrant history of amending its constitution. Since the original Constitution of 1777, New York State has held eight constitutional conventions, three of which overhauled the entire constitution.[59] Since 1894, the most recent overhaul, the New York Constitution has been amended over two hundred times.[60] The volume of state amendments is magnitudes greater than amendments to the Federal Constitution; out of over 12,000 proposed amendments, only twenty-seven federal amendments have ever been ratified.[61] New York's experience is common to many other states: New Hampshire has had seventeen constitutional conventions[62] and its constitution has been amended nearly 150 times;[63] Massachusetts has had four constitutional conventions[64] and its constitution has been amended more than 120 times;[65] Alabama has had seven constitutions, resulting from six constitutional conventions, and its 1901 constitution has been amended more than a thousand times.[66] That does seem a bit much.

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58 Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

59 Since 1777, New York replaced its Constitution three times: in 1821, 1846, and 1894. The 1894 Constitution was revised significantly following the Convention of 1938. *See New York State Constitution*, Hist. Soc'y. N.Y. Cts., https://history.nycourts.gov/about_period/nys-constitution [https://perma.cc/RD5R-WQ4F] (last visited Apr. 10, 2026).

60 Peter J. Galie, Ordered Liberty: A Constitutional History of New York 5 (1996).

61 Jill Lepore, *How Originalism Killed the Constitution*, Atlantic (Sep. 10, 2025) https://www.theatlantic.com/magazine/archive/2025/10/constitutional-originalism-amendment/683961 [https://perma.cc/5JML-HFUB].

62 *Summary Statistics*, N.H. State Const. Convention Clearinghouse, https://newhampshire.concon.info [https://perma.cc/BUG7-4RRZ] (last visited Jan. 20, 2026).

63 *New Hampshire Constitution*, Ballotpedia, https://ballotpedia.org/New_Hampshire_Constitution [https://perma.cc/E7AU-R38H] (last visited Apr. 10, 2026).

64 *Researching the History of Amendments to the Massachusetts Constitution*, State Libr. of Mass., https://www.mass.gov/info-details/researching-the-history-of-amendments-to-the-massachusetts-constitution [https://perma.cc/ZTP9-XFF4] (last visited Apr. 10, 2026).

65 *Amendments to the Massachusetts Constitution*, 50 Consts., https://50constitutions.org/ma/timeline [https://perma.cc/DZ89-GHM9] (last visited Apr. 10, 2026).

66 Keisha Stokes-Hough, *The Alabama Constitution: Despite a Century of Updates, Traces of Its Racist Past Linger*, State Ct. Rep. (July 16, 2025), https://statecourtreport.org/our-work/analysis-opinion/alabama-constitution-despite-century-updates-traces-its-racist-past [https://perma.cc/F9JJ-ZQNU].

As with most other state constitutions, the New York Constitution can be amended by "direct popular consent."[67] Before a proposed constitutional amendment is adopted, New Yorkers must ratify it by majority vote. There are two avenues by which amendments make it on the ballot: either by majority vote of the Legislature in two subsequent legislative sessions, or by a constitutional convention. In fact, our constitution was amended during the 1846 convention to require the State to place on the ballot every twenty years whether to hold a constitutional convention.[68] The relative ease with which New Yorkers can amend the state constitution is evidence of the popular expectation that it is meant to accommodate change. Eighteen states go even further by incorporating an explicit constitutional guarantee of the people's right to amend their constitutions by proposing and ratifying amendments.[69] Despite recent attacks on the people's right to amend,[70] amendments, conventions, or even wholesale constitutional revision do not mean political instability or the end of democracy. Rather, the dynamic relationship between our state's constitution and its people promotes a healthy system of governance. To illustrate my point, I offer three examples of when New Yorkers used the constitutional amendment process to enact significant changes that would, at least today, be unimaginable in the federal context.

The first example is Article XVII of the New York Constitution. New York, as is true in many other states, confers a host of positive constitutional rights, which are virtually absent from the Federal Constitution. Perhaps the most notable panoply of positive rights was born out of the Convention of 1938, which New Yorkers voted to hold.[71] The convention redefined the government's relationship to New Yorkers and committed the State to a new set of social responsibilities involving labor, health, welfare, and housing.[72] The historical context is important to understand the impetus for such a sea change: The Great Depression forced countless New Yorkers out of their jobs and homes, straining local relief mechanisms.[73] In response,

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67 GALIE, *supra* note 60, at 5–6 ("State constitutions have been shaped by the tradition of majoritarian democracy; direct popular consent has shaped constitutional change to a degree not approached at the national level.").

68 NY CONST. art. XIX, § 2.

69 Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. FORUM 191, 198–99 (2023).

70 *Id.* at 206–16.

71 GALIE, *supra* note 60, at 231.

72 PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 34 (2d ed. 2012).

73 *See* Christine Robitscher Ladd, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. REV. 272, 287 (1986). *See generally* 6 REPORTS OF THE NEW YORK STATE

convention delegates proposed, and the people with overwhelming support approved,[74] a bundle of amendments, including Article XVII, also known as the Social Welfare Article.

That Article is one of a kind. Section 1 mandates that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state."[75] The Court of Appeals has held that Section 1 "unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy," adding that "such a definite constitutional mandate cannot be ignored or easily evaded in either its letter or its spirit."[76] The effects of the Article cannot be understated. For example, through litigation asserting rights under the Social Welfare Article, unhoused people in New York City have a legal right to shelter.[77] By contrast, the U.S. Supreme Court has explicitly declined to find a right to welfare in the Federal Constitution.[78] Convention president and former Chief Judge of the New York Court of Appeals, Frederick E. Crane, aptly synthesized the ethos animating the Convention of 1938: "We are here to do one thing, if nothing else: to prove to the world that our form of government does work."[79]

As the Social Welfare Article illustrates, the amendment process opens the door for New Yorkers to shape their relationship with the government. It also provides an avenue by which New Yorkers can directly respond to, and correct, state and even some federal judicial decisionmaking. The referendum process for amendments provides

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Constitutional Convention Committee (1938), https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/s/25b0fc65-0edb-4758-9114-52b56a30f5d0 [https://perma.cc/7RJT-927Q] (discussing contemporary constitutional problems in the context of New York's social welfare and public health policies).

74 New Yorkers approved the social amendments by vote of 1,902,075 to 943,296. *See* Alan Jenkins & Sabrineh Ardalan, *Positive Health: The Human Right to Health Care Under the New York State Constitution*, 35 Fordham Urb. L.J. 479, 484 (2008).

75 NY Const. art. XVII, § 1.

76 Tucker v. Toia, 371 N.E.2d 449, 452 (N.Y. 1977).

77 Michael Bobelian, *The Contentious History Behind New York City's Right to Shelter*, State Ct. Rep. (Mar. 18, 2024), https://statecourtreport.org/our-work/analysis-opinion/contentious-history-behind-new-york-citys-right-shelter [https://perma.cc/535C-KW6H]. Relying on Article XVII, Section 1 of the New York Constitution, New York State Supreme Court Justice Andrew Tyler ordered New York City and State governments to provide "at least 750 beds . . . for the helpless and hopeless men of the Bowery." *Callahan v. Carey*, Index No. 42582/79 1, 3 (N.Y. Sup. Ct. 1979), https://www.coalitionforthehomeless.org/wp-content/uploads/2014/08/CallahanFirstDecision.pdf [https://perma.cc/CSF4-3VGE]. After nearly two years of negotiations, *Callahan* was settled as a consent decree, which established the right to shelter for single men. Subsequent litigation extended the right to single women and families with children. *See* Eldredge v. Koch, 469 N.Y.S.2d 744 (N.Y. App. Div. 1983); McCain v. Koch, 484 N.Y.S.2d 985 (N.Y. Sup. Ct. 1984), *rev'd in part*, 70 N.Y.2d 109 (1987).

78 Dandridge v. Williams, 397 U.S. 471, 485, 487 (1970).

79 Galie & Bopst, *supra* note 72, at 31.

effective popular response to address important social needs when the judicial system fails to act or fails to act in accord with such needs.

The second example of a significant change effected through New York's constitutional amendment process is New York's Workers' Compensation scheme. In 1910, the New York Legislature passed the first Workers' Compensation Law, the first comprehensive scheme of its kind in the nation.[80] However, the Court of Appeals deemed the law unconstitutional, holding that the statute failed to preserve employers' due process of law because it authorized the "taking of the employer's property without his consent and without his fault."[81] The Court handed down its decision on March 24, 1911. The very next day, a fire broke out at the Triangle Shirtwaist Company factory.[82] One hundred forty-six people, mostly women and girls, died.[83] The fire spurred such fierce opposition to the Court's invalidation of the Workers' Compensation Law that two years later, in 1913, the people passed a constitutional amendment explicitly authorizing the Legislature to reenact the scheme, overriding any other conflicting provision of the constitution.[84] The Legislature did so the following year.[85] Because of the forceful language in that constitutional provision, subsequent constitutional challenges to the Workers' Compensation Law have largely failed.[86]

New Yorkers are not just attuned to decisions from our high court. My third example shows how New Yorkers used the state amendment procedure to expand state constitutional protections when the U.S. Supreme Court declined to do so. In *Olmstead v. United States*, the Supreme Court held that warrantless wiretapping was lawful under the Fourth Amendment, provided that the taps were installed outside of a person's home.[87] Ten years later, delegates to the 1938 New York Constitutional Convention proposed, and voters ratified, a constitutional amendment that incorporated an express prohibition on warrantless wiretapping into the New York State Constitution,

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[80] Workmen's Compensation Act, ch. 674, 1910 N.Y. Laws 1945, *invalidated by* Ives v. S. Buffalo Ry. Co., 94 N.E. 431, 441 (N.Y. 1911); *see* Robert E. Grey, *The Rise and Fall of Workers' Compensation in New York*, 86 ALB. L. REV. 713, 715 (2023); GALIE & BOPST, *supra* note 72, at 100.

[81] *Ives*, 94 N.E. at 441.

[82] *Remembering the 1911 Triangle Factory Fire*, CORNELL UNIV., https://trianglefire.ilr.cornell.edu/story/fire.html [https://perma.cc/RU89-XC3C] (last visited Apr. 12, 2026).

[83] *Id*.

[84] *See* N.Y. CONST. art. I, § 18; GALIE & BOPST, *supra* note 72, at 100.

[85] Act of Mar. 16, 1914, ch. 41, 1914 N.Y. Laws 216.

[86] *See, e.g.*, Shanahan v. Monarch Eng'g Co., 114 N.E. 795 (N.Y. 1916); Helfrick v. Dahlstrom Metallic Door Co., 176 N.E. 141 (N.Y. 1931); Powers v. Porcelain Insulator Corp., 32 N.E.2d 790 (N.Y. 1941); Crosby v. N.Y. Workers' Comp. Bd., 442 N.E.2d 1191 (N.Y. 1982).

[87] 277 U.S. 438, 466 (1928).

regardless of where the taps were placed.[88] At the convention, Governor Lehman emphasized the need to protect scrupulously against wiretapping, quoting Justice Brandeis's dissent in *Olmstead*: "[W]rits of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping."[89]

Now, the Federal Constitution prohibits warrantless wiretapping, but not through constitutional amendment. Instead, nearly forty years after New Yorkers amended our constitution, the Supreme Court overruled *Olmstead*.[90] The Workers' Compensation and *Olmstead* examples make clear that, where the constitutional amendment process is functionally accessible to the people, judicial intervention is not necessary to resolve erroneous or outdated interpretations of law. Conversely, where the amendment process is practically unavailable, a polity is forced to rely exclusively on judicial modifications and reversals.

The varied sources of constitutional change in New York have generated a healthy, active adaptability that strikes a balance between stability and innovation. Of course, the New York Court of Appeals has historically exercised an important role in the development of our constitutional jurisprudence. But the Court is not the sole arbiter of constitutional change: The people, either directly or through legislatively propounded referenda, have regularly and consistently amended our constitution. Such robust dialogue between the branches of government makes for greater governmental legitimacy quite apart from stare decisis, and it depends, ultimately, in the final word resting with the people, not any single branch of government.

IV

State high courts are constantly presented with, and have an obligation to decide, important constitutional disputes. This past year alone, the Court of Appeals decided whether allowing noncitizens to vote in municipal elections violated the state constitution;[91] whether

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88 N.Y. Const. art. I, § 12.

89 *See* Herbert H. Lehman, Speech to the Constitutional Convention (June 13, 1938), *reprinted in* Revised Record of the Constitutional Convention of the State of New York 339 (1938) (quoting *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting)); *see also* Thomas B. Dyett, Speech to the Constitutional Convention (June 28, 1938), *reprinted in* Revised Record of the Constitutional Convention of the State of New York 505 (1938) (quoting *Olmstead*, 277 U.S. at 474–75); Philip Halpern, Speech to the Constitutional Convention (June 28, 1938), *reprinted in* Revised Record of the Constitutional Convention of the State of New York 550 (1938).

90 Katz v. United States, 389 U.S. 347 (1967).

91 *See* Fossella v. Adams, 44 N.Y.3d 258 (2025).

the Even Year Election Law violated the New York or Federal Constitutions;[92] whether a defendant's conviction by an eleven-member jury violated the constitutional right to a jury of twelve people;[93] and whether the Foreclosure Abuse and Prevention Act's retroactive application violated the right to due process under the New York Constitution.[94] Whether our decisions in those cases will become ingrained in state law, or a relic of history, is ultimately a decision for the people.

At her inaugural lecture, Chief Judge Kaye celebrated state courts' use of common law, because common law decisions, unlike constitutional ones, are more "susceptible to subsequent modification."[95] Relying on the common law enables state courts "to shape evolving legal standards more cautiously" and thus allows them some "flexibility [that] is not an option for the federal courts."[96] Today, I make that same extension to state court decisions grounded in their respective state constitutions. Viewed on a continuum, state constitutional interpretation may not (and should not) be as freely altered as state common law or statutory interpretation, but it is certainly more easily reformed than federal constitutional interpretation. It is the impermanence of state court constitutional decisions that reveals their value.

Historically, the New York State Court of Appeals has construed provisions of our constitution as distinct from contracts and statutes because it believed "the approval of the People of the State . . . gives force to a provision of the [c]onstitution drafted by the convention, and in construing the [c]onstitution we seek the meaning which the words would convey to an intelligent, careful voter."[97] However, in 1980 we overturned that approach "in favor of a more realistic approach" that interprets the constitution "by applying the traditionally accepted standards of statutory construction."[98] This shift by our Court to treat constitutional and statutory interpretation similarly, unlike federal courts who employ a sort of constitutional "exceptionalism," illustrates that because a state constitution is amendable, it is not so fantastically exceptional after all.[99] It is this perception of a state constitution as a mutable, living document

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92 *See* Cnty. of Onondaga v. State, 275 N.E.3d 1058 (N.Y. 2025).

93 *See* People v. Sargeant, 277 N.E.3d 1049 (N.Y. 2025).

94 *See* Van Dyke v. U.S. Bank, Nat'l Ass'n, 282 N.E.3d 1183 (N.Y. 2025); Art. 13 LLC v. Ponce de Leon Fed. Bank, 282 N.E.3d 1195 (N.Y. 2025).

95 *See* Kaye, *supra* note 1, at 16.

96 *Id.* at 17.

97 Kuhn v. Curran, 61 N.E.2d 513, 518 (N.Y. 1945).

98 Golden v. Koch, 404 N.E.2d 1321, 1323 (N.Y. 1980).

99 *See* Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 Cornell L. Rev. 701, 749–51 (2016).

that gives state court judges more space to interpret their constitutions flexibly, promoting genuine inquiry into what a state constitution *should* mean today, without an originalist focus trained on what the drafters may have intended it to mean eons ago.

The case studies of constitutional change in New York already discussed—the Social Welfare Article, the Workers' Compensation Laws, and the legality of wiretapping—demonstrate our state system working as the Framers intended its federal counterpart should. But, just as those instances should encourage state courts to continue to push boundaries in constitutional interpretation—knowing that if they get it wrong, a state is not bound to that failure—we also see that if the courts get it right, their interpretations can endure, shaping the rights of the state's constituents well into the future.

The constitutional dialogue between the courts and the people facilitated by the amendment process is important for another reason: It encourages the people, when amending the constitution, to grant new rights broadly stated, leaving it to the courts to take the first bites at thereafter operationalizing the meaning of those amendments. Since Reconstruction, no federal amendment has embodied a new affirmative right. Meanwhile, state constitutions, including New York's, have regularly been amended to add such rights,[100] often in broad terms that require judicial refinement. But with state constitutions, judicial decisions misapplying those rights can be overruled or adjusted by the people. This, too, helps facilitate trust in government.

For example, in 1894, as part of one of the complete constitutional overhauls, the Education Article, now Article XI, Section 1, was added to the New York Constitution.[101] The Education Article states: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[102] The Court of Appeals has interpreted that

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100 *See, e.g.*, N.Y. CONST. art. I, § 19 (amended in 2022 to provide that "[e]ach person shall have a right to clean air and water, and a healthful environment"); MICH. CONST. art. 1, § 28 (amended in 2022 to provide "[e]very individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care"); NEV. CONST. art. I, § 24 (amended in 2022 to provide "[e]quality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin"); OHIO CONST. art. I, § 22 (amended in 2023 to provide "[e]very individual has a right to make and carry out one's own reproductive decisions").

101 ERNEST HENRY BREUER, CONSTITUTIONAL DEVELOPMENTS IN NEW YORK 1777–1958, at 39 (1958).

102 N.Y. CONST. art. XI, § 1.

provision as requiring the State to offer a "sound basic education" to all schoolchildren.[103] With that interpretation, the Court of Appeals reshaped the State's education system and created a positive right that "afford[s] students with the 'opportunity for a meaningful . . . school education, one which prepares them to function productively as civic participants' and 'compete for jobs that enable them to support themselves.'"[104] The positive right to a "sound basic education" exemplifies an interpretation by the Court of Appeals that is now deep-rooted within the State. We can be fairly certain that the failure to amend the "sound basic education" doctrine reflects the people's century-long satisfaction with the court's interpretation.

Similarly, New York State courts have interpreted our constitution to include a right to counsel that, as compared to the U.S. Supreme Court's interpretation of the analogous federal right, is both broader and firmer.[105] The New York Constitution's Bill of Rights provides that "in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . ."[106] That language, alongside the state constitution's due process protections and the privilege against self-incrimination, led the Court of Appeals to express its "special solicitude for th[e] fundamental right" to counsel, because "the presence of an attorney is the most effective means we have of minimizing the disadvantage at which an accused is placed when he is directly confronted with the awesome law enforcement machinery possessed by the State."[107]

New York State's right to counsel attaches earlier than the federal right—that is, as soon as a defendant in custody requests counsel or once criminal proceedings commence. The former circumstance does not create a right to counsel in the federal system, and although the right attaches upon commencement of formal criminal proceedings in both the federal system and in New York State, New York State courts interpret commencement to occur earlier.[108] But what makes New York's right indelible is that once it does attach, "the defendant

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103 Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); *see* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 665 (N.Y. 1995).

104 Aristy-Farer v. State, 81 N.E.3d 360, 363 (N.Y. 2017) (citing Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 332, 331 (N.Y. 2003)).

105 *See* Debra M. Zverins, *The Expanding Right to Counsel in New York*, 10 FORDHAM URB. L.J. 351, 352–53 n.4 (1982).

106 N.Y. CONST. art. I, § 6.

107 People v. Cunningham, 400 N.E.2d 360, 363 (N.Y. 1980); *see also* People v. Hobson, 348 N.E.2d 894, 896 (N.Y. 1976).

108 *See* Zverins, *supra* note 105, at 352–53 n.4; *see also* PROTECTIONS IN THE NEW YORK STATE CONSTITUTION BEYOND THE FEDERAL BILL OF RIGHTS 12 (Scott N. Fein & Andrew B. Ayers eds., 2017), https://nysenate.gov/sites/default/files/article/attachment/

in custody may not waive [the] right to counsel in the absence of the lawyer."[109] The federal standard, on the other hand, allows a defendant to waive that right outside of the presence of counsel. The bounds of New York State's right to counsel have developed through state court constitutional interpretation but settled through implicit approval by the people.

If we recall that the framers of the initial state constitutions, as well as the Framers of the U.S. Constitution, believed in natural law, adopted the common law and understood that legislatures had the power to alter it, and viewed the normative parts of those constitutions as statements of rights that largely operated to restrict legislative action, it takes little imagination to conclude that common law adjudication and state constitutional adjudication are cousins. One of New York's most distinctive deviations from federal constitutional law was created nearly fifty years ago, in *People v. De Bour*, which sets out a four-part test for warrantless police interactions with the public, as compared to the binary *Terry* rule derived from the Fourth Amendment.[110] Even today, it is uncertain whether *De Bour* is a state constitutional rule or a common law rule.[111] In the federal system, that ambiguity might matter greatly—because if it is a constitutional rule, only the U.S. Supreme Court could alter it. In New York, by contrast, if *De Bour*—no matter its nature—outlives its purpose, if a better rule comes along, or if it was a bad rule from the start, the Court of Appeals can change it, and so can the people. The knowledge that extrajudicial change is possible perhaps made it easier for the Court of Appeals to adopt the *De Bour* rule, and easier to conclude that the Court's legitimacy would not be badly tarnished even had the people acted immediately to revoke it.

The people of New York continue to provide our courts with opportunities to be visionary, and unlike the federal courts, to do so in the context of new, broad, positive constitutional rights. In November 2021, seventy percent of New Yorkers voted to add environmental rights to the state constitution.[112] Known as the Green Amendment, it provides that "[e]ach person shall have a right to clean air and water, and

protections_in_the_new_york_state_constitution_beyond_the_federal_bill_of_rights.pdf [https://perma.cc/NP9N-F9V6].

109 *Hobson*, 348 N.E.2d at 896; *see also* People v. Arthur, 239 N.E.2d 537 (N.Y. 1968).

110 *Compare* People v. De Bour, 352 N.E.2d 562 (N.Y. 1976), *with* Terry v. Ohio, 392 U.S. 1 (1968).

111 *See* People v. Hollman, 590 N.E.2d 204, 212 (N.Y. 1992) ("In *De Bour*, constitutional law and common law both played a part in the articulation of the four-part test.").

112 *What Is a Green Amendment?*, N.Y. Green Amend., https://nygreenamendment.org/overview [https://perma.cc/2ZPD-9HZF] (last visited Jan. 20, 2026).

a healthful environment."[113] Since the Green Amendment's passage, nearly twenty cases testing its application have been filed within the New York State and federal courts.[114] Although none of those cases have yet reached the Court of Appeals, it is inevitable that a Green Amendment case one day will, and that those pioneering claims will call for innovative solutions. The Green Amendment serves as another example of a well-functioning democracy permitting New Yorkers to establish a new, vaguely defined, and potentially broad positive constitutional right. But the Green Amendment also reveals continued trust in the New York State courts to adapt and innovate the same way they have with other positive rights regularly added to our state constitution over the past two centuries, with the knowledge that the people can undo any judicial decision.

V

I return to the question of legitimacy. The purpose of stare decisis is threefold: to "promote[] the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process."[115] Although the differences in state versus federal constitutional amendability may not weigh very differently into the first rationale, the difference in constitutional amendability certainly weighs into the final rationale for stare decisis: the legitimacy of the court.

When constitutional change comes from only one body, as it does in the federal system—or, indeed, as it did with King George III—the overturning of a previous constitutional rule may appear as if it were done at the whim of the Supreme Court's Justices, not because it necessarily is the law, whether "law" means natural law, original intent, or something else. That appearance of doctrinal instability inherently eats away at the public's view of judicial legitimacy—especially when the decision is out of step with current societal needs or is perceived as politically motivated instead of resting on legal principles. By contrast, when the New York Court of Appeals, for example, interprets a provision of our constitution in a way that is completely out of step with New York's needs, there is a reasonable chance that the state constitution will be amended. That reality also sets public expectations

113 N.Y. Const. art. I, § 19.

114 *Summaries of Cases Implicating New York's Green Amendment*, Elizabeth Haub Sch. of L., https://nygreen.pace.edu/cases [https://perma.cc/L6TV-ECR3] (last visited Jan. 20, 2026).

115 State v. Donald DD., 21 N.E.3d 239, 239 (2014) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

differently. Because amendments need not come from or be undone by the Court itself, the Court's legitimacy depends less on adherence to longstanding precedent than does that of the U.S. Supreme Court. Belief in omnipotence requires proof of perfection. Belief in a functioning majoritarian democracy requires proof of engagement.

Peter Galie, a leading scholar on New York constitutional history, remarks that:

> Constitutional growth in a democratic, pluralist order is likely to resemble that of a Banyan Tree, complex and baroque in character. A constitution is political in the fundamental sense that it is shaped by the various forces present in the public arena, and as such it is likely to take on the irregular and inconsistent contours that such a political order produces.[116]

In states, where courts should feel less bound by adherence to their prior decisions, the ramifying and expansive branches of that constitutional Banyan tree successfully form. It is those branches that demonstrate the mutable nature of the democratic system that the Founders envisioned, because each new growth presents an instance in which the court, in conversation with the people, has transformed the constitution.

Understanding that state constitutional jurisprudence can be readily overridden places less emphasis on the courts, their adherence to stare decisis, and their infallibility. Although fallible, state courts are capable innovators and should participate without hesitation in the dynamic process of constitutional amendment in their states—secure in the knowledge that, in the end, the ultimate arbiter of a state constitution's scope and sweep is its people.

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116 GALIE, *supra* note 60, at 6–7.