LAW DAY

The 14th Amendment: Transforming American Democracy

PHOTO ESSAY

Naturalization Ceremony

Photographs by David Handschuh

Above and right, Magistrate Judge **Peggy Kuo** swears in 180 new citizens at a naturalization ceremony held at the Eastern District Courthouse on Cadman Plaza in Brooklyn on April 18, 2017. This occurs several times a week in the court's Ceremonial Courtroom. Naturalization is the process by which U.S. citizenship is conferred upon a foreign citizen or national after fulfilling the requirements of the Immigration and Nationality Act.

Below right, **Fatima Begum**, originally from Bangladesh, signs paperwork after the swearing-in ceremony. Below left, **Most F. Chowdhury** and two-year-old daughter **Tazfi Islam Mouno**, originally from Bangladesh, sign in before the ceremony.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

14th Amendment, §1: The Citizenship, Privileges or Immunities, Due Process And Equal Protection Clauses

Preserving Due Process And Preventing Wrongful Convictions

Janet DiFiore
Chief Judge
State of New York

On Law Day 2017, we are encouraged to reflect on the role of the 14th Amendment to the U.S. Constitution, which serves as the mechanism by which the fundamental guarantees of the Bill of Rights are made enforceable in the states. The 14th Amendment has long shaped American law and advanced and protected the rights of all Americans through its citizenship, due process and equal protection clauses. On this Law Day, I would like to focus on the due process clause and the requirement that states provide fair and just legal proceedings before any person may be deprived of life or liberty.

While there is much to be proud of in the American criminal justice system, we know that it is not a perfect system, as evidenced by the fact that innocent people have been wrongfully convicted and imprisoned in New York and around the country. According to the Innocence Project, post-conviction DNA testing first initiated in 1989 has established the innocence of 349 persons around the country, opening our eyes to the hard reality that wrongful convictions occur much more frequently than anyone previously imagined. More recently, we have experienced a growing number of non-DNA exonerations, a trend that appears disturbing on its face but is largely attributable to the increasing adoption of accountability procedures by prosecutors, including second-look procedures and special review units, that are uncovering erroneous convictions—and that is all to the good.

The New York State Justice Task Force has become one of the leaders in our state's continuing efforts to identify and eliminate the principal causes of wrongful convictions. A first-of-its-kind institution, the Justice Task Force was created by former Chief Judge Jonathan Lippman as a permanent, independent group of prosecutors, defense attorneys, judges, legislators, police officials, scientists and others who work together to review documented exonerations and isolate the systemic factors that lead to wrongful convictions. In 2009, I was pleased to accept an appointment as a founding co-chair of the Justice Task Force, along with the late Theodore Jones Jr., of the Court of Appeals.

The work and mission of the Justice Task Force reflect the Judiciary's obligation to take the lead in fostering reforms to eliminate the root causes of erroneous convictions. This is an issue of the highest priority for every person and institution involved in the criminal justice system. Each time an innocent person is found guilty, a grave injustice is committed. To make matters worse, public safety is compromised because the true perpetrator remains free to commit additional crimes. And at a deeper level, we must be concerned with the erosion of public trust and confidence in the fairness and efficacy of our courts, our profession and the entire legal system.

The Justice Task Force has a strong track record of producing meaningful reforms to strengthen the accuracy and reliability of our state's criminal justice system, including expansion of the state's DNA Databank, expanded access to post-conviction DNA testing by criminal defendants, and adoption of best practices around electronic recording of custodial interrogations and procedural safeguards for lineups and photo identifications. The judiciary is supporting passage of legislation that would codify these critical best practices into state law during the 2017 legislative session.

This February, the Justice Task Force, now ably co-chaired by retired Court of Appeals Judge Carmen Beauchamp Ciparick and Acting Supreme Court Justice Mark Dwyer, issued an important report with recommendations addressing issues of attorney con-

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DNA Exonerations In the United States

1989	The first DNA exoneration took place
37	States where exonerations have been won
20	Of 349 people exonerated served time on death row
14	Average length of time, in years, served by exonerees
37	Of 349 pled guilty to crimes they did not commit
71%	Involved eyewitness misidentification
42%	Of these cases were a cross racial misidentification
32%	Of these cases involved multiple misidentifications of the same person
28%	Of these cases involved misidentification through the use of a composite sketch
46%	Involved misapplication of forensic science
28%	Involved false confessions
52%	Of the false confessors were 21 years old or younger at the time of arrest
17%	Involved informants

Source: Innocence Project

Non-Lawyers Help to Bridge the Justice Gap

Lawrence K. Marks
Chief Administrative Judge
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Unified Court System

The Permanent Commission on Access to Justice, which reports annually to the Chief Judge, has well-documented that despite the high level of pro bono legal assistance provided by the private bar and the generous funding for civil legal service organizations in the judiciary's budget, many low-income New Yorkers seeking assistance are still unable to obtain help in situations that affect the essentials of life. The time is ripe to consider creative solutions and alternative forms of legal assistance besides full representation by a lawyer to address the dire legal needs of low-income New Yorkers.[1] The aid of a trained non-lawyer can be immensely beneficial in guiding a confused litigant through filling out paperwork, providing moral support in a courtroom setting and giving valuable information regarding an individual's case. Non-lawyers can greatly improve a litigant's court experience and also affect outcomes—resulting, for example, in more people staying in their homes with great cost savings to the government.[2]

The courts have implemented a variety of programs in New York to harness the skills of non-lawyer volunteers to assist people in need. Non-lawyers are utilized successfully in the Court Navigator Program, which was planned and designed by the chief judge's Committee on Non-Lawyers and the Justice Gap, chaired by Roger Maldonado and Fern Schair. The program, authorized by an administrative order of the chief administrative judge in 2014, allows non-lawyer "navigators" to help litigants file answers in Housing Court, accompany litigants in court, answer factual questions posed by the judge or court attorney and provide information about social services. The navigators provide moral support to needy New Yorkers, can help them access interpreters, impart crucial background information about what to expect in court and assist in completing paperwork. The Court Navigator Program is currently active in Bronx, Kings, New York and Queens County Housing Courts and Bronx County Civil Court (consumer credit matters), with plans to expand outside of New York City.

Research conducted by the American Bar Foundation and the National Center for State Courts and supported by the Public Welfare Foundation assessed the appropriateness, efficacy and sustainability of the Navigator Program.[3] The researchers found that litigants who had assistance from a navigator were significantly more likely than unassisted litigants to say they could tell their side of the story. In Housing Court, tenants assisted by a navigator were far more likely to have their defenses recognized and addressed by the court, with judges more likely to order needed repairs.[4]

While navigators aid litigants in court, the Legal Hand program, with storefront offices in Brownsville and Crown Heights, Brooklyn, and Jamaica, Queens, provides New Yorkers, in a community setting, with access to trained volunteers knowledgeable about how to navigate the court and social services systems. Non-lawyer volunteers work under the supervision of staff attorneys

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Inside

The 14th Amendment and Our Present Day Democracy

Peter Tom
Acting Presiding Justice
Appellate Division, First Department

In July 1858, a year removed from the *Dred Scott* decision[1] in which the U.S. Supreme Court had ruled that African-Americans, whether enslaved or free, were not citizens of the United States and therefore, could not sue in federal courts, Abraham Lincoln delivered a speech on the founding fathers of this country and its later inhabitants.[2] In it, he wondered how it is that those who are not blood descendants of this country's founding generation, who subsequently came from Europe themselves and settled here, find "themselves equal in all things." In his infinite wisdom Lincoln answered:

> When [such people] look through that old Declaration[3] of Independence they find that those old men say that "We hold these truths to be self-evident, that all men are created equal," and then they feel that that moral sentiment taught in that day evidences their relation to those men, that it is the father of all moral principle in them, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration, and so they are.

According to Lincoln, that concept in the Declaration is the "electric cord" that links us all together as equals and we could not abide by the notion of excluding those of another race, as had been decided in *Dred Scott*. Rather, Lincoln urged that we attempt to include everyone in applying the principle that all men are created equal and "unite as one people throughout this land." That this cord will link liberty-conscious people together as long as the love of freedom is instilled in people's minds.

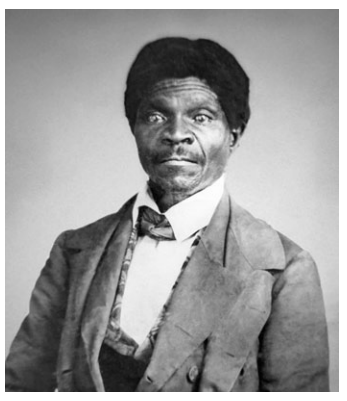
Lincoln reiterated this position in his Gettysburg Address,[4] saying it was for us to advance the Founders' conception of a nation "dedicated to the proposition that all men are created equal." Sadly, it was only after much loss of life in a civil war and by overcoming an existential threat to our union that this could be accomplished.

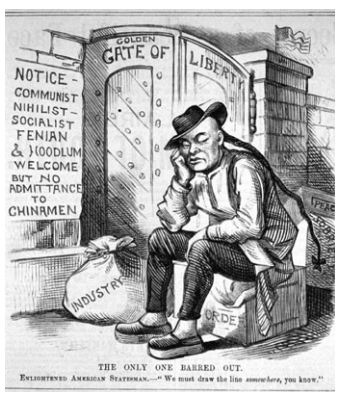
Enter the 14th Amendment[5] to our U.S. Constitution, which, in guaranteeing due process and equal protection of the laws to all persons, was the promulgation and institutionalization of that most fundamental principle articulated in the Declaration of Independence and by Lincoln.

To be sure, enforcement of that principle of equality experienced fits and starts, even legislation and judicial rulings to repress and nullify its application. On the one hand, we saw the passage of the Chinese Exclusion Act of 1882, the first law implemented to prevent a specific ethnic group from immigrating to the United States and which made Chinese immigrants already settled here permanent aliens by excluding them from becoming U.S. citizens.[6] Even an Asian born at that time on American soil was denied citizenship.

The Supreme Court also gave us its 1883 decision in the *Civil Rights Cases*,[7] which invalidated the Civil Rights Act of 1875 as not authorized by the 14th Amendment, and ultimately sustained racial segregation in public accommodations until the Civil Rights Act of 1964. And, of course, in the 1896 case of *Plessy v. Ferguson* the Supreme Court found that under the doctrine of "separate but equal" racial segregation in public facilities was permissible under the 14th Amendment.[8]

And yet, alongside those cases the court also handed down expansive 14th Amendment rulings, which could have led to an earlier advancement of the principle of equality for all. For example, 10 years before *Plessy*, in *Yick Wo v. Hopkins* the Supreme Court struck down a San Francisco ordinance that gave unfettered discretion to a Board of Supervisors in deciding who could » Page 12





LIBRARY OF CONGRESS (3)

From left: A photograph of Dred Scott, taken around the time of his court case in 1857; a political cartoon from 1882, showing a Chinese man being barred entry to the "Golden Gate of Liberty", with the caption that reads, "We must draw the line somewhere, you know."; President Calvin Coolidge with four Osage Indians at a White House ceremony to celebrate the passage of the Indian Citizenship Act in 1924.

Upholding Justice Close to Home

Karen K. Peters
Presiding Justice
Appellate Division, Third Department

"Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."

— Eleanor Roosevelt

When we consider landmark U.S. Supreme Court cases—famous, historic cases memorialized in textbooks and effortlessly cited by students of constitutional law or history—it can be easy to forget that those cases began in "small places, close to home." The holdings of these important decisions and the fundamental rights they guarantee are etched in our minds, but the stories of the individuals involved are sometimes overshadowed by the monumental legacy of their own small and private struggles. *Brown v. Board of Education of Topeka*[1] began in the segregated schools of children whose parents sued the City of Topeka because they knew that separate schools could never be equal. *Griswold v. Connecticut*[2] began at a Planned Parenthood office in Hartford, nine days after it opened, when Executive Director Estelle Griswold and Dr. C. Lee Buxton were arrested for providing medical advice and contraception. *Loving v. Virginia*[3] began in the bedroom of Mildred and Richard Loving, the interracial couple awakened in the middle of the night and arrested for the crime of being married to one another.

AP PHOTO

This undated file photo, location unknown, shows Linda Brown Smith. Smith was a third grader when her father started a class-action suit in 1951, *Brown v. Board of Education of Topeka*, which led to the U.S. Supreme Court's 1954 landmark decision against school segregation.

AP / JACQUELYN MARTIN

Balloons spell out "love" over the U.S. Supreme Court in Washington, D.C. on June 26, 2015, after the court declared in *Obergefell v. Hodges* that same-sex couples have a right to marry anywhere in the United States.

Considering the small places where those transformative cases began reminds us not only of the grave importance of every case to the individuals involved, but also of the role of state courts as the first bulwark for human rights. Those cases and others like them were ultimately decided by our nation's highest court, but the struggles all began close to home. Many began in local trial courts and progressed through state appellate courts. For the vast majority of cases that will never make it to the Supreme Court, the rights of the individuals involved begin close to their home, and they are finally determined relatively close to their home as well. Every day, attorneys, judges and other participants in our justice system are immersed in the stories of struggles beginning in small places, and we have been entrusted with the tremendous responsibility of assisting individuals in peacefully resolving their disputes.

As I complete my final year as Presiding Justice of the Appellate Division, Third Department, I reflect upon the critical role of the judiciary at every level in guaranteeing due process and equal protection under the law. It has been an immense privilege to serve the people of the state of New York and to work with so many brilliant and dedicated public servants toward our common cause of ensuring justice for every individual who comes before our courts.

In addition to guaranteeing equal protection and due process, the 14th Amendment also incorporates several fundamental rights and applies them to the states. This was a critical development for the advancement of oppressed populations in many parts of the nation. However, in cases dealing with some of those fundamental rights, New York courts have proudly applied our state Constitution, statutes and jurisprudence to provide protections that extend beyond (and, in many cases, predated) their federal counterparts.[4] Just as state courts are so often the first line of defense in protecting fundamental rights, the states serve as "laboratories of democracy,"[5] and, historically, New York has often been ahead of the curve in protecting the rights of its citizens.

The relationship between equal protection and the rights of LGBTQ people is one area that has undergone relatively rapid changes in recent years, and it is one where New York has progressed at a pace different from the federal government. Four years before the Supreme Court held in *Obergefell v. Hodges*[6] that the Equal Protection Clause of the 14th Amendment guarantees the right to same-sex marriage, New York had passed the Marriage Equality Act in 2011, allowing gender neutral marriages for all couples.[7] Even before that, in 2010, the Third Department held that a trial court in New York state had jurisdiction to entertain an action for dissolution of a same-sex civil union performed in Vermont. While New York had not yet enacted marriage equality, our court found that the recognition of a same-sex marriage validly performed in another state was consistent with our state's public policy. We cited the many protections provided to same-sex couples in New York such as hospital visitation rights, the right to dispose of a same-sex partner's remains, domestic partnership regulations and laws affecting areas ranging from evictions to adoption. We found that these policies indicated our state's commitment to respect and uphold same-sex relationships.[8]

Beyond the issue of marriage equality in the post-*Obergefell* legal landscape, the rights of LGBTQ people vary from state to state. Last year, the Third Department had the occasion to apply the First Amendment of our federal Constitution—as incorporated by the 14th Amendment—to our state's laws requiring equal treatment of same-sex couples. In that case, *Gifford v. McCarthy*,[9] a wedding venue refused to allow a same-sex couple to hold their wedding ceremony there. The Third Department upheld a determination by the state Division of Human Rights finding the owners guilty of unlawful discrimination.[10] We also found that New York's Human Rights Laws protecting same-sex couples did » Page 12

New York: A Leader In Ensuring a Fair And Just Society

Randall T. Eng
Presiding Justice
Appellate Division, Second Department

The 14th Amendment to the U.S. Constitution, ratified in the wake of the Civil War, addressed several important objectives. It expressly prohibited the states from depriving persons of life, liberty, or property without due process of law, a prohibition already imposed upon the federal government by the Fifth Amendment. Various decisions of the U.S. Supreme Court have established that the 14th Amendment also incorporated most other protections afforded to individuals by the Bill of Rights, and prohibited states from infringing upon those rights as well. By compelling the states to honor the individual liberties enshrined in the U.S. Constitution, the federal government led the way in ensuring a more just and fair society.

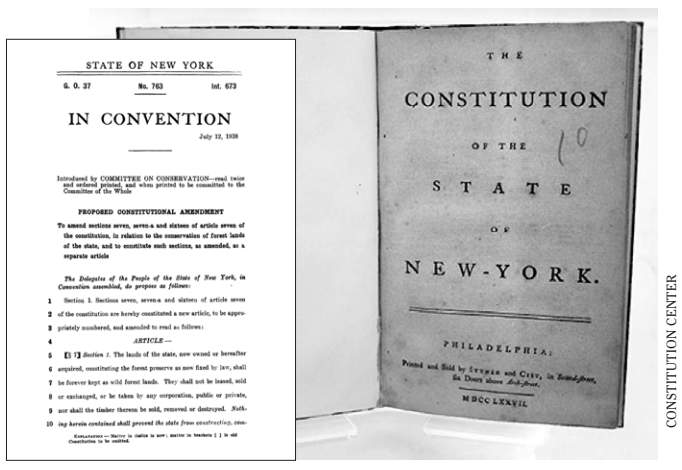
The 14th Amendment also introduced a new concept into the Constitution: the right of every person to be treated the same as other similarly situated persons. Although the Declaration of Independence had deemed it "self-evident" that "all men are created equal,"[1] neither the Bill of Rights nor any of the Constitution's original articles contained a provision codifying that concept, and for those who were subjected to the scourge of slavery, the Declaration's promise of equal treatment rang hollow. The Equal Protection Clause of the 14th Amendment filled that void by declaring that no state may "deny to any person within its jurisdiction the equal protection of the laws."[2]

Prior to the ratification of the 14th Amendment in 1868, the Constitution of the state of New York already contained a clause prohibiting any deprivation of life, liberty, or property without due process of law.[3] Our state Constitution, however, contained no provision guaranteeing its citizens the equal protection of the laws. This was remedied in 1938 with the adoption of Article I, §11 of the New York Constitution, which provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."[4] The first sentence of this provision "is an equal protection provision which, like the Federal equal protection right, is addressed to State action," and the second sentence "prohibits private as well as State discrimination as to civil rights," i.e., "rights which are elsewhere declared by Constitution, statute, or common law" to be civil rights.[5] Thus, New York's Equal Protection Clause borrowed the principle of equal protection from the 14th Amendment, and also expanded upon it by identifying particular classes of individuals against whom neither the state nor private entities may discriminate with respect to any civil right.

The significance of the additional language in the Equal Protection Clause of the New York Constitution relating to civil rights was illustrated in a recent decision of the New York Court of Appeals in a criminal matter. In *People v. Bridgeforth*,[6] during jury selection, the prosecutor used peremptory challenges to strike five dark-skinned women from the jury, including one juror who was not African-American. That juror was excluded from the jury despite the defendant's challenge to the peremptory strike pursuant to *Batson v. Kentucky*,[7] and the Court of Appeals held that this was reversible error. The court observed that the rule adopted in *Batson* prohibits discrimination in jury selection on the basis of any "'status that implicates equal protection concerns,'"[8] and that the Equal Protection clause of the New York Constitution prohibits discrimination based on "'*race*, *color*, creed or religion.'"[9] Furthermore, New York's Civil Rights Law prohibits the disqualification of any person from a jury "on account of *race*, creed, *color*, national origin or sex."[10] Since this constitutional and statutory language clearly indicates that "race" and "color" are distinct classifications, the Court of Appeals had little difficulty concluding that discrimination on the basis of skin color provides a valid basis for a *Batson* challenge in New York.

This has become particularly relevant in a state as diverse and cosmopolitan as New York where many of the traditional classifications of its citizens have largely become blurred.

Through statutes enacted after the adoption of the state Constitution's Equal Protection Clause, New York has continued to identify additional classes of persons who are entitled to the equal protection of the laws. In 1951, the Legislature, acting "in fulfillment of the provisions of the constitution of this state concerning civil rights" (specifically, Article I, §11),[11] enacted the New York State Human Rights Law.[12] As amended over the years, that legislation declares to be a civil right the opportunity to obtain employment, education, housing, and the use of places of public accommodation, "without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability."[13] The statute prohibits employers, landlords, business owners, and various other individuals and entities from engaging in certain enumerated discriminatory practices based on a person's membership in one or more of the protected classes.[14]



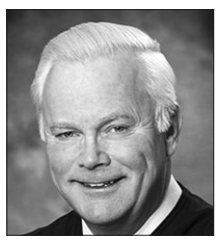
CONSTITUTION CENTER

The Constitution of the State of New York from 1777, background. Inset: Amendments to the state constitution adopted by the Constitutional Convention of 1938, that included an Equal Protection Clause.

While the framers of the 14th Amendment were motivated by the goal of eliminating the racial discrimination that remained as a vestige of slavery, the New York State Human Rights Law, along with other state and local legislation, reflects a recognition in our state that the principle of equal protection of the laws applies not only to race, but to all human characteristics that are immutable or otherwise not a proper basis for disparate treatment. With its expansive equal protection requirements, the state of New York is now in a position to be a leader in ensuring a more just and fair society.

1. Declaration of Independence, ¶ 2.
2. U.S. Const. Amend XIV, §1.
3. N.Y. Const. (1821), art. VII, §7.
4. N.Y. Const. Art I, §11.
5. *People v. Kern*, 75 N.Y.2d 638, 651 (1990)(internal quotation marks omitted).
6. 28 N.Y.3d 567 (2016).
7. 476 U.S. 79 (1986).
8. 28 N.Y.3d at 571, quoting *People v. Luciano*, 10 N.Y.3d 499 (2008).
9. Id., quoting N.Y. Const. art. I, §11 (emphasis added by Court of Appeals).
10. Civil Rights Law §13 (emphasis added).
11. Executive Law §290(2).
12. Executive Law §§290 et seq.
13. Executive Law §291(1), (2).
14. Executive Law §296.

'Jack v. Martin' and State Law Roots Of Equal Protection Theory



Gerald J. Whalen
Presiding Justice
Appellate Division, Fourth Department

I would not be going out on a limb to suggest that, if surveyed, most lawyers would say that the doctrine of "equal protection" was born on July 9, 1868—the date of the 14th Amendment's formal ratification. Of course, this is completely understandable. Attend a constitutional law class anywhere in the nation and you will find equal protection theory being taught as a uniquely federal doctrine deployed by federal authorities and federal courts to police recalcitrant state officials and state courts who refuse to treat their citizens with the evenhandedness and equality required by the 14th Amendment. See, e.g., *Obergefell v. Hodges*, 576 US ___, 135 S Ct 2584 (2015); *Brown v. Board of Educ. of City of Topeka*, 347 US 483 (1954). This understanding of equal protection, however, is at best incomplete.

The historical record teaches us that equal protection, as a concept, was not the product of a singular event occurring in the Summer of 1868. While it cannot be gainsaid that *federal* enforcement of equality principles on *state* officials dates only to the 14th Amendment's adoption in 1868, several precursors to modern notions of equal protection are actually derived from various state constitutions promulgated in the early and mid 19th century. In New York, for example, article VII §1 of the Second State Constitution (1821) provided that "[n]o member of this State shall be disfranchised or deprived of any rights or privileges secured to any citizen thereof, unless by the law of the land." Two states (Ohio and Kansas) even included the words "equal protection" in their antebellum constitutions. See Andrew T. Hyman, "The Substantive Role of Congress Under the Equal Protection Clause," 42 So. Univ. L. Rev. 79, 142 n. 92 (2014).

Much of the earliest case law that arose from these provisions involved allegations of preferential special legislation in connection with land and financial transactions, see, e.g., *Taylor v. Porter*, 4 Hill 140 (Sup. Ct., Saratoga County 1843) (applying, inter alia, art VII, §1 of Second State Constitution); *Ward v. Barnard*, 1 Aik 121 (Vt. 1825) (applying analogous provision of Vermont Constitution)), but there was also a nascent recognition that broader challenges to institutionalized forms of inequality required more nuanced analytical responses. Like many of the most consequential constitutional issues in antebellum America, the latter category of cases often pitted the economic interests of slaveholding southern states against the moral obligations of free northern states to resist the horror of human chattel slavery—particularly the Fugitive Slave Acts of 1793 and 1850.

The New York Court for the Trial of Impeachments and Correction of Errors, the predecessor of our modern-day Court of Appeals, was one of the first tribunals in the United States to invoke equality theory in opposition to the Fugitive Slave Acts. See *Jack v. Martin*, 14 Wend 507 (N.Y. 1835)). *Jack v. Martin* involved an escaped slave from Louisiana discovered in New York. The Louisiana slaveowner filed a petition for a "certificate of removal" in the Recorder's Court of the City of New York.[1] The Recorder granted the slaveowner's petition and issued a certificate of removal. Anti-slavery activists in New York then sued for a writ of de homine replegiando on the slave's behalf in the Court of Common Pleas.[2] The writ was refused, and the activists appealed to the Supreme Court. Justice Samuel Nelson dismissed the appeal, holding that the Fugitive Slave Act, as a federal statute, wholly preempted any state interference with the rendition of suspected fugitive slaves—including entertaining a writ of de homine replegiando on behalf of the fugitive slave. See 12 Wend 311 (Sup. Ct., New York County 1834).

The activists met with greater success on further appeal to the Court of Errors, however. In the principal opinion, Chancellor Reuben Walworth rejected Justice Nelson's preemption rationale. Indeed, the Chancellor "denie[d] the power of congress to legislate upon the subject of the escape of slaves from one state to another, and consequently insist[ed] that the [Fugitive Slave] act of congress of February, 1793, making the certificate of a state magistrate conclusive evidence of the right of a claimant to remove a native born citizen of one state to another state, and thus deprive him of the benefit of the writ of [de homine replegiando], and the right of trial by jury in the state where he is found, is unauthorised by the constitution." 14 Wend at 507 n. a1, 527-28. A contrary ruling, the Chancellor explained, would permit any "citizen of this state [to] be seized as a slave or apprentice who has escaped from servitude and transported to a distant part of the union, without any trial except a summary examination before a magistrate, who is not even clothed with power to compel the attendance of witnesses upon such investigation; and upon the certificate of such magistrate that he is satisfied that such citizen owes service to the person claiming him under the laws of the state to which he is transported." Id. at 524.

The rudimentary underpinnings of modern equal protection theory are clearly evident in Chancellor Walworth's opinion: Even assuming, arguendo, that foreign slaveholders could petition the New York courts for the "removal" of fugitive slaves, Congress could not enact legislation depriving alleged fugitive slaves of the procedural protections to which any other New York litigant was entitled simply on account of his or her status as an alleged fugitive slave. The Fugitive Slave Act of 1793 was therefore, according to Chancellor Walworth, unconstitutional.[3]

Unfortunately, Chancellor Walworth's view of the Fugitive Slave Act did not survive long. Less than a decade later, the U.S. Supreme Court effectively abrogated Chancellor Walworth's ruling in *Jack* and declared the Fugitive Slave Act of 1793 to be perfectly constitutional. See *Prigg v. Pennsylvania*, 41 U.S. 539, 620 (1842) (reversing slave catcher's kidnapping conviction in Pennsylvania state court). And when Congress enacted an even more brutal version of the Fugitive Slave Act in 1850, see 9 Stat 462, the U.S. Supreme Court doubled down on its repudiation of *Jack*'s reasoning by reversing a decision of the Wisconsin Supreme Court which had declared the 1850 Act unconstitutional on grounds similar to those adopted by Chancellor Walworth. See *Ableman v. Booth*, 62 U.S. 506 (1858), rev'g 3 Wis 1 (1854). Soon thereafter, the outbreak of the Civil War ended any further confrontations between state and federal courts on the subject of fugitive slaves.

I will end where I started. The great import and utility of the equal protection clause of the 14th Amendment cannot be overstated, and its accomplishments in spreading our founding ideals to every corner of this nation are well known. For these accomplishments, the federal courts deserve much credit. But it is also important to remember that, at one point in American history, it was the state courts, deploying state law, that lead the charge for equal and evenhanded justice. From this perspective, state courts and state law take their rightful place alongside federal courts and federal law as partners in our collective and unending quest to ensure equal justice for all.

1. A "certificate of removal" was the procedural device created by the Fugitive Slave Act of 1793 to facilitate the euphemistically-termed "removal" of escaped slaves from states, such as New York, that had outlawed slavery. See 1 Stat 302.

2. A writ of de homine replegiando is a now-extinct special proceeding in the nature of replevin. » Page 12

Deputy Chief Appellate Court Attorney Winston R. Brownlow assisted in the drafting of this article.

Toward Liberty And Justice for All

Claire P. Gutekunst
President
New York State Bar Association

This year's Law Day celebrates the 14th Amendment to the U.S. Constitution, the most-cited amendment in our jurisprudence. It is almost 150 years old and still going strong. Enacted to guarantee rights and protections to newly-freed slaves, its equal protection and due process clauses have been integral to many consequential court decisions and legislation in modern times that have protected fundamental rights of all citizens and prohibited discrimination.

For example, the U.S. Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967) relied on the equal protection clause to strike down miscegenation laws; in *United States v. Virginia*, 518 U.S. 515 (1996), the court cited the equal protection clause in ending the Virginia Military Institute's male-only policy; and the *Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) decision cited both the due process and equal protection clauses as the basis for requiring states to allow same-sex marriage. President Harry S. Truman's 1948 order to desegregate the military was based on the 14th Amendment due process clause, and the 1990 Americans with Disabilities Act, 42 U.S.C. §12101 (1990), relied on the equal protection clause in prohibiting discrimination based on disability.

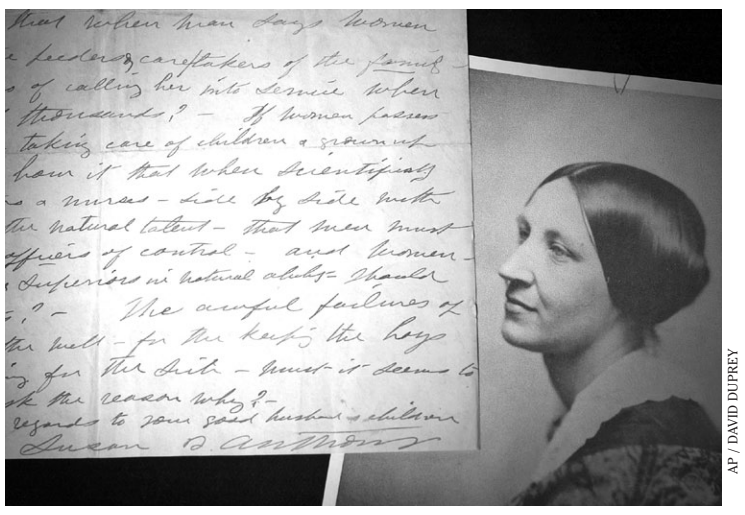
Initially, the provisions of the Bill of Rights applied only to the federal government. Then a number of Supreme Court decisions used the due process clause of the 14th Amendment to make most portions of the Bill of Rights applicable to the states. Thus, for example, states and localities are required to ensure that individuals' freedom of speech and religion, criminal procedural rights, right to a civil jury trial and right against cruel and unusual punishment are not infringed. In *McDonald v. Chicago*, 561 U.S. 742 (2010), the Supreme Court incorporated the Second Amendment right to bear arms, declaring it "fully applicable to the States."

When the 14th Amendment was ratified, there was no inkling that its language would be used to protect rights to same-sex and interracial marriage and birth control or to protect women from discrimination. But review, reinterpretation and reinvention by the courts and by the people are integral to our constitutional system of governance.

When the Constitution was ratified in 1788, it was almost immediately criticized for insufficiently protecting individual liberties from federal government intrusion. James Madison reviewed the text and suggested changing the language to nullify these fears. One of his colleagues, however, argued that no one had the authority to alter the document (it was already sacred text), so Madison's alterations became 17 separate proposed amendments. In December 1791, the states ratified 10 amendments, known as the Bill of Rights.

In other words, the Constitution got a "do-over." It needed work. And, as it turned out, it needed more work. In 1865, eight months after President Lincoln's assassination, the 13th Amendment, abolishing slavery, became law. It freed the slaves but did not guarantee they would be considered whole persons, let alone full citizens. The *Dred* » Page 12

Claire P. Gutekunst is an independent arbitrator and mediator.



AP / DAVID DUPREY

An original letter about male oppression of women's rights during the Spanish American War, handwritten by Susan B. Anthony in 1898, on exhibit in Buffalo.

AP PHOTO

Mildred and Richard Loving. In 1967, U.S. Supreme Court released its landmark civil rights decision, *Loving v. Virginia*, which invalidated laws prohibiting interracial marriage.

STEPHANIE KLEIN-DAVIS / THE ROANOKE TIMES VIA AP

Virginia Military Institute cadets listen to Justice Ruth Bader Ginsburg on campus in Lexington, Va. In 1996, Ginsburg wrote the majority opinion in *U.S. v. Virginia*, which held VMI's policy excluding women violated the Equal Protection Clause of the 14th Amendment.

Gutekunst

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Scott decision, 60 U.S. 393 (1857), had established that blacks were considered three-fifths of a person, and nothing in the amendment changed that.

Much of the South was under federal jurisdiction and states were eager to rejoin the union. But unless Congress acted to ensure that the states treated the freed slaves as citizens, there was no guarantee they would.

The 14th Amendment, drafted to ensure that blacks could not be relegated to permanent second-class status, states that "[a]ll persons born or naturalized in the United States … are citizens of the United States and of the State wherein they reside" and further that no state shall "abridge the privileges and immunities of citizens of the United States" or "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The 14th Amendment did not accomplish all it set out to do. It declared blacks born in the United States to be citizens and the drafters clearly intended them to have the right to vote, but somehow a loophole in the language allowed Southern states to pass ordinances that restricted or completely excluded blacks from voting. Clearly, the amendment needed work. Thus came the 15th Amendment, which provided that the right to vote cannot be denied or restricted on the basis of "race, color, or previous condition of servitude."

In the past 150 years, the 14th Amendment has gone from needing fixing to having power and reach. In particular, the Supreme Court has relied on the due process clause in identifying and protecting fundamental rights involving personal liberty, including rights to privacy and to marry, and it has used the equal protection clause to protect individuals from disparate treatment based on suspect classifications such as race and gender.

The expanded reliance on the 14th Amendment caused Supreme Court Justice William O. Douglas to observe that "[n]o patent medicine was ever put to wider and more varied use than the Fourteenth Amendment." But Supreme Court Justice Anthony Kennedy lauded that usefulness in his opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down anti-sodomy laws.

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.
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> Id. at 578-79.

A great constitutional scholar and judge from New York, Benjamin Cardozo, wrote that "[a] constitution states or ought to state not rules for the passing hour, but principles for an expanding future." Benjamin N. Cardozo, "The Nature of the Judicial Process," 83 (1922). On this Law Day, we celebrate the principles embodied in the 14th Amendment, which will continue to protect our myriad rights as we look to our "expanding future."

Peters

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not violate the owners' rights to free speech and free exercise of religion. Rather, we held that, "[l]ike all other owners of public accommodations who provide services to the general public, the [owners of the wedding venue] must comply with the statutory mandate prohibiting discrimination against customers on the basis of sexual orientation or any other protected characteristic."[11]

These recent developments in marriage equality and treatment of LGBTQ people provide just one example of the application of our state and federal laws and constitutions to protect the rights of individuals. On Law Day, we celebrate the rule of law as the keystone of our democratic way of life. As we all do our part to reinforce public faith in the rule of law, we must remember the small places where equal justice, opportunity and dignity are sought. The spirit of equal protection and due process requires not only the fair application of the law, but also that our legal system treats all litigants fairly and with dignity and respect. It should also inspire us to ensure that our bar, bench and all individuals who represent our judiciary reflect the diversity of the communities they serve. With these concerted actions close to home, we do our part to promote equal treatment and respect for the rule of law in our courts, our state, and across our nation.

1. 349 U.S. 294 (1955).
2. 381 U.S. 479 (1965).
3. 388 U.S. 1 (1967).
4. See, e.g., *People v. Scott*, 79 N.Y.2d 474, 478 (1992) (granting a greater degree of protection under the search and seizure provision of the New York State Constitution and New York jurisprudence than that provided by its U.S. Constitutional counterpart); *People v. P.J. Video*, 68 N.Y.2d 296, 303 (1986) ("In the past we have frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties."); *Beach v. Shanley*, 62 N.Y.2d 241, 256 (1984) (Wachtler, J., concurring) (observing that "it is often forgotten that diversity is the essence of federalism and that the federal Constitution only guarantees minimum protections, leaving to the States the task of affording additional or greater rights under their Constitutions, tailored to the special needs and traditions of the various States," in a case providing additional protections for freedom of expression); *People v. Settles*, 46 N.Y.2d 154, 161 (1978) ("So valued is the right to counsel in this State [N.Y. Const., art. I, §6], it has developed independent of its Federal counterpart [U.S. Const., 6th Amend.]. Thus, we have extended the protections afforded by our State Constitution beyond those of the Federal well before certain Federal rights were recognized.").
5. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
6. 135 S.Ct. 2584 (2015).
7. L. 2011, ch. 95.
8. *Dickerson v. Thompson*, 73 A.D.3d 52, 54-56 (2010).
9. 137 A.D.3d 30 (2016).
10. Id. at 43.
11. Id. at 42.

Tom

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receive permits to operate a laundry.[9] Although the ordinance was racially neutral, the court found that the administration of the statute—which was clearly bent on denying Chinese laundry permits—was discriminatory, and that the Chinese laundry owners in question were protected by the 14th Amendment even though they were generally not U.S. citizens.

Similarly, in *U.S. v. Wong Kim Ark*,[10] the Supreme Court established that under the 14th Amendment citizenship belongs to all those born within the territory of the United States, regardless of "race or color," paving the way for all people of foreign descent who were born in this country, including Asian Americans, to become U.S. citizens. Yet, it must be noted that, despite the broadly worded Citizenship Clause of the 14th Amendment, the amendment was not interpreted to grant citizenship rights to Native Americans.[11] It was not until 1924, with the passage of the Indian Citizenship Act, that Native Americans were granted full U.S. citizenship.

But, cases like *Yick Wo* had little impact in the years following their issuance. It was not until the 1950s that the Supreme Court began using the principles articulated in *Yick Wo* to strike down laws that limited the rights of African-Americans. Most famously, this was done in *Brown v. Board of Education of Topeka* in which the court found that the "segregation of children in public schools solely on the basis of race" deprives minority children of equal educational opportunities, and thus deprives them of the equal protection of the laws guaranteed under the 14th Amendment.[12]

While a line can be drawn from *Yick Wo* to *Brown*, there were great detours on the way. In both *Hirabayashi v. U.S.*[13] and *Korematsu v. U.S.*,[14] while proclaiming that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," the court, shortly after the attack on Pearl Harbor by Japan, upheld curfew and exclusion orders applicable only to people of Japanese descent, even including Japanese-American citizens, as necessary to prevent espionage and sabotage during war time. This country permitted war time hysteria to supersede basic and fundamental constitutional rights to Japanese-Americans, clearly without due process or equal protection.

But as time and our society progressed, the 14th Amendment was applied more often than not to recognize individuals' fundamental rights and to ensure equal protection of the laws to all groups. In the *Loving v. Virginia* decision,[15] which turns 50 this summer, the Supreme Court held that laws preventing marriages between persons solely on the basis of race violates the equal protection and due process clauses of the 14th Amendment. The court's conclusion that the freedom of choice to marry resides with the individual, and that the central purpose of the 14th Amendment was to eliminate racial discrimination, laid the foundation for the court's conclusion many years later in *Obergefell v. Hodges* that the fundamental right to marry extended to same-sex couples.[16]

Significantly, these principles of equality under the 14th Amendment have also been applied to laws and policies that excluded or discriminated against women,[17] a far cry from the 1873 prosecution of Susan B. Anthony for voting in the 1872 presidential election, and the Supreme Court's 1875 ruling that neither the Constitution nor the 14th Amendment granted women or all citizens the right of suffrage.[18]

Ultimately, our country's founding principle of equality, ingeniously crafted in the 14th Amendment, has evolved throughout the past century in many meaningful ways which our founding fathers and Lincoln could not have foreseen.

1. 60 U.S. 393 (1857).
2. Abraham Lincoln, "Electric Cord" speech, Chicago, Ill., 10 July 1858.
3. Adopted on July 4, 1776.
4. Abraham Lincoln, "The Gettysburg Address," Gettysburg, Penn., 19 Nov. 1863.
5. The amendment was ratified on July 9, 1868.
6. The Act was upheld by the Supreme Court in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
7. 109 U.S. 3 (1883).
8. 163 U.S. 537 (1896).
9. 118 U.S. 356 (1886).
10. 169 U.S. 649 (1898).
11. See *Elk v. Wilkins*, 112 U.S. 94 [1884]).
12. 347 U.S. 483 (1954).
13. 320 U.S. 81 (1943).
14. 323 U.S. 214 (1944).
15. 388 U.S. 1 (1967).
16. 135 S. Ct 2584 (2015).
17. For example, in *U.S. v. Virginia*, 518 U.S. 515 (1996), the Supreme Court found the Virginia Military Institute's male-only admissions policy violated the equal protection clause.
18. *Minor v. Happersett*, 88 U.S. 162 (1875).

African American man drinking from a segregated water fountain. The "separate but equal" doctrine of 1896's *Plessy v. Ferguson* remained standard doctrine until its repudiation in the 1954 Supreme Court decision *Brown v. Board of Education of Topeka*.

LIBRARY OF CONGRESS (2)

Soldier posts a Civilian Exclusion Order for Japanese-Americans in 1942.

Whalen

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Unlike its better known cousin, habeas corpus, the writ of de homine replegiando offered a jury trial. Given that it usually took longer to convene a jury trial than a summary habeas corpus proceeding, de homine replegiando was not typically the preferred procedural device for securing the immediate and prompt release of an illegally detained prisoner. In the unique cases of detained fugitive slaves, however, lengthy pre-trial delays were advantageous because they offered anti-slavery activists greater time to recruit prominent pro bono legal teams and marshal public and media support in favor of the detained slave. See, e.g., Paul Finkelman, "Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys," 17 Cardozo L. Rev. 1793 (1996) (discussing the 1854 certificate-of-removal proceeding against Anthony Burns in Boston). Additional time to publicize a pending certificate-of-removal proceeding was particularly beneficial for a fugitive slave detained in New York, where anti-slavery fervor was especially strong among many segments of society in the years preceding the Civil War. See, e.g., id. at 1817 (noting that, "in 1851, a mob had raided and destroyed a jail in Syracuse … to rescue Jerry, a fugitive slave"); see also H. Robert Baker, "The Fugitive Slave Clause and the Antebellum Constitution," 30 Law & Hist Rev. 1133, 1174 n. 113 (2012), citing, inter alia, Angela Murphy, "'It Outlaws Me, and I Outlaw it!' Resistance to the Fugitive Slave Law in Syracuse, New York," Afro-Americans in New York Life & History 28 (2004) & Jean Richardson, "Buffalo's Antebellum African-American Community and the Fugitive Slave Law of 1850," Afro-Americans in New York Life & History 27 (2003).

3. Chancellor Walworth would later be nominated by President John Tyler to serve as an Associate Justice of the U.S. Supreme Court. The Senate did not act on his nomination, however, and, in an ironic twist, Justice Nelson was ultimately nominated and confirmed instead.

Marks

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from New York Legal Assistance Group, the Legal Aid Society and Legal Services NYC to provide assistance in such diverse areas as immigration, consumer debt, public benefits and family matters. The success of Legal Hand has shown that in many cases, full representation by an attorney may not always be necessary to effectuate a positive outcome. Empowering individuals to protect their rights and helping them represent themselves in legal matters can be highly effective in averting larger crises and avoiding costly litigation. Legal Hand came into being due to the vision of Helaine Barnett, the chair of the Permanent Commission on Access to Justice, and is operated by the Center for Court Innovation.

With the positive results generated by Legal Hand and the Navigator Program, the judiciary is now seeking to further expand the role of non-lawyers through state legislation by creating the roles of housing court advocate (HCA) and consumer court advocate (CCA). The legislation will authorize the chief administrative judge to certify persons as HCAs or CCAs, so that they may provide services free of charge to needy individuals living below 200 percent of the federal poverty level who appear in specified housing and consumer credit proceedings—litigants who could never afford to pay for full representation by a lawyer. The HCAs and CCAs will receive special training and work under the supervision of attorneys admitted to practice law in New York and employed by approved legal service providers. In addition to offering assistance that the existing navigators are now providing, HCAs and CCAs will also be able to assist in the preparation of pleadings and specified orders to show cause, negotiate with an adversary concerning the terms of a stipulation or order and address the court on behalf of the person being represented.

Our bill, which has the strong support of the New York State Bar Association, is drafted so that it will protect the public from the unauthorized practice of law while simultaneously making legal services more accessible to those who need it most. Leveraging non-lawyer resources is now more important than ever as New York contends with a potential decline in federal funding for legal services and homelessness as well as other woes in our cities and towns. As a profession, we must all recognize that broader roles for non-lawyers are necessary given the breadth and seriousness of the justice gap, and that the aid of a non-lawyer can make a profound difference in the lives of New Yorkers involved in our civil justice system.

1. Finding creative solutions is especially critical given that continuing federal Legal Services Corporation funding of legal services programs in New York State (currently $21 million) is politically uncertain.
2. See generally Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York, November 2016, at 8, available at https://www.nycourts.gov/accesstojusticecommission/PDF/2016_Access_to_Justice-Report.pdf.
3. Rebecca L. Sandefur and Thomas M. Clarke, "Roles Beyond Lawyers: Summary and Recommendations of an Evaluation of the New York City Court Navigators Program and Its Three Pilot Projects," December 2016, at 3, available at http://www.americanbarfoundation.org/uploads/cms/documents/new_york_city_court_navigators_executive_summary_final_with_final_links_december_2016.pdf.
4. Id. at 4.

DiFiore

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duct and responsibility in the criminal context.[1] One of the report's groundbreaking recommendations addresses the link between erroneous convictions and the prosecution's failure to adhere to its ethical and constitutional duty to disclose favorable defense information under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. The task force concluded that such lapses, as well as defense counsel's failure to comply with their own professional obligations, create an unacceptably high risk of injustice.

To address this risk, the task force reached consensus on an important recommendation urging all trial judges to issue an order at the outset of a criminal case addressing the obligation of prosecutors to make timely *Brady* disclosures to the defense, and directing criminal defense counsel to comply with the defendant's statutory notice obligations and take steps to ensure constitutionally effective representation.

Issuance of standing *Brady* orders will help create a culture of disclosure, educate inexperienced prosecutors, remind experienced prosecutors of their duties and provide judges with the ability to enforce compliance with disclosure requirements. Such orders would have a similar impact on defense counsel with regard to their professional and ethical obligations.

The task force arrived at its recommendations after careful study of prior reports issued by the New York State Bar Association Task Force on Wrongful Convictions and Chief Judge Lippman's Commission on Statewide Attorney Discipline. It also met with and heard presentations from scholars and representatives of the attorney disciplinary system, and reviewed and discussed related recommendations in this area issued by prosecutorial, defense and innocence advocacy groups.

The proposed model orders have been released for public comment at www.nycourts.gov/rules/comments/. All interested persons, including prosecutors, the defense bar, judges, policy makers and scholars, are urged to review the proposed orders and provide input within the prescribed time period. Feedback from persons and institutions affected by the Task Force's recommendations is welcome as we seek to fully understand and appreciate the impact that the proposed orders may have on the litigants and the judicial process, and to improve both the specific content of the orders and their eventual implementation by judges and counsel.

The Task Force's recommendations cover much additional ground, clarifying the term "misconduct" to distinguish between good faith error and intentional wrongdoing; addressing the circumstances under which lawyers and judges have an ethical duty to report attorney misconduct; and advancing various measures, including enhanced training, to strengthen the ability of disciplinary authorities to properly investigate attorney misconduct in the criminal context.

As the Task Force moves forward with its vital work of identifying and eliminating the causes of wrongful convictions, I have asked it to expand its original mission to focus on broader due process issues of critical concern for a fair and effective criminal justice system, including the impact of systemic delays on the right of all New Yorkers to a speedy trial—one of the key guarantees of the Bill of Rights.

Having experienced first-hand how effective the Task Force can be in prompting broad-based change, and having the highest respect for the abilities and motives of its members, I believe that the Justice Task Force's expanded reach will help foster a fairer, speedier and more effective criminal justice system capable of insuring that no person will be deprived of life or liberty without a just and speedy legal proceeding.

Indeed, the Justice Task Force serves as a wonderful example of how every element of our criminal justice system is committed to eliminating the scourge of wrongful convictions and helping New York State live up to the promise of the due process clause of the 14th Amendment.

1. http://www.nyjusticetaskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf.