The New York State Constitution

Second Edition

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THE OXFORD COMMENTARIES ON THE STATE CONSTITUTIONS OF THE UNITED STATES
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SERIES FOREWORD

In 1776, following the declaration of independence from England, the former colonies began to draft their own constitutions. Their handiwork attracted widespread interest, and draft constitutions circulated up and down the Atlantic seaboard, as constitution makers sought to benefit from the insights of their counterparts in sister states. In Europe, the new constitutions found a ready audience seeking enlightenment from the American experiments in self-government. Even the delegates to the constitutional convention of 1787, despite their reservations about the course of political developments in the states during the decade after independence, found much that was useful in the newly adopted constitutions. And when James Madison, fulfilling a pledge given during the ratification debates, drafted the Federal Bill of Rights, he found his model in the famous declaration of rights of the Virginia Constitution.

By the 1900s, however, few people would have looked to state constitutions for enlightenment. Instead, a familiar litany of complaints was heard whenever state constitutions were mentioned. State constitutions were too long and too detailed, combining basic principles with policy prescriptions and prohibitions that had no place in the fundamental law of a state. By including such provisions, it was argued, state constitutions deprived state governments of the flexibility they needed to respond effectively in changing circumstances. This—among other factors—encouraged political reformers to look to the federal government, which was not plagued by such constitutional constraints, thereby shifting the locus of political initiative away from the states. Meanwhile, civil libertarians concluded that state bills of rights, at least as interpreted by state courts, did not adequately protect rights and therefore looked to the federal courts and the Federal Bill of Rights for redress. As power and responsibility shifted from the states to Washington, so too did the attention of scholars, the legal community, and the general public.

During the early 1970s, however, state constitutions were "rediscovered." The immediate impetus for this rediscovery was former President Richard Nixon's appointment of Warren Burger to succeed Earl Warren as Chief Justice of the U.S. Supreme Court. To civil libertarians, this appointment seemed to signal a decisive shift in the Supreme Court's jurisprudence, because Burger was expected to lead the Court away from the liberal activism that had characterized the Warren Court. They therefore sought ways to safeguard the gains they had achieved for defendants, racial minorities, and the poor during Warren's tenure from erosion by the Burger Court. In particular, they began to look to state bills

of rights to secure the rights of defendants and to support other civil-li claims that they advanced in state courts.

The "new judicial federalism," as it came to be called, quite quickly ad beyond its initial concern to evade the mandates of the Burger Court. I less than two decades after it originated, it became a nationwide phenon For when judges and scholars turned their attention to state constitution discovered an unsuspected richness. They found not only provisions tha leled the Federal Bill of Rights, but also constitutional guarantees of the r privacy and of gender equality, for example, that had no analogue in tl Constitution. Careful examination of the text and history of state gua revealed important differences between even those provisions that most bled federal guarantees and their federal counterparts. Looking beyon declarations of rights, jurists and scholars discovered affirmative constit mandates to state governments to address such important policy conc education and housing. Taken altogether, these discoveries underlin importance for the legal community of developing a better understan state constitutions.

Yet the renewed interest in state constitutions has not been limited to and lawyers. State constitutional reformers have renewed their efforts wit ble success: Since 1960, ten states have adopted new constitutions, and others have undertaken major constitutional revisions. These changes ha ally resulted in more streamlined constitutions and more effective state ments. Also, in recent years political activists on both the left and the rig pursued their goals through state constitutional amendments, often through the initiative process, under which policy proposals can be directly on the ballot for voters to endorse or reject. Scholars too have b rediscover how state constitutional history can illuminate changes in thought and practice, providing a basis for theories about the dynamics ical change in America.

In this second edition, Peter Galie and Christopher Bopst update Gali inal excellent study of the New York Constitution as part of *The Commentaries on the State Constitutions of the United States*, a series which the renewed interest in state constitutions and will contribute to our kn about them. Because the constitutional tradition of each state is distinc volume begins with the history and development of constitutionalism York. It then provides the complete text of the state's current constituti each section accompanied with commentary that explains the provis traces its origins and its interpretation by the courts and by other gover bodies. Finally, the book concludes with a bibliography, a table of cases the volume, and a topical index.

G. A

PREFACE TO THE SECOND EDITION

In the first edition, Professor Galie wrote: "It is a measure of the neglect of state constitutions that while numerous commentaries exist on our national document, there is no one volume commentary on the current constitution of New York. This is unfortunate for a number of reasons. The New York Legislature and State Board of Regents mandate that elementary and secondary school teachers introduce their students to the state constitution, a difficult task in light of the dearth of readily available materials. College instructors, students, and the general citizenry face the same problem. Even lawyers and judges, whose work requires a much more detailed analysis than could be provided in one volume, may have felt the need for a readily available reference work on the state's constitution."

A one-volume work of manageable proportions on a document that is nearly 50,000 words in length necessarily means that the treatment will be introductory in character: A variety of topics connected with each article and section had to be left out or given only cursory treatment. Within these limitations we have tried to provide the legislative intent for each section—why it was put there in the first place; some information about its evolution; and the interpretations by the judiciary and the attorney general which have shaped the contours of the section. Where relevant, we have noted statutory interpretations and/or implementations of the various clauses. We have tried to emphasize the basic principle or values embodied in each article. The introductions to each article contain historical and conceptual materials that relate New York State developments to the National Constitution and to other state constitutions. No attempt has been made to provide a complete doctrinal history of all aspects of each section. Such detailed commentary does not exist, though one can find commentary on various sections scattered throughout the multivolume legal encyclopedia, *New York Jurisprudence. McKinney's Consolidated Laws of New York Annotated* and the *New York Consolidated Laws Service* both provide case annotations for each section of the constitution, and the reader is referred to these for a more complete annotation of relevant cases.

This edition is not merely an updating; it constitutes a thorough revision. Errors of omission and commission have been corrected; amendments to the constitution adopted between 1990 and the close of 2011 are included, and major decisions of the court of appeals during the same period have been incorporated and analyzed. The constitutional history has been brought up to date, as has the bibliographical essay. Wherever possible we have incorporated online sources for material in the bibliography. We have found these sources as valuable

as they are exasperating. Instantly available to readers all over the world, th
just as quickly capable of disappearing into cyberspace. Finally, a table of d
tions for provisions of the current constitution has been provided.

The historical derivations in brackets after each section are not complet
tories of the sections. They include changes in renumbering and amendr
subsequent to the constitution of 1894, which was the last "new" constit
adopted by the state. The table of derivations also provides the provenan
each section.

Peter J.
Christopher

For the task of revising the guide, I am joined by my coauthor, Christ
Bopst. This opportunity was also an opportunity to invite Chris to join me.
the past fifteen years Chris and I have been examining various aspects
New York Constitution. Chris brings to the task an indefatigable work
attention to detail and accuracy, as well as an understanding of New York c
tutional law. Each of us reviewed and revised all parts of the manuscript, m
the revision a fully collaborative effort. The final product is a much imp
version of the first edition in every way thanks to Chris's contributions.

Peter J.

> The State Constitutions are the oldest things in the political history of America, for they are the continuations and representatives of the royal colonial charters.
>
> JAMES BRYCE, The American Commonwealth[1]

New York's first constitution, adopted in 1777, was written and adopted in the midst of a revolutionary war by a government literally on the run. The shape of that document, however, reflected the state's peculiar history and geography more than the hazardous conditions under which it was hammered out. Three factors stand out in this respect.

First was the presence of wealthy, established families such as the Livingstons, Van Cortlandts, Schuylers, Philipses, and Van Rensselaers. These families provided the leaders who played a key role in the shaping of New York's first constitution. John Jay, Gouverneur Morris, and Robert Livingston, all of whom were drawn from this establishment, were major actors at the state's 1777 constitutional convention.

The second factor was the early development of diverse religious, economic, and ethnic interests vying for political power and social position. This pluralism

[1] James Bryce, *The American Commonwealth*, 2 vols. (New York: McMillan, 1919), 1:427

created "a factious people."[2] Factions, the parties or groups formed arc interests, created a party spirit. It "was the instrument not simply interest, or ideology, but of all this and something more—of politics, v tained and absorbed everything else."[3] This precocity in the politics o and self-interest was crucial in moving the constitutional structure of toward a new conception of the polity that was to triumph with the a the National Constitution in 1787.

The third factor was the series of charters founding the colony of beginning with the Duke's Laws (1665) and continuing with the (Liberties and Privileges of 1683 and its successor in 1691. These cha the immediate source of a consensus in favor of a written constitutio ernment by fundamental law not to be altered except by extraordinary Eventually they would be transformed into instruments of colonial se ment. The idea of inviolable rights, which also appeared in these cha vided the basis for subsequent arguments about the expansion of thos

The extent to which demands for more representative governmen of law, and liberty had developed is well illustrated by the followin from a grand jury in 1681 begging for relief from

> inexpressible burdens by having an arbitrary and absolute power used ar cised over them, by which a yearly revenue is extracted from us agai wills... our liberty and freedom inthraled, and the inhabitants wholly sl and deprived of any share, vote, or interest in the government... contrary laws, rights, liberties, and privileges of the subject.[4]

These demands persisted, and a new governor, Thomas Dongan, was a In 1683, the Duke of York instructed Governor Dongan to call an ass people. The result was the Charter of Liberties and Privileges. This cha milestone in the development of constitutional liberty in New York; it York's first experiment with representative government.[5]

By the opening of the eighteenth century, the constitutional structu York resembled the pattern that had developed in England after the Revolution of 1688. For the next seventy years, constitutional disputes the question of ultimate authority: whether it was possessed by the go the legislature or shared by both. Though fundamental disputes reappe 1776 when the state's constitution makers had to decide how to d

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[2] Patricia U. Bonomi, *A Factious People: Politics and Society in Colonial New York* (New York University Press, 1971).

[3] *Id.*, at 286.

[4] As quoted by Charles Z. Lincoln, *The Constitutional History of New York State from the I the Colonial Period to the Year 1905* (Rochester, N.Y.: Lawyers Cooperative, 1906), 1:428–29

[5] Robert C. Ritchie, *The Duke's Province: A Study of New York Politics and Society 1664–16* Hill: University of North Carolina Press, 1977), 155.

powers between the legislative and executive branches, the structure in place by the middle of the eighteenth century proved satisfactory enough to be adopted with only a few changes as the first constitution of the state of New York.

■ CONSTITUTION OF 1777

> We have a government to form, you know; and God knows what it will resemble. Our politicians, like some guests at a feast, are perplexed and undetermined which dish to prefer.
>
> JOHN JAY

the Fourth Provincial Congress, or the "Convention of Representatives of the State of New York" as they renamed themselves on July 10, 1776, was not only the governing body of the newly independent state, but also a body exercising constituent powers. Although the notion of an independent body chosen by the people for the specific purpose of drafting a constitution had not yet developed—no state had entrusted the work of forming a new constitution to a specially elected constitutional convention—the members of the Third Provincial Congress were troubled by the lack of any mandate to form a new government. For this reason, the congress called for a special election to obtain that mandate, and such an election was held in June 1776. This decision to go to the electorate for a mandate to frame a new government was a step in the direction of recognizing both a distinction between a constitutional convention and a legislative body and the notion of a state constitution as superior to legislative enactments.

The provincial congress's uneasiness about legislative adoption of a constitution was shared by the Committee of Mechanics of New York City, which demanded that any constitution drafted by the congress be submitted to the voters for ratification. For them it was a right "which God has given them, in common with all men, to judge whether it be consistent with their interest to accept or reject a Constitution framed for that State of which they are members."[6]

The newly elected congress created a committee to form a new government in August 1776, but no draft of a constitution was produced until March 1777, partly because the war repeatedly forced the convention to move and partly because conservatives in the congress wished to delay action until calmer conditions prevailed and the chance of radical triumph was less likely.[7] As two

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[6] "The respectful Address of the Mechanicks in Union for the City and County of New York, represented in their General Committee," in Peter Force, ed., *American Archives*, 4th series (Washington, D.C.: M. St. Clair Clark, 1837–1853), 6:895.

[7] Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* (New York: Fordham University Press, 2006), 37–38.

members of the congress stated, they ought "first to endeavor to secure govern, before we established a form to govern it by."[8]

Generally, a broad division appeared in the convention between t wished to keep change to a minimum, variously called traditio Conservatives, and those who wished for extensive change, variou majoritarians or Popular Whigs. Between these two were the moder were less committed to any specific program. The central issues of th tion debates were how democratic the government should be, how fa sent of the people should be carried, and how power should be di among the various branches of government. The Popular Whigs favo mal property qualifications and legislative supremacy; the Conservativ for large property requirements and some sharing of power among the of government. The result was a series of compromises tilted to the si traditionalists, under which roughly 60 percent of the adult males and cent of the heads of families could vote for the assembly, but only 28.9 p the adult males could vote for state senators and the governor.[9]

A related concern was whether voting should be by oral declaration ballot. The Popular Whigs wanted the secret ballot, fearing the influenc lords on their tenants. The congress compromised here as well, continu voting during the war but authorizing the legislature to abolish it whe ended (Const. 1777, Art. VI).

Another major issue addressed at the convention was the distrit power among the branches of government. Again, compromise occu governor was directly elected by the voters for a term of three years, gi an independence and stability not available to governors in other state made commander-in-chief of the militia, given some pardoning powers ized to convene and adjourn the assembly, and empowered to make p ommendations to the legislature (Const. 1777, Art. XVIII). On the oth veto power resided in a council of revision (consisting of the governor, t cellor, and a minimum of two judges of the state supreme court), whi "revise all bills" it deemed unconstitutional or inconsistent with the pul (Const. 1777, Art. III). This council reflected the convention's desire both a governor with too much legislative power and the unsettling pr a veto-proof legislature. It may be that "hard political necessity" preve

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[8] Christopher Tappen and Gilbert Livingston to the Convention, August 24, 1776, in *Archives, supra* note 6, 5th series, 1: 1542.

[9] Alfred Young, *The Democratic Republicans of New York: Their Origins 1763–1797* (Ch University of North Carolina Press, 1967), 84. *Cf.* Milton Klein, *The Politics of Diversity: E. History of Colonial New York* (Port Washington, NY: Kennikat Press, 1974), 20–25 and n. 4 ments on Young's figures and Chilton Williamson, *American Suffrage from Property to Democr 1860* (Princeton: Princeton University Press, 1960), 111.

delegates from strictly following doctrines such as the separation of powers,[10] but it is more likely that the council of revision was an anticipation of the Federalist view that the great danger in republican government was the tendency for all powers to be swept into the legislative vortex. Seen in this light, the council was an early attempt to mix the powers of government in order to keep the weaker branches (executive and judiciary) separate and independent.

The appointment power created as much difficulty as the question of suffrage. There was little support for lodging it in the governor's office alone, and the traditionalists feared that the assembly would use the power to appoint "lesser sorts" to government positions. The compromise was the council of appointment, consisting of one senator from each of the four senatorial districts, chosen annually by the assembly, as well as the governor, who had only a casting vote (Const. 1777, Art. XXIII). John Jay, who proposed the compromise, intended for the governor to make all nominations for office and the council to confirm or reject them, but the article did not reflect this. This omission led to a constitutional crisis that precipitated a second convention in 1801.

The 1777 convention attempted to ensure an independent judiciary by giving judges tenure "during good behaviour." (Const. 1777, Art. XXIV). It also stripped the governor of his equity and probate jurisdiction, which had the effect of increasing the judiciary's separateness, as well as its independence. A court of impeachment and errors consisting of the president of the senate, senators, the chancellor, and judges of the supreme court acted as a court of last resort, hearing appeals from the supreme court (Const. 1777, Art. XXXII). It is clear that the convention's understanding of the separation of powers did not prevent it from adopting structures that mixed the various powers for specific purposes.

Although the 1777 constitution did not include a bill of rights, rights were a concern for the delegates. Provisions protecting religious freedom (Const. 1777, Art. XXXVIII), trial by jury (Const. 1777, Art. XLI), right to counsel (Const. 1777, Art. XXXIV), a conscientious objector clause for Quakers (Const. 1777, Art. XL), and protection against bills of attainder (Const. 1777, Art. XLI) were found throughout the document. Moreover, the constitution provided for the continuation of most of the common law (Const. 1777, Art. XXXV), which in itself afforded important protections. The religious liberty provisions ended the old struggle for supremacy between the Church of England and the English Dissenters for supremacy, defusing the potentially explosive issue of church and state.

The 1777 constitution did not contain any provision for its amendment. Assuming this was not an oversight, the implication is that the legislature believed itself to be the body to initiate constitutional change and to determine

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[10] Bernard Mason, "New York's First Constitution" in *Essays on the Genesis of the Empire State* (Albany: New York State Bicentennial Commission, 1979), 26.

the process of amendment. This belief is reflected in the New York legislatu adoption of a bill of rights in 1787.[11]

1777 Constitution: An Assessment

New York's first constitution stands out because it deviates from many of t assumptions and institutions that dominated state constitutional making fr 1776 to 1780.

The New York Constitution of 1777 provided for the strongest executive the American states, giving him the longest term with re-eligibility, direct po lar election, and a share with the judiciary in the veto power. By virtue of its pr ence on the council of revision and the court for the trial of impeachments a corrections of errors, the judiciary was given more power than any other com rable judiciary in its day. By requiring property qualifications for those voting senators and governor, which disenfranchised 70 percent of the adult wh males, and electing senators from the four "great" districts (the Southern, incl ing Suffolk, Queens, New York, Westchester, and Richmond counties; t Middle, including Dutchess, Ulster, and Orange counties; the Eastern, includi Charlotte, Gloucester, and Cumberland counties; and the Western, includi Albany and Tyron counties) (Const. 1777, Art. XII), the convention distanc the representatives from the represented. The terms of office for the senate w the longest among the states, and there were no constitutional requirements petitions to or instructions of legislators. The senate was to be more a filter th a mirror for popular sentiment. Moreover, much of the sentiment for doing was similar to that which animated Madison and others at the federal conv tion: the need to put restraints on the "levelling spirit." Finally, where rig appeared in the 1777 constitution, these rights were written in the prescript *shall* and were clearly aimed at limiting legislative as well as executive actions. such, they anticipated the movement to make rights legally binding on t legislature.

What we see in institutions such as the councils of revision and appointm is a concern for institutional checks among the various branches of governm rather than the relationship between government and the people. New Yor long history of regional, religious, and group conflict made New York seem, the eyes of one contemporary observer, "mad with [p]olitics."[12] As one stud of colonial New York put it, at a time when political factionalism was looked as "disruptive of public order, New Yorkers accepted it as legitimate."[13] Gro

[11] Act of Jan. 26, 1787, ch. 1, 1785–1788 N.Y. Laws 344.

[12] As quoted in Milton M. Klein, "Shaping the American Tradition: The Microcosm of Colonial N York," *New York History* 59 (Apr. 1978):196.

[13] *Id.*, at 197.

conflict was a part of the political culture of New Yorkers almost from the beginning. It is this pluralism and interest group conflict that best explains the early appearance of politics in the modern sense and helps explain the character of New York's constitution as the bridge to the view embraced by the delegates at the Philadelphia Convention of 1787.

Assessing the quality of a constitution is a difficult task. If the degree of support for the final product is the measure, the convention succeeded admirably: the final vote in favor of the document was 31–1. In his inaugural address of 1777, Governor George Clinton called it "our free and happy constitution," a judgment shared across the political spectrum, even by Anti-Federalists such as Robert and Abraham Yates, who opposed the Federal Constitution. In his study of the states during the Revolution, Alan Nevins concluded that "[a]t the time, and with reason, it was widely regarded as the best of the organic laws, and it exerted a considerable influence upon the Federal Constitution."[14]

The constitution of 1777 remained in force unchanged until 1801. At that time, two problems prompted the calling of a constitutional convention: the number and method of apportionment of members of the assembly and a bitter partisan dispute between Governor Jay, a Federalist, and the Republican members of the council of appointment over the question of who had the power to nominate appointees. Jay claimed that the governor nominated; the council claimed that the power was shared. The 1801 convention decided that the power to nominate was a concurrent right of both the governor and the council (Amends. 1801, Art. V), putting effective control of nominations and appointments in the hands of the council and in effect the legislature, both weakening the executive and giving a great boost to the spoils system. The convention also adopted four other amendments stipulating the number of assemblymen and senators and their method of apportionment. None of the amendments adopted by the 1801 convention was submitted to the voters for ratification.

■ CONSTITUTION OF 1821

> A political bear-garden from beginning to end.
>
> AMBROSE SPENCER, convention delegate

The convention of 1821 owed its origins to the attempt by Tammany Hall to destroy its arch enemy, Governor DeWitt Clinton, as well as to demands from new political forces for constitutional change. When New York adopted its first constitution, the state's population stood at 190,000, with two-thirds of the people living on both sides of the Hudson River between Albany and New York. By 1820, that population had increased to 1.4 million, with two-thirds of the

[14] Alan Nevins, *The American States during and after the Revolution 1775–1789* (New York: Macmillan, 1924), 161.