1777

The Political Revolution and New York's

First Constitution

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***Fourteen Revolutions***

YEARS BEFORE the United States constitution was written, each of the independent American states adopted constitutions of their own. America's rebellion against British rule destroyed thirteen distinct colonial governments. Each had a direct political link with England; there was no formal political connection between the colonies themselves. As these colonial governments began to collapse under the pressure of the growing rebellion in 1775 and 1776, the revolutionaries recognized that the various congresses and committees which were directing the revolutionary movement within the states would have to be replaced by more permanent governments.

Constitutions were being written and state governments organized even before independence was declared. In January 1776, New Hampshire adopted a preliminary constitution; South Carolina did so in March. (Both states later replaced these hurriedly drafted documents with permanent constitutions.) On May 4, Rhode Island converted its colonial charter into a state constitution by purging all references to royal authority, a method followed by Connecticut in October. Virginia acted in June, and on July 2, the very day the Continental Congress declared independence, New Jersey's constitution became law. Delaware and Pennsylvania adopted constitutions in September, followed by Maryland in November, North Carolina in December, Georgia in February 1777, and New York in April. Vermont proclaimed a constitution in July 1777 even though none of the other states acknowledged the state's independence until the 1780s. (Control of the territory of present-day Vermont was disputed between New York and the Vermont separatists.) In 1780, the temporary government which had been in operation in Massachusetts since 1775 was replaced by a permanent constitution.

These first state constitutions made the war for American independence a genuine political revolution. Although the states had united under the Continental Congress to declare their independence, raise an army, and conduct a unified defense against England, the Continental Congress had no political jurisdiction within the states themselves. The creation of state governments gave substance to the declaration of independence: not only were Americans prepared to fight for their independence, but also they were filling the political vacuum caused by the repudiation of British authority. That political vacuum was filled in ways that transformed American political culture. Unique forms of government were established; even though the principles underlying them were ancient, and even though the language had been adopted largely from English law and politics, Americans knew perfectly well that they were undergoing a political revolution unprecedented in scope and originality.

New York's first constitution, like all the others, was an experimental document devised to cope with a political emergency. On July 9, 1776, delegates to a specially elected provincial congress, the fourth since May 1775, convened in White Plains for the purpose of establishing "such a government as they shall deem best calculated to secure the rights, liberties and happiness of the good people of this colony; and to continue in force until a future peace with Great-Britain shall render the same unnecessary." By the time the fourth congress met, peace with Great Britain was unlikely. Seven days earlier, independence had been declared by the Continental Congress. New York's delegates in Philadelphia, lacking specific instructions, refused to vote but instead referred the matter of independence back to the provincial congress. As soon as the meeting at White Plains-had begun, the declaration of independence was adopted unanimously. The next day, the provincial congress changed its name to "the Convention of the Representatives of the State of New-York." For nearly a year the convention of representatives and its derivative committee of safety governed the state, while the work of framing a more permanent state government went ahead.

On August 1, the convention assigned the task of drafting a constitution to a committee of thirteen men-John Jay, John Sloss Hobart, William Smith (of Suffolk County), William Duer, Gouverneur Morris, Robert R. Livingston, John Broome, John Morin Scott, Abraham Yates, Jr., Henry Wisner, Samuel Townsend, Charles De Witt, and Robert Yates. James Duane was later added. The committee had to work under the most extreme wartime conditions. Staten Island had already been occupied by the British army when the convention met, forcing it to assemble in White Plains instead of New York City. Planning for the constitution had hardly begun before the convention was forced to flee northward as Long Island and Manhattan fell to the British.

Those convention delegates from Suffolk, Queens, Kings, and New York Counties who participated in the constitutional deliberations became exiles from their homes; they would not be able to return for more than seven years.

Understandably, the drafting proceeded slowly. Abraham Yates, the chairman, constantly had trouble assembling a quorum of committee members. Several had active military commands which kept them away. Others had local governmental responsibilities

or were serving on additional committees. There were also charges that the delay was deliberate. Some committee members were suspected of dragging their feet in the hope of a reconciliation with England, or were believed reluctant to be associated with the drafting of a constitution if New York fell to the British, a real possibility in late 1776 and 1777. A few members insisted that it was a waste of time to debate a constitution while the state's independent existence was still very uncertain.

It was hardly surprising, then, that the drafting process took months, despite the prodding of the convention and complaints from local officials. The committee was initially ordered to report a draft by August 26, but this date passed. Another month went by. Early in October, as criticism began to mount, committee member Henry Wisner informed General George Clinton that "the formation of government goes on very slow indeed; we have done little or nothing about it." Two weeks later, John McKesson, the convention secretary, made an optimistic progress report; the impasse was apparently broken. But once again, the committee was silent. More than five more months passed before James Duane stood in the convention on March 12, 1777, and read the draft the committee had prepared.

*Four of the principal figures in the drafting and adoption of New York's first constitution. The drawings of Jay, Morris, and Livingston are from Benson J. Lossing,* Pictorial Field-Book of the Revolution. *Yates’ portrait is reproduced courtesy of the New York Bar Association.*

   

 John Jay Gouvernor Morris Robert Livingston Abraham Yates, Jr.

The work was still far from over. For another six weeks, the members of the convention subjected the committee draft to an article-by-article scrutiny. Some provisions were scarcely debated; others took days. By the time the convention had finished, many basic changes had been made.

The document that became the state's first constitution reflected the joint efforts of the drafting committee and many of the more than thirty members of the convention who regularly attended during the floor debate. A few people stand out. John Jay-brilliant, detached, reserved-single-handedly reduced the cumbersome, long-winded committee draft into a compact, concisely written document for the convention to consider. During the convention debate, Jay excelled at breaking deadlocks by proposing workable compromises. He often discussed his ideas with Gouverneur Morris. Urbane, sarcastic, cynical, contemptuous of the new popular influences in politics, and utterly self-assured, Morris exerted his influence most strongly during the floor debate, where he displayed superb parliamentary skills to dominate the proceedings. He often got his way, but he could not persuade the members to abolish slavery.

Jay and Morris usually acted in concert with Robert R. Livingston, scion of one of the state's most notable political families. Livingston was frequently bored by the tedious legal argumentation at which Jay excelled, and he wrote Edward Rutledge of South Carolina that he was "sick of power and politics" and would not "give one scene of Shakespeare for 1,000 Harringtons, Lockes,

Sidneys and Adams to boot." Yet he helped Jay formulate the compromises that kept the discussion from foundering and, like

Morris, was often able to control the floor debate.

Abraham Yates, the former sheriff of Albany County, was selected as chairman of the drafting committee though he lacked the political credentials of Jay, Morris, and Livingston. Yates was the incarnation of the new men of the revolution, who rose from obscurity to positions of power and who were distrusted and despised by colonial patricians such as Morris. Yates led those

convention members who wanted to increase public control over politics.

Others also played important parts: James Duane, a New York City lawyer, and William Duer, an English-born land speculator; Duane and Duer usually supported the actions of Jay, Morris, and Livingston. William Smith of Suffolk County (not to be confused with the loyalist William Smith, Jr.) and Robert Yates, nephew of Abraham Yates, helped to draft the constitution and then to guide it through the convention. Henry Wisner, a farmer and landowner who doubled as a manufacturer of gunpowder, and Thomas Tredwell actively proposed and supported measures designed to increase popular influence in the new state government.

Often at odds, but just as often able to submerge their differences, the convention members finished their work late in the day on April 20, 1777. Thirty-three of the thirty-four members present voted in favor of the constitution; only Peter Livingston dissented. No time was allowed for making a clean copy before the document was rushed to the printer. Convention president Leonard Gansevoort signed his name to the heavily amended last draft, which was covered with erasures and interlineations; words and phrases were crossed out and clauses were written in the margins.

Two days later the constitution was proclaimed.

***A Choice of Dishes***

"WE HAVE a government to form," wrote John Jay early during the drafting of New York's constitution. "God knows what it will resemble. Our politicians, like some guests at a feast, are perplexed and undetermined which dish to prefer." Throughout the states Americans were debating the formation of their new governments. Opinions varied widely on what should be included or what should not, what powers should be granted to whom and how they should be defined or restricted. Although the colonists had obtained an extensive political education during the years of protest against Britain's imperial practices, the debate had focused largely on the erosion of rights and liberties; little attention was paid to planning alternative forms of government if British authority collapsed. When that happened, there was a scramble to fabricate workable structures.

While there was no consensus on just how the governments should be constructed, there were certain basic principles which all the constitution-makers accepted. It was universally agreed that, by the act of revolution, the people had become their own political masters; there could be no higher political authority. No one seriously doubted that the new governments would be republican in form. The colonists rejected the royal colonial governments in favor of republicanism, Thomas Jefferson observed in 1777, as easily as "throwing off an old and putting on a new suit of clothes." Americans were also committed to government by law and the protection of basic rights; most agreed on the necessity of distributing power between various branches of government. "It is essential to Liberty," the voters of Boston stated in May 1776, "that the legislative, judicial, and executive Powers of Government be, as nearly as possible, independent of and separate from each other, for where they are united in the same Persons, there will be wanting that natural Check, which is the principal Security against the enacting of arbitrary Laws, and a wanton Exercise of Power in the Execution of them."

Sovereignty of the people, superiority of republicanism, rule of law, protection of rights, separation of powers. Few Americans in 1776 would have found fault with any of these basic principles. But within this framework of principles was a wide range of possible applications. Theory did not necessarily translate smoothly into practice. It was easier to declare that the people were their own political masters than to create mechanisms through which they truly governed themselves. Republicanism was fine in principle, but there were questions about what representation really meant or even who was to be represented. Guaranteeing rights was a laudable objective, but could liberty truly be threatened if the people themselves controlled the government? Nor was it easy to draw distinct lines between various types of political power. Where, for instance, did legislative authority end and executive authority begin? Or where did the process of administering the laws - an executive function-become distinct from interpreting them - a judicial responsibility?

The constitution-makers of 1776 and 1777 had to refer to basic principles partly because they lacked exact models to guide them. Republics had existed from time to time since antiquity, but in no case did the conditions completely match those in America. Written constitutions of the kinds Americans were beginning to envision were also rare. The closest thing to a working model was, ironically, the British government. Even though most Americans believed that English politics had become hopelessly corrupt, they also believed that England, with its entrenched traditions expressed in the common law, its commitment to the protection of basic rights and liberties, and its balanced institutions, had the best-constructed government in the world. Americans continually insisted that they were fighting to protect their rights "as Englishmen"; many believed that the American war was being waged to preserve the spirit of English law. Yet even England's form of government could not be followed exactly, particularly since America lacked two of the most conspicuous elements in the English social and political balance - a monarchy and a hereditary nobility.

Ideas flowed into the constitution-making process from many sources. Well-educated Americans were familiar with European political and legal literature, both classical and contemporary, English and continental. Throughout the constitutional discussions are references to the writings of Livy, Cicero, Plato, Plutarch, Thomas Hobbes, Henry St. John (Viscount Bolingbroke), Baron de Montesquieu, Sir Edward Coke, Jean Louis De Lolme, David Hume, Baron de Pufendorf, Jean Jacques Rousseau, the third Earl of Shaftesbury, Emmerich de Vattel, and many others.

John Adams, who pursued the business of making constitutions with characteristic intensity, absorbed many of the ideas of these and other writers, fashioning them into *Thoughts on Government,* a kind of political manual for Americans. John Jay carried a copy of Adams's book with him as he returned to New York from Philadelphia to participate in the drafting of New York's constitution.

American political thinking was influenced most by the principles of the English Whigs. English Whig thought had taken shape during the English civil wars of the mid-seventeenth century and the politically volatile period of Stuart rule that followed. Through such prominent seventeenth-century theorists as John Milton, James Harrington, Algernon Sidney, and John Locke, Americans were introduced to basic Whig political maxims - the contractual nature of political society, the supremacy of natural rights, the eternal tension between power and liberty, and ideal of balanced government. In the early eighteenth century, as English politics became more pragmatic and patronage ridden, Whig political rhetoric became more radical in content and strident in tone, particularly as expressed in the essays of Thomas Gordon and John Trenchard.

Trenchard and Gordon's essays, called *Cato's Letters,* drew a dark, conspiratorial picture of politics. Government, in their view, was very nearly the natural enemy of society. Politicians were invariably corrupt and grasping, intent upon pursuing self-interest at the expense of the public good. Individual liberty was in constant danger from those who ruled. Only a virtuous populace, cautious in granting political authority and ever vigilant against abuses of power, had a chance of establishing and maintaining a free government.

Radical Whiggery reflected the dissatisfaction and suspicion of those excluded from political power. The shrill rhetoric of Trenchard and Gordon and others had little influence in England but appealed to Americans, who were keenly aware of their own isolation from English politics. *Cato's Letters* and similar writing were widely read in the colonies long after they had been forgotten in England. While the earlier Whig writers were a source of basic principles and structural concepts, the radical Whigs provided Americans with an emotional political language capable of giving vent to their own frustrations under British rule.

Not everything in the constitutions was new. Even a political revolution as deep as the one Americans were undergoing could not uproot everything from the political past. Some revolutionaries did not believe it should. Many of those who were forming new governments had substantial experience in the old, and they brought to the constitution - drafting process their collective thinking on what should be preserved as well as what should be repudiated. There was substantial political carryover from the old governments, particularly at the local level. Components of the colonial system were often altered only slightly, if at all. The degree of continuity between the colonial period and statehood varied from state to state, but in every case it was a major factor shaping the new constitutions.

From this combination of principles and experience, general fears and specific aspirations, lofty intentions and pragmatic assumptions,

the constitution-makers had to find workable formulas for their new governments. Complicating the process further was the fact that Americans did not always agree on what they wanted their revolution to accomplish. Even by July 1776, when independence became the most commonly agreed upon objective, many of those who supported independence believed that it was still possible (and desirable) to reach some sort of reconciliation with England. Others supported independence only reluctantly and would have preferred to defer the business of creating state governments until it was clear whether or not the rebellion would succeed. Nor was there a consensus upon the relationship between independence and the creation of new governments. Some revolutionaries wanted as little change as possible from the colonial system; others saw the war as an opportunity to make drastic reforms in the social and political order. Some Americans were generally unconcerned about the institutional structure of government as long as specific rights were protected; others believed that rights were secure only in properly fabricated governments.

It is understandable, then, that the first constitutions shared certain common features and differed greatly in others. Starting from the political assumptions underlying the revolution throughout the colonies, New York's constitution-makers created a state government reflecting their own experience under colonial rule and designed to meet the state's particular needs. Though a hybrid creation, as Jay had anticipated it would be, it proved to be among the most effective of the first state constitutions.