

ORDERED LIBERTY: A VERY BRIEF CONSTITUTIONAL HISTORY OF NEW YORK

By Peter J. Galie and Christopher Bopst

The U.S. Constitution was drafted in 1787; New York State's first Constitution was adopted ten years earlier, in 1777. The first constitutions of 12 of the first 13 states (all but Rhode Island) preceded the adoption of the national constitution, and in fact shaped and molded their federal counterpart. The separate but parallel development of state and national constitutions, such as in the United States, is known as dual constitutionalism.

State constitutions, like the U.S. Constitution, provide the framework for governance, distribute and limit power, and protect liberties. In addition, they complete the national document. States are referred to fifty times in forty-two sections of the national Constitution. The national Constitution does not even contain a definition of citizenship, and says very little about voting.

Other dimensions of American life, such as public business and policymaking, are left untouched by the national constitution. No national Constitutional provision dictates that New York keeps the Adirondacks and Catskills "forever wild;" the state constitution does (N.Y. Const., art. XIV, sec. 1). The U.S. Constitution does not mandate the state to care for the needy; the state constitution does (N.Y. Const., art. XVII, sec. 1). The U.S. Constitution says nothing about education; the state constitution has an article devoted to it (N.Y. Const., art. XI). In spite of an ever-expanding national government, state constitutions and the policies made pursuant to them are most likely to affect the daily lives of citizens. Finally the state constitution protects rights. In many areas the New York Constitution provides greater protection for individual rights than the national constitution.

Throughout its history, New York has adopted four constitutions (1777, 1821, 1846 and 1894), and has convened nine constitutional conventions (1777, 1801, 1821, 1846, 1867, 1894, 1915, 1938 and 1967). The Constitution of 1894, as amended (including substantial revisions by the 1938 convention) is the document currently in force. Over 225 amendments have been adopted to the constitution since 1895, resulting in a document of over 50,000 words and 20 articles:

Article I—Bill of Rights	Article VIII—Local Finance	Article XV—Canals
Article II—Suffrage	Article IX—Local Government	Article XVI—Taxation
Article III—Legislature	Article X—Corporations	Article XVII—Social Welfare
Article IV—Executive	Article XI—Education	Article XVIII—Housing
Article V—Civil Departments	Article XII—Militia	Article XIX—Amendments
Article VI—Judiciary	Article XIII—Public Officers	Article XX—Effective Date
Article VII—State Finance	Article XIV—Conservation	

Unlike the national amending process, the state process is majoritarian and participatory. There are two methods for altering the New York State Constitution: Legislatively initiated amendments and constitutional conventions. Amendments require: 1) first passage by a majority of the elected members of each house of the legislature; 2) second passage by a majority of the elected members of each house of the legislature following the next general election of assembly members; and 3) approval by a majority of voters voting on the amendment in a general election.

Constitutional conventions, which have the authority to submit proposals directly to the voters without the consent of the legislature, can be convened in one of two ways, both of which require the approval of the voters. The legislature can place a convention question on the ballot at any time. In addition, Article XIX requires that in 1957 and every twenty years thereafter the question of whether to hold a convention to revise and amend the constitution shall be submitted to the voters. The last four convention votes were 1957 (automatic); 1965 (legislative proposal); 1977 (automatic), and 1997 (automatic). Of these, only the 1965 convention question was approved by voters.

From Colony to Constitutional Republic: The Constitution of 1777

The 1777 constitution was written and adopted in the midst of a revolutionary war by a government literally on the run. It created an electorate in which nearly 60% of adult males and 70% of heads of families could vote for members of the assembly but only roughly 29% could vote for senators and the governor. No distinction was made between white and black males for purposes of voting. A tripartite structure was established with a bicameral legislature. The veto power resided in a Council of Revision.

The 1777 constitution provided for the strongest executive in the American states, giving him the longest term (three years), as well as providing for direct popular election and eligibility for reelection. These measures gave the office of governor in New York stability and independence.

The judiciary was given a degree of independence, with judges serving "during good behavior." A court of impeachment made up of the president of the senate, senators the chancellor and judges of the Supreme Court was established; otherwise the court system at the lower levels remained essentially unchanged.

Although no formal bill of rights was included in the document, **there were provisions establishing the right of property owners to vote, religious freedom, a right to trial by jury, a due process clause, right to counsel, a conscientious objector clause for Quakers, and protection against bills of attainder. Additionally the constitution provided for continuation of the common law, which afforded important protections. The religious liberty provision ended the tradition of multiple religious establishments in the state, thus defusing the potentially explosive church-state issue.**

The constitution was approved on Sunday, April 20, 1777, at Kingston New York, marking that day as the birth of New York as a constitutional state. In forty-two sections and fewer than 7,000 words the 1777 constitution embodied the great ideas and institutions for which it is justly praised. Its preamble incorporated the Declaration of Independence, and the document directly influenced the work of the 1787 Constitutional Convention in Philadelphia. Just as important are the issues that were not addressed. John Jay lamented the fact that no clause prohibiting domestic slavery was included. No provision mentions education and, most surprisingly, no method of amendment was included. Among the reasons for the success of the document was the fact the convention did not alter those aspects of the governing process that had proven effective. That continuity, combined with the moderate character of the document, enabled it to

achieve legitimacy, which, in turn, accounted for the relatively smooth transition from colony to constitutional republic.

New York's Only Limited Constitutional Convention: 1801

The first constitutional convention in New York and the only one ever called for limited purposes was occasioned by a defect in the Council of Appointments and the growing size of the legislature. In the absence of formal mechanism for amending the constitution, the legislature passed an act recommending a convention and calling for the selection of delegates to address only those issues. In response to rapid population growth that had swelled the number of senators to 43, the convention fixed the number at 32. The Assembly was set at 100 members, with the authority to increase to a maximum of 150 members. Senate seats were to be apportioned according to population but one member of the assembly was guaranteed each county regardless of population.

The second issue confronting the convention was a dispute over who had the power to nominate appointees: the governor alone or shared with the council. The convention made the power a concurrent right of both, putting effective control of nominations and appointments in the hands of the council and, in effect, the legislature. This change weakened the executive and accelerated the development of the spoils system.

Participation and Property: The Constitutional Convention of 1821.

The state had grown from just over 190,000 in 1777 to 1,300,000, with much of the growth coming in newly settled areas of the West and North. The suffrage, apportionment, and judicial service provisions of the constitution of 1777 disadvantaged these new settlers. The Council of Appointment had become the chief vehicle for the spoils system and the Council of Revision, with the power to veto legislation, was increasingly seen as an anti-democratic and partisan check on the will of the people.

In the absence of any constitutional provision for calling a convention it fell to the legislature to make the decision. In the absence of any constitutional provision for calling a convention, it fell to the legislature to make the decision. A dispute with the Council of Revision forced the legislature to place the question of a call for a convention before the people and to include a provision that required convention proposals to be ratified by the people before taking effect.

This decision established the tradition in New York of making constitutional conventions the creatures of the people and not the legislature.

Much of the convention's focus centered on four issues: suffrage, the appointing power, the power of the Council of Revision and reorganization of the judiciary. On suffrage, property qualifications for white males were removed, but delegates placed a property qualification on African Americans, disenfranchising all but a handful of the 6,000 free adult black males. The debates over property qualification for voting at this convention have been justly called one of the great suffrage debates in American history.

The Council of Appointments was abolished. The convention made some offices elective, while making the others appointed by either local bodies, the legislature, or the governor. The much maligned Council of Revision was also eliminated. The replacement was modeled on the national presidency with the governor possessing a veto that could be overridden by two thirds of the legislature. He was also given the power to see that the laws were faithfully executed. This increase in gubernatorial power was offset by a reduction in term from three to two years and the elimination of the power to adjourn the legislature.

Concerning the judiciary, a new system of circuit courts was created, members of the Supreme Court were dismissed and a new supreme court created, the latter measure aimed at the alleged partisanship of sitting judges.

The convention added a provision requiring a two-thirds vote of the legislature for passage of any bill appropriating money or property for local or private purposes, beginning a tradition of restricting legislative action that would continue throughout the nineteenth century. For the first time the canal policy of the state was constitutionalized.

Unlike its predecessor, **the 1821 convention devoted a separate article (Article VII, now Article I) to a bill of rights for its citizens, drawing it provisions largely from the English Bill of Rights of 1689, the statutory Bill of Rights adopted by the state legislature in 1787, and the Federal Bill of Rights of 1791.** Unique to the state constitution was a provision allowing conscientious objection to any member of a religious denomination.

For the first time, a formal amending procedure was placed in the constitution authorizing amendment by majority of the legislature in one session and a two-thirds vote of the legislature in a subsequent session. Amendments would be effective upon ratification by majority vote of the electorate. In New York after 1821 voters could do what no voter could do at the national level: vote directly on whether to adopt a constitutional amendment!

The Constitution of 1846: Canals Commerce and the Common Man

Constitutional developments in New York between 1821 and the Civil War reflected the larger national movement known as Jacksonian Democracy. In 1826 the first legislatively initiated amendments to a New York Constitution took place. They made justices of the peace elective offices and established universal white male suffrage. Amendments in 1833, 1839 and 1845 made city mayors elective officers and eliminated all property qualifications for holdings public office.

The convention swept away the old feudal system of land ownership, constitutionalized debt structure for the canals, and eliminated the bank monopoly by limiting the legislature's power to grant special charters.

Practically all local offices were made elective; senator's terms were reduced from four to two years; and assemblymen were to be elected from single member districts to give representation to smaller opinion clusters. The judiciary was made elective and completely reorganized, with a

court of appeals established as the court of last resort. The offices of secretary of state, treasurer, attorney general, comptroller, canal commissioner, state engineer and state prison inspector were made elective.

Reflecting general disillusionment with the legislative branch, convention delegates added 22 restrictions on legislative power, including two remarkable provisions mandating a popular referendum for issuance of any long-term bonds and the placing of a limit of one million dollars on the aggregate temporary debt of the state (later repealed).

The convention devoted some attention to rights, adding provisions protecting against excessive fines or bail, cruel and unusual punishment and unreasonable detention of witnesses. The capstone of the convention's drive to democratize the polity came with the addition of a new mode of initiating constitutional reform. The delegates provided that in 1866 and every twenty years thereafter, and also at such other times as the legislature may provide, the question "Shall there be a Conventions to revise the Constitution and amend the same?" be submitted to the voters.

On the question of repeal of the property qualification for suffrage for black males, the convention submitted that question to voters apart from the new constitution. The suffrage question was overwhelmingly rejected (85,306 in favor to 223,834 opposed), by a margin similar to that by which the constitution was approved.

The 1846 constitution was essentially a new document, with only eleven provisions unchanged. State and local offices were democratized, legislative power was restricted, executive power was diffused all, in the name of grass roots democracy. For this reason the Constitution of 1846 has been called the "People's Constitution." The convention tripled the size of the document to 20,400 words.

The First Rejection: The Constitutional Convention of 1867-68

In 1866, the first automatic convention call was submitted to voters. The call was approved, and the Convention of 1867-68 was convened. The main issues confronting the convention were the judiciary, a recurring theme at conventions throughout New York's history, and suffrage.

The convention proposed a new Judiciary Article. Changes were implemented which were aimed at reducing the backlog of cases and which extended the term of judges to fourteen years. This article was submitted separately to voters in 1869, and was approved.

The most contentious issue, African American suffrage, embroiled the convention in the politics of race. Delegates proceeded cautiously, submitting a separate amendment that retained the property qualification for African American males. This amendment was also approved. The issue of women's suffrage also received some attention, but delegates declined to recommend it because public sentiment did not demand and would not sustain such a radical innovation.

In addition to those separately submitted proposals, the convention proposed an amended constitution, which was rejected. This constitution would have:

- Increased the term of senators to four years;
- Placed more restrictions on legislative power;
- Strengthened the governor's powers;
- Created a court of claims (previously claims against the state were resolved by the legislature)
- Added provisions prohibiting unreasonable searches and seizures, allowing juries of less than 12; calling for free common schools; and punishing bribery of public officials.

For the first time in a constitutional convention in New York a Committee on Cities was created and a serious attempt was made to address the question of home rule (the authority of cities to govern themselves). Caught in the crossfire between the desire to address corruption in the cities and impulse towards local autonomy, the final recommendations did not provide much in the way of home rule.

Efforts for reform continued in the state and gave birth to **a new mode of constitutional reform, the constitutional commission**. Unlike constitutional conventions, commissions lack the authority to submit their proposals directly to the voters for approval. Instead, they propose recommendations to the legislature, which has sole discretion whether to propose them to the people in the manner required for other legislatively initiated amendments.

Commissions were created by the legislature at the behest of the governor in 1872 and 1890 made valuable recommendations concerning the judiciary, legislature, the executive, debt, the cities and corruption. Many of these recommendations found their way into the constitution by way of legislatively proposed amendments.

The Constitution of 1894: Confronting a "New" New York

The convention of 1894 actually resulted from an automatic constitutional convention vote in 1886. Partisan disputes between the legislature and the governor over how the delegates should be selected delayed the convening of the convention for eight years.

The convention proposed by the 1894 convention, as amended, remains the current constitution of the state. The document proposed by that convention:

- Incorporated changes in the judicial article recommend by the judiciary commission of 1890;
- Created a "forever wild" state forest preserve, which cannot be developed or altered;
- Founded the University of the State of New York, which is the umbrella organization having control over all public and private education throughout the state;
- Set up a merit based civil service system;
- Established some home rule provisions for municipalities;

- Adopted provisions regulating registration, authorizing voting machines, and setting up bipartisan election boards in an attempt to reduce electoral fraud.
- Established the present method of selecting delegates to a constitutional convention (3 delegates per senate district and 15 at large delegates), thus preventing another eight-year delay between the approval and commencement of a convention;
- Added a provision forbidding any aid, direct or indirect, to institutions of learning under the direction of a religious denomination (often referred to as the Blaine Amendment).
- Guaranteed a right of action to recover in wrongful death case and prevented the legislature from capping monetary damages on such an action.

In addition to the constitution, the convention proposed (and voters approved) a separate legislative apportionment that largely remains in tact in text if not in action. The convention apportioned the legislature in such a way as to ensure representation of all counties and to prevent the counties of New York City from ever dominating the legislature. The convention did this in several ways: 1) it made sure that as the state grew, any additional growth in urban areas was not offset by senate seat losses in rural areas, but was instead accompanied by a growth in the number of senate seats; 2) it apportioned a significant number of assembly districts by county regardless of size, ensuring that smaller, rural counties would retain significant power in that body. Significant portions of the apportionment scheme remain on the books despite being found to violate the “one-person, one-vote” requirements of the Equal Protection Clause of the U.S. Constitution. A women's suffrage amendment was reported to the floor of the convention that, after a long and thoughtful debate was rejected.

The Second Rejection: The Constitutional Convention of 1915

The Constitutional Convention of 1915 was held in the midst of the Progressive Era, and, not surprisingly, its work reflected that era. The constitution proposed by that body was grounded on a philosophy of expertise, efficiency and economy, reflecting the ideas of leading reformers who extolled the virtues of business and the British parliamentary system.

The constitution proposed by that convention:

- Significantly reorganized and consolidated the executive branch of government;
- Implemented a short ballot, meaning fewer offices would be elected statewide;
- Adopted an executive budget, in which the governor would control most aspects of the budget process and priorities;
- Took some steps to move the government away from a principle of separation of powers, allowing more coordination between executive and legislative branches;
- Inserted an Equal Protection Clause likely modeled after the Fourteenth Amendment to the U.S. Constitution;
- Allowed defendants accused of minor crimes to waive their right to indictment by grand jury and trial by jury.

This constitution was rejected by the voters. Voters also rejected two other amendments submitted by the convention, one that would have provided a new legislative apportionment and the other which would have added a new taxation article.

At the same election at which the 1915 conventions would submit its proposed constitution, a legislatively initiated amendment granting women's suffrage would also appear. The convention was considering a women's suffrage amendment but in deference to legislatively initiated proposal took no action. The amendment was defeated, but the defeat would be temporary as women would be granted the right to vote in New York I 1917 when the voters approved second legislatively initiated amendment.

The defeat of the convention's work did not end the push for reform. Between 1917 and 1938 most of the measures proposed in 1915 were adopted through legislative amendment, including a reorganization of the judiciary (1925), executive consolidation and the short ballot (1925), an executive budget (1927), and a four year term for the governor (1937). Governor Al Smith, a delegate at the 1915 convention, Robert Moses and Belle Moskowitz, were the prime movers in this reshaping of New York Government in the first quarter of the twentieth century.

Constitutional Reform and the Depression: The Convention of 1938.

In 1936, voters were asked pursuant to the automatic call provision if they wanted a constitutional convention. They responded affirmatively, and the constitutional convention of 1938 was convened. For the fourth time, Republicans won a majority of delegate seats. With no clear mandate and no specific constitutional issues, few expected much from the convention. Yet the social and economic issues ignored in 1894 and 1915 could no longer be ignored in the midst of the Depression. Delegates embraced a more sympathetic view of the role government in society. The convention proposed numerous additions to the existing constitution (but not a new constitution), including:

- A "bill of rights for labor" and new articles on care of the needy and housing which recognized the state's responsibility for those who needed support for the necessities of life;
- Protections against unreasonable search and seizure, however, following one of the most enlightening debates on civil liberties in the annals of New York's constitutional history, the convention rejected an amendment to include an exclusionary rule for unconstitutionally obtained evidence;
- A provision prohibiting discrimination against an individual's civil rights on the basis of race, color or creed which marked the first appearance of an Equal Protection Clause in the state's constitution, and including protections against private as well as state discrimination;
- A new article on local finance, which consolidated the various provisions concerning the debt and taxing powers of local governments,
- A new article on taxation;
- A new requirement that all amendments be submitted to the attorney general for an opinion on their impact on other sections of the constitution.

In line with new understanding of role government, convention delegates liberalized some of the restrictions placed on the legislature during the nineteenth century, but simultaneously imposed additional restrictions on the use of state credit and on public authorities.

The convention also sought to avoid submitting the question of holding a convention during a national or state election year, fixing 1957 and every 20 years thereafter as the automatic submission years.

Rather than submitting an entirely revised constitution for an “up or down” vote, the convention submitted its work in the form of nine separate amendments, allowing voters to pick and choose which ones they wanted. Voters approved six of the nine, rejecting the three generally viewed to be partisan.

A Modern Constitution? The Constitutional Convention of 1967

New Yorkers amended the constitution 93 times between 1939 and 1966. Among others, these amendments created departments of commerce and motor vehicles (1943 and 1959, respectively), accomplished court reorganization (1961), added a bill of rights for local government (1963) and established a state lottery to support education (1966). In 1957 voters said no to the question of calling a constitutional convention. However a series of ground shaking Supreme Court decisions declaring New York's apportionment scheme a violation of the Equal Protection Clause of the national Constitution precipitated a 1965 legislative call for a constitutional convention. The voters approved. For the first time in over a hundred years, Democrats, with the help of Liberal Party votes, gained control of the convention.

Although delegates did not mirror the state's population, they were the most diverse group ever elected to a constitutional convention in New York, including eleven women, eleven African Americans, seven Hispanics and a significant number of delegates of Italian, Jewish and Irish extraction. Two-thirds of the delegates were lawyers with one-fourth of them judges. The alliance of Democrats, Liberal Party delegates and civic reformed produced a substantially revised document which made extensive and far-reaching changes. Among the changes the convention proposed were:

- A reduction in the length of the constitution by half, with the number of articles reduced from twenty to fifteen;
- The elimination of the ban on aid to sectarian schools that had been added in 1894;
- The addition of an exclusionary rule and a conservation bill of rights;
- The assumption by the state of the cost of all state welfare programs over a ten-year period, as well as the cost of the statewide court system;
- The elimination of the governor's pocket veto power, which was balanced by an increase in gubernatorial flexibility in administering the executive branch;
- The removal of apportionment from the hands of the legislature and its placement with a special independent commission;
- Provisions moving the state towards providing free higher education,

- The reduction of the voting age from 21 to 18 (which would later be achieved by the Twenty-Sixth Amendment to the Constitution).
- The removal of the requirement that all general obligation debt be approved by the voters.

The delegates produced a more streamlined document with minimal restrictions, a constitution designed for an activist state. No constitutional convention in New York was more responsive to the needs of the cities, but its bold initiatives in the area of welfare, education, and community development, among others, proved too much for the voters.

Convention President Anthony Travia, Assembly Speaker, submitted the changes as a new constitution. Voters would have to say up or down to all the changes: all or nothing at all. That decision proved fatal. Opposition to many of the controversial provisions, combined with tepid support from reformers, resulted in a stunning defeat.

In 1977 and 1997, voters answered “no” to calls for constitutional conventions, leaving the state with the constitution, as amended, adopted in 1894. The next every call will be placed on the ballot in November, 2017.

More on the history and current constitution can be found in Peter Galie, *Ordered Liberty A Constitutional History of New York* (Fordham University Press, 1996), and Peter Galie and Christopher Bopst, *The New York Constitution*, 2nd ed (Oxford University Press, 2012).