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NEW YORK STATE CONSTITUTIONAL REFORM–PAST POLITICAL BATTLES IN CONSTITUTIONAL LANGUAGE*

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New York State, one of the thirteen original colonies that revolted against King George III and banded together to form an infant nation, has had a written constitution since 1777 Drafted by three bright young lawyers, John Jay, Robert Livingston, and Governeur Morris, the constitution was adopted in Kingston, a small village on the Hudson River, and it became effective on April 20, 1777, without a popular referdum. War conditions overshadowing the new state did not permit a popular referendum to be held; instead, the new document was read from the steps of the county courthouse and became the law of the land immediately

Over the years, changing conditions and new governmental philosophies, such as the wave of Jacksonian democracy, and major political battles, such as the New Deal legislation of the 1930's, required that the original constitution be amended and re-amended, drafted and re-drafted, in order to express the current wishes of the people. Since 1777, amendments and re-drafted constitutions have come from three sources: (1) a constitutional convention; (2) a constitutional commission; or (3) separate amendments initiated by the state legislature. New York State has never adopted the direct popular initiative as a method of

* The present paper is part of the author's larger study of various aspects of the 1967 New York State Constitutional Convention. The author is grateful to the Carnegie Foundation of New York and the National Municipal League for their generous support of this study which is part of a series of similar studies of upcoming constitutional conventions in other states.

For further general background in this area, *see generally* E. BREUER, CONSTITUTIONAL DEVELOPMENTS IN NEW YORK *1777-1958* (1958); A. O'ROURKE & D. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE (1943); J. DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK (1915); and C. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK (1906). *See also* REPORTS OF THE NEW YORK (STATE) CONSTITUTIONAL CONVENTION (1938) (Popularly known as the "Poletti Report").

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amending its constitution;[1] all changes must pass through the legislature or be proposed by a duly constituted convention. Throughout its history, the state of New York has convened nine constitutional conventions[2] and two constitutional commissions.[3] In addition, numerous bills to amend the constitution were passed by the legislature and placed on the ballot for approval or rejection by the electorate.[4]

A reading of the present New York State Constitution, together with a reading of the state's political history, reveal that a major share of the constitutional provisions are outgrowths of historic political struggles. Victories in political battles translate themselves into dignified constitutional language. In the political arena, victories may be wiped out subsequently by the shifting majorities, and hard-won political settlements may again become unsettled. Therefore, there is a universal urge to rivet into the state's constitution the details of a hard-won political compromise or victory so that the battles will not be re-fought anew with each temporary shift in the legislative majority. Thus, we in the twentieth century are beneficiaries of detailed constitutional provisions that were hammered out in the political arena and that have lain to rest old political battles. For example: The state's first constitution did not provide a procedure for adopting amendments or calling constitutional conventions and, therefore, the Constitution of 1777 remained unchanged until 1801, when the legislature, acting on its own authority, passed a bill[5] which convened the state's second constitutional convention. A precedent was set thereby and a third constitutional convention was called in 1821 by legislative action.[6] However, by the 1840's the full force of Jacksonian democracy was reaching its peak and popular demand increased for the calling of the fourth convention, but the legislature, which was the only recognized source for a convention "call," refused to act. Eventually, under mounting pressure, the fourth constitutional convention was called in 1846[7] and a wholly new con-

1. The popular initiative is a device for direct democracy adopted in twenty-two states as part of the reforms of the Progressive Era in the early 1900's. *See* Note, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717 (1966).

2. In 1777, 1801, 1821, 1846, 1867, 1894, 1915, 1938 and 1967.

3. The Constitutional Commission of 1872 and the Judiciary Commission of 1890.

4. For example, between the Convention of 1938 and the next convention, which convened in 1967, 115 amendments were placed on the ballot. Three times as many amendments were introduced as bills but never survived the legislative procedure.

5. Law of 1801, ch. 159, N.Y. Laws [1801].

6. Law of 1821, ch. 90, N.Y. Laws [1821].

7. Law of 1845, ch. 252, N.Y. Laws [1845].

stitution was drafted. The most significant feature of the Constitution of 1846 was the provision which automatically places on the ballot every twenty years the question: "Shall there be a Convention to revise the Constitution and amend the same?" [8] Through a dignified constitutional provision, political struggles have been avoided because the question of calling a convention is placed before the voters periodically without possible interference by the governor or legislature.[9] Although the political victory of the reformers was neatly written into the constitution, their victory was not complete. In 1886, a serious omission was discovered: after the electorate voted overwhelmingly in favor of calling a convention, a political struggle between the governor and the legislature developed over the method of electing delegates to the convention[10] and, as a result of the political deadlock, the convention was delayed nine years, until a new governor was elected and an executive-legislative agreement was reached. Again, to prevent the recurrence of such crippling political battles, the reformers at the Convention of 1894 wrote detailed constitutional provisions establishing a method for selecting delegates to future conventions and prescribing the date on which future conventions must convene.[11] This brief history of the amending procedure and the surrounding political battles is an essential preface to an understanding of the state's constitutional development during the twentieth century.

Constitutional Reform in the Twentieth Century

During the twentieth century, the proponents of constitutional reform in New York State were greatly aided by prior political victories written into the constitution: the question of calling a convention is

8. It is interesting to note that Thomas Jefferson, arguing that the dead hand of past generations should not control the present, recommended that the Federal Constitution be revised every twenty years. Although rejected at the Federal level, the twenty-year referendum provision was incorporated into the state constitution, N.Y. Const. art. XIX, § 2 (1846). Under this provision, the question of calling a convention may also be placed on the ballot "at such times as the legislature may by law provide." *Id.*

9. Experiences in New Jersey and other states illustrate that the calling and timing of a constitutional convention may become a hot local political issue.

10. Obviously, the method of selecting delegates would pre-determine which political party or faction would control the convention and write the amendments.

11. The constitution provides for the election of three delegates from each senate district and fifteen delegates-at-large. "The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed." N.Y. Const. art. XIX, § 2 (1894).

placed automatically before the people; the method of selecting delegates is prescribed; and the convention's opening date is fixed. On these issues a political deadlock could not develop to prevent a convention from being held.

Under the present constitution, two amending procedures are provided: (1) A duly constituted convention offers proposals which are placed directly before the electorate on a referendum ballot without submission to, or approval by, the Governor or Legislature; (2) A bill, proposing to amend the constitution, is passed by a majority vote in both houses of the legislature. The identical bill is repassed by the next legislature (*i.e.*, the next legislative session following a general election of its members). The bill, in the form of a referendum question, is placed on the ballot without submission to the governor and the amendment becomes effective if a majority of those who vote on the question vote affirmatively.[12]

Convention of 1915

Under the automatic referenda provision, the question of calling a convention would have been submitted to the people at the general election in 1916. However, Governor Glynn, fearful that the constitutional question would be mixed with and overshadowed by national and state political issues, suggested that the Legislature submit the question to the people at a special election. This was done and at a special election in April 1914, the voters approved the calling of the Constitutional Convention of 1915.

The delegates were adventurous and reform-minded. They proposed thirty-three changes in the constitution, hoping to update the document and create a modern, efficient state government. Among their proposals were: changes in the judiciary article; the establishment of an executive budget; and the strengthening of the office of the Governor through extensive reorganization of the governmental bureaucracy and through a short ballot with enlargement of the Governor's appointment and removal powers. The thirty-three changes were packaged into five proposals and presented to the voters in November 1915. By a substantial mar-

12. The constitution does not expressly provide for the creation of a constitutional commission. However, it is argued that, since the legislature itself could initiate amendments, the legislature could request advice from any source on the need for specific amendments. In essence, a constitutional commission is merely a study committee aiding the legislature. Proposals offered by a constitutional commission must be introduced as bills in the legislature and must travel the legislature amending route.

gin, all five proposals were rejected by the electorate. In the post-election analysis, the argument was made that the voters did not disapprove of the substance of the amendments, but that they objected to the packaging of disparate controversial amendments into five large proposals presented on a take-it-or-leave-it basis. Quite clearly, every word change could not be separately voted upon by the electorate; some grouping was necessary. However, the fear that the proposed amendments could be wrongly packaged has haunted every constitutional convention since 1915, and the fear was freshly reinforced last year when the voters rejected a wholly new constitution that was presented as a single referendum question.

Despite the action of the legislature in placing the convention question on the ballot in 1914, the question was automatically placed on the ballot again in 1916, as mandated by the twenty-year referenda provision of the constitution. Prior action by the legislature did not break the periodic twenty-year cycle of referenda. By a wide disapproving margin, the voters rejected another convention. Nevertheless, despite the voters' rejection, the work of the Convention of 1915 was not entirely lost. Considerable amount of research, background studies, and position papers had been prepared for the delegates. The legislature had created a special study commission which, with the aid of private and academic organizations, produced comprehensive studies that spurred numerous constitutional amendments in subsequent years.

Governor Smith was particularly eager to salvage the sensible work the Convention of 1915 had produced, especially in the area of reorganization of the state governmental structure which had become a loose, unmanageable collection of agencies and departments. In 1923, the legislature adopted a revised article 5, incorporating many of the proposals for government reorganization offered by the Convention of 1915. The new article 5 was placed on the ballot at the general election of 1925 and won approval of the voters. Two years later, in 1927, the voters accepted an amendment proposed by the legislature for the establishment of an executive budget system. Thus, twelve years, not a long time in constitutional law, was needed for the legislature to salvage the main work of the Convention of 1915.

Judiciary Convention of 1921

However, not all rejected proposals offered by the Convention of 1915 subsequently found their way into the constitution. The revised

judiciary article drafted by the Convention of 1915 was not subsequently adopted by the Legislature and placed on the ballot. Nevertheless, dissatisfaction with the antiquated and cumbersome judicial system continued to mount and, in response to popular demands for reform, the legislature adopted a new technique in constitutional revision: A limited constitutional convention.[13] It was thought unnecessary to open up the entire constitutional document for review, since only the judiciary article was the focus of dissatisfaction. The legislature, acting on its own initiative, could create a constitutional commission or convention with limited jurisdiction, *i.e.*, with an explicit mandate to study only one area or article in the constitution. Such a limited commission or convention may be created by the legislature, but the convention called by the voters pursuant to the twenty-year automatic referenda is per se a general convention with unlimited jurisdiction over the whole constitutional document which may not be restricted by legislative action.

The Judiciary Convention of 1921 was composed of thirty delegates, chosen from the state legislature and the legal profession, including senators, assemblymen, a Court of Appeals judge, justices of the appellate division and the supreme court, the state Attorney General, and members of the local bar. The judiciary article was studied in depth and a general revision of the article was drafted and recommended by the convention in its report to the legislature. However, the revised judiciary article, which included several proposals suggested by the Convention of 1915, was not adopted by the legislature,[14] and badly needed court reform again was postponed.

Convention of 1938

At the general election on November 3, 1936, at the time when the Great Depression was reaching its deepest trough, the voters approved a call for the state's ninth constitutional convention.[15] Three major factors greatly influenced the thinking of the delegates. First, the suffering caused by the Great Depression and the New Deal experi-

13. Law of 1921, ch. 348, §§ 1-4, N.Y. Laws, 144th Sess.

14. Although called a "convention," the Judiciary Convention of 1921 was in fact a commission that was obligated to report its recommendations to the legislature which held the power to adopt or ignore the recommendations. A true convention, on the other hand, does not report to the legislature, but instead submits its proposals directly to the people.

15. The question had been placed on the ballot automatically pursuant to the periodic twenty-year provision in the constitution.

ments being newly launched in Washington convinced the delegates that the state legislature should be given more power to engage in social programs. With this in mind, the delegates drafted a new article 17, giving the legislature broad powers in the field of social welfare, and a new article 18, permitting the expenditure of public funds for urban renewal and public housing for low-income families. The second influential factor was the prevailing philosophy of constitutional law. It was believed that the state legislature could not enact social welfare programs unless the constitution expressly granted the authority for such programs, and such authority, it was believed, could not be derived from the state's general welfare or police powers. Thus, the new welfare and housing articles were written in painful detail, containing much that could be described as statutory matter. Thirty years later, at the next constitutional convention, it was argued that the welfare and housing articles were unnecessary because the legislature held inherent powers to legislate in these areas and that a simple statement concerning the "health, welfare and safety of the citizens" would be adequate. The third factor that influenced the delegates' thinking was the overwhelming defeat of the proposals offered by the Convention of 1915. Eager to avoid the packaging error committed by the Convention of 1915, the delegates in 1938 adopted fifty-eight proposed amendments, but were careful to offer them in nine separate questions on the ballot, with the more controversial changes set forth separately. Of the nine referendum questions offered, six won overwhelming approval, while three were rejected. The approved amendments included the provisions for urban renewal and low-rent housing and the use of public money and credit for social welfare programs. In addition, the education article was amended to permit the Legislature to expend public funds for student transportation to parochial schools. The purpose of this amendment was to overrule expressly a decision of the Court of Appeals which had barred such expenditure.[16] Of the three rejected proposals, one proposal would have permitted extensive judicial review of all administrative action—a clear reflection of the legal profession's distrust and antagonism toward the newly emerging administrative agencies.[17] With the rejection at the polls, this proposal was

16. Judd v. Board of Educ. of Union Free School District No. 2, Town of Hampstead, 278 N.Y. 200, 15 N.E.2d 576 (1938).

17. A bill with a similar provision requiring automatic judicial review of determinations by federal administrative agencies was passed by Congress and vetoed by President Roosevelt. H.R. 6324, 76th Cong., 1st Sess. (1939), popularly known as Logan-

abandoned and did not become part of the constitution by the procedure of legislative amendment.

Convention of 1967

With the running of the calendar, the question "[s]hall there be a Convention . . ." was placed on the ballot on November 5, 1957 and, by a narrow margin, the voters rejected a call for a constitutional convention. The newspapers throughout the state were opposed to the call and there appeared to be no major social problem which commanded public attention and needed constitutional solution. Further, the small rural villages and towns in upstate New York, mainly Republican, were fearful that a convention, if called, would be dominated by delegates from the urban and suburban areas surrounding New York City, mainly Democratic. The upstate-downstate cleavage plays a decisive role in New York State's political history and explains the rejection of the convention call in 1957.

By 1965, however, the political climate had changed. In the presidential election of 1964, the landslide vote for President Johnson delivered both houses of the state legislature to the Democrats. Since the Democrats had not controlled both houses in thirty years, they promptly took advantage of their new opportunity and passed a bill placing on the ballot the question whether a constitutional convention should be called.[18] It was hoped that the Democrats, with their new found legislative majority, would also control the convention if the people approved the call. At the general election of 1965, the voters were receptive to a call for a convention. Widespread dissatisfaction with the state's outmoded court system, substantially unchanged over one hundred years, and gross under-representation of the new suburban areas in both houses of the legislature were two major reasons for the voters' approval of the call for the Convention of 1967.[19]

Although the constitution fixes a method and time for the election of delegates to conventions, there is no requirement that the delegates must run and be elected on partisan party labels. Reform groups throughout

Walter Bill.

18. Law of 1965, ch. 371, §§ 1-3, N.Y. Laws, 188 Sess. Because it is a regular bill, this law required the approval of the Governor.

19. *See* editorials in N.Y. Times, June 10, 1965 and October 11, 1965, urging the voters to approve the call for a constitutional convention. Political and social leaders formed a Citizens Committee for a Constitutional Convention to win support for a new convention.

the state, with the support of many newspapers, urged the Republican and Democratic party officials to agree on a single slate of delegates-at-large, to be composed of acknowledged leaders from education, social services, the judiciary, and the bar. The suggestion was rejected by Governor Rockefeller, the leader of the state's Republican Party, and the delegates ran on party labels.[20] The Democrats won a majority of the delegate seats and, therefore, controlled the convention.

The first major issue that confronted the delegates was the length of the constitutional document and the form in which the new amendments would be presented to the voters, *i.e.*, in a single referendum question on a wholly new document, or several referendum questions on key constitutional changes. There was strong sentiment for a short, simple constitution, similar to the Federal Constitution. However, while legally possible, it was almost politically impossible to accomplish. Each pressure group, faction, organization, union, society, and club agreed that all extraneous, statute-like matter should be cleaned out of the constitution, *except* the detailed article or provision in which they had a vested interest. In addition, new interest groups came forth demanding constitutional protection for rights which, they argued, could not be permanently protected by statutes. The pruning and cutting of the old constitution raised the basic question: "What belongs in a constitution?" —in essence, "What is constitutional law?" Never fully answered, the question evoked the realistic response that any provision put into the constitution becomes, ipso facto, constitutional law and that the phrase "statutory matter in the constitution" had no real legal meaning. Nevertheless, it was generally agreed that the constitution had grown into a voluminous, repetitive, outdated document, replete with inflexible, detailed provisions that could be better handled by statutory law.[21] To solve this dilemma, *i.e.*, whether a provision was constitutional or statutory in nature, the suggestion was offered that a new body of law be created between the statutes and the constitution. Statutes can be enacted, amended or repealed in one session of the legislature and, therefore, cannot reliably protect minority rights against a temporary legislative majority. Constitutions, because they are more difficult to amend, necessitating several procedural steps over a longer period of time and a popular referendum, grant the maximum protection of minority rights that is

20. *See*, N.Y. Times, January 21, 1966 and January 29, 1966.

21. *E.g.*, a single article, the judiciary article, was longer and more complex than the entire Federal Constitution.

possible in a democracy. The newly suggested body of law, to be created between the constitution and the statutes, would be called "a statute of restrictions," more popularly known as a "two-part constitution." Detailed matter could be removed from the constitution and enacted by the legislature into the statute of restrictions. Unlike traditional statutes, a right or power granted in the statute of restrictions could be amended or repealed only by legislative action in two successive years with the approval of the governor each year. Thus, the protection of the statute of restrictions would be less than constitutional, yet more than statutory.[22]

The widespread desire for a short, simple constitution, patterned on the Federal Constitution, sprang not from the desire for literary excellence in public documents, but rather from two very practical problems: A detailed constitution requires continual amending to update the provisions; and the elaborate amending process results in delays and frequent popular referenda. For example, before the Superintendent of Public Works could correct a dangerous curve in a state highway that ran through a forest area, the constitution had to be amended, because the forest was preserved in the constitution. Similarly, an administrative change in the school system of the city of Buffalo required a statewide constitutional referendum. A new, simple constitution, it was hoped, would avoid these problems, because general statements of government policy would not require constant amendments, and the implementation of the general policies would be handled by more flexible statutes and local laws.

Despite dire warning and reminders about the popular rejection of the work of the Convention of 1915, the Convention of 1967 voted to submit to the people a single, wholly rewritten constitution which was considerably shorter and simpler than the existing document and with as much of the "statutory matter" removed as was politically possible.[23] Following an emotional public debate that raised many issues, such as the expenditure of public funds for private and parochial education

22. The idea of a two-part constitution was first employed in 1964, when the constitution was amended to provide for a "statute of local governments" N.Y. CONST. art. IX, § 2 (1964). The mechanism of a two-part constitution was carried over and used in the new constitution in the local governments article only; it was not employed throughout the constitution.

23. It was argued that a wholly new, modern constitution required rewriting and reshuffling of provisions in the existing document and, therefore, the closely knit, integrated document must be offered as a single package to replace the entire old constitution.

and the state's responsibility for local welfare costs, the new constitution went down to dramatic defeat, failing in every county in the state. Again, the post-election analysis suggested that the people were not opposed to the substantive changes in the new document; they opposed the single package, offered to them on a take-it-or-leave-it basis.[24]

The new constitution, like a bride, contained something new and something old. The old amending and convention procedures that had worked so well over the years were carried over unchanged into the new document. Under a new article, the Governor was given broad powers to reorganize the state's departments and agencies without prior approval of the legislature. Also, the legislature was mandated to adopt a code of administrative procedures which must contain broad review, both judicial and administrative, of all agency determinations, rules and regulations. Imbedded in the old constitution was a lengthy and elaborate apportionment formula which, Al Smith complained, guaranteed the Republicans a "constitutional majority" in both houses of the legislature because the formula gave over-representation to upstate rural regions. On winning control of the Convention of 1967, the Democrats were anxious to remove the old formula[25] and to find a better method of apportioning legislative seats. The new constitution provided that, after every decennial census, the legislative district lines would be redrawn by a five-member bipartisan commission, headed by an appointee of the state's highest court. It was intended that the commission would serve as an automatic mechanism for obtaining fair reapportionments every ten years.

The biggest disappointment in the new constitution was the judiciary article which was carried over substantially unchanged into the new document. The existing maze of courts, with conflicting and overlapping jurisdictions, was the focus of considerable criticism throughout the state and particularly in New York City.[26] Rather than modernize

24. In fact, many of the Republican leaders who, for local political reasons, did not wish to attack the substance of the new constitution attacked instead the "arrogance" of the Democrats in combining all the constitutional changes into a single package. Thus, the form of the presentation on the ballot became as large a political issue as the constitutional issues themselves.

25. The state's constitutional apportionment formula had been knocked down two years earlier as being violative of the U.S. Supreme Court's one-man-one-vote rule, WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964). The constitutional delegates had run within Senate district lines established under a court decree. Orans v. Rockefeller, 17 N.Y.2d 107, 216 N.E.2d 31, 269 N.Y.S.2d 97 (1964).

26. For an intelligent discussion of the problems in the court system, *see* Weinstein,

and simplify the cumbersome judicial structure, the delegates left the courts untouched and added a new undefined judicial level, "an administrative court to determine violations other than felonies." Knowledgeable observers and constitutional reformers had warned that the judiciary committee of the convention should not be dominated by judges and lawyers, because members of the legal profession, with their instinctive conservatism, would not revamp from top to bottom a court system which was fully understandable to them and in which they had a vested interest. As it happened, a large proportion of convention delegates were lawyers and sitting judges, and the judiciary committee was composed entirely of lawyers, most of whom were members of the bench. Convention debate on proposed changes in the judiciary became a sensitive and embarrassing matter for many convention delegates. Delegates, particularly practicing lawyers, found it difficult to argue the merits of abolishing the traditional system of court patronage, of combining and updating inefficient courts, or of simplifying court procedures, when the sitting judges were on the convention floor as delegates and as members of the committee that would consider the proposals for change.[27] The outcome, an unchanged judiciary article, was predictable.

Conclusion

Despite the overwhelming rejection of the new constitution, the work of the Constitutional Convention of 1967 was not entirely lost. Important social issues were raised in the new document and debated by the citizens. Much important research had been done and many useful proposals had been put forth which will be the source of numerous reforms in the future. And, of course, the amending process through the legislative initiative continues. In fact, a prediction can be made that key proposals offered in the rejected constitution will be placed on the ballot as single propositions and will eventually find their way into the existing constitution.[28]

Improving the Administration of Justice in New York Through Constitutional Reform, 28 Acad. Pol. Sci. Proc. No. 3 (1967).

27. The new constitution gave silent recognition to this problem by providing that judges of the court of appeals shall not be eligible to serve as delegates at future constitutional conventions.

28. The first legislative bill introduced for the 1968 session was a constitutional amendment to permit the state to aid private and parochial schools. This proposal was contained in the new constitution and was the source of a great deal of emotional debate that contributed to the defeat of the new constitution. S. 1, N.Y. (1968).