Democracy, Liberty, and Property

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The State Constitutional Conventions of the 1820s

Edited by Merrill D. Peterson

With a Foreword to the Liberty Fund Edition by G. Alan Tarr

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FOREWORD TO THE LIBERTY FUND EDITION

This volume reproduces key debates from the important constitutional conventions held in Massachusetts, New York, and Virginia during the 1820s. The New York and Virginia conventions drafted constitutions to replace the original constitutions in those states, and voters by sizable majorities approved the new charters. The Massachusetts convention proposed a series of amendments to the state's first (and only) constitution, several of which were approved by voters. The constitutional changes that the conventions introduced not only affected political development in the three states but also, given the states' preeminence within their regions, influenced constitutional change in neighboring states.

In embarking on constitutional reform during this period, Massachusetts, New York, and Virginia were hardly unique. During the first half of the nineteenth century, Americans enthusiastically embraced the view, asserted in the Virginia Declaration of Rights, that "no free government, nor the blessings of liberty, can be preserved in any people, but by . . . a frequent recurrence to fundamental principles."[1] Altogether thirty-eight new state constitutions were ratified from 1800 to the outbreak of the Civil War. Eighteen of these new constitutions were drafted by territories seeking statehood, but the expansion of the Union alone cannot explain the extraordinary burst of constitutional creativity. Eighteen of the new constitutions replaced existing state constitutions, and two replaced the colonial charters under which Connecticut and Rhode Island had continued

1. Virginia Declaration of Rights, Section 15 (1776).

to govern following independence. Indeed, of the twenty-four states in the Union by 1830, fifteen had revised their constitutions by 1860, two of them twice; and during a single decade (1844–1853) more than half the American states held constitutional conventions. New York and Virginia were among those states that rewrote their basic charters during that decade, adopting new constitutions in 1846 and 1851 respectively.

What prompted Massachusetts, New York, and Virginia (among others) to reassess their constitutional foundations during the early nineteenth century? The experience of government under the states' existing constitutions played a vital role. By the 1820s the constitutions of all three states had been in operation for more than forty years, and time had revealed defects that demanded correction.[2] This was hardly surprising: the initial charters in those states had been drafted in the midst of a war for independence by people who lacked experience in constitutional design and self-government. With the passage of time, later generations felt themselves positioned to improve on the work of their predecessors. After all, as a New York delegate put it, "we find constitutions of the states more perfect, the later the period in which they have been made" (p. 142).

As this suggests, the example of other states was likewise important. State constitutional reformers drew both inspiration and guidance from the innovations pioneered in states that had recently written or revised their constitutions. In fact, the models that states emulated were found more frequently in the constitutions of other states than in the Federal Constitution. Delegates regularly referred to the experience of other states in the convention debates. For instance, in proposing a system of gubernatorial appointment with senatorial confirmation, the system found in the Federal Constitution, New York delegate Martin Van Buren noted that the state "constitutions which had been recently formed, and might therefore be in some degree regarded as the most recent expression of the sense of a portion of the American people, were in unison with the plan" (p. 161).

Population shifts within the states also fueled calls for constitutional reform. Many states made use of existing units of government, such as

2. New York did hold a constitutional convention in 1801, but this meeting focused exclusively on the size of the legislature and the operation of the Council of Appointment.

counties or towns, in apportioning representation in one or both houses of the state legislature. For example, the Massachusetts Constitution of 1780 guaranteed representation for each town, and the Virginia Constitution of 1776 provided for the election of two members of the House of Delegates from each county. The problem in Virginia, as in several other states, was that county boundaries had been drawn prior to independence or immediately after it was declared, when state populations were still concentrated along the Atlantic seaboard. When population shifted as a result of intrastate migration, political power did not, and this prompted demands for a more equitable system of representation.

In Virginia, the slaveholding eastern counties, which were dominated by large landowners, exercised disproportionate influence, continuing to control the government even after they no longer included a majority of the population. Dissatisfaction with this situation was the principal factor that led to the 1829–1830 convention. Although the topic of representation dominated debate in the convention and called forth considerable eloquence from both sides, it is doubtful that the debate changed many votes. The eastern delegates feared that western dominance of the government would mean heavy taxation on slaves. As one delegate put it, "Our interests are not identical, and the difference between us arises from property alone. We therefore contend that property ought to be considered, in fixing the basis of representation" (p. 284). Whatever the validity of that view, the eastern delegates offered only limited concessions, and it was not until 1851, when Virginia adopted its third constitution, that representation in the lower house was closely tied to population.

Significant changes had also occurred in political thought and political practice since the founding era, and reformers insisted that the constitutions in their states should be revised to reflect those shifts. In doing so, they were endorsing a distinctive understanding of constitutionalism. In *The Federalist* James Madison cautioned that constitutional change should be infrequent lest popular reverence for the fundamental law be undermined. Madison's advice has been heeded at the national level: the Federal Constitution is more than two centuries old, and it has been amended only twenty-seven times. But most states have rejected Madison's concern. Instead they have followed the advice of Thomas Jefferson, who argued that "laws and institutions must go hand in hand with the progress of the human mind" and that

"as manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."[3] In endorsing Jefferson's recommendation of more frequent constitutional updating, the states have opted for a more matter-of-fact attitude toward their constitutions, treating them as instruments for advancing political goals and susceptible to modification and replacement as circumstances require, rather than as venerated documents.

A final, perhaps less obvious factor encouraging state constitutional innovation during the early nineteenth century was the division of power between nation and state under the United States Constitution. By assigning certain policy concerns to the states, the Constitution ensured that when conflicts over these matters arose, they would be resolved by state law and often by state constitutional prescription. A prime example is the relations between church and state. The First Amendment prohibits Congress from "mak[ing] laws respecting an establishment of religion," a provision that not only forbade the establishment of a national church but also, in deference to federal diversity, prevented Congress from interfering with the religious establishments that existed in the states. As criticism of these establishments mounted in the decades following independence, state constitutional conventions became the venue for discussion about their reform or elimination.

Virginia had already eliminated all vestiges of religious establishment in the state with the adoption of the famous "Bill Establishing Religious Freedom," so the issue of church and state did not arise at its 1829–1830 convention. New York too had no formal establishment, but delegates to the 1821 convention were troubled by the test oath for public office and by Chancellor Kent's opinion in *People v. Ruggles* (1811), in which he declared that Christianity was "part and parcel of the laws of the land." To eliminate these remnants of establishment, the New York delegates inserted

3. Madison insisted in *Federalist* No. 49 that frequent amendment of the constitution "would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability." Jefferson's position is elaborated in his letter to Samuel Kercheval, July 12, 1816, reprinted in *The Writings of Thomas Jefferson,* ed. Albert Ellery Bergh (Washington, D.C.: Thomas Jefferson Memorial Association, 1905), 15:41.

language in the Bill of Rights that eliminated the test oath, repudiated *Ruggles,* and reaffirmed the state's commitment to religious liberty.

In Massachusetts the issue of church and state proved particularly contentious. The 1780 constitution had established a general assessment for religion, obliging towns and villages to "make suitable provision at their own expense" for "the support and maintenance of public Protestant teachers of piety, religion, and morality."[4] The debates in the Massachusetts Convention of 1820–1821 reveal a broad consensus in favor of, in the words of one delegate, "the right of every individual to worship God in a manner agreeable to the dictates of his own conscience" (p. 34). Most delegates also agreed that republican government depended on the moral character of the citizenry and that religion played a vital role in instilling virtue. But they disagreed about "the propriety of mixing civil and religious institutions" (p. 38) and about whether eliminating tax support for churches would undermine religion and jeopardize republican government. Ultimately the Massachusetts delegates sought to retain a modified establishment that extended benefits to non-Protestant teachers, but voters refused to ratify the compromise they crafted, and in 1833 by amendment they altogether eliminated public support for religion.

Another key issue that the Federal Constitution left to the states was voting qualifications. Article I, section 2, of the Constitution authorizes any person who is qualified to vote for the lower house of a state's legislature to vote for members of the House of Representatives. In so doing, it implicitly recognizes the authority of the states to establish qualifications for those voting in state elections. Initially, the original thirteen states restricted the franchise to either freeholders or taxpayers. Some states admitted to the Union from 1800 to 1820, such as Ohio, adopted similar restrictions on suffrage while others, such as Alabama, instituted white manhood suffrage. From the 1820s onward, property-holding and taxpaying requirements for voting came under sustained attack in state constitutional conventions.

Those defending property qualifications for voting portrayed the franchise as a privilege rather than as a right and insisted that, in the words of a Massachusetts delegate, "it was a distinction to be sought for; it was the reward of good conduct. It encouraged industry, economy and prudence;

4. Art. III, Declaration of Rights, Massachusetts Constitution (1780).

it elevated the standard of all our civil institutions, and gave dignity and importance to those who chose, and those who were chosen" (p. 57). Other delegates argued that extension of the franchise would "jeopardize the rights of property, and the principles of liberty," enabling the many poor to confiscate the property of the wealthy few (p. 175). Proponents of manhood suffrage responded that limiting the franchise was inconsistent with the natural equality of all men recognized in the Declaration of Independence. If human beings were equal by nature, then they should have an equal voice in governing. They insisted that "possession of land [was no] evidence of peculiar merit" and that assertions that the vote might be misused did not justify qualifications that were "invidious and anti-republican" (pp. 339, 352).

After fierce debate, the Massachusetts Convention of 1820–1821 and the Virginia Convention of 1829–1830 both expanded the franchise, with Massachusetts permitting taxpayers to vote and Virginia extending the vote to heads of families and certain types of leaseholders. But neither state embraced manhood suffrage. In contrast, the New York Convention of 1821 jettisoned its freehold requirement. By giving the vote to white males who paid taxes or otherwise made a contribution to the community through service in the militia or as firemen or through work on the roads, it in practice established white manhood suffrage, expanding the state's electorate by 160,000 voters.[5] At the same time, however, New York introduced an onerous freehold requirement for African-Americans that effectively disenfranchised all but a few black voters.

A final area left to the states involved the structure of state governments. The Federal Constitution requires that the national government guarantee to each state a "republican form of government," but it otherwise permits the states broad leeway in designing their institutions, provided they are republican in character. The states have taken advantage of this opportunity to experiment. So, for example, Pennsylvania and Vermont initially established unicameral legislatures, New York and New Jersey lodged ultimate appellate authority outside the judiciary, and several states permitted

5. Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* (New York: Fordham University Press, 1996), 90.

removal of judges by address, that is, on the recommendation of the legislature even in the absence of an impeachable offense.

In the Massachusetts convention, the key structural issue was the system of representation. Under its 1780 constitution, Massachusetts apportioned representation in the Senate on the amount of taxes that residents paid, and it guaranteed representation to each town in the House, with proportionately more representatives for more populous towns and cities. Those who defended the system of representation in the Senate noted that "all government is a modification of general principles and general truths, with a view to practical utility" (p. 92). They argued that the existing system provided a salutary check on "intemperate legislation" and insisted that "property should have its due weight and consideration in political arrangements" (pp. 84, 91). Because "no practical inconvenience has been felt" under this system, it was unwise "to exchange the results of our own experience for any theory" (p. 78). In contrast, those who favored basing representation in the Senate on population contended that "our government is one of the people, not a government of property" (p. 64). Invoking the revolutionary slogan of no taxation without representation, they argued that it did not justify unequal representation based on the amount of taxes paid. Adequate checks and balances could be established, and property rights protected, without directly representing wealth. Ultimately, the convention declined to make any change in the apportionment of the Senate.

For the New York Convention of 1821, debate centered on two distinctive institutions, the Council of Revision and the Council of Appointments, that were created by the state's 1777 constitution. That constitution lodged the veto power over laws that were "hastily and inadvisedly passed" in the Council of Revision, which consisted of the governor, the chancellor, and judges of the supreme court.[6] It is not altogether clear whether this institution, apparently modeled on the king of England's Privy Council, was designed to strengthen the executive, which otherwise might have lacked the fortitude to oppose the legislative will, or to weaken it by requiring the concurrence of a council to veto bills. Whatever the case, the council played an active role in legislation, vetoing 169 of the 6,500 bills passed by the

6. New York Constitution, Art. III. Data on the council's operation relies on Galie, *Ordered Liberty,* 61.

legislature (2.6 percent), although the legislature overrode almost one-third of its vetoes.

Although there was little support in the convention for the retention of the Council of Revision, the delegates divided over what should be done with the veto power. Some radical delegates favored a gubernatorial veto that could be overridden by a simple majority in the legislature, arguing that requiring an extraordinary majority "tends to perpetuate the aristocracy that exists in the constitution" and interferes with popular government (p. 144). However, most delegates concluded that "the experience of the community shews, that no essential injury" would result from requiring a two-thirds majority to override gubernatorial vetoes, because "a wise and salutary law" would generate broad support (p. 148). One indirect effect of the abolition of the Council of Revision, unnoted by the delegates, was a broader exercise of judicial review by the courts. Judges who had been reluctant to invalidate laws that had survived scrutiny by the Council of Revision became much more willing to strike down legislation after its abolition.[7]

New York's 1777 constitution lodged the appointment power in a Council of Appointment, composed of the governor and four senators elected annually by the legislature. Although the expectation was that the governor would appoint officials with the advice and consent of the council, the constitution did not expressly state that, and the senators on the council claimed a concurrent power of nomination. When New York's 1801 convention confirmed this concurrent power of nomination, it opened the door to a system of blatant political patronage that ultimately undermined support for the council. The 1821 convention voted unanimously to abolish the Council of Appointment, but this raised the question of where the appointment power should be lodged. The eventual answer was a political compromise, under which various local officials—justices, sheriffs, county clerks, and coroners—would be nominated and selected at the county level; all other judges would be appointed by the governor with the advice and consent of the Senate; and all other officials—such as the state treasurer and attorney general—would be appointed by the legislature.

Perusal of the debates on these and other matters reveals a considerable political sophistication among the delegates. They readily appeal to

7. For data on this, see Galie, *Ordered Liberty,* 80.

fundamental principles to bolster their arguments, invoking the Declaration of Independence's natural equality of human beings and the natural rights possessed by all human beings as a consequence of that equality. Writers such as Locke and Grotius are regularly cited, and delegates often draw on English and Roman, as well as American, history to support their arguments. Experience likewise plays a crucial role in the convention deliberations, with delegates assessing not only the effects of existing practices and institutions in their own states but also the effects of alternative constitutional arrangements in sister states.

The importance of the task of constitutional reform attracted the most talented political figures in the states to the conventions. Thus the Virginia convention included two former presidents (James Madison and James Monroe), the chief justice of the Supreme Court (John Marshall), future justice Philip Barbour, and two United States senators, including John Randolph, who attended sessions with crepe on his hat and sleeves in mourning for the old constitution.[8] The Massachusetts convention boasted former president John Adams, Supreme Court justice Joseph Story, and future senator Daniel Webster, among others, while the New York convention included future president Martin Van Buren, Chancellor James Kent, and Chief Justice Ambrose Spencer.

Yet the convention debates also highlight the contributions of lesser known figures. Constitutional conventions are a peculiarly American invention, designed to provide ordinary citizens an opportunity to chart their political futures. The seriousness and good sense exhibited by virtually all the delegates confirms how important political responsibilities can elevate those entrusted with them. And reading these debates can inform and instruct later generations that may likewise be called upon to set the direction for the future course of their political societies.

Indeed, this collection of convention debates is just as timely now as when it was first published in 1966. In the intervening decades scholars such as Gordon Wood, Bernard Bailyn, and Donald Lutz have revolutionized the study of the American founding, highlighting the political alternatives available to the founding generation and the deliberation that went

8. John A. Dinan, *The Virginia State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 2006), 5.

into their choices among those alternatives.[9] This volume complements that research, showing that as the nation grew and developed, nineteenth-century Americans had to confront anew the perennial question of how to guarantee liberty and promote self-government. Also, since the initial publication of these debates many countries throughout the world have thrown off dictatorships. This volume provides a model of self-government, of popular participation in making fundamental political choices, that can serve as an inspiration to those struggling to secure liberty and create viable popular governments. Finally, for students this volume illustrates how political liberty can encourage and elevate public discourse. By reading and reflecting on these debates, they can better understand the enduring issues relating to liberty and popular rule that they will confront as citizens.

G. Alan Tarr

Suggested Further Reading

Recent decades have witnessed a burgeoning interest in American state constitutions and American political development. Listed below are sources pertinent to constitutional development and constitutional debates in Massachusetts, New York, and Virginia, and in the American states more generally, from the beginning of the nineteenth century to the outbreak of the Civil War.

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GENERAL INTRODUCTION

The constitutional convention has been called "America's basic institution." It developed in the actual process of state-making during the American Revolution. When the people of the thirteen colonies declared their independence, they had not only to prove their claim on the battlefield but also to reestablish the foundations of political authority. The fundamental principle was stated in the Declaration of Independence: "That governments are instituted among men, deriving their just powers from the consent of the governed." But how could the people, thrown into the figurative state of nature by the dissolution of old bonds and allegiance, reduce the principle to practice? History furnished no models; and political philosophers, though they had speculated on the sovereignty of the people, had not descended to the lowly realm of political means and institutional contrivance to implement their theory.

The Revolutionary Americans discovered the answer to the riddle in the constitutional convention. A product not of abstract theory but of developing practice, of essentially *ad hoc* experimentation under the trying conditions of the Revolutionary War, the first state constitutions were at best imperfect realizations of the principle of popular consent in the making of government. In 1780, however, the Massachusetts constitution produced a model from which the theory of *constituent sovereignty* could be formulated. It contained three main elements. First, the people, through their elected delegates, "represent" their sovereignty in a convention called to constitute a government. Second, the constitution thus framed is ratified by the people and given effect by their majority. Third, the people retain the right to revise, and presumably to abolish, the constitution by the ongoing exercise of their sovereignty.

It was scarcely to be expected that the first state constitutions would endure beyond the age that produced them. The age was a time of peril; American society was in its infancy; self-government was a daring experiment; and democracy had not been born. "In truth," Thomas Jefferson later observed,

> the abuses of monarchy had so much filled all the space of political contemplation, that we imagined everything republican which was not monarchy. We had not yet penetrated to the mother principle, that "governments are republican only in proportion as they embody the will of their people, and execute it."

The movement for the reform of the original state constitutions got underway after 1800, but the principal impetus developed in the years following the Peace of Ghent. Problems of war and foreign relations receded from view, and the people turned inward to catch up with nearly a half-century's growth and to fix the direction of further advance. The mere process of growth made manifest the errors and defects of the Revolutionary state constitutions. Where they obstructed progress or blocked the aspirations of newly ascendant groups in the community, there were demands for constitutional reform; and backed by the force of Revolutionary ideas of freedom and equality, these demands became irrepressible. The expanding American West opened new political vistas. Six new states—Indiana, Illinois, Mississippi, Alabama, Missouri, and Maine—entered the Union between 1816 and 1821. Their constitutions, while in most respects imitative of Eastern models, registered important democratic gains, particularly in the provision for universal white manhood suffrage. Of the original states, only Maryland had taken this step.

All the states felt the pressure for democratization, and slowly, haltingly, responded to it. Democracy was the political talisman of the new age—the age that had its symbol in Andrew Jackson, elevated to the Presidency in 1829. "There was a kind of democratic fanaticism in the air," wrote a prominent historian of several decades ago. "A kind of metaphysical entity called the People (spelled with a capital) was set up for men to worship. Its voice was the voice of God; and, like the king, it could do no wrong." But many Americans challenged the wisdom or the legitimacy of this voice. From conviction or habit or interest—or all together—they were attached to established institutions and profoundly distrustful of this brazen pretender King Numbers. The confrontation between conservatives and democratic reformers—the old order and the new—occurred in many areas of public