



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 19
Number 2 *New York State Constitutional
Decisions: 2002 Compilation*

Article 20

April 2015

New York's Statutory Bill of Rights: A Constitutional Coelacanth

Robert Emery

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Legal History Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Emery, Robert (2015) "New York's Statutory Bill of Rights: A Constitutional Coelacanth," *Touro Law Review*. Vol. 19: No. 2, Article 20.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol19/iss2/20>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

New York's Statutory Bill of Rights: A Constitutional Coelacanth

Cover Page Footnote

19-2

NEW YORK'S STATUTORY BILL OF RIGHTS: A CONSTITUTIONAL COELACANTH

*Robert Emery**

Article I of the New York State Constitution contains the state's Bill of Rights.¹ Article 2 of the New York State Civil Rights Law contains the state's Bill of Rights.² The statutory Bill of Rights dates back to 1787,³ the constitutional only to 1821.⁴ The two bills guarantee different rights, but the rights they protect are equally important. Thus, for instance, the constitutional Bill protects the citizen against deprivation of rights "unless by the law of the land, or the judgment of his or her peers," guarantees trial by jury, protects religious liberty;⁵ the statutory bill states the fundamental principle that authority is "derived from . . . the people," provides that only the legislature can levy taxes, and guarantees the right to bear arms.⁶ Americans are used to constitutional bills of rights, but they find statutory bills of rights strange, at best foreign. What is the origin, history, and nature of New York's statutory Bill of Rights? Why does it coexist with a constitutional instrument of the same name and what seems to be similar functions? Does it have any role to play today, in modern New York?

I. BACKGROUND OF THE STATUTORY BILL OF RIGHTS

A. *The English Background*

Seventeenth and eighteenth century Englishmen saw their constitutional history as punctuated by legislative declarations of

* Associate Director, Albany Law School Law Library, J.D., George Washington University Law School.

¹ N.Y. CONST. art. I, §§ 1-18.

² N.Y. CIV. RIGHTS LAW §§ 2-15 (McKinney 1992).

³ For adoption of the statutory Bill of Rights, see text accompanying notes 47-61, *infra*.

⁴ For the initial adoption of a constitutional Bill of Rights, see text accompanying notes 99-115, *infra*.

⁵ N.Y. CONST. art I, §§ 1-3.

⁶ N.Y. CIV. RIGHTS LAW §§ 2-4.

the subjects' rights granted by the ancient common law, but threatened by the royal prerogative.⁷ Magna Carta of 1215,⁸ the first and greatest of these statutory assertions of rights,⁹ was described by Sir Edward Coke as "declaratory of the principall [sic] grounds of the fundamentall [sic] laws of England."¹⁰ The 1628 Petition of Right,¹¹ passed by parliament largely at the instigation of Coke himself,¹² asserted the rights of Englishmen to be free from arbitrary imprisonment and from taxation not granted by Parliament. The Declaration of Rights of 1689,¹³ the central constitutional instrument of the Glorious Revolution, was the culmination of these parliamentary assertions of fundamental rights. Subsequently enacted as a formal statute, the 1689 Bill of Rights¹⁴ not only declared the throne abdicated by one monarch (James II) and granted it to others (William and Mary), but also formally stated acts by which "the Lawes [sic] and Liberties of this Kingdome [sic]" had been "Subvert[ed] and extirpate[d]" and declared the "antient [sic] rights and Liberties" of the nation.¹⁵

B. The Colonial Background

Colonial New Yorkers regarded themselves as Englishmen, heirs to the common law.¹⁶ As the last royal governor, William

⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 123-124 (1765). For modern discussions, see LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689 16 (1981); J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 44-45 (1987).

⁸ For the original Magna Carta, with commentary, see WILLIAM F. SWINDLER, MAGNA CARTA; LEGEND AND LEGACY 244-351 (1965). The present statutory text is that confirmed by Edward 1 in 1297. See 10 HALSBURY'S STATUTES OF ENGLAND AND WALES 14-17 (2001).

⁹ For 17th-century (as opposed to the medieval) understandings of Magna Carta, see MAURICE ASHLEY, MAGNA CARTA IN THE SEVENTEENTH CENTURY 55-62 (1965).

¹⁰ SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, unpaginated "proeme" (1797).

¹¹ 3 Car. 1, c. 1.

¹² 5 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 449-53 (1927).

¹³ See SCHWOERER, *supra* note 7, at 295-98.

¹⁴ 1 Will. & Mar. sess. 2, c. 2.

¹⁵ See SCHWOERER, *supra* note 7, at 295-96.

¹⁶ For the "Anglicization" of colonial New York law, see MICHAEL KAMMEN, COLONIAL NEW YORK; A HISTORY 128-31 (1975).

Tryon, himself said in 1773, “[t]he Common Law of England is considered as the Fundamental law of the Province.”¹⁷ With the common law, provincial New Yorkers were also heirs to the tradition of statutory assertion of fundamental rights. In 1683, the first popular assembly held in New York adopted a Charter of Libertyes and Priviledges [sic],¹⁸ which claimed the colonists’ right to legislative representation, rejected taxation without legislative consent, and asserted the rights of a freeman to be judged “by the lawful judgment of his peers and by the law of this province.”¹⁹ Later commentators have noted the similarities of this Charter to Magna Carta and the Petition of Right.²⁰ It was, however, vetoed by King James II.²¹ In 1691, the first assembly held after the Glorious Revolution adopted a similar Act declaring the “Rights and Priviledges of Their Majestyes [sic] Subjects Inhabiting within Their Province of New York.”²² It was also vetoed by the crown.²³ The assembly still asserted, in 1728, that these rejected statutes were nothing more than declarations of the “Rights and Privileges inherent in Us . . . [as] his Majesty’s Free-born Natural Subjects.”²⁴ When, in 1768, the assembly declared the “equality of constitutional rights, among all his Majesty’s subjects,” and resolved that “this colony lawfully and constitutionally has and enjoys an internal legislature of its own,”

¹⁷ 1 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 39 (1906). For similar statements made by New Yorkers, see 1 WILLIAM SMITH JR., *THE HISTORY OF THE PROVINCE OF NEW-YORK* 256, 259, 262-64 (Michael Kammen ed., 1972) (1690); Chief Justice Daniel Horsmanden (1764), 6 *The Letters and Papers of Cadwallader Colden* 381, in *COLLECTIONS OF THE NEW-YORK HISTORICAL SOCIETY FOR THE YEAR 1922*.

¹⁸ 1 *THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION* 111-16 (1894) [hereafter *COLONIAL LAWS OF NEW YORK*]; see also 9 *ENGLISH HISTORICAL DOCUMENTS: AMERICAN COLONIAL DOCUMENTS TO 1776* 228-32 (Merrill Jensen ed., 1955). For an account of the adoption of the Charter, see ROBERT C. RITCHIE, *THE DUKE’S PROVINCE* 170-74 (1977).

¹⁹ 1 *COLONIAL LAWS OF NEW YORK*, *supra* note 18, at 111-16.

²⁰ 1 LINCOLN, *supra* note 17, at 28-31; KAMMEN, *supra* note 16, at 103-04.

²¹ 3 *DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK* 357-59 (E. B. O’Callaghan ed., 1856).

²² 1 *COLONIAL LAWS OF NEW YORK*, *supra* note 18, at 244-48.

²³ 1 LINCOLN, *supra* note 17, at 440-41.

²⁴ MARY LOU LUSTIG, *PRIVILEGE AND PREROGATIVE; NEW YORK’S PROVINCIAL ELITE, 1710-1776* 9 (1995).

it was thus drawing on a long tradition, both English and colonial, of statutory declarations of fundamental rights.²⁵

C. *The 1777 New York Constitution*

In August 1776, the revolutionary Convention of the Representatives of the State of New York appointed a committee to draft a state constitution and a bill of rights.²⁶ Despite this command, the constitution eventually produced did not contain a separate bill of rights.²⁷ Robert Yates, a member of the drafting committee, later explained that advocates of a bill of rights thought in terms of an instrument by which “the power of the rulers ought to be circumscribed,” modeled after the 1628 Petition of Right and the 1689 Bill of Rights.²⁸ The committee, however, took the view that the American Revolution placed the people “in a state of nature” such that the new fundamental instrument the people themselves created, the constitution, “would operate as a bill of rights.”²⁹ This view was not uncommon in revolutionary America.³⁰ John Jay, for instance, a principal drafter of the 1777

²⁵ N.Y.S. DIVISION OF ARCHIVES AND HISTORY, *THE AMERICAN REVOLUTION IN NEW YORK* 309 (1926).

²⁶ 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK 1775-1776-1777 552 (1842) [hereafter JOURNALS OF THE PROVINCIAL CONGRESS]. Gouverneur Morris, a leading conservative, failed to block the motion to adopt a bill of rights. See BERNARD MASON, *THE ROAD TO INDEPENDENCE; THE REVOLUTIONARY MOVEMENT IN NEW YORK, 1773-1777* 214 (1966).

²⁷ MASON, *supra* note 26, at 229.

²⁸ Robert Yates (writing as “Sydney”), *To the Citizens of the State of New York . . . (1788)*, reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788* 299 (Paul Leicester Ford ed., 1892) [hereafter *ESSAYS ON THE CONSTITUTION*]. Such views were typically held by anti-federalists, opponents of the 1787 federal constitution. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 540-41 (1969).

²⁹ *ESSAYS ON THE CONSTITUTION*, *supra* note 28, at 229.

³⁰ See, e.g., WOOD, *supra* note 28, at 377-78, 540 (1969); Federalist No. 84 (Hamilton), in *THE FEDERALIST* 575-87 (Jacob E. Cooke ed., 1961); Melancthon Smith, *An Address to the People of the State of New-York. . . (1788)*, reprinted in *PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788* 114 (Paul Leicester Ford

federal constitution,³¹ used the same argument when objecting to the adoption of a federal bill of rights in 1788.³²

The constitution adopted by the New York Convention in April 1777, did contain certain clauses guaranteeing basic rights, such as might be found in a bill of rights: all power derived from the people,³³ right to counsel in criminal trials,³⁴ freedom of religion³⁵ and abolition of religious establishments,³⁶ and trial by jury and prohibition of attainder (to take effect after the war).³⁷ In addition, on the motion of Gilbert Livingston³⁸ (later a radical anti-federalist),³⁹ the Convention added to the constitution a clause guaranteeing due process.⁴⁰ In the face of Loyalist threats to the existence of the new government, the Convention refrained, however, from adding to the constitution any further assertions of fundamental rights that would hinder efforts to suppress counter-revolutionary activity.⁴¹

D. Other States

New York was unique in adopting, and maintaining for years, a comprehensive statutory bill of rights. Connecticut was the only other state that adopted a statutory declaration of rights, but its scope and purpose were quite different from New York's.

ed., 1888) [hereafter PAMPHLETS ON THE CONSTITUTION]. Martin van Buren made much the same observation in the New York constitutional convention of 1821. See REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821 172 (1821).

³¹ PETER J. GALIE, ORDERED LIBERTY; A CONSTITUTIONAL HISTORY OF NEW YORK 38 (1996).

³² John Jay, *An Address to the People of the State of New York* . . . (1788), reprinted in PAMPHLETS ON THE CONSTITUTION, *supra* note 30, at 77.

³³ N.Y. CONST. OF 1777, art I.

³⁴ *Id.* art. XXXIV.

³⁵ *Id.* art. XXXVIII. In addition, the right of Quakers to refuse bearing arms was recognized, art. XL.

³⁶ *Id.* art. XXXV.

³⁷ *Id.* art. XLI.

³⁸ See 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 26, at 869.

³⁹ See GEORGE DANGERFIELD, CHANCELLOR ROBERT R. LIVINGSTON OF NEW YORK 1746-1813 229 (1960).

⁴⁰ N.Y. CONST. OF 1777, art. XIII.

⁴¹ Bernard Mason, *New York State's First Constitution*, in NEW YORK AND THE UNION 181 (Stephen L. Schechter & Richard B. Bernstein eds., 1991).

The Connecticut Act containing an Abstract and Declaration of the Rights and Privileges of the People of this State,⁴² adopted by the state legislature in 1776, contained three brief sections declaring fundamental rights, but it primarily served to declare the state's colonial charter (dating back to 1662), the state constitution.⁴³ Both the declaration and charter were superseded by the Connecticut constitution of 1818.⁴⁴ Delaware and Virginia adopted declarations of rights before adopting state constitutions,⁴⁵ but these declarations were adopted by the same bodies that framed the state constitutions, and they were regarded as parts of the same fundamental instruments.⁴⁶

II. THE STATUTORY BILL OF RIGHTS UNTIL 1821

A. *Adoption of the Statutory Bill of Rights*

The New York State legislature adopted the original version of the statutory bill of rights, "an Act concerning the rights of the citizens of this State," in January 1787.⁴⁷ One historian has asserted that "little is known about this act,"⁴⁸ while another has proclaimed that it was a partisan measure pushed through a Clintonian-dominated legislature.⁴⁹ Neither assertion is correct. The state constitution had declared that such parts of the common

⁴² Acts and Laws of the State of Connecticut, in AMERICA 1-2 (1784).

⁴³ WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION; A REFERENCE GUIDE 5, 35 (1993).

⁴⁴ *Id.* at 13.

⁴⁵ Delaware Declaration of Fundamental Rights (1776), reprinted in 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, 197-99 (William F. Swindler ed., 1978); Virginia Declaration of Rights (1776), reprinted in 10 *id.* at 48-50.

⁴⁶ THE DELAWARE CONSTITUTION OF 1897; THE FIRST ONE HUNDRED YEARS 28 (Harvey B. Rubenstein ed., 1997); 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 7-8, 34-35 (1974).

⁴⁷ L. 1787, c. 1.

⁴⁸ Stephen L. Schechter, "A Trust . . . to Our Children" *New York State and the Adoption of the Bill of Rights*, in NEW YORK AND THE UNION, *supra* note 41, at 188.

⁴⁹ ERNEST W. SPAULDING, NEW YORK IN THE CRITICAL PERIOD, 1783-1789 112 (1932). Clintonians were supporters of Governor George Clinton, many of whom later became Jeffersonian Republicans. *Id.*

and statutory law of England and the acts of the colonial legislature as formed the law of New York colony in April 1777, “shall continue [to be] the law of this State.”⁵⁰ In order to effectuate this declaration, in 1786, the legislature appointed two prominent lawyers, Samuel Jones and Richard Varick, revisers “to collect and reduce into proper form under certain heads of titles” all the English and colonial statutes still effective in New York.⁵¹ On January 13, 1787, “pursuant to the law for revising the laws of this State,” Samuel Jones (then serving in the Assembly) introduced a bill entitled, “An act concerning the rights of the citizens of this State,” along with nine other bills (covering such heterogeneous subjects as abolishing wager of law, Quaker affirmations, and justices of the peace).⁵² The Act concerning the rights of citizens passed both Assembly and Senate without opposition.⁵³ It became law on Jan. 26, 1787, without comment by Governor Clinton or objection from the Council of Revision.⁵⁴ The statute was reenacted without change by the Revised Acts of 1801⁵⁵ and by the Revised Laws of 1813.⁵⁶

The Act concerning the rights of citizens contained dogmatic assertions of fundamental rights, such as might be found in modern constitutional bills of rights.⁵⁷ Likely due to this format, historians have suggested that in enacting the statute, the

⁵⁰ N.Y. CONST. OF 1777, art. XXXV.

⁵¹ L. 1786, c. 35. For the work of the revisers, see 1 BOARD OF STATUTORY CONSOLIDATION, *THE CONSOLIDATED LAWS OF THE STATE OF NEW YORK* v-vii (1909); ROBERT LUDLOW FOWLER, *HISTORY OF THE LAW OF REAL PROPERTY IN NEW YORK* 77-79 (1895).

⁵² JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK AT THEIR TENTH SESSION 5 (1787).

⁵³ *Id.* at 9; JOURNAL OF THE SENATE OF THE STATE OF NEW-YORK AT THEIR TENTH SESSION 10 (1787).

⁵⁴ Until its abolition by the 1821 constitution, the Council of Revision (composed of the Governor, Supreme Court Justices, and Chancellor) reviewed all legislation before it could take effect. See ALFRED B. STREET, *THE COUNCIL OF REVISION OF THE STATE OF NEW YORK* (1859).

⁵⁵ 1 LAWS OF THE STATE OF NEW-YORK 47-49 (James Kent and Jacob Radcliff revisors, 1802).

⁵⁶ 1 LAWS OF THE STATE OF NEW-YORK 47-48 (William P. van Ness and John Woodworth revisors, 1813).

⁵⁷ JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK AT THEIR TENTH SESSION 5 (1787).

legislature failed to distinguish between constitutions and legislative enactments as sources of fundamental rights,⁵⁸ a failure common in the revolutionary period.⁵⁹ It has also been suggested (possibly on the model of Parliament's role in the English Constitution) that the statute indicated a belief that both the people and the legislature were sources of fundamental rights.⁶⁰ Since constitutional theory was in flux in the 1780s,⁶¹ both suggestions may well be correct. Beyond these abstractions, however, the Act concerning the rights of citizens should primarily be regarded as a product of statutory revision; it consisted of dogmatic assertions of rights because the statutes from which it was derived, Magna Carta, the Petition of Right, and the 1689 Bill of Rights, were themselves dogmatic assertions of rights.

B. Contents of the Original Statutory Bill of Rights

The 1787 Act concerning the rights of the citizens of this State⁶² took the form of thirteen numbered paragraphs, summarized below. Each paragraph stated certain rights; all but one were based on historic English statutory assertions of common-law rights.⁶³ In addition, most of these rights were derived from the New York Constitution, Magna Carta, Petition of Right, 1689 Bill of Rights, or the federal Bill of Rights.⁶⁴

First, All authority is derived from the people.⁶⁵

⁵⁸ See GALIE, *supra* note 31, at 50; Mason, *supra* note 41, at 181.

⁵⁹ See WOOD, *supra* note 28, at 273-82. For the development of the distinction between fundamental constitutions and subordinate legislatures, see also THE CONSTITUTION AND GOVERNMENT OF THE STATE OF NEW YORK; AN APPRAISAL 183-86 (1915).

⁶⁰ See GALIE, *supra* note 31, at 61.

⁶¹ WOOD, *supra* note 28, *passim*.

⁶² L. 1787, c. 1.

⁶³ The English forerunners of each section of the 1787 Act, noted in this section, were traced by 1 LINCOLN, *supra* note 17, at 728-29.

⁶⁴ *Id.*

⁶⁵ Derived from the New York Constitution. See N.Y. CONST. OF 1777, art I.

Second, No citizen is to be imprisoned or deprived of property without “lawful judgment of his or her peers or by due process of law.”⁶⁶

Third, No imprisonment unless by indictment “in due manner or by due process of law.”⁶⁷

Fourth, No person will be “put to answer” without presentment, matter of record, or due process.⁶⁸

Fifth, No person is to be imprisoned or executed without due process; no person is to lose franchise, life or limb, or goods and chattels, unless by “due course of law.”⁶⁹

Sixth, Justice is not to be sold.⁷⁰

Seventh, No fines without good cause; fines are to be reasonable.⁷¹

Eighth, Excessive bail or fines and cruel and unusual punishment are prohibited.⁷²

Ninth, Elections are to be free.⁷³

Tenth, Right to petition is guaranteed.⁷⁴

Eleventh, Legislative freedom of speech and debate is guaranteed.⁷⁵

⁶⁶ Derived from Magna Carta. See SWINDLER, *supra* note 8, at ch. 39.

⁶⁷ Derived from 1628 Petition of Right. See 3 Car. 1, c. 1.

⁶⁸ Derived from 1628 Petition of Right. See *id.*

⁶⁹ Derived from Magna Carta. See SWINDLER, *supra* note 8, at ch. 39.

⁷⁰ Derived from Magna Carta. See SWINDLER, *supra* note 8, at ch. 40.

⁷¹ Derived from Magna Carta. See SWINDLER, *supra* note 8, at chs. 20-22.

⁷² Derived from the 1689 Bill of Rights. See 1 Will. & Mar. sess. 2, c. 2.

⁷³ Derived from the 1689 Bill of Rights. See *id.* For the importance of this section in election controversies of the time, see ALFRED F. YOUNG, THE DEMOCRATIC REPUBLICANS OF NEW YORK; THE ORIGINS 1763-1797 87, 305 (1967).

⁷⁴ Derived from the 1689 Bill of Rights. See 1 Will. & Mar. sess. 2, c. 2.

Twelfth, No taxation or military service without legislative authorization.⁷⁶

Thirteenth, Billeting of soldiers on private citizens is prohibited.⁷⁷

As has been noted, the state constitution contained certain additional guarantees of fundamental rights.⁷⁸ In the eyes of Jones and Varick, the revisers, and of the legislature that enacted their work, presumably the rights declared by the constitution and by the Act concerning the rights of citizens formed the corpus of fundamental rights inherited by New York State citizens from their Anglo-colonial legal heritage.⁷⁹ In other words, they indicated the extent to which the principles declared by Magna Carta, the Petition of Right, and the 1689 Bill of Rights were still valid and enforceable in the new jurisdiction.⁸⁰

C. *The Statutory Bill of Rights Interpreted*

New Yorkers, in the period before the adoption of the first constitutional bill of rights in 1821, approached the Act concerning the rights of citizens in an ambiguous way. The Act was often regarded as more than an ordinary statute, explaining the constitution but not having constitutional status. Sometimes its provisions were accorded the respect traditionally accorded the underlying English enactments from which they had been derived. Shortly after its adoption, on February 6, 1787, Alexander Hamilton, serving as a state Assemblyman, cited the Second section of the Act concerning the rights of citizens (guaranteeing due process of law)⁸¹ to clarify that the term “law of the land” in

⁷⁵ Derived from the 1689 Bill of Rights. *See id.*

⁷⁶ Derived from the 1689 Bill of Rights, *see id.*, and from the 1628 Petition of Right, *see* 3 Car. 1, c. 1.

⁷⁷ Derived from 1628 Petition of Right. *See* 3 Car. 1, c. 1.

⁷⁸ *See supra* text accompanying notes 33-41.

⁷⁹ 1 BOARD OF STATUTORY CONSOLIDATION, THE CONSOLIDATED LAWS OF THE STATE OF NEW YORK v-vii (1909).

⁸⁰ *Compare* N.Y. CONST. OF 1777, art. XXXV, with L. 1786, c. 35.

⁸¹ L. 1787, c. 1, Second section.

the state constitution⁸² meant judicial proceedings not legislative enactments. "If there were any doubt upon the constitution, the bill of rights enacted in this very session removes it."⁸³ Thus, the opinion of a legislator who voted to approve the Act (a legislator, moreover, who was also a lawyer of the highest attainments)⁸⁴ was that the Act, if not a constitutional provision, was so authoritative as to establish what a constitutional provision meant.⁸⁵

Twice, the Council of Revision used the Act concerning the rights of citizens to invalidate proposed legislation.⁸⁶ In 1791, in an opinion by Chancellor Livingston, the Council held unconstitutional a bill granting New York City the power to license hackney coaches and tax "wheel carriages," in part because it violated the Twelfth section of the Act, which prohibited taxation not imposed by the legislature: "[i]f this law is explanatory of our rights, and essential to liberty, it must mean that the precise sum to be paid should be set by the Legislature . . ."⁸⁷ In 1814, in an opinion by Chancellor Kent, the Council held unconstitutional a bill to aid in the apprehension of military deserters, in part because it violated personal liberty: "[b]y the act of the 26th January, 1787, which was only a transcript of the provisions of Magna Charta, and is therefore to be regarded as a declaration of fundamental rights, 'no citizen of this State shall be taken or imprisoned but by due process of law . . .'"⁸⁸ Thus, in one instance the Council of Revision found the Act concerning the rights of citizens "explanatory" of fundamental rights, in the other it gave the Act the force of the fundamental document from which it derived, Magna Carta. In neither case was it expressly given constitutional status.

Due to the Council of Revision's review of pending legislation, early New York courts rarely had to consider the constitutionality of enacted statutes.⁸⁹ This must have forestalled

⁸² N.Y. CONST. OF 1777, art. XIII.

⁸³ 4 THE PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

⁸⁴ See 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 20 (1829).

⁸⁵ *Id.*

⁸⁶ STREET, *supra* note 54, at 295.

⁸⁷ *Id.*

⁸⁸ *Id.* at 378.

⁸⁹ 1 LINCOLN, *supra* note 17, at 744-45.

applications of the Act concerning the rights of citizens, in a quasi-constitutional manner, to test the constitutionality of other enactments. Into the 1820s, the Act concerning the rights of citizens appeared in reports of ordinary litigation in three different contexts.⁹⁰ First, the Act was sometimes cited as the embodiment of a fundamental English declaration of rights (such as Magna Carta) from which it was derived.⁹¹ Thus, for example, when Chancellor Kent cited the main due process section of the Act,⁹² he noted that “[t]his is an ancient and fundamental maxim of common right to be found in *Magna Charta*, and which the legislature has incorporated into an act declaratory of the rights of citizens of this state.”⁹³ Second, the Act was sometimes cited to elucidate a state constitutional provision,⁹⁴ as when one lawyer used a due process provision of the Act to amplify the constitutional guarantee of jury trials.⁹⁵ Third, when due process issues arose, rather than relying on the general due process clause of the state constitution,⁹⁶ counsel tended to cite the Act, whose provisions⁹⁷ gave more specific guarantees of due process in various contexts.⁹⁸

⁹⁰ In the reports, counsel in their arguments cited the Act much more often than did courts in their opinions. Partly, at least, this must have reflected the practice of reporters extensively recording counsels' arguments, following the English pattern. See *Preface*, 1 Johns. vi (1807).

⁹¹ *Yates v. People*, 6 Johns. 337, 364 (N.Y. 1810); *Jackson v. Gilchrist*, 15 Johns. 89, 91 (N.Y. Sup. Ct. 1818) (counsel's argument, citing both Magna Carta and colonial Charter of Rights and Liberties of 1683); *People v. Goodwin*, 18 Johns. 187, 196-97 (N.Y. Sup. Ct. 1820) (counsel's argument); *Barker v. People*, 3 Cow. 686, 694 (N.Y. 1824) (counsel's argument).

⁹² L. 1787, c. 1, *Second* section.

⁹³ *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816). See also *Jackson v. Gilchrist*, 15 Johns. 89 104 (N.Y. Sup. Ct. 1818) (Attorney General van Buren's argument) (“Our bill of rights is copied from *magna charta*”).

⁹⁴ E.g., *Smith v. Shaw*, 12 Johns. 257, 262 (N.Y. Sup. Ct. 1815) (counsel's argument). Federal constitutional provisions, although not applicable to the state, were sometimes cited for the same purpose. See, e.g., *People v. Goodwin*, 18 Johns. 187, 196-97 (N.Y. Sup. Ct. 1820) (counsel's argument).

⁹⁵ *Case of Yates*, 4 Johns. 317, 328 (N.Y. Sup. Ct. 1809) (counsel's argument citing N.Y. CONST. OF 1777, art. XLI, and L. 1787, c. 1, *Third* section).

⁹⁶ N.Y. CONST. OF 1777, art. XIII.

⁹⁷ L. 1787, c.1, *Second*, *Third*, *Fourth*, and *Fifth* sections.

⁹⁸ See *Thorn v. Blanchard*, 5 Johns. 508, 518 (N.Y. 1809) (counsel's argument); *Voorhis v. Whipple and Hawes*, 7 Johns. 89, 92 (N.Y. Sup. Ct. 1810)

III. THE STATUTORY BILL OF RIGHTS IN THE ERA OF CONSTITUTIONAL BILLS OF RIGHTS: THE 19TH CENTURY

A. *The Constitutional Convention of 1821*

The constitutional convention held in 1821 added, for the first time, a formal bill of rights to the state constitution.⁹⁹ Peter Sharpe, a member of the convention's bill-of-rights committee, stated that this addition "would be an additional safeguard to the people to specify distinctly, and adopt some of the most important principles [of civil liberty]."¹⁰⁰ Sharpe further stated that this proposal was derived from "the bills of rights of other states, of the United States, and of our own state."¹⁰¹ This was the only explicit mention of New York's statutory bill of rights during the course of the convention.¹⁰² Although Chief Justice Spencer thought constitutional bills of rights were "redundant," he agreed that it was "proper to keep before the eyes of the legislature a brief and paramount declaration of rights beyond which they cannot go."¹⁰³ Despite extensive debate over details, the convention eventually agreed with this conclusion.¹⁰⁴

The new bill of rights derived a majority of its provisions from scattered articles of the 1777 constitution.¹⁰⁵ Of its fourteen sections,¹⁰⁶ eight originated in 1777.¹⁰⁷ Although the preamble of

(counsel's argument); *Woodcock v. Bennett*, 1 Cow. 711, 740 (N.Y. 1823); *People v. Richardson*, 4 Cow. 97 (N.Y. Sup. Ct. 1825) (counsel's argument).

⁹⁹ See GALIE, *supra* note 31, at 85-86.

¹⁰⁰ See REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821 162 (1821).

¹⁰¹ *Id.* at 163.

¹⁰² Peter Livingston may have had the statutory bill of rights in mind when he observed that bills of rights "are declaratory acts of the people, that the legislature shall not encroach upon their rights—and your constitution is very much the same thing." *Id.* at 171.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 162-63, 171-73.

¹⁰⁵ 1 KENT, *supra* note 87, at 10-11.

¹⁰⁶ N.Y. CONST. OF 1821, art. VII, §§ 1-14.

¹⁰⁷ 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 45, at 147-52. The 1821 provisions derived from the 1777 constitution

the 1821 constitution¹⁰⁸ recognized that all power derived from the people, as did the First section of the 1787 Act concerning the rights of citizens,¹⁰⁹ and although section 1 of the constitution's bill of rights guaranteed due process¹¹⁰ as did four sections of the 1787 Act,¹¹¹ it cannot be said that any section of the 1821 constitutional bill of rights derived specifically from the 1787 Act.¹¹² A substantial body of fundamental rights, like protection against cruel and unusual punishment¹¹³ and the right to petition the legislature,¹¹⁴ were not mentioned by the 1821 constitution, and were protected only by provisions of the 1787 Act concerning citizens.¹¹⁵

B. *The Revised Statutes of 1829*

The legislature in November 1824¹¹⁶ appointed revisers "to collect and reduce into proper form, under certain titles of acts, all the public acts of the legislature now in force."¹¹⁷ This direction resulted in the famous Revised Statutes of 1829, the closest approach to a scientific statutory code attained by any state of the union (other than Louisiana) during the nineteenth century.¹¹⁸ The revisers included a Chapter IV, "Of the Rights of the Citizens and

were N.Y. CONST. OF 1821, art. VII, §§ 1-5, 12-14. See N.Y. CONST. OF 1777, arts. XIII, XLI, XXXVIII, XXXIX, XL, XXXVII, XXXV, XXXVI.

¹⁰⁸ N.Y. CONST. OF 1821, preamble ("We, the people of the State of New York. . .").

¹⁰⁹ L. 1787, c. 1, *First* section.

¹¹⁰ N.Y. CONST. OF 1821, art. VII, §1.

¹¹¹ L. 1787, c. 1, *Second, Third, Fourth, and Fifth* sections.

¹¹² Compare N.Y. CONST. OF 1821, art. VII, §§ 1-14, with L. 1787, c.1. N.Y. CONST. OF 1821, art. VII, § 6 (habeas corpus), derived from L. 1787, c. 39, which itself substantially reenacted the English habeas corpus act of 1679, 31 Car. 2, c. 2.

¹¹³ L. 1787, c. 1, *Eighth* section.

¹¹⁴ *Id.* *Tenth* section.

¹¹⁵ *Id.* *Sixth* through *Thirteenth* sections. For the rights protected by these sections, see text accompanying notes 70-76, *supra*.

¹¹⁶ L. 1824, c. 336; extended by L. 1825, c. 324.

¹¹⁷ For the work of the revisers, see WILLIAM ALLEN BUTLER, *THE REVISION OF THE STATUTES OF THE STATE OF NEW YORK AND THE REVISERS* 5-6, 9-11, 17-61 (1889).

¹¹⁸ See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 167-68 (1981).

Inhabitants of this State,” in Part I of the Revised Statutes (the section that covered, in part, “the civil polity” of the state).¹¹⁹ They noted that Chapter IV was derived from the 1787 Act concerning the rights of citizens¹²⁰ and from the state and federal constitutions.¹²¹ In fact, of the twenty-one sections of Chapter IV, eight came solely from the 1787 Act,¹²² three partly from the 1787 Act and partly from the federal constitution,¹²³ eight from the state constitution,¹²⁴ and two from the federal constitution.¹²⁵ The revisers stated that “[e]ach section has been framed in the declaratory form; a mode of expression which the Revisors have uniformly adopted, whenever it has been found expedient to incorporate in the statutes, a constitutional provision, or any other principle which does not depend on the will of the legislature.”¹²⁶ In doing so, the revisers retained, substantially, the language of the original statutes and constitutional provisions.¹²⁷

By the 1820s, constitutional thought clearly distinguished between fundamental constitutions and subordinate statutes, and clearly recognized the constitutional nature of bills of rights.¹²⁸ The anomaly of including in a statutory compilation any provision “which does not depend on the will of the legislature” was not lost upon the revisers. They displayed more than a hint of unease when they noted:

[t]he opinion has frequently been advanced that a declaration of rights by the legislature, or even a convention, is, in this country, unnecessary and improper It is obvious that the objections

¹¹⁹ R.S., pt. 1, c. 4, §§ 1-21. Of the revisers, Benjamin F. Butler seems to have drafted Chapter IV. See BUTLER, *supra* note 117, at 40.

¹²⁰ L. 1787, c. 1.

¹²¹ *Appendix, Containing Extracts from the Original Reports of the Revisors*, 3 REVISED STATUTES OF NEW YORK 431 (2d ed., 1836) [hereafter *Reports of the Revisors*]. Marginal notes prepared by the revisers indicated the origin of each section of the Revised Statutes.

¹²² R.S., pt. 1, c. 4, §§ 1, 2, 4, 14, 15, 16, 18, 19.

¹²³ *Id.* §§ 6, 7, 17.

¹²⁴ *Id.* §§ 5, 8, 9, 10, 12, 13, 20, 21.

¹²⁵ *Id.* §§ 3, 11.

¹²⁶ *Reports of the Revisors*, *supra* note 121, at 431.

¹²⁷ BUTLER, *supra* note 117, at 50.

¹²⁸ See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 702, 728-31 (1st ed., 1833).

above adverted to, are much stronger when applied to legislature, than when applied to a convention invested with extraordinary powers; but as the statute book contains a bill of rights, the Revisers did not feel themselves at liberty to omit it. Nor do they know that any injury can result, from the solemn recognition, by the legislature, of those fundamental principles of liberty and justice which constitute the basis of our government and laws.¹²⁹

Given the revisers' awareness of the doctrinal incongruity of statutory bills of rights, it seems strange that they added federal and state constitutional provisions to the statute. They did not explain their action; however they may have seen the need for collecting all the fundamental rights traditionally accorded citizens in the part of the Revised Statutes that defined the scope of governmental authority.¹³⁰ Whatever their reasons, Part I, Chapter IV, of the Revised Statutes was a full-bodied bill of rights. Beyond the protections contained in the 1787 Act concerning citizens, it contained, for instance, guarantees of freedom of religion,¹³¹ freedom of speech,¹³² and prohibitions of unreasonable searches and seizures¹³³ and double jeopardy.¹³⁴ It was the statutory bill of rights at its apogee.

The *Political Code*, proposed in 1860 by the Commissioners of the Code headed by David Dudley Field, completely omitted a statutory bill of rights.¹³⁵ The legislature, however, failed to adopt this proposal.¹³⁶ The statutory bill of

¹²⁹ *Reports of the Revisors*, *supra* note 117, at 431.

¹³⁰ That the revisers regarded the statutory bill of rights as "limitations of the governmental power," rather than as rights granted to the people, see WILLIAM D. DRISCOLL, BENJAMIN F. BUTLER; LAWYER AND REGENCY POLITICIAN 132-33 (1987).

¹³¹ R.S., pt. 1, c. 4, § 9.

¹³² *Id.* § 20.

¹³³ *Id.* § 11.

¹³⁴ *Id.* § 13.

¹³⁵ Commissioners of the Code, *The Political Code of the State of New York* (1860).

¹³⁶ Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD; CENTENARY ESSAYS 40 (Alison Reppy ed., 1949).

rights contained in Part I, Chapter IV, of the Revised Statutes, as it stood in 1829, remained unchanged for the balance of the nineteenth century.¹³⁷

C. *The 1846, 1867, and 1894 Constitutional Conventions*

New York held further constitutional conventions in 1846, and 1867, and 1894.¹³⁸ The 1846 and 1894 conventions resulted in new constitutions; voters rejected the constitution proposed in 1867.¹³⁹ All three conventions amended the constitutional bill of rights. All but the 1846 convention entirely ignored the statutory bill of rights in doing so.

In 1846, the convention's Committee of Rights and Privileges did examine the statutory bill of rights, as contained in the Revised Statutes, at its first meeting, but "thought that matter had better to be left untouched by this convention."¹⁴⁰ The Committee reported that provisions of its proposed bill of rights either derived from the 1821 constitution or were new;¹⁴¹ it expressly rejected proposed amendments from the convention floor concerning matters "properly appertaining to legislation."¹⁴² Neither did the debates on the floor of the convention mention the statutory bill of rights.¹⁴³ Fourteen of the eighteen sections of the bill of rights contained in the constitution of 1846 derived, at least

¹³⁷ Compare R.S., pt. 1, c. 4. (1st ed., 1829), with *id.* (9th ed., 1896). After the Civil War, the legislature adopted civil rights statutes forbidding racial discrimination, L. 1873, c. 186; L. 1881, c. 400, and forbidding localities from discriminating against residents of other localities within the state, L. 1878, c. 212; L. 1879, c. 417, but none of these enactments constituted amendments to the statutory bill of rights.

¹³⁸ THE TEMPORARY STATE COMMISSION ON CONSTITUTIONAL REVISION, THE NEW YORK STATE CONSTITUTION, A BRIEFING BOOK, 43 (1994).

¹³⁹ GALIE, *supra* note 31, at 184. For the text of the rejected 1867 constitution, see 2 LINCOLN, *supra* note 17, at 423-63.

¹⁴⁰ REPORTS OF THE DEBATES AND PROCEEDINGS FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 357 (1846) [hereafter REPORTS OF THE DEBATES AND PROCEEDINGS].

¹⁴¹ 1 DOCUMENTS OF THE CONVENTION OF THE STATE OF NEW-YORK, No. 39 (1846).

¹⁴² REPORTS OF THE DEBATES AND PROCEEDINGS, *supra* note 140, at 196-97.

¹⁴³ *Id.* at 357-63, 453, 1050-51.

in part, from the constitution of 1821.¹⁴⁴ Two new sections, prohibiting cruel and unusual punishment and recognizing citizens' rights to assemble and petition the legislature,¹⁴⁵ in fact restated provisions of the statutory bill of rights without acknowledgment.¹⁴⁶

The unsuccessful constitutional convention of 1867 substantially adopted the 1846 constitutional bill of rights.¹⁴⁷ In doing so, neither the report of the convention's Bill of Rights committee¹⁴⁸ nor the debates of the convention itself mentioned the statutory bill of rights.¹⁴⁹ One new provision, prohibiting unlawful search and seizure,¹⁵⁰ was, however, derived from the statute.¹⁵¹ The constitutional convention of 1894 also substantially carried forward the 1846 bill of rights,¹⁵² with certain additions regarding eminent domain, lotteries, and wrongful death actions.¹⁵³ None of these additions derived from the statutory bill of rights. The 1894 convention adopted its revised bill of rights with little debate and with no reference to the statutory bill of rights.¹⁵⁴

New York State underwent a half-century of constitutional development with hardly any reference to its statutory bill of rights. The legislature had adopted a remarkably robust and wide-ranging bill of rights when it approved the Revised Statutes of 1829.¹⁵⁵ Thereafter, it made no effort to adjust the statute to the realities of constitutional change.

¹⁴⁴ Compare N.Y. CONST. of 1846, art. I, §§ 1-10, 16-17, with N.Y. CONST. of 1821, art. VII, §§ 1-3, 5-9, 11-14.

¹⁴⁵ N.Y. CONST. of 1846, art. I, §§ 5, 10.

¹⁴⁶ R.S., pt. 1, c. 4, §§ 17, 19.

¹⁴⁷ Compare N.Y. CONST. of 1846, art. I, with proposed N.Y. CONST. of 1867, art. I. For bill of rights provisions considered, but not adopted by the subsequent Constitutional Commission of 1872, see 2 LINCOLN, *supra* note 17, at 475-77.

¹⁴⁸ 5 DOCUMENTS OF THE CONVENTION OF THE STATE OF NEW YORK 1867-'68, No. 149.

¹⁴⁹ 5 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 3234-65 (1868).

¹⁵⁰ Proposed N.Y. CONST. of 1867, art. I, § 9.

¹⁵¹ R.S., pt. 1, c. 4, § 11.

¹⁵² Compare N.Y. CONST. of 1846, art. I, with N.Y. CONST. of 1894, art. I.

¹⁵³ See GALIE, *supra* note 31, at 161-63.

¹⁵⁴ 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 493-94; 4 *id.* 1099-1100.

¹⁵⁵ R.S., pt. 1, c. 4.

D. *The Statutory Bill of Rights Litigated*

Three factors militated against the statutory bill of rights appearing in reported litigation after 1821. First, by 1846, eleven of the twenty-one sections of the statutory bill of rights also appeared, in whole or in part, in the state constitution.¹⁵⁶ Given the mid-nineteenth century assumption that bills of rights were properly constitutional,¹⁵⁷ litigants asserting fundamental rights naturally cited to a constitutional provision rather than to a statute for authority.¹⁵⁸ In the same vein, courts came clearly to recognize the non-constitutional status of the statutory bill of rights, “a statutory enactment. . . [that] the legislature could repeal or alter”; an enactment, therefore, that could not be used to judge the validity of other enactments.¹⁵⁹ Second, the great English declarations of fundamental rights, like Magna Carta, were no longer living documents, as they had been for earlier generations. Litigants were less likely to cite the statutory bill of rights as a restatement of these ancient declarations; they now had fundamental constitutions of their own upon which to rely.¹⁶⁰ Third, several sections of the statutory bill of rights, like those prohibiting quartering of troops in private homes¹⁶¹ and forced military

¹⁵⁶ Compare *id.* §§ 1, 5, 8, 9, 10, 12, 13, 17, 19, 20, 21, with N.Y. CONST. of 1846, preamble, and art. I, §§ 2, 3, 4, 5, 6, 8, 10.

¹⁵⁷ See, e.g., JOHN ALEXANDER JAMESON, A TREATISE ON THE PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW AND LEGISLATION 95-96 (2d ed., 1869). Chancellor Kent’s discussion of the “rights of persons,” written in 1829, cited constitutional provisions, and omitted any reference to New York’s statutory bill of rights. See KENT, *supra* note 84, at 1-37.

¹⁵⁸ See 4 LINCOLN, *supra* note 17, at 29-179, for judicial treatment of the constitutional bill of rights in the 19th century.

¹⁵⁹ *People v. Fish*, 26 N.E. 319, 323 (N.Y. 1891); see also *In re Smith*, 10 Wend. 449, 455 (N.Y. Sup. Ct. 1833) (counsel’s argument). But cf. *People v. Glennon*, 74 N.Y.S. 794, 798 (Sup. Ct. 1902) (search-and-seizure section, R.S., pt. 1, c. 2, § 11, “deemed to have the force of fundamental law”). Although counsel sometimes challenged the validity of other statutes under the statutory bill of rights, courts usually avoided deciding the issue. See, e.g., *Stokes v. New York*, 14 Wend. 87, 88 (N.Y. Sup. Ct. 1835); *In re Prime*, 1 Barb. 340, 343 (N.Y. Gen. Term 1847).

¹⁶⁰ There were exceptions however. See, e.g., *People ex rel. Cutler v. Dibble*, 18 Barb. 412, 415 (N.Y. Sup. Ct. 1854); *Briggs v. Mackellar*, 2 Abb. Pr. 30, 59 (N.Y. Com. Pl. 1855); *People v. Billis*, 110 N.Y.S. 387, 388 (Sup. Ct. 1908).

service,¹⁶² declared rights historically important, but no longer the subject of controversy and litigation.

Despite these factors, citations to the statutory bill of reports appeared fairly often in the New York reports. They appeared most frequently, not substantively, but as a rhetorical device, a synonymy to emphasize reference to the state constitution. Thus, variations of the phrase “the bill of rights and the constitution,” as a general reference, recurred often in the reports.¹⁶³ Sometimes a constitutional provision and the statutory bill of rights would be cited in tandem, to reinforce a point,¹⁶⁴ or to elucidate the constitutional provision.¹⁶⁵

Some sections of the statutory bill of rights were living law, of real utility in protecting fundamental rights omitted from the constitutional bill of rights.¹⁶⁶ Thus, courts and litigants relied on section 11 of the statute,¹⁶⁷ prohibiting unreasonable searches and seizures and requiring warrants to issue on probable cause;¹⁶⁸ and

¹⁶¹ R.S., pt. 1, c. 4, § 6. The analogous federal provision, U.S. CONST. amend. III, has never been construed by the U.S. Supreme Court. See THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION 1195 (Johnny H. Killian & George A. Costello eds., 1996).

¹⁶² R.S., pt. 1, c. 4, § 4.

¹⁶³ E.g., *People v. Underwood*, 16 Wend. 546, 549 (N.Y. Sup. Ct. 1837); *Shotwell v. Mott*, 2 Sand. Ch. 46, 56 (N.Y. Ch. 1844); *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 591 (1875); *In re Kemmler*, 7 N.Y.S. 145, 147 (Co. Ct. 1889).

¹⁶⁴ E.g., *Underwood*, 16 Wend. at 549; *Snyder v. Andrews*, 6 Barb. 43, 60 (N.Y. Gen. Term 1849); *Meech v. Brown*, 4 Abb. Pr. 19, 21 (N.Y. Com. Pl. 1856); *In re Brenner*, 70 N.Y.S. 744, 747 (Sup.Ct. 1901).

¹⁶⁵ E.g., *Hunt v. Bennett*, 19 N.Y. 173, 177 (1859); *People v. Hoch*, 44 N.E. 976, 982-83 (N.Y. 1896) (Vann, J., dissenting); *People ex rel. Aritelli v. Grount*, 84 N.Y.S. 97, 99 (App. Div. 1903); *People v. Billis*, 110 N.Y.S. 387, 388 (Sup. Ct. 1908).

¹⁶⁶ Before the addition of a cruel and unusual punishment clause to the constitutional bill of rights, N.Y. CONST. of 1846, art. I, § 5, courts cited R.S., pt.1, c. 4, § 17, for this purpose. See, e.g., *People v. Potter*, 1 Parker Crim. Rep. 47, 56 (N.Y. Cir. Ct. 1845).

¹⁶⁷ R.S., pt. 1, c. 4, § 11.

¹⁶⁸ E.g., *Walker v. Cruikshank*, 2 Hill 296, 300 (N.Y. Sup. Ct. 1842); *Devlin's Case*, 5 Abb. Pr. 281, 292 (N.Y. Com. Pl. 1857); *Comfort v. Fulton*, 39 Barb. 56, 58 (N.Y. Sup. Ct. 1861); *In re Blum*, 30 N.Y.S. 396, 397 (Oyer & Terminer 1894). Section 11 did not apply, of course, to civil seizures under a writ of *fi. fa.* (*fieri facias*), *Hergman v. Dettlebach*, 11 How. Pr. 46, 47 (N.Y. Sup. Ct. 1855). Historically, a writ of *fieri facias* was a writ of execution obtained by a High

on section 14,¹⁶⁹ entitling defendants to be informed of charges against them,¹⁷⁰ to confront their accusers,¹⁷¹ and to have public trials.¹⁷² Sometimes the statute would be cited to elucidate the construction of another statute.¹⁷³ Oddly enough, a few courts cited the statutory bill of rights despite the existence of a pertinent constitutional provision.¹⁷⁴

IV. THE STATUTORY BILL OF RIGHTS IN THE ERA OF CONSTITUTIONAL BILLS OF RIGHTS: THE 20TH CENTURY

A. *The Consolidated Laws of 1909*

In 1904, the legislature appointed a Board of Statutory Consolidation¹⁷⁵ to prepare the first complete recodification of New York's statutes since the Revised Statutes of 1829. The Board, in Article 2 (entitled "Bill of Rights") of a new Civil Rights Law, placed "such of the historic principles as found their last statutory expression in the State in the Revised Statutes, except those contained in the State Constitution".¹⁷⁶ The Board, therefore, omitted ten sections of the statutory bill of rights in the Revised Statute,¹⁷⁷ which were duplicated by state constitutional provisions.¹⁷⁸ In consolidating the surviving sections,¹⁷⁹ the Board traced their origins, often to early English enactments like Magna

Court in England, and which did not require notice to the debtor prior to levy. See *Land Credit Co. v. Lord Fermoy*, L.R. 5 Ch. 323, 325 (1870).

¹⁶⁹ R.S., pt. 1, c. 4, § 14.

¹⁷⁰ E.g., *People v. Dumar*, 13 N.E. 325, 326 (N.Y. 1887).

¹⁷¹ E.g., *Barron v. People*, 1 N.Y. 386, 391 (1848); *People v. Corey*, 51 N.E. 1024, 1029 (N.Y. 1898); *People v. Elliott*, 64 N.E. 837, 838 (N.Y. 1902).

¹⁷² E.g., *People v. Hall*, 49 N.Y.S. 158, 159 (Sup. Ct. 1898).

¹⁷³ E.g., *Walker v. Cruikshank*, 2 Hill 296, 300-01 (Sup. Ct. 1842); *Taylor v. Porter*, 4 Hill 140, 149 (N.Y. Sup. Ct. 1843) (Nelson, C.J., dissenting); *Greater New York Athletic Club v. Wurster*, 43 N.Y.S. 703, 708-709 (Sup. Ct. 1897); *Ehrich v. Root*, 119 N.Y.S. 395, 399-400 (App. Div. 1909).

¹⁷⁴ E.g., *People v. Coombs*, 55 N.Y.S. 276, 283 (App. Div. 1899).

¹⁷⁵ L. 1904, c. 664.

¹⁷⁶ 1 Board of Statutory Consolidation, *Report* 428 (1907).

¹⁷⁷ R.S., pt.1, c. 4, §§ 7-10, 12, 13, 17, 19-21.

¹⁷⁸ 1 Board of Statutory Consolidation, *Report*, *supra* note 176, at 441.

¹⁷⁹ R.S., pt.1, c. 4, §§ 1-6, 11, 14-16, 18.

Carta or the 1689 Declaration of Rights.¹⁸⁰ When, in 1909, the legislature enacted the Civil Rights Law as part of the Consolidated Laws,¹⁸¹ it repealed all the prior statutes, both omitted and included, from which the consolidated law derived.¹⁸² The statutory bill of rights thus entered the twentieth century as a body of “historic principles,” not otherwise declared by the state’s constitution or statutes.¹⁸³

B. The Statutory Bill of Rights Amended

In the nineteenth century, the legislature left the statutory bill of rights untouched for seventy years; in the twentieth century, the legislature amended it six times. Three entirely new sections were added: section 15 in 1920,¹⁸⁴ to preserve the right of civil servants to administrative appeals;¹⁸⁵ section 16 in 1921,¹⁸⁶ allowing damages for illegal sales of intoxicants; and section 17 in 1935,¹⁸⁷ regarding employment contracts restricting union membership. Sections 16 and 17 were transferred to the General Obligations Law when that consolidated law was adopted in 1964.¹⁸⁸ Two sections were amended. In section 8, which prohibited unreasonable searches and seizures, the phrase “ought not be violated” was changed to “shall not be violated” in 1923¹⁸⁹

¹⁸⁰ 1 Board of Statutory Consolidation, *Report*, *supra* note 176, at 440-41.

¹⁸¹ L. 1909, c. 14.

¹⁸² *Id.* Schedule of Laws Repealed following § 61. As a matter of statutory interpretation, it should be noted that the legislature, as part of the consolidation process, provided that the meaning of Consolidated Law sections are determined by the meaning of the repealed statutes they replaced, L. 1909, c. 596.

¹⁸³ N.Y. CIV. RIGHTS LAW §§ 2-14, in 1 THE CONSOLIDATED LAWS OF THE STATE OF NEW YORK 303-05 (official ed. 1909).

¹⁸⁴ N.Y. CIV. RIGHTS LAW § 15, added by L. 1920, c 805.

¹⁸⁵ PUBLIC PAPERS OF ALFRED E. SMITH GOVERNOR 1920 409-10 (1921).

¹⁸⁶ L. 1921, c. 157, § 1 (repealed 1964).

¹⁸⁷ L. 1935, c.11, § 2 (repealed 1964).

¹⁸⁸ N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2001), formerly N.Y. CIV. RIGHTS LAW §16; N.Y. GEN. OBLIG. LAW §§ 1-203, subd. 9, and 5-301 (McKinney 2001), formerly N.Y. CIV. RIGHTS LAW § 17.

¹⁸⁹ L. 1923, c. 80.

in order to make the provision a positive prohibition¹⁹⁰ identical in wording to the federal Fourth Amendment.¹⁹¹ Section 13 was amended to prevent jury disqualification on the basis of sex in 1938,¹⁹² and on the basis of national origin in 1945.¹⁹³

Six amendments in ninety years hardly suggested much legislative interest in the statutory bill of rights. The amendments to the search and seizure and the jury service sections were compatible with the statements of “historic principles” the Board of Statutory Consolidation had envisioned in 1909. The three new sections suggested, however, that if the legislature thought of the statutory bill of rights at all, it thought of it more as a useful pigeon-hole in which to tuck miscellaneous pieces of remedial legislation that did not fit elsewhere in the consolidated laws.

C. The 1915, 1938, and 1967 Constitutional Conventions

The voters rejected the constitutions proposed by the 1915 and 1967 constitutional conventions; however, they approved the substantial amendments to the constitution of 1894 that the 1938 convention proposed.¹⁹⁴ All three conventions amended the constitutional bill of rights, all with little or no reference to the statutory bill of rights. The four amendments to the constitutional bill of rights proposed by the 1915 convention¹⁹⁵ did not

¹⁹⁰ 1 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK APRIL FIFTH TO AUGUST TWENTY-SIXTH 1938 409 (1938) [hereafter REVISED RECORD 1938 CONVENTION].

¹⁹¹ U.S. CONST. amend. IV.

¹⁹² L. 1938, c. 292. *see* FOURTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK 48-49 (1938); LAWS OF THE STATE OF NEW YORK PASSED AT THE ONE HUNDRED AND SIXTY-FIRST SESSION OF THE LEGISLATURE 684 note (1938).

¹⁹³ L. 1945, c. 292, § 2.

¹⁹⁴ *See* GALIE, *supra* note 31, at 200, 255, 327.

¹⁹⁵ *See* Proposed N.Y. CONST. of 1915, art. I, §§ 1-19, *printed in* DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1915, Doc. No. 52 (1915).

incorporate any provisions from the statutory bill of rights.¹⁹⁶ Neither did the convention, in its debates, mention the statute.¹⁹⁷

Of the sixteen amendments to the constitutional bill of rights proposed by the 1938 convention, and adopted by the voters,¹⁹⁸ two derived from the statutory bill of rights. The rights of accused persons to be informed of charges against them and to be confronted by witnesses, found in section 12 of the statute,¹⁹⁹ were included in the amended section 6 of the constitutional bill of rights.²⁰⁰ A new constitutional provision regulating search and seizure, section 12,²⁰¹ adopted the identical language of statutory section 8.²⁰² A report prepared for the use of the convention had remarked on the anomaly of these fundamental rights being protected only by statute,²⁰³ as did delegates on the floor of the convention.²⁰⁴

The 1967 convention proposed a modified constitutional bill of rights,²⁰⁵ with some novel features.²⁰⁶ None of its new provisions, however, derived from the statutory bill of rights. The report of the convention's Committee on Bill of Rights and

¹⁹⁶ The proposed amendments are noted in *id.*, at 71-72.

¹⁹⁷ 4 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, APRIL SIXTH TO SEPTEMBER TENTH 1915 4041-84, 4137-65, 4170-4201, 4223-26 (1916).

¹⁹⁸ JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK APRIL FIFTH TO AUGUST TWENTY-SIXTH 1938, App. No. 3, Doc. No. 52, at 1-7 (1938).

¹⁹⁹ N.Y. CIV. RIGHTS LAW § 12.

²⁰⁰ N.Y. CONST., art. I, § 6. This section also contained a new paragraph regarding wiretapping.

²⁰¹ *Id.* § 12. For an attempt to place this amendment in the context of a so-called "legalist reformation," see WILLIAM E. NELSON, THE LEGALIST REFORMATION; LAW POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980 124-128 (2001).

²⁰² N.Y. CIV. RIGHTS LAW § 8.

²⁰³ New York State Constitutional Convention Committee, *Problems Relating to Bill of Rights and General Welfare* v, 105, 215-16 (1938).

²⁰⁴ 1 REVISED RECORD 1938 CONVENTION, *supra* note 190 at 413-31.

²⁰⁵ Proposed N.Y. Const. of 1967, art. I, §§ 1-12, *printed in* 9 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK APRIL FOURTH TO SEPTEMBER TWENTY-SIXTH 1967, Doc. No. 60 (1967) [hereafter PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION].

²⁰⁶ *See, e.g., id.* § 11 (freedom of information); *id.* § 12 (consumers' rights).

Suffrage did not mention the statute,²⁰⁷ neither did debates on the floor of the convention.²⁰⁸

The 1938 constitutional convention successfully incorporated three clauses from the statutory bill of rights into the state constitution, and discussed its reasons for doing so. The failed constitutions of 1915 and 1967 ignored the statute. To a substantial extent, therefore, constitutional development in the twentieth century, as in the nineteenth, occurred with almost no reference to the existence of the statutory bill of rights.

D. The Statutory Bill of Rights Litigated

In twentieth-century litigation, the statutory bill of rights was occasionally venerated, generally ignored, and usually superseded. Within four years of the adoption of the consolidated Civil Rights Law, two prominent courts displayed an ardent fundamentalism with respect to the statute that would not have been out of place in 1787. The state Court of Appeals, in 1911, in repelling the suggestion that the confrontation clause of the statute²⁰⁹ had been amended by implication, stated:

It may also be said that though the Bill of Rights is but a statute, it is a statute of great antiquity in this state, having been enacted first in 1787, and having remained on the statute books ever since, despite the perpetual revision and codifications our laws undergo Such a statute should be deemed amended by other provisions of law only when the legislature has expressed that intention in clear terms.²¹⁰

More remarkably, in 1913, the Appellate Division for the First Department used a section of the statutory bill of rights²¹¹ to test the validity of a later statute; in doing so, the court stated:

²⁰⁷ 9 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION, *supra* note 205, Doc. no. 18.

²⁰⁸ 2 *id.* at 177-80; 3 *id.* at 208-14.

²⁰⁹ N.Y. CIV. RIGHTS LAW § 12.

²¹⁰ *People v. Bromwich*, 93 N.E. 933, 934-35 (N.Y. 1911).

²¹¹ N.Y. CIV. RIGHTS LAW § 4 (right to bear arms).

The provisions of the Bill of Rights, in this state, are embodied in the statutes . . . and not in the Constitution. Nevertheless, we fully recognize the proposition that the rights enumerated in the Bill of Rights were not created by such declaration. They are of such character as necessarily pertain to free men in a free state.²¹²

(The court found the later statute valid.) It was as if Magna Carta and the 1689 Declaration of Rights were speaking from their graves.

More typical was the general absence of the statutory bill of rights from the reports. Two sections of the statute, sections 6 (conscientious objection to military service) and 7 (quartering soldiers),²¹³ were not litigated at all during the twentieth century. Six sections²¹⁴ (declaring such fundamental principles as that all power derives from the people²¹⁵ and that elections are to be free)²¹⁶ received little more than desultory notice in reported litigation,²¹⁷ and three more²¹⁸ were not cited more than a dozen or so times, rarely in a substantive context.²¹⁹ Thus, of the fourteen sections of the statutory bill of rights,²²⁰ eleven played little or no role in litigation.

Section 8 (search and seizure)²²¹ and the information and confrontation clauses of section 12²²² of the statute played an

²¹² *People ex rel. Darling v. Warden of City Prison*, 154 A.D. 413, 421, 139 N.Y.S. 277, 284 (1st Dep't 1913).

²¹³ N.Y. CIV. RIGHTS LAW §§ 6, 7.

²¹⁴ *Id.* §§ 2, 3, 4, 5, 9, 11.

²¹⁵ *Id.* § 2.

²¹⁶ *Id.* § 9.

²¹⁷ *See also id.* § 5. This provision, which prohibits coerced military service was several times asserted, unsuccessfully, as a defense by Vietnam War resisters. *See, e.g., Berk v. Laird*, 429 F.2d 303, 304 (2d Cir. 1970).

²¹⁸ N.Y. CIV. RIGHTS LAW §§ 10, 14, 15.

²¹⁹ There are exceptions to this statement. *See, e.g., In re Cochran*, 143 N.E. 212, 213 (N.Y. 1924) (citing N.Y. CIV. RIGHTS LAW § 14 (jurors not questioned for verdicts) on the issue of juror criminal contempt).

²²⁰ Omitting the two sections transferred to the General Obligations Law; *see supra* text accompanying note 188.

²²¹ N.Y. CIV. RIGHTS LAW § 8. Although from 1923 on the statute was identical in language to the federal Fourth Amendment, New York (unlike

active role in litigation until they were superseded by constitutional amendment in 1938.²²³ Those clauses of section 12 not placed in the state constitution were also useful as independent declarations of basic rights²²⁴ in the period before the United States Supreme Court, through the Fourteenth Amendment, applied the federal bill of rights to the states.²²⁵ Since that time New York courts have repeatedly cited section 12 in criminal proceedings, although recognizing that its provisions at best restate constitutional principles definitively declared elsewhere. In addition, two clauses of section 12 have been implemented more specifically by other state statutes. Taking these clauses as they appear in section 12, the right to a speedy trial is mandated by the federal Sixth Amendment²²⁶ and implemented by the Criminal Procedure Law.²²⁷ The right to a public trial is also required by the Sixth Amendment²²⁸ and implemented by the Judiciary Law.²²⁹ The clause requiring impartial juries is regarded as implementing the due process section of the state constitutional bill of rights.²³⁰ The

federal) courts held that it did not import an exclusionary evidence rule. See *People v. Defore*, 150 N.E. 585, 587-88 (N.Y.) (Cardozo, J.), *cert. denied* 270 U.S. 657 (1926). This interpretation also applied to the 1938 constitutional amendment. See *People v. Richter's Jewelers*, 51 N.E.2d 691, 692-93 (N.Y. 1943). Now, of course, the federal exclusionary rule applies to the states. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

²²² N.Y. CIV. RIGHTS LAW § 12; see *Bromwich*, 93 N.E. at 934-935; *People v. Sugarman*, 162 N.E. 24, 25-26 (N.Y. 1928).

²²³ N.Y. CONST., art. I, §§ 6, 12. Courts still have occasion to cite the predecessor statutes when interpreting these constitutional provisions. See, e.g., *Brown v. State*, 674 N.E.2d 1129, 1139 (N.Y. 1996).

²²⁴ See e.g., *People v. Jelke*, 123 N.E.2d 769, 771 (N.Y. 1954); *People v. Wells*, 5 N.E.2d 206 (N.Y. 1936).

²²⁵ For the process of applying the federal bill of rights to the states through the Fourteenth Amendment, see THE CONSTITUTION OF THE UNITED STATES OF AMERICA; ANALYSIS AND INTERPRETATION, *supra* note 161, at 957-64.

²²⁶ U.S. CONST. amend. VI. See, e.g., *People v. Anderson* 488 N.E.2d 1231, 1234 (N.Y. 1985); *People v. Gates*, 70 A.D.2d 734, 735, 416 N.Y.S.2d 870, 872 (3d Dep't 1978).

²²⁷ N.Y. CRIM. PROC. LAW §§ 30.20, 30.30 (McKinney 1992 & Supp. 2002). See also, *People v. Dean*, 384 N.E.2d 303, 305 (N.Y. 1978).

²²⁸ U.S. CONST. amend. VI; see *People v. Ramos*, 685 N.E.2d 492, 495-96 (N.Y. 1997); *People v. Ematro*, 728 N.Y.S.2d 162, 163 (2001).

²²⁹ N.Y. JUD. LAW § 4.

compulsory process clause is also mandated by the federal Sixth Amendment.²³¹ The clause abolishing mixed juries for aliens, a right derived from an ancient English statute,²³² has no relevance to modern New York law. Thus, section 12 of the statutory bill of rights may have some utility in summarizing New York's policy with respect to the rights of persons accused of crimes, but it cannot now be regarded as an independent source of those rights. Much the same could be said of section 13, guaranteeing the right to serve on juries: it declares a right mandated by the state and federal constitutions.²³³

V. CONCLUSION: THE STATUTORY BILL OF RIGHTS TODAY AND WHAT TO DO WITH IT

The statutory Bill of Rights, contained in New York's Civil Rights Law, is an artifact, a memento, of a time in the eighteenth century when Magna Carta, the 1628 Petition of Right, and the 1689 Declaration of Rights were more real to New Yorkers, more significant as statements of fundamental rights, than the state and federal constitutions are to us today. The Consolidated Laws, however, are not the place for constitutional coelacanths. The statutory Bill of Rights either states foundational principles that are no longer the subject of dispute, or have been superseded by more authoritative state and federal constitutional provisions. The statute's presence in the Consolidated Laws is at best a curiosity, at worst a source of confusion, of wasted time for the researcher.²³⁴ In order to correct this anomaly, certain sections of the statutory

²³⁰ N.Y. CONST., art. I, § 1. *See, e.g.,* *People v. Thompson*, 79 A.D.2d 87, 96, 435 N.Y.S.2d 739, 746-47 (2d Dep't 1981); *People ex rel. Mursch v. Cleary*, 43 N.Y.S.2d 533, 536 (City Ct. 1943).

²³¹ U.S. CONST. amend. VI; *see* *People v. Robinson*, 679 N.E.2d 1055, 1058 n.1 (N.Y. 1997); *People v. Sher*, 332 N.Y.S.2d 166, 170 (Co.Ct. 1972).

²³² *See* 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 271 (1736).

²³³ U.S. CONST. AMEND. XIV; N.Y. CONST., art. I, §§ 1, 11. *See, e.g.,* *People v. Allen*, 653 N.E.2d 1173, 1177 (N.Y. 1995); *People v. Rambersed*, 649 N.Y.S.2d 640, 644-45 (Sup. Ct. Bronx County 1996) (noting usefulness of statute's specification of "national origin" as basis of discrimination).

²³⁴ *See* for example, the awkward mention of sections of the statutory bill of rights in tandem with constitutional provisions, in GENERAL PRACTICE IN NEW YORK §§ 18.9, 18.12 (Robert L. Ostertag & James D. Benson eds., 1998).

Bill of Rights should be added to the state constitution by amendment, and certain sections should be repealed as redundant. If this is done, the remainder of the statutory Bill of Rights should be repealed in its entirety.

Some rights declared by the statutory Bill of Rights, although now unquestioned, are the result of centuries of constitutional struggle. It is fitting that they be placed in the organic law of the state, beyond the powers of any future legislature to modify them.²³⁵ To take one concrete example, the right of jurors not to be questioned for verdicts, declared by section 14 of the statute,²³⁶ is an unquestioned principle of the common law,²³⁷ settled a hundred years before the revolution.²³⁸ Although this right is probably protected by general due process concepts,²³⁹ placing it specifically in the state's organic law would put it beyond any future question. It is not sufficient to suggest that the right may be protected by federal constitutional standards;²⁴⁰ as a matter of federalism, of the independent standing of New York State, it should be asserted in the state's own constitution.²⁴¹ The provisions of the statutory bill of rights that should be added to the state constitution (and that thereafter should be repealed in their statutory form) probably include the prohibition of taxes without assent (section 3); the right to bear arms (section 4); the prohibition of coerced military service (section 5); the prohibition of military quartering (section 7); the guarantee of free elections (section 9); those trial rights of the accused not now in the constitution (section 12);²⁴² and the prohibition of questioning jurors regarding verdicts (section 14).²⁴³

²³⁵ See *Problems Relating to Bill of Rights and General Welfare*, *supra* note 203, at v.

²³⁶ N.Y. CIV. RIGHTS LAW § 14.

²³⁷ 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 306 (1883):

²³⁸ *Bushnel's Case*, 124 Eng. Rep. 1006 (C.C.P. 1670).

²³⁹ *C.f.* *Fay v. Noia*, 372 U.S. 391, 403 (1962) (discussed in the habeas corpus context).

²⁴⁰ *Id.*

²⁴¹ JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES ¶ 1.03, at 1-9 through 1-16 (1995).

²⁴² See *supra* text accompanying notes 198-204.

²⁴³ N.Y. CIV. RIGHTS LAW §§ 3, 4, 5, 7, 9, 12, 14.

Certain sections of the statutory bill of rights, otherwise guaranteed by constitutional provisions, either are redundant and should be repealed, or are so detailed that they do not belong in a state's constitution and are properly subsumed under more general provisions. The statement of popular sovereignty (section 2) in the statutory bill of rights is implicit in the preamble of the state constitution;²⁴⁴ exemption from military service for conscientious objectors (section 6) is guaranteed by the constitutional religious freedom clause;²⁴⁵ the right to free and speedy justice (section 10) is implied by the constitutional due process clause;²⁴⁶ the statutory guarantee of reasonable fines (section 11) is essentially duplicated by the constitutional prohibition of excessive fines;²⁴⁷ and the right to serve on juries (section 13) is protected by the constitutional equal protection clause.²⁴⁸ These five statutory sections are obviously redundant: they should be repealed. The language of section 8 and part of section 12 of the statutory bill of rights were added to the state constitution in 1938;²⁴⁹ they should also be repealed as redundant. Section 12's abolition of mixed alien juries should be repealed as obsolete. Finally, the right of administrative appeal guaranteed by section 15 of the statutory bill of rights is fully implemented by provisions of the state Civil Service Law;²⁵⁰ it, also, should be repealed as redundant.

²⁴⁴ Compare N.Y. CIV. RIGHTS LAW § 1, with N.Y. Const. preamble.

²⁴⁵ Compare N.Y. CIV. RIGHTS LAW § 6, with N.Y. Const., art. I, § 3.

²⁴⁶ Compare N.Y. CIV. RIGHTS LAW § 10, with N.Y. Const., art. I, § 1.

²⁴⁷ Compare N.Y. CIV. RIGHTS LAW § 11, with N.Y. Const., art. I, § 5.

²⁴⁸ Compare N.Y. CIV. RIGHTS LAW § 13, with N.Y. Const., art. I, § 11.

²⁴⁹ See *supra* text accompanying note 202.

²⁵⁰ Compare N.Y. CIV. RIGHTS LAW § 15, with N.Y. CIV. SERV. LAW §§ 6, subd. 5; 72, subd. 3; 120; 130, subd. 5 (McKinney 1999 & Supp. 2002).