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# NEW YORK'S STATE CONSTITUTION IN NATIONAL CONTEXT<sup>1</sup>

Robert F. Williams\*

*Hon. Leon D. Lazer:*

Our next speaker is exceptionally well-equipped to tell us how the New York Constitution compares with the constitutions of other states. Professor Robert Williams is the distinguished professor of law at Rutgers University of Law in Camden, New Jersey. He is an import from Florida, where he received his Bachelor's Degree and his Law Degree at the University of Florida College of Law. He served as a legislative intern at the Florida Legislature. He has also received his L.L.M. from the New York University School of Law and a second L.L.M. from Columbia Law School. He is the author of two books, *State Constitutional Law: Cases and Materials*,<sup>2</sup> the Second Edition, published by the Michie Company, and the *New Jersey Constitution: A Reference Guide*,<sup>3</sup> that is published by Greenwood Press. I might add that Greenwood Press is producing reference guides for all the states, at least twenty-eight have been completed. These individual state guides are excellent examples that display the constitutional law. Professor Robert F.

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<sup>1</sup> This is an expanded version of *New York's State Constitution in Comparative Context*, published as Chapter 2 in *THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK* (Temporary State Commission on Constitutional Revision, Gerald Benjamin, ed., 1994) and in *DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK* 29-43 (Gerald Benjamin and Henrick N. Dullea, ed., 1997), and is reprinted here with permission. I would like to thank the Commission Research Director Gerald Benjamin, and Commission Counsel Professor Eric Lane, for the opportunity to participate in the Commission's work, and to thank Gerald Benjamin for his helpful comments on the draft chapter, as well as this expanded version.

<sup>2</sup> Robert F. Williams, *STATE CONSTITUTIONAL LAW CASES AND MATERIALS* (Michie Company, 2d ed. 1993).

<sup>3</sup> Robert F. Williams, *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE* (Greenwood Press, 1990).

Williams is also the co-author of *Legislative Law and Process*, also published by the Michie Company. I cannot imagine anybody more qualified to speak on the topic, which is, "How does the New York State Constitution compare to other constitutions?" Please welcome Professor Robert F. Williams.

*Professor Robert F. Williams:*

The explanation for the comparatively small amount of intensive professional and scholarly interest in at least the basic study of comparative state constitutional provisions lies to a great extent in the nature of the state constitutional documents themselves. This can be proved, for anyone with the necessary time and patience, by reading . . . the fifty state constitutions. With some exceptions, the state constitutions are not notable as masterpieces of legal draftsmanship or literary style.<sup>4</sup>

The field of state constitutional research has become in large measure a field of comparative law, and states that propose to amend their constitutions usually look to the constitutional language and experience of other states, either for example or avoidance.<sup>5</sup>

## I. Introduction

The problems of comparative research in state constitutions are very great. Despite the obvious need for such research as background for a state considering amending or revising its state constitution, the indexes and comparative materials are scarce.

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<sup>4</sup> See Morris M. Goldings, *Massachusetts Amends: A Decade of State Constitutional Revision*, 5 HARV. J. LEGIS. 373 (1968). One commentator stated, concerning the New York State Constitution, "probably no other large industrial state has such a poorly drafted charter." *Id.* ROBERT B. DISHMAN, *STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT*, 69 (1968).

<sup>5</sup> See Frank P. Grad, *Foreword*, in BARBARA FAITH SACHS, *FUNDAMENTAL LIBERTIES AND RIGHTS: A 50 STATE INDEX V* (1980).

This article is thus necessarily only a preliminary, general comparison.

A fully developed research agenda in state constitutional law must be comparative both with respect to other state constitutions as well as the Federal Constitution.<sup>6</sup> Even comparisons with the state ("subnational") constitutions in other federal systems should be considered.<sup>7</sup>

Interestingly, New York's State Constitution is among the better documented of the American state constitutions.<sup>8</sup> As Justice Hans A. Linde has pointed out, state constitutions are not "common law."<sup>9</sup> But the lessons of one state's constitutionalism are useful in any other state. Despite Justice Linde's point that state constitutions contain unique textual differences, they are similar in many respects. Therefore, it is important to study, analyze and write about state constitutional law on both a state-specific and national basis. As I have suggested "[m]any common themes appear in the constitutional law of all states. They share many of the same issues, despite differences in how

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<sup>6</sup> Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 172-73 (1983) ("[S]tate constitutions do not differ significantly from one another. . . the recurring themes and issues throughout state constitutional law . . . make it susceptible to treatment on a comparative or 'all states' basis."); See, e.g., ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (2d ed. 1993); Robert F. Williams, *Foreword: A Research Agenda in State Constitutional Law*, 66 TEMPLE L. REV. 1145 (1993).

<sup>7</sup> James A. Thomson, Review Essay, *State Constitutional Law: Some Comparative Perspectives*, 20 RUTGERS L.J. 1059 (1989) (reviewing R. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES & MATERIALS* (1988)); ROBERT F. WILLIAMS, *Comparative State Constitutional Law: A Research Agenda on Subnational Constitutions in Federal Systems* in *LAW IN MOTION* 339 (Roger Blanpain, ed. 1997).

<sup>8</sup> See, e.g., PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* (1996); *infra* note 31; CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* (5 VOLS. 1906).

<sup>9</sup> Hans A. Linde, *Are State Constitutions Common Law?* 34 ARIZ. L. REV. 215, 229 (1992).

such issues may be resolved in each state.”<sup>10</sup> It is literally true that state constitutional law is a matter of “comparative American constitutional law.”<sup>11</sup>

There has been a relatively intense scrutiny of New York’s constitution and the revision process the past few years. In May, 1993, Governor Mario Cuomo promulgated an executive order establishing a Temporary Commission on Constitutional Revision to make preparations for the 1997 referendum on whether to call a constitutional convention.<sup>12</sup>

The 1993-95 Commission issued several interim reports concerning the processes of state constitutional revision, substantive matters, and several crucial voting rights and apportionment matters surrounding a constitutional convention.<sup>13</sup> In its February, 1995 Final Report the Commission identified four crucial areas (the state budget process, state-local relations, education and public safety) that were in need of reform, including the possibility of state constitutional change. The Commission recommended the creation of “action panels,” modeled on the National Commission on Social Security Reform and the Federal Base Closing Commission, which would address each of the four areas and make recommendations that the governor and the legislature would commit ahead of time to consider seriously. In the absence of serious consideration, and some meaningful reform, the Commission would recommend a positive vote on whether a constitutional convention should be

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<sup>10</sup> Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 172-73 (1983) (emphasis added) (stating that [S]tate constitutional law “usually is thought of as a parochial matter.”). *Id.*

<sup>11</sup> I am indebted to Gisbert H. Flanz for pointing out the applicability of this term to American state constitutional law.

<sup>12</sup> Exec. Order No. 172, May 26, 1993, *reprinted in* EFFECTIVE GOVERNMENT NOW, *infra* note 14, at 143. Selected excerpts of the commission’s reports are reprinted in *Documents*, 26 RUTGERS L. J. 1355 (1995).

<sup>13</sup> See TEMPORARY NEW YORK STATE COMM. ON CONSTITUTIONAL REVISION: THE DELEGATE SELECTION PROCESS (MARCH 1994); THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK (1994).

called in 1997.<sup>14</sup> This was a unique approach to the problem of state constitutional revision in an atmosphere where many people were worried about the outcome of an unlimited state constitutional convention.<sup>15</sup> It was also a new approach to using the periodic referendum on calling a state constitutional convention to pressure the executive and legislature to accomplish substantial reform prior to the referendum. It was unsuccessful, though, and the New York voters decided in November, 1997 not to call a constitutional convention.

New York State has long and repeated experience with constitution making. Eight of the original thirteen states adopted their first constitutions in 1776. That of New York, drafted primarily by John Jay<sup>16</sup> was adopted only one year later, placing it among the states with the longest state constitutional experience. One of New York's delegates to the Federal Constitutional Convention in 1787 in Philadelphia, Robert Yates, had been instrumental in the drafting and adoption of the 1777 New York Constitution.<sup>17</sup> New York is about in the middle of the original thirteen in the number of constitutions it has adopted. There have been four to date (that of 1777 and three in the nineteenth century, in 1821, 1846 and 1894). Additionally, there was one major revision in the twentieth century, in 1938,<sup>18</sup> and

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<sup>14</sup> EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY: THE FINAL REPORT OF THE TEMPORARY STATE COMMISSION ON CONSTITUTIONAL REVISION 11-32 (Feb. 1995).

<sup>15</sup> Thomas Gais and Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMPLE L. REV. 1291 (1995). The concerns about state constitutional conventions are perceptively treated in this article.

<sup>16</sup> JOHN JAY: THE MAKING OF A REVOLUTIONARY - UNPUBLISHED PAPERS 1745-1780, 389-418 (R. Morris ed. 1975); B. MASON, THE ROAD TO INDEPENDENCE: THE REVOLUTIONARY MOVEMENT IN NEW YORK, 1773-1777, 225 (1966).

<sup>17</sup> Alfred F. Young, THE DEMOCRATIC REPUBLICANS OF NEW YORK: THE ORIGINS, 1763-1797, 17 (1967).

<sup>18</sup> Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS: THE JOURNAL OF FEDERALISM 57, 58 (WINTER, 1982).

one major failed revision, in 1967.<sup>19</sup> New York has the second longest state constitution, trailing a distant second behind Alabama, where the state constitution is more than twice the length of New York's.<sup>20</sup>

As an original state, New York avoided the exertion of influence over the content of its state constitution by Congress and the President. In fact, scholarship has demonstrated that the influence flowed in the opposite direction, with the New York governorship, including the veto power, serving in some measure as a model for the design of the presidency.<sup>21</sup> Therefore, whatever is contained in the New York constitution is of New York origin, and not the product of nationally-imposed preferences that often were made the price of statehood for the non-original states.<sup>22</sup> As Chief Judge Judith S. Kaye has stated: "The combination of high detail and accessibility to the amendment process gives our Constitution a distinctive New York character. It is a product and expression of this State."<sup>23</sup> She pointed out, though, that it "is a curious document --

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<sup>19</sup> Robert B. McKay, *Constitutional Revision in New York State: Disaster in 1967*, 19 SYRACUSE L. REV. 207 (1967). For an important new, exhaustive analysis of the 1967 Convention, see HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION (1997).

<sup>20</sup> 28 BOOK OF THE STATES 1990-91, 40 (Council of State Governments 1990).

<sup>21</sup> See CHARLES THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789 (1969). See Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMPLE L. REV. 541, 566 (1989). For an in-depth study of New York's veto provision, see FRANK M. PRESCOTT & JOSEPH F. ZIMMERMAN, THE POLITICS OF THE VETO OF LEGISLATION IN NEW YORK STATE (1980).

<sup>22</sup> See PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775-1787, 43-46 (1983); ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 15-19, 76-90 (2d ed. 1993).

<sup>23</sup> See Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 409 (1987).

particularly when compared with the United States Constitution.”<sup>24</sup> She continued:

Given its laborious detail, our Constitution may not in every phrase ring with the majesty of Chief Justice Marshall’s declaration: “it is *a constitution* we are expounding.” But it *is* a constitution we are expounding, and its commands are therefore entitled to the particular deference that courts are obliged to accord matters of constitutional magnitude. To borrow former Chief Judge Breitel’s eloquent words, in overturning the moratorium on enforcement of city obligations as violative of the state constitutional requirement of a pledge of faith and credit: “it is a Constitution that is being interpreted and as a Constitution it would serve little of its purpose if all that it promised, like the elegantly phrased Constitutions of some totalitarian or dictatorial Nations, was an ideal to be worshipped when not needed and debased when crucial.”<sup>25</sup>

New York’s Constitution, and its judicial interpretation, are of great interest to others around the country.<sup>26</sup>

Alexander Hamilton pointed proudly to the New York Constitution in the very first number of *The Federalist*, where he assured New Yorkers that the new Federal Constitution was an “analogy to your own State constitution. . . .”<sup>27</sup> In his *Federalist No. 66*, Hamilton defended the Federal Constitution’s provision for the trial of impeachments in the Senate against the charge that it was an unwise blending of judicial and legislative authority, noting that the Constitution of New York made essentially the same provision.

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<sup>24</sup> *Id.* at 408.

<sup>25</sup> *Id.* at 411.

<sup>26</sup> Robert F. Williams, *Foreword: New York Constitutional Law: The State and Nation Watch*, 8 TOURO L. REV. i (1992).

<sup>27</sup> THE FEDERALIST NO. 1 at 6 (A. Hamilton) (Modern Library ed. 1937). In Number 69, Hamilton defended the proposed four-year term for the President by referring to the “close analogy between *him* and a governor of New York, who is elected for *three* years . . . .” *Id.* No. 69, at 446 (A. Hamilton) (emphasis in original).



In fact, too, in addition to influencing the national document, New York's constitution was a model for other states as they drafted or revised their state constitutions. For example, "the Iowa and New York constitutions lay behind virtually every section of the Californian's [1849] document."<sup>28</sup>

Each of New York's constitutions has built on the preceding one, while reflecting the principle political concerns and theories of governance that prevailed at the time of its drafting. Several commentators who studied a number of state constitutional conventions, including New York's 1967 convention, noted the importance of understanding the political, social and cultural context of state constitution making and constitutional development:

[C]onstitutional revision is a political process. As such it does tap the full range of motives and interests called into play by the other political subprocesses at the state level. And like these other forms of state politics, it varies from jurisdiction to jurisdiction in response to local differences in political culture and style.<sup>29</sup>

In addition to the successes of the past, the current content of the New York constitution also displays the influences of ostensibly failed efforts at constitutional revision in the state, for example those of 1867, 1915 and 1967. In fact, these conventions substantially set the constitutional change agenda for New York for decades after their initial proposals were rejected at the polls. Constitutional Commissions have also played a major role in state constitutional change in New York.<sup>30</sup>

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<sup>28</sup> See DAVID ALAN JOHNSON, *FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840-1890*, 102 (1992). See also Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution - Making in the Nineteenth Century West*, 25 *RUTGERS L.J.* 945, 978-79 (1994).

<sup>29</sup> ELMER E. CORNWELL, JR. ET AL., *STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES*, 192 (1975). See also Henrik N. Dullea, *supra* note 19.

<sup>30</sup> See Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State*

Alterations occurred too in New York as a result of the major waves of state constitutional change that swept the region and nation.

It is therefore evident that New York's Constitution cannot be viewed in a one-dimensional way, as though it were simply drafted all at "one sitting." Rather, it must be seen as the culmination of centuries of experience and an enormous array of influences. The result is a layered, or multidimensional document.<sup>31</sup> As in other states, the state constitution in New York can be seen as a "mine of instruction for the natural history of democratic communities,"<sup>32</sup> reflecting "the romance, the poetry and even the drama of American politics"<sup>33</sup> in the unique New York context. Further, it is the very nature of this experience that it is never finished.

One of the leading experts on state constitutions and constitution making in this century, Frank P. Grad of the Columbia Law School, had little patience for the notion that there is an "ideal" state constitution. Rather, Grad wrote:

[W]e must be content with something less than the Platonic ideal; we must aim rather for a constitutional document that is designed to enable the state to carry on its work of government today and in the foreseeable future with efficiency and economy and with minimum interference by unnecessary restrictions . . . .<sup>34</sup>

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*Constitutional Change*, 1 HOFSTRA LAW & POLICY SYMP. 1, 11-14 (1996); Peter J. Galie and Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*. *Id.* at 27, 40-46.

<sup>31</sup> For excellent consideration of each section's origins, see PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE* (1991) and ROBERT ALLAN CARTER, *NEW YORK STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT* (1988).

<sup>32</sup> See JAMES BRYCE, *THE AMERICAN COMMONWEALTH*, 434 (2d Ed. 1891).

<sup>33</sup> JAMES Q. DEALEY, *GROWTH OF AMERICAN STATE CONSTITUTIONS*, 11 (1915).

<sup>34</sup> Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 928-29 (1968). See also *Model State Constitution*, New York: National Municipal League, 1963.

Because there is no “ideal” state constitution, because political influences are different from state to state, and because the Federal Constitution performs a different function from state constitutions, comparisons should be made with caution. With these cautionary points in mind, there is great value to examining generally New York’s current state constitution in comparative context.

## II. New York’s State Constitution

### *A. Article I: The Bill of Rights*

The New York Bill of Rights did not appear in the original 1777 constitution. That document, like those of the other original states without separate bills of rights, did protect a variety of rights, such as jury trial, freedom of religion, and due process within the body of the constitution itself.<sup>35</sup> Robert C. Palmer has argued that decisions, like in New York, not to include a separate Declaration of Rights, “indicated no less social value attributed to rights.”<sup>36</sup>

Seeming individual liberties in the body of the constitution, stated in mandatory form, were concerned primarily not with individuals, but with the structure of government. Not only did the New York constitution not have a declaration of rights, its concern was so thoroughly consumed with establishing a liberty-enhancing republican government that nowhere did the constitution explicitly address the protection of individual rights.<sup>37</sup>

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<sup>35</sup> See Galie, *supra* note 31, at 4.

<sup>36</sup> Robert C. Palmer, *Liberties as Constitutional Provisions, 1776-1791* in William E. Nelson and Robert C. Palmer, *Liberty and Community: Constitution And Rights In The Early American Republic* 55, 61 (1987). He continued: “Adopting a constitution without a declaration of liberties, as four states did, did not establish that such a state was more arbitrary or less free than states with declarations; liberties, in these four states, were usually mentioned somewhere in their constitutions.” *Id.* at 75.

<sup>37</sup> *Id.* at 79.

In 1821, a separate bill of rights was adopted, forming the basis for the current article which, like in most states now, comes at the beginning of the constitution. New York's Bill of Rights is in many respects similar to those of the other states.<sup>38</sup> The specific provisions reflect amendments over the years to accommodate pragmatic recognition of what are thought to be the necessities of modern state government. For example, Article I, § 1, concerning disenfranchisement was amended in 1959 to permit the legislature to dispense with primary elections under certain circumstances. Article I, § 2 regarding the right to jury trial has been amended to permit non-unanimous jury verdicts if the legislature so desires. Article I, § 7 also reflects a similar modern modification in section (d).

The guarantee of freedom of speech contained in Article I, § 8 is, as in many states, an affirmative statement of the right, rather than a negative limitation on government such as is found in § 9. This has led some states, but not New York, with similar provisions to construe them to apply to free speech and assembly activities on certain private property such as private university campuses and shopping malls.

The detailed regulation of gambling in Article I, § 9 is not unusual for state constitutions, because of its highly political and morally charged content,<sup>39</sup> but it is unusual to find it treated in the bill of rights. State constitutional regulation of gambling is more often found in the legislative article.

New York's equal protection provision, Article I, § 11, is quite unusual because the second sentence, on its face, seems to apply to private as well as state action. The courts, however, have not accorded this much recognition.<sup>40</sup> Montana apparently modeled its equal protection provision on New York's.<sup>41</sup>

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<sup>38</sup> See generally Barbara Faith Sachs, *supra* note 5; Mark L. Glasser and John Kincaid, *Selected Rights Enumerated in State Constitutions*, 17 *Intergovernmental Perspective* 35 (Fall, 1991); Ronald K. L. Collins, *Bills and Declarations of Rights Digest*, in *THE AMERICAN BENCH* 2483 (1985).

<sup>39</sup> See Grad, *supra* note 34, at 950 n. 66, 955-56.

<sup>40</sup> N.Y. CONST. art. I § 11. By its terms, it does not require state action but the New York courts have read this requirement into it. See *e.g.*, *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949); *Holy Spirit*

The search and seizure protection in Article I, § 12 includes a modern provision extending its protection to “unreasonable interception of telephone and telegraph communications.” This provision is found in only a few state constitutions, and is another example of a modern modification of a much older, core constitutional protection.<sup>42</sup>

The Article I, § 16 prohibition on limiting recoveries for wrongful death is also present in a number of states, reflecting a specific, substantive distrust of the legislature arising from actual experience. Under the pressure of powerful railroad employer interests, state legislatures passed statutes limiting recovery for wrongful death at the end of last century, leading to provisions like this. Other examples may be found in the constitutions of Kentucky and Pennsylvania.

The recognition of labor rights in Article I, § 17 is relatively unusual; it is found in only five other state constitutions.<sup>43</sup> New York led the way in this regard, as it did in constitutionalizing a number of other social policy concerns in 1938. Florida, Missouri, New Jersey, and Hawaii all adopted or modified their constitutions after 1938, perhaps emulating New York’s provision in this area. Finally, the workers’ compensation provision, Article I, § 18 is very common in state constitutions for two reasons. First, like in New York, such a provision was necessary

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*Ass’n. v. New York State Congress of Parents & Teachers, Inc.*, 95 Misc. 2d 548, 552, 408 N.Y.S. 2d 261, 265 (Sup. Ct. New York County 1978); *Antinore v. State*, 79 Misc. 2d 8, 13, 356 N.Y.S. 2d 794, 800 (Sup. Ct. Monroe County 1974). For a recommendation to overrule the state action requirement, see J. WEINSTEIN, *ESSAYS ON THE NEW YORK CONSTITUTION* II 41 to 43 (1966).

<sup>41</sup> Tia Rikel Robbin, *Untouched Protection from Discrimination: Private Action in Montana’s Individual Dignity Clause*, 51 MONT. L. REV. 553, 557-58 (1990).

<sup>42</sup> See generally Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals’ Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1 (1996).

<sup>43</sup> See Richard A. Goldberg and Robert F. Williams, *Farmworkers’ Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729, 731-32 (1987).

in some states to overcome a decision of the highest state court holding that the legislature was without power to establish a system of workers' compensation. New York's experience in this regard with the famous *Ives*<sup>44</sup> case is among the most well-known examples of a state constitution being amended to "overrule" a state court interpretation of the state constitution. Other states that have these provisions included them to eliminate doubt about statutory workers' compensation schemes because of alleged jury trial, access to court, and other potential constitutional impediments.

Overall, New York's Bill of Rights is comparable to those in most states, subject to the exceptions noted above. However, it does not contain a guarantee of equal rights for women (a "state ERA") as is now present in about one-third of the states.<sup>45</sup> The New York Bill of Rights also does not contain constitutional protection for persons with disabilities, which has been adopted in a few states.

### *B. Article II: Suffrage*

Article II has its origins in the Revolutionary debates over the right to vote, as well as in the 1821 Constitutional Convention, which has been referred to as "one of the great suffrage debates in American history."<sup>46</sup>

Currently, it covers much of the same ground as will be found in other constitutions, such as basic qualifications, absentee voting, registration, and disqualification from the right to vote. As noted elsewhere in this volume, many of the New York provisions on Suffrage are now invalid because they are in conflict with the United States Constitution or federal statutes as

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<sup>44</sup> *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, 94 N.E. 431 (1911).

<sup>45</sup> See Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 RUTGERS WOMEN'S RTS. L. REP. 69 (WINTER 1994).

<sup>46</sup> See Galie, *supra* note 31, at 7 (quoting CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY, 1760-1860*, 195 (1960)). See also MERRILL D. PETERSON, *DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820'S* 125, 187-233 (1966).

interpreted by the United States Supreme Court. The special provision contained in § 9 with respect to presidential elections, quite common in state constitutions, is essentially mandated by federal law. The New York Constitution contains somewhat more detailed provisions regarding voter registration and election administration than generally found in state constitutions.

### *C. Article III: Legislature*

Article III concerns the basic lawmaking branch of state government, and sets forth its basic structure, the qualifications for service as a legislator, and the method for designing legislative districts.<sup>47</sup> Like in all of the states but one (Nebraska), it establishes a bicameral legislature. In Article III, § 2 the use of the term “assemblymen” reflects the absence of gender neutrality toward which some states have moved in their constitutions.

Part of the responsibility to reapportion the legislature is assigned by § 4 to the legislature, where it has traditionally resided. Some other states, in recent times, have amended their constitutions to assign the politically difficult task of reapportionment to a commission set up specifically for this purpose.<sup>48</sup> These commissions typically develop a reapportionment plan which is then subject to direct review by the state’s supreme court, without any involvement by the legislature itself.

The provisions with respect to senate districts (§ 4) and assembly districts (§ 5) are, as in many states, subject to the overriding mandates of the federal one-person-one-vote decisions and the Voting Rights Act, where it applies. This is confusing. It leaves some but not all aspects of the state constitutional

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<sup>47</sup> Robert F. Williams, *Comment: On The Importance Of A Theory Of Legislative Power Under State Constitutions*, 15 QUINNIPIAC L. REV. 57 (1995).

<sup>48</sup> See Bruce Adams, *A Model State Reapportionment Process: The Continuing Quest for “Fair and Effective Representation*, 14 HARV. J. LEGIS. 825 (1977).

provisions on this subject without force or effect. But it is not a uncommon situation.

The provisions on compensation and expenses (§ 6) and qualifications and the ban on certain civil appointments, "to an office which shall have been created, or the emoluments whereof shall have been increased," are very common among most of the states.

The content of sections 8-11 is quite standard in most constitutions, though the provision in section 12 that "any bill may originate in either house" diverges from that of some states which include the more rigid requirement that revenue bills originate in the House. The section 13 requirement that only bills are valid to enact law is standard, and reflects the notion that legislative actions short of bills, such as resolutions, are not available to enact a formal law. The limitations on the passage of laws contained in sections 14-17 are also fairly standard, although states vary on the approach taken to private and local bills (§17) and a number of other states expand this prohibition to cover "special" legislation.<sup>49</sup> The special laws provisions in other states are generally aimed at legislative classifications, and in most states are thought to be similar to equal protection guarantees.

The provision in § 18 permitting the legislature to call itself into session, common in most states, serves as a compliment to the governor's power to call special sessions.

The remaining sections of Article III each reflect issues treated in some other state constitutions in comparable ways.<sup>50</sup> Section 24 serves as a substantive limit on the legislature. The provision for emergency government included in § 25, reflecting the attitudes of the day in 1963, is similar to the relatively untested provisions contained in some other state constitutions.

Legislative term limitation, adopted in almost all states with initiative and referendum, is not present in New York, which

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<sup>49</sup> Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1209-10 (1985).

<sup>50</sup> See generally BARBARA FAITH SACHS, *LAW, LEGISLATURE, LEGISLATIVE PROCEDURE: A FIFTY STATE INDEX* (1982).



does not provide for these techniques of direct democracy, or for recall of elected officials, in its constitution.

*D. Article IV: Executive*

The relatively streamlined executive article reflects the standard powers and duties of the governor. Unlike New York, more than half the states limit the number of terms a governor may serve. The policy choice in section 1 of having the governor and lieutenant governor “chosen jointly” is found in some other states that have lieutenant governors. Other states specify that they run independently. Their joint election notwithstanding, the separate nomination of the governor and lieutenant governor in New York has sometimes led to incompatibility between them.

The mechanisms for succession in office, or the “devolution of the duty of acting as governor,” is reflected in fairly standard terms in § 6.

The executive veto power in § 7, the original 1777 version of which served as a partial model for the Federal Constitution’s veto power, now includes a somewhat restricted version of the item veto. The text of the provision seems limited to veto of “items of appropriation of money.” Some other states do not so restrict item veto, permitting the governor to veto substantive provisions in appropriation bills, and, under some circumstances, proviso language or “riders” in appropriation bills.<sup>51</sup>

Finally, the limitation on the effectiveness of administrative rules, reflected in §8, is found in a number of states, and is a reaction to the importance of law making by agency regulation in the modern administrative state.

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<sup>51</sup> See generally Richard Briffault, *The Item Veto in State Courts*, 66 TEMPLE L. REV. 1171 (1993).

### *E. Article V: Officers and Civil Departments*

Article V reflects the reality in many states today. In many states, the governor is not the Executive, but is rather a part of the Executive. This was one of Woodrow Wilson's favorite points about executive powers under state constitutions. In fact, however, the executive power is less dispersed among other constitutionally empowered actors in New York than in most other states. Section 1 establishes the Comptroller and Attorney General as statewide, elected officials. In the other sections contained in Article V the constitutional duties of these offices are established. Unlike in some states, California for example, the Attorney General in New York has virtually no role in overseeing or coordinating the criminal justice process.

The limitation in § 2 to "twenty civil departments in the state government" is contained in some other state constitutions, and reflects an attempt to force a reorganization of, and to pinpoint responsibility for, the many administrative agencies in the executive branch.

The appointing and removal powers given the governor in Section 4 are relatively extensive, though this official in New York lacks the constitutional authority to reorganize the executive branch given to the chief executive in a number of other states.

Civil service provisions, such as contained in § 6, are fairly common in state constitutions.<sup>52</sup>

### *F. Article VI: Judiciary*

State constitutional judiciary articles are among the hardest to compare. They often include a high level of detail with respect to the establishment of different courts and their jurisdiction. New York's judiciary article is no exception. It begins to provide for a unified court system (§1.a.), further unification remains a goal, and sets out the basic structure of the state-wide court system. Some detail is required because of special treatment for courts in

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<sup>52</sup> See Grad, *supra* note 34, at 961.

New York City, making the judicial article another in which the city's presence in the state is manifest constitutionally.

As with other state constitutions, the article deals not only with the establishment of courts and their jurisdiction, but with the selection of judges, their qualifications, terms, and provisions for their removal. States employ five different systems for the selection of judges: merit selection, appointment by the governor, election by the legislature, nonpartisan election and partisan election. New York is one of twenty-one states with a variant of merit selection for its high court. The Commission on Judicial Nomination for the Court of Appeals provided for in § 2.d. is similar to those in a few states. Eleven states use partisan election for some level of their judiciary, the system employed in New York for most other judgeships.<sup>53</sup> The Commission on Judicial Conduct in New York, established in § 22, is less common among the states.

The provisions in § 24 concerning the impeachment power of the legislature seem oddly placed within the judicial article. Although the content of § 24 is similar to most states, these provisions are usually contained in the legislative article. The apparent rationale here is the description of the senate trial in an impeachment matter as the "court for trial of impeachments." Technically, though, impeachment is a legislative and not a judicial power.

The provision in § 30, recognizing the power of the legislature over questions of practice and procedure in the courts is somewhat unusual today. Many state constitutions assign this power to the highest court, with only the possibility, in fewer states, of some shared legislative power.

#### *G. Article VII: State Finances & Article VIII: Local Finances*

Sections 1 through 5 of Article VII establish the modern executive budget making process. There are similar provisions in

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<sup>53</sup> See G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 67 (1994).

many other state constitutions, but this is a strong version, and some states (South Carolina, for example) still lack such a process. The second paragraph of § 1, apparently based on separation of powers concerns, permits the proposed judicial and legislative budgets to be submitted directly to the legislature, subject only to the governor's power to comment thereon. The § 6 restriction on other appropriations bills being limited to a single object or purpose is contained in a number of other state constitutions, but is often worded differently from this section. The provision in § 7 that no money should be paid out except pursuant to appropriation by law is very common, as are the limitations on state credit contained in § 8. The accretion of exceptions reflected in § 8 is also very common, authorizing the reintroduction of state government financing into a variety of modern activities.

Otherwise, state constitutional provisions on the limitation of borrowing and spending are quite common, but difficult to compare in their detailed provisions.<sup>54</sup> This holds true for the rest of Article VII and the entirety of Article VIII. Furthermore, Article VIII, Section 7 evidences the recognition of the need to treat a city like New York differently. This reality appears elsewhere in the New York Constitution, and is to a certain extent reflected in other state constitutions where there is the presence of a large, dominant city or a few such cities.

#### *H. Article IX: Local Governments*

Section 1, the "Bill of Rights for Local Governments," is an attempt to set forth a version of constitutional home-rule for local government.<sup>55</sup> Importantly, it refers to the "power to adopt *local* laws . . . ." (Section 1(a)). These powers seem dependent on

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<sup>54</sup> See generally M. David Gelfand, *Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, The Taxpayers' Revolt and Beyond*, 63 MINN. L. REV. 545 (1979).

<sup>55</sup> See generally Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA LAW & POLICY SYMP. 79 (1996).

legislative implementation (see Section 2), subject to the limitations contained in Section 1. Furthermore, the provision sets up a dichotomy between local matters and statewide matters. This distinction has been abandoned in some state constitutions because of the difficulties in separating state and local matters, leading to the necessity of continuous judicial resolution of disputes.

In other states, the constitutional treatment of local government ranges all the way from self-executing grants of power over any topic that the state legislature could consider (such as Alaska), to essentially no constitutional treatment at all (such as New Jersey).

### *I. Article X: Corporations*

The state constitutional treatment of corporations is found in a number of constitutions, mostly in states in the West. This article reflects concerns about corporations and banks that dates from the Jacksonian era.<sup>56</sup> Like in other states, but in language that is in fact less limiting than that used elsewhere, this article seeks to set forth rules for corporations and banks that are beyond the reach of the legislature, reflecting a lack of trust in the legislature.<sup>57</sup>

### *J. Article XI: Education*

New York's education article is briefer than those in most states. The § 1 requirement of "the maintenance and support of a system of free common schools" is one of a number of different state constitutional formulations of this legislative mandate.<sup>58</sup>

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<sup>56</sup> See Johnson, *supra* note 28, at 102-03; MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* 199-204 (1957).

<sup>57</sup> For a strong criticism of the inclusion of even more detailed regulation of corporations in the Oklahoma Constitution, see Robert L. Stone, *Article Nine of the Constitution of the State of Oklahoma of 1907 and Comparative Constitutional Law*, 17 OKLA. CITY U.L. REV. 89 (1992).

<sup>58</sup> See William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on Public School Finance Reform Litigation*, 19 J. L. & EDUC. 219 (1990).

Stronger, more directive language has been critical in decisions of state high courts in some states, but not in New York, to intervene to compel massive restructuring of state educational systems and education financing schemes.<sup>59</sup>

The constitutionally based board of regents appointed by the legislature, the governance structure for all education set out in Section 2, is one of several models used in the states.<sup>60</sup> Other states employ statewide officials, elected boards or boards appointed by other means for this function.

Unlike many states, New York lacks a constitutionally prescribed structure for its state university system.

Finally, the § 3 restriction on public aid to religious schools, with the exception for transportation can be found in some other state constitutions.

#### *K. Article XII: Defense*

This one-section article, concerning the militia covers a topic found in many state constitutions. Because of the dominance of federal law in this area, these type of provisions have lost their importance in modern times.<sup>61</sup>

#### *L. Article XIII: Public Officers*

This article contains miscellaneous provisions concerning terms of office, vacancies, oaths of office, removal from office, and compensation for a variety of public officials. These kinds of provisions, in more or less detail, are found in most state constitutions. More recently, modern ethics provisions have

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<sup>59</sup> Jennifer M. Palmer, Comment, *Education Funding: Equality Versus Quality - Must New York's Children Choose?* 58 ALB. L. REV. 917 (1995).

<sup>60</sup> See Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J. L. & EDUC. 177 (1978).

<sup>61</sup> See generally, Anthony J. Scaletta, Note, *The Governor's Troops Under the Florida Constitution*, 18 NOVA L. REV. 1133 (1994); and Dishman, *supra* note 4, at 43-47 (stating that these provisions are "obsolete.").

begun to appear in state constitutions, though not yet in New York's.

The treatment in § 13 of sheriffs (as recently amended in 1989 to make counties liable for the acts of its sheriff), district attorneys, and other officials is probably a bit more detailed than will be found in most state constitutions.

The provision in § 14 concerning the power of the legislature to require payment of the "prevailing wage" seems at the very least to be misplaced in this article, being more appropriately contained in the legislative article. Secondly, it is not clear why such a provision is necessary, since presumably the legislature would have the power to provide by law for this matter without specific constitutional authorization. It may be here, of course, to overcome some judicial interpretation or constitutional doubt, or to please groups especially interested in having this protection in the constitution.

#### *M. Article XIV: Conservation & Article XV: Canals*

These two articles, dealing with state owned and state controlled lands, and the consequences of the building of state supported canals, are not common in other state constitutions. Provisions aimed at the similar problems, however, can be found in some state constitutions.<sup>62</sup>

The Article XIV provisions on conservation reflect an early policy decision to remove certain state lands from legislative control, as well as the later accretions of exceptions, each of which must be voted upon by the people. Few states deal with these matters in as great detail as is found here.

The general policy statements about conservation and natural resources contained in Article XIV, § 4 are found in a number of

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<sup>62</sup> In Western states, for example, where water resources are an important issue, the matter of water rights is treated in state constitutions. See GORDON MORRIS BAKKEN, *ROCKY MOUNTAIN CONSTITUTION MAKING: 1850-1912*, 65-73 (1987).

state constitutions, utilizing a variety of different language.<sup>63</sup> Some states include these type of provisions in their Bills of Rights.

#### *N. Article XVI: Taxation*

All state constitutions now include detailed provisions on taxation, which serve to limit the range of legislative and local government choice. In fact, perhaps because of the absence of initiative and referendum in New York, the state constitution is less limiting regarding taxation than in many other states. The exemption provisions in § 1 are common in most state constitutions. Interestingly, the New York constitution does not seem to contain an explicit “uniformity” provision for taxation.<sup>64</sup> Section 2 comes the closest to this concept.

Many states have added provisions such as § 6 which ease the strict limitations on tax exemptions, tax abatements, and debt limitations for the purpose of urban redevelopment projects which are seen to be included in the role of modern government.

#### *O. Article XVII: Social Welfare & Article XVIII: Housing*

These two articles, recognized around the country as the 1938 Constitutional Convention’s contribution to modern social welfare theory, are substantially more detailed than most state constitutions. Some states have, however, picked up some of the ideas contained in these two articles. They form the basis for

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<sup>63</sup> See Jose Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?* 17 HARV. ENVIRONMENTAL L. REV. 333, 361-65 (1993); Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 872 (1996) (“Of those provisions that mandate legislative action without creating separate environmental rights or duties, only New York’s addresses enforcement, permitting citizens to sue with the consent of the state’s supreme court; all others are silent regarding enforcement.”).

<sup>64</sup> See generally, WADE J. NEWHOUSE, *CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION* (2d ed. 1984).



what is now seen as the special contribution of state constitutions to "positive rights."<sup>65</sup>

Much of what is contained in Article XVIII with respect to housing consists of exceptions to the rigid limitations on indebtedness, eminent domain, and the general public purpose doctrine.

Section 10 of Article XVIII contains an interesting provision ("shall not be construed as imposing additional limitations") that is aimed at avoiding interpretation by "negative implication."<sup>66</sup>

### *P. Article XIX: Amendments to Constitution*

Virtually all state constitutions now contain specific provisions concerning the mechanisms for constitutional change. The method used by New York for change through the legislature, passage by two sessions followed by citizen approval at referendum, is one of the two most commonly used.<sup>67</sup> The New York article contains the Jeffersonian idea of an opportunity to revise the state constitution for each generation (§ 2). Not included is a provision for state constitutional change by initiative, which is contained in a number of other, mostly western, state constitutions. The detailed New York constitutional provisions for election of delegates to a constitutional convention are paralleled by those in Missouri, but few other states. The constitutions of Ohio and South Dakota provide for non-partisan election of delegates.

## III. Conclusion

Judge Joseph W. Bellacosa recently made the following observations about the New York Constitution:

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<sup>65</sup> See Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L. J. 881 (1989).

<sup>66</sup> Grad, *supra* note 34, at 964-68.

<sup>67</sup> For an excellent analysis of this mechanism, see Gerald Benjamin and Melissa Cusa, *Amending the New York State Constitution Through the Legislature* in DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 385 (1997).

To be sure, the State Constitution in the overall is a lengthy and highly detailed document. While its largely non-self-executing rights are sometimes characterized as technicalities, they are, within a proper and reflective perspective, the embodiment of protections built on history and fair-minded principles that have withstood the test of time and experience. It is not too much to ask that the requirements be satisfied rather than evaded or eroded for the sake of situational expediency.<sup>68</sup>

New York's Constitution can be better understood through a comparative lens. Regardless, however, of any favorable or unfavorable comparisons, it remains the highest law of New York State. It is, most emphatically, a constitution.

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<sup>68</sup> *People v. Trueluck*, 88 N.Y.2d 546, 550, 670 N.E.2d 977, 979, 647 N.Y.S.2d 476, 478 (1996).

