

ARTICLES

A REIN ON GOVERNMENT: NEW YORK'S CONSTITUTION OF 1777 AND BILL OF RIGHTS OF 1787

*John P. Kaminski**

While doing research for any historical project—whether a book, an article, or a presentation like this—I like to immerse myself in the historical figures involved in the study. One way of doing this is to read the correspondence of the key figures during the time period being studied. In this way you can get a sense of what people are thinking about—the important things on their minds as well as the seemingly unimportant things that creep into their thoughts and demand their attention. After getting familiar with the topic and the individuals, I like to sit on the recliner in my study and try to think myself back to the time I'm studying.

Empathy is what I'm looking for. Trying to see the world from the perspective of the people I'm studying. That's what I did for this presentation. I thought back to April 1787 in New York City. Yes, I said 1787, not 1777. I know we are supposed to be celebrating New York's first Constitution drafted and adopted right here in Kingston in 1777. So why go back to New York City in 1787? Because I wanted to see what the Father of the Constitution was thinking—no, not John Jay or Gouverneur Morris or Robert R. Livingston, the primary authors of the New York Constitution. I'm talking about James Madison—thought by many to be the Father of the U.S. Constitution. There he was back in Congress in New York City after a three-year hiatus mandated by the rotation in office requirement of the Articles of Confederation.

What was Madison thinking? Shays's Rebellion had just been suppressed in neighboring Massachusetts, but no one knew for certain whether it might flare up again. In Rhode Island the agrarian County Party had just celebrated its first year in power during

* Director of the Center for the Study of the American Constitution in the Department of History at the University of Wisconsin-Madison. This paper was presented at the April 20-21, 2002 gathering in Kingston, New York to celebrate the 225th anniversary of the New York State Constitution of 1777.

which the most radical economic program in American history had been implemented. The American Revolution was a decade old, and Madison thought the country was falling apart. A Constitutional Convention had been called to meet in Philadelphia in May 1787 to revise the Articles of Confederation. Madison was elected a delegate to that Convention. He knew that revisions to the Articles would not be sufficient. He decided to take the responsibility to submit a plan for an entirely different form of government. This tiny, soft-spoken man from the great Commonwealth of Virginia intended to propose a revolution in government in order to secure the principles of the American Revolution—the principles that Americans had fought and died for during their struggle for independence. Madison felt the ominousness of the occasion. He wrote a friend back home that “[t]he nearer the crisis approaches, the more I tremble for the issue.”¹ Would he be able to do the job? Would he be able to convince the delegates from thirteen disunited states to agree to a plan devised by a thirty-six-year-old Virginia legislator? If he could get agreement among the Convention delegates, could his plea gain the approbation of Congress required by the Articles, and then would it be ratified by the people in the states? The pressure on Madison was unbelievable.

How did he prepare for this awesome task? As was typical with the Founding Fathers, Madison let history be his guide. “Let us,” Madison wrote, “consult experience, the guide that ought always be followed, whenever it can be found.”² Between April and June 1786, Madison, the scholar, studied the histories of the ancient and modern confederacies. What were their weaknesses; what were their strengths? Most importantly, why did they always fail? Then Madison, the politician, focused more closely to home. Between April and June 1787, he studied the Vices of the Political System of the United States. This is where Madison listed the weaknesses of the *American* Union under the Articles of Confederation and put the final touches on his outline for a new Federal Constitution. He convinced his own delegation that his plan was appropriate and achievable. Realizing the limitations of his own oratorical abilities, Governor Edmund Randolph was selected by the delegation to submit Madison’s Virginia Plan to the Convention on May 29, 1787. The Virginia Plan—essentially Madison’s

¹ Letter from James Madison to Edmund Pendleton (Apr. 22, 1787), in *THE PAPERS OF JAMES MADISON* 395 (Robert A. Rutland ed., 1975).

² *THE FEDERALIST* No. 52, at 324 (James Madison) (Isaac Kramnick ed., 1987).

Plan—would serve as the starting point for the long, tortuous road of constitutional reform.

Madison believed that the Articles of Confederation were far too weak and that the state constitutions were far too democratic. The “excesses of democracy” frightened him and many other Americans. State constitutions, for the most part, had proven to be ineffective in applying the brakes to the revolutionary juggernaut. But there was one state constitution that Madison endorsed almost completely—the New York Constitution of 1777. It was the structure of this Constitution and the way it was implemented that Madison would model his Virginia Plan upon.

Scholars have long recognized James Madison as America’s foremost constitutional thinker. They agree that Madison’s contribution to *The Federalist Papers* was his greatest political writing, especially essays number 10 and 51. In essay 51, Madison waxed eloquent (for one of the few times in his life) in support of the concept of separation of powers.

But the great security against a gradual concentration of the several powers in the same department consists of giving to those who administer each department the necessary constitutional means, and personal motives, to resist encroachment of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.³

What did Madison mean by this? Generally, Madison said, it was through elections that people tried to control their governments. But this was often ineffective. Other means of control had to be devised—these Madison called “auxiliary precautions.” Structural

³ THE FEDERALIST No. 51, at 319-20 (James Madison) (Isaac Kramnick ed., 1987).

components of a government had to be designed to withstand the avaricious grasping for power and control by government officials and demagogues. In studying the state constitutions, Madison found that New York alone had adopted effective auxiliary precautions that allowed its government to function smoothly and responsibly without falling prey to tyranny by the one, the few, or the many.

Madison's first structural protection was the division of power between the federal government and the state governments. Neither the federal government nor the states would have all power. Similarly the New York framers in 1777 wanted officially to establish what had been a practical reality denied by the British King and Parliament—that the British Empire was truly a federal government with the central government located in London and the federal states being made up of the individual colonies. To a great extent, the controversy over this issue is what the American Revolution was all about. Thus, while anticipating Congress's proposal of a federal plan of union, the New York framers seized the initiative by stating in the very first article of their Constitution "that no authority shall on any pretense whatever be exercised over the people or members of this State, but such as shall be derived from and granted by them."⁴ This provision was a direct and categorical denial of Parliament's Declaratory Act of 1766 which provided that Parliament had the complete and unrestricted authority to legislate for the colonies and "bind them in all cases whatsoever."⁵ Thus, the new American government would have to be a federal government—it would have only those powers over New Yorkers that New Yorkers themselves allowed.

All of the revolutionary state constitutions were derived from colonial precedents and adapted colonial institutions of government to the new independent states. The new constitutions included bicameral legislatures, governors, and judiciaries. Adhering to the principles espoused by Montesquieu's *Spirit of Laws*, all state constitutions either explicitly or implicitly endorsed the concept of separation of powers. But in all the constitutions, except those of Massachusetts and New York, virtually all power resided in the lower houses of assembly. Governors and senates were stripped of most of their powers; governors were usually elected by assemblies for short terms often with limited eligibility to serve consecutive terms, while judiciaries were dependent upon assemblies for either

⁴ N.Y. CONST. of 1777, art. I.

⁵ Parliament's Declaratory Act of 1766.

their appointments or their salaries. Only in the New York and Massachusetts Constitutions were governors and judiciaries given powers sufficient to withstand domination by the assemblies. What exactly did the New York Constitution establish?

New York's Constitution of 1777 created a bicameral legislature consisting of a seventy-man Assembly and a twenty-four-man Senate.⁶ The legislature was required to meet at least once each year. Each house could judge of its own members and each needed a majority for a quorum. The Assembly could elect its own speaker; the lieutenant governor would serve as the president of the Senate. The doors of both houses were to be open, except when "the welfare of the State" required secrecy. Bills could originate in either house. A conference committee would resolve differences between the two houses.

The Assembly was elected annually by adult male inhabitants who had resided in a county for at least six months and who were either freeholders owning land worth at least £20 or tax-paying tenants who paid annual rents of at least £2.⁷ As the population increased (determined by a septennial census), a county's representation could be increased or the legislature could create new counties until the Assembly grew to a maximum of 300 members. Because of a demand to switch from *viva voce* to voting by secret ballot, it was decided that "as soon as may be" after the war, an experiment with balloting for both houses of the legislature should be tried. If, however, "after a full and fair experiment" balloting should "be found less conducive to the safety of interest of the State, than the method of voting *viva voce*, it shall be lawful and constitutional for the legislature" by a two-thirds vote of those present in each house to restore the voice voting.

The Senate was to be chosen by freeholders possessed of net property worth £100.⁸ Immediately after the first election, the twenty-four senators would be divided by lot into four classes of six senators each. Those in the first class would have a one-year term, in the second class two years, etc. In this way, after 1781 all senators would have a four-year term with only one-quarter of the senators being elected in any given year, thus encouraging stability in government. At any one election, a new governor and lieutenant governor and a completely new Assembly might be elected, but at least three-fourths of the old Senate would remain, as would the

⁶ N.Y. CONST. of 1777, arts. IV-X.

⁷ N.Y. CONST. of 1777, art. VII.

⁸ N.Y. CONST. of 1777, art. X.

judiciary. The State's senators were to be grouped into four districts—southern, eastern, western, and middle districts. When a septennial census indicated a sufficient population growth, the legislature could increase the number of senators to a maximum of 100, increase any district's allotment of senators, and increase the number of counties and districts.

The supreme executive power was lodged in a governor elected by ballot by those freeholders qualified to vote for the Senate.⁹ The governor had a three-year term, the longest of any state executive in the Union, and was unfettered with reeligibility restrictions. The governor was general and commander-in-chief of the state militia and admiral of the state navy. He could call the legislature into special session "on extraordinary occasions" and could prorogue it but not for more than sixty days within a year. The person receiving the second highest number of ballots for governor was named lieutenant governor.

The Constitution provided for two unique councils to handle certain executive functions—the Council of Revision and the Council of Appointment. The Council of Revision¹⁰ was totally unique. It was meant to put a break on unwise acts of the popularly elected legislature. It was the ballast that would keep New York's government functioning smoothly. It consisted of the governor, the chancellor, and at least two of the three judges of the Supreme Court. Every bill passed by the legislature had to be submitted to the Council of Revision for its "revisal and consideration." The Council had to act within ten days, otherwise the bill automatically became law. If the majority of the Council agreed on a report objecting to the bill for any reason, the bill and the objections would be returned to the originating house, which could override the Council's objection by a two-thirds vote. The bill and objections would then be sent to the other house, and, if it overrode the objections by a two-thirds vote of the members present, the bill became law.

The Council of Appointment consisted of the governor and one senator from each senatorial district chosen annually by the Assembly.¹¹ Senators could not serve two consecutive terms on the Council. The governor was president of the Council but could only vote in case of a tie. The Council made all appointments not otherwise provided for by the Constitution. All Council appoin-

⁹ N.Y. CONST. of 1777, art. XVII.

¹⁰ N.Y. CONST. of 1777, art. III.

¹¹ N.Y. CONST. of 1777, art. XXIII.

tees, whose tenures were not otherwise fixed by the Constitution, served at the pleasure of the Council.

The Constitution established several courts.¹² The Supreme Court consisted of a chief judge and two associate judges. Equity cases were under the jurisdiction of the chancellor in a court of chancery. The chancellor, Supreme Court judges, and the first judge of each of the county courts were all appointed by the Council of Appointment and served during good behavior or until they reached the age of sixty. The other county judges and justices of the peace served at the pleasure of the Council of Appointment, but their commissions had to be issued at least once every three years. Judges appointed the officers of their courts.

The Constitution provided for a court of impeachments and for the correction of errors in the courts.¹³ Based on the judicial power of the British House of Lords, the court consisted of the president of the Senate, the senators, the chancellor, and the judges of the Supreme Court. No member of the court could sit on his own impeachment trial, and neither the chancellor nor the judges of the Supreme Court could sit on cases appealed from their courts. The court was not created by law until November 1784.

Madison greatly admired this integrated structure. Not only were the three branches of government broadly separated, but simultaneously they also intermeshed like the gears of a finely crafted watch. A simple separation of powers, Madison knew, would not work.

If a Constitutional discrimination of the departments on paper were a sufficient security to each against encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead, therefore, of contenting ourselves with laying down the theory of the Constitution that each department ought to be separate and distinct, it was proposed to add a defensive power to each which should maintain the theory in practice. In doing so we did not blend the departments together. We erected effectual barriers for keeping them separate.¹⁴

¹² N.Y. CONST. of 1777, arts. XXIV-XXV.

¹³ N.Y. CONST. of 1777, art. XXXII.

¹⁴ Speech of James Madison (July 21, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 77 (Max Farrand ed., 1911).

This complex structure sufficiently inhibited radical actions by any one branch of government over the others but, at the same time, did not saddle the system of checks and balances that encouraged government equilibrium.

The Council of Revision especially captivated Madison as a way of involving the governor and judges in writing legislation. The mere threat of the Council's veto would force the legislature to do a better job of writing legislation. In the Virginia Plan, Madison made the Council of Revision the centerpiece of his federal system of checks and balances.¹⁵ He felt that the early intervention of the judiciary in writing legislation would be a far more effective safeguard of rights than a written bill of rights or judicial review, which could only come into play *after* a bad law had been put into operation and only when an aggrieved party had sufficient financial resources and fortitude to challenge the law.

Madison also supported the concept behind the Council of Appointment—appointment of government officials by the Senate. He favored the nomination of federal judges by the Senate with confirmation by the President. That method was in the draft Constitution until the very end, when the Committee on Unfinished Business gave the Senate the power to try impeachments of federal judges. With that power, it would be inappropriate to allow the Senate to nominate judges. Thus, that authority was transferred to the President with confirmation by the Senate.

Madison's plan supported a proportional representation for both houses in Congress. Only New York's Constitution provided that both houses of the legislature would be based upon population determined by a septennial census. In all other state constitutions, at least one and often both houses of the legislature had equal or static representation of their towns or counties despite sometimes wide discrepancies in their populations. This was a fundamental issue for Madison.

Unlike many other state constitutions, New York's Constitution was not prefaced with a bill of rights. Madison agreed with New York's framers that rights were better protected by the unwritten common law and the structure of the constitution rather than by any "parchment barrier" that could never list and protect all rights. But given their colonial experience, the New York framers (especially John Jay with his Huguenot ancestry) felt that certain rights needed to be specifically guaranteed. The Anglican Church

¹⁵ See THORNTON ANDERSON, *CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS* 140-43 (1993).

and the Dutch Reformed Church were disestablished, since the Constitution provided that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever hereafter be allowed within this State to all mankind."¹⁶ Madison had advocated such a measure in the Virginia House of Delegates. He partially succeeded in the first instance and then shepherded Jefferson's Bill for Religious Freedom through the legislature in 1786. The New York Constitution forbade clergymen from holding civil or military office, and Quakers could be granted conscientious objector status. The trial by jury as formerly practiced in New York was to "remain inviolate forever," bills of attainder were forbidden for crimes committed after the war, the right to counsel was guaranteed in felony cases, treason was specifically and narrowly defined, and no new courts could be established but that "shall proceed according to the course of the common law."¹⁷ Jay and a handful of others wanted to require a religious test for office holding that would effectively prohibit Catholics from public service but the Convention wisely omitted any religious test.

Ten years after the adoption of their Constitution, New Yorkers reassessed the need for a written bill of rights. Congress had proposed an amendment to the Articles of Confederation giving it the power to levy a federal tariff. With that power, Congress would implicitly be able to create a powerful and potentially oppressive bureaucracy reminiscent of the prewar imperial customs establishment. It might appoint a whole panoply of collectors and agents. Ships and soldiers could be maintained in port towns to enforce the tariff. Special courts could be created to try offenders. Opponents of the impost also argued that when the federal government augmented its power, Congress's voracious appetite for authority would be satiated only when it had "swallowed entirely the *sovereignty of the particular states*."¹⁸ Because of these fears, most states included in their acts ratifying the tariff a provision that their state constitutional protections could not be violated if their citizens were prosecuted by federal officials.

New York alone refused to adopt the federal tariff in April 1785. A year later, on reconsideration, the legislature adopted the impost but with restrictions that were unacceptable to Congress. In January 1787 the legislature prepared to reconsider the tariff,

¹⁶ N.Y. CONST. of 1777, art. I, § 3.

¹⁷ N.Y. CONST. of 1777, arts. XXXVIII-XLI.

¹⁸ Abraham Yates, Jr., *A Rough Hewer*, N.Y. JOURNAL, Mar. 17, 1785.

while some thought that Congress might now accept New York's restrictions and declare the tariff adopted. Thus the New York Legislature felt that a written bill of rights was needed to restrict *federal* authority over its citizens. Therefore, as the first order of business in January 1787, the legislature adopted "An Act concerning the Rights of the Citizens of this State"—a bill of rights.¹⁹

The first of thirteen articles summarized the act. "That no authority shall, on any pretense whatsoever, be exercised over the Citizens of this State, but such as is or shall be derived from and granted by the People of this State."²⁰ At least a dozen rights were protected: trial by jury, grand jury indictments, the right of petition, protection for free speech within the legislature, and prohibitions on excessive bail and fines, cruel and unusual punishments, and quartering soldiers. Article twelve specifically prohibited all taxes and duties not approved by the legislature. Scattered throughout the act were references to the "due process of law" protections provided New Yorkers. Once again, as with the first article of New York's Constitution, these protections were guaranteed not only against the state but also against actions by the Confederation government—in essence another reversal of the Declaratory Act of 1766. The New York bill of rights in practical terms applied state protections to the federal government 150 years before the U.S. Supreme Court first applied the Federal Bill of Rights to a state in the case of *Gitlow v. New York*.²¹

Let's not, however, lose sight of James Madison. What did he think about a bill of rights? As mentioned previously, Madison agreed with the framers of New York's Constitution that a separate bill of rights was unnecessary. A limited number of protections were placed in the body of the U.S. Constitution to restrict Congress in areas where legislatures had been prone to violate the rights of individuals. And in the debate over the Constitution he had opposed adding a bill of rights. But after debating the Constitution for almost a year, Madison came to believe that a bill of rights would be helpful in winning over the opponents of the Constitution. He also realized that his own election to the U.S. House of Representatives was dependent upon his support for a bill of rights. Thus, after his election, Madison stood virtually alone in Congress to advocate the submission of a bill of rights to the states for their ratification. On June 8, 1789, he proposed a comprehen-

¹⁹ Laws of the State of New York chap. I (1787).

²⁰ *Id.* at art. I (1787).

²¹ 268 U.S. 652 (1925).

sive bill of rights. Madison modeled his bill of rights on state bills of rights and the rights proposed by the state conventions that had recently adopted the Constitution. Madison especially relied upon the New York Bill of Rights of 1787 and the amendments proposed by the New York Ratifying Convention. Only in these two documents did Madison find the “due process of law” clause that he inserted in what became the Fifth Amendment. That clause made it possible, through the concept of “substantive due process,” greatly to enlarge the protections inherent in the U.S. Bill of Rights.²²

But if the structure of New York’s Constitution made it appealing to Madison, far more important to him was that New York’s Constitution *worked*. During its ten-year history before 1787 it provided the foundation for the state’s economic recovery from a devastating war and from the throes of a debilitating depression. No other state experienced such a phenomenal recovery. It also provided a constitutional system within which America’s most diversified state population lived together peacefully. Madison studied this experiment in republican government and attempted to adapt the experiences of New York to the national political scene. To a certain degree, Madison either had New York in mind when he wrote the tenth essay in *The Federalist* or New York confirmed the theory of *Federalist 10*.

How exactly did New York draft its Constitution? Equally important, how was it implemented? During the decade preceding the War for Independence, New York was divided into two large provincial factions—the Delanceys and the Livingstons. When independence neared, the Delanceys were in power and they remained loyal to the king. The opposition to British imperial policy consisted of three groups—the radical elements led by New York City mechanics who advocated independence from Great Britain, a very conservative group that wanted reconciliation, and another conservative group that was hesitant about independence but would not give up key colonial rights. Because the conservatives controlled the third Provincial Congress, that body gave no instructions on the question of independence to New York’s delegates to the Second Continental Congress. Not being instructed, the New York delegation, alone among the delegations, abstained from voting on independence on July 2, 1776. Earlier, in response to the Continental Congress’s resolution of May 15, 1776, New

²² See, e.g., *Lochner v. New York*, 198 U.S. 45, 46 (1905); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Lawrence v. Texas*, 539 U.S. 558 (2003).

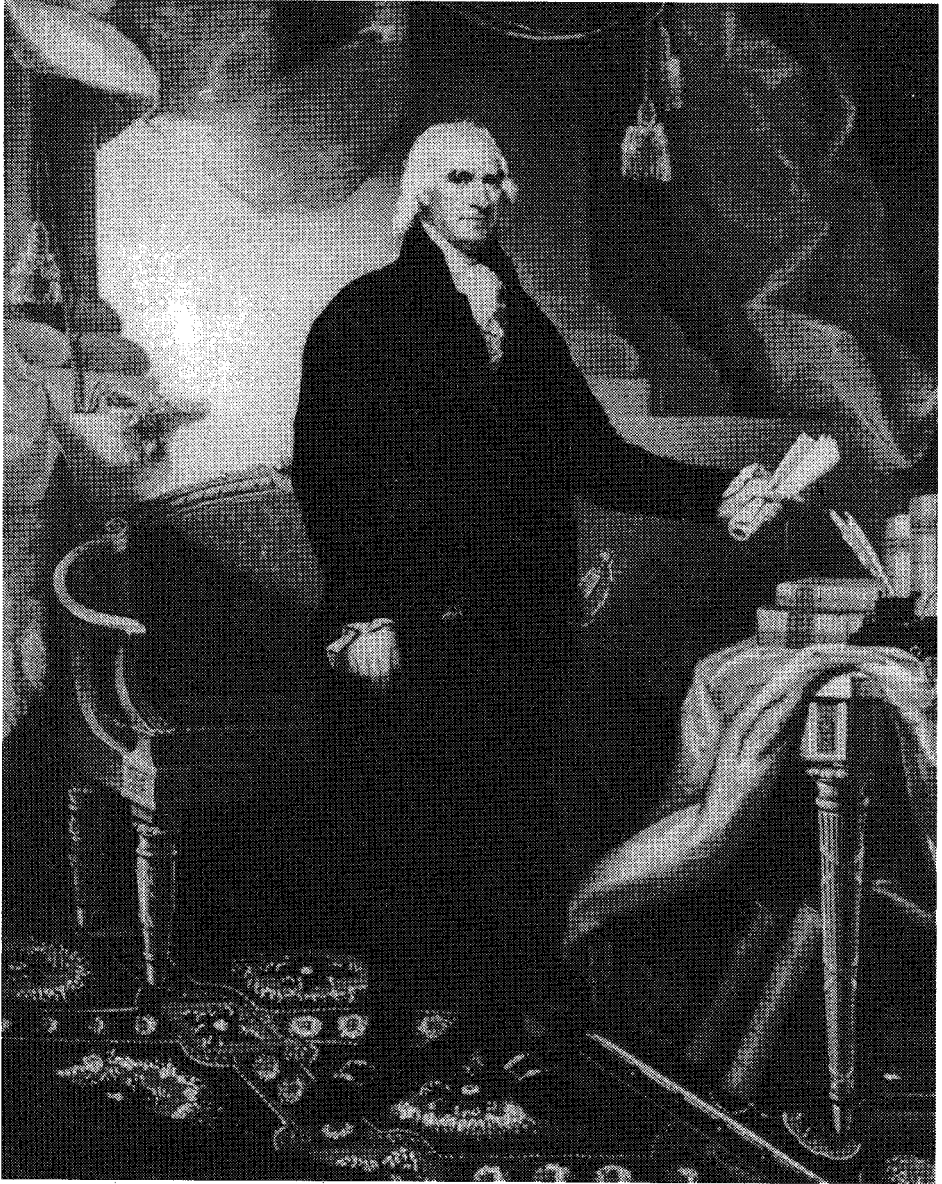


Photo courtesy of Temporary State Commission on the Restoration of the Capitol, Albany, New York.

GEORGE CLINTON. Oil on canvas by Ezra Ames.

York's third Provincial Congress had called for the election of a fourth provincial congress which might draft a constitution creating a government not dependent upon the Crown and responsive to the people. The election took place and the new Provincial Congress on July 9, after renaming itself the Provincial Convention, resolved unanimously to join the other colonies in declaring

independence. On August 1, 1776, the Convention appointed a committee of thirteen to draft a state constitution and to report by August 26. The committee did not report until March 12, 1777. After almost six weeks of debate, the Convention on April 20 voted "in the name and by the authority of the good people of this State" to adopt the Constitution.

Throughout the entire struggle with Britain before New York adopted its Constitution, conservatives realized the dangers they faced. Tom Paine's recommendation in *Common Sense* for democratic state constitutions²³ had been accepted by Pennsylvania where the most radical Constitution was adopted in 1776. New York conservatives considered this a catastrophe and wanted to avoid a similar disaster. A youthful Alexander Hamilton advised John Jay that

[i]n times of such commotion as the present, while the passions of men are worked up to an uncommon pitch, there is a great danger of fatal extremes. The same state of the passions which fits the multitude, who have not a sufficient stock of reason and knowledge to guide them, for opposition to tyranny and oppression, very naturally leads them to a contempt and disregard of all authority. The due medium is hardly to be found among the more intelligent, it is almost impossible among the unthinking populace. When the minds of these are loosened from their attachment to ancient establishments and courses, they seem to grow giddy and are apt more or less to run into anarchy. These principles, too true in themselves, and confirmed to me both by reading and my own experience, deserve extremely the attention of those, who have the direction of public affairs. In such tempestuous times, it requires the greatest skill in the political pilots to keep men steady and within proper bounds.²⁴

To avoid the disaster that occurred in Pennsylvania, Robert R. Livingston believed that conservatives had to swim with the democratic stream that was temporarily impossible to stem. "I long ago advised that they should yield to the torrent if they hoped to direct its course—you know nothing but well timed delays, indefatigable industry, and a minute attention to every favourable circumstance,

²³ THOMAS PAINE, *Common Sense*, reprinted in COLLECTED WRITINGS 5, 34 (Eric Foner ed., 1995) (1776).

²⁴ Letter from Alexander Hamilton to John Jay (Nov. 26, 1775), in 1 THE PAPERS OF ALEXANDER HAMILTON 1768-1778, at 176-77 (Harold C. Syrett & Jacob E. Cooke eds., 1961).

could have prevented our being exactly in their [that is, Pennsylvania's] situation."²⁵ Conservatives adroitly maneuvered and obtained what Hamilton called a Constitution "higher toned than that of any other state."²⁶

During the war, John Jay reported from Philadelphia that New York's Constitution was so highly respected that thousands were expected to emigrate to New York after the hostilities. Jay favorably compared New York's charter with Pennsylvania's "whimsical Constitution." Furthermore, Pennsylvania's political leaders had lost control of events. New York's leaders, on the other hand, understood the importance of opposing "the least Deviation from the Line of Constitutional Authority. *Obsta Principiis*, is a good Maxim."²⁷ Unfortunately all leaders did not have the courage or strength to maintain their constitutional authority. Jay lamented that "Government once relaxed is not easily braced. And it is far more difficult to reassume Powers than permit them to be taken and executed by those who have no Right by the Constitution to hold them."²⁸

Most New Yorkers admired their new charter, but John Jay knew that "unless the government be committed to proper hands, it will be weak and unstable at home, and contemptible abroad."²⁹ The state's five-man committee of safety reported to the county committees that the Constitution was "universally approved. Let us not lose our Credit in committing the government of it to men inadequate to the Task."³⁰ Conservatives in the Provincial Convention had given the governor a three-year term and substantial powers. They intended for a conservative to be elected and to use his powers and the Constitution to limit the radical torrent. To the dismay of conservatives, however, George Clinton, an Ulster County yeoman farmer-lawyer, was elected governor. A disappointed Philip Schuyler, knowing in his heart that he should have been elected, said of Clinton that "his family and connections do not

²⁵ Letter from Robert R. Livingston to Alfred F. Young, *THE DEMOCRATIC REPUBLICANS OF NEW YORK, THE ORIGINS 1763-1797*, at 15 (1967).

²⁶ Speech of Alexander Hamilton (June 21, 1787), at 366.

²⁷ Withstand beginnings; resist the first approaches or encroachments.

²⁸ Letter from John Jay to George Clinton (Oct. 7, 1779), in *JOHN JAY: THE MAKING OF A REVOLUTIONARY, UNPUBLISHED PAPERS 1745-1780*, at 39 (Richard B. Morris ed., 1975).

²⁹ Letter from John Jay to Leonard Gansevoort (June 5, 1777), in *1 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1781*, at 141 (Henry P. Johnston ed., 1890).

³⁰ State of the Committee of Safety to Governor George Clinton (June 2, 1777), in *1 PUBLIC PAPERS OF GEORGE CLINTON 856* (Hugh Hastings ed., 1899).

entitle him to so distinguished a predominance."³¹ Despite their disappointment, conservatives supported the new governor as all segments of New York's revolutionary polity united in their struggle for independence.

At the beginning of the Revolution, "near half" of New York's population were Loyalist. "By different means" the state purged itself "of a large part of its malcontents," but near the end of the hostilities fully a third of New Yorkers still secretly wished to return to British rule.³² New York's revolutionaries were broadly divided into two groups—conservatives and democrats, usually called at the time tories and whigs—and these two groups were further segmented. According to Alexander Hamilton, "There is no man in the government who has a decided influence on it."³³ Conservatives were divided between New York City and Albany factions. Philip Schuyler led upstate conservatives and eventually united with the followers of his two prominent sons-in-law—Alexander Hamilton and Stephen Van Rensselaer. Although popular in the north, Schuyler was neither well known nor liked in the south. Although powerful in the State Senate, Schuyler's proposals frequently miscarried. Other conservatives like the Livingstons often opposed Schuyler and, in fact, the Livingstons were often at odds among themselves. Robert R. Livingston, the chancellor, was the most prominent of the Livingstons in politics, but he was often criticized by his friends as being too lazy. Other individual conservative leaders such as John Jay, Gouverneur Morris, and John Sloss Hobart had their own followings. Jay was universally admired as a man of "distinguished abilities, and unshaken integrity."³⁴ Active first in Congress, then diplomatically abroad, then as the Confederation Secretary for Foreign Affairs, and finally as Chief Justice of the United States, Jay was usually not intimately involved in state politics from 1779 to 1795, when he was elected for the first of his two terms as governor.

Gouverneur Morris was recognized as a man of great talent, who hedonistically wasted great time and energy. A carriage accident in June 1780 that caused him to lose part of a leg made him a more serious person. He was active in Congress and then served as the deputy superintendent of the Confederation's Office of Fi-

³¹ Letter from Philip Schuyler to John Jay, in 1 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1781, *supra* note 29, at 147.

³² Letter from Alexander Hamilton to Robert Morris (Aug. 13, 1782), in 3 THE PAPERS OF ALEXANDER HAMILTON 1782-1786, at 141 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

³³ *Id.*, in 3 THE PAPERS OF ALEXANDER HAMILTON 1782-1786, *supra* note 32, at 137.

³⁴ A *Citizen and real Friend to Order and Good Government*, N.Y. DAILY ADVERTISER, Mar. 21, 1788.

nance. He moved to Pennsylvania when the New York Legislature refused him an appointment to Congress.

Supreme Court Judge Hobart, according to Alexander Hamilton, was

solemn and sententious. He thinks rightly in the main as to the imperfections of our present system, both general and particular and the proper remedy: but he has a prodigious propensity to a *convulsion*; and he augurs many fine things from a second *bankruptcy* and a total derangement of our affairs. "Then" (says he) "and not 'till then *Order* will rise out of confusion."³⁵

Nathaniel Hazard described Hobart as being "just, liberal and firm in his political Sentiments yet possessing a great share of Moderation & Equanimity. He has great Influence with all Parties."³⁶

Democrats were also segmented. The governor, as titular head of state, was the leader of the Clintonians—the dominant whig faction. Hamilton referred to Clinton as "truly the leader of his party."³⁷ Young men from all political and societal ranks gravitated to him—democrats like Melancton Smith and Marinus Willett and conservatives like Egbert Benson and James Kent. The governor had a natural affable personality. "The simplicity and unpretending good sense" coupled with his "great decision of character and a stern inflexibility of purpose"³⁸ made Clinton a natural leader.

As governor, Clinton was satisfied to exert his influence behind the scenes and was reluctant publicly to display his leadership. He believed that he could be more effective above the fray of partisan politics. By staying publicly aloof, the governor stayed out of the rough and tumble of political battle, yet he could usually win support for or kill legislative proposals at will.

Clinton also had a deep and abiding respect for constitutionalism. The ministers of the Reformed Dutch Church of Kingston, among other well wishers, congratulated Clinton on his election as governor in July 1777—"the highest Honor the Subject of a free

³⁵ Letter from Philip Schuyler to John Jay, in 1 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1781, *supra* note 29, at 140-41.

³⁶ Letter from Nathaniel Hazard to Mathew Carey (July 28, 1788), in LEA AND FEBIGER COLLECTION (Historical Society of Pennsylvania).

³⁷ Letter from Alexander Hamilton to James Madison (May 19, 1788), in 4 THE PAPERS OF ALEXANDER HAMILTON 1787-1788, at 649 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

³⁸ MEMOIRS AND LETTERS OF JAMES KENT 304, 306 (William Kent ed., 1898).

State can possess.”³⁹ The church was “uniformly attached to the cause of America” and believed that “Religion and morality” justified this “glorious revolution.” The ministers admonished Clinton to set the proper precedents “from your vigilance, impartiality and firmness in preserving inviolate the state constitution and the rights of the people.”⁴⁰ The governor-elect thanked the Dutch ministers for their support and agreed with them “in thinking that the Constitution gives the fairest Promises of Happiness.”⁴¹ Clinton vowed to “preserve inviolate and thereby secure to the People those Civil and religious Liberties which it [the State Constitution] has with the utmost Liberality and Wisdom been attentive to establish and guard.”⁴² In responding to a committee of Kingston gentlemen, Clinton promised “under the double Tie of Gratitude & Duty . . . faithfully to discharge the important Trust reposed in me by strictly adhering to the Principles of the Constitution so wisely calculated to secure the Rights & promote the Happiness of the free People.”⁴³

In his first address to the newly elected State Legislature assembled at Kingston on September 10, 1777, Governor Clinton praised the late convention for its Constitution which marked “the line between the executive, legislative and judicial powers.”⁴⁴ The governor told the legislators that it was his and their joint responsibility to set precedent for future officeholders. Each branch of government should “remain within the several departments in which the [C]onstitution has placed us, and thereby preserve the same inviolate, and repay the trust reposed in us by our constituents when they made us the guardians of their rights.” Clinton did not urge this restraint because he feared a domineering legislature. Rather, he used the opportunity to state his own personal philosophy of government: “it shall always be my strenuous endeavor on the one hand to retain and exercise for the advantage of the people the powers with which they have invested me; on the other, carefully to avoid the invasion of those rights which the con-

³⁹ Letter from the Order of the Reverend Consistory to Governor George Clinton (Aug. 2, 1777), in 2 PUBLIC PAPERS OF GEORGE CLINTON 161 (Hugh Hastings ed., 1900).

⁴⁰ *Id.*, in 2 PUBLIC PAPERS OF GEORGE CLINTON, *supra* note 39, at 161-62.

⁴¹ Speech of Governor George Clinton to the Address of the Kingston Church, in 2 PUBLIC PAPERS OF GEORGE CLINTON, *supra* note 39, at 176.

⁴² *Id.*, in 2 PUBLIC PAPERS OF GEORGE CLINTON, *supra* note 39, at 176.

⁴³ Speech of Governor George Clinton to Kingston Committee (Aug., 1777), in Special Collections of the New York State Library.

⁴⁴ Speech of Governor George Clinton (Sept. 10, 1777), in 2 MESSAGES FROM THE GOVERNORS 10 (Charles Z. Lincoln ed., 1909).

stitution has placed in other persons.”⁴⁵ The governor would not give up any of his constitutional powers nor would he trespass upon the powers of the other two branches of government or violate the rights of the people. Clinton lived this philosophy throughout his many years as governor and it in large part contributed to the success of the Constitution and government of New York during the Revolutionary era. With the exception of John Jay, it is doubtful that any other New York politician at the time would have been so adamant in scrupulously governing within the strict limits of the Constitution.

Other democratic leaders had their own supporters. The irascible Abraham Yates, Jr., and Supreme Court Judge Robert Yates, both of Albany, led a group which was more radical than Governor Clinton's, but was often willing to follow the Clintonians, especially if the governor took a public stance on the issue. Two recent immigrants from New England, Jacob Adgate and Matthew Ford, led the most radical revolutionaries called by Alexander Hamilton “the levelling kind.” For a time they made “tools of the Yates's and their Associates.” Hamilton believed that only the Council of Revision prevented this junta from subverting the Constitution and destroying the rights of private property.⁴⁶ The populist John Morin Scott had a solid core of supporters—“his little party”—but his alcoholism alienated many. According to Hamilton,

Nature gave him genius; but *habit* has impaired it. He never had judgment; he now has scarcely plausibility; his influence is just extensive enough to embarrass measures he does not like; and his only aim seems to be by violent professions of popular principles to acquire a popularity which has hitherto coyly eluded his pursuit. His views as a statesman are warped; his principles as a man are said to be not the purest.⁴⁷

John Adams was amazed that Scott could “Set up all Night at his Bottle. Yet argue to Admiration next Day.”⁴⁸

In the New York Senate, Zephaniah Platt, Ephraim Paine, and Abraham Yates all had “their share of influence” among the whigs. According to Hamilton, Platt was “a man of plain sense, thor-

⁴⁵ *Id.*, in 2 MESSAGES FROM THE GOVERNORS, *supra* note 44, at 11.

⁴⁶ See Letter from Alexander Hamilton to Robert Livingston (Apr. 25, 1785), 3 THE PAPERS OF ALEXANDER HAMILTON 1782-1786, *supra* note 32, at 609.

⁴⁷ 3 THE PAPERS OF ALEXANDER HAMILTON 1782-1786, *supra* note 32, at 138-39.

⁴⁸ Diary entry of John Adams (Aug. 28, 1774), in 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 1771-1781, at 113 (L.H. Butterfield et al. eds., 1961).

oughly acquainted with agriculture. He intends to do well whenever he can hit upon what is right.”⁴⁹ Ephraim Paine was “a man of strong natural parts and as strong prejudices; his zeal is fiery, his obstinacy unconquerable. He is as primitive in his notions, as in his appearance. Without education, he wants [i.e., needs] more knowledge, or more tractableness.”⁵⁰ Yates received Hamilton’s severest assessment:

[He] is a man whose ignorance and perseverance are only surpassed by his pertinacity and conceit. He hates all high-flyers, which is the appellation he gives to men of genius. He has the merit of always being the first man at the Legislature. The people have been a long time in the *habit* of choosing him in different offices; and to the title of prescription, he adds that of being a preacher to their taste. He *assures* them, they are too poor to pay taxes.⁵¹

In the Assembly, William Malcolm, John Lansing, Jr., Thomas Treadwell, and Cornelius Humphrey composed the whig leadership. Hamilton described Malcolm as having

a variety of abilities; he is industrious and expert in business; he wants not resource and is pretty right on the subjects of the day; but he is too fond of popularity and too apt to think every scheme bad, that is not his own. He is closely linked with [John Morin] Scot, because he can govern him. A man of warm passions, he can control all but his vanity, which often stands in the way of his interest. He is accused of duplicity and insincerity. He has it in his power to support or perplex measures, as he may incline, and it will be politic to make it his interest to incline to what is right.⁵²

To John Jay, Hamilton wrote that Malcolm “is of a restless temper, artful, plausible and popular, addicted to cabal.” “His vanity” caused him to have “an extreme partiality to his own opinions, an impatience of control and a fondness for dominion,” but “he has the art of conciliating those with whom he is connected and is clear sighted in discerning and pursuing his interest.”⁵³ Hamilton saw Lansing as “a good young fellow and a good practitioner of the

⁴⁹ 3 THE PAPERS OF ALEXANDER HAMILTON 1782-1786, *supra* note 32, at 139.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 140.

⁵³ Letters from Alexander Hamilton to John Jay (June 26, 1779 and Sept. 29, 1779), in 2 THE PAPERS OF ALEXANDER HAMILTON 1779-1781, at 82, 190 (Harold C. Syrett & Jacob E. Cooke eds., 1961).

law, but his friends mistook his talents when they made him a statesman.”⁵⁴ According to Hamilton, Tredwell was “esteemed a sensible and an honest man.”⁵⁵ Humphrey, on the other hand, had “his admirers, because he is pretty remarkable for *blunder* and vociferation.”⁵⁶

The state was divided by occupation (farmers versus merchants and lawyers), by religion (Anglican, Dutch Reformed, and many others), by slaveholders versus abolitionists, and by geography. New Yorkers adopted a conservative Constitution but elected a democratic governor and a faction-riddled legislature. Perfectly fitting Madison’s model in *Federalist 10*, the sphere of New York was large enough to deny any one faction a permanent majority. Gouverneur Morris explained the beauty of New York’s factional equilibrium to the delegates in the Constitutional Convention of 1787: “In the election of a Governor of N. York, it sometimes is the case in particular spots, that the activity & intrigues of little partizans are successful, but the general voice of the State is never influenced by such artifices.”⁵⁷ Only when Aaron Burr came on the political scene, was the equilibrium threatened. Both conservatives and democrats feared Burr because he was the most dangerous of all politicians—a charismatic demagogue with no principles who could attract followers from all perspectives.

The dynamics in New York politics persisted with new alignments regularly cropping up to meet new exigencies. Different Livingston factions united with George Clinton on various occasions, as in 1791 when they helped defeat Schuyler’s reelection as a U.S. senator. When, late in 1794, Robert R. Livingston attempted to reconcile with the conservatives, Philip Schuyler objected. He told Alexander Hamilton, “I am this moment informed that Chancellor Livingston has proposed to our friends at New York to form a Coalition, I do not know on what principles. I hope he has not met with encouragement for I am persuaded any kind of Coalition with him would be Injurious to us.”⁵⁸ Whigs crossed over and supported conservatives, as when Antifederalist Robert Yates became the Federalist candidate to oppose Clinton’s reelection as governor in 1789. Democratic leaders like Melancton

⁵⁴ 3 THE PAPERS OF ALEXANDER HAMILTON 1782-1786, *supra* note 32, at 140.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Speech of Governor Morris (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 30-31.

⁵⁸ Letter from Philip Schuyler to Alexander Hamilton (Jan. 5, 1795), in 18 THE PAPERS OF ALEXANDER HAMILTON 1795, at 18-19 (Harold C. Syrett & Jacob E. Cooke eds., 1973).

Smith, Marinus Willett, and Peter Van Gaasbeek abandoned Clinton in the early 1790s and supported the rapidly rising newly elected U.S. Senator Aaron Burr, and Burr repeatedly sent out feelers trying to ally with Federalists or Clintonians—whoever would have him and whomever he felt could be to his advantage at that particular moment.

In early 1806, fearful of their weakened position, some desperate Clinton leaders (with DeWitt Clinton secretly orchestrating the proceedings) “more zealous than prudent”⁵⁹ decided to seek a rapprochement with the Burrrites in early 1806. Theodorus Baily, representing the Clintonians, presided over a supper with the Burrrites in New York City on February 18. Toasts were drunk to the renewed coalition, which looked to defeat Governor Morgan Lewis, to resurrect Burr’s career, and to elect either George or DeWitt Clinton as president in 1808. Most Clintonian Republicans, however, objected to such a political alliance. The “ill-judged project . . . produced a storm of serious magnitude.”⁶⁰ Two days after the “novel interview,” party operative James Fairlie warned DeWitt Clinton about the dangers inherent in dealing with the Burrrites. In New York City, Fairlie predicted “that where one vote will be obtained by the Union (as it is called) there will be five lost.”⁶¹ A week after the attempted rapprochement, a general meeting of hundreds of Republicans assembled in New York City and denounced their leaders’ actions by unanimously censuring the supper and Aaron Burr. Fairlie told DeWitt Clinton that “[t]he mass of our friends before the meeting appeared to be much agitated, that a few should attempt to do an act, and one so important too under the Sanction of a great & respectable party without consulting the party at a meeting called previously.” Fairlie feared that the meeting might get out of hand, but leaders of the rapprochement were ready to “give up the project . . . and acknowledge that it was indiscreet on their part.”⁶²

George Clinton wrote from Washington City expressing his opposition to the Clinton-Burr coalition. The vice president was heartened to learn that New York Republicans had regained some

⁵⁹ Letter from James Fairlie to DeWitt Clinton (Feb. 26, 1806), in DEWITT CLINTON PAPERS (Columbia Univ. Libraries, special collections).

⁶⁰ Letter from Nathan Langford to DeWitt Clinton (Feb. 27, 1806), in DEWITT CLINTON PAPERS (Columbia Univ. Libraries, special collections).

⁶¹ Letter from James Fairlie to DeWitt Clinton (Feb. 20, 1806), in DEWITT CLINTON PAPERS (Columbia Univ. Libraries, special collections).

⁶² Letter from James Fairlie to DeWitt Clinton (Feb. 26, 1806), in DEWITT CLINTON PAPERS, *supra* note 59.

of their strength; he hoped, however, that it was not because of "the accession of the Burrrites." Some Burrrites, Clinton suggested, were honest men who had been "misled." These men would have returned to the Clintonians "tho their Leaders had held out." The Burrrite leaders could not be trusted—they sought only "their own Interest and the Ambitious Views of their Principal." Clinton told his nephew that the unholy coalition "excited great Alarm among our Friends throughout the Union who speak of it with destination & Concern and it is next to impossible to give them a satisfactory Explanation of the Business."⁶³

The embarrassed Clintonian leaders lamely explained away the meeting as accidental, and Bailey apologized for his actions. With all his political acumen, DeWitt Clinton had not yet learned the political fact so well understood by his uncle. "The Republican party is . . . very large, and contains many respected persons." Prudence and discretion were "requisite in all matters that require the Sanction of the Party at large."⁶⁴ After flirting with Burr at one time or another, all the major factions rejected his overtures after 1800.

By the end of the Revolution, New York's Constitution was universally admired. Gouverneur Morris reported that at a time when malcontents throughout the country were agitating for radical measures, "the superior Advantages of our Constitution will now appear in the repressing of those turbulent Spirits who wish for Confusion."⁶⁵ John Jay, on diplomatic service abroad, compared the situation of America with Spain. Nothing, he said, could "compensate for the free air, the free conversation, the equal liberty, and the other numerous blessings which God and nature, *and laws of our making* [emphasis added], have given and secured to our happier country."⁶⁶ First and foremost among the laws Jay referred to was New York's Constitution.

Nowadays, historians believe that monumental movements—not individual human beings—determine world events. I subscribe only partially to this view. Yes, the American Revolution was part of a great world movement, but it was also the actions of a host of individuals that made New York's Constitution such a success. For

⁶³ Letter from George Clinton to DeWitt Clinton (no date), in DEWITT CLINTON PAPERS (Columbia Univ. Libraries, special collections).

⁶⁴ *Id.*

⁶⁵ Letter from Governor Morris to John Jay (Jan. 10, 1784), in 2 JOHN JAY, THE WINNING OF THE PEACE, UNPUBLISHED PAPERS 1780-1784, at 674 (Richard B. Morris & Ene Sirvet eds., 1980).

⁶⁶ Letter from John Jay to Robert Morris (Apr. 25, 1782), in 2 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1781-1782, at 197 (Henry P. Johnston ed., 1890).

example, the personal dislike of Philip Schuyler for George Clinton—the feeling by Schuyler that he had been unjustly deprived of his birthright to be governor—did much to color New York politics.

New York's Constitution was designed to protect rights and property from the despotic rule of an uncontrolled people, from the dominance and tyranny of an individual branch of the government, and from the oppressive authority of a potentially dangerous federal government. A conservative, well-balanced Constitution, an active and highly factionalized polity, and a gifted and conscientious leader like George Clinton as governor worked together to create the Empire State, which had a monumental impact on James Madison, as he formulated what would become the U.S. Constitution and the Bill of Rights. The New York Constitution of 1777 had a profound impact on the constitutional history of the United States.