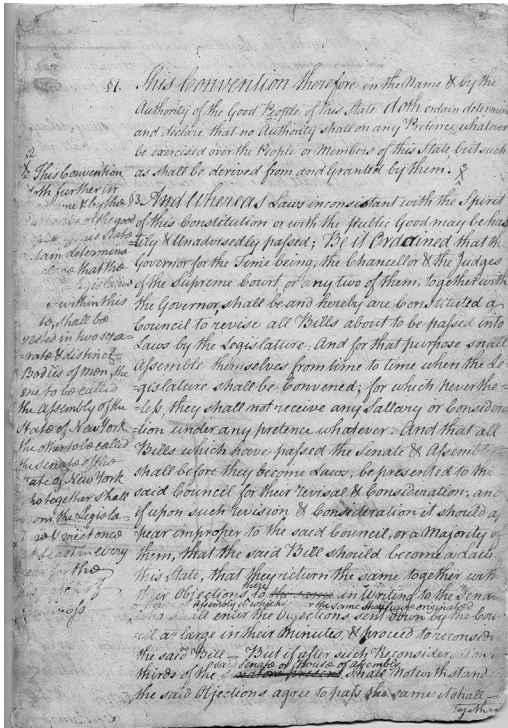


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April 22, 1777

New York State Begins



The first state constitution, drafted in haste under wartime conditions, included crossed-out words and interlinear substitutions but launched the new state of New York in 1777. Photo courtesy of New York State Archives.

New York State asserted itself into existence as a self-proclaimed geopolitical entity on April 22, 1777. Two days earlier, the Convention of Representatives of the State of New York, an ad hoc revolutionary group elected the previous summer, had completed work on New York's first constitution. The convention had done its work on the fly, scurrying from White Plains to Fishkill to Kingston ahead of advancing British

military forces. Delegates voted approval of a final draft that still had strikeouts and marginal corrections; there was no time to waste making a clean copy. The document declared that the convention, acting “in the name and by the authority of the good people of this State, doth ordain, determine and declare that no authority shall on any pretence whatever be exercised over the people or members of this State, but such as shall be derived from and granted by them.”¹ In 1777, a document purporting to represent the consensus and will of the people was a startling, radical departure from the past. The men who drafted the constitution tempered their soaring new ideas with pragmatic realism. Given the perils the new state faced, it just wasn’t practical to give “the people” a chance to vote on the new document that established “their” government. The convention simply proclaimed it in effect.

New York’s birth was a rushed, improbable political miracle. Seldom has a government been established in such forlorn circumstances with such seemingly dim prospects. The previous summer, British army and naval forces had easily conquered Long Island, New York City and the rest of Manhattan Island, and lower Westchester County. As the new constitution was being proclaimed, the British were planning three invasions—south from the British colony of Canada, north from occupied New York City, and west across Lake Ontario from Canada via Oswego and the Mohawk River—to rendezvous at Albany and split and subdue the fledgling state. New York’s northeastern boundary was in dispute with separatist Vermonters, uneasy allies against the British who were openly determined to wrest their independence from New York. Even in the areas the newly proclaimed government controlled, there were large numbers of loyalists who resisted calls to join the militia and harbored spies and criminals. Many more people were indifferent or opportunistic, ready to ally with the newly minted state or swing their allegiance back to British colonial authorities, depending on the exigencies of the war.

New York had gradually drifted from proud allegiance to the British Empire to a status of armed rebellion in the late 1760s and early 1770s. British taxes, trade restrictions, and regulations tightened London’s control over colonial trade and commerce and violated the colonists’ rights as Englishmen. Philip Schuyler, a member of the colonial assembly who held large tracts of land near Albany and in Saratoga County, was typical

1. New York State Constitution, 1777, http://en.wikisource.org/wiki/New_York_Constitution_of_1777.

of the shift in sentiment. In July 1775, he wrote that the British “may be induced to give up their odious claims, and pursue measures tending to reconciliation instead of the nefarious and hostile ones they had adopted.” By early 1776, however, enraged by British intransigence, he despaired of reconciliation and accepted an appointment as a major general in the new rebel army. He cautioned about the work ahead: “[I]ndependence and happiness are not synonymous.”² New Yorkers elected three “provincial congresses” in 1775 and 1776 to deliberate on the growing crisis and what New York should do. The third one met only briefly in the early summer of 1776, its sole accomplishment to arrange for quick election of a fourth provincial congress to take up the issue of independence. By the time the fourth provincial council met at White Plains on July 9, the issue of independence had to be addressed. The Continental Congress had drawn up a declaration of independence on July 2, but New York’s delegates, lacking instructions, sent home for direction. The new provincial council quickly took three steps. It changed its name to the Convention of Representatives of the State of New York, as noted previously. This was an audacious leap of faith, since “the State of New York” technically did not exist yet. It instructed New York’s delegates to vote for the Declaration of Independence with a resolution that said convention members “will at the risk of our lives and fortunes join with the other Colonies in supporting it.” It appointed a committee of fourteen members to draft a constitution for the “state” with the implicit understanding that the constitution itself would call the state into existence.

New York had cast its lot for independence. But the drafting committee seemed unhurried, almost leisurely. The convention was serving as the de facto government of New York, and all its members were busy with other things, including raising money, dealing with loyalists, investigating conspiracies, overseeing the state militia, and supporting continental army forces under General Washington’s command. General Philip Schuyler wrote on December 6, 1776, “I am very apprehensive that much Evil will arise if a Government is not soon established for this State. The longer it is delayed, the more difficult it will be to bring the unprincipled and licentious to a proper Sense of their Duty and we have too many such amongst us.”³ Drafting did not begin in earnest until early 1777. Three extraordinarily capable delegates did most of the work: John Jay (1745–1829),

2. Don R. Gerlach, *Philip Schuyler and the American Revolution in New York, 1733–1777* (Lincoln: University of Nebraska Press, 1964), 293–294.

Gouverneur Morris (1734–1806), and Robert R. Livingston (1746–1813). They were all among the educated elite, graduates of Kings College, the predecessor of Columbia University. They embodied and reflected traits that would later be associated with the spirit of New York: energetic, tempering idealism with pragmatism and a get-it-done determination, putting the public interest above their own welfare. Relatively young in 1777, they all went on to positions of service and leadership in the state and national governments.

From Reluctant Rebels to Constitutional Statesmen

John Jay, a brilliant, capable, articulate New York City attorney, did most of the actual writing. Jay had been elected a delegate to the first Continental Congress in 1774. He was, in the words of historian Richard B. Morris, a “prudent revolutionary” who at first counseled reconciliation and compromise. He disapproved of parties to the dispute who “observe no medium and are either all flame or all frost.” Hoping for a change in British policy, Jay drafted an “Address to the People of Great Britain,” which the Continental Congress adopted on September 5, 1774. Americans demanded restoration of their rights as Englishman, he asserted. “No power on earth has the right to take our property from us without our consent. . . . we will never submit to be hewers of wood or drawers of water for any ministry or nation in the world.” British intransigence and punitive policies transformed Jay into a revolutionary, and by April 1776 he confided to a friend that “the sword must decide the controversy.” Elected to the fourth New York provincial congress, Jay quickly assumed a leadership role, drafting the resolution approving the Declaration of Independence.⁴

The second major constitutional architect was Gouverneur Morris, another astute New York City lawyer. Born in an affluent, well-connected family, Morris built up comfortable wealth through a lucrative law practice and land speculation. He sometimes struck people as arrogant and headstrong, but friends insisted he was a “witty, genteel, polite, sensible,

3. *Ibid.*, 297.

4. Richard B. Morris, *John Jay, the Nation and the Court* (Boston: Boston University Press, 1967), 6; Walter Stahr, *John Jay: Founding Father* (New York: Hambledon and London, 2005), 57; Milton M. Klein, “John Jay and the Revolution,” *New York History* 81 (January 2000), 23.

and a judicious young man.” As pressure for independence built, Morris at first stood aloof. He referred to the rebel group known as the Sons of Liberty in 1774 as “poor reptiles” and sneered that “the mob begin to think and reason.” But his reputation for fairness and his legal abilities led to his election to the first New York provincial congress in 1775 and its successors. Morris was appalled by tyrannical British policies and believed that Americans had the right to control their own internal trade and taxes. He worried that unless men of learning and substance took control of the revolutionary movement, it could fall into the hands of radicals and degenerate into mob rule. On May 24, 1776, he delivered a three-hour “Oration on Necessity for Declaring Independence from Britain” before the third provincial congress. British arrogance and blundering had brought on this crisis, turning back was unthinkable, and now “*an independence is absolutely necessary.*” The British might relent on some coercive measures temporarily but only to buy time to build up their military forces. They were already bringing in ruthless Hessian soldiers ready to brutally subdue the colonists. “Trust Crocodiles, trust the hungry wolf in your flock or a rattlesnake nigh your bosom. . . . But trust the King, his Ministers, his commissioners, it is madness in the extreme! . . . there is no redress but by arms.”⁵

The third principal author was Robert R. Livingston, member of a prominent family with extensive real estate holdings along the Hudson River in Columbia County. Livingston was also a lawyer and had been a law partner with John Jay. As a member of an old family, he inherited a prominent social position but also “a certain kind of self-consciousness, at once proud and sensitive, accepting respect as a matter of course. . . . He was a prototype of the Hudson River squires, an individual who did not believe that there could be a better way of life than his own and who borrowed from other ways of life only what happened to suit his fancy.”⁶ As problems with Britain mounted, Livingston was at first a voice for compromise and reconciliation. Elected to the first Continental Congress, he moved toward the same conclusion that his friends John Jay and Gouverneur Morris reached: Wrongheaded British policies made revolution inevitable. As a member of the second Continental Congress, he served

5. James J. Kirschke, *Gouverneur Morris: Author, Statesman, and Man of the World* (New York: St. Martin's Press, 2005), 40–42.

6. George Dangerfield, *Chancellor Robert R. Livingston of New York, 1746–1813* (New York: Harcourt Brace and Company, 1960), 7, 190.

on the committee to draft the Declaration of Independence but contributed little of substance and left for home before the vote for independence was taken. Like Morris, he feared mob rule, which might take a particularly menacing form on his manor: rent strikes or land seizures by tenants. He was elected to the fourth provincial congress and to the committee to draft the new constitution. But by the fall of 1776, he was already expressing disdain for the new political groups represented among the delegates: mechanics, small farmers, and country lawyers whom he characterized as “unimproved by education and unrefined by honor.” “I am sick of politics and power,” he grumbled on October 10. “I long for more refined pleasures, conversation and friendship. I am weary of crowds and pine for solitude nor would in my present humour give one scene of Shakespeare for one thousand Harringstons, Lockes, Sidneys and Adams to boot.”⁷ But Livingston stayed and contributed substantially to the document.

Livingston’s list of political philosophers who were making him weary including three Europeans and one American, the irrepressible Massachusetts rebel leader John Adams. In April 1776, Adams wrote a pamphlet entitled *Thoughts on Government*, a concise distillation of the best thoughts about the purpose and structure of republican government.⁸ John Jay brought back copies from his time as a member of the Continental Congress, used it in his New York constitution drafting work, and prevailed on other delegates to read it. Republican government requires “the common people brave and enterprising. . . . sober, industrious, and frugal,” said Adams. A republican government should reflect the people it represents. The first principle, Adams said, is “to depute power from the many to a few of the most wise and good.” The lawmaking body should have two houses, to check and balance each other. The larger house, which Adams called the assembly, “should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them.” Elections should be frequent. Rotation in office will teach “the great political virtues of humility, patience, and moderation without which every man in power becomes a ravenous beast of prey.” Executive power should be vested in a governor, but gubernatorial power should be checked by annual elections. Many of the ideas distilled in *Thoughts on Government*

7. Clare Brandt, *An American Aristocracy: The Livingstons* (Garden City, NY: Doubleday, 1986), 120; Dangerfield, *Chancellor Robert R. Livingston*, 86.

8. John Adams, *Thoughts on Government*, April 1776, <http://www.teachingamericanhistory.org/library/index.asp?documentprint=37>.

can be found in the philosophy, and sometimes in the structure, of New York's constitution.

The New York constitutional statesmen drew on summary writings like Adams's pamphlet, European writers, and their own experience with colonial governors, assemblies, and local governments. Members of the provincial convention divided roughly into four groups. A small number counseled delay, hoping that British concessions would make revolution unnecessary. Another small group wanted to wait until New York and continental army forces controlled more territory. The convention needed to secure the state to govern before devising a means of governing it, they argued. A few delegates hoped to use the constitution-writing process to effect substantial political and social change such as radically broadening the suffrage or breaking up large estates and distributing their lands as individual farms. The majority of delegates wanted to move ahead expeditiously but in a way that did not upset the economic or social order in their new state. They held an unwritten consensus that the constitution should have several features.

A written document. New York leaders had seen firsthand the limitations of the unwritten "British constitution," a hybrid that included the Magna Carta, laws, judicial decisions, and precedents. That "constitution" had proven too vague to protect colonists' rights. The New York constitutional statesmen wanted something concrete.

Clear, readable, and understandable text. The constitution would be read by the literate, read to the illiterate, and broadly discussed by the citizens of the new state. It would help wavering New Yorkers decide which side to support in the great struggle. It needed to be written in language that people could readily understand.

Acknowledgment of derivation from the people. The document would specify that all governmental authority derived from consent of the governed. Everyone understood, though, that over half of "the people" would not actually have political rights: Women were not included in the convention and would not be able to vote; and slavery, which had taken root during Dutch colonial days over a century earlier, would continue.

Suffrage by men with a stake in society. Males of full age who held property or paid taxes should have the vote.

Strong executive, but with limitations. The new state would need a strong governor to win the war, create state government, collect taxes, secure the state's borders, execute the laws, and hold the new state together. At the same time, experience with a tyrannical king and overreaching

colonial governors required that the governor's power would be subject to checks.

Two-house legislature. There was a rough consensus on the desirability of a bicameral legislature. One house, with larger membership, elected by a sizeable part of the electorate, would represent all citizens. The second, smaller and elected by men with more substantial property holdings, would be more representative of the upper levels of society.

An independent judiciary. The framers envisioned a tripartite government, with the legal system related to the other two but also insulated from the political considerations that might affect the governor and the legislature.

Protection of citizens' rights. The constitution's architects were determined to protect civil rights, and in fact the drafting committee was given a specific charge to include a bill of rights.

"A Choice of Dishes"

Most of the drafting work fell to the three most capable, educated, and thoughtful members of the drafting committee, Jay, Morris, and Livingston. "We have a government . . . to form and [no one] knows what it will resemble," Jay wrote in July 1776. "Our politicians, like some guests at a feast, are perplexed and undetermined to which dish to prefer."⁹ The committee labored through five drafts and finally reported on March 12, 1777. The convention met in a small room above the local jail in Kingston, and its members smoked heavily to dispel the "disagreeable effluvia" in the air from the jail below, overcrowded with loyalist prisoners. The debates sometimes focused on principles, other times on the minutiae of word choices. Some were heated and divisive, and Jay, Morris, and Livingston sometimes had to work behind the scenes to bring people together. The document approved on April 20 represented a blend of principles and pragmatic compromises. It had the following features.

A strong executive but with novel constraints. Morris, apprehensive about radical democratic threats, proposed a strong governor with total power over appointments and a qualified veto as being "necessary for the preservation of society."¹⁰ Livingston and others counseled limiting the

9. Stahr, *John Jay*, 74.

10. Melanie R. Miller, *An Incautious Man: The Life of Gouverneur Morris* (Wilmington, DE: ISI Books, 2008), 29.

governor's veto power. The final version of the constitution declared that "the supreme executive power and authority of this State shall be vested in a governor" who shall "take care that the laws are faithfully executed." The governor, elected to a three-year term, was also made commander of the state militia, assigned power to convene the legislature in extraordinary sessions, and charged to inform the legislature annually about "the condition of the State" and "recommend such matters to their consideration as shall appear to him to concern its good government, welfare and prosperity." Men who held property worth at least one hundred pounds could vote for governors, the same as the requirement for voting for senators, effectively limiting the franchise to the upper middle class and above.

Colonial governors had possessed the power to veto bills passed by colonial assemblies and virtually unlimited power of appointment. They had sometimes used both powers to thwart the popular will. The framers of the New York constitution restricted their governor's prerogatives through creation of two novel, unprecedented review/approval groups to share power with the governor. Jay, Morris, and Livingston were decisive in shaping both of them. Livingston developed the notion of a "Council of Revision" consisting of the governor, chancellor, and judges of the supreme court. This group could veto bills by a majority vote and return them to the originating house with an explanation. But its veto could be overridden by a two-thirds vote of both houses of the legislature. A "Council of Appointment," mostly Jay's handiwork, was established, consisting of the governor and four senators, chosen annually by the assembly. The governor could nominate appointments for state offices, but the council had to approve and the governor could only vote to break a tie. This "allowed indirectly for the interplay of *vox populi* and . . . the evolution of a patronage system." The two councils blurred the boundaries among the executive, legislative, and judicial branches, but they represented a pragmatic compromise between those who favored a strong governor and those who feared too much executive power. "The entire structure comprised an intricate web of powers and functions with something for almost everyone."¹¹

A balanced bicameral legislature. The convention wanted to create a two-house legislature, one house broadly representative of the people,

11. Richard B. Morris, "New York's First Constitution," in John H. G. Pell, ed., *Essays on the Genesis of the Empire State* (Albany: New York State American Revolution Bicentennial Commission, 1979), 26–27.

the other smaller and more attuned to the interests of business and property. It created an assembly, elected annually; set the number of members at a minimum of seventy; and provided for periodic censuses to keep the number of members growing as the population grew. Voter eligibility was the subject of one of the most complicated compromises of the constitution. Three groups were included: men with freeholds of at least forty pounds, land-renting tenants who paid at least two pounds per year rent, and “freemen” of Albany and New York City (the term “freemen” referred to men who were legally permitted to vote by their municipal governments; by the time of the Revolution, that would have included almost any man who worked or engaged in a trade in the cities). That opened the suffrage broadly among white males. There was a rough model for the new assembly: the previous colonial assembly. But there was no model for the second house, called the senate. The closest approximation was the provincial council, but it had been appointed by the crown on recommendation of the governors. The senate was intended to be smaller, more reflective of the upper class, deliberative, safe from the tumult of the crowd. Senators were to be elected for four years, insulating them from popular clamor and demands. Voting for senators was restricted to men with one hundred pounds or more of property, five times the requirement for the assembly. Four senatorial districts consisting of specified groups of counties were established, and the number of senators to be chosen in each district was specified. The initial number was established at twenty-four. There would be adjustments in the size of delegations and additional members added, as the state’s population shifted and the state expanded, as measured by the periodic censuses. Either house could initiate legislation; approval of both was required to enact it into law.¹²

An independent judiciary. The constitution said little about the courts, essentially continuing the colonial system but under the authority of the new state. The local courts of colonial days were adopted with little change but a new “supreme court” was added at the top. The constitution continued a separate court of chancery, which had powers to adjudicate commercial disputes, appoint and supervise trustees of people needing judicial protection such as orphans and widows, foreclose mortgages, and settle disputes where there was no clear legal guidance or common law precedent. The colonial governor had formerly acted as head of the court of

12. William A. Polf, 1777: *The Political Revolution and New York’s First Constitution* (Albany: New York State American Revolution Bicentennial Commission, 1977), 13–20.

chancery; the constitution created a new position, chancellor, to head the court. Over both courts was placed a special appeals court or “court of errors” consisting of the senate, the supreme court justices, and the chancellor, but with the provision that neither the chancellor nor the supreme court justices could vote on appeals from their respective branches. The assembly was given power to impeach, and a special court for the trial of impeachments was established. The constitution also legalized those portions of the common law in effect on April 19, 1775, the date of the battles of Lexington and Concord. That gave the new judicial system a body of precedent and judge-made law to use as a basis for making rulings.

A secret ballot. Balloting in colonial New York had been *viva voce*: Men declared their preferences in an open meeting. The system opened voting to influence and coercion. For instance, landlords knew how their tenants voted, and tenants, not wishing to displease them, might vote as the landlord desired rather than as conscience dictated. The draft included provision for a secret ballot, but Morris spoke against it during the debate as being too great a departure from precedent and he carried the day. Jay happened to be absent for that debate. Just before the final vote, in one of the rare disagreements among the triumvirate, Jay proposed a compromise: Keep voice vote during the war but institute the secret ballot after the war’s end. Morris protested, but the convention reversed itself and endorsed Jay’s proposal, which was included in the final document.

No bill of rights. The charge to the drafting committee included a provision for a bill of rights but none was included. The constitution included the entire Declaration of Independence as a preamble, but that listed rights violated by the British rather than rights to be protected in New York. The constitution guaranteed the right to trial by jury, but other rights are not mentioned. The most plausible explanation for the absence of a bill of rights is that the framers decided that it might inhibit the new government’s flexibility in dealing with loyalists. The legislature enacted a bill of rights in 1787.¹³

Freedom of religion. The document declared that “the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind.” John Jay was suspicious of Catholics because he felt they owed allegiance to the Pope rather than state or nation. He proposed a provision

13. Bernard Mason, “New York’s First State Constitution,” in Pell, ed., *Essays on the Genesis of the Empire State*, 31.

to exclude Catholics from guarantee of religious toleration unless they abjured the authority of the Pope. Few delegates agreed with that. But Jay was persistent, and in the end the constitution included three provisions bearing directly or indirectly on religion. First, after the provision quoted earlier about freedom of religion, the convention added another clause: “provided, that the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state.” That was a warning against using religion as an excuse to break the law, but it had little impact on New York jurisprudence. Second, a phrase was included barring ministers and priests from holding civil or military offices. Third, naturalized citizens were required to renounce “all allegiance” to “every foreign king, prince, potentate, and state, in all matters, ecclesiastical as well as civil.”¹⁴

The scourge of slavery. The institution of slavery was not compatible with the lofty pronouncements about the sovereignty of the people. John Jay wanted to include a clause to abolish slavery, but most delegates considered that too preemptive. Gouverneur Morris came up with a gradualist approach. He proposed that the constitution should urge “future legislatures” to abolish slavery “so that in future ages, every human being who breathes the air of this state, shall enjoy the privileges of a freeman. . . . The rights of human nature and the principles of our holy religion call upon us to dispense the blessings of freedom to all mankind.” But too many New Yorkers owned slaves or were engaged in the slave trade, and Morris’s amendment failed. New York did not move to end slavery until 1799, when John Jay, who was by then governor, signed a law that gradually abolished it.¹⁵

The final version was approved on April 20 by a vote of 33 to 1; Peter Livingston, a distant relative of Robert Livingston, felt it was too radical. The convention declared the constitution to be in effect two days later. Thoughtful observers found it impressive. Alexander Hamilton, General George Washington’s military aide and an up-and-coming political leader, pronounced it “happy, regular, and durable.” But it showed signs of having been drawn up in haste: “split-the-difference” compromises and, in the councils of revision and appointment, untested mechanisms. No one

14. Morris, *John Jay, the Nation, and the Court*, 11–13; Patricia Bonomi, “John Jay, Religion and the State,” *New York History* 81 (January 2000), 8–18.

15. Richard Brookhiser, *Gentleman Revolutionary: Gouverneur Morris—The Rake Who Wrote the Constitution* (New York: Free Press, 2003), 34.

was totally satisfied with it. “That there are faults in it is not to be wondered at,” wrote Gouverneur Morris, explaining with irritation that the process had necessitated the disagreeable act of compromising with men who did not entirely agree with him.¹⁶

Jay, Livingston, and Morris, and others who allied with them, had come to see the revolution and independence as inevitable, but they had sought to head off social upheaval. In June 1777, Livingston said he was convinced of “the propriety of Swimming with a Stream which it is impossible to stem” and in fact helping to channel and direct it.¹⁷ George Dangerfield, Livingston’s biographer, gives him and his colleagues even more credit. Through skillful leadership, persuasive arguments, and patient consensus-building, “the New York conservatives had managed the radical Revolution so that, while it rid them of Parliament, it did not deprive them of privilege.”¹⁸ The document featured many compromises and balances. For instance, the governor was popularly elected and given broad executive power. But the privilege of voting for the governor was restricted to men with a stake in the economy and society, and two of the governor’s key powers—veto and appointments—were shared with others. Historian Bernard Mason, emphasizing the property qualifications for voting and the senate as a check for the propertied class on the popular assembly, said the constitution represented a “moderate-conservative consensus.”¹⁹

The New State in Action

New York had proclaimed itself into existence. The convention arranged for election of a governor and legislators in June, to take office in September, but remained the de facto government in the interim. It designated a council of safety from among its membership to handle security and military matters. It set up the judicial branch of the new government on its own authority, building on the basic outline in the new constitution. The convention selected John Jay as chief justice and Robert Livingston as chancellor, thereby placing at the head of the judicial branch two of

16. Ibid.

17. Alfred Young, *Democratic Republicans of New York: The Origins, 1763–1797* (Chapel Hill: University of North Carolina Press, 1967), 15.

18. Dangerfield, *Chancellor Robert R. Livingston*, 92.

19. Bernard Mason, *The Road to Independence: The Revolutionary Movement in New York, 1773–1777* (Lexington: University of Kentucky Press, 1966), 248.

the constitution's most influential authors. Jay served for two years, promulgating legal procedures and deciding key cases. He went on to serve as Minister to Spain and Secretary for Foreign Affairs under the Articles of Confederation, first Chief Justice of the U.S. Supreme Court, and governor of New York, 1795–1801. Livingston presided over the court of chancery until 1801. He also served as Secretary of Foreign Affairs under the Articles of Confederation from 1781 to 1783 and as U.S. Minister to France, 1801 to 1804. His work included negotiating the Louisiana Purchase in 1803.

John Jay wrote in July 1777 that “unless the government be committed to proper hands, it will be weak and unstable at home, and contemptible abroad.”²⁰ The conservative-minded revolutionaries who had written the constitution, two of whom had been quickly elevated to the new state's top judicial offices, expected to engineer the election of the governor. Their preferred candidate was General Philip Schuyler, a substantial landholder who could be relied on to protect business and landed interests. He could count on the votes of his tenants in the Albany region, but he was widely regarded as arrogant and overbearing. General George Clinton, an Ulster County native who had built a solid if not stellar military record as commander of rebel forces in the lower Hudson region, was endorsed by local political leaders in his region. He was regarded as reliable, strong, and honest, but he had not been involved in drafting the new constitution and his political views were unknown. Clinton was well liked by just about everyone who knew him. He was popular in the mid-Hudson region, and the sheriff of Dutchess County—a Clinton supporter—allowed any man who showed up to vote, not bothering to check for residency or whether the one hundred pound freeholder qualification imposed by the new constitution was being met. Soldiers were also permitted to vote in the forts where they were stationed with few or no checks on whether they met the qualification. That helped Clinton, who was popular among the troops, but not Schuyler, who was regarded as an overbearing commander. Voter turnout was light. Clinton received 1,828 votes, Schuyler 1,199, other candidates a few hundred each. Schuyler grumbled to Jay that Clinton's “family and Connections do not intitle [*sic*] him to so distinguished a predominance” but that he had “played his Cards better than Expected.” The new legislature included some well-known men who had

20. John Jay to Leonard Gansevoort, June 5, 1777, in Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay*, I, 1763–1781 (New York: Putnam, 1891), 141.

served on the various provincial councils but also many who were new to politics. Like the new governor, they had no affiliation to the prudent revolutionaries who had prevailed at the convention. To men like Jay, Morris, and Livingston, who had dominated the constitution-writing process and the establishment of the judiciary, New York's political future suddenly seemed uncertain.²¹

Military responsibilities prevented the new governor from reporting to Kingston for his inauguration until September 10. In his inaugural speech, Clinton described the state's dire military situation but emphasized the positive. General Nicholas Herkimer and the Tryon County militia had stopped the British invasion from the west at the Battle of Oriskany on August 6. Work was continuing to obstruct the Hudson to prevent the British sailing up to Albany. The state militia law needed revision because many more troops were needed. "The state of our finances likewise claims your serious attention," he told the legislature. "The want of an organized government" had meant that "we have . . . accumulated a debt, which if neglected, will not only prove burthensome [*sic*] to the state, but [also] strike at the credit of our currency." A government with "vigour and dignity" will also help discourage loyalists and outlaws from making trouble. How did the new governor perceive his own role? He praised the convention for the constitutional provisions that marked "the line between the executive, legislative and judicial powers" and explained, "[I]t 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 constitution has placed in other persons." It was a modest and unassuming description of gubernatorial power.

Three days later, the new assembly sent a response to the new governor:

We thoroughly approve your Excellency's intention to retain and exercise all the powers with which you are invested, and we trust that you will exert yourself vigorously to execute the laws, for the restoration of good order and the suppression and punishment of vice and immorality—while as faithful guardians of the rights of our constituents, we are determined neither to encroach upon the privileges of others, nor suffer our own to be invaded; we shall

21. Gerlach, *Philip Schuyler*, 303–310; Young, *Democratic Republicans*, 22–23.

heartily concur in all things for the advantage of the people over whom you have been chosen to preside.

Sensing a tone of concern, Clinton realized he might have understated his intention to use executive power. He replied the same day, reassuring the legislature that he would “execute the laws, maintain the peace and freedom, and support the honor, independence, and dignity of the people of this State.”²² The new legislature responded to the governor’s plea for funds by levying a tax on real and personal property. Funds began to flow into the state’s nearly empty treasury.

Chief Justice John Jay assumed his official duties on September 9, 1777, when he delivered a charge to the first grand jury of the supreme court held at Kingston. He used the occasion to instruct them on the principles upon which the Revolution was being fought and enlighten them about the new constitution. The “charge” took on the status of an important state paper and was reprinted and widely distributed: “[A]ll the calamities incident to this war will be amply compensated by the many blessings flowing from this glorious constitution,” said the new chief justice. The constitution came from the people through their elected representatives. “From the people it must receive its spirit, and by them be quickened. Let virtue, honor, the love of liberty and of science be, and remain, the soul of this constitution . . .” The constitution protected “great and equal rights of human nature” including liberty of conscience and equal protection by the laws. It organized the government so “as to promise permanence to the constitution, and give energy and impartiality to the distribution of justice.”²³ Jay turned his attention to getting the court system up and running and presiding at cases. “I am now engaged in the most disagreeable part of my duty, trying criminals,” he wrote Gouverneur Morris on April 29, 1778. “They multiply exceedingly. Robberies become frequent; the woods afford them shelter, and the tories [give them] food. Punishments must of course become certain, and mercy dormant—a harsh system, repugnant to my feelings, but nevertheless necessary.”²⁴

22. Governor George Clinton, “Opening Speech,” September 10, 1777; Assembly Address to the Governor, September 13, 1777; Governor’s response, September 13, 1777, in Charles Z. Lincoln, ed., *Messages from the Governors*, II, 1777–1822 (Albany: J. B. Lyon, 1909), 7–12.

23. John Jay, *To the Grand Jury of Ulster County*, September 9, 1777, in Johnston, ed., *The Correspondence and Public Papers of John Jay*, I, 158–163.

24. John Jay to Gouverneur Morris, April 29, 1778, in Johnston, ed., *The Correspondence and Public Papers of John Jay*, I, 179–180.

New York's prospects, dim in 1777, were much brighter by the beginning of the next year. General Horatio Gates continued and intensified the strategies initiated by his predecessor, Philip Schuyler: obstruction of trails and limited attacks that wore down the enemy. On October 17, 1777, British general John Burgoyne, low on supplies, his way forward and retreat backward both blocked, surrendered to Gates near Saratoga in what was arguably the turning point of the war. General Nicholas Herkimer fought the British and Indians invading from the west to a draw at the battle of Oriskany on August 6. A third British invasion force began moving up the Hudson from New York City in October 1777. Washington asked Governor Clinton, who was also still serving as a continental army general, to take charge of defending two forts near West Point that guarded a chain the rebels had strung across the Hudson to impede the British fleet. The new governor of New York could have refused; the Americans had only a few hundred poorly armed defenders in the forts, and the British were expected to assault them with warships and some four thousand troops. Instead, he took personal command of one and his brother, General James Clinton, assumed command of the other one. The British assault on October 6 overwhelmed both forts, but stout resistance organized by the Clintons inflicted unexpected casualties on the enemy. As the British were breaching the front of his fort, Governor Clinton retreated out the back and descended a steep cliff to the Hudson in the darkness. As the British searched, Clinton hailed a boat that had just arrived from the opposite shore to rescue survivors. Seeing that the boat was full to capacity, the governor prepared to swim across the river. The officer in charge, recognizing the governor, insisted on giving up his own spot. Clinton refused. With the British closing in, the new governor made an executive decision: He jumped into the already full boat, and, very slowly, the overloaded vessel was rowed across the Hudson to safety. The new governor had not been able to hold the forts, but he had demonstrated personal courage, a skill in rallying outnumbered forces, and an ability to inflict substantial losses on an overconfident enemy. "The Post [fort] was lost for want of Men to defend it," Gouverneur Morris wrote Robert Livingston after the battle. "The Militia behaved as well as they could do. We shall beat them. We should do so soon if we have as good Officers as our Governor."²⁵

25. John P. Kaminski, *George Clinton: Yeoman Politician of the New Republic* (Madison: Madison House, 1993), 25–33

The British proceeded up the river to the New York rebel capital of Kingston. The legislature had plenty of advance warning, delegated its responsibilities temporarily to a committee of safety, and evacuated. They did not meet again until February 1778. Troops led by British general John Vaughn landed on October 15, silenced the shore battery, and marched into town. "Esopus [Kingston] being a nursery for almost every villain in the Country," he wrote, "I judged it to be necessary to proceed to the town. On our approach, [defenders] were drawn up with cannon, which we took and drove them out of the place." Firing continued from the houses, and so "I reduced the place to ashes . . . not leaving a House." A few days later, Vaughn's troops burned Robert Livingston's mansion and other buildings on his land in what seemed like a needlessly vindictive move and one that cost the British among many New Yorkers whose allegiance had been hitherto undecided.²⁶ By then, Burgoyne had been defeated at Saratoga and was under house arrest at Philip Schuyler's mansion in Albany. The grand plan to link with him at Albany was in shambles. The British sailed back down the river to New York City. It was to be their last major incursion into the territory under the authority of the new state government.

The government reconvened in February 1778, this time in Poughkeepsie, and got down to work in earnest. New York's security was assured after the British defeat at Yorktown; the new state got its biggest city back on November 25, 1783, when the last British troops departed from Manhattan. General George Washington, accompanied by Governor George Clinton, triumphantly led the victorious continental army through the city. Clinton proved to be a popular, effective governor, serving until 1795, returning for another term in 1801–1804, and then serving as vice president under both Thomas Jefferson and James Madison. Morris moved to Pennsylvania, but Jay, Livingston, Hamilton, and Schuyler all stayed in New York and grew apprehensive of Clinton's policies, including taxation of land, harsh treatment of loyalists and sale of their confiscated lands, and issuance of the paper money that promoted inflation. They were alarmed by his ability to appeal directly to the public. In part to counter the growing popular appeal of Clinton—and other popular governors like him in some of the other states who seemed like threats to the established social and economic order—the prudent New York revolutionaries who wrote the state constitution became strong supporters of the movement to create

26. Dangerfield, *Chancellor Robert R. Livingston*, 103–105.

a strong national government. The trio who were most influential in drafting the state constitution in 1777 were soon identified as “federalists,” men who supported the proposed U.S. constitution, the move to a strong federal government, and conservative fiscal policies. Morris, a delegate to the constitutional convention from Pennsylvania, drafted much of the document. Livingston was a prominent proponent in New York. Jay was its most important advocate in the state. Along with Alexander Hamilton and James Madison, he wrote *The Federalist Papers*, a comprehensive treatise on the proposed constitution.

New York’s first constitution endured without major revisions until 1821, and even then the changes were modest. The Council of Appointment was abolished and state offices were thereafter filled by the legislature, the governor, or the governor with the consent of the senate. The Council of Revision, which had sometimes proved obstructionist and other times seemed overly politicized over the years, was abolished. The governor was given the power to veto bills, subject to reversal by the legislature. Specific civil rights such as freedom of speech and habeas corpus—left out of the 1777 constitution, covered by 1787 legislation, and firmly embedded in the common law and state court decisions—were specifically protected in the 1821 revision.

John Jay noted in his speech to the Ulster County grand jury in September 1777 that “the Americans are the first people whom Heaven has favoured with an opportunity of deliberating upon and choosing the forms of government under which they should live.”²⁷ By just about any measure, the first New York State constitution was a fulfillment of that opportunity.

27. John Jay, *To the Grand Jury of Ulster County*, September 9, 1777, in Johnston, ed., *The Correspondence and Public Papers of John Jay*, I, 161.