A BRIEF HISTORY OF THE MECHANISMS OF CONSTITUTIONAL CHANGE IN NEW YORK AND THE FUTURE PROSPECTS FOR THE ADOPTION OF THE INITIATIVE POWER

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I. INTRODUCTION

On June 5th, 2007, the New York State Senate passed for the second time in three years a bill that would amend the New York State Constitution to allow constitutional amendments to be proposed by popular initiative.1 While the likelihood of that bill to be submitted to the people for approval is a long shot at best, it represents a developing area in the constitutional tradition of New York State: constitutional change. The language of this tradition, whether ultimately chosen or avoided, provides an essential understanding of New York's current article governing constitutional amendments and revision and its two mechanisms of constitutional change: legislative proposals and constitutional conventions. In this Article, I track in some detail the changes made to these mechanisms of constitutional change in order to identify important themes and considerations that have shaped the power of constitutional change in New York. These themes not only provide important insights into constitutional change in New York generally, but they also provide a unique perspective on the past rejection and future prospects for the adoption of a third mechanism.

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of constitutional change: the initiation of proposed constitutional amendments by the people. In reflecting on the development of these themes over time, I conclude that New York’s constitutional change tradition is, on balance, generally inconsistent with the popular initiative as a method of constitutional amendment. Despite this inconsistency, however, the initiative may be adopted in the future due to the ineffectiveness of the existing mechanisms of constitutional change.

To reach that conclusion, Part II of this Article introduces the development of the power of constitutional change in New York from 1775 to 1938, the year in which the last substantive change to the power of constitutional change was made. Part III then describes the changes proposed during the Constitutional Convention of 1967 in order to provide the most recent comprehensive account of proposals that may be adopted in the future. Part IV then identifies two themes that describe this development: (1) diffusion of power in the constitutional process to ensure that no one individual or group, whether the people, the legislature, or constitutional conventions, has too much control in the constitutional process; and (2) the treatment of constitutional revision and amendment as a filtered and controlled manifestation of the will and sovereign power of the people. Part V compares these themes with the initiative power in the context of initiative powers proposed within the last century. Part VI concludes that the initiative processes for constitutional amendment as have been proposed in New York in the past are inconsistent with New York’s conception of the people as the source of political and constitutional power and the legislature’s control of that power through safeguards to ensure that the people, just as with the legislature and constitutional conventions, do not wield too much control in the constitutional process.

II. THE DEVELOPMENT OF THE POWER OF CONSTITUTIONAL CHANGE IN NEW YORK

Over the more than two centuries that have passed since New York’s first constitutional convention that lead to the adoption of New York’s first constitution in 1777,2 the topic of constitutional change has received considerable attention by scholars and

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delegates at subsequent constitutional conventions. Due to this attention, the power of constitutional change has been modified relatively frequently by constitutional conventions and individual amendments.

A. Constitution of 1777

New York’s first constitution, the Constitution of 1777, did not contain any provisions describing constitutional change nor the manner in which constitutional amendments were to be permitted. The method of its adoption, however, provides an insight into the framers notion of and requirements for constitutional change. While a provincial government had been established in New York well before 1777, prior to 1777 there was no procedural mechanism in New York or in any of the other colonies by which the governing body or the people of the new state could draft and formally adopt a constitution. As a result, in 1775 the Third Provincial Congress, “troubled by the lack of any mandate to form a new government,” called for a special election to ask the people for approval to form a new constitution and a new government. By 1777, the delegates to the constitutional convention, as representatives of the people of the state of New York, approved the document as the first Constitution of the State of New York—notably without the ratification of the people at the polls.

The resulting constitution contained no explicit mechanisms for constitutional change, but it did articulate in the prologue the central place of the people in the construction of the state itself, a construction governed by the constitution:

[G]overnments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such
principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.\(^8\)

It went on to specifically pronounce that the people were empowered to “institute and establish such a government... deem[ed] best calculated to secure the rights and liberties of the good people of th[e] State.”\(^9\) This recognition of the sovereign power of the people to institute and establish their own government was precisely the same reason why the members of the Third Provincial Congress believed that they did not have the necessary mandate of the people to form a new government, and why they called for a special election in 1775 to ask the people for approval to form a new constitution and a new government.\(^10\) Based on this and the subsequent utilization of the people to authorize later conventions, it is as at least arguable that the framers of the constitution implicitly provided for the ability of the people to authorize the creation of future constitutional conventions to affect constitutional change in order to “institute and establish” a new government as the people would see fit.

Furthermore, “[a]ssuming this was not an oversight, the implication is that the legislature believed itself to be the body to initiate constitutional change and determine the process of amendment.”\(^11\) This view finds support in the assertion by the Third Provincial Congress, the legislative body in existence at the time of the founding of the State, of the power to “go to the electorate for a mandate to frame a new government” and with that mandate, to devise the method of constitutional revision to be undertaken.\(^12\) While this power would not be explicitly articulated

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\(^8\) N.Y. CONST. of 1777 pmbl.

\(^9\) Id. The Constitution of 1777 reasoned that the authority of the people to reconstitute their government was justified because of the actions of the British government:

By virtue of [the] several acts [of the British government]... all power whatever therein hath reverted to the people thereof, and this convention hath by their suffrages and free choice been appointed, and among other things authorized to institute and establish such a government as they shall deem best calculated to secure the rights and liberties of the good people of this State, most conducive of the happiness and safety of their constituents in particular, and of America in general.

Id.

\(^10\) GALIE, supra note 3, at 3. Of course, to the extent that the legislature first had to submit a call to the people to authorize a general convention, the responsiveness of the constitutional process to the will of the people, as well as the power of the people itself, is diluted. See 2 LINCOLN, supra note 4, at 210.

\(^11\) GALIE, supra note 3, at 5.

\(^12\) Id. at 3.
in New York's constitution until 1846, the use of the power early in New York's constitutional history definitively established the power of the legislature to submit a call to the people for the authority to draft a new constitution.

B. Constitution of 1821

The method of amending the Constitution was one of the topics particularly brought before the Convention of 1821, the convention that lead to the adoption and enactment of the second series of revisions to New York's constitution since 1777, the Constitution of 1821.13 In 1820, Governor DeWitt Clinton argued that the limited mode of constitutional revision available at the time, namely, the general constitutional convention process authorized by the people following a request by the legislature, was ineffective in improving the constitutional scheme.14 The lack of any method of constitutional change other than by such general conventions likely "prevented many amendments . . . because of the unwillingness of the people to call conventions."15

As a result of this and other perceived deficiencies of the Constitution of 1777, as well as growing calls for constitutional reform, there was increasing interest in calling another constitutional convention.16 The legislature did not respond to this pressure until "popular discontent no longer could be safely

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13 1 LINCOLN, supra note 4, at 751.
14 Id. at 617. Governor Clinton noted that from 1777 to 1821, constitutional conventions succeeding in producing only a single instance of change. Id. The single instance of constitutional change occurred in 1801 when a convention was called to address problems of apportionment and the power of appointment. GALIE, supra note 2, at 6. Just as with the Constitution of 1777, none of the amendments adopted were submitted to the people for ratification. Id.
15 1 LINCOLN, supra note 4, at 751. This perhaps should be clarified to say that the people are cautious in approving constitutions from conventions. Prior to Governor Clinton's observation, the people did authorize a constitutional convention in 1801. 2 id. at 209–10. Governor Clinton suggested that the unwillingness was due to a fear held by the people that "an innovating spirit might predominate, and destroy, instead of consolidating, [the] temple of freedom and safety" created by the Constitution of 1777, particularly given "the circumstances under which it was established, in the midst of war and commotion, and without the benefits of much experience in representative government." 1 id. at 617 (internal quotation marks omitted). This view was echoed in 1823 by Governor Joseph C. Yates, noting that the Constitution of 1777 was created while New York was "emerging from a state of colonial dependence, and while desperately, and almost convulsively, struggling to break the fetters of trans-Atlantic despotism." Id. at 756 (quoting Governor Yates's speech to the legislature given on January 7, 1823) (internal quotation marks omitted).
16 GALIE, supra note 2, at 7.
ignored.” The legislature ultimately introduced two bills, one to put to the people the question of whether to hold a convention, and one to require that the results of any such convention would be submitted to the people for approval. This “established the tradition in New York of making constitutional conventions the creature of the people, not of the legislature.”

And so the Convention of 1821 convened, in part to address the absence of a plan for amending the Constitution. The Convention ultimately provided for the amendment of the constitution in Article VIII:

Any amendment or amendments to this Constitution may be proposed in the senate or assembly, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen; and shall be published for three months previous to the time of making such choice; and, if in the legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two thirds of all members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment, or amendments to the people, in such manner, and at such time, as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments shall become part of the Constitution.

This addition allowed the legislature to submit proposed amendments to the people if approved by a majority from each house during one legislative session and a two-thirds super-majority during the next legislative session. As the Constitution of 1821 provided that state senators were elected on a rotating basis, the practical effect of the “legislature then next to be chosen” language

17 Id. “In the absence of any constitutional provision for calling a convention,” however, “it fell to the legislature to make the decision and determine whether the results would be submitted to the people.” Id.
18 Id.
19 Id.
20 N.Y. Const. of 1821, art. VIII, § 1, reprinted in 1 Lincoln, supra note 4, at 219.
21 Id.
22 N.Y. Const. of 1821, art. I, § 5; 2 Lincoln, supra note 4, at 382.
was to require that an amendment be considered and passed in two successive years before it could be submitted to the people for adoption. In addition, the courts have held that the proposed amendment must remain essentially the same and must not amount to “a redeclaration of the fundamental principle” contained in the prior version.

Despite the progress made by the addition of the new Article VIII, many have argued that the 1821 plan did not go far enough because it did not provide explicitly for conventions. As Lincoln noted, “[t]he legislature could still decline to recommend a convention, or defer action indefinitely, even if there were a general public demand for such a convention.” Similarly, no deadlines were implemented for the legislature to submit the proposed amendment(s) to the people, instead allowing the legislature the discretion to “submit such proposed amendment or amendments to the people, in such manner and at such times, as the legislature shall prescribe.” The Convention of 1846 directly addressed some of these perceived deficiencies.

C. Constitution of 1846

Some twenty-five years after the introduction of the legislature’s power to submit amendments piecemeal to the voters, the subject of constitutional revision was again a focus of debate. Among the points of contention was the belief that the Constitution of 1821 “did not put enough direct control of the government in the hands of the people.” In part because of these concerns, twenty-four counties around the state submitted “petitions to the legislature calling for a law authorizing the people to vote on the question of calling a constitutional convention.” The popular demand for reform ultimately led the legislature to submit the question to the people; the people overwhelmingly approved the new convention.

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23 2 LINCOLN, supra note 4, at 382.
24 E.g., Brown v. City of New York, 211 N.Y.S. 306, 315 (App. Div. 1925), aff’d, 149 N.E. 211 (N.Y. 1925). While such a redeclaration would “nullify the manifest purpose of [the amendment article],” modifications of terms are not always enough to constitute a cognizable difference in the proposed amendments. Id.
25 See, e.g., 2 LINCOLN, supra note 4, at 210.
26 Id.
27 N.Y. CONST. of 1821, art VIII, § 1.
28 GALIE, supra note 2, at 11.
29 Id.
30 Id.
The convention introduced new provisions in the legislative amendment process and an entire section governing constitutional conventions.\footnote{2 LINCOLN, supra note 4, at 210; N.Y. CONST. of 1846, art. XIII, §§ 1–2, reprinted in 1 LINCOLN, supra note 4, at 274–75.} Organizationally, the provisions regarding constitutional revision were moved to Article XIII and included two sections instead of one.\footnote{Compare N.Y. CONST. of 1846, art. XIII, with N.Y. CONST. of 1821, art. VIII.}

The first substantive change reduced the majority required by the second legislature to approve a proposed amendment before the amendment could be submitted to the people from a two-thirds super-majority in each house to a simple majority in each house.\footnote{N.Y. CONST. of 1846, art. XIII, § 1.} The 1846 Constitution also changed the description of the second legislature from “the legislature then next to be chosen” following one legislature’s successful passage of a proposed amendment to the “next general election of senators.”\footnote{Compare N.Y. CONST. of 1821, art. VIII, with N.Y. CONST. of 1846, art. XIII, § 1.} The provision that allowed the legislature, despite having passed the amendment twice and the duty to submit the amendment to people, to decide when and how such an amendment would be submitted to the people, however, remained.\footnote{N.Y. CONST. of 1846, art. XIII, § 1.}

The third, and perhaps most significant, change made in the Constitution of 1846 was the addition of a section describing constitutional conventions. This new section provided that

At the general election, to be held in the year [1866], and in each twentieth year thereafter, and also at such time as the legislature may by law provide, the question “Shall there be a convention to revise the Constitution, and amend the same?” shall be decided by the electors qualified to vote for members of the legislature; and in case a majority of the electors so qualified, voting at such election, shall decide in favor of a convention for such purpose, the legislature, at its next session, shall provide by law for the election of delegates to such convention.\footnote{Id. § 2.}

The new section 2 specifically authorized the legislature to submit the question to the people at such times the legislature deems necessary.\footnote{Id.} This expressly articulated the long-standing power of the legislature to do so for the first time.
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From this provision, the legislature is required to put the question of whether to hold a constitutional convention before the voters every twenty years at a general election. This section was perhaps one of the most contested provisions relating to constitutional revision at the 1846 Convention, drawing opposition from a variety of delegates. In response to one delegate’s motion to strike the twenty-year provision, one delegate argued that the provision “asserted a great principle that all power was inherent in the people, and that once in twenty years they might take the matter into their own hands. Without this provision the legislature might be continually tormented with applications to amend.” The chairman of the committee assigned to this topic concluded that this section “simply provided that the Constitution should be brought into review once in twenty years, and did not prevent a convention at any other time. And once in twenty years, if the people were satisfied with the Constitution, they could indorse it, and the state of things would continue.” In the end, the twenty-year provision was resoundingly affirmed by a vote of 89 to 5 against a motion to strike the provision from the proposed constitution.

D. Constitution of 1894

The next constitutional convention to make changes to the constitutional revision provisions was the Convention of 1894.

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38 See 2 LINCOLN, supra note 4, at 210.
39 Id. (internal quotation marks omitted).
40 Id. at 211 (internal quotation marks omitted).
41 Id.
42 In 1866, the voters approved a new constitutional convention pursuant to the twenty-year provision of the Constitution of 1846. GALIE, supra note 2, at 14. While a number of provisions submitted to the people were adopted, no modifications to the methods of constitutional change were accepted. Instead, the focus of the convention was on the judiciary article, women’s suffrage, and African American suffrage. Id. at 14–15. The convention did, however, consider several points related to amendments and constitutional conventions, including the interval required “after an amendment had been proposed in the legislature before it could be considered again previous to its submission to the people” and the length of time between calls for the people to consider the question of whether to convene a constitutional convention. 2 LINCOLN, supra note 4, at 382. Other changes were suggested in the years between the 1846 Constitution and the 1894 Constitution, including proposals to “require a majority of all the electors of the state to adopt an amendment” instead of the majority of electors voting on the amendment as provided in the Constitution of 1846. Id. at 576. Following this convention, Governor John T. Hoffman proposed the creation of a constitutional commission composed of citizens that would be charged with proposing amendments to the constitution, in part because “it did not seem likely that the legislature would be able to give the necessary time and energy to the task.” GALIE, supra note 2, at 15. While similar to a small convention, the commission was required to submit its proposals to the legislature for approval before the proposals could be submitted to the people. Id. Galie
which adopted New York’s fourth constitution, the Constitution of 1894. The question of whether to convene a constitutional convention was required to be put the people in 1886. GALIE, supra note 2, at 16. The convention was approved, but did not meet until 1894 “because the governor and the legislature could not agree on the method of selecting delegates.” Id. at 16; see infra notes 54–55 and accompanying text.

43 The question of whether to convene a constitutional convention was required to be put the people in 1886. GALIE, supra note 2, at 16. The convention was approved, but did not meet until 1894 “because the governor and the legislature could not agree on the method of selecting delegates.” Id. at 16; see infra notes 54–55 and accompanying text.

44 N.Y. CONST. of 1894, art. XIV, reprinted in 3 LINCOLN, supra note 4, at 399–401.

45 Compare id. § 1, with N.Y. CONST. of 1846, art. XIII, § 1. One minor change introduced in the 1894 Constitution set the effective date of legislative amendments adopted by the people as the first day of January in the year following the approval of the proposed amendment by the people. N.Y. CONST. of 1894, art. XIV, § 1.

46 3 LINCOLN, supra note 4, at 659.

47 Id. This proposal would have added the following language to section 1:

Such approval [of proposed amendments] shall be expressed in one of the following methods: First, if such amendment or amendments are submitted at a general election, by the affirmative votes of a majority of all the electors voting at such election; or second, provided two thirds of all the electors voting at such election shall vote thereon, by the affirmative votes of a majority of such electors voting thereon; third, if submitted at a special election, by a number of affirmative votes equal to a majority of all the electors voting at the last previous general election; or fourth, provided two thirds of the number of electors who voted at the last previous general election shall vote thereon, by the affirmative votes of a majority of such electors voting thereon. Id. (internal quotation marks omitted) (citation omitted).

48 Id.
“substantially independent of the legislature.” First, the revised section 2 altered the year in which the question of whether to hold a constitutional convention would be put to the voters, starting the twenty-year interval with 1916.

In addition, the revisions to section 2 afforded the people “the absolute right to elect delegates to constitute a convention, without further action by the legislature” once the voters approved a call for a constitutional convention to be held. This was a departure from the 1846 Constitution’s provision that once a convention was approved by the people, the legislature would, at its next session, “provide by law for the election of delegates.” Instead, under the Constitution of 1894, the secretary of state is required to give notice of the election of delegates and use the “machinery of the election law” to provide for the election of convention delegates just like other state officers.

The 1894 Constitution also described how the convention was to be constituted. The composition of the convention, particularly as to the number of delegates, was a source of particular controversy from 1886, the year in which the constitutional convention was authorized by the people, to 1894, the year in which the convention was actually convened. The source of controversy was the number of delegates and the way in which delegates were to be selected. This prompted the 1894 Convention delegates, when finally selected, to address the problem expressly in a revised section 2. The delegates proposed a number of alternatives in this area, but the language ultimately adopted provided that

[I]n case a majority of the electors voting [on the question to call a constitutional convention] shall decide in favor of a convention . . . , the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election at which members of the assembly shall be chosen, and the electors of the state voting

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49 Id. at 671.
50 N.Y. CONST. of 1894, art. XIV, § 2, reprinted in 1 LINCOLN, supra note 4, at 400. For a description as to why the timing was altered, see 3 LINCOLN, supra note 4, at 660.
51 3 LINCOLN, supra note 4, at 661.
52 N.Y. CONST. of 1846, art. XIII, § 2.
53 3 LINCOLN, supra note 4, at 661.
54 Id.
55 Id.
56 Id.
57 Id. at 662–64.
at the same election shall elect fifteen delegates.\textsuperscript{58}

Additional provisions established compensation for the delegates as well as for the operations of the convention itself.\textsuperscript{59} Perhaps the most facially important provision regarding the operation of the convention added by this convention was its definition of quorum and the majority of convention delegates required to submit proposed amendments to the constitution. Prior to the 1894 Constitution, “amendments were frequently adopted by a small minority of delegates, and the people were thus called on to consider and determine constitutional amendments which had not received the approval of a majority of the Convention.”\textsuperscript{60} The new 1894 Constitution first defined the quorum necessary to transact convention business as a majority of the convention, and provided further that “no amendment to the Constitution shall be submitted for approval to the electors . . . unless by the assent of a majority of all the delegates elected to the convention.”\textsuperscript{61} This change brought the convention process into line with the legislative amendment process that required “a majority of the members elected to each of the two houses” to approve a proposed amendment before it could be submitted to the people for consideration.\textsuperscript{62}

The submission to the people of amendments approved by the convention, however, differed from the legislative process for submitting amendments in a key respect. While such convention-based amendments have to be submitted by the convention to the people “at the time and in the manner provided by such convention” just as allowed for with the legislative submission of amendments to the people, the convention is required to do so “not less than six weeks after the adjournment of such convention.”\textsuperscript{63} This removed from the convention, a body more closely associated with the people, the same discretion afforded the legislature.

The powers and function of constitutional conventions were also enumerated. For example, the 1894 Constitution provided that constitutional conventions have the “power to appoint such officers, employees, and assistants as it may deem necessary, and fix their

\textsuperscript{58} N.Y. CONST. of 1894, art. XIV, § 2.
\textsuperscript{59} Id. Specifically, the 1894 Constitution provided that conventions called would meet on the first Tuesday of April following the election and continue working “until the business of such convention shall have been completed.” Id. Prior to this constitution, the legislature had established the meeting date. 3 LINCOLN, supra note 4, at 664.
\textsuperscript{60} 3 LINCOLN, supra note 4, at 665.
\textsuperscript{61} N.Y. CONST. of 1894, art. XIV, § 2.
\textsuperscript{62} Id. § 1.
\textsuperscript{63} Id. § 2.
compensation, and to provide for the printing of its documents, journal, and proceedings.\textsuperscript{64}

In addition, the convention was empowered to determine its own procedural rules, chose its own offices, and, importantly, to judge “the election returns and qualifications of its members.”\textsuperscript{65} In 1894, the determination of contested convention seats was an issue.\textsuperscript{66} The 1894 Convention assumed the power to make these determinations, but the assumption was challenged by a writ of prohibition issued by Justice Samuel Edwards of the supreme court of the state.\textsuperscript{67} The writ prohibited the convention from interfering in a contested seat election other than taking testimony in existing proceedings.\textsuperscript{68} The convention delegates rejected this limitation as interfering with the independence required of the convention process,\textsuperscript{69} with the Judiciary Committee writing in a report that

\begin{quote}
It is far more important that a constitutional convention should possess these safeguards of its independence than it is for an ordinary legislature. . . . The convention furnishes the only way by which the people can exercise their will [against the judiciary and legislature] and their control over the convention would be wholly incompatible with the free exercise of that will.\textsuperscript{70}
\end{quote}

The Committee further asserted that the convention represented a “‘gathering of the people, in their sovereign capacity,’” that was empowered to “exercise the very highest political powers.”\textsuperscript{71} The writ was eventually rejected on review.\textsuperscript{72}

\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} 3 LINCOLN, supra note 4, at 666.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Other delegates supported the ability of a convention to determine the eligibility, election, and qualification of its members in part because of the historical existence of such powers in the convention powers of other states. Id. at 668–69. Still other delegates cited general principles of parliamentary bodies in support of its contention that constitutional conventions have the authority to review and decide upon the election and qualifications of its own members. Id. at 666–67.
\textsuperscript{70} Id. at 667 (internal quotation marks omitted). The Judiciary Committee also rejected the Court’s involvement as an assertion by the Court that the convention was an “inferior tribunal” over which the Court was empowered to control, noting that the Supreme Court “usurp[ed] powers which it d[id] not possess, and encroach[ed] upon a jurisdiction beyond its purview.” Id.
\textsuperscript{71} Id. at 667–68.
\textsuperscript{72} Id. at 669. The involvement of the judiciary in the “election, returns and qualifications” of delegates to constitutional conventions has, however, been upheld in other circumstances. For example, in Rice v. Power, the Court of Appeals found that the Supreme Courts of New York did possess the jurisdiction to order a re-canvassing of ballots cast in the elections of
The issue of vacancies of delegates was also addressed by the 1894 Constitution. It provided that

In case of a vacancy, by death, resignation, or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large.73

The selection of replacement delegates by the remaining convention delegates constituted a "radical departure from the general policy of the state under which representatives in legislative bodies are to be chosen directly by the people."74 Prior to the 1894 Constitution, replacement delegates were chosen by the people in a special election.75 The advantages of replacing the special election scheme are illustrated by the fact that while there were indeed vacancies in the Convention of 1894, none of them were filled.76

Finally, the 1894 Constitution, for the first time, mandated how conflicts between legislative and convention amendments considered in the same popular election would be resolved. This provision, given its own place in a new section, section 3, provided that

The New York City Board of Elections has the duty of determining and certifying which candidate received "the greatest number of votes" for the office of delegate to the Constitutional Convention (Election Law, § 276), and no provision in the Constitution deprives the courts of jurisdiction under section 330 to inquire whether the board has properly discharged its duty. Although the Convention is privileged to disregard the certificate issued by the Board of Elections in determining whether a delegate was properly elected and should be seated, this does not in any way vitiate the power of the courts to require that the certificate reflect an accurate tally of the votes cast. Id. at 865–66. Such cases notwithstanding, the courts have generally affirmed the convention's position as the ultimate "judge of the election, returns and qualifications" of its members. See, e.g., Rice v. State, 287 N.Y.S.2d 263, 268 (Ct. Cl. 1968) (holding that the convention had discretion over affording candidates with the rights to participate in the convention).

73 N.Y. CONST. of 1894, art. XIV, § 2.
74 3 LINCOLN, supra note 4, at 670.
75 Id.
76 Id. Lincoln provides a useful apologetic on the necessity of the convention method of selecting replacement delegates:

The session of a constitutional convention is almost necessarily brief, and if a special election were the only method of filling a vacancy, much time would elapse before it could be filled, or else, in default of such special election, the seat would remain vacant. . . . The new provision furnishes a prompt and inexpensive method of filling vacancies. Id. These considerations, coupled with the lack of the effectiveness of special elections in this context, cast the people's power to replace delegates as an empty power.
Any Amendment proposed by a constitutional convention relating to the same subject as an amendment proposed by the legislature, coincidentally submitted to the people for approval at the general election held in the year [1894], or at any subsequent election, shall, if approved, be deemed to supersede the amendment so proposed by the legislature.77

Thus, an amendment proposed by a convention will supersede an amendment proposed by the legislature that concerns the same subject and is submitted to the people in the same election.78

E. Constitution of 1938

Forty-four years after the changes introduced by the Constitution of 1894, another constitutional convention introduced a series of changes to the constitutional change process.79 Aside from renumbering the article from Article XIV to Article XIX, these changes were largely designed to clarify and augment existing provisions. In section 1, the delegates added a requirement that amendments proposed by the legislature must be submitted to the Attorney General of New York.80 The Attorney General was then required to “render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution” within twenty days of receiving the proposed amendment(s) from the legislature.81 If the proposed amendment(s) are agreed to by the majority of the members of each house of the legislature, then, “upon receiving” the opinion of the Attorney General, the proposed amendment(s) will be submitted to the next legislature.82

77 N.Y. CONST. of 1894, art. XIV, § 3.
78 The genesis of this addition actually came about in part as an effort to nullify an amendment submitted by the legislature for consideration by the people during the same 1894 election in which the 1894 Constitution was submitted to the people. 4 LINCOLN, supra note 4, at 799–800. Because the Convention could not prevent the legislature from submitting their amendment, which concerned a topic covered by the Conventions proposed constitution, the Convention included this provision to nullify the effect of the legislature’s amendment. Id. For an example of the use of this principle in a later convention, see STOUGHTON v. COHEN, 23 N.E.2d 460 (N.Y. 1939), discussed below in note 89.
79 The Convention of 1938 was authorized by the people after the question of whether to hold a convention was put to the voters 1936 as required under the twenty-year provision.
80 N.Y. CONST. art. XIX, § 1.
81 Id.
82 Id. The language of this provision seemed to make mandatory the submission of the opinion of the Attorney General prior to the legislature’s submission of the proposed amendments to the second legislature in the two legislature process. The Revised Record of
The definition of what constitutes the “next” legislature was also modified. The language, the “legislature to be chosen at the next general election of senators,” was removed and replaced with the “next regular legislative session convening after the succeeding general election of members of the assembly.”  There were three other textual changes made to section 1, all of which were non-substantive textual changes for clarity.

Section 2 of the 1938 Constitution was similarly adjusted for clarity. Slightly more substantively as it relates to this Article, the twenty-year requirement for submitting to the voters the question of whether to call a constitutional convention was restarted as of 1957. This placed the next call for a convention to be made “when no pending national or state election was being held.” The responsibility of the legislature to submit the question to the people
was enhanced by providing that “the question ‘Shall there be a
convention to revise the constitution and amend the same?’ shall be
submitted to and decided by the electors of the state.”88

The revised section 3 removed the effective date of the elections to
which the amendment would apply, leaving the coincident
amendment provision of section 2 as self-executing for all elections
in which “[a]ny amendment proposed by a constitutional convention
relating to the same subject as an amendment proposed by the
legislature, [was] coincidentally submitted to the people for
approval.”89

F. Amended in 1941 and 2001

Article XIX was successfully modified only twice since 1938, once
in 1941 and then again in 2001.90 In 1941, the legislature proposed
and the people adopted a provision limiting the importance of the
referral of amendments proposed by the legislature to the Attorney
General for an opinion as to the effect of the proposed amendment(s)
on the existing constitution.91 The clarification consisted of the
addition of one sentence at the end of section 1 of Article XIX that
expressly made the opinion of the Attorney General an optional
element in the legislative amendment process: “Neither the failure
of the attorney-general to render an opinion concerning such a
proposed amendment nor his or her failure to do so timely shall
affect the validity of such proposed amendment or legislative action

88 N.Y. CONST. art. XIX, § 2 (emphasis added).
89 Id. § 3. One of the first judicial applications of this provision occurred in 1938 when the
Court of Appeals of New York found in Stoughton v. Cohen that an amendment concerning
para-mutual racing did not fail due to conflict with the concurrently considered proposed
constitution because the proposed Constitution did not contain a provision covering that topic.
23 N.E.2d 460, 462 (N.Y. 1939). More specifically, the Court reasoned that since the intention
of the 1938 Convention was to amend the existing constitution through discrete amendments,
and none of those convention-based amendments covered the same topic as the para-mutual
amendment, there was no “coincidental submission” of conflicting amendments. Id. at 461–
62. An interesting question not addressed by the Court of Appeals is whether there is a
dormant constitution” limitation on proposed amendments. In other words, if a
constitutional convention were to submit a new constitution as a whole, not as a series of
discrete amendments, would that proposed constitution supersede a coincidentally submitted
legislative amendment governing a topic not covered specifically in the convention’s complete
constitutional revision.
90 In 2001, the entire New York Constitution was amended to render it gender-neutral.
2001 Laws of N.Y. 3117 (detailing the concurrent resolution eventually adopted by the people
at the polls). Several such changes were made to Article XIX. See id. at 3176–77.
91 N.Y. CONST. art XIX, § 1; 1941 Laws of N.Y. 2231 (detailing the concurrent resolution
eventually adopted by the people at the polls).

In addition to the trends found in the changes actually made to the model of constitutional change adopted in New York, changes that have not been adopted, in some cases despite tremendous initial popular and political support, are also informative. Perhaps the most important of these proposed, but not yet adopted, provisions are those offered by the Constitutional Convention of 1967, the most recent formal attempt to modify the mechanisms of constitutional change in New York. While the 1967 Convention did not incorporate all of the questions and issues discussed during the convention into its proposed constitution, in the end the Convention suggested sweeping changes throughout the constitutional revision process.  

92 N.Y. CONST. art. XIX, § 1 (amended 2001); 1941 Laws of N.Y. 2231. As Attorney General Lefkowitz noted in a 1961 opinion, the modification eliminated any doubt that an opinion from the Attorney General was not required to be submitted to the legislature in the legislature's amendment process. 1961 N.Y. Op. Att'y Gen. 52 (citing 1939 N.Y. Op. Att'y Gen. 358). Attorney General Lefkowitz further opined that the 1941 amendment came about in part as a response to the Court of Appeals' failure to "pass upon the validity of an amendment passed by the Legislature prior to the receipt of the Attorney General's opinion since compliance with the 1938 amendment appeared in the record." Id. Whatever the origin, the 1941 provision clearly provided that the Attorney General's opinion was not a required element in the legislature's amendment process.

93 In its introductory report, the Temporary State Commission on the Constitutional Convention raised a number of issues that the convention should address in the areas of the function of the state constitution, the amendment process, and constitutional conventions. TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, INTRODUCTORY REPORT: 1967 CONVENTION ISSUES 70–71 (1966) [hereinafter 1967 CONVENTION ISSUES]. Among these issues were questions as to whether there should be "different methods for amending different provisions of the Constitution, depending on the subject matter involved or on some other consideration of policy"; whether the people should be allowed to propose constitutional amendments directly by initiative; whether the constitution should continue to provide that voters be offered every twenty years the question of whether to call a constitutional convention; whether the calling of a convention and the election of delegates should be decided at a general election; whether the constitution should continue "to provide for three delegates from each Senate district and 15 delegates-at-large"; whether the constitution should "specify the manner of electing delegates-at-large"; whether public officers should be permitted to serve as delegates to a convention and if so whether they should receive compensation for both their service as a delegate and their service as public officers; and whether the rules governing constitutional conventions should be retained. Id. Previous reports of the Temporary State Commission on the Constitutional Convention described other areas of interest including limiting the number of amendments that could be submitted at one time, granting privileges and immunities protection to delegates just like those afforded legislators, and studying the feasibility of authorizing the initiative method of amending the constitution. TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, SECOND
1. Structure

Perhaps most notably, the 1967 Proposed Constitution broke up section 2 into four subdivisions, controlling the calling of conventions and the qualifications of delegates, the operations of a convention, the appointment of convention employees, and the submission of proposals to the people, and renumbered the article from Article XIX to Article XIV. In addition, the proposed constitution removed much of the extraneous language that many see as plaguing the current constitution in general and in the constitutional revision process in particular. The undeniable result from these modifications is an article that is imminently more readable and clear.

2. Legislative Amendments

The 1967 Proposed Constitution significantly shortened the legislative amendment section. First, the proposal stated that legislative amendments “may be proposed by the legislature through a concurrent resolution in the senate or assembly.” This modification kept the legislative approach in line with current provision allowing amendments to be proposed “in the senate and assembly,” but clarified the language to describe the joint action between the two bodies that was required. The remainder of the proposed section 1 simplified the language of the existing provisions, but kept most of the substantive requirements:

Any amendment adopted by the individually recorded vote of a majority of the members elected to each house shall be entered on their journals, referred to a regular session of the next elected legislature, and published at least once prior to such election. If then again so adopted by the next elected legislature, such amendment shall be submitted to the...
people at a general election.\textsuperscript{101}

The proposal, however, did make two important changes.\textsuperscript{102} First, it removed the requirement that the legislature submit legislatively proposed amendments to the Attorney General to describe the effect that the amendments would have on the current constitutional framework. This change, however, would have been more of a housekeeping measure because the Attorney General opinion requirement was, after being introduced in the 1938 Constitution, eviscerated by the 1941 amendment to Article XIX that stated that “[n]either the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.”\textsuperscript{103}

Second, the 1967 Proposed Constitution provided that once two successively elected legislatures adopted an amendment, “such amendment shall be submitted to the people at a general election.”\textsuperscript{104} This modification would have removed the discretion of the legislature to submit proposed amendments to the people “in such manner and at such times as the legislature shall prescribe,”\textsuperscript{105} instead requiring that the legislature submit the proposed amendment or amendments to the people at a general, as opposed to special, election.\textsuperscript{106} The indefinite article, “a,” in the proposed language, however, allows the legislature a similar degree of discretion by not specifying a time frame in which the legislature must submit the proposed amendment(s) to the people for consideration.

\textsuperscript{101} Proposed N.Y. Const. of 1967, art. XIV, § 1.
\textsuperscript{102} In addition to the two important changes described below, several relatively minor changes were proposed. First, the proposed language lightens the publication burden of proposed amendments. Instead of having to be published for three months leading to the consideration of the proposed amendment by the second legislative session, the proposed language requires that the proposed amendment be published “at least once” prior to the election of the legislature next elected. Id. Second, the provision describing when legislative amendments approved by the people would become part of the constitution was modified. Under the current constitution, such amendments would become law “on the first day of January next after [its] approval.” N.Y. Const. art. XIX, § 1. The proposed language kept this provision, but also allowed the enactment date to be any day after the first day of January after its approval “as may be specified in the amendment.” Proposed N.Y. Const. of 1967, art. XIV, § 1. This change would allow the enactment of amendments to be delayed for any length of time if so specified in the amendment.
\textsuperscript{103} See supra notes 91–92 and accompanying text.
\textsuperscript{104} Proposed N.Y. Const. of 1967, art. XIV, § 1.
\textsuperscript{105} N.Y. Const. art XIX, § 1.
\textsuperscript{106} Proposed N.Y. Const. of 1967, art. XIV, § 1.
3. Constitutional Conventions

The constitutional revision by convention process would also have been changed in several ways. Aside from structurally making the provisions easier to read and restarting the mandatory call for constitutional conventions every twenty years beginning in 1992, the proposed language specified qualifications of convention delegates never before required and disallowed current state-wide officeholders from being eligible to serve as delegates. In addition, the 1967 Proposed Constitution provided for the possibility of a tie vote in filling a delegate vacancy. Under the revised language, such a tie would be "resolved by the vote of the presiding officer of the convention." The proposal also included a catchall provision for delegate vacancies: "In the event of a failure to elect a person to any office of delegate the convention shall fill such office."

4. Conflict Between Legislative and Convention Proposals

The version of section 3, the conflict between legislative and convention proposals provision, proposed by the 1967 Proposed Constitution would have potentially limited the extent to which legislative proposals would have been superseded by the conflicting convention proposals. The current version provides that if an amendment proposed by the legislature, coincidentally submitted to the people for approval in the same election as an amendment proposed by a constitutional convention, conflicts with the amendment proposed by a constitutional convention, the entire

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107 See supra Part II.G.1.
108 Proposed N.Y. Const. of 1967, art. XIV, § 2. The proposal also would have brought the constitutional convention process in line with the legislative amendment process by allowing constitutions and amendments to become effective on whatever date is provided in the adopted constitution or amendment, though in this context the drafter removed the language that allowed a constitution or amendment to become effective automatically on the first day of January after the document’s approval by the voters. Compare id., with N.Y. Const. art. XIX, § 2. The 1967 Proposed Constitution also revised delegate compensation. Proposed N.Y. Const. of 1967, art. XIV, § 2.
109 Proposed N.Y. Const. of 1967, art. XIV, § 2 ("Delegates shall be at least twenty-one years of age, eligible to vote in the state, and shall have been domiciled in the state for at least the three years preceding such election. The governor, lieutenant governor, attorney general, comptroller and chief judge and associate judges of the court of appeals shall not be eligible to serve as delegates.").
110 Id.
111 Id.
112 Id.
legislatively-proposed amendment would be deemed superseded by the convention’s amendment.113 Under the proposed language, the legislatively-proposed amendment would only be deemed superseded by the convention’s amendment “to the extent of the inconsistency” between the two proposed amendments.114 This would have represented a further departure from the conflict rules of other states115 and would seem to invite complex constitutional questions of how two amendments enacted on the same topic conflict and, perhaps more perplexingly, how the legislative intent of the framers of each valid amendment interacts—even if assuming that the legislative intent of an amendment proposed by a constitutional convention would dominate.

III. THEMES OF CONSTITUTIONAL CHANGE IN NEW YORK

New York’s constitutional history related to the development of the power of constitutional change evinces an interrelated and often conflicting system of common themes. Not only do these themes and their development help to explain the approaches to constitutional change taken in New York, a tradition long dominated by legislatively-proposed amendments and constitutional conventions,116 but they also help to explain the treatment of proposals that would empower the people to initiate amendments by petition and provide insight into the likelihood that such proposals would be approved in the future.117

Perhaps the most important theme in New York’s constitutional change tradition is the diffusion of constitutional power due to a pervasive concern for ensuring that no one individual or group, whether the people, the legislature, or the convention, has too much control in the constitutional process. Following New York’s initial period of near unilateral control of the legislature to adopt constitutional changes, such as with the Constitution of 1777 and the amendments of 1801, subsequent amendments and wholesale

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113 N.Y. CONST. art. XIX, § 3.
114 Proposed N.Y. CONST. of 1967, art. XIV, § 2.
115 See, e.g., Ark. Code § 7-9-122 (“If two (2) or more conflicting measures shall be approved by a majority of the votes severally cast for and against the measures at the same election, the measure receiving the greatest number of affirmative votes shall become law.”); Cal. Const. art. XVIII, § 4 (“If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.”).
116 It is important to observe that most of these themes have evolved considerably since the advent of New York’s constitutionalism in 1775.
117 See infra Parts IV–V.
Constitutional revisions have imposed limits on the legislature’s ability to control the constitutional process. Even before these subsequent limitations were instituted, the legislature limited itself by establishing the tradition that a vote of the people was required to authorize a convention to make changes to the constitution, a requirement that was not formally adopted until the Constitution of 1821.

The 1821 Constitution also required that the legislature pass each proposed amendment twice, first by a majority in each house and then a two-thirds majority, before submitting the proposal to the people for final approval. The 1846 Constitution reduced the majority in the second legislative vote to a simple majority, but also added a non-legislative method for constitutional revision, the constitutional convention process. The legislature was also required to submit calls for constitutional conventions to the people every twenty years. Indeed, scholars have commented that the most significant change introduced by the 1846 Constitution was the “dramatic reduction in legislative power.”

The Constitution of 1894 continued the move towards limiting legislative power in this area. For example, it gave the people a further check on the power of the legislature by affording the people the “absolute right” to elect convention delegates, a power previously exercised by the legislative and executive branches. The legislature and secretary of state were then required to provide for the elections of convention delegates during its next session using existing election law procedures. In 1938, the legislature was required to submit its proposed amendments to the Attorney General for evaluation. While this submission was deemed to be merely directory, it did suggest that the legislature needed assistance in drafting constitutional proposals. The proposed Constitution of 1967 further would have limited the discretion of the legislature by requiring that all amendments be submitted during a general election, removing the ability of the legislature to submit proposals to the people in the manner and time chosen by the legislature.

Conventions have also been subjected to an evolving set of restrictions similar to those imposed on the legislature. After being formally established as a method of constitutional change in 1846, the convention process was immediately limited by the 1821

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118 E.g., GAILE, supra note 2, at 13, 24
119 3 LINCOLN, supra note 4, at 661.
Constitution, which had increased the electorate by more than 160,000 voters. Such a large voter pool rendered popular approval of conventions instantly more difficult than the much smaller, much more elite electoral body that could vote on conventions prior to 1821. Moreover, “[t]he combination of controversial issues and a factionalized and largely indifferent electorate have made major constitutional reform by the convention method increasingly difficult.”

The second most dominant theme seems to be the treatment of constitutional revision and amendment as a filtered and controlled manifestation of the will and sovereign power of the people. From the very beginning of constitutional history in New York, the people and their representatives have recognized the sovereign power of the people as an essential element of constitutional change, without the support of which no constitutional change may be made. Yet, this involvement of the people in the constitutional process has always been limited. Currently, the people may not initiate amendments nor vote to hold for convention other than by the discretion of the legislature or pursuant to the twenty-year provision. Instead, the legislature, as representatives of the people, and constitutional conventions, through figures elected by the people, do the work of constitutional revision by acting as conduits for, and filters on, the will of the people. Yet, the fact remains that a driving force in New York’s constitutional history has in fact been the countervailing movement for providing “enough direct control of the government in the hands of the people.”

Implicit to the theme of filtered and controlled popular involvement is the involvement of people in the constitutional process. Despite the limited role that the people play in New York’s constitutional process, it is undeniable that the people have actively participated in the constitution process, approving more than 162 individual amendments and constitutions from 1875 to 1990.

120 GAILE, supra note 2, at 7–8, 10.
121 See id. The 1821 Constitution itself removed property qualification requirements for voting, thereby providing the franchise to all male taxpayers, militiamen, or highway workers regardless of property ownership. Id. at 7. Prior to this change, only male landholders could vote. Id. at 7–8.
122 Id. at 29.
123 See supra Part II.A.
124 But see infra text accompanying note 148 (discussing the use of popular petitions in the constitutional process).
125 GAILE, supra note 2, at 11.
126 Id. at 16–30 (detailing the history of constitutional change in New York).
This involvement is based on the fact that since 1821, New York’s constitution has required that any and all constitutional changes must be approved by a vote of the people.

Indeed, every constitutional amendment or complete revision since 1777 has required the approval of the people before it became effective. Even the Constitution of 1777, although it was never submitted to the people for approval, demonstrates this requirement. There the drafters of the 1777 Constitution affirmatively involved the people in the constitution precisely because they believed that a constitution must involve the people and be sanctioned by them. To this end, they decided that they must first ask for the permission of the people before they could construct a new government through a new constitution. It is in the tradition of this mandate for popular approval that framed the construction of constitutions for the next two centuries.

The primacy of constitutional changes proposed by conventions over constitutional changes proposed by the legislature also speaks to the central place of the people. As Peter Gaile observed, “[t]his choice is consistent with the view that the convention as a constituent body chosen for the specific task of amending the constitution is closer to the sovereign will of the people than the legislature.” Lincoln also observed that constitutional conventions are “the highest representative body known to a free people.”

Indeed, the resolution of conflicts between legislative amendments offered at the same election as convention-based amendments also speaks to the primacy of popular involvement in the constitutional process. While other states have opted for a bias towards whatever amendment held the most popular support at the polls, the representatives of the people of New York have, by favoring convention-based amendments over legislatively-proposed amendments, opted to favor amendments created closer to the people.
IV. THE INITIATIVE POWER IN NEW YORK

The power of the people to initiate constitutional amendments has never been established in New York. Yet, the initiative power has been considered throughout New York’s constitutional history as part of a larger movement to provide sufficient “direct control of the government” by the people. Specifically, I focus on the proposals and arguments presented at the 1938 and 1967 constitutional conventions as illustrative of the general conception of the initiative power found in New York. While each of the proposed constitutional amendments that would have established an initiative power was eventually voted down at these conventions and never presented to the people, they provide an invaluable perspective on the treatment of initiative proposals in New York. Moreover, the proposals, coupled with the arguments that have been articulated for and against the initiative power in New York, inform a comparison of the initiative power and the traditions of constitutional change in New York. As is described below, the initiative proposals considered at these conventions generally follow the two general themes that characterize New York’s constitutional change tradition: diffusion of constitutional power and the careful control of the participation of the people in the constitutional process.

During the Convention of 1938, three proposed amendments were offered that would have added a petition process by which the people themselves could offer amendments to the constitution.

Lincoln, supra note 4, at 795–96 (“While the legislature might make and propose a new constitution which the people would be bound to accept or reject, such legislative action would not be likely to receive popular approval, for the reason that the Constitution provides . . . a means by which the people have the right to choose a convention for the express purpose of framing a constitution by delegates who would not possess any ordinary legislative power.”).

132 See Gaile, supra note 2, at 11; infra notes 135–37 (noting the numerous proposals made in the 1938 and 1967 Conventions); supra note 93 (noting that the initiative power was considered in the early reports of the 1967 Convention). The focus on sufficient popular control of government continues in New York’s present-day initiative movements. For example, in support of the initiative power passed by the New York Senate in June of 2007 by a vote of forty-seven to twelve, Senator Joseph L. Bruno argued that the “[i]nitiate . . . is one of the most powerful reform tools in politics because it gives the people the ability to make informed decisions to directly change the powers and priorities of their government.” Jared Arader, Senate Takes Up Term Limits, Initiative and Referendum, Legis. Gazette (Albany, N.Y.), June 11, 2007, at 1 (internal quotation marks omitted).

133 The initiative power was also discussed during at least one other convention, the Convention of 1915. 1 Revised Record of the Constitutional Convention of the State of New York, 1915, at 377 (1916).

Perhaps the most detailed exposition of the initiative power proposals offered in 1938 provided that

In addition to the methods provided in the preceding sections of th[e] article for amendments to the constitution, the people themselves may by petition propose any amendment or amendments to the constitution other than an amendment restricting the power of taxation of the state or of its political subdivisions. Such petition shall be signed by qualified electors at least equal in number to ten per centum of the number who voted in the state at the last election for governor before the petition is filed, provided that in counting the required number of such signatures not more than one-third of such required number shall be counted from any one county and not more than one-half from one city. Such petition may be in several parts, each of which shall contain the full text of the proposed amendment or amendments.

Such petitions or the several parts thereof shall be filed with the secretary of state who shall submit the amendment or amendments contained in such petition to the people for approval at a general election held not earlier than eight months subsequent to the filing of the petition upon such notice and in such manner as is now, or may hereafter be prescribed by the legislature with reference to proposed amendments originating in the legislature, except that every amendment proposed by petition of the people shall be described as “A proposed amendment of the constitution instituted by petition.” If the people shall approve such amendment or amendments by the majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution from and after the first day of January next after such approval. If provisions of two or more constitutional amendments approved by the people are in conflict, the provisions of the measure receiving the largest number of affirmative votes at such election shall prevail.

The legislature shall by general law provide proper safeguards and limitations upon the procedure established by this section but not inconsistent herewith.\(^{135}\)

\(^{135}\) 1 Proposed Amendments of the Constitution of the Constitutional Convention
A nearly identical initiative proposal was also proposed during the 1967 Convention, along with at least ten other proposed initiative power amendments.

Such provisions follow the primary theme identified in this article by further diffusing the power over the constitutional process to ensure that no one individual or group, here the legislative and convention processes, do not exercise too much control in the constitutional process. In this way, the initiative provides a relief mechanism outside the legislative sphere to achieve constitutional change without requiring direct support in the legislature. This mechanism is limited, following the tradition of filtering and controlling the manifestation of the will and sovereign power of the people in their participation in the constitutional process, through a series of “safeguards and limitations” that both limits the scope of the initiative power and involves the legislature as a check on the initiative process.

The debate concerning a proposal similar to the 1938 amendment described above, while the proposal itself was not included in the language ultimately submitted to the people, articulates many of the arguments for and against the initiative power in New York. These arguments also echo the diffusion and control characteristics of the State of New York, 1938, at No. 19 (1938) [hereinafter 1938 Initiative Proposals]. This proposal was submitted a second time in substantially the same form. See id. at No. 253. A similar, but simpler version of the initiative power was proposed by another delegate:

Any amendment or amendments to this constitution may be proposed and initiated by a petition signed by at least one hundred qualified electors from each county in the state. The petition shall be verified by the oaths of the persons subscribing thereto and shall be filed with the secretary of the state on or before July first in any year. The secretary of state shall cause the proposed amendment or amendments to be published for three months prior to the next general election, at which election the proposed amendment or amendments shall be submitted to the people for approval; and if the people shall approve such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution from and after the first day of January next after such approval.

Id. at No. 106. A much more complex and far-reaching proposal was also offered in 1938 that would have nearly completely reworked the legislative power in favor of effectively a second legislative body based on initiatives and referenda. See id. at No. 128. Under this proposal, the people had the right to approve or reject proposed amendments (and laws), propose amendments, “demand [the] submission of any measure to the direct vote of the electors,” and more. Id. at No. 2-A, 209; 7 id. at No. 593; 8 id. at No. 791, 817, 913; 9 id. at No. 1053, 1167, 1216–17.

See text accompanying supra note 135; infra notes 141–43 and accompanying text.

of New York’s constitutional change tradition that have been identified in this Article. For example, supporters of the initiative process argued that the initiative process was an important non-legislative- and non-convention-based method of constitutional change that provided to the people, as the ultimate authority in the state, a method of asserting the people’s collective voice in the event that the legislative and the convention processes were not responsive to their needs.\textsuperscript{140} Addressing some of the concerns of opponents to the initiative that “hysteria” could compel the population to initiate and pass impulsive and ill-conceived amendments, supporters highlighted the system of limits imposed on the initiative power. First, amendments initiated by the people were prohibited from “altering the taxation articles of th[e] Constitution.”\textsuperscript{141} Second, the legislature was empowered to prescribe the manner in which petitions are filed and establish such “safeguards and limitations upon the [initiative] procedure[]” as they find necessary.\textsuperscript{142} Third, and more generally, initiated amendments would have required broad and wide-spread popular support in order to be placed on the ballot.\textsuperscript{143}

Each of these safeguards was designed to control and filter the will of the people through a procedural scheme, much in the same way that the established methods of constitutional change provide, in order to ensure that the initiative power does not allow the people to exercise too much power over the constitutional process. For example, they filter the actions of the people by placing a procedural check with the legislature. They also limit the scope of the power by prohibiting the limitation of the state and local governments’ taxation powers. Put another way, the initiative power afforded the people the direct involvement in the constitutional process that the people have always enjoyed while also ensuring that the will of the people was filtered and controlled through a constitutionally-prescribed framework of safeguards, limitations, and checks and balances with the legislature to ensure that the people do not wield too much power in the constitutional

\textsuperscript{140} For example, the sponsor of one proposal asserted that “the Constitution in essence belongs to the people of the State, and they should not be barred from obtaining amendments if it is the will of the people.”\textsuperscript{3} \textsuperscript{1967 INITIATIVE PROPOSALS, supra note 134, at 34. In support of the same proposal, another delegate found that “our whole system is based on the voice of the people.”} Id. at 36.
\textsuperscript{141} Id. at 34.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 34, 36.
process.

The notion of direct involvement of the people in the constitutional process, however, is both consistent and inconsistent with the themes identified in this Article. Certainly, the principal place of the people as the source of sovereign power imbues the people with the potential authority to propose and approve constitutional modification. Similarly, the filtering of that power through intermediaries such as the legislature and constitutional convention seems to be contrary to the supreme authority of the people to, in the words of the 1777 Constitution, “alter or to abolish [its government], and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.”144 This sort of filtration, however, is the tradition of New York. Indeed, the initial limitation of the people’s direct involvement in the constitutional process to its power of “last resort” and the requirement that constitutional modifications must be submitted to the people for final approval each exemplify the limited manner in which the people have traditionally been able to exercise their sovereign power.

In this way, the arguments of opponents to the initiative power that the substantive and procedural safeguards were insufficient to protect against the dangers of the initiative process also reflect the themes of New York’s constitutional change tradition. For these opponents, the initiative power provides too much power to the people. Contrary to the current constitutional process and the protections it offers against improvident changes by the legislature or convention delegates, the people would be afforded a direct and unchallenged avenue of effecting constitutional change. As the chairman of the Committee on the Legislature in 1967 and several other delegates noted, amendments to the constitution must be made through “mature deliberations,” and not through hasty changes made on a whim of the people that would invite discord throughout the state or the introduction of subject-matter not appropriate for inclusion in a constitution.145 Other opponents

144 N.Y. CONST. of 1777 pmbl.
145 3 1967 INITIATIVE PROPOSALS, supra note 134, at 36–37, 40–41. The Chairman also offered a powerful constitutional argument against the initiative. He argued that “the constitution is drawn to protect the rights of the minority, and when you go and permit petitions, even though it be by a substantial group, which may attack the rights of [] minorities, you are invading their constitutional rights and you shouldn’t make it easy to do so.” Id. at 37.
suggested that the initiative does not even advance the goal of
popular involvement, but rather “giv[es] a voice to . . . large
organizations with large sums of money to appear as additional
legislators.”

The consistencies and inconsistencies of an initiative power with
the traditions of New York brings into specific relief the intersection
of the primacy of the power of the people and New York’s
concomitant tendencies to diffuse constitutional power and filter the
direct actions of the people through the constitutional change
process: when faced with an exclusive method of constitutional
access for one entity, New York has always chosen to limit that
entity’s control through extensive procedural and substantive
safeguards. This is not to say that innovative alternatives that
more directly link the people to the constitutional should not or
have not be considered. Indeed, a number of such alternatives have
already been used. For example, a commission of citizens
empowered to propose amendments to the constitution was
proposed following the 1846 Convention. In another situation,
the people actually used petitions to demand that the legislature
call a convention. These compromises involving initiative-like
powers are much more reflective of New York’s history because they
provide more direct popular involvement without the pitfalls of a
pure initiative system that renders such a system inconsistent with
New York’s constitutional traditions.

V. CONCLUSION

The historical traditions of constitutional change in New York
suggest at least two major themes that have guided the
development of the powers of constitutional change since 1775.
First, there has always been a pervasive concern for ensuring that
no one individual or group, whether the people, the legislature, or
the convention, has too much control in the constitutional process.
Second (and attendant to the previous concern), while the people,
through expressions of their will and sovereign power, have always

\[146\] Id. at 38.
\[147\] See supra note 42; 4 Lincoln, supra note 4, at 795. This compromise approach to
constitution-making required the legislature to approve amendments proposed by the
commission before they could be submitted to the people. See supra note 42; Galie, supra
note 2, at 15.
\[148\] See Galie, supra note 2, at 11 (“In 1844, twenty-four counties presented petitions to the
legislature calling for a law authorizing the people to vote on the question of calling a
constitutional convention.”).
been deeply involved in the constitutional revision and amendment process, all popular involvement has been filtered and controlled by the established mechanisms of constitutional revision in general, and by the legislature specifically. In comparing these two themes with the nature of the initiative power, particularly as it has been articulated in New York, I conclude that the initiative power is generally inconsistent with New York’s well-established constitutional change traditions.

This observation may be especially important for a few reasons. First, many observers argue that New York’s framework for effecting constitutional change is broken. If New York’s framework for constitutional change is broken, the question becomes, can it be fixed? Indeed, as a threshold matter, it may not be possible. As Lincoln observed in his classic treatise on the constitutional history of New York, “[New York’s] constitutional policy is now so well established that the people are not likely to make many changes in its fundamental provisions, at least, so long as the chief characteristics of our political society continue in their present form.”149 So where does that leave New York’s power of constitutional change for the future?

Looking to the existing framework, the potential for achieving a breakthrough in the constitutional revision process seems bleak. The ineffectiveness of conventions to achieve broad constitutional changes over the last fifty years and the evolution of partisanship in New York’s political landscape suggest that conventions are not sufficient.150 While this ineffectiveness has also resulted in establishing incremental change through the increasingly partisan legislative amendment process as the only remaining viable method of constitutional change,151 even the legislative process has not

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149 4 LINCOLN, supra note 4, at 799.
150 See GAILE, supra note 2, at 26, 29; supra text accompanying note 122. Richard Bartlett, New York’s first Chief Administrative Judge, would certainly argue that constitutional conventions are not the way to fix the problems with the constitution. In rejecting the future utility of constitutional conventions, Professor Bartlett, believed that “No new convention should be held because it is an excuse for the legislature not to act and the governor not to lead.” Richard Bartlett, Remarks at Albany Law School (Feb. 8, 2007) (notes on file with author). Conventions, Bartlett argues, are just “not a good way to achieve change” because it is “too hard to deal with highly debatable social policy” in that context. Id.
151 Peter Gaile seems to agree with this prognosis, writing that The history of constitutional conventions since 1957 suggests that they will not be the major vehicle for constitutional change they have proved to be in the past. Interest groups committed to preserving advantages they have succeeded in enconcinc in the constitution will likely oppose constitutional conventions, and voters, fearful of the possibilities of drastic change and attendant large costs, will be reluctant to approve the calling of a convention. Absent a major crisis, constitutional change in the foreseeable
succeeded in achieving effective change, much less comprehensive improvements to the existing constitution as a whole or the mechanisms of constitutional change in particular.

Moreover, this ineffectiveness, combined with the traditional distrust of government and the overarching theme of ensuring that those in government power do not have too much control in the constitutional process, suggests that a time may be coming in the not too distant future that an alternative to the current domination of the constitutional process by the legislature may achieve enough popular support to warrant a change in New York’s constitutional change framework.

Consequently, some variant of the initiative power may be the remedy sought to address the deficiencies of the existing mechanisms of constitutional change. Indeed, proposals for the introduction of the initiative power have achieved some success in the New York legislature in recent years.\(^\text{152}\) The question of whether or not providing such a power is an effective or appropriate means of constitutional change, however, is complex and cannot be answered easily. But what can be said is that the adoption of an initiative power without extensive limitations would not follow in New York’s long tradition of limiting popular involvement in the constitutional process and diffusing constitutional control amongst the legislature, constitutional conventions, and the people.\(^\text{153}\)