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## LAWMAKING BY POPULAR VOTE

### SOME REFLECTIONS ON THE NEW YORK CONSTITUTION OF 1938

ARTHUR E. SUTHERLAND, JR.\*

#### I

When Justice Holmes wrote, "The life of the law has not been logic: it has been experience,"<sup>1</sup> he was probably not thinking about the New York Constitution; but his words could have had no more apt illustration. From time to time good and thoughtful people have complained at the detail and complexity of the constitutional laws<sup>2</sup> of this state, and have somewhat fretfully urged that this body of enactments should be revised to cut out all "statutory" matter.<sup>3</sup> There is much that is attractive in the thought of composing in a few epigrammatic sentences a definition of the broad governmental aims of a free people, and committing the attainment of these aims to the legislature. Such an essay would offer an interesting field for literary effort in the style of the eighteenth century. It would, however, perform almost none of the functions of New York's successive constitutions.<sup>4</sup> These have been the products of competing popular demands operating over

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\*For some very helpful suggestions in the preparation of this paper I am indebted to Mr. Sol M. Linowitz of the New York bar.

<sup>1</sup>HOLMES, *THE COMMON LAW* (1881) 1.

<sup>2</sup>The term "constitutional laws" seems well fitted to express the thought of this paper,—that there is no generic difference between the contents of New York's Session Laws and her Constitution. The difference is that in the latter case the people reserve to themselves the right to decide when changes may be made.

<sup>3</sup>See, for example, the New York League of Women Voters' *Monthly News*, for October, 1938, which contains the statement:

"The League of Women Voters believes that a constitution is the framework on which our statutory law is built and should contain only the fundamental law. The interpretation of the broad principles laid down by a constitution should be left to the legislature."

<sup>4</sup>Much of the criticism of the length and detailed provisions of the State Constitution arises from confusion between its functions and those of the Federal Constitution. The latter is of course an enumeration of a limited number of subjects of federal power, with some limitations on the exercise of those powers, and a few broad guarantees to all persons within the federal power against unreasonable state aggression. Inasmuch as the states retain all other powers, no grants are necessary, and the State Constitution has as its function the distribution of the retained powers among the agencies of state government, and the restriction of their exercise of these powers to the extent deemed wise by the people themselves.

a century and a half, and can be understood only in the light of the social and political conditions which resulted in their enactment. The critic who studies the proposals of the Convention of 1938 *in vacuo* will undoubtedly find much matter to criticize as "purely statutory", as though by taking thought a criterion could be found by which to distinguish that part of the written law of the state properly subject to change only by popular vote, from that part properly left to the legislature. But probably such syllogistic exercises are less informative than a study of the wishes and prejudices of the inhabitants of New York. A philosopher in his closet would scarcely hit upon a prohibition of long term farm leases<sup>5</sup> as suitable material for a constitution; but a student of the history of the rent riots of the forties would realize that popular opinion on this subject might rise to such a point that this measure could become typical material for inclusion among the fundamental laws.<sup>6</sup>

This paper undertakes to define the function of New York's Constitution in the light of its history, and then to discuss some of the popular movements which brought the Convention of 1938 to approve the changes laid before the people, and which brought about the acceptance and rejection of these proposals in the election just past.<sup>7</sup>

## II

In 1821 the most distinguished public men of the state of New York had come to Albany for the Constitutional Convention. The critical question of the composition of the Senate was under discussion, and to the distress and alarm of many statesmen it was proposed to eliminate the requirement that the Senators "be chosen by the freeholders of this state possessed of freeholds of the value of one hundred pounds, over and above all debts charged thereon".<sup>8</sup> Chief Justice Spencer moved that election by freeholders continue; and in support of this motion there arose James Kent, the Chancellor. A former member of the legislature, a one-time professor of law at Columbia, Kent had held a series of judgeships and now, within two years of retirement for age, he occupied the highest judicial office in the state. He uttered a solemn warning:

"There is a constant tendency in human society, and the history of every age proves it,—there is a tendency in the poor to covet and share the plunder of the rich; in the debtor to relax or avoid the obligation of contracts; in the majority to tyrannize over the minority and trample

<sup>5</sup>NEW YORK CONSTITUTION, 1894, Article 1, § 13.

<sup>6</sup>LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK (1906) Vol. II, 18 *et seq.*, 115 *et seq.*

<sup>7</sup>There would be little point in repeating here the text of all the fifty-seven amendments proposed by the Constitution of 1938. These are already conveniently available in several forms, notably in Convention Document No. 16.

<sup>8</sup>LINCOLN, *op. cit.* *supra* note 6, Vol. I, 171.

down their rights; in the indolent and the profligate, to cast the whole burthens of society upon the industrious and virtuous; and there is a tendency in ambitious and wicked men to inflame these combustible materials. . . .

"We are no longer to remain plain and simple republics of farmers, like the New England colonists, or the Dutch settlements on the Hudson. We are fast becoming a great nation, with great commerce, manufactures, population, wealth, luxuries, and with the vices and miseries that they engender.

"The growth of the city of New York is enough to startle and awaken those who are pursuing the *ignis fatuus* of universal suffrage. In 1773 it had 21,000 souls; in 1801 it had 60,000 souls; in 1806 it had 76,000 souls; in 1820 it had 123,000 souls.<sup>8\*</sup>

"It is rapidly swelling into the unwieldy population, and with the burdensome pauperism, of a European metropolis. New York is destined to become the future London of America; and in less than a century, that city, with the operation of universal suffrage, and under skilful direction, will govern this state."<sup>9</sup>

Kent's awesome words did not persuade his fellow-delegates, and the special qualifications for senatorial elections were eliminated.<sup>10</sup> But the tension between New York City and the rest of the state, already old in 1821,<sup>11</sup> has continued until the present time. There still rankles in that city the aggrieved feeling that its citizens have less influence in the conduct of the state affairs than accords with their numbers and contributions of taxes.<sup>12</sup> And the age-old opposition of the many who live in poverty and those who have accumulated possessions,—noted with dismay by Kent more than a century ago,—is still a primary problem among students of state government, which has been accentuated by the extension of suffrage to practically all adult citizens and the perfection of methods of organizing opinionated and vocal groups. The result of such opposed tendencies has been to make the citizens of New York into Indian givers, who first turn over to their legislators the full power of the state reserved from federal exercise, and then by a series of detailed constitutional enactments, cautiously withdraw such legislative powers as they feel may be used unwisely.

Those parts of the Constitution of 1894 which deal primarily with the structure of the state's political institutions clearly illustrate the compromises between the claims of the City of New York and those of the rest of the state. Universal adult suffrage<sup>13</sup> is modified in its effect by the allotment

<sup>8\*</sup>Of the thirteen million people who live in the state today, some seven million live in New York City!

<sup>9</sup>LINCOLN, *op. cit. supra* note 6, Vol. I, 646.

<sup>10</sup>CONSTITUTION, 1826, Article II, § 1; LINCOLN, *op. cit. supra* note 6, Vol. I, 198.

<sup>11</sup>See SPAULDING, *NEW YORK IN THE CRITICAL PERIOD* (N. Y. State Historical Ass'n Series 1932) Vol. I.

<sup>12</sup>See speech of Hon. Lithgow Osborne, Aug. 16, 1938; RECORD OF CONSTITUTIONAL CONVENTION, pages 2940 *et seq.*

<sup>13</sup>CONSTITUTION, 1894, Article II, § 1.

of one assemblyman to every county.<sup>14</sup> By this means Kent's freehold farmers and villagers, though without their special privilege in the election of Senators, still exercise more influence in the legislature than their number would entitle them to by strictly popular vote. The Governor and the Judges of the Court of Appeals are popularly elected and thus give the City an advantage, but the Justices of the Supreme Court are elected by districts which safeguard the fearsome upstater.

The plainest examples of constitutional laws as protections against group demands are found in the many provisions limiting the power of the legislature. Indeed this class might be taken to include everything in the Constitution except the provisions governing the structure of the legislature itself; for a logically complete constitution could be written by describing the organization and means of selection of the legislature, and conferring on it all the governing powers of the state. All the rest of the state's governmental mechanism could conceivably be supplied by ordinary statutes instead of constitutional laws; and accordingly the effect of the rest of the Constitution is to "fetter the legislature." One is frequently reminded by enthusiasts that the English Parliament is happy in its freedom from such restrictions; but the people of New York have become accustomed to the exercise by ballot of a sort of veto power in certain fields of legislation, and have shown no signs of a willingness to give it up.

One noteworthy class of constitutional restrictions on legislative power is that intended to prevent the commission of outrages on the citizen by public authority. The Bill of Rights<sup>15</sup> contains a number of guarantees that the legislature shall not unreasonably narrow the "areas of non-restraint of men's natural faculties of action".<sup>16</sup> Thus the people have "frozen into the Constitution"<sup>17</sup> matter which conceivably might have been left in the discretion of the legislature. The obvious motives are fear that under pressure from one group or another, statutes may be enacted by the legislature which will be distasteful to the people generally, and a consequent desire to keep legislation on these important subjects under direct popular control.

The criticism that the Bill of Rights contains needless "statutory" matter is rarely heard,—perhaps because most citizens are used to the similar enactments in the Federal Constitution. But many who staunchly support these

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<sup>14</sup>Except Hamilton. CONSTITUTION, 1894, Article III, § 5.

<sup>15</sup>This expression is used loosely in this paper to indicate Article I of the Constitution of 1894.

<sup>16</sup>Roscoe Pound, *The Constitution; Its Development, Adaptability and Future* (1937) 23 A. B. A. JOURNAL 739.

<sup>17</sup>This expression for some reason has acquired a decidedly pejorative connotation, and is almost universally used by those arguing the undesirability of making some law unalterable without a popular referendum. No corresponding verb seems to have been commonly adopted to express *desirable* inclusion among constitutional laws. "Weld into the Constitution . . ."? Perhaps the very suggestion of immobility is distasteful to a restless age.

protections, are resentful at the detailed limitations on the legislative power to use public credit and money, and to permit the state and its subdivisions to incur debts and levy taxes. Yet these limitations, like those in the Bill of Rights, have grown out of the fear of the people lest the legislature be moved by group pressure to act intemperately.

New York's Constitution then, is that portion of its laws which its people have from time to time thought so important that changes should require direct popular consent. The Convention of 1938 and the election which followed it show some persistent survivals of long-established popular opinion, and some significant changes especially in the direction of more legislative freedom to use the public money and credit for objects formerly thought suitable only for private ventures.

### III

As this paper is written<sup>18</sup> the voters appear to have disapproved the proposals of the Convention reapportioning the legislative representation (Proposal No. 2), amending the judiciary article (Proposal No. 5), and forbidding the institution of proportional representation anywhere in the state (Proposal No. 7). They have approved several amendments making exceptions to the general prohibition of the use of public credit or funds for purposes once considered private. Thus they have approved public contribution of 85% of the cost of eliminating railway grade crossings (Proposal No. 3), public contributions to low-rent housing (Proposal No. 4), public contribution to various welfare services, in which general health insurance appears to be the only real novelty<sup>19</sup> (Proposal No. 8). They also permit New York City to use its credit in excess of the present debt limit to buy the privately owned subway systems operating within the city (Proposal No. 9). By approving Proposal No. 6, they have taken from legislative control certain laws of the Bill of Rights type which are of particular interest to organized labor. And by approving Proposal No. 1, the omnibus proposal, they have engaged in constitutional legislation<sup>20</sup> of considerable diversity. No good purpose would be served by attempting here to describe in detail each of the forty-odd amendments included in Proposal No. 1,<sup>21</sup> but the striking feature of the proposal is the large proportion of the amendments it contains which concern either new permissible objects of public expenditure, or new controls over the getting and spending of public money.

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<sup>18</sup>November 15, 1938. See a tabulation of the vote on the amendments in the New York Herald-Tribune for November 10, 1938, page 20.

<sup>19</sup>In view of the decision of the Court of Appeals in *Chamberlin, Inc. v. Andrews*, 271 N. Y. 1 (1936) one is left in doubt as to the powers the legislature enjoyed prior to the approval of Proposal No. 8. However, the amendment makes the question of little practical importance.

<sup>20</sup>This expression is intended not to be critical, but accurate.

<sup>21</sup>Convention Document No. 16 contains the text of all amendments.

The line between expenditures for public purposes and private purposes is not permanently fixed. Its location depends on the current conception of what are suitable fields for governmental activity, and this conception has for a long time been coming to include more and more functions, in a manner somewhat comparable to the increase in the number of businesses once considered purely private and now held subject to regulation as affected with a public interest.<sup>22</sup> Not very long ago, universal schooling at public expense was an innovation,<sup>23</sup> but the thought of New York without its public schools is now shocking. "Poorhouses" are familiar enough; and the progression is obvious from such institutions to low-cost housing, maintained partly at public expense, where families unable to pay for decent private dwellings may live without squalor, and may feel that they are paying rent. There is clearly a feeling in the minds of many large groups<sup>24</sup> that government can and should perform more and more services for its citizens, and this feeling has translated itself into a number of amendments. Health insurance,<sup>25</sup> greater aid in railroad crossing elimination,<sup>26</sup> the purchase of railroads for public operation by the city of New York,<sup>27</sup> the transportation of children to and from any school or institution of learning<sup>28</sup> as well as slum clearance and low-rent housing,<sup>29</sup> all exemplify the tendency to extension. And an examination of the session laws for the last few years would bring to light many other examples of the same response by government to the demands of the multitude of persons who seek a better life with government aid.

The transfer of more and more activities from private to public agencies has of course increased the amount of money to be raised by various taxes and loans, and the contributors of these funds naturally exert a substantial pressure on all lawmaking bodies to pass regulations governing the raising and spending of public money. Accordingly, a substantial proportion of the amendments just approved are such regulations of the government's financial operations. Taxpayers' actions are authorized to restrain improper payment of state funds.<sup>30</sup> A completely revised article on State Finances<sup>31</sup> seeks to foster cooperation between the executive and legislative branches

<sup>22</sup>See *Nebbia v. People*, 291 U. S. 502 (1934).

<sup>23</sup>A constitutional provision for it was rejected in 1846. LINCOLN, *op. cit. supra* note 6, Vol. II, 205,

<sup>24</sup>The large pluralities by which Proposals 4 and 8 were approved is significant of this feeling. See the tabulated votes in the *New York Herald-Tribune*, November 10, 1938, page 20.

<sup>25</sup>NEW CONSTITUTION, Article VII, § 8.

<sup>26</sup>Article VII, § 14.

<sup>27</sup>Article VIII, § 7-a.

<sup>28</sup>Article XI, § 4.

<sup>29</sup>Article XVIII.

<sup>30</sup>Article V, § 1.

<sup>31</sup>Article VII.

of the state government in the preparation of a business-like budget, the passage of suitable appropriation bills, and the management of state debts. And because so much of the business of government is necessarily conducted by its local divisions, the new article on State Finances has been complemented by a new article on Local Finances.<sup>32</sup> This article was intended, among other achievements, to give some comfort to the owners of real estate who have been feeling the heavy burden of taxation for local debt-service. Accordingly, the creation of new sorts of municipal corporations with power to contract debts and levy taxes is halted,<sup>33</sup> and provision is made for reduction by the year 1949 of the debt limits of counties, towns and villages to eight per centum of the assessed valuation of their real estate as determined by the average of the last five assessment rolls. By the same year the debt limits of cities (except New York) are to be reduced to nine per centum. The greater amount of debt left to cities is justified by the greater number of services which their population has come to demand. Two per cent annual tax limits are provided for counties containing cities with more than 100,000 population, and also for such cities; and after January 1, 1944, for all cities and villages.

The mere summary enumeration of the new financial provisions of the Constitution gives the impression of very detailed regulation. These laws are difficult to read, and very dull to those not conscious of the human realities which lie behind their verbiage. Some of the resounding phrases of the Declaration of Independence and the Federal Constitution are so much easier to read and understand that one can sympathize with a great deal of the criticism of the new Constitution as being too much like a code of some sort. The justification for this regulation is appreciated only by those who can watch the steady increase of government functions, and can feel the insistence of the people who provide the money that certain fundamentals of financial practice be preserved until they themselves consent to a change.

Another result of the rapid increase of government activity is the arousing of fear lest the people find that, like Frankenstein, they have created a monster which threatens to overmatch them. The recital of amendments of the Bill of Rights type approved at the recent election speaks rather eloquently of such a sentiment. A writing is to be required for waiver of a jury trial.<sup>34</sup> A public officer who refuses to testify before a grand jury concerning the conduct of his duties is to forfeit his office.<sup>35</sup> The power of grand juries to inquire into the misconduct of public officers is never to be impaired.<sup>36</sup> No person is to be denied equal protection of the laws nor discriminated

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<sup>32</sup>Article VIII (as amended 1938).

<sup>33</sup>See for an additional similar restriction, Article X, § 5 (as amended 1938).

<sup>34</sup>Article I, § 2.

<sup>35</sup>Article I, § 6.

<sup>36</sup>Article I, § 6.

against because of race or religion.<sup>37</sup> Unreasonable searches and seizures, and eavesdropping by telephone are proscribed.<sup>38</sup> Employees are not to be forbidden to combine for bargaining.<sup>39</sup> Rules of subordinate agencies of the state, which make up so large a part of the body of the law today, are to be effective only when filed in the office of the department of state, and the legislature is directed to provide for their speedy publication.<sup>40</sup>

Quite possibly the strengthening of the Bill of Rights and the adoption of other comparable amendments were influenced by the development of government in various foreign nations where the rights of individuals have been more and more subordinated to current ideas of collective necessity. One reads in the list of measures just cited a genuine fear lest the servant become the master, and the citizen become the servant. Among American pioneers there was a fierce resentment at the prospect of government closing in around the citizen and depriving him of what he considered his liberty; and this passion has not yet lost all its strength. Even in a modern state it has its uses.

#### IV

Popular movements can be seen not only in the amendments which were accepted by the people, but also in those which were rejected. In the fall of 1937, New York City voted by a majority of 367,969 to adopt proportional representation in the election of members of the city council.<sup>41</sup> This large plurality indicated, one supposes, a feeling among the citizens that minority groups should be represented in the government,—another example perhaps, of the resentment of the American at being submerged by any government or political party. The idea was new in New York, however, and it seriously disconcerted many earnest and able students of government who saw in proportional representation the beginning of the breakdown of party government and the dissolution of our traditional parties in a number of little quarreling blocs.<sup>42</sup> The result was the passage in the Convention of Proposal No. 7, which would forbid the use of proportional representation anywhere in the state. The rejection of this proposal, both upstate and in New York,<sup>43</sup>

<sup>37</sup>Article I, § 11.

<sup>38</sup>Article I, § 12.

<sup>39</sup>Article I, § 17. Whoever questions the classification of this provision with Bill of Rights amendments may well reflect on the relation between government and labor organizations in certain countries of Europe.

<sup>40</sup>Article IV, § 8. The exhortation to the legislators is worthy in motive but not enforceable.

The provisions of Article V, § 7, that after July 1, 1940, membership in a pension system shall be a contract right, and not subject to diminution, is not clear in all its implications. Perhaps it should be classified with the Bill of Rights type of amendments, as it tends to protect a growing class of citizens against a feared governmental action.

<sup>41</sup>See argument of Hon. Helen Z. M. Rogers, RECORD OF CONSTITUTIONAL CONVENTION, page 3286.

<sup>42</sup>See the argument of Hon. James M. Foley, RECORD, page 3295.

<sup>43</sup>See New York Herald-Tribune, November 10, 1938, page 20.

is an interesting demonstration of the strength of feeling throughout the state that local communities should be allowed to determine for themselves that minorities may be represented in the local legislatures. It presents a convincing refutation of the argument that the people of New York City were confused in 1937 by the simultaneous submission of propositions for relief bonds and for the three-platoon system for firemen, and so voted for proportional representation by inadvertence.<sup>44</sup>

The rejection of Proposal No. 2, for reapportionment of the state legislative representation is harder to interpret. As it raised the old issue of control of the state by New York City or by the rest of the state, one would expect that the upstate electors would favor the proposal which favored them and that the citizens of the city of New York, who were less favored, would oppose it. Actually the proposed reapportionment was rejected as decisively by the upstate voters as by those in New York.<sup>45</sup> While a guess at the reason for this queer result has little value, one may perhaps ascribe it to the complex text of the amendment which made it hard to understand, and to the lack of any considerable organized pressure in its favor in the upstate communities. The upstate citizen has for many years heard of reapportionment as a sort of black spectre; and perhaps, on seeing this fearful word in a proposal of whose contents he knew little, he prudently pulled down the negative lever.

To the lawyer, the most interesting of the rejections was that of Proposal No. 5, concerning the Judiciary Article. While this proposal contained a number of minor changes perfecting the judicial system, and contained one amendment of political significance,<sup>46</sup> the substantial opposition which defeated it was chiefly directed against the proposal to guarantee a certain minimum of judicial review of administrative determinations, both on law and facts. Its sponsors in the Convention earnestly urged that the substitution of administrative for judicial justice was proceeding so rapidly that the citizen stood in real need of this protection from an overpoweringly comprehensive executive branch. One delegate argued on the floor of the Convention:

“The problems raised by the amendment . . . are far more fundamental than any minor question of detailed changes of phraseology. Now and then, behind the particular and the specific, there can be seen some great trend in the course of modern government. In the demand which we have seen here for some amendment providing for a general review of administrative adjudications, there appears the problem of a sudden and disproportionate growth in the executive branch of our government. Whatever the reason for this growth, I think that it is related to a tend-

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<sup>44</sup>RECORD OF CONSTITUTIONAL CONVENTION, page 3296.

<sup>45</sup>New York Herald-Tribune, November 10, 1938, page 20.

<sup>46</sup>That creating a Tenth Judicial District of Nassau and Suffolk Counties.

ency to attempt to make our legislatures mere registration agencies for the will of the executive, and to a related tendency to exclude the courts from sitting in judgment on all questions where their decisions may come in conflict with executive desires.

"This process is not confined to the State of New York or to the United States. It is a world-wide process and has lately seen its greatest extension in some of the European states.

"The division of opinion among us here in this chamber is not in itself important. It is, I think, largely significant as it registers the sentiment of the people of our state concerning the manner in which they wish to be governed.

"As it seems to me, those delegates who wish to grant to the administrative judges a substantial exemption from the usual judicial review represent consciously or unconsciously the feelings of a part of our people who put their greatest faith in the executive branch of our government, and who are impatient of the more deliberate processes of the legislature and of the courts.

"It may be that these people are right but my hope is otherwise. It is my hope that for our time at least, our people may continue to feel that the usual safeguards of judicial proceedings may be thrown around those proceedings of the executive branch which are fundamentally judicial in their character."<sup>47</sup>

The proposal aroused very substantial opposition within the Convention, including that of Mr. Justice Sears, Chairman of the Judiciary Committee, and many other delegates of great ability. The Governor wrote a letter objecting that if judges were given power to review the facts involved in administrative adjudications, many administrative functions would be taken over by the courts.<sup>48</sup> Editorial writers condemned the proposal in somewhat extravagant terms.<sup>49</sup> A special committee of the National Municipal League sent out a questionnaire to many groups interested, and from its replies and from the platforms of the major parties, reported that while the Republican Party favored the amendment, the Democratic, Socialist, American Labor and Communist parties, as well as the New York Citizens Union, the City Affairs Committee of New York, and a number of other civic groups all opposed it.<sup>50</sup> The Republican candidate for Governor declared

<sup>47</sup>RECORD OF CONSTITUTIONAL CONVENTION, page 3136 *et seq.*

<sup>48</sup>Letter of Governor Lehman to Senator Wagner, RECORD, page 3139.

<sup>49</sup>The Rochester Times-Union for August 17 was quoted on the floor of the Convention as asking:

"Shall the justices of New York's Supreme Court be required to count the number of bacilli in contaminated milk?

"Are they to be asked to grade examination papers for civil service jobs, and to pass on the eligibility of applicants for relief?

"So it would seem, if the judiciary article drafted by the Constitutional Convention at Albany is written into the basic law of the State." See RECORD OF CONSTITUTIONAL CONVENTION, page 3134.

<sup>50</sup>*What's in the Proposed Constitution*, a pamphlet distributed by the National Municipal League. One of the striking features of the Convention was the abundance of able pamphleteering it evoked.

against it. In brief, it became very apparent that administrative adjudication without court review of the facts had many enthusiastic friends throughout the state, and the proposal was decisively rejected alike in New York City and elsewhere. For the student of the state's legal system this result was a striking indication that the voting public were conscious of the movement toward a more inclusive executive branch, and favored it as the most effective means of carrying out the multitude of new and complex duties they expect government to perform.

## V

The work of the Convention well illustrated Bryce's words written fifty years ago:

"The fact that the constitution when drafted has to be submitted to the people, by whose authority it will (if accepted) be enacted, gives to the convention a somewhat larger freedom for proposing what they think best than a legislature, courting or fearing its constituents, commonly allows itself. As the convention vanishes altogether when its work is accomplished, the ordinary motives for popularity hunting are less potent. As it does not legislate but merely proposes, it need not fear to ask the people to enact what may offend certain persons or classes, for the odium, if any, of harassing these classes will rest with the people."<sup>51</sup>

Most of the great trends in modern government are reflected in the proposals which the Convention laid before the people. A realization of the increasing interdependence of the members of a crowded society makes men turn more and more to government for filling their needs. And the entrusting of these new duties to government brings a conviction that while administrative agencies with full powers are essential to the successful conduct of complex enterprises, they hold serious dangers to certain customary immunities. The people feel that they must give their servants great authority, but they must forbid them to use it oppressively. They must direct their servants to levy great taxes, but they must cautiously limit the manner of getting and the objects of spending. They must leave the ultimate rule of the state in the hands of the many, but they must not permit life to become intolerable for the dissenting few. And the people were asked to choose, among a number of proposed amendments, those which best reconciled these opposing desires.

The results of the election abundantly justified the system of constitutional lawmaking by popular vote. One may agree or disagree with the choice of the electors among the proposals offered to them, but it seems quite apparent that they chose with considerable discrimination. The fear, expressed by many before the election, that the people simply would not under-

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<sup>51</sup>JAMES BRYCE, *AMERICAN COMMONWEALTH* (2d ed. 1891) Vol. 1, page 638.

stand the proposals and so would blindly reject the entire work of the Convention, was evidently ill-founded. The Constitution can truly be defined as that part of the state's written laws which the people have reserved for their own direct enactment; and in the world of 1938 the ability of the citizens of New York wisely to use such a reservation is an encouraging symptom of successful democratic government.