

Louisiana Law Review

Volume 14 | Number 1

The Work of the Louisiana Supreme Court for the

1952-1953 Term

December 1953

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Repository Citation

Thomas W. Leigh, *Forum Juridicum: The Need and Basis for Constitutional Revision*, 14 La. L. Rev. (1953)

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Forum Juridicum

The Need and Basis for Constitutional Revision

Thomas W. Leigh*

[At its 1953 Convention the Louisiana State Bar Association passed a resolution urging its officers and Board of Governors "to adopt and put into effect at the earliest possible moment a consistent and comprehensive program designed to educate and inform the people of this state with respect to the needs and purposes of a new constitution" and appointed a committee for the implementation of this program. In order to cooperate in bringing these vital issues before a broader public, Mr. Leigh graciously granted the LOUISIANA LAW REVIEW permission to reprint the substance of a paper which he delivered before the Section on Judicial Administration.]

Every high school student is familiar with the Holy Roman Empire—the confederation of Central European states which maintained its existence for several hundred years before finally falling apart of its own weight. Some historian in commenting upon the era of its decline pointed out that it had never been holy, that it was no longer Roman, and was certainly not an empire. I submit that an analogous indictment can be returned against the document which we refer to as the Constitution of 1921: In its present form it can no longer rightly be called a constitution, and it certainly cannot be assigned to the vintage of 1921.

This is a sweeping indictment. Let us examine whether the evidence supports the charge.

A constitution is defined by Webster's New International Dictionary as "a written instrument embodying the *organic* law or principles of government of a nation or state and laying

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down *fundamental* rules and principles for the conduct of affairs." (Italics supplied.) Can the Louisiana Constitution of 1921 be brought, in its present form, within that definition?

Every member of the bar here present, whether advocate or jurist, is all too fully aware of the fact that our Constitution must be consulted not only for our organic law—for the fundamental principles of our state government—but also for the detailed provisions of many substantive and procedural laws which are purely statutory, and oft-times local, in their significance.

Many of our constitutional amendments are, in fact, nothing more than statutes—which have been enacted into law with the formalities required by the process for amending the constitution. For example, the Fire and Police Civil Service amendment adopted at the general election last fall even retains the short title provision—a purely statutory device. One of its opening sections provides that it shall be known and may be cited as "The Municipal Fire and Police Civil Service Law."

Again, for example, the provisions for an additional tax of one cent per gallon on gasoline, which were added to the Constitution as an additional Article—Article VI-A—by an amendment adopted in 1930, prescribe intricate statutory machinery for the reporting and collecting of this tax and the allocation of the proceeds thereof, all of which was made self-executing, and which requires no further or other legislation to make it effective. Section 22 of Article VI, dealing with the general Highway Fund, which was initially less than a page in length now takes up 26 pages of fine print as the result of having been amended on no less than 10 different occasions. And most of these amendments go far beyond any requirements of organic law, providing complex administrative procedures involved in the issuance of bonds and the expenditure of the funds derived therefrom.

Examples of this integration into our Constitution, by means of the amending process, of enactments which are strictly statutory in character could be multiplied almost ad infinitum. And the conclusion is irresistible that, however effective the Constitution of 1921 might have been at the time of its adoption, this amalgamation into that instrument of statutory material has resulted in a document which, by the definition quoted

above, is no longer a constitution. What was a *constitution* in 1921, has become a *conglomeration* in 1953.

It is equally obvious that 1921 is no longer the dominant date which characterizes this document, for only a fraction of its total content was adopted in that year. As a matter of fact, the thirty-four amendments which were ratified at the last general election added to this document approximately as great an amount of written material as was included in the entire Constitution at the time of its adoption.

When adopted, the Constitution of 1921 consisted of 21 articles in addition to the schedule article which merely provided for an orderly transition from the Constitution of 1913. These 21 articles were divided into 373 sections, requiring less than 100 printed pages to set out in full. Since that time our Constitution has been enlarged by no less than 302 separate amendments, almost as many as there were sections in the original document. These have been adopted by the voters at 19 different general elections. Each of the 16 general congressional elections which have been held in the 32 years since 1921 has seen its quota of constitutional amendments to be voted on by the people, and on three occasions, in 1928, 1940, and 1947, additional amendments were also submitted at the general elections held in the spring of those years. The number of proposed amendments submitted at any one election has ranged from a single amendment submitted and adopted in April, 1947, to the 41 proposed amendments which were submitted at the general election held in November, 1948. This use, or perhaps I should say abuse, of the amending process has resulted in a document which is now longer than the constitution of any other state in the union, embracing some 184,000 words and requiring several hundred pages to set it out in full. I have already pointed out that the material added in 1952 alone, most of which was statutory in character, approximately doubled the length of the original Constitution, and I daresay that as much or even more material has been added on previous occasions.

When these statistics are taken into consideration, it is obvious that the original Constitution of 1921 has been relegated to a minor role insofar as total content is concerned; and that the evidence preponderates overwhelmingly against the year 1921 as its distinguishing date.

I submit that the evidence which can thus be marshalled in support of the indictment which I suggested above is at least sufficient to warrant holding the defendant for trial on the charge as made.

But, more important, I believe that everyone will also agree that the need for constitutional revision has long since become critical. And if the past offers us any criteria for the future, each biennial session of our Legislature will continue to emphasize that need and make it more acute.

Once we have established and acknowledged the need for a revision of our existing Constitution, our attention naturally turns to some consideration of the basis for such a revision, and here let me say that although I have made a considerable point of the length of our present Constitution, I am not suggesting that length or brevity, *per se*, should be a determining factor in the drafting of any constitution which might be formulated. A constitution must contain all the material necessary to accomplish its purposes, regardless of length, and nothing should be omitted merely for the attainment of brevity.

But if we are to preserve the relationship which should exist between the constitution on one hand, by which our government is instituted, and the statutory enactments on the other hand, by which that government is to function, care must be taken that a constitution should not usurp the functions of a statute, just as we must also take care that once the fundamental principles of government have been set forth in a legally adopted constitution, these should not be infringed upon or disregarded by any statute which the Legislature might thereafter adopt.

This is the concept which should determine the length of our Constitution. A constitution should be so constructed as to include all of the organic law and fundamental principles necessary to the orderly functioning of the government as a sovereign authority, without including detailed provisions which are the proper subject of statutory enactments to be adopted by the Legislature.

Having in mind this concept of a written constitution, certain broad general principles can be stated which should govern the scope of its provisions.

First, a constitution should preserve to the individual citizen, singly and collectively, all of those personal liberties, the

curtailment of which is not essential to the accomplishment of any of the objectives for which the government is being instituted.

Second, a constitution should insure to the sovereign all of the powers necessary to enable it to carry on the normal functions of government, to provide for the general welfare, and to protect the lives and property of the people subject to its jurisdiction.

Third, a constitution should establish, in such detail as may be necessary, the frame-work of government—the means by which and the limits within which the authority of the sovereign shall be exercised.

Fourth, a constitution should provide such restrictions and limitations upon the authority of the sovereign as will prevent the abuse by any branch of the government of any of the powers entrusted to it.

Fifth, a constitution should provide an amending procedure by means of which it can be kept abreast of the changing needs of the society upon which it operates.

The first of these principles is embodied in our traditional Bill of Rights and needs no explanation here, but the one last stated may well be elaborated at this point, particularly as it operates with respect to our present Constitution.

Obviously, provision must be made for amending any constitution in order, as I have just stated, that it may continue to provide for the changing needs of the society upon which it operates; and the amending process provided in our existing Constitution is by no means basically unsound. The plethora of amendments with which our present Constitution has become overburdened has resulted not so much from the amending procedure now in effect as from the extent to which as a state we have become addicted to the amending habit.

Since the adoption of the Constitution of 1921, 347 different proposed amendments have been submitted and only 45, or about 13 per cent, have failed of adoption. Out of the 19 elections at which amendments have been submitted, on 10 occasions every proposed amendment was ratified, including that of last fall when 34 such amendments were integrated into the text of the Constitution.

It is a matter of common knowledge that the adoption and ratification of constitutional amendments have come to be taken almost as a matter of course. For many proposed constitutional amendments receive the required $\frac{2}{3}$ vote in the Legislature without the benefit of proper study by our lawmakers on the theory that their adoption by that body does not make them a part of our organic law but is only a submission to the voters; and the voters oftentimes remain silent, or vote affirmatively on these proposals, on the theory that they have been studied and approved by those elected representatives and therefore can be safely ratified. All too frequently, amendments to our Constitution are adopted which have not received thorough and thoughtful consideration at the hands of anyone other than their authors and sponsors.

This amending habit into which we have fallen also represents an extreme form of minority control. For example, in 1952 when 34 amendments were submitted, the number of registered voters who expressed an opinion on these amendments one way or the other ranged from less than 31 per cent on Amendment No. 23 to approximately $37\frac{1}{2}$ per cent on Amendment No. 1. Amendment No. 1 was the Civil Service amendment which had received comparatively wide publicity, yet the number of votes cast on this issue represented only $\frac{3}{8}$ of those qualified to vote and only 61 per cent of those who actually did vote in the presidential election. For another example, since any indebtedness secured by the full faith and credit of the state must be discharged out of funds derived from taxation, it would seem that any proposition to incur debt running into millions of dollars would merit an expression, pro or con, from a vast majority of the people affected. Yet a study recently made by the Public Affairs Research Council discloses that no amendment authorizing the incurring of state-wide debt has ever drawn as many as 50 per cent of the registered voters, and in 1946 an amendment which authorized a 25 million dollar debt became effective with the approval of only 9 per cent of the registered voters.

This indiscriminate resort to the amending process has made it possible to incorporate in our Constitution the mass of statutory material which I have already referred to, and the presence of that material in our organic law has in turn made necessary a more frequent resort to the amending process. Thus completing the well-known vicious circle.

All of this leads to the conclusion that in order to counteract our amending habit, some greater restraints should be placed upon the amending process than are provided in our present Constitution. For only by making the process more difficult can we hope to overcome the weakness which we have developed for constitutional amendments. The amending procedure should permit the incorporation in our Constitution of whatever change may be necessary in our organic law, but it should discourage the inclusion in the Constitution of statutory enactments which ought to be the responsibility of the Legislature alone.

This caveat with respect to the amending process is, I must confess, more easily stated than carried out. And it is likewise true that a strict conformance to the other basic principles of constitutional draftsmanship which I have just stated is also not a simple matter. Their application in the preparation of a new constitution will involve the careful re-evaluation of many questions of policy which form the core of our political structure. It is not my purpose to mention all, or even a substantial part, of the varied and complex problems with which the framers of a constitution will find themselves confronted, but it may not be out of order to examine a few of the features of our present organic law which might well be considered for revision.

The observations made with respect to the amending process point up, as among the first of these questions, the need to place greater authority and responsibility in the hands of the Legislature. I am told by thoughtful members and former members of that body that it is frequently, if not usually, easier to procure the passage of a proposed constitutional amendment than of a corresponding legislative act, since the Legislature's action on a statute is final and generates a greater sense of responsibility on the part of its members than is felt with regard to a proposed constitutional amendment, the final adoption of which, at least in theory, is left up to the will of the people. And this is true notwithstanding the fact that experience has shown that the ratification of proposed constitutional amendments by the voters is largely a routine affair and that only a small proportion of such proposals is rejected at the polls.

But the members of the Legislature are sincere men and women who are earnestly attempting to carry out their obligations to the people to the best of their abilities; and I am firmly

convinced that if we will place squarely on their shoulders the constitutional authority and responsibility for enacting such laws, and only such laws, as are in the best interests of the state, and if we will provide a constitutional means by which they will have more time and opportunity to study and appraise the effect of the bills presented at any given session, a far more useful body of statutory law will result and less ill-considered material will be proposed for inclusion in the Constitution.

Another problem which will present itself is that of reapportionment. The senatorial districts, public service districts, the Supreme Court and Court of Appeal districts, and other geographical subdivisions where elective representation is based on population, have not been kept in balance with the population changes which the state has undergone in the past thirty years. And the abortive attempts which have been made at various sessions of the Legislature to re-apportion the representation in that body have demonstrated that any general reapportionment must await a constitutional revision in which provision should also perhaps be made for further reapportionment to be effected at periodic intervals through an administrative rather than a legislative process.

Still another problem which might be mentioned is that of defining the areas of taxation from which are to be derived the revenues required to carry on state and local governmental functions. Whether or not the state should withdraw from the field of ad valorem taxation and leave that entirely in the hands of local governmental subdivisions is a matter for a constitutional convention to decide.

Other equally important questions of policy could be added to these particular examples, such as the whole question of the dedication of revenues to specific purposes, the extent to which administrative boards should be given constitutional sanction, or the desirability of providing for the selection of members of our judiciary through a procedure other than that of direct election. But these remarks represent no effort on my part to enumerate all the various problems which will demand consideration. As a matter of fact, there are no two individuals whose views will be in accord on the particular items which should be revised, but the gravity and complexity of the problems which I have suggested emphasize the importance of the task.

The Legislature of 1946 instructed the Louisiana State Law Institute to prepare the projet of a new constitution, and after four years of labor that body completed a proposed draft of such a document. The preparation of that projet represented the united efforts of many lawyers throughout the state and many experts on the various subjects with which a constitution must deal. In the course of its preparation numerous studies were made by the Institute's research staff relating to particular problems which were encountered, and several volumes of research material were assembled in connection with that work. The Institute makes no claim that the projet which it has prepared is *the* constitution which should be adopted for Louisiana. This projet does represent, however, *a* constitution, every provision of which has received thorough and thoughtful consideration and which can well serve as a prototype for whatever final document may be decided upon. And the studies which have been made and which are available for the revisers' use will, it is believed, provide them with working tools such as have never before been made available for the fashioning of a constitution.

It must be acknowledged, however, that tools alone are not sufficient to produce any finished article. The finest of precision instruments are of little value until placed in the hands of workmen who are familiar with their use. It is the skill of the artisan, rather than the quality of his tools, which distinguishes the finely finished and perfectly proportioned masterpiece of a Sheraton from the unimagative and ill-assembled imitation of a neighborhood carpenter.

So with the creation of a constitution. Its actual drafting must be done by earnest and conscientious workmen selected with the utmost care by the people whose interests will be most vitally affected. Every laborer who is permitted to take part in that work should be chosen on the basis of worth alone. Neither his political affiliations nor his official status should otherwise entitle him to employment. The principle of a closed shop has no place in a constitutional convention. For in the last analysis we must recognize that the quality and the permanence of any constitution will be in direct proportion to the sincerity, the unselfishness, and the vision of those by whom it is prepared.

In this sense the enduring basis for revision must rest—the indispensable cornerstone for a sound and lasting consti-

tution must be laid—in the hearts and minds of the delegates to whom the task of revision is entrusted.

It is we, the lawyers of the state, who are most vitally concerned in the problem of constitutional revision. It is we who must take the lead in bringing about such a result. The revision itself is a task which cannot and should not be undertaken by any single individual or by any single class, group, or profession; but the need for revision should be most acutely apparent to members of the bar, and we must assume the responsibility for making this need known to the people as a whole, and of building up a demand for remedial action in a volume that cannot be denied.