

**A PRINCIPLED
PATHWAY TO**

A Model Louisiana Constitution



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Constitutional reform in Louisiana can provide a pathway to a state government that fosters liberty, economic growth and positive policy reform. Further, it could be a model for other states interested in becoming freer, fairer, and more effective. This report delves into a brief history of constitutional reform movements in Louisiana, explores how they mirrored those of the nation, then outlines principles of a model constitution that point the way toward the next generation of constitutional reform for Louisiana.

Constitutional Reform Movements in the States and Louisiana

Constitutions are rooted in the distinctive social and cultural values of the place they are written, and Louisiana's unique mix of cultures has long been recognized and celebrated. When A.J. Liebling came to visit the state in 1959 he noted, "Louisiana politics is of an intensity and complexity that are matched, in my experience, only in the Republic of Lebanon."² That complex mix of interests may have contributed to the fact that Louisiana has enacted more constitutions than any other state in the union. A brief review of constitutional reform efforts in Louisiana reveals six basic movements of constitutional reform that largely matched national trends: origination; democratization; secession and reconstruction; corruption; administration; and modernization.

ORIGINATION: CONSTITUTION OF 1812

The drafters of the first Louisiana Constitution of 1812 wrote first in French and translated into English.³ While largely modeled after the Kentucky Constitution of 1797 (which loaned some of its drafters to advise Louisianans during their convention), it contained distinctive elements of Louisiana's French heritage by preserving civil law over common law in private matters, outlining separation of powers, and containing no bill of rights (in a nod to French political theorist Baron de Montesquieu). It was free of defects of over-detail, and could only be amended by a legislative call for convention (though it never was).⁴

This original constitution shared elements of constitutions in other states: brief and focused on structure and over-arching principles rather than detailed instructions. The great power granted to the legislature was also typical of contemporary constitutions. In addition to the ability to call for constitutional amendments, the legislature selected the governor, and the senate confirmed the governor's picks for local office. It was a time in which Alexis de Tocqueville could say, "the legislature of each state is faced by no power capable of resisting it."⁵


1 Adams, John, "Thoughts on Government," 1776, <https://founders.archives.gov/documents/Adams/06-04-02-0026-0004>. Accessed 18 Aug. 2019.

2 Liebling, Abbott J. *The Earl of Louisiana*. Louisiana State University Press, 1986, p. 18.

3 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 5.

4 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 6.4.

5 Tarr, G. Alan. *Understanding State Constitutions*. Princeton University Press, 2000, p. 118.



“[T]he divine science of politicks is the science of social happiness, and the blessings of society depend entirely on the constitutions of government, which are generally institutions that last for many generations, there can be no employment more agreeable to a benevolent mind, than a research after the best.”²

– John Adams,
“Thoughts on Government”

DEMOCRATIZATION: CONSTITUTIONS OF 1845 AND 1852

Nationwide, legislative deference fell out of favor by the mid-1800s. A wave of Jacksonian reforms overtook half of the states, including Louisiana. The constitutions that resulted increased suffrage and democracy while decreasing elected leaders' freedom of action in certain areas.

Louisiana's Constitution of 1845 expanded suffrage, established free public schools and Tulane University (then the University of Louisiana in New Orleans) and included the first revenue dedication: Article 135 required that proceeds from the sale of lands donated by the United States be treated as a loan to the state with six percent interest on those funds to be used solely for schools.⁶

The Constitution of 1852 led to increased elections for everything from judges (previously appointed) to the attorney general and district attorneys. These changes prompted Bernard Marigny to jest, "We have an election for almost everything, from sheriff down to an inspector of porks."⁷ These constitutions continued to make amendment easier, bringing the process to our present-day method of passage by a two-thirds majority of both houses and approval by voters.


SECESSION AND RECONSTRUCTION: CONSTITUTIONS OF 1861, 1864, AND 1868

The Civil War and Reconstruction brought a series of constitutional changes to Louisiana like those experienced by other states in the south. In 1861, a constitutional

⁶ Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 7.

⁷ Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 7.





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convention that called for secession modified the prior Louisiana constitution by replacing references to the United States with the Confederacy. As the war wound down, General Nathaniel Banks called for a constitutional convention in 1864. This convention suffered from a lack of participation as much of the state still lay under Confederate control, but delegates managed to establish a minimum wage.⁸

In 1868, the state passed a Reconstruction constitution that included the first bill of rights in Louisiana, black male suffrage, and the authorization for the Louisiana State Lottery Company. Only those who had not aided the Confederacy were authorized to vote for delegates. As a result, equal numbers of black and white delegates were elected to the convention.⁹

CORRUPTION: CONSTITUTIONS OF 1879 AND 1898

The late 1800s saw the rise of Jim Crow laws in Louisiana and the increasing power of the Louisiana State Lottery Company over the state.¹⁰ The lottery company, for a time the only legal lottery in the United States, sold lottery tickets nationwide via the United States Postal Service and profited handsomely. Originally chartered in 1868, the lottery became a national symbol of vice and corruption, culminating in attempts to extend their charter by bribing delegates. The Constitution of 1879 was the first “long constitution” and reined in the power of the legislature.¹¹ That of 1898 placed strict residency requirements on voting and enacted mandatory segregation in schools.

8 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 10.

9 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 11.

10 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 13.

11 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 13.

ADMINISTRATION AND MODERNIZATION: CONSTITUTIONS OF 1913, 1921 AND 1974

As progressive ideals gained traction in the United States, efforts to target corruption, vice, and inefficiency spread to Louisiana with the movement for a constitutional convention in the early twentieth century. The Constitutional Convention of 1913 was meant to be a limited convention. However, delegates went beyond the call of the Convention and added amendments adopted since the 1898 Constitution. Inclusion of local matters, such as expanding the powers of the New Orleans Sewerage and Water Board became routine with the 1913 Constitution.¹²

The Constitutional Convention of 1921 began with a plea for simplicity and legislative flexibility,¹³ but with no preparatory studies conducted and no research staff, it quickly devolved into “a prolonged, well-lobbied and confused affair.”¹⁴ The splintered committee process led to a product that “was a lengthy mish-mash of organic and statutory law, with the customary restraints upon the legislature.”¹⁵ Delegates spent substantial energy trying to procure liquor (then illegal under Prohibition) and left Baton Rouge for the holidays despite the requirement to stay and finish their work.¹⁶ By the time this constitution was re-evaluated in the Constitutional Convention of 1973, it had grown to a morass of 250,000 words via frequent amendments.

On the national level, movements for model laws and model constitutions grew popular. The National Municipal League published its first Model State Constitution in 1921¹⁷ and continued

the project until 1968. These Model State Constitutions emphasized brevity and clarity. The recommendations called for a unicameral organization of the legislature,¹⁸ no more than twenty administrative agencies under the office of governor,¹⁹ judicial selection by appointment with advice and consent of the legislature (or from a list by a nominating commission),²⁰ only half a page on finance matters (Article VII), and a paragraph on civil service (Article X).²¹

The model constitution movement eventually found its way to Louisiana. In the 1950s, the Louisiana Law Institute introduced the *Project of a Constitution for the State of Louisiana with Notes and Studies*,²² with a goal of writing an ideal Louisiana constitution that would fix the extensive and confusing 1921 document. Between 1921 and 1972, voters ratified 536 of a proposed 892 constitutional amendments. The fraction of the electorate that bothered to vote rejected most of the amendments proposed between 1970 and 1972. Momentum for a constitutional convention finally coalesced when Edwin Edwards was elected governor in 1972.²³

A constitutional convention was called in 1973 to revise and improve the 1921 Constitution. Delegates included one elected representative from each of the 105 districts of the Louisiana House of Representatives and twenty-seven appointed by the Governor (fifteen general and one each to represent twelve different interest groups from industry to youth, labor to law enforcement), for a total of 132 delegates.²⁴ The convention met and elected officers in January 1973, then retired until July while a research staff prepared a preliminary draft.²⁵ After the convention, the Constitution was put before the voters who ratified it 58% to 42%.

12 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 16.

13 Joyner, Conrad. “Notes on the Louisiana Constitution of 1921.” *The Southwestern Social Science Quarterly*, vol. 41, no. 2, 1960, p. 116.

14 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, pp. 16-17.

15 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, pp. 16-17.

16 Joyner, Conrad. “Notes on the Louisiana Constitution of 1921.” *The Southwestern Social Science Quarterly*, vol. 41, no. 2, 1960, p. 117.

17 National Municipal League, *Progress Report on a Model State Constitution, 1921*, <https://hdl.handle.net/2027/mdp.39015042012628>. Accessed 18 Aug. 2019.

18 National Municipal League, *Model State Constitution, 1963*, <https://hdl.handle.net/2027/mdp.39015033711493>, Section 4.02. Accessed 18 Aug. 2019.

19 National Municipal League, *Model State Constitution, 1963*, <https://hdl.handle.net/2027/mdp.39015033711493>, Section 5.06. Accessed 18 Aug. 2019.

20 National Municipal League, *Model State Constitution, 1963*, <https://hdl.handle.net/2027/mdp.39015033711493>, Section 6.94. Accessed 18 Aug. 2019.

21 National Municipal League, *Model State Constitution, 1963*, <https://hdl.handle.net/2027/mdp.39015033711493>, art. X. Accessed 18 Aug. 2019.

22 Joyner, Conrad. “Notes on the Louisiana Constitution of 1921.” *The Southwestern Social Science Quarterly*, vol. 41, no. 2, 1960, p. 115, n. 4.

23 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 20.

24 Carleton, Mark. “Elitism Sustained: The Louisiana Constitution of 1974.” *The Tulane Law Review*, vol. 54, 1979-80, p. 566.

25 Carleton, Mark. “Elitism Sustained: The Louisiana Constitution of 1974.” *The Tulane Law Review*, vol. 54, 1979-80, p. 566.



“ The model constitution movement eventually found its way to Louisiana.

Since its ratification, the Louisiana constitution of 1974 has more than doubled in size through the amendment process. At over 72,000 words, it is three times longer than the average state constitution and now the fourth longest in the United States.²⁶ Voters have approved 203 amendments to the document, many increasing legislative restrictions on budgetary matters in a fiscal section that has grown to almost the size of the entire original document.²⁷

These restrictions have significantly limited the ability of legislators to address the budgetary challenges facing the state today. Partly as a result, several special sessions of the legislature have been called in the last few years in an attempt to craft a state budget.²⁸ Due to a combination of statutory, constitutional, and funding source regulations, discretionary spending available to lawmakers now comprises only \$2.2 billion out of a \$36 billion state budget.²⁹ Constitutional language also barred the use of Minimum Foundation Program funding for a statewide voucher program passed by the legislature in 2012.³⁰

These types of restrictions have led to renewed calls for constitutional reform. In the 2018 legislative session, a majority of legislators in the House of Representatives voted to call a constitutional convention, short of the two-thirds majority required but indicative of serious momentum for constitutional change.³¹ A similar measure was also introduced in the Louisiana Senate that year.³² As the need and appetite for reform grows, an evaluation of basic principles of constitutional law can help guide the process.

26 Public Affairs Research Council, Louisiana Constitutional Reform Part I: Getting the Foundations Right, 2019, http://parlouisiana.org/wp-content/uploads/2019/08/PAR-Constitutional-Reform_PART-1_Principles.v2.pdf. Accessed 18 Aug. 2019.

27 Public Affairs Research Council, Louisiana Constitutional Reform Part I: Getting the Foundations Right, 2019, http://parlouisiana.org/wp-content/uploads/2019/08/PAR-Constitutional-Reform_PART-1_Principles.v2.pdf. Accessed 18 Aug. 2019.

28 Public Affairs Research Council, Louisiana Constitutional Reform Part I: Getting the Foundations Right, 2019, http://parlouisiana.org/wp-content/uploads/2019/08/PAR-Constitutional-Reform_PART-1_Principles.v2.pdf. Accessed 18 Aug. 2019.

29 Louisiana House of Representatives, House Fiscal Division, https://house.louisiana.gov/housefiscal/DOCS_APP_BDGT_MEETINGS/DOCS_APPBudgetMeetings2021/Overview.pdf Accessed 14 April. 2021.

30 La. Fed'n of Teachers v. State, 2013-0120 (La. 05/07/13), 118 So. 3d 1033, 1050.

31 Louisiana House of Representatives, House Bill 500, 2018, <https://legiscan.com/LA/bill/HB500/2018>. Accessed 18 Aug. 2019.

32 Louisiana Senate, Senate Bill 218, 2018, <https://legiscan.com/LA/bill/SB218/2018>. Accessed 18 Aug. 2019.



“Since its ratification, the Louisiana constitution of 1974 has more than doubled in size through the amendment process.”

“No free government, nor the blessings of liberty, can be preserved to any people but by . . . frequent recurrence to fundamental principle.

—Virginia Declaration of Rights³³

Principles of American Constitutionalism

Americans have experimented with state constitutionalism since before the drafting of our national charter. From 1776 onwards, hundreds of state constitutions have been drafted, enacted, and amended. During all that time, state constitutional drafters and academics have identified principles for a “model constitution”. Some of those principles are universal and some are particular to the American system of government. The principles of legitimacy, brevity and clarity, structuralism, rights, and amendability provide a roadmap to constructing a state constitutional reform plan.

LEGITIMACY

Since the Declaration of Independence, individuals consenting to act as “we the people” form the basis of legitimacy for America’s

representative government. Governments are created and sustained by the consent of the governed, the sovereignty of the people, with individual rights as the foundation. The “inalienable rights” recognized in our founding documents are rooted in the idea of the inherent dignity of people and respect for individuals’ ability to choose for themselves their form of government and their representatives.

That elections of members to serve as representatives of the people, in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assembled for the public good.

— *Virginia Declaration of Rights*³⁴

The implications of this belief led to the slow expansion of suffrage to all American citizens

³³ Section 15, Virginia Declaration of Rights, 1776, <https://www.archives.gov/founding-docs/virginia-declaration-of-rights>. Accessed 18 Aug. 2019.

³⁴ Section 6, Virginia Declaration of Rights, 1776, <https://www.archives.gov/founding-docs/virginia-declaration-of-rights>. Accessed 18 Aug. 2019.

over the age of eighteen, not just property owners. Americans believe in safe, open elections, protected from fraud with minimum restrictions on voter eligibility. Flowing from this belief is the expectation that to the extent practicable, voting districts should be divided evenly by population so that a voter in one part of the state is no more or less powerful than one in another.

Louisianans, likewise, concur that the legitimacy of our constitution rests in the right of individuals to agree to be governed. Our constitution recognizes “[w]e, the people of Louisiana,” as the legitimate basis for their “representative and orderly government.”³⁵ The Louisiana Constitution expressly declares that all government “originates with the people” and that “[i]ts only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people.”³⁶ To further these legitimate ends, any reform to the Louisiana Constitution should retain the legitimacy of origin and purpose of the government of the people, be “founded on their will alone,” and be “instituted to protect the rights of the individual and for the good of the whole.”³⁷

OUR RECOMMENDATIONS:

- A constitution should enshrine the timeless principles held dear by those who consent to be governed by the document.
- Constitutional provisions and any subsequent amendments should advance the interests set forth in the preamble.

³⁵ La. Const. pmbi.

³⁶ La. Const. art. I § 1.

³⁷ La. Const. art. I § 1.

³⁸ Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 21.

BREVITY AND CLARITY

A constitution is not a super-statute. Founders have long recognized the value of clarity and brevity in the crafting of a fundamental law. Before the United States Constitutional Convention, delegate George Mason noted,

In the [draft] of a fundamental constitution, two things deserve attention:


- To insert essential principles only; lest the operation of government should be clogged by rendering these provisions permanent and unalterable, which ought to be accommodated to times and events, and
- To use simple and precise language and general proposition, according to the example of the constitutions of the several states.

– *George Mason, Misc. Letters, 1763-1791, 7/24-7/26/1787*

Brevity ensures that over-detail does not hamper the flexibility that future leaders will need to deal with the unforeseen problems. The United States Constitution, arguably the most successful constitution ever written, consists of only 7,500 words. The bulky Louisiana Constitution of 1921 consisted of around 250,000 words by the time the Constitutional Convention of 1973 convened to revise it.³⁸

Clarity is critical. Lawmakers and executives swear an oath to defend the Constitution. The words within it form a binding contract on future generations. Like all contracts, these words may be interpreted in courts years after their drafting. To ensure proper interpretation, clear, simple language laid out in a logical order is essential in constitutional drafting.

After the provisions of the federal constitution were decided upon, a separate “Committee on Style and Arrangement” that included gifted writers like Alexander Hamilton and James Madison re-organized and polished its contents.

A large, illuminated steel structure, possibly a bridge or a tower, stands in the middle of a river at night. The structure is lit with blue lights, and its reflection is visible in the water. In the background, several city buildings are lit up, and their lights reflect on the water. The sky is dark, and the overall scene is a mix of blue and white tones.

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Contrastingly, for the Louisiana Constitution of 1921, separate committees drafted separate parts that touched on the same subjects – all scattered throughout three massive volumes that proved difficult to understand or interpret. Such disjointed drafting and arrangement of constitutional provisions violates the principle of clarity and frustrates courts’ attempts to interpret the provisions *in pari materia*.³⁹


The current Louisiana Constitution memorializes issues best left to statute. Much has been made of the onerous fiscal provisions that limit legislators’ ability to react to changing financial conditions in the state. Article VII of the Louisiana Constitution (the portion related to finance) is now nearly the entire length of the original 1974 Constitution. But overly complex and detailed fiscal restrictions are not the only super-statute mistake in the state constitution.

In 1974, legislators essentially constitutionalized the Louisiana civil service system in a well-intentioned desire to shield workers from a corrupt governor.⁴⁰ Since the 1970s though, changes in the national economy have dramatically altered incentive pay structures, hiring and firing flexibility, and pension and retirement systems. Louisiana is one of only fifteen states that include a civil service provision in their constitutions, and Louisiana’s provision is much longer than other states’, which merely require that the legislature put a merit-based system in place. While other states such as Arizona have been able to experiment with civil service reform to increase efficiency and reward high-performing state workers, Louisiana will have an added challenge of overcoming constitutional barriers to any such reform. Excessive detail in the Louisiana Constitution violates the principles

³⁹ A rule of statutory interpretation providing that laws of the same matter and on the same subject should be construed with reference to each other.

⁴⁰ Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 180.





“The current Louisiana Constitution memorializes issues best left to statute.

of brevity and clarity, and unduly inhibits the state’s ability to enact reform through the normal legislative process.

OUR RECOMMENDATIONS:

- A constitution should protect fundamental rights and set up a framework for government.
- Elected officials should have the flexibility to make policy decisions and respond to current events through statute.
- The constitution should be accessible to citizens, written in a style that is easily understood, and allows for interpretation by a judge when necessary.
- The constitution is not a super-statute. Excessive details handcuff future generations and limit their ability to respond to changed circumstances.

STRUCTURALISM

The Founders of the American constitutional system focused extensively on the proper structure of government, including separation of powers. French political theorist Baron de Montesquieu wrote in his seminal work *Spirit of the Laws* that separating the functions of government into different branches would safeguard against despotism. The same ideas were accepted and promulgated by the American founders.

“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

– James Madison, *Federalist 47*⁴¹

41 Madison, James. “Federalist 47,” 1788, <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-47> Accessed 18 Aug. 2019.

The original state constitutions provided for “checks and balances” of the other branches: giving the executive a veto on the legislature’s work that could be overcome with a supermajority; giving the legislature the opportunity to “advise and consent” on executive appointments and impeach wayward executive or judicial officials; and giving the judiciary the power to check both.⁴²

Ultimately, the separation of powers and mechanisms for checks and balances were written into the very organizational structure of the federal constitution, with Article I representing the Legislature and its lawmaking power, Article II devoted to the President as executor of the law, and Article III enabling the judiciary. In contrast, the structure of the Louisiana Constitution as set forth in Article II does not formally provide for checks and balances among the three branches of government. It simply contains a basic statement of commitment to the “Distribution of Powers.”⁴³

LEGISLATIVE BRANCH

The Model State Constitution designates the legislative branch as the largest government body, and the branch closest to the people. It calls for biannual elections in districts based on population size and reapportionment every ten years, flexibility in legislative organization and procedure, minimum restrictions on legislative power, and provision for adequate staffing and good pay sufficient to attract average citizens to seek office.⁴⁴

In Louisiana, the legislative branch has a restricted “power of the purse” because discretionary spending comprises only about eleven percent of Louisiana’s budget. This is partially due to the high number of

Louisiana’s constitutional funds, along with other constitutional dedications, relative to other states. The level of detail for Louisiana’s constitutional funds is abnormal. To put Louisiana’s outlier status into context, approximately 85% of Georgia’s fiscal year 2020 budget is non-dedicated, discretionary spending.⁴⁵ North Carolina’s constitution contains no direct language on appropriations; its \$24 billion General Fund is entirely discretionary.⁴⁶ In Texas, approximately 48% of the state’s budget can be considered discretionary.⁴⁷ Changing fiscal circumstances such as those related to Hurricane Katrina, fluctuation in oil prices and the 2020 COVID-19 shutdowns, illustrate the urgent need for flexibility in budgeting.

EXECUTIVE BRANCH

With respect to the executive branch, the early state constitution drafters recognized that it was needed to make up for the legislature’s lack of “secrecy and dispatch.”⁴⁸ Nonetheless, these men had lived through the period of abusive colonial governors and therefore placed more power in the legislature as the primary branch of government.⁴⁹

Louisiana is in the minority of states with a separate, direct election of different members of the executive branch (called plural executives) including the lieutenant governor, the attorney general, and the secretary of state. For example, there are forty-two states with elected lieutenant governors but in twenty-four they run on a ticket with the governor and in eight they are selected through some nomination process.

In the ten states where those positions are separately elected, this system can create “acting governor” problems when the governor

42 Hamilton, Alexander or James Madison. “Federalist 51,” 1788, <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-51> Accessed 8 July 2020.

43 La. Const. art. II. Distribution of Powers. §1 (“The powers of government of the state are divided into three separate branches: legislative, executive, and judicial.”); id., §2 (“Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.”).

44 National Municipal League, Model State Constitution, 1963, <https://hdl.handle.net/2027/mdp.39015033711493>, pp. 3–5. Accessed 18 Aug. 2019.

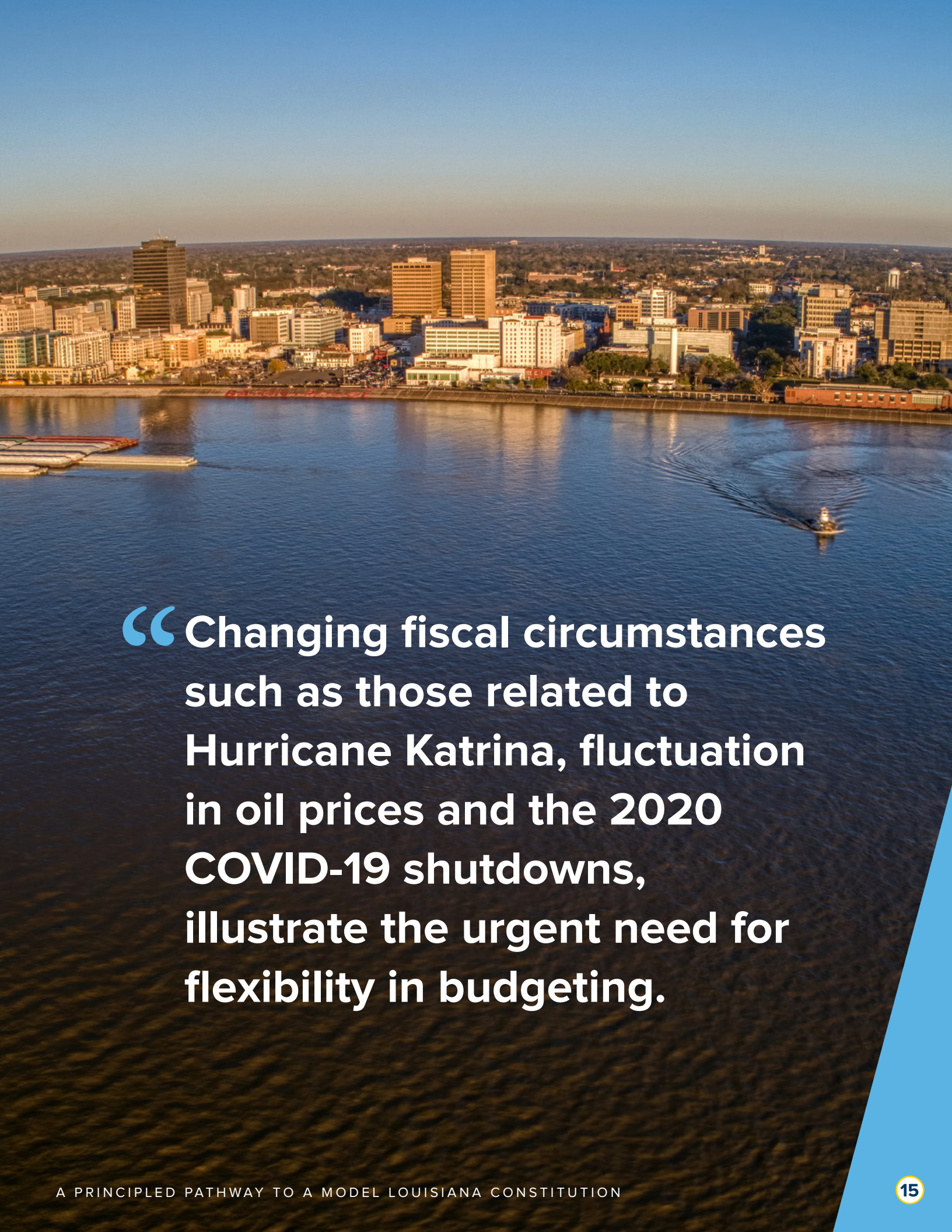
45 Georgia Office of Planning and Budget, The Governor’s Budget Report Amended FY 2020 & FY 2021. Available at <https://opb.georgia.gov/afy-2020-and-fy-2021-governors-budget-report>. Accessed 8 July 2020.

46 Governor Cooper’s Recommended Budget 2019-21; https://files.nc.gov/ncosbm/documents/files/BudgetBook_web_2019_rev.pdf. Accessed 15 June 2020.

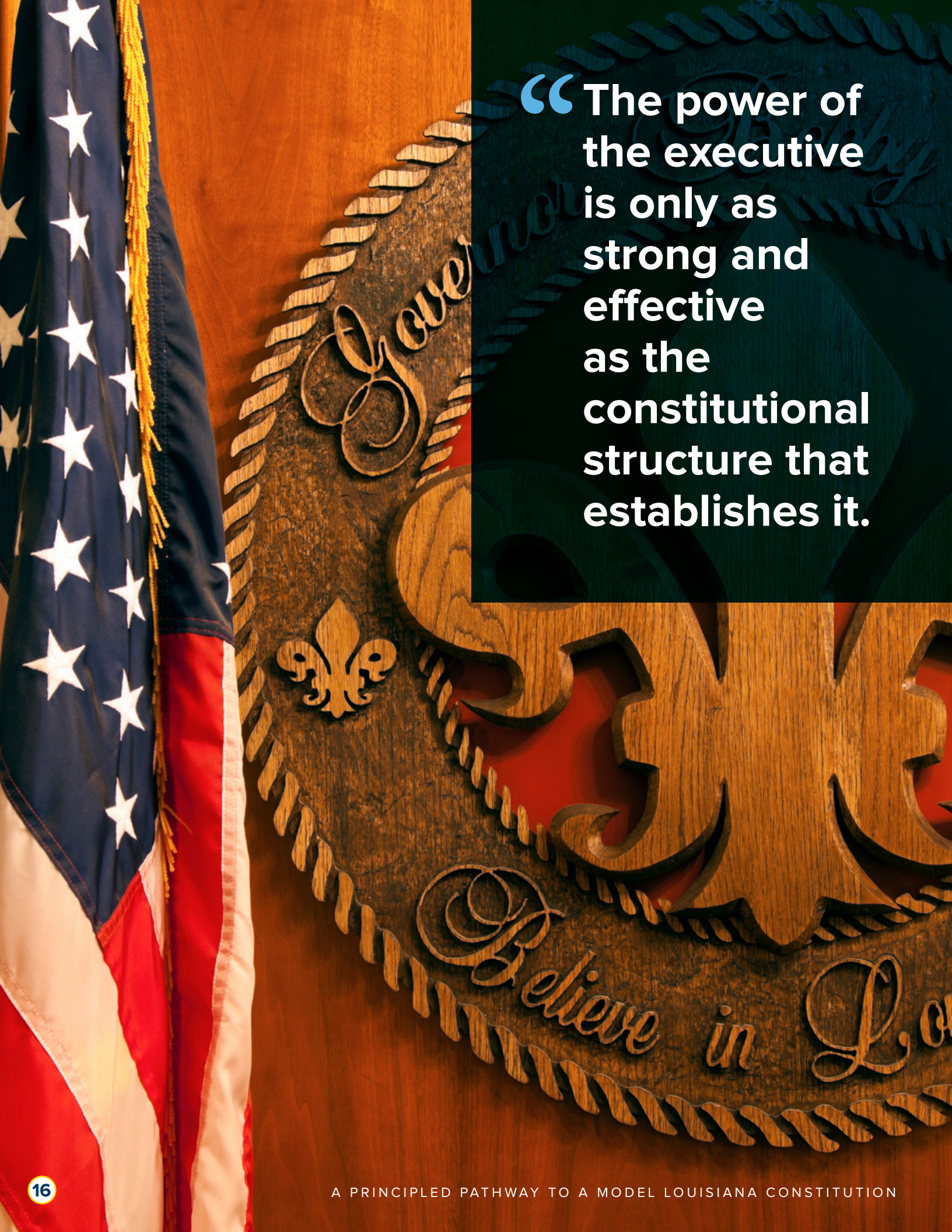
47 See https://www.lbb.state.tx.us/Documents/Publications/Fiscal_SizeUp/Fiscal_SizeUp_2020-21.pdf.

48 Adams, John, “Thoughts on Government,” 1776, <https://founders.archives.gov/documents/Adams/06-04-02-0026-0004>. Accessed 18 Aug. 2019

49 Tarr, G. Alan, et al. State Constitutions for the Twenty-First Century. State University of New York Press, 2006, p. 67.

An aerial photograph of a city skyline across a large body of water. The city features numerous high-rise buildings and a mix of architectural styles. The water is dark blue with some ripples, and a small boat is visible in the lower right. The sky is clear and blue.

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“ The power of the executive is only as strong and effective as the constitutional structure that establishes it.

leaves the state. A lieutenant governor with a different agenda than the governor, or an attorney general with different enforcement priorities than the elected governor could take advantage of the governor's absence.⁵⁰ In the federal scheme, the challenge of a vice president from a different party than the president was resolved with the passage of the Twelfth Amendment, ensuring both would be elected as a ticket. On the other hand, separately elected executive branch members from different parties can serve as a check when, for example, federal policies do not align with the electorate's priorities.

A constitutional convention should devote thoughtful consideration to the question of whether any of the currently elected executive offices should be handled by appointment by the governor or legislature instead. Currently, Louisiana is in line with the majority of states that separately elect attorneys general (forty-three)⁵¹, treasurers (thirty-six)⁵², and secretaries of state (thirty-five).⁵³ However, the state is an outlier as one only twelve states that elect an agriculture commissioner⁵⁴, and one of eleven that elect an insurance commissioner.⁵⁵

When executive power is split and fragmented, it lacks coherent power to implement the law. The power of the executive is only as strong and effective as the constitutional structure that establishes it. The Model State Constitution recommends an integrated executive branch with extensive executive and administrative powers (subject to legislative disallowance), a line-item veto, and limitation on the number of sub-agencies. Louisiana's current constitution has two of these three features but retains its plural executive. Reforming this branch by

vesting the executive power in one individual will increase accountability to voters who expect the governor to exercise the executive power anyway.⁵⁶ Such a change will prove unpopular to politicians who seek to use these lesser statewide offices as stepping-stones to the governor's mansion but could be made by a people's convention.⁵⁷

JUDICIAL BRANCH

The national constitution drafters described the judicial branch as the "least dangerous" branch.⁵⁸ Unlike the executive (which had the power of the sword) and the legislature (with the power of the purse), the judiciary had only the power of "judgment" and had to take care not to be overpowered by the other branches.⁵⁹ Independence was a critical feature of this branch, exhibited by the lifetime appointment of Supreme Court justices at the national level and the implementation of judicial review shortly after the creation of the Supreme Court. Ensuring judicial accountability along with independence, however, is a more nuanced discussion. Judges are held accountable to both the law through the appellate review process, and to the people through codes of professional conduct and disciplinary procedures.⁶⁰ Constitutional amendment and corrective legislation are tools available to the electorate and legislature to override judicial decisions.⁶¹

As a result of these conflicting values of independence and accountability, state-level judicial selection methods vary widely. Some states have a "merit selection" (also known as a Missouri Plan) process where a committee composed of lawyers selected by their peers and laypeople chooses a list of candidates

50 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 74.

51 Attorney General (state executive office), available at [https://ballotpedia.org/Attorney_General_\(state_executive_office\)](https://ballotpedia.org/Attorney_General_(state_executive_office)), Accessed August 17, 2021.

52 Treasurer (state executive office), available at [https://ballotpedia.org/Treasurer_\(state_executive_office\)](https://ballotpedia.org/Treasurer_(state_executive_office)), Accessed August 17, 2021.

53 Secretary of State (state executive office), available at [https://ballotpedia.org/Secretary_of_State_\(state_executive_office\)](https://ballotpedia.org/Secretary_of_State_(state_executive_office)), Accessed August 17, 2021.

54 Agriculture Commissioner (state executive office), available at [https://ballotpedia.org/Agriculture_Commissioner_\(state_executive_office\)](https://ballotpedia.org/Agriculture_Commissioner_(state_executive_office)), Accessed August 17, 2021.

55 Insurance Commissioner (state executive office), available at [https://ballotpedia.org/Insurance_Commissioner_\(state_executive_office\)](https://ballotpedia.org/Insurance_Commissioner_(state_executive_office)), Accessed August 17, 2021.

56 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 67.

57 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, pp. 74-79.

58 Federalist No. 78.

59 Federalist No. 78.

60 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*, State University of New York Press, 2006, pp. 86-87.

61 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*, State University of New York Press, 2006, pp. 86-87.

from which the governor selects. Others have gubernatorial nominations with the advice and consent of the legislature (like the federal model).⁶² Thirty states, including Louisiana, have elections for judges (partisan or nonpartisan). Our legislature has considered various forms of “merit selection” in the past, without much success. While some expect appointed judges to exhibit more independence, studies have shown that elected judges actually exhibit more willingness to enforce state constitutional protections such as balanced budget amendments.⁶³ An active debate continues to rage over whether appointment or election leads to higher quality judges.

The Louisiana Constitution also contains an unusual level of detail on the state-local balance of power, particularly the transfer of state dollars to localities. Constitutional amendments have slowly eroded localities’ ability to control property tax revenue; every time the legislature seeks to provide a new property tax exemption, it requires amending Article VII. Louisiana’s local property tax base that goes to local schools, for example, is about half that of other states. Louisiana’s revenue sharing funds, intended to offset local government ability to control certain revenue, must be considered in the discussion of fiscal reform.

Under the traditional approach, municipalities had only those powers expressly granted them by state legislatures, with “[a]ny fair reasonable doubt concerning the existence of power” resolved against the locality by operation of Dillon’s Rule.⁶⁴ It was 1851 before any states legislatively provided for home rule and 1875 before any state constitutions included such provisions.⁶⁵ Simply stated, home rule allows local governments to make legislative decisions that have not been addressed by the state, and Dillon’s Rule only allows local governments to act in ways specifically sanctioned by the legislature.

62 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 98.

63 Primo, David M. *Rules and Restraint Government Spending and the Design of Institutions*. University of Chicago Press, 2014.

64 Engstrom, Richard L. “Home Rule in Louisiana: Could This Be The Promised Land?” *Louisiana History*, 1976, p. 434 (emphasis in original).

65 Engstrom, Richard L. “Home Rule in Louisiana: Could This Be The Promised Land?” *Louisiana History*, 1976, p. 432.



Such a change will prove unpopular to politicians who seek to use these lesser statewide offices as stepping-stones to the governor’s mansion.



Some advocates of model state constitutions have pushed for the expansion of “home rule.” The Louisiana Constitution of 1974 arguably contained one of the strongest home rule options of any state constitution at the time,⁶⁶ but problems remain in identifying appropriate local and statewide powers. For example, the state de-centralizes tax collection to the parishes, a function much more efficiently managed from a central source. Further, localities are constrained in their ability to raise their own revenue, which results in a plethora of funds flowing from the state to localities with neither accountability nor transparency. Constitutional tax exemptions, as well as caps on tax rates and revenue, restrict the taxing options of local governments, and contribute to over reliance on certain forms of taxes. Given the scale of reforming such well-settled revenue mechanisms, gradual implementation of constitutional measures that affect state-local fiscal relationships should be considered. Rebalancing state-local government fiscal responsibilities should reduce state expenditures and waste and allow for reducing taxes.

OUR RECOMMENDATIONS:

- Eliminate arbitrary silos, called “constitutional dedications,” for government programs and allow lawmakers the flexibility to manage the budget holistically, not mere portions of it.
- The constitution should set boundaries of policy, but specifics of tax rates, deductions, etc., should live exclusively in statute.
- Reform the executive by vesting the executive power in one individual.
- Give thoughtful consideration to whether any currently elected executive offices could be appointed by the governor or legislature instead.
- Provide for a transparent judicial disciplinary process.

⁶⁶ Engstrom, Richard L. “Home Rule in Louisiana: Could This Be The Promised Land?” Louisiana History, 1976, p. 431.

RIGHTS AND JUDICIAL REVIEW

Since Virginia’s Declaration of Rights, state constitution drafters have devoted substantial efforts to outlining the individual rights upon which majorities cannot encroach. While the original federal constitution did not contain a Bill of Rights, its supporters were only able to bring it into effect by promising that such a package of amendments was on the way. These protections include well-known rights such as freedom of religion, freedom of speech, and a right to bear arms. These federal rights are not automatically enforceable to the states—keep in mind that several of the original states had state churches, for example—but they have been interpreted as applying to the state through the operations of the Fourteenth Amendment.

While the federal constitution did not explicitly identify the courts as the protector of these rights, in *Marbury v. Madison* the Supreme Court argued that the courts implicitly had the right to judicial review to ensure that there was no right “without remedy.”⁶⁷ In the states, the highest state court can interpret state constitutional protections more broadly than the federal Supreme Court has interpreted them, even if written with the exact same wording. The Supreme Court’s interpretation of the federal constitution is the baseline for the protection of rights, not their zenith.⁶⁸ Thus, Louisiana voters retain the authority to expand the protection of rights afforded by the federal constitution. For example, voters overwhelmingly passed a constitutional amendment to subject any restriction on their Second Amendment rights to strict scrutiny.

The Louisiana Constitution maintains a thorough declaration of rights, including the enumerated right to judicial review before a forfeiture of any right, property or imprisonment.⁶⁹ Economic liberty is also enshrined in the Louisiana Constitution.⁷⁰ A rewrite of the

Louisiana Constitution could include more robust protections of the right to pursue one’s profession against the power of licensing boards that can block new entrants into their industries (whether they are hairdressers, florists or casket makers) and the right to protect one’s land against governmental encroachments such as eminent domain.⁷¹

JUDICIAL STRUCTURE

The judiciary is a separate, co-equal branch of government. Judicial articles in state constitutions should be structured to hold the judiciary accountable to the public and to the law and ensure the efficient administration of justice. Additionally, judicial articles should preserve the branch’s autonomy from the influence of the executive and legislative branches as well as from special interests and shifting public sentiment.

The judicial articles of most state constitutions were re-examined in the decades following World War II. On the recommendation of groups such as the American Bar Association, the National Center for State Courts and the State Justice Institute, states re-evaluated their methods of selecting judges and the structure and administration of their state court systems.⁷² The Model State Constitution recommends a three-tiered court system and legislative flexibility to organize and change the court system. Louisiana did not adopt these changes in its 1974 constitution.⁷³ Instead, the Louisiana constitution prevents the legislature from divesting the courts enumerated in Article V (including the supreme court, appellate courts, district courts, and “other courts”) of their power. The diversion from the Model State Constitution recommendations is the result of a compromise at the 1973 convention. Existing specialized courts of limited jurisdiction, including family, juvenile, parish, city, magistrate, mayoral courts,

67 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803).

68 Sutton, Jeffrey S., 51 *Imperfect Solutions: States and the Making of American Constitutional Law*. Oxford University Press, 2018, p. 187.


69 La. Const. art. I § 19 (“No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review....”).

70 La. Const. pmb. (“We, the people of Louisiana, grateful to Almighty God for the civil, political, economic, and religious liberties we enjoy....”).

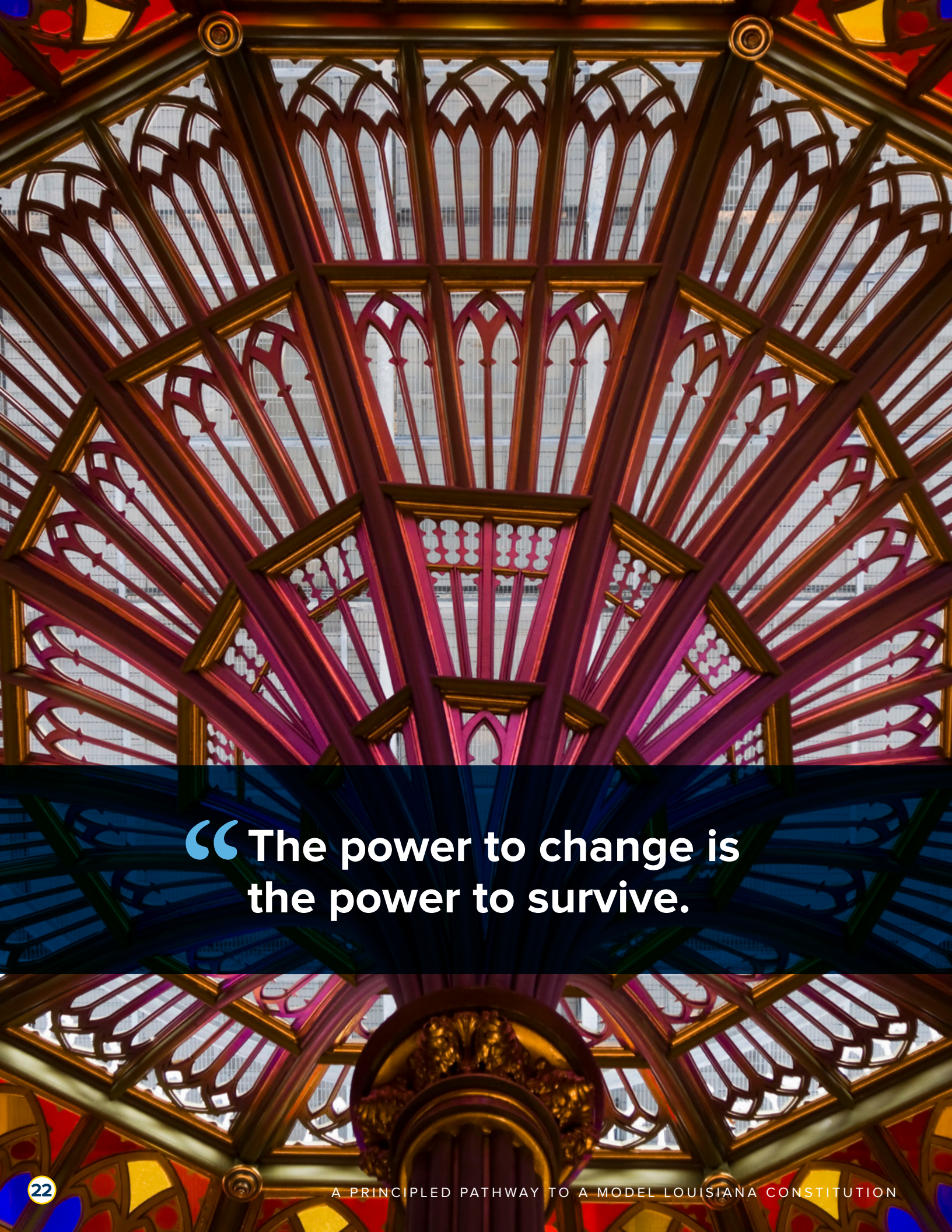
71 Timothy Sandefur, *The Right to Earn a Living*, 6 *Chap L. Rev.* 207 (2003).

72 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 85.

73 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 81.



“ Thus, Louisiana voters retain the authority to expand the protection of rights afforded by the federal constitution.



**“ The power to change is
the power to survive.**

and justice of the peace courts were unwilling to give up power. The resulting compromise allowed these courts to remain authorized by Article V and prohibited the establishment of other courts in the future.⁷⁴

OUR RECOMMENDATIONS:

- Maintain a robust declaration of rights.
- Recognize economic rights and the right to earn a living as fundamental.
- Judicial articles should respect the judiciary as an autonomous, independent branch of government.

AMENDABILITY AND REFORM

“Happy for us that when we find our constitutions defective and insufficient to secure the happiness of our people, we can assemble with all the coolness of philosophers and set it to rights, while every other nation on earth must have recourse to arms to amend or to restore their constitutions.”

– *Thomas Jefferson*⁷⁵

The power to change is the power to survive. All American constitutions contain within them the power of amendment. A review of state constitutional amendment mechanisms reveals a logical correlation: the more difficult it is to amend, the fewer times change has occurred. In Louisiana, two-thirds of the members of each house may vote to call a convention or place an amendment on the ballot. Ratification of a convention’s constitution or acceptance of a ballot measure requires a simple majority of the electorate.

AMENDABILITY

All state constitutions provide for an amendment process that begins with the state legislature, and the vast number of state constitutional amendments are proposed in this manner.⁷⁶ Because a state constitution enshrines fundamental rights, it should be more difficult to amend the document than it is to pass a statute. Consequently, most states require the legislature to pass an amendment in two successive sessions, or with extraordinary majorities in each house.⁷⁷ Louisiana’s Constitution requires that legislators pre-file proposed amendments at least ten days before the start of a regular legislative session, or five days before a special session.⁷⁸

In addition to amendment via legislature, twenty-five state constitutions offer a bypass, usually in the form of initiative or constitutional commission.⁷⁹ Florida, for example, seats a constitutional commission with ballot access. Commission members are appointed by the governor, legislative leadership, and the supreme court and meet every ten years.⁸⁰ State constitutions that provide for citizen initiatives typically include details regarding procedural requirements, timing, signature gathering, and public information.⁸¹ These methods allow the citizens to enact reform, particularly legislative and budget reform, because the legislature is unlikely to initiate these changes.⁸²

Arizona’s experience with Proposition 105, the state’s so-called Voter Protection Act Amendment, urges caution when considering the use of the citizen-led initiative. Proposition 105 requires a three-fourths vote of the legislature to amend voter initiatives, and limits changes to those that further the purpose of the initiative. These limitations make it nearly impossible for the legislature to remedy bad

74 Hargrave, W. Lee. *The Louisiana State Constitution*. Oxford University Press, 2011, p. 81-82.

75 Thomas Jefferson to C. W. F. Dumas, 1787. ME 6:295, Papers 12:113, <https://famguardian.org/Subjects/Politics/ThomasJefferson/jeff1000.htm>. Accessed on 18 Aug. 2019.

76 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, pp. 178, 181.

77 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, pp. 181-182.

78 La. Const. art. XIII, §1.

79 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 185, 191.

80 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 191-192.

81 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 186-188.

82 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 186.

policy resulting from poorly drafted provisions or limited voter education.

In Louisiana, ratification of a constitutional amendment requires a simple majority of those voting on the question. Some states have adopted safeguards to protect against voter dropoff or low turnout, such as limiting the number of amendments offered in a year,⁸³ requiring submission at general elections only,⁸⁴ or requiring a certain voter turnout threshold.⁸⁵ Ballot dropoff in Louisiana was minimal when voters considered constitutional amendments during the 2016,⁸⁶ 2017,⁸⁷ 2018,⁸⁸ 2019,⁸⁹ and 2020⁹⁰ elections.

Of the scores of constitutional amendments passed over the years, the adoption of an amendment to preserve an expiring tobacco tax is a standout. The story of the amendment's origins is an interesting example of the concepts discussed above—constitutionalizing issues best left in statute, the legislature's "power of the purse" and separation of powers. In 2011, the renewal of the tobacco tax had widespread legislative support, while the governor, emboldened by Tea Party activists, was not on board.

During the session, statutory tax renewal legislation passed both houses, but was vetoed by the governor. In an effort to prevent the loss of an existing revenue stream (and after failing to override the governor's veto), the legislature permanently renewed the statutory tobacco tax by amending it into a separate constitutional measure passing through the legislature.⁹¹ The tobacco tax therefore bypassed the governor's veto as a constitutional measure which was overwhelmingly approved by the voters.⁹²

83 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 183.

84 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 183.

85 Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 183.

86 See <https://voterportal.sos.la.gov/graphical>, accessed June 19, 2020.

87 See <https://voterportal.sos.la.gov/graphical>, accessed June 19, 2020.

88 See <https://voterportal.sos.la.gov/graphical>, accessed June 19, 2020.

89 See <https://voterportal.sos.la.gov/graphical>, accessed June 19, 2020.

90 See <https://voterportal.sos.la.gov/graphical>, accessed July 21, 2021.

91 2011 Regular Session, Senate Bill 53, which became Act 423. Nola.com, "The mostly forgettable session of Louisiana's Legislature: An Editorial," June 26, 2011.

92 Passed the voters, 81% to 19% (October 22, 2011)



“In Louisiana, ratification of a constitutional amendment requires a simple majority of those voting on the question.”



REVISION BY CONVENTION

Article XIII, §2 of Louisiana’s constitution provides for a constitutional convention. In three sentences, the constitution authorizes the legislature to call a convention by law enacted by two-thirds of the members of each house. The document resulting from the convention is then submitted to the voters for ratification or rejection. The governor declares the document to be the new state constitution if it passes with a simple majority.

Most states allow the legislature to call a convention, and a few allow the use of the initiative.⁹³ In many states, every few years an automatic convention call is put to the people asking if a constitutional convention should be held. Ironically, although Louisiana does not have such a system, it has changed its constitution more than any other state in the union.

State constitutions vary widely in the degree of detail provided for staffing, convening, and structuring a convention. In Louisiana, the legislation which calls for the convention must provide for timelines, election of delegates or appointment of the drafting committee, and may limit the scope of the convention. Bills presented over the last few years provided for a mix of delegates elected from house or senate districts, appointments made by house leadership, the governor, or supreme court, and representatives from various state associations, law schools, and interest groups.⁹⁴

Legislation authorizing a Louisiana constitutional convention must also provide a date for submission to the voters. A simple majority is required to ratify the constitution. Voter turnout for ratification of Louisiana’s 1974 constitution was 36.3%. It was rejected by voters in thirty-six parishes. However, it was overwhelmingly approved by New Orleans-area voters, with 76.9% of votes in the region cast in support of the new constitution. This

⁹³ Tarr, G. Alan, et al. *State Constitutions for the Twenty-First Century*. State University of New York Press, 2006, p. 192.

⁹⁴ HB 323; HB385; HB500; SB218; SB329.

lopsided result can be attributed to a media blitz by the then-Jefferson Parish assessor and delegate, who falsely claimed that failure to ratify the constitution would mean an increase in residential property taxes.⁹⁵

OUR RECOMMENDATIONS:

- The people are the source of the constitution's legitimacy. Processes for amendment and revision should reflect this relationship.
- Maintain the requirement that amendments be limited to a single subject or object.
- Maintain the requirement for popular ratification of constitutional amendments and revisions.
- Processes for amendment and revision should remain separate and distinct.
- Constitutional guarantees should protect fundamental rights, no matter who is in power. The constitution should be more difficult to change than statutes.
- Amendments should adhere to principles of brevity and clarity.

Conclusion

Louisiana's 1974 Constitution has outlived its usefulness. Five bills in the last three years provided for the calling of a full or limited constitutional convention. A constitutional convention was a major issue in the 2019 gubernatorial race. In 2020, the twin crises of COVID-19 and the collapse of oil prices underscored the need for a new constitution that is responsive to budgetary realities.

A constitutional convention should allow a diverse group of Louisianans to participate. Bills proposing a constitutional convention called for the election of one delegate from each of the state's 105 House districts. Each of the bills provided for various appointees by the legislature, the governor or from governmental or interest groups. While it's important that the different sectors of the state economy are included in the discussion, the legislature should be wary of special interests' attempts to influence the process. Finally, delegate selection should take the state's geography into account. Concerns of the rural, northern part of the state should not be diluted by the more populous south.

A pathway to reform the Louisiana Constitution begins with an understanding of its history and how its departure from foundational constitutional principles affects Louisiana's current economic and financial wellbeing.

Reformation of the Louisiana Constitution can serve as a model of freedom and fairness for the rest of the nation if we apply the lessons provided by America's constitutional principles to set Louisiana's most fundamental document on the right path.



⁹⁵ Carleton, Mark. "Elitism Sustained: The Louisiana Constitution of 1974." *The Tulane Law Review*, vol. 54, 1979-80, p. 587.

About the Authors



Sarah Harbison joined the Pelican Institute as General Counsel in January 2020. At the Pelican Institute, Sarah serves in the vital role of defending Louisianians' First Amendment rights, as well as their right to earn a living. Prior to joining the Pelican Institute, Sarah's civil defense practice focused on products liability litigation. Because politics is her first love, Sarah left full-time law practice in December 2015 to join a Presidential primary campaign. From there, she subsequently advised candidates running for statewide office, including U.S. Senate, treasurer, secretary of state, and governor. A Lafayette native, Sarah is a summa cum laude graduate of Loyola University and Loyola Law School, where she served as a member of the Moot Court staff. She and her husband, Medlock, live in the Garden District in New Orleans with their handsome orange tabby, Beauregard and tuxedo, Jack. Sarah and Medlock enjoy hiking in our country's national parks, exploring Civil War battlefields, and renovating their 100-year-old home.



James Baehr is a Constitutional litigator and a founder of the Pelican Institute for Justice.

Baehr previously served as a Special Assistant to the President in the Domestic Policy Council in the White House. He coordinated and oversaw DPC's policy portfolio across a number of agencies, including the Department of Veteran's Affairs and the Department of Justice.

Baehr serves as a Major in the Marine Corps Reserves as the Reserve Regional Defense Counsel-East Coast. In 2018, he activated and deployed to the Middle East for Operation Inherent Resolve, where he worked on the Command Staff and earned the Defense Meritorious Service Medal.

In his civilian career, Baehr was a federal prosecutor at the U.S. Attorney's Office in New Orleans, prosecuting over 100 defendants for felony level violations in the Eastern District of Louisiana including narcotics, fraud, murder, and corruption. He previously clerked for Judge Edith Clement of the United States Fifth Circuit Court of Appeals.

Baehr's first job after law school was as an active-duty Marine judge advocate defense counsel. He defended over 200 Marines in trials, presentencing trials, and administrative boards.

Baehr received his J.D. and a Masters in History from the University of Virginia in 2008. He graduated from Dartmouth College with honors in History and Government in 2005.



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