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A New or Revised Constitution for Colorado

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A NEW OR REVISED CONSTITUTION FOR COLORADO

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I. NEED OF REVISION

THE Constitution of 1876 was framed for a pioneer territory of which the chief activities were mining and stock raising, its largest city having less than 13,000 inhabitants. During six decades, it has had many amendments, usually of one section at a time, some of which have required the courts from ten to twenty years to interpret, clarify and strive to harmonize with other sections. It contains four times as many words as that of the Nation. It lacks clarity, precision and symmetry. Of it, it may be said, as of the Ghost of Hamlet's father: It is a thing "of shreds and patches." The developments of the last half century render it wise better to adapt our fundamental law to conditions of the present age. Our recent dependence on Washington bureaucracy on matters which the State should control, is regrettable.

Of late years, the need of revision has had frequent expression; but fear of too drastic innovations during a great industrial depression and consequent popular unrest, has prevented any concerted effort to that end. Many deem it wise "rather to bear those ills we have than fly to others that we know not of." The difficulties, time and expense incident to a general revision have further contributed to that view. A plan to reduce such expense and to minimize such hazards is here submitted.

II. SUGGESTED CHANGES

For one of critical mind, it is easier to point out defects in an existing order than to erect a better one. More mental labor is required for constructive than for destructive criticism. It is intended now to designate certain obvious defects in our present fundamental law and to suggest general lines of improvement, leaving formulation thereof with proper detail, to a deliberative body after ample study.

An analysis of our Constitution, its apparent defects and general lines of suggested change next follows:

ARTICLES I, II AND III

These are as follows: (1) that defining boundaries; (2) the Bill of Rights; (3) on distribution of powers. No changes are suggested.

ARTICLE IV

It pertains to the Executive Department and now consists of 21 sections. It provides for election by ballot of seven state administrative officials, each for a term of two years. Comparing it with Article II of the National Constitution, it is worthy of note that the latter in effect gives to the electorate a direct choice only for President and Vice-President. All other important administrative officials are appointed by the President by and with the advice and consent of the Senate. The term of office is four years.

Many believe our state government would have increased efficiency if modeled on similar lines. Then, the Governor would have a four-year term, with increased appointing power. With approval of the Senate, he could select his own cabinet and all other important administrative officials, and would have sufficient time to carry out a fixed policy, approved by the electorate at the time of his election.

Now, the Governor is unduly hampered and becomes little more than a figurehead. On such change, the state executive could always be selected midway between presidential elections, thereby enabling the electorate to give their undivided attention every alternate two years to matters of paramount state importance, and in other elections devote their thought chiefly to national issues.

ARTICLE V

It concerns the Legislative Department. It contains 49 sections. Now, the Senate consists of 35 Senators, elected from 25 districts, each consisting of one or more counties. Of these districts, 21 elect one Senator each; Denver, 8; Pueblo, El Paso and Weld, 2 each. The

House of Representatives has 65 members, elected from 37 districts, each consisting of one or more counties. Twenty-seven districts elect but one Representative each; six, 2 each; one, 3; two, 4 each; and Denver, 15, on a blanket ballot.

This arrangement presents a serious defect in our present system. In the national government, no congressional district elects more than one Representative. The flaw in our present state system is specially noteworthy with reference to Denver. On the present apportionment that city should be divided into 15 compact representative districts and 8 senatorial districts. Weld and Pueblo counties should each be divided into four representative and two senatorial districts; El Paso, into two senatorial and three representative districts. Provision should be made to reframe the districts on ten-year intervals, to meet changes in population.

Each senatorial district should elect but one Senator and each representative district, but one Representative.

The change now suggested would make our Legislature a more truly representative body and more responsive to the mature judgment of its constituency. The tendency would be to improve its personnel and to increase public confidence in its wisdom. It would give each district an equal representation in the Legislature. Hence, it would lessen if not overcome the rivalry between city and country.

Now, in Denver, with 15 Representatives to be elected in bulk, each party at its primary election may have a list of 30 or more designates on the ballot, from which each voter must select 15, most of whom reside in portions of a large city remote from the residence of the voter. At the final election, should there be more than two parties, each voter would have to select 15 out of a long ballot containing 45 candidates for the office. At present it is very difficult for any Denver voter to choose legislators with wisdom. Many voters, sometimes a majority, are indifferent to strict party lines. To such it is in effect impossible to exercise due care in selecting 15 names out of so numerous a list, but it would be relatively easy to exercise his best judgment in selecting one Representative and one Senator out of a list of two or three living in his own part of the city.

This Colorado system is not in vogue in any other large American city. If Greater New York or Chicago, by a majority of one could elect in bulk nearly half the legislature of either New York or Illinois, few if any voters could exercise the franchise with due care. In those cities, as it is now, each voter indicates his choice for one assemblyman and one state senator. The voters in each district have equal power and opportunity to select wisely from residents of their immediate neighborhood. If congress was chosen on the same plan as the Colorado Legislature, the voters in New York by a majority of one could elect in bulk 43 representatives.

We urge, the feature of our present Colorado Constitution just considered is one of its most serious defects.

To extend the term of State Senators from four years to eight, and of Representatives from two years to four, with retention of regular biennial sessions, should also be considered. This plan is in harmony with doubling the term of the Governor. Then, State Legislators would be elected at terms midway between presidential campaigns; Representatives in their second session would have increased experience; the prestige and average personnel of our General Assembly would be improved; confidence of the public in its wisdom would be strengthened; citizens of deserved eminence would be more ready to serve.

Another desirable change in Article V concerns its Section 1 as amended in 1910, regarding the initiative and referendum. The referendum feature has become a dead letter by the practice of the Legislature, regarding each statute, no matter how unimportant, solemnly to declare that it vitally concerns the public peace, health and safety. The initiative feature is subject to great abuse, since it enables any citizen or coterie of citizens with some special "axe to grind" to draft and hire petition circulators to have submitted to the electorate not only new legislation, but to amend our fundamental law. We submit, there should be no referendum except on direction of the Legislature, and that the initiative should be only on matters submitted by a public commission authorized to draft proposals.

The defects of our present amended Section 1 of Article V were stated, perhaps at unnecessary length, in the address of the then President of this Association at its session held in 1913.

With a properly constituted legislature, too drastic limitations on its power may be of doubtful wisdom. This is indicated by the fact that the House of Commons of later years, since its membership has been properly selected after the Reform Bills, has rarely if ever abused unlimited legislative power.

ARTICLES VI, VII AND VIII

These cover respectively the Judical Department, Suffrage and Elections, and State Institutions. No revision seems necessary.

ARTICLE IX

This concerns Education. Its Section 12 makes regents of the State University elective, though trustees of other state institutions are appointed by the Governor with approval of the Senate. That the Regents should be appointed seems wise for four reasons: (1) to insure more care in selection; (2) to relieve such officials from the burden of a political campaign; (3) to harmonize the method of selection of the governing board of each state institution of approximately equal dignity; (4) in line with the general desirability of a short ballot.

ARTICLE X

This treats of Revenue. It should be revised to meet an almost imperative demand. Without doubt, an undue burden of taxation is now cast upon the owners of real and other tangible property such as livestock.

There are pending for determination in the general election of 1934 two amendments to this Article, one submitted by the Legislature, the other on Initiative Petition. Grave objections to each of these are apparent. They are inconsistent with each other. Should both be adopted, confusion and uncertainty would arise.

A commission empowered to draft a new Article X should carefully consider the system of taxation prevailing in our sister states and give deep study to the following subjects:

(a) So far as practicable, to avoid too much duplication of federal and state taxes;

(b) To apportion a larger part of the burden of state and county revenue on those better able to bear it, without going too far to "soak the rich";

(c) To impose a maximum, based on population or assessable valuation, on the total revenue to be raised by all forms of taxes for state and county purposes;

(d) To cause a portion of the taxes to fall upon nearly all citizens, to increase their interest in state affairs and to lessen the danger of a majority throwing too heavy a burden on a minority;

(e) To determine how to apportion revenue derived from indirect taxes between State, State Institutions, Counties, Municipalities and School Districts;

(f) To consider whether or not direct taxes on real and tangible property be confined to raising revenue for school districts, towns and cities.

Perhaps no single person is competent to frame a proper revision of this Article X. Manifestly, a draft thereof should be prepared by a very carefully selected commission.

ARTICLE XI

Its subject is Public Indebtedness. It also needs revision. It prohibits any state loan or bonded debt in any form, with these exceptions: (1) to provide for casual deficiency of revenue, carefully limited to a small sum; (2) to erect public state buildings after approval of the electorate, such debt not to exceed 3 mills on the assessed valuation; (3) to suppress insurrection; (4) to defend the state; (5) in time of war, to assist in defending the United States. It strictly limits county, school district and municipal bonded debt.

In the recent crisis, these limitations were found unduly severe. The present rule unduly thwarts needed development of the state's re-

sources. Beyond question, a careful limit should be placed on a bonded indebtedness, either of the state or any county, school district, or municipality therein; but the present restrictions seem too narrow. The state should be permitted to incur a bonded debt of principal not to exceed, say 5% of its assessed valuation, which it should float at 4% per annum or less. It should be permitted to use such fund for purposes strictly defined, including needed enlargements of our penal and charitable institutions and improvement of our highway system. The tax burden to meet interest and sinking fund for such bonded debt would probably be little if any greater than the cost of construction by piece-meal, now necessary. The suffrage on creation of bonded indebtedness should be limited to those the assessed value of whose property is equal to or exceeds a defined minimum.

ARTICLE XII

Its subject is Officers. Its first 12 sections seem to need no change. An amendment to its Section 13, submitted by the Legislature, pertaining to Civil Service and the Merit System, will be passed on by the electorate at the 1934 election. Said Section 13, adopted on Initiative Petition at the election of 1918, has required many judicial decisions for its careful interpretation. The amendment now pending seeks to clarify its phrasing. If for any reason the electorate shall reject this proposed amendment, a duly constituted commission may deem it wise to propose some other change.

ARTICLE XIII

It concerns Impeachments. Since no impeachment trial has occurred hitherto since the admission of Colorado as a state, there seems no need of revising this Article, though, should the Governor be guilty of an impeachable offense, months or a year before the next ensuing regular session of the Legislature, it is impossible to have prompt consideration or decision.

ARTICLE XIV

This pertains to Counties. In view of the prevailing belief that the state has too many counties of very limited population and taxable wealth, a commission to prepare revision of our Constitution, if appointed as suggested *infra*, should consider the wisdom of revising this Article on the following lines:

(1) To combine several of the present small counties into one larger county and to fix its temporary county seat, providing for an early election of the resident electors to fix a permanent county seat. This task of course will throw an onerous duty on said commission.

(2) To lengthen the term of county officers, other than the board, to four years, and that of the members of the board to eight years, one or two members to be elected at alternate state elections, so that as at present there always would be one or two experienced com-

missioners sitting. On this plan, each county and state elected official would be chosen midway between presidential campaigns.

If it be urged that in theory it would seem wise to increase the responsibility of the board and further shorten the ballot to make all county and precinct officers appointive by the board instead of by election, objections to this theory are these:

(a) As a rule, the voter takes so much interest in the choice of his county officers that he is more likely to exercise the franchise with care in state matters, if so attracted to the polls;

(b) The increased size of the ballot, so far as it pertains to county offices, is relatively unimportant, because of the acquaintance of the voter with candidates for office in his own county:

(c) The electorate are so wedded to the present system of electing county officers that said increase of power in the county commissioners would probably be too violent a change to meet their approval.

ARTICLES XV, XVI, XVII, AND XVIII

These Articles, headed severally: Corporations, Mining and Irrigation, Militia, and Miscellaneous, seem to call for no change.

ARTICLE XIX

Its topic is Amendments. Its provisions receive comment *infra*.

ARTICLE XX

This pertains to Denver. Having now received judicial construction, it better be left unchanged.

ARTICLE XXI

Its title is Recall from Office. It was adopted on Initiative Petition, November 5, 1912. No officer has ever been recalled under it, though much expense and agitation has resulted from recall efforts. It should be repealed *in toto*. However, in view of past experience, for it to remain may be harmless.

ARTICLE XXII

Its subject is Intoxicating Liquors. As amended in 1932, it leaves regulation of this topic to the Legislature, with prohibition "of any saloon." In view of recent approval of this amended Article by the electorate, there seems no occasion for a change.

ARTICLE XXIII

It pertains to Publication of Legal Advertising. It is subject to no criticism except that it is merely legislation, and has no place in the Constitution.

From what precedes, desirable amendments of varying degrees of urgency, in order of importance, seem to cover the following Articles: X on Revenue; XI on Public Indebtedness; V on Legislative Department; IX on Executive Department; XIV on Counties; XIX on Amendments.

Having pointed out certain defects in our fundamental law and having stated general lines on which revision of certain Articles is desirable, we next consider methods whereby suitable revisions may be attained.

III. METHOD BY CONSTITUTIONAL CONVENTION

Under Section 1 of Article XIX, the following steps are required:

1. That the General Assembly in 1935, by vote of two-thirds of the members of each House, recommend that the electorate in November, 1936, vote for or against such convention.

2. On favorable vote of the electorate, the General Assembly at its 1937 session must provide for the *calling* of such convention and designate the time and place of its meeting, compensation and necessary expenses thereof.

3. Such convention must have 70 members—twice the number of State Senators—to be elected in the same manner, places and districts as State Senators. This may require that said election occur at the General Election in 1938. The section does not provide for any date of such election, but merely for the *calling* thereof. It may therefore be claimed that it must be called for the same time when State Senators are elected.

4. Such Constitutional Convention may remain in session for an indefinite time, in effort to submit a new Constitution, or amendments to the present one.

5. On formulating a new Constitution, or sundry amendments to the present one, the convention must appoint a date for a *special election*, to enable the electorate to approve or reject the same, to be held *not more than six months* after it adjourns.

Assuming that such convention would not meet before January, 1939, and that it remain in session sixty days, the special election to be held six months after its adjournment would be held some time in the fall of 1939. At such election, such new Constitution, or amendments, might be either approved or rejected. The convention presumably would set the date when the new or revised Constitution, if adopted, should take effect.

Denver would have sixteen members of that convention, elected in bulk, as are its fifteen Representaives—a very unsatisfactory method, as noted *supra*.

Such a convention, elected by usual political machinery, might contain many advocates of so-called "reforms" of doubtful wisdom. As a result of log-rolling usual to such bodies, undesirable features might be incorporated. After all, the expense of the convention and special election—aggregating perhaps $500,000—the final adoption of satisfactory revision would be problematical. To lessen such hazard, it seems essential that a draft of a revised Constitution should be prepared with great care by a public commission created and empowered by the Legislature to that end. Said draft, in pamphlet form with appendix containing full explanation, should be delivered to each elected member of the convention at least thirty days before it assembles; also, said pamphlet should have general circulation through offices of the county clerks and clerks of courts.

With such draft, the probability of a suitable document being adopted both by the convention and the electorate should be very much strengthened.

But, we submit, needed revision should be attained with less expense and at less hazard either under Section 2 of Article XIX, or perhaps under the Initiative, now authorized by Section 1 of Article V, to each of which we shall next refer.

It seems passing strange that the advocates of a Constitutional Convention appear to have made no careful analysis of Section 1 of Article XIX. We believe few lawyers and practically no laymen have done so.

IV. REVISION BY LEGISLATIVE PROPOSAL

This method is provided in Section 2 of Article XIX, adopted by the electorate in the General Election of 1900. Under this Section, amendments to not more than six Articles may be proposed by the General Assembly on vote of two-thirds of the members elected to each House. Such amendments must be published with the Session Laws; also in newspapers for four successive weeks prior to the next general election, when the electorate may either reject or approve them, voting separately on each.

In People ex rel. Elder vs. Sours, 31 Colo. 369, 405, the Supreme Court held:

> The limitation that the Legislature may not propose amendments to more than six Articles . . . at the same session, does not apply to constructive amendments, or amendments by implication.

Manifestly, we can not expect the 30th General Assembly, in its ordinary session beginning in January, 1935, in addition to urgent legislation and appropriation bills, to draft

amendments to six Articles with that care, study and reflection which so important a matter demands. To obviate this difficulty, six revised Articles should be drafted by an authorized Public Commission, for submission to either an adjourned regular session of the Legislature, or a special session to be called by the Governor to meet before January, 1936. If such submitted revision of six Articles is approved by the General Assembly, it can submit the same to the electorate in 1936, to take effect at such time as may be designated.

By this method, the long delay and expense of two special elections and of a Constitutional Convention, can be obviated. Moreover, there is strong probability that the electorate will approve what is recommended both by such Public Commission and the General Assembly.

V. REVISION THROUGH THE INITIATIVE

Section 1 of Article V, as amended by the electorate in 1910, permits 8% of the voters to propose any measure. It provides:

> Initiative petitions . . . for amendments to the Constitution shall be addressed to and be filed with the Secretary of State at least four months before the election at which they are to be voted upon.

This section does not permit an initiative petition to revise the Constitution as a whole. Amendments to each Article must be submitted separately. This plan is subject to the difficulty of obtaining signatures of 8% of the electorate.

The writer begs to suggest that in his view, the method through legislative proposal, with the aid of a duly constituted commission, is the best and least expensive method of the three.

VI. A PUBLIC COMMISSION

In view of the procedure incident to a revision of our Constitution, from what precedes, it seems obvious that the Legislature should create a commission whose special duty it should be to draft for submission to the former such revisions as such commission may deem advisable. The need of such action is equally apparent, whatever method be pursued, before the revised Articles are submitted to the electorate.

The writer has the temerity to suggest that said commission should consist of, say nine members of the legal profes-

sion. Whether they are named directly by the Legislature or on its direction appointed by the Governor with approval of the Senate, is an immaterial detail. By training, lawyers are especially qualified to formulate and phrase documents. They advise on important subjects in every line of human activity. At least three of the nine should be lawyers who have given special thought to questions of taxation. The commission should be as nearly non-partisan as is possible; at least bi-partisan. Either by subcommittees or as a whole, it should have public meetings from time to time to enable proponents and opponents of any proposed amendment a full hearing. The probability that its recommendations will receive general approval will be strengthened according as what it submits approaches unanimous concurrence of its members. During its deliberations it would doubtless confer with citizens in all vocations of life, including bankers, stockmen, farmers, and labor leaders for suggestions regarding the merits or demerits of any proposed changes.

CONCLUSION

All lovers of Colorado who have given thought to this subject recognize the urgent need of revision of our present Constitution, without incorporating therein mere legislation or undesirable innovations. How to accomplish that end is a matter of much gravity. It is hoped that this paper may afford some aid to attain the desired object.

FOOD FOR THOUGHT

Will Shafroth, Adviser to the Council of the American Bar Association on Legal Education and Admissions to the Bar, than whom there is no greater authority on the subject, says in the Tennessee Law Review for April, 1934, "The bar is decidedly overcrowded. In 1930 we had 160,000 lawyers, and now we have 175,000. Law school enrollment, which dropped steadily for five years, this year shows an increase. . . . What are we going to do with 200,000 lawyers in 1940?"