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## THE CASE FOR CONSTITUTIONAL REVISION IN FLORIDA

THOMAS E. DAVID\*

There is a piney woods grove near Port St. Joe, Florida. It was there in the year 1838 that the State of Florida got its first constitution. This constitution had no official recognition until 1845, when Florida was admitted to the Union. During the course of the Civil War and the period immediately thereafter, Florida had a rash of new constitutions which finally culminated in the Constitution of 1869. This new constitution served as the foundation for the laws of Florida until 1885 when a constitutional convention was called to rewrite the Constitution of 1869. Today, some sixty-four years later, the state of Florida is still using the Constitution of 1885. During that period of time there had been added 87 constitutional amendments which have in many instances only served to increase the inadequacy of the constitution rather than to lessen it.

There are those who assert that our constitution needs no revision and point to the United States Constitution as their example. In answer, one need only compare the length and amendments of the two constitutions. The state constitution contains 19 articles, 270 sections and has been amended 87 times. The Federal Constitution, which is nearly a century older, has only seven articles, 20 sections and has been amended only 58 times. It would seem obvious that the state constitution contains far too much legislation. It is, in fact, a document that hinders the reform of our state and local government. For example, the cities of Florida exist only as a creature of the legislature with that curious legal position which gives neither constitutional nor statutory home rule but only those powers accorded to them by the kindness, or even perhaps the whim of the legislature. Then there are the six members of the governor's cabinet who are popularly elected constitutional officers and may succeed themselves, whereas the governor may not. It is only through personal prestige and strength of character that the governor may have his cabinet cooperate wholeheartedly with him. This loss of integration in the executive department of our state government renders the job of the executive head of the state much more difficult. The constitutional obstacles to the reform of county government and common sense tax reform seem to make out a *prima facie* case for constitutional revision.<sup>1</sup>

During the administration of the Honorable Millard F. Caldwell as governor of Florida, and at the specific request of the governor, a distinguished

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1. See RESEARCH REPORT ON FLORIDA TAX CONDITIONS, FLORIDA TAXPAYERS ASSOC., INC., c. IV, 43 (1947).

group of Floridians known as the Citizens Tax Committee made a thorough study of the state tax structure. In their study, they understandably encountered difficulty on the question of constitutional revision, since thirty-six separate sections of the constitution bear directly upon taxation. In the committee's report to the governor, they stated:

The basic difficulty arises from the fact that the constitution enacted last in 1885 as only a revision of the earlier 1869 constitution, is no longer applicable to modern conditions. There is some question that it was even applicable in 1885 since most of its distinctive features are carry-overs from the one adopted immediately after the Civil War. . . . It is not within the scope of the Committee's work to prepare a detailed and comprehensive proposal for a constitutional revision. The Committee is convinced, however, that the state's tax problems cannot be effectively attacked unless and until the constitution is revised and modernized. . . . The constitutional problem is basic. The state's tax structure cannot be rationalized without its revision. The Committee sees little point in making further studies of over-all tax policy until that is done. As its major recommendation, therefore, the Committee recommends that the constitution be revised at the earliest possible date.<sup>2</sup>

The aura of mysticism and the traditional respect that have for so long surrounded the Federal Constitution are inclined to "rub off" on any constitution. However, the peculiar element that produces the soundness of the Federal Constitution is not that it is all encompassing but rather that it leaves so much room, through its lack of detail, for flexible legislation. Not all constitutions can be written so effectively; and when detailed provisions are written into, and become imbedded in the constitution, such provisions will surely stifle and prevent timely changes in the organization and procedure of the administration of the state and local governments.<sup>3</sup>

#### RECENT EFFORTS AND PROSPECTS FOR REVISION

On November 2, 1948, when the people of the State of Florida went to the polls and approved a constitutional amendment which will allow the state legislature to revise the constitution article by article, they ended a long and arduous struggle to bring about any acceptable method of revision. In the 1941 session of the legislature, a bill to revise the constitution by the more acceptable means of a constitutional convention died in committee. In the 1945 session, two bills were defeated in the Senate to revise the constitution by convention. Another bill was introduced in the House which proposed the creation of a commission to draft a new constitution and submit the same to the legislature and for the amendment of such revision by the legislature and for the submission by the legislature to the voters of the proposed revision. This bill passed

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2. REPORT OF CITIZENS TAX COMMITTEE, c. VII, 159 (1947).

3. SEC REPORT OF CITIZENS TAX COMMITTEE, c. II, 116 (1947).

in the House of Representatives but was defeated by the Senate. In the 1947 session a Senate bill to revise the constitution by convention was again defeated. During the same session, a House bill was introduced that was to end the long struggle. After an amendment limiting the revision to one article at a time, the bill passed both houses and came to the voters as a referendum question in the 1948 general election. The voice of the people approved the revision of the constitution by voting in favor of the constitutional amendment. Thus the way has finally been cleared; and, if the legislature chooses to act, the revision may begin in the 1949 session.

One of the outstanding leaders in the fight for revision has been Perry E. Murray, Speaker Elect of the House of Representatives for 1949.<sup>4</sup> It is largely through his efforts that the opportunity for revision is now at hand.

The method of revision has also been subject to debate for many years. The five constitutions which have served as the basic document for all laws in Florida since 1838 each provided for the revision of the constitution. The more recent constitutions all called for the revision by the customary means of calling a constitutional convention. The present constitution provides for revision by calling a constitutional convention equal to the member strength of the state legislature. In order to call such a convention, the legislature must first decide that revision is necessary by a vote of two-thirds of all the members of both houses and submit the question to the voters by referendum.<sup>5</sup> However, the constitution was amended in this respect when the people approved such amendment in the 1948 general election. The new method chosen for revision and allowed by the amendment will permit the legislature to revise the constitution during its regular session so long as the revision is article by article. This forbodes a long drawn-out revision, because our constitution contains nineteen numbered articles and each one must proceed through both houses and then await a general election year for submission to the people. Allowing for the possible defeat of revised articles, it would be quite hazardous even to speculate when a complete revision might occur. For this reason the amendment was opposed by such outstanding civic organizations as the Florida League of Women Voters during and prior to the 1948 general election. These organizations believed it preferable to revise the constitution by the convention method and if revision by convention were not possible in the immediate future, that it would be more advisable to wait until such time as the legislature should decide to follow the method set forth in our present constitution.<sup>6</sup>

Other individuals and groups have felt that a special commission created by the legislature should draft a new constitution and submit the same to the

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4. See Murray, *Recent History and Present Prospects of Efforts to Revise State Constitution*, 22 FLA. L. J. 56 (1948).

5. FLA. CONST. Art. XVII, § 2.

6. *Ibid.*

legislature for its guidance in proposing a revision to the constitution.<sup>7</sup> The legislature disapproved of this idea, feeling that an official commission to draft a new constitution was unnecessary since it would only duplicate the effort of the committee of the State Bar Association, under the able direction of the Honorable Daniel H. Redfearn, of Miami.<sup>8</sup> This committee, known as the Florida State Bar Association Constitution Committee, has prepared a proposed constitution in the form of a draft and has submitted it to the people of Florida for study. This proposed constitution is not submitted as a final draft; the committee welcomes the suggestions and criticisms of the people. The proposed constitution represents a great deal of research and study by some of the ablest lawyers and professors of law in Florida. These men met on numerous occasions in various sections of Florida to combine their efforts and ideas. Their final product is not yet ready, but if it can be measured by the first and second drafts, the State of Florida may become the recipient of one of the best drawn, most modern, coherent and logical constitutions in existence.

#### THE PROPOSED CONSTITUTION

In the preparation of a new constitution, the Florida Bar Association Committee has taken special care to arrange the articles and sections in a logical and coherent order. There has also been a special effort to express the proposed constitution in correct English in order to prevent ambiguities. A casual count made by the chairman of the committee disclosed more than two hundred errors in grammar, punctuation, and capitalization in our present constitution. Starting with the premise, held by the Supreme Court of Florida, that the Federal Constitution is a grant of power and that the state constitution is a limitation of power,<sup>9</sup> the committee has made an effort to eliminate purely statutory material, so that the legislature may enact necessary statutes except where limited by the constitution. In addition, there has been a consolidation of related material which permitted a reduction from nineteen to fifteen articles.

The new constitution starts logically with the Bill of Rights as Article I. Our present constitution does not give an article number to the Declaration of Rights but rather defines the boundaries of the state under Article I. All rights provided in the Bill of Rights of the present constitution have been preserved in this constitution with the addition of the following: Commissions, boards and bureaus are prohibited from imposing fines or imprisonment; the rights of suffrage and collective bargaining are assured; the right of eminent domain

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7. H.J.R. 117, introduced during the 1947 session of the Florida State Legislature by the Hon. Perry E. Murray, Polk County.

8. See Redfearn, *A New Constitution for Florida*, 21 FLA. L. J. 2 (1947).

9. *Cotton v. Leon County Comm'rs*, 6 Fla. 610 (1856). *Savage v. Board of Public Instruction for Hillsborough County*, 101 Fla. 1362, 133 So. 341 (1928).

and the prohibition of the quartering of the military have been removed from elsewhere in the constitution and added to the Bill of Rights.

Article II has been adapted from the present constitution, and sets out the division of powers as legislative, executive and judicial.

Article III defines and limits the legislative powers and in addition to retaining in substance the provisions of the present constitution, it suggests a new plan of apportionment and methods of securing reapportionments annually. The present apportionment of the seats in the House of Representatives gives three seats to the five most populous counties, two seats to the eighteen next most populous and one seat to each of the remaining counties. The proposed constitution adds an additional seat for each 100,000 persons and entitles counties of over 300,000 population to a seat for each additional 100,000 or fraction thereof.

The 38 senatorial districts under the present constitution would be increased to 40 under the proposed constitution, with a new method of enforcing redistricting every ten years. The committee believes that the weakness in the present constitution which allowed the legislature to meet from 1925 to 1945 without redistricting, and then required the governor to call a special session at an added expense to the taxpayers to accomplish redistricting, should be remedied. This new provision would allow a commission composed of the President of the Senate, the Speaker of the House and a third person appointed by the governor to redistrict if the legislature should fail to do so at the regular decennial period.

The time proposed for the meeting of the legislature is the first Tuesday in April instead of the first Tuesday after the first Monday.

Remuneration for members of the legislature, which was changed by constitutional amendment approved by the voters in the 1948 general election, would be limited to twelve hundred dollars in any one biennium. Prior to the recent amendment, approved by the voters in the 1948 general election, the present constitution provided for six dollars per day and expenses during each session. In recent sessions of the legislature, the legislators found it necessary to pay their secretaries nearly double their own wages in order to get competent assistance.

The proposed constitution would provide for curtailing local legislation and for passing local legislation strictly as a local law rather than through general laws with a local application. This provision would require an approval by the majority of the qualified electors of the political subdivision affected before becoming a law. The committee apparently thinks that the legislature presently holds such unlimited power over the political subdivisions of the state that the supposed "home rule" of cities and counties is nothing more than a fond hope or a misguided belief. A careful study of the statutory controls of the state over the cities and counties will readily substantiate the opinion

of the committee. For example, the previously mentioned position of a city in Florida, where it exists only so long as the legislature so desires that it may exist, will certainly bear out the opinion of the committee. By controlling the incorporation of the municipalities, the legislature can control even the salaries of the city officials. To prevent further invasion of local "home rule," the committee proposes in section 25 of Article III of the constitution certain specific prohibitions which would prevent the legislature from passing local or special laws, such as: regulating the jurisdiction and duties of any class of officers except municipal officers; punishing crime or misdemeanor; regulating the practice of courts of justice—except municipal courts; providing for changing venue of civil and criminal cases; granting divorces; changing the names of persons; vacating roads; summoning and impaneling grand and petit juries, and providing for their compensation; assessing and collecting taxes for state and county purposes; opening and conducting elections for state and county officers, and designating the places of voting; providing for the sale of any property, real or personal, belonging to minors or other persons under legal disabilities or belonging to estates of decedents; regulating the fees of officers of the state or county; giving effect to informal or invalid deeds, wills, or other instruments; legitimizing children; providing for the adoption of children; relieving minors from legal disabilities; authorizing the creation, extension, or impairment of liens; limiting the time within which civil actions may be brought; remitting fines, penalties, and forfeitures, or refunding money legally paid into the treasury; extending the time for the assessment or collection of taxes, or otherwise relieving any tax receiver from the due performance of his duties, or his securities from liability; legalizing the unauthorized or invalid acts of any officer or agent of the state or of any county or municipality; incorporating any private corporation. These seem to be rather extensive prohibitions; but the committee points out that its proposed constitution is offered simply as a basis for the revision, and not as a perfected instrument to be adopted wholly without change. If Florida is to have "home rule" by its political subdivisions, then it is submitted that there should be a real effort and not a weak-kneed, half-hearted effort in the general direction of home rule.

Article IV proposes a number of changes relating to the executive powers. The principal change would be to empower the governor to consolidate or abolish boards, bureaus, commissions and other agencies with conflicting or overlapping duties and responsibilities. The committee points out that this change would result in greater efficiency and save much money. The mushrooming bureaucracy of our state government has greatly increased the cost of government to the taxpayers and has reached a point where it seriously interferes with the administration of the cabinet posts where, for example, a cabinet member has to serve as a member of as many as 17 boards or bureaus

in addition to his regular duties. The proposed constitution does not provide for any accountability as to budgetary expenses of these agencies, but it is likely that the legislature may take some statutory action in the next session. The executive functions as proposed by the new constitution would create new departments for the purpose of direct and efficient administration of important state services which presently come under the loose formation of the cabinet. These departments are specifically named as: Agriculture, Education, Highways, Prisons, Public Health, Public Welfare and Revenue. In addition thereto, the legislature is empowered to add other new departments. Some of the specific changes which would result are: the elimination of the elective office of State Superintendent of Public Instruction and the creation of the appointive office of a commissioner of education appointed by the Board of Education as the department head of education; a commissioner of prisons would supervise state prisons in place of the commissioner of agriculture; the new department of revenue, split into two divisions, would be headed by the comptroller as head of the division of budget and control and the treasurer as head of the division of collection.

Article V is an entirely new article pertaining to the judiciary. The committee, composed entirely of men trained in the law, has undertaken to provide for a completely new court system which would abolish all courts other than the principal and important courts, that is, the Supreme Court, circuit courts, county courts and juvenile courts. The revolutionary changes asked for by the committee are idealistic in conception and, although of unusual merit in most instances, would probably stand slight chance of becoming a part of the constitutional law of Florida. For example, the proposal that judges be selected on merit by a commission appointed for that purpose would probably meet with considerable opposition because the elective nature of public office has long been jealously guarded in Florida by both the people and the elected officials. The fact that the people may vote an unsatisfactory judge out of office would probably not be sufficient to allow the acceptance of such a revolutionary change. The real purpose behind this change is to take the judiciary out of the realm of politics and to give more security to judges in their positions; however, it must be remembered that this is mere conjecture since no such system has ever been tried in Florida. The proposed system could become subject to "politics" in the selection of judges without the voice of the people.

Another important proposed change is the provision that the Chief Justice shall be the chief administrative officer of all state courts for the purpose of prompt dispatch of litigation.

Article VII pertains to local government. Proposed changes adapted from the Model State Constitution and the new Missouri constitution would eliminate such unnecessary constitutional amendments as those approved by the



voters in the 1948 general election, which allowed certain county tax assessors and tax collectors to assess and collect taxes for other political subdivisions within the county. It seems obvious that such a simple administrative step would fall entirely within the "home rule" objectives; and, being of purely local nature and effect, that it did not belong in the constitution in the first place. The proposed constitution empowers local units and political subdivisions to work together in the interest of efficiency and low cost government by transferring functions or consolidating duties and responsibilities. The will of the electorate, instead of the legislature, may decide the city and county boundaries under the proposed constitution.

Article VIII, on public officers, departs from the present constitution in its provisions to abolish the offices of constable and justice of the peace. It also proposes the abolition of the state's attorney and county prosecutor, with the substitution therefor of a single prosecuting attorney within the county. These changes would be necessary and consistent with the changes proposed for the judiciary. There is a new provision designed to combine the functions of the tax assessor and tax collector into an office of tax receiver. It also contemplates the tax receiver's performance of the duties of the clerk of the circuit court with reference to delinquent taxes. This provision is consistent with the changes under local government in Article VII. Other proposed changes include: basing the eligibility for public office on citizenship and one year's residence in the state; giving the House of Representatives the sole power of impeachment of all executive officers; protecting pension rights of officers holding offices abolished under the new constitution. The committee has drawn freely on the new Missouri state constitution for ideas and recommendations on the constitutional provisions for public officers.

Article IX pertains to taxation and may well be the article subject to the greatest controversy. Keeping in mind the Supreme Court rulings that a state constitution is deemed a limitation of power,<sup>10</sup> and that state statutes, although unwise, oppressive and contrary to public sentiment, may be held unconstitutional only for plain conflict with a designated provision or provisions of the state or Federal Constitution,<sup>11</sup> any constitutional provisions regarding taxation must be carefully drawn. The allocation of the revenue received from special state taxes does not normally belong in the constitution because the needs of the state and the services demanded by the people may change drastically over a period of years. If state tax revenue is allocated constitutionally, it requires a constitutional amendment to change the allocation and this is a slow and difficult procedure costly in times of emergency.

A tax equalization commission is proposed to supervise, review and equalize tax assessments, to administer the tax laws and to act as a board of

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10. *Cotten v. Leon County Comm'rs*, 6 Fla. 610 (1856).

11. *Jackson Lumber Co. v. Walton County*, 95 Fla. 632, 116 So. 771 (1928).

appeals in equalization of taxes. This commission may be granted the power by the legislature to assess the properties of all railroads and other transportation companies, telegraph and telephone companies and power and water companies—the taxes on such properties to be paid to the tax receivers of the counties in which the properties are located. This article also provides for the creation of the tax receiver as mentioned in earlier articles on local government and public officers. The committee believes that these two changes would increase uniformity, efficiency and economy in the assessment and collection of taxes in the counties of the state.

The highly controversial homestead exemption provision in the present constitution is not changed in the proposed constitution, although the committee mentions in a footnote that the homestead exemption might be omitted or the amount of exemption reduced to \$2,500 by the way of improvement. They ask for suggestions regarding this provision. There seems to be no quarrel with the homestead exemption in itself; the question is whether it rightfully belongs in the constitution. The original purpose of making it a part of the constitution was to assure that it would remain a law until changed by the people. The original purpose of allowing the exemption on the homestead was to provide initiative for home building in the state. It has proved quite satisfactory for the purpose intended; but it has operated over the years as a severe limitation on the tax revenue sources available to cities and local political subdivisions of the state. This is due to the gradual and ever-widening encroachment of the Federal and state governments into the tax fields, normally open to such political subdivisions. The elimination or reduction of the homestead exemption at this time would be difficult and a nearly impossible task; but, nevertheless, in the opinion of the writer it should not be in the constitution.

Article XI retains the provisions of the present constitution concerning married women's rights. The committee suggests the additional right of curtesy which gives a married man the same rights in the property of his wife which she has in his estate under her right of dower. A further suggestion is the authorization of conveyance without the joinder of his or her spouse. This provision excepts homestead property, estates held by the entirety and estates where husband and wife are joint tenants or tenants in common.

A reviser of statutes is provided for in Article XIII of the proposed constitution. He would be appointed by a supervisory committee consisting of the justices of the Florida Supreme Court together with the Attorney-General. The purpose here seems to be to create an office possessing the necessary technical skill for a statutory revision. The personnel would consist of technical advisers and assistants to the legislature for the general purpose of statutory revision. The idea is both interesting and sound but the value would depend upon the enabling act or acts of the legislature.

Article XIV of the proposed constitution pertains to amendment and revision of the constitution. The proposal as to revision would circumvent the new constitutional amendment which allows the legislature to revise article by article and return to the original method of calling a convention for the purpose of revision. A change suggested by the new Missouri constitution is that the voters of the state shall vote every twenty years on whether the constitution shall be rewritten or revised. This article provides for rewriting the constitution as well as for revising it.

The Bar Association Committee has received numerous suggestions based on their proposed draft of the constitution.<sup>12</sup> The majority of these suggestions indicate that in spite of the committee's reduction and elimination of material as purely statutory, there is still much more of the proposed constitution that rightfully belongs in the statutes.

#### CONCLUSION

The need for an early and complete revision of our state constitution is great. One need only think for a moment of the tremendous population changes, economic developments and expansion of state services in the past sixty-four years to realize the truth of this statement. During those years, the revenue and expenditures of the state have expanded to over 300 times that of 1885.

The new constitution as proposed by the State Bar Association Committee offers the groundwork for the writing or revising of a constitution comparable to any existing constitution. This committee presents to the people of Florida the abilities and skills of some of the best legal minds in our state.

The method selected for revision, that of article by article by the legislature, is perhaps not the most desirable one; but it is at least preferable to delaying revision any longer.

The task of revision should begin during the next legislative session. The framers of the new constitution should bear in mind that a state constitution is functionally a limitation on the powers of government, executive and legislative. To forget this principle and to include statutory material in the new constitution, will only lead to endless amending, as at the present time. A new constitution based upon a proper appreciation of this principle will serve for an indefinite period to protect the people from unjust government, if necessary, and yet permit a sound development of public institutions.

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12. See Florida Bar Ass'n Committee on Constitutional Revision, *Suggestions as to Proposed Constitution of Florida*, 22 FLA. L. J. 329 (1948).