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FORUM JURIDICUM

CONSTITUTIONAL REVISION IN LOUISIANA

*Sam H. Jones***

Before undertaking the subject of constitutional revision in Louisiana I decided to consult some authorities. So I went first to Walter Bagehot, who wrote a 312-page commentary on the English constitution—which does not exist at all—in writing, that is. This discouraged me greatly, since if such a book can be written on a constitution that does not exist, how much time, and how many pages, would be required in writing a commentary on a constitution which is the longest in the American Union, and probably in the world? The reading of Bagehot's treatise discouraged me even more. But at the very end of the first edition there is to be found a quotation that I shall give you, at the risk of lulling some of you into a false sense of complacency, for the quotation sounds strangely like some of our own constitutional problems here in Louisiana. Bagehot describes the English constitution as

“full of curious oddities, which are impeding and mischievous, and ought to be struck out. Our law very often reminds one of those outskirts of cities where you cannot for a long time tell how the streets come to wind about in so capricious and serpent-like a manner.

“At last it strikes you that they grew up, house by house, on the devious tracks of the old green lanes; and if you follow on to the existing fields, you may often find the change half complete. Just so the lines of our constitution were framed in old eras of sparse population, few wants, and simple habits; and we adhere in seeming to their shape, though civilization has come with its dangers, complications, and enjoyments.

“These anomalies, in a hundred instances, mark the old boundaries of a constitutional struggle. The casual line was traced according to the strength of deceased combatants; succeeding generations fought elsewhere; and the hesitating

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line of half-drawn battle was left to stand for a perpetual limit."¹

That reasoning, written 98 years ago, sounds strangely like some recent arguments, false as they are, defending Louisiana's constitution, bad as it is, as containing the political philosophy of a people won after hardfought battles, and which should not be surrendered—as if to say that you cannot both keep that hard-won political philosophy and correct the evils of your constitution, at one and the same time.

I am also reminded of the warning given by the first Earl of Balfour:

"Constitutions may be traced historically, described legally, compared critically.

"The writer may be more concerned to tell us what they *have been, ought to be, or will be*, than to tell us *what they are* (now); and he is often more competent to do so."²

I shall, therefore, make certain that I tell you, at the very outset, what our constitution is now, before I get around to telling you what it has been, ought to be, and will be in the future.

It has been referred to as a "monstrosity," an "abortion," a "roadblock to progress"; and, as Dean Paul M. Hebert once said, it is "one of the worst and certainly the most long-winded of all." Chief Justice John Marshall condemned constitutions which "would partake of the prolixity of a legal code"; and Dean Hebert observed that "Louisiana is in the vanguard of those states having acquired a constitution with such 'prolixity.'" But perhaps the most apt description of all came from the late Kimbrough Owen, who once said:

"A layman who starts out to study the Louisiana Constitution . . . is confronted with [a] Herculean task The document will trip, entangle, infuriate and then exhaust him.

The difficulties presented to the inquiring citizen include the vast detail, the dispersion of subject matter, confusing terminology, inconsistencies, errors, reference to other legal documents . . . duplication of material, contradictions and omissions."³

1. BAGEHOT, *THE ENGLISH CONSTITUTION* 258 (1872).

2. *Id.* at v (Introduction).

3. Owen, *The Need for Constitutional Revision in Louisiana*, 8 *LA. L. REV.* 1, 2 (1947).

Now just calling our constitution bad names does not necessarily prove our case against this so-called "basic law." But it happens that there is ample documentation. In the first place, far from being a framework of our state government, and a charter to protect the people in their basic rights, ours is the lengthiest, the most complex, and certainly partakes of the greatest variety of "prolixities" complained of by John Marshall as being typical of legal codes, rather than basic constitutions.

It contains, at the present time, more than 550 pages of material. This contrasts with 10 pages for our first constitution. Comparing it with the more modern state charters, we find that Alaska has 55 pages; Michigan has 40 pages; Hawaii has 30 pages; and the model constitution prepared by the National Municipal League also contains only 30 pages. These recent constitutions, averaging 39 pages, clearly show a trend towards relative brevity. We find that Louisiana's is more than 14 times longer.

Another way of pointing up its inordinate size is to remind you that this "long-winded" document has a total of more than 220,000 words. This contrasts with the federal constitution of 6,700 words; with Connecticut's first embracing only 1,500; and with New York's constitution of 3,000 words. This means our constitution is nearly 33 times as long as the federal, and over 73 times longer than New York's basic charter.

Still a third way of comparing the size of our constitution with others is by the number of amendments adopted since it was enacted in 1921. A total of 614 have been submitted, and no less than 462 have actually been adopted. This means that our constitution has grown from 113 pages when enacted in 1921 to a present length of more than 550 pages.

Let us now compare this record with five Southern and New England states, as follows: Vermont has amended its constitution only 44 times since 1793. New Hampshire, which adopted its constitution in the same year of 1793, has approved only four amendments in 172 years. Rhode Island, which adopted its basic charter in 1843, has approved only 36 amendments. Mississippi has made but 35 changes since the adoption of its constitution in 1890; Arkansas, whose constitution dates from 1874, has made only 59 changes. Thus the average for these five states is one amendment for every 3.55 years. This compares with an average

of 10.5 amendments per calendar year for Louisiana. If our average had been the same, we would have approved about 12.4 amendments since 1921, instead of the whopping 462 we have actually ratified.

Now, our constitution is indeed complex, because we disregard completely the basic function of a constitution. So far as Louisiana is concerned, we have "thrown out the window" the definition and the basic objectives of a constitution, which should be to set forth policies and principles that are not of fleeting moment, but of lasting importance. Stated in another way, a constitution should be the basic framework of our government. And it should include the following:

- (1) The protection of the people in certain basic rights and freedoms;
- (2) The establishment of the major branches of the state government, and the outlining of their most important powers;
- (3) The provision, in general terms, for the accountability of public officials and agencies, and for a system of checks and balances among the branches of the government; and
- (4) Finally, the provision for its own amendment, since the people must have some means of changing their basic policies peacefully.

This is the kind of constitution we had in 1812; and which Alaska, Hawaii, Michigan, and others have today. It is the kind that the National Municipal League has prepared and recommended as a "model constitution."

But getting back to the opening premise, let us abide by the instructions of Balfour, who admonishes us to be not so much concerned about what our constitution has been in the past, or ought to be, or will be in the future, but what it is now, today. We actually have a constitution which, in addition to being a "basic charter," is a hodgepodge of statutes, local ordinances, rules and regulations, and even, in some cases, private contractual arrangements. Some of the extreme examples we have inserted in our constitution go so far afield that they get to be quite ridiculous. I recite here a few of these ridiculous examples:

First, it took five pages of the constitution to authorize the financing of the Upper Pontalba Apartment Building in New Orleans back in 1948.

Second, there is a "Board of Control" written into the constitution for the New Basin Canal and Shell Road. Yet, today there is no New Basin Canal and no Shell Road.

Third, there is an authorized board for a public ferry system on the Mississippi at New Orleans. Yet no board has been appointed; and no ferry is being operated except such as is being operated by another agency, the Mississippi River Authority.

Fourth, the Delgado Trade School has a continuing annual appropriation of \$50,000 per year written into the constitution; yet for some unknown reason, it is the only state agency to enjoy such distinction.

Fifth, Caddo and Jefferson Parishes got constitutional amendments authorizing them to buy and maintain voting machines. All such machines are now bought and maintained by the state, but the authority of these two parishes still stands out, in bold relief, in the constitution.

Sixth, Caddo also got authority to sell its jail site at the corner of Milam and McNeil, and to set up a jail site trust or revolving fund. The constitution is still cluttered up, and we assume the fund is still revolving.

Seventh, the Parish of Calcasieu decided it wanted one of its legislators to reside west of the Calcasieu River. So a million voters went to the polls to authorize the request. Then Calcasieu changed its mind, and the million voters of the state went to the polls again to put the law back where it was in the first place.

Eighth, we have written into the constitution the sale price of certain reclaimed land at 30 cents per square foot; and

Ninth, in it we have appointed men to a Highway Advisory Board, by actual name, most of whom are as dead as some of the ridiculous statutes we have improvidently written into the basic law.

This is but a sample, selected at random, of the extremes to which we have gone in making a mockery of what should be the

basic charter of our people. I could go on by the hour; but I think the point is made.

I must, however, point to still another type of provision that goes to make up our unusual basic charter. And I tread now upon "holy ground"; for I speak of those provisions which do, in fact, form a part of the hard-earned political philosophy of our people. Civil Service is one of the examples of this category. The Code of Ethics is another. Both of these sections, imbedded in the constitution, are longer than the average modern constitution. Voting machines have been written into our basic law. So has the elimination of the poll tax as a requirement for voting, the three dollar auto license, the recently enacted series of "right to profit" amendments for the benefit of industry, the "depoliticized" New Orleans Dock Board, and the non-political L.S.U. Then, too, there is the new Department of Wild Life and Fisheries, for which the sportsmen of Louisiana conducted something resembling a Holy Crusade. Also included is the Vieux Carre Commission, which is a veritable second religion for substantial elements of our people.

All these provisions, and others of their kind, are in the constitution. And it would take something of the order of volcanic upheaval to dislodge the protections which insure the continuance of these gains in the political philosophy of our state. As most of you know, I happen to believe in these reforms. But we should always bear in mind that there are ways of protecting sacred rights without doing violence to the concept of constitutional government. And it is these matters we should inquire into.

Now, having paid my proper respects to the first Earl of Balfour, by showing, at least to a degree, what the Louisiana Constitution is now, today, and perceiving that no good can come, so far as this paper is concerned, in discussing what the Louisiana Constitution once was, I shall devote what little time remains to me in trying to make a case for a different kind of constitution for the future. I shall base my case not upon the confection of an ideal constitution, not upon the "literary view" of constitutional procedure, not upon the perfect balance among the three branches of a Republic—legislative, executive and judicial—nor even upon the perfect balance with the national government above and the local governments below the state level. Rather

I shall base my case upon the absolute, urgent necessity of doing something about stopping the growth of the legal Frankenstein we have created—a monster which, if left unrestrained, will slow to a walk, if not entirely halt, the orderly legal progress of a state destined by nature to be one of the leading states of the Union.

Let me, if I can, simplify the problem. We wrote a constitution in 1921. That constitution has been amended 462 times in 44 years. In 1921 it contained 113 pages. Today it has upwards of 550 pages, or five times as many. The more we amend, the more content we have that may continue to be amended. So our amending process may continue to grow not arithmetically, but in geometrical proportions. The result will be not merely fantastic, but tragic, and possibly fatal, from a juridical standpoint. As examples of the alarm I sound, let me give you two actual occurrences :

The first involved an amendment dealing with a city court. In an effort to create still another city court, it became apparent to good lawyers that there was a real danger in “putting to death” all the existing city courts, if this new one were adopted. We had a close shave, but an aroused electorate came to the rescue and saved the situation.

The second involved a placing of restrictions on the eligibility to elective office of persons who were, or had been, employed in the election machinery of the state. If the proposed amendment had passed, it was the considered opinion of other good lawyers that the Secretary of State and all the clerks of court outside the Parish of Orleans would have been ineligible for reelection. Once again we had a close shave. And once again, an aroused public saved us.

The urgent necessity of doing something about the growth of “the legal Frankenstein” we have created is not really overdrawn. Remember, if you will, that our rate of constitutional amendments has proceeded as follows: In the 1920’s it was 13 per legislative year. In the 1930’s: it was 20 per legislative year. In the 1940’s it was 27. In the 1950’s it reached 35 per legislative year, while in the present decade the average has reached 49 per legislative year. This is not the worst. Assuming that the present rate of increase continues throughout the 1960’s, we shall be voting on 69 amendments per election in the 1970’s, and 97

per election in the 1980's. This will bring us close to chaos, if something is not done to correct and rectify the situation.

What we are unconsciously approaching is a system by which we shall operate the state with a state-wide town meeting—each voter voting on every issue. Now that system no longer works effectively, even in the small towns of New England; and it was never intended to apply to entire states. Ours was to be a representative form of government, even in the days when our population was sparse and our wants and habits were simple. The necessity for a representative form of government is even more imperative today than it was back in 1812, when our population was only 80,000, compared with the 3,500,000 we have today.

The urgency of controlling "the legal Frankenstein" we have created is even more urgent and ominous because of a rather indifferent philosophy that has grown up among our politicians. Three statements will suffice.

(1) The first one says: "The difference between a statute and a constitutional amendment is 90 days."

(2) The second one argues: "If you are for the measure, it's fundamental and belongs in the constitution; if you're against it, it becomes statutory."

(3) And the third one came from a distinguished federal judge, with a long experience in Louisiana politics, who said to me: "Now, Governor, you ought to be against a new constitution; you and I know what the present constitution means; but if we get a new one, we'll have to learn all over again."

Although some very fine citizens share some of these views, I cannot refrain from saying that these are very disorderly approaches to a very vital problem. Actually what we are saying is: In Louisiana there is no legal distinction between, or definition of, constitutional and statutory provisions. If you can get the votes, it becomes constitutional; if you cannot, it is statutory.

If I may proceed one step further in describing the danger which our "sloppy approach" has encouraged, let me cite the following: From 1952 to 1964, inclusive, we considered a total of 297 amendments. Of this total there were 157, or more than one-half, which, under any orderly constitution, could have been and should have been avoided. In the first place, 39 of these

dealt with the judiciary, adding new judges, creating new city and parish courts, and the like. Fifty provided for the creation of special districts. Eleven authorized zoning in certain specified parishes. Some 40 dealt with the local affairs of the City of New Orleans. Twenty-two amendments dealt with authorization of debt and bond issues on the state level. A few simple amendments could have eliminated the necessity of all these in the first four categories, by simply clothing the legislature with the authority to handle these matters, which are, in reality, nothing more than statutory in nature. As to the fifth group, that of incurring debt and issuing bonds, the legislature might want to consider authorizing bond issues by a large percentage of its membership or resorting to referenda outside the constitution, and thus avoid cluttering up our basic law.

I have purposely avoided a discussion of the reorganization of the executive branch of our government, because three official groups are now undertaking simultaneously the consideration of this phase of the overall problem. It is a big one, for it involves the consideration of some 240 different state agencies, which are inclined at times to go off in 240 different directions. The mere fact that three different groups are studying this portion of the problem gives credence to both its importance and urgency. The three groups I refer to are the Louisiana Law Institute; the Committee to Consider the Governor's Powers; and the authority conferred on the Governor, himself, to submit a plan of reorganization under Senate Concurrent Resolution No. 10 of 1964.

A good start has been made in solving the problems of the judiciary, by the recent adoption of the revised system of the appellate courts. A great deal of talk has been generated about the recapture of the legislature's long-lost powers. And there are audible stirrings among those interested in municipal and parochial governments, but, even here, without all-out revision, the ultimate goal is a long way off. But when it is considered that there are 24 articles in our Constitution, all of which are mandated for revision, a long, hard road lies ahead. And it is a road over which we *must* travel, if we are to put Louisiana back on the orderly road of traditional American constitutional government. On the optimistic side, however, let us consider these developments:

- (1) There is already in existence the monumental projet

for a new constitution, published by the Institute in 1950. This needs merely to be updated to serve as a basis for the study on revision by the same Institute.

(2) There has been enacted by the legislature, and adopted by the people, a constitutional amendment doing away with the effect of *Graham v. Jones*,⁴ which now makes it possible to proceed with constitutional revision by major areas.

(3) The Law Institute, under the leadership of Colonel John H. Tucker, Chairman, and LeDoux R. Provosty, President, is already at work on this new trail-blazing undertaking. It has invited the Louisiana Bar Association, the Public Affairs Research Council, and the Council for A Better Louisiana to participate in this unprecedented task. And it is quite likely that the wealth of intellectual leadership embraced in this undertaking could be second to none in undertakings of this kind in the history of Louisiana. Certainly it is apt to bring into play a great array of talent, because the Law Institute is restricted by no limitations; politics will play no part; and there will be almost unlimited time for research and deliberation by men of great stature, drawn from the fields and areas in which they are expert and experienced.

(4) The Legislature of Louisiana has shown its wholehearted cooperation in the subject of constitutional revision by repealing the effects of *Graham v. Jones*; by mandating the Law Institute to proceed with the revision; by authorizing the Governor under SCR No. 10 to submit his own idea of a plan to reorganize the executive branch of the state government; and by providing the necessary appropriations for these projects.

(5) The Governor has indicated his approval of all these ideas by signing the necessary statutes; and by creating a committee to consider changes in the powers and duties of the governor. In addition, we are led to believe that he will also proceed in the not distant future to the activation and implementation of SCR No. 10, by employing a staff to proceed with the purposes thereof.

(6) By virtue of some 15 years of research and study, PAR has educated and acquainted the electorate of Louisiana to such an extent that it has become highly knowledgeable and discrimi-

4. 198 La. 507, 3 So. 2d 761 (1941).

nating in constitutional revision. This is evidenced by the fact that, although the legislature submitted 41 proposed amendments to the voters in 1964, the voters rejected 20 out of the 41, thus demonstrating their dissatisfaction with the present cumbersome mode of dealing with constitutional legislation.

At no time, therefore, has the climate been better for this undertaking than now. Some of you may ask the question, Why not an unlimited convention? The answer is, that it is, at the present time, politically impossible to have a successful unlimited convention. The people will not give a convention a blank check to write a constitution, without submitting it to the people for ratification. If a worthwhile constitution, which really does the job, is submitted, then this is an invitation—in the opinion of every experienced politician I know—for the sudden death of the new charter.

On the other hand, it is the opinion of many that we can revise, article by article, with a reasonable degree of hope that the people will approve, just as they approved in the revision of the appellate courts portion of the judiciary article. It is also the hope of the realists that we can get rid of all the “dead letters”; that we can revise our practice of amending the constitution to take care of “local and special laws,” and handle all these by broad grants of powers to the legislature; that we can clothe local governments with the powers that our system intended them to have, and thus eliminate scores upon scores of future amendments that will cause us, once again, to bog down into the morass of legal prolixities; and, finally, that we can preserve all the truly vital reforms, either in the bedrock of the Constitution or in a “schedule” requiring that certain provisions can neither be repealed nor amended except in the same manner, and by exactly the same methods, as were required for original incorporation into the Constitution.

This procedure would enable us to have a short, concise constitution establishing the basic rights, and setting up the framework of the state government. It would preserve the hard-fought reforms and the political philosophy, for which our people have fought, bled and, sometimes, almost died. But it would also eliminate the “flotsam and jetsam” that has no place in the basic charter of any state, or any nation.

I am intrigued by the prospect, because it is an undertaking

upon which I have worked, off and on, all my mature life. I was a part of the first phase of this undertaking when I was a member of the Constitutional Convention of 1921. I was a part of the second phase back in 1940 when we attempted constitutional revision of the executive branch by consolidating 174 agencies into 20 departments and five independent agencies. This was accomplished and ratified by the people; but it died with the rendition of the Supreme Court's decree in *Graham v. Jones*. The third phase was suggested by PAR in 1963. And once again I was a part of that phase, delivering the principal address at PAR's Conference, titled: "Constitutional Revision Within Our Reach." So this is the third great effort of the 20th century to provide our state with a modern, up-to-date constitution. And each time, I have patiently, and perseveringly, done my stint to aid the cause.

This time we are in the hands of experts, the Law Institute—the greatest organization of its kind in our state. And, whereas we have failed twice in the past, I now have an abiding faith that after two tries and 44 years, the light of hope burns bright. I believe we can convert that hope into reality. Because of the objective embodied in constitutional revision, and the fact that this objective has been a part of my life's work, I chose this subject for this occasion.

And, frankly, after all these years, I would like to have a wee, small part in a job that badly needs to be done, for a truly great people, and a truly great state.