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THE 1997-98 CONSTITUTION REVISION COMMISSION:
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COMMISSION'S FIRST CHAIRMAN

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THE 1997-98 CONSTITUTION REVISION
COMMISSION: REFLECTIONS AND COMMENTARY
FROM THE COMMISSION'S FIRST CHAIRMAN

TALBOT "SANDY" D'ALEMBERTE*

Twenty years ago, I had the great pleasure of chairing the first Commission, and although one wag said that "never before have so many labored so long with so little result," the truth is that I look back on that service with a great sense of pride.

Not only did the 1977-78 Constitution Revision Commission launch a number of important ideas that ultimately became a part of our constitution—most notably, the free standing right of privacy that has been so important to individual rights in this state—but it allowed a discussion of very important basic issues. Indeed, the best debate before our Commission concerned the abolition of the death penalty, and anyone who was in the chamber when Governor LeRoy Collins and Jesse McCrary spoke to this issue will never forget it. Whatever fate may hold for the work of this Commission, I wish for it the satisfaction I still feel for honorable service with splendid colleagues.

I want to use this opportunity to address several issues briefly, but, even more, I want to discuss some approaches to constitutional revision.

Many commentators have said that the current Commission is largely a conservative panel. As I may be the last person in Florida public life who still thinks of himself as a liberal, I hope the reader will permit me a word from the left. Those who are familiar with my political leanings will be surprised to hear that I am enthusiastic about having a conservative commission. I do not fear a conservative panel, as long as its conservatism is a traditional one in the best sense of the word. I believe that true conservatives will be very careful to think about the long view of history and that they will have a high regard for the continuation of those freedoms that protect us against the excesses of the modern state.

Some of our worst mistakes have been the adoption of provisions that react to a particular set of contemporary conditions with little thought to long-range philosophy. Florida has made many mistakes of this type. Our 1868 constitution was a product of the politics of Radical Reconstruction, an era that brought peace after a terrible

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national conflict. This peace, though, had its own difficulties, with one wag calling it “the peace that passeth all understanding.”

The constitution of 1868, sometimes referred to as the “Carpetbag Constitution,” placed most executive power in the Governor. In the period following the adoption of that constitution, many of Florida’s pre-Reconstruction leaders felt humiliated by the new regime, which, though it brought many important reforms to our state, was characterized by unstable and often corrupt government. In reaction, Florida’s post-Reconstruction 1885 Constitution created a new system with a weak Governor.

That old system with its fragmented executive survives today, and I believe that it robs Florida of the opportunity for the decisive and responsive leadership needed by our state.

I will use education as one example. Accountability for education is virtually non-existent in Florida. We have a public expectation that the Governor and Lieutenant Governor will lead us in this area, but we also have a two-house legislature, a separately elected member of the Cabinet—the Commissioner of Education—and the entire Cabinet operating as the State Board of Education. This fragmentation continues with a split in authority between the state and local government, as well as a division in many of our counties between an elected superintendent and the local school board.

People who believe in classical American constitutional theory will probably agree that our executive ought to have the power to execute laws and to provide leadership. Confusion of authority is hampering our system.

Tom Lazar, in his recent contrarian book, *The Frozen Republic*, argues that the United States is more hindered than helped by its system of checks and balances. Whatever you think of the system of checks and balances in our federal system, the fragmentation in Florida clearly goes several steps further. Florida has taken this system of dividing power to such an extreme that its citizens are bound to be frustrated by a hobbled and ineffective government, incapable of vigorous action.

By now, we should have lived down Reconstruction. We should have the courage to provide for an executive branch that can be effective and accountable.

Similarly, the legislative branch ought to have the power to provide for the needs of our citizens, yet our constitution places severe, radical limitations on the taxing powers of the Legislature.

The movement restricting the power to tax also began in reaction to an exceptional event, the general pattern of property tax reassessment during the 1960s. People who have some memory of that time will remember that tax assessors (we now call them property appraisers, for they do not want to have the word “tax” uttered in

their presence) were systematically under-appraising homestead property so that businesses were carrying a disproportionate tax burden. The Florida courts found that this practice violated our constitution and ordered it stopped. When reappraisal began under the new guidelines, there was a large public backlash, and the constitutional restrictions on the taxing power were suddenly on the public agenda.

From what philosophical base do these extraordinary limitations on the taxing power spring? Under what banner do we declare that we do not trust the very people we elect? For those of you who believe in the power of the electorate, I ask, is it a democratic idea? For you who believe in representative government, I ask, is it a republican idea?

Back when the founding fathers were debating this nation's constitution, Alexander Hamilton made the very strong point that a government ought to have the means to accomplish all the goals entrusted to it. Yet we are creating a deficit in Florida of unmet needs that will stunt our growth if we do not address this issue.

Our Legislature is paying immense sums for a criminal justice system and not investing in the activities that we all know can provide for a better future. It is easy to see how the Legislature gets into this fix. It has immediate pressing needs, yet the limitations on its taxing powers are so profound that it cannot provide the resources for a more reasonable long-term course of action.

I acknowledge that these very basic mistakes in our constitution will be difficult to correct. It sounds so democratic to say that Floridians get to elect each of their cabinet officers. Citizens in Miami will probably be reluctant to give up the right to select the person who runs our Department of Agriculture, but the price of this right is accountability.

I know that the present climate of distrust will make it difficult to restore legislative taxing powers and to change our status as a tax haven, but the result of these restrictions on taxation is an extremely expensive short-term approach to the problems of this state.

I encourage the Constitution Revision Commission to raise these issues and force a public debate that may, in time, lead us to a more rational path.

As I offer advice, you should know that I admit to having made a large number of mistakes. I was, for instance, one of the legislators who pushed for a liberalization of the much-maligned initiative provision. In response to the many critics of this provision, I give two answers. First, I was wrong. Second, the measure was offered and adopted before the U.S. Supreme Court decided *Buckley v. Valeo*, radically changing the ability of legislators to regulate political activity dealing solely with "issue only" elections.

Others have suggested that the Commission ought to examine the initiative provision. I agree, and I would like to raise an argument that did not occur to me at the time, now over a quarter of a century ago, that I proposed we broaden the initiative provision. The argument is fairly fundamental: There is a serious question as to whether the initiative provision meets the United States Constitution's guarantee of a republican form of government. Whatever label we place on the process through which citizens directly place provisions in our most basic document, I doubt that the label "republican" comes to mind.

I will not chew further on this delicious constitutional question, but it is a useful reminder that, when we are thinking about our constitution, we ought to think about the very significant basic questions.

The Commission ought also to look at some of the dubious provisions that the initiative process has placed in our constitution. There are so many worthy of examination and repeal that I will limit myself to comment on the two in which I played a direct part, the lottery provision and the ethics in government provision.

Each of these was drafted and adopted in response to the perceived pressures of a particular time, and although I had a role in drafting each, I must say that they are both flawed. I do not think that either of these is the worst provision the initiative process has placed in our constitution. That title belongs to the "English only" provision. However, the reader is more likely to pay attention if I confess personal error.

Again, these errors came about because those advocating changes were using the constitution to respond to a temporary situation. In the case of the lottery, it was the prospect of having other states sell lottery tickets to our citizens. Polls showed that a lottery initiative would pass, and a number of people were putting together lottery petitions with various designated beneficiaries such as the police or senior citizens. The people who recognized that education was woefully under-funded felt that if we were going to have a lottery, the proceeds should go to education. Of course, the single subject rule prevented the proposed amendment from containing the provisions that would implement this idea. Nevertheless, its proponents sold the lottery as a great opportunity to improve education in Florida, and when these improvements did not come, there was a great sense of betrayal.

I voted against the lottery provision. I would like the Commission to offer it for repeal, although I believe that if it does, the measure will likely fail. Another principled approach would be to take out the misleading language on education. Once again, though, this will be difficult to explain to the voters and is likely to fail. Perhaps we are

now the prisoners of history, and if we are to designate the lottery proceeds, we should make it an effective designation. Even though I am the president of a major state university, I do not suggest that the proceeds go to higher education. Indeed, if I were in the shoes of Commission members and felt myself in a quandary over designation, I would suggest a sadly neglected area in Florida, the education and health care of pre-school children, as this is the area where our need is so great and our crabbed tax system has prevented investment.

The other amendment with which I was involved, ethics in government, was also a response to a contemporary situation—a crisis in public confidence arising from a series of indictments, press exposés, and resignations in our executive and judicial branches. Despite widespread criticism, the Legislature was reluctant to act. In hindsight, the legislative leaders were not entirely wrong, but, again, political forces led to the drafting and passage of a provision that close examination shows is mostly legislative in content. I encourage the Commission to use this opportunity to clean up or repeal this provision.

I have raised several areas where I have contributed to constitution revision in ways that, on reflection, I believe were not wise, and I hope that the constitution revision process will be able to correct some of my mistakes.

There are other areas where I am very proud of my efforts to help improve our constitution. I am particularly proud of the judicial article even though there is one major issue that I hope the Commission will consider—the provision for merit selection and retention of trial judges. This proposal came very close to passing in 1978, and I hope that the Commission will examine this issue and consider placing it on the ballot.

The Constitution Revision Commission will receive hundreds of proposals for constitutional amendments, and its success will depend, in large part, on its ability to weed through these proposals to find the issues that most demand the attention of the voters. To meet this task, Commissioners will travel vast distances and wade through a maze of information. Scholarly commentary, discussion, and debate, such as will be found within these pages, should be one of the most important avenues that Commissioners will follow in their quest for a brighter tomorrow. I invite the Commission, the voters, and anyone interested in the revision process to make use of this commentary as the Commission forges a new plan for Florida's future and presents that plan to the voters.