1922

Constitutional Problems of Kentucky

Leon P. Lewis
Constitutional limitations on progress in Kentucky have long been observed by everyone interested in new legislation. Whenever I have had occasion to consider a civic problem which seemed to require legislation corrections, I have always looked first to see if the Constitution interposed a barrier, either difficult to surmount or quite insuperable, and have usually found that such was the case. Nearly all really progressive legislation has encountered an obstacle in some provision of the Constitution of 1891.

State constitutions of the latter part of the nineteenth century were essentially documents of distrust. Our democratic system of government had failed to overcome certain elemental human frailties, and special privileges secured by the powerful and the grasping from complaisant, ignorant, or venal legislative bodies had given rise to scandals from coast to coast. So the framers of new constitutions undertook to curb some of these obvious evils, but in doing so they forgot the fundamental difference between a constitution, which is presumed to be a charter of rights for all time, and legislation, which in its nature must change with the progress of political, economic and social thought and conditions. The constitution makers of the period, despite their good intentions, seemed to proceed on the theory that both wisdom and patriotism would die with them, and accordingly legislated on all manner of subjects, without thought that changing conditions require new laws.

Nor did Kentucky escape the prevalent vice of the times in this particular when the constitution of 1891 was written. The very length of the document is suggestive. Whereas the Constitution of the United States contains 4,150 words, the first Constitution of Kentucky, promulgated in 1792 contained 6,320 words, the second Constitution of 1799 contained 7,067 words, the third Constitution of

*(An address delivered by Leon P. Lewis before the Exchange Club, Louisville, Ky., February 17, 1921.)*
1850 contains 12,030 words, and the present fourth Constitution of 1891 contains 22,143 words. When we remember that this very brief Constitution of the United States is generally considered the greatest document of its kind in history and has served the needs of this rapidly expanding country for a period of 134 years with but nine short amendments in addition to the original clarifying ten, a strong presumption arises that a state Constitution five times as long as the organic law of the nation is a strait jacket rather than a support to the development of the state.

For instance, in the Constitution of the United States the only offices specifically provided for in the entire executive, legislative, and judicial branches of the government are the President, the Vice-President, members of the House of Representatives and of the Senate, and Judges of the Supreme Court. The number of representatives in the lower house is not limited, nor the number of judges of the Supreme Court. In Kentucky, the Constitution specifically provides for a Governor, Lieutenant-Governor, Treasurer, Auditor, Commissioner of Agriculture, Secretary of State, Attorney-General, Superintendent of Public Instruction, members of the House of Representatives, members of the Senate, not exceeding one Chief Clerk, one Assistant Clerk, one Enrolling Clerk, one Sergeant-at-Arms, one Doorkeeper, one Janitor, two Cloak-room Keepers, and four Pages for the House of Representatives, and not exceeding one Chief Clerk, one Assistant Clerk, one Enrolling Clerk, one Sergeant-at-Arms, one Doorkeeper, one Janitor, one Cloak-room Keeper, and three Pages for the Senate, Railroad Commissioners, Commonwealth's Attorneys, Circuit Clerks, County Judges, County Clerks, County Attorneys, Sheriffs, Jailers, Coroners, Surveyors, Assessors, Magistrates, Constables, Judges of the Court of Appeals, Circuit Judges, County Judges to serve as judges of the Quarterly Courts, Justices of the Peace and Police Judges. The number of Representatives is fixed immovably at 100, the number of Senators at 38, the Court of Appeals shall have not less than five nor more than seven judges, and the provisions for the election of these officers and for the possible consolidation or abolition of a few of the offices are given in great detail. Even the hours for election are fixed, but with rare consideration for the legislature, permission is given to change these hours by statute.
Possibly such particularity may at first blush seem merely amusing, but when we remember, for instance, that the Superintendent of Public Instruction must be elected and cannot succeed himself regardless of his fitness for the office; that an intermediate court between the Circuit Courts and the Court of Appeals cannot be established, however desirable this may be to care for increasing litigation; that a Municipal Court is impossible in Louisville to take the place of our very unsatisfactory system of Magistrates' Courts; that the Commissioner of Agriculture is in exactly the same position as the Superintendent of Public Instruction as to election and non-eligibility for a second term; and that $5,000 a year is the limit of salary for all our officers regardless of changed conditions and rising salaries and earnings in private life, the situation ceases to be amusing and becomes tragic.

I think I am correct when I say that neither the word "tax" nor "taxation" occurs in the Constitution of 1850, as the framers of the instrument correctly proceeded on the theory that the right to tax is inherent in the State and that no body of men, however wise or far seeing, can anticipate the limit of the needs of government to meet changing conditions. The present Constitution provides an irremovable maximum to the tax rate to be levied by the different classes of cities, towns, and counties therein mentioned, and further puts a similar limit on the amount of bonded indebtedness which may be incurred by a vote of the residents of the municipalities or counties. It permits the imposition of a poll tax, but limits it to $1.50 a head for all time. A constitutional amendment was required to permit additional levies and bond issues for road purposes; and you are all doubtless familiar with long struggle which finally resulted in the abolishment of the antiquated provision for uniformity of ad valorem taxation on all kinds of property, real and personal, tangible and intangible, and the substitution of a classified property tax. Taxing units are permitted to impose license taxes, and the result has been that cities and counties, unable to secure sufficient revenue under the inelastic provisions as to direct taxes on property, have exercised much ingenuity in finding new businesses and occupations to license, the result being an annoying multiplication of taxes which the individual must pay, with a corresponding multiplication of officers to whom the pay-
ments must be made, and of penalties imposed on the unwary delinquent. It is a fair assumption that official ingenuity will find some way to pluck the necessary tax feathers from the helpless goose; so why not grant to future legislatures some latitude in determining how the operation shall be performed so as to produce the proper amount of feathers with the least pain and the minimum of lost motion?

Under former Constitutions, special legislation was a real evil, and the framers of the present document wisely provided general laws for the creation of corporations, public and private. Municipalities are divided into six classes, the first class containing all cities of more than 100,000 population. This of course puts Louisville in a class by herself, but as a practical matter, the other provisions for general uniformity throughout the Constitution result in much difficulty in framing legislation which will serve the purposes of this city without resulting in hardship elsewhere. As an instance, take the juvenile court law of the 1920 Legislative Session. The most progressive students of the juvenile court problem are fairly unanimous in the opinion that jurisdiction of these important cases be in a court of the dignity of our Circuit Court. Furthermore, the County Judge of Jefferson County has statutory duties so numerous and so varied that it is practically impossible to perform all of them properly and in addition act as judge of the Juvenile Court. Yet because of different conditions and conflicting interests in other cities and counties, the amendments which were necessary to secure the passage of the bill resulted, according to a decision of the Court of Appeals, in violating the provision of the Constitution requiring uniformity of jurisdiction in the different courts of the Commonwealth, and the law was accordingly declared invalid. But for the Constitutional provision, there could have been no possible objection to giving this jurisdiction to the Circuit Court in Jefferson County while retaining it in the County Courts in those counties differently situated in this particular. Similar difficulties are constantly presenting themselves when there must be a choice between inconveniencing if not actually injuring either this city or some other portion of the state so as to make a law sufficiently general to meet the requirements of some Constitutional provision,
although without that provision a purely local problem could be solved by appropriate legislation without harm to anyone.

Some of the most difficult of the problems of public utilities are treated in a way to leave no room for the exercise of the ripened wisdom of larger experience. Franchises, except for trunk line railroads, must be sold to the highest and best bidder, and cannot be for a term of more than twenty years; no common carrier, telegraph or bridge company can in any way combine with a competing company, but telephone companies may make such agreements with certain restrictions; nor can a common carrier charge more for a short than a long haul, except in special cases allowed by the Railroad Commission. It is not my purpose to indicate either approval or dissent as to the wisdom of any of these provisions at the present time; my point being that they do not involve a fundamental principle of eternal right, but rather a problem of economic expediency which may change with the development of these utilities, and for that reason the legislature should be given power to deal with them in the light of existing conditions. The exception as to combination of the telephone companies illustrates my contention, as this provision is a constitutional amendment carried at the election of 1917, and was understood to be for the purpose of permitting the consolidation of the telephone companies in Louisville, thus indicating an apparent change of opinion as to the wisdom of combinations in this field of public utilities.

Penology is likewise prevented from making adjustments to meet more enlightened methods of dealing with those convicted of crime. The power to pardon and commute sentences is in the hands of the Governor, without any limitation; persons convicted of felony or election bribery are forever disfranchised unless pardoned by the Governor; convicts may not be worked outside the prison walls except on public works of the Commonwealth, or during certain emergencies; and the institution for the reformation of juvenile offenders shall be known as the "House of Reform." The same comment is applicable here. Without either criticising or commending these provisions under present conditions, a more scientific method of exercising executive clemency may be found some day; farms may take the place of prisons, in the future; and a less suggestive title than "House of Reform" may be deemed wise for the institution for juvenile offenders.
Two or three more miscellaneous provisions, and I am through with my illustrations. The minimum size of new counties and distance of the county seat from the boundary line is provided for, regardless of any special circumstance of geography, topography, or population. Residence qualifications of a voter as to state, county, and precinct are specified, whatever future political theories on the subject may suggest to the contrary. Wage earners must always be paid in lawful money, regardless of conditions which might under exceptional circumstances make it to the mutual interest of employer and employee to agree on a different settlement to meet an emergency. All public printing and binding must be let by contract to the lowest responsible bidder, thus precluding the possibility of the State following the example of the national government and establishing its own printing office.

And to make the strait jacket all the more inflexible, it is provided that only two amendments may be proposed to the voters of the State by each Session of the Legislature. These amendments have been coming through with considerable regularity, but the situation is a good deal like a run on a bank. It is difficult to convince the importunate ones that some one else should be given precedence.

The simplest solution of the difficulty is to present to the voters of the State as one of the two amendments proposed by the 1922 Legislature an amendment to this amending clause, giving what is sometimes called a "Flodgade" amending clause which will permit an unlimited number of amendments to be proposed at one time. If this were enacted into law, the 1924 Legislature could propose as many amendments as desired.

My personal preference is for a more thoroughgoing job. Mere amendments will help, but after all nothing but a new instrument can purge it of its essential character as perpetual legislation. Under the provision for the calling of a Constitutional Convention, two successive legislatures must approve a referendum to the people as to the desirability of a Convention. If the voters acquiesce, the next Session of the Legislature issues the formal call for the Convention, and the delegates are elected at a subsequent state election. To be specific, if the next Legislature should consider the matter, and the proper steps were taken as expeditiously as the law permits, the members of the
Constitutional Convention would be elected in the fall of 1927, to begin their deliberations presumably in the year of 1928.

Naturally, the first objection touches the money cost to the State. If the state will in reality be unshackled as a result and subsequent legislatures permitted to do some independent thinking, the result will be cheap at any price. Furthermore, the number of delegates is limited to the number of members of the House of Representatives—100—and as that number sat in the Convention of 1891, it is a fair presumption that the state can afford in money now what it could pay thirty years ago.

The other objection which looms large to many at this time is the feeling that a Constitution written under present conditions would be tainted with dangerous radicalism. In the first place, the actual drafting of the Constitution would be seven years in the future, and the nation can calm down considerably in seven years. Besides, if I may venture a personal opinion on the subject without being charged with injecting politics into this discussion, I feel that radicalism in the United States now is very much like the frogs in the famous story of the man who proposed to furnish a hogsheadful to the hotel proprietor. He was greatly deceived by the noise that half a dozen lusty males of the species were able to make. Whatever other interpretation partisans may see fit to put upon the late presidential election returns, I submit that all judicially minded observers will concede that the vote did not yield much encouragement to those of radical tendencies.

As a final word, Kentucky’s Constitutional problem arises from the imperfection of a government of a free people by servants of the people’s choosing. The present Constitution attempted to cure the ill by limiting the legislative power of those servants. If we do not elect legislators whom we can trust, the solution is not in tying their hands so that they can do only a limited amount of mischief, but in arousing public sentiment to the point of electing men who can be trusted to serve the Commonwealth with their hands free.