

## THE ILLINOIS EXPERIENCE WITH CONSTITUTIONAL REVISION AS IT RELATES TO CALIFORNIA IN THE TWENTY-FIRST CENTURY

Remarks offered by Professor Ann M. Lousin of The John Marshall Law School in Chicago at the *Getting to Reform* Conference, October 14, 2009, in Sacramento, California

Friends, each state is different from the other 49 states. Therefore, I am *not* here to tell you how to transplant the Illinois experience into California. However, all of the 50 states seem to be experiencing similar problems in their structures of state government. I am here to relate some of the Illinois experience that might be useful to California.

My view is that a successful constitutional convention requires success at two steps:

First, it must produce a draft constitution that has the enthusiastic support of a majority of the members of the convention and does not have undying opposition from the dissenters.

Second, it must produce a draft constitution that will be adopted by the ratifying body or bodies.

The federal constitution is a good example. Although several delegates withdrew from the 1787 Philadelphia convention, the convention was able to effectuate several major compromises and garner the support of almost all of the delegates. From what we know of the convention, the delegates were aware that they needed to compromise among themselves and that they needed to draft a constitution that the ratifying conventions of at least nine states would find acceptable.

The Illinois constitutional experience has mirrored the federal one. The first convention produced the 1818 constitution in only three weeks. There was only one real purpose: to set up the rudiments of a state government in a way that the United States Congress would find acceptable and vote Illinois in as a state. Again, the delegates had to agree among themselves, which meant they had to compromise, and they had to draft with an eye to persuading the ratifying body, the U.S. Congress, to agree to the draft.

The second constitutional convention took place in 1848 and produced what I call the Jacksonian Democracy Constitution. By this time, the population of Illinois had spread north and there was already a city called Chicago on Lake Michigan. The 1848 delegates had to compromise on issues of state powers and economic development. They also had to produce a draft that the *voters*, by then the ratifying body, would accept.

To obtain the voters' approval, the delegates submitted several "hot-button issues" of the day separately from the main draft. This practice of "separate submissions" for separate votes has been a feature of Illinois constitutional conventions ever since. It is a political compromise necessary to prevent the opponents of one part of the main draft from combining to defeat the entire work product.

The third constitutional convention took place during the civil war, in 1862. It was run by the Democratic party, which then espoused a racist, often anti-Lincoln, anti-Union agenda. It

was a partisan Democratic convention, which produced a document that the voters rejected decisively. The Democrats were incredibly stupid.

The fourth constitutional convention took place in 1869-1870. This time it was a bi-partisan convention that sought to bring together the factions of Illinois life, including the Democrats in the southern part and the Republicans in the northern part of the state. To put it bluntly, the result was a constitution that enabled the leaders of the two political parties to run state government and control future constitutional revision. In effect, if the leaders of the two parties had brokered a deal, had made a compromise, any proposed constitutional amendment was sure to pass.

For various reasons, the system broke down in the 1890's. It became clear that no amendment would ever pass unless it had near-universal approval by the party leaders, the legislators, and the voters. Illinois was in a constitutional stalemate.

The fifth constitutional convention took place in 1920-1922. The Republicans seized control of the agenda and ran it as if it were a caucus of the Republican party. They would not compromise; they would not even listen to others. The Republicans were as incredibly stupid as the Democrats had been in 1862. The delegates were unenthusiastic about the draft, and the voters rejected it wholeheartedly.

In the next half-century those who sought constitutional revision in Illinois learned from these experiences. By the time the sixth constitutional convention met on December 8, 1969, some observers were saying that it was "pure dumb luck" that Illinois had another convention.

But "luck" should be defined as what happens when preparation meets opportunity. I don't believe that any state can hold a successful convention without having months, indeed years of preparation before the delegates meet.

Beginning soon after World War II leaders of both parties, of the bar, and the academy commenced serious efforts to revise the Illinois constitution. They were able to get the legislature to propose and the voters to adopt an amendment that made it somewhat easier to amend the Illinois constitution. The reformers, who were---and this is crucial---a bi-partisan group, had just a few more successes, notably in restructuring the judiciary.

The breakthrough came in 1964, when a federal decision on redistricting state legislatures forced candidates for the Illinois House of Representatives to run on an at-large basis. Many of the state representatives elected were new to state government. Some were willing to consider the heresy of holding a referendum on whether to call a constitutional convention. One of them was a former President of the League of Women Voters of Illinois. At her urging, the legislature created a constitution study commission. When she died suddenly in 1966, her colleagues searched for a way to honor her memory. Partly to honor her and partly to settle the issue, the legislature voted almost unanimously to put the question of a call for a convention on the ballot in November, 1968.

This was the opportunity that the reformers had been seeking. Although many legislators thought the issue would not pass, few actively opposed the call. The leaders of both political parties and most civic and bar leaders supported the call. The call passed: preparation had met opportunity.

The few legislators who were actively involved in shaping the statutes governing the election of delegates and the organization of the convention really *wanted* the convention to succeed. They knew this was a once-in-a-lifetime opportunity. For example, they made the election of delegates a non-partisan election, meaning that candidates could run without party labels and that when the convention met, there would not be the formal party structure inherent in the legislature.

As I recall, most of the delegates also understood these lessons. They understood the two steps for success I mentioned a few minutes ago: a convention must produce a draft supported by the majority of the delegates, and a convention must produce a draft supported by the majority of the voters.

*Of course* there were compromises on major issues. *Of course* no delegate got everything he or she wanted. But in the end, only one or two delegates refused to support the draft constitution.

One way the delegates resolved issues was to submit four hotly-contested issues to the public separately from the main document. Two of those issues---whether judges should be elected or appointed and how the members of the Illinois House should be elected---were so bitter and divisive that the convention had almost broken apart over them. The separate submissions meant that much of the debate between the time the convention adjourned on September 3, 1970, and the referendum on December 15, 1970, centered upon the four separately-submitted issues, not upon the intricacies of the document itself.

Another way the delegates resolved issues was to delay the effective dates for several key provisions. For example, the convention abolished the much-hated *ad valorem* tax on personal property, but it was mindful of the difficulty local governments and school districts would have in adjusting to the loss of revenue. Therefore, it delayed the effective date of the abolition until 1979. It was an elegant solution.

What does the Illinois experience mean for California? I think you would have to reflect carefully before holding a convention.

More specifically, all of the players, including the citizens of California, will have to consider which basic problems in the state's constitutional structure *really* need to be addressed. In Illinois, during the 20th century, that huge issue was the tug and pull between the giant city of Chicago, with its expanding metropolitan area, and the rest of the state.

From what I can gather, the comparable problem in California might be what I call your "tri-cameral government." Most states have a bicameral legislative process: the Senate and the House. Through your extensive initiative, referendum, and recall system, you have added a third

chamber: the voters, who regularly initiate and enact legislation outside of the California legislature. I could make observations on how I think that has affected your legislative process, your constitutional amending process, and your discourse on public policy issues. But I won't. That is a decision for Californians alone.

As you make your decisions, I ask you to remember these four points that you could take from the Illinois experience:

First, consider which basic problems in the California constitutional structure really need to be addressed.

Second, prepare for a convention carefully by commissioning studies, determining what the key players *and* the citizens would like or at least accept.

Third, the convention must produce a document that the majority of the delegates can support.

and Fourth, the convention must produce a document that the majority of California voters will approve.

*AND*, if you do hold a convention, I'll be happy to come back and share some thoughts with you, based on my experiences. I am available as a consultant.