1-1-2011

Constitutional Revision: Are Seriatim Amendments or Constitutional Conventions the Better Way to Amend a State Constitution?, 115 Penn St. L. Rev. 1099 (2011)

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Constitutional Revision: Are Seriatim Amendments or Constitutional Conventions the Better Way to Amend a State Constitution?

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The fifty American states may amend their constitutions in two ways. *First,* the states can submit individual amendments to the voters. Usually, the legislature drafts each amendment, adopts it, and submits it to the voters for their approval. In those states that allow the initiative process, a group of voters sign a petition containing the proposed constitutional language and, if they obtain enough signatures, the state government submits the amendment to all of the voters for their approval. *Second,* the states can hold a constitutional convention to consider revisions of the constitution on either a limited or plenary basis.

Which method is better? In my forty years of researching Illinois constitutional issues and observing other states, I have learned that there are advantages and disadvantages to each method. Sometimes I recommend the first choice, serial amendments, and sometimes I recommend the second choice, a convention.

There are three key points to consider in choosing a method of state constitutional amendment. The first point is that *the voting public invariably has the final say on whether the proposed language will become part of the state constitution.* This is true for both the seriatim amendment method and the constitutional convention method. This means that the important political players, parties, and operatives must be reasonably content with the proposal. Strong opposition from any one faction will strengthen the hand of those who oppose *any* change in the constitution. The consequent combined opposition will often doom the proposed amendment or the proposed call for a convention. I believe this is the reason that most constitutional revision in the twentieth and twenty-first centuries has been relatively conservative. Truly bold moves are certain to arouse suspicion and opposition from people or groups who feel threatened by major changes.

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In recent decades, the campaigns for and against proposed revisions have become the bailiwick of professional political operatives who use computers, targeted lists, and political action groups organized under Sec. 527 of the Internal Revenue Code. They operate on a level of sophistication unimaginable when most state constitutions were drafted. (I include the Illinois constitution of 1970 in that statement because nobody at the 1969-1970 Illinois constitutional convention could have envisioned the way computers would change all elections and referenda.) Many of these political operatives are based in California, which has more statutory and constitutional referenda than any state. However, proponents and opponents of constitutional amendments everywhere often retain these organizations' services.

The second point is that *legislatures are suspicious of constitutional conventions, seeing them as rival legislative bodies.* This suspicion is rooted deeply in American constitutional history. The Congress organized under the Articles of Confederation authorized the calling of the 1787 Constitutional Convention, whose work product effectively abolished that Congress upon ratification by the states. Ever since then, legislatures have been wary of constitutional conventions. Unless a convention is "loaded" with delegates who are also legislators or have been legislators recently, the legislatures fear that the convention will propose revisions that will diminish the powers of the legislative branch. There is an inherent rivalry between the two bodies.

Legislators know they must account to their constituents for their votes when they run for re-election. Constitutional conventions, by contrast, are one-time events. I liken them to the mythical village of Brigadoon in the eponymous musical: they appear for day (really a few months), do what they do, and then disappear into the mists. The delegates to a convention seek to have their work product adopted, but they do not have to run for re-election to their posts.

The third point is that *legislatures are reluctant to propose any serial amendments that restrict the powers of the legislative branch.* In fact, *no* branch of government, whether it is the legislative, executive, or judicial branch, thinks its powers should be reduced. The 1970 Illinois Constitutional Convention knew this. Therefore, it created a limited initiative and referendum procedure for certain basic parts of the article on the legislature. Although the convention record lists several examples of parts of the legislative article that could be amended by the initiative and referendum "bypass procedure," only one procedure was truly paramount in the delegates' minds. This procedure was to change the method of electing members of the Illinois House of Representatives through a system unique to Illinois: multi-member districts elected by cumulative voting. Many delegates at the convention and some other

Illinoisans wanted to switch to the more traditional American system of single member districts with "first past the post" voting.

The method of electing the Illinois House of Representatives was one of the most-hotly-debated issues at the convention. At various times, especially towards the end of the convention, there was a real danger that the convention might break apart over this issue. In the end, cooler and cleverer heads prevailed.

The method of electing the Illinois House was one of four controversial, but discrete, issues at the convention. The other three were 1) changing from electing state judges to appointing them; 2) abolition of the death penalty; 3) and lowering the voting age from twenty-one to eighteen. These four issues became "separate submissions." The voters were thus given five choices at the referendum: should the proposed new constitution be adopted and then, if adopted, should any of these four proposals submitted separately also be adopted? The decision to submit the proposed constitution along with the four separate submissions gave the proponents of the main document a great advantage: those who wanted a change from the current order, *i.e.,* wanted to abolish the death penalty, wanted to lower the voting age, wanted to have judges appointed rather than elected, or wanted to have the Illinois House elected by single member districts also had to campaign to have the main document approved by the voters.

In effect, the 1970 referendum combined the most advantageous aspects of the *seriatim* amendment process and the constitutional convention process. The convention submitted a complex "proposed constitution" and then four discrete issues, each of which could stand or fall on its own.

The voters adopted the proposed constitution at the referendum held December 15, 1970. However, they also voted at that time on the four separately-submitted issues. They voted to adopt the new constitution, but to retain the *status quo* regarding the four separate issues. They chose to keep the basic method of electing members of the Illinois House; to continue electing judges, instead of appointing them; to reject a constitutional abolition of the death penalty; and to retain the voting age at twenty-one. The voters' decisions on these four issues had no effect at all upon the content of the proposed constitution they adopted.

Since the new constitution became effective on July 1, 1971, there have been several attempts to amend it. In the end, Illinois voters have had twenty-one opportunities to vote on state constitutional issues at referenda.

Two of the twenty issues voted upon were whether to call new constitutional conventions. The Illinois constitution requires submission

of a "call for a convention" every twenty years.[1] In 1988 and again in 2008 the issue automatically appeared on the ballot. The first time, in 1988, the proponents of a call found it difficult to convince the voters that Illinois should hold another convention only twenty years after the previous one. Those who wanted an appointive system of judges combined forces with a citizens' group led by our now-incumbent Governor, Pat Quinn. Quinn's group advocated "citizens' initiatives" for legislation and constitutional amendments. The voters turned the call down by a vote of three to one.[2]

The second time, in 2008, the proponents were totally unorganized and advocated positions ranging from the extreme right, akin to the current Tea Party movement, to the extreme left, who wanted massive tax restructuring and "returning power to the people." The only major public official who publicly and strongly supported the call was again Quinn, who by this time was the Lieutenant Governor of Illinois. Quinn repeated his populist agenda, but added "reform of legislative procedures" that would diminish the powers of the legislative leaders. At one point he advocated a state constitutional convention "to combat global warming." The voters rejected the call by a vote of two to one.[3] Proponents could not carry even a single county.

Of the remaining nineteen referenda on the state constitution, all but one were *seriatim* amendments submitted by the legislature. That one exception was the Cutback Amendment of 1980, which reduced the size of the Illinois House by one-third and, much more importantly, abolished the multi-member district system with cumulative voting in favor of a single member district system.[4] The chief proponents of the Cutback Amendment of 1980 were Pat Quinn, then a professional activist, and the League of Women Voters of Illinois, which has long espoused single member districts.

Obviously, there was no chance that the Illinois House would vote to propose any change in the system by which the incumbents were elected. Only the limited citizens' initiative could accomplish that. Quinn and the League circulated the petitions and ran a successful campaign for adoption. Quinn's argument to the voters emphasized that it would "get rid of a third" of the House in order to save money; there was little emphasis upon the elimination of multi-member districts with cumulative voting. Without question, adoption of the Cutback

1. ILL. CONST. art. XIV, § 1(b).

2. Of the 4,697,192 votes cast on whether to call a constitutional convention in 1988, there were 900,109 "for" votes and 2,727,144 "against" votes.

3. Of the 5,539,172 votes cast on whether to call a constitutional convention in 2008, there were 1,493,203 "for" votes and 3,062,724 "against" votes.

4. *See* chart at the end of this essay.

Amendment has had more impact than any of the other ten amendments adopted. Most observers think it increased the power of the four legislative leaders over rank-and-file members and that it reduced the influence of minority party voters in most legislative districts.

The legislature drafted and submitted the remaining ten amendments adopted over the years. Most are noncontroversial. Only three are really worth describing here.

The first is the 1994 amendment to the "Effective date of laws" section.[5] Formerly, the legislature needed the approval of only a majority of the members elected to each chamber to pass a bill by June 30th of any year, but any bill passed after that date that was to become effective before January 1st of the next year needed approval by three-fifths of each chamber.[6]

This so-called "Effective date of laws" provision had the greatest impact upon adoption of the annual state budget. It is rare that either political party has a majority of three-fifths in either chamber, let alone in both chambers. Yet, after that "effective date," proponents of a bill must muster three-fifths of those elected to each chamber in order to pass a bill that would become effective before January 1st of the next year.[7] Clearly, the state budget must become effective on or shortly after July 1st of each year, six months before the next January 1st. Consequently, the minority party in only one of the chambers gains great power if the state budget is not passed by the "effective date."

In 1994 the legislature proposed and the voters adopted an amendment pushing that "effective date" up from June 30th to May 31st.[8] After midnight on May 31st, the "majority party" in each chamber must corral votes from "across the aisle" in order to keep state government functioning. This situation raises the spectre of California, which has found a state budget almost impossible to pass because since 1933, two-thirds of each chamber must approve the state budget. Illinois began moving in that direction in 1994, with sad repercussions. That

5. *See* chart at the end of this essay.

6. Article IV, Section 10 of the Illinois constitution provides:

> The General Assembly shall provide by law for a uniform effective date for laws passed prior to June 1 of a calendar year. The General Assembly may provide for a different effective date in any law passed prior to June 1. A bill passed after May 31 shall not become effective prior to June 1 of the next calendar year unless the General Assembly by the vote of three-fifths of the members elected to each house provides for an earlier effective date.

ILL. CONST. art. IV, § 10. Before adoption of the 1994 amendment, "June 1" was "July 1," and "May 31" was "June 30." The "general effective date" has long been January 1 of the year after passage by the General Assembly. *See* Ann M. Lousin, THE ILLINOIS STATE CONSTITUTION: A REFERENCE GUIDE 111-113 (2009).

7. *Id.*

8. *See* chart at the end of this essay.

amendment is one reason that Illinois is fast going down California's road to fiscal disaster.

The second significant amendment is the 1998 amendment to the judicial article.[9] It amended the judicial discipline system in several ways. The 1998 amendment's major purpose was to involve more non-judges in the process of judicial discipline. So far, the "citizen members" of the Illinois Courts Commission, of whom I was one from 2001 to 2003, do not seem to have been the crucial votes in judicial discipline matters. However, there is now a greater appearance of fairness and less of an appearance of decisions made by an "old boys' club."

The third significant amendment is the 2010 amendment providing for recall of the Governor.[10] It is clearly a response to the most recent scandal in the governorship, which resulted in Governor Rod Blagojevich's being impeached and removed from office in January, 2009. Although the Illinois constitution provided a way for the legislature to remove a Governor deemed guilty of gross malfeasance in office,[11] some Illinoisans thought that there should also be a way for the voters to remove a Governor. The recall system proposed by the General Assembly requires signatures by Senators and Representatives from both major parties on a petition, which would also be signed by a large number of voters, to submit the issue of recall to the electorate.[12] In effect, the Illinois gubernatorial recall system requires the consent of both the legislature and thousands of voters just to *initiate* the recall drive.

Although the recall procedure is so new that Illinois has no experience with it yet, it is clearly a method by which the legislature can pressure the Governor. Legislators can tell the Governor that if he consistently countermands their wishes, they will sign the papers allowing voters to petition for his recall. Although it would be very difficult for a recall drive to succeed, the Governor under attack would be forced to devote significant time and energy to defending himself.

The Illinois voters have refused to give seven legislatively-proposed *seriatim* amendments the 60% approval they need for adoption.[13] However, of these seven, five garnered a majority of the votes cast on the issue. In short, if Illinois required only 50% plus one to adopt a

9. *See* chart at the end of this essay.

10. *See* chart at the end of this essay.

11. The Illinois Constitution provides for the impeachment and removal of various officers of state government, including the Governor. ILL. CONST. art. IV, § 14. On January 29, 2009, the Illinois Senate voted to remove Governor Rod R. Blagojevich from his office after the Illinois House impeached him a few weeks earlier. That is the only impeachment and removal of a Governor in Illinois history.

12. ILL. CONST. art. III, § 7.

13. *See* chart at the end of this essay.

constitutional amendment, we would have had fifteen amendments, not just eleven, to the 1970 Illinois constitution. Of the proposed amendments that failed to be ratified, the most important was probably the 1992 amendment on education funding.[14] This amendment would have required the legislature to establish a minimum level of dollars that the State must contribute to the funding of each child in a public school. Although just over 57% of the voters approved it, it failed to obtain the 60% necessary for adoption. (Full disclosure: I voted against it.)

The history of the campaigns for and against the 1992 "Educational funding amendment" shows how difficult it is to adopt an amendment submitted *seriatim.* Virtually every major player in Illinois public life advocates greater state support of the elementary and secondary public schools. Likewise, virtually every major player advocates "equality of funding." But when it comes to facing the issue directly, there is pushback. All of those who pay high property taxes to support their local schools, all of those who send their children to non-public schools, and all of those who are not certain that increasing funding will increase educational quality joined forces to oppose the amendment. Even some of the Illinoisans who told me they voted for it admitted that they did so to "send a message," not because they really wanted to have the legislature set an equal contribution of State funding to the schools.

For issues as complex as the funding of public education, with the ramifications of state versus local control, the relative burden between state taxation and local property taxes, and the compromises needed to satisfy the parents of students in non-public schools, a constitutional convention is a more appropriate method of constitutional revision. School funding is *not* really a discrete issue that can easily be addressed by one up or down vote.

I have attached a chart on the Illinois experience with constitutional referenda submitted on twenty-one occasions. Perhaps you will come to different conclusions, but I think submitting amendments *seriatim* is better when the voters can truly focus upon a discrete issue and can make an intelligent judgment upon it without considering other factors. I also think that when issues are undeniably complex, as education funding is, the better way to address them is a constitutional convention. At a convention the various players can be heard more easily and the necessary compromises can be made. Perhaps most importantly, the members of the convention will not have to stand for re-election.

14. *See* chart at the end of this essay.

CHART ON CONSTITUTIONAL REFERENDA SINCE 1970[15]

Automatic Calls for a Constitutional Convention (60% approval needed)

1988 Approve: 24.82%; Disapprove: 75.18%FAILED

2008 Approve: 32.77%; Disapprove: 67.23% FAILED

Amendments Approved by the Voters (60% approval needed)

1980 The Cutback Amendment, proposed by the citizens' initiative provision of Article XIV, Section 3, which reduced the size of House of Representatives from 177 to 118 and substituted single member districts for districts having three members elected by cumulative voting. Approve: 68.70%; Disapprove: 31.30%PASSED

1980 Amendment to Article IX, Section 8 on sales of property for delinquent taxes. Approve: 69.94%; Disapprove: 30.06% PASSED

1982 Amendment to Article I, Section 9 limiting the right to bail. Approve: 85.31%; Disapprove: 14.69% PASSED (N.B.: This was apparently a response to the legislature's removing the death penalty from several crimes for which it could have been applicable before; Illinois allows bail for non-death penalty offenses.)

1986 Amendment to Article I, Section 9 limiting the right to bail and habeas corpus. Approve: 77.25%; Disapprove: 22.75% PASSED

1988 Amendment to Article III, Section 1 to conform voting eligibility requirements to federal standards. Approve: 64.23%; Disapprove: 35.77% (N.B.: disapproval would have had no practical effect whatsoever.) PASSED

1990 Amendment to Article IX, Section 8 on sales of property for delinquent taxes. Approve: 72.25%; Disapprove: 27.75% PASSED

1992 Amendment adding Section 8.1 to Article I on rights of victims of crimes. Approve: 80.56%; Disapprove: 19.44% PASSED

15. The text of each amendment and further information can be found at various websites maintained by Illinois state government, notably at http://www.ilga.gov/commission/lrb/conampro.htm.

1994 Amendment to Article I, Section 8 rights after indictment, notably the right to confront witnesses. Approve: 62.73%; Disapprove: 37.27% PASSED

1994 Amendment to Article IV, Section 10 effective date of laws. Approve: 68.87%; Disapprove: 31.13% PASSED

1998 Amendment to Article VI, Section 15 regarding judicial discipline, notably composition of the Illinois Courts Commission. Approve: 80.47%; Disapprove: 19.53% PASSED

2010 Amendment to Article III, adding Section 7 regarding gubernatorial recall. Approve: 67.69%; Disapprove: 34.31% PASSED

Amendments Rejected by the Voters (60% approval needed)

1974 Amendment to Article IV, Section 9 limiting the gubernatorial amendatory veto. Approve: 49.48%; Disapprove: 50.52% FAILED

1978 Amendment to Article IX, Section 5 removing the projected constitutional abolition of the ad valorem personal property tax on individuals. Approve: 56.48%; Disapprove: 43.52% FAILED

1978 Amendment to Article IX, Section 6 to exempt veterans' organizations' posts from real property taxes. Approve: 48.11%; Disapprove: 51.89% FAILED

1984 Amendment to Article IX, Section 6 to exempt veterans' organizations' posts from real property taxes. Approve: 52.41%; Disapprove: 47.59% FAILED

1986 Amendment to Article IX, Section 6 to exempt veterans' organizations' posts from real property taxes. Approve: 54.18%; Disapprove: 45.82% FAILED

1988 Amendment to Article IX, Section 8 on sales of property for delinquent taxes. Approve: 59.13%; Disapprove: 40.87% FAILED

1992 Amendment to Article X, Section 1 to require a legislatively-established minimum contribution of state aid per child in public elementary and secondary schools. Approve: 57.05%; Disapprove: 42.95% FAILED

Please note that several of these amendments are either exactly identical or essentially duplicative. If one of the amendments that failed, but received a majority of the votes cast on the question, had passed, subsequent amendments on that topic would have been unnecessary. Therefore, while it is correct that Illinois would have adopted fifteen amendments, not just eleven, under the lower standard, it is also true that several of the amendments would have passed the first time and therefore not have been proposed again. A more realistic assessment is that Illinois would have voted upon fifteen or sixteen amendments and would have adopted twelve or thirteen of them.