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ILLINOIS REJECTS A NEW CONSTITUTION

BY WALTER F. DODD*

THE constitutional convention which assembled in Illinois on January 6, 1920, held a number of sessions running until September 12, 1922. On September 12 a proposed constitution was finally agreed upon for submission to the people on December 12, 1922. The chief reasons for calling a constitutional convention were (a) to modernize the tax system of the state; (b) to obtain a better and more simplified judicial organization; (c) to produce a short ballot, so that the voter would be able better to perform his duties; and (d) to provide an easier method for future amendments to the constitution, so that changes in the fundamental law of the state could be made when desired by the deliberate sentiment of the people.

The issue of Cook County representation became a serious one immediately upon the meeting of the convention; and this issue was largely responsible for numerous sessions and recesses. Under the constitution of 1870 all parts of the state are to be equally represented in proportion to their population. However, no reapportionment has taken place in Illinois since 1901, and Cook County though now having about forty-seven percent of the population has grown more rapidly than the remainder of the state and still has but thirty-seven percent of the representation in the two houses of the general assembly. The failure to reapportion the state as required by the constitution after each decennial cen-

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sus has been due to a developing fear upon the part of the rest of the state that Cook County will dominate both houses of the general assembly, and that a union of Cook County members may control the policy of state legislation with respect not only to Cook County but with respect to the remainder of the state as well. Many of the delegates to the Illinois constitutional convention from outside of Cook County felt for this reason that it would be necessary to limit Cook County representation permanently in both houses of the general assembly. Until it was possible to agree upon a compromise the other work of the convention was for a long time at a standstill.

The compromise finally agreed upon by the convention limited Cook County permanently to one-third of the members of the state senate; and provided that all parts of the state should be equally represented in the house of representatives upon the basis of voting strength rather than of population. The adoption of voting strength (the vote for governor being taken as a basis) would have reduced the representation of Cook County and of all other large industrial communities of the state, as well as certain mining communities, because of greater alien population in these parts of the state. Aliens of course count in the total population of the several counties, but a large proportion of aliens who cannot vote would reduce the representation of these areas. Cook County, for example, although entitled to forty-seven percent of the representation upon the basis of population, would upon voting strength have been entitled to between forty-one and forty-two percent.

The framers of the proposed constitution also provided that in a future constitutional convention the representation of Cook County should be forty-five out of one hundred twenty-one members, approximately thirty-seven percent. This was the proportion in which Cook County was represented in the constitutional convention of 1920-22, and would have been a permanent limitation. Under it Cook County would in a future convention for the revision of the constitution, have had thirty-seven percent of the total membership even though the population of this county may have advanced to perhaps sixty percent of the population of the state as a whole.

To some extent related to the issue of representation, was that as to the membership of the supreme court. The supreme court is composed of seven members, one chosen from each of

seven supreme court districts. The theory of the constitution of 1870 was that these districts should be substantially equal in population, but under the census of 1920 the seventh district (having one member of the supreme court) contained fifty-one percent of the population of the state. The constitutional convention provided that the membership of the supreme court should be increased to nine and that three of these nine should be elected from the seventh district, but provided further that not more than two of the three members from this district should at the time of their election be residents of the same county.

Until a compromise was reached upon the issues of representation, it was difficult for the convention to reach an agreement upon other matters. Upon the larger issues which occasioned its assembling, the work of the convention was not fully satisfactory.

Next to representation, the issue of taxation was the most important and took the greatest amount of time. Illinois still relies for state and local revenue primarily upon the general property tax. Under this tax, intangible personalty largely escapes taxation, tangible personalty escapes to a large extent, and the methods of valuing real property are unsatisfactory. Many interests in the state were, however, opposed to the abolition of the general property tax, and felt that to abolish this tax would increase the burdens upon land. The plan finally agreed upon by the convention permitted the substitution of an income tax upon the income of intangibles for the taxation of such property on the basis of value. The proposed constitution also permitted, in addition to other taxes, the imposition of a general income tax upon all net incomes, and provided by its own terms for the exemption which might be made and for rates of progression, should the general assembly provide for this additional income tax.

With respect to judicial organization the work of the convention was more satisfactory than elsewhere. The proposed constitution would have permitted the consolidation of the courts of Cook County, the simplification to some extent of the organization of courts in other parts of the state, and would have given the supreme court power to make rules of pleading, practice and procedure. Although the theory of judicial rule-making power is a wise one, the proposed constitution was defective in that it sought to give the supreme court exclusive rule-making

power, without an effective check upon such power in the legislative department. In effect it would have set up two legislative departments for the state, with power over different aspects of the same matter, and would probably have led to serious difficulties. It is impossible to separate rules of procedure from the rules of substantive law, and to give one department of government exclusive authority over the one field, and another department exclusive authority over the other.

Under the existing constitution of Illinois cities have no home-rule powers. The proposed constitution would have given Chicago authority to frame its own form of government; and power, without the necessity for legislative action, to deal with certain of its purely local problems.

The necessity for a constitutional convention was largely occasioned by the difficulty of amending the constitution of 1870 through legislative proposal. But the framers of the proposed constitution were unwilling to propose an amending method much if any easier than that already in force.

There are styles in constitutions as in other human institutions. The recent constitutional convention in Illinois was a highly conservative group, more likely to follow the styles of the past generation than of the present. The initiative and referendum are present styles in constitution-making, but they found almost no support in this convention. Arguments in favor of the short ballot found little favor with the convention or in its proposals. In certain respects, however, present tendencies were influential. Something of municipal home rule was proposed for Chicago. Provisions for a more unified judicial system were agreed to, and the proposal to confer rule-making power upon the courts was approved. Unfortunately it is still the fashion to have detailed constitutions, and the proposal of the Illinois constitutional convention was in line with this policy; although as in other states there were some proposals leading toward increased power in the legislature. The amending process of the present constitution of Illinois belongs to the period of the Civil War, but the conservative group in the recent Illinois convention were opposed to anything that would materially if at all alter this situation.

When submitted on December 12, 1922, the proposed constitution was rejected by a majority of more than 700,000. No part of the state favored the new document. The popular major-

ity was against it in seventy-six of the one hundred and two counties. In Cook County it received the vote of only about one voter in seventeen.

The convention submitted its work as a single document, thus of necessity uniting all the forces opposed to any single change. It was urged to submit all important and controversial issues separately, as was done in 1870, but declined to adopt this policy. Had this been done, the people would probably have adopted a number of the proposed changes.

Another important factor in defeating the proposed constitution was the fact that in form it appeared to be an entirely new document. Where a state has been long in existence, a new constitution is in most of its provisions new only in name. This was true of the proposed constitution of 1922. Both the delegates to the convention and the people were satisfied with most of the provisions of the constitution of 1870 and did not desire to change them. But the convention decided that it could express many of these provisions in better form, and that they should be re-written. Were a constitution a mere literary composition, this decision would not have been dangerous. But a constitution is a legal document whose language had in large part been construed by the supreme court. To change it involved the danger of changing its meaning, unless the changes were made with great care; and great care was not exercised. Many voters for this reason rightly felt that adopting the proposed constitution was to embark upon an uncertain experiment. Not having the facilities for an intelligent judgment regarding each change, they suspected that in some cases concealed meanings had been introduced.

The chief factors in producing an overwhelming adverse vote may perhaps be summed up as: (1) taxation; (2) representation; (3) the fact that the voter must support or oppose as a whole, and (4) distrust (in many specific cases without basis but in others warranted) of a document whose language had been changed, even though admittedly no change of sense was intended.

The election upon the proposed constitution presents an interesting illustration of the operation of popular government. Inasmuch as the proposed constitution was submitted as a single document, the issues were too detailed and too complex to be understood by the voter. No one could understand all of the points presented without carefully analyzing every section of the

proposed constitution in relation to the constitution of 1870 and in view of the judicial decisions construing that constitution. The voters naturally and necessarily lined up in various groups, and this grouping was determined not so much by the merits of the case, as by the prestige of individual leaders and by party or other affiliations. There was some grouping also because of distrust of specific provisions of the proposed constitution.

The line of opposition to the proposed constitution was one of a type not often presented in an election. The organization of the democratic party was largely opposed because of the feeling that under the proposed constitution issues of apportionment and of supreme and appellate court membership would largely be determined by the dominant republican organization. The Small-Thompson factional organization in the republican party was opposed, apparently for political reasons, though ostensibly on matters of principle. The labor and radical groups were strongly opposed. The labor organizations opposed partly because of the feeling that increased power in the courts was in opposition to the interests of labor, and partly also because the conventions defeated the effort of labor organizations to have the terms of the constitution at least give some recognition to labor as a factor in the state. It may be interesting to remark that the colored voters of Chicago were more influential with the convention than were the labor forces. The colored influences obtained an express provision in the proposed constitution prohibiting discriminations on account of race or color. The labor forces found it impossible to obtain even a relatively meaningless provision with respect to themselves.

The teachers and various groups of other state and local employees opposed the proposed constitution on the ground that it would interfere with present laws with respect to employees' pensions. The fears in this respect were probably groundless, but had a large influence in bringing about the great majority against the proposed constitution.

The manufacturers and various other groups in the state opposed the proposed constitution on the ground that it was likely to increase the burdens of taxation. The same influence probably affected the professional groups and many people on fixed salaries.

The issue of Cook County representation was largely responsible for the tremendous vote against the proposed constitution in Cook County and the city of Chicago; though the tax

issue was also prominent, and the teachers and other governmental employees were highly influential.

It is perhaps more difficult to analyze the forces in favor of the proposed constitution, and less necessary because such forces were the less numerous. Some down-state support for the proposed constitution was obtained on the ground that it restricted the powers of Chicago and Cook County in the state legislature. This issue was expected by the supporters of the constitution to play a large and controlling part, but apparently did not do so in any part of the state. It was expected also that the farmers would be influenced in favor of the proposed constitution by the argument that the proposed document would make it more readily possible to tax intangible property, and would thus reduce the tax burden upon the farmers. However, it was urged on the other side that the farmers might be subjected to an income tax in addition to their property taxes, and the farmer vote was not decisively with the proposed constitution. The State Bankers' Association supported the proposed constitution as did also a referendum of the Chicago Bar Association.

Some civic organizations in Chicago were strongly in support of the proposed constitution. This support was based primarily on two grounds. The proposed constitution would have abolished the cumulative system for the election of the house of representatives. Some of these bodies regarded this as a sufficiently great gain to justify support. The proposed constitution would have given Chicago power to frame its own charter, and wider powers with respect to matters of a purely local concern. This was regarded by some as a highly desirable gain, and as compensating for the many serious defects of the proposed constitution.

The majority against the proposed constitution was united only in opposition, and not in the reasons for such opposition. In this case, as in most complex issues submitted to popular approval, the majority was but the combination of a series of more or less diverse minorities. The minority was also composed of diverse elements. There is no such thing as unified mass opinion controlling the settlement of complex governmental problems. The election upon the proposed constitution did not and could not turn on one issue alone. The mass decision of such a complex issue was of necessity more or less unintelligent. Few voters had the opportunity or possibility of deciding either for or

against the proposed constitution with reference to its merits as a whole. As in all other cases of such a character, the issue was settled by reasoned support of or opposition to the document as a whole, coupled with opposition or support because of specific reasons. And the great mass of voters, as usual, acted upon the basis of the old rule of "follow your leaders."

The assembling of the Illinois constitutional convention of 1920-22 will not have been in vain. The constitution of Illinois needs change as badly now as it did before; and the defeat of the proposed constitution was not an expression of satisfaction with things as they are. It may be remembered that a proposed constitution was rejected in this state in 1862, but a new constitution adopted in 1870. It is not likely, however, that another constitutional convention will be called in the near future. Effort will now be centered upon the attempt to obtain an easier method of amending the present constitution through legislative proposals.

The experience of Illinois raises an issue as to whether the constitutional convention is now as useful as in earlier days. Certainly there has been a tendency in recent years for conventions to submit their work as separate propositions, rather than to propose complete constitutional revisions. Illinois is for some years at least now forced back upon the individual amending process through legislative proposal. Unfortunately this process is in Illinois so hedged about that the amendment of the constitution is substantially impossible. Little enthusiasm can ordinarily be developed behind the proposal to change an amending process; for people are normally more interested in specific proposals than in the machinery by which later reform may be accomplished. However, a consistent effort will now be made in Illinois to amend the amending clause in such a manner that the more needed constitutional changes may be obtained through legislative proposal.

The Minnesota constitution is not so difficult to amend as that of Illinois, though the required popular vote does make serious difficulty. The Minnesota constitution is older than that of Illinois, and if numerous changes are desired it may be that a constitutional convention would be a useful instrument for governmental progress. If an amending system were relatively easy, the Illinois experience may well point to the desirability of using that machinery, unless such a complete overhauling of a con-

stitutional document is desired as to make the use of the amending process difficult and perhaps useless.

Certain local factors contributed to the failure of the recent Illinois convention. This body did not develop effective leadership, and popular respect was weakened because of its numerous sessions and recesses, covering a period of more than two years and a half. The most serious difficulty, that occasioned by the presence of one county containing nearly half of the state's population, fortunately does not present itself in many other states.

Leaving aside matters personal to the membership of the Illinois convention, and those peculiar to conditions in Illinois, it may be wise to suggest that conventions in other states will profit by avoiding certain serious blunders in the methods of the Illinois convention. The first of these serious blunders was that of attempting to rephrase all of the provisions of the constitution. Clear and satisfactory English is as important in a constitution as elsewhere; but when constitutional language is satisfactory and has been construed by the courts for a number of years, it is best to leave well enough alone. It is best to do this for two reasons: (1) Any effort to tinker with such language may lead to unforeseen results, however careful the drafting may be done; (2) The rephrasing of constitutional provisions whose meaning is not intended to be changed will almost of necessity lead to a suspicion on the part of the voters that some concealed design is being carried out through such change.

Drafting a constitution is not the mere preparation of a literary composition. The constitution is an important legal document, dealing with many technical matters. Nor can the framers of a constitution ignore the past. If framing a constitution for a new state, they will use language which has already been judicially construed in other states. If revising an existing constitution, they will be dealing with language already judicially construed in that state. To change language for the sake of change (even though its literary flavor may be improved) is to run the risk of overturning desired constructions, and sacrifices the important for the unessential.

The Illinois convention did not devote sufficient attention to the manner of presenting its proposal to the people. Beginning with Michigan in 1908, the framers of constitutional changes have in a number of instances adopted by official vote brief statements

of the purpose of each proposed change. Such notes aid not only in the popular presentation of a convention's work, but also in the subsequent judicial construction of that work if approved. An effort by the Illinois convention to explain each proposed change would have led to the detection of many defects in the proposed constitution before correction was too late. Not only did the convention not seek to explain its work in detail, but the official publications issued in support of the proposed constitution gave the impression of disingenuousness and concealment.

The recent Illinois experience also shows the danger of submitting as a single document the terms of a proposed constitution containing numerous controversial issues. New York in 1915 substantially adopted this plan, and the work of the New York convention met the same fate as that of the Illinois convention. Illinois in 1870 submitted a proposed constitution, but at the same time proposed for the separate vote of the people eight distinct questions which seemed more or less controversial or doubtful in character. This plan has the advantage of reducing the number of separate issues to be voted upon. The Ohio constitutional convention of 1912, the Massachusetts convention of 1917-18, and the Nebraska constitutional convention of 1920 all submitted their work in the form of separate and distinct amendments to existing constitutions. This plan involves the difficulty of submitting too many separate issues, if the proposed amendments are numerous; but has in recent years worked more satisfactorily than the plan of submitting the work of a constitutional convention as a single document.