

1-1-2011

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Recommended Citation

Ann M. Lousin, *Essay: How to Hold a State Constitutional Convention in the Twenty-First Century*, 44 Loy. L.A. L. Rev. 603 (2011).
Available at: <https://digitalcommons.lmu.edu/llr/vol44/iss2/7>

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ESSAY: HOW TO HOLD A STATE CONSTITUTIONAL CONVENTION IN THE TWENTY-FIRST CENTURY

*Ann M. Lousin**

Although few states have held constitutional conventions in recent decades, there is renewed interest in holding state constitutional conventions in the twenty-first century. This Essay explains the author's views on holding such a convention, based on her experience in Illinois and with a view toward a California convention. The author believes that the two keys to a successful convention in the twenty-first century are extensive preparation and transparency. Only with preparation can the delegates and staff of a convention draft a document worthy of adoption. Only with great transparency of the process, especially in the Internet age, can the citizens be confident that the proposed constitution is truly "theirs." The author offers ten tips for holding a convention.

It is inevitable that one or more of the fifty American states will hold a state constitutional convention within the next few decades. Too many states are facing issues that will require substantial revisions of their constitutions. These issues include the near financial collapse of many state and local governments, the inability of many states to provide an ethical and efficient framework for their governments' operation, and the increasing reliance both of local governments on the state and of the states on the federal government for revenue and even guidance.¹

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1. See Ann M. Lousin, *Challenges Facing State Constitutions in the Twenty-First Century*, 62 LA. L. REV. 17, 18–20, 25–26 (2001) (discussing trends toward national uniformity and centralization of state education financing).

Although I believe that most of the problems mentioned also require a drastic change in citizens' attitudes, I realize that the problems are due to more than just the absence of political will. State constitutions drafted a century or more ago frequently hinder the resolution of problems in the twenty-first century. When Illinoisans voted to hold a constitutional convention in 1968, the state's extant constitution was almost a century old.² One of the rallying cries of proponents of holding a "con con"³ was to change "the century-old constitution," to update "the horse-and-buggy constitution."⁴ Like many post-Civil War state constitutions, the 1870 Illinois Constitution contained many detailed restrictions on government.⁵ As Illinois's population and complexity increased, many of these restrictions seemed at best quaint, and at worst barriers to the development of the state.

One of the salient features of the 1970 Illinois Constitution is the relative lack of restrictions on government. Indeed, many of those who wish to amend the Illinois Constitution have wanted to impose *more* restrictions, especially upon the taxing and spending powers. I regard this view as folly. Most citizens want *more*, not *fewer*, services from their governments at all levels.⁶ I believe the most desirable "restrictions" on government are, first, a system of checks and balances among the branches and offices, and second, as much transparency as can be maintained without impinging on individuals' rights of privacy.

Let us assume that a state, such as California, wished to hold a convention sometime after 2011. The state would first have to follow the procedures set forth in its current state constitution.⁷ To some extent, each state constitution restricts citizens' power to modernize that constitution, rather like the "dead hand" of the testator trying to determine how his heirs should spend their inheritance.⁸

2. See ANN M. LOUSIN, *THE ILLINOIS STATE CONSTITUTION: A REFERENCE GUIDE* 13 (2010).

3. A constitutional convention is commonly referred to as a "con con."

4. JANET CORNELIUS, *A HISTORY OF CONSTITUTION MAKING IN ILLINOIS* 118 (1969).

5. See LOUSIN, *supra* note 2, at 9–13.

6. See Lucy Madison, *Do Americans Really Want a Smaller Government?*, CBSNEWS.COM (Oct. 11, 2010), http://www.cbsnews.com/8301-503544_162-20019244-503544.html.

7. See CAL. CONST. art. XVIII.

8. See, e.g., FLA. CONST. art. XI; GA. CONST. art. X; ILL. CONST. art. XIV; N.J. CONST. art. IX.

However, to a remarkable extent, most state constitutions also seem to leave many issues concerning a convention to the state legislature. The citizens of the state, through their elected representatives, can usually decide when the convention is to be held and how the members of the convention (usually called “delegates”) are to be elected and compensated.⁹ To a great extent, a legislature can make or break a convention through its power to regulate the elections, to fund the convention, and to increase or decrease the chances of the convention’s success. If I were advising a state on holding a convention, I would first speak with the Governor and the state legislators. If they see a convention as a “rival body”—a group of people that could undermine their authority—they may well doom a convention from the outset. Ever since 1787 when the Congress organized under the Articles of Confederation called a convention, legislatures have regarded con cons with skepticism, if not downright hostility.¹⁰ Sometimes the legislatures try to co-opt a convention and create a constitution that reflects only the views of the incumbent legislators.

Very often, the best that one can hope for is a kind of benign neglect. That is what happened in Illinois from 1968 to 1970.¹¹ Many legislators were surprised that the voters chose to call a constitutional convention in November 1968. Although several legislators who took office in January 1969 took an active role in drafting the statutes providing for the election of the delegates and for convention funding, most thought they had more important things to do. Indeed, with the state in the midst of one of its periodic economic crises, the legislative leaders were more interested in passing a state income tax that would pass muster under the 1870 state constitution than in shaping the form of a convention that might (or might not) draft a new state constitution. They passed the statutes, they provided funding, and then to a great extent, they ignored the convention. Although incumbent legislators were able to run for slots as delegates, only two legislators also served as delegates.

9. See 16 C.J.S. *Constitutional Law* §§ 29–30 (2010).

10. See LOUSIN, *supra* note 2, at 20; Ann M. Lousin, *Another Con Con? It's Our Choice*, CBA REC., June 1988, at 30, 30 (discussing how the legislature is unlikely to submit to a call for a constitutional convention).

11. For a discussion on Illinois’s history see LOUSIN, *supra* note 2, at pt. 1.

Regardless of how a state decides to hold a convention, there are certain givens that I believe should be common to all con cons in the twenty-first century. I propose ten of them, rather like a “Letterman’s Top Ten” list. In this case, however, I shall roll these tips out in the order in which a state would address these issues, not in the order of importance. All of them relate to the two keys to a successful convention: *preparation* and *transparency*.

*1. The People of the State Must Have Conversations About
What They Want for Their State and Begin Preparing Studies of the
Issues That Truly Relate to the Constitutional Problems
Hindering Their Goals for the State.*

This is really a dual suggestion: (1) the people of the state must begin thinking about what they consider their goals to be, and (2) those planning a convention must begin preparing serious academic studies relating to the people’s goals.

First, it is now clear that the general populace, especially the voters, must have a role in deciding what the state’s goals are. Of course, some of those goals are contradictory: I want more services, and I want to pay lower taxes; or I want governments to hire the best people available, and I want them to hire more members of my family or racial/ethnic group, irrespective of their formal credentials; or I want laws enforced against other people, but not against me.

In 1968 it was possible for those campaigning for a convention to be vague about their goals for Illinois. The 1870 Illinois Constitution was clearly so restrictive and so outmoded that it was possible to say that “the great state of Illinois deserves a constitution fit for the twentieth century.” As best we can glean from the literature, there were few specific proposals regarding goals. The constitution later drafted and adopted made some drastic changes in government: strong civil rights provisions; strengthened gubernatorial vetoes; a shorter executive ballot; more safeguards for judicial ethics; the strongest municipal home rule provisions in the country, a matter of great importance to Chicago and other large cities; a sophisticated budget and finance process; abolition of one hated tax, the *ad valorem* personal property tax, and modernization of the tax structure; state-wide boards regulating elections and education; and a modernized process for amending the state constitution. As I recall, none of these, with the possible exception of

repealing the *ad valorem* personal property tax, was mentioned during the 1968 campaign for a call for a con con.

The same scenario continued during the primary and general elections for delegates to the convention. I remember that occasionally the candidates spoke in general terms about “streamlining government,” or “getting rid of the deadwood in the constitution,” or “taking judges out of politics,” or even “making government honest and accountable to the people it is supposed to serve.” However, few candidates were willing to risk losing votes by making overly specific proposals. The only possible exception was, again, repeal of the *ad valorem* personal property tax, which was never collected on individuals in the Chicago area, but which imposed a significant burden on other Illinoisans. Yet, there was opposition to repeal, chiefly from school officials in rural areas, who asked where they would find the revenue to fund schools.

If California—or any other state—were to hold a convention in the near future, such vague statements would never pass muster. Voters want to know, with relative specificity, what candidates stand for and, in the case of a convention, what the purpose of calling the convention would be. This requires finding a consensus among the public about the state’s goals. It also requires determining a consensus about what is and is not a constitutional problem. I call this a “state-wide conversation.”

Second, the people of the state must conduct serious studies of their problems and decide whether their problems relate to their constitution. While it is not my place to tell Californians what their constitutional problems are, I have visited California approximately every two years since my first visit in 1950 as a small child. I have watched the population of this incredibly rich and diverse state explode. I have seen California, one of the largest states in terms of square miles,¹² become the most populated state in the union.¹³ The resources of California, both in its land and its people, make it the

12. U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, UNITED STATES SUMMARY: 2000 CENSUS OF POPULATION AND HOUSING 18 tbl.11 (2004), available at <http://www.census.gov/prod/cen2000/phc3-us-pt1.pdf>.

13. *Id.* at 29 tbl.17.

eighth-largest economy in the world.¹⁴ All by itself, California has a larger economy than the Russian Federation.¹⁵

May I suggest that the California Constitution contains provisions that were well suited for an expanding California, but that are not as appropriate for a mature economy with a stabilized population? Article IV, section 12(d), as I read it, requires that two-thirds of the members serving in each house of the California legislature approve the state budget.¹⁶ This requirement has been in place since 1933.¹⁷

When I first heard of this requirement, I recognized it was one suited for a budget that must establish the infrastructure for an expanding state. From the end of World War II until the end of the twentieth century, California's population increased on average by approximately 28 percent every decade.

Year	California Population	Percentage Increase
1930 ¹⁸	5,677,251	--
1940	6,907,387	21.668%
1950	10,586,223	53.259%
1960	15,717,204	48.468%
1970	19,971,069	27.065%
1980	23,667,764	18.510%
1990	29,760,021	25.741%
2000	33,871,648	13.816%
2010	37,253,956	9.9857%

I was a witness to this expansion as I traveled across the state from 1950 to 1990 and saw deserts become suburbs on a yearly

14. *California Economy Ranking Among World Economies*, ECONPOST (Nov. 8, 2009), <http://econpost.com/californiaeconomy/california-economy-ranking-among-world-economies>.

15. *Id.*

16. See CAL. CONST. art. IV, § 12(d).

17. See Joe Mathews, *The Rule That Wrecked a State*, L.A. TIMES, May 30, 2010, at A40; see *Special Report: Democracy in California*, ECONOMIST, Apr. 23, 2011, available at <http://www.economist.com/surveys/downloadSurveyPDF.cfm?id=18567784&surveyCode=%254e%2541&submit=View+PDF>.

18. For data on California's population in the years 1930–1990, see U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING 26 tbl.16 (1990), available at <http://www.census.gov/prod/cen1990/cph2/cph-2-1-1.pdf>. For data on California's population in 2000 and 2010, see PAUL MACKUN ET AL., U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, POPULATION DISTRIBUTION AND CHANGE: 2000 to 2010, at 2 (2011).

basis. Such expansion requires an enormous investment in infrastructure, especially in schools and public safety. From my experience with the Illinois legislature, I realized that a two-thirds requirement also meant that one-third plus one person in any of the two chambers could thwart the will of the rest of the legislature. Those who blocked passage of the budget would be in a unique position to demand concessions, that is to say, projects for their districts. In Illinois, we would say that they would play “come to Mama.” The legislative leaders would have to give the bloc that was obstructing passage of the budget whatever it wanted in order to secure passage of the budget. Although I have never observed the California legislature in action, some Californians have told me that this scenario is substantially correct.

The question confronting Californians is whether the requirement of an extraordinary majority to pass the state budget seriously impedes the budget process of a state with a large, but no longer dramatically expanding, economy. One may argue that the requirement would take a broad consensus on expenditures by the legislative branch. One may also argue, as I have intimated, that the requirement gives a small bloc the power to leverage its votes to increase local expenditures—what might be called earmarks or “pork.”

In assessing the role of the extraordinary-majority requirement, Californians would benefit from studies conducted by the many excellent university centers around the state. To avoid leaving some out inadvertently, I shall not try to name them. From 1968 to 1970, Illinoisans were fortunate in having centers, especially the Institute of Government and Public Affairs of the University of Illinois, to prepare studies during the decade preceding the convention, including specific studies dedicated to the two years preceding the convention.¹⁹ It would be an understatement to say that these studies were invaluable; truly, the convention could not have functioned at all without the preparatory work by these scholars.

19. See LEAGUE OF WOMEN VOTERS OF ILL., CONSTITUTIONAL CONVENTION STUDY GUIDE: DOES ILLINOIS NEED A NEW CONSTITUTION? 4 (2008), available at http://www.lwvill.org/ConCon_%20StudyGuide.pdf.

2. *The People Must Hold Hearings Throughout the State and Involve As Many Constituencies As They Can; It Is Important That Every Group Be Able to Express Its Views, Even Ventilate Its Anger.*

This tip is really a corollary to the first one. In the twenty-first century, many of us communicate via the Internet. The media, whether the newspapers or the broadcast media, still play a role, too. I fully realize that the state-wide conversation mentioned in the first tip will take place through computers and the media, especially among young people.

There is no substitute, however, for face-to-face meetings. Public officials, including the President, have found that their town hall meetings enable them to hear from many different people, notably from those who do not call in to talk shows or comment on blogs.²⁰ While it takes courage to stand up in a public forum and tell off a public official, there are those who prefer speaking face-to-face to writing to an official.

Equally important, public officials find that going into communities they do not know and speaking to the residents can be an enlightening, if somewhat disconcerting, experience. Some public officials have told me that they never realized the extent of poverty—and the sense of hopelessness that accompanies poverty—until they drove into neighborhoods and saw block after block of boarded-up storefronts, of cracked sidewalks covered with glass shards, and of streets scarred with potholes. When they began to talk with the residents, they heard voices of anger and frustration. From those voices came a greater understanding of those residents.

When the Illinois Constitutional Convention began in December 1969, the delegates decided to hold open-mike hearings around the state.²¹ Some reporters derided this as “the road show.”²² Yet, ever since then, delegates have said that the experience of traveling to parts of the state they had not seen and listening to their fellow Illinoisans, whose accents they had not heard before, enabled the

20. See Peter Nicholas, *Obama Speaks with Young Voters*, L.A. TIMES, Oct. 15, 2010, at A10.

21. Samuel W. Witwer, *Federalism and Constitutions: The Illinois Experience*, 63 NAT'L CIVIC REV. 16, 20 (1974).

22. *Id.*

delegates to see Illinois as one state.²³ Downstaters, who often think of Chicago and its metropolitan area as just the corrupt big city that siphons money from Downstate, were amazed to ride the buses and trains in the city and to talk with long-time residents of the ethnic neighborhoods. The biggest eye-opener of all came when visiting the poorest African American neighborhoods. Chicagoans, who are even more parochial, were equally surprised by their visits to small towns and rural areas. The distances that a family had to cover to shop and that the children had to cover to attend school showed them why their fellow Illinoisans south of Interstate 80 greatly valued highways. As many delegates have told me over the years, “that was when we became Illinoisans.”

Few states are more diverse than Illinois, but California is one of them. No one race is in the majority.²⁴ Anyone seeking to form a consensus as to the goals of Californians and the constitutional problems that may prevent achievement of those goals would have to meet with and listen to as many Californians as possible.

3. After the People Decide Which Issues Are Truly Constitutional Ones, They Must Begin Establishing a Consensus Among the Major Political Players and Civic Groups Regarding Which Issues They Want Addressed and, in a General Way, Regarding Possible Solutions to the Constitutional Issues.

In any constitutional revision process, the major political parties and civic leaders play a leading role. Occasionally, I hear someone say that “the people” must take a convention away from the political leaders and ignore them. This is nonsense. It is the political parties that are best suited to turn out the vote for a call for a convention, for the election of delegates, and for the ratification of the proposed constitution.

Inevitably, there would be civic groups favoring and opposing a constitutional convention and favoring and opposing the consideration of specific issues at a California convention. There would be groups wanting to repeal Proposition 13 and groups

23. See LOUSIN, *supra* note 2, at 22.

24. *California Quickfacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06000.html> (last updated Nov. 4, 2010) (showing that there is no racial majority in California when “White persons” and “persons of Hispanic or Latino origin” are categorically separated).

wanting to expand it. There could even be civic groups based on ethnic and racial concerns.

To me, one of the chief constitutional issues that the major players and groups would have to address in California is whether to keep, abolish, or amend the initiative and referendum process. Either the legislature or the voters can initiate the process.²⁵ As a result, there are sometimes a dozen or more propositions on the ballot.²⁶

More significantly, it is common for dozens of petitions for initiatives to be circulating at any one time. I saw this in action in the late 1980s in Palm Springs. I was in a shopping center when several young people at a table asked if I was a registered voter. I said I was, but not in California, and turned to the young people at the next table. They were asking registered California voters to sign a petition for legislation on a hot button issue, I think gun control. Then I walked down the mall and saw another pair of tables. Some other young people were registering voters and asking for signatures on a petition on the opposite side of the hot button issue. It was clear that political operatives had hired the signature gatherers on both sides of the issue to acquire signatures for use by political candidates. Probably, the signature gatherers did not care if the proposition ever reached the ballot; they had already achieved their goal of obtaining a targeted mailing list, which is golden in political campaigns.

A few years ago, I told a California legislator that the California legislature was “tricameral,” not bicameral, because the voters formed a third chamber. The voters can, in fact, bypass the legislature through the initiative and referendum process. I asked him if it was true, as I suspected it was, that the legislators sometimes punted controversial issues to the voters. He ruefully admitted it was true. He said that no legislator wanted to vote in favor of raising taxes to support new programs and that sometimes legislators told lobbying groups that if they wanted a program they should get signatures on petitions to put that program on the ballot. No legislature has the ability to shift responsibility for decisions about legislation to the voters as much as the California legislature has.

25. CAL. CONST. art. II, §§ 8, 9 (providing the initiative and referendum process respectively).

26. *See, e.g.*, CAL. SEC’Y OF STATE, HISTORY OF CALIFORNIA INITIATIVES 10–13, available at http://www.sos.ca.gov/elections/init_history.pdf (last visited Nov. 20, 2010).

Clearly, any discussion of the principal constitutional issues facing California would include the initiative and referendum system. To a lesser extent, it would also include the recall of elected officials. Californians have told me it is common to have recall petitions circulated at cocktail parties, again with little thought of actually placing the recall issue on the ballot. The petitions are simply a way of obtaining the signatures of those who might support a future opponent of the incumbent whose recall is being sought. I think of this as an “enemies list,” one that President Nixon would have envied.

The issues I have just identified—initiatives, referenda, and recall—are truly constitutional issues. Before a convention begins, the major political players and civic leaders in California would have to decide whether they wanted the convention to address these issues and, at least in a general way, how they wanted the convention to change these time-honored processes.

4. From the Very Beginning, the Process Must Be Open; the Participants Must Flood the Airwaves and the Internet with Serious Information Every Day So That the Public Does Not Feel It Is Being Left out or Kept in the Dark.

In the twenty-first century, it is common for many citizens to obtain information and form views about public issues via the broadcast media and the Internet. Those planning a convention must have a public relations, public information, or press department that meets with all aspects of the media every day and keeps the public informed.

In 1787, it was possible for the federal constitutional convention to meet in secret and forbid delegates to take notes or keep minutes. Since then, state constitutional conventions have been much more open.²⁷

From the time that the Illinois General Assembly passed the resolution placing a call for a convention on the ballot in November 1968, those seeking to hold a convention regularly communicated with the public. They organized a public relations campaign as part of their political campaign to persuade voters to adopt the call for a

27. See, e.g., LOUSIN, *supra* note 2, at 22; Janet Cornelius, *Illinois Constitution-Making in the Spirit of the Sixties, 1969–1970*, 9:1 ILL. HIST. TCHR. 44, 44 (2002), available at <http://www.lib.niu.edu/2002/ih910244.html>.

convention. Neglecting to utilize a public relations counter-campaign was one of the shortcomings of those who opposed holding a convention.

Communicating the various views about a convention is part of the state-wide conversation mentioned in the first tip in this Essay. If the public feels left out of the process, any product of the convention is probably doomed from the outset.

5. From Early on, There Must Be Serious Academic Studies of the Situation the State Is in and the Possible Solutions to Its Problems. A Con Con Is an Academic Seminar; It Is Serious Business, and Very Costly.

As mentioned in the first tip, it is imperative that there be serious academic studies of the issues facing a convention before the convention begins. The academic centers at universities must take the lead. If they do not, the lobbying groups representing specific interests will provide their own “studies” of state problems. Predictably, the solutions the lobbyists offer will be skewed toward their positions.

Although the convention will have its own research staff, that staff will simply have neither the time nor the resources to conduct exhaustive research on a state’s problems or possible solutions. There are now excellent comparative studies of the fifty states and how those states have attempted to solve constitutional issues. Some form of a constitutional study commission must organize and assemble this research before the delegates are seated.

When the delegates take their seats and begin their deliberations, there will be time for little else but consideration of proposals and compromises. Although the staff will be able to conduct some research, most of that research will be what I call “spot research” or “day research”—that is, research that must be completed in one day. There will be no time for thoughtful studies.

During the run-up to the 2008 campaign concerning a call for a constitutional convention, one young Illinois lawyer told me that he wanted to hold a convention “so that all the people can gather in Springfield and hold a debate about the future of the state.” I told him that a convention would probably cost \$80 million and that it was not an academic seminar, that if he wanted an academic seminar he should find a foundation that would sponsor such a seminar and

find Illinoisans willing to spend time debating with each other. I asked him what would happen if his “great debate” produced a bad product—defined as something he did not want. He hesitated, and then said that if it were a bad product, the voters in their wisdom would vote it down. Clearly, he did not understand the seriousness of a convention process.

Over the past few decades, many state constitutional conventions have taken place. Few of them have produced draft constitutions acceptable to the voters.²⁸ Although there can be many reasons why the voters have rejected the drafts, one seems to be that the delegates simply “debated” instead of preparing for a convention and hammering out proposals during the convention. A convention is a serious and expensive business. The overwhelming majority of the preparation must occur before the convention begins.

*6. The Convention Must Operate Independently from Other
Parts of the Government, Especially the Legislature.
It Must Have Its Own Staff, Public Relations Department, and
Administrative Structure.*

As mentioned before, legislatures often think of constitutional conventions as rival legislative bodies. Because legislatures have extensive staffs and often have the best research departments in state government, they may want to assign their staffs to the convention. This is an absolutely terrible idea.

In an era where state governments are trying to save money, it will be tempting for a convention simply to take legislative staffers on a “seconded” basis. The legislative staff would be temporary employees of the convention and return to their regular jobs after the convention adjourned. This might save some money. Moreover, the staffers already have expertise. However, the staffers will always remember that their primary employer is the legislature. This could be fatal to the independence of the convention.

During the Illinois Constitutional Convention, the staffers were separate from the legislature. Because the legislature was not in session during most of the convention, several of its secretaries were seconded to the convention. One or two members of the nonpartisan research unit of the legislature also took leave to work for the

28. See generally Lousin, *supra* note 1, at 26–27 (discussing the need for flexibility in drafting state constitutions, which would impliedly lead to voter approval).

convention. However, all of the committee counsel and over 90 percent of the staff were not regular legislative employees.

The public relations department of the convention was also separate from the state government. Some members of its staff were former members of the press corps, while one or two were newly minted journalism graduates. They were excited about being members of a once-a-century event—a con con—and represented the convention enthusiastically to the press. In those days, of course, there was no Internet. In the twenty-first century, a public relations department would have to establish an Internet framework, as well as communications with the print and electronic media outlets.

7. The Convention Must Have a Set Starting Date and a Budget That Contemplates the Ending of the Convention Within a Year in Order to Encourage the Delegates to Finish Their Work Expeditiously.

The statutes establishing the framework for the convention must set the times for delegate elections and when the convention must begin. In all probability, the Governor will open the convention and administer the oath of office to the delegates.

It is equally important that the convention's funding be adequate, but only for no more than one year. That will encourage the delegates to finish their work within several months. The saga of the two most recent Illinois con cons is illustrative.²⁹ The Fifth Illinois Constitutional Convention opened in 1920 to much promise. Most observers realized that the fifty-year-old constitution was already out of date. However, the Republicans, who commanded a clear majority at the convention, never seized the opportunity to draft a constitution within six months. Instead, the delegates of both parties frequently recessed the proceedings and were at best dilatory when they did return to business. After two years, the public and both political parties had lost interest in the endeavor, and the draft constitution that was eventually submitted went down in ignominious defeat.

The delegates to the Sixth Illinois Constitutional Convention were aware of that disaster. The convention opened on December 8, 1969. For most delegates, who were paid on a per diem basis when

29. For a discussion of Illinois's history see LOUSIN, *supra* note 2, at pt. 1.

they attended sessions, the money ran out by the end of the summer. By August 1, 1970, although most of the clerical staff remained, most of the committee staffs had returned to other jobs or to graduate school. Aware that some delegates might stop attending if the convention dragged on beyond the point of endurance, the delegates convened virtually every day toward the end of August. It concluded its business on September 1, 1970, and the Closing Day Ceremonies took place to great fanfare and substantial press coverage on September 3, 1970.

Unfortunately, in the era of a twenty-four-hour news cycle, the public's attention span is much shorter. In 1970, nobody read "yesterday's newspaper." Today few watch news more than a few hours old. A constitutional convention must take that short attention span into account and wind up its work within a year. If there has been adequate preparation before the convention, a few months of proceedings should be perfectly adequate to draft a constitution.

*8. The Convention Must Establish Television and
Internet Coverage of All of the Floor Sessions and
As Much of the Other Proceedings As Possible.*

Here, again, we see the effect of the Internet and the twenty-four-hour news cycle. We also see the effect of C-SPAN, which has a devoted, if relatively small, viewer following.³⁰ Who would have thought thirty years ago that we could have news on television every single minute of the year? CNN showed it was possible, and other networks followed suit.³¹ Who would have thought that some people (and I am one) would spend hours watching congressional speeches, committee hearings, and even proceedings of the British Parliament? C-SPAN showed it was possible. Consequently, many Americans *expect* to see governmental proceedings on television or, with increasing frequency, the Internet.

None of this was available, let alone expected, in Illinois forty years ago. The floor proceedings and committee meetings were open to the public, but only a few dozen seats were available. However,

30. See *General Viewer Information*, C-SPAN, http://legacy.cspan.org/about/viewer_info/index.asp?code=VSTATS (last visited Mar. 2, 2011) (describing that C-SPAN has 28.5 million viewers per week with regular viewers watching an average of 12 hours per week).

31. See John Kiesewetter, *In 20 Years, CNN Has Changed the Way We View the News*, CIN. ENQUIRER, May 28, 2000, at 1G.

there is now a public-affairs channel for the state called The Illinois Channel. It is similar to C-SPAN and is available on cable. Although it does not regularly televise proceedings of the Illinois General Assembly, it does provide excellent insights into state and local government. If Illinois ever held another convention, everyone would expect the proceedings to have “gavel-to-gavel coverage” on the public-affairs channel.

Of course, the desire to observe the proceedings would probably not extend to committee meetings. The plethora of such meetings would make television coverage impractical. It would be enough if they were, as they usually are, open to the public.

*9. The Convention Should Consider Submitting
Several Controversial But Discrete Issues Separately from the
Main Document; These “Separate Submissions” Can Rise or
Fall on Their Own and Deflect Negative Emotions Away from the
Main Body of the Draft Constitution.*

In Illinois, as in many states, there is a tradition of carving out several discrete and controversial issues from voting on the main body of the document.³² Some of these issues are so controversial, and public opinion about them so evenly divided, that placing one side of the issue into the main body would prove fatal. If these issues can stand or fall on their own, then whichever way the voters decide, it will not affect the main document. In those situations it is better to let the voters decide the issues separately.

Illinois has followed this pattern since 1848. In 1970 there were four such separate submissions. Two of them concerned emotionally charged issues: (1) whether the voting age should be lowered from twenty-one to eighteen and (2) whether Illinois should abolish the death penalty in its constitution.

There were two other separate submissions, both of which affected state government more directly. One was whether Illinois should change its unique system of electing members of the Illinois House (three members elected from each district with cumulative voting available) to the usual single-member districts or “first-past-the-post” system. The majority of the Downstate delegates favored

32. For a discussion of Illinois’s history see LOUSIN, *supra* note 2, at pt. 1.

changing to single-member districts,³³ largely because they saw the old system as favoring Chicago and the Democratic Party. Chicagoans clearly felt otherwise. In the end, the voters decided to keep a variation on the old system.³⁴ In 1980, the voters changed their minds and decided to vote for an amendment that cut the size of the Illinois House by one-third and abolished the old system in favor of single-member districts.³⁵

The other major structural issue was how to select judges. Illinois has long elected most of its judges.³⁶ In 1970, most Downstaters and virtually all of the African Americans in Illinois wanted to continue to elect judges.³⁷ So did many members of various Chicago ethnic groups.³⁸ In 1970, the voters decided to keep on electing most judges as opposed to having the governor appoint judges from lawyers nominated by merit selection commissions.³⁹ Both judicial selection and election of the Illinois House were enormously fractious issues that at various times almost broke up the convention. Separating the votes on those issues from the vote on the main document made it possible for voters to ratify the main document without being distracted by controversies over certain issues.

What would be the similar hot button issues in California? Perhaps the initiative and referendum process and the recall system would be such issues. It is hard for me, a non-Californian, to say.

33. See David Kenney, *No Cumulative Voting*, ILL. ISSUES, Nov. 1976, at 12, available at <http://www.lib.niu.edu/1976/ii761112.html>. Cumulative voting is the process by which a voter who can cast more than one vote can “cumulate” his votes and cast them for one or more candidates. In the Illinois system, there were three seats to be filled. Each voter could cast up to three votes among the candidates, of whom there were usually four in the general election. A voter could cast one vote each for three candidates, could cast one-and-a-half votes each for two candidates, or could cast all three votes for one candidate. This last option was called the “bullet vote” and helped a relatively small but organized minority faction elect one representative to the Illinois House. Typically, there were two Democrats and one Republican in House districts from a Democratic stronghold like Chicago; there were also two Republicans and one Democrat in House districts from Republican strongholds in the suburbs.

34. See LOUSIN, *supra* note 2, at 29.

35. ILL. BUS. ROUNDTABLE, ILLINOIS’ PROPOSED CONSTITUTIONAL CONVENTION 26 (2008), available at <http://www.illinoisbusinessroundtable.com/documents/Con%20Con--IBRT%20report.pdf>.

36. JAMES D. NOWLAN ET AL., ILLINOIS POLITICS: A CITIZEN’S GUIDE 145 (2010).

37. See Ann M. Lousin, Will Illinois Hold a Constitutional Convention 15–16 (Sept. 3, 2008) (Working Paper), available at <http://ssrn.com/abstract=1262467>.

38. *Id.* at 15.

39. *Id.* at 14; see LOUSIN, *supra* note 2, at 140.

Certainly, however, there are passions in California over particular issues, as there are in many states, and it is wise to consider separating those issues from the complex compromises in the main document.

10. The Ratifying Referendum Must Be Held Soon After the Convention Ends Because Long Campaigns Bore Voters and Favor Both Extremists and Those Who Are Opposed to Any Change.

Most observers think that any ratifying referendum must be held no earlier than two months and no later than six months after the convention ends. The precise time depends on the state. It is necessary to send copies of the proposal to the voters and to mount a state-wide information campaign before the referendum. Of course, it is also necessary to allow proponents and opponents time to mount their campaigns, especially if there are separate submissions.

In any state there is always a faction opposed to any change. In Illinois, the population in the southern third of the state rarely votes for any kind of change. In most states, organized labor has not favored calling constitutional conventions or adopting draft constitutions. In any given state, there are taxpayers who believe that any constitutional change will result in bigger government and higher taxes. The longer a campaign is, the stronger the “nay” voices become.

It is hard to estimate the best length of time between the conclusion of the convention and the ratification referendum. Each state is different. But in an era of instant communication, presumably no state need wait longer than four months and probably should wait no longer than three months before holding the ratification referendum. On this issue, as on so many others, fifty states will have fifty different solutions.

CONCLUSION

This Essay is an expansion of my remarks delivered via Skype on September 24, 2010, to the *Rebooting California* Symposium at Loyola Law School Los Angeles. I have tried to outline ten points I consider salient in holding a modern state constitutional convention. Certainly, each state is different from all others. As the century goes on, my views on these ten tips may change. I have used my home state of Illinois as an example because I am most familiar with its

experience. I have referred to possible issues in California because that is the state most actively considering holding a convention, and because it was my audience on September 24, 2010.

The keys to any successful convention are preparation and transparency. A successful convention takes hard work; it takes good will; and it takes the ability to compromise to draft a decent constitution and persuade the voters to adopt it. Is it worth it? That is like asking whether it is worth it to work toward the best government for the people of a state.

