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Taking a look at 'original intent' in 1787 and 1970

Two score years ago, March 23, 1970, was my first day as a research assistant at The Sixth Illinois Constitutional Convention. I bless that day because my position was a fabulous opportunity to learn, to contribute to Illinois, and to work with some of the most remarkable people I have ever known.

My column, "Miracle in Springfield," published in the Law Bulletin on Dec. 8, 2009, was my tribute to that convention. Here is my description of something I observed at the convention: original intent.

"Original intent" is the theory of constitutional interpretation that seeks to determine the intent of the drafters of the constitution at the time of drafting and to interpret the document exactly the way the drafters understood the words. Some "originalists" expand the concept to include the intent of those who ratified or voted for the constitution, as well.

The most ardent champion of original intent is Associate Justice Antonin Scalia. He and his fellow originalists seek to interpret the constitution strictly according to the presumed "intent" of the 55 people who met in Philadelphia in 1787. However, neither Scalia nor his fellow-originalists were present at the convention. I doubt that any of them has ever participated in a constitutional convention at all.

I have participated in a constitutional convention and I know that there are only two intents of the convention:

First, the delegates want to produce a document that the majority of them approve and that the rest will accept, or at least not oppose.

Second, the delegates want to produce a document that the ratifying body — elected members of the federal ratification conventions in 1787, and the voters of Illinois in 1970 — will approve.

All of the substantive issues are secondary. They are all subject to compromise in order to achieve those two "intents." Indeed, if the delegates do not compromise, the two intents are profoundly unattainable.

Let's look at the parallels between the Founding Fathers' efforts in 1787 and those in Illinois in 1970. The best source of the federal delegates' intent in 1787 is probably James Madison's letter to Thomas Jefferson, then our Ambassador to France. On Oct. 24, 1787, Madison, a key figure at the convention that had adjourned a month earlier, sent a copy of the constitution to his mentor. His accompanying letter described the debates over the "four great objects" of the convention (Madison's papers, 10:207-15.)



Law and Public Issues

By Ann Lousin

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First, the delegates sought to balance the powers conferred upon the executive and legislative branches. The result of this compromise is Articles I and II of the U.S. Constitution. Second, the delegates sought to balance the powers between the national government and the various states. Third, the delegates sought to find a way to satisfy the differing interests in the country, which presumably meant the increasingly mercantile North, the at the time slave-holding South, and the expanding West. Finally, they sought to adjust, in Madison's words, "the clashing pretensions of the large and small states."

The delegates who met in 1787 knew that they must resolve these issues among themselves before they could try to persuade the ratifying conventions elected in each state to approve their products. The most famous solution was "the Great Compromise." It gave the states equal representation in the Senate, which pleased the small states, and gave the states representation based on population in the House of Representatives, which pleased the large states. The most infamous compromise was the decision to count a slave as "three-fifths of a person" in establishing population for the House of Representatives. However, Madison's letter shows that the delegates compromised on issues every day, particularly on the "four great objects" he mentioned.

In the end, 39 of the 55 delegates signed the constitution and worked diligently for its ratification. Even the opponents, the "anti-Federalists," eventually saw that the compromises were necessary and that the delegates could not have produced a better document that was acceptable to themselves and to the ratifying conventions.

The Illinois experience I observed in 1970 was strikingly similar. The delegates compromised on many issues. One issue was the balance of power between the executive and

legislative branches. Another was the balance of power between the state government and the more than 6,000 local governments.

The competing commercial and agricultural interests Madison alluded to in 1787 had their counterparts in Illinois in 1970, as did many other vocal interests. The Illinois delegates debated revenue powers, regulation of commerce, education, and the environment. Unlike 1787, the delegates did not debate slavery, but they did debate civil rights. In considering all these issues, the delegates compromised among themselves and with an eye toward what would be acceptable to Illinois voters.

Sometimes "intent" can be surmised from what delegates omit mentioning, too. The federal convention did not address a bill of rights, partly because the delegates knew that if they began enumerating specific rights they would offend members of one or another of the ratifying conventions. The thought of failing to get their work product adopted stopped them from entering into that sphere altogether.

Delegates to the 1970 Illinois convention agreed upon a modernized Bill of Rights, but could not agree upon one aspect: abolition of the death penalty. They knew that the voters were as divided over this issue as the delegates were and that some voters would vote against the proposed charter if it addressed capital punishment at all. The solution was to submit the issue of abolition of the death penalty separately from the vote on the main document so that this one issue would not "sink the ship." They also submitted three other contentious issues separately. Their intent was to help insure adoption of the main document.

In the end, all but a few of the 116 delegates to the 1970 Illinois convention supported the document and worked diligently for its approval by the voters. Those who did not support it found themselves marginalized during the campaign. Since then, most of the dissenters have become reconciled to the constitution as "the best that could be achieved" and even glory in their role as Founding Fathers of the Illinois Constitution.

That was "original intent," both in 1787 and 1970. "Framers" are practical people, not political theorists. Their goal is and should always be to get the job done. I saw that in 1970 and can glean that from Madison's letter in 1787.

Note to the people of Illinois: In 1970 you entrusted me, a callow law school graduate, with the task of serving you on a great endeavor. You even paid me \$4,125. I tried to prove worthy of your trust. I owe you a debt I can never repay. It was an honor to serve you, and I thank you with all my heart.