

"States out of Nature:  
The Legislative Founding of Democracies"

"Appendix: The 1870 Illinois State Constitutional Convention"

Richard Bensel  
Department of Government  
Cornell University

E-mail: [rfb2@cornell.edu](mailto:rfb2@cornell.edu)

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## Appendix: The 1869 Illinois Constitutional Convention

The delegates to the Illinois Constitutional Convention assembled in the state capitol building in Springfield at about half past two o'clock on December 13, 1869.<sup>1</sup> This day and place had been designated in the same law that had authorized the election in which the delegates had been selected. And to that extent and that extent only the convention was the creature of the legislature that had enacted the law.

The first entry in the convention record is an announcement by Lawrence Church:

Gentlemen: The Convention will please come to order, and that we may proceed by some system, (as we do not know the difference between the delegates here, and others), I move that the Hon. William Cary, from Jo Daviess county, take the chair, as temporary President of this Convention.

As is the case in almost all constitutional conventions, there was no recognized presiding officer when the delegates assembled. There were also no rules and recognized membership. Thus, when Church called for order, he was acting upon his own authority, an authority that need not be recognized by any other person in the chamber. His reason for so acting tacitly rested upon practical necessity: "that we may proceed by some system" because, in fact, there was no procedural structure in place at that moment. One of the consequences of that lack of structure was that "we do not know the difference between the delegates here, and others" who might also be in the chamber. In other words, the membership of the assembly had not been defined. As a first step in remedying these defects, Church moved that one of his colleagues "take the chair." This motion, while utterly ordinary in an of itself, was still quite audacious in that no one had, in a parliamentary sense, recognized him for offering the motion. In fact, without rules and in the absence of a presiding officer, no one could recognize him for the purpose of offering this motion.

In most such situations, the delegates informally and consensually agree to the temporary elevation of one their number as leader for purpose of

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<sup>1</sup>. Debates and Proceedings of the Constitutional Convention of the State of Illinois...1869 (Springfield: E.L. Merritt & Brother, 1870), p. 1. Unless otherwise noted, all the information in this section comes from this source.

organizing the convention.<sup>2</sup> But this was not the case here. Ignoring Church's attempt to claim the floor, James Allen offered his own motion:

Gentlemen of the Convention: I desire to put in nomination Col. John Dement, of Lee county, as temporary President of this Convention. This is that gentleman's third term of service as a member of a Constitutional Convention, and I think that such an honorable experience is sufficient reason to justify conferring on him the honor of temporarily presiding over this body.

After Charles McDowell seconded his motion, Allen immediately called a vote:

Gentlemen: As many as are of opinion that Col. John Dement, of Lee, be elected temporary President of this Convention, will say Aye. [*`Aye!' `Aye!' And applause.*] Those of the contrary opinion, will say No. [*`No!' `No!' and confusion.*]

Allen then summarily announced that: "The ayes seem to have it. The ayes have it. [*Applause and confusion.*]" This would have seemed to have given Dement the post. However, Church immediately responded by calling a vote on the nomination he had made.

Gentlemen: As many as are in favor of Hon. Wm. Cary for temporary President of this Convention will say Aye. [*`Aye!' `aye!' `aye!' and applause.*] The contrary, No. [*`No!' `no!' and applause and laughter. `Cary!' `Cary!' `Dement!' `Dement!'*]

Although the record does not show that Church summarily pronounced his own candidate to have been elected, we can safely assume that was what happened. In any event, the two nominees ascended opposite side of the podium. Dement went up the stairs "from the democratic (south) side of the hall" while Cary went up "from the republican (north) side of the hall." When they met at the presiding officer's chair, "they shook hands amid great laughter and applause."<sup>3</sup>

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<sup>2</sup>. Although this generalization rests on an examination of the records of dozens of constitutional conventions, it still must be hedged in that it is impossible to know for sure just what happens outside the official transcript of the proceedings. The most common practice nonetheless appears to be the unanimous selection of the oldest delegate for this post, a practice that ostensibly encourages the appointment a neutral and experienced leader. The absence of a competitive election and the arbitrary nature of the selection tend to support the conclusion in the text.

<sup>3</sup>. The symbolism of this ascension was not lost on the convention secretary

Dement and Cary had been sponsored by their respective party contingents, Dement by the Democrats and Cary by the Republicans. In nominating them for the post of temporary president of the convention, Allen and Church had played the role of spokesmen for their respective parties. All the delegates of course recognized that was the subtext for their actions, thereby partially legitimating what they had done. For example, Church's nomination of Cary was not viewed as arrogant effrontery but as collective audacity on the part of his party. Allen's response was similarly interpreted but from the perspective of the opposite party. However, that subtext and the obvious good humor with which the delegates enjoyed the spectacle should not blind us to the fact that this was a collision of wills unmediated by any consensual understanding as to what constituted the rules of the game. When Dement and Cary shook hands atop of the podium, neither one of them was the temporary leader of the convention.

Lawrence Church once again proposed a solution to the assembly's dilemma.

Presidents-I say Messrs. Presidents, for there is some doubt in the minds of the members of the Convention as to who should be addressed by me as President. In order that this question may be settled, and settled, too, in such manner as gentlemen in deliberation should settle such questions, I move that there be a division of this Convention, and that none except members of the Convention vote; and, therefore, that those in favor of Hon. Wm. Cary for temporary President take the north side of the hall, and those in favor of Hon. John Dement take the south side of the hall, and that Hon. Milton Hay and Hon. John Scholfield be appointed tellers to ascertain which has the larger number. With that, all, I suppose, will be content.

There are several aspects of Church's motion that deserve attention. First, although he, along with the rest of the delegates, understood that neither of the two "presidents" had been formally elected to the post, he appealed to them for recognition because, under the circumstances, that was all he or anyone else could do. The assembly absolutely required a leader in order to proceed with the organization and, if Dement and Cary were not to play that role, the delegates would be thrown back into the same quandary from which

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and should not be lost on us. Like the rest of the nation, Illinois was still recovering from the Civil War in 1869 and the state, like the nation, was deeply divided into a southern section dominated by the Democratic party and a northern region controlled by the Republicans. Almost all the delegates at this convention were strongly tied to one or the other of these two parties and, almost unconsciously it seems, gravitated toward either the northern or southern ends of the chamber in order to be with their party colleagues.

they had just emerged. So Church was now appealing to them for recognition where, originally, he had just stood up and announced his motion. Second, he had moved that the assembly vote on the two nominee-presidents, dividing up the hall into Republicans and Democrats. This proposal simultaneously recognized the quasi-authority of the two nominee-presidents (in that Church was asking them to permit him to offer this motion) and impeached that authority (by tacitly admitting that neither of them legitimately occupied their position without an election).

Thirdly, Church had implicitly acknowledged that almost all the delegates in the chamber shared a structuring "identity" that both needed to be taken into account as the assembly organized and just might facilitate that organization. The party affiliations of the individual delegates deeply informed just how they interpreted the situation and, at the same time, appeared to promise a solution. Finally, Church "supposed" that all the other delegates would be "content" with his proposal because consensus would solve all the procedural contradictions attending this highly irregular, from any parliamentary perspective, proceeding. In fact, consensual understandings are the routine method for resolving the opening dilemma in democratic foundings and this situation, although far more complicated than most, was no more pregnant with procedural contradictions than any other.<sup>4</sup>

However, James Allen was not about to concede the initiative to Church, declaring:

Mr. President: The gentleman is out of order. I think it is too late for the gentleman to call for a division, inasmuch as the division was not demanded until after the presiding officer had taken his place at the desk.

Here, Allen first declares Church to be "out of order," a phrase describing an action that violates parliamentary rules and therefore is either meaningless or, if the individual persists, merits suppression by the presiding officer. By his use of the singular "president," Allen clearly has in mind Dement, his nominee for the post.<sup>5</sup> And when he says that "it is too

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<sup>4</sup>. Another situation in which consensus resolves otherwise thorny parliamentary complexities is the role of unanimous consent agreements in the United States Senate.

<sup>5</sup>. A little later that day, Allen, in fact, stated that he believed "the gentleman from Lee [Mr. Dement] was properly elected temporary President of this Convention" because, after he (Allen) had "announced" the result of the vote, no one had "asked for a division, according to parliamentary law." As we have seen, this was a rather self-serving interpretation of what had

late" for a division, he also clearly implies that Dement has already been elected president of the convention. Underlying all of this is Allen's expectation (or, perhaps, hope) that Dement will now step forward to the podium and claim the office by declaring Church, in fact, to be "out of order." If Dement had done this, there would have been, of course, no reason for the Republicans to have respected his construction of the situation. The result might have been pandemonium within the chamber if the Republicans contested the Democratic coup de etat or, alternatively, they might simply have bolted the convention. But, whatever happened, the opening dilemma was not going to be resolved in that way.

However, the two nominee-presidents had evidently been discussing the situation up on the podium. John Dement now stepped forward to the "president's desk" and made a suggestion.

I hope that my friends in this Convention will not insist upon the position of the gentleman from Crawford [Mr. Allen.] I understand it to be entirely satisfactory to my very worthy competitor at my side [applause and laughter] that the motion of the gentleman who spoke first on this subject shall prevail. For the sake of harmony, and in order that we may commence our deliberations here in that kind and harmonious spirit which the people expect of us, and which is due to our relations to our constituents and to our character as the chosen representatives of the people of this great State, elected in the exercise of a conservative and generous spirit, I hope that we will have no dispute as to who is to be either your temporary or permanent President; and if there is a majority of a single one here against me, I entreat my friends, for the sake of harmony, to support the successful gentleman in all his efforts to aid in the organization of your honorable body.

It was now Cary's turn to speak:

Gentlemen of the Convention: I cordially acquiesce in the remarks which have fallen from my honorable competitor, Colonel John Dement, of Lee county; and I suggest that the roll be called, or a division be had, as mentioned by the gentleman from McHenry [Mr. Church], and I will be satisfied with the result, be it as it may.

By aligning himself with Church and Cary, Dement clearly undercut Allen's ostensible role as spokesman for the Democratic party. Allen's objection now appeared entirely personal inasmuch as Dement, the intended beneficiary of

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actually happened.

that objection, refused the assistance. By nominating him as the Democratic candidate for temporary president, Allen had, in effect, created Dement's authority as a significant figure in the Democratic ranks, if not his party's leader in the chamber. Dement had now used whatever authority he had to oppose Allen's objection. But more importantly, because we might otherwise overlook the fundamentals of this situation, Dement and Cary were collectively claiming the role of temporary president(s) of the convention. They could not have made this claim had they disagreed. But by concurring they could go a long way toward establishing their own legitimacy, even if that legitimacy was limited to the mere taking of a single vote. Since their authority ultimately rested upon the saliency of party identities as a structuring feature of the assembly, their ability to suggest that a consensus did, as Church had originally suggested, exist with respect to a division of the assembly again demonstrated that the strong influence of party alignments within the chamber must be taken into account in any resolution of the opening dilemma.

#### The Convention Roll:

The delegates appear to have warmly embraced the proposal for a division. At least the record shows that the chamber redounded with the sound of "Call the roll." Lawrence Church formalized this request with a "Let the roll be called," adding "I ask for the yeas and nays." In response, the delegates yelled out "Ayes and noes, ayes and noes." However, just as the delegates were readying themselves for the vote, Allen again sought the attention of the presiding officer: "Mr. President--." At the same time, the temporary secretary of the convention began the roll, calling out "John Abbott--."<sup>6</sup> Allen persisted, ultimately commanding the attention of the chamber as he announced another objection:

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<sup>6</sup>. The attentive reader may well wonder where this temporary secretary came from. As with all convention officers, he had to be elected by the assembly and, thus far, the assembly had not even been able to elect the temporary president who would subsequently preside over the election of the other officers. The temporary secretary, George H. Harlow of Tazewell county, had not been elected at this point in the proceedings but was already, evidently with the tacit consent of the delegates, serving in that capacity. Otherwise, there would have been no one to record their deliberations or, in the present moment, call the roll. The record was subsequently "back-dated" by giving Harlow a title and office at a point in the proceedings when, in fact, he possessed neither.

Mr. President: The question I raise is that this motion is not in order. The motion which was made by the gentleman from McHenry [Mr. Church] was that there be a division; that tellers be appointed to take the vote of the Convention.

Allen had seized on the procedural discrepancy between Church's original motion and the recorded vote that had just begun.<sup>7</sup> Although technically correct, we should remember that the assembly was still operating without rules. Allen was thus appealing to a common understanding of parliamentary procedure which most of the delegates had brought with them when they came into the chamber. When Church tried to correct his mistake by withdrawing his original motion for a division, Allen immediately reinstated it:

Then I desire to renew the motion. We have no other means, in our present condition, of taking the vote of the Convention except by tellers.

Given the subsequent course of the assembly's deliberations, Allen was apparently objecting to a recorded vote because the convention roll had not yet been approved. Thus, the technical grounds for his objection (that Church had changed the method of voting from the division specified in his original motion) was a stalking horse for his real motive. Evidently, Allen did not want a recorded vote because it would imply that the convention roll, whatever it might be, had been approved and, at least from his perspective, there might be something or someone on that roll that he might want to change. Because a division of the chamber in which tellers simply counted the delegates on each side of the question would not involve approval of the roll, Allen wanted the chamber to use that method of voting.

From our perspective, however, the situation again displays the irresolvable qualities of the opening dilemma. The convention simply did not have a recognized membership that could legitimately do the voting, regardless of whether the delegates were simply counted or their names were called off the roll. A division of the chamber partially veiled the dilemma by making it seem as if the members "naturally knew" who had membership

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<sup>7</sup>. Church had apparently changed his mind about a division of the chamber (in which the delegates would have been merely counted without recording their individual votes) and was now requesting a recorded vote in which individual positions would be set down in the convention journal.

standing and who did not and would exercise social pressure or some other means to prevent those who did not from voting. But the bottom line in this founding assembly, as in all founding assemblies, is that there is simply no democratic method for determining the membership.

Allen appears to have temporarily won this point and the assembly was preparing to vote for temporary president by tellers. However, Dement raised the leadership question once again. Standing at the president's desk with Cary right beside him, Dement made light of their predicament.

There is an embarrassing question before the Chair—the question of who has the right to put the question. [Laughter.]

In formal parliamentary terms, he of course was correct; the assembly did not yet have an acknowledged presiding officer who could put the question to the delegates. However, the sociology of the situation very strongly implied that, if Dement and Cary worked together, the delegates would follow their lead. At this point, one of the delegates, Milton Hay, suggested that

for the sake of harmony and peace, that the gentleman at the Secretary's desk be allowed to read the roll; and that the Convention hear the roll which he has made up.<sup>8</sup>

Church immediately backed Hay's suggestion: "Let us hear the roll."

The "roll" was a copy of a list of delegates compiled from the official election returns received from the counties. The list had been prepared by the Illinois Secretary of State and then given to the convention. In many situations where a state constitutional convention or lower chamber of legislature was initially organized, such a list served as a temporary roll of the membership until the assembly could determine for itself who would or would not be a member. It should be emphasized that this list had no more authority or standing in this convention than what the delegates wished to give it.<sup>9</sup> Onias Skinner, one of the delegates opposed to using this list,

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<sup>8</sup>. The "gentleman at the Secretary's desk" was a more accurate way of naming George H. Harlow, the yet-to-be-elected convention officer referred to in the previous note.

<sup>9</sup>. This list was thus not an authoritative intervention by the Illinois Secretary of State into the affairs of the constitutional convention. The Secretary of State was simply powerless to determine who belonged in the convention because, once the delegates had gathered together, they were free to organize their assembly however they wished. Although the delegates would not have interpreted the list in quite this way, we can view it has a very

succinctly summarized the limits of the secretary's role.

[T]he duty of the Secretary of State is this, and no more; to attend at the opening of the body; to furnish the body with such documents, paper, stationery, etc., as the delegates may require. He has no power to present a roll for the government of this body in any respect whatever. ...He has no power to come here with his roll, and say, A, B, and C are delegates to this Convention. The roll in his possession has no more vitality than simply an abstract copy of record in the county court, which is filed in his office and preserved as a mere duplicate.

While Skinner was undoubtedly correct, there was simply no easy way for the assembly to determine for itself who would or would not be a member. One of the preconditions for that determination, for example, was that the assembly know who should vote on the determination, a precondition that threaten to tie up the assembly in an infinite regress.<sup>10</sup>

The convention secretary then read the list of delegates for the information of the assembly. This, however, was not the same thing as a calling of the roll in which members would be asked to respond to their names. Such a call would constitute a major step toward determining who was a member of the convention because those whose names were not called would then have to establish their credentials another way. Church now moved that the roll be formally called and asked the delegates who favored calling the roll to answer "Aye" and those who opposed to respond "No." The record states that the "vote was accordingly taken," apparently solely on Church's initiative. Immediately after the vote, Church declared that the "ayes have it." However, many of the delegates disagreed, yelling out "No, No."

Because his initiative had encountered intense opposition, the whole proceeding fell to the floor and the assembly again was at a stalemate. John Dement once more stepped into the breach:

Let me remark to the Convention that it seems to have no other officers selected from this honorable body to preside on this very momentous occasion, than the Hon. Mr. Cary and myself. We are perfectly willing that the questions that are propounded to the Chair shall be announced to the Convention by us, alternately, and in that way this matter can

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useful means of bridging the opening dilemma in the sense that it suggested how the delegates could proceed in the organization of the assembly. However, if the list had met opposition from a sizable number of delegates, it would have been useless.

<sup>10</sup>. The assembly could not vote on a motion to determine their membership because that vote would require that they already had determined their membership in order to know who was qualified to vote.

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easily settled.

This proposal prompted Elijah Haines to suggest an alternative method of creating a convention roll.

I am a member [of the convention], for I have a certificate to that effect. I make this suggestion, then (and I think it is the only one that can be made), that our certificates be all handed up to these two gentlemen [Dement and Cary]; that a roll be prepared by them, and that the members entered upon that roll proceed to select a temporary President.

The certificates to which Haines referred had been issued by the county or counties that composed the districts from which the delegates had been elected. The delegates (or at least most of them) had carried these certificates to Springfield and Haines was suggesting that they now be turned over to nominee-presidents for the purpose of constructing a convention roll. This proposal would thus have sidestepped the mediating role of the Illinois Secretary of State, although the information on the certificates in the possession of the delegates should have been identical (or nearly so) to the election returns reported by the Illinois Secretary of State.

At this point, Skinner raised three issues that seemed to him to counsel against a speedy organization. The first was that "some claiming their seats in this Convention, as delegates, are not upon [the Secretary of State's] list." That meant that the list could not be used as a temporary roll for the convention as it organized. The second was that some of the delegates had not yet arrived in Springfield. He urged that the organization be postponed until all of them had arrived and could participate in the proceedings. Finally (and rather technically), he said that opening the convention at 2:00 in the afternoon was an arbitrary interpretation of the law. While that law designated December 13, 1869, as the day the convention should assemble, it did not say at what hour on that day the convention should assemble. In all this, Skinner was clearly speaking as a Democratic partisan. He felt that a postponement would allow the party to realize its full strength within the assembly and, when it did, the roll could be perfected to the best advantage of his party.

Skinner, however, had himself informally agreed to 2:00 as the hour for opening the convention. Lawrence Church must have been a little taken aback as he pointed out that the time had been selected in response to "a special

request of the gentleman and his friends." Henry Bromwell, himself a Republican, then entered a full explanation into the convention record.

If the President will permit, I will say in response to the gentleman, the idea of convening at two o'clock arose in this manner: The gentleman from Crawford [James Allen, a Democrat] and myself, talked about an hour, and suggested to each other that some hour should be fixed; and we agreed, at first, that it should be three o'clock, and see who wanted it at that hour. We talked to half dozen or so, and it was suggested that the days were so short—three o'clock being pretty near dark—that two o'clock would be better; and we agreed to that, and everybody fell in with it, until perhaps thirty or forty had been spoken to on both sides of the Convention. That is all there was of that, so far as the time was concerned.

So the time had been informally agreed upon prior to the opening of the convention. The time had been set by consensus in a discussion heavily structured by partisan identities. If Skinner now impeached the legitimacy of that informal agreement, he was implicitly attacking either the integrity or good sense of his own party colleagues. But this apparently did not bother him, for he replied.

Gentlemen: We come here upon grave business. It is said that it has been suggested among some delegates that we should meet here at two o'clock. How many were these delegates, and what were their names? What authority have a dozen, or even thirty or forty delegates to dispose of the organization of this Convention? And how remarkable it is that in pursuance of that very polite little negotiation between gentlemen, posted unquestionably in parliamentary rule, these doors fly open...If I may use a strong expression, I will say that decency would require (when this special little bargain has been made in violation of all law) the giving at least of the whole day for the members elect to appear—because the law says it. The law says `this day;' and if the whole day, what authority have these gentlemen to make their arrangement among themselves, and congregate at such time as they please, all that they may happen to find hanging around the hall of the State house, in one office or another, or in this room, and insist upon the calling of this roll?

Because there were 88 delegates in the convention, the consultation among "thirty or forty" of them had actually been quite inclusive. And, if Church had correctly stated that Skinner himself had requested that time, Skinner's

objection was both rather tardy and uncollegial.<sup>11</sup> However, we should not miss the point that no one could invoke an authority, other than this informal agreement, for designating 2:00 as the hour for opening the convention. On this point Skinner was absolutely correct.

But Skinner was already embarked on a tactic that he hoped would gain his side the time they needed. And Church recognized it for exactly what it was: a filibuster.

If the gentleman will indicate about what time it is necessary for him to speak, we will proceed with the calling of the roll, and let him at the same time go on. It has been suggested to me that there is a limit to the length of time which a gentleman, claiming to be a delegate, may speak.

The problem here was that the assembly had not adopted formal parliamentary rules and there was thus no means of shutting off debate. So Church was suggesting that Skinner, if he so wished, could continue to address the assembly while the roll was called. For their part, the Republicans were ready to concede what appeared to be the major stumbling block: Church, as the party spokesman, thus proposed "that the name which is said [by the Democrats] to have been omitted from the roll be inserted therein, and that the business go forward."

Skinner ignored Church's offer and launched into a long harangue in which he repeated, again and again, that the Secretary of the State had no authority to even offer a list of delegates to the convention and that the doors to the chamber had been "swung open" at 2:00 PM in utter disregard for the rights of the delegates to the convention. Although he did not admit that he was simply playing for time, Skinner urged that the convention "should now adjourn until tomorrow at twelve o'clock meridian." Presumably, he would have yielded the floor for that purpose but no one stepped forward

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<sup>11</sup>. At one point, Skinner described the decision to open the convention doors at 2:00 PM as "fraudulent" and part of "a determined and preconcerted plan," adding "I enter my protest against this whole machinery, from beginning to end, of carrying out a preconcerted scheme, of seizing, irrevocably, upon power in the absence of others who are soon to be here, and which affects their rights." Note that the "scheme" to which Skinner refers are only an important consideration because the convention has not yet organized and, thus, has no accepted means of making ritually proper and respected decisions. If the convention were organized, such a "scheme" would merely be an acceptable strategy pursued by political actors, working within and with full knowledge of the parliamentary procedures (and thus opportunities) open to them and their opponents.

to take up his suggestion. Although we might consider his rhetoric a little over-heated, Skinner did justify his request in language that accurately referenced the central core of the convention's legitimacy: its direct and unmediated connection to the popular will. Referring to the members of both parties who had struck the informal agreement on time, Skinner charged that:

You present to an intelligent world, palpably and fairly--and you cannot avoid the consequence, you cannot conceal the fact from the good people of Illinois and the civilized world--this spectacle of an attempt at seizure upon, and organization of, a Convention of the people of the State of Illinois, based upon the bargain of three or four, five or six individuals; based upon the action of the Secretary of State, without the color of law.

Supposing you execute it, what do you accomplish? Do you do anything else but tell the world, in language not to be mistaken, that you had consulted, that you had arranged, that you had bargained and fixed upon the plan which, if it worked well, would give you the control of the organization of the Convention of the people of the State of Illinois? You cannot excuse yourselves when the facts come before the people. I do not care what may be the legality; you never can satisfy the fair-minded people of Illinois with these proceedings. They will declare them a trap, and if you succeed, they will regard you as culprits in a moral sense. Now, why do it? Why this haste? Evidently there is pre-concert among a portion of the delegates of this Convention. This is all admitted. This is all proclaimed to the world.

This the world must know.

The problem with all this, of course, is that Skinner had nothing to offer as an alternative beyond adjournment to the next day. And the time he set for opening the convention on that day was even more arbitrary, because it reflected only his own personal will--a will made extraordinarily powerful because he held the floor and would not give it up.

Still, there might have been something to his request that there were delegates who, for one reason or another (including misinformation as to when the convention would open), had not yet arrived in Springfield. Westel Sedgwick, one of the Republican delegates, rose to the occasion:

I ask the gentleman how he knows the delegates are not all here? The roll has not been called, and the presumption is that they are here.

Sedgwick was, of course, suggesting that Skinner was protecting the rights of phantoms. If all the delegates were, in fact, in the chamber, then there would be no harm in proceeding. The problem, from Skinner's perspective, is

that the method of determining whether all the delegates were in the chamber (i.e., calling the roll) was the very thing he wanted to prevent.

So Skinner simply answered Sedgwick by saying, "The presumption is that, according to all human experience, they are not here." He then continued his harangue, again with the evident purpose of filibustering the proceedings. Here, too, Skinner reminded his colleagues of the rather unusual position in which they were placed. If they were to make an error in the organization, there would be "no appeal" to a higher authority because there was, with reference to the state of Illinois, no higher authority than the constitutional convention itself. And, "as there is no remedy, and you [referring to the Republicans] have the power" to effect a partisan organization and thus "can effect a revolution [in which] to carry out your preconcerted plans—you are invulnerable, because there is no power but the great Jehovah can avert the consequences." This would be "a revolution, according to the understanding of mankind. And if you can consummate it, make the revolution effectual—then there is no remedy." Once more, Skinner's rhetoric is perhaps over-blown but still rested on a fundamental recognition that a state of nature existed within the bounds of a constitutional convention, a state of nature that did not admit and could not admit of any higher authority than what would be created out of it.

In the midst of Skinner's observations on revolution and Jehovah, James Allen asked if he might "interrupt a moment." Allen then brought the filibuster back to earth by identifying the crux of the problem and offering a solution:

It seems there are some errors on this roll. I desire to propose to the gentlemen of this Convention an adjournment until some hour tomorrow. And we ask that the two gentlemen (laughter) prepare a corrected list of the members sent to the Convention, so that they may present it. We are anxious to have a speedy organization.

Because he, like Skinner, was a Democrat, Allen was probably speaking for the both of them and other party colleagues as well. And, like Church previously, he seized on the quasi-leader roles of the "two gentlemen," Dement and Cary, as possibly effecting a compromise by asking them to jointly correct the list of delegates provided by the Illinois Secretary of State. In the meantime, the convention would adjourn until the next day.

Church responded for the Republicans by stating that he favored, as consistent with the "forms of law," an alternative method of correcting the roll in which

the roll-call would have proceeded. Any gentleman who is not upon the list would have been placed upon it, and our temporary organization would have been effected; and then, if adjournment should have been required to further the organization of the Convention, of course we would have been governed by the circumstances. All we ask is, that we may effect a temporary organization, and not be here to lag and mope away the day, but act like reasonable men.

In the course of his remarks, Church deplored the way in which Skinner had characterized the Illinois Secretary of State who "should be treated with proper respect" and termed Skinner's harangue a "factious interruption...made for what purpose we cannot conceive."

Allen and Church had thus offered two alternative methods of creating a temporary roll of delegates. In some ways, the two methods appeared very similar in that they would both use the Illinois Secretary of State's list as a template, would correct mistakes on that list, and would be carried out more or less consensually. But there was a very important difference between them that meant everything in terms of party interests in the convention. Allen's method would allow the convention plenary authority, through its two quasi-leaders, to construct the roll. Because the Illinois Secretary of State's list would be nothing more than a convenient starting point for this construction, there could and probably would be substitutions in which one man claiming to be a delegate would be displaced by another. Church's method, on the other hand, would have conferred much more legitimacy upon the Illinois Secretary of State's list by making it prima facie evidence that a particular man should be considered a member-elect. If the right of a man to a seat at the convention were challenged, it was not entirely clear what would happen because Church had himself talked about corrections. But the ordinary course was, in state and national legislatures, to note the challenge and give those men their seats until the challenges could be resolved. Since the parties were so closely balanced in the convention and because most of the challenges would be made by Democrats, the Democrats feared that Church's method would advantage the opposition. As Skinner put it,

I perceive my friend [Church] is anxious that this temporary

organization should take place at once; that A, B, C, and D should have their seats until further proceedings. If this is done, the impression will be that it is for ulterior party purposes.

For our purposes, however, this possible partisan advantage is rather unimportant. What is more significant, on the other hand, is that these two alternatives were equally arbitrary in that, despite Church's appeal to the "forms of law," there was simply no way to confer more legitimacy upon one, as opposed to the other. The opening dilemma was thus just as firmly ensconced as it ever was.

Church answered Skinner by saying that

We [the Republicans] have no partisan object to accomplish by pressing this matter. But we repeat that the hour of two o'clock was the hour, as every one, I suppose, knows, arranged for our meeting, with the concurrence of all parties. And now I will suggest that this body adjourn until tomorrow morning at ten o'clock. This is proposed with the understanding that this opposition [evidently referring to Skinner's  
filibuster] will be will be withdrawn, and that no further  
embarrassment  
will be offered to the organization of this Convention.

So Church was acceding to Allen's request for an adjournment while attaching conditions. However, there was still no apparent agreement on a method for constructing a roll.<sup>12</sup>

Stating that he wanted to make an explanation, Allen admitted that "I did agree with my friend here [Mr. Bromwell] that the hour of two o'clock was a very convenient time for us to get together," thus confirming that a consensus on time had been reached between the parties. He then explained that the Democrats had, just after the convention opened, "received a telegraphic dispatch from a member elect, that owing to the severe illness of his father he had not been able to leave. He will probably be here tonight or tomorrow." So, in fact, one of the motives behind Skinner's filibuster was merely to delay the proceedings.

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<sup>12</sup>. At this point, Orville Browning rose and offered a third method for constructing the roll. Describing himself as "[s]tanding outside of all party organizations" (and thus ostensibly a neutral in this partisan conflict), Browning suggested that the two quasi-leaders, Dement and Cary, construct a roll on the basis of the county certificates the delegates had carried with them to Springfield and report that roll back to the convention when it met again the next day. This method would have not relied upon the Illinois Secretary of State's list in any way. His suggestion, however, was ignored by all but one of the other delegates.

At this point Samuel Hayes, one of the Democratic delegates, rose and summarized the situation in which convention found itself. Since his summary closely conforms to the state of nature interpretation, it is worth a glance or two. After discussing the various kinds of evidence that might document the election of a delegate, Hayes launched into a broad theoretical description of just what the assembly was when it made a constitution.

I hold the doctrine that the people of the State of Illinois are sovereign, within the limitations of the Constitution of the United States, and that they have the right, within the limitations of that constitution, to frame and remodel their organic law. I hold that the power cannot be taken away from them by representatives of the people who are elected merely to pass ordinary acts of legislation, and I therefore hold that it is incompetent for the Legislature to restrict the representatives of the people elected to frame the organic law, in regard either to the mode of their organization or to the extent of their power after they have been organized...

I hold, then, that while the Secretary of State is bound to attend upon the proceedings of the Convention—the law requiring him to do so—the Convention is the only judge of the election returns and qualifications of its members—and I think that gentlemen of all parties will agree to that proposition.

When we meet together in this hall, we are only prima facie members of the Convention. We meet here and recognize one another as persons who are presumed to be members of the Constitutional Convention.

We generally have no difficulty in selecting a temporary President, for the reason that the office of the temporary President is merely to secure the regular organization of the Convention, by presiding over its proceedings, and securing the vote of those who appear to be members.

While this was a particularly lucid analysis of the situation, carried out at a high level of abstraction, Hayes did little more than confirm that the assembly was still lodged securely in the opening dilemma. Acknowledging the sovereignty of the convention over its own proceedings merely indicated that the convention alone was responsible for solving that dilemma.<sup>13</sup>

#### Election of the Temporary President:

However, when Hayes sat down, the partisan stalemate began to break up.

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<sup>13</sup>. As another delegate put it somewhat later in the proceedings, "This Convention is in an inchoate condition. No person here has proven his right to a seat. It is not officially known who are entitled to them. It is not officially known how many other gentlemen are here to contest our claims to seats in this Convention. We are not yet a legal body. We are simply eighty-five gentlemen claiming to be members elect, and by courtesy conceding in

First, Thomas Turner, one of the Democrats in the assembly, stated his belief (formed "[a]fter consulting with a number of the members") that

there is but one error in the Secretary [of State]'s list. I understand

that the gentleman from Du Page, [Mr. Cody], has-in fact I know he has-the proper certificate from the clerk of the county court, certifying that he has been elected; and if the gentlemen of the Convention will consent that his name be called, I think we can consent to go into the election of a temporary President, and let the question be settled at the present time. I think, now, that every gentleman is present whom we have any reasonable cause to suppose will be present within the next two or three days. And after consultation, I

understand

that the only difficulty now in the way is, that the name of the member from Du Page is not on that list. If he is recognized here under that certificate as a member of this Convention, our side of the Convention, if there is any that I can call 'ours,' is ready to go in to an

election

this moment. Now, then, let that be settled, and that takes all the difficulty out of the way.

Turner's suggestion appears to assume that the member or members the Democrats had been waiting for already arrived.<sup>14</sup> The only other obstacle in creating a convention roll was the status of this one member from Du Page county who, although he had the proper certificate of election in hand, did not appear on the Illinois Secretary of State's list. Suggesting that he himself had offered to place Cody's name on the roll much earlier in the proceedings, Church immediately agreed to this solution and the Republicans were on board.

The assembly then immediately proceeded to call the roll, as corrected, with each of the delegates announcing, as they responded, whom they favored for the post of temporary president. As they voted, some of the Republicans explained that they were voting for John Dement out of deep respect for his long service to the state, including membership in the 1847 and 1862 constitutional conventions. Other Republican delegates evidently abstained on this vote as well. As a result, Dement easily defeated Cary, 44 votes to 32, and was escorted to the president's chair.

After the newly-elected temporary president gave a short speech, the

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advance that each can show and make good his title to membership."

<sup>14</sup>. Skinner later that day explained that "that my remarks, made this afternoon, were offered on behalf of absentees, who were on the train coming in, and whatever I said was for their benefit; and I was very much relieved when it was announced to me that several of them had arrived."

convention turned to the election of a convention secretary. Here the partisan balance in the convention was starkly evident as the Democratic nominee, Harmon G. Reynolds, and the Republican candidate, George H. Harlow, tied at 42 votes apiece. Two of the other delegates, one a Republican and the other a Democrat, then rose and offered motions that the nominees be considered "temporary secretary" and "temporary assistant secretary" of the convention.<sup>15</sup> This suggestion was approved and the convention then elected two temporary doorkeepers, one from each party, as well.

Oath of Office:

Now that temporary convention officers had been installed, the assembly turned to task of confirming the delegates-elect as formal delegates of the convention. In many legislative bodies and constitutional conventions, members are confirmed by taking an "oath of office." The oath performs two functions at the same time. On the one hand, the member must step forward and voluntarily take the oath, thereby symbolically demonstrating that he desires to serve. On the other, eligibility to take the oath confirms that the assembly recognizes the delegate as having all the rights and privileges of membership. Like everything else in a constitutional convention, the assembly has total control over the form that the oath will take. In this instance, Lawrence Church offered a resolution in which the form of the oath was to be in this convention:

You do solemnly swear to support the Constitution of the United States, and of this State, and to faithfully discharge the duties of your office as members of the Convention. So help you God.

This oath may seem almost completely ordinary and thus devoid of controversy. But it was not.

After the clerk had read Church's resolution, James Allen immediately rose and moved to strike the words "and of this State" from the oath. The reasons he gave for his motion go to the very heart of the state of nature in which the convention was placed.

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<sup>15</sup>. This is the election in which Harlow, who had already been serving as de facto secretary of the convention, was formally elected to that post. It is not clear from the record which of them served as secretary and assistant secretary, respectively.

I do not see how we are very well to alter and amend our Constitution, or any provision of our Constitution, while taking an oath to support its provisions. I move to strike out 'and of this State' from the resolution, so that the oath may be taken to support the Constitution of the United States and faithfully discharge our duties.

In sum, Allen contended that no one could "support" the Illinois state constitution and also, at the same time, be engaged in a collective effort to change that constitution. As he put it,

It...would be an absurdity for us to take the oath solemnly to observe the provisions of the Constitution of the State, while we are engaged in taking to pieces that Constitution and substituting something else for it.

Anticipating what would turn out to be the Republican position on this issue, Allen also said that he was "aware that the Legislature has prescribed the oath which this body should take, but not believing that the Legislature had power to prescribe the form of oath to be administered to the members of this body, I make this motion to strike out."

Church rejected Allen's interpretation by contending that their collective task to "revise, alter or amend the Constitution of Illinois" was, in fact, a process entirely framed by that same constitution.

[T]hough we are here to take to pieces, examine, correct and revise that instrument, we are here to do it in a method pointed out by that instrument, holding our power and authority from that instrument, and from a law made in pursuance and protection of it, under which law we are required to take the oath to support the Constitution of the United States, also that of the State of Illinois, and also the usual oath of office, to discharge our duties here.

Church's position thus had two parts. The most important was that they could only change the constitution within a process authorized and set out within that constitution. In other words, the constitution both anticipated and sanctioned the process in which they would amend it. They were thus acting in accord with its provisions even as they changed those provisions. He also noted that the state legislature, in calling the convention together, had specified this oath for its delegates and they were thus bound by law to use it. Church rejected the notion that they were

a revolutionary body, resorting to first principles,-the elementary right of revolution,-but are simply here as a legally constituted body, acting under a properly constituted power...

If they had gathered together to change the state constitution outside the color of law, they would be making revolution and, thus, swearing an oath to support the state constitution would be a complete contradiction. But, because this was an ordinary process, fully enjoying the sanction and drawing upon the authority of the state, the oath he offered was perfectly consistent with their obligations and responsibilities.

Henry Bromwell agreed with his Republican colleague and drew for the delegates a scenario which would starkly contrast with the situation in which they found themselves.

We are not in the position of a body of men on an island, who should assemble, after being cast away in a storm, and attempt to lay the foundations of a government. Here the foundations are laid. The Constitution is made. The machinery of the State government goes forward. In that machinery it is provided that whatever alterations or amendments may be desired, shall be made in a certain manner, in a manner conformable to certain laws, in a mode pointed out and ordered beforehand.

One difference between the position Allen assumed and this interpretation drew upon what would happen if the convention were to fail to adopt a new constitution. All three men clearly recognized that, if the convention were to fail, the people of Illinois would not revert to a state of nature because the current state government would remain legitimate, with all its powers and officials up and running. For Church and Bromwell, this fact was proof positive, along with the clear sanction for their actions by the state, that they were well within the ambit of the state constitution as they deliberated.

Allen clearly accepted the premises but rejected the conclusion. For him, the delegates would step into a, albeit limited, state of nature when they began to deliberate. They could thus appropriately swear an oath to the national constitution because that charter was not suspended as they deliberated. In fact, one of the constraints under which they would work is that nothing they adopted could conflict with the United States Constitution. But the state constitution was necessarily suspended with respect to the delegates. While this suspension was very narrowly limited to their deliberative roles in the convention, they could not simultaneously

deliberate on a constitutional revision and pretend, at the same time, that they were "supporting" the state constitution.<sup>16</sup>

All three men also believed that, as Bromwell put it, the Illinois "Legislature is entirely powerless to prescribe the scope of our action when once [the constitutional convention] is assembled in due form." But the Republican delegates emphasized that, once they were finished, the revised constitution would be submitted to the people of Illinois for approval in an election. That meant, for one thing, that their labors were provisional, not definitive. Furthermore, because the revised constitution would only come into being when and if the people voted their approval, the existing state constitution would still be in place once they adjourned. And, because that election would be held under Illinois law, the existing state constitution thus controlled both entry (when and how the delegates were elected) and exit (popular approval of the revision) from the convention. To pretend otherwise, again in Bromwell's words, was to

jump at once from the control and order of law into the wild filed of anarchy, and say that we are unlimited in our powers...

If the convention were to adopt such an attitude, "society will be remitted to its first principles [and the delegates and the Illinois people] shall be but a step from barbarism."

The prospect of a return to the state of nature clearly disturbed some of the delegates. The Republicans appear to have seized upon the oath as a way of preventing a slide into anarchy in that, if the delegates swore to support the state constitution, they would be, at the least, committed to the post-convention process in which an election, sanctioned and overseen by the state legislature, was necessary for ratification. In other words, by swearing such an oath, delegates would become pledged to the process currently set out in the existing state constitution. If they did not swear to support the state constitution, the delegates could possibly change that process by, for example, simply declaring their revision to be ratified before they adjourned. The oath would, in effect, limit their sovereignty

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<sup>16</sup>. Lest the reader conclude that this was an arcane distinction which possessed no vital substance, I should emphasize that controversies over the construction of the oath occurred in numerous state constitutional conventions throughout the nineteenth century. Many of those controversies, in fact, turned on whether this precise clause should be included.

before they began to deliberate.<sup>17</sup>

The Democrats never did say in debate that they wanted to supersede the ratification process currently set out in the state constitution. What they did say, and repeatedly, was that they could not honorably swear to support the state constitution and, at the same time, deliberate on its revision. In that sense, the two sides on this question were speaking past one another. Even so, the Democrats did seem to interpret the convention's sovereignty much more expansively than did the Republicans. William Archer, for example, had also served in the 1847 Illinois Constitution Convention in which this very issue had been

very fully and very elaborately discussed; and I know that it was the opinion of some of the most eminent jurists who held seats upon that floor that no oath at all was necessary—that that Convention was an elementary body, deriving its authority from no source; that absolute sovereignty and paramount authority were the attributes of such a body; that it owed allegiance to no person and no body of men; that it was, as it were, the people en masse, and that no oath at all was necessary.

The outcome of that debate was that the delegates swore an oath that omitted any reference to the state constitution. Archer then concluded that

the act of the people, in calling this Convention, is a resumption of power of government into their hands, and the election of delegates to this Convention is a transfer of that sovereignty to this body; and if it be sovereign, I am at a loss to know to what authority it is amenable, except to the Federal Constitution, to which, under God, every government, State and Federal, and all State Constitutions must conform.

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<sup>17</sup>. While the interpretation in the text is consistent with much of the debate on the convention floor, the controversy was complicated by Republican claims that the state legislature could authoritatively specify the form of the oath. If so and if that form (meaning inclusion of the phrase "support the Constitution...of this State") could limit the sovereignty of the delegates as they deliberated, that would then imply that the state legislature could constrain what the delegates could do within the convention. Because the Republicans, like the Democrats, did not hold this position, this seems to involve them in a contradiction. The contradiction is resolved, however, if the Republican were to maintain that any change in the ratification process could only take effect once the revised constitution had been approved by the people. Then the state legislature, in specifying the form of the oath, would only have been recognizing the only way in which the convention could legitimately act. However, this interpretation, while resolving the contradiction in one way, opens up a new contradiction in that the Republican position would seem to postulate that the delegates in the convention would be

While Archer did not explicitly say that the delegates could, in fact, legitimately specify a change in the process through which their new constitution would be adopted, there is clearly nothing in his position that would prevent such an assumption of authority. And that is what had the Republicans worried.

The debate over what the oath should entail and how it would be administered went for over several days.<sup>18</sup> At one point in these exchanges, one of the Democrats offered a substitute for the oath Church had presented.

Resolved, That the delegates to this Convention take the following oath: `You do solemnly swear to support the Constitution of the United States, and faithfully discharge the duties of delegates to revise, alter or amend the Constitution of the State of Illinois.'

Because this would place determination of what "the duties of delegates" might be in the hands of the individual delegates, the substitute effectively evaded the question of whether or not the delegates would be pledged to support the state constitution.

Later on, the Mayflower Compact was alluded to, although the reference was intended to support the Republican position in this debate.<sup>19</sup> At another point, one of the delegates presented a catalog of past state constitutional conventions in which he showed that many of them had required no oath at all.<sup>20</sup> After more debate, Thomas Turner moved that the convention "proceed to

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constrained regardless of the form of the oath.

<sup>18</sup>. In the midst of this debate, one of the delegates moved the adoption of the following resolution: "Resolved, That until a permanent organization of this Convention has been effected, and until otherwise provided, the rules of the Convention of 1862 to amend or revise the Constitution of the State of Illinois, be adopted as the rules of this Convention." However, Dement ruled that the adoption of procedural rules was not a privileged question and that the convention should therefore continue its consideration of the oath. Thus, the convention was deliberating without parliamentary rules at this time.

<sup>19</sup>. "It was said in old times, by way of burlesque, that there was one colony that came to New England that had not time to prepare their Constitution before they landed--and that it adopted a resolution that it would be governed by the laws of God until it could make better ones. [Laughter.]..." The gist of this comment was that they did not need to resort to such desperate measures.

<sup>20</sup>. "In the Conventions of Maryland of 1776 and 1850; Tennessee, 1796 and 1834; Virginia, 1829 and 1850; Pennsylvania, 1789 and 1837; New York, 1821 and 1846; Massachusetts, 1779, 1821 and 1853; Michigan, 1850; Wisconsin, 1847; Louisiana, 1812, 1844 and 1852, no oath at all was administered to the members. In the Conventions of Pennsylvania, 1776; North Carolina, 1835; New Jersey, 1844; Missouri, 1845; Illinois, 1847 and 1862; California and Kentucky, 1849; Ohio and Indiana, 1850; Iowa and the two Minnesota Conventions of 1857, and Maryland, 1864, the members were sworn." The delegate did not

take the question" upon the alternative oath that had been offered as a substitute amendment. This motion was immediately seconded. After more debate, Orville Browning (who had previously said that he stood "outside of all party organizations") offered another, alternative oath:

That I will support the Constitution of the United States, and of the State so far as its provisions are compatible with, and applicable to my position and duties as a member of this Convention, and that I will faithfully discharge my duties as a member of said Convention.

The Democrats, possibly recognizing that the vote was going to be close and that Browning's oath was little different from their own, accepted his version in place of their alternative. After much more debate, the convention finally voted, pitting Browning's oath against the one originally offered by Church. Browning's alternative prevailed, 44 to 40. The convention then adopted Browning's oath as the one they would use to swear the delegates. The assembly then adjourned.

On the next day, however, the delegates soon discovered that the controversy over the oath was not quite finished. James Allen suggested that the assembly might, by unanimous consent, allow delegates to choose to swear the oath the convention had adopted or, alternatively, the oath that the legislature had passed. However, Charles Emmerson, a Republican objected, saying

I must confess that the taking of a multiplicity of oaths does not look proper to me. It seems to me that when we organize we all should take an oath; and that every member should take the same oath, and not a number of different oaths...

This question was left in the air as the delegates, twelve at a time, came to the bar of the chamber and were sworn by Samuel H. Treat, a judge serving on the bench of the United States District Court for Southern Illinois. Then the question again reverted to the legislature's oath. After much parliamentary maneuvering and debate, the convention decided to allow those delegates who desired to take the legislature's oath, in addition to the convention oath, to rise in their places and be sworn by Judge Treat.<sup>21</sup>

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reveal what kind of oath had been sworn in the latter conventions.

<sup>21</sup>. In effect, those who preferred the legislature's oath were sworn in twice, once by the convention oath and again by the legislature's oath. Although this portion of the debate is inconclusive, the question appears to have

### Election of a Permanent Convention President:

Now that the delegates were sworn the convention had defined its membership. It also had a serviceable presiding officer in John Dement, the temporary president. Even so, the assembly now turned its attention to the election of a permanent president and smoothly elected Charles Hitchcock, a Democrat, with little or none of the existential angst that had accompanied some of the other stages in the assembly's organization.

### Adoption of Procedural Rules:

On the afternoon of the fourth day of the convention, the assembly finally adopted procedural rules. They came in the form of a resolution authorizing the appointment of a committee "to prepare and report rules for the government of this Convention." Until that committee reported back to the assembly, the rules of the previous constitutional convention, held in 1862, were to be enforced. The following day, December 17, 1869, the Committee on Rules reported back to the convention. After debate, their proposed rules were adopted by voice vote.

### Summary and Conclusion

The opening dilemma in the 1869 Illinois Constitutional Convention was resolved in stages, beginning with the highly irregular recognition of two delegates as quasi-presiding officers (see Chart X). Although the specific course of this convention's organization had many unique aspects, the general form was quite common in the United States during the nineteenth century. Many, if not most, assemblies would open with the selection of a temporary presiding officer. In many cases, this selection was consensual. Where it was not, as in the present case, the assembly would have to decide who could vote on the selection. After the selection of a temporary presiding officer,

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turned on the implications of an oath for the way in which the delegates would subsequently deliberate. If they were all sworn by the same oath (which they were with respect to the convention oath), then all the delegates were deliberating within the same context with respect to their constitutional obligations as delegates. However, by providing that the delegates could swear to the legislature's oath as well, the convention seemed, at least to some delegates, to allow that oath to supersede the convention oath.

the assembly would then proceed to the construction of an official membership roll. When this was done, the convention would elect a permanent presiding officer. Last and in many ways least, the assembly would adopt formal rules of procedure. By this point, the members, of course, had been offering motions and making points of order for some time.

Although the confusion was often amicable and even humorous, the opening moments of this convention amply illustrated the problems that can attend the opening dilemma. In the resulting deadlock, possible resolutions of the dilemma were constructed out of "general understandings" of the shared experience and values of the delegates. The delegates appealed to these understandings as they searched for the pivot upon which the convention could be levered into motion. For example, in the debate over what a "day" might be, the members cited legal interpretations that would have been at home in court of law, thus appealing to the professional occupation of many of the delegates as lawyers. Similarly, the interpretation of the list of members presented by the Secretary of State rested upon an "external" understanding of the relation of the certificates forwarded by the county courts as "matters of fact" of which the Secretary had no more cognizance than did the delegates themselves. The travel plans of the delegates, appealed to early on, were said to have been influenced by a general "custom" under which legislative assemblies began their deliberations on Tuesday because travel on Sunday was "customarily" understood to be a possible violation of the Sabbath and it would take some members at least a day to arrive at the state capital.

The most pervasive reliance upon consensual understandings was common obedience to what was sometimes called "general parliamentary practice." In the absence of formal rules, what was considered appropriate and reasonable arose out of the prior experience of the delegates in other venues such as, most commonly, the state legislature but also city councils and party meetings. For example, Church criticized Skinner for mounting what we would call a "filibuster."<sup>22</sup> And underneath all such disputes was the understanding (indeed, certain knowledge) that most of the organization of the chamber

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<sup>22</sup>. The propriety of extended debate reappeared later when one of the delegates attempted to move what he described was the "equivalent" to the "previous question." The problem for the convention was to somehow sneak into general parliamentary practice a motion that they all knew was not universally found in conventions, assemblies, and other political meetings. If they were successful in persuading their colleagues to accept the apparent subterfuge, they could cut off debate if one of their number insisted on delaying the proceedings. If not, they had no way, short of adoption of the appropriate rules, of moving forward. And that adoption, of course, could be filibustered

would rest upon a division of the delegates into the two major party organizations (e.g., the "north" [Republican] and "south" [Democratic] sides of the chamber).

The opening dilemma is formally irresolvable by purely democratic means. Without a presiding officer, a recognized membership, and formal rules of procedure, no assembly can democratically make a decision. However, assemblies have been, in fact, able to organize themselves for legislative deliberations without seeming to impeach their legitimacy as democratic agents serving the "will of the people." One major contributor to their success is a shared orientation toward and respect for consensual political principles such as "general parliamentary practice" that allow delegates to "act as if" one of the legs of the opening dilemma, the absence of formal rules, had already been resolved. Another is the intrusion of preexisting social and political identities. In many cases, for example, one of the formally organized political parties is commonly conceded to have a clear majority in an assembly, once it is up and running. In such instances, many of the practical decisions concerning the initial organization of a chamber are made within that party and presented in the assembly to the minority as what is simply going to happen. Party intervention doesn't formally solve the opening dilemma but it does make resistance to the solution imposed by the majority party appear to be undemocratic obstruction. From that perspective, the problem facing the 1869 Illinois Constitutional Convention was that it was very unclear which party would control the chamber when the assembly was finally organized.

In sum, a convention could not resolve the opening dilemma without appeal to dimensions of political life external and prior to the legislative session. Everything else being equal, the ease with which a convention could organize depended on how robust those dimensions proved in producing consensual understanding on how to proceed. In some ways, strong challenges to this understanding threaten to throw the proto-assembly back into chaos by exposing those aspects of political culture that routinely (and sometimes unconsciously) are taken for granted or assumed. For example, when delegates pointed out that an assembly had not adopted formal rules of procedure, it was almost as if they were denying the authority of the very language of legislative deliberations. Even the observation that the assembly had not adopted formal rules of procedure, which usually took the form of a point of

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as well.

order addressed to the presiding officer, required use of that deliberative language, a language that the observation simultaneously used and denied. Such challenges often, if not always, addressed the foundational role of the assembly in creating a democratic government. However, that foundational role is thoroughly suspended, as we have seen, in the horns of the opening dilemma.

In the opening moments of the 1869 Illinois Constitutional Convention there were at least three different levels of rhetoric. On the most superficial level, the delegates debated the specifics of the situation in which they were deliberating. These specifics included what evidence they could use to establish the credentials of the members-elect, suggestions for a transient and effective solutions to particular disagreements, and a pragmatic search for other areas in which they might move forward when they were stymied in one direction. On this level, the delegates pragmatically dealt with the opening dilemma without recognizing it for what it was or that it was common to all such assemblies.

These exchanges frequently moved to the next rhetorical level in which the delegates cited what they considered to be persuasive precedents arising out of practice in previous constitutional conventions or metaphorical constructions of what was "reasonable" arising out of personal experiences in their professions or political careers. Intended to generalize the situation in which the delegates found themselves by illustrating commonalities with other, similar venues, these precedents and metaphorical applications contended that political and social practice at other times and places could and should inform the present. As such, they constructed a fiction that could bridge the opening dilemma if the delegates accepted the precedent or metaphorical application.<sup>23</sup> The arrangements they thus created and accepted were not, in fact, imperatively determined features of the situation in which they found themselves but rather like jerry-rigged acts of imagination. They were persuasive only to the extent that the political culture of the delegates allowed them to imagine their relevance and applicability in the same way.

The most fundamental rhetorical level was reached whenever pragmatism and imagination gave way under pressure of intense disagreement and conflict. For example, one of the most common and effective ways of rejecting the

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<sup>23</sup>. By "fiction," I mean that the precedent or application was not formally binding upon the delegates but, instead, consensually seized upon as a

applicability of precedents and personal experience was to stress the sovereignty of the convention, a sovereignty that could not and should not be compromised by obeisance to external authorities. Whenever sovereignty was invoked, the delegates could be certain that they were being impaled on one of the horns of the dilemma. They were similarly impaled whenever the delegates were reminded that the assembly's obligation to realize and act in accord with the people's will demanded a complete devotion to democracy. In many assemblies (this one was no exception), party identities and allegiances were criticized as fundamentally incompatible with pure representation of the popular will. The delegates, of course, did not shed their party allegiances in the convention but they were often compelled to present partisan proposals very circumspectly, using arguments that appeared to rest on anything but partisan interest or desires. The opening dilemma also showed its horns when delegates stressed that the way they deliberated would haunt the future peace and prosperity of their society. In all these ways, any insistence that the assembly completely devote itself to democratically realizing the will of the people threw the delegates upon the horns of the opening dilemma because there was just no way to both organize the convention for business and, at the same time, honor democratic principles.

At the beginning of all legislative foundings there is thus something that we might unfairly call a "dirty little secret." The secret is that any legislature organized for the purpose of founding a democracy must first lay its own foundation by violating, one way or another, democratic principles. And the reason that this can be called, fairly, a "secret" is that it is never openly admitted. The secret could be called "dirty" in the sense that the violation of democratic principles impeaches the very legitimacy of the assembly as it goes about the task of constructing the legitimacy of the democratic state it is founding. That opens the assembly and the delegates to the charge of hypocrisy. However, the charge could be considered unfair because the problem is, in reality, an unavoidable contradiction in the logic of the situation, not a voluntary failure of virtue. Finally, whether or not this is a "little" secret, usually depends on whether or not the delegates in the assembly share a wide, deep political culture. If they do, they might not even notice the arbitrary nature, in formal terms, of the opening decisions in the assembly.

And this raises the question of why founding assemblies cannot openly

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solution to their predicament.

acknowledge this contradiction that lies at the very heart of their own foundation. The answer lies in the mystical nature of democratic constitutions and their role as the sacred core of a society's political culture. The popular legitimacy of a democratic state cannot emerge from an open acknowledgment that the construction of its constitutional charter was a mechanical process that elided the way in which it contradicted its own principles. That contradiction, along with other messy aspects of democratic foundings, must be veiled. We, as students of these processes, may have become jaded through constant exposure to the imperfections of democracy-in-reality. Even so, the notion that there exists or can exist a popular will and that that popular will can be translated into a legislative founding in such a way as to become instantiated in a democratic state has been a fundamental principle of Western political culture for centuries. Millions of people, in fact, have sacrificed their lives for that principle, a principle that underpins the claims of democratic states upon the very lives of its citizens. Measured against the project of establishing the popular legitimacy of a democratic state, the opening dilemma may seem rather paltry...until someone calls attention to it and notes the way in which decisions are made in a founding assembly may forever haunt the future of their society.

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#### Chart 1

#### Stages in the Resolution of the Opening Dilemma in the 1869 Illinois Constitutional Convention

- 1) Informal Recognition of Quasi-Presiding Officers: John Dement and William Cary jointly ascend to the podium and cooperatively serve as informal presiding officers while the assembly tries to construct a convention roll.
  
- 2) Compromise Agreement on the Convention Roll: Leaders of the two parties, after a long debate on the propriety of using the list of delegates provided to the assembly by the Illinois Secretary of State, reach an agreement in

which that list is slightly modified. In the meantime, some of the delegates who had been detained for one reason or another arrive in Springfield.

3) Election of a Temporary President: The convention roll is called. As the delegates answer to their names they also vote on candidates for the post of temporary president. John Dement is elected.

4) Oath Sworn by Delegates: After long debate over the form of the oath, the delegates are finally sworn into the convention. Although an oath was considered unnecessary in many nineteenth century constitutional conventions, this Illinois assembly treated the oath as an official confirmation of membership.

5) Election of a Permanent President: The convention was now well along in the organization process and a permanent president was smoothly and swiftly elected.

6) Adoption of Procedural Rules: The procedural rules that had governed the previous constitutional convention in 1862 were temporarily adopted by the assembly. At the same time, a committee was appointed to prepare permanent rules. These were adopted the following day.

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