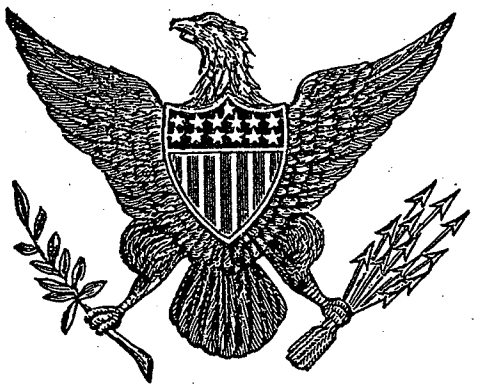

CONstitutional CONcepts

Number 10

A series of condensations of the scholars' research papers prepared by the Illinois Constitutional Research Committee which was appointed by Governor Richard B. Ogilvie to furnish background material for delegates to the Constitutional Convention.

THE GUARANTEE OF CIVIL RIGHTS

from a paper by
Lucius J. Barker and Twiley W. Barker, Jr.

Specifically, what is meant by "civil rights?"

With the strong interpretations of the guarantees of the Federal Constitution, is there a need for the Illinois Convention to pay further attention to Civil Rights?

These and other questions are answered in the paper, "The Guarantee of Civil Rights," written by Lucius Barker, Gellhorn University Professor of Public Affairs and Political Science at Washington University, St. Louis; and Twiley Barker, Professor of Political Science at the University of Illinois at Chicago Circle. Commissioned by the Governor's Constitution Research Group, this will be background material for use by Constitutional Convention delegates.

This summary is abbreviated and does not purport to contain all the detail of the original 21 page report. (See the back page for further information.)

The term "civil rights" is associated with those rights outlined in the amendments added to the Constitution immediately after the Civil War, namely, the Thirteenth, Fourteenth, and Fifteenth Amendments.

The Thirteenth Amendment affirmed the Negro's constitutional status as a free man. The Fourteenth Amendment defined United States citizenship to include the newly freed Negro, to guarantee the privileges and immunities of U.S. citizens, and declares that no state shall deny to any person within its jurisdiction the equal protection of the laws, or deprive such person of his life, liberty or property without due process of law.

The Fifteenth Amendment guarantees that the right to vote shall not be denied on account of race, color or previous condition of servitude. In general, it has been these three amendments that have provided the foundation for protection of civil rights in the United States.

The Fourteenth Amendment has been of especial importance. In addition to its own provisions, that amendment has been interpreted by the Supreme Court to include rights guaranteed in the Bill of Rights such as freedom of speech and the right to assistance of counsel. (These guarantees are included in another paper.) Consequently, the term civil rights might be construed to include these rights. Moreover, there is increasing support to broaden the scope of civil rights protection to include social and economic rights such as freedom from poverty.

Whatever the term civil rights may include as it evolves in the future, the argument here is that rights of every description should be extended to all persons equally. Specifically, it is the thesis of this paper that the Convention should guarantee in the Constitution that no person shall be disadvantaged in any way because of race, religion or national origin.

Our national experience fulfilling civil rights for all Americans has been at worst appalling and at best uneven. *(The authors provide a history of this national experience together with a history of Illinois laws both of which are omitted from this summary to give emphasis to constitutional issues.)*

Guarantees of Civil Rights in Illinois Constitutions

Like most other states in the past, Illinois has given very little consideration to the civil rights of blacks and other minority groups. Upon entering the Union in 1818, the state adopted an official policy prohibiting slavery and involuntary servitude except as punishment for crimes. However, recognition of indentured servants and protection extended to such contracts "practically amounted to slavery." On the other hand, a provision of the Bill of Rights in the 1818 Consititution declared:

> "That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing and of pursuing their own happiness." (Art. VIII, Sec. 1)

"But this noble expression of liberty was not intended to apply to blacks, mulattoes and Indians, for the article on the militia considered them separate and apart from the white citizenry by excluding them from service in that body."

The 1848 Constitution reveals no significant change in constitutional status of blacks in Illinois. By contrast, the delegates who drafted the rejected 1862 Constitution agreed to a number of restrictions on blacks and mulattoes; prohibiting them from migrating to or settling in the state, denying them the franchise and right to hold public office, and authorizing the General Assembly to enact legislation to implement the two previous provisions.

Perhaps the Constitutional Convention of 1869-1870 considered the problem of the rights of blacks settled by the Civil War and subsequent adoption during that current decade of the 13th, 14th and 15 Amendments to the Federal Constitution. The only attention given to the status of blacks during proceedings centered around the nature of their service in state militia. One proposal provided for racially segregated units in the militia and another would have prohibited black officers from commanding white militiamen. Both were rejected, and the article adopted by the Convention removed all racial restrictions on such service.

Nevertheless, in our present Illinois Constitution there is no specific guarantee that civil rights shall be extended to all men regardless of race. This is a significant omission in view of the fact the constitution does spell out that "no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions." (Art. II, Sec. 3)

Black delegates to the Convention of 1920 asked that the constitution include a provision that would proscribe any legislative action designed to legitimatize segregation practices (prohibited by state law). Specifically, their proposal provided that "laws be applicable alike to all citizens without regard to race or color, and no citizen, by reason of his race or color shall be prohibited from doing anything that any other citizen may do." Careful examination of the debates suggests that the intent of this provision was to provide a shield for blacks in the state constitution against further erosion by U.S. Supreme Court interpretation of the equal protection clause of the 14th Amendment.

But the proposal met stiff opposition. Opponents argued that such a provision was unnecessary. They said the Bill of Rights made no distinction with regard to race or color and, consequently, blacks have exactly the same rights as whites. In the end the convention adopted: "laws will be applicable alike to all citizens without regard to race or color." But this action proved to be of little consequence since the proposed constitution was rejected by the voters.

Civil Rights and the New State Constitutions

The guarantee of civil rights to minorities was not an issue confronting the early constitution makers. Of the constitutions adopted during the era immediately preceding the 1954 *Brown* decision, only those of New York (1938) and New Jersey (1947) contain significant policy declarations against discrimination. Most of the early constitutions provided for equality of persons as a general proposition with no reference to differentiations like race, religion or national origin. Among state constitutions adopted during the nineteenth century, only the constitutions of Arkansas (Const. of 1874, Art. II, Sec. 3), South Carolina (Const. of 1895, Art. I, Sec. 5) and Wyoming (Const. of 1890, Art. I, Sec.3) contained provisions guaranteeing equality with special reference to race or color.

Today, the situation is quite different. The guarantee of civil rights for all is now of central concern to those who write state constitutions. Let us see how the issue has fared in recent constitution-making.

Alaska and Hawaii, the last two states to be admitted to the Union, adopted constitutions shortly after the Warren Court's decision in *Brown* v. *Board of Education* commenced the nation's civil rights revolution. Convention proceedings reveal very little discussion and no controversy about the inclusion of strong civil rights guarantees in the two documents. Provisions in both are concise statements prohibiting denial of the emjoyment of civil rights because of race, creed, color or national origin. The Hawaii provision is an expanded version of the traditional equal protection clause (Art. I, Sec. 4), while the Alaskan framers did not find it necessary to use such traditional language. But the Alaskan framers appeared to take a step toward positive action beyond the mere declaration of policy when they included a clause directing the legislature to implement the civil rights provision. (Art. I, Sec. 3)

Michigan adopted a new constitution in 1964 and the convention which drafted it gave extensive consideration to the civil rights issue. That consideration was engendered at least in part, by civil rights groups and black and white delegates who spoke for these groups. In addition, President John A. Hannah of Michigan State University, himself a delegate, brought to the convention valuable experience from his service on the U.S. Civil Rights Commission.

Several proposals for equal rights were introduced and two seriously considered. The civil rights provision eventually adopted provides:

> "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation."

The framers of the Michigan Constitution took another significant stride in the civil rights field when they created and placed in the executive article a civil rights commission. The question was not whether there should be a commission, but whether the commission would be granted adequate power to operate effectively. Debate on the issue revealed additional concern over responsibility for and the timing of establishment.

The 1938 *New York* Constitution contained one of the earliest and most advanced provisions of civil rights ever adopted by a state. Pursuant to this constitutional declaration of policy, the state legislature enacted several significant anti-discrimination statutes covering such matters as housing, employment and education, and created the State Commission Against Discrimination with broad powers to eliminate discriminatory practices. Consequently, in the 1967 Constitutional Convention only minor changes were sought in the civil rights section.

Limited by the convention call, the *Pennsylvania* Constitutional Convention of 1967-68 was not authorized to consider the Bill of Rights article in which the civil rights guarantee is included. However, an anti-discrimination section was added to that article by amendment in May, 1967. It provides that "neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil rights, nor discriminate against any person in the exercise of any civil right."

The new *Maryland* Constitution rejected by the voters in 1968 contained equal protection and nondiscrimination clauses in the article on Declaration of Rights. The clauses are preceded by a due process of law clause carried over from the old constitution and provide that "no person shall . . . be denied the equal protection of the laws, nor be subject to discrimination by the State because of race, color, religion or national origin." In recommending the clauses, the Constitutional Convention Commission contended that while some of the language was similar to that found in the 14th Amendment to the U.S. Constitution, "the states themselves bear the responsibility for enlarging upon the basic protections in the national Constitution." The clause's emphasis, however, is directed at governmental discrimination as no specific reference to private action is included.

Conclusion

State constitution-makers of the last 15 years have undertaken their tasks in the midst of a far-reaching revolution against deprivations of civil rights. Black Americans and others have made it clear that they will no longer suffer racial injustice whether from public or private sources, in public accommodations or private employment. Many appeals or demands for governmental action have been made to legislative bodies, and such appeals would carry considerably more weight if they were supported by a clear constitutional declaration of state policy against racial and religious discrimination.

The present Illinois Constitution was written in 1870. It has not been updated through the amending process to reflect the increasingly important role of government in the protection and fulfillment of civil rights. While some might argue that the equal protection clause of the 14th Amendment and its case law progeny afford sufficient protection against racial discrimination, they fail to take into account that the *Civil Rights Cases* of 1883, which held that Congress does not have the power under that amendment to prohibit private discrimination, have never been specifically overruled. Therefore, the concept of "state action" is still determinative. Consequently, state constitutions can prove important in eliminating the fine line sometimes drawn between "state" and "private" action.

On the basis of this study, we suggest that consideration be given to the inclusion of a provision in the new constitution along these lines:

> The state has the responsibility to guarantee that no person shall suffer any disadvantage because of race, religion or national origin; and the state shall do whatever is necessary and proper to see that no person suffers any disadvantage because of race, religion, or national origin.
>
> The General Assembly shall have the power and shall take affirmative action to implement this provision by appropriate legislation.

The language and intent of this proposal are simple. It assigns to the state the clear responsibility to see that no person suffers *any* disadvantage on account of his race, religion or national origin. Moreover, the use of the term "any" makes it clear that the state must remedy such disadvantages whether they accrue from state or private action. No attempt is made here to list the various areas where discrimination has traditionally existed, e.g., education, employment, housing. What is simply suggested here is a situation where all people have an *equal* and *fair* opportunity to live a decent life, whatever that might involve in the 1970's and beyond.

Some persons have doubted that the equal protection clause of the 14th Amendment includes affirmative governmental actions to eliminate discrimination such as employment programs. Our suggested "necessary and proper" clause avoids the legal fuzziness surrounding positive governmental actions *vis-a-vis* the equal protection clause and gives the state flexibility to take *positive* actions designed to guarantee that "no person shall suffer any disadvantage . . ."

We suggest further that consideration be given to creation of a civil rights commission similar to the one created in the 1964 Michigan Constitution. Such a body would help to engender, through its investigations and findings, the kinds of proposals for legislative action to implement constitutional declaration of policy. The Commission should be granted sufficient power to take (in accordance with constitutional and statutory requirements) a variety of remedial actions to eliminate discriminatory practices and to secure equal protection of civil rights. And, as in the case of Michigan, the General Assembly should be directed to provide the necessary fiscal support for effective operation of the commission.

On this matter, we feel that the Illinois practice of not including commissions in the constitution should not automatically rule out a constitutional commission on civil rights. There is nothing sacred about the existing pattern, and furthermore, giving constitutional status to a body which concentrates its efforts on civil rights policy underscores and emphasizes the magnitude of the problem and the overriding concern of the people to seek solutions to it.

WHY these DIGESTS?

Preparing for a constitutional convention requires advance background and research. Accordingly, Governor Richard B. Ogilvie called upon a group of scholars to prepare research papers for the use of delegates and appointed Dr. Samuel K. Gove, director of the Institute of Government and Public Affairs of the University of Illinois as project director. Sixteen papers on various aspects of state government are being assembled. These will be issued in condensed form in continuing issues of Constitutional Concepts. A sincere attempt has been made to retain the concepts and ideas of the writers whose papers run from up to 80 pages or more. Any errors which result from the condensations clearly are not those of the scholars originating the research.

As no public funds were available to the Constitution Research Group, the Union League Club of Chicago made an initial grant of $10,000 to the group so the work might proceed. The Club took no part in the selection of the scholars nor the topics to be researched; made no effort to influence either research or conclusion; and did not, in any manner, direct the group. Nor does the Club necessarily endorse any suggestions, proposals or ideas expressed by the scholars.

This is one of a series of condensed research papers, prepared and published as a public service by the Public Affairs Committee of the Union League Club of Chicago.

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