UIC School of Law
UIC Law Open Access Repository

UIC Law Open Access Faculty Scholarship

1-1-1988

The 1970 Illinois Constitution: Has It Made a Difference?, 8 N. Ill. U. L. Rev. 571 (1988)

Ann Lousin
John Marshall Law School, alousin@uic.edu

Follow this and additional works at: https://repository.law.uic.edu/facpubs

 Part of the Constitutional Law Commons, and the State and Local Government Law Commons

Recommended Citation

Ann Lousin, The 1970 Illinois Constitution: Has It Made a Difference?, 8 N. Ill. U. L. Rev. 571 (1988).

https://repository.law.uic.edu/facpubs/269

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Open Access Faculty Scholarship by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

The 1970 Illinois Constitution: Has It Made A Difference?

ANN LOUSIN*

On July 1, 1971, a new constitution became effective in Illinois. After seventeen years, with the possibility of a seventh constitutional convention appearing on the horizon, Illinoisans may fairly ask whether the 1970 Illinois Constitution has worn well. Has it met the

---

* Professor of Law, The John Marshall Law School, Chicago, Illinois; B.A. Grinnell College; Graduate Studies, University of Heidelberg (Germany); J.D. University of Chicago. She was a Research Assistant at the Sixth Illinois Constitutional Convention (1969-70); Staff to the Committee on Constitutional Implementation, Illinois House of Representatives (1971-73); and Parliamentarian of the Illinois House of Representatives (1973-75).

Author's Note

The genesis of this article is a chapter I wrote in 1979 for *Illinois: Political Process and Governmental Performance*, a collection of readings edited by Edgar G. Crane and published in 1980. In 1987, when the issue of a constitutional convention to revise the 1970 Illinois Constitution arose, Louis Ancel asked me to study the effect of the constitution. He generously supported the publication and distribution of the report I wrote in the summer of 1987. That report is, in turn, the pre-cursor of the article that follows.

This article is only a short overview, not a detailed study. It concentrates only upon case law, statutes and my observations and opinions based upon eighteen years serving in and studying Illinois government. The reader seeking other articles on the subjects my article discusses should consult the ensuing bibliography, which I have tried to make current as of spring, 1988.

I owe thanks to the several kind souls whose comments improved the 1979 chapter, particularly the late Professor Rubin G. Cohn, and to those whose comments improved the 1987 report, Joan G. Anderson, William L. Day and Samuel W. Witwer. Thanks are also due to Anita Silver, typist and reader, and Andrew Siegel, my research assistant.

Above all, I thank Louis Ancel, who is, as the simple saying goes, "of the Chicago bar." His decades of experience as the dean of municipal lawyers in Illinois have not made him parochial; indeed, he is one of those rare far-sighted people who see beyond their own specialties and try to use their skills and influence to better the lives of generations to come. He supported the cause of constitutional reform long before 1968, but he has never received credit for his many accomplishments. Yet, those of us who toil in this vineyard know Lou is working alongside us.

To Lou Ancel, therefore, I dedicate this article with deep respect and gratitude.

HeinOnline -- 8 N. Ill. U. L. Rev. 571 1987-1988

present needs of the people who adopted it in 1970? Has it enabled the citizens and their public officials to solve problems that have arisen since 1971? Will it help solve the problems of the 1990's? Should Illinoisans call another constitutional convention?

This essay defines the nature of a state constitution and sketches the history of the Illinois constitutions. It divides the constitution drafted in 1970 into ten topics or areas, each concerning problems addressed by the constitution. It notes what the delegates to the constitutional convention considered at that time to be the most important issues within each area, discusses how the convention attempted to resolve those issues, analyzes the effectiveness of the constitutional solutions during the past seventeen years and suggests ways in which the 1970 Constitution may help or hinder the solution of the key problems appearing as Illinois enters the last decade of the century.

THE ROLE OF CONSTITUTIONS IN ILLINOIS

It is not easy to define the role of an American state constitution or to ascertain its impact on the public and private lives of that state's citizens. Samuel W. Witwer, who served as President of the constitutional convention that drafted the 1970 Illinois Constitution, defined a constitution as "an accepted body of organic laws which structures the government of a state; limits the powers of the legislative, executive, and judicial branches; and guarantees the rights, immunities, and liberties of the people."[1]

Benjamin N. Cardozo, a great jurist and an Associate Justice of the United States Supreme Court, spoke more generally when he warned that "a constitution states, or ought to state, not rules for the passing hour but principles for an expanding future."[2] Witwer and Cardozo would agree, however, that a constitution should not contain provisions on the rights of the people and powers of the government which are so detailed and so limited to current problems that they trivialize the constitution or hamstring future generations, at worst.

There are two great obstacles in the path of those seeking to write a constitution containing only "principles for an expanding future." First, it is much easier to ascertain the problems of "the

1. J. CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818-1970 (1972).

2. As quoted by Mr. Witwer in his address to the Sixth Illinois Constitutional Convention, RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION Vol. II 31 [hereinafter cited as RECORD OF PROCEEDINGS].

HeinOnline -- 8 N. Ill. U. L. Rev. 572 1987-1988

passing hour" and to write rules to solve those problems than it is to forecast the problems of the future and establish guidelines to avoid or remedy them. Second, a modern state constitution must be submitted to the electorate for ratification. The voters, or at least special interest groups, are likely to be more interested in the proposed constitution's solutions to the concrete problems of today than in its guidelines for solving the potential problems of tomorrow. Consequently, a modern state constitution must meet two tests: it must be "relevant" enough to convince special interest groups and the electorate that it meets the needs of the present, and it must be flexible enough to meet the needs of unborn generations.[3]

The 1970 Illinois Constitution, the fourth basic charter of the state, may well meet those tests better than the charters which preceded it: the Constitutions of 1818, 1848 and 1870. Preferences in constitutions, as in styles of clothing, are subject to changes in fashion. The 1818 Constitution was an example of the rather aristocratic, neo-Federalist style popular in the early nineteenth century. The 1848 Constitution was an example of frontier populism, the triumph of Jacksonian democracy over the Atlantic seaboard elite. The 1870 Constitution was a typical late-nineteenth century charter. Created during the economic and social depression caused by the Civil War, it was designed for an agrarian state in which what little urban life existed was centered in small towns. Even Chicago, already the largest city in Illinois, was not the booming center of a giant metropolitan area that it is today. The 1870 Constitution reflected that society. Perhaps the chief characteristic of this constitution was its long lists of restrictions on the institutions of government, particularly the powers of the General Assembly.[4]

One way to alleviate a "tight" constitution, such as the 1870 Illinois Constitution, is to facilitate amending the constitution. The drafters of the 1870 Constitution did not intend to make it very difficult to amend their handiwork—at least as long as both political parties agreed to an amendment. Through a series of historical accidents, the 1870 Constitution came to be very difficult to amend

---

3. The first Illinois constitution was drafted in 1818 to satisfy Congress' requirements for elevation from territorial status to full statehood. Congress did not, however, require that this charter be submitted to the Illinois electorate for adoption. Perhaps that is why it is by far the shortest and "loosest" of the four Illinois Constitutions.

4. *See, e.g.*, ILL. CONST. of 1870 art. IV, §22, which seeks to prevent passage of special and local laws.

HeinOnline -- 8 N. Ill. U. L. Rev. 573 1987-1988

by the early twentieth century.[5] When attempts to alter the 1870 Constitution proved unsuccessful, many citizens and scholars began arguing that only a totally new document could provide Illinois with a modern constitution—and only a constitutional convention could design a totally new document. The Fifth Illinois Constitutional Convention proposed the 1922 Constitution, but the electorate rejected their draft. By mid-century, the forces for constitutional revision once more began to urge the legislature to submit the question of a call for a constitutional convention to the electorate. Writing a new document, it seemed, was better than piecemeal reform.

The stories of the call for the Sixth Illinois Constitutional Convention, of the election of the 116 delegates to the convention, of the proceedings of the convention and of the climactic day when the voters adopted the constitution proposed by the delegates have all been told well elsewhere and do not warrant lengthy repetition here.[6] It suffices to note that in November, 1968, the people voted to call a convention; that they elected two delegates from each of the 58 state senatorial districts in November, 1969; that the convention met from December 8, 1969, through September 3, 1970; that the people adopted the new constitution on December 15, 1970;[7] and that virtually all of the constitution became effective on July 1, 1971.

Many, perhaps most, of the people who voted to adopt the Constitution in 1970 hoped that it would help solve the political, economic and social problems of that day and of the future. What was in their new constitution? Although the constitution has a preamble and fourteen articles, it really addresses only ten major areas of concern. The next ten parts of this essay discuss how the constitution has affected each of those areas. Each part analyzes the impact of the constitution upon "the passing hour" and "the expanding future" in relation to each of those areas.

I. STATUTE OR BASIC CHARTER?

(Article XIV; Sections of the 1870 Constitution Deleted)

---

5. For a good account of the historical accidents which resulted in a restrictive amending article see Bergstrom, *The Amending Process*, in S. GOVE & V. RANNEY, CON CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 465 (1970).

6. See particularly J. CORNELIUS, *supra* note 1, at 121-163; S. GOVE & T. KITSOS, REVISION SUCCESS: THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION (1984); E. GERTZ & J. PISCIOTTE, CHARTER FOR A NEW AGE (1980); E. GERTZ & E. GILBRETH, QUEST FOR A CONSTITUTION: A MAN WHO WOULDN'T QUIT 70-207 (1984).

7. The vote totals on the referendum whether to adopt the 1970 Constitution was:

For: 1,122,425; Against: 838,168.

HeinOnline -- 8 N. Ill. U. L. Rev. 574 1987-1988

The first provisions considered by the 1970 Constitutional Convention delegates were those relating to the role of a state constitution. The 1870 charter was notorious for certain provisions that should have been placed instead in statutes so that they could have been repealed more easily when they became superfluous. In short order, the delegates voted to exclude from a new constitution such noncontroversial and even quaint provisions as those relating to the World's Columbian Exposition held in Chicago in 1893 and to the expenditures for the state capitol, which was built before 1900.[8] The debate on these sections was so dull that Victor A. Arrigo, a delegate of Italian birth and parentage, provided the only excitement of the day by offering a semi-serious protest against the first deletion, on the grounds that it was an affront to the sacred memory of Christopher Columbus.[9]

Although these early deletions were not important in themselves, the convention's vote to delete them at the outset was significant. The delegates decided that the deleted provisions had concerned matters better left to the General Assembly, and they wanted the new constitution to contain only the guidelines necessary for future generations to govern, rather than "rules for an hour" which would pass all too soon. The delegates did not formally and openly make this judgment; indeed, they may not have been fully conscious of their decision. The consequences, however, were that the new constitution would be "loose," not "tight," and it would contain less "legislative detail" than its predecessor. Of course, as the convention progressed, the delegates found themselves abandoning the goal of drafting only "principles for an expanding future" in order to placate the fears or wishes of a group of delegates or of an outside pressure group. By and large, however, they resisted including many, if not most, of the proffered restrictions and special-interest provisions.

The first major article considered by the delegates tested their conscious or unconscious decision to resist writing a fundamental

---

8. It should not be assumed that all of the deletions proposed by the Committee on General Government were merely "clean-up exercises" and totally noncontroversial. Those which proposed abolition of the ban on lotteries, of the provision granting the Illinois Central Railroad a special charter, and of restrictions on corporate charters were particularly controversial. In fact, the problem of the constitutional prohibition of branch banking was one of the bitterest issues of the convention from beginning to end, as the discussion of economic regulation shows. *See infra* text accompanying footnotes 229-36. Nonetheless, the deletions considered at the very beginning were scarcely controversial.

9. RECORD OF PROCEEDINGS, *supra* note 2, Vol. II at 615-17.

HeinOnline -- 8 N. Ill. U. L. Rev. 575 1987-1988

statute rather than a fundamental constitution. This was Article XIV, "Constitutional Revision," the article that establishes the manner by which the people may later amend their constitution. As the delegates knew, any game must be played according to rules. However, they knew as well that the players must have the right to change the rules from time to time, and the most important rule is the one establishing how the players may change the rules. The delegates also knew that the 1870 Constitution's inadequacy was due in part to the inflexibility of its amending article and that the voters now wanted a constitution they could amend more easily.

Illinois has traditionally provided for constitutional amendment by one of two methods: (1) the calling of a constitutional convention, or (2) the legislative submission of an amendment to the electorate for ratification. All 116 delegates were experiencing the convention method, and most had observed the second method through campaigns for constitutional amendments over the years.

Article XIV, Section 1 of the 1970 Constitution makes two major changes in its predecessor provision on constitutional conventions. The first is that it lowers, from two-thirds to three-fifths, the majority needed in each house of the legislature to propose a constitutional convention and at a popular referendum to adopt the convention's product. The other change is potentially one of the most important in the entire document: if the question of a convention call is not submitted for twenty years, the Secretary of State must submit the question to the people at the next November election. The purpose of this automatic submission of the question of a call for a constitutional convention is to allow the electorate to consider this major issue at least once every other decade.

In 1985, some observers thought that if the legislature, which controls the other avenue to constitutional revision, perceived that the public wanted a convention called in 1988, the General Assembly would forestall a campaign to approve a call by submitting a large number of constitutional amendments, particularly those relating to such important questions as judicial selection, in 1986. The legislature did no such thing, probably because there was no perceived groundswell of public opinion for a convention.

Although the bare text of Article XIV, Section 1(b) arguably may be ambiguous enough to permit a call in 1988 or 1992, the debates of the 1970 Convention absolutely clarify this issue. The call must be submitted in November, 1988, twenty years after the last submission of a call.[10] On September 17, 1987 the Attorney General of Illinois,

10. The Report of the Committee on Suffrage and Amending specifically says

HeinOnline -- 8 N. Ill. U. L. Rev. 576 1987-1988

Neil Hartigan, formally advised the Secretary of State, Jim Edgar, that he must submit the question to referendum at the general election in November, 1988.[11]

The convention also made two important changes in legislative submission of amendments to the people for their approval or rejection. It lowered, from two-thirds to three-fifths, the vote needed in each house to approve the submission of an amendment. It also lowered, from two-thirds to three-fifths, the vote needed to approve the amendment at a referendum.

By lowering the majority approval required for legislative amendment, the delegates hoped to facilitate the modernization of specific parts of the constitution without the expense of calling a constitutional convention. The three-fifths requirement seemed reasonable because the 1970 population of Illinois fell into three almost equal groups: Chicago; the Suburbs (suburban Cook and the five "collar" counties); and Downstate (the 96 other counties). A two-thirds requirement would have enabled one segment of the state's population to frustrate the will of the other two, whereas a three-fifths requirement requires the opposing third to secure the cooperation of some of the members of the majority to block an amendment.

Since 1970, the legislature has submitted eight proposed amendments, three of them virtually identical. In 1974, it proposed an amendment restricting the Governor's power to use an amendatory veto. In 1978, it submitted an amendment allowing the exemption of veterans' organizations' post homes from property taxation and an amendment designed to repeal the 1970 Constitution's abolition of the *ad valorem* personal property tax in 1979. None passed. These early failures were perhaps surprising in view of the lowered majority now needed. However, the three amendments submitted were "low profile" issues—relatively non-controversial, or at least not emotionally charged, as far as most voters and the press were concerned.

In 1980, when the voters approved the Cutback Amendment, which was placed on the ballot pursuant to Article XIV, Section 3, the voters also approved a legislatively-submitted amendment designed to alleviate the difficulties of owners of property sold at delinquent tax sales. In 1982 and 1986, the voters approved amendments to Article I, Section 7, the net effect of which is to leave the granting

---

so at RECORD OF PROCEEDINGS, *supra* note 2, Vol. VII at 2268-69, and the colloquies between the chair of the committee and delegates clearly buttress this conclusion. RECORD OF PROCEEDINGS, *supra* note 2, Vol. II at 491-96; RECORD OF PROCEEDINGS, *supra* note 2, Vol. IV at 3598-99.

11. Op. Att'y Gen., Sept. 17, 1987, File No. 87-007.

HeinOnline -- 8 N. Ill. U. L. Rev. 577 1987-1988

of bail to judges' discretion in felony cases. In 1984 and 1986, the voters rejected the veterans' post home tax exemption twice more.[12]

Sections 3 and 4 of Article XIV are completely new to Illinois. Although the delegates gave them less attention than they gave Sections 1 and 2, these new provisions have proven to be both controversial and the subject of novel court decisions.

Section 3 provides for a "limited initiative" method of amending Article IV of the constitution, which deals with the legislature. In adopting Section 3, the delegates in effect rejected the Progressive Movement's proposal, popular about 1900, that an effective way to combat legislative inefficiency and corruption was to allow the electors themselves to initiate substantive legislation and constitutional amendments. In a state which has the "initiative," a petition for such a "proposition" that receives enough signatures is enough to place the proposition on the ballot to be voted on at a referendum.[13] The key to the "initiative and referendum" method of popular control over the legislature is the bypass of the legislature. The 1970 delegates chose instead to write a constitution which they hoped would strengthen the legislative process and make it so open and responsive to the public's needs and will that an initiative and referendum procedure—for substantive matters, at least—would be unnecessary.

However, the delegates also realized that some aspects of the legislative process are so dear to legislators' hearts that the legislature itself would never change them. Uppermost in the delegates' minds was the recent battle over Congressional and state legislative reapportionment, a battle that was fought in the federal courts because the state legislatures were unwilling to give up the power to gerrymander, a cornerstone of their political maneuvering.

The delegates were also mindful of the controversy over Illinois' unique method of electing members of the Illinois House of Representatives. Since 1870, the House had been divided into districts, from which three members were elected by "cumulative voting," a device which allowed a voter to cast all three of his votes for one candidate

---

12. For a summary of amendments under the 1970 Constitution, *see* Gaudet, *Amending the State's Constitution*, 11 ILL. ISSUES 30 (Nov. 1986).

13. California is the leader in using this device. The two most famous California constitutional amendments to be initiated and adopted without legislative approval are Proposition 14, the 1968 attempt to ban open housing laws which the United States Supreme Court declared unconstitutional in Mulkey v. Reitman, 387 U.S. 369 (1967), and Proposition 13, the 1978 attempt to limit *ad valorem* real property taxes. It is ironic that the Progressives, who created the initiative and referendum, would almost certainly have opposed these two uses of it.

HeinOnline -- 8 N. Ill. U. L. Rev. 578 1987-1988

(the "bullet vote") or to apportion them equally among two or three candidates. This method, first hailed as a creative attempt to introduce the best features of the continental European proportional representation system into an American state legislature, was the subject of much criticism by 1970. The Illinois League of Women Voters and many academics and delegates thought that the system had long since ceased to fulfill any useful purpose and, worse, confused the electorate. Opponents said that the goal of insuring "minority representation," however valuable it may have been in a sharply partisan Illinois in 1870, had been perverted by 1970. The system virtually guaranteed that each of the two major political parties could seat one of three representatives from a district even if the vote cast for that member was well under one-third of the total popular vote and the majority of the voters of the district clearly did not want that candidate elected. This result, opponents said, was anti-majoritarian and served no good purpose.[14] Supporters of the status quo, including many legislators, denied these charges.

The Illinois General Assembly, quite naturally, had refused to abandon the system that had enabled the election of all of the members of the House and in their turn many members of the Senate, who often served in the House before running for the Senate. By 1970, many delegates thought that only a constitutional convention could abolish the present system. Other delegates strongly favored retention of multi-member districts with cumulative voting. Numerous legislators lobbied the delegates on this issue, and several state representatives threatened to oppose the constitution unless it retained the system then in effect.

The delegates agreed upon a two-pronged compromise between their faith in an improved legislature and the legislature's occasional intransigence. First, they decided to submit the "multi-member districts with cumulative voting vs. single-member district" issue to the people as one of the four controversial issues to be voted upon as separate "side-elections." These side-elections on the separately submitted issues were held during the referendum at which the body of the constitution was submitted on December 15, 1970. This happy solution defused these four issues at the convention, prevented the convention's breaking up over them and transferred the battles over

14. For extended arguments against this system and in favor of the usual "single member district" system, *see* Minority Reports 1A and 1C to the Committee on the Legislature's Proposal, RECORD OF PROCEEDINGS, *supra* note 2, Vol. VI at 1413, 1463.

HeinOnline -- 8 N. Ill. U. L. Rev. 579 1987-1988

each to the public arena. Second, they created an initiative and referendum procedure, but they limited its scope to amending only the "structural and procedural subjects contained in Article IV" (the article on the legislature). Although it is unclear whether the delegates intended this limited initiative to cover more than the obvious controversies—for example, reapportionment, bicameralism, the method of election of the House and the size of the General Assembly—those issues were uppermost in their minds. One must remember that the initiative and referendum method of amending the constitution was totally new to Illinois constitutional philosophy.

The new method was tested in 1976, when an organization called the Coalition for Political Honesty, in accordance with Article XIV, Section 3, circulated a petition calling for a referendum on three amendments to the legislative article. One amendment prohibited legislators from having any other public job, while a second required them to declare a "conflict of interest" in a bill and refrain from voting on it. The third, by far the most popular with those signing the petitions, prohibited the practice, then sanctioned by statute, of drawing the salary for the entire legislative biennium at the beginning of the two-year term.

When it became apparent that circulators of the petition had garnered enough signatures, five former delegates and a former staff member of the convention filed a suit to prevent the submission of the amendments at the November, 1976 election. In *Gertz v. State Board of Elections*,[15] the Illinois Supreme Court held that any proposed amendment must meet two tests: (1) the amendment must relate to "subjects contained in Article IV," eliminating, for instance, the possibility of an amendment on taxes being grafted onto Article IV; and (2) the amendment must be both "structural" and "procedural." Although the opinion of the court did not specifically address the three amendments separately, probably at least one, the prohibition on a legislator's voting on bills in which he had a "conflict of interest," was indeed "procedural" in nature. However, because none of the amendments was both structural and procedural, none of them was proper under Article XIV, Section 3. In this section, the word "and" is a conjunctive, not a disjunctive.

Regardless of how one might feel about the merits of the three amendments, or even about the reasoning of the court, it is clear that this is one of the most significant decisions on the 1970 Illinois Constitution. The two tests established by the court are so difficult

15. 65 Ill. 2d 453, 359 N.E.2d 138 (1976). The author was one of the plaintiffs.

HeinOnline -- 8 N. Ill. U. L. Rev. 580 1987-1988

to meet that very few, if any, controversies other than those precisely envisioned by the delegates could be the subject of a constitutional amendment initiated by citizen petitions. The overall impact of the 1976 case was that, except for those very few relatively well-defined matters for which the initiative method is especially appropriate, constitutional amendments would occur by a simple, two-step process: (1) either a constitutional convention or the General Assembly will write an amendment; and (2) the electorate will either reject or adopt it.

In 1980, the Coalition for Political Honesty helped lead the campaign for the Cutback Amendment, which sought to substitute single-member districts for multi-member districts for election to the House of Representatives, to abolish cumulative voting and to reduce the number of State Representatives by one-third. Proponents of the status quo, led by several current and former state representatives, led the opposition. The Illinois Supreme Court found this use of the petition system to be valid and allowed it to be submitted to the electorate.[16] The amendment passed, and in 1981 the General Assembly redistricted on the basis of 59 members of the Senate and 118 members of the House. In 1982 and since, the members of the House have been elected from "legislative districts," each of which is half a "senatorial district."

The third test of Article XIV, Section 3 came in 1982, when the Coalition sought to have an amendment allowing the initiative and referendum to enact legislation. This was the first of the trio of reforms so dear to turn-of-the-century Progressives: initiative, referendum and recall. Although the idea gained favor then, especially west of the Mississippi, many modern populists are less enthusiastic about a device that allows a legislature to shirk responsibility for deciding tough issues and allows a dedicated, organized group to draft and submit unamendable bills to the public, bills that often become the subject of professionally-managed political campaigns themselves.

The Coalition had to use Article XIV, Section 3 to obtain this amendment to Article IV. When the Illinois Appellate Court held this to be an improper use of the petition procedure,[17] the Illinois Supreme Court refused to hear the Coalition's appeal. As a result of all three cases, then, amending the Illinois Constitution by initiative seems to

16. Coalition for Political Honesty v. State Bd. of Elections, 83 Ill. 2d 236, 415 N.E.2d 368 (1980).

17. Lousin v. State Bd. of Elections, 108 Ill. App. 3d 496, 504, 438 N.E.2d 1241, 1246 (1982). The author was the lead plaintiff.

HeinOnline -- 8 N. Ill. U. L. Rev. 581 1987-1988

be limited to narrowly and clearly-defined structural and procedural changes in the legislature. Now that the Cutback Amendment has effected the most popular change in the structure of the General Assembly, there is apparently no issue within the defined scope of Article XIV, Section 3, that could seize the public's attention. Amending the Illinois Constitution, therefore, seems to be primarily a matter for the General Assembly (Art. XIV, § 2) or a convention elected by the people (Art. XIV, § 1), and only secondarily a matter for initiative and referendum (Art. XIV, §3).

Section 4 of Article XIV is unique because it concerns amendments to the United States, not the Illinois, Constitution. The delegates were aware that several proposals for calling a federal constitutional convention had received the approval of many state legislatures during the 1960's. The motive behind most of these proposals was to reverse the Supreme Court on several decisions, particularly those mandating reapportionment of state legislatures and restricting religious observances in the public schools. The apparent ease and alacrity with which state legislatures ratified these proposals alarmed many delegates. In an effort to make the process more deliberative, the convention established two requirements in Section 4. The first is that, between the time a proposed federal amendment is submitted by Congress to the states and the time the Illinois Legislature may consider its ratification, a majority of the members of the Illinois Legislature must have been elected. The second is that a vote of three-fifths of the members of each house of the legislature is necessary to call for a federal constitutional convention, to call for a state convention to ratify a proposed federal amendment and to ratify an amendment submitted by Congress to the state legislatures.

Apparently the delegates never fully considered the impact of this section. Only four years after its creation, a federal court declared both requirements repugnant to the United States Constitution in *Dyer v. Blair*,[18] a case brought during the campaign to win Illinois ratification of the proposed Equal Rights Amendment, "E.R.A."

Even in 1970, the first requirement of Article XIV, Section 4 was clearly in violation of the federal constitution.[19] The constitutionality of the second requirement was more debatable. It seems unnecessary, however, in view of the two-thirds vote requirements of Article V of the United States Constitution: that the approval of two-thirds of Congress is necessary to propose a federal constitutional amendment,

18. 390 F. Supp. 1291 (N.D. Ill. 1974).
19. Leser v. Garnett, 258 U.S. 130 (1922).

HeinOnline -- 8 N. Ill. U. L. Rev. 582 1987-1988

or that two-thirds of the states must call a federal constitutional convention to propose an amendment; and that ratification by three-fourths of the states is necessary to adopt such an amendment. The federal court in *Dyer* held that a state constitution cannot require an extraordinary majority for legislative approval of a proposed amendment to the federal constitution. Ironically, the court also held that either house could establish its own rules for ratification, including a three-fifths vote requirement, as long as the rules were reasonable. The General Assembly can thus do by rules, which it can change virtually every day, that which the citizens voting at a constitutional referendum cannot do.

It is ironic as well that so far the only federal constitutional amendment affected by this novel provision is one probably favored by most of the "liberal" delegates, the ones who were most alarmed at what they perceived as the easy approval of "conservative" amendments. Finally, the only reason for the three-fifths majority requirement in the rules and parliamentary rulings of each chamber was the decision by the leaders of each house to conform legislative practice to the new Illinois Constitution. Before 1971, neither house had ever required an extraordinary majority to approve a proposed federal amendment.

Article XIV, Section 4 is the only provision of the 1970 Illinois Constitution thus far to have been held unconstitutional under the United States Constitution. This Section provides a sorry distinction, and is an unhappy and ironic consequence of an ill-thought-out attempt by some delegates to stall the ratification of federal amendments they did not like. The practical effect of the provision is to place into the hands of a majority of each house the power to change the requirements for ratification of any federal constitutional proposal, increasing or decreasing its chances for ratification as a majority of each house sees fit. The real test of the legislators' devotion to an extraordinary majority requirement as a matter of political philosophy, as opposed to their desire to conform to the 1970 Illinois Constitution, will arise when a "conservative" proposal to amend the federal constitution comes to a vote in the General Assembly. For example, what will be the vote requirement on the proposal to call a federal constitutional convention to consider a "balanced budget" amendment?

II. The Basic Principles of Government

(Preamble; Article II; and Article XIII, §§1-4)

HeinOnline -- 8 N. Ill. U. L. Rev. 583 1987-1988

Six sections of the constitution and the Preamble specify some of the convention's fundamental assumptions about the purpose and principles of Illinois government. The Preamble is largely the same as that of the 1870 Constitution, which in turn owed much to the majestic simplicity of the Preamble to the United States Constitution. However, the Preamble to the 1970 Constitution adds boldly that its purposes include "to . . . maintain a representative and orderly government; eliminate poverty and inequality; assure legal, social and economic justice; [and] provide opportunity for the fullest development of the individual. . . ." This additional language shows that the delegates were products of the mid-twentieth century: they firmly believed that it is the purpose of government to aid the individual and to promote his individual well-being, not merely to refrain from doing him harm. The new words of the Preamble make it easier to understand why the delegates drafted provisions prohibiting discrimination,[20] promoting education[21] and generally committing the resources of Illinois government to improving the quality of life in Illinois.

A. SEPARATION OF POWERS

Article II establishes the basic powers of state government and specifies that the legislative, executive and judicial branches may not exercise each other's powers. This has long been a standard provision in most state constitutions, including the 1870 Illinois Constitution.

The rapid growth of the administrative agencies in recent years has created a dilemma for the separation of powers doctrine. Most administrative agencies, whether federal or state, perform some functions that are arguably "executive" in nature, some that are arguably "legislative" and some that are arguably "judicial." The Illinois Supreme Court has held that the separation of powers doctrine does not prohibit the intermingling of some of the powers of the branches in one agency; it prohibits only the lodging of all of the power of one branch in another one.[22]

B. SOVEREIGN IMMUNITY

Article XIII, Section 4 is not well known, but it affects the lives of everyone who is the victim of a tort committed by an employee of

---

20. ILL. CONST. art. I, §§17, 18 and 19.

21. ILL. CONST. art. X, §1.

22. In re Barker's Estate, 63 Ill. 2d 113, 345 N.E.2d 484 (1976); City of Waukegan v. Pollution Control Bd., 57 Ill. 2d 170, 311 N.E.2d 146 (1974); People v. Brumfield, 51 Ill. App. 3d 637, 366 N.E.2d 1130 (1977).

HeinOnline -- 8 N. Ill. U. L. Rev. 584 1987-1988

the state or a local government, e.g., someone who is injured by a CTA bus in an accident. The traditional rule in such tort cases, called "sovereign immunity," is that no one can sue a government without its consent if the governmental employee was engaged in a governmental function.[23] The new constitution abolishes that rule.

Pursuant to the 1870 Constitution, Illinois had established a Court of Claims, an administrative court that adjudicated such private claims against the state. In effect, then, Illinois had decided to "consent" to suits before 1970.[24] The significance of Article XIII, Section 4 lies in its implicit acknowledgment of a policy that the government ought not be able to commit a tort with impunity. The "sovereign" cannot be immune because the true sovereign is the people, not the government.

C. GOVERNMENTAL ETHICS

The first three sections of Article XIII are very important because they establish high standards of conduct for public officials. Section 3 establishes a modern form of the traditional oath of office taken by holders of state offices or positions created by the constitution. Section 1 strengthens the similar provision of the 1870 Constitution and declares a person convicted of "a felony, bribery, perjury or other infamous crimes" to be ineligible to hold an office created by the constitution. Although it allows the legislature to restore a convict's eligibility to hold office, the General Assembly has not done so. The state officials convicted of bribery or of crimes amounting to bribery in recent years are thus still unable to hold office again.

The recent cases on public officials' dishonesty have clarified the terms in Section 1. A "conviction" occurs when the judge enters the order of a judgment of conviction, even though the defendant appeals.[25] An "infamous crime" is one "inconsistent with commonly accepted principles of honesty and decency."[26] There is no question that the office is vacant as soon as there is a "conviction" for an "infamous crime" under either federal or state law.

---

23. For a definition of this rather elusive concept, *see* GIFIS' LAW DICTIONARY 196 (1975) upon which the definition in the text is based.

24. ILL. REV. STAT., ch. 37, para. 439.1-439.25 (1983).

25. People *ex rel.* Taborski v. Illinois Appellate Court, First District, 50 Ill. 2d 336, 278 N.E.2d 796 (1972); ILL. REV. STAT. ch. 46, para.25-2; ILL. REV. STAT. ch. 38, para.2-5 (1985). *But see* People *ex rel.* Grogan v. Lisinski, 113 Ill. App. 3d 276, 446 N.E.2d 1251 (1983) (conviction occurs when sentence is imposed).

26. People *ex rel.* City of Kankakee v. Morris, 126 Ill. App. 3d 722, 726, 467 N.E.2d 589, 592 (1984).

HeinOnline -- 8 N. Ill. U. L. Rev. 585 1987-1988

The most innovative of the three "ethics" provisions is Section 2, which had no counterpart in the 1870 Constitution. It requires every state officer or holder of an office created by the constitution to file a statement of his economic interests. If the officeholder fails to file this report on his finances, he forfeits his position. Section 2 also allows any branch of government to establish ethical standards for that branch, and empowers the General Assembly to require financial disclosure reports of local government and school district officers.

Section 2 is a strong provision that could be of great use to citizens seeking to know whether their public officials hold financial interests that could conflict with their public duties. It can also be a source of abuse, however, because it may force candidates for even minor offices to divulge the personal holdings of their families, even if these holdings do not give rise to any questions of public honesty. This inherent conflict between the public's right to know and the individual officeholder's right to privacy became critical when the General Assembly passed the Illinois Government Ethics Act to implement Section 2. The Illinois Supreme Court resolved the conflict in favor of the public's right to know when it upheld the Act's constitutionality.[27]

After the basic constitutional issue had been settled, problems arose because of attempts by the governor to enforce the Section 2 standards. The first conflict evolved from an executive order issued by Governor Dan Walker that required most employees of agencies subject to him to file separate statements of financial disclosure and copies of their income tax returns with a Board of Ethics appointed by the Governor. In *Illinois State Employees' Ass'n v. Walker*,[28] the Illinois Supreme Court held that Walker, as head of the executive branch, could require such extensive disclosure from his employees, because the income tax records were for the use of the Governor in assigning people to sensitive positions and were not made public.

A second problem arose from another executive order requiring both regulated businesses and those seeking to sell goods or services to agencies of the state responsible to him to disclose their political

27. Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *cert. denied*, 412 U.S. 925 (1973) (the U.S. Supreme Court refused to hear an appeal which contended that the Illinois constitutional requirement violated officeholders' rights to privacy and to seek office).

28. 57 Ill. 2d 512, 315 N.E.2d 9 (1974), *cert. denied*, 419 U.S. 1058 (1974) (again, the U.S. Supreme Court refused to hear an appeal based on federal constitutional rights).

HeinOnline -- 8 N. Ill. U. L. Rev. 586 1987-1988

campaign contributions. Here the court drew the line on the public's or the Governor's "right to know," holding that the Governor had no power to require this type of disclosure from people outside state government.[29]

Recently problems have arisen with the language in Section 2 imposing the severe, perhaps Draconian, penalty of forfeiture of office upon those who fail to file "within the time prescribed" by the legislative act implementing this provision. In 1972, an opinion of the Illinois Attorney General[30] upheld the rather plain meaning of this language. After some candidates for public office failed to file in the early 1970's, there were routine and timely filings. Candidates for,[31] as well as holders of, public office apparently understood they were required to file.

In 1984, when the Mayor of Chicago, Harold Washington, failed to file in time, his opponents in the City Council declared he had forfeited office, but their efforts failed when state law enforcement officials refused to proceed against the Mayor.

It is difficult at present to assess the effects of Article XIII, Section 2 and the three reported decisions interpreting it. There is no evidence that any candidates have refused to run for public office because of the economic disclosure requirement. On the other hand, there is some evidence that the citizens and press are not interested in the contents of public officials' disclosure statements.[32] Similarly, there is no way to determine whether the disclosure requirement has caused officeholders to refrain from unethical practices. For the moment, Article XIII, Section 2 seems to be a requirement which has neither cleansed the state of corruption nor driven the best people from office.[33]

III. SUFFRAGE AND ELECTIONS

(Article III and Separate Proposition 4)

---

29. Buettell v. Walker, 59 Ill. 2d 146, 319 N.E.2d 502 (1974).

30. Op. Att'y Gen. No. S-514 (1972).

31. Havens v. Miller, 102 Ill. App. 3d 558, 429 N.E.2d 1292 (1981) (holding candidates were covered).

32. *Economic Disclosure Statements* 3 ILL. ISSUES 16 (Jan. 1977).

33. The author, in her capacity as Chairman of the State Civil Service Commission, filed statements of economic interest pursuant to both the Illinois Government Ethics Act and gubernatorial executive order between 1977 and 1983; she considered the latter a more detailed report.

HeinOnline -- 8 N. Ill. U. L. Rev. 587 1987-1988

The most heatedly debated issue on suffrage and elections at the 1970 Convention was that of lowering the voting age for state and local elections to 18. A half-generation later, it is hard to remember the apprehension over allowing "the kids" to vote. The debate was nation-wide because feelings about the Vietnam War and about the college students' responses to it affected positions taken for or against the proposal.

It suffices to note that the delegates submitted the issue to the voters as one of the four separate questions voted upon at the constitutional referendum on December 15, 1970. The voters rejected the proposal. Ironically, the United States Supreme Court upheld the congressional act lowering the voting age for federal elections[34] only a week later. Further, the 26th Amendment to the United States Constitution, lowering the voting age for state and local elections as well, became effective a few months later. Whether the Illinois electors would have voted for extending the franchise to 18-, 19- and 20-year-old Illinoisans if they had known of either of these developments, must remain an historical "if."

The second most important issue related to voting was the regular, fair conduct of elections. Charges of widespread fraud in registration and voting, particularly in Chicago, were prevalent, and had been so for decades. In addition, in 1970, the delegates were particularly concerned with fairness, not just fraud, in the administration of elections. Several delegates had experienced what they considered unfair treatment in their races for the constitutional convention, especially those who had never run for office before and were unfamiliar with the intricacies of filing procedures. Some discovered that local election officials were reluctant to give help and information to candidates who belonged to the other political party or, worst of all, who were non-partisan or "independent."

The most controversial treatment of candidates for membership in the convention came at the hands of Paul Powell, who was Secretary of State in 1969 when the elections for membership in the convention took place. Powell, who by virtue of his office was the chief administrator of state elections, openly placed the names of candidates he most favored first on the ballot and those he least favored last on the ballot. Presumably, voters are more likely to vote for candidates whose names appeared at the top of the ballot. Since many of those running for "Con Con" had never run for office before, they were incensed at Powell's favoritism, particularly since

34. Oregon v. Mitchell, 400 U.S. 112, 121 (1970).

HeinOnline -- 8 N. Ill. U. L. Rev. 588 1987-1988

the elections for membership in the convention were on a non-partisan basis, and many of those running were not from the usual party ranks. Although a federal court forced Powell to change his practices, Powell's actions and total lack of remorse over them sharpened the delegates' perception that one person had too much discretion in running elections.[35]

Another obstacle faced by those running for membership in the convention was inconsistent treatment by local election officials. These officials—county clerks and, in certain areas, Boards of Election Commissioners—sometimes treated individual candidates in a disparate manner, and officials in some election areas treated candidates differently from candidates in other election areas. Clearly there was no "Illinois" way of handling elections in a fair way.

The convention's solution to all these problems was to create a State Board of Elections to oversee the voter registration and elections in the whole state. Although the delegates left the number, compensation and manner of selection of the Board members to the legislature, they specified that no political party could have a majority of members on the Board.

In 1973, after two years of bitter wrangling over these issues, the General Assembly passed a bill implementing this creation of a State Board of Elections. The Board was to have four members, each chosen, in a two-step process, by the Governor from a pair of nominees submitted by each of the four party leaders in the General Assembly.[36] From the beginning, the Board was in constant turmoil. Virtually every decision it made, even on the forms of ballots, created controversy and litigation.[37]

Two early decisions, *Lunding v. Walker*[38] and *Walker v. State Board of Elections*,[39] established the basic constitutional status of the Board. In *Lunding*, the precise question was whether the Governor could remove a member of the Board. Governor Walker, relying upon the decision in *Illinois State Education Association v. Walker*[40] that

35. Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969) (holding that Powell had violated the delegates' constitutional rights).

36. The four "legislative leaders" are the Speaker and Minority Leader of the House and the President and Minority Leader of the Senate.

37. For a good history of the Board, *see* Bernardini, *The Illinois State Board of Elections: A History and Evaluation of the Formative Years*, 11 J. MAR. J. 321 (1977-78).

38. 65 Ill. 2d 516, 359 N.E.2d 96 (1976).

39. 65 Ill. 2d 543, 359 N.E.2d 113 (1976).

40. Illinois State Educ. Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9, *cert. denied*, 419 U.S. 1058 (1974).

HeinOnline -- 8 N. Ill. U. L. Rev. 589 1987-1988

he had the power to require some employees responsible to him to file financial disclosure reports,[41] insisted that he could remove Lunding, a member of the Board, for failing to file such a report. The underlying issue in this dispute was whether the Board was part of the executive branch of state government.

After prolonged, complicated litigation, the Illinois Supreme Court held that, although the Governor had appointed members of the Board, thereby making them part of the executive branch, of which he is the head, he could not remove them at his sole discretion in the same way he could remove the members of ordinary agencies and boards. The Board of Elections, said the court, is a very special part of the executive branch—it is independent and non-partisan. Not even the Governor, the holder of "the supreme executive power,"[42] could remove a member of the Board unless he could show that there was a good cause for the removal.[43]

The court's holding that the Board, although a unique, highly independent body, is a part of the executive branch was crucial to its consideration of the constitutionality of the two-step selection of Board members. In *Walker v. State Board of Elections*[44] the supreme court held that selection procedure unconstitutional. It pointed out that the constitution forbids the legislature, whose four leaders nominated the four pairs of people from whom the Governor appointed the four members of the Board, to "elect or appoint officers of the Executive Branch."[45]

When one reads both cases, therefore, it is clear that the State Board of Elections is a part of the executive branch, but that it has a unique constitutional status which ought to protect its independence and integrity from encroachment by the members of both the executive and legislative branches. The General Assembly cannot take part in the selection of Board members, and the executive officer appointing them cannot remove them unless he can show a good reason for doing so.

In another section of Walker, the court invalidated the "tie-breaker" provision of the bill establishing the Board. This statutory provision allowed the Board to break a tie among its four members

41. *Id.* at 530-31, 315 N.E.2d at 18-19.

42. ILL. CONST. art. V, §8.

43. Because the case was appealed from a temporary injunction issued by a circuit court, the Supreme Court did not reach the question whether Lunding's failure to file a financial disclosure report was sufficient "cause" for discharge.

44. 65 Ill. 2d 543, 359 N.E.2d 113 (1976).

45. ILL. CONST. art. V, §9(a).

HeinOnline -- 8 N. Ill. U. L. Rev. 590 1987-1988

by having one member, to be chosen by lot, abstain from voting. The court said that the Board's decisions on elections, which affect the basic constitutional rights of every candidate and voter in Illinois, are too important to be left to "a lottery."

In January, 1978, the General Assembly passed another bill creating a new State Board of Elections.[46] The new Board has eight members. The Governor appoints two from members of his political party who live in Cook County and two from co-partisans who live outside Cook County. The next highest ranking state executive officer[47] who belongs to the major political party other than the Governor's nominates twelve members of his party, three for each of the four remaining positions. The Governor then appoints one of the three nominees for each post. This procedure is an attempt to insure a Board made up of four Democrats and four Republicans, selected from varied geographical and political areas, all appointed (at least technically) by the Governor.[48]

Even a decade later, we cannot tell whether this Board has succeeded. Certainly it is less controversial than its predecessor. In the few years of its existence, it has kept a very low profile and has attempted to handle only the day-by-day administrative tasks of supervising registration and elections. The county clerks and Boards of Election Commissioners remain powerful local election officials, for the Board does not seem to want to challenge their local hegemony.

The current political realities of Illinois are such that the Board could scarcely do otherwise. The breakdown of the Cook County Democratic Party, which began after Mayor Daley's death in 1976, has insured that local election squabbles are sent to the Circuit Court of Cook County for resolution. The Board does not play a significant adjudicative role, even as an administrative agency, in these disputes. If it investigated and prosecuted fraud and unfairness in local elections effectively, the Board would inevitably create enemies at the state and local levels. To withstand their attacks, the Board would have to have the confidence of the public and of governmental officers and candidates for office. As yet, the Board has not acquired this trust. Only if and when it does will we be able to judge its effectiveness. Until

---

46. ILL. REV. STAT. ch. 46, para. 1A-1 (1978).

47. The rank of the state executive officers is Governor, Attorney General, Secretary of State, Comptroller and Treasurer. ILL. REV. STAT. ch. 46, §1A-3(2) (1987).

48. In 1978, Governor James R. Thompson appointed four Republicans. He also appointed four Democrats of the twelve nominated by Secretary of State Alan J. Dixon, the highest ranking non-Republican officer.

HeinOnline -- 8 N. Ill. U. L. Rev. 591 1987-1988

then, the partisan political process, criminal statutes, law enforcement officials and investigative reporters remain the true watchdogs of elections in Illinois, especially in Cook County.

Compared to the controversial 18-year-old vote and the State Board of Elections, the remaining provisions of Article III were relatively uncontroversial. Perhaps the most interesting of these sections is the automatic restoration of the right to vote upon the completion of a criminal sentence.[49] Formerly, only a gubernatorial pardon could restore suffrage to a convict. Although it is impossible to know whether ex-convicts have made use of their new right, the provision makes a public statement favoring rehabilitation. It is apparently still well ahead of its time, because the United States Supreme Court has held that there is no federal constitutional right to reenfranchisement after the completion of a penal sentence.[50] The Illinois Attorney General has advised that only people who are actually serving prison terms, including those on work release programs and those convicted of misdemeanors, are prohibited from voting; those serving sentences of "periodic imprisonment" or on conditional discharge, probation or parole may vote.[51]

A second change the convention made was only a few months ahead of federal law. The delegates decided that the former requirement of a year's residence in Illinois before one could vote[52] was unnecessarily long in an era when the average American moves at least every two years. They shortened the duration of residence the General Assembly could require to a maximum of six months and allowed the legislature to establish an even shorter period of durational residence.[53] The United States Supreme Court held just two years later that a state could not require a person to live in the state for longer than 30 days before he could vote.[54] Thus, the change in the Illinois requirement, which seemed quite radical, was conservative in comparison with United States Supreme Court standards.

Article III, Section 4 mandates the legislature to define "permanent residence for voting purposes" and requires laws on voter registration and elections to be "general and uniform." The phrase "permanent residence for voting purposes" is not easy to define.

---

49. ILL. CONST. art. III, §2.

50. Richardson v. Ramirez, 418 U.S. 24 (1974).

51. Op. Att'y. Gen. S-1056 (1976). *See also* ILL. REV. STAT. ch. 46, para. 3-5 (1987).

52. ILL. CONST. of 1870, art. VII, §1.

53. ILL. CONST. art. III, §1.

54. Dunn v. Blumstein, 405 U.S. 330 (1972).

HeinOnline -- 8 N. Ill. U. L. Rev. 592 1987-1988

After much controversy in the early 1970's, chiefly concerning undergraduates living in college dormitories, the Election Code seems to have settled upon "permanent abode"— which hardly disposes of the issue.[55]

The phrase "general and uniform" is also difficult to define. One court said that a "general law is one which includes all persons, classes and property similarly situated,"[56] language reminiscent of equal protection clauses and prohibitions of special legislation. The most important case on "general and uniform" is *Bridgewater v. Hotz*,[57] in which the Illinois Supreme Court virtually conceded that Article III, Section 4 is really an equal protection guarantee or ban on special legislation in registration and elections. Nonetheless, the supreme court upheld differences in primary dates based on the size of the counties in which the primary was to be held. The same court later held the Republican Party's decision to have a "blind" presidential primary, while the Democratic Party had a "presidential preference" primary,[58] did not violate this provision. Yet it also held that a 1986 attempt to change from a partisan to a non-partisan mayoral primary shortly before the Chicago mayoral election did violate the "general and uniform" clause.[59]

In short, registration of voters, primaries and elections in Illinois are still under both local and state control. As yet, Article III has had little impact upon the electoral process in Illinois. Decisions of the United States Supreme Court and changing partisan alliances have had at least as much influence upon the franchise and elections in the lives of most Illinoisans.

IV. Individual Rights and Responsibilities

(Article I; Article XI; Article XIII, § 5; Separate Proposition 3)

When we speak of the rights of an individual, we usually mean his rights vis-a-vis the government—rights which the courts will enforce. The 1970 Constitution contains many provisions on individual rights, some of them traditional, some daringly new. Article I, the Bill of Rights, contains most of these provisions. In addition, Article

55. Ill. Rev. Stat. ch. 46, para.3-1 through 3-4 (1987).

56. *In re* Worth-Palos Park Dist., 50 Ill. App. 3d 356, 358, 365 N.E.2d 565, 566 (1977).

57. 51 Ill. 2d 103, 281 N.E.2d 317 (1972).

58. Totten v. State Board of Elections, 79 Ill. 2d 288, 403 N.E.2d 225 (1980).

59. Lipinski v. Chicago Board of Election Commissioners, 114 Ill. 2d 95, 500 N.E.2d 39 (1986).

HeinOnline -- 8 N. Ill. U. L. Rev. 593 1987-1988

XI guarantees a clean, healthful environment, and Article XIII, Section 5 confers a contractual status on membership in public employee retirement plans and bars impairment of earned benefits. Separately Submitted Proposition 3 would have created a right not to be executed.

A. MISCELLANEOUS RIGHTS AND REMEDIES IN THE BILL OF RIGHTS

Taken together, the rights guaranteed by Article I logically fall into four distinct groups. The first group consists of the twelve sections of Article I that are virtually unchanged from the 1870 Constitution.[60] All concern individual "rights" except for Section 23, which contains a warning, really a "constitutional sermon," that the "blessings of liberty . . . cannot endure unless the people recognize their corresponding individual obligations and responsibilities." In short, both the 1870 and 1970 Constitutions recognized that citizens have duties as well as rights.

The second group consists of four miscellaneous provisons, three of which are completely new and one of which is a substantial revision of an 1870 provision. The revised section is Article I, Section 12, which declares that everyone "shall" find a remedy in the legal system for wrongs done to him. The 1870 provision stated simply that he "ought" to find a remedy. So far, this change in verb from the prescriptive to the imperative mode has not affected the courts. They have held, as they did under the 1870 Constitution, that the statement expresses only a political or jurisprudential philosophy.[61] Not surprisingly, therefore, the courts have refused to let plaintiffs use even the philosophy of this provision as the basis for creating a new cause of action, i.e., one unknown at the common law and not granted by statute.[62] Given these positions, it is a bit surprising that the courts seem to allow litigants to use the section as a "make-weight" to buttress their interpretation of an already established common law principle or already effective statute. Lawyers, therefore, can use

---

60. ILL. CONST. art. I, §§1, 3, 4, 5, 8, 9, 10, 13, 15, 16, 21 and 23.

61. Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 367 F. Supp. 594, *rev'd on other grounds*, 505 F.2d 1141, *cert. denied*, 420 U.S. 997 (1973); Sullivan v. Midlothian Park Dist., 51 Ill. 2d 274, 281 N.E.2d 659 (1972); Costello v. Unarco Industries, Inc., 129 Ill. App. 3d 736, 473 N.E.2d 96 (1984).

62. Favata v. Rosenberg, 106 Ill. App. 3d 572, 436 N.E.2d 49 (1982); Koskela v. Martin, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978).

HeinOnline -- 8 N. Ill. U. L. Rev. 594 1987-1988

Article I, Section 12 to support their arguments, but only to a limited extent.[63]

The three new provisions in the second group of rights have not effected great changes either. Article I, Section 24, "Rights Retained," is in substance a restatement of the Ninth Amendment to the United States Constitution. It has had no impact on case law so far.

Article I, Sections 20 and 22 have been more controversial. Section 20, "Individual Dignity," declares, "[c]ommunications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group . . . by reference to religious, racial, ethnic, national or regional affiliation are condemned." Proposed by Victor A. Arrigo, a delegate sensitive to charges that Americans of Italian descent were "all Mafia," it was criticized at the convention as a well-intentioned effort that probably, but not certainly, is a violation of the First Amendment guarantee of Free Speech.[64] The one case interpreting this section holds only that it does not give a person the right to sue someone who has defamed a group to which he belongs.[65] During the American Nazi Party's attempt to march in Skokie in 1977, this section received some publicity, although it was not the basis of any of the litigation surrounding those attempts. More recently, Section 20 may have been one of the inspirations for the 1983 Act making "ethnic intimidation" a misdemeanor.[66] Since this Act makes actions—"assault, criminal trespass to land, or mob action"—the offenses, as opposed to statements, it is probably constitutional. Article I, Section 20 may be only a "constitutional sermon," but it has apparently helped foster the social and political climate necessary for passage of such bills.

Section 22, purporting to give "the individual citizen" a "right . . . to keep and bear arms . . . ," has engendered the most litigation. Although the supporters of the section apparently thought it a ban on gun control laws, the three cases on it to date clearly validated gun control statutes and ordinances.[67] Two of the cases[68] arose from

---

63. *See, e.g.*, Crocker v. Finley, 99 Ill. 2d 444, 459 N.E.2d 1346 (1984) ("right to obtain justice by law freely"); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), *cert. denied*, 444 U.S. 828, *reh'g denied*, 444 U.S. 974 (1979).

64. The absence of certainty of Section 20's unconstitutionality arises from the United States Supreme Court's upholding of an Illinois statute similar to Section 20 in Beauharnais v. Illinois, 343 U.S. 250 (1952). The wording of the statute, repealed before 1969, was the apparent genesis of Section 20.

65. Irving v. J. L. Marsh, Inc., 46 Ill. App. 3d 162, 360 N.E.2d 983 (1977).

66. ILL. REV. STAT., ch. 38, para.12-7.1 (1987).

67. Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 470 N.E.2d 266

HeinOnline -- 8 N. Ill. U. L. Rev. 595 1987-1988

a Morton Grove village ordinance prohibiting possession of "handguns," not all "arms," by those who were not peace officers, military personnel or licensed gun collectors, but allowing recreational use at gun clubs. The ordinance attracted national publicity, much of it emotional, but both state and federal courts upheld it under both Article I, Section 22 and the Second Amendment to the United States Constitution.

B. CRIMINAL JUSTICE PROVISIONS IN THE BILL OF RIGHTS

The third group of rights consists of the four potentially significant changes in criminal justice. The first two concern pre-trial rights. Article I, Section 6 addresses the search and seizure problems that the Fourth Amendment to the United States Constitution also addresses. The most important aspect of the section is that it creates a specific right to privacy. In contrast, the United States Constitution does not specifically declare an individual right to privacy, but cases construing the first, third, fourth, fifth and ninth amendments have cumulatively created that right.[69] As the governmental ethics cases discussed previously indicate,[70] the government's need to make certain information public may conflict with an individual's right to keep personal matters private. Since the Illinois Supreme Court has held that Section 6, despite the inclusion of a specific right to privacy, is no more extensive than the right to privacy implicit in the United States Constitution,[71] it seems useless, at least for now, to consider how the Illinois Consitution might afford its citizens greater protection from governmental intrusion than the federal right does.

The unsettled issue of Article I, Section 6 is whether it protects people only from governmental intrusions into their privacy or from intrusions by private persons as well. Presumably, the answer is "no", but it is not a simple answer. The requirement of "state action" by a defendant before the plaintiff can raise his right to privacy is not an easy requirement to define. If state action is truly absent, however, there is neither a federal nor a state right to privacy.[72]

(1984); Quilici v. Morton Grove, 532 F. Supp. 1169, *aff'd* 695 F.2d 261, *cert. denied*, 464 U.S. 863 (1983); People v. Williams, 60 Ill. App. 3d 726, 377 N.E.2d 285 (1978).

68. *Kalodimos*, 103 Ill. 2d 483, 470 N.E.2d 266; *Quilici*, 532 F. Supp. 1169.

69. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

70. *See supra* text accompanying notes 27-33.

71. People v. Tisler, 103 Ill. 2d 226, 469 N.E.2d 147 (1984).

72. People v. Burton, 131 Ill. App. 3d 153, 475 N.E.2d 583 (1985) is the most recent Illinois case on this issue.

HeinOnline -- 8 N. Ill. U. L. Rev. 596 1987-1988

The other potentially significant change in pre-trial criminal justice is the inauguration of the use of a judge's finding of "probable cause" at a preliminary hearing as an alternative to an indictment by a grand jury. The grand jury is an ancient Anglo-American institution by which the prosecutor presents evidence for his case against a defendant before several citizens, who may then vote to indict the defendant. If they do not indict the defendant, the prosecutor cannot bring the defendant to trial. Although the grand jury was originally devised to protect a defendant from unwarranted prosecution, it has evolved into a rubber stamp for any prosecutor who really wants to indict a defendant and a convenient excuse for failing to indict a person whom the prosecutor does not really want to indict.[73]

Section 7 of Article I allows the General Assembly to limit or abolish the use of a grand jury. It also provides, for the first time in Illinois, an alternative to a grand jury indictment: a finding of probable cause by a judge in a preliminary hearing. The courts have not successfully defined "prompt;" indeed, they have refused to grant judicial relief to a defendant held too long a time, claiming that the power to afford such relief resides solely in the legislature.[74] The legislature responded to these cases by allowing dismissal of a case against a defendant who has not had a preliminary hearing or been indicted by a grand jury within thirty days after being taken into custody.[75]

The Illinois Supreme Court has settled the major question about the preliminary hearing: whether a prosecutor who has failed to obtain a finding of probable cause at a preliminary hearing may then try to obtain an indictment from a grand jury. The court said that the prosecutor could indeed try again, this time before a grand jury, because the defendant had only the right either to an indictment or to a finding of probable cause, at the prosecutor's option.[76] To date, the legislature and the courts have allowed grand juries and preliminary hearings to co-exist without regulating when each method can

---

73. RECORD OF PROCEEDINGS, *supra* note 2, Vol. III. at 1465-66 (remarks of Delegate Raby); Duff & Harrison, *The Grand Jury in Illinois: To Slaughter a Sacred Cow*, 1973 U. ILL. L. FORUM 635, 642-43.

74. Cases refusing judicial relief include People v. Riddle, 141 Ill. App. 3d 97, 489 N.E.2d 1176 (1986); People v. Anderson, 92 Ill. App. 3d 849, 416 N.E.2d 78 (1981); and People v. Sanders, 36 Ill. App. 3d 518, 344 N.E.2d 479 (1976). Cases holding that relief lies solely within the legislative power include People v. Kilgore, 39 Ill. App. 3d 1000, 350 N.E.2d 810 (1976), and People v. Todd, 34 Ill. App. 3d 844, 340 N.E.2d 669 (1976).

75. ILL. REV. STAT. ch. 38, para. 109-3.1(b) (1975).

76. People v. Kent, 54 Ill. 2d 161, 295 N.E.2d 710 (1972).

HeinOnline -- 8 N. Ill. U. L. Rev. 597 1987-1988

be used. The need for efficiency in criminal courts will probably force a reconciliation between the two systems.

Two other significant provisions on criminal law concern post-trial criminal matters. Article I, Section 11 contains language essentially the same as its predecessor,[77] which required that penalties be determined "according to the seriousness of the offense." It also contains new language adding that the penalties be determined "with the objective of restoring the offender to useful citizenship." The addition of rehabilitation as a purpose of sentencing has not caused a revolution in criminal law, but it has had a definite effect on the courts. The courts have suggested, however, that the sentencing judge must "look at the circumstances attending the offense,"[78] and that he "may not resign to total retribution one who has a chance of future restoration to useful citizenship in a free society."[79] This section applies both to the General Assembly in establishing penalties for crimes and to judges in imposing sentence.[80] Courts have been reluctant to upset legislative determinations of minimum and maximum sentences or to reduce a sentence imposed by a trial court judge. Of more than a hundred cases raising these issues on appeal, few have resulted in reductions of sentences. In those few cases the particular defendant usually was a very young first offender.[81]

The death penalty was an emotional focal point of the convention, which met before the recent federal court challenges to the death penalty. Because the differences between the proponents and opponents on this issue were irreconcilable, the delegates submitted the question as a separately submitted side-issue at the constitutional referendum. Although the anti-capital punishment movement was relatively strong in 1970, the voters rejected Proposition 3, the abolition of the death penalty, by a two-to-one margin. Since then, United States Supreme Court decisions have greatly restricted, although never abolished, the use of the death penalty.[82] Illinois has reinstated the death penalty for certain crimes, and it seems that Illinois will continue to have capital punishment on the books for a

77. ILL. CONST. of 1870, art. II, §11.

78. People v. Carmickle, 46 Ill. App. 3d 112, 115, 360 N.E.2d 794, 797 (1977).

79. People v. Gibbs, 49 Ill. App. 3d 644, 648, 364 N.E.2d 491, 494 (1977).

80. People v. Taylor, 102 Ill. 2d 201, 464 N.E.2d 1059 (1984).

81. *See, e.g.*, People v. Williams, 62 Ill. App. 3d 966, 379 N.E.2d 1268 (1978); People v. Horton, 43 Ill. App. 3d 150, 356 N.E.2d 1044 (1977); People v. Wilkins, 36 Ill. App. 3d 761, 344 N.E.2d 724 (1976); People v. Brown, 27 Ill. App. 3d 405, 327 N.E.2d 75 (1975), all involving young defendants with no adult convictions.

82. *See* Furman v. Georgia, 408 U.S. 238 (1972) and its progeny.

HeinOnline -- 8 N. Ill. U. L. Rev. 598 1987-1988

long time to come.[83] The Illinois Supreme Court retained its constitutional duty of hearing appeals from a death sentence directly from the circuit court trial (Art.VI, § 4(b)). The final noteworthy new provision on criminal justice is Article I, Section 14, "Imprisonment for Debt." Although the first sentence of this section, forbidding imprisonment for debt except in cases of fraud or refusal to pay, is only a modernization of its 1870 predecessor,[84] the second sentence is new. It prohibits the imprisonment of a criminal defendant for failure to pay a fine assessed in a criminal prosecution "unless he has been afforded adequate time to make payments, in installments if necessary, and has willfully failed" to pay. The purpose of this section was to remove the discrimination between the rich and the poor in the rare instance when a judge imposes a substantial criminal fine. At first, the trial courts implemented this provision informally by simply granting a stay of execution of the sentence pending the defendant's payment of the fine on an installment plan set by the court. Later, the General Assembly specifically authorized the court to order a fine to be paid in installments.[85]

Article I, Section 14, is another provision which anticipated the United States Supreme Court by only a few months, since in 1972 the Court held that an indigent criminal defendant could not be imprisoned for non-payment of a fine unless he had willfully refused to pay it.[86] The Illinois courts have followed the federal decision and Article I, Section 14, without complaint or controversy. In fact, one Illinois Appellate Court has extended both Article I, Section 14 and another United States Supreme Court decision to apply the same rule to defendants who willfully fail to pay the costs and fees of their prosecution imposed by the costs statute.[87]

C. THE ANTI-DISCRIMINATION PROVISIONS IN THE BILL OF RIGHTS

The final category in the Bill of Rights is also the most novel: the civil rights provisions. These are the three new anti-discrimination sections and the due process equal protection clause.

The 1870 Constitution had guaranteed due process of law, but not equal protection of the laws.[88] The delegates quickly remedied that by adding a standard equal protection clause to the new consti-

83. ILL. REV. STAT. ch. 38, para. 9-1 (1987).
84. ILL. CONST. of 1870, art. II, §12.
85. ILL. REV. STAT. ch. 38, para.1005-9-1(e) (1985).
86. *See* Tate v. Short, 401 U.S. 395 (1971).
87. People v. Nicholls, 45 Ill. App. 3d 312, 359 N.E.2d 1095 (1977).
88. ILL. CONST. of 1870, art. II, §2.

HeinOnline -- 8 N. Ill. U. L. Rev. 599 1987-1988

tution.[89] Although an equal protection clause is the traditional means of preventing discrimination, particularly racial discrimination by the "state," meaning any government, the delegates decided that three additional provisions, each attacking discrimination in its own way, were necessary reinforcements of the principle of equality. The most important of these is Article I, Section 17, which prohibits discrimination based upon "race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property." The delegates chose to attack only employment and property discrimination primarily because jobs and housing are the two most critical needs of racial, religious and ethnic minorities.

A mere glance at the section shows why some observers originally called it the broadest civil rights provision in any state constitution.[90] It provides that the right to be free of discrimination is not limited to the public sector, but extends to private employment and private property as well. There are no exemptions from this broad grant except for those "reasonable exemptions" the General Assembly may set. The rights are self-executing, i.e., not dependent upon legislative action, but the General Assembly may add remedies to those usually given by a court.

For the first few years after the constitution became effective, no one petitioned a court for a remedy under Article I, Section 17. Finally, two noteworthy cases arose. In *Walinski v. Morrison*,[91] the plaintiff alleged discrimination by a private party. She sought damages from an accounting firm that had refused to hire her, allegedly because of her sex. The Illinois Appellate Court held that Article I, Section 17 created a private right of action, allowing a victim of discrimination to obtain any damages a civil court could grant, including money damages, instead of having to proceed through an administrative process.

In the other case, *Davis v. Attic Club*,[92] one man and several women contended that the businessmen's clubs in downtown Chicago violated Article I, Section 17 by selling "property"— liquor and food—to a membership whose ranks were not open to women. Over a strong dissent, the majority of the Illinois Appellate Court held that the clubs had not violated the constitution. The case held that, although food and liquor are "property" for purposes of Article I,

89. ILL. CONST. art. I, §2.

90. *See, e.g.*, E. GERTZ, FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS 155-71 (1972).

91. 60 Ill. App. 3d 616, 377 N.E.2d 242 (1970).

92. 56 Ill. App. 3d 58, 371 N.E.2d 903 (1977).

HeinOnline -- 8 N. Ill. U. L. Rev. 600 1987-1988

Section 17, the General Assembly had created a permissible "reasonable exemption" for "private clubs," including businessmen's clubs. It also held that the clubs' membership policies were protected by the right of privacy contained in Article I, Section 6.

Although the Illinois Supreme Court refused to hear the plaintiff's appeal, the case attracted much attention for two reasons. First, the Appellate Court's extension of the right of privacy beyond that established by the marital and sexual privacy cases decided by the United States Supreme Court[93] and the economic disclosure cases decided by the Illinois Supreme Court[94] establishes the superiority of one constitutional right, a broadly-defined right of privacy, over another constitutional right, the right to be free of discrimination. Second, the court said that the legislature had created a "reasonable exemption" in 1949 when it had passed a bill concerning the sale of alcoholic beverages. This seems wrong because the General Assembly sitting in 1949 obviously could not have been creating an exemption to a constitution drafted in 1970. Nobody knows how many other statutes passed years ago can now be considered retroactive "exemptions" to Article I, Section 17 or indeed any other part of the constitution.

The private club issue smoldered for a decade. Most of the one-sex clubs, at least in downtown Chicago, changed their rules under strong pressure from women's groups. In 1987, shortly after the United States Supreme Court held that a state statute could prohibit the "men only" rule of Rotary International,[95] the Chicago City Council passed an ordinance that effectively prohibited the clubs from excluding women. In Chicago, at least, the fires of this issue apparently have died out.

In the early 1980's, Article I, Section 17, along with Section 19, faced a threat greater than "privacy" and "anticipatory exemption." In 1979, the General Assembly passed the Illinois Human Rights Act.[96] It replaced the Fair Employment Practices Commission with a state commission to hear charges of discrimination by, among others,

---

93. Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

94. Buettell v. Walker, 59 Ill. 2d 146, 319 N.E.2d 502 (1974); Illinois State Employees' Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9 (1974); Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972). *See also supra* text accompanying notes 27-29.

95. Board of Directors of Rotary International v. Rotary Club of Duarte, 107 S.Ct. 1940 (1987).

96. ILL. REV. STAT. ch. 68, para. 1-101, *et seq.*

HeinOnline -- 8 N. Ill. U. L. Rev. 601 1987-1988

private employers, sellers of real estate and landlords. In a series of cases beginning with *Thakkar v. Wilson Enterprises*,[97] the courts required grievants to exhaust their remedies before the Human Rights Commission before they could bring an action in court. The foundation for this conclusion is the language of Article I, Section 17, allowing the creation of "exemptions" and the court's finding that the Human Rights Act makes just such an exemption by establishing the jurisdiction of the Human Rights Commission.

The federal courts have extended the ramifications of these decisions by prohibiting Illinoisans from bringing federal suits on employment discrimination until they have exhausted their administrative remedies.[98] The effect of the state and federal decisions is to deprive Illinois employees of a cause of action unless they are willing to continue a lawsuit after receiving a decision from a state agency whose backlog is years old.

In effect, then, there is no longer a constitutional remedy against employment discrimination in Illinois. It is hard to escape the conclusion that the courts have eviscerated Article I, Section 17 and imposed a situation intended by neither the convention nor the General Assembly—and that the General Assembly has been remiss in taking steps to amend the statutes to reverse these decisions. Indeed, the text of the Illinois Human Rights Act says specifically that one of its purposes is to implement Sections 17, 18 and 19 of Article I; nothing in the text suggests an intent to create an exemption.[99] Since the courts' interpretation is now "settled law," any advocate asserting that the constitution does not allow the creation of such an "exemption" would invite sanctions for filing friviolous pleadings.[100]

The second of the three new anti-discrimination provisions is Article I, Section 18. Cast almost in the words of the standard equal protection clause and of the proposed Equal Rights Amendment, the section seeks to prohibit sex discrimination "by the State or its units of local government and school districts." As the convention debates clearly show, the delegates intended this section to make sex a "suspect classification."[101] This means that if a law treats males and females

97. 120 Ill. App. 3d 878, 458 N.E.2d 985 (1983).

98. The most recent cases are Sanders v. A. J. Canfield Co., 635 F. Supp. 85 (N.D. Ill. 1986) and Walker v. Woodward Governor Co., 631 F. Supp. 91 (N.D. Ill. 1986).

99. ILL. REV. STAT. ch. 68, para.1-102(c) (1987).

100. ILL. REV. STAT. ch. 110, para.2-611 (1987); FED. R. CIV. P. Rule 11. There is language in *Sanders*, 635 F. Supp. 85 (N.D. Ill. 1986), suggesting precisely that.

101. RECORD OF PROCEEDINGS, *supra* note 2, Vol. V at 3669 (remarks of Delegate Nicholson).

HeinOnline -- 8 N. Ill. U. L. Rev. 602 1987-1988

differently, the legislature must prove to the court that there is a compelling reason for the law to treat them differently. If sex were not a "suspect classification," the person being discriminated against would have to prove that the distinction drawn between males and females was improper. This difference in who bears this burden of proving inequality is crucial to many equal protection decisions.

The first Illinois Supreme Court case on Article I, Section 18 was *People v. Ellis*,[102] in which a 17-year-old boy claimed that the statute on criminal trials of juveniles was unconstitutional. The Act said that females under 18 years old and males under 17 years old were to be tried as juveniles, rather than as adults. Ellis claimed that being tried in juvenile court was more favorable to a defendant's case than being tried in adult court. The supreme court agreed and said the Act violated Article I, Section 18. Most important, it held that the section made sex a "suspect classification." Because the state could not show that it had a compelling reason for distinguishing between males and females for the trial of juvenile offenses, the court said that the sexes had to be treated equally for this purpose.

The cases on Article I, Section 18, show that it can be a powerful tool to invalidate governmentally-related sex discrimination, but that it does not automatically invalidate classifications based on sex. Under the "compelling state interest" test, not every classification by sex is unconstitutional. For example, the Illinois courts struggled with the incest statutes, which until 1977 imposed a heavier penalty upon a father who had sexual relations with his daughter than upon a mother who had sexual relation with her son.[103] The Illinois Supreme Court refused to decide whether the incest statute was a "sex-based classification," but it has held that even if the statute had created a sex classification, the state could impose a heavier penalty on the fathers, because their action can result in pregnancy, whereas the actions of the mothers cannot.[104]

Curiously, although many observers regard both Section 18 and its close relative, the Equal Rights Amendment, as "women's rights provisions," none of the early Section 18 cases in Illinois involved discrimination against women. All of the early plaintiffs were men.[105]

---

102. 57 Ill. 2d 127, 311 N.E.2d 98 (1974).

103. ILL. REV. STAT. ch. 38, para.11-10, 2-7 (1977). *See also*, Linton, *Sex Discrimination Under Article I, Section 18 of the 1970 Illinois Constitution*, 66 ILL. BAR. J. 450 (1978). The legislature equalized the penalties in 1977, ILL. REV. STAT. ch. 38, para. 11-10 (1977).

104. People v. Boyer, 63 Ill. 2d 433, 349 N.E.2d 50 (1976).

105. *See* Linton, *supra* note 101.

HeinOnline -- 8 N. Ill. U. L. Rev. 603 1987-1988

One reason for this is that, although about 75% of the Illinois statutes that might have been found to be discriminatory under Section 18 discriminated against women, the legislature has amended most of those statutes since 1971 to conform to the requirements of the new constitution. Thus, one result of Section 18 has been to reduce litigation. The female plaintiffs to date have not been particularly successful,[106] and if the state and federal courts require them to exhaust their remedies before the Human Rights Commission, they will have even fewer chances of success.

The last of the three anti-discrimination sections, Article I, Section 19, prohibits discrimination against the mentally or physically handicapped in the sale or rental of property and "discrimination unrelated to ability in the hiring and promotion practices of any employer." Just as Article I, Section 18 is really a specialized form of the Equal Protection Clause, so Article I, Section 19 is really a specialized form of the anti-discrimination provision of Article I, Section 17. It applies only to the sale or rental of property and to employment, because the handicapped face more obstacles from discrimination in those areas than in others.

Article I, Section 19 has suffered the same fate as Article I, Section 17. Beginning with *Advocates for the Handicapped v. Sears, Roebuck*,[107] there have been several cases defining "handicapped" and "hiring and promotion practices" and several dealing with the exhaustion of administrative remedies issues presented by the Illinois Human Rights Act. Amputation of a leg is a handicap,[108] while uterine cancer[109] and kidney transplants preventing lifting heavy weights[110] are not. One Appellate Court has declined to define "hiring and promotion practices" broadly, holding that the phrase does not include being discharged from a job.[111] As a result, an employer is required to hire a handicapped person, but he may fire the handicapped person with impunity.

---

106. *See, e.g.*, O'Connor v. Board of Education, 645 F.2d 578 (7th Cir. 1981), *cert. denied*, 454 U.S. 1084 (1981), *on remand*, 545 F. Supp. 376 (N.D. Ill. 1982); Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 394 N.E.2d 855 (1979).

107. 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978), *cert. denied*, 444 U.S. 981 (1979).

108. Melvin v. City of West Frankfort, 93 Ill. App. 3d 425, 417 N.E.2d 260 (1981).

109. Lyons v. Heritage House Restaurants, Inc., 89 Ill. 2d 163, 432 N.E.2d 270 (1982).

110. Advocates for the Handicapped v. Sears, Roebuck & Co., 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978), *cert. denied*, 444 U.S. 981 (1979).

111. Yount v. Hesston Corp., 124 Ill. App. 3d 943, 464 N.E.2d 1214 (1984).

HeinOnline -- 8 N. Ill. U. L. Rev. 604 1987-1988

These cases, which many advocates for the handicapped would say result in a setback for the rights of disabled persons, pale beside the cases holding that persons bringing actions under Section 19, like those bringing actions under Section 17, must exhaust their remedies before the Illinois Human Rights Commission before seeking relief in either state or federal court.[112]

As a result of these recent cases, Article I, Section 19, is, like Article I, Section 17, a toothless tiger. These two provisions, on their face the strongest constitutional protections against private discrimination in the country, have been consigned to a state agency that cannot adequately process charges. Perhaps Article I, Section 18 will also be relegated there. The courts and the legislature have failed. Until the General Assembly amends the Illinois Human Rights Act to prevent any judicial construction favoring an "exemption," these sections will remain unfulfilled dreams.[113]

D. PENSION RIGHTS

Aside from the Bill of Rights, two other constitutional provisions grant Illinois citizens novel and potentially significant rights. One is Article XIII, Section 5, "Pension and Retirement Rights," which makes membership in a public pension system "an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." This is a specialized form of Article I, Section 16, the traditional ban on governmental impairment of contracts. Article XIII, Section 5 was a response to public employees' fears that, because the General Assembly had not appropriated sufficient money for pension funds, there would not be enough money to pay the pensions when they became due.

One case held that the provision does not require the state to appropriate funds to maintain a specific level of support for a public retirement system,[114] a decision that does not bode well for the concept of sufficient funding.

The most significant cases on Article XIII, Section 5 have arisen in a very different context. A few cases have considered the effect of

---

112. *Id.*

113. I say this even though many of the members of the convention apparently disagree with me. When many of the living delegates "reconvened" on September 17-19, 1987, those present and voting refused to adopt a resolution saying that the convention had not "intended" the "reasonable exemption" language to include an exhaustion of remedies requirement, such as the one in effect now.

114. People *ex rel.* Illinois Federation of Teachers, A.F.T., AFL-CIO v. Lindberg, 60 Ill. 2d 266, 326 N.E.2d 749 (1975), *cert. denied*, 423 U.S. 839 (1975).

HeinOnline -- 8 N. Ill. U. L. Rev. 605 1987-1988

the section upon changes in pension laws and ordinances, for example those concerning mandatory retirement. The cases, particularly concerning changes in retirement regulations and benefits, are mixed.[115]

One important case wrestled with the issue of what conditions, if any, the legislature may place upon a public employee's conduct before he can receive his pension. A state statute removed pension benefits from any public official who was convicted of a felony arising out of his employment, although it allowed him to recover the money he had paid into the pension system.[116] Otto Kerner, who was convicted of a federal felony for acts arising out of his position as Governor of Illinois, lost his pension rights by operation of this statute. The Illinois Supreme Court held that the statute did not "impair" his contractual right to a pension in violation of Article XIII, Section 5, because that provision did not preclude the state's setting reasonable conditions upon the exercise of an employee's pension rights. It found that the completion of public service without committing acts resulting in a conviction for a service-related felony was just such a reasonable condition.[117]

E. RIGHT TO HEALTHFUL ENVIRONMENT

The last provision granting a new right is Article XI— "Environment." Section One of this article establishes the provision and maintenance of "a healthful environment" as the "public policy of the State and the duty of each person." Section Two gives each person "the right to a healthful environment," and allows him to enforce this right in court, subject to any reasonable regulations the legislature may provide.

Although few plaintiffs have brought actions even tangentially related to environmental protection, and those have been unsuccessful,[118] no court has required exhaustion of remedies before a state agency before filing a complaint. Presumably, therefore, a plaintiff who can prove he has been injured by a polluter can still bring a civil suit for money damages or for an injunction compelling the defendant

---

115. *Compare* Peifer v. Board of Trustees, 35 Ill. App. 3d 383, 342 N.E.2d 131 (1976) (violation of rights) *with* Peters v. City of Springfield, 57 Ill. 2d 142, 311 N.E.2d 107 (1974) (no violation).

116. ILL. REV. STAT. ch. 108§, para. 14-149 (1977).

117. Kerner v. State Employees' Retirement System, 53 Ill. App. 3d 747, 368 N.E.2d 1118 (1977).

118. *E.g.*, Scattering Fork Drainage Dist. v. Ogilvie, 19 Ill. App. 3d 386, 311 N.E.2d 203 (1974).

HeinOnline -- 8 N. Ill. U. L. Rev. 606 1987-1988

to stop polluting. Eventually, this right could lead to lawsuits and sanctions against polluters.

Article XI cannot be understood without reading the Illinois Environmental Protection Act[119] as well. The General Assembly debated and passed this Act in the spring of 1970, exactly when the convention was discussing Article XI. Each body was aware of the other's actions. A state agency, the Environmental Protection Agency, may file complaints against polluters before the Pollution Control Board; individual citizens may also file complaints. The Board can assess penalties and issue cease and desist orders, although it cannot award damages, and, of course, its actions are reviewable by the judiciary. In a very real sense, then, the Environmental Protection Act was a "concurrent implementation" of Article XI.

In summary, we could divide the provisions within the Bill of Rights, the Environment Article and the pension rights provisions into two very broad categories: the traditional rights and the new rights. So far, there have been no surprising court decisions on the traditional rights. The novel rights, particularly those combatting discrimination and pollution, are striking, even daring, in their potential. They could become extremely useful tools for social change in the next decades. The lack of will and imagination on the part of plaintiffs' lawyers, the legislature and the courts has made it doubtful, however, whether the new rights will ever fulfill their potential.

V. THE POLITICAL BRANCHES OF STATE GOVERNMENT

(Articles IV, V and XII; Separate Proposition 1)

The government of Illinois, like that of every American state, consists of three branches, each patterned on the corresponding branch of the federal government. The legislative and executive branches are commonly called the "political" branches because their chief officers are elected by the people and are thus responsible to them through the elective political process and because these two branches can initiate policy and make laws.

A. THE STRUCTURE OF THE GENERAL ASSEMBLY

The Illinois General Assembly is a traditional bi-cameral body consisting of a Senate and a House of Representatives. In 1971, it was remarkable for two features. One was its size. The House, with

119. ILL. REV. STAT. ch. 111§, para. 1001-1052 (1985).

HeinOnline -- 8 N. Ill. U. L. Rev. 607 1987-1988

177 members, was the fourth-largest lower chamber in any state legislature, and the Senate, with 59 members, was the second-largest upper chamber.

The other distinctive feature was the manner of election of the House. Three representatives were elected from each district; each voter could cast up to three votes for any one of the candidates for the three seats. By 1969 the multi-member district/cumulative voting system was the subject of fierce debate in and out of the convention.[120] The convention's solution to the debate was to place the issue, whether to replace the cumulative voting system with the more common "one member per district" method, before the people as a separate question. In effect, it let the people choose the system they wanted. The voters had more difficulty understanding this complex question than they did understanding the issues of allowing 18-year-olds to vote, abolishing the death penalty and selecting judges. The question attracted less attention than the other three did, except among politicians, especially legislators. In 1970, the people voted to retain a modified form of the multimember district/cumulative voting system.

In 1974, several groups organized into a coalition called the Committee for Legislative Reform tried to place the issue in question once again. They did not obtain enough signatures on their petitions to meet the requirements of Article XIV, Section 3 for an initiative and referendum attempt to amend the constitution. But this is precisely the type of constitutional issue for which the delegates drafted Article XIV, Section 3. The alternative method of constitutional amendment, legislative submission of the amendment to the electorate for ratification, would never succeed: the House would so strongly oppose the change (because it would make their own re-election more difficult) that the legislature would not be able to muster the three-fifths-of-each-house majority required.

In 1980, another coalition, this time led by the Coalition for Political Honesty, succeeded in placing this issue, along with the issue of a reduction in the size of the House, before the voters. The voters approved the amendment, and in 1981, the General Assembly redistricted on the basis of both the 1980 Federal Census and the 1980 Cutback Amendment. The Senate still has 59 members, but the House has only 118.

B. MAJOR CHANGES IN THE LEGISLATIVE PROCESS

Of the half-dozen or so major changes in the legislative process wrought by the constitution in 1970, none had as immediate an impact

120. *See supra* discussion at text surrounding note 14.

HeinOnline -- 8 N. Ill. U. L. Rev. 608 1987-1988

as the reapportionment provision, Article IV, Section 3. According to this provision, the General Assembly must redistrict itself in the year following each Federal Decennial Census. If it cannot agree upon a reapportionment map, each of the four party leaders of the legislature (Speaker of the House, Minority Leader of the House, President of the Senate and Minority Leader of the Senate) appoints one legislator and one non-legislator to form an eight-member redistricting commission. The commission then tries to find an acceptable compromise map.

This provision had its baptism by fire in 1971, when the legislature had the first opportunity to redistrict itself. Three of the four leaders appointed themselves and one of their legislative aides to the commission. The fourth, who was too ill to serve, appointed his party's leader in his absence and a former Governor. In *People ex rel. Scott v. Grivetti*,[121] the Illinois Supreme Court held that the three leaders should not have appointed themselves as "legislative members," because that is not a true "appointment," or their aides as "public members," because the intent of the delegates in framing the provision had been to include the views of "the public" in the legislative redistricting process. The aides, quite predictably, had simply voted with their bosses on the commission. Since the court granted the invalidly-created map provisional validity, and the General Assembly simply passed the same map after the 1972 election, the only practical effect of *Grivetti* was to warn future legislative leaders of what they could not do in appointing members of redistricting commissions.

In 1981, the General Assembly was unable to redistrict itself again. The resulting commission consisted of four incumbent legislators and four people not currently connected with the legislature.[122] When they deadlocked, the lottery tie- breaker on August 10th made former Governor Samuel H. Shapiro, a Democrat, the ninth member of the commission. Predictably, the result was called "the Democratic map," although members of both parties objected to certain new districts, partly because some of the legislative districts (more so than senatorial districts) were not "compact and contiguous." The inevitable litigation on state and federal grounds resulted in a modified plan for the rest of the decade.[123]

---

121. 50 Ill. 2d 156, 277 N.E.2d 881, *cert. denied*, 407 U.S. 921 (1972).

122. Senator James Phillip, Senator James H. Donnewald, Rep. Arthur Telscer and Rep. Michael McClain were the "legislative members;" James Skelton, Robert Casey, Corneal Davis and Martin Murphy were the "public members," although the four non-legislators obviously had political connections and leanings.

123. Schrage v. State Board of Elections, 88 Ill. 2d 87, 430 N.E.2d 483 (1981);

HeinOnline -- 8 N. Ill. U. L. Rev. 609 1987-1988

The second important change brought about by the new constitution was the removal of the Lieutenant-Governor from the Presidency of the Senate, i.e., the position of presiding officer. At the state level, the Lieutenant-Governor, like the Vice-President of the United States at the federal level, is traditionally the presiding officer of the Senate. That position has created problems for each Senate since Vice-President John Adams, because the executive authority of any legislative chamber consists both of parliamentary power and political power. In every House of Representatives, both powers are united in one person, the Speaker. In the traditional Senate, however, the parliamentary power resides in the Vice-President or Lieutenant-Governor, and the political power vests with the President Pro Tem of the Senate, the leader of the majority party. If the parliamentary officer does not belong to the majority party of the chamber, the situation can be very tense.

Even in the best of situations, when the Vice-President or Lieutenant-Governor belongs to the party having the majority of the Senate, the normal tension between the legislative and executive branches causes suspicion between the members of the Senate and its presiding officer, a member of the executive branch. As a result, the Vice-President rarely in fact presides over the United States Senate; he confines himself to being "the President's man" and breaker of tie votes. When the Illinois Senate elected its first president in 1973, every senator approved the emancipation of the Senate from the last vestige of control by a member of the executive branch.

The third major change in the legislative process was the imposition of a requirement that the General Assembly keep a transcript of its debates as well as a journal of its proceedings.[124] The transcript, which is made from voice-activated electronic tapes, is sometimes useful in determining the intent of the legislature in passing bills. The transcripts and journals are available in major law libraries around the state and in the state archives. The impact of this requirement upon the legislature itself is uncertain, but some lawyers use the debates in litigating new statutes.

Fourth, the new Constitution substitutes the "enrolled bill rule" for the "journal entry rule." Under the 1870 Constitution, the courts could examine the journal of each house for evidence that the legislature had complied with all of the constitutional procedural

---

Rybicki v. State Board of Elections, 574 F. Supp. 1082, *supplemented* 574 F. Supp. 1147, 1161 (N.D. Ill. 1982).

124. ILL. CONST. art. IV, para. 7(b).

HeinOnline -- 8 N. Ill. U. L. Rev. 610 1987-1988

requirements for passage of a bill. If the legislature had failed to record compliance in its journals, the courts could invalidate the bill. This journal entry rule resulted in much litigation over purely technical flaws alleged to be in a bill. Article IV, Section 8 of the 1970 Constitution sets forth the procedure for bill passage and then establishes a rule forbidding the court to look at anything but the final printed bill (called the "enrolled bill") to see whether the legislature had complied with the technical requirements of the constitution. So far, the Illinois Supreme Court, accordingly, has refused to look beyond the final bill itself.[125] This view differs from the journal entry rule, by which the journal creates a presumption that the constitutional requirements were followed, a presumption that may be rebutted by clear and convincing evidence to the contrary.[126]

The remaining two major changes have caused considerable difficulty. Article IV, Section 10 requires the General Assembly to establish a set date upon which laws become effective. It also requires a three-fifths vote of each house to pass any bill between July 1st and December 31st of each year if the bill is to become effective before July 1st of the following year. The purpose of the first requirement is to give the public notice that laws are about to become effective. The purpose of the second is to encourage the General Assembly to conclude its legislative business by July 1st of each year.

Since 1971, about two-thirds of all bills have in fact become effective on one date, so the purpose of the uniform effective date requirement apparently has been fulfilled. The three-fifths majority vote requirement, however, has become counter-productive, because it has allowed a minority bloc (albeit 41%, a substantial minority) in either house to prevent the passage of a bill the majority wants to become effective before July 1st of the next year. That bloc needs only to prolong the legislative session beyond June 30th, and it will be in a superior bargaining position to obtain compromises on the bill. In short, in their zeal to insure a firm end to the Spring legislative session, the delegates created a mechanism for prolonging the session into July.[127]

A further complication arises from the effect of the Governor's vetos upon the effective date of a bill. The new gubernatorial power

---

125. *See, e.g.*, Fuehrmeyer v. Chicago, 57 Ill. 2d 193, 311 N.E.2d 116 (1974).

126. Yarger v. Board of Regents, 98 Ill. 2d 259, 456 N.E.2d 39 (1983) (considering a bill passed in 1967, under the 1870 Constitution).

127. The author, who was Parliamentarian of the House in 1973-74, has observed the phenomenon just described. For a longer analysis, see Gherardini, *Effective Date of Laws*, 11 J. MAR. J. 363 (1977).

HeinOnline -- 8 N. Ill. U. L. Rev. 611 1987-1988

to "amend" a bill passed by the General Assembly[128] enables a Governor to "propose" a bill to each house. Does the approval of the proposed changes by each house mean a new "passage" of the bill for purposes of the effective date of laws provision? In *People ex rel. Klinger v. Howlett*,[129] the Illinois Supreme Court said it was; since the Governor's proposed changes were "approved" after July 1st of a calendar year, the bill did not become effective until July 1st of the following year. This decision, among others,[130] has only served to confuse everyone about the effective date of a bill, especially a bill subjected to the Governor's amendatory veto.

Finally, the 1970 Constitution made a major change in its predecessor's prohibition of special legislation. The 1870 Constitution, like most late-nineteenth-century constitutions, banned the passage of "special or local laws." Its purpose was to avoid favoritism in legislation, and its method was to list the types of laws which the General Assembly could not pass.[131] The 1970 Constitution's solution, found in Article IV, Section 13, is simply to prohibit special legislation and to give the courts the power to decide whether the legislature could have drafted a general bill instead of a special or local one.

This is an enormous power for the judiciary, for an activist court could easily find many instances in which a law is "special" and could have been "general." For instance, a number of Illinois statutes confer benefits only upon persons who are at least 65 years old. Is this special legislation? Certainly, the General Assembly could instead have passed more general laws, simply by extending the benefit to everyone, regardless of age. Yet the Illinois Supreme Court has refused to declare a senior citizens' homestead exemption to be special legislation[132] and has generally been very reluctant to exercise its increased power.[133] The judges must know that their entry into this political thicket could give rise to an increase in litigation and to legislative animosity toward the judiciary. In fact, there is some

---

128. *See infra* text accompanying notes 136-139 for a discussion of the amendatory veto. *See also* Van Der Slik, *Reconsidering the Amendatory Veto for Illinois*, 8 N. ILL. U.L. REV. 753 (1988).

129. 50 Ill. 2d 242, 278 N.E.2d 84 (1972).

130. See particularly People *ex rel.* Am. Federation of State, County and Municipal Emp. v. Walker, 61 Ill. 2d 112, 332 N.E.2d 401 (1975); City of Springfield v. Allphin, 50 Ill. App. 3d 44, 365 N.E.2d 249 (1977), *modified*, 74 Ill. 2d 117, 384 N.E.2d 310 (1978).

131. ILL. CONST. of 1870, art. IV, §22.

132. Doran v. Cullerton, 51 Ill. 2d 553, 283 N.E.2d 865 (1972).

133. *See, e.g.*, Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972); Bridgewater v. Hotz, 51 Ill. 2d 103, 281 N.E.2d 317 (1972).

HeinOnline -- 8 N. Ill. U. L. Rev. 612 1987-1988

evidence that the courts regard Article IV, Section 13, as nothing but surplusage to the equal protection clause.[134]

Apart from these six major changes, the constitution made several less important amendments to legislative powers and procedures. Article IV, Section 5 requires the General Assembly to convene annually and declares it to be "continuous" throughout the two years of a "session." By 1970, the legislature was virtually meeting annually anyway. Being a "continuous" body has enabled the legislature to abolish many of its "commissions," which were really joint committees with "public" members. They were designed to operate when the General Assembly could not constitutionally be in session and, therefore, its regular committees also could not meet. Section 5 also allows the presiding officers of the House and Senate, acting jointly, to proclaim a special session of the legislature. This is in addition to the power to convene special sessions traditionally held by the chief executive: the monarch, the President, or, in Illinois, the Governor. These changes have modernized legislative sessions and worked quite well.

The 1970 Constitution's change in filling legislative vacancies has not been as effective. Article IV, Section 2(d) requires the filling of a vacancy in the membership of the House or Senate "as provided by law." The current statute calls for filling vacancies by a committee formed of leaders of the incumbent's party and district, a method of dubious constitutionality, as it grants private persons the power to fill a public office.[135]

C. THE ELECTED EXECUTIVE OFFICERS

In 1848, in a burst of populist fervor, Illinois began the practice of electing at least a half-dozen officers of the executive branch. By 1969, it had become almost conventional wisdom that principles of good public administration required only a few elected officers. There was general agreement at the convention, for example, that the Superintendent of Public Instruction, an elected officer, ought to be replaced by a chief state education officer appointed by a State Board of Education. The delegates also agreed that the Illinois Supreme Court ought to appoint its own clerk instead of having to deal with

---

134. *See, e.g.*, Illinois Polygraph Soc. v. Pellicano, 83 Ill. 2d 130, 414 N.E.2d 458 (1980); Maldonado v. License Appeal Comm'n of Chicago, 100 Ill. App. 3d 639, 427 N.E.2d 225 (1981); Fox v. Rosewell, 55 Ill. App. 3d 860, 371 N.E.2d 287 (1977).

135. ILL. REV. STAT., ch. 46 para.25-6, 8-5 (1985); People *ex rel.* Rudman v. Rini, 64 Ill. 2d 321, 356 N.E.2d 4 (1976).

HeinOnline -- 8 N. Ill. U. L. Rev. 613 1987-1988

one elected by the public on a partisan basis. Many delegates also favored eliminating the State Treasurer from the list of elected officers.

Ultimately the delegates chose to retain the election of a Governor and a Lieutenant Governor, to be elected jointly; an Attorney General; a Secretary of State; a Comptroller (who replaced the Auditor of Public Accounts); and a Treasurer. They proposed that four-year terms be retained for all of them, but that their election year be shifted to the even-numbered year in which the electors do not vote for a President. This decision met with general approval, for most observers assumed, because of straight-party-line voting, that the Presidential candidates at the "top of the ticket" carried the lesser-known officers with them on their "coat tails." This proposal, they thought, would eliminate the coat tail effect, at least as far as Presidential coat tails are concerned.

To implement this proposal, the delegates created a two-year term for state officers elected in 1976, to be followed by four-year-terms beginning in 1978. For two reasons, it might have been better to create six-year terms for officers elected in 1972. First, the officers elected in 1976 all found it extremely difficult to raise funds in 1976; supporters were reluctant, knowing they would be asked to contribute again two years later. Second, they found it a strain to administer their offices well for those two years, because they were forced to begin running for office again the day they were inaugurated in 1977.

Ironically, in the 1976 election, held in a Presidential year, the voters disproved the coat tail theory by splitting their tickets for federal and state offices. This trend continued in 1978, when the state executive officers were elected in a non-Presidential year, and it has continued since then. Perhaps the premises upon which the delegates based their decision to shift the election of Illinois officeholders to non-Presidential years disappeared in the 1970's—or perhaps they were wrong in the first place.

D. THE GOVERNOR

At the same time the convention decreased the number of elected executive officers, it strengthened or confirmed the powers of those few retained, except for the Lieutenant Governor. Foremost among the delegates' intentions was to concentrate power in the chief executive officer, the Governor. He retains the "supreme executive power,"[136] the basis of his authority to issue executive orders, includ-

136. ILL. CONST. art. V, §8.

HeinOnline -- 8 N. Ill. U. L. Rev. 614 1987-1988

ing the newly-created power to issue an executive order reorganizing state government, and retains his post as commander-in-chief of the state militia.[137]

By any estimate, the most important new powers of the Governor are the amendatory veto and the reduction veto. These new powers, especially when combined with the general and item vetos he already possessed,[138] have given the Governor of Illinois as powerful a collection of vetos over legislation as those given any Governor in the country. The reduction veto is really a partial-item veto and applies only to amounts of appropriations. The general, item and reduction vetos are powerful fiscal management tools. In fact, one court has said that, partly because he has these tools, the Governor may not reserve or "impound" funds appropriated by the General Assembly.[139]

The amendatory veto is far more controversial. The Governor may use the general and amendatory vetos regarding both appropriations and non-appropriations bills. From the first uses of the amendatory veto by Governor Ogilvie in 1971, this power has been a source of friction between the legislature and the Governor. In *People ex rel. Klinger v. Howlett*,[140] the Illinois Supreme Court said in dictum that a Governor could not use the amendatory veto to strike all of the text from a bill and re-write the text.[141] This was a perplexing statement because, first, it was dictum, and second, Governor Ogilvie had in fact retained the substance of most of the passed bill, using the amendatory veto as a means to present a "cleaner" and easier-to-read text to the legislature during its 1971 fall veto session. Moreover, his reason for proposing those changes in the text of the original bill was not to introduce new concepts into a passed bill, but simply to conform the bill to the requirements of a United States Supreme Court opinion that came down after the bill had virtually cleared all legislative hurdles and the Spring, 1971 session of the General Assembly was winding down.[142]

The amendatory veto remains just as controversial today. The General Assembly has adopted neither formal nor informal procedures to force a Governor to consult with the legislative leaders and legis-

---

137. ILL. CONST. art. XII, § 4(a).

138. ILL. CONST. art. IV, §9.

139. West Side Org. Health Servs. Corp. v. Thompson, 73 Ill. App. 3d 179, 391 N.E.2d 392 (1979), *rev'd on other grounds*, 79 Ill. 2d 503, 404 N.E.2d 208 (1980).

140. 50 Ill. 2d 242, 278 N.E.2d 84 (1972).

141. *Id.* at 248-49, 278 N.E.2d at 88.

142. Lemon v. Kurtzman, 403 U.S. 602 (1971).

HeinOnline -- 8 N. Ill. U. L. Rev. 615 1987-1988

lators most interested in the bill before recommending changes in the text. Governors have occasionally— perhaps even regularly—succumbed to the temptation to use amendatory veto messages as "bully pulpits," or, more accurately today, press releases. Since any attempt to restrict a Governor's changes to "technical" ones, as opposed to "substantive" changes, would merely shift the battleground to litigation over the meaning of "technical" and "substantive," there appears to be no resolution to this dilemma.

E. THE LIEUTENANT GOVERNOR

The Lieutenant Governor, by contrast, lost more power than any other elected state officer. He lost his official power base, the Presidency of the Senate. Although he runs for the nomination separately from the gubernatorial candidates, he loses all official independence immediately after the primary, because he runs for election jointly with the gubernatorial nominee. After the election, he has no constitutionally-designated duties; in effect, the Governor, by request, and the legislature, by statute, decide how he will spend the next four years.

Since 1980, two dominant problems with the office of Lieutenant Governor have surfaced. The first problem was the apparent powerlessness felt by at least one incumbent, Dave O'Neal. On July 31, 1981 he resigned, saying, in words reminiscent of John Nance Garner's description of the Vice-Presidency, that he was frustrated. It is a mark of the lack of importance the convention attached to the Lieutenant-Governorship that, alone of all the executive offices, it cannot be filled if a mid-term vacancy occurs. The Lieutenant Governor, unlike his predecessors, does not even become Acting Governor whenever the elected Governor crosses the borders of the state. His predecessors in office, according to afficionados of Illinois history and politics, sometimes had a splendid time while "Governor for a day." Today, the Lieutenant Governor of Illinois has only the constitutional power to succeed to a vacant Governorship—or, as John Adams said, "Today I am nothing; tomorrow I may be everything."[143]

The other problem surfaced in the March, 1986 Democratic primary. For various reasons, most of them related to internal struggles within the Democratic Party in the early 1970's, the General Assembly had never required the gubernatorial and lieutenant-gubernatorial hopefuls in any party to run "as a team" in the primary.

---

143. *See* Locin, *"Light Guv": Spotlight on an Invisible Office,"* Chicago Tribune, May 11, 1986, § 5 at 4, col. 3.

HeinOnline -- 8 N. Ill. U. L. Rev. 616 1987-1988

Until 1986, no real disasters had resulted, although some winners of their parties' gubernatorial primaries may have been unenthusiastic about the voters' selections for their running mates. In 1986, however, Adlai Stevenson found he would have to run on the Democratic Party ticket with a candidate he did not know, he did not like and whose policies he found anathema. His subsequent resignation of the nomination and formation of a third party are too well-known to need recounting here.

F. THE ATTORNEY GENERAL

In comparison to the power of the Governor, the powers of the Attorney General, Secretary of State, Comptroller and Treasurer changed very little. The convention confirmed their pre-1970 status.

In a world in which no public official can move without consulting a lawyer, "the legal officer of the State" plays a key role. Pre-convention case law suggested that the Attorney General was the only person who could act as lawyer for the state.[144]

Since 1971 a series of court decisions have confirmed a broad interpretation of the Attorney General's powers. The three most important cases are *People ex rel. Scott v. Briceland*,[145] which confirmed the power of the Attorney General to represent state agencies, if he so chooses, and two cases which allow him to choose which state agency he wants to represent, if two agencies are adverse parties to a court proceeding.[146] With these impressive victories behind the office of the Attorney General, it is clear that the position is now second only to the governorship in power.

The potential for conflict between the Attorney General and his fellow-officers increases with the amount of legal work in which the state is involved, and is further heightened by different political affiliations of holders of those offices. From 1973 to 1977, when the Attorney General and Governor were of different political parties for the first time in Illinois history, the conflicts were frequent and open. Republican Attorney General William J. Scott, moreover, had ambitions for the office then held by Democratic Governor Dan Walker. From 1983 to the present, the Democratic Attorney General and the Republican Governor have apparently cooperated better. One must wonder, however, if their relationship would have been so amicable

144. Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915).

145. 65 Ill. 2d 485, 359 N.E.2d 149 (1976).

146. Environmental Protection Agency v. Pollution Control Board, 69 Ill. 2d 394, 372 N.E.2d 50 (1977); Scott v. Cadagin, 65 Ill. 2d 477, 358 N.E.2d 1125 (1976).

HeinOnline -- 8 N. Ill. U. L. Rev. 617 1987-1988

if Neil Hartigan had been his party's nominee against James Thompson in 1986.

G. THE SECRETARY OF STATE

The Secretary of State, the next-highest-ranking officer, is chief administrator of a variety of state services, from granting corporate charters to issuing and revoking driver's licenses. Because the Constitution made no change in his status, it has had no impact on his office whatsoever.

H. THE FISCAL OFFICERS: COMPTROLLER AND TREASURER

The Comptroller and Treasurer are the two fiscal officers of the executive branch. Although many delegates questioned the wisdom of retaining a Treasurer, who does little more than invest the state's funds, the convention voted to retain the position as an elective office, and, in fact, it made no change at all in his status.

The position of the Comptroller was a somewhat different matter. Illinois splits its fiscal powers among four officers. The four officers having fiscal powers before 1971 were the Governor, the Auditor of Public Accounts and the Treasurer, all elected officers of the executive branch, and the Auditor General, an officer of the legislative branch then created by statute. The most important fiscal power, that of creating an executive budget, has always belonged to the Governor. The function of "post-auditing" has belonged since 1956 to the legislature's own Auditor General. That left the elected state officer of the executive branch, entitled the Auditor of Public Accounts, with little to do but estimate revenues available for a given period and order the Treasurer to release funds.

In 1970 the convention made the Auditor General a constitutional officer situated within the legislative branch and abolished the office of Auditor of Public Accounts, creating in its stead the more modern position of the Comptroller. But with few exceptions, the Comptroller has the same duties as the Auditor of Public Accounts did. He maintains "the State's central fiscal accounts" and orders "payments into and out of the funds held by the Treasurer."[147] The chief role of the Comptroller, therefore, is that of a "pre-auditor." "Pre-auditing" is the process of controlling expenditures before they are made—i.e., requiring authorization from someone who makes sure they are

147. ILL. CONST. art. V, §17.

authorized by the budget or appropriation.[148] In accordance with modern administrative practice, the Comptroller also regularly estimates the revenues available to the state. As the technology of public fiscal management improves, the role of the Comptroller may become increasingly sophisticated. Apart from regularly issuing press releases, however, no Comptroller as yet has actively sought to expand his official status.

To summarize, the chief contribution of the 1970 Constitution to the legislative and executive branches has been the modernization of the terminology and procedures of the two "political branches." The convention stripped Articles IV and V of their constitutional deadwood, conformed the procedures to modern political and administrative practices, and introduced the terminology of the mid-twentieth century. Both political branches acquired some modern and more sophisticated tools to use in making policy and laws. In that sense, both branches became powerful—and the balance of power between them remains much the same as before.

VI. JUDGING DISPUTES

(Art. VI; Separate Proposition 2)

The third branch of government is the judicial branch. Although judges obviously have an impact on the political life of Illinois, their official role is not that of policy-makers, but of dispute-settlers. They decide issues of law which others have brought before them, but they cannot initiate either policy or lawsuits.[149] In order to decide cases impartially, a judge should be free of outside influences, including partisan considerations.

The 1970 Constitution has had several important effects upon the judiciary and the people of Illinois. The first resulted from its modernization of Article VI—"The Judiciary." The "old" judicial article dated not from 1870, however, but from 1962, when the legislature proposed and the people adopted, an amendment completely revising the judicial structure of Illinois. The 1962 amendment, which became effective January 1, 1964, established the three-tiered

148. Professor Glenn W. Fisher's definition of "pre-audit" in a letter to the author, dated February 12, 1979. A copy of the letter is permanently on file at the N. ILL. U.L. REV.

149. The issue of a court's power to file lawsuits is one of the issues in Madden v. Cronson, 114 Ill. 2d 504, 501 N.E.2d 1267 (1986), *cert. denied*, 108 S. Ct. 73 (1987).

HeinOnline -- 8 N. Ill. U. L. Rev. 619 1987-1988

and centralized judicial system which observers have praised as the most modern and efficient in the country. Like any new system, however, it had shortcomings, and the six years' experience with it between 1964 and 1970 showed where those shortcomings were.

Some of those who had been active in drafting and promoting the 1962 amendment played a significant role at the 1970 convention. They had that rare opportunity of which every drafter dreams: the chance to correct his draft after giving it a trial run. The convention adopted several such corrections. For example, the magistrates, a type of trial judge, had, until 1970, been appointed by the judges of the circuit court (full- fledged, elected trial court judges) and had served at the circuit judges' pleasure.[150] The convention changed the title "magistrate" to "associate judge" and gave the newly-dignified jurists the comparative security of four-year terms.[151] Those two changes have given those judges an enhanced status in the judicial system.

A second effect of the new constitution upon the judiciary concerns the judicial selection process. One of the most controversial issues in Illinois government, then and now, is the method of selecting judges. Should they be elected or appointed? In either case, how? Should they have to declare a party affiliation or not? If the delegates had not postponed resolution of this sensitive question by submitting it to the people as one of the issues to be voted upon separately, the convention would almost certainly have foundered on this one issue. The dispute between the advocates of electing judges and the advocates of appointing judges was perhaps the most divisive of the whole convention. The dispute among the voters turned out to be equally sharp; this was the most debated of the four propositions submitted separately to the voters. Even though a substantial minority of the voters—forty-six percent—voted to appoint judges, the majority decided to retain the elected-judges system, although in modified form. For the first time in Illinois history, the voters were allowed to make the specific choice between the two methods of selecting judges: appointment or election.

Since the people voted to retain the election method of selecting judges, rather than change to the appointment method, one could well ask whether there really has been any change in the selection process. The fundamental issue, after all, is whether judges should be elected or appointed. In comparison, all the other issues may be only details.

---

150. ILL. CONST. of 1870, art. VI, §12.
151. ILL. CONST. art. VI, §8.

HeinOnline -- 8 N. Ill. U. L. Rev. 620 1987-1988

ELECTING JUDGES

Although the voters decided to retain the election method, there have been changes in the nomination procedure and in the vote needed for retention in office. Under the 1962 judicial article, judicial candidates were nominated by a party convention; under the election method adopted in 1970, they are nominated at a primary or by petition. Consequently, it is now possible for lawyers who are not slated by the party to be nominated by their party's primary electors and become the party's nominees or to obtain a ballot position by obtaining enough signatures on a petition. The most notable examples of this phenomenon were two Illinois Supreme Court Justices, James A. Dooley and William C. Clark, who were nominated over the Democratic Party's "slated candidates" in 1976. As a consequence, one could say that although judges are still chosen at elections, they are nominated for election differently and that this change has made a difference.

Once elected, a judge may be removed from office more easily than before, because the delegates raised the percentage of the favorable vote needed to retain office from fifty percent to sixty percent. In 1974 the people of Cook County voted not to retain a circuit court judge in office.[152] In 1976, they voted not to retain an influential circuit court judge, the chief of the Criminal Division in Cook County,[153] and in 1978, they voted not to retain the Chief Judge of the Circuit Court of Cook County.[154] Also in 1978, Downstaters voted not to retain three resident circuit judges.[155] Since then seven circuit judges have not been retained, for a total of thirteen rejected. No appellate or Supreme Court level jurists have been in any danger of losing their seats.[156] In 1984 and 1986, when many observers thought

152. Judge David Lefkovits received a 59.8% favorable vote. The United States Supreme Court upheld the validity of the extraordinary majority vote requirement for retention in Lefkovits v. State Bd. of Elections, 424 U.S. 901 (1975).

153. Judge Joseph A. Power received a 58.8% favorable vote.

154. Judge John Boyle received a 59.1% favorable vote.

155. Judge William A. Ginos, Jr., resident circuit judge of Montgomery County (4th Judicial Circuit), received a 58.4% favorable vote; Judge Albert Pucci, resident circuit judge of Putnam County (10th Judicial Circuit), received a 59.8% favorable vote; and Judge Charles W. Iben, resident circuit judge of Peoria County (10th Judicial Circuit), received a 50.9% favorable vote.

156. Of the 718 judges of all ranks who "ran on their record" from 1972 to 1986, 13 were rejected. Aside from those mentioned in the text, three Downstate judges were rejected in 1980; one Cook County judge was rejected in 1982; none were rejected in 1984; and three Cook County judges were rejected in 1986. Total rejection rate: 1.8%.

HeinOnline -- 8 N. Ill. U. L. Rev. 621 1987-1988

the public's reaction to the "Greylord" scandal in Cook County would result in mass rejection of judges up for retention, the circuit court judges still survived the retention process.[157] Apparently, all of the rejections were the result of concerted campaigns by the press, citizens' groups and the bar. In effect, Illinois judges are still elected, but they are subject to a "recall vote" at the end of their terms, a recall that rarely occurs.

A third, though indirect, result of the new judicial article has been a continuing drive for the appointment of judges system. Proponents of "merit selection" contend that both of the above two developments indicate citizens are dissatisfied with the judiciary and with the manner in which they are selected. They point to the Cook County judiciary's survival of the Greylord scandal in 1984 and 1986 as proof also that the public thinks that the retention system does not work. "Bad" judges, they say, almost always have the passive and sometimes the active support of the bar associations and the press; how can voters be expected to know more and do more than the bar and the press? Supporters of the present system counter this argument by saying that the low rate of rejection is proof that the voters are quite satisfied with the judiciary and wish to retain the power to elect their judges.

Every year the legislature considers a form of the gubernatorial judicial-appointment system designed at the 1970 convention: "merit selection," sometimes called the "Missouri plan." So far, it has not passed a resolution for a constitutional amendment on judicial selection, although that will continue to be one of the major issues facing it. If a convention is called in 1988, this issue will almost certainly be the dominant constitutional question at the convention.

When the appointment vs. election issue arises, it would be well to examine the record of the Illinois Supreme Court in filling vacancies. Under Article VI, Section 12(c), the Supreme Court routinely fills vacancies unless otherwise provided by law. Since there is no statute on vacancies, the Supreme Court has filled dozens of positions since 1971. A study of its procedures and the quality of its appointments might be useful in estimating the effect of changing to an appointment method for the Illinois judiciary.

A fourth change made by the new Constitution is the creation of the Illinois Judicial Inquiry Board. Individual judges, regardless of

157. That none were defeated in 1984, during the height of the publicity over Greylord, is amazing until one remembers that the bench, organized bar, and even the U.S. Attorney pled with the public not to reject the judges up for retention, since none were targets of the Greylord investigation.

HeinOnline -- 8 N. Ill. U. L. Rev. 622 1987-1988

how they were selected, may in time become physically or mentally unable to serve, or may commit unethical acts. The phrase "judicial discipline" sounds harsh, but it conveys the requirement that judges conform to certain standards of conduct. If they do not conform, the bar and the public suffer.

In order to give those two groups a role in enforcing standards of judicial conduct, the convention established the Board as the first step in investigating the fitness of a judge. The Governor appoints four non-lawyers and three lawyers to the Board, and the Supreme Court appoints two circuit judges. The nine members hear and investigate charges of unfitness. If they find that the judge is probably unfit, they file a complaint with the Illinois Courts Commission, a panel of five judges who have had the responsibility for judicial discipline since 1964 (under the 1962 Amendment to the 1870 Constitution). If the Commission agrees with the Board, it can remove or discipline the judge. The cases concerning confidentiality of communications to the Board and of the Board's proceedings have generally upheld the confidentiality of the proceedings.[158]

Although the Commission thus far continues to regulate judicial discipline, an early Illinois Supreme Court case called into question the authority of the new Judicial Inquiry Board. In 1977, that court held in *People ex rel. Samuel G. Harrod, III, Judge, Petitioner v. The Illinois Courts Commission*,[159] that the Supreme Court could define, and therefore restrict, the Board's jurisdiction, and that the Board had no constitutional power to hear a complaint against Harrod, because his alleged misconduct, the imposition of an improper sentence, was a proper subject for appeal to a higher court.

Apart from the power of the Judicial Inquiry Board and the Illinois Courts Commission to discipline judges, there are only two ways to remove incompetent or, worse, corrupt judges. One is rejection by the voters at a retention election, already discussed. The other is impeachment by the General Assembly. Article IV, Section 14 specifically allows the legislative branch to impeach and remove both judges and officers of the executive branch. The process, as the country learned during the Watergate crisis of 1973-74, is so costly in time and energy, however, that anyone contemplating using impeachment to remove any official must realize he is bringing the legislative

158. Owen v. Mann, 105 Ill. 2d 525, 475 N.E.2d 886 (1985); People *ex rel.* Judicial Inquiry Board v. Hartel, 72 Ill. 2d 225, 380 N.E.2d 801 (1978), *cert. denied*, 440 U.S. 915 (1979); *In re* Petition of Judicial Inquiry Board, 128 Ill. App. 3d 798, 471 N.E.2d 601 (1984).

159. 69 Ill. 2d 445, 372 N.E.2d 53 (1977).

HeinOnline -- 8 N. Ill. U. L. Rev. 623 1987-1988

branch to a virtual halt for the duration. Therefore, as a practical matter, the removal and discipline of judges rests with the Judicial Inquiry Board and the Illinois Courts Commission.

The *Harrod* decision means that the Illinois Supreme Court has great say in determining the power of the Board and Commission to regulate judicial conduct. It means that the Supreme Court justices, who draft and promulgate the rules of judicial conduct,[160] will now also define the role of non-judges in disciplining judges. The judges, the guardians of justice in Illinois, are the final arbiters over themselves. The question is, as always, who will guard these guardians?

VII. Fiscal Affairs

(Articles VIII and IX)

The "fiscal affairs" of Illinois, as dealt with by the 1970 Constitution, comprise more than just the collection of taxes. They also include state and local governments' record-keeping of the collection and use of public funds, budgeting and appropriating funds and state auditing of public funds. The constitution also regulates the traditional types of revenue, such as income taxes, property taxes and state debt.

A. FISCAL MANAGEMENT

Article VIII—"Finance" provides, in general and simple terms, for the orderly management of public funds. It is new to Illinois and unusual, if not unique, in state constitutions in America. None of the three branches of government has truly perceived the benefits of this article.

Although Article VIII is virtually unknown to the general public, it has great potential as a management tool in public administration. For example, Section 1 requires that records of the collection and use of revenue be open to the public. When coupled with Section 4's requirement that the legislature provide for systems of accounting by local governments, it could force both state and local governments to be more accountable to the public. To date, the courts have struggled with, but not entirely solved, the issues of how "open" the records of state and local governments must be, particularly in view of the emerging individual right to privacy and governmental need to protect the integrity of its records.[161]

---

160. Ill. Const. art. VI, § 13.

161. Oberman v. Byrne, 112 Ill. App. 3d 155, 445 N.E.2d 374 (1983); Mid America Television Co. v. Peoria Housing Authority, 93 Ill. App. 3d 314, 417 N.E.2d 210 (1981); Pope v. Parkinson, 48 Ill. App. 3d 797, 363 N.E.2d 438 (1977).

HeinOnline -- 8 N. Ill. U. L. Rev. 624 1987-1988

There is yet another role for Sections 1 and 4: if the legislature could use uniform accounting systems to compare the finances of one government to another's, it could more easily judge governmental efficiency. To date, however, the General Assembly has not mandated these systems, and the public shows little interest in the subject.

Article VIII, Section 2 deals with the state budget, which the Governor prepares annually and presents to the legislature. The very title "state budget" means a budget for all aspects of state government, including all three branches and the university system. Nonetheless, no state budget submitted so far has been that comprehensive. It must also be a "balanced budget"—that is, the amount of expenditures he proposes may not exceed the amount of revenue he estimates to be forthcoming that year. Section 2 also deals with the appropriation of funds, a function only the legislature can perform. The General Assembly also must "balance its budget," as it cannot appropriate more money that it estimates to be available that year. It may, however, make an appropriation that continues in effect beyond a year—a continuing appropriation.[162]

These balanced budget requirements are an example of the prescriptive "shall" meaning the permissive "may," since there is no feasible way for an entity outside the executive branch to compel the Governor to submit a balanced budget or an entity outside the legislative branch to compel the General Assembly to refrain from appropriating beyond the dollar amount it estimates will be available. Absent exterior, i.e., judicial, enforcement, the requirement of a balanced budget imposes only a moral duty upon the Governor and the legislature.

Section 3 of Article VIII provides for an Auditor General, whose task is to conduct a periodic audit of all "public funds of the State." This officer is the only one in government elected by the entire legislature; he is also the only officer of the legislative branch who is not a legislator. Because he must be elected by three-fifths of each house, serves a ten-year term and receives a salary which cannot be diminished during that term, he can be a very independent officer indeed.

The roots of this office date from 1956, when a massive scandal in the office of the Auditor of Public Accounts caused the legislature to create a commission and a legislative post- auditor to watch over the public funds it appropriated. The system worked so well that in 1970, the delegates decided to strengthen the powers of the office.

---

162. People *ex rel.* Ogilvie v. Lewis, 49 Ill. 2d 476, 274 N.E.2d 87 (1971).

HeinOnline -- 8 N. Ill. U. L. Rev. 625 1987-1988

Most important, they gave it the protection of constitutional status and definition.

In 1974, the General Assembly elected Robert G. Cronson, a Chicago lawyer and investment banker with experience in state government, to the office. He has conducted regular audits of state agencies and generally brought some more order to their accounts. Occasionally he issues reports on specific management problems, called performance audits, but only at the behest of the General Assembly.

The greatest controversy concerning the Auditor General has been over his attempts to conduct a financial audit of the judicial branch. Among its powers and duties, the Illinois Supreme Court regulates the admission to, and practice before, the bar through two agencies created and supervised by the Court: the Board of Law Examiners, which regulates admission to the bar, and the Attorney Registration and Disciplinary Commission, which regulates practice at the bar. The supreme court has allowed him to audit the Court's books, but these two agencies have consistently resisted his attempts to audit them. Eight years of litigation, some of it brought by The Chicago Bar Association on the side of the two agencies, has resulted in a Circuit Court decision on behalf of the two agencies.[163] Before this case was final in the Circuit Court of Cook County, the Illinois Supreme Court's acting administrator obtained an order from the Illinois Supreme Court to compel Cronson to perform a "partial audit"[164] of the supreme court, i.e., one that did not include an audit of the two agencies. Cronson filed an unsuccessful suit in federal court claiming that the Illinois Supreme Court's hearing a case brought by its own administrator violates Cronson's federal rights to due process.[165]

The questions of Illinois constitutional law are (1) whether the fees paid by lawyers and applicants to the bar are "public funds" within Article VIII, Section 3; (2) whether the two agencies of the Court are "state agencies"; and (3) whether Cronson's attempts to audit those funds violate the Separation of Powers clause of Article II, Section 1. Since the 1970 Constitution itself grants auditing powers

163. Chicago Bar Ass'n v. Cronson, 82 L 50131 (Circuit Court of Cook County, April 21, 1987), currently on appeal to the Illinois Appellate Court, First District.

164. Madden v. Cronson, 114 Ill. 2d 504, 501 N.E.2d 1267 (1986), *cert. denied*, 108 S. Ct. 73 (1987).

165. Cronson v. Clark, 645 F. Supp. 793 (N.D. Ill. 1986); 810 F.2d 662 (7th Cir.), *cert. denied*, 108 S. Ct. 199 (1987).

HeinOnline -- 8 N. Ill. U. L. Rev. 626 1987-1988

to the Auditor General, it is clear that the "public funds" and "state agencies" questions are the only serious issues.[166]

For the moment, then, Article VIII is a sleeping giant whose potential for fiscal management by the Governor, the General Assembly and the public has never been reached.

B. INCOME AND SALES TAXES

In 1970, Illinois had four major traditional sources of tax revenue: the income tax, the sales tax, the personal property tax and the real property tax. The income tax was and is solely a state tax, but the state rebates a percentage collected to some local governments. Although the state collects the sales tax, part of it goes to the state and the remainder goes to the municipality where the sale occurred. Since 1932, only local governments have imposed and collected taxes on real and personal property.

Until 1969, the major state-imposed tax was that on sales, which, for reasons of interpretation of the 1870 Illinois Constitution, was formally a tax on the occupation of retailing. But in that year, the Illinois Supreme Court held that the 1870 Constitution imposed no barrier to a state income tax.[167] The effect of that decision upon the 1970 Convention was enormous. It virtually guaranteed that the delegates would not seriously consider constitutionally prohibiting an income tax. The delegates did not change the structure of the income tax as they found it, but they placed two constitutional restrictions on it. One was the "8 to 5 ratio" limitation. This ratio reflects the tax's two-rate structure—4% on corporations and 2% on individuals—or a ratio of 8 to 5. The delegates provided that the corporate rate should not exceed the individual rate at a ratio higher than 8 to 5. Presumably, this limitation provides business with some protection from a legislature more interested in the welfare (and votes) of individuals than in that of corporations. The 8 to 5 limit, however,

166. The author freely admits she thinks Cronson, who is represented by Samuel W. Witwer, is absolutely right, and the Illinois Supreme Court, the Attorney Registration and Disciplinary Commission, the Board of Law Examiners and the Chicago Bar Association are absolutely wrong. She represented the Chicago Council of Lawyers in the state court litigation in its petitions for intervention and *amicus curiae*, taking Cronson's side, both of which petitions were denied by the Circuit Court Judge hearing the case. At the reconvening of the delegates in Sept. 1987, those present and voting adopted a resolution saying that it had been their intent to give the Auditor General both the power and the duty to audit these two agencies of the Supreme Court.

167. Thorpe v. Mahin, 43 Ill. 2d 36, 250 N.E.2d 633 (1969).

HeinOnline -- 8 N. Ill. U. L. Rev. 627 1987-1988

does not prevent imposing a higher tax upon individuals than upon corporations, and the "replacement of personal property tax" surtax upon corporations in Article IX, Section 5(c) may be (and is) excluded from the 8 to 5 limit. The other constitutional restriction prohibited a graduated or progressive income tax, although the legislature may establish exemptions in such a way as to achieve the effect of graduation.

The sales tax, now somewhat reduced in importance as a revenue source, appears only tacitly in Article IX, Section 2, as a "non-property tax." If the General Assembly so decides, it may now drop the fiction of an "occupation tax" and simply call the tax a "sales tax." To date, it has not chosen to do so. The legislature also may now create exemptions from the occupation tax for such sales as those of food and drugs. It did so, on a graduated basis, in the early 1980's.

C. TAXES ON PROPERTY

Long the mainstay of local governments and school districts in Illinois, taxes on real and personal property were the center of two of the most turbulent debates at the convention. The chief controversy over the real property tax was whether real property could be classified, so that owners of some types of real property paid taxes at a higher rate than others paid. The controversy over the personal property tax was whether the tax should be abolished by the constitution.

At the time of the convention, Cook County "classified" real property by its use. The county assessor first established the market value of the real property—the price it could fetch at an open market—and then established the "assessed valuation" of the real property. The "class" of real property having single-family homes, for example, was assigned an "assessed valuation" of about one-third of the home's market value. A shopping center, on the other hand, was assigned an "assessed valuation" of about 80% of the center's market value. When local taxing districts levied real property taxes, they imposed the levy upon the "assessed valuation" of the real property, e.g., "$3.00 per each $100 of assessed valuation." Although both the homeowner and the shopping center owner each paid a "3 percent tax," their tax bills were vastly different, even if the market value of their property was identical.

Why should there be classification of real property? One reason might be to impose a greater burden upon real property used to make a profit than upon real property used only for personal purposes. Another might be to encourage middle-class homeowners to stay within a big city, such as Chicago, or at least within the near suburbs,

HeinOnline -- 8 N. Ill. U. L. Rev. 628 1987-1988

such as those in Cook County that border Chicago. Or, to put it most simply, the theory behind classification may be that it helps to win the political support of a stable, conservative segment of the electorate: homeowners. Although only Cook County openly admitted it classified real property, there were strong indications that other counties informally classified, at least to a certain extent.

At the 1970 convention, almost all of the delegates from Cook, certainly all of those who were "regular Democrats," wanted to retain Cook County's power to classify real property. Although the "official" downstate position was against classification, some downstate delegates admitted privately that their counties also wanted the constitutional power to classify, even if the counties had no present intent to classify. As a compromise, the delegates decided to allow the counties with more than 200,000 people to classify, but to forbid smaller counties to do so. Although the Illinois Supreme Court has said that this distinction between large and small counties is constitutional, even if applied retroactively,[168] no county except Cook has taken advantage of the power to classify real property. The courts have made it clear, however, that valuations of individual parcels of property must be uniform within that parcel's class.[169]

The ad valorem ("according to value") personal property tax has been far more controversial. The delegates knew that the General Assembly would, in November, 1970, submit a proposed amendment to the 1870 Constitution which abolished that tax as it applied to individuals. They also assumed that the amendment would be adopted. To insure that the result of this amendment would carry over into the new constitution, they drafted Article IX, Section 5(b), which forbids the reinstatement of any ad valorem personal property tax abolished before the effective date of the new Constitution.

The delegates further realized that the personal property tax was the most unpopular, most unevenly-administered and least-collected tax in Illinois. They therefore decided to abolish it forever by a constitutional fiat. Opponents of the abolition, however, demanded that the local governments and school districts be guaranteed a new source of the revenues they would thereby lose. The compromise between the two forces was Article IX, Section 5(c), which prescribed a deadline of January 1, 1979 for the General Assembly to abolish the remaining personal property tax. It also required the legislature

168. People *ex rel.* Kutner v. Cullerton, 58 Ill. 2d 266, 319 N.E.2d 55 (1974).

169. People *ex rel.* Hawthorne v. Bartlow, 111 Ill. App. 3d 513, 444 N.E.2d 282 (1983).

HeinOnline -- 8 N. Ill. U. L. Rev. 629 1987-1988

to enact concurrently a replacement tax, to be imposed only upon the taxpayers relieved of the burden of paying the tax by this second abolition—in short, businesses, since businesses are the primary "non-individuals" in Illinois.

Section 5(c) has caused untold confusion in the legislature and the courts. The legislature was unable to abolish the tax because it could not agree upon a workable, constitutional replacement for the revenues lost. In 1973, ruling on an attempt at partial abolition of the tax, the Illinois Supreme Court said that any time the legislature attempts even such a partial abolition, it must replace the revenues thereby lost.[170] The Court also said that the abolition is not self-executing: if the General Assembly did not pass a bill abolishing the tax and replacing revenues by January 1, 1979, the tax would continue in effect indefinitely.

In 1978, the General Assembly submitted a proposed constitutional amendment that would have eliminated the 1979 deadline and made the abolishment language permissive instead of mandatory. In effect, it would have withdrawn the mandate to abolish the remaining ad valorem personal property taxes. The issues were complex, the public found all these constitutional nuances difficult to understand, and business groups and the press were split on the issue. The proposal received 56 percent of the vote, four percent less than the 60 percent approval needed for adoption. No one was surprised when the General Assembly adjourned in December, 1978, without abolishing the tax.

The saga of the ad valorem personal property tax had a reasonably happy ending. In 1979, in a baffling re-interpretation of Article IX, Section 5(c), the Illinois Supreme Court held that no ad valorem personal property tax could be collected after January 1, 1979.[171] In prohibiting the collection, however, the court still found the legislature responsible for finding replacement revenues. The General Assembly, not surprisingly, chose to replace revenue by imposing a special surtax on income taxes imposed upon businesses. The ad valorem personal property tax is dead; the special surtax on the income tax may live forever.

Another problem with property taxes, whether real or personal, is that of exemptions from the tax. As long as the tax on real and personal property was the major source of state and local revenues from 1818 to 1932, exemptions from it were, in effect, exemptions from the general tax burden. For over a hundred years, Illinois

170. Elk Grove Engineering Co. v. Korzen, 55 Ill. 2d 393, 304 N.E.2d 65 (1973).
171. Client Follow-Up Co. v. Hynes, 75 Ill. 2d 208, 390 N.E.2d 847 (1979).

HeinOnline -- 8 N. Ill. U. L. Rev. 630 1987-1988

constitutions have allowed the legislature to exempt property used for county fairs and "for school, religious, cemetery and charitable purposes." The legislature has frequently exercised its power to exempt both real and personal property.

In the past fifty years, there has been a movement towards granting exemptions to the elderly and other groups unusually hard-pressed by real estate taxes. The General Assembly enacted a homestead exemption for senior citizens in 1970, but the Illinois Supreme Court held that the 1870 Constitution prohibited such an exemption.[172] Because the new Constitution specifically allows the legislature to "grant homestead exemptions or rent credits,"[173] the General Assembly re-passed the bill under the new Constitution. The Illinois Supreme Court held it constitutional under the new provision,[174] and the legislature soon created a homestead exemption for all. This exemption and the abolition of the ad valorem personal property tax are specific instances in which the new constitution has made a difference.

The elderly are not the only Illinoisans wishing to have exemptions from their real property taxes. In 1978, 1984 and 1986, veterans' groups succeeded in persuading the General Assembly to place on the ballot amendments allowing the "post homes" of veterans' groups to be exempt from property taxes. No amendment came close to receiving the 60% approval needed for ratification.[175]

Voters have expressed greater sympathy for homeowners whose residences are about to be sold at delinquent tax sales. In 1980, they approved an amendment allowing the legislature more power to give greater rights of redemption to homeowners whose homes are about to be "sold for taxes."[176] It is probable that the General Assembly had the power to expand the right of redemption under Article IX, Section 8, as drafted in 1970. Such, however, is the emotional attachment to the fear of "losing one's home" that surrounds this constitutional provision.

Article IX, Section 7 concerns "overlapping taxing districts," and, arcane as it sounds, deals with a problem arising from constitutional mandates to make property taxation uniform. If a taxing district, particularly a school district, covers—or "laps over"—two or more counties, property assessed by the county assessor in one county may not be valued on the same basis as property in the other

172. Hoffman v. Lenhausen, 48 Ill. 2d 323, 269 N.E.2d 465 (1971).
173. ILL. CONST. art. IX, §6.
174. Doran v. Cullerton, 51 Ill. 2d 553, 283 N.E.2d 865 (1972).
175. Gaudet, *Amending the State's Constitution*, 12 ILL. ISSUES 30 (Nov. 1986).
176. *Id.*

HeinOnline -- 8 N. Ill. U. L. Rev. 631 1987-1988

counties. This is especially inequitable if one county classifies, as Cook County does, and the other counties in the taxing district do not. Owners of single-family homes in the Cook County part of the district will receive a tax break that owners of single-family homes in the other counties do not—a significant difference in tax burdens where school districts are concerned. This difference may amount to constructive fraud.[177] The General Assembly has not completely addressed this problem.

D. STATE DEBT

Aside from taxes, the state government has two major revenue sources: federal funds and borrowing, usually on a long-term basis. The new constitution deals only with the latter.

Going into debt through borrowing is viewed by many as a proper way to finance the construction of capital improvements, such as buildings, as long as the term of the debt does not exceed the "useful life" of the improvements. Under the 1870 Constitution, the state could not have more than $250,000 in debt unless the electorate approved more debt at a referendum.[178] This unrealistic limit soon spawned many quasi-state agencies, which were actually, though not officially, under the control of the state government. For example, the Illinois Armory Board built the state armories and still runs them under the direction of the state, but the debt it incurred is not backed by the full faith and credit of the state; therefore, it is not part of the "state debt." When the General Assembly has failed to separate a quasi-state agency sufficiently from the state to evade the debt limit, the bonds issued by the agency have been found unconstitutional. The last such failure occurred in 1970; the Illinois Supreme Court invalidated an agency created to issue road construction bonds.[179] The convention, which was meeting at the time, abolished the debt limit but created the requirement that three-fifths of each house must approve a bill incurring state debt.[180] Although the approval of three-fifths of each house is difficult to obtain, the state legislature has sometimes passed a debt bill. For example, in 1971, it re-passed substantially the same highway debt bill declared unconstitutional a

177. The one case is not dispositive of the constitutional issues. People *ex rel.* Skidmore v. Anderson, 56 Ill. 2d 334, 307 N.E.2d 391 (1974).

178. ILL. CONST. of 1870, art. IV, §18.

179. Rosemont Bldg. Supply, Inc. v. Illinois Highway Trust Auth., 45 Ill. 2d 243, 258 N.E.2d 569 (1970), *appeal after remand*, 51 Ill. 2d 126, 281 N.E.2d 338 (1972).

180. ILL. CONST. art. IX, §9(b).

HeinOnline -- 8 N. Ill. U. L. Rev. 632 1987-1988

year earlier. The Supreme Court later found the new bill constitutional under the new constitution,[181] providing yet another example of the difference the new constitution has made.

The only significant problem of interpretation of Section 9 is the definition of "state debt." The courts have made it clear that debt created by special districts is not "state debt," even though the districts are created by legislation and, in the case of the Regional Transportation Authority, encompass more than one county.[182] On the other hand, when the state legislature or a group of entities that are clearly state agencies, such as public universities, create an entity whose sole purpose is to incur debt to purchase equipment for state agencies, then that is "state debt."[183]

* * *

There have been few surprises in the revenue article. The delegates took the basic revenue structures, including the income tax, as they found them, and gave them clearer constitutional status. Their one attempt at major change, total abolition of the personal property tax, was ultimately successful. Since 1970, the legislature and the public have shown no inclination to make major changes in the revenue structure, although the legislature has taken advantage of its new powers to create exemptions by exempting food and drugs from the sales tax and "homesteads" from the real property taxes. The liberalization of the power to incur state debt has not resulted in a drastic increase of state debt, suggesting that the true limit on incurrence of debt is either the fiscal prudence of the legislature or the wrath of the citizens, but not the constitution.

The finance article has potential for enormous change. The legislature can encourage, if not exactly force, efficiency in state agencies and local governments, by requiring uniform systems of reporting and accounting. It can use the "balanced budget" provisions as a means of estimating revenues available in the coming year on a more sophisticated basis. So far, these management tools have not

---

181. People *ex rel.* Ogilvie v. Lewis, 49 Ill. 2d 476, 274 N.E.2d 87 (1971).

182. Day v. Regional Transp. Auth., 66 Ill. 2d 533, 363 N.E.2d 829 (1977); Hoogasian v. Regional Transp. Auth., 58 Ill. 2d 117, 317 N.E.2d 534, *appeal dismissed*, 419 U.S. 988 (1974); People *ex rel.* Hanrahan v. Caliendo, 50 Ill. 2d 72, 277 N.E.2d 319, *appeal dismissed*, 406 U.S. 965 (1971) (transportation district in part of one country).

183. Op. Att'y. Gen. No. S-1209 (1977) (the Illinois Educational Consortium). *Cf.* Op. Att'y Gen. No. S-362 (1971) (advising that revenue bonds issued pursuant to the State Colleges and Universities Revenue Bond Act did not require legislative approval).

HeinOnline -- 8 N. Ill. U. L. Rev. 633 1987-1988

been used to their full potential, largely because there is no political impetus to do so.

The post-auditing powers of the Illinois Auditor General have enabled the legislature to know more about the agencies of the executive branch, sometimes resulting in greater financial efficiency by those agencies.[184] Two agencies of the judicial branch, however, have prevented achieving the same results in the third branch of government.

VIII. LOCAL GOVERNMENT

(Article VII)

There are six types of governments in Illinois. One is the state. Another is the school district, a unique locally-controlled government which runs a public junior college or an elementary and/or secondary school system. The other four are the categories of "units of local government": counties, townships, municipalities and special districts.[185]

The oldest and largest of the four categories of units of local government is the county. There are 102 counties in Illinois, each governed by a county board elected by the people of the county. This unit has general supervisory and administrative duties. For example, it assesses and collects the property taxes, real and personal, levied by all of the school districts, municipalities and other taxing districts in the county.

Eighty-five of the counties (roughly the northern two-thirds of the state) are divided into townships, the second unit of local government. Each township has some duties assigned by the legislature, such as dispensing public aid or running the "township road" system. Townships do not perform as many functions as counties do.

The third unit of local government is the "municipality," which is a general term including cities, towns and villages. In Illinois, a "municipality" is both Chicago, with its 3,000,000 residents, and a tiny hamlet with a hundred residents. Municipalities have many administrative duties assigned by the legislature and are governed by municipal councils, commissions or boards of trustees elected by the residents of the municipality.

---

184. The author, who was Chairman of the Illinois State Civil Service Commission from 1977-83 found the Auditor General's reports of the Agency very helpful in achieving fiscal economy and efficiency.

185. ILL. CONST. art. VII, §1.

HeinOnline -- 8 N. Ill. U. L. Rev. 634 1987-1988

The last unit of local government, the special district, is a relatively autonomous local government that usually provides a single service.[186] Police districts, fire protection districts, street lighting districts, curb districts, sewer districts, water districts, garbage collection districts, transportation districts and mosquito abatement districts are all examples of Ilinois special districts. Although one special district, the Regional Transportation Authority, covers the six counties of the Chicago metropolitan area, most special districts are smaller than a county. Some of them, in fact, cover only a fraction of a township, municipality or county and provide service only to that fraction of a larger unit.

The history of local government in Illinois is colorful and problem-ridden. In 1969, the major problem with Illinois local government was that there were too many local governments. With 6,454 counties, townships, municipalities, special districts and school districts,[187] Illinois had more local governments than any other state. Although property owners were not terribly heavily pressed by taxes, some did support ten or twelve separate taxing districts. For example, of each suburban tax dollar, seventy-five to eighty percent went to school districts, and the remainder to a county, usually to a municipality, often to a township, and always to several special districts.

The first reason for this over-abundance of special districts was the 1870 Constitution's limit on indebtedness to five percent of the assessed valuation of property under each local government. As each unit of government outgrew its debt limit, the community met the growing demand for services by creating a new special district. The second reason was that political factors helped perpetuate these new districts. Once a district was created, its officers had a vested interest in its continuation, and its constituency wanted to ensure that the services it provided would continue. Finally, each district had bonded indebtedness and found it difficult to find another local government which could assume its debt, because the other local governments in the area were usually at their own five percent debt limit.

Counties and municipalities are "general purpose" governments and therefore the logical units to absorb the special districts. For two reasons, however, they were not able to take over many of the districts' functions. First, they, too, were subject to the five percent

186. Anderson and Lousin, *From Bone Gap to Chicago: A History of the Local Government Article of the 1970 Illinois Constitution*, 9 J. MAR. J. 697, 700 n.8 (1976).

187. *Id.* at 701 n.12.

HeinOnline -- 8 N. Ill. U. L. Rev. 635 1987-1988

debt limit and could not absorb more debt. Second, and more importantly, they also did not have any constitutionally-granted powers; they had only those powers the legislature chose to give them. The Illinois courts have long followed a principle of local government law called "Dillon's Rule."[188] According to this rule, a local government has only those powers "granted in express words," powers "implied in or incident to" the expressly-granted powers and powers "essential to the accomplishment" of the purposes of the local government.

The Illinois courts interpreted "Dillon's rule" so strictly that it was said that no local government could take any action unless it could point to statutory authority to take the action. This interpretation worked no particular hardship on the special districts, which were, after all, very limited in their purposes and did not need "strong" powers. It had devastating results, however, upon counties and municipalities. The large counties, especially Cook, and the large cities, especially Chicago, often had the political and financial power base from which they could launch new programs to meet the growing urban and metropolitan ills of the twentieth century, but they first had to obtain enabling legislation from the General Assembly. The legislature soon found itself passing bills to meet the purely local needs of counties and cities in different parts of the state. In effect, Dillon's Rule promoted the special or local legislation theoretically prohibited by the 1870 Constitution. Even worse, the plethora of local governments promoted irresponsibility and inefficiency.

The constitutional convention delegates' solution to the problem was four-pronged. First, they liberalized the municipal debt limits, basing them upon the population and home rule status of the local governments.[189] Second, they drafted an intergovernmental cooperation provision that allowed local governments the broadest possible power to form agreements to share services. The delegates hoped that the governments would choose to share the costs of providing some special services instead of creating or maintaining special districts to provide them.[190] Third, the delegates made it relatively easy for counties and municipalities of all sizes, whether they have home rule powers or not, to create "special service districts."[191] This enables a county or municipality to provide services only to one geographical

188. J. DILLON, LAW OF MUNICIPAL CORPORATIONS 237 (5th ed. 1911).
189. ILL. CONST. art. VII, §§6(k) and (7).
190. ILL. CONST. art. VII, §10.
191. ILL. CONST. art. VII, §6(l)(2) and §7(6).

HeinOnline -- 8 N. Ill. U. L. Rev. 636 1987-1988

part of its territory, imposing a special tax only upon the area served. They hoped that counties and municipalities would prefer creating a special service district directly under their control, allowing the creation of a special district, a completely different and separate unit of local government.

Finally, their most important innovation was the provision granting the strongest constitutional home rule power to counties and municipalities of any state in the country.

A. HOME RULE: AN OVERVIEW

An Illinois home rule unit may, subject to enumerated exceptions, "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt."[192] Under the 1970 Constitution, more municipalities receive home rule powers automatically than in most states, and the powers they receive are stronger than those in any other state. Indeed, it is an indication of this grant's importance that the Local Government Article is sometimes called the "home rule article."

Only two types of local governments can obtain home rule status: municipalities and counties. Presumably because the delegates believed that larger cities had the most complex problems, which home rule could help solve, they gave automatic home rule status to every municipality with more than 25,000 people. Thus, on July 1, 1971, sixty-seven cities obtained home rule on the basis of their population as established by the 1970 Federal Census. Since then, thirty-four more cities have obtained that status automatically by population growth and four more by approval of the people at a special referendum.[193] Although the people of 25 cities have voted on the question of rejecting home rule powers, only four have chosen to do so.[194] One of those, however, is Rockford, the second largest municipality in Illinois. After sixteen years, home rule for municipalities is now more a matter of popular choice than a matter of population.

When the delegates considered county home rule, they thought primarily of Cook County, and, to a certain extent, of the five "collar counties" surrounding Cook and a few of the largest downstate counties. Given the Balkanization of the Chicago suburbs, the county

192. ILL. CONST. art. VII, §6(a).
193. J. BANOVETZ & T. KELTY, HOME RULE IN ILLINOIS 8 (1977).
194. *Id.*

HeinOnline -- 8 N. Ill. U. L. Rev. 637 1987-1988

was the only unit of local government that had the geographical jurisdiction and powers sufficient to solve the problems of the suburbs, let alone of Chicago and its suburbs combined into one metropolitan area. Here the key to the effectiveness of home rule was not the population of the county, but its form of government. The delegates decided that only a county which elected a chief executive officer had the administrative structure to manage home rule powers wisely. In 1970, only Cook County had such an officer. Although the General Assembly passed a County Executive Act enabling other counties to elect a county executive and thereby to obtain home rule status,[195] no county has chosen to acquire that form of government and home rule. Nine counties, most with a substantial urban population, have voted on the issue, but every time opponents have defeated the proposal.[196] Since DuPage and St. Clair Counties now have a county-wide elected chairman of their county boards, they may have home rule, but their county governments have never openly addressed that question.[197] In retrospect, therefore, it appears that the delegates perceived that only Cook County had the political power base to support, not just the need for, county home rule. That perception is apparently still correct.

Home rule units have the powers to license, to tax, to incur debt, to change their form of government and to pass ordinances to protect the public health, safety, morals and welfare (the "police power"). Although some home rule units have used their powers to license and to change their form of government, most have not found it necessary to do so.

Some have incurred debt, but others have discovered that the electorate's disapproval and the financial market's occasional rejection of their bonds have put effective limits on that power. Still, many communities have incurred debt above their statutory limits. Much, if not most, of this debt is general obligation bonds, rather than revenue bonds, although revenue bonds are far from an extinct species in home rule municipalities. Home rule cities also use bank loans more and tax anticipation notes less than they did in the early years of home rule. Perhaps we can say, albeit cautiously, that the 1980's have been the decade when home rule cities began to use more

195. ILL. REV. STAT. ch. 34 para. 701, *et seq.* (1977).

196. In 1972: DeKalb, Fulton (not so large), Lee (also not so large), Peoria, St. Clair and Winnebago, all Downstate counties; DuPage, Kane and Lake, all metropolitan counties. In 1976, Lake and Winnebago tried again, to no avail. *See* J. BANOVETZ & T. KELTY, *supra* note 190, at 9.

197. J. BANOVETZ & T. KELTY, *supra* note 193, at 9.

HeinOnline -- 8 N. Ill. U. L. Rev. 638 1987-1988

generally secured bonded indebtedness, which reduces the amount of the interest the municipality must pay to service the debt.[198]

Since the most frequently used and litigated home rule powers have been the police power and the taxing power, this report will discuss both, as space does not permit a full discussion of home rule.

B. HOME RULE: THE POLICE POWER

The police power encompasses virtually everything a government can do to protect its citizens' safety (by enacting, for example, traffic laws, criminal laws and fire safety laws), and health (by passing sanitation laws, zoning laws and water supply laws). All of these areas can produce home rule problems, but it is impractical to recount all the litigation here.[199] The attempted extension of the police power to environmental control, however, encapsulates one of the problems that have arisen from home rule in Illinois. Therefore, this report will discuss only the home rule cases on environmental regulation, part of the police power.

As previously noted, a home rule unit "may exercise any power and perform any function pertaining to its government and affairs." The limitation embodied in this grant of authority—"pertaining to its government and affairs"—has caused courts deciding home rule cases a great deal of trouble. Take, for example, cases on enviromental regulation. Two early cases on zoning and environmental control, for example, held ordinances of home rule local governments subordinate to the Illinois Environmental Protection Act (EPA),[200] a statute making protection of the environment such a paramount interest of the state government that, in the court's view, any local ordinance inconsistent with an EPA regulation must fall. They were *O'Connor v. City of Rockford*[201] and *Carlson v. Village of Worth*.[202] In another case, *Metropolitan Sanitary District of Greater Chicago v. City of Des Plaines*,[203] the Illinois Supreme Court held that a home rule city's ordinance banning sewage disposal plants was ineffective against the Metropolitan Sanitary District, a special district created by the state

198. J. BANOVETZ & T. KELTY, *supra* note 193, at 10-11, is the source of the statements upon which these conclusions are based.

199. For the most recent summary of home rule litigation, *see* Survey, *Developments in the Law of Illinois Home Rule*, 17 J. MARSHALL L. REV. 613 (1984).

200. ILL. REV. STAT. ch. 111§, para. 100 *et seq.* (1977).

201. 52 Ill. 2d 360, 288 N.E.2d 432 (1972).

202. 62 Ill. 2d 406, 343 N.E.2d 493 (1975).

203. 63 Ill. 2d 256, 347 N.E.2d 716 (1976).

HeinOnline -- 8 N. Ill. U. L. Rev. 639 1987-1988

long before 1970. That court later held, in *City of Des Plaines v. Chicago and Northwestern Railway Co.*,[204] that regulation of noise pollution was a proper subject for regulation by the Environmental Protection Agency and was not within the home rule powers of the city.

Although the ordinances in most of these cases pertained to a home rule city's "government and affairs," they were struck down as infringements upon the state government's control over the environment. The question was whether control over the environment was such a state-wide concern that no local entity, even a home rule unit, could act in the field at all. The Supreme Court had suggested[205] in 1974 that a home rule unit could regulate environmental affairs concurrently with the legislature, so long as the local ordinance conformed to the minimum standards established by the legislature under the EPA. Concurrent jurisdiction with the state thus seemed to be the most home rule units could hope for.

That hope was realized in *Carlson v. Briceland*.[206] In *Carlson*, the Illinois Appellate Court held that even though the owner of a landfill had to obtain the Environmental Protection Agency's permission to construct and operate it, Cook County could also require him to obtain a special use permit under its zoning ordinance. (This was important because zoning is a chief means of regulating the environment on the local level.) The court affirmed its position of concurrent jurisdiction between the Environmental Protection Agency and home rule units in *Cook County v. John Sexton Contractors Co.*,[207] in which it held that Cook County must adhere to the EPA's regulations and standards when zoning land for landfills, while the EPA, in turn, must adhere to the home rule county's zoning ordinance when issuing state permits to landfill operators. Of course, landfill operators instantly found themselves in the bind of double regulation: they had to satisfy two masters.

The decade of the 1980's has seen more tests of this uneasy truce in environmental control in Illinois. In 1984, the Illinois Supreme Court held that the choice of garbage disposal facilities in southern Cook County was left to the concurrent jurisdiction of, or double

---

204. 65 Ill. 2d 1, 357 N.E.2d 433 (1976).

205. City of Chicago v. Pollution Control Board, 59 Ill. 2d 484, 322 N.E.2d 11 (1974).

206. 61 Ill. App. 3d 247, 377 N.E.2d 1138 (1978).

207. 75 Ill. 2d 494, 389 N.E.2d 553 (1979), *appeal after remand*, 86 Ill. App. 3d 673, 408 N.E.2d 236 (1980).

HeinOnline -- 8 N. Ill. U. L. Rev. 640 1987-1988

regulation by, the home rule county and the EPA.[208] Most recently, in an opinion mixing the home rule power to tax with the home rule power to regulate the environment, an appellate court held the EPA did not prevent Chicago from imposing a seven-cent consumer tax on sales of leaded gasoline inside the city.[209] The purpose of the ordinance was presumably two-fold: to raise revenue and to discourage the use of harmful pollutants in a crowded urban area. The Illinois General Assembly tried to solve this problem by amending the EPA to require hearings on permits for regional landfill facilities, but since it exempted Cook, the home rule county, the problem of dual regulation still exists in that county.

As of now, therefore, Illinois still has "concurrent jurisdiction" in environmental matters, at least when Cook County is involved. Concurrent jurisdiction is, however, an uneasy truce between the legislative power and home rule power, a truce which will be tested many times in the years to come.

C. HOME RULE: THE POWER TO TAX

The most striking and controversial of the Illinois home rule powers is the power to impose almost any kind of tax. Only the imposition of income taxes and occupation taxes, and the requirement of licenses for revenue, are specifically forbidden to home rule units.[210] Home rule units can even impose taxes differentially upon different parts of the taxing area.[211]

The courts have gradually defined the scope of this great power. The first tax case to arise under the new home rule was *S. Bloom, Inc. v. Korshak*,[212] in which the Illinois Supreme Court upheld Chicago's tax on each pack of cigarettes purchased there. After that came a succession of cases upholding Chicago or Cook County tax ordinances, including *Mulligan v. Dunne*[213] (Chicago's "employer's expense tax," really a "doing business" tax); *Rozner v. Korshak*[214] (Chicago's "wheel-tax license" on ownership of motor vehicles); *Jacobs v. City of Chicago*[215] (Chicago's parking tax); and *Williams v.*

208. Cosmopolitan Nat'l Bank v. Cook County, 103 Ill. 2d 302, 469 N.E.2d 183 (1984).

209. Illinois Gasoline Dealers Ass'n v. City of Chicago, 141 Ill. App. 3d 976, 491 N.E.2d 112 (1986).

210. ILL. CONST. art. VII, §§6(a), (e)(2).

211. ILL. CONST. art. VII, §6(1).

212. 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

213. 61 Ill. 2d 544, 338 N.E.2d 6 (1975), *cert. denied*, 425 U.S. 916 (1976).

214. 55 Ill. 2d 430, 303 N.E.2d 389 (1973).

215. 53 Ill. 2d 421, 292 N.E.2d 401 (1973).

HeinOnline -- 8 N. Ill. U. L. Rev. 641 1987-1988

City of Chicago[216] (Chicago real estate transfer tax). In a sixth case, the court also upheld Cicero's municipal admission tax on amusements.[217]

However, the Illinois courts have drawn a firm line at taxes which affect the "government and affairs" of governments other than the government passing the ordinance. For example, they held invalid Cook County's attempt to collect a $2.00 fee on the filing of civil cases to support the county law library, calling it a tax on those using the judiciary, a branch of the state government.[218] They also held invalid a Cook County ordinance permitting the collection of real estate taxes four times a year, not just twice, with the rationale that the collection of real estate taxes is an "affair" of all the units of government within Cook County, not just of the county itself.[219]

About ten years after home rule became effective, the courts appeared to view home rule powers a little more strictly. In *Commercial Nat'l Bank of Chicago v. City of Chicago*,[220] the Illinois Supreme Court held invalid a tax upon services purchased in a home rule municipality, on the grounds it was really an occupation tax that obviously had not been authorized by statute. It also held invalid Waukegan's tax on a consumer's use of telephones, electricity and gas, also on the grounds it was really an occupation tax.[221] On the other hand, a hotel-motel tax, a very popular way to raise funds from people who do not vote in the taxing district, was held not to be an occupation tax,[222] nor was Chicago's tax upon the lease or rental of personal property.[223] Not surprisingly, a boat mooring tax imposed upon owners of boats docking within the City was neither extra-territorial (and therefore beyond the powers of a home rule unit) nor an occupation tax.[224]

---

216. 36 Ill. App. 3d 216, 343 N.E.2d 539, *rev'd on other grounds*, 66 Ill. 2d 423, 362 N.E.2d 1030 (1977), *cert. denied*, 434 U.S. 924 (1977).

217. Town of Cicero v. Fox Valley Trotting Club, 65 Ill. 2d 10, 357 N.E.2d 1118 (1976).

218. Ampersand, Inc. v. Finley, 61 Ill. 2d 537, 338 N.E.2d 15 (1975).

219. Bridgman v. Korzen, 54 Ill. 2d 74, 295 N.E.2d 9 (1972).

220. 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

221. Waukegan Community Unit School Dist. 60 v. City of Waukegan, 95 Ill. 2d 244, 447 N.E.2d 345 (1983).

222. Springfield Hotel-Motel Ass'n v. City of Springfield, 119 Ill. App. 3d 753, 457 N.E.2d 1017 (1983).

223. Wellington v. City of Chicago, 144 Ill. App. 3d 774, 494 N.E.2d 603 (1986) (as applied to taxi cab leases); Webster v. City of Chicago, 132 Ill. App. 3d 666, 478 N.E.2d 446 (1985).

224. Forsberg v. City of Chicago, 151 Ill. App. 3d 354, 502 N.E.2d 283 (1986).

HeinOnline -- 8 N. Ill. U. L. Rev. 642 1987-1988

These court-imposed limitations do not significantly restrict the home rule units' constitutional power to tax. The most severe limitations on their exercise of that power come instead from other sources. The economic ability of the tax base to support another tax burden is one limitation, and the political mood of the taxpayers is another, even greater, limitation. When the advocates of the new constitution campaigned for it in 1970, they did not encounter the fierce opposition to taxes they would find today. Certainly, no one wanted to pay home rule taxes, but most voters realized that there had to be alternatives to the general real property tax.

After the first blush of the novel home rule powers had passed, more and more citizens came to view home rule as the source of new taxes, not of greater efficiency in government. True, home rule units, as well as non-home rule units, used their new power to cooperate with other governments to a significant extent. However, special districts did not disappear, and, in many citizens' view, local government was only costlier, not more efficient and responsive. Perhaps mutual distrust and unwillingness to give up part of one's power are as powerful limitations on municipal powers as Dillon's Rule had ever been. The new constitution merely tried to remove the old constitutional problems facing local governments. It did not, because it could not, remove the political, economic and social problems facing local governments.

As a result, the biggest threat to the eventual success of Article VII's bold solutions to local governmental problems does not come from the courts which once imposed Dillon's Rule on Illinois local governments. It comes instead from the very citizen-taxpayers the article should serve. Local government officials have not been able to convince the taxpayers that home rule has promoted economy, efficiency and progress. Perhaps that failure arises from the perception that elected public officials may not want to achieve these economies, efficiency or progress. Although home rule units, like non-home rule units, rarely tax up to their limits, and most impose taxes far below those limits, many members of the public, insofar as they think about home rule at all, often associate "home rule" with taxes, especially taxes upon small groups singled out to pay occupation or use taxes.[225] To paraphrase Chief Justice Marshall, "[t]he power to tax is the power to destroy oneself." The people of any home rule unit can unmake home rule at a popular referendum, just as they can grant their county or municipality that power at a referendum.

---

225. J. BANOVETZ & T. KELTY, *supra* note 193, at 11.

HeinOnline -- 8 N. Ill. U. L. Rev. 643 1987-1988

IX. EDUCATION

(Article X)

Article X—"Education" is one of the shortest articles in the 1970 Constitution, but each of its three sections has already had a telling effect on Illinois education. In considering this article, one must remember that the delegates met when both school finance and aid to parochial schools were still hotly debated constitutional and political issues. Moreover, scandals in the office of the Superintendent of Public Instruction, an elected officer loosely charged with supervision of education, had recently brought the administration of Illinois education into question.

Section 3 bans the use of "public funds for sectarian purposes," thus apparently forbidding "parochiaid" (aid to parochial private schools), one of the most volatile issues in the nation in 1970. The delegates, making a decision both politically cunning and statesmanlike, left the exact language of the 1870 prohibition intact here.[226] This left any change in the constitutional status of parochiaid to the federal courts deciding cases on first amendment grounds. After the United States Supreme Court decided the first major case against grants to parents of children in non-public schools in 1971,[227] the Illinois Supreme Court followed suit and invalidated the Illinois statutes.[228] Thus, this issue, once so volatile in 1970, is purely a federal first amendment issue.

The battle over aid to schools has since shifted to another front: the issue of financing public elementary and secondary education. Section 1, like Section 3, is based on language lifted from the 1870 Constitution. However, it adds three significant sentences. First, it establishes that "[a] fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities." The courts have held that this language requires that any special education provided handicapped children in public school be free,[229] but that parents who voluntarily place a handicapped child in a private institution cannot recover their tuition payments for their child.[230]

---

226. *Cf.* ILL. CONST. of 1870, art. VIII, §3, and ILL. CONST. art. X, §3.

227. Lemon v. Kurtzman, 403 U.S. 602 (1971).

228. People *ex rel.* Klinger v. Howlett, 56 Ill. 2d 1, 305 N.E.2d 129 (1973).

229. Elliot v. Bd. of Educ. of the City of Chicago, 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978).

230. Teplitz v. Mount Prospect Elementary School Dist. No. 57, 117 Ill. App. 3d 495, 453 N.E.2d 871 (1983).

HeinOnline -- 8 N. Ill. U. L. Rev. 644 1987-1988

Another sentence provides: "Education in public schools through the secondary level shall be free." In 1970, almost half the Illinois adult population did not have a high school diploma. If they were all suddenly to demand a free high school education, the schools could not accommodate them either physically or financially. As yet, however, these adults seem satisfied to attend high school equivalency classes at local community colleges.

The last sentence of the section is the most controversial. It reads, "[t]he State has the primary responsibility for financing the system of public education." One question of its interpretation was whether the language is hortatory, merely stating a goal, or whether it is mandatory and judicially enforceable. In *Blase v. State*,[231] the Illinois Supreme Court held that it was only hortatory. The second problem of interpretation is the meaning of "primary responsibility." According to *Blase*, it apparently means that the state should provide at least 50 percent of the financial support for public schools.

Section 2 of Article X has provided the most radical change in the Education Article. It replaced the elected executive officer called the Superintendent of Public Instruction with a State Board of Education. Here, the wishes of the delegates and public coincided almost exactly: everyone favored, at least publicly, "taking politics out of education," meaning that education ought not be a partisan matter. The members of the Board are appointed from geographical areas by the Governor, subject to the advice and consent of the Senate. Their main accomplishment to date has been the fulfillment of their constitutional duty to appoint a state chief education officer, who ironically has the same title as his elected predecessor. This officer is the general supervisor of Illinois education below the university level. His duties are purely statutory, not constitutional; hence, he is a creature of both the Board and the General Assembly. Not surprisingly, neither the Board nor the chief education officer has a high profile. They are virtually unknown to the general public and even to teachers.

In a narrow sense, the Board has successfully removed education from the influence of partisan politics on the state level. The Board spawns little litigation, generates few public emotions and is not the center of the major controversies, let alone partisanship. In a broader sense, however, education is still part of partisan politics. The annual battle over the school-aid formula is fought in the General Assembly, not in the Board's meeting room, a fact that suggests how little direct

231. 55 Ill. 2d 94, 302 N.E.2d 46 (1973).

HeinOnline -- 8 N. Ill. U. L. Rev. 645 1987-1988

influence over education the Board has. The Board simply has no power base, no direct authority and very low visibility. Indeed, no one, not even the Board, is responsible in a public administration sense, for education in Illinois. Perhaps the lesson to be learned from Section 2, and even from the entire Education Article, is that although goals are good, goals backed by a sound financial and political base are even better.

X. Economic Regulation

(Article XIII, §§ 6, 7 and 8)

The 1870 Illinois Constitution, just as most late nineteenth-century charters, attempted to regulate certain businesses. For instance, it specifically regulated corporations,[232] banks,[233] railroads[234] and warehouses.[235] By 1969, it was obvious that these areas were more appropriate subjects for legislative, not constitutional, regulation. With only two exceptions, the 1970 Constitution does not mention specific business problems. The two exceptions are banking (it addresses branch banking) and corporate charters.

Article XIII, Section 6, continues the 1870 Constitution's prohibition of special charters of private corporations, but does not continue the other and less important regulations on corporations.[236]

The issue of branch banking divided downstate bankers from Chicago bankers, and the delegates from those areas, almost on an exact regional basis. Since the nineteenth century, small locally-owned downstate banks have feared that, if Chicago banks were permitted to establish branches outside Chicago, they would drive the downstate banks out of business. Even in 1970, the issue called forth deeply-rooted regional prejudices and antagonisms which consumed a disproportionate share of the convention's time. Finally, the delegates decided that branch banking was primarily a matter for the legislature. The sole concession to the anti-branch banking forces was the inclusion in the constitution of a unique majority requirement for approval of branch banking by the legislature: "three-fifths of the members voting on the question or a majority of the members elected, whichever

232. Ill. Const. of 1870, art. XI.

233. Ill. Const. of 1870, art. XI, §§5-8.

234. Ill. Const. of 1870, art. XI, §§9-15.

235. Ill. Const. of 1870, art. XIII.

236. Note, however, that the Transition Schedule, §8, requires cumulative voting for corporations organized before July 1, 1971.

HeinOnline -- 8 N. Ill. U. L. Rev. 646 1987-1988

is greater, in each house of the General Assembly."[237] Although the downstate bankers thought this vote requirement would make it more difficult for the legislature to approve branch banking, the efficiency of this device has yet to be tested.[238] No bill has reached a final vote in the legislature.

Ironically, after all that dissension, the issue has become almost moot, for two reasons. First, most Chicago banks have decided they do not want far-flung branches. The legislature has allowed banks so many "service centers" that the need for true full-service "branches" is reduced. Second, downstate banks have discovered that their real competition is federally-chartered and regulated savings and loan associations, which are immune from state prohibitions on branch banking.

A greater threat to the status quo of Illinois financial institutions may come from the legal and economic implications of the development of the electronic funds transfer system. This system would place computer terminals in stores to record a customer's purchases in the form of debits to his bank account. In effect, the terminals would be "mini-branches" which might require a change in the branch banking laws to be valid. This technological advance, which would have made an anachronism of the 1870 Constitution's ban of branch banking, illustrates why constitutional conventions ought not preoccupy themselves with solving the problems of the present, at the expense of allowing future generations to solve the problems of the future. Such provisions rarely, if ever, do any good, and many times they do harm by freezing the constitution to the technology at the time the constitutional provision was written.

The delegates added only one new provision in the field of economic regulation. It is Article XIII, Section 7, which establishes public transportation as a proper purpose for the expenditure of public funds. As is true of most constitutional provisions on economics, it was a response to a contemporary problem: the need to encourage mass transportation in the cities. The section merely allows the General Assembly to appropriate public funds for public transportation, including funds to be given privately-owned commuter

---

237. ILL. CONST. art. XIII, §8.

238. Sometimes a bill passes that appears to be a "branch banking" bill, but the courts have held that these bills are not true "branch banking" bills. *See* McHenry State Bank v. Harris, 89 Ill. 2d 542, 434 N.E.2d 1144 (1982); Skokie Fed. Sav. and Loan Ass'n v. Illinois Sav. and Loan Bd., 61 Ill. App. 3d 977, 378 N.E.2d 1090 (1978); Security Sav. and Loan Ass'n of Hillsboro v. Griffin, 56 Ill. App. 3d 903, 372 N.E.2d 1118 (1978).

HeinOnline -- 8 N. Ill. U. L. Rev. 647 1987-1988

railroads, without any fear that they are violating the Finance Article's prescription that public funds be used only for "public purposes."[239]

In short, the delegates to the 1970 convention learned, at least moderately well, a lesson from their counterparts at the 1869 convention and perhaps from other states: do not try to establish a constitutional system for specific businesses.

SUMMARY

Cardozo's statement that "a constitution states, or ought to state, not rules for the passing hour but principles for an expanding future" provides a standard against which we can judge the 1970 Illinois Constitution a half-generation later. Although the delegates to the 1969-70 convention found it necessary to try to solve problems of the "passing hour" in order to obtain the voters' approval of their Constitution, they also tried to write a constitution suitable for "an expanding future."

The experience so far demonstrates the wisdom of Cardozo's statement. Some of the most controversial issues of 1970 have diminished in importance or virtually disappeared. The changing economic picture is one reason. For example, the expansion of federal savings and loan associations downstate has drastically altered the economic situation that once made branch banking so controversial.

Additionally, United States Supreme Court decisions and the 26th Amendment have rendered many other issues almost moot. Restrictions on the death penalty, suffrage for 18, 19 and 20-year-olds, aid to parochial schools and the payment of criminal fines in installments are prime examples of issues now considered relegated almost entirely to federal action. Even if the Illinois voters had rejected the 1970 Constitution, federal action would have made these changes anyway.

In two instances, appointment of judges and election of state representatives from single-member districts, failure bred hope for future success. The strong showing by those propositions at the separate side-elections in 1970 encouraged their advocates. In 1980, the single-member district forces finally succeeded. The supporters of "merit selection" or some other form of appointing judges continue their struggle. If the voters do approve the call for a convention in 1988, their primary reason for doing so will probably be to reform the judiciary. The Greylord scandal casts a long shadow, one whose edges we have not yet seen.

---

239. ILL. CONST. art. VIII, §1(a).

HeinOnline -- 8 N. Ill. U. L. Rev. 648 1987-1988

The changes made in the text of the new constitution are too numerous to recapitulate here. Most of the minor technical changes, such as the streamlining of bill passage in the legislature, already appear to be working well. The amendatory veto is, however, less successful. It is too early to tell if the major administrative innovations, such as the Judicial Inquiry Board, the State Board of Elections, and State Board of Education, will fulfill their promise. Their records so far are not encouraging. All were responses to those felt needs of 1970 Illinois. All are bi-partisan or non-partisan commissions designed to oversee or administer a vital function of government. The needs are still here and are still felt. Whether the mechanisms for fulfilling them will prove adequate to meet the needs of an expanding future is a question which must wait for future generations to answer.

In at least three specific cases we can discern the impact of the constitution decisively. The 1971 bills granting homestead exemptions to senior citizens and incurring state debt for building highways are substantially identical to bills passed under the 1870 Constitution and declared invalid by the Illinois Supreme Court. The court declared both 1971 bills valid under the new constitution. After many tribulations, the ad valorem personal property tax ceased in 1979.

In several other areas, we can see the unfulfilled dreams of the drafters of the constitution. It would have been hard to improve upon the text they wrote—their intent is clear—and yet, there has been a failure to realize these dreams. The anti-discrimination provisions, the entire Finance Article, and many of the provisions attempting to improve the legislative process and the judiciary are as yet unrealized. Yet they are good, forward-looking provisions of which all Illinoisans can be proud.

Each of the three previous Illinois constitutions served the state reasonably well for a time. Eventually, however, the "rules for the passing hour" each constitution had laid down stymied later generations trying to solve the problems of the "expanding future." As a result, the people changed their constitutional framework in 1848, 1870 and 1970. The fourth charter has given Illinois a sound constitutional basis for today, for the first half a generation of its existence. It has met well the test of the passing hour. The real test, however, is whether it will meet the test of providing a sound constitutional basis for the expanding future.

In judging the effectiveness of the 1970 Constitution, in 1988, when the people must decide to call a convention to reconsider the charter, or, indeed, at any time in the future, it would behoove us to remember the last words of the 1969-70 Constitutional Convention's address to the People of Illinois:

HeinOnline -- 8 N. Ill. U. L. Rev. 649 1987-1988

In a state so diverse as Illinois, only the spirit of compromise has made it possible for many problems to be solved. The Convention asks the People to view its product in the same spirit—with the idea that while it is not in every respect ideal from a given point-of-view, it is from any vantage point far better suited than is the Constitution of 1870 to serve the future needs of the State.[240]

240. RECORD OF PROCEEDINGS, *supra* note 2, Vol. VII, at 2678.

HeinOnline -- 8 N. Ill. U. L. Rev. 650 1987-1988