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WHERE ARE WE AT? THE ILLINOIS CONSTITUTION AFTER FORTY-FIVE YEARS

ANN M. LOUSIN*

I. INTRODUCTION: WHERE ARE WE AT?

During the floor debates of the Sixth Illinois Constitutional Convention in 1969 and 1970, one of the questions most frequently heard was "where are we at?" Any member of the convention who was not certain of the debate's posture—which issue was being discussed or whether a vote was about to be taken or some other parliamentary inquiry—would ask that question. The phrase was a particular favorite of the delegates from Chicago, because the question, with its unnecessary preposition at the end, was an example of the Chicago dialect.

The convention met on December 8, 1969 and adjourned on September 3, 1970. The people of Illinois voted to adopt the proposed constitution on December 15, 1970. Therefore, in 2015, forty-five years after its adoption, we can ask what has transpired regarding the constitution. In short, where are we at?

In this issue, THE JOHN MARSHALL LAW REVIEW is publishing a series of articles about the status of several major changes wrought by the constitution. This essay is an introduction to those articles and an assessment of the constitution's treatment of the major issues and controversies that the convention faced. What did the framers think were the major issues of the day, and how did they address and resolve them? How well have their solutions worked in the last forty-five years?

Let us begin with 1968, when the people of Illinois voted to call a constitutional convention. Under the constitution then in effect, the 1870 Illinois Constitution, only the Illinois General Assembly could place the question of a call upon the ballot. In

1920, the Fifth Illinois Constitutional Convention met and produced a constitution soundly defeated by the voters. From then until 1966, the legislature had shown no desire to call a sixth convention. While many in Illinois government and commentators outside government decried the rigid, antiquated provisions in the 1870 Constitution, there was little agreement upon which changes should be made. In 1966, the legislature proposed a set of amendments to the Revenue Article, including the power to impose a state income tax. The voters defeated those amendments.

However, also in 1966, a state representative named Marjorie Pebworth died suddenly. She had been a strong advocate of state constitutional revision. Some legislators thought that placing the question of a call for a "con con" would be a way to honor Mrs. Pebworth. A number of legislators who voted for the resolution later said that they also assumed that the voters would not adopt the call. Thus, partly to honor her and partly to dispose of the "con con" issue by an up-or-down vote by the electorate, the Illinois General Assembly placed the issue on the November 1968 ballot.

Those who favored major constitutional revision seized the opportunity. They formed The Illinois Committee for a Constitutional Convention. The committee represented a broad spectrum: the political parties, the key political leaders, the geographic areas of the state, and the major economic players in industry, commerce, and agriculture. Only the labor unions were reluctant to endorse a call. This was not unusual in states considering a convention because organized labor feared the insertion of right-to-work provisions and other anti-union measures in state constitutions.

Fortunately for the committee, 1968 was both a presidential election year and a gubernatorial election year. That meant there would be a high voter turnout. Almost without exception, the state candidates "endorsed the call." Momentum began to build.

II. WHAT WERE THE MOST IMPORTANT ISSUES DURING THE CALL IN 1968?

Why would people vote for a call? Why would they want the expense of a convention? During the campaign for the call, probably six issues dominated the discussion:

1. To modernize, shorten, and liberalize the Illinois Constitution;

2. To grant home rule powers to the City of Chicago and maybe other cities and even counties;

3. To validate the system of classifying real property by its use for the purpose of *ad valorem* real property taxation in Cook County;

4. To replace the popular election of most judges with a system of having the Governor appoint judges from nominees chosen by judicial nominating commissions, a system known as "merit selection";

5. To abolish the *ad valorem* personal property tax; and

6. To change the unique system of electing the Illinois House of Representatives, which was based upon three representatives elected by cumulative voting, with a single member districts system.

Let's see how these six issues fared during the convention and have fared since adoption of the 1970 Illinois Constitution.

First: modernize, shorten, and liberalize the Illinois Constitution. The committee offered one overriding reason for replacing the 1870 Illinois Constitution: Illinois had a horse-and-buggy constitution.

The theme was appealing: we must have a modern constitution for Illinois. But what did a "modern constitution" mean? The response was that the constitution, at 21,580 words, was too long and dealt with outdated issues, such as the regulation of warehouses (Article XIII) and railroads (Article XI, Sections 9-15) and the authorization of bonds to finance the World's Columbian Exposition of 1893 (Article IX, Section 13).

What happened at the convention? The answer is easy: even those critical of parts of the 1970 Illinois Constitution agree that it is shorter, that its language is more modern, and that the unnecessary "legislative detail" of the 1870 Constitution no longer clutters the text. Nobody can say that Illinois now has a "horse and buggy constitution."

According to data collected by the Book of the States, the 1870 Illinois Constitution contained approximately 21,580 words when the convention met in 1969.[1] The document that went into

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1. The Council of State Governments, *The Book of the States*, 19 (1970), *available at* http://knowledgecenter.csg.org/kc/content/bos-2007-chapter-1-state-constitutions.

effect on July 1, 1971, contained approximately 17,500 words, approximately 80% as many words as before. As of 2013, the Illinois Constitution, as amended, contained 16,401 words.[2] With the two amendments adopted November 4, 2014, the constitution is now slightly longer.

The theme of "modernize, shorten, and liberalize" sold well. The difficulties arose when anyone asked what specifically the committee wanted to change. The committee itself did not take a position. However, some of the proponents almost certainly had some changes in mind, although they thought it prudent not to broadcast these views during the 1968 campaign. For example, one of the chief proponents was the legendary mayor of Chicago, Richard J. Daley. He wanted the new constitution to make two significant changes:

1. Grant constitutional home rule powers to the City of Chicago, and maybe also to Cook County and some other cities and counties, but above all, to Chicago; and
2. Validate the system of classifying real property by its use for *ad valorem* real property taxation in Cook County, a long-established system that was vulnerable to criticism and that Daley feared would be challenged in federal courts based on a denial of equal protection theory.

Home rule for Chicago was probably the most important for Mayor Daley. Although there was some debate over the extent of home rule powers, there was little opposition to granting significant home rule powers to the City of Chicago. Without that grant, the Mayor almost certainly would not have used his vital political influence to turn out a "yes" vote for the proposed new constitution.

The home rule provisions of Article VII, Section 6 are often called the strongest home rule provisions in the country. The Committee on Local Government knew that there had to be a reversal of "Dillon's Rule," the concept that no local government could exercise any power unless it had express or virtually express authorization from either the state constitution or the legislature. It was easy to say that Chicago should have home rule. Chicago, founded in 1833, had grown from little more than a trading post at the mouth of the Chicago River to the second-largest city in the country and was home to one-third of the population of Illinois. But how strong should those powers be? Should other cities and even counties have home rule? In short, how could the state

2. The Council of State Governments, *The Book of the States*, 12 (2013), *available at* http://knowledgecenter.csg.org/kc/content/book-states-2013-chapter-1-state-constitutions.

constitution accommodate the special needs of Chicago within the framework of Illinois?

Article VII, Section 6 grants home rule powers to all cities with a population over 25,000 and any others that opt in by referendum. According to the Illinois Municipal League, approximately 200 cities now have home rule status.[3] Only a few cities have opted out of automatic home rule status, of which the largest is Rockford, then the second-largest city in the state. (It is now the third-largest city, having been overtaken by Aurora, a home rule unit.)[4]

Counties that elect a chief executive officer on a county-wide basis also automatically obtained home rule status. In practice—and this was hardly an accident—only Cook County obtained home rule powers on July 1, 1971. Every attempt by other counties to obtain home rule status by referendum has failed, even in DuPage County, which elects a chief executive officer county-wide, but has rejected home rule status. Cook County is by far the most populous county. According to the 2010 census, Cook County is home to 40% of the state's residents: 5,194,675 out of a total population of 12,830, 632.[5] DuPage County, which contains most of the western suburbs of Chicago, has 916,924 residents.[6]

How important has home rule been to Chicago, Cook County, and other home rule cities? In this symposium, Joseph Kearney, a long-time observer of Illinois local government, analyzes the effects of home rule upon Chicago.[7] He concludes that Chicago absolutely needed home rule to avoid urban stagnation and compares its situation with that of Detroit, Michigan. *Spoiler alert:* Mr. Kearney shows that many of Detroit's recent problems stem from the divesting of its home rule powers, which were granted in 1913 by a constitutional amendment, in 1978. In effect, Detroit lost much of its power to raise revenue in 1978, just as Chicago was beginning to use the expansion of its home rule powers to remain a great metropolis. Mr. Kearney argues that the courts should allow Chicago to have strong home rule powers in the twenty-first century.[8]

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3. *See* Illinois Municipal League, *Home Rule Municipalities*, IML.ORG, http://www.iml.org/page.cfm?key=2 (last visited Jan. 3, 2015) (providing a list of the cities that have been granted home rule status).

4. Hal Dardick, *Aurora Now 2nd-largest City in Illinois*, CHI. TRIB., (July 11, 2003), *available at* http://articles.chicagotribune.com/2003-07-11/news/0307110042_1_census-bureau-population-estimates-second-largest-city-special-census.

5. State of Ill., Ill. Census 2010, http://www.illinois.gov/census/Pages/Census2010Data.aspx (last visited Jan. 3, 2015).

6. *Id*.

7. Joseph A. Kearney, *Stubhub's Tug at the Municipal Purse String: Why the Home Rule Taxing Powers Enumerated in the Illinois Constitution Must Remain Broad and Strong*, 48 J. MARSHALL L. REV. 36 (2014).

8. *Id*.

The third issue that arose during the 1968 campaign for a call was also close to Mayor Daley's heart: the validation of the system of classifying real property by its use for *ad valorem* real property taxation.

Although many political and economic theorists have argued that it is improper to establish classes of real property based upon use, Cook County has long done so. Mayor Daley saw that system as a key to the power of Cook County (Chicago and its near suburbs) to control its chief source of local revenue. The Committee on Revenue and Finance agreed with him, and in the end so did the other delegates.

Article IX, Section 4(b) allows any county with a population of more than 200,000 to classify real property for taxation. So far, only Cook County has chosen to do so, at least officially. I think we can safely say that most Illinoisans are content with allowing Cook County to classify real property by use and for other large counties to have that power, which they decline to exercise.

The fourth issue that arose in 1968 was that of selection of judges, that is, to replace the popular election of most judges with a system of having the Governor appoint judges from nominees chosen by judicial nominating commissions.

Most of those advocating "merit selection" spoke on behalf of the bar associations and some "citizens' reform groups." These proponents knew that the General Assembly would not submit a constitutional amendment that would eliminate the popular election of judges and that a convention was their only opportunity to effectuate such a change. Most of the merit selection advocates lived in the Chicago area. In 1968, they were relatively quiet about their goal because they knew that the vast majority of Downstaters, both lawyers and voters, favored popular election of all, or almost all, judges.

The cry of "take the judges out of politics" was heard during the delegates' campaigns in 1969. Throughout the country, both in 1970 and now, the issue of popular election of judges has been contentious.

The issue has been especially contentious in Illinois. Since the 1848 Illinois Constitution made judgeships elective offices, Downstaters have preferred that system. Both lawyers and non-lawyers outside of the Chicago area have long believed that judges, at least local judges, should be elected by the people whom they will judge. Their position, which even Thomas Jefferson favored for local state judges, was that most voters really did know the candidates for judicial office and that, even if they did not, their local bar associations did. Members of Downstate bar associations reported that they actively recruited good lawyers for the bench and helped them get elected.

Residents of Chicago and a few other areas with large ethnic and minority populations distrusted any appointive system. As

each ethnic group rose economically and socially in Chicago, some of its members became lawyers. Admission to the bar was a path to middle class status and political power. After the Great Migration of African-Americans from the South, Chicago's Black residents saw themselves in the same light.

Advocates of an appointive system found a voice in the major bar associations. The Chicago Bar Association and the new Chicago Council of Lawyers, founded in 1969, strongly favored "merit selection." It is not clear whether the Illinois State Bar Association, which had many Downstate members, favored any appointive system. Merit selection advocates maintained that "popular election" was a farce, that the political bosses controlled the process. What was worse, they claimed, was that many judges elected were not independent of their political organizations.

The convention almost broke apart on this issue. Thirty years later, I heard from a strong merit selection advocate in the convention that Mayor Daley offered a compromise very quietly when it was clear that the two sides were not negotiating. He said that he would let the seven Supreme Court justices be appointed by the Governor from among nominees chosen by judicial nominating commissions. These high-profile judges were, he reportedly said, not really part of the patronage ladder and were not known to most voters. The appellate court justices were negotiable. The circuit court would continue to be divided between elected circuit court judges and the new Associate Judges. As told to me, the Mayor pointed out that many Downstaters, as well as members of racial and ethnic minorities, coveted judgeships for the lawyers in their communities and did not trust any Governor to understand "their people." The person reporting to me said that the merit selection advocates rejected the Mayor's offer.

Towards the end of the convention, it was clear that there would be no compromise. The delegates, in a series of the most fractious votes at the convention, decided to let the voters decide between electing and appointing most judges. The delegates submitted Proposition 2A, which was a modernized, somewhat "cleaned-up" version of electing most judges, and Proposition 2B, which called for the Governor to appoint a judge from among three nominees submitted to him by Judicial Nominating Commissions. The latter system was called "the Missouri Plan" because Missouri was the first state to adopt it in 1940. (Ironically, Missouri apparently took the plan from the 1920 Constitution created by the Fifth Illinois Constitutional Convention that the voters of Illinois rejected soundly.)

During the campaign for the constitution between September 3, 1970, when the convention adjourned, and December 15, 1970, when the referendum on ratification and the four separate issues took place, the battle between the competing systems for selecting judges became a focal point. Mayor Daley

saw the appointive/merit selection system as a serious threat to his power base. As a Chicago delegate who favored merit selection put it to me, "circuit court judgeships are the top of the patronage ladder." Many Downstaters sided with the Mayor and distrusted Governors in general, partly because they saw Governors as too beholden to their power base, which by 1970 was the Chicago metropolitan area. Most African-Americans in Chicago saw merit selection as a way that the "Lakefront liberals" and "LaSalle Street firms" could prevent African-Americans' ascension to the bench. Many of the old ethnic groups shared that view. As I recall that campaign, in which I advocated Proposition 2B, the Hispanic and Asian voters expressed no viewpoint.

As expected, the Chicago Lakefront voters, the suburban voters, and some Downstate urban voters supported Proposition 2B. Chicago's African-American and old ethnic voters supported Proposition 2A. So did rural Illinoisans. In the end, Proposition 2A prevailed, and forty-five years later, Illinois still elects all state judges except the Associate Judges.

The battle continues. Every session of the General Assembly seems to feature a re-play of the battle over judicial selection. However, since the impeachment, conviction, and removal of Governor Rod Blagojevich in 2009, there has been less enthusiasm for giving a Governor so much power over the judiciary. Shortly after Blagojevich went to prison, I said to a bar association officer, "don't you think that Blago[jevich] would have tried to sell judgeships as willingly as he apparently tried to sell a Senate seat?" He replied, "yes, and the line of lawyers willing to pay him for a judgeship would have stretched around the corner."

On the other side, those favoring the popular election of judges have come to realize that judicial elections have become as nasty as many elections for the executive and legislative branch. Some have said to me, in private conversations, that the slate-making committees have less control over the election of judges than they did in 1970; as one put it, "now we have true elections." Advocates of elections are aware, moreover, that the current posture of elections, supported by several United States Supreme Court decisions, has meant that non-party political groups have more sway in deciding judicial races.

The influence of non-party organizations and of groups not affiliated with a candidate has become critical. In 2004, some business-oriented groups promoted the election of the Republican candidate for the Illinois Supreme Court from the Fifth District, Lloyd Karmeier, in one of the most expensive judicial races ever held in the United States.[9] He won. When he ran for retention in

9. Billy Corriher & Brent DeBeaumont, *Dodging a Billion-Dollar Verdict*, THE CENTER FOR AMERICAN PROGRESS, Aug. 14, 2013, https://www

2014, a coalition of plaintiffs' personal injury lawyers, perhaps the exactly opposite group, promoted his defeat. He kept his seat with barely 60% of the votes. In 2010 a coalition of business-oriented groups mounted a campaign against Thomas Kilbride, the Democratic justice from the third district, albeit without success. It is clear that groups of all stripes are determined to influence judicial elections and retention elections.

How can we assess the convention's "solution" to the problem of judicial selection? One Chicago lawyer and bar association official said in the late 1990s that the delegates should have "put merit selection inside the package rather than allowing the voters to choose." I replied that such a move would almost certainly have doomed the entire constitution. His response was that it was immoral not to advocate merit selection and that he would not have minded if the constitution had failed "in such a noble purpose." Other lawyers, mostly Lakefront Liberals, have said to me that "only political hacks favor electing judges." I doubt that these proponents understand the concerns of African-American, Hispanic, and Downstate voters. However, as merit selection advocates point out, scandals in the Cook County judiciary, most notably "Operation Greylord" in the 1980s, have called into question the methods of selecting and retaining judges. In short, the two camps cannot compromise yet. The issue that the convention could not resolve continues.

The fifth and sixth changes mentioned (if not exactly trumpeted) during the 1968 campaign were of particular interest to Illinoisans living outside Cook County. They were

5. To abolish the *ad valorem* personal property tax, with the concomitant replacement of revenues lost by the abolition; and
6. To change from the unique system of electing the Illinois House, based upon three representatives elected by cumulative voting, to the more familiar single-member districts, first-past-the-post system.

The fifth issue, the abolition of the *ad valorem* personal property tax, was important because the counties, apart from Cook County, imposed it regularly. Banks, businesses with large inventories, factories with expensive equipment, farmers with farm machinery—all paid the tax every year. The county assessor in each of the 101 Downstate counties assessed the value of each item of personal property. It was said that when "valuation day" arrived, banks moved their cash assets out of the bank for a few days. Many taxpayers disputed the value that assessors placed on

.americanprogress.org/issues/civil-liberties/report/2013/08/14/72199/dodging-a-billion-dollar-verdict.

their personal property, but they also realized that the revenue raised helped support local services, especially schools.

What galled the Downstate taxpayers was that the Cook County government had given up on collecting the tax from individuals in the most populous county in Illinois. Only businesses paid the tax. Rumors of corruption flourished. By the mid-1960s it was said that 10% of the property tax revenue raised in Cook County came from this hated tax, the other 90% being raised from *ad valorem* taxation on real property. Because it was so difficult to establish the value of factory machinery and business inventory, those business taxpayers often negotiated tax settlements with the county assessor. It was rumored that the settlement often involved a contribution to the Cook County Democratic Party, giving rise to the claim that "the personal property tax is the fund-raising arm of the Cook County Democratic Party." Downstaters argued that if most Cook County taxpayers did not pay the tax, neither should Downstate taxpayers.

The convention debated the issue for weeks. In the end, it decided upon Article IX, Section 5, which abolished this "most-hated tax in Illinois" as of 1979 and mandated that the legislature replace the revenues lost to local governments and school districts. The path to abolition was tortured, with many twists and turns in the Illinois Supreme Court. However, the Court eventually mandated abolition as of 1979.

The local governments and school districts, at least outside Chicago, were vocal in their insistence upon an immediate "replacement tax." As expected, this tax took the form of a surcharge upon the corporate tax rate. It is safe to say that the convention's solution, while messy, was the only one that was politically and economically feasible. It is also safe to say that few Illinoisans even remember this tax, let alone know why it was so controversial.

The sixth major issue, to change the method of electing the Illinois House of Representatives, involved a system unique to Illinois. During the Fourth Illinois Constitutional Convention in 1869-1870, the publisher of the Chicago Tribune, Delegate Joseph Medill, proposed a way to heal the north-south division in Illinois. During the Civil War, many Southern Illinoisans opposed Lincoln, the Union, abolition of slavery, and the war. They were Democrats. Many who lived in the northern third of the state felt exactly the opposite on those issues. They were Republicans. Medill thought that no Republican could be elected in the southern third of the state and no Democrat could be elected in the northern third.

To insure that members of minority parties in each part of the state could have a voice in the General Assembly, Medill suggested that there be three representatives elected at large from

each district. The key feature of his proposal, perhaps unique to Illinois, was "cumulative voting." Each voter could cast up to three votes in the House election. Many "minority" voters cast a "bullet vote," that is to say, three votes for their favorite candidate. As a result, each of the two major parties was virtually guaranteed one-third of the seats in the House. Because some of the "minority representatives" were elected with a very small percentage of the total vote, that party had greater power than it would have had in a "single member district" or "first past the post" type of election. That was especially apparent if the strength of the minority party was spread across a fairly wide geographical area.

By the 1960s, the geographical bases of the two parties had changed places. Most of the voters in the Chicago suburbs and the more-sparsely-populated areas of the rest of the state, voted Republican more often than they voted Democratic in state and local elections. Most Chicagoans voted Democratic in state and local elections. Downstate voters should have liked having one Republican in each of the House districts in Chicago. However, most of the "Chicago Republicans" were "Chicagoans" rather than "Republicans." Except for voting for the Republican candidate for Speaker, they voted with Democrats from Chicago, or at least with the progressive wing of that faction, more frequently than they voted with suburban and Downstate Republicans.

The Downstate Democrats in the House also frequently voted with the two Republicans with whom they represented their districts. However, the Downstate Democrats were not immune from pressure exerted by the most powerful Democrat in the state, Mayor Daley of Chicago. On issues important to the Democrats of Chicago, the Mayor could often count on support from the entire Chicago delegation and most of the Downstate Democrats, thereby outflanking the House Republicans.

For all these reasons, some Downstate delegates wanted to abolish the cumulative voting system in favor of a single member district system. They were sometimes remarkably vociferous about it, and passions on both sides ran high. Consequently, the issue of how to elect state representatives also almost broke up the convention. I well remember delegate David Davis[10] from Central Illinois declaring,

> I am not threatening to go out and fight against the adoption of the product of this Convention, but I am saying to you that at this point, and after spending two weeks trying to find things that I did think were good for

10. Delegate Davis was from a powerful Republican family in Bloomington. His great-grandfather was Abraham Lincoln's campaign manager in 1860 and later an Associate Justice of the Supreme Court of the United States.

> my area, this was one of the few things that I found that was of importance; and when you take this away, you take away from me a great deal of the incentive I might have had to go out and work for the adoption of a new constitution in this state.[11]

In effect, he was hinting that he would not mind if the 1870 Constitution continued. He threatened to oppose any proposed constitution that favored keeping the Medill system.

To avoid a crisis as intractable as the issue of how to select judges, the delegates took a two-pronged approach to the problem. First, they submitted the issue to the voters to be voted upon separately from the main body of the constitution, as they did with the selection of judges. This "election of the House" proposal was the first "separately submitted issue" that voters saw on the ballot on December 15, 1970. Proposition 1A called for retention of the Medill system in a slightly modified form that made it more difficult for the two parties to insure the election of three candidates: by holding that if a party limited the number of candidates who could run, it could not limit to fewer than two candidates. This virtually guaranteed that there would be four people running for three seats. Proposition 1B called for a single member districts system.

Mayor Daley and many political party leaders desirous of keeping a foothold in every district in the state supported Proposition 1A. The League of Women Voters, many suburbanites, and most political theorists supported Proposition 1B. The voters decided to retain the Medill system.

Second, the delegates established a limited popular initiative for amending the Legislative Article, Article IV. It was clear that incumbent House members would never vote for any change in the method of their election or the size of the House. The limited "citizens' initiative," contained in Article XIV, Section 3, has been very controversial. Despite several attempts to get "citizens' initiative" amendments on the ballot, only one proposal has met constitutional muster in the courts: the so-called "Cutback Amendment" of 1980. This amendment reduced the size of the House by one-third, which was very popular with the voters and was the source of its name, "the Cutback Amendment." It also—and much more importantly—replaced the Medill system with the single member districts system.

When presented with the 1980 amendment, most voters saw it as a way to reduce the size of the House. They saw it as a way to strike back at legislators, who had just voted themselves a pay raise, by "throwing out" at least one-third of the incumbents in

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11. V Record of Proceedings, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 3665, 4321 (Aug. 28, 1970).

1982. Indeed, Pat Quinn, the political activist who spearheaded the drive for signatures on the petitions to put the amendment on the ballot, advertised it that way. The League of Women Voters of Illinois, which had long supported eliminating the Medill system for reasons never entirely clear to me, saw this as a way to obtain a single member districts system. Probably few voters understood the true implications of eliminating the Medill system. They adopted the Cutback Amendment.

This issue, therefore, seems to have been resolved successfully. The convention offered the voters a choice in 1970 and a means to choose the single member districts system later on. Whether the people of Illinois are satisfied with the choice they made in 1980 is problematical. (Frankly, I would much prefer a return to multi-member districts with cumulative voting.)

III. WHAT WERE THE MOST IMPORTANT ISSUES THAT EMERGED DURING THE DELEGATES' CAMPAIGNS IN 1969?

By the time of the referendum on "the con con call" in November 1968, the six issues just discussed were clearly on the table. After the call passed, some other issues emerged during the election of the members of the convention, usually called "delegates," in the summer and fall of 1969. There were probably as many as ten issues that became fodder for the campaigns. Whether those casting ballots voted for the candidates based on their positions is problematical. However, many candidates later mentioned that these issues occasionally surfaced during their campaigns.

First of all, the issue of liberalizing the constitutional amending process came to the fore. All of the candidates and many voters were aware of the strictures on amending that had kept the 1870 Constitution in a straitjacket. A two-thirds vote in both houses was difficult to obtain in order to propose a constitutional amendment. A vote of a majority of those voting on the question was also difficult to obtain because there appeared to be a built-in "no" vote of about 30% on any amendment. But what should the amending process entail? The American constitutional tradition favors making constitutional amendments difficult. Constitutions, after all, are not statutes. They are basic charters, not to be tampered with lightly. Opinions differed on how to "loosen up" the amending process.

However, as I recall, there was little or no real enthusiasm for a popular initiative for constitutional amendments. That proposal, which eventually became Article XIV, Section 3 of the 1970 Illinois Constitution, saw the light of day only as part of a compromise on the dispute over electing the Illinois House.

The delegates liberalized the amending process in three ways:

1. By lowering the votes needed to propose amendments to the constitution;

2. By requiring that the issue of whether a constitutional convention should be called be placed on the ballot every twenty years automatically, without any action by the legislative branch; and

3. By allowing a limited citizens' initiative to the "structural and procedural" parts of the Legislative article.

It now takes three-fifths of those elected to each house to propose an amendment, although it also takes three-fifths of those voting on the amendment (or "a majority of those voting at the election," which is meaningless) to approve an amendment. It is not easy to obtain an extraordinary majority in the General Assembly, but if the leaders of both parties in both houses agree upon the measure, it will pass. Approval by the voters is more problematical, but as of November 2014, thirteen of the twenty-one amendments submitted to the voters have been adopted.

The automatic call provision has met two tests: in 1988 and in 2008. Both times the voters declined to call another "con con." The campaign to obtain approval for a convention requires a unified message across all parts of the state and its political life, as was true in 1968. In 1988 it was difficult to convince voters that there should be another convention so soon after the Sixth Illinois Constitutional Convention, especially because the principal aim of proponents was to change to a "merit selection" system of selecting judges. Among Downstaters and African-Americans, that suggestion was anathema. In 2008 the proponents were totally disorganized, ranging from extreme left liberals ("we want a con con to have the people's voices heard," "we want a con con to combat global warming") to extreme right conservatives ("we want a con con to prevent school principals from getting such big pensions," "we want a con con to lower all taxes"). For example, those favoring increased school funding, often by increasing the income tax, were as numerous as those who favored decreasing taxes for schools. The two factions could not compromise and certainly could not have worked together at a convention.

The second issue was the prohibition on branch banking. Article XI, Section 5 of the 1870 Constitution effectively prevented Illinois banks from having branches. Downstate bankers preferred it that way. The fear was expressed in the phrase, "if we had branch banking, Continental Illinois National Bank in Chicago

would have a branch on every street corner in Peoria and Springfield." Nowhere was the social and economic split between Chicago and the rest of the state more apparent than in the banking issue. For their part, the large Chicago banks, known as "the LaSalle Street banks," believed that Chicago was emerging as a power on the international economic stage and that Illinois needed to allow banks to expand to meet the demands of the latter part of the twentieth, as well as the twenty-first, centuries. Candidates running far from Chicago reported that their voters were concerned about "having their banks taken over by Chicago."

After months of lobbying by banks on both sides, the delegates adopted Article XIII, Section 8, which effectively makes the issue of branch banking one for the General Assembly to decide. Economic forces pushed the legislature into adopting first ATM's and then full branches. Young Illinoisans, who frequently "bank" by pressing an app on their iPhones, have no clue about the controversy in 1969-1970. Ironically, Continental Illinois National Bank, the bugaboo of Downstate banks, is no more; Bank of America took it over in 1994.[12]

The third issue, which emerged very quietly, was the protection of benefits earned by public employees. Several candidates received letters from public employees, especially school teachers and university personnel, who were concerned that their pensions "would not be there" when they retired. By the time the convention began holding hearings, the Downstate fire fighters and police officers had joined the educators in expressing fears that their pension funds were seriously underfunded. This complicated issue, which has emerged as one of the major issues of the twenty-first century in state and local government, began to emerge in letters to con con candidates. However, I do not remember any organized movement to persuade candidates to promise to guarantee full funding of pensions or any newspaper editorials advocating that the candidates tackle the funding issue.

The delegates adopted a measure introduced on the floor in July 1970. Based on a provision in the New York Constitution, Article XIII, Section 5 made public employees' pension and retirement rights contracts that could not be "diminished or impaired." As the state's fiscal situation worsened in 2008, this provision became controversial. Legislation and litigation have attempted to clarify the provision and ameliorate the burden of meeting the pension obligations. This symposium features Eric M. Madiar's seminal article, without question the most

12. Sharon Stangenes, *Continental Bank No More*, CHI. TRIB., (Aug. 31, 1994), *available at* http://articles.chicagotribune.com/1994-08-31/business/9408310113_1_merchants-savings-grand-banking-ha\ll-lasalle-street.

comprehensive discussion of the history, issues, legislation, and litigation on the topic.[13]

The fourth issue was "the 18-year-old vote." Illinois, like most states, gave only those who had reached their twenty-first birthday the constitutional right to vote. The legislature could have extended the franchise by statute, but had chosen not to do so. Some youth groups organized campaigns to "give youth the vote." The ongoing war in Vietnam complicated the discussion because it seemed incongruous that men who could not vote on whether there was a war should be asked to risk their lives in that far-away conflict.

The delegates were as split on the issue as the legislators were. In the end, they submitted it to the voters as a separate issue at the referendum on adopting the constitution on December 15, 1970. The voters decided to keep the voting age at 21. Exactly one week later, the Supreme Court of the United States handed down *Oregon v. Mitchell*,[14] which held a Congressional statute lowering the voting age valid as to federal elections. Faced with "split elections" every two years, Congress submitted the Twenty-Sixth Amendment to the state legislatures in 1971. When it received approval from three-fourths of the state legislatures, including Illinois, the issue was settled in favor of the lower voting age.

The fifth issue involved ethical conduct by judges. As mentioned before, there were Illinoisans who wished "to take judges out of politics" by having them appointed, usually by the Governor, not elected by the voters. Apart from that issue, it was clear that some judges were ethically challenged. In 1968, a solitary "legal researcher" named Sherman Skolnick uncovered evidence that at least two members of the Illinois Supreme Court were too close to party organizations and may have been taking bribes. The resulting scandal, called the Solfisburg-Klingbiel scandal after the two justices, revealed that these ethical lapses were simply the tip of the iceberg. It is impossible to overestimate the effect of the scandal, which occupied the newspapers virtually every day, upon the campaigns and later upon the convention's deliberations.

The convention's Committee on the Judiciary wrestled with the issue for months. Eventually it proposed, and the convention adopted, a two-step process in judicial discipline, in Article VI, Section 15. The first step, which was new, was the establishment of a fact-finding commission, the Judicial Inquiry Board, to hear complaints against judges. Most of the members of the Board were

13. Eric Madiar, *Is Welching on Public Pension Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of the Illinois Constitution* 48 J. MARSHALL L. REV. 166 (2014).

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

non-judges and appointed by the Governor. The second step was retained from the 1962 Judicial Article to the 1870 Constitution, a Courts Commission composed of judges, which decided whether complaints brought by the Board warranted disciplinary action. In 1998, the voters approved an amendment to place two non-judges on the Commission.

Opinion on the efficacy of the new system is divided. (As an alternate citizen member of the Commission, I sat on one case in 2002, and thought it proceeded well.) However, there have been no scandals. Most critics think that the Board and perhaps the Commission have not been aggressive enough in disciplining and removing "bad judges." On the other hand, the occasional "voluntary resignation" of a judge under investigation suggests that perhaps the system works better than it appears to, but just quietly.

The sixth issue was that of shortening the statewide ballot for elections. Illinois elected the Clerk of the Supreme Court and the Superintendent of Public Instruction, as well as the usual executive officers. Obviously, few people besides the seven members of the Supreme Court cared who the Clerk was. However, he was typically a Downstater who employed many Springfield residents and who reportedly sometimes operated somewhat independently of the Court. There was little opposition to eliminating that office as elective.

The Superintendent of Public Instruction was often a party operative—some might say a party hack—who had very little power, but many patronage employees. During the convention, a scandal in the office of the Superintendent of Public Instruction concerning a "flower fund" that the Superintendent collected from his employees should have made it easy to eliminate that office. However, the teachers' unions opposed eliminating election of the Superintendent. It is not clear why. Apparently, they thought that they were gaining enough political power that they could influence the election of that state officer, who in fact had comparatively little authority over state financing and supervision of the curriculum—those were the province of the General Assembly.

A bigger problem was whether to eliminate the election of two fiscal officers, the Attorney General, and the Secretary of State. The two fiscal officers were the Treasurer and the Auditor of Public Accounts under the 1870 Constitution. The convention updated the latter to be the Comptroller. An effort to combine the two fiscal officers failed largely because both political parties found it enough to eliminate the two most minor offices just mentioned. Likewise, there was no real desire to eliminate the election of the Attorney General and the Secretary of State. Surprisingly, there was little desire to eliminate the officer called the Lieutenant-Governor, perhaps because he (but more recently she) has been useful in "balancing the ticket."

Most states have at least one statewide elected fiscal officer, an elected Secretary of State, an elected Attorney General, and even an elected Lieutenant-Governor, although the last-named is really only a deputy to the Governor. One reason it is so hard to eliminate their election is that people fear that an officer appointed by the Governor would not be truly independent of "the boss." Presidents of the United States fire the comparable officers as they wish. Another reason is related to the "stepping stone" theory of political advancement: an ambitious person starts out with election to the less powerful offices and then proceeds to the position of Attorney General or Secretary of State and then the post of Governor, the most powerful in the state.

The seventh issue was education—financing, supervision, etc. The "Blaine Amendment," which supposedly prohibited aid to religious schools, could have been controversial. The issue arose in some candidates' forums, especially in the Chicago metropolitan area. When the Chicago Catholic Archdiocese, at the urging of one of the members of the Committee on Education, decided not to press that issue, it was clear that the amendment, Article X, Section 3, would remain as was, comma for comma. In fact, most candidates realized that "aid to parochial (read: Catholic) schools" was a federal constitutional matter.

However, by 1969 the issue of financing public schools began to come to the fore. Illinois, like most states, allowed local districts to control the revenue for schools. The increasing number of legislative directives on curriculum and school policies meant that the state played an ever-increasing role, but most parents wanted "to keep local control of schools." Nobody had a perfect answer, but the 1969 campaigns suggested that a restructuring of financing seemed inevitable. When Illinois enacted a state income tax in 1969, it became possible, for the first time, to envision increased state aid to schools.[15] Those intertwined issues, financing and supervision, began to surface during the campaign. However, I have not heard of any candidate who proposed a concrete plan as part of his or her platform.

The issues of financing and supervising public elementary and secondary education were already among the thorniest, perhaps almost unsolvable, issues of state government.[16] Indeed, over the last forty-five years, financing and supervising public education has become one of the paramount issues of public policy in the entire country.

The convention's Committee on Education debated this issue and split over a proposal to prohibit school districts from spending more than 10% above their state subsidy in operating costs. The

15. FRANK KOPECKY & MARY SHERMAN HARRIS, UNDERSTANDING THE ILLINOIS CONSTITUTION 10 (2d ed. 2000).

16. *Id.* at 51.

purpose of this proposal was to "nudge" all school districts to lobby the legislature for a larger state subsidy. In short, it was an attempt to obtain more statewide funding for all school districts. The convention did not approve. Instead, it agreed upon a compromise: the hortatory language in Article X, Section 1, which reads,

> The State has the primary responsibility for financing the system of public education.[17]

The cases interpreting this provision have made it clear that the courts do not wish to substitute the legislature's judgment about financing with their own.[18] Illinois continues to rely heavily upon the *ad valorem* real property tax as the basis of funding. School districts in high *per capita* income areas usually impose high property taxes. They also regularly seek bonding referendum approval for capital expenditures, including new school buildings, sports facilities, and even deeper diving wells in high school swimming pools

Because Matthew Locke has contributed a discussion of education financing to this symposium, there is no need to elaborate upon the issues here. Suffice it to say, the problem raises profound and vexing questions about the role of money in education and of state versus local control over schools. The issue is critical because, as Mr. Locke notes, education is "the silver bullet" to success in American society. [19]

The eighth issue was the method of redistricting the legislature. The United States Supreme Court cases of the early 1960s made it clear that all fifty states had to devise a means of redistricting every decade. Case law was sparse, indeed almost non-existent. Legislators and party officials were hostile to almost any change. One thing was clear: the 1964 at-large election for the Illinois House, the "bedsheet ballot," had been a logistical nightmare.[20] Because the legislature could not redistrict itself in 1963, there was a paper ballot of considerable size in the November 1964 election.[21] Each of the two major parties ran a "slate" of candidates for the House. Most voters simply voted a party slate. Democrats won two-thirds of the seats, leaving Republicans with only one-third.

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17. IL CONST. art. X, § 1 (emphasis added).

18. Board of Ed., School Dist. No. 150, Peoria v. Cronin, 51 Ill. App. 3d 838, 842-43 (3d Dist. 1977) (citing McLain et al. v. Phelps et al., 409 Ill. 393 (1951)); People v. Deartherage, 401 Ill. 25 (1948).

19. Matthew A. Locke, *Illinois Gets an "F" in Public School Financing*, 48 J. MARSHALL L. REV. 141 (2014).

20. Rick Pearson & Thomas Hardy, *Ruling Rekindles Visions of '64 'bedsheet' Ballot*, CHI. TRIB., (Dec. 17, 1991), *available at* http://articles.chicagotribune.com/1991-12-17/news/9104230254_1_illinois-supreme-court-democrats-and-republicans-straight-ticket.

21. *Id.*

By 1966, Illinois returned to a more normal election procedure, but the specter of the 1964 "bedsheet ballot" hung like a pall over the convention. None of the delegates wanted that to happen again. But what was the solution? As I recall, no candidate had any specific proposal.

Like education financing, this is an issue that admits of no easy solution. It is common to deride the complicated three-step procedure for redistricting set forth in Article IV, Section 3. Indeed, this provision is one of the most frequently criticized provisions in the 1970 Illinois Constitution.

We must remember that the provision was drafted in 1970; only eight years after the federal courts entered "the political thicket" of redistricting in *Baker v. Carr*.[22] The Illinois cases on legislative redistricting were few and essentially inconclusive. The delegates had little guidance from the courts and from other states on how to redistrict every ten years. Computers were in their infancy. When I ask critics of the current Illinois system to imagine devising a redistricting system using only the cases decided by 1970, they are at a loss. It is easy to look back and criticize—hindsight is always 20-20—but the system created in 1970 has had one great success: it has obviated a statewide ballot imposed upon the election of legislators.

Clearly, nobody foresaw computerized redistricting, modern campaign financing, and the development of a voluminous body of federal case law on constitutional and statutory provisions.

All efforts to revise the process in Illinois have failed. Reformers say that is due to the intransigence of the legislature, but I think it is really due to the inability to devise a really good alternative to the present system. The adoption of the single member districts system for electing the Illinois House has exacerbated the problem. Every ten years, Illinois carves fifty-nine Senate districts and then divides each of those districts into two districts for the members of the House. Every division entails another battle over where to draw lines.

In short, the issue of legislative redistricting is a continuing and unresolved problem.

The ninth issue was that of general ethics. Many candidates campaigned on the vague promise of promoting "honest government." Again, candidates were short on concrete proposals.

There was a general agreement that "we must eliminate corruption," "we should set standards for public officials," and "we must clean up government". In the end, the delegates adopted an updated and expanded version of some sections in the 1870 Constitution. These provisions, in Article XIII, Sections 1, 2, and 3, require officials to disclose their income while running for office and while in office, and seek to keep convicted felons out of office.

22. 369 U.S. 186 (1962).

However, at least one delegate had a specific proposal. Mary Lee Leahy of Chicago's South Shore neighborhood promised to try to eliminate the patronage system then prevalent in Illinois, especially in Chicago. Of course, she failed at the convention. However, as she reminded me years later, it was an unsuccessful candidate for a seat in the convention, Michael I. Shakman, who struck the greatest blow against "the patronage machine." Shakman claimed he lost in Chicago's Hyde Park area because the Regular Democratic Organization of Cook County had used public employees as "foot soldiers" for his opponents. The litigation went on for over forty years. Is it not ironic that a candidate for a non-partisan position in a temporary office was the driving force behind the largely successful war on political patronage?

Is it also not fitting that Mrs. Leahy later argued one of the most important patronage cases, *Rutan v. Republican Party of Illinois*,[23] before the Supreme Court of the United States, a case that severely curtailed patronage on the state level against the Republican Party? Ironically, as Mrs. Leahy and I discussed years later, if Mayor Daley had not thrown his support behind the constitution, including sending forth all of his precinct captains to produce a vote for the constitution on December 15, 1970, there would probably not have been a 1970 Constitution. A huge part of the 55% affirmative vote for ratification came from Chicago. Could any Governor or any Mayor "gin up" such a vote in the post-Shakman Decrees era?

The tenth and final issue that emerged during the campaigns was virtually confined to parts of Illinois outside the Chicago metropolitan area. It was gun control and "the right to bear arms." At that time, most observers thought that the Second Amendment to the United States Constitution did not apply to the states. Illinois had no "right to arms" in its constitution. Many candidates running in Downstate rural areas, where hunting and self-protection are almost sacred, wanted their right to keep and bear arms recognized in the state constitution. In 1969, Illinois enacted a firearm owners registration statute. Downstate constituents, particularly those in rural areas, were upset. Few urban dwellers, particularly Chicagoans, understood their anger. Yet those Downstaters were adamant. They saw the registration statute as the nose of the camel entering the tent and desired a constitutional provision to stop the camel from going farther.

In the end, the convention adopted Article I, Section 22, which provides a right to bear arms completely separate from that in the Second Amendment.[24] Recent cases in the Supreme Court of the United States have expanded the federal right to the state,

23. 497 U.S. 62 (1970).
24. IL CONST. art. I, § 22.

including Illinois.[25] It is safe to say that, at least until now, the federal and state courts have decided Illinois gun law issues on the federal right, with little reference to the Illinois state right. James Leven's article in this symposium issue discusses the interplay between those two rights as an example of the lockstep doctrine in assessing federal and state rights on the same subject.

By December 8, 1969, when Governor Richard B. Ogilvie called the convention to order in Springfield, it was clear that perhaps as many as twenty issues were "on the table." The delegates would have to address them. When the President of the convention, Samuel W. Witwer, appointed the committees, each committee knew which of these issues it would have to address. Each committee was tasked with holding hearings on the respective issues, debating member proposals, and recommending or not recommending a course of action to their fellow delegates. Opinions as to how important the issues were at the time will surely differ, but I think most observers would agree that each of the topics discussed above has played a significant role in Illinois in the last forty-five years.

IV. WHICH ISSUES AROSE DURING THE CONVENTION, HOW DID THE CONVENTION ADDRESS THEM, AND WHAT HAS HAPPENED IN THE LAST FORTY-FIVE YEARS?

As the convention met, other issues arose. It is difficult to decide which were the most important. However, there were at least a dozen that emerged from the committee hearings and deliberations or from the floor debates.

The Committee on the Bill of Rights soon heard from those advocating state *civil rights provisions* to protect against discrimination based on race, religion, or nationality, as well as on sex and physical or mental handicap. They also heard from those wanting strong state protections of *the rights of those accused of crimes* and from those wanting *a specific right to privacy*. A coalition of citizens also sought a constitutional *abolition of the death penalty*.

The Committee on Suffrage and Amending heard many proposals on *improving the administration of elections,* primarily by removing much of the power in that area from the Secretary of State. It also heard proposals that *those who have served their sentences for felonies should have the right to vote restored automatically* without having to petition the Governor for a pardon first.

25. District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010).

The Committee on the Legislature soon found itself dealing with issues more mundane than electing the State Representatives and redistricting. It, along with the Committee on the Executive, had to evaluate *the relationship between the Governor and the General Assembly, especially the types of vetoes and the votes needed to override the vetoes.* It also had to consider which of the traditional restrictions on legislation, such as the *bans on special legislation and bundling two or more subjects into one bill,* should be in the new constitution. Overarching the rules regarding legislation was whether the *courts could police those rules* via the "journal entry rule," as it did under the 1870 Constitution, or through the "enrolled bill rule," which was the more modern way of enforcing those rules.

The Committee on the Executive also dealt with the relationship between the Governor and the General Assembly, especially regarding vetoes, and of course with the issue of which officers should be elected on a statewide ballot. However, it also considered the *powers of those officers who would remain elected.* The Governor, as the "chief executive officer" of the state, had to have strong powers, but how many? Which ones? And should the legislature have any way to constrain the Governor, such as through impeachment? The powers of the Attorney General were also debated. Those powers were derived from the common law as much as from statutes.

The Committee on the Judiciary had a unique task because the judicial branch had undergone a substantial revision with the adoption of the 1962 Judicial Amendment, effective in 1964. In terms of structure, Illinois had as modern a system as any in the country. However, the issue of electing judges versus appointing judges and the issue of judicial conduct after the Solfisburg-Klingbiel scandal dominated that committee's deliberations. Another issue that surfaced during the convention was *the status of the "magistrates,"* who were Circuit Court judges chosen by the elected Circuit Court judges and whose terms depended upon the desires of those who chose them, i.e., they were at will employees. Soon there was general agreement that they should have a more suitable title and some job security.

The Committee on Local Government dealt with the paramount issue of municipal and county home rule. However, it also learned that units of local government needed more powers generally. That raised the issue of special districts, of which Illinois has the largest number in the country, and townships. Because so many Downstaters were loath to part with these "lesser" forms of local government, which exercised highly-restricted powers, the committee had to walk a tightrope. Would empowering the "general purpose" governments of counties and cities overly-diminish the powers of the special districts and townships? It was also suggested that because Illinois had so

many local governments, the governments should be allowed to cooperate extensively.

The Committee on Revenue and Finance decided quickly that it was necessary to establish a constitutional framework for the budgeting, appropriations, and fiscal process. This was called the Finance Article. Only after it completed that article, which it developed in consultation with the Committees on the Legislature and the Executive, could it turn to the huge issues of raising revenue.

I admit that other observers might list yet other issues that developed after the delegates took office on December 8, 1969, but I think these were the most important ones that arose during the course of the convention.

In short, there is a total of twenty to thirty significant issues—perhaps six truly major ones and between twenty and twenty-five important ones. There were times when the convention threatened to break apart over the major issues, which had the most significant political implications, such as selection of judges and electing state representatives. However, debates over the other issues could also be heated.

A. Rights of Those Accused of Crimes

The Bill of Rights Committee modernized several sections pertaining to the rights of those accused of crimes that were in the 1870 Constitution's Bill of Rights. There are now six sections in Article I on the subject: Section 7 Indictment and Preliminary Hearing; Section 8 Rights after Indictment; Section 8.1 Crime Victim's Rights (a section added in 1992 and amended in 2014); Section 9 Bail and Habeas Corpus; Section 10 Self-incrimination and Double Jeopardy; and Section 11 Limitation on Penalties after Conviction.[26]

To a great extent, the Bill of Rights Committee simply updated previous rights, and the other delegates agreed to the changes. In 1992, the voters adopted Section 8.1, a crime victim's rights amendment, which they expanded in November 2014. In both cases, the amendments were part of a nation-wide attempt to include participation by victims of crimes or their families in the criminal trial process. At the time of the 1969-1970 convention, that movement did not exist.

Section 9 concerns both bail and habeas corpus. By its provisions, bail was available except for "capital offenses." When the legislature reduced the number of crimes that were "death penalty eligible" in the 1970s, one consequence was the adoption of two amendments, one in 1982 and one in 1986. These stipulated that crimes for which life imprisonment was a possible penalty

26. IL CONST. art. I, §§ 7, 8, 9, 10, 11.

were also offenses for which a defendant had no right to bail. Since Illinois abolished the death penalty in 2011, the maximum penalty has been life imprisonment without parole.

The revision to Section 11 may have had some impact. Article II, Section 1 of the 1870 Constitution mandated that sentences, both in the penal code and as handed down from the bench, be "apportioned to the nature of the offense." The convention added the mandated objective of "restoring the offender to useful citizenship." Because this "rehabilitation clause" arose from a floor amendment, not a committee report, we are not certain what the convention thought the effect of the added language would be. The early cases, interpreting the combination of seriousness of the offense and potential for rehabilitation, sometimes held invalid either a statutory penalty or a specific sentence. In recent years, courts have shown more deference to the legislature's judgment as to statutory penalties. Because the statutes limit the range of penalties, judges now have relatively little discretion in imposing sentences upon specific defendants.

B. Search and Seizure; Right to Privacy

Article I, Section 6 contains the thorniest issue of the criminal justice provisions in the Bill of Rights. To the previous constitutional right, the convention added language prohibiting unreasonable "interceptions of communications by eavesdropping devices or other means" and unreasonable "invasions of privacy." Although the "right to privacy" is separate, it can also be read with the language on "searches and seizures" and "interceptions of communications."

The cases run into the dozens, if not the hundreds, and many are both controversial and volatile. The advent of more mechanized forms of communication, such as the computer upon which I am writing this article, and the development of a "privacy" jurisprudence in areas such as abortion and "marriage equality," have transformed the debate. Timothy O'Neill's article in this symposium issue about the Illinois Supreme Court's creation of the "lockstep doctrine"[27] treats the issue of the relationship between the Fourth Amendment and Article I, Section 6 so comprehensively that I need not address it here. Suffice it to say that this is an unsettled issue, one that in fact may never be settled.

C. Civil Rights

Article I, Sections 17, 18, and 19 may have been the first state constitutional provisions protecting civil rights; certainly no

27. Timothy P. O'Neill, *Escape From Freedom: Why "Limited Lockstep" Betrays Our System of Federalism*, 48 J. MARSHALL L. REV. 320 (2014).

Illinois Constitution had addressed them. In that context, the three provisions are rather breathtaking. Because Illinois has a sad history in racial justice, it is noteworthy that the convention broke from the past here, even adding new rights concerning gender and disability.

Section 17 is a standard civil rights provision and is to some extent a state version of the 1964 Civil Rights Act on the federal level. It arose from the Bill of Rights Committee. The African-American delegates were especially eager to have it proposed.

Section 19 was truly an innovation because the "rights of the handicapped" were not addressed on the federal level until the passage of the Americans with Disabilities Act in 1990. The convention broke ground with this provision.

Court decisions and statutes implementing Sections 17 and 19 have largely confined them to administrative proceedings on the state level. Although it is likely that the delegates really wanted the rights in both Section 17 and Section 19 to be the basis of original suits in courts, that is not the reality. There seems to be little dissatisfaction with the administrative procedures.

Section 18 was a "little equal rights amendment," a provision introduced on the floor by two women delegates, one White and one African-American. This was probably the first state constitutional provision mandating equality on the basis of gender in the country. It antedated the federal "E.R.A." by two years. Because there is a requirement of state action, only governmental actions are covered. The litigation has established that "sex" or gender is a suspect classification and that a "strict scrutiny test" would apply to judge any governmental action differentiating between the sexes. Although the country as a whole does not have the E.R.A., Illinois does.

D. The Death Penalty

A coalition of opponents of capital punishment joined with several delegates who had long opposed the death penalty to propose abolition by constitutional fiat. Because the delegates were unable to decide whether the state constitution should abolish the death penalty, they decided to submit the issue to the voters as a "separately-submitted" issue at the referendum on the constitution. The voters decisively refused to abolish capital punishment in the state constitution. However, in March 2011, Illinois abolished the death penalty by statute.

E. The Administration of Elections

The principal change wrought in Illinois elections was the transfer of administration from the elected officer known as the Secretary of State to a newly created State Board of Elections.[28] Many of the delegates had experienced the openly partisan and often arbitrary actions of the then-Secretary of State, Paul Powell. Powell, an old time Southern Illinois Democrat who believed in the spoils system, said when he was elected to an office, "I smell the meat a-cookin.'" [29] There was some indication that he approached the administration of elections with that attitude.

The convention's solution was to create a bipartisan or non-partisan Board within the executive branch.[30] The Governor appoints the members, whose duties are set forth in statutes.[31] There is debate over whether the Board is truly effective and truly fair. However, in the forty-odd years of its operations, it has remained relatively free of scandal. Moreover, it is the legislature that determines the powers of the Board, and in a state with a tradition of strong local control over elections, it is difficult to impose statewide standards and procedures.

Probably, the most accurate description of the Board is that it has not lived up to the highest expectations of the delegates who voted to create it,[32] but that it is a "work in progress" in administering elections in a state with—how shall I put it?—a colorful history in elections.

F. Re-Enfranchisement of Ex-Felons

This has been a quiet success story. During the convention, there was little opposition[33] to including a provision, Article III, Section 2, that automatically restored the right to vote upon

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28. ILL. CONST. art. III, § 5. *See also* V Record of Proceedings, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 3665, 4341 (Aug. 6-31, 1970) (describing the transfer from the secretary of state to the Board as producing a "fairer and more reasonable way of canvassing election returns").

29. ROBERT E. HARTLEY, PAUL POWELL OF ILLINOIS: A LIFELONG DEMOCRAT 45 (1999).

30. *See* V Proceedings, *supra* note 28, at 4300-01 (discussing which branch the board would lie under and outlining proponents' views on why the board should be evenly bipartisan and comparing it to other states' bipartisan election boards).

31. ILL. CONST. art. III, § 5.

32. *See* V Proceedings, *supra* note 28, at 4301 (commenting on the reasoning behind the creation of the Board by characterizing Illinois as "one of the most partisan administration[s] for elections.")

33. *See* II Record of Proceedings, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 867, 1089 (May 1-21, 1970) (recording sixty-eight yeas and one nay).

completion of a penal sentence. [34] In this respect, the convention was ahead of its time. Indeed, the 1970 Illinois Constitution was one of the first constitutions to raise re-enfranchisement to the level of a constitutional right.

It is not clear how many ex-felons exercise their restored right. Upon release from prison, each ex-prisoner is given a list of his newly restored rights, among them the right to vote.

As recent debates over "voter rights suppression" indicate, many of those denied the right to vote in many states are ex-felons. A disproportionate number of the ex-felons are African-American males.[35] Thus, the Illinois provision has been a pioneer in extending the franchise to a class of Americans who do not command much respect and do not have a strong lobby.

G. Powers of the Governor

This is best described as another work-in-progress. Article V of the Illinois Constitution generally enhances the power of the Governor to make appointments and remove appointees in agencies responsible to him. [36] It is generally agreed that he can reorganize state government by executive order more easily than before.

Since the 1970 Constitution became effective in 1971, each Governor has exercised his powers in his own way. Some saw themselves as CEOs, some as statewide "cheerleaders," some as partners with the legislature, and some as "creators of public policy." Over time, each Governor seems to have learned how to exercise his powers within his sphere of influence with more decisiveness. Article V certainly gives him the tools to exercise those powers.

H. Relationship of the Governor with the General Assembly, Especially Regarding Vetoes

Again, this is a work-in-progress. Article IV of the 1970 Constitution re-formulated the relative positions of the Governor and the General Assembly regarding legislation. Previously, the Governor had only two vetoes, the standard ones of a total veto (for all bills) and an item veto (for appropriations). Overriding a gubernatorial veto was so rare that before Governor Ogilvie took office in 1969, there were reportedly only two to four overrides.

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34. ILL. CONST. art. III, § 2.

35. George Brooks, *Felon Disenfranchisement*: *Law*, *History*, *Policy*, *and Politics*, 23 FORDHAM URB. L.J. 101, 122 (2004) (explaining that approximately 1.4 million black Americans, equivalent to 13% of all black men, cannot vote because of felon disenfranchisement).

36. ILL. CONST. art. V.

Overrides required a two-thirds vote of those elected to each house of the General Assembly. Because at least one-third of the Illinois House was almost sure to be of one party and no more than two-thirds of the other party, it was almost impossible to override a gubernatorial veto.

The convention made two significant changes. First, it enhanced the Governor's veto powers. It added a reduction veto to the item veto, thereby enabling a Governor to eliminate a part of an item of an appropriation while leaving the rest of the item intact.[37] It also made the Governor of Illinois a potential co-legislator by allowing him an amendatory veto, a veto that suggested changes in bills passed.[38] With these changes, Illinois became the fourth state to have a Governor with all four vetoes.

The delegate who most strongly supported the creation of the amendatory veto was Dawn Clark Netsch, a law professor who had been the legislative aide to Governor Kerner in the early 1960s. At that time, most bills were passed in the last week of the session in odd-numbered years, often on the last day of the session, June 30th. In that pre-computer era, bills often contradicted each other. The gubernatorial reviewing staff, which she headed, was tasked with sorting through bills and recommending which of the contradictory bills the Governor should sign. She maintained that an amendatory veto would allow a Governor to suggest changes, which the legislature could adopt in the fall veto session, that would obviate the need to sign one bill (making one legislator happy) and veto another bill on the same topic (making another legislator unhappy).

The second significant change was the reduction of the number of votes needed to override a total veto from two-thirds to three-fifths.[39] In 1970 approximately one-third of all Illinoisans lived in Chicago, one-third in the suburbs, and one-third in the 96 "Downstate" counties. Given that none of the three areas was entirely homogeneous, it was almost impossible to organize two of the three areas to override a veto. The three-fifths extraordinary majority is more doable; it allows for some defections by mavericks.

The consequences of these two changes have been profound. Almost every Governor has wielded his vetoes, especially the amendatory veto, with a will unknown before. At least one Governor, Dan Walker (1973-1977), used to announce amendatory vetoes at a press conference called before he transmitted the veto message to the legislature. I remember him saying to the press—

37. VII Record of Proceedings, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1, 2702 (Dec. 8, 1969-Sept. 3, 1970).

38. *Id.*

39. III Record of Proceedings, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1201, 1347 (May 22-29, 1970).

and beyond that, the public—that he "was introducing a bill in the legislature that would . . . ." In a sense, he was right. The amendatory veto can force legislators to choose between the bill they voted for and the new version, which the Governor may have convinced their constituents is a better idea. In an age of computerized bill drafting and bill reviewing, it is doubtful whether there is still any real need for the amendatory veto.

On the other hand, the legislature has regularly overridden gubernatorial vetoes. There have probably been more veto overrides every year since 1971 than in the entire century of history under the 1870 Illinois Constitution.

I. Special Legislation/The Single Subject Rule/and the Enrolled Bill Rule

It is difficult to assess these changes. Article IV, Section 13 specifies that the courts may decide whether a bill is so narrow that it constitutes "special legislation" favoring one group over another group.[40] Article IV, Section 8 specifies that a bill must be confined to "one subject."[41] Speaking as one who has experience in drafting bills, I have found that it can be difficult to satisfy both requirements in the same bill.

For better or worse, the courts have deferred to the legislature for both requirements. In the last decade of experience with the requirements for legislation, say since the year 2000, courts have rarely held a statute invalid because it was special legislation or because it contained more than one subject. Perhaps the legislators have learned how to craft bills more carefully. However, it is more likely that the courts are more reluctant to hold bills invalid and cause the confusion that inevitably results.

An important aspect of this discussion is the transfer from the "journal entry rule" to the "enrolled bill rule."[42] Under the 1870 Constitution, courts could examine the journals of each house to see if the legislators had complied with the constitutional requirements for bill passage. Of course, most of the time the journal simply reflected that the legislature had complied. After all, the Clerk of the House and the Secretary of the Senate are employees of their respective chambers. Would anybody expect them to put down, "there were only two readings, not the required three, of this bill?"

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40. ILL. CONST. art. IV, § 13.

41. ILL. CONST. art. IV, § 8.

42. *See* VI Record of Proceedings, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1, 1386 (Dec. 8, 1969-Sept. 3, 1970) (describing how each system functions and the weakness of the journal entry rule).

The 1970 Constitution, Article IV, Section 8(d) substitutes the enrolled bill rule for the journal entry rule.[43] The courts cannot look beyond the face of the bill after it is "enrolled", *i.e.*, the presiding officers have certified that it was duly passed, to see if the bill has complied with the constitutional requirements for procedure.[44] In practice, this has meant that courts do not consider whether a bill has been "read" three times in each house before passage. The single subject rule and the ban on special legislation are not immune from challenge under the enrolled bill rule because violations of those requirements are apparent on the face of the bill.

In short, one has to wonder if any of the changes in requirements for a bill have had any real impact.

J. The Change from Magistrates to Associate Judges

The shift in status, as well as in title, for certain judges of the Circuit Court may have been significant. Under the 1962 Amendment to the Judicial Article of the 1870 Illinois Constitution, which became effective in 1964, there were two classes of trial court judges. The first class was the Circuit Court judges, who were popularly elected for six-year terms. [45] The second class was the Magistrates, who were appointed by judges in the first class and who served "at their pleasure."[46]

During the convention, some magistrates claimed that people confused their title with the old "police magistrates," a lower class of judicial officer that had been abolished years before. They wanted a change in title, and the nomenclature of "Associate Judge" was chosen. Perhaps more significantly, they wanted job security to give them a modicum of judicial independence. Serving at the pleasure of the elected Circuit Court judges was insufficient. There was little controversy over giving the new Associate Judges four-year terms.

Approximately half of the trial judges in Illinois are elected Circuit Court judges. The other half are Associate Judges. Article VI, Sections 8 and 10 have combined to make a difference in the second group.[47] There is general agreement, in Cook County at least, that the Associate Judges work as hard as their elected counterparts and that they are of good quality.[48] Indeed, many, if not most, of the elected Circuit Judges begin their judicial careers as appointed Associate Judges.

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43. ILL. CONST. art. IV, § 8(d).

44. VI Proceedings, *supra* note 42.

45. ILL. CONST. 1870 art. VI, § 14 (1964).

46. ILL. CONST. 1870 art. VI, § 8 (1964).

47. ILL. CONST. art. VI, §§ 8, 10.

48. I Record of Proceedings, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1, 69 (Dec. 8, 1969-Sept. 3, 1970).

K. Powers of Cities and Counties (General Purpose Governments)

The clarification, modernization, and expansion of the powers of counties and municipalities (cities, towns, and villages) has been a constitutional success story.[49] This is true even for those without home rule powers: 101 counties and approximately 1,000 municipalities.[50] It has been less successful in practice because the political forces at work in many cities and counties prevent change.

Article VII, Section 7 of the 1970 Constitution grants significant powers to raise revenue, such as bonding, special assessments, and special service areas, to counties and cities that are not home rule units.[51] However, reports indicate that many local government officials in those cities and counties simply feel that they cannot exercise those powers. The voters, who are also taxpayers, do not want their officials to raise taxes or issue bonds. If reports are accurate, many powers go unused despite claims by residents of these cities and counties that they need more governmental services. The powers are there; the political will is not.

L. Powers of Townships and Special Districts (Limited Purpose Governments)

Again, this is a constitutional success story, but there is little political will to re-structure, much less eliminate, most of these specialized governments. Eighty-five Illinois counties have townships.[52] They are covered in Article VII, Section 5.[53] It is generally agreed that their functions almost completely duplicate the functions of other governments. Yet, when Evanston tried to

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49. James M. Banovetz, *Illinois Home Rule: A Case Study in Fiscal Responsibility*, 32 J. REG'L ANALYSIS & POL'Y 79, 82 (noting that the Illinois Supreme Court's liberal construction of the powers granted to local government in three cases: *Kanellos v. Cook County*, 53 Ill. 2d 161 (1972); *Sommer v. Village of Glenview*, 79 Ill. 2d 383, 403 (1980); *Rozner v. Korshak*, 55 Ill. 2d 430 (1973)).

50. *See* Center for Governmental Studies, *Illinois Home Rule: A Thirty Year Assessment*, Feb. 2001 Pol'y Profiles 1,1 (2000) (finding that as on November 2000 elections, Illinois has 147 cities and villages with home rule powers). Of those cities, seventy-seven gained such status by virtue of their population being over 25,000 and seventy gained the status through referendum. *Id.*

51. ILL. CONST. art. VII, § 7.

52. *See* Illinois Ass'n of Cnty. Bd. Members, *About Illinois Counties*, ILCOUNTY.ORG, http://www.ilcounty.org/news/22-2.html (last visited Dec. 20, 2014) (noting eighty-five of the 102 counties in Illinois operate under township government).

53. ILL. CONST. art. VII, § 5.

eliminate The Township of Evanston, which is coterminous with the City of Evanston, it faced opposition.[54] It was not surprising that the employees who would lose their jobs objected. But so did residents who were used to having a "township assessment" on their property tax bills and a "township assessor."[55] In 2014 Evanston finally succeeded.[56] Most municipal officials do not even try to abolish townships.

Special districts, of which Illinois has more than any other state, are equally difficult to eliminate.[57] The Office of the State Comptroller, which is supposed to receive annual financial reports from each special district, admits that it is not completely sure how many special districts there are. Article VII, Section 8 of the 1970 Constitution tries to limit the powers of special districts.[58] Efforts to eliminate them are almost always hopeless. Since 1971, the legislature has created the largest special district, the Regional Transportation Authority (RTA), which covers the six counties in the northeastern part of the state and serves the public transportation needs of more than eight million Illinoisans.[59] The residents of those counties approved the creation of the RTA at a referendum held in March 1974.[60]

Recently, it was reported that a small suburb west of Chicago had abolished its fire protection district. It is not clear how the city officials intend to have fires extinguished, but the suburb apparently has contracted with a private ambulance service to provide emergency medical services normally provided by a fire department.

I think that the only way to eliminate the smaller special districts will be to enact legislation that declares them without revenue powers or governing powers five years after the bill becomes law. In effect, it would be necessary to drive a stake

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54. *See* Oliver Ortega, *Evanston Residents Seek to Remove Advisory Referendum on Township Dissolution from Ballot*, THE DAILY NORTHWESTERN, Feb. 22, 2012, http://dailynorthwestern.com/2012/02/22/city/evanston-residents-seek-to-remove-advisory-referendum-on-township-dissolution-from-ballot (describing Evanston resident's attempts to remove the dissolution referendum from the ballot).

55. *Id*.

56. *The Dissolution of Evanston Township*. *The Continuance of Critical Services*, CITY OF EVANSTON (Mar. 19, 2013), http://www.cityofevanston.org/news/2014/03/the-dissolution-of-evanston-township-the-continuation-of-critical-services.

57. *See* Illinois Ass'n of Cnty. Bd. Members, *supra* note 52, at Inside the Courthouse: Special Districts (detailing some of the 3,145, the number indicated by the 2002 census, special purpose districts in Illinois).

58. ILL. CONST. art. VII, § 8.

59. *Overview and History*, RTACHICAGO.COM, http://www.rtachicago.com/about-the-rta/overview-history-of-the-rta.html (last visited Dec. 20, 2014).

60. *Id*. at *RTA Documents*.

through their hearts or they will keep on sucking the blood out of their residents.

M. Intergovernmental Cooperation

This is a constitutional success story that has really worked well. The Committee on Local Government of the convention proposed Article VII, Section 10, which grants local governments broad powers to enter into "intergovernmental cooperation agreements" with other local governments, the State, and even private entities.[61] Here, the political will has often matched the constitutional powers granted.

We do not know how many intergovernmental cooperation agreements there are. However, the reports indicate great satisfaction among both local government officials and their constituents. When the emergency services hotline known as "911" came into being, some small local governments found they could not support the service on their own. They pooled their financial and administrative resources into one "911/311" central service. In short, this provision is a resounding, if unheralded, success.

N. Fiscal Process—Budgeting, Reporting, Auditor General

This is a mixed success story. Article VIII of the Illinois Constitution broke new ground by establishing a modern process for an executive budget, appropriations by the legislative branch, fiscal reporting, and, above all, legislative oversight by a new officer called the Auditor General.[62] In the interests of full disclosure, I was the legal researcher who helped draft the final text and report that created that article.

The Governor is supposed to present a balanced budget each year, one in which his estimate of expenditures is not more than his estimate of revenue to be raised.[63] The General Assembly cannot appropriate funds to be spent (appropriations bills) that exceed the amount of revenue that it, in turn, estimates to be available.[64] It is generally agreed that neither Governors nor legislatures have met these standards, at least if one refers to the Generally Accepted Principles of Governmental Accounting.[65] The

61. ILL. CONST. art. VII, § 10.
62. ILL. CONST. art. VIII.
63. ILL. CONST. art. VIII, § 2(a).
64. ILL. CONST. art. VIII, § 2(b).
65. *See* JACK RABIN, HANDBOOK ON PUBLIC BUDGETING AND FINANCIAL MANAGEMENT 330 (1983) (outlining the thirteen basic principles of governmental accounting).

demands for more services by Illinoisans create pressures that elected officials find difficult to resist.

Article VIII, Section 4 mandates that there be uniform systems of reporting and accounting.[66] Because there are so many local governments—and so many different kinds of them—it is almost impossible to achieve uniformity. Therefore, there is no way to compare the governments and their fiscal structures.

One of the true innovations of the 1970 Illinois Constitution is the creation of the Office of the Auditor General in Article VIII, Section 3.[67] Elected by the legislators for a ten-year term, this officer performs all legislative oversight of any entity, public or private, that receives state funds.[68] Although some entities receiving public funds object to these annual audits, most have come to accept them. To date, there have been only two Auditors General: Robert G. Cronson and William G. Holland, the incumbent. It is safe to say that no more than a hundred Illinoisans recognize those names. However, their work, by all accounts, has provided the legislative branch with invaluable insights into the use of public funds.

V. CONCLUSION: WHERE INDEED ARE WE AT?

The Sixth Illinois Constitutional Convention addressed virtually all, perhaps all, of the significant issues placed before it in 1969-1970. Many of the solutions proposed have operated as expected. In some cases, such as reducing the voting age and abolishing the death penalty, it took subsequent efforts to achieve the goals. The voters used the limited citizens' initiative to set in motion the change in the election of House members that nearly broke apart the convention.

Certain issues that the delegates could not resolve are with us today. School funding, selection of judges, and redistricting the legislature may be the most important. They admitted of no easy solutions in 1970 and, despite what pundits say, they admit of no easy solutions today. In that respect, Illinois is like the other states, none of which seems to be able to come to acceptable conclusions regarding those pressing issues of public policy either.

We at The John Marshall Law School are proud to present this symposium issue on the 1970 Illinois Constitution. We hope that readers will find new insights in the analyses contained in these articles and will appreciate the efforts of Illinoisans since 1969 who have tried to make Illinois a better place to live.

66. ILL. CONST. art. VIII, § 4.
67. ILL. CONST. art. VIII, § 3(a)(b).
68. ILL. CONST. art. VIII, § 3(a).