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ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION

PAPERS PREPARED BY THE
CONSTITUTION RESEARCH GROUP

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RICHARD B. OGILVIE
GOVERNOR

To the Constitutional Convention Delegates

I am very pleased to forward to you part of a series of research papers prepared by the Constitution Research Group on issues which will face the Constitutional Convention.

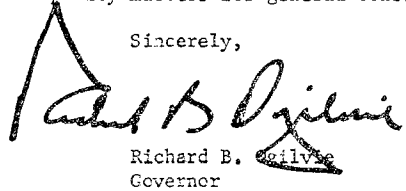
Let me emphasize that the distinguished scholars who aided this effort were given maximum freedom to report independently on their assigned subjects.

In great part, their work was performed on a volunteer basis, and there has been no cost to the State. It is most appropriate for me to acknowledge hereby their dedicated efforts, as well as the contributions of funds from the Union League Club and the Constitution Convention Information Service, Inc.

In announcing the appointment of members of the Research Group, I emphasized that the purpose was to stimulate independent thinking, not to write a draft of a proposed constitution. The views in the papers are those of the scholars and do not necessarily reflect my own.

I am hopeful, however, that the thoughtful work they have performed will assist all delegates in the coming months by the presentation of facts, of methods, and policy matters for general consideration.

Sincerely,



Richard B. Ogilvie
Governor

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Introduction

by Samuel K. Gove

The Illinois constitutional convention that convened in Springfield on December 8, 1969, is the state's sixth convention. The last was in 1922 — the last successful one in 1870. Conventions, in Illinois at least, are infrequent. When one is convened, the delegates, and subsequently the voters, have a rare opportunity to review the basic governmental document that defines the powers and structures of their state and local governments.

Illinois is not alone in considering constitutional change. Conventions have been held recently in other states — some have succeeded, some have failed. In general, the successful conventions have been preceded by much preparatory work. The preparatory work takes many forms. One important aspect is developing background papers on the issues that the delegates will face.

At the request of Governor Richard B. Ogilvie, several academicians in Illinois and elsewhere were recruited to prepare background papers for the Illinois convention. They organized as the Constitution Research Group.

In announcing the establishment of the Research Group at a February, 1969, meeting in Chicago, Governor Ogilvie said that the authors "will work independently. Their sole charge will be to prepare for the convention a broad range of facts, of methods, of approaches, of policy considerations.

"The work of the Constitutional Research Group will aspire to the highest standards of independent scholarship. It will include objective criticism and open expression of dissenting views."

The governor went on to say, "I want to make available to the delegates not a governor's point of view, but a substantial body of academic research, as disinterested as possible, which the delegates can use in making many difficult decisions."

In the governor's speech he referred to the constitutional convention as presenting an exciting chapter in Illinois' history.

"Let us prepare to write it well. Let's do our homework.

"To the extent that the convention — and the rest of us — are well informed, we shall avoid needless and divisive controversy, both in writing the new constitution, and in voting on it."

It was agreed that the authors would concern themselves with rather broad issues that would be before the convention. All major issues that could be contemplated were to be covered.

Each author was given considerable leeway in his approach to his topic. Because of the varying academic disciplines, the approaches vary — both as to content and style. Some of the authors have been more aggressive than others in presenting a particular point of view. As in other aspects of this project they were given considerable leeway in this regard.

The authors were encouraged to review constitutional provisions in other states, as well as earlier Illinois constitutions. They reviewed the literature as well as court decisions. They made frequent reference to the *Model State Constitution* published by the National Municipal League. They had access to earlier drafts of the publication *The Illinois Constitution: An Annotated and Comparative Analysis,* by George D. Braden and Rubin G. Cohn. They also had copies of *A History of Constitution Making in Illinois* by Janet Cornelius.

It is hoped that these research papers by outstanding scholars will make a contribution to a well-informed group of delegates, in addition to a well-informed public.

Acknowledgments

There are many persons that should be acknowledged for their contributions. First and foremost are the paper writers who, in most cases, volunteered their services and time. Mrs. Victoria Ranney of Chicago undertook the mammoth task of getting the papers ready for publication.

She was asked to operate under an extremely tight schedule. My responsibility, at the request of the governor, was to recruit the paper writers and to coordinate the entire project.

In the governor's letter of transmittal, recognition is given to the financial contributions from certain organizations. In addition, there was a contribution from the Illinois Agricultural Association. These are greatly appreciated. In addition, the Constitution Study Commission, chaired by Senator Robert Coulson and co-chaired by Senator Robert W. McCarthy, made a contribution for the distribution of the book.

The Illinois Legislative Council, chaired by Representative John H. Conolly, prepared multilithed individual editions of the papers so that the delegates and delegate candidates would have early copies available. This assistance was greatly appreciated.

1. The State Constitution: Its Nature and Purpose

by Paul G. Kauper

Introduction

A convention consisting of popularly elected delegates is now undertaking its important task of studying the Illinois Constitution of 1870 and probably, after due deliberation, proposing a revised constitution for submission to the state's electors. Most of the time and energy spent by the delegates will be devoted to the treatment of specific areas and problems involved in restating the state's organic law.

It is important, however, that the delegates in approaching these specific tasks be guided by a sense of perspective and an overall view as to the nature and purpose of a state constitution both in relation to the structure of our federal system and in relation to the internal purposes served by the state's constitution. It is the purpose of this paper to suggest considerations and standards that may prove helpful in orienting delegates to the nature of the task they face and the decisions they must make.

A state constitutional convention elected by the people is free to fashion any kind of document it pleases, subject only to restraints imposed by the Constitution of the United States as the supreme law of the land and subject, of course, to having its work ratified by the state's voters. The delegates will find that there are no single, correct answers to most of the large and important questions confronting them. These are matters of opinion and judgment, and honest differences of view can readily be entertained.

A recognition, however, of the possible diversity of views on a number

of matters should not obscure the consideration that the concepts of government fundamental to American constitutional thinking, experience in constitutional revision, and the informed judgment of scholars furnish a basis for opinion and judgment and that on many constitutional questions a fair degree of consensus is to be found.[1]

THE WRITTEN CONSTITUTION

The idea of a written constitution defining the structure of government and enumerating the rights of the people as a limitation on the powers of government is deeply rooted in Anglo-American history. England, to be sure, has no written constitution in the American sense, but English history furnishes antecedents for the idea of reducing to writing, that all may see and know, fundamental propositions relating to the liberty of the citizen and determining the relationship between the government and the governed.[2]

Magna Carta, extracted by the barons from King John in 1215 and designed to define the rights of barons which the king agreed to respect, is usually regarded as the first of the significant documents in the shaping of the constitutional tradition both in England and America. Other notable documents such as the Bill of Rights of 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689 have, over the years, made their contribution to English constitutional history. These fundamental documents were concerned with asserting the rights of the citizens, and apart from their contribution to the development of specific constitutional liberties both in England and the United States, they have in times of crisis when men's liberties were threatened served as symbols and rallying points in defense of freedom.

[1] For helpful discussion, see William B. Munro, "An Ideal State Constitution," *Annals of American Academy of Political and Social Science*, 181 (1935): 1; W. F. Dodd, "The Function of a State Constitution," *Political Science Quarterly*, 30 (1915): 201; David Fellman, "What Should a State Constitution Contain?" Ch. 8 in W. Brooke Graves (ed.), *Major Problems in State Constitutional Revision* (Chicago: Public Administration Service, 1960); Harvey Walker, "Myth and Reality in State Constitutional Development," Ch. 1 in Graves, *op. cit.*; Robert B. Dishman, *State Constitutions: The Shape of the Document* (New York: National Municipal League, 1960).

[2] For a collection of these documents as well as others referred to below, see Richard L. Perry (ed.), *Sources of Our Liberties* (Chicago: American Bar Foundation, 1959).

1. *American Beginnings*

When the colonists came to this country under charters granted by the Crown, it became necessary to define by the terms of the charter the skeleton structure of government. Here was planted the seed of the idea that the fundamental structure and organization of government, as well as a declaration of the rights of the people, should be incorporated in a written document recognized to have a basic and organic character and, indeed, to have the quality of a fundamental law superior to ordinary laws and enactments.

Indigenous American constitutional documents followed the tradition of the colonial charters. Here one may mention particularly the Fundamental Orders of Connecticut of 1639 which Lord Bryce calls "the oldest truly political Constitution in America,"[3] and the Frame of Government of Pennsylvania of 1682 which was "in substance a colonial constitution promulgated by Penn as sole proprietor."[4] The significant Mayflower Compact of 1620, signed on shipboard by the Pilgrim Fathers, rested on the assumption that men may by compact among themselves determine how they shall be governed. The idea that a constitution is a compact resting on agreement and consent of the people is a fundamental facet of American political thinking.

Prior to the rupture with England in 1776, the conspicuous elements in the basic documents of the colonial period were the establishment of systems of representative government and the declaration of basic rights. The struggle with England gave great impetus to the adoption of documents which, in their more complete statement of individual rights and greater elaboration of a form of government resting on the consent of the people, furnished the immediate prototype of modern state constitutions. In the years 1776 and 1777, having declared their independence of

[3] James Bryce, *The American Commonwealth*, 3rd ed., rev. (New York: Macmillan, 1893), 1, p. 429.

[4] Perry, *op. cit.*, p. xviii.

England, all but two of the thirteen colonies fashioned their own constitutions.[5] The written constitution thus became the expression of popular sovereignty and the people's right of self-government.

2. *Culmination of an Idea*

The adoption of the state constitutions preceded the drafting by the Philadelphia Convention of 1787 of the Constitution of the United States which established the federal system under which we now operate. The U.S. Constitution and its Bill of Rights may be said to represent the culmination of the idea that the basic frame of government and the reserved rights of the people shall be reduced to writing in a document recognized as the supreme law. To the historical precedents was added a new reason for reducing the constitution to writing, the need to define the federal system. A distribution of powers between a central government and constituent states and a well-defined separation of powers within a government cannot be achieved on a constitutional basis except pursuant to a written document.

The tradition established by the early state constitutions, the precedent furnished by the Constitution of the United States, and the situation created by the operation of the federal system resulted inevitably in the adoption of a written constitution by each new state when it entered the Union. In fact, no new state may be admitted into the Union until its constitution is adopted and submitted to Congress for approval.

FEDERALISM AND THE STATE CONSTITUTION

1. *Sovereignty*

That Illinois is one state among fifty comprising the United States of America is a paramount consideration in determining the nature and functions of its constitution. This is a matter that goes to the question of sovereignty and the source of the state's power to adopt its own constitution as well as to limitations that must be recognized on the powers of government exercisable by the state. It has been said that the U.S.

[5] Connecticut and Rhode Island continued to govern themselves under their old charters which had been liberally framed.

Constitution "looks to an indestructible Union composed of indestructible States."[6] But each state of the Union, while indestructible and possessing a distinctive constitutional status and a sphere of constitutional autonomy, is not a completely sovereign state in the usual sense of the word. Because of the federal Constitution's expressed or implied delegation of certain powers to the central government, its express or implied denial of certain powers to the states, and its protection of citizens against denial of certain rights by the states, Illinois is not a sovereign entity in the full sense of the word.

On the other hand, the central government does not possess sovereign powers in full measure either. In the sphere of foreign relations it is recognized as a sovereign nation among the family of nations, but internally it is limited by the powers delegated to it under the Constitution.

The Tenth Amendment makes explicit the theory of federalism on which the Constitution rests. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It may be said in respect to the power over internal matters that as a practical matter sovereign power is shared by the central government and the states. But in recognition of the view that government exists by consent of the people, one may say that ultimate sovereign power is vested in the people of the United States who ordained and established its Constitution and who by this document allocated the spheres of governmental authority between the central government and the states.[7]

Regardless of the view one takes respecting the place and nature of sovereign power under our federal system, the practical and important consideration emerges that under this system the people of each state are vested with the constitutional power and, indeed, the duty to fashion

[6] C. J. Chase in *Texas* v. *White,* 7 Wallace 700, 725 (1868).

[7] "The proposed Constitution, so far from implying an abolition of the state governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government." Alexander Hamilton in *The Federalist* (New York: Everyman's Library, 1911), No. 9, p. 40.

a system of government effective within the state's territorial jurisdiction. This government is to be subject to such restraints as the people see fit to impose as well as to the restraints resulting from the federal character of our system.

It is often said that the states possess "residual powers," that is, the powers of government not expressly or by implication delegated to the central government. This is not quite accurate since the states may act in some areas of power delegated to the federal government as long as the latter has not acted to pre-empt the field and thereby foreclose state legislation on the subject. Perhaps the most accurate statement of the matter is that each state enjoys the constitutional freedom to exercise the general powers of government subject to the U.S. Constitution, the laws enacted by Congress in the lawful exercise of its powers, and treaties made under authority of the United States.

2. *The Expansion of Federal Powers*

There has been witnessed in recent years a steady and progressive expansion in the powers exercised by the federal government. For many purposes the important locus of power has shifted from the states to the federal government. Broadened interpretation of the commerce power has resulted in federal hegemony in the regulation of economic affairs. The broad fiscal authority of the federal government, combining a virtually unlimited power to tax income and impose excises of various kinds, a constitutionally unlimited power to borrow, and an indeterminate independent power to spend for the general welfare, has resulted in increased reliance on the federal government for its intervention and assistance in areas within the primary jurisdiction of the states. Moreover, a progressively broadened review by the United States Supreme Court of state legislative, administrative, and judicial acts for the purpose of protecting rights secured on the national level under the Fourteenth Amendment, notably under the due process and equal protection clauses, has resulted in further subordination of the states to the central authority.

In all these aspects the recent decades have witnessed a substantial transformation in the nature of our federal system. These developments

have, indeed, increased pessimism in certain quarters as to the continued vitality and integrity of the federal system and doubts as to the continuing place of the states within the system. Some may go so far as to say that the federal system with its theory of limited federal powers and recognition of the constitutional status of the states has become obsolete.

3. *State Responsibilities*

It is easy, however, to develop a distorted or pessimistic picture. Despite the expanded activities of the federal government, the states continue to find themselves faced with many large tasks and responsibilities. The bulk of the criminal law and the whole system of private law and its administration, local government, education, public health, highways, and traffic control continue to be primary responsibilities of the states. And the states continue to exercise significant regulatory power in important areas of economic life notwithstanding the controls exercised by the federal government over the vital segments of the national economy. A need for increased regulation results from the urbanization and industrialization of our society. The constantly growing demands upon government for additional services to meet public needs — particularly in the fields of education, highways, public health, housing, and recreation — have resulted in the intensification of functions performed by the states and their local units. The total taxes exacted annually by state and local units of government have reached a volume which in itself suggests that any requiem over the states and their place in our system is premature.

Several factors have contributed to the expansion of federal power. One is the elementary and indisputable factor that many of our problems requiring governmental attention have grown national in scope and transcend the power of the states to deal with them effectively. This is particularly true of the regulation of commerce and business. The expansion of federal power has been commensurate with the nationalization of vital phases of American life. A second and related factor is that as a result of improved means of transportation and communication the nation has shrunk in size with a resulting greater awareness of na-

tional needs and interests and a greater sense of national community. State boundary lines have lost significance for many purposes.

However, the hard fact must be faced that pressure for federal assistance and intervention, particularly financial assistance, is attributable in substantial measure to the failure of the states to function effectively in discharging their responsibilities within the spheres of their constitutional competence. This point bears directly on state constitutions and the need for their revision.

It is safe to predict that the continued vitality and integrity of our federal system will depend in substantial part on how effectively the states discharge their responsibilities. If the states fail to measure up to their tasks because they have inflicted disabilities upon themselves in their constitutions and their structure of government is inadequate to meet modern needs, the movement for increased federal intervention will gain added momentum. At present the fault lies in large part with state constitutions which have not been revised to keep pace with the times.

To establish a form of government responsive to the will of the people, organized to deal effectively with the problems of our day and equipped with powers adequate to meet the state's needs, is the sobering responsibility faced by a state constitutional convention. The Illinois constitutional convention, in proposing a constitution which will make possible the kind of government just described, can contribute not only to good government in Illinois but also to the continued vitality of our federal system.

THE STATE CONSTITUTION — GENERAL PRINCIPLES

The constitutional system of government in America presupposes certain basic principles expressed or implied in the state and federal constitutions. Some of these are so fundamental and familiar and their implications so plain that they need not be developed at length. For example, it is generally understood that political power rests ultimately in the people, and that the will of the people is reflected in the constitution and the institutions of representative government designed to serve them. It is agreed that the organs of government are subject to the limitations imposed by the people and by the rights retained by them.

The constitution is accepted as the fundamental and supreme law which the courts in the exercise of the power of judicial review must uphold by refusing to enforce legislative and other acts of government found to be in conflict with it. These are all propositions that need no elaboration; the matters discussed below warrant more extended treatment.

1. Legislative Powers

LEGAL THEORY OF LEGISLATIVE POWERS

A theoretical difference distinguishes the legislative powers of Congress under the Constitution of the United States from the powers of a state legislature. Subject to an exception recognized by the courts in respect to the handling of foreign affairs, the powers of the federal government are delegated powers, and it must find authority for what it does in express or implied grants of power under the Constitution.

Regarding the states, however, respectable authority supports the theory that, subject only to the restraints derived from the Constitution of the United States or its own constitution, a state government enjoys all the general powers of government, and that, therefore, an express enumeration of legislative powers is not required in a state constitution. To put the matter in another way, the state constitution, and this is particularly relevant to the legislative power, is viewed primarily as a limitation on power and not a grant.[8] In order to justify the exercise of a given power, a legislature established pursuant to a state constitution is not required to point to powers granted to it in the constitution. As stated explicitly by the Illinois Supreme Court: "The State constitution is not a grant of, but is a limitation upon, legislative power. All legislative power is vested in the General Assembly, subject to the restrictions contained in the State constitution and the constitution of the United States. Every subject within the scope of civil government which is not within such constitutional limitations may be acted upon by it."[9] Theoretically, this means that if a state constitution did nothing more than establish a legislative body, this body, despite the absence of any specific

[8] See the discussion in Dodd, *op. cit.*, pp. 201-212.

[9] *The Italia America Shipping Corp.* v. *Nelson*, 323 Ill. 427, 439 (1926).

grants of authority, could enact general laws in the exercise of the police power, levy taxes of various kinds, borrow and spend money, and condemn property for public use, as well as do many other things embraced within the concept of the general powers of government.

This theory has not gone unchallenged. The argument is made that under the Tenth Amendment the powers not delegated to the federal government and not prohibited to the states are reserved to the states and *to the people;* that ultimate sovereign power rests in the people; and that there is no basis for assertion of power by any organ of state government except as conferred by the people.[10] However, it is fair to say that the people of a state in establishing the basic organs of government have implied a delegation to those organs, including the legislature, of the general powers of government within the sphere of the state's constitutional competence, subject to the restraints imposed by the constitution and the other express provisions found in it.[11]

HISTORICAL PRACTICES REGARDING LEGISLATIVE POWERS

Whatever the correct theory on this matter, as a matter of history and experience state constitutions are not viewed solely as limitations on power but in respect to many matters as a positive grant of authority. Frequently specific legislative powers are spelled out, often out of an abundance of caution, in order to make clear that no limitation stated in the constitution or rights recognized under it should stand in the way of legislative power to deal with a given problem. Thus Article XIII of the 1870 Illinois Constitution in dealing with the regulation of warehouses was probably prompted by doubts as to whether in the

[10] See Dishman, *op. cit.*, pp. 9-12.

[11] "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion." Thomas M. Cooley, *Constitutional Limitations,* 8th ed. by Walter Carrington (Boston: Little, Brown, 1927), I, p. 175.

absence of these provisions public warehouses could be subjected to such extensive regulation. The recognition these days of the wide scope of the police power would appear to make it unnecessary to continue in a new constitution the kind of detail found in Article XIII. It should also be noted that frequently provisions designed as limitations are found, either by their wording or by construction, to be limited grants of power to deal with the particular subject. The result, then, is that state constitutions include both grants and limitations of power.

CONSTITUTIONAL ENUMERATION OF LEGISLATIVE POWERS

As a practical matter it would be a sound principle of constitution-making and draftsmanship to spell out in broad terms the general legislative powers such as the taxing, borrowing, spending, police, and eminent domain powers. Enumeration of detailed powers to deal with specific situations should be avoided. Such enumeration is unnecessary, adds to the bulk of the instrument, and may also have the unexpected result of being taken as an implied limitation and denial of powers not enumerated. Thus, in regard to the police power it is enough to say that the legislature shall have the power to enact laws it deems necessary and proper to protect and promote the public health, safety, morals, convenience, and general welfare. The reach of this power has been established by modern judicial decisions. Certainly it is not necessary to say in the constitution that the legislature has the power to regulate trade, industry, the professions, and use of property.

Unless a constitutional convention undertakes the unnecessary and virtually impossible task of attempting to spell out all the legislative powers, it should make clear that the enumeration of certain powers shall not be construed as a denial of the overall power of the legislature, subject to limitations stated in the constitution, to enact all laws it deems appropriate to promote the well-being and prosperity of the people, including laws necessary and proper to the execution of the enumerated powers.

2. *The Separation of Powers*

Based on Montesquieu's celebrated analysis of governmental power, the principle of the separation of powers is a classic part of American

constitutional thinking and practice. According to this theory, the powers of government can be classified into three categories — the legislative, the executive, and the judicial powers. The distribution of power under this theory assures a system of checks and balances whereby no single department will unduly extend its powers; these three powers are committed to their respective departments, and no department shall exercise powers committed to the other two departments. The theory in its general features is still valid. It is not the business of the executive to enact laws or of the legislature to conduct trials of persons accused of crime. But recognition of validity of the general theory should not obscure the fact that a rigid separation of powers is not possible. Particularly in our day, with the widespread use of administrative agencies that often combine several functions, any theory of complete separation of powers is untenable and unworkable. This situation should be faced when constitutions are revised.

The present Illinois Constitution, after declaring that the powers of government are divided into the legislative, executive, and judicial departments, states that "no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted" (Art. III). This provision, commonly found in state constitutions, is categorical in its wording, although the recognition of exceptional cases expressly directed or permitted under the constitution tempers its rigidity. But constitution makers may not anticipate all the situations where some departure from the separation principle is warranted.

It may be more suitable simply to recognize the separate departments in the constitution and leave the implications of the separation principle to be worked out on the basis of experience and judicial construction. In any event the constitution should allow for some flexibility here.

Closely related to the separation principle is the principle of nondelegability of legislative power. Legislative power is to be exercised by the legislature. The executive and administrative agencies are not to make laws. In the abstract this states an excellent principle. But again, as a practical matter, in view of the necessity of confiding in the executive and the administrative agencies the power to make rules and regulations to implement legislative policies, an absolute adherence to the nondelegation principle is unworkable. Courts now sanction delegations where the general policy is declared by the legislature and where statutory standards serve to guide and limit the exercise of administrative discretion in the implementation of statutory policy. In view of the vast expansion of the administrative arm of government and the subjection of citizens to the authority of these agencies in areas touching on many vital interests, it would be appropriate to include in a state constitution an express provision stating the general circumstances under which legislative power may be delegated and the limitations to be observed by the legislature in making any delegation.

The Constitution as a Fundamental and Enduring Instrument of Government

The question of what specifically should be dealt with in a state constitution depends on the choice of a basic approach to constitution-making. Most students of the subject agree that the constitution should serve the purpose of a fundamental organic document establishing, defining, and limiting the basic organs of power, stating general principles, and declaring the rights of the people. This points to the conclusion that the constitution should *not* be an elaborate document; that it should be relatively compact and economical in its general arrangement and draftsmanship; that details should be avoided; and that matters appropriate for legislation should not be incorporated into the organic document. Chief Justice Marshall stated this idea in classic form in his famous opinion in *McCulloch* v. *Maryland:*

> A Constitution to contain an accurate detail of all the subdivision of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects

themselves. . . . In considering this question, then, we must never forget that it is a Constitution we are expounding.[12]

Justice Cardozo stated the matter more succinctly: "A constitution states or ought to state not rules for the passing hour but principles for an expanding future."[13]

The early state constitutions embodied the idea that a constitution should establish a general frame of government, setting forth general principles and avoiding the detail which mistakes a constitution for a statute or legal code. And the Constitution of the United States is a superb model of a compact, organic document that is logically arranged, internally coherent, and drafted with the object in mind of stating broad, fundamental, and enduring purposes.

1. The Trend toward Detail

Despite the admirable pattern established by the earlier documents, the general trend throughout the nineteenth century was to make state constitutions, by the process either of revision in conventions or amendment, much more detailed and elaborate. They became in many cases prolix documents which incorporated matters that could well have been left for the ordinary lawmaking processes.[14] In many cases the distinctive character of a constitution as the fundamental or basic law, superior to ordinary laws, was lost.

A number of factors contributed to this increase in detail. A distrust of the legislature and an unwillingness to vest it with broad general powers led to the inclusions in state constitutions of restrictions on the legislative power, notably the taxing, borrowing, and spending powers. In some states the increased detail resulted from the theory of popular participation in the lawmaking process. Most state constitutions can be amended with relative ease compared to the Illinois Constitution and the Constitution of the United States. In the usual case a state constitution can be amended by affirmative majority vote at a popular election

[12] 4 Wheaton 316, 407-408 (1819).

[13] Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921), p. 24.

[14] See Fellman, *op. cit.*, pp. 139-146.

on a proposition placed on the ballot either by the legislature or initiated by citizens by petition. In such cases the power to amend the constitution by simple majority vote is no different from the power of the people to vote on legislative propositions initiated by citizens' petitions or submitted to them by the legislature. In some situations an amendment process initiated by citizens offers an easier method for securing legislation than the usual legislative process. It is not surprising, therefore, that the distinction between the constitution as fundamental law on the one hand and ordinary statutory law on the other tended to become lost in the process.

The amendment of the Illinois Constitution has been a much more difficult process. Under Article XIV, Section 2, of the 1870 constitution, amendments can be initiated only by a two-thirds vote of all the members in each house of the legislature. They cannot be initiated by popular petition. Prior to 1950, the legislature could not at any single session propose amendments to more than one article of the constitution. The amendments proposed are submitted to the electors at the next election for members of the legislature. Prior to 1950, an affirmative vote of a majority of the electors voting at the election was required to ratify the amendment. The restrictions proved to be so rigid that relatively few amendments to the 1870 constitution were adopted.[15] In view of this situation Section 2 of Article XIV was amended in 1950 by the so-called Gateway Amendment, which was designed to facilitate the amendment process. Under this amended section a proposal submitted by the legislature becomes effective if approved by either a majority of the electors voting at the election or two-thirds of the electors voting on the proposed amendment. Moreover, the legislature may now at the same session propose amendments to as many as three articles of the constitution.

Even with the loosening of the amendment process in 1950, the Illinois Constitution is more difficult to amend than many state constitu-

[15] See Charles V. Laughlin, "A Study in Constitutional Rigidity — Part I," *University of Chicago Law Review*, 10 (1943): 142; Kenneth Sears and Charles V. Laughlin, "A Study in Constitutional Rigidity — Part II," *ibid.*, 11 (1944): 374.

tions. It is not surprising, therefore, that the Illinois Constitution has been a relatively stable document and that it has not offered the temptation to use the amendment process as a substitute for the legislative process, thereby cluttering up the constitution with matters more appropriately left to legislation.

The inclusion of what are essentially statutory matters in a state constitution has its defenders.[16] It is argued that the distinction between what is fundamental and what is nonfundamental is not always clear. No precise or scientific line can be drawn to distinguish and fence off the fundamentals. Moreover, if the people of a state feel that a particular matter, otherwise appropriate for legislative determination, is so important that it should be incorporated into the fundamental law, who can say that they are wrong or unwise? This is a matter of choice and judgment.

2. *The Case for Brevity*

Notwithstanding these contentions, a good case can be made for limiting the state constitution to the essentials or fundamentals and avoiding inclusion of matters ordinarily reserved for the legislative process. The constitution loses much of its distinctive significance as the basic and enduring instrument of government when the process of constitutional amendment or revision is used as a substitute for legislation. Furthermore, the effect of incorporating what are essentially legislative matters in a state constitution is to undercut the legislative process and to limit the area of legislative responsibility and discretion. It is more difficult to remove what is essentially a statutory provision from a constitution than it is to incorporate it in the first instance. Despite change of circumstances or results not anticipated, the legislature is powerless to correct the situation and deal adequately with problems pressing for solution. The only recourse in this event is to amend the constitution again, and a large part of the prolixity and bulk of state constitutions is attributable to piecemeal and detailed amendments spelling out power to deal with specific situations notwithstanding previously imposed limitations that have been demonstrated to be too rigid and unworkable. The inclusion of rigid restrictions on the legislative power also frequently forces harassed and well-intentioned legislators to find ways and means of circumventing the constitution. This undermines the position of honor and respect which a constitution should enjoy.

[16] See Dodd, *op. cit.*, pp. 212-216.

A state constitution premised on an unwillingness to entrust the people's representatives with powers adequate to their tasks will be unable to meet modern needs. Improving the legislative process, attracting able men to the legislature, and equipping them with the means and facilities conducive to well-informed and responsible discharge of their tasks is a more constructive approach to the problem of responsible government than attempting to legislate in constitutional conventions or amendments and placing rigid constitutional limitations on the legislature. This is not to suggest that some generally stated limitations on legislative power are not desirable. But any limitations adopted should not be narrowly conceived, should admit of flexibility, should be carefully examined in light of their restrictive power on the legislature to meet not only today's problems but tomorrow's as well, and should be drafted with a clarity that will make it unnecessary to resort repeatedly to the process of litigation in order to determine their meaning.

A final consideration in favor of brevity is that a written constitution is a document which citizens should be acquainted with and willing to read, and which they can understand. The briefer and more compact the document, the more likely it is to be read, studied, and understood. A long document replete with details does not invite the attention of the average citizen or reward his efforts.[17]

With due regard, then, to the conception of a state constitution as establishing only the fundamentals of government, this paper will focus on these areas for debate and consideration in the constitutional convention: the frame of government, the declaration of rights, and the amending process.

[17] Fortunately the current trend reveals a return to brevity and compactness in the making and revision of state constitutions. Four new constitutions — those of New Jersey, Alaska, Hawaii, and Michigan — are among the shortest of the state constitutions.

THE FRAME OF GOVERNMENT

The first fundamental objective of the convention is to establish the organs of governmental power, to define and distribute authority among them, and to state limitations on these powers.

1. The Electorate

The electors of the state are the primary organ of power, both because they in the end establish the constitution and because they elect the legislative representatives and other officers who operate the government. A necessary function of the constitution is to define their voting qualifications. Second, it may be suggested that since political parties are vital to the voting process and the operation of representative government, attention should be given in the constitution to their status, organization, and responsibilities.

2. The Legislature

The important organization and procedural questions regarding the legislature are whether it should be bicameral or unicameral, and what should be the scheme of legislative apportionment, the qualifications of legislators, the time and method of their election, the terms of office, the method of determining compensation, and the mechanics of the legislative process. These are all vital organic matters and a number of them necessarily require treatment in some detail.

Questions regarding the substance of legislative power should search for limitations that are flexible and that admit of departure without the necessity either of piecemeal constitutional amendments that add bulk and complexity to the constitution or of forced judicial interpretations that undermine the limitation and weaken the dignity of the document and the respect that should be entertained for it. A flexible type of limitation on the borrowing power, for instance, is one which fixes a borrowing limit on a formula basis that takes account of assessed property values or other variable factors and in turn permits borrowing in excess of this limit either by a special majority vote of the legislature or on approval of the electorate. This same principle can be applied in

defining and limiting the borrowing and taxing powers of local units of government.

Finally, consideration may be given to authorizing greater citizen participation in the lawmaking process by means of initiative and referendum procedures invoked through popular petitions. The present Illinois Constitution does not authorize such procedures. These procedures, marking a deviation from the principle of representative government, are not an unmixed blessing, and any proposal to give them constitutional status should be thoroughly examined and the limitations thereon carefully defined.

3. The Executive

The governor's qualifications, his term of office, the time and manner of his election, the method of determining his compensation, and his general powers and duties are the central items of interest in the executive branch. However, other controversial questions in respect to the executive department are whether the other important executive officers should be elected or appointed, and whether the constitution should spell out the branches of the executive department or the state administrative agencies. Much current thinking supports the idea that the number of elected state officers should be reduced; that in the interests of unified responsibility the governor should have the power to appoint heads of the principal executive departments; that details in regard to the organization and duties of departments should be avoided; and that either the legislature should be authorized to detail the organization of the executive department, as well as create state administrative commissions and agencies as needed, or that the governor be vested with power in these matters subject to legislative veto.

4. The Judiciary

In the judicial branch important questions relate to the selection of judges, the method of their election or appointment, the term of their office, and the fixing of their compensation. As far as practicable the constitution should assure the independence of the judges. The constitu-

tion should also establish the structure of the court system and the general authority of the Illinois Supreme Court in such matters as rule-making and the supervision of the lower courts. An important question is whether the types of courts and their respective jurisdictions should be spelled out or whether the constitution should outline the general structure and vest power in the legislature to fill in the details.

5. *Public Corporations*

Apart from the electorate and the three departments of government, the other organs or bodies that may be vested with constitutional status are public corporations. These may be divided into two categories: (1) municipal corporations and other local governmental units including counties, townships, and metropolitan districts and (2) public corporations organized for specific purposes such as the state universities. With respect to both classes, the questions respecting constitutional position and authority — including in the case of those in the first class the important questions of home rule status — are matters of basic concern.

THE BILL OF RIGHTS

Article II of the Illinois Constitution, entitled "Bill of Rights," enumerates in some detail the constitutional rights that serve as limitations on the exercise of governmental power. These are rights that are reserved by the people, not rights created by the constitution. The understanding and spirit of the Bill of Rights is captured in Section 1 which declares: "All men are by nature free and independent, and have certain inherent and inalienable rights — among these are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just power from the consent of the governed."

The inclusion of a declaration of rights conforms to the principle deeply rooted in American constitutional experience that the basic rights of the citizen are of such importance as to require recognition in the fundamental law and thereby receive the added protection furnished by the process of judicial review. Indeed, the earliest of English and

American constitutional documents were concerned primarily with asserting the rights of persons as against the arbitrary and despotic acts of those clothed with the powers of government.

1. *The State Bill of Rights* vis-à-vis *the Federal Bill of Rights*

The question may be raised whether, since many basic rights of the person are already protected against impairment by the states under the Constitution of the United States, further recognition and protection of rights under a state constitution is necessary. This question admits of a ready answer. A number of the provisions in the Bill of Rights of the U.S. Constitution, held applicable to the states as fundamental rights by virtue of the Fourteenth Amendment, find their counterpart in provisions of the Illinois Bill of Rights. But these federally protected rights do not embrace all the rights presently protected in the Illinois Constitution. For instance, Section 1 of Article II of the Illinois Constitution, quoted above, found by the Illinois Supreme Court to be a source of liberties immune to arbitrary legislative impairment, has no specific parallel in the federal Constitution. The same is true of the fine provision guaranteeing the right to remedy and justice found in Section 19 of Article II. Moreover, some of the fundamental rights protected under the U.S. Constitution do not have the same scope as corresponding rights enumerated in the state constitution. Thus while the federal Constitution requires the payment of just compensation when property is taken for public use, Section 13 of Article II of the Illinois Constitution requires the payment of just compensation when property is *taken or damaged* for public use. Similarly, the specific prohibitions in Section 3 of Article II on the use of public funds for sectarian purposes are more precise and admit of more restrictive interpretations than the general language of the First Amendment to the U.S. Constitution prohibiting laws respecting the establishment of religion. (Section 3 of the education article carries this prohibition even further.)

It must also be remembered that a state supreme court is free to give the freedoms recognized in the state constitution a reach that transcends

interpretations given the fundamental rights by the United States Supreme Court. A state is free to develop its own higher standards. The Supreme Court has held that, consistent with the Constitution of the United States, a state may authorize advance censorship of movies. But a state by its own constitution may see fit to prohibit all forms of advance censorship.

A state bill of rights also counters the trend toward further centralization of power at the hands of the federal government. The United States Supreme Court has been broadening its review of the actions of state legislatures, administrative agencies, and courts for the purpose of protecting fundamental rights and freedom from discrimination based on race or color. A study of the cases coming before the Supreme Court illustrates that the failure of the states in many instances to respect minimum standards of justice, particularly regarding the administration of criminal justice, accounts for this increased federal intervention in matters over which the states have primary authority and responsibility. Recognition by each state in its own constitution of the basic rights of the individual — not limited to the minimum standards derived from the Constitution of the United States — and a policy and program of effective protection of these rights by all state agencies, including preeminently the state judiciary, offer the surest guarantee of maximum state responsibility and autonomy in this area and a corresponding minimum of federal intervention.

In any revision of a state constitution, the existing declaration of rights should be examined to determine whether some provisions are no longer necessary, whether some should be clarified or expanded, and whether new basic rights should be recognized. Moreover, in view of the progressive extension in recent years of provisions of the federal Bill of Rights to the states, on the theory that they are fundamental rights protected against the states by the Fourteenth Amendment, the corresponding provisions of the Illinois Constitution should be examined to see whether they accord with the federal standard applicable to the states.[18]

A word of caution may be introduced here. Courts follow the general

[18] For discussion of the subject, see Robert S. Rankin, *State Constitutions: The Bill of Rights* (New York: National Municipal League, 1960).

rule of construction that words carried forward verbatim from an earlier constitution to a revised constitution also carry forward the accumulated gloss of judicial interpretation. This is a matter of particular importance with respect to the provisions respecting basic rights, and alterations of language should not be undertaken without an appreciation of their possible impact on previously established judicial interpretation.

A right of vital current significance is the right to equal protection of the laws and, more particularly, the right to be free from governmental action which discriminates on the basis of race, color, religion, or national ancestry. This right is protected at the national level by the equal protection clause of the Fourteenth Amendment which has no counterpart in the Illinois Constitution. The right to the equal protection of laws under the Illinois Constitution derives from the provision of Article II, Section 2, which states that no person shall be deprived of life, liberty, or property without due process of law. The convention might well consider adopting an explicit equal protection clause and along with it a specific provision prohibiting the deprivation or denial of right on the basis of race, color, religion, or national ancestry.

2. *Rights of Citizens against Other Citizens*

The classic concept of basic rights in the American constitutional tradition is that these rights are retained by the people as a protection against the government. The rights a person has against other persons are defined by common law and statute. These are not ordinarily regarded as constitutional matters. The principle that a state shall not deprive a person of his life without due process of law is a constitutional matter, but constitutions do not make it a crime for an individual to take another's life. This is governed by the criminal laws.

If all civil rights, in the sense of rights which a person may assert against his fellow citizens, were to be incorporated in the constitution, the distinction between the constitution as fundamental law, defining the frame of government and the relation of the government to the citizen, and the general laws of the state, defining rights and obligations arising out of private relationships, would be lost. Adherence to the basic purpose of a constitution suggests, for instance, that laws dealing with

employer-employee relations, such as laws declaring a right of collective bargaining or declaring a right to work regardless of closed shop agreements, and laws prohibiting discrimination by private persons in such fields as employment or housing, are properly reserved for legislation and should not be made constitutional matters.

Declaration of any such rights against private persons would necessarily have to be accompanied by details limiting and controlling the right, which are matters best left to the legislative process. Once the door is opened for enumerating and defining rights in the field of private relations, it may be expected that a number of special interest groups will be pushing for recognition of their own particular interests.

3. *Social and Economic Rights*

It may be argued that the conception of basic rights should be expanded to include not only the traditional rights of citizens against government but also the right of citizens to receive from government the assurance of certain social and economic benefits. Mention may be made of rights to welfare relief, old age assistance, health benefits, public housing, recreation, and education. The present Illinois Constitution enters this sphere when it directs the legislature to provide "a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education" (Art. VIII, Sec. 1). But whether in deference to present trends favoring increased public services and benefits, new economic and social rights should receive sanction in the Bill of Rights is another question. Rights of this kind, stated in a constitution, are "programmatic" in character. They are not judicially enforceable and require legislative acts for their implementation. To define the limit and scope of these rights is necessarily reserved for legislation.

Discussion of rights of this character at a constitutional convention and of the kinds of rights to be enumerated will necessarily excite extended debate on such broad subjects as free enterprise, socialism, and the welfare state. A constitutional convention must ask itself whether consideration and discussion of these matters are not more appropriately reserved for the legislative forum. The people through their elected representatives

in the legislature are free to fashion their own destiny in this respect and to adopt the controls and provide the public services needed in response to the temper and spirit of the times. What is relevant and important in a constitution is that the legislature be recognized to have the power to adopt legislation and programs to promote the general welfare and to have the choice of means suitable to this end, subject only to such restrictions as the people have seen fit to impose by express limitations and by the rights they have reserved.[19]

The Process of Constitutional Revision or Amendment

Just as the establishment of a state constitution rests in the first instance on the authority and will of the people, so also must opportunity be allowed for future amendment or revision and approval of the same by the electors. A constitution should state the means and processes for such amendment or revision.

State constitutions commonly set procedures for amendment by means of popular vote on propositions submitted by the legislature or initiated by citizens' petition. They also define the procedure for calling a constitutional convention to consider revision of the constitution. A proposal to the electorate for a convention may be initiated by the legislature or automatically submitted to the voters at regularly stated intervals.

The amendment process should be neither too difficult nor too easy. To suggest limitations on the amending process is to enter upon a sensitive area, since it is one of our traditions that a constitution resting on the will of the people should always be freely subject to amendment by expression of the same popular will.

The important point is that a constitutional convention give serious thought to the problem of whether the process of constitutional amendment can be limited in such a way as to preserve the constitution's char-

[19] Attention may be called at this point to the provisions of Art. X of the *Model State Constitution*. The legislature is placed under a duty to provide for a system of public education and to protect and promote the health of the inhabitants of the state. In respect to public relief, public housing, and conservation, the legislature is authorized to enact appropriate legislation.

acter as the state's basic fundamental and enduring law, while at the same time keeping open necessary and adequate channels for changes in response to the popular will and consistent with the theory of the people's sovereignty on which the constitution rests. The history of the Illinois amendment article discussed earlier may convince the delegates to the constitutional convention that at least compared to provisions in other states, the Illinois article achieves a happy medium in reconciling the competing demands of stability and change.

CONCLUSION

Extraordinary changes have taken place since the Illinois Constitution was last revised in 1870. The state's population has quadrupled, the state has become highly urbanized and industrialized, means of transportation and communication have undergone radical changes, governmental regulation and public services have expanded and proliferated in ways not dreamed of in 1870, and the social, economic, and political problems the state faces are vastly different and far more complex. Patterns of government adequate to meet the relatively simple needs of 1870 are no longer responsive to today's conditions.

The organs of government must be vested with powers adequate to their tasks and responsibilities in fashioning and administering policies that are directed to the end of promoting the general welfare as determined by a preponderant public opinion in the context of new and changing circumstances. And, on the other hand, the vast expansion of governmental authority, the broadened areas of public service, and the increased demands placed upon citizens by regulatory and tax laws make it equally imperative that the safeguards of representative government in its various institutional aspects, of the rule of law, of the reserved rights of the people, and of the restraints designed to prevent the arbitrary and irresponsible exercise of power be preserved and strengthened.

The constitutional convention of 1969-70 will not be starting from scratch. The state of Illinois has a constitutional history and tradition that began with the adoption of the first constitution in 1818. Any revised constitution must keep faith with the past and with what has been determined by experience to be the enduring values of a government

resting on the consent of the people. To fashion a fundamental order of government that preserves the continuity of our constitutional tradition by holding fast to that which is good, but which will be adequate to meet not only today's but also tomorrow's needs — this is the challenging and difficult task that faces the constitutional convention of 1970.

In the end, the convention must submit the results of its deliberations to the state's electors for approval. To merit this approval, the constitution must be a document that can be read and understood by citizens and which in its meritorious features commends itself to the people as a worthy instrument for the furtherance of effective and responsible government directed to the end of serving and promoting the common good.

2. The State Bill of Rights

by Frank P. Grad

Every one of the fifty state constitutions includes a bill of rights or a declaration of rights. In every instance, the bill of rights is placed in one of the first articles of the constitution, an indication of the great importance which has been attributed to it throughout state constitutional history. Unlike the Constitution of the United States, which added the Bill of Rights by way of the first ten amendments — in order to make the new constitution acceptable to the people of the original thirteen states — the several state constitutions, from earliest times on, have included the protection of individual liberties as a primary part of the constitutional document itself.

The Place of the Bill of Rights in the State Constitution

The inclusion of a bill of rights in the state constitution might, logically, be viewed as unnecessary. State governments, in their origin and nature, are sovereign governments having all of the powers government can have, except insofar as some of these powers have been delegated to the United States in the federal Constitution. The state government is wholly responsible to the people, and in theory, at least, the people ought to be capable of controlling their government so as to prevent it from riding roughshod over the rights of individuals or minority groups. In fact, we know from our experience — just as the Founding Fathers knew from theirs — that government may become oppressive and arbitrary, that minorities may sometimes need protection against the tyranny of the majority, that the dissenter, the critic of government or of the existing order, and the social theorist need to be protected against abuses

of the power of government as well as against the imposition of any official or orthodox view of government. A democratic society needs constant re-examination and criticism for its growth and for its sound development. Moreover, the citizen in his ordinary pursuits needs to be protected against bureaucratic and administrative excesses, whether resulting from overzealousness or negligence, and whether done in the name of the public interest or from less pure motives.

The need for the protection of the individual or the group is clear. Yet such protection could be provided — and most of it indeed is — through the method of ordinary legislation. Why, then, are certain protections given this special constitutional status? The answer must be sought in the nature of the state constitution itself. The Constitution of the United States is a document of grant: the federal government has only those powers granted or delegated to it by the states, and in spite of its enormous powers, the federal government cannot exercise any function which cannot be derived from one of the powers expressly delegated to it. State constitutions, on the other hand, are documents of limitation. The state government, as has been noted, has all of the powers a sovereign government can have *except as limited by the state constitution.* To react flexibly and effectively to current needs, state constitutions ought to be simply and briefly written, and ought to contain few limits, for the inclusion of any provision within the constitution generally puts the matter outside the range of legislative consideration and action. The inclusion of certain personal rights and liberties in the constitution's bill of rights thus puts them beyond the reach of the legislature, and any laws passed by the legislature (or any action taken by other branches of the government) in violation or derogation of these rights are unconstitutional and subject to invalidation. Thus, the inclusion of certain rights in the bill of rights elevates them to the highest order in the hierarchy of our laws.

Relationship with Federal Bill of Rights

The present Illinois Bill of Rights, similar to other state bills of rights, duplicates many of the most important provisions of its federal counterpart. There was an excellent reason for this initially, for the courts had

held that the first ten amendments protected the people only against legislation and action of the government of the United States, not against improper action of the governments of the several states. To protect themselves against denial of these rights by their own state governments, the people needed to have protection in their own state constitutions. This, essentially, was the state of the law until the Fourteenth Amendment was adopted shortly after the Civil War: "No state shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Through the Fourteenth Amendment, the federal government for the first time undertook to protect the rights of its citizens against encroachments by their own states. The Fourteenth Amendment, however, did not automatically make all of the federal Bill of Rights applicable to the states. Instead, there has been a gradual incorporation (by United States Supreme Court interpretation) of the first eight amendments into the protections of the Fourteenth Amendment. Over the years, the United States Supreme Court has construed the Fourteenth Amendment to prohibit the states from abridging only those guarantees of the federal Bill of Rights which are "fundamental to a concept of ordered liberty" (*Palko* v. *Connecticut,* 302 U.S. 319 [1937]). The process of incorporation has been accelerating rapidly in recent years, so that today, in October, 1969, most — but not all — of the rights guaranteed in the Illinois and other state bills of rights duplicate provisions of the federal Bill of Rights that the United States Supreme Court has already applied to the states through the Fourteenth Amendment. Indeed, the test for the inclusion of United States Bill of Rights guarantees through the Fourteenth Amendment itself has been broadened recently: the test no longer appears to be merely whether the particular right is necessary to assure "fundamental" fairness, but whether the guarantee is "fundamental to the American scheme of justice" (*Duncan* v. *Louisiana,* 391 U.S. 145 [1968]). The extent to which the present Illinois Bill of Rights duplicates existing federal protection will be considered in some detail in terms of the particular constitutional protections.

Although most important bill of rights provisions have thus become

"federalized," there is a clear, continuing justification for state bills of rights. First, the state may grant greater and more far-reaching protection to its citizens than federal decisions require. For instance, the Illinois Bill of Rights does provide greater protection in the case of damages for property taken or "damaged" for public use by eminent domain. The federal Bill of Rights as applied through the Fourteenth Amendment merely establishes the minimum amount of protection afforded, leaving the states free to impose more stringent requirements if they choose to do so. In the past the minimum required under the Fourteenth Amendment has all too often been the maximum provided by the states, but there is no reason why this should persist into the future.

Another continuing reason for state bills of rights is based on a view of the relationship of the people to their state governments. State government has long exercised powers that affect the people most directly in their family relations, education, property arrangements, occupational requirements, environmental controls, and in many other aspects of their daily lives. Relatively few persons ever have the opportunity to commit a federal crime or to come directly under federal legal or regulatory requirements, and many federal programs and laws rely on state implementation and enforcement. Hence the relationship of the people to their state governments ought to be one of close mutual reliance. When a person's rights are abridged by his state government, he should be able to seek protection close to home — in his own state courts, subject to his own state constitution. He should not have to rely for protection, at least not in the first instance, on a federal court and a more distant government.

In examining the Illinois Bill of Rights in the light of the 1969-70 constitutional convention, delegates should note that constitutions hold a particularly high place in the popular scheme of values. It is probably no exaggeration to say that the degree of uncritical respect of the citizen stands in inverse relationship to the extent of his information of the state constitutional document's variegated contents. Bills of rights appear to be viewed with even more awe than the constitution as a whole, and consequently there is great political reluctance to change the language of a bill of rights, or to delete any part of it, lest such a change be viewed

s an undermining of a cornerstone of the established order. This has sulted in the preservation in state bills of rights of archaic language nd unnecessary or inappropriate protections such as that against the uartering of troops. It should be noted, however, that age itself does ot affect the efficacy of constitutional protections. If cast in sufficiently road and general language, they are likely to be reinterpreted from ime to time to reflect contemporary needs. Provisions that are no longer eeded will generally do little more than take up space without causing ny damage. Thus the question whether archaic language should be emoved from state constitutional bills of rights should be carefully eighed against the popular apprehensions which may be caused by ere verbal changes in so significant a part of the constitutional ocument.

The Illinois Bill of Rights: Derivation and Contents

The provisions of the present Illinois Bill of Rights, adopted as part f the constitution of 1870, are all derived from the prior constitution of 848, with only a few verbal changes. Eighteen of the twenty sections f the Bill of Rights were, in fact, derived from the first Illinois Constitution, that of 1818. There have been no amendments of the present Illinois Bill of Rights since its adoption almost one hundred years ago.

With a few exceptions, the Illinois Bill of Rights limits itself to well-ecognized areas of substantive and procedural protections, largely aralleling the provisions of the first eight amendments of the federal ill of Rights and of such other federal constitutional provisions as prohibit the suspension of the writ of habeas corpus or bills of attainder and *ex post facto* laws (U.S. Const., Art. I, Sec. 9). Other provisions, for xample Section 12 prohibiting imprisonment for debt and Section 13 equiring just compensation for private property taken or damaged by minent domain, have their counterparts in most other state constitutions. Section 1 on inherent and inalienable rights, Section 19 on rights remedy and justice, and Section 20, which admonishes a "frequent ecurrence to the fundamental principles of government," merely state principles of government rather than define areas of protection. Although these three sections do not add anything of operational significance to the other provisions, they are relatively brief and do not detract from the conciseness of the document as compared to other state bills of rights.

A noteworthy and significant omission from the Illinois Bill of Rights is the lack of an express guarantee of the equal protection of the laws. Illinois shares this defect with some forty-three other states, all of which make up for it by an expanded interpretation of some other constitutional provisions, commonly the due process clause. Nevertheless, an adequate clause guaranteeing the equal protection of the laws, possibly enhanced by an express protection of civil rights regardless of race, creed, color, or sex, ought to be considered for inclusion in the Bill of Rights so as to give expression to what is already the law of the land as well as the aspiration of its people.

On the whole, the Illinois Bill of Rights falls well within the norm of states' bills of rights generally. It is about as inclusive as most, its language is not unusual and neither are its substantive contents. Whether other newer and, perhaps, more contemporary concerns ought to be reflected among its protections is a matter which will be left to later discussion.

Areas of Protection

What follows is a discussion of the major areas of protection covered in the Illinois Bill of Rights. The areas referred to will not follow the arrangement of the Illinois Bill of Rights — which is not entirely logical — but will rather group related topics under a single heading. Throughout this discussion reference will be made to relevant federal Bill of Rights provisions and to relevant federal decisions in the bill of rights area.

1. Freedom of Expression

Under freedom of expression we may group Section 4 of the Illinois Bill of Rights, which covers freedom of speech and of the press, and Section 17, which protects the right to assemble and petition. The correlative federal protections are all part of the First Amendment.

As to freedoms of speech and press, the First Amendment was made applicable to the states by selective incorporation some forty-five years

ago (*Gitlow* v. *New York*, 268 U.S. 652 [1925]); thus the protections of free speech and free press as determined by the United States Supreme Court are applicable to Illinois as well, and the Illinois constitutional protections under Section 4 of the Bill of Rights must be interpreted consistently with the interpretation of the First Amendment. Illinois courts therefore cannot go it alone when determining, for instance, whether or not a particular publication is obscene (*City of Chicago* v. *Kimmel*, 31 Ill. 2d 202, 201 N.E. 2d 386 [1964]), or whether or not a particular form of protest, such as, let us say, draft card burning, is protected by free speech or represents an activity not protected by constitutional immunities for freedom of expression.

There is one significant respect in which the Illinois section on freedoms of speech raises problems outside of federal constitutional protections, and that is with respect to the subject of libel. Free speech is guaranteed in the following terms: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." It is clear that, similar to federal interpretations of the First Amendment, the language of Section 4 does not permit so-called prior restraints on expression. However libelous or offensive a statement, neither injunction nor any other legal procedure may be used to stop a person from having his say on any subject in any manner he may choose. If his statement is libelous, however, he may be held responsible *after* he has made it. The question might be asked whether the defense against libel — that the statements were true and published with good motives and for justifiable ends — is a proper matter for inclusion in the constitution. In the past the defense based on truth, good motives, and justifiable ends has generally been given a broad interpretation and has been allowed in the context, for instance, of a political candidate who makes true statements about his opponent. The question remains, however, whether the definition of civil or criminal libel is a matter of sufficient importance for constitutional inclusion — even though similar provisions may be found in some twenty other state constitutions. It may well be argued that the legislature should be free, for instance, to make the truth of a statement an absolute defense, regardless of good motives and justifiable ends. The First Amendment of the federal Constitution has no analogous provision relating to libel, and it cannot be claimed that its absence has worked any disabilities on persons who wish to defend themselves against libelous attacks.

The right to assemble and petition in Section 17 is analogous to another First Amendment provision which was made applicable to the states some thirty-two years ago (*DeJonge* v. *Oregon*, 299 U.S. 353 [1937]). The right of assembly is not an unlimited right, and appropriate police regulations which require notice to the proper authorities and a permit for the use of streets, parks, and other facilities have been regularly upheld in Illinois as well as elsewhere. Such regulations cannot, of course, deny the right of assembly under the guise of police regulation nor can they be used selectively to grant facilities to favored groups and not to others. Section 17 reads as follows: "The people have the right to assemble in a peaceable manner to consult for the common good, to make known their opinions to their representatives, and to apply for a redress of grievances." The language of the section adequately describes the right and appears to have caused no substantial problems of interpretation. In a recent case it was held that the police are not authorized under a city ordinance on disorderly conduct to stop a peaceful civil rights march merely because a hostile crowd may not agree with the views of the demonstrators, but such a disorderly conduct ordinance can properly and constitutionally authorize a stoppage of the march where there is an imminent threat of violence. The case has been appealed to the United States Supreme Court and a decision on the issue is presently pending (*City of Chicago* v. *Gregory*, 39 Ill. 2d 47, 233 N.E. 2d 422, *certiorari* granted, 391 U.S. 964 [1968]).

2. *Freedom of Religion*

Freedom of religion is one of the freedoms protected by the First Amendment of the federal Constitution, now applicable to the states through incorporation into the Fourteenth Amendment (*Cantwell* v. *Connecticut*, 310 U.S. 296 [1940]). The First Amendment provision on religion is notably brief: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

The Illinois provision which achieves the same purpose is considerably more detailed:

> *Section 3. Religious Freedom.* The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.

The constitutional provisions on religious freedom contain two parts. One deals with freedom of belief and of religious exercise, and a second part, the so-called "establishment clause," prohibits the establishment of a state religion or the official preference of one denomination over another. As to freedom of belief, the right has been held to be absolute, and although neither the federal nor the Illinois provision expressly says so, the right to believe also includes the right to disbelieve. When it comes to religious practices, the Illinois provision is far more detailed than the federal. Religious exercise is fully protected but it may not provide a basis for acts which are otherwise prohibited. A sect which believes in human sacrifice could cherish and profess its belief, but it could not practice it. So, too, a sect of snake handlers could be stopped from carrying on their rites.

Far more serious questions arise today with respect to state support of religious institutions, prohibited primarily under the federal establishment clause. Illinois, like most other states, has held that tax exemption for property owned by religious institutions does not violate the principle of separation of church and state. So, too, Illinois courts have upheld the rights of school boards to release children during regularly scheduled school hours so as to enable them to undergo religious instruction outside of public school buildings. As for state support of schools run by religious institutions, the Illinois Bill of Rights imposes no express obstacles to the use of the so-called "child benefit doctrine" under which the use of

public funds for school children attending sectarian schools has been upheld if the benefit flowed to the child and not to the religious institution. As presently phrased, Section 3 is silent on the subject and susceptible to any interpretation the courts may choose to give it with relation to "child benefit."

3. Limitations on the Exercise of the State's Police Power — Due Process and Equal Protection and Related Provisions

DUE PROCESS

As has been previously noted, the state governments, sovereign in origin, have all of the powers it is possible for government to have except insofar as limited by the state constitution or as delegated to the federal government. Perhaps the most significant part of a sovereign state's inherent power is the state's so-called police power — the power to legislate and to provide for the health, safety, welfare, and morals of its people. It appears from the mere statement of the range of police power that it is indeed a broad and vast power and that most of a state's legislative and regulatory activities are carried out under it. If the states were unlimited in the exercise of the police power, the rights of individuals or of minority groups could be wholly disregarded, because it could always be asserted that the particular action was necessary or required for the common good of the people. Fortunately, the police power is limited by established guarantees of due process of law and of the equal protection of the laws.

The concept of due process in the Illinois Constitution was initially embodied in the constitutions of 1818 and 1848 which adopted the provision from Magna Carta that "no free man shall be . . . deprived of his life, liberty or property but by the judgment of his peers or the law of the land." In the present constitution, adopted in 1870, that concept was rendered in somewhat more modern form: "*Section 2. Due Process of Law.* No person shall be deprived of life, liberty or property, without due process of law." The concept of due process focuses on the individual treatment of persons. The requirement of due process insures that no person shall be deprived of those rights which are "implicit in the concept of ordered liberty" and it guarantees that every individual

shall be treated with at least a minimum of "decency and fairness" (*Rochin v. California*, 342 U.S. 165 [1952]). While the application of the concept of due process may sometimes involve very complex questions of law, in the ordinary situation it requires that persons be afforded the accepted procedural protections of the law and that no person suffer any loss of life, liberty, or property unless traditional and established safeguards have been provided.

While due process is primarily a procedural concept, the idea has sometimes been extended to include not only procedural protections but protection against certain kinds of substantive legislation as well. During the 1920's in particular, courts applied a doctrine of "substantive due process" which rested largely on the notion that the state was without power to pass certain kinds of laws which would operate to deprive persons of supposedly inherent rights. Commonly, court decisions basing themselves on substantive due process rested on notions of sanctity of private property and sanctity of contracts, and decided on the constitutionality of economic and other police power regulation by balancing the public interest to be protected against the private interest invaded, so as to arrive at a judgment of the reasonableness of the regulation. Prior to the thirties, substantive due process was often used to invalidate new social legislation. Although substantive due process is no longer an accepted doctrine for constitutional adjudication in the United States Supreme Court, it is still widely used in state constitutional decisions, and in this context the Illinois courts frequently read the due process clause of the Illinois Constitution together with Section 1 on inherent and inalienable rights: "All men are by nature free and independent, and have certain inherent and inalienable rights — among these are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed." As a statement of political philosophy, the provision reflects much of the contents of the Declaration of Independence and its first sentence forms part of the American credo. Its use in conjunction with the due process clause for the purpose of supporting substantive due process decisions is questionable and there is some doubt whether Section 1 on inherent and

inalienable rights should not be made part of the Preamble rather than of the Bill of Rights itself.

EQUAL PROTECTION OF THE LAW

It is noteworthy that the Illinois Constitution contains no equal protection clause. However, the due process clause has been given an expanded reading by the courts so as to incorporate the concept of equal protection as well. As will be noted later, in so doing the courts have relied to some extent on the provision of Section 22 of Article IV, which bars certain local and special legislation. While the due process clause deals with the individual treatment of any person, the equal protection clause focuses on the comparative treatment of individuals and insures that persons in similar circumstances are treated alike, with respect to both burdens imposed and privileges granted. Equal protection of the laws does not, however, prevent proper classification into groups that are distinctly different. As long as groupings are based on reasonable and sound distinctions, such as that between minors and adults for the purposes of criminal law or wholesalers and retailers for the purposes of commercial law, individuals in different groups or classes may be treated differently as long as all of the individuals within any one group or class are treated alike.

The relationship of equal protection to the new concept of civil rights is clear. In fact, the Constitution of the United States provides no special protection for "civil rights," and all of the recent protections have come through legislation rather than constitutional amendment. It is only in the Fifteenth Amendment to the federal Constitution, in guaranteeing that there shall be no denial of any citizen's rights to vote, that race, color, or previous condition of servitude is mentioned. Illinois is one of the forty-three states which have no equal protection clause in their constitutions and which make no mention of denial of rights by reason of religion, race, color, sex, or any other similar factors. It is noteworthy, however, that some of the more recent constitutions, such as the constitutions of Hawaii, Alaska, and Michigan, expressly provide for the protection of civil rights, with Michigan going so far as to provide

constitutionally for the establishment of a separate agency of government to deal with the problem.

The subject of the constitutional protection of civil rights is treated extensively in another research report. It is appropriate to note, however, that although special constitutional mention of civil rights may be desirable because it gives considerable reassurance to large parts of the population, it is not an absolutely necessary component of a state constitution because adequate protection of civil rights may be based on recognized due process and equal protection grounds, as indeed has been the case in the federal courts. As a very minimum, however, Illinois should consider the adoption of a clearly stated equal protection clause in lieu of reliance on an expanded interpretation of its due process clause aided by Article IV, Section 22, which prohibits special or local laws in a score or more of enumerated cases. The interpretational technique used has been to view laws that would violate the guarantee of equal protection as falling within one of the prohibited categories of special legislation as defined in Section 22 (*Monmouth* v. *Lorenz*, 30 Ill. 2d 60 [1964]). While this technique appears to have worked passably well, it has also led to a vast number of adjudications which are sometimes difficult to reconcile. The results, moreover, have been accomplished at the expense of a clear constitutional recognition of the principle of the equal protection of the laws.

OTHER RIGHTS RELATED TO DUE PROCESS: EMINENT DOMAIN, *Ex post facto* LAWS, AND LAWS IMPAIRING OBLIGATION OF CONTRACTS

Like many other state constitutions, the Illinois Bill of Rights, in sections 15 and 14, protects against the taking of private property for public use without just compensation and against the enactment of *ex post facto* laws or laws impairing the obligation of contracts. These provisions are in fact special applications of the guarantee of due process. The taking of private property for public purposes without just compensation and without an established procedure would fall squarely within the definition of a deprivation of property without due process of law, even in the absence of the special eminent domain provision.

The right of eminent domain is provided for in Section 13 as follows: "Private property shall not be taken or damaged for public use without just compensation. Such compensation when not made by the state shall be ascertained by a jury as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owner thereof, shall remain in such owners, subject to the use for which it is taken." Section 13 is one of the more useful eminent domain provisions in that it provides for compensation not only for property "taken" but also for property "damaged" for public use. Thus the owner of a home which has been deprived of light and air by an elevated highway is just as much entitled to compensation for the difference in value before and after the construction of the highway as is an owner whose property was condemned for actual highway use. There is, however, a question whether eminent domain is not a proper subject for legislation rather than the state constitution, particularly in view of the fact that the Illinois provision sets a procedural requirement — namely that compensation be ascertained by a jury. This may not be the only reliable or satisfactory way of ascertaining such damages, and the legislature ought to be free to provide for other, alternative procedures. The provision which requires that the fee of lands taken for railroad tracks remain in their owners, with the railroad holding only an easement for its tracks, is probably obsolete and of no great current significance.

In the commentary to the *Model State Constitution,* it was stated, too, that:

> . . . The power of the state to condemn private property for public use is an incident of sovereignty which requires no special constitutional authorization; so is the sovereign's duty to pay just compensation for such taking. Both are so firmly established as to require no special constitutional mention. This requirement has been effectively accomplished by the due process clause in states which, like the *Model,* have no express condemnation provision. There may be need for such a clause if it has not been firmly established in the state that compensation be paid not only for a user's "taking" but also for a "damaging" by public use (*Model State Constitution,* p. 28).

In view of the fact that both due process protection and the compensation for damage is well established in Illinois, no such constitutional provision appears to be necessary.

Section 14 provides that "No *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed." The ban on *ex post facto* laws and laws impairing the obligation of contracts appears to be unnecessary because both of them are effectively included in the concept of due process and expressly prohibited by Article I, Section 10, of the United States Constitution. The force of the provision against laws impairing the obligation of contracts has been greatly lessened, moreover, by repeated recognition that private contracts must yield when, in the exercise of the police power, the legislature finds that the public health, safety, and welfare demand particular acts of legislation. On the whole, the provision against impairment of contracts presently appears to protect against little else except the state's reneging on its own contracts by legislative action.

The final phrase in Section 14, which prohibits the making of any irrevocable grants or special privileges or immunities, has come to mean that the state cannot issue permanent franchises of any kind. A sound application of the principle of equal protection of law — whether through an express equal protection clause or by the device of construing Section 22 of Article IV together with the due process clause — would bar such a special grant of privileges or immunities in any event.

SEARCHES AND SEIZURES

Section 6 of the Illinois Bill of Rights is identical in language with the Fourth Amendment of the United States Constitution and reads as follows: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized." The protection against unreasonable searches and seizures has an ancient history. Its major purpose is to protect against unwarranted official invasions of a person's home. It

was established some twenty years ago that federal protection against unreasonable searches and seizures was part of due process under the Fourteenth Amendment and was, therefore, applicable to state action as well (*Wolf* v. *Colorado,* 338 U.S. 25 [1949]). For some time thereafter, each of the states was still left free to determine for itself whether or not evidence seized by an illegal search was admissible in a criminal prosecution, but in 1961 the United States Supreme Court held that evidence illegally seized could not be so used whether it had been seized by a federal or a state official, and whether such evidence was to be used in a federal or a state court (*Mapp* v. *Ohio,* 367 U.S. 643 [1961]). More recently the United States Supreme Court has had further opportunity to define what constitutes, for Fourth Amendment protection purposes, a search. It held that a health or safety inspection of a home or of a place not generally accessible to the public was a constitutionally protected search that would require a warrant unless consent to the inspection had been given (*Camara* v. *Municipal Court of San Francisco,* 387 U.S. 523 [1967]; *See* v. *Seattle,* 387 U.S. 541 [1967]).

Thus it is clear that in interpreting provisions against search and seizure the states are now bound to follow, at the very least, the requirements laid down by the Supreme Court whether or not, as is the case in Illinois, the state's own provision on searches and seizures follows the federal one (*People* v. *Erickson,* 31 Ill. 2d 230, 201 N.E. 2d 422 [1964]). Thus the question as to whether or not a so-called stop and frisk law would meet constitutional requirements is an issue to be decided by the United States Supreme Court, even though the courts of Illinois could give the Illinois Bill of Rights more far-reaching scope by holding such "frisks" constitutionally improper, even if they were upheld by the Supreme Court. Such a holding would not limit the police right to search a suspect incident to an arrest upon reasonable suspicion.

The Fourth Amendment search and seizure provision has recently been expanded in a holding by the United States Supreme Court which bans unauthorized or warrantless electronic eavesdropping or "bugging," or "bugging" authorized by insufficient warrants, as well as unauthorized wire taps on telephone conversations (*Berger* v. *New York,* 388 U.S. 41 [1967]). The only state constitutions which contain express provisions

against unauthorized wire taps are those of New York and the *Model State Constitution;* the latter also contains provisions against electronic eavesdropping or bugging. Although federal protections against unlawful searches and seizures have been extended to cover both wire tapping and bugging, this is a subject of important contemporary concern which may well be considered for express constitutional inclusion. The original search and seizure provisions were designed to deal with the only method of intrusion into the home then known — that of physical intrusion. Newer methods of intrusion through the use of electronic devices dispense with the need for the physical intruder, and it may be well to reflect contemporary threats to privacy in the constitutional document.

4. *Procedural Protection of Persons Accused of Crime*

GRAND JURY INDICTMENT

Section 8 of the Illinois Constitution provides as follows: "No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: *Provided,* that the grand jury may be abolished by law in all cases." In effect Section 8 requires grand jury indictment in all cases of felony. This is not a federal constitutional requirement because the grand jury requirement in the Constitution of the United States has not been made applicable to the states. There is considerable debate among persons expert in criminal practice and procedure as to the utility or protection afforded by grand jury indictment. It is a subject which might well be left to the determination of a code of criminal procedure. The Illinois provision in this respect affords greater opportunities for change than most other state constitutions which also require grand jury indictment, in that Illinois allows the abolition of the grand jury "by law in all cases." This has been held to mean that the institution of the grand jury may be abolished altogether but that the legislature may not abolish grand jury indictment for one or more categories of cases from time to time.

RIGHTS AFTER INDICTMENT

The rights of an accused after indictment are set forth in Section 9 as follows: "In all criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation, and to have a copy thereof; to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." These protections closely parallel the provisions of the Sixth Amendment of the United States Constitution. All of these protections, including the right to assistance of counsel (*Gideon* v. *Wainright,* 372 U.S. 335 [1963]) and, most recently, the right to trial by jury (*Duncan* v. *Louisiana,* 391 U.S. 145 [1968]), have now been incorporated into the Fourteenth Amendment so that they apply in state as well as federal cases. Under the recent Supreme Court ruling, a defendant charged with a crime other than a petty crime punishable by a term of less than six months or a year has the right under the Fourteenth Amendment to a jury trial. (He may, however, waive that right.) As to lesser, petty offenses, the states are free to choose whether a jury trial is needed — in Illinois Section 9 requires it. All of the rights of persons accused of crime are well established. The question whether or not a jury trial is necessary for the protection of a person charged with a misdemeanor or petty offense might well be left to the legislature as part of the development of a sound code of criminal procedure.

In recent years there has been complaint in some quarters that the law unduly protects the "criminal." It should be recalled that civil liberties are usually tested in the context of apparent breaches of the law by apparent evil doers or criminals. However, the constitutional protection we afford the person charged with a crime is designed not so much as a protection for the criminal, but rather as a defense against improper or unfair attempts to enforce the law against the ordinary citizen. In a very real sense, persons charged with crime and the procedural requirements designed to protect them are the first line of defense that noncriminals have against the improper exercise of governmental power. Unless excesses in the application of governmental

power are tested in the context of the "bad" person charged with crime, excessive governmental power could be applied against all of us with impunity.

RIGHT TO BAIL

Section 7 of the Illinois Constitution in pertinent part provides: "All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great. . . ." The formulation parallels that of the majority of other state constitutions. The protection is guaranteed also by the Eighth Amendment of the federal Constitution. The entire subject of bail is one which is likely to undergo considerable discussion in the near future in the light of some current proposals of preventive detention of persons accused of crime. Under present state and federal constitutional provisions as interpreted by both state courts and the Supreme Court of the United States, reasonable bail must be set for all persons who are "bailable" so as to assure their appearance for trial (*Gendron* v. *Ingram*, 34 Ill. 2d 623, 217 N.E. 2d 803 [1966]). "Bailable persons" excludes defendants in cases where there is strong evidence to suggest their guilt when the punishment for the offense would be death or life imprisonment. Preventive detention of persons charged with crime would appear to run counter to long-established constitutional law and constitutional traditions.

PRIVILEGE AGAINST SELF-INCRIMINATION

Section 10 of the Illinois Bill of Rights in pertinent part provides: "No person shall be compelled in any criminal case to give evidence against himself. . . ." The provision closely parallels the protection against self-incrimination in the Fifth Amendment which is applicable through the Fourteenth Amendment to the states (*Malloy* v. *Hogan*, 378 U.S. 1 [1964]). It should be noted that although both the federal and the state provisions against compulsory self-incrimination are couched in terms of criminal cases, the privilege against self-incrimination is recognized in all official proceedings, whether of a criminal, civil, or administrative nature. The privilege against self-incrimination has undergone significant developments. The Supreme Court of the United States has held that a person must be properly informed of his right to remain

silent before police interrogation, and that he is entitled to the presence of counsel during such interrogation (*Escobedo* v. *Illinois*, 378 U.S. 478 [1964]; *Miranda* v. *Arizona*, 384 U.S. 436 [1966]).

RIGHT AGAINST DOUBLE JEOPARDY

Section 10 of the Illinois Bill of Rights in pertinent part provides that ". . . no person shall . . . be twice put in jeopardy for the same offense." The provision closely parallels the Fifth Amendment provision — except insofar as Illinois extends the protection against double jeopardy only to charges of the same *offense*. This means that where the same transaction or act may form the basis for two separate criminal charges, a person who is acquitted of one may nevertheless be prosecuted for the other. So, for instance, a person who is acquitted on a charge of assault with a deadly weapon may nonetheless be convicted of carrying a concealed weapon on facts arising out of the same incident. On the other hand, a person who has been acquitted on one charge may not again be prosecuted for a lesser included offense — a person acquitted of murder may not be prosecuted again on a charge of voluntary manslaughter, for instance. The protection against double jeopardy is the most recent addition to the list of federal Bill of Rights provisions that have been applicable to the states through interpretation of the Fourteenth Amendment, in a Maryland case decided in June of 1969 (*Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056 [1969]).

5. Rights against Excessive, Cruel, and Unusual Punishment

There is no express provision in the Illinois Bill of Rights that protects against cruel and unusual punishment in those terms, but there is an analogous provision which serves the same purpose. The provision is Section 11, which reads as follows: "All penalties shall be proportioned to the nature of the offense and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state for any offense committed within the same." The only portion of Section 11 which appears to form a basis for adjudication in our day is that which requires that all penalties be proportioned to the nature of the offense. The rest of the section deals with matters which

are covered by Article I, Section 10, of the United States Constitution, in that bills of attainder and corruption of the blood are expressly outlawed by constitutional provisions which run against the states as well as against the federal government. The federal Eighth Amendment protection against cruel and unusual punishment is now held applicable to the states by inclusion in the Fourteenth Amendment, so that the requirement of proportionment of the penalities to the nature of the offense must in any event be construed in a fashion parallel to the prohibition against cruel and unusual punishment (*Louisiana* v. *Resweber*, 329 U.S. 459 [1947]). In practice, the requirement that penalties be proportioned to the nature of the offense has not imposed any stringent limitations on the state legislature, and challenges based on purported disproportions of sentences have generally been dismissed by the courts of Illinois, as long as the sentence actually imposed was within the sentence legislatively authorized.

6. *Trial by Jury in Civil Cases*

The requirement of trial by jury under discussion here deals with the use of juries in civil cases. As has been previously noted, trial by jury in criminal cases, one of the rights of an accused after indictment, recently has been incorporated into the Fourteenth Amendment by a 1968 decision of the United States Supreme Court. Unlike the right of trial by jury in criminal cases, the civil jury is not a federally guaranteed right, for even though the Seventh Amendment of the United States Constitution gives a right to a jury trial in all cases involving claims of $20 or more, this federal protection is limited to the federal courts. The right to a civil jury in Illinois is contained in Section 5, which reads as follows: "The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law."

A question which recurs under Section 5 is whether or not a case is one in which a jury trial has been "heretofore enjoyed." The phrase appeared for the first time in the constitution of 1870. In view of the fact that the constitutions of 1848 and 1818 also contained jury trial guarantees, it would appear that the right to a civil jury is defined by

the practice at common law at the time of Illinois' first constitution (*Reese* v. *Laymon*, 2 Ill. 2d 614, 119 N.E. 2d 271 [1954]). Judicial decisions indicate that in determining whether a jury trial is required in a civil case, the court will generally look to past practice in similar cases. It has been decided, too, that a jury trial need not be granted when a new remedy or a new cause of action is created by law. In addition, cases in equity, where juries have never been used in the past, will not require jury trials, but it has been held that to change a cause of action from an action at law into a proceeding in equity to avoid the jury guarantee would run counter to the constitution. The jury trial guarantee does not prevent an appellate court from overruling the trial court and from giving judgment without sending the case back for another jury trial in instances where no questions of fact remain and it is clear on the basis of the evidence that a directed verdict for the other party would have been proper in the first instance (*Fulford* v. *O'Connor*, 3 Ill. 2d 490, 121 N.E. 2d 767 [1954]).

The jury trial guarantee of Section 5 does not prevent waiver of trial by jury by the parties in a litigation. Although the permissibility of waivers reduces the burdens on the judicial system, the right to a jury trial in all civil cases raises substantial problems for effective judicial administration, particularly in a state like Illinois which has large urban centers with a substantial volume of private litigation and consequent likelihood of court congestion. The trial of a case before a jury usually takes far longer than the trial of a similar case before a judge and costs the state a great deal of money. Many lawyers and judges doubt whether the civil jury affords substantially greater protection to the litigants than does trial before a judge. In the case of criminal prosecutions, the jury system serves a number of values, including the protection of individual liberties, that are absent in the case of commercial and other litigation between private parties. Because jury trials usually last much longer than trials before a judge, civil jury trial guarantees may result in so much delay as to affect rights of litigants adversely. The delays resulting from the guarantee of a civil jury may well deprive litigants of their right to a speedy remedy; in consequence, the protection of a civil jury may cost too high a price. At present virtually all of the states guarantee a civil jury in their constitutions and there are more than a dozen states

that allow juries of less than twelve jurors under some circumstances; some twenty states do not require a unanimous verdict in civil cases but permit a jury verdict by a lesser number of jurors.

7. *Miscellaneous Rights*

Like other state constitutions, Illinois' has a number of provisions that appear to provide for rights that may be regarded as obsolete in that they are either fully protected elsewhere or in that they are not likely to be challenged in modern times. Sections 15 and 16 of the Illinois Constitution clearly fall into the latter category. Section 15 provides: "The military shall be in strict subordination to the civil power." This proposition is generally accepted and unlikely to be challenged in any state at the present time. Section 16, even less likely to afford vital protections, reads as follows: "No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war except as prescribed by law."

Section 12, which prohibits imprisonment for debt, is hardly of constitutional importance in our day. The section reads as follows: "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud." The section will not protect a person sent to jail for contempt of court for failing to respond to orders in an equity proceeding, such as, for instance, for failure to pay alimony. Generally the protection against imprisonment for debt has been strictly construed as limited to debts arising out of contract. It will not protect a person who has been in default of a judgment imposed for an action in tort where the tort involved the infliction of malicious damage or injury. The entire subject is likely to be managed far more effectively through procedural law than by constitutional fiat. Such procedural legislation would have to meet the requirements of due process and would therefore adequately protect the debtor against imprisonment.

Another provision of very limited utility is Section 18, which provides that "all elections shall be free and equal." It was not used to require equality of legislative districting or apportionment until the decisions

of the United States Supreme Court established the one man–one vote principle. Since then it has been cited as additional though not essential authority in Illinois apportionment decisions. Prior to the one man–one vote cases, Section 18 of the Bill of Rights was cited occasionally in cases of election irregularities in which recourse to the principles of due process and equal protection would have reached the result in any event.

There are three other sections of the Bill of Rights that state principles or theories of government rather than grant protections. Reference has been made earlier to Section 1, which echoes the language of the Declaration of Independence in its statement of inherent and inalienable rights to life, liberty, and the pursuit of happiness. It has never been used as an independent source of adjudication, and in those instances where it has been used to any effect it has been used, as noted earlier, in support of due process adjudications.

Section 19 of the constitution has been used in a somewhat similar fashion. It reads as follows: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay." The section seems to have served as little more than a gloss upon the requirement of due process of law. It has not been used, it would appear, as an independent source for the development of new remedial applications of the law.

Finally, Section 20 on fundamental principles asserts that "a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty." There appear to have been no occasions for the interpretation of this admonition. In a case decided some sixty-seven years ago, however, the section was referred to by the Supreme Court in holding unreasonable and oppressive a city ordinance which prohibited getting on or off moving cars or trains without first securing permission from the conductor! (*Wyce* v. *Chicago & N.W. Rway. Co.*, 193 Ill. 351, 61 N.E. 1084 [1902]).

The miscellaneous provisions here referred to serve no particular contemporary purpose in the Bill of Rights though they do no positive harm. They neither limit the legislature nor protect the people. Perhaps the only reason for recommending their repeal would be to empha-

size that a bill of rights is a statement of living, meaningful protections, capable of being effectively enforced. These miscellaneous provisions that include the pieties and the deadwood of constitutional thought detract to some extent from that aim. On the other hand, the effort to rid the constitution of them may be more trouble than it is worth.

8. Protection of the Right to Organize and "Right-to-Work" Amendments

It is likely that the forthcoming constitutional convention will be urged by union and labor groups to include an express statement of the right of workers to organize and bargain collectively. It is also to be expected that some employer groups will urge upon the convention the adoption of provisions that would prohibit closed shop agreements through a so-called "right-to-work" amendment.

At present five states, namely Florida, Hawaii, Missouri, New Jersey, and New York, give constitutional recognition to the right to organize and bargain collectively. Seven states, namely Arizona, Arkansas, Florida, Kansas, Mississippi, Nebraska, and South Dakota, prohibit the closed shop by a right-to-work amendment. The amendment commonly prohibits denial of employment opportunities to any person on account of nonmembership in a union. Regardless of political sympathies, the inclusion of either one of these provisions appears to be unwarranted. The negotiation of labor-management relations is a matter which requires detailed, responsible adjustment, not broad constitutional coverage. The right to organize and bargain collectively is recognized in all fifty states and it would be difficult to argue that the mention of that right in five state constitutions protects workers more fully in those states than they have been protected in the other forty-five. The great majority of workers are already protected in their right to organize by federal legislation, because their work is related to interstate commerce. The only workers who might benefit from the guarantee of the right to organize and bargain collectively are employees of state or local governments or of charitable, religious, or other institutions who have not been granted that right heretofore. In those instances the salient issue is generally not the right to organize or bargain collectively, but the right

to engage in concerted action, such as strike action, to support their collective bargaining efforts. Unless detailed provisions with respect to the mode of collective bargaining of public employees were to be included in the constitution, the subject is one which is more effectively dealt with by legislation which can provide procedural and substantive safeguards. In the Hawaii and New Jersey constitutions, which expressly grant the right to organize to public employees, this grant is promptly cut back by limiting concerted action to making known their grievances through representatives of their own choice. In practice the presence or absence of constitutional or other legal barriers to concerted action by public employees has neither deterred nor prevented such action, nor has the presence of constitutional provisions that broadly grant the right to organize and bargain collectively to all employees significantly enhanced their organizing efforts.

The right-to-work provision, which is a euphemism for a constitutional ban on the closed shop, is also of dubious constitutional importance. The federal law regulates the use of the closed shop device in establishments in interstate commerce. Some states that do not have a right-to-work amendment have accomplished results similar to that of the federal law by state legislation. The question is whether the ban on the closed shop is of such pre-eminent importance as to warrant its inclusion as a protected right in the state constitution. Another question is whether the right-to-work laws protect the worker's right to choose a job, or whether they protect the employer against having to accept the closed shop after negotiations with a strong union. Right-to-work amendments are not generally supported by workers whose rights the amendment purports to protect. It is perhaps noteworthy that the *Model State Constitution* contains neither a guarantee of the right to organize and bargain collectively nor of the so-called right to work.

SOCIAL AND ECONOMIC RIGHTS

The provisions of states' bills of rights have traditionally included a number of affirmative rights such as the right to freedom of speech, press, religion, and assembly, but in the main their contents have focused on protections of a procedural nature against governmental interference

with life, liberty, and property. With growing emphasis on the affirmative obligations of government to provide effectively for the good life of its people, it has been repeatedly proposed that bills of rights should reflect not only the people's right to be left alone by their government, but also the people's right to make claims upon their government for the rendition of social and economic services. In spite of these claims, none of the recent state constitutions contains an enumeration of social or economic rights, even though the United Nations' Declaration of Human Rights, following upon President Franklin Roosevelt's advocacy of the Four Freedoms, gave a major impetus to their articulation. The only North American constitution of fairly recent vintage that makes mention of these rights is that of the Commonwealth of Puerto Rico.

It is likely that these new rights will be urged upon all constitution makers in the future. The right to be free from hunger and want, the right to medical care and dignified support during old age, the right to adequate food, clothing, and shelter, the right to useful and creative work — all of these have been formulated and reformulated frequently since the days of the New Deal. Whether or not constitutional conventions of the future will adopt these new rights depends on their view of the nature of the constitutional document. If they view the bill of rights as a mere depository of general aspirations and contemporary pieties, they will find it easy to include the new rights. If, on the other hand, they view the bill of rights as a meaningful document in which every guarantee of a right carries with it the assurance of an effective remedy, then they will first attend to finding the remedy before articulating the right. A guarantee in a state constitution of adequate food, clothing, shelter, medical care, and security during old age is meaningless unless provision is made elsewhere in the constitution to make good on that guarantee. Otherwise the statement of new rights is about as useful as the present provision of the Illinois Constitution that a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty. If the integrity of the constitutional document is to be preserved, its guarantees must be meaningful and capable of fulfillment. A mere statement of a guarantee will not accomplish this purpose because there is no legal or constitutional method by which the legislature can be compelled to comply with such

a constitutional mandate. State constitutions even now are full of directions to the legislature that have never been carried out because there is no method to compel the legislature to do so. Unless a method to fulfill the promise of social and economic rights is provided, their inclusion in the state constitution will at most provide a slogan or a rallying point for political action by the disadvantaged groups who, instead of new rights, will discover new disappointments.

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3. The Guarantee of Civil Rights

by Lucius J. Barker and Twiley W. Barker, Jr.

Introduction

The term "civil rights" is associated with those rights outlined in the amendments added to the Constitution immediately after the Civil War, namely, the Thirteenth, Fourteenth, and Fifteenth amendments. The Thirteenth Amendment affirmed the Negro's constitutional status as a free man. The Fourteenth Amendment defined United States citizenship to include the newly freed Negro and to guarantee the privileges and immunities of U.S. citizens. Another provision of the Fourteenth Amendment — one that looms important today — declares that no state shall deny to any person within its jurisdiction the equal protection of the laws or deprive such person of his life, liberty, or property without due process of law. The Fifteenth Amendment guarantees that the right to vote shall not be denied on account of race, color, or previous condition of servitude. In general, these three amendments have provided the foundation for the protection of civil rights in the United States.

The Fourteenth Amendment has been of especial importance. In addition to its own provisions, that amendment has been interpreted by the Supreme Court to include rights guaranteed in the Bill of Rights such as freedom of speech and the right to assistance of counsel. (These guarantees are discussed in another paper.) Consequently, the term "civil rights" might be construed to include these rights. Moreover, there is increasing support to broaden the scope of civil rights protection to include social and economic rights such as freedom from poverty. Whatever "civil rights" may include as they evolve in the future, the argument here is that rights of every description should be extended to all persons equally. Specifically, it is the thesis of this paper that the convention should guarantee in the constitution that no person shall be disadvantaged in any way because of race, religion, or national origin.

Our national experience in fulfilling civil rights for all Americans has been at worst appalling and at best uneven. Indeed, the battle to secure these rights still plagues our national conscience and has developed into what one writer has labeled the "New Civil War."[1] True, Congress in the 1860's and 1870's passed legislation designed to make provisions of the Thirteenth, Fourteenth, and Fifteenth amendments more than empty declarations; however, such legislation proved of little value. For one thing white Southerners used outright violence and intimidation to regain control of state governments and put the black man "back into his place." Some states went further by reinforcing social barriers with legal restrictions, which often created new forms of inferiority.

The Supreme Court not only acquiesced but provided legal justification for such state action. Decisions of the court effectively thwarted Congressional efforts at enforcement of the Civil War amendments. For example, it declared the Civil Rights Act of 1875 unconstitutional in the *Civil Rights Cases* (109 U.S. 3 [1883]), holding that the Fourteenth Amendment did not give Congress the power to prohibit privately enforced discrimination. Still further, by its decision in *Plessy* v. *Ferguson* (163 U.S. 537 [1896]) the Supreme Court gave support to the so-called "separate but equal" schemes developed by Southern state legislatures to foster racial segregation. Indeed, as Thurgood Marshall, former NAACP legal counsel and now a member of the court itself, put it:

> That many of the vestiges of slavery remain and that racial discrimination still is practiced in all sections of the United States is to a considerable extent the responsibility of the United States Supreme Court which spelled out the meaning of this new constitutional provision. The Court's narrow, cautious, and often rigid interpretation of the amendment's reach and thrust in the past gave constitutional sanction to practices of racial discrimination and

[1] Fred Powledge, *Black Power/White Resistance: Notes on the New Civil War* (Cleveland: World Publishing Co., 1967). For a clear and concise summary of the history of the Negro protest movement from the very beginnings up to the present, see *Report of the National Advisory Commission on Civil Disorders*, 1968, Ch. 5.

prejudice. Thus such practices have been permitted to become a part of the pattern of contemporary American society, in effective nullification of the constitutional mandate.[2]

And though subsequent decisions of the court[3] attempted to help the black man's legal status, they did little to stem the pervasiveness of white dominance of black Americans.

Nor did the other branches do much toward removing the vestiges of racial segregation and discrimination. For more than three-quarters of a century after the Reconstruction legislation, Congress failed to act. Though there were some presidential actions, such as Roosevelt's establishment of a Committee on Fair Employment Practices and Truman's action ending segregation in the armed forces, they were minor compared to the depth of deprivation of civil rights encountered by the black minority. Until recent times, then, national action to safeguard civil rights proved inadequate and ineffective.

But in 1954 things began to change. This was the year of the famous Supreme Court decision in *Brown* v. *Board of Education* (347 U.S. 483 [1954], 349 U.S. 294 [1955]). Here the court declared racial segregation in public schools unconstitutional and subsequent court action has applied Brown to other areas of public activity. This court action not only reversed the Plessy decision, but it also gave impetus to civil rights activity at the national level generally. Congress passed the first civil rights legislation since Reconstruction in 1957 and followed this up with the Civil Rights Act of 1960. Though positive in tone, both acts were actually modest, pertaining as they did to the most basic of civil rights — voting and attempts at eliminating discrimination in voting practices.

[2] Thurgood Marshall, "The Supreme Court as Protector of Civil Rights: Equal Protection of the Law," *Annals of American Academy of Political and Socid Sciences*, 275 (May, 1951): 101.

[3] See, for example, court decisions outlawing the white primary (*Smith* v. *Allwright*, 321 U.S. 649 [1944]); declaring the "grandfather clause" unconstitutional (*Guinn* v. *U.S.*, 238 U.S. 347 [1915]); and a number of cases leading up to the 1954 Brown decision declaring public school segregation unconstitutional, e.g., *Gaines* v. *Canada*, 305 U.S. 337 (1938), and *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

In 1964, after the previous year's racial strife in Birmingham, Alabama, and the tragic assassination of President Kennedy, President Johnson asked Congress to pass the civil rights legislation which Kennedy had initiated as a lasting memorial to him. The 1964 Civil Rights Act which Congress subsequently passed put forth a comprehensive national policy of eliminating racial injustices in such areas as voting, public accommodations, and employment. However, despite this sweeping legislation, the wave of racial violence continued. It was becoming abundantly clear that policies designed to cure the old civil rights problems, as exemplified in the 1964 act, did not really come to grips with the root problem: a decent life for poor Americans in general and black Americans in particular. Social and economic justice was needed to make political justice (for example, voting) meaningful.

The Johnson administration, with a cooperative Congress, responded to the situation which has since become known as the "crisis in our cities." In addition to the Civil Rights Act of 1964 and the Voting Rights Act of 1965, Congress enacted broad-scale legislation as ammunition in President Johnson's "war on poverty": the Model Cities, Rent Supplement, Medicare and Medicaid, Job Corps, Neighborhood Youth Corps, and Manpower Development programs. But as the war in Vietnam grew hotter, the war on poverty grew colder. Civil rights leaders and others became disturbed to see "the crisis in our cities" and the "pangs of hunger" take a back seat to Vietnam and to our efforts in space. They questioned the nation's sense of values and priorities. In addition, the "war on poverty" became embroiled in a maze of bureaucratic and political bickering. In any event, as President Nixon took office, the programs designed to eliminate poverty were all but at a standstill. The extent to which the Nixon administration is able to reenergize these programs and make them effective depends not only on factors such as Vietnam but also upon the willingness of state and local governments to commit themselves to positive civil rights policies — those designed to eradicate poverty and racial injustice.

In summary, although judicial and legislative actions have removed most legal barriers, black Americans and others are far from being free to share and participate fully in the rewards and responsibilities of the

American political system. They have had more than their share of the deprivations of that system. Whereas past legal targets have been the more visible barriers to racial justice, today's targets include the more subtle features of American society, features highlighted by the Kerner Commission's concept of "white racism," a concept that embraces the pervasiveness of racial injustice in America.

The problems identified by the Kerner Commission cannot be cured by the national government alone. States, too, must act. Neither can they be solved by judges alone. Legislators and administrators must also get into and stay in the action. But it may be that just as the U.S. Supreme Court provided impetus for action at the national level, so may state courts have to provide leadership at the state level. State constitutions should give them a firm basis to do so. But let us not get ahead of the story. Let us now backtrack and recount the experience of Illinois and other states in dealing with civil rights problems.

Guarantees of Civil Rights in Illinois Constitutions

Like most other states in the past, Illinois has given very little consideration to the civil rights of blacks and other minority groups. Upon entering the Union in 1818, the state adopted an official policy prohibiting slavery and involuntary servitude except as punishment for crimes (1818 Const., Art. VI, Sec. 1). However, it has been pointed out that although the constitutional provision on slavery was "sufficiently restrictive to cause Illinois to be regarded as a free state," the recognition of indentured servants and the protection extended to such contracts "practically amounted to slavery."[4] On the other hand, a provision of the Bill of Rights in the 1818 constitution declared "That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing and of pursuing their own happiness" (Art. VIII, Sec. 1). But this noble expression of liberty was not intended to apply to blacks, mulattoes, and Indians, for the

[4] See Neil F. Garvey, *The Government and Administration of Illinois* (New York: Thomas Y. Crowell, 1958), p. 25.

article on the militia considered them to be separate and apart from the white citizenry and excluded them from service in that body.

The constitution of 1848 reveals no significant change in the constitutional status of blacks in Illinois. By contrast, the delegates who drafted the constitution of 1862 (rejected by the voters), undoubtedly reflecting the concern for the race problem embroiled in the Civil War, agreed to a number of restrictions on blacks and mulattoes to keep them in a secondary status. One provision prohibited them from migrating to or settling in the state, another denied them the franchise and the right to hold public office, and a third authorized the General Assembly to enact legislation to implement the two previous provisions (proposed 1862 Const., Art. XVIII, Secs. 1 and 2).

Perhaps the constitutional convention of 1869-70 considered the problem of the rights of blacks settled by the Civil War and the subsequent adoption of the Thirteenth, Fourteenth, and Fifteenth amendments to the federal Constitution. To be sure, the only attention given to the status of blacks during the proceedings centered around the nature of their service in the state militia. One proposal provided for racially segregated units in the militia and another would have prohibited black officers from commanding white militiamen. Both were rejected[5] and the article adopted by the convention removed all racial restrictions on such service. Nevertheless, in our present Illinois Constitution there is no specific guarantee that civil rights shall be extended to all men regardless of race. This is a significant omission in view of the fact that the constitution does spell out that "no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions" (Art. II, Sec. 3).

In the years following the adoption of the constitution of 1870, the rights of blacks, and of any minority group for that matter, were dealt severe setbacks by decisions of the U.S. Supreme Court in the Civil Rights Cases in 1883 and in *Plessy* v. *Ferguson* in 1896, discussed above. The practical effect of these decisions was to leave to the several states the power to determine the scope of the rights of blacks.

While Illinois legislation declared against the policy of "separate but

[5] *Journal of the Constitutional Convention of 1869-70*, pp. 478ff.

equal" in several actions, black delegates to the convention of 1920 thought such an important policy declaration should be included in the state constitution. Accordingly, they asked that the constitution include a provision that would proscribe any legislative action designed to legitimize segregation practices. Specifically, their proposal provided that "[l]aws be applicable alike to all citizens without regard to race or color, and no citizen, by reason of his race or color, shall be prohibited from doing anything that any other citizen may do."[6] Careful examination of the debates suggests that the intent of this provision was to provide a shield for blacks in the state constitution against further erosion by U.S. Supreme Court interpretation of the equal protection clause of the Fourteenth Amendment. Delegate Edward H. Morris, the sponsor, stated in debate:

> . . . [M]ost of the men who were instrumental in bringing about the adoption of [the Thirteenth, Fourteenth, and Fifteenth] amendments thought . . . that they had thrown around the men of color . . . such a complete armor that it would be impossible for any state to pass a law making a distinction simply and solely because of race or color.
>
> But beginning with the decision in *Plessy* v. *Ferguson,* in which Mr. Justice Harlan so vigorously dissented, the Federal Court began to take the position that it was within the power of every state to so regulate its internal affairs that distinctions could be made. Many of the best men of the country at that time agreed with Mr. Justice Harlan. . . .
>
> But, every fairly good citizen must bow in obedience to the law and in respect to his superiors in office, and so the men and women of color . . . bowed in obedience to the law of the land as laid down by our highest tribunal. . . .
>
> So, this measure has been presented with the view of having this Constitutional Convention say to all law-making powers in the State of Illinois, "You shall never pass any law rendering a citizen unequal to any other citizen because solely of the race or color of that citizen. . . ." It simply says to a class of citizens: "You are absolutely assured of your legal rights and no law-making power that shall ever assemble in the State of Illinois can take away from you those rights because of something over which you have absolutely no control."[7]

[6] Proposal No. 136, introduced by delegate Morris from Cook County.

But the proposal met stiff opposition. Opponents argued that such a provision was unnecessary. The Bill of Rights, they said, made no distinction with regard to race or color and that consequently blacks have exactly the same rights as whites. They contended that to adopt such a proposal would constitute an insult to the "sense of justice" of the people of Illinois. "The colored man," said one delegate, "can afford to trust in the future as he has trusted in the white man in the past . . . to continue to protect him. . . ."[8] In the end, and after consideration of several substitute proposals and amendments, the convention adopted a mild version of the Morris proposal: "[l]aws will be applicable alike to all citizens without regard to race or color." But this action proved to be of little consequence since the proposed constitution was rejected by the voters.

Illinois Legislative Action against Discrimination

Before the Civil War Illinois legislation regarding the rights of minorities was mainly restrictive. Despite its admission to the Union as a free state, the first General Assembly enacted a series of measures designed to restrict the liberty of blacks, mulattoes, and Indians. Among them was one which prohibited appearance of persons belonging to these three groups as witnesses in judicial proceedings except in those cases in which they alone were parties,[9] and another required blacks and mulattoes to file with the clerk of the county court a certificate of freedom as a condition for establishing residence in the county and state.[10] In addition, the latter statute required the black or mulatto migrant to register himself and his family with the clerk. Other provisions restricted assemblies of blacks to no more than three, prohibited seditious speeches, and forbade transporting slaves into the state for purposes of emancipation. Additional measures were enacted in 1829 and 1833 dealing with

[7] *Proceedings of the Constitutional Convention of 1920,* 4, pp. 3695-96.
[8] *Ibid.,* 2, pp. 1980-81; Delegate Sylvester Gee of Lawrence County.
[9] *Sess. Laws of Ill.,* 1819, p. 143.
[10] *Ibid.,* p. 354.

runaway slaves, prohibiting marriage between colored and white persons, and prohibiting colored and white children from attending school together. These "black codes," as they came to be known, were repealed in 1865 with the end of slavery and the Civil War.

1. *Public Accommodations*

Following the Civil War, Illinois was one of the first states to enact a civil rights statute prohibiting racial discrimination in public accommodations. Patterned after the federal Civil Rights Act of 1875, this law, which was enacted in 1885 and is still in effect, proclaimed that all persons were "entitled to the full and equal enjoyment" of various privately operated facilities and accommodations open to the public. Specified were inns, restaurants, eating houses, barber shops, public conveyances on land or water, theaters, and all other places of public accommodation and amusement.[11] In subsequent action, the General Assembly added to the list of places covered by the act. In 1897, hotels, soda fountains, saloons, bathrooms, skating rinks, elevators, ice cream parlors, railroads, omnibuses, stages, streetcars, and boats were added.[12] Subsequent legislation added funeral hearses, cemeteries, airplanes, clothing, hat, shoe, and department stores, and golf courses and golf driving ranges. A 1951 act also prohibits racial discrimination by concessionaires in state parks and natural preserves; the governor and the Department of Conservation are directed to terminate concession leases when violations are proved.

Enforcement procedures of the 1885 civil rights law are modeled after those employed in other states. Violators are subject to civil damages of from $100 to $1,000 for each offense. In addition, misdemeanor charges may be brought where a conviction is punishable by a fine of not more than $1,000 or six months' imprisonment or both. Furthermore, a place found to be operating in violation of the law may be declared a public nuisance and abatement proceedings may be instituted.[13]

General responsibility for enforcement is vested in all state, county,

[11] *Ibid.*, 1885, p. 64.
[12] *Ibid.*, 1897, p. 137.
[13] *Ill. Rev. Stat., 1967*, Ch. 38, par. 13-3.

and municipal officials. However, in practice, serious enforcement efforts rest with the state's attorney in each county. The statute directs him to "use every legitimate means at his command to secure the necessary . . . evidence" of statutory violations and to "vigorously prosecute" them.

Unlike New York and several other states, Illinois has not created a special commission to aid in the compliance with and enforcement of its civil rights legislation. Instead, the General Assembly enacted legislation in 1943 creating and placing in the Attorney General's Office the Division for the Enforcement of Civil and Equal Rights. The division is authorized to investigate all violations of civil rights laws and upon determining that such exist, it is directed to institute enforcement measures.[14]

2. *Fair Employment Practices*

Illinois was one of the most reluctant of the nation's large industrial states to enact a fair employment practices law to prohibit racial discrimination in private employment. Beginning in 1939, FEP proposals were introduced in the General Assembly in each regular session, but Illinois adopted such a law only in 1961, sixteen years behind the pacesetter New York. New Jersey, Wisconsin, Massachusetts, Connecticut, New Mexico, Oregon, Rhode Island, Washington, Alaska, Colorado, Michigan, Minnesota, Pennsylvania, California, Ohio, and Delaware all enacted fair employment practices laws before Illinois.

While Illinois was slow to move against private employers, the General Assembly had enacted two earlier measures directed at discrimination in public employment. In 1933, the General Assembly passed a law prohibiting racial discrimination in employment by contractors engaged in public works. The measure covers subcontractors as well, and both civil and criminal sanctions may be invoked against violators.[15] The second measure was passed in 1941 in furtherance of the national defense effort. Proclaiming the need for "integration into the war defense industries of the state . . . of all available types of labor," the act pro-

[14] *Sess. Laws of Ill.*, 1943, p. 210.
[15] *Ibid.*, 1933, p. 296.

hibited discrimination in employment and apprenticeship programs of defense contractors.[16] Violations of this act were made punishable by a fine of up to $500 for each day's violation.

The Illinois fair employment practices law of 1961 follows the basic policy declaration of some forty other states by proclaiming as its objective equal employment and apprenticeship opportunity without discrimination because of race, color, religion, national origin, or ancestry. At the same time, the statute declares as a policy objective the protection of employers, labor organizations, and employment agencies from unfounded charges of discrimination.[17]

Enforcement responsibility is placed in a five-member bipartisan Fair Employment Practices Commission. The members are appointed by the Governor with the advice and consent of the Senate for four-year staggered terms. The commission functions primarily as a conciliatory body. It investigates complaints of unfair and discriminatory employment practices and, upon a finding that illegal practices exist, confers with the parties involved in an attempt to effect a settlement and to eliminate the practices in question. As a supplement to its conciliatory function, the commission may direct the parties in a dispute to appear at a public adversary hearing, which could lead to a cease and desist order upon a substantiation of the charges. Such an order, when issued by the hearing's examiner, is subject to review by the commission and the court.

When the Illinois law is compared with other state FEP laws, two significant weaknesses appear. In the first place, the act provides far less coverage than all states except Missouri. When the act became effective in 1961, it applied to employers of 100 or more. This figure was reduced to seventy-five or more in 1963, to fifty or more in 1965, and to twenty-five or more in 1968. The laws of seven states — Alaska, Delware, Hawaii, Idaho, Iowa, Vermont, and Wisconsin — contain no numerical exemptions. Of the large industrial states comparable to Illinois, Ohio covers employers with four or more employees, California with five or more, Indiana, New Jersey, and New York with six or more,

[16] *Ibid.*, 1941, p. 557.

[17] *Ill. Rev. Stat., 1967,* Ch. 48, Sec. 851.

Michigan with eight or more, and Pennsylvania with twelve or more. Only in 1968 did an amendment to the Illinois statute provide for coverage of governmental units irrespective of their number of employees.

The other major weakness of the Illinois statute is the limited authority of the commission. It is not permitted to initiate actions against violators. Instead, it must await the filing of a complaint by an aggrieved person. In addition, when compared with other states the commission lacks sufficient remedial powers. For example, the Illinois law authorizes the issuance of a cease and desist order requiring the employer "to take such further affirmative actions" necessary to eliminate the unfair practice in question. On this same point, the California law empowers the commission "to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay" in eliminating unfair employment practices.[18] The New York law contains a similar provision. In addition, the New York commission is empowered to formulate policies and make recommendations to state and local agencies to aid in effectuating the policy objectives.[19]

3. Fair Housing

The General Assembly's steadfast refusal to enact legislation prohibiting racial discrimination in the sale or rental of private housing has been one of Illinois' major shortcomings in the civil rights area.[20] In a decade which saw the number of state fair housing laws covering private housing increased to twenty-three,[21] the number of municipal fair housing ordinances in Illinois increased to eighty, and the enactment of a fair housing law by Congress, the General Assembly bucked the tide and rejected proposals of such legislation in five successive regular sessions.

[18] *Deering Calif. Code Anno., Labor,* Sec. 1426.

[19] *McKinney's Consol. Laws of N.Y., Anno., Executive Law,* Art. XV, Secs. 294 and 297.

[20] To be sure, Illinois law prohibits racial discrimination in public housing and outlaws restrictive covenants in urban renewal areas: *Ill. Rev. Stat., 1967,* Ch. 67½, Secs. 8.15 and 318.

[21] Kentucky and all of the nation's large industrial states have such laws.

These proposals were similar to statutes passed in other states. They enumerated and prohibited certain unfair housing practices in the sale and rental of private housing, specified an administrative agency to enforce the law, prescribed detailed procedures for processing complaints, and provided for judicial review of administrative actions. In addition, the proposals contained exemptions such as "Mrs. Murphy's boarding house" clauses to exempt small apartment buildings in which the landlord lived. In 1965 and again in 1969 a fair housing bill passed the House of Representatives only to be killed in the Senate.

Several attempts to amend existing laws to prohibit discrimination in the private housing market were successful in the House, but were killed by the Senate. Two such bills were passed by the House in 1965. One added racial discrimination in real estate transactions as a cause for the suspension and revocation of real estate brokers' licenses and the other amended the public accommodation section of the Criminal Code to include in the definition of a place of public accommodation real estate offices, banks, and savings and loan associations. The Senate did relent, however, during the adjourned session of the 75th General Assembly when it approved a House bill clarifying the power of municipalities with respect to fair housing ordinances.[22] The effect of the statute was to solidify existing fair housing ordinances and to stimulate enactment of others. Also during the 75th General Assembly, a measure was passed outlawing the real estate practices of "blockbusting" and "panic peddling."

While advocates of fair housing were receiving rough treatment from the legislature, they found some support in the executive branch when on July 10, 1963, Governor Kerner promulgated a code of fair practices to govern operations of all state agencies under his control. The code declared that "all persons are entitled to equal and fair treatment by the State without regard to race, color, creed, or national origin." It required all state agencies that "license or regulate activities whose services are available to the public" to take action "to assure that such services are extended . . . on a nondiscriminatory basis." Pursuant to this code and upon recommendation of a statutory examining committee, the Department of Registration and Education promulgated Rule 5 in July, 1966, which provides:

[22] *Ill. Rev. Stat., 1967,* Ch. 24, Sec. 11-11.1.

1. No registrant shall enter into a listing agreement which prohibits the sale or rental of real estate to any person because of race, color, creed, religion or national origin.

2. No registrant shall act or undertake to act as a real estate broker or real estate salesman with respect to any property, the disposition of which is prohibited to any person because of race, color, creed, religion or national origin.

The rule was sustained against a challenge in *Chapman* v. *Watson* (240 N.E. 2d 604 [1968]). The state Supreme Court reasoned that the departmental authority to issue the rule came from its statutory power "to make and enforce reasonable rules and regulations in connection with the issuance, renewal, revocation, suspension, or recall of certificates of registration."[23]

4. Education

The only significant legislative action on the problem of de facto school segregation came in the 73rd General Assembly in 1963 with the enactment of the so-called Armstrong Act. The act focuses on two activities of school boards. First, it directs school boards, in the creation of new attendance units, to be governed by policies which would prevent or eliminate racial segregation. Boards are also required to revise existing attendance units from time to time with the aim of preventing and eliminating racial segregation in public schools. The records of all actions creating and revising attendance units are to be kept open to the public. The second activity to which the act is directed is the construction and acquisition of public school buildings. It proscribes board action on this matter that would promote racial segregation.[24]

An earlier amendment to the school code in 1957 was no more than a weak effort toward preventing discriminatory practices by local school boards. Under its provision, a prerequisite for claiming state aid funds is the execution of a sworn statement indicating that the board is in

[23] *Ibid.*, Ch. 114½, Sec. 3.08.

[24] *Ibid.*, Ch. 122, Secs. 10-21.3, 34-22.

compliance with the nonracial segregation requirement in pupil assignments.[25] The same kind of statement is required with regard to teachers and other school personnel.

While there has been general debate on the matter of racial imbalance in the public schools, the Illinois General Assembly has not considered legislation which would authorize local school boards the power to take action to eliminate such imbalance.

CIVIL RIGHTS AND THE NEW STATE CONSTITUTIONS

The guarantee of civil rights to minorities was not an issue confronting the early constitution makers. Of the constitutions adopted during the era immediately preceding the 1954 Brown decision, only those of New York (1938) and New Jersey (1947) contain significant policy declarations against discrimination.[26] Most of the early constitutions provided for equality of persons as a general proposition with no reference to differentiations like race, religion, or national origin. Among state constitutions adopted during the nineteenth century, only the constitutions of Arkansas (Const. of 1874, Art. II, Sec. 3), South Carolina (Const. of 1895, Art. I, Sect. 5), and Wyoming (Const. of 1890, Art. I, Sec. 3) contained provisions guaranteeing equality with special reference to race or color. But today the situation is quite different. The guarantee of civil rights for all is now of central concern to those who write state constitutions. Let us see how the issue has fared in recent constitution-making.

1. *Alaska and Hawaii*

Alaska and Hawaii, the last two states to be admitted to the Union, adopted constitutions shortly after the Warren Court's decision in *Brown* v. *Board of Education* commenced the nation's civil rights revolution.

[25] *Ibid.*, Ch. 122, Sec. 18-12.

[26] For example, the constitution of New York, 1938, Art. I, Sec. 11, provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." Also see Const. of N.J., Art. I, Sec. 5.

Convention proceedings reveal very little discussion and no controversy about the inclusion of strong civil rights guarantees in the two documents. The provisions in both are concise statements prohibiting the denial of the enjoyment of civil rights because of race, creed, color, or national origin. The Hawaii provision is an expanded version of the traditional equal protection clause (Art. I, Sec. 4), while the Alaskan framers did not find it necessary to use such traditional language. But the Alaskan framers appeared to take a step toward positive action beyond the mere declaration of policy when they included a clause directing the legislature to implement the civil rights provision (Art. I, Sec. 3).

2. *Michigan*

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

Several proposals for equal rights were introduced, but attention focused on two of them. One was a two-section proposal offered by President Hannah that provided:

> Sec. 1. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the state.
>
> Sec. 2. . . . No person is to be denied the enjoyment of any civil or political right because of race, color, religion, ancestry or national origin. The legislature shall implement this section.[27]

The other proposal was a more explicit declaration of civil rights for

[27] *Mich. Con. Con. Record*, 1961-62, p. 740.

which constitutional protection was sought. Its principal section provided: "Each person in Michigan shall enjoy the equal protection of the law. No person shall, because of his race, color, religion, national origin or ancestry, be discriminated against in employment, housing, public accommodations, education, or in his enjoyment of all other of his civil rights by the state or any political subdivision thereof, or any firm, corporation, institution, labor organization or any other firm."[28]

In the end, the Hannah proposal was recommended to the convention by the Committee on Declaration of Rights, Suffrage, and Elections. The committee majority reasoned that as a general proposition, constitutional limitations should serve as a restraint on government but should not define private duties. Furthermore, the committee reasoned that having declared a general nondiscriminatory policy, the areas in which private discrimination is forbidden, the extent to which discrimination is prohibited, and the sanctions to be applied should be left to legislation.

A minority of the committee supported the second proposal because they felt that enumerating areas in which discrimination is forbidden aids in enforcement and does not necessarily connote limitation of the nondiscriminatory policy. Apparently of greater significance was the proposal's imposition on private as well as public agencies of a duty of nondiscrimination in the exercise by all persons of their civil rights. The convention approved the committee recommendation with some modification and the civil rights provision eventually adopted provides: "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation" (Const. of 1964, Art. V, Sec. 29).

The framers of the Michigan Constitution took another significant stride in the civil rights field when they created and placed in the executive article a civil rights commission. The question was not whether there should be a commission (the Committee on the Executive Branch had agreed unanimously to recommend its creation), but whether the

[28] *Ibid.*, Delegate Proposal 1621.

commission would be granted adequate power to operate effectively.[29] Debate on the issue revealed additional concern over responsibility for and the timing of establishment.[30] The original proposal as recommended by the Committee on the Executive Branch provided for legislative establishment, but in the event of the legislature's failure to act within two years after the adoption of the constitution, the authority for establishing the commission went to the governor. It was feared that the original proposal could lead to a shifting of responsibility and to a protracted hang-up between the legislative and executive branches over establishment. Consequently, the convention accepted an amendment which called for a simple self-executing provision in the executive article which creates the commission. As finally adopted, the provision calls for an eight-member bipartisan commission (not more than four from the same political party) appointed by the governor (with senatorial confirmation) for four-year staggered terms. The commission is directed "to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by [the] constitution and to secure the equal protection of such rights without . . . discrimination." In accordance with constitutional and statutory provisions governing administrative agencies, the commission is empowered to: (1) make its own procedural rules and regulations; (2) hold hearings and take testimony; (3) subpoena (through court authorization) witnesses and records; and (4) issue orders. The legislature may grant the commission additional powers to aid in performance of its functions and is directed to provide an annual appropriation for the *effective operation* of the commission. As would be expected, provision is made for judicial appeals of commission orders but, in addition, commission refusals to issue complaints are made appealable (Const. of 1964, Art. V, Sec. 29).

3. *New York*

As noted above, the New York Constitution adopted in 1938 contained

[29] See James K. Pollock, *Making Michigan's New Constitution* (Ann Arbor: George Wahr Publishing Co., 1962), pp. 66-68.

[30] *Mich. Con. Con. Record*, 1961-62, pp. 1921-33, 1950.

one of the earliest and most advanced provisions on civil rights ever adopted by a state. Pursuant to this constitutional declaration of policy, the state legislature enacted several significant antidiscrimination statutes covering such matters as housing, employment, and education. In addition, it created the State Commission Against Discrimination and granted it broad powers to eliminate discriminatory practices. Consequently, in the 1967 constitutional convention, only minor changes were sought in the civil rights section. Prior to the convention Professor Jack Weinstein of the Columbia University Law School drafted a new constitution which included a brief addition to the civil rights provision (Art. I, Sec. 11) aimed at resolution of difficulties in taking corrective action in the field of education.[31] It provided that the legislature take affirmative action to eliminate existing discrimination. The expansion of the concept of civil rights to include social and economic rights is clear in his proposal that "The state shall foster the health and welfare of its citizens through a partnership of public agencies and voluntary organizations where practicable, by providing: care for the helpless, the needy and the sick; protection against physical and mental illness; conditions encouraging maximum realization of the individual's independence; freedom from discrimination, unemployment, and the anxieties of old age; personal safety; and decent housing, recreation facilities and aesthetic surroundings" (Art. I, Sec. 2).

While Professor Weinstein's suggestions were not available to the convention, the delegates did make several significant modifications in the civil rights article (proposed Const. of 1967, Art. I, Secs. 3a and 3b). First, the original article, which forbade discrimination on account of race, color, creed, religion, and national origin, was expanded to also prohibit discrimination on account of age, sex, and physical or mental handicap. Moreover, and quite significantly, by adding the words "public or private" to modify the words "person, corporation or unincorporated association," the convention made it clear that the civil rights

[31] Jack B. Weinstein, *A New York Constitution Meeting Today's Needs and Tomorrow's Challenges* (New York: National Municipal League, 1967), p. 61. Professor Weinstein's proposed draft was not available to the convention because of his appointment to the federal bench just prior to the convening of the convention.

section was to apply to both public and private sources of discrimination. In addition, the civil rights section was amended to prevent public funds from being granted, loaned, or invested with private or public entities found to be in violation of constitutional guarantees. The convention also added provisions forbidding discrimination in employment and labor union membership (Art. I, Sec. 10) and a provision that authorized the legislature to take affirmative action in dealing with educational problems of specific groups such as blacks and Puerto Ricans (Art. IX, Sec. 1c).

In the end, New York voters rejected the constitution proposed by the convention.

4. *Pennsylvania*

Limited by the convention call, the Pennsylvania constitutional convention of 1967-68 was not authorized to consider the Bill of Rights article in which the civil rights guarantee is included. However, an antidiscrimination section was added to that article by amendment in May, 1967. It provides that "neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil rights, nor discriminate against any person in the exercise of any civil right" (Art. I, Sec. 26).

5. *Maryland*

The new Maryland Constitution, rejected by the voters in 1968, contained equal protection and nondiscrimination clauses in the article on declaration of rights. The clauses are preceded by a due process of law clause carried over from the old constitution and provide that "no person shall . . . be denied the equal protection of the laws, nor be subject to discrimination by the State because of race, color, religion or national origin" (proposed Const. of 1968, Art. I, Sec. 1.03). In recommending the clauses, the Constitution Convention Commission contended that while some of the language was similar to that found in the Fourteenth Amendment to the U.S. Constitution, "the states themselves bear the responsibility for enlarging upon the basic protections in the national Constitution." The clause's emphasis, however, is directed at govern-

mental discrimination as no specific reference to private action is included.

6. *Virginia*

The Commission on Constitutional Revision included a nondiscrimination clause in its proposed draft of a new constitution submitted to the General Assembly in 1969. The proposed clause would be added to the existing due process section (Art. I, Sec. 11) and provides "that the right to be free from any governmental discrimination upon the basis of religious or political conviction, race, color or national origin shall not be abridged. . . ." As in the case of Maryland's proposal, the clause omits any reference to private discrimination. This omission, coupled with the failure to include an "equal protection of the laws" requirement, appears to leave any prohibition of private discrimination to legislative chance and the legislative history of Virginia suggests that a statutory proscription is highly unlikely in the near future.

CONCLUSION

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

In short, the need to include specific provisions in the state constitution seems compelling. In a speech before the opening session of New York's 1967 state constitutional convention, the late Senator Robert F. Kennedy put it this way: ". . . The constitution should be a document of principle — protecting the process of democracy itself, distributing general powers among the institutions, *and placing the rights and liberties of the minority* — even a minority of one — behind an implacable constitutional barrier to official power and private assault. . . ."[32] In

[32] Quoted in *ibid.*, p. 5 (emphasis added).

a similar vein, Chairman James K. Pollock of the Committee on Declaration of Rights, Suffrage, and Elections in the Michigan convention of 1962 stated that "the incorporation of civil rights provisions [in the state constitution] is in accord with the contemporary trend in state constitution writing."[33]

The present Illinois Constitution was written in 1870. It has not been updated through the amending process to reflect the increasingly important role of government in the protection and fulfillment of civil rights. Nor does it contain the minimal equal protection clause under which courts have struck down a number of racial discrimination practices. While some might argue that the equal protection clause of the Fourteenth Amendment and its case law progeny afford sufficient protection against racial discrimination, they fail to take into account that the Civil Rights Cases of 1883, which held that Congress does not have the power under that amendment to prohibit private discrimination, have never been specifically overruled. Therefore, the concept of "state action" is still determinative. Consequently, state constitutions can prove important in eliminating the fine line that is sometimes drawn between "state" and "private" action.

Some state legislatures have acted to prohibit private discriminatory practices infringing civil rights. However, experience shows that without a clear-cut consitutional declaration of policy and a mandate to enact legislation pursuant to such policy, little is achieved. Michigan, for example, did not enact a fair housing law until the legislature was charged with enacting appropriate legislation to implement the constitutional declaration of policy. New York's legislature followed up its 1938 nondiscrimination constitutional policy with laws prohibiting racial and religious discrimination in employment (1945) and housing (1955) and the creation of the State Commission against Discrimination (1945). New Jersey's 1947 constitutional declaration was followed with legislative action designed to eliminate discriminatory practices in its educational system (1949) and the housing market (1955). Pennsylvania, following the adoption of its antidiscrimination amendment in the spring of 1967, enacted several laws to strengthen its antidiscrimination legis-

[33] *Mich. Con. Con. Record*, 1961-62, p. 740.

lations. These laws were directed at real estate practices in the private housing market, discrimination in apprenticeship programs, and increasing the authority of the State Human Relations Commission.

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

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

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

There is a division of opinion as to whether the equal protection clause of the Fourteenth Amendment imposes an affirmative duty on government to eliminate racial discrimination, e.g., de facto public school segregation. Our suggested "necessary and proper" clause avoids the legal fuzziness concerning positive governmental actions when measured under present interpretations of the equal protection clause and gives the state the flexibility to take *positive* actions designed to guarantee that "no person shall suffer any disadvantage. . . ."

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

On this matter we feel that the Illinois practice of not including commissions in the constitution should not automatically rule out a constitutional commission on civil rights. There is nothing sacred about the existing pattern and, furthermore, giving constitutional status to a body which concentrates its efforts on civil rights policy underscores and emphasizes the magnitude of the problem and the overriding concern of the people to seek solutions to it. In addition, constitutional status would avoid any legislative-executive "tug of war" over the creation of a commission, a possibility which led the Michigan framers to include their commission in the constitution. Indeed, past legislative experience in Illinois on civil rights policy would seem to suggest a similar approach.

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4. SUFFRAGE

by William Goodman

THE RIGHT TO VOTE gives the people a regular and recognized influence in the determination of public affairs. All citizens have civil rights but only some have the right to vote. The basis for making this distinction is the acceptance of certain standards for a voter although the tendency in the United States has been to accept more and more people as properly being part of the electorate.

The power to make decisions as to who can and cannot vote remains with the individual states, but this power is limited in some respects by provision of the United States Constitution and acts of Congress.

Illinois constitution makers may choose from a wide range of suffrage requirements employed by the other states. In addition, there are possibilities beyond existing provisions in the proposals made to the states and to the federal government to liberalize such laws as those relating to residence, registration, and the minimum age.

Subjects related to suffrage are also included in this paper: ballots and methods of voting, the election calendar, and the initiative and referendum.

THE PURPOSE OF SUFFRAGE LAWS

A government which derives its powers from the consent of the governed must provide the broadest possible participation in voting. To speak of the broadest possible participation, however, means that there are restrictions on the exercise of suffrage. The Illinois Supreme Court has held that the right to vote is not a natural or inherent right but exists only as conferred by the constitution or statute (*Scown* v. *Scarnecki*, 264 Ill. 305 [1914]), and that the right to vote is a conditional, not

inalienable, right (*Tuthill* v. *Rendleman,* 387 Ill. 321 [1944]). Voting has universally been restricted to that part of the total population considered sufficiently responsible to exercise the right, but the restrictions have progressively disappeared as more and more people have been considered responsible and, therefore, entitled to participate.

To be eligible to vote, it is generally agreed, a person has to meet certain standards. One of these standards is *maturity.* Although this is extremely difficult to define or measure, the practical way of making the judgment has been to set a minimum-age requirement. A second standard has been *familiarity with the candidates and issues.* Those who met this standard have an identification with one another and possess the knowledge to make decisions. This standard has been determined by requirements of citizenship and residence within the state and its subdivisions. A third standard requires a degree of *mental and moral competence* and is applied by making certain exclusions from the total electorate. Those of unsound mind and those convicted of particular crimes or incarcerated in prisons are not eligible. Literacy or educational requirements also fall within this category.

In the interest of orderly and regular procedures in voting, other legal requirements have been added. These are not, in most states, qualifications for voting but are protections for those who do vote and for the integrity of elections. First, the registration of voters determines who is eligible to vote, a process made necessary by the growth and concentration of population. Second, corrupt practices acts assure qualified voters that their votes will be counted accurately and that abuses or irregularities will be prohibited.

Federal Limitations on Suffrage Laws

The suffrage requirements in each state are determined by its own constitution or statutes. This state function antedated the writing of the United States Constitution, which in Article I, Section 2, adopted state qualifications for voting for members of the House of Representatives. The Seventeenth Amendment, which required the direct election of United States senators, adopted state qualifications for electing senators. In 1875 the United States Supreme Court held that voting arises from

state, not national, citizenship (*Minor* v. *Happersett,* 21 Wallace 162 [1875]).

However, the attitude of Americans has gradually shifted so that problems arising from suffrage laws are conceived of as being national instead of exclusively the responsibility of the individual states. As in many other areas of governmental activity, when state practices have become controversial, the tendency has been to favor federal intervention and to advocate federal requirements directly superseding those of the states. Such a transition has not yet occurred and state constitution makers still assume the responsibility for determining positive suffrage requirements. At the same time, the delegates are limited because state constitutional provisions must conform to Supreme Court interpretations of the United States Constitution.

The federal Constitution specifically limits the states in determining who is eligible to vote. The states are forbidden to disfranchise anyone by reason of "race, color, or previous condition of servitude" (Fifteenth Amendment) or by requiring the payment of a poll or other tax in a federal election (Twenty-fourth Amendment) or in a state or local election, according to the United States Supreme Court. The Nineteenth Amendment forbids the states to disfranchise anyone by reason of sex and thus invalidates the word "male" in Article VII, Section 1, of the Illinois Constitution. In fact, in the 1869-70 constitutional convention in Illinois there was sentiment in favor of deleting the word "male." A motion favoring woman suffrage lost 46 to 12 and another motion to submit the question of woman suffrage to a referendum of the voters was defeated 32 to 28. In 1920 the national government resolved the question, and Illinois women have been voting ever since, although the word "male" remains in our constitution.

The United States Constitution, in Article I, Section 4, gives Congress the power to make or alter state regulations regarding the times, places, and manner of holding elections for members of Congress. By Supreme Court interpretation, Congress can also regulate the election of presidential electors where they are popularly elected, as they are in all states. Decisions of the court indicate that Congress has the power to prevent fraud, violence, or restrictions of suffrage in the federal election process whether or not the actions prohibited are legal under state law.

Federal regulation of elections has been increased by Supreme Court interpretations of the Fourteenth Amendment. *Baker* v. *Carr*, 362 U.S. 186 (1962), required equal apportionment of state legislatures under the equal protection clause, and subsequent reiteration by the court of the one man–one vote doctrine seems to establish as a right the opportunity of every voter to full and equal participation in voting. *Gaston County, N.C.* v. *U.S.* in 1969 invalidated a North Carolina literacy test for voting on the ground that it was racially discriminatory because black residents had been deprived of an equal educational opportunity as a result of segregated and unequal school systems.

Congress has intruded upon the literacy requirement of the states as well. In the Civil Rights Act of 1964, it was provided that literacy tests be in writing, that applicants be able to examine their tests after taking them, and that sixth-grade education be accepted as proof of literacy. In the Voting Rights Act of 1965, literacy in a language other than English was sufficient for a voter who had completed at least six grades in a school in the United States or its territories where the classroom language was not English. This provision was prompted by Puerto Ricans moving to states where English literacy was required, particularly New York. In addition, the 1965 act suspended literacy tests in those states and counties where less than 50 per cent of the total voting-age population was registered or actually voted in the presidential election of 1964. The Nixon administration has proposed abolishing literacy tests for all fifty states until at least January 1, 1974.

I now remains to take up the present voting qualifications in Illinois in relation to those in other states and to some of the possibilities for changes which can be considered by the delegates to the constitutional convention of 1969-70.

THE POSSIBILITIES IN SUFFRAGE LAWS

The greatest challenge for constitution makers is to decide what to include as mandatory matter and what to leave to the discretion of the legislature. Generally, state constitutions make mandatory the qualification for, and the protection of, suffrage; that is, they determine who should be eligible to vote and provide guarantees that they can vote.

In the Illinois Constitution, Article VII, Section 1, prescribes suffrage qualifications and makes clear that those meeting them have a right to vote; it is specifically reinforced by the Illinois Supreme Court, which held that all qualified voters have a constitutionally protected right to vote and to have their votes counted (*Craig* v. *Peterson*, 39 Ill. 2d 191 [1968]).

Although the General Assembly cannot change the voting requirements specified in Article VII of the constitution, the Illinois Supreme Court has generally recognized the need for flexibility and has interpreted some of the provisions of Article VII in such a way as to give the General Assembly wide discretion. The delegates to the convention must decide not only specific mandatory provisions but also discretionary provisions for the General Assembly. In doing so they should consider each of the following voting requirements in the present constitution and the court decisions which have modified them.

Exemption of Voters
(Article VII, Section 3)

Carrying out the intention that voters should be free of interference or conflicting duties on election day, Article VII, Section 3, of the Illinois Constitution exempts voters from arrest — except for treason, felony, or breach of the peace — "during their attendance at elections, and in going to and returning from the same." About half of the states have a similar provision and five states specifically limit the immunity to civil processes. The second sentence of this section also exempts voters from military duty on election days, "except in time of war or public danger." About one-third of the state constitutions make the same provision. The *Model State Constitution* contains neither provision. The objectives of both provisions can be achieved by the alternative method of giving the General Assembly authority to legislate on these subjects.

Citizenship
(Required in Illinois; Article VII, Section 1)

National citizenship is universal among the states either through constitutional or legislative provision except in West Virginia which requires

state, not national, citizenship. The *Model State Constitution* specifies citizenship but not United States citizenship.

Five states require a minimum period of citizenship prior to an election (applicable to naturalized citizens), varying from one month to three months. Federal law since 1953 has prohibited anyone from voting in a general election who was naturalized less than sixty days before. A state requirement of a minimum period therefore appears pointless unless the intention is to require more than sixty days of citizenship. In Illinois it is not necessary to be naturalized for any specific period before voting (*Report of the Attorney General,* 1912, p. 413).

Residence

(Article VII, Section 1)

Residence requirements have become increasingly important as the population of the country has become more mobile both in interstate and intrastate travel. Ineligibility to vote because of moving or being temporarily absent from one's residence affects large numbers and has consequently led to proposals for wider latitude in residence provisions.

ELECTION DISTRICT RESIDENCE

(Illinois: Thirty days)

The purpose of this requirement is to allow time for registration of voters. Forty-one states make such a requirement, ranging from one year in one state to ten days in five states. The Illinois requirement of thirty days is less severe than most. The *Model State Constitution* leaves local residence requirement to the legislature with the limitation that the period cannot exceed three months.

In Illinois "election district" has no settled meaning according to the state Supreme Court. It may designate a voting precinct or a larger or smaller district (*People* v. *Markiewicz,* 225 Ill. 563 [1907]). Voting districts established by the General Assembly are the election districts referred to in the state constitution (*Donovan* v. *Comerford,* 332 Ill. 230[1928]).

COUNTY RESIDENCE

(Illinois: Ninety days)

Thirty-six states including Illinois have county residence requirements ranging from six months to thirty days. The *Model State Constitution* makes no provision for county residence. Such requirements create problems for the voter who moves between counties before an election. In Illinois such a voter is disfranchised if he does not have ninety days to qualify in his new county. Even though he may not know the county candidates in his new residence, he is familiar with issues and candidates on the state level. Nevertheless, the county requirement disqualifies him from voting for state candidates during this period.

Some states qualify intercounty movers by allowing them to return during this period and vote in their former place of residence. In five states they may do this if they move within a given number of days before an election; in three they can do it until they establish residence at their new home; in four states, an intrastate move is not disfranchising until thirty days after moving.

STATE RESIDENCE

(Illinois: One year)

A large majority of the states, thirty-two, have a one-year state residence requirement. Mississippi requires two years. Fourteen states require six months, one, three months, and one, ninety days. The trend has been to shorten the period, and there are variations in some state laws which shorten the formal period: for example, Hawaii permits a person to register after nine months residence and South Carolina requires only six months residence for ministers, teachers, and their spouses.

The *Model State Constitution* provides only three months state residence and leaves it to the legislature to define residence for voting purposes. Unless the legislature has authority to make this definition, the law is likely to be the result of piecemeal decisions resulting from litigation.

A voter who moves from one state to another in a presidential election year should be entitled to vote in national elections because he

carries with him his understanding of the election, and the purpose of a residence requirement is served no matter in which state he votes. Two kinds of provisions have been developed to enable him to do so. The so-called Connecticut plan permits the mover to vote by absentee ballot in his former state if he was qualified to vote there but cannot qualify in his new state because of residence. The so-called Wisconsin plan, adopted by Illinois, permits him to vote a presidential ballot in his new state if he meets other requirements and was qualified in his former state. Some states have made such provisions by constitutional amendment; others have done it by statute, like Illinois, where residents can vote in presidential elections after sixty days in an election district.

The present Illinois provision is in line with recent national proposals for eliminating state residence requirements which restrict voting in national elections. The Commission on Uniform State Laws, which is composed of delegates selected by the several states, proposed that new residents be permitted to vote in presidential elections with no residency qualification as such, as long as there is time for election officials to process the administrative details and protect against fraudulent voting. There have been numerous proposals in Congress for amending the national Constitution to suspend state residence requirements in presidential elections and to provide the qualifications (that is, citizenship, age, residence) for voting in all federal elections. An example was the bill introduced in 1967, sponsored by the Johnson administration, permitting an otherwise qualified voter to vote in presidential elections if he had resided in his state or political subdivision by September of the election year, and providing that any state permitting absentee voting also permit absentee registration. In 1969, the House Judiciary Committee, in its resolution to amend the Constitution to abolish the electoral college and elect presidents by a direct popular vote, included a provision authorizing Congress to establish uniform national residence qualifications for voting in presidential elections (H.J. Res. 681).

ABSENTEE VOTING

(Illinois: Authorized by statute)

The Illinois Constitution does not mention absentee voting. However, the debates in the constitutional convention of 1869-70 suggest that the

delegates believed that Article VII, Section 1, permitted the General Assembly to provide for absentee voting because nothing is said about *where* the voter casts his vote. In 1912, the attorney general was doubtful of the constitutionality of absentee-voting legislation but did note that the decisions in other states were favorable. In 1917, the General Assembly passed two laws: one authorized absentee voting in general and the other permitted the military to vote as a unit on the assumption the Illinois National Guard would remain intact in the federal service. The attorney general in 1917 upheld the military-unit law and in 1918 cautiously upheld absentee voting by military personnel when not voting as a unit. The absentee-voting law apparently has not been challenged in the Illinois courts.

Is it desirable to authorize absentee voting specifically in the Illinois Constitution? Only seventeen state constitutions do so, while thirty-two states provide for it by statute. Article VII, Section 4, of the Illinois Constitution provides that no voter can lose his residence as a result of absence for office-holding in either the federal or state governments or military service; Section 5 provides that being stationed in Illinois on military service does not constitute residence. If absentee voting were specifically provided for in the constitution and the General Assembly were clearly given the authority to define residence for voting purposes, both Sections 4 and 5 could be deleted. The *Model State Constitution* has no provision comparable to either of these articles because the legislature is authorized to define residence.

Age

(21 years in Illinois; Article VII, Section 1)

Perhaps the most discussed voting requirement today is the proper minimum age. Until the end of World War II, all states required voters to be 21 years of age. Now four states provide a lower age: 18 years in Georgia and Kentucky, 19 years in Alaska, and 20 years in Hawaii. The *Model State Constitution*, interestingly enough, leaves the minimum age open.

Controversy over the minimum age has a long history. A proposal for a voting age under 21 was discussed and rejected in Missouri in 1820,

in New York in 1821, and in Tennessee in 1834. The Illinois constitutional convention in 1869-70 discussed a motion to adopt age 18 because 18-year-olds were subject to be drafted under the militia article, but apparently no vote was taken in the convention on the motion. Currently, constitutional amendments will be submitted to referenda in four states: age 18, to be voted on in New Jersey in November, 1969, and in Connecticut in November, 1970; age 19 to be voted on in Montana in 1970 or 1972 and in Wyoming in 1970. A bill introduced in the Illinois House of Representatives in 1969 (H.B. 1574) provided that persons between the ages of 18 and 21 who were on active military duty and who met the citizenship and residence requirements could vote in presidential elections. It was rejected.

The arguments pro and con are by now fairly well established. It is contended in favor of 18-year-old voting that:

1. The voting age should be the same as the age of men subject to the draft — if you are old enough to fight, you should be old enough to vote. According to the Gallup poll, a majority of respondents favor 18-year-old voting but the majority increases in wartime when 18-year-old boys are being drafted. Statistics in Vietnam show that about half of U.S. servicemen killed were under 21 years of age.

2. Citizens between 18 and 20 are treated as adults in such matters as taxation, court prosecution, marriage, and full-time employment.

3. Younger people are more politically aware and informed than previously, partly because of the rising level of education. Those under 21 are politically involved and have demonstrated their interest by their energy and effectiveness in political campaigns.

4. Youthful idealism and enthusiasm would be beneficial in its influence upon government.

5. It would encourage those under 21 who are discontented with society to channel their efforts at reform through the established political processes. The present time lag of three years between high school civics classes and citizen participation encourages young people to resort to protest as an alternative means of influencing society. The President's Commission on Registration and Voter Participation argues that the 18-year-old would be more likely to be interested in two-party politics if given the vote.

It is argued that 21 should be kept as the minimum voting age because:

1. The functions of serving in the armed forces and voting are essentially different; physical maturity is not the same thing as political and social maturity.

2. Those who are younger really do not have the emotional stability and political maturity desirable in a voter. Twentieth-century tyrants — Lenin, Mussolini, and Hitler — exploited the inexperienced youth of their respective countries in coming to power.

3. Those under 21 are not mature enough to be fully responsible for their actions and in most states they are treated as minors in many respects under the law, for example, entering into contracts only with parental consent.

4. Even in the four states with voting ages under 21, it is necessary to be 21 to hold public office. Questions may arise regarding other kinds of citizen activity such as jury service.

5. Foreign practice among democratic countries supports the age of 21. In the Netherlands, in fact, the age limit is 23. In Italy and Denmark the age varies between 21 and higher, depending upon the officials to be elected. In Israel the minimum age is 18; otherwise, the countries with this provision are in Latin America and communist countries. To argue that 18-year-olds vote in the U.S.S.R. is irrelevant because a vote counts for nothing in the Soviet Union.

6. Voters should already be mature enough to assume citizenship responsibilities; voting should not be a training ground for citizenship.

It is difficult to assess the impact if 18 were the minimum age in all states. The Census Bureau estimates that, in 1968, 9,778,000 more would have been eligible to vote in the United States and 507,000 more in Illinois. Voting participation of those between 21 and 30 years of age is consistently lower than that of those 30 and older. The Census Bureau estimates that only 34 per cent of those under 21 in Georgia, Kentucky, Alaska, and Hawaii actually voted in 1968, compared with 51 per cent for those aged 21 to 24 who were eligible. For the country as a whole in 1968, 61 per cent of the potential electorate voted; the comparable figure for Illinois was 70.2 per cent.

There is no particular reason to expect any spectacular political effects if the age limit is lowered to 18. The effect has been compared with that of woman suffrage which was to increase the total electorate and decrease the percentage of the voting turnout. The arguments on both sides involve assertions that cannot be proved or disproved. Primarily the issue involves value judgments such as justice and the proper caliber of the electorate.

Registration

(Illinois: By statute)

Some form of registration is required by constitution or statute in every state except North Dakota. The new Illinois Constitution could follow the 1870 constitution and omit all reference to registration, or follow the *Model State Constitution* and authorize the legislature to provide for registration by statute. It could also specify whether registration should be permanent or periodic.

With permanent registration, a voter registers once. Reregistration is necessary only if he fails to vote in a given number of elections, or moves his voting residence within the state, or changes his name. This is the far more popular method because the demands upon the voter are kept to a minimum and record-keeping by election officials is a matter of enrolling new voters and deleting the names of ineligible voters.

With periodic registration, all registration records are discarded at given intervals and all voters must reregister. This system is unpopular because it is inconvenient, uneconomical, and places a huge task upon registration officials during the short period of registration. Its main advantage is that the registration lists are kept current so that the opportunities for corrupt practices are reduced. However, this can be achieved with the permanent type if the rolls are purged consistently and thoroughly. There has been some sentiment in Illinois to adopt periodic registration because the rolls are not kept current in some counties. In 1961, the General Assembly required all Chicago voters to reregister and, in 1969, a similar attempt was made for downstate Illinois.

The courts in some states have held that registration amounts to a qualification inasmuch as an unregistered voter, otherwise qualified, cannot vote. In these states, registration, like all other voting qualifications, has to be provided for in the constitution. Such necessity does not exist in Illinois where registration is judicially considered not a qualification for voting but a reasonable means for ascertaining who the qualified voters are. Thus neither the registration statute in Illinois nor the requirement that registration be completed three weeks prior to a general election is unconstitutional (*People* v. *Hoffman,* 116 Ill. 587 [1886]).

The Census Bureau estimated that in 1968 in Illinois 394,869 qualified voters did not register. Registration regulations can be designed to encourage broader participation in voting. In all of the states in the United States, the responsiblity for registration is upon the voter, with the result that significant numbers of voters do not register. In many foreign countries, however, the responsibility for registration is placed upon the government, with the result that practically all qualified voters are registered. It is possible to provide by law for registration by mail or waive it entirely for certain voters as is the case in Illinois for servicemen who are stationed outside of the state. More of this type of leniency would also increase the prospective number of actual voters.

Literacy

(Illinois: No requirement)

Neither illiteracy nor physical disability is a bar to voting in Illinois. The General Assembly cannot, by ruling of the Illinois Supreme Court, deny a voter from having assistance in voting either because of illiteracy or physical disability (*People* ex rel. *Drennan* v. *Williams,* 298 Ill. 86 [1921]). The *Model State Constitution* authorizes the legislature to provide a "reasonable" requirement of ability to read and write English. However, an English-language literacy requirement may be questionable now in view of the 1965 act of Congress previously noted.

The constitutions of seventeen states contain a literacy requirement and two others authorize the legislature to prescribe education qualifications. The actual provisions vary widely. Thirteen states include some form of standard; the others provide no standard and leave the matter to the legislature. There is a distinction between requiring a literacy

test as such and accepting proof of literacy in such ways as the voter being able to sign his name, read a passage in the federal or state constitution, or take an oath of literacy. New York alone equated literacy with completion of a minimum number of grades in elementary school.

There is a sharp division of opinion on the justification of a literacy or educational qualification for voting. It is argued that a voter should be literate in order to be sufficiently informed on public affairs to participate, that an illiterate is subject to more manipulation, even unknowingly having his vote cast for him by election officials or campaign workers. Conversely, it is argued that illiterate voters have interests to protect with their vote; that it is increasingly possible to be informed on public affairs through radio and television; and that administration of literacy laws is open to abuse.

Literacy has become particularly controversial in its having been used to restrict or effectively prohibit Negro voting in some Southern states. As a result of these practices, a literacy test which gives election officials arbitrary power to disqualify voters was held to be a violation of the Fourteenth Amendment to the federal Constitution (*Davis* v. *Schnell*, 81 F. Supp. 872 [1949], affirmed 336 U.S. 933 [1949]).

Disqualifications

The Illinois Constitution, Article VII, Section 7, requires the General Assembly to exclude "from the right of suffrage persons convicted of infamous crimes." In implementing this provision, the Illinois Election Code prohibits voting by any person legally convicted in Illinois, in any other state, or in a federal court of any crime punishable by confinement in the penitentiary, until rights of citizenship are restored by the governor or by a court.

Almost every state has a comparable constitutional provision. Some states designate the crime variously as "infamous," as a "felony," or by listing specific crimes. In some constitutions the provision is self-executing or a command to the legislature or merely permissive for the legislature. Eight states go further and disfranchise paupers.

Exclusion for mental incompetency is universal among the states and, even if not provided for by the constitution or statute, is enforced by judicial decision as is presently done in Illinois, where idiots are excluded (*Welch* v. *Shumway*, 232 Ill. 54 [1908]) as well as the insane (*Bekrensmeyer* v. *Kreitz*, 135 Ill. 591 [1891]). Exclusion of criminals must be provided for in a constitution if it is intended. Otherwise, the legislature may not have the power to exclude by statute. However, the *Model State Constitution* leaves disqualifications for both "mental incompetency or conviction of a felony" to the legislature.

Ballots and Methods of Voting

The Illinois Constitution, Article VII, Section 2, states that "all votes shall be by ballot." The intention was to prohibit *viva voce* voting. The Illinois Supreme Court upheld the use of voting machines, finding that the real purpose of Section 2 was to preserve secrecy. The effect of this decision was to substitute the word "secrecy" for "ballot" (*Lynch* v. *Malley*, 215 Ill. 574 [1905]).

In view of the ruling of the Illinois Supreme Court, apparently nothing needs to be changed in Section 2 although the convention can go on record in favor of secrecy as well as the use of voting machines and the use of computers in voting.

Approximately two-thirds of the states have the same constitutional provision as Illinois and about one-third provide for secrecy. Only twelve state constitutions specifically authorize voting machines. The *Model State Constitution* leaves it to the legislature to insure secrecy in voting and to provide for the administration of elections.

Election Calendar

Illinois elects its state officers for four-year terms. Their election occurs at the same time as presidential elections, except for the superintendent of public instruction and the treasurer, who are elected in the intervening even-numbered years. A number of states with the four-year term for governor provide for his election in the even-numbered years between presidential elections. In Kentucky and New Jersey state elections are held in odd-numbered years and in Mississippi the state election is early in the year of presidential elections.

There is a difference of opinion as to whether gubernatorial and

presidential elections should occur at the same time. Aside from political party advantage or disadvantage in the coat-tail influence of presidential candidates, it has been contended that having them separate permits voters to give better consideration to state issues and candidates. Conversely, it is contended that fewer voters regularly turn out in non-presidential election years and that coinciding elections give the voters an opportunity to make a general decision regarding government policies on both the state and federal levels at one and the same time.

INITIATIVE AND REFERENDUM

The Illinois Constitution makes various provisions for the voters to express themselves through referenda. Article IX provides for referenda within counties to change county boundaries (Secs. 2, 3), to move the county seat (Sec. 4), to determine township organization (Sec. 5), and to authorize taxes (Sec. 8). Article XI, Section 5, specifies that before an act of the General Assembly "authorizing or creating corporations or associations with banking powers" can go into effect, it must be approved at a state-wide referendum. Finally, Illinois follows the general pattern of the states in requiring referenda in the procedure for amending the constitution. The General Assembly can refer to the people a proposal to approve a constitutional convention which, in turn, must submit its proposals to the voters (Art. XIV, Sec. 1). The General Assembly can submit directly to the voters specific amendments to the constitution.

The 1920 Illinois constitutional convention considered and rejected two mechanisms by which voters could legislate directly, the initiative and referendum. The initiative is a procedure used in twenty states. It permits those citizens who wish some specific legislation which the legislature refuses to enact to circulate petitions and, upon securing the minimum number of signatures required, to have their measure placed upon the state ballot for a referendum decision. Some of these states also provide for the indirect initiative, in which case the proposed legislation is submitted first to the legislature; if the legislature fails to enact it, a direct vote of the people follows.

Twenty-two states provide for a referendum which prevents a bill

enacted by the legislature from going into effect. Consequently, every bill in the legislature, with some exceptions specified by the constitution such as an appropriation, carries a clause that the bill cannot go into effectfor some given period of time after passage. During this period, opponents of the legislation can circulate petitions and, upon securing sufficient valid signatures, hold the legislation in abeyance until there is a statewide vote. In some states the referendum can be avoided if the legislature — often by an extraordinary majority — includes an emergency clause providing for the legislation to go into effect upon being approved by the governor. In some states, the legislature itself may call for areferendum on a bill it has passed.

The belief in the initiative and referendum has weakened. They were popular reforms in the progressive era, but Alaska is the only state since 1917 to include them in its constitution. Perhaps legislators are considered more responsive and perhaps there is less assurance that laymen can decide major matters of complicated policy. There are procedural and financial disadvantages and voters too frequently have been asked to pass judgment on measures which were too complex, technical, and detailed for many of them to understand the issues involved. Improvements in state government and reforms in the election system have likely had a direct bearing upon the change in attitude. On the other hand, many of the fears of the opponents of the initiative and referendum have not been realized. In general, citizens have displayed responsibility and restraint. In conclusion, the best defense of the initiative and referendum is that they are a "gun behind the door," something to fall back upon in case of need.

Although the Illinois Constitution does not include the initiative and referendum as standard legislative procedures, there is an Illinois statutoryprovision for submitting public policy questions to the electorate. In this case, as in a convention referendum, approval requires a majority of those voting on individual amendments, a two-thirds majority of those voting on the proposal. Seven times between 1902 and 1904 the General Assembly submitted public policy questions to the voters as a voluntary action to determine public sentiment on the issues involved. The effect of such a referendum was advisory only.

Under the present constitution Illinois is as generous as most states in its suffrage provisions. Yet to provide the broadest possible participation in voting, which is the foundation of government by consent of the people, the delegates to the convention should consider the advisability of such steps as easing the state and county residence requirements and lowering the voting age.

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5. THE LEGISLATURE

by Samuel K. Gove and Richard J. Carlson

ONE STATE CONSTITUTIONAL SCHOLAR has written that the ideal democratic legislature meets the following tests:

1. It is responsive to the needs of the state and endowed with sufficient power to formulate necessary policy.
2. Its seats are distributed according to the principle of "one man, one vote."
3. It has high "visibility," performing its duties responsibly and in such a fashion that the public can oversee and judge its actions.
4. Its rules permit majority rule while protecting against arbitrary action.
5. It has sufficient time and resources for informed deliberation.
6. Competent citizens are attracted to and honored by legislative service.[1]

If we accept this kind of yardstick, the measure of the legislature can be achieved only in part by considering the constitutional basis of its operation. The Illinois Constitution of 1870, for example, assigns legislative power to the General Assembly, outlines legislative structure, and prescribes certain procedures that must be followed in the process of enacting laws. These provisions constitute only the skeletal framework within which the legislature functions. Complementary elements of the statewide political system, such as organized interest groups, the party system, the degree of urbanization, the structure of the state's economy,

[1] Patricia S. Wirt, "The Legislature," in John P. Wheeler, Jr. (ed.), *Salient Issues of Constitutional Revision* (New York: National Municipal League, 1961), pp. 68-69.

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8. THE JUDICIARY

by Charles W. Joiner

A NUMBER OF RECENT EVENTS have focused attention on the judicial article of the Illinois Constitution. In the last days of his administration Governor Shapiro appointed eleven judges to the courts of the state, but his appointments were ruled unconstitutional and void by the Supreme Court. Since then charges of judicial corruption have rocked the state and resulted in the resignation of two members of the Supreme Court and several lower court judges. These developments have led to criticism of the present constitutional provisions for the selection and removal of judges and the filling of judicial vacancies. Ironically, the judicial article has recently been carefully studied and revised; the amended article was adopted by the people of the state and went into effect on January 1, 1964. However, in the process of harmonizing the recommendations of various groups and the desires of the politicians in the legislature, provisions were included in the present article which should be reconsidered in the light of the abortive appointments and the resignations in the courts.

Beyond mending the flaws in the judicial article which have recently become apparent, the constitutional convention has a broad mandate to determine the best possible framework for the administration of justice in Illinois.[1] In this pursuit the delegates should bear in mind that a good

[1] In 1906 Roscoe Pound made a great speech which set forth six basic needs in a system for the administration of justice ("The Causes of Popular Dissatisfaction with the Administration of Justice," *American Bar Association Report,* 29:396). In an article he wrote in 1958 commenting on the need for judicial reform in Illinois, he drew upon his previous article, stating, "The program then outlined urged six items corresponding to six needs in a system of judicial

judicial article should accomplish a number of related ends. It should establish a system of courts with few jurisdictional problems so that litigants may obtain quick and inexpensive decisions. It should include within its purview all agencies of government that make decisions of a judicial nature. It must make provision for the selection of judges with legal ability and impartiality. To allow the judges independence from outside pressures, the article should provide for reasonably long terms of office, a reselection process that is removed from decision-making, and a method of removing corrupt or incompetent judges which does not adversely affect the independence of the others. It should provide for judicial compensation at a high enough level so that all compromising financial ties may with fairness be prohibited. Finally, a judicial article should include provisions pertaining to rules of appropriate judicial conduct.

I. Procedures Providing Well-Qualified and Impartial Judges

The judges are the backbone of the judicial branch of government.

administration of justice such as was required in the economic and social order which have developed in six generations of our national existence.

"First was the need of a simplified and unified court system. The system of courts in the United States at the end of the nineteenth century was archaic in three respects: in its multiplication of courts, in its concurrent and overlapping jurisdictions, and in its waste of judicial power.

"Second was the need of flexibility in the assignment of judges and distribution of judicial business, of better organization and superintendence of the administrative work of the courts. Judicial power is wasted by rigid territorial districts or judges specially provided for special purposes only, so that dockets may be congested in one place while judges are relatively idle in another.

"Third was the need of taking selection of judges out of politics.

"Fourth was the need of simplifying procedure and adapting it to its purposes in the administration of justice in the social and economic order of today.

"Fifth was the need of doing away with the system of successive appeals which had grown up in England out of contests between local or feudal or ecclesiastical tribunals and the King's courts, and in America out of want of confidence in local special or petty tribunals.

"Sixth was an urgent need of making proper provision in the system as a whole for disposition of small causes and petty prosecutions." Pound, "Toward an Adequate Administration of Justice," *Chicago Bar Record,* 39 (1958):247, 252.

It is therefore essential to frame a judicial system around those provisions which are most likely to give the people judges who are well-qualified and impartial. A number of procedures may encourage or discourage these qualities among the judges: the method of selection, reselection, and removal, as well as the term of office, the level of compensation, and the express limitation upon outside activities and affiliations.

A. The Method of Selection

There are a number of ways of selecting judges in use in this country. They may be elected by the people on a partisan ballot, as in Illinois, or on a nonpartisan ballot. They may be nominated for election by party convention or by partisan or nonpartisan primaries. Alternatively, judges may be appointed by the governor, the legislature, or some other specifically designated person or agency. Appointments may require confirmation by one branch of the legislature or an agency created for the purpose. The nomination for appointment may come from a commission. In the commission plan first adopted in Missouri in 1945, a commission composed of the chief judge, laymen appointed by the governor, and lawyers elected by the organized bar proposes a slate of nominees to the governor. Such a plan may be referred to as the Missouri plan, the American Bar Association plan, or simply a merit selection plan.

No system of choosing judges can guarantee that they will be uniformly good. On the other hand, each system of selection will tend to develop judges having characteristics properly identified with that method. Delegates to the constitutional convention should first decide what kind of men they want to be judges and then provide the system of selection likely to produce that kind of judge. In order that a judge give a fair hearing to the citizens before him, it is generally agreed that he should be intelligent enough to grasp the complexities of a case. He should be a good lawyer who has mastered the laws and legal theories on the basis of which he must make decisions. He should be impartial so that he will not rule against a litigant because of an ethnic, political, or social bias, and independent enough that he will not decide a case in favor of a particular interest with which he is personally connected. The relative abilities of the appointive and elective systems to produce

judges with these characteristics have been hotly debated. Some of the arguments are listed below.[2]

Proponents of the elective system argue that:

1. Under a democratic form of government the people must be given a direct voice in selecting all important officials, including those of the judicial branch. Our entire governmental system is built upon a faith in the ability of the electorate to make rational decisions.

2. The elective system assures the selection of judges representative of all groups in the community—ethnic, religious, racial, and age; it is important to foster faith in the judicial process by these groups.

3. Courts must reflect to some degree social changes in the community; because of popular participation in it, the election process produces men aware of and sensitive to these changes.

4. Politics can never be eliminated from selection of any government officer. Appointive authorities, including presidents and governors, are generally the leaders of their own political parties; nominating commissions and bar associations are all subject to their own kinds of political pressures. Many objections raised against the elective system are nothing more than the usual complaints about the inconveniences of the popular election process, that is, fund-raising and speech-making. However, inconvenience is no reason to abolish the system.

5. It is important to support party government even in the judicial branch because in the long run parties produce better candidates; any appointive system weakens party government.

Arguments against the election of judges include the following:

1. The people should have a direct voice in selecting the policy makers, that is, the legislators and the executive, but not the judges, themen who are sworn not to allow influence to affect them or to give preference to one side over another. The public should choose from among legislative candidates the men who agree with their goals for

[2] The genesis of the following discussion may be found in *Selection of Judges*, a pamphlet published in 1967 by the Association of the Bar of the City of New York. Comparative statistics on the various utilization in the states of selection systems may be found in *Book of the States 1968-1969*, vol. 17 (Chicago: Council of State Governments, 1968).

change and who they believe can be effective in bringing about change. Such a stance for judges, however, would represent the antithesis of what a judge should be. Persons who oppose a judge, or oppose a specific program, are as much entitled to a fair hearing before him as his friends and supporters.

2. Only a small proportion of the voters are responsible for the election of judicial officers. In Los Angeles County in 1962 in a contested judicial election for three judgeships, only 50 per cent of the people who actually voted for other offices on the ballot bothered to cast a vote for the judgeships. Since not all of the registered voters voted, it was estimated that only 30 per cent of the eligible people participated in the selection of these judges.[3]

3. Voter knowledge of the candidates and their qualifications is insufficient to form the basis for a rational choice. In New York a poll taken in 1954 showed that only 1 per cent of the voters in a rural upstate county, as well as in New York City, could remember the name of the newly elected chief judge of the court of appeals.[4] Furthermore, the qualifications for judicial office are rarely discussed in campaigns, and impartial appraisals of judicial performance are not generally available to the average voter. As a consequence, most people who vote at all do so on the basis of party affiliation or a popular and well-known name.

4. The elective system is essentially a system of choice by political party officials. The voters in effect ratify nominations made in party caucuses. In many parts of the state one party is so dominant that its candidates are all but assured election, and thus the party officials not only select their party's candidate but in effect appoint the judges. When party officials choose candidates, the process of choice is so obscure to most citizens that there is little way for the public to exert pressure for better nominations.

5. The choice of the party is usually restricted to those persons who have been active in the affairs of the party, and party regulars are not

[3] *Selection of Judges*, p. 6.

[4] *Ibid.*, p. 7.

known for their independence and impartiality.[5] A recent study showed that of the eighty Cook County circuit or associate circuit judges elected from Chicago, seventy-four were members of the regular party organizations.[6]

6. Political ties often continue after election. Too often other party workers are the ones to benefit from judicial patronage such as to guardianships and refereeships. If a judge must run for re-election, the system forces him to keep up his political connections and build good will during his tenure in office. Even though since 1964 Illinois incumbent judges run only on their records, political ties are renewed by the necessity of facing the formalities and expenses of election.

7. An crucial aspect of successful judicial selection is to enlist for candidacy the most qualified individuals. Yet many able lawyers are unwilling to enter the political battlefield of the elective system or serve on a basis which carries with it any semblance of obligation to party officials.

8. Party slatemakers include members of various minority groups in the process of ticket balancing, but they balance the composition of the election slate rather than the composition of a court. Thus members of a minority group might always be represented on a party slate but never proposed for judgeships.

[5] Two comments are pertinent here: "It is almost impossible for a lawyer to obtain a popular following of any size without a large expenditure of time and effort in ways altogether likely to make him less fitted for judicial office than if he faithfully devoted himself to his profession." B. Parkhill, *Judicial Selection in Illinois* (Chicago: American Judicature Society, 1969), p. 6.

"Selection of a judge should be based upon considerations of character and integrity, educational background, experience, fair-mindedness and judicial temperament. The partisan process tends to favor a candidate who is on good terms with the leaders of his party, has a record of service to the party, has campaigning ability, has influence with minority groups, has personal connections who will make financial contributions to help get the ticket elected, will himself make financial contributions, and will not likely render decisions that would embarrass the party. Actual selection of the candidates is by the leaders of the political organizations (not the citizens)." Allard, "Application of the Missouri Court Plan to Judicial Selection and Tenure in America Today," *Buffalo Law Review*, 15 (1966):378.

[6] "Who's on the Bench? In Cook County It's Usually a Politician," Chicago *Sun-Times*, September 7, 1969.

Those in favor of the appointment of judges with commission nomination have argued as follows:[7]

1. A commission whose object is to produce good judges rather than to reward party workers will nominate highly qualified men.

2. Many able lawyers who exclude themselves from judicial office under the elective system might not be reluctant to submit résumés and be interviewed about their qualifications by a judicial nominating commission.

3. The appointive system can produce a judiciary with a balance of ethnic, social, and age groups.[8] Demands for a balanced judiciary can be directed at the members of the nominating commission who, unlike party slatemakers, are clearly identifiable. Public media and private communications can make commissions keenly conscious of these viewpoints. A commission approaching the task of filling a vacancy would almost surely examine the existing composition of the court with a view to assuring that the proposed new appointment would not result in marked imbalance. Thus a citizen would have less chance of appearing before a court biased against him. It has sometimes been argued that the use of a nominating commission will produce judges only from the "silk stocking" or "establishment" law firms. But experience in Missouri and other states where the commissions have been operating indicates the nominees come from firms of all sizes and characters. The only common factor is legal excellence.[9]

4. Commission nomination minimizes political influence and obligation. The governor, whose choice is limited to the commission's nominees, cannot use the appointment as a party leader can use his influence over nominations, to reward any lawyer who has served him well.

5. The nominating commission may be set up to represent local in-

[7] S. 3579 (89th Cong., 2nd sess.) introduced by Senator Hugh Scott in 1966 would have provided a judicial nominating committee for the federal courts, but was not reported out of committee. See *Journal of American Judicature Society*, 50 (1966):50 for Senator Scott's discussion of his proposal.

[8] *Selection of Judges*, p. 8.

[9] See G. R. Winters and Sunwall (eds.), *Selected Readings on the Administration of Justice and Its Improvement* (Chicago: American Judicature Society, 1966) for reports on the experience of other states.

terests by requiring the laymen and lawyers on it to reside in the district served by the court to which they make their nominations.

6. Experience in Missouri shows that a merit selection plan provides judges who are acceptable to the people. In Missouri the appointee serves an initial term and then runs in a noncompetitive election for a twelve-year term. Since 1940 only one judge has been rejected by the people of Missouri in a retention election.[10]

Those against the appointive system argue that:

1. Political power is not removed from the appointment system of judicial selections; it is merely shifted from the hands of the party leaders to the hands of the governor, the members of the nominating commission, and the bar associations who in part select the commissions.

2. The appointive system violates the principle of separation of powers in that the officers of one branch of the government should not hold office at the will of the governor, an officer of another branch.

3. The appointive system will produce "silk stocking" judges from prestige law schools and law firms rather than men of the people.

When the present judicial article was before the Illinois legislature for approval in 1961, it included in its original form a plan of judicial nominating commissions. Before the article was placed on the ballot, however, the legislature dropped those provisions and continued the elective system in which judges are nominated by party convention or primary. Section 10 does provide that the system of selecting judges may be amended through a simple majority of those electors voting on the question (as opposed to the general amendment requirement of two-thirds of those voting on the question or a majority of those voting in the election). However, it has been pointed out that the legislature, always politically conscious, would hesitate to propose an amendment which would thus deprive the parties of this area of influence.[11]

[10] See R. A. Watson, "Missouri Lawyers Evaluate the Merit Plan for Selection and Tenure of Judges," *American Bar Association Journal*, 52(1966):539, and note 9 above.

[11] *Chicago Bar Record*, 50(1968):19.

B. Judicial Tenure
(Term, Reselection, Retirement, and Removal)

The constitution should provide for each judge a term of office sufficient to make him independent of outside pressure and should include a method of reselection to minimize the effect of such pressure on his opinions. Independence of thought and action is the unique characteristic of the judge on which the judicial system is appropriately based. If a judge is secure in his right to be on the bench, if he does not have to think of reappointment or re-election, he may become relatively independent and decide cases based on merit even though he may end up on the unpopular side. Witness, for example, the impartiality of decision in matters involving segregation and integration which ordinary Southern lawyers have exhibited when they become federal judges with life tenure. This strength has shown itself on the federal bench, but it has not shown itself on the state bench in the same area of the country where judges must stand periodically for re-election.

The questions of tenure in office under ordinary circumstances and disciplinary removal from office under special circumstances are inextricably woven into the question of selection. If an elective system is used, the length of term usually depends on the status of the judicial seat occupied.

Under the Illinois judicial article any judge selected or elected runs thereafter against his record and not an opponent (Art. VI, Sec. 11). This device is intended to help develop independence of thought and action. Under the Illinois Constitution, this "yes-no" retention vote comes every ten years for Supreme and appellate court judges and every six years for other judges (Art. VI, Sec. 14). The A.B.A. Model Judicial Article provides for this retention election for all judges every ten years. A proposal before the recent Michigan convention, based on the principle that selection by commission is the critical stage and recognizing that voters tend to retain incumbent judges, automatically provided for only one retention vote, held three years after appointment, whereupon if the judge is retained he holds office for life, subject to mandatory retirement at age 70 or disciplinary removal.

Judging is tough, hard business. Judges should be people who are re-

sponsive to current problems and who can work hard. A retirement age should be established and the legislature should be directed to provide retirement salary for judges who have served a number of years. The federal system encourages timely voluntary retirement by providing full salary on retirement.

A method which allows the removal from office of judges who are corrupt, incompetent, or sick without causing a diminution of independence of thought and action on the part of the remaining judges is necessary in all constitutions but sadly absent in many. Traditionally the short election term and impeachment have been relied on by constitution makers to remove the bad judges, but both have proved inadequate. Very seldom are judges convicted in an impeachment proceeding. The public is so naive about who are good and who are bad judges that often the poorest of the judges are returned to office with the highest votes. Popular names and group affiliations corrupt the process. Short terms not only affect efficiency adversely by requiring frequent expenditure of judicial time and effort on elections but also jeopardize judicial independence of thought and action.

Illinois has a disciplinary removal system. Section 18 of the present judicial article provides that a commission composed of one Supreme Court judge, two appellate court judges, and two circuit court judges may be convened by the Supreme Court or the Senate to remove a judge "for cause" after notice and hearing. A seemingly more effective system of removal of judges is the California commission plan, made part of their constitution in 1960 and since used in several other states (Art. VI, Sec. 18).

The California commission is composed of nine members — two appellate judges, three trial judges, two lawyers, and two laymen — and is a group more representative of the people involved in the entire judicial process than is the Illinois commission. They serve for staggered four-year terms, and a full-time executive secretary is employed to receive complaints from any source and investigate them. The California commission, unlike that of Illinois, which must be convened by order of the Supreme Court or request of the Senate, has regular meetings at which it reviews those complaints found by the secretary to have merit. The commission may then deal with the matter informally

by conferring with the judge against whom a complaint is made and formally by serving charges against him when informal pressures fail to bring results. These proceedings are completely confidential. If a judge refuses to retire on the commission's recommendation in a confidential hearing, the commission decides whether to dismiss the charges or recommend to the state's highest court that the judge be removed.

If they make this recommendation, the court then reviews the entire case and makes a final determination. Only this last step is public. Because of these regular proceedings, errant judges frequently retire voluntarily before their cases reach the publicity of a Supreme Court hearing. In this way the judicial system rids itself of its corrupt members more easily than by public proceedings and avoids the crisis in popular confidence which results from the convening of a removal commission in Illinois. The success of the California system may be measured by the fact that in the first four years under it, 344 complaints were received, 188 were formally investigated, and 26 judges retired or resigned as a result of the commission's actions.[12]

C. Compensation of Judges

An additional consideration which has bearing on the quality of judges is the amount of their compensation. One of the major hurdles in many states in the attraction of highly skilled and competent lawyers to serve on the bench is the low salaries they receive. Many good lawyers who have built a lucrative practice hesitate to give it up for the economic uncertainty of a judgeship. To some extent adequate staffing and flexible budget control by the Supreme Court could help, but the crucial question of salary and retirement benefits needs further consideration. In the present judicial article, Section 17 directs the legislature to provide for judges' salaries and expenses. Because legislatures do not always act with vision in dealing with salaries and retirement benefits of judges and tend to set salaries according to what they think the incumbent judges are worth, this section could be improved by a

[12] Burke, "The California Story," *Journal of American Judicature Society*, 48(1965):167, 170.

provision to make certain that salary and retirement benefits are provided at a level which permits a good lawyer to give up a flourishing practice and become the independent, uninfluenced judge needed by society. This problem might be handled by a judicial salary and retirement commission which would be directed to set salaries every two years for all courts, treat judges in the same courts equally, and specify a set percentage of the then active salary as a minimum retirement benefit[13] after some limited period of service.

In the current Illinois article, Section 16 prohibits outside employment of judges. This is an important provision but not as strict as was the pre-1964 Section 16. In light of the current problems caused by judges accepting outside income and gifts, a provision requiring judges to disclose all outside income and gifts to a tenure commission such as California's would be appropriate. There may not be any reason for public disclosure if all questions are handled by the tenure commission. It may well be argued in the convention that political ties as well as outside employment should be explicitly prohibited in order to assure the independence of the judiciary.

II. The Organization of the Courts

The judicial article should establish a simple, straightforward framework for the administration of justice, providing for independence from other parts of the government and the people so as to remain impartial. A number of constitutional provisions have bearing on the effectiveness of the court system.

A. Assignment of Judges

Authorities in the field of judicial administration support the view expresed by Roscoe Pound in his book, *The Organization of Courts,* that there should be but one court of justice having several branches, and that all judges should be judges of the court of justice, having specifically defined duties in one or another of the branches (appeal,

[13] A comprehensive description of retirement and pension plans in the various states, entitled *1968 Survey of Judicial Salaries and Retirement Plans,* written by Rae N. Selig, was published in 1968 by the American Judicature Society.

trial, or small claims and lesser offenses) but subject to assignment elsewhere when needed.

The present Illinois article (Art. VI, Sec. 2) permits a type of assignment horizontally within the same branch or court (for example, from one appellate court to another or one circuit court to another). What may be needed to meet severe problems is a provision which would permit the Supreme Court to assign judges vertically instead of having to call on retired judges as the current court has done. Specifically, the court should be permitted to utilize appellate court judges on special assignment to the Supreme Court and trial court judges on special assignment to the appellate court.

The present constitution requires the concurrence of four justices in any Supreme Court decision but provides that judicial vacancies may only be filled at the biennial general election. When there are resignations or deaths on the Supreme Court, as there were in 1969, there is danger that the required majority to decide cases will not be available. The danger is increased if a remaining judge feels he should disqualify himself from a case because of conflict of interest. Furthermore, the extreme pressure upon remaining members of the court to reach consensus may limit independent thought. The situation can be temporarily alleviated, as it was in 1969, by the assignment of retired judges to Supreme Court positions. However, insufficient numbers of judges on the bench is a problem touching all courts and can arise at any time because of pending litigation in which a number of judges may have some interest. It may be a temporary problem for a single case or a long-range problem because of extended illness, resignation, or death. A practical solution to the problem is to adopt the one court of justice concept and to draft a provision authorizing transfer of judges vertically among the levels of the court.

If all judges are judges of the state, all residence requirements should ideally be removed, for judges may be required to sit in different places from time to time. Whether or not all requirements are removed, there can be no reason for residence requirements for the appellate court or the Supreme Court. Under the present constitution the appellate court is divided into five judicial districts, and the Supreme Court may only assign a judge outside the district in which he lives with the con-

sent of a majority of the judges in the district to which he is assigned. It is unlikely that removal of this requirement will change the make-up of the court much, but having such requirements is a type of balkanization that should be avoided.

B. Creation of Additional Judgeships

One of the serious problems that often arises in the operation of a judicial system is the incongruity between the number of judges and either the population within judicial districts or the amount of judicial business generated. This may arise from a shift in population and the kinds of problems handled without a comparable shift in the judicial structure and manpower. In part this is remedied by reassignment of judges under the authority of the Supreme Court, but this is only a partial solution.

Some states have solved this problem with a strong constitutional directive to the legislature to increase the number of judges and to redistrict on the recommendation of the Supreme Court. Florida, for example, provides for one additional circuit judge for every 50,000 persons (Art. V, Sec. 6). Michigan's Article VI, Section 11, among other things, provides that "The number of judges may be changed and circuits may be created, altered and discontinued by law and the number of judges *shall* be changed and circuits *shall* be created, altered and discontinued on recommendation of the Supreme Court to reflect changes in judicial activity" (emphasis supplied). For possible judicial remedies see the *Baker* v. *Carr* decision of the United States Supreme Court which utilized the equity jurisdiction of the court to compel the legislature to act (*Baker* v. *Carr*, 369 U.S. 186, 7 L. ed. 2d 663, 82 S.Ct. 691 [1962]).

C. Centralized Budgeting

Under the current constitution the court is given no control over personnel and salaries of supporting staff and the other matters for which public funds are spent to keep the courts in operation. Decisions are made by the legislature as to the nonjudicial officers of the courts — clerks, deputies, reporters, and bailiffs. Good management in the public interest should permit, within a total appropriation for the courts,

money to be applied in the amount necessary for the jobs necessary to provide service to the people and the courts.[14] The ideal solution would be to vest in the Supreme Court, rather than the legislature, the budgeting authority for the court system of the state and to permit a subordinate officer of the court such as the court administrator to handle the details of budget and financial control for all the courts of the state. Such an approach is taken in most states for higher education, where the expenditure of funds is delegated to the boards of the respective institutions and where the particular structure of each institution can then be varied to make the best use of the funds. This method might save money if incorporated in the constitution, but it might be opposed by those who now hold jobs set up by the legislature.

D. Rule-Making

Although the Supreme Court of Illinois has held that it has inherent rule-making authority for the courts of the state (*People* v. *Callopy*, 358 Ill. 11 [1934]), its responsibility to make and maintain rules of practice and procedure for all the courts would be strengthened if an express provision granting it the power of superintending control and rule-making were included in the constitution. This would be in accord with provisions in a large number of states.

Superintending control and rule-making go hand in hand. The usual provision for the former is a simple statement, "The Supreme Court shall have general superintending control over all courts and persons exercising judicial power and shall by general rules establish, modify, amend and simplify the practice and procedure in all the courts and for all persons or agencies in the exercise of judicial power in this state." This provision is needed to pinpoint responsibility in the judicial system. If the Supreme Court does not have the responsibility for effective procedures or if legislation can nullify efforts on the part of the judges to provide effective rules, the court, the body which sees the problems first, is powerless to act. Statutory regulations of practice in the courts are rigid, often out of date, and often result

[14] See Sec. 8.2 of the model judicial article of the American Bar Association for a provision pointing in this direction.

in injustice in given cases. Ambiguities in wording are difficult to clarify and because of the slowness of legislation, corrective measures are too slow to emerge. The judges, on the other hand, can react and make needed corrections more effectively.

It can be argued that since the court already has assumed the rule-making power, an express provision need not be added at this time. However, arguments always exist as to whether each new rule or set of rules is appropriate and an express provision pertaining to this function would clarify the matter.

E. Administrative Agencies

Much of the litigation in Illinois is carried on before administrative agencies. Decisions are made by these agencies that are as binding on the litigants as decisions by judges and juries, although they can be reviewed in the courts. Although agencies have a great many functions other than deciding cases, their methods of deciding matters between litigants are the same as those of the courts. At the very least, the same concepts of fairness and justice should be expected in agencies as in courts. In the operation of the courts, the ultimate responsibility for having fair procedures rests upon the Supreme Court. That court makes rules for the lower courts and litigants to comply with. It is as much in the interest of the people of the state to have the Supreme Court make certain that the adjudication procedures of all administrative agencies which decide cases are fair, as it is for the court to make certain that the procedures used in the trial courts are fair. At the present time the court can do this only when problems are brought before it on a case-by-case basis; consequently its action must be sporadic and very limited in scope. The judicial system should permit the same attention to be given to the procedure of adjudication in the contested administrative decision as in the circuit courts. The Supreme Court should be permitted to make general rules for governing the exercise of judicial power by adminstrative agencies. One solution to this problem would be to define judicial power broadly enough to embrace not only the courts but the adjudicative functions of administrative agencies.

F. Jurisdictional Problems

The constitution should eliminate as many jurisdictional problems as possible. Most Illinois jurisdictional problems were eliminated with the passage of the 1964 amendment. Section 5 of the amendment provides for the jurisdiction of the Supreme Court and severely limits review as of right to the Supreme Court. Section 7 provides for the jurisdiction of the appellate court and Section 9 provides for the jurisdiction of the circuit courts. The primary virtue of the amended article is the elimination of troublesome jurisdictional problems which in the past resulted in nonsuit or dismissal of meritorious cases on the ground that suit was commenced in the wrong court. As now written, since there is only one trial court in each circuit, there can be no possibility of being in the wrong court; mere venue problems are solved by simple transfer to the proper division.

The problem of successive appeals remains.[15] To a marked degree the current judicial article reduces successive appeals of right. However, decisions must be made as to which court to take the appeals. All appeals of right should go to the appellate court and the Supreme Court's jurisdiction should be entirely discretionary, based on Supreme Court rule, to be exercised either before or after the appellate court has acted. Such a procedure simplifies matters for the lawyer and still permits the Supreme Court to act on matters it believes to be important.

III. CONCLUSION

In summing up, the delegates should give serious consideration to assuring the quality and independence of judges in Illinois by (1) changing the method of selection so as to provide a system that will infuse new and quality blood in the judiciary and will remove selection from politics; (2) providing other devices that will assure judicial independence of thought and action, such as long terms, salary, tenure, renewal, and retirement plans, perhaps involving salary and

[15] See note 1 above, where Roscoe Pound called for "doing away with the system of successive appeals." Any time an intermediate court of appeals is required by a state, this problem exists.

tenure commissions, and rules for the disclosure of financial and political ties.

The convention should also consider making the Illinois judicial system into a unified court of justice. The Supreme Court should be given responsibility for making rules, superintending the courts, assigning judges, making budgets, districting, defining judicial manpower needs, and supervising the judicial activities of administrative agencies. All constitutional compartmentalization of the court system, either geographical or functional, should be eliminated to permit assignment of judges vertically as well as horizontally.

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9. Local Government outside Cook County

by Alice L. Ebel

Summary

Illinois has a pattern of local government which has remained virtually unchanged for more than 100 years. Encouraged by the state's constitutional restrictions on local bonding and taxing powers and by its political tradition, its governmental fragmentation is greater than that of any other state. Local government in Illinois is characterized by decentralized administration, a complicated series of overlapping units, and an uncoordinated group of local officials. It leads the nation in the number of its local units.

Ideally, all constitutional provisions restricting local government should be replaced by a brief, broad grant of residual powers which would permit localities to exercise any and all powers enjoyed by the state if the powers were not denied to them by statutory or constitutional provisions. Such a grant would provide maximum flexibility for a city, county, or other local unit to adapt its organizational structure and powers to its particular needs and desires. Practically, to be acceptable a new constitution must recognize the "felt needs" of the political community without sacrificing urgently needed changes.

Introduction

Tremendous changes have occurred in all aspects of our lives since the pattern of local government in Illinois was determined more than 100 years ago. There have been phenomenal advances in transportation,

10. Urban Government

by Joseph F. Small, S.J.

Summary

The growing complexity and overlapping of local governments in metropolitan areas call for a review of the present role of the state legislature in urban affairs. The 1970 Illinois constitutional convention should consider several types of self-determination for urban governments and make explicit the respective jurisdictions of the constitution, the General Assembly, and the local governments in the framing of municipal laws.

To provide governments responsive to new, unforeseen, urban life-styles, the constitution in its references to local government should be simple and flexible. It should attempt to guarantee self-determination in matters of purely local concern while providing for state jurisdiction over areawide interests that cross municipal boundaries.

Introduction

In American law, local governments (cities, villages, townships, districts, and counties) are created and regulated by their respective states. Their existence, their form of government, their functions and powers are all determined by the state's constitution and statutes. An important concern of the Illinois constitutional convention will be to review and re-evaluate the relationship between levels of government.

The 1870 constitution forbids counties, cities, townships, school districts, or other municipal corporations from incurring debts of more than 5 per cent of the taxable property within their boundaries. To circumvent this obsolete revenue provision the people have superimposed

upon the original units of government new ones which could each incur 5 per cent debts. This has allowed government to perform certain essential functions, but the overlapping is now so complex and confusing that the average citizen is unaware of the number and types of governments which affect his life and which he supports with his taxes. In Illinois there are 102 counties, with a total of 6,453 local government entities. In the Chicago metropolitan area residents live in six counties with 250 municipalities, 114 townships, 327 school districts, and more than 400 other special districts providing a variety of services. The federal government adds one more level of jurisdiction with the funds it grants directly to the cities.

Added to the confusion of overlapping governmental jurisdictions, there is a maze of state restrictions limiting the kinds of public services that local governments may provide and the revenues they may raise. Obviously, the constitution of 1870 could not have foreseen the phenomenon of metropolitan growth in the twentieth century. In 1870, 80 per cent of the Illinois population was rural; now 85 per cent is urban. Constitutional provisions specifying the types of local government and detailing their limitations were written for an age of small municipalities surrounded by farm land and for counties mainly rural in character. Unknown and unprovided for in the constitution is the modern urban life-style involving clusters of contiguous municipalities, core and satellite cities, economies of scale, and countywide or areawide services.

Delegates to the constitutional convention face, therefore, the difficult dilemma of allocating the appropriate jurisdiction of the constitution, of the state legislators, and of the local public officials in the government of a highly complex urban society. An added ingredient in this dilemma is the flow of federal funds directly to cities to solve urban problems. The responsibility of the convention in the area of local government is, therefore, to define a new federalism: the new relationships of local, state, and federal governments.

In carrying out this responsibility the delegates must weigh the likelihood of acceptance of the new constitution and its provisions by the voters of Illinois. A perfect allocation of jurisdictions would be futile if the voters would be unwilling to accept the changes involved.

Legislative Control over Local Governments

Our colonial legislatures established the precedent for state control of cities by incorporating the small rural communities which the residents had set up to provide for their local governmental needs. They also created counties and townships to exercise local governmental powers. After the Revolution the new states assumed and exercised the control over local governments begun by the colonial assemblies.

During the early nineteenth century the legislative supremacy of the states over local governments was universally accepted in America. State legislatures not only incorporated new towns and cities but also drew up specific statutes for each which approved the form of government and set the municipal powers and functions. In effect, a state legislature played the role of a super city council for all its municipalities. Supporting this role were court decisions, particularly the famous Dillon Rule, in which Justice John F. Dillon of the Iowa Supreme Court interpreted the powers exercised by cities narrowly, asserting that no city or county could perform any service for its citizens unless it had specific authorization by the state or unless the functions were clearly implied in the state law (*City of Clinton* v. *Cedar Rapids and Missouri Riv. Co.*, 24 Iowa 455 [1868]).[1]

Special Laws for Individual Localities

The Illinois Constitution of 1870 (Art. IV, Sec. 22) placed some restriction on legislative supremacy by forbidding special laws for individual localities. As far as possible only general laws equally applicable to all municipalities were to be enacted. This restriction, however, has been circumvented in a number of ways.

First, municipalities are placed in separate classifications, generally as related to population. Special laws are then applied to these separate classifications although the courts may declare the laws invalid if they conclude that the circumstances in the various classifications do not differ sufficiently to warrant special legislation.

Second, legislation has been passed that is optional, allowing individual

[1] John F. Dillon, *Commentaries on the Law of Municipal Corporations* (Boston: Little, Brown, 1911), vol. 1, Sec. 237.

local governments to select one of a number of approved charters. The system of township government in the counties is one example. The law of 1872 for the incorporation of cities and villages allows municipalities to choose among four types of local government: mayor-council, council-manager, commission, or trustee.

A third technique used by the legislature to provide special legislation has been the creation of special districts to afford certain services to a selected area. Often a district is brought into existence as a means of evading the constitutional limit on the tax rate allowed to counties (Art. IX, Sec. 8) or on the debts that local governments may assume (Art. IX, Sec. 12). Sometimes the district is created to provide a service across municipal boundaries or to provide a service independent of other units of government. Special districts may handle water supplies, sanitation, natural resources, fire protection, hospitals, parks, and so on. Illinois has 2,313 special districts, more than any other state. They now total 57 per cent of the governmental units in the state. While the number of school districts is steadily decreasing through the merging of smaller districts, noneducational special districts continue to multiply rapidly. Districts, of course, overlap with general service governmental units and are a prime factor in the complexity and confusion of local government.

A final category of special laws for local government in Illinois is the constitutional amendment of 1904 establishing in effect a special charter for the City of Chicago. Under it the state legislature is empowered to pass special legislation for Chicago with the consent of the city's voters. The Illinois Constitution proposed in 1922 and rejected by the voters attempted to include in one article (Art. VII) all matters concerning county and municipal governments. The General Assembly would have been authorized to reorganize the governments of all counties on a uniform basis, but all changes would have required ratification by the voters in each county affected. This article also proposed that the City of Chicago should have power to draw up its own charter and have "complete power of local self-government." Its power to tax and to borrow money, however, was to be authorized by the state legislature. Section 176 of Article VII would have authorized the future consolidation of the City of Chicago with "the portion of the County of Cook

ling within the City" if such a proposal were approved by all Cook County voters.

Problems of Metropolitan Areas

The problems of local government outside Cook County are treated in Professor Ebel's paper. This analysis is primarily concerned with the intergovernmental problems found in larger metropolitan areas. The Bureau of the Census in 1967 identified 227 standard metropolitan statistical areas (SMSA) across the United States, each with a central city of at least 50,000 people and neighboring county or counties that are economically and socially integrated with it and urban in character. Nine SMSAs are located in Illinois: Chicago, Rockford, Rock Island-Moline, Peoria, Bloomington, Champaign-Urbana, Decatur, Springfield, and St. Louis.

The Committee for Economic Development in *Modernizing Local Government* identifies a series of interlocking and mutually aggravating problems of these metropolitan areas.

1. Metropolitan areas are characterized by the overlapping of governmental jurisdictions. These separate and independent layers of government in the same geographical area compete for sources of revenue and so divide legal responsibilities that no local governmental entity is adequate to provide solutions for urgent communitywide problems.

2. Many local governments are too small in population and revenue to provide the services demanded by a modern urban community. The Jacksonian ideals of the nineteenth century encouraging the incorporation of crossroads towns stimulated local political participation, but they also created a multitude of decision-making entities unprepared for intergovernmental cooperation and lacking an adequate financial base. This financial inadequacy often results in unqualified personnel attempting to administer increasingly complicated departments at a pay rate too low to attract professional administrators. Admittedly, unqualified personnel are also a facet of the patronage system traditional in many local governments.

3. Popular interest in and control over local government is generally ineffective. The urban voter is bewildered by the variety of elective

offices. He knows nothing about the candidates, very little about the responsibilities of each office, and sees very little impact of the office on his own life. All these reasons plus the fact that these offices seem to have no policy-making significance create a widespread indifference among the voters.

4. Primitive and ineffective administrative organizations prevent adequate local government. Local governmental bodies without a single executive authority or one who shares in the legislative responsibilities blur the lines of authority and hamper the necessary decision-making in that government.

5. The whole policy-making mechanism is warped by gerrymandered legislative bodies and a variety of independently elected executives who cannot be expected to cooperate with a nonexistent chief executive. This last impasse is intensified, of course, when the elected officials in the same administration are of opposing parties. When these built-in obstacles to efficient government are added to inadequate financial resources, insufficient legal authority, and fragmented geographical jurisdiction, it is not surprising that we have problems in local government.

Criteria for Evaluating Solutions

The federal government's Advisory Commission on Intergovernmental Relations in its *Alternative Approaches to Governmental Reorganization in Metropolitan Areas* (1964) lists a number of criteria for evaluating solutions to local governmental problems.

1. Local governments should have broad enough jurisdiction to cope adequately with the forces that create the problems which the citizens expect them to solve. This suggestion hits at the modern phenomenon of overlapping governments as well as at the frustration of municipalities in any metropolitan complex adversely affected by nuisances originating outside their boundaries.

2. Local governments should be able to raise adequate revenues, and do it equitably. This problem rooted in present constitutional restrictions is treated in Professor Fisher's study in this series.

3. There should be flexibility to adjust governmental boundaries. The constitution and state laws should be written to allow local residents

to enter into annexation and consolidation agreements with their neighbors. Villages that once stood alone in the countryside are now often sharing boundaries with other municipalities with common interests, each one unable by itself to supply services that consolidation could provide.

4. Municipal areas should be large enough to permit taking advantage of economies of scale. This merely states what the professionals in every field recognize: efficient and economic operation of a given service (board of health, school system, welfare, etc.) demands a certain size, that size at which the unit cost is lowest. An affluent suburb can finance all services exclusively for its own residents at whatever cost, but for most municipalities this luxury is not feasible. Some form of cooperation, therefore, with neighboring cities or with a central metropolitan agency should be considered.

5. Local governments should be organized as general-purpose rather than as single-purpose units. This is a criticism of the single-purpose special district, one of the causes of fragmentation and overlapping of governments. Special districts have been the *ad hoc* solution in crises of flood control, sanitation, etc., where services must be provided across municipal boundaries and often beyond the taxing powers of the local communities. These districts, adequate for the crisis, are criticized as governmental entities too far removed from citizen control and uncoordinated with other municipal functions.

6. Local governments should provide the conditions for active citizen participation and control. Many suburbanites have moved out of the large central city because they wished to have some choice in the type of community they would live in, the level of taxes they would pay, and the type of school their children would attend. These people, while often nonparticipators in routine local governmental affairs, will be articulate critics of any proposed changes. They will demand that new arrangements provide for citizen control.

7. Whatever solution is proposed should be politically feasible. Our present maze of multitudinous governments represents an existing power structure that may be threatened by any changes proposed in the organization and procedures of local governmental entities. Any proposal that will eliminate or substantially reduce an existing office will make that

office holder an opponent of the new constitution unless he is persuaded that the change will bring new opportunity and prestige to him and to his party.

MUNICIPAL HOME RULE

A primary consideration of the constitutional convention will be whether municipal government entities in Illinois should be allowed to determine their own structure and powers, including taxing powers. Illinois is now among fifteen states that do not allow local self-determination to their citizens. In part this is due to the fact that our present constitution was adopted just before the era of home rule began. In 1875 Missouri adopted the first state constitution that guaranteed municipal home rule. Since that date thirty-four other states have followed this plan, thirteen in the past decade. In Illinois counties and municipal governments are still under close regulation by constitutional and statutory limitations. The result is the continual trek to Springfield by local governmental officials during the sessions of the General Assembly.

In considering home rule for Illinois the convention should consider the forms adopted in other states.

1. In five states (Connecticut, Iowa, Mississippi, North Carolina, and South Carolina) the legislature grants certain powers to local governments without specific constitutional authority to do so. These statutory grants are subject to challenge as unconstitutional under the Dillon Rule.

2. In seventeen states the constitution provides a direct or self-executing grant of home rule. Local governments draft their own charters and have the right to legislate in all matters of purely local concern. The state legislature may not interfere with the government of municipalities except by passing general statutes applicable to all municipalities on matters of statewide concern. But even in such matters the constitution may list certain municipal powers that are not subject to any state legislation. States that grant this power to municipalities in their constitution are: Alaska, Arizona, California, Colorado, Florida (for Dade County exclusively), Kansas, Louisiana, Maryland, Missouri, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, and Utah.

Such a constitutional grant may either spell out the specific powers

given to the local governments or it may broadly grant all powers of local government except those specifically denied or restricted in the constitution or in general state laws. The latter approach has the advantage of a short, uncomplicated grant without the need of enumerating the specific powers of local government. At the same time it reserves to the state legislature the power to pass uniform restrictive legislation where needed for the general welfare of the whole state.

This self-executing form of constitutional home rule is the most thorough exclusion of the state legislature from municipal affairs. It is designed to delineate more clearly and more permanently (either as a grant of specific powers or as a general grant with certain specified limitations) the proper jurisdictions of both municipal and state legislation. For public officials who have made regular trips to the state capitol pleading for revenue or powers to regulate their own affairs, the direct grant is very attractive. They find in this form the implication that urban residents are mature citizens equally as capable of ruling themselves as the members of the state legislature.

3. Another form of constitutional home rule empowers the state legislature to delegate specific powers of self-determination to local governments. The legislature may exercise whatever option it wishes in granting such powers and it may, if it so desires, take away what it has given. This form has been adopted by thirteen states (Georgia, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Virginia, Washington, West Virginia, and Wisconsin).

Those preferring constitutional home rule with legislative option argue that the direct constitutional grant to municipalities tends to create independent governments within the state, a kind of *imperium in imperio*. This kind of independence leads to conflicts over what constitute matters of local concern and matters of statewide interest. These differences become burdens on the courts for settlement when, it is argued, they could have been defined in the first place in a system of constitutional home rule that is not self-executing but is authorized by the state legislature.

Reflecting the controversy between the direct grant and the legislative grant, the *Model State Constitution*, revised periodically since 1921 by the National Municipal League, makes a significant shift in a recent

edition.[2] From its traditional advocacy of a direct grant of home rule the league now advocates a constitutional grant of power to the legislature to provide the necessary general laws for local home rule. The *Model Constitution* then presents the direct grant of home rule as an alternative provision. The league believes that the state legislatures can be expected to pass the enabling legislation. It also notes, however, that where state legislatures are not likely to provide the necessary legislation, the direct-grant form of constitutional home rule may have to be enacted.

The local government article in the latest *Model State Constitution* empowers the legislature to provide the general law to adopt local charters, to establish classification of civil divisions, and to provide optional charters of municipal organization. Under this article a county or city may then exercise any legislative power not denied to it either by its charter or by general state laws. This constitutional provision, in effect, reverses the Dillon Rule because the courts would be expected to rule that a county or city has the power to act unless that power has been specifically denied to it.

Advocates of this plan argue that it safeguards state responsibility by allowing the legislature to specify limitations, it gives wide legislative options to municipalities, and it should eliminate controversies over whether the local governments are acting on matters of local or state concern. This last achievement would avoid the need for judicial determination of proper jurisdiction, for the local government is authorized to act on any matter within its territorial jurisdiction as long as that matter has not been specifically denied either by its charter or by general law.

Underlying this controversy over direct grant versus power to the legislature is a change of social and political climate that should be assessed by the convention. Early demands for constitutional home rule were made in an era before equitable apportionment of state representation when rural domination effectively blocked needed legislation for urban areas. In the light of this legislative indifference and even opposition it seemed necessary to argue for direct grants of home rule with detailed listings in the constitution of municipal powers and procedures.

[2] National Municipal League, *Model State Constitution*, 6th ed. (New York, 1963).

Municipal self-determination is still highly valued, but the twentieth century is producing new, unforeseen problems in regional development and areawide services. The constitutional detailing of local powers served the purpose of bypassing the state legislature; but this enumeration of home rule powers now threatens to be a roadblock against solutions for metropolitan problems. Ironically, the early demand for flexibility in solving local problems now stands as a posture of inflexibility in the context of metropolitan planning, development, services, and intergovernmental relations.

Hopefully, the convention will draw up a document that will attempt to be serviceable to the unpredictable urban life-styles of the twenty-first century. Whatever these might be, we can be sure that we shall need a constitutional framework that will allow the state legislature to achieve and maintain a balance between local self-determination and areawide needs.

Despite the popularity of local home rule across the United States, there are a number of objections to the concept that can be raised. First, it may be argued that we have expertise in the General Assembly but inefficiency and the danger of corruption at the local level. The state legislature after acting as a super city council for 150 years certainly has the expertise in local law. However, our daily headlines indicate that the present system of legislative control does not prevent local corruption. The people in the cities should be trusted with their own affairs; law enforcement and an alert press are capable of uncovering malpractices.

A second objection to home rule is that we are already flooded with inadequate and overlapping local governmental jurisdictions; to strengthen these governments with home rule would be to perpetuate our inefficiencies. Undoubtedly, as noted above, there is danger of our local government entities becoming so many dogs in their mangers hampering the needed areawide services. But with proper constitutional authorization to cooperate for common concerns municipalities should be able to recognize and negotiate for their own best interests. Again, the present system has not shown the ability to solve intergovernmental metropolitan problems. A freedom on the part of the participants to enter into mutually advantageous arrangements offers some hope for a political solution.

In the matter of structure, organization, and powers of local government the convention should decide whether the form of local government should be by local option under constitutional guarantees or under general statutory provisions of the legislature. If it is to be under legislative discretion, the convention may wish to make some constitutional guarantees; e.g., the structure and organization might be a local decision while the powers exercised might be under statutory provision. Or the legislature might be directed to provide optional charters for local governments.

With the rapid urbanization of counties in the metropolitan areas the convention should address itself to new incorporations as well as annexation and consolidation. Should the state have a policy (constitutional or statutory) of minimal requirements for new incorporations that would consider the adequacy of the economic base of the new community? Should the present proliferation of municipalities in urban counties be offset by encouraging annexation and consolidation? Desire for areawide services as well as economy of scale may recommend this in certain sectors.

The consolidation of city and county governments may prove feasible and popular in some areas. The convention may wish to provide for such developments. The political climate in Cook County, for example, may someday revive a long-standing proposal that Chicago be a separate county with the remainder of Cook County divided into two other counties. While a single metropolitan area government is highly unlikely in the Chicago area within the foreseeable future, common problems in the urban area may someday recommend some form of federation of municipal and county governments.

County Governments Equipped to Solve Metropolitan Problems

Strong county governments may be a key factor in solving the problems of metropolitan areas. Because a county is primarily a subdivision of the state created to perform state legal and administrative responsibilities, it serves an essentially distinct function from a city, which has come into being at the request of local residents needing services. Local gov-

ernments may ask counties to assume new or exclusive service responsibilities, as in the recent merger of the Chicago and Cook County welfare departments. As an arm of state government, the county may be used to supply areawide services which take advantage of economies of scale.

Any consideration for strengthening county government must note the spreading demand for executives and legislators who reflect a one man-one vote electorate. The eighty-four Illinois counties presently ruled by boards of township supervisors are not structured to reflect population or population shifts; they represent a piece of geography no matter what its population. The fifteen Cook County commissioners — ten from Chicago and five from the county outside Chicago — similarly represent territory rather than people. The remaining counties are governed by commissioners elected at large.

If the counties of Illinois are to be prepared to provide metropolitan services and are to be responsive to a mobile population, some changes will be needed in their governing bodies. But a move to eliminate the township or commission governments would meet with strong opposition. A less traumatic approach would be to add an optional form of county government which each county could separately consider for adoption. Counties could then at their individual pace change or not change their governments as they wished.

At present Illinois counties are governed in one of three ways. Cook County, as noted above, is governed by fifteen commissioners; seventeen counties have opted for the commission form in which each elects three commissioners at large; the remaining eighty-four counties have chosen to be governed by a board of supervisors made up of all the township commissioners elected in that county. A fourth optional charter designed as a framework for meeting metropolitan problems could have a strong county executive, either elected countywide or appointed as a county manager by the elected board of commissioners. The constitutional status of such a charter could include county home rule comparable to municipal home rule, that is, either a direct grant in the constitution or a constitutional provision for home rule as delineated by the state legislature. Such a charter of county government with strong executive leadership and ample powers to respond to the service needs of an urbanized county could allow the county government to play an expanding role

in guiding future urban growth while allowing the municipal governments to maintain their local jurisdictions.

An alternative to the optional county executive charter would be a simple home rule provision allowing counties to maintain their present governments or adopt a new charter of their choice. This provision should allow the counties to adjust their boards of governors, develop county executives, and consider the appointment of various administrative officers who are now elected under the present constitution. If such a government were unshackled from the artificial taxing and debt limitations of the present constitution, it could review the status of special districts within its jurisdiction and consider absorbing them into the general government.

METROPOLITAN INTERGOVERNMENTAL RELATIONS

The *Model State Constitution* recognizes the looming crisis of intergovernmental relations in metropolitan areas by including an article that guarantees the right of any government in the state to enter into cooperative arrangements with any other government. It also supports the consolidation of existing governmental entities.

It may be argued that such an article is unnecessary, and it is inconceivable that cooperative service or governmental arrangements mutually agreed to by local governments would be denied by the state government. Yet as we become increasingly interdependent, particularly in our metropolitan areas, and as we evolve new life-styles beyond the imagination of an earlier generation (and even beyond our present imagination), it is important that a constitution that may govern the state of Illinois for the next century should be so worded as to allow its citizens to fashion local governmental structures and services that may come to be needed by the new and more complex urban living.

Intergovernmental agreements might include the contracting of services by one community with another, the formation of voluntary intercommunity councils to study and come to agreements on mutual problems, or the transfer from a city to its county of governmental functions such as the regulation of water pollution, air pollution, or the use of open space. The growth of cities to approximately the size of

counties may lead in time to the more radical consideration of consolidating the city and county governments. Finally, some form of local federation of central city and satellite cities might be considered for certain areas. A number of states in recent constitutional conventions have faced this developing need in urban areas and have made some specific arrangements.

Pennsylvania in its new constitution allows local units of government to share their powers and functions with, or delegate them to, any state, federal, or local unit. This power does not require action by the state legislature but may be initiated by the local governing body. Such action must be taken by the local unit if requested by a referendum of the electorate. Pennsylvania has also constitutionally authorized its state legislature to establish or dissolve governments in areas involving two or more municipalities. Boundary changes may be made with the approval of a majority of the voters in each municipality affected.

New York attempted in its proposed constitution of 1967 to arrange for state legislative overseeing of intergovernmental cooperation. Local governments would be able to provide "cooperatively, jointly or by contract" any service which a local government is empowered to provide, but these arrangements would be entered into "as the legislature may provide." Regional governments are also provided for, subject to conditions prescribed by the state legislature and upon approval of the electorate in a referendum.

Maryland in its constitution proposed in 1968 allocated to the state legislature inherent power to determine the overall structures of local government including the creation, merger, and dissolution of multicounty governmental units. The constitution refers to "popularly elected representative regional government" at the discretion of the state legislature.

In the Chicago metropolitan area social, economic, and political factors make a regional government in northeastern Illinois highly unlikely in the foreseeable future. The concentration of Negroes in the central city and whites in the suburbs, the entrenched Democratic party in Chicago versus the equally entrenched Republicans in the suburbs, and the preponderance of commercial and industrial assessed valuation in the city versus suburban needs for services all argue against the likelihood of one overall government for this particular area. Yet this area will need more and more areawide services in the coming years. A constitution proposed in 1970 should allow for local options where intergovernmental cooperation is desired and should provide the opportunity for "popularly elected representative regional government" if such a form of government should be desirable and feasible in the future.

PERSONNEL

In the present constitution a number of local governmental officials are mentioned by title and details concerning their election are supplied. These offices are thus given constitutional protection. In the volatile changes of urban living now taking place, it may be argued that if the forms of government are to be made more flexible through home rule provisions, then the offices in these governments and their mode of election or appointment should be left to legislative decision either at the state or local level.

Jacksonian democracy of the nineteenth century is the source of our constitutional and statutory preference for the direct election of public officials. This policy may have served a purpose in simpler times of training a new nation in participatory democracy, but it is a serious obstacle in the complexity of the modern world. The "long ballot" has been adequately criticized and even ridiculed in recent years. The constitutional convention should address itself to the number and kinds of public offices that should be elective and the kinds that should be assumed by appointment.

Not only are the voters often unaware of the qualifications of many candidates running for administrative posts, but also they are asked to elect a man at one level and see his counterpart appointed at another level. The sheriff of Cook County, for example, is elected, while the superintendent of police in Chicago is appointed by the mayor. The superintendent of schools for Cook County is popularly elected, while the school board for Chicago is appointed by the mayor after an elaborate screening process.

The present system of electing county officers can result in the current anomaly found in Cook County where the sheriff and the state's attorney

are of opposite parties while the presidency of the county board has switched from one party to the other. In the next election neither party can clearly be given credit or held responsible. Each can blame the other.

At all levels of state government the convention should weigh the advantages of the federal system where elections are limited to the representatives of the people in the legislative arm and to the chief executive. No other offices are constitutionally protected. In Illinois this would mean electing the General Assembly, the governor, and the lieutenant governor. At the county level a board of commissioners as legislators and a chief executive would be elected. The same principle would be followed for cities and villages. All other officers would be appointed by the appropriate chief executive. Separate districts would continue as distinct levels of government. When and if they should be absorbed by county or regional government, their commissioners would be appointed by the chief executive of the county or region.

Ironically, neither political party in Illinois could make such a suggestion without being accused of seeking to capture an administration. Yet at the federal level we hand over the whole administration to the winning party, allowing the president to appoint to all federal offices. We then hold him and his party responsible for the welfare of the nation for four years. The president and his appointees work as a team to build a record. They can take credit as a team, and criticism can be focused on a single administration.

Norms for the Future

On the presumption that a new constitution will serve Illinois for the next century, there is need, particularly in matters concerned with urban government, that the document be simple and broad enough to accommodate life-styles unforeseen in this era. Home rule provisions both for municipalities and counties allowing for self-determination in new developments will be a prudent provision. Constitutional restrictions on future options as well as constitutional guarantees that may in time interfere with areawide developments should be minimal. A norm that may be helpful is to seek a balance in the constitution that guarantees local self-determination in all matters of purely local concern and state legislative jurisdiction in matters of common areawide interest.

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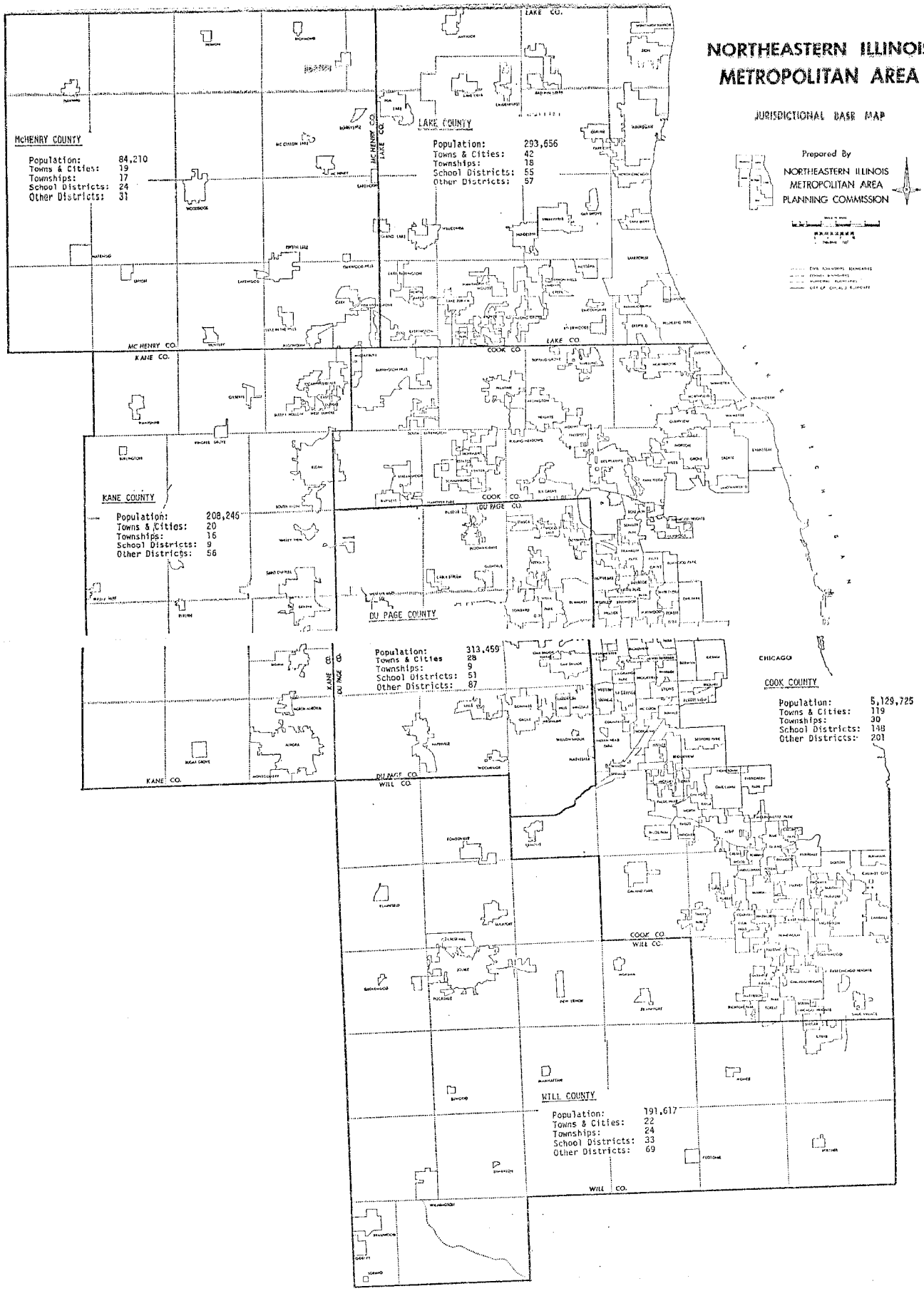
NORTHEASTERN ILLINOIS METROPOLITAN AREA

JURISDICTIONAL BASE MAP

Prepared By
NORTHEASTERN ILLINOIS METROPOLITAN AREA PLANNING COMMISSION



11. Urban Problems

by James M. Banovetz

Constitution writers have traditionally sought to draft a legal document that will successfully endure the test of time and the change of environmental conditions. Impetus toward this goal has undoubtedly been generated by the success of the framers of the American Constitution in producing a document that has thus far endured nearly 200 years with but minor changes in its wording.

Yet no matter how hard constitution writers seek to produce a "timeless" document, their work inevitably reflects the political concerns manifest in society at the time they labor at their legal task. Thus the Founding Fathers made specific provision for the fractional enumeration of Negro slaves and failed to anticipate the evolution of national political parties when they contrived their scheme for presidential election. Thus the 1870 Illinois Constitution embodied prominent concerns of that era mandating the Illinois General Assembly to pass liberal homestead laws, provide a system of free public education, and formulate protective acts for miners.

While the Illinois constitutional convention of 1970 will undoubtedly strive to produce a document of indefinite applicability, it is safe to presume that it, too, will mirror in its work the principal concerns of its members. Since the decade of the 1960's has been one in which the state — indeed the nation — has been preoccupied with the problems emanating from urbanization, it seems equally safe to presume that urban concerns will be dominant considerations in the proposals, debates, and decisions of the convention's delegates. Thus it would seem particularly relevant to examine the interrelationship between potential constitutional provisions and the conditions of Illinois urban life in the last

third of the twentieth century. This is the task to which this paper is addressed.

Attention is directed to two very basic questions. First, what provisions should be made within a new constitution for the resolution of urban problems; that is, what should Illinois governments be empowered to do about urban issues? Second, once powers are provided, what steps should be taken to assure that this authority is in fact used to ameliorate urban problems? After considering these points, the paper will conclude with a discussion of specific clauses in the present Illinois Constitution which are alleged to impair efforts to resolve urban ills.

Urban Problems

This task is predicated, however, upon some definition of the term "urban problems." As used in this discussion, the term "urban problems" refers to those social maladies which arise from, or are aggravated by, the condition of life in cities: that is, problems which are a direct product of many socially heterogeneous people living, working, and playing in a relatively small geographic area.

Beyond this, it is easier to specify what urban problems are not, rather than what they are. First, the term "urban problems" does *not* refer exclusively to the problems of Chicago, Cook County, or the Chicago metropolitan area. Rather, it refers to the problems caused by population density and diversity wherever they are found in the state. Urban problems are, for example, found in all nine of the state's metropolitan areas, including, besides Chicago, Bloomington, Champaign-Urbana, Decatur, East St. Louis, Peoria, Rockford, Rock Island–Moline, and Springfield. They are found in rapidly growing college communities like Carbondale, Charleston, DeKalb, and Macomb; in communities like Belvidere, faced with major industrial expansion; in smaller towns like Cairo, which are experiencing explosive issues; and in the downstate trade centers — the Ottawas, Harrisburgs, and Mt. Vernons — which now must redefine their role in terms of the needs of an urbanized state and nation.

Second, the term "urban problems" is *not* used in the narrow but popular sense of referring exclusively to the difficulties of race relations or ghetto life. Indeed, these problems are not — by the definition given

above — truly "urban" problems at all. They result not from the basic nature of cities, but instead from a significant social fact: that Illinois' urban areas, and particularly its central cities, are increasingly the home of the poor of all races and of the black population generally. It is on this basis that such issues require the attention of those concerned with governing an urban state.

In a more positive sense, then, the term "urban problems" refers to such contemporary concerns as transportation, air and water pollution, land use planning, sewage and waste disposal, public safety, park and recreational opportunities, and governmental organization. All of these seem to be rooted in the urban condition itself. The economic and social structure of cities compel the addition of other concerns to this list, including public education, housing, race relations, and poverty, health, and welfare. More specifically, contemporary race or poverty-related dilemmas include the regulation of landlord-tenant relations, the provision of legal aid, including court services, to those who experience alleged violations of their constitutional rights, the development of day-care centers for the children of working mothers, improvements of worker retraining programs, neighborhood control of code enforcement programs, and protection of the right of privacy for those persons receiving various forms of public assistance.

Yet, just as the process of urbanization has not yet stopped, so, too, a summary of urban problems cannot be limited to those difficulties which are now the focus of attention. The future will likely see increased levels of concern about matters now but vaguely perceived, including adequate provision of mental health services, protection of citizens from technological — rather than forceful — invasions of privacy, conservation of natural resources in the forms of animal and plant life, regulation of noise and heat pollution, and provision of adequate cultural and recreational facilities for a population having increasing leisure time.

This discussion, in other words, is directed at the constitutional ramifications of people living together in villages, cities, and metropolitan areas. As already noted, it assumes that the 1970 Illinois constitutional convention will be concerned with such problems, an assumption predicated upon the fact that the great majority of the state's population now lives — not altogether happily — in these areas.

CONSTITUTIONAL APPROACHES TO AN URBAN SOCIETY: EMPOWERING GOVERNMENTS TO RESOLVE URBAN PROBLEMS

Since the question of whether or not the Illinois Constitution should address itself to urban concerns has been rendered all but obsolete by the extent to which the state has become urbanized, the first question obviously becomes: how should the proposed new Illinois Constitution deal with the growing number of social and environmental problems directly or indirectly a product of urbanization? There are seemingly as many responses to this question as there are respondents; nevertheless, it is possible to categorize typical responses into four general groupings. The first suggests that the constitution say very little about specific urban problems. The second takes the opposite point of view; it would seek to incorporate any number of specific provisions within the constitution relating to particular urban problems or issues. The third group of responses suggests that urban problems can best be met through the incorporation of either a statement of socio-economic goals or the provision of a bill of social rights. Finally, another approach would offer home rule as a means of turning primary responsibility for urban problems over to units of local government.

Each of these groupings deals, in a manner of its own, with a very singular task: the assignment of specific responsibility for undertaking specific kinds of actions to some specific unit or agency of government. Each of them also answers, in one manner or another, the continuing argument over the degree of "specificity" appropriate for constitutions. Finally, each carries with it certain basic advantages and disadvantages as a functional approach for a new constitution. Since ultimately the constitutional convention must settle either upon one of these approaches or upon some combination of them, the question of approach must necessarily be considered one of the principal policy questions confronting the delegates. Hence, each will be discussed at some length in the following paragraphs.

1. *The "Brevity and Flexibility" Approach*

The "brevity and flexibility" approach holds essentially that the enumeration of governmental powers in any state constitution should be

kept as brief as possible, and that the state legislature should be given both a sufficient scope of authority and the definitive responsibility to cope with new problems and to satisfy an ever-changing pattern of public demands for services. The approach is largely predicated upon the following two premises: (1) state governments generally can exercise any and all governmental powers not specifically denied to them either in the federal Constitution or in their respective state constitutions; and (2) as bodies composed of democratically elected representatives of the people, state legislatures can be trusted to use broad grants of authority in an intelligent and judicious manner.

Perhaps the ultimate embodiment of this approach to state constitution-writing is that contained in the *Model State Constitution* prepared by the National Municipal League.[1] In effect, the league approach in dealing with urban problems is to say nothing about them. The *Model State Constitution* does not discuss urban problems as distinct from the more general problems of attaining good government. Its principal feature is a broad, open-ended grant of powers to the state. This grant, which constitutes Article II of the *Model Constitution*, reads as follows: "The enumeration in this Constitution of specified powers and functions shall be construed neither as a grant nor as a limitation of the powers of state government but the state government shall have all of the powers not denied by this Constitution or by or under the Constitution of the United States."[2] Beyond this, the constitution's only urban-related provisions are the following: a grant of broad home rule powers to local units; a restriction on special legislation; and a provision guaranteeing local units the power to cooperate with one another. A response to the conditions of an industrial-urban civilization is also included in the constitution's bill of rights with the addition of a clause restricting the use of electronic surveillance. In short, the *Model State Constitution* deals with urban problems by giving the state legislature — and, indirectly, local units of government through its home rule provisions — broad authority to take whatever actions it sees fit in dealing with unspecified urban problems.

[1] National Municipal League, *Model State Constitution*, 6th ed. (New York, 1963).

[2] *Ibid.*, p. 3.

Much can be said in behalf of this strategy. It recognizes that specificity in dealing with governmental problems frequently does more to restrict than to facilitate the resolution of those problems. The history of state constitutions in the United States is filled with instances of provisions which, while inserted initially with the best of intentions, have later hamstrung the efforts of legislatures facing new and different problems. The United States Constitution — itself a model of brevity — has endured for 200 years largely because it avoided such commitments to the parochial concerns of 1790.

An open-ended provision provides, simultaneously, adequate powers through which the state government can resolve both matters currently considered to be public problems, and matters — most of which are now completely unanticipated — which will prove to be problems in the future. It would permit the utilization of both the methods currently used to resolve public problems and any new methods which might be developed in the future. It would, furthermore, eliminate the need to prepare an exhaustive listing of the powers which the state government should be able to exercise and would eliminate the risk of inadvertently overlooking any powers which may be needed either now or in the future.

In commenting upon this grant of power, the National Municipal League also noted a number of other advantages for this particular approach. For instance, such a clause largely eliminates concern that legislative or executive actions upon questions relating to the exercise of governmental functions might not be constitutional. Furthermore, such a clause should markedly reduce the amount of adjudication concerning the constitutionality of legislative enactments. Further, such a grant of powers should strongly discourage unnecessary and frivolous amendments. As the league has noted, "Constitutions that . . . seek to control the government for an unforeseen and unforeseeable future usually hamper the state's ability to meet the demands of changing times. Constitutions which seek to control the future the most have generally been found to be in need of amendment the soonest."[3] Finally, the wording of the article, and specifically that which states, "the enumeration in this Constitution of specified powers and functions

[3] *Ibid.*, p. 37.

shall be construed neither as a grant or as a limitation of the powers of state government," lays down a rule of interpretation which will avoid judicial findings of implied limitations upon the powers of the state legislature that were wholly unintended by the framers of the constitution. Such broad grants of power are found not only in the recommendations of good government groups; they are also embodied in the constitutions of Alaska, Hawaii, Oklahoma, and Virginia.[4]

Countering these arguments are a number of criticisms levied against this particular approach. Essentially, these criticisms come from three different directions: from those who claim this kind of constitutional language is so general that it is dangerous, from those who claim that such language is so general that it is meaningless, and from those who claim that such language is unnecessary. Those taking the first position argue, for instance, that a state legislature cannot be trusted with such broad grants of power, that such broad and open-ended language affords the public too little protection against legislative or executive capriciousness. Accompanying this argument is the assertion that, since legislative and executive bodies cannot be trusted with the civil liberties of their constituents (and presumably they cannot, since virtually every constitution in the United States contains a bill of rights), they should not be given a blanket grant of power in other matters either. Such arguments obviously question the responsiveness and the responsibility of state legislative bodies. Needless to say, there is no dearth of substantiation for this point of view.

Opponents of this broad approach also argue that it fails to offer any guidance or direction to legislative and executive officials in the discharge of their responsibilities. It is claimed, for example, that a constitutional specification of particular powers is required to remind, guide, and direct legislative and executive officials. It is said that state legislatures will not or are too unlikely to take action on certain matters (for example, the passage of legislation specifying the rights of tenants in rental dwellings) unless directed to do so by constitutional mandate.

Others are indifferent or hostile to such a "broad power" article because states, as sovereign units, are seen as necessarily possessing general

[4] *Ibid.*, p. 38.

powers of governance (except, of course, when their actions collide with prohibitions in the United States Constitution). In this view, a declaration of the scope of state authority seems redundant. This philosophy is expressed in the current Illinois Constitution, which does not describe the state's governmental authority but merely presumes it. Proponents, of course, do not accept this criticism. The lack of a specific statement of authority is seen by them as an invitation to litigation and a potential source of capricious action in the courts.

Finally, it can also be argued that a general statement of governmental powers will produce a legal document which, on its face, will not appear "relevant" to Illinois' restless urban residents who are looking to the constitutional convention for a promise of relief from their poverty, frustration, desperation, and perceived status as "second-class citizens." To such persons, constitutional rhetoric will be at least as important as constitutional flexibility and will undoubtedly play a larger role in winning their support. Illinois' black residents, for example, are much more likely to support a constitution which speaks directly to problems of poverty and race relations than they are a constitution which accomplishes the same purposes through resort to legal jargon. The provisions of the *Model State Constitution* are noteworthy for their absence of such socially relevant rhetoric.

2. *The Specified Powers Approach*

Such rhetoric is readily available, however, in an alternative approach which specifically lists or enumerates the powers which the state may exercise. Typical of this approach, for example, is Article VIII of the Hawaiian Constitution which specifies powers which the state may exercise in the field of public health and welfare (and additionally in dealing with several urban problems). These provisions state:

> Section 1. The State shall provide for the protection and promotion of the public health.
>
> Section 2. The State shall have power to provide for treatment and rehabilitation, as well as domiciliary care, of mentally or physically handicapped persons.

Section 3. The State shall have power to provide assistance for persons unable to maintain a standard of living compatible with decency and health.

Section 4. The State shall have power to provide for, or assist in, slum clearance and the development or rehabilitation of substandard areas, including housing for persons of low income.

Section 5. The State shall have power to conserve and develop its natural beauty, objects and places of historic or cultural interest, sightliness and good order, and for that purpose private property shall be subject to reasonable regulation.

This approach to a constitutional enumeration of powers may take two different forms. In the first, the constitution may provide a general statement of powers, similar to that set forth in the *Model State Constitution,* with a listing of specific powers following the general statement. The listing may either follow immediately after the general statement, or it may be interspersed at various points in subsequent articles of the constitution. Second, a state constitution might contain only a list of specified powers, refraining from the inclusion of a general grant of power. In both cases, the constitution would contain specified grants of power authorizing governmental action in pursuit of certain listed purposes.

The present Illinois Constitution follows essentially the first of these two alternatives. The constitution lacks any general grant of power, but specific provision is made for the exercise of power at several points. Article IV, Section 1, for example, vests the legislative power of the state in the General Assembly; Article V, Section 6, vests the judicial power in the state's court system. These general, if vague, grants of power are then supplemented by specific provisions scattered through the constitution. Typical, for example, are the following sections in Article IV:

Section 27. The General Assembly shall have no power to authorize lotteries or gift enterprises. . . .

Section 29. It shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners. . . .

Section 30. The General Assembly may provide for establishing roads and cartways. . . .

Section 31. The General Assembly may pass laws permitting the owners of lands to construct drains, ditches, levees for agricultural, sanitary, or mining purposes. . . .

Section 32. The General Assembly shall pass liberal homestead and exemption laws.

Such specificity can be justified on a number of grounds, not the least of which is the fact that it does permit the inclusion of rhetoric about the principal social and economic concerns of the people who will be asked to approve the proposed constitution. Reliance on specificity, for example, would permit the inclusion of language directing the state to undertake urban renewal programs, provide day-care centers for the children of low-income working mothers, guarantee employment opportunity for persons of all racial backgrounds, provide more housing units for low-income families, develop public transportation facilities connecting low-income neighborhoods with suburban industrial parks, assure all citizens of the state of a minimum annual income, or any other similar programs deemed imperative to resolve problems of racial discrimination and poverty in Illinois cities.

In addition to providing desired rhetoric, the inclusion of provisions such as these would offer a number of additional advantages. It would, for example, remove all questions regarding the constitutionality of laws enacted under such provisions, assuming, of course, that the constitutional provisions contain a clear statement of intent. Further, such provisions serve as an effective method of focusing legislative and executive attention upon the state's most pressing public problems. While they are not in themselves a guarantee of state action, such provisions do provide directives that are unlikely to go unheeded by members of the General Assembly.

Special provisions are both justified and criticized for a number of their effects. They are a mechanism which can be used to provide a special umbrella of constitutional protection, or a special statement of constitutional concern, for interest groups wanting privileged treatment at the state level. For instance, the Illinois Constitution of 1870 provided special provisions for the protection of miners (Art. IV, Sec. 29) and for the establishment of homestead and exemption laws (Art. IV, Sec. 32). Among the special interests competing for privileged treat-

ment in the Illinois Constitution in 1970 will be those groups with a personal interest in the constitution's treatment of urban issues, including groups for and against open occupancy, guaranteed annual income, equal employment opportunity, public housing, planning and zoning regulation, and similar concerns.

Finally, specification of governmental powers, particularly when not accompanied by a general grant of power, is viewed as an advantage by those who fear the excessive use or abuse of legislative or executive power. Specificity, it is argued, is a means of insuring popular control over the actions of elected officials. The validity of such arguments is, however, clouded at best. Too often, the record on constitutional limitations indicates that, rather than restricting the actions of public officials, such limitations merely force officials into evasive methods. The history of constitutional limitations on state and local government borrowing, for example, is replete with examples of evasive actions taken with the full support of the judicial branch.

Most experts on government are strongly opposed to the specification of governmental powers in the state constitution. Basically, this opposition has been stimulated by three difficulties which inevitably result from specification. First, since humans are unable to predict the future with any certainty and hence are unable to specify powers that will be needed to cope with problems unforeseen at the time of constitutional drafting, constitutions with a great deal of specificity have experienced a rapid rate of obsolesence. As a consequence, such constitutions impair governmental responses to new and emerging problems, while forcing the state to undergo frequent attempts at constitutional revision. In short, highly specific constitutions give rise to questions concerning the constitutionality of proposed actions which are not specifically listed. Since such constitutional doubts may in themselves greatly impede action — as was the case in Illinois, for example, when doubts about the constitutionality of income taxation were used for years as a basis for deferring action on tax proposals — this is an objection of no small significance. In fact, state courts frequently take the position that a specification of powers in a state constitution is pre-emptive: such a listing is considered to be an exhaustive summary of all of the powers which the state may exercise, with the result that powers not so specified may not be exercised. Thus, such specification hamstrings the General Assembly and the governor, strictly limiting their activities to those functions explicitly authorized by constitutional language.

Two other objections, neither lacking in significance, are raised to this approach. The first is theoretically based: it is argued that such specific provisions fall outside the normal (or at least ideal) constitutional functions; that they are unnecessary, given the residual powers allocated to the states by the nation's federal system of government; and that the potential problems posed by a detailed enumeration of powers far outweigh any gains to be derived. Second, opposition is also based upon practical political motives: the specification of governmental powers may very likely inspire opposition to the proposed constitution from those groups who oppose the exercise of the powers being enumerated. Persons who oppose greater public effort in the areas of health, housing, welfare, education, or similar fields may very well oppose a proposed constitution which specifically enumerates the powers which the state may exercise in these fields.

3. The "Statement of Social Goals" Approach

There is yet a third approach to the enumeration of governmental powers that may satisfy the demands for rhetoric while avoiding the complications of legal interpretation surrounding the specified powers approach. For convenience, this approach might be termed the "statement of social goals" approach. This approach does not necessarily constitute a workable compromise between the two approaches already described; it does, however, present a third alternative well worth considering.

This particular approach would view a state constitution as something more than a basic legal document: it would be treated as a basic statement of social or public policy goals outlining in either general or specific terms the goals which the state should seek to accomplish through governmental action. These goals might include, for example, adequate housing for all persons; employment for all persons willing and able to work; adequate out-patient and institutional health care for all persons; quality educational opportunities for all; equal opportunity in jobs,

housing, and schools; and access to the courts for redress of grievances. Such a statement of goals would in no way compel governmental action — no constitutional provisions can force action on unwilling public officials — but it would serve as a means of offering direct popular guidance to public officials, clearly enunciating the goals which the people of Illinois wish to pursue.

As is clear in the above listing, such goals would not have to verbalize radical departures from existing public policy, but would offer assurances to the poor, the black, the aged, the uneducated, and the sick that society is concerned about their problems and is willing to make a commitment in the strongest, most explicit terminology toward remedying them. At the same time, since such a statement of goals would not be a grant of power, it could hardly be interpreted by the courts as a pre-emptive statement rendering unconstitutional those public programs about which no mention has been made in the constitution.

A statement of social goals would change somewhat the basic function of the constitution. Constitutions have traditionally been viewed as basic legal documents — the supreme law of the state — which prescribe a basic structure and organizational format for government. With the inclusion of social goals, however, the constitution would become something more than a basic legal document. It would become openly and admittedly what, in fact, state constitutions have always been: social documents embodying the principal concerns of the era in which they have been written. The social bill of rights approach would continue this tradition, but would do so avowedly and would avoid the legal entanglements that surround explicit statements of powers in state constitutions.

On the other hand, any constitutional statement of social goals would have certain drawbacks. Like the specification of powers to deal with urban problems, statements of social goals might easily raise false hopes among discontented racial and poverty-stricken groups about the prospects for an early resolution of their difficulties, thereby leading to greater frustration and discontent when quick action is not immediately forthcoming. Further, such goal statements will undoubtedly provoke opposition to the proposed constitution by those groups which are either opposed to the goals themselves or opposed to greater governmental efforts to resolve contemporary social and economic problems. Objections may also be raised to such goal statements by groups which feel that the statements neither go far enough nor are sufficiently explicit in addressing themselves to urban problems. Thus, while such goal statements might go far toward meeting the pragmatic, political need for socially relevant rhetoric in the constitution, they might also fail to satisfy the very groups to which such rhetoric is important.

4. The "Bill of Social Rights" Approach

There is another way of stating social objectives: many substantive provisions concerning urban services might be worded not as legislative authorization or as social goals but as "rights" inherent in state citizenship. Just as both the federal and state constitutions guarantee the right of peaceable political assembly, for example, the new Illinois Constitution might secure rights pertaining to housing, education, employment, a minimum living standard, and similar considerations. These rights, which might be stated in terms such as the following, "Every citizen of the state shall be assured an annual income sufficient to provide an adequate standard of living," could be presented in a separate constitutional article following the article protecting civil liberties.

A listing of social rights would provide victims of social or economic deprivation with a more viable basis for legal redress through the courts than would a detailed enumeration of government authority. Depending on the nature of such provisions, suits might provide a means for raising educational standards, challenging state aid formulas, requiring supplemental income payments, guaranteeing equality in the provision of public services to all neighborhoods within a community, or similar actions.

Such an approach has several advantages. It would lessen the dependence on legislative action in certain areas, provide judicial means for redress of service inequities in other areas, and firmly establish the nature of the state's responsibility for the social and economic welfare of its residents. It would probably represent the most certain commitment that the constitution could make in specific policy fields, and should probably satisfy all but the most extreme demands for a constitution which is "socially relevant" to the problems and needs of contemporary

society. Finally, it would provide a recourse for chronic legislative inaction on key social issues.

In opposition, it might be questioned whether any social or economic right is as truly fundamental or enduring as are civil liberties and, therefore, whether these comparatively transitory concerns need be as permanently secured through constitutional action. Moreover, there are certainly those who would question whether decent housing, minimum income, or basic education are in fact "rights" at all. Even those who embrace the positive view must recognize that there are those who do not share this feeling and that the inclusion of such statements in the constitution might consequently jeopardize the ultimate ratification of the entire document.

It is also possible to object that such constitutional provisions would result in endless litigation and ultimately might transfer basic policy-making functions from the legislative branch to the judicial system. Few experts in governmental organization, the law, or ghetto problems favor such consequences. Finally, there is the possibility that some of the programs thus enshrined by constitutional action — a guaranteed annual income, for example — might ultimately prove less useful than is currently hoped. If this were the case, then constitutional status for such programs would be inappropriate, ineffectual, and undesirable.

There are some obvious similarities between the "statement of social goals" and the "bill of social rights" approaches. Both have as their end product the embodiment of contemporary social and economic — urban — concerns within the language of a proposed constitution. Neither would jeopardize the Illinois General Assembly's capability to fashion programs intended to ameliorate such concerns. The mere inclusion of such language would make a proposed constitution far more appealing to many elements of the state's electorate while simultaneously rendering it unacceptable to others. On balance, the desirability of either approach might depend upon the nature of the political responses they would evoke.

But, despite similarities of language, the difference between the two approaches is fundamental: the "bill of social rights" approach would establish a basis for litigation over social and economic issues that would

be wholly lacking in the "statement of social goals" approach. The ramifications of this basic difference demand careful evaluation.

5. *The Home Rule Approach*

There is still another approach often suggested as a means through which the state can move toward the resolution of urban problems. This approach, widely supported by local government officials throughout the state, is the home rule approach. In essence, the proponents of this approach argue that urban problems can best be resolved by giving local governments the authority to prescribe their own governmental forms, powers, duties, and responsibilities. Currently, local governments do not have such prerogatives in Illinois; they may exercise only those powers specifically granted them by state statute. Thus, Illinois urban governments currently may not undertake any programs intended to resolve the social or economic problems of their citizenry unless they are expressly permitted by statute to do so.

The essence of the case for home rule has been put in the following terms by one of Illinois' leading experts on local government law: "The problems of police and fire protection, polluted air, befouled streams and waters, noise, traffic, littered streets, crime and vandalism, slums, obsolescence, inadequate mass transportation, garbage disposal, zoning, planning, recreation, open-space, urban sprawl, and the great human and social problems, to name but a few — require the tools, the power, and the flexibility on the municipal level in order to effectuate their solution. Adequate solutions cannot be derived from our present method of piecemeal delegated grants of legislative power narrowly construed."[5]

The argument for home rule is based upon the assumption that, given the opportunity, local units of government will govern themselves capably and will be able to resolve their internal urban problems. Local governments, it is argued, are more familiar than any other agency with the peculiar dimensions of problems within their own boundaries and so are in a better position to tailor solutions for those problems. Further, the proponents of home rule point out that local governments are closer

[5] Testimony presented to the Commission on Urban Area Government by Louis Ancel, September 17, 1969.

and more accessible to the people than are state or national governments; hence, local governments are capable of greater responsiveness to the needs and desires of the people they are serving. By removing state-imposed constraints on local government authority, local governments will gain flexibility to meet local needs.

Home rule is also advocated strongly on the ground that it could help relieve the considerable pressures upon state legislative and judicial bodies. By eliminating the need for the General Assembly to deal with strictly local concerns — matters such as minimum salaries for policemen — state legislators would presumably have more time to consider issues of statewide importance. Further, because local governments, in planning their activities, must constantly seek to interpret applicable state statutes, the courts are required to deal with a considerable volume of complex litigation concerning the authority of local units. Home rule would alleviate the necessity for much of this time-consuming review.

On the other hand, there is no strong evidence which suggests that home rule states have made greater strides in resolving urban problems than have states such as Illinois which do not offer home rule to their local governing units. In Ohio, for example, home rule is extensively utilized. Ohio is also burdened by many of the same urban problems confronting Illinois municipalities. Of course, it can be argued that home rule by itself will not enable municipalities to resolve urban problems; local governments must also have access to an adequate tax base if they are to underwrite the programs needed to resolve those problems. In the case of Ohio, for example, municipalities do have home rule, but fewer taxes are raised in Ohio to support state and local government services than in any other state. Thus, in the absence of adequate provisions for the financial support of local government, it appears that home rule will not necessarily produce progress toward the resolution of urban problems.

Other arguments can also be raised against the home rule approach. Opponents point out, for example, that municipalities in other states which operate under home rule charters frequently find that their charter provisions are more restrictive than the provisions in state enabling acts. This is true in Minnesota where home rule cities, because

of obsolete, inflexible charter provisions, have far less latitude in dealing with local problems than do communities organized under the state's general enabling act for villages.

Systems of home rule also provide no assurance that local governments will manifest an adequate concern for the problems of minority groups within their jurisdiction. There is, in fact, much evidence to the contrary: minority groups during the last two decades have generally found that their problems receive a more sympathetic hearing at the higher levels of government. This accounts for the fact that minority groups have typically sought redress for their grievances in Washington rather than in state capitals, or in state capitals rather than in city halls. There is no reason why local units of government cannot be responsive to minority group demands; it is simply uncertain whether or not such governments will, in practice, demonstrate such responsiveness.

Others argue that home rule cannot and should not be viewed as a substitute for state responsibility in dealing with urban problems. Home rule does not absolve the state of its responsibilities to deal with the problems of its urban residents. Whether or not home rule is granted by the new constitution to Illinois local governments, the state must still be capable of acting on urban problems, serving as a court of last resort in instances where local units of government have demonstrated either an unwillingness or an incapacity to act.

6. Summary

There are five different approaches which the Illinois constitutional convention can take in dealing with the social and environmental problems associated with urbanization. These various alternatives are not necessarily exclusive: the convention may well decide that some blend would provide the most desirable format through which the state's responsibility for urban problems can be discharged. For example, the convention may well adopt a general statement of powers such as that suggested by the *Model State Constitution,* supplement this with either an enumeration of specific powers which it wishes to emphasize or a statement of social goals or both, and finally grant local governments some measure of home rule with which they can more effectively deal with the urban problems within their boundaries.

Unfortunately, the constitution can only outline the powers which state and local governments should exercise; there is no way in which the constitution can compel governments to exercise the powers given to them. Thus, no constitutional provision can immediately set in motion the machinery needed to eliminate poverty, racial discrimination, environmental pollution, crime, or governmental proliferation and fragmentation. The constitution can, however, establish a framework which facilitates rather than impedes governmental attempts to act. The scheme ultimately used to authorize governmental action should be one which will provide such a framework.

SUGGESTIONS FOR RESOLVING URBAN PROBLEMS

The convention's concern with urban problems will not be restricted to the simple, if very basic, matter of enumerating governmental powers to deal with urban issues. Inevitably, numerous constitutional proposals will be made relating to specific programs, ideas, or concepts, each with an urban-based ramification. Just as the convention must render a decision about the enumeration of urban-related governmental powers, so, too, will it have to render decisions about each of these specific proposals.

It is impossible to predict what these proposals will be. It is also impossible to specify with any precision those characteristics which classify a specific proposal as being urban-related. Nevertheless, it is possible to delineate those problems, if not the specific proposals, that are most apt to be discussed by the convention. The following paragraphs summarize these problem areas, the kinds of proposals that are likely to be made regarding them, and the "pros" and "cons" of such proposals.[6]

[6] Obviously, an exhaustive listing of potential proposals is not possible. Proposals discussed in this section of the paper are those which, in the author's opinion, are most likely to be presented, are most likely to receive serious consideration, or are particularly fruitful prospects for consideration. Background material for this presentation has come from a review of the experiences of other states' constitutional conventions, the literature on urban problems, an extensive series of interviews conducted for this project during the spring and summer of 1969, and from testimony presented at public hearings on the constitutional convention sponsored during the fall of 1969 by the Commission on Urban Area Government.

1. Constitutional Re-evaluation and Revision

As previously noted, a constitution is inevitably rooted in the social, economic, and political concerns of the era in which it is written. Since this will undoubtedly be true for the 1970 Illinois Constitution, and since the pace of change in the social, economic, and political environment has become increasingly rapid, any new constitution will probably merit re-evaluation at a comparatively early date. Further, since a proposed 1970 Illinois Constitution will undoubtedly mirror the urban problems of the 1960's, and since the nature of urban problems is likely to change drastically within the next several decades, it appears particularly urgent that provisions be made within the constitution for its periodic reconsideration and re-evaluation.

Accordingly, proposals for such re-evaluation will undoubtedly be advanced before the 1970 constitutional convention. These proposals might take several forms. For example, the proposed new constitution might contain a section requiring the General Assembly, the governor, or the secretary of state to conduct a statewide referendum on the question of calling a new constitutional convention at specified intervals of time, perhaps every twenty or thirty years. Under such a section, the voters would be assured of regular opportunities to call a constitutional convention without waiting for legislative action. Alternately, the constitution could bypass statewide referendum requirements by simply directing the General Assembly to call a constitutional convention at stated intervals. Still another option would be the specification of an expiration date for the new constitution. Under this scheme, the constitution would automatically expire after a certain period of time, such as twenty or thirty years, unless extended beyond the expiration date by a statewide referendum.

These or similar provisions would assure periodic, systematic, comprehensive review of the constitution, thereby minimizing the likelihood of the state being required to operate for years under a constitution generally viewed as archaic or obsolete. Such a review, furthermore, would also assure to each successive generation of state residents an opportunity to redraft the state's constitution in accordance with their preferences and desires. On the other side of the coin, however, is the fear that

such provisions would render a constitution as being little more meaningful than statutory enactments. The notion of the constitution as representing a basic, timeless, supreme law would thus be impaired, and the tendency might develop to utilize the constitution as simply another source of statutory law. The legal status of the constitution as the "supreme law of the state" would not, however, be affected by such a provision.

2. *Housing*

Few areas of concern promise to present more problems for governmental agencies during the next several decades than housing. In fact, current statistics indicate an impending crisis in that area, as the nation's number of family units increases faster than its number of housing units and as housing construction costs escalate far faster than family incomes. From the perspective of urban dwellers — rich or poor, but especially poor — the crisis has already arrived. Accordingly, the convention can expect to consider alternate means of dealing with the housing problem. A number of the more likely demands are described below.

STATE RESPONSIBILITY

It may very well be proposed that a section be written into the Illinois Constitution specifically directing the state government itself to assume full responsibility for all housing programs, or at least for public and low-income housing programs. Such a proposal would be based upon the thesis that the crisis in housing has reached, or is rapidly reaching, such grand dimensions and is of such statewide concern that it can no longer be handled adequately by local units of government. Past experience demonstrates that municipal governments are frequently incapable of resolving the housing situation, particularly where public or low-income housing is concerned. The use of public housing in high-rise buildings has been demonstrated to be undesirable, yet scatteration of smaller low-income public housing units is impossible unless such units are located in neighborhoods of all income levels. To date, neither the residents of upper- and middle-income suburbs nor the residents of upper- and middle-income neighborhoods in large cities have been willing to accept such housing in their areas. As a consequence, cities such as Chicago face the prospect of running out of space for public housing long before public housing problems are satisfactorily resolved. Since local governments have been unable to achieve a scatteration of public and low-income housing units, it is argued that the state should assume this responsibility and use its power to distribute such units throughout urban areas. Needless to say, any such attempt by the state, and perhaps any attempt to write such a provision into the state constitution, will be opposed by those middle- and upper-income citizens who feel threatened by such programs.

Also advanced is the argument that only the state and national governments now have the financial capability of providing meaningful, long-term solutions to housing problems. Large sums of money are needed, for example, to guarantee home mortgages, to provide mortgages at interest rates lower than the current high market levels, to acquire expensive urban land for low-rent housing, to underwrite research designed to reduce the unit cost of building, and to experiment with new concepts in housing design and utilization. Countering this argument is the proposition that local units of government are better able to take care of their own housing problems, and would do so if the state and national governments made sufficient funds available for local utilization.

RENTAL HOUSING

The rapidly disappearing supply of vacant rental housing has added new dimensions to contemporary housing problems. Most particularly, the housing shortage has brought an imbalance in the relative rights of landlord and tenant. Landlords retain their traditional right to maintain their property as they see fit and to evict tenants for a variety of reasons, including but not limited to a failure to keep up rental payments. However, because the shortage of alternative housing units has become so severe, the tenant's complementary right to vacate an apartment because of inadequate maintenance on the landlord's part has been jeopardized. As a result, the tenant is put in a disadvantageous bargaining position in his dealings with his landlord. This situation has led, particularly in ghetto and low-income areas where housing shortages

are especially critical, to landlord abuses of the landlord-tenant relationship.

The constitutional convention will almost certainly be called upon to deal with this problem. Proposed solutions to it range from a statement expressing tenant rights, perhaps as a portion of the Bill of Rights, to the establishment of a statewide regulatory agency specializing in the adjudication of disputes between landlords and tenants.

The desirability of such proposals is difficult to ascertain. On the one hand, tenants undoubtedly need governmental protection against landlord abuses, particularly in view of the ever-worsening housing shortage. Such regulation is an appropriate governmental function and, if properly executed, would not impose upon the property rights of landlords. Further, such proposals are strongly backed by the state's Negro community; a constitutional provision acknowledging the problem and providing for its solution would do much to secure the support of Negro and liberal groups for constitutional revision. On the other hand, it is highly questionable that the matter is a proper subject for constitutional (as opposed to legislative) treatment.

LOW-INCOME HOUSING

The rising cost of both urban land and housing construction, combined with the increasing scarcity of available housing, have together made housing problems particularly severe for middle- and low-income groups in urban areas. These problems are felt both by the central cities, in which most low-income people reside, and in the industrialized suburbs, where the lack of low-cost housing for workers has produced a severe labor shortage for growing industrial concerns. The absence of sufficient low- and moderate-income housing is creating a growing crescendo of demand for some kind of governmental action to alleviate the situation.

There are a number of related proposals which might be presented to the convention. These include constitutional authorization for the granting of tax incentives to private agencies, either profit or nonprofit, which undertake to build moderate- or low-income housing. Alternately, the constitution might approve state subsidization of such housing schemes or authorize state subsidization of public or private efforts to acquire land for development into moderate- or low-income housing. Still another alternative would be the establishment of a state agency designed to encourage, or even construct and operate, moderate- and low-income housing programs.

Again, the need for this kind of governmental action is now largely beyond question. On the other hand, its appropriateness for constitutional inclusion *is* subject to question. Also basic to these proposals is another very germane subject for constitutional deliberation, namely the question of whether or not the constitution should permit the use of public funds for the support of private, profit-making enterprises when those enterprises promote a public purpose. This matter is discussed in greater detail below under the heading "Public Funds for Private Purposes."

NEW TOWNS

Many students of urban problems have advised that the projected future congestion in urban areas be relieved by the establishment of new urban communities in entirely new locations. Several experiments with the development of new communities have already been undertaken in various parts of the country. While such new communities do not offer any cure for the problems in existing communities, they may be a method of heading off the development of more severe problems in the much more densely settled cities of the future. Consequently, since the 1970 Illinois Constitution will be written for the future as well as for the present, it may be that it should address itself to the question of new towns.

Such concern might take several forms. It could call, for example, for state authority to sponsor or underwrite the development of new urban communities in Illinois. It might authorize the subsidization of private efforts to develop such communities. It might make provisions under which the state could assist in the land acquisition needed to initiate such a project. The constitution could also require that developers of new towns in Illinois must first secure state approval for their plans

or submit to other forms of state regulation. Alternately, the constitution could prohibit the state from having any or all of these kinds of involvements in the formation of new communities.

Except for the fact that inclusion would settle all questions regarding the constitutionality of state involvement in the establishment of new towns, such provisions are probably unnecessary and may even be inappropriate in a new constitution. On the other hand, since new towns are likely to be common in the future, it would seem unwise to restrict unduly the state's ability to regulate or control such developments.

ZONING ORDINANCES

No new constitutional provisions appear needed in Illinois to authorize the regulation and control of land use through zoning ordinances. Yet, a revised constitution might specifically require that zoning ordinances contain certain kinds of provisions. Typical, for example, might be a requirement that local zoning ordinances embrace the recommendations recently set forth by the National Commission on Urban Problems: "The Commission recommends that state governments amend state planning and zoning enabling acts to include as one of the purposes of the zoning powers the provision of adequate sites for housing persons of all income levels and to require that governments exercising the zoning power prepare plans showing how the community proposes to carry out such objectives in accordance with county or regional housing plans, so that within the region as a whole adequate provision of sites for all income levels is made."[7]

Such provisions, it might be argued, are hardly appropriate for inclusion within the constitution. Conversely, it might also be argued that such provisions provide additional assurance of fair and equitable treatment for all residents within the state's urban areas and hence are entirely appropriate on that score. Such provisions are likely to secure widespread support from the Negro and liberal communities while acquiring strong opposition from the residents of homogeneous white suburbs.

[7] National Commission on Urban Problems, *Building the American City* (Washington, D.C.: U.S. Government Printing Office, 1968), p. 242.

SUMMARY

The above discussion presents just a few of the many suggestions that will probably be made to the constitutional convention regarding problems in the field of housing. Since prognosticators are uniformly predicting that housing problems will rank at the top of urban concerns during the next several decades, special consideration of housing problems by the convention might be deemed particularly appropriate. Certainly it would appear urgent that state and local government capability to deal with housing problems should not be unduly impaired either by constitutional provision or by subsequent judicial interpretations.

3. Judicial Reform

Questions related to the reform of the state's judicial system have been raised with increasing frequency by persons and groups concerned with the condition of life in the state's urban areas. Generally, these requests for reform fall into three disparate categories: those related to alterations in the processes used to select judges; those related to the involvement of the courts in policy-making processes; and suggestions aimed at guaranteeing "equal protection of the laws" to all persons or, as otherwise stated, improving access to the courts for persons from moderate- and lower-income groups to the judicial branch of government. Each of these general categories will be discussed in turn.

THE SELECTION OF JUDGES

Undoubtedly the most widely discussed aspect of the constitution's judicial article is the process established for the selection of judges. There is widespread concern among the residents of racial and poverty-stricken ghettos that present selection systems are not producing either a "representative" or a "responsive" judiciary. The feeling runs high in ghetto areas that the existing state judiciary, composed principally of judges drawn from the upper-income white segment of society, can neither empathize with the concerns of ghetto residents nor be properly responsive to their particular needs, problems, and concerns. As a result, the courts are too often viewed as hostile rather than helpful ele-

ments in the American governmental system; they are too often viewed as repressive or punitive institutions rather than mechanisms through which people can seek redress of legitimate grievances.

A second set of urban concerns about the existing judicial system relates to the feeling, widely held in suburban areas, that the courts fail to emanate proper concern for suburban problems. Suburbanites contend, for example, that their juvenile problems are discounted as relatively unimportant by the courts and, hence, that the courts will not assist them in their resolution. Court officials, on the other hand, argue that they have little time to spend on suburban cases involving truancy, vandalism, or cases involving students who strike teachers, when their dockets are already overflowing with cases involving murder, rape, drug addiction, and aggravated assault. Discussions of this sort are being waged not only in Cook County but in other counties, such as Kane County, which contain both newer suburbs and older communities.

Thus far, Illinois has experimented with two different systems for judicial selection, direct election and the present system of judicial appointment-election. Neither, to date, has alleviated problems. Nor is judicial appointment generally viewed as a constructive alternative.

The key to these issues may well be in the alteration of court systems at the county level. Instead of continuing the present system of county courts, issues such as those described above might best be resolved by developing court systems in which judges are selected from particular districts within a county, and hear cases which arise only within those districts. Thus, for example, cases arising within a ghetto neighborhood would be heard only by judges selected from within that neighborhood; cases involving suburban problems would similarly be heard only by judges selected from that same suburban area.

Such a subcounty system of selecting judges and apportioning judicial case loads would go a long way toward meeting the current objections of both suburban and ghetto residents, but it may not be appropriate for many nonurban counties. Accordingly, the convention may choose to prescribe different kinds of organization for different kinds of counties or, perhaps even preferably, to leave the selection of court organizational formats either to the state legislature or to the counties themselves.

JUDICIAL POLICY-MAKING

The question of judicial encroachment upon the traditional policy-making prerogatives of the legislative branch has become a matter of increasing concern in recent years. There are basically two perspectives on the issue. On the one hand, there are those who feel legislative bodies, including the Illinois General Assembly, are not properly responsive to the changing needs and conditions of life. As a consequence, they argue, the courts can and should move into the void created by legislative inaction, providing remedies for the social, political, and economic injustices in society. Such theories of judicial activism are opposed, on the other hand, by those who feel that the courts are an inappropriate vehicle for the formulation of public policy. The courts are not, it is argued, representative political bodies operated to insure that all affected groups will have an opportunity to participate in their deliberations. Further, it is argued that the judges involved in any particular decision are not representative of the whole society, and that the evolution of judicial policy-making is a direct violation of the traditional system of separation of powers. Finally, it is contended that the courts are simply unable to operate effectively as policy-making bodies.

Even the proponents of judicial activism generally agree that such activism would be unnecessary if legislative bodies were more responsive to the needs and problems of contemporary times. The question, then, becomes: should the courts be used as a governmental "court of last resort" to correct alleged improprieties in society upon which the legislative bodies either cannot or will not act? In part, this question can be answered if the constitution provides a proper grant of authority to legislative bodies. In part, too, questions of judicial involvement could be resolved by the enunciation of clear guidelines covering judicial interpretation of statutory enactments.

An excellent example of a possible alteration in such guidelines would be a constitutional statement outlawing the utilization of "Dillon's Rule," a common law principle traditionally applied by courts in Illinois and most other states in the interpretation of statutory provisions governing local units of government. Under Dillon's Rule, the courts apply the rule of strict constructionism to such interpretations. The result has been

a judicial tendency to deny to local governments any powers which they are not explicitly granted in statutory enactments.

Several states have followed this recommendation, discarding Dillon's Rule. The Alaska Constitution, for example, states specifically that "A liberal construction shall be given to the powers of local government units." The New Jersey and Ohio constitutions contain similar language.[8]

GUARANTEEING "EQUAL PROTECTION OF THE LAWS"

There is a widespread feeling in moderate- and low-income communities that the "equal protection of the laws" guaranteed by the United States Constitution[9] or the "right to remedy and justice" (Art. II, Sec. 19) guaranteed by the Illinois Constitution are not actually available to persons with lower incomes because of the high cost of securing legal counsel and litigating matters before the courts. The cost of litigation has, in fact, become so high that full access to the courts is now a luxury enjoyed only by the very wealthy. Yet lower-income groups have perhaps an even greater need for such access than other segments of society.

From another perspective, the best of constitutional provisions safeguarding basic human rights is meaningless without adequate procedures for implementing its guarantees. The present Illinois constitutional guarantee of a free public education for all children of the state (Art. VIII, Sec. 1), for example, is allegedly compromised by the textbook and activity fees levied by most school districts; yet the persons for whom the payment of such fees is most burdensome — the poor — are the very people least able to seek litigation on the legality of such charges. Other comparable examples could be cited dealing with such basic constitutional rights as freedom of assembly, freedom of religion, or freedom from racial discrimination, as well as the mundane but no less important economic problems such as suits by tenants against landlords who fail to maintain their property, suits by employees against alleged discrimination in promotions by their employers, or suits by consumers against producers of food products for mislabeling those products.

[8]Constitution of Alaska, Art. X, Sec. 1; constitution of New Jersey, Art. IV, Sec. 11; constitution of Ohio, Art. XVIII, Sec. 3.

[9]Constitution of the United States, Amendment XIV, Sec. 1.

The courts have long recognized the need to provide free legal assistance for persons accused of crime who are unable to finance their own defense. To a large degree, the argument outlined above simply urges the application of this same principle to civil as well as criminal law matters: to make some provision under which persons could receive legal assistance, including help in adjudication before the courts, even if the person involved in such litigation, whether as plaintiff or defendant, is unable to provide his own legal counsel.

Few formal proposals have been advanced under which this goal could be achieved, but presumably a specialized legal office, an office of "public advocate" somewhat comparable to the existing office of public defender, would have to be established somewhere within the governmental structure. It would undertake court cases on behalf of those persons who are adjudged to have legitimate complaints involving major questions of legal substance but who lack the necessary financial resources to sponsor such litigation on their own behalf. Presumably, such an office would have to be independent of the existing attorney general's or state's attorneys' offices to avoid conflicts of interest within those offices over litigation of actual court cases.

The argument in favor of some such system has already been stated: it would improve access to the courts for persons of limited economic standing, thereby in fact making "equal protection of the laws" more available to all persons. On the other hand, any such system would undoubtedly be expensive and could be viewed as a potential threat by attorneys engaged in the private practice of law.

4. Urban Development Agencies

A number of suggestions have recently been advanced concerning the establishment of new governmental agencies to deal with urban problems. One agency, a Department of Local Government Affairs, was established in Illinois in 1969. Several related recommendations for structural change are described in the following paragraphs. It is questionable, however, whether any of these suggestions should be advanced through constitutional action. Each could be adopted by legis-

lative action under the current constitution without any revisions in that document. In essence, while constitutional specification helps secure the adoption of such ideas, it also complicates the elimination of structural innovations which may ultimately prove unwise. Thus, on balance and on principle, constitutional mention of these suggestions might be inappropriate. However, since every constitution is a product of the era in which it is written, and since any constitution currently written will inevitably reflect the problems of contemporary urban society, constitutional treatment of the following suggestions might be justified on the grounds of pragmatism, if not principle.

COUNCIL OF URBAN ADVISORS

It has sometimes been suggested that states should establish a council of urban advisors patterned along the lines of the national government's Council of Economic Advisors. Such a council would advise the governor and the General Assembly on public policy problems of concern to urban areas. It could be staffed by either full- or part-time urban experts. Generally, such suggestions presume that the advisors would not hold other elected or appointed positions in state government.

Perhaps the most important function of a council of urban advisors would be the development of a comprehensive urban program for presentation to, and consideration by, the General Assembly. The importance of such a program, both to the Illinois General Assembly and to the state's urban areas, has been described by Professor Samuel Gove. Writing about the impact of reapportionment on the "urban orientation" of the Illinois General Assembly, he said:

> It should not be surprising that there has not been more state involvement in urban affairs because no one — state officials, local officials, political parties, or pressure groups — have come up with a program for the legislature to consider. . . . The General Assembly is equipped and accustomed to reacting to proposals presented to it rather than being innovative. . . . Will the General Assembly itself in the future come forward with state solutions to urban problems? . . . If some outside force — city officials, civic organizations, or others — come up with a well thought through plan, the answer may be "yes." . . . The state solutions, it must be reiterated, will result from the efforts of the outside forces.[10]

A council of urban advisors might well provide the comprehensive program — the outside force — needed to increase the General Assembly's concern with urban problems.

Proponents of this particular idea also argue that such a council would provide the governor with expert advice in the formulation and execution of urban policies; would more fully utilize the research facilities and personal expertise of knowledgeable citizens found in the state's universities, civic organizations, and in private life; could, through an annual or biennial report, focus public and legislative attention on urban problems; and could act as a permanent, impartial investigating commission for a host of urban problems (for example, the disturbances in Cairo). Opponents argue that such a council would be inadvisable since it might create public demand for constitutional status for other similar councils dealing with additional areas of public policy. Such proliferation would obviously render the executive structure of state government cumbersome and unwieldy.

URBAN AGENTS

It has also been suggested that the constitution might permit or require city or county governments to establish the office of urban agent to serve in a liaison capacity between citizens and the maze of state and local government agencies. Such an office, patterned after the agriculturally oriented county agents, would provide information about governmental programs to inquiring citizens and direct people to governmental agencies which could help them with their particular problems. In short, urban agents would make government more accessible to the individual citizen, cut through bureaucratic red tape to locate officials responsible for particular programs, improve government-citizen relations, and reduce the alienation of citizens from their governments. On the other hand, such an officer, dealing as he would with a number of

[10] Samuel K. Gove, *Reapportionment and the Cities* (Chicago: Center for Research in Urban Government, Loyola University, 1968), p. 34.

potentially controversial issues, might become readily and frequently embroiled in political issues, thereby compromising his effectiveness. Such an agent might also have considerable difficulty securing cooperation from the many local government agencies with which he would necessarily deal. In spite of such criticisms, however, the establishment of such an office has been recommended by the National Commission on Urban Problems.[11]

URBAN DEVELOPMENT CORPORATION

Another suggested innovation, quasi-governmental in nature, is the formation of urban development corporations to aid in rebuilding urban areas. The Council of State Governments, one of the groups supporting this proposal, describes such a corporation in the following terms:

> The primary aim of the corporation is to stimulate private investment in blighted areas by assuming initial development risks and avoiding delays of development. The corporation is authorized to initiate the planning, building, and developing of needed urban facilities. In addition, it may sponsor urban renewal projects and build certain housing, commercial, and civic facilities. The corporation is empowered to sell or lease its projects to public agencies or private investors at the earliest feasible time, whether during planning, construction or operation.
>
> The corporation can bear the risks of projects during planning, acquisition and building stages when returns on initial investment are minimal. This will permit investors to invest in existing, functioning projects without having to incur the risks and delays which now characterize urban renewal projects.
>
> Financing of corporation projects is accomplished through an initial State appropriation and the sale of bonds, loans from the Federal government and private institutions, public urban renewal grants and interest subsidies, and mortgage insurance under various Federal housing programs. The corporation may acquire property by eminent domain. . . .
>
> In addition to helping rebuild existing urban core areas, the corporation can aid private enterprise in building new cities and towns by using its power of eminent domain to provide the necessary land.[12]

[11] National Commission on Urban Problems, *op. cit.*, p. 193.

The state of New York has, through statutory enactment, formed such a corporation; it is thus far the only state to do so. Since, however, the New York corporation has as yet had insufficient time to carry major projects through to completion, experiences there do not provide a firm basis for evaluation. The idea has, however, won many adherents, as well as some important opponents.

5. *Financial Arrangements*

Basic to any state constitution are provisions relating to the financial powers of state and local governments. These financial powers are, in turn, of critical importance in determining the flexibility and energy with which governments can attack public problems. Thus it is only natural that the financial provisions of the 1970 Illinois Constitution should be of the utmost importance to the state's efforts at improving its urban life.

It goes without saying that it is in the urban areas' interest to provide state and local governments with as much financial power — as much revenue-raising and borrowing capacity — as can be made available, consistent with the principles of equitable taxation and sound money management. Too often in the past, well-intentioned efforts to construct programs aimed at alleviating urban problems have failed because of fiscal inadequacy: the absence of money available to underwrite broad-scale urban development and redevelopment programs is alleged to be a prime cause of the deepening plight of the cities.

Several sections in the present Illinois Constitution are frequently criticized by local government officials and others concerned with the state's urban problems. Several new provisions are frequently suggested for a revised constitution, the most important of which are reviewed below.

TAX AND DEBT LIMITS

No provisions in the present Illinois Constitution are so frequently

[12] Council of State Governments, *1970 Suggested State Legislation* (Lexington, Ky., 1969), pp. 53-54.

criticized by local government officials as the tax and debt limits, particularly the latter. Article IX, Section 12, of the 1870 Illinois Constitution limits the borrowing powers of all local government units in the state to an amount not exceeding 5 per cent of the value of all taxable property in the governmental unit. This debt limit is charged with a litany of faults. Opponents claim that it prevents local government units from borrowing money to provide badly needed facilities, such as new school buildings to serve rapidly expanding student enrollments. It causes the proliferation of governmental units since two such units (e.g., a municipality and a park district) with the same geographic boundaries have more borrowing power than a single unit (e.g., a municipality which itself provides all park and recreation services). It impedes, for the same reason, efforts to achieve a consolidation of governments. It imposes unnecessary hardships on local government units since the cost of acquiring new capital facilities (e.g., new schools, streets, parks) increases far more rapidly than assessed property valuations, which tend to remain fairly stable over long periods of time. Finally, it forces local governments to resort to fiscally unsound or unwise methods of circumventing the restriction, such as the acquisition of property on a lease-purchase basis or the issuance of revenue bonds.

While there appears to be nearly unanimous agreement that the present local government debt limitation is unrealistically low, there is no comparable agreement about what a new limit ought to be. Recommendations range, for example, all the way from a doubling of the present limit to the removal of all debt limits entirely. Intermediate suggestions include linking local government debt to total governmental revenues rather than to property tax valuation, thereby permitting local governments to borrow against their tax revenues from nonproperty sources, such as sales tax revenues. A second idea is to tie debt limits to the commercial market for local government borrowing, permitting any local government borrowing on which the interest rate falls within a specified variation from current average rates of interest. Another suggestion is to leave the establishment of debt limitations to legislative rather than constitutional discretion. A fourth recommendation is to write into any debt limit a cost-of-living factor which would permit increases in the limitation as the cost of living rises. An example of the latter provision would be the cost-of-living adjustment written into the Minnesota statutes dealing with limitations on local government taxing powers.[13] Yet another option is to make any debt limit flexible enough to avoid some of the above-described defects. For example, provisions might be made whereby the debt limitation of governmental units which consolidate could be increased to the sum total of the limits existing for both units prior to consolidation.

Tax levy limitations frequently produce consequences roughly comparable to those described above for debt limits. The present Illinois Constitution contains limitations only on the taxing powers of county governments; all other local governments are subjected to statutory tax levy limitations. At a minimum, this indicates that statutory limitations can be as effective as constitutional limitations in restricting the financial powers of governmental units. Alternative methods for restricting tax levies are comparable to the alternatives for limiting local government borrowing.

The constitutional limitation on county taxing powers (Art. IX, Sec. 8) contains a provision whereby the limitation can be raised for any particular county by a vote of the people of that county. There are two schools of thought on the desirability of such referenda. One school holds that this is a desirable manner of obtaining flexibility in levy limitations; the opposite school holds that referenda are poor ways of making judgments on complex financial questions, and holds that such decisions would be better rendered by vote of an extraordinary majority of the legislative body of the affected local government unit.

ASSUMPTION OF DEBT BY THE STATE

Article IV, Section 20, of the present Illinois Constitution, which prohibits state assumption of debts or liabilities of any governmental organization in the state, also seems onerous to many urban affairs experts. The feeling generally is that the state should be permitted to assume the debts of urban development corporations, local governments, or other agencies where the assumption of such debt would serve a legitimate public purpose as determined by the General Assembly. The present

[13] See *Minnesota Statutes Annotated*, Sec. 775.11.

restriction is seen as an arbitrary restriction upon the General Assembly, a restriction which accomplishes little in a positive or protective sense but does impair the General Assembly's ability to deal with certain kinds of problems.

PUBLIC FUNDS FOR PRIVATE PURPOSES

One of the changes most widely recommended for the revenue article in the new Illinois Constitution is one which would explicitly permit the use of public funds to support private, nonprofit — or even profit-making — activities which are specifically designed to promote a public purpose. Such a provision, it is argued, is necessary to encourage private capital to undertake those ventures earnestly needed to resolve public problems, but which are considered so risky that private capital without public support is discouraged if not precluded from being channeled to that purpose. For example, it has been suggested that public funds might underwrite private efforts to provide housing and venture capital for ghetto neighborhoods; underwrite the operating deficits of nursing homes which take care of the indigent elderly; subsidize the operation of day-care centers for the children of working mothers who, without employment, would be forced on the welfare rolls; or encourage private industry to undertake extensive worker retraining programs.

This particular proposal was explained in the following words by a staff member to the New York constitutional convention:

> The change most often suggested in the finance provisions of state constitutions is to replace the restrictions on the use of state and local money, property and credit with a "public purpose" test. Under this test, public funds may be used for any public purpose the Legislature chooses. The substitution of this doctrine, it is argued, would vest the Legislature with broad discretion to adopt new programs for solving problems that are now unforeseen and to develop new methods of financing them.
>
> State and local governments, of course, have always been subject to a "public purpose" requirement in the disposition of public funds of property. It is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution for a State or its subdivisions to use the power of taxation or eminent domain for private purposes.

> However, this federal test imposes no significant restriction on state action; it prevents only the "plain case of departure from every public purpose which can reasonably be conceived." All that is necessary to insure the constitutionality of a particular expenditure is a legislative finding of public purpose confirmed by the State's highest court. The U.S. Supreme Court has frankly admitted, "Subject to specific constitutional limitations, when the legislature has spoken, the public purpose has been declared in terms well-nigh conclusive." (Berman v. Parker, 348 U.S. 26, 32 [1954]). It is not surprising, therefore, that no state decision on "public purpose" has ever been overruled by the Supreme Court.[14]

Opposing this point of view is the argument that such a constitutional provision would open the doors to patent fraud: it would be too easy to channel public funds into private, profit-making enterprises which fulfill public purposes only in an indirect or vague sense.

There are a number of related recommendations, including suggestions that the constitution authorize loans from public funds to qualified nonprofit sponsors of low-income housing programs, that tax incentives be provided for programs involving the construction and rehabilitation of low- or moderate-income housing, or that public funds be used to support new industry in areas with many unemployed residents. The federal government has long utilized public funds in this manner under the Housing Act and other acts.

SPECIAL TAX TREATMENT

Related to the above suggestions are those calling for special tax treatment for particular individuals or groups. It is widely recommended, for example, that the constitution authorize specific tax relief for elderly persons living on pensions. It has also been suggested that the constitution authorize special treatment in other situations, such as tax incentives to encourage industrial development in certain communities, to encourage the construction of moderate- and low-income housing, to stimulate the development of new communities, to encourage the

[14] Robert S. Amdursky, "The Urban Crisis and the Need for State Constitutional Revision," *State Government* (Summer, 1968), pp. 161-162.

rehabilitation of aging buildings, or to encourage the establishment of specialized facilities, such as out-patient medical clinics, in neighborhoods where such facilities are not already available.

It has by now been well documented that tax incentives can be an effective means for channeling private effort into certain activities. The federal income tax laws are filled with special tax treatment provisions. On the other hand, special tax treatment, once extended to several groups, quickly proliferates until virtually all groups are requesting some form of favored treatment. Again, the federal income tax demonstrates this tendency. Further, there is a strong suspicion that in the long run such incentives produce more harm than good. For example, the Southern states have for years used tax incentives to encourage industrial development. A number of studies, however, indicates that most of the industry which has located in the South would have done so whether or not such incentives existed, with the consequence that the incentives provided a net loss instead of a net gain in state and local tax revenues.

There are two approaches to granting such specialized tax treatment. In the first, the constitution could authorize the General Assembly to permit special tax treatment whenever it felt a public purpose would be served. In the second, the constitution could authorize special tax treatment only for specific individuals or situations, such as special treatment in residential property taxation for elderly persons living on fixed-income pensions. The first alternative avoids the disadvantage of granting special constitutional tax shelters for particular groups, but it does open the door to future legislative abuse of the tax incentive concept.

TAX EXEMPTIONS

Another controversial section of the present Illinois Constitution, from the urban point of view, is Article IX, Section 3, which permits property used by agricultural or horticultural societies or for school, religious, cemetery, or charitable purposes to be exempted from taxation. This provision imposes particularly severe problems upon the larger, older communities which have an extensive amount of property in tax-exempt categories.

There are, in a general sense, three alternatives on the question of tax exemption: (1) the constitution could continue present practices; (2) the constitution could forbid all tax exemption; or (3) the rules governing exemptions could be tightened by, for instance, eliminating exemptions for those properties owned by tax-exempt institutions which are used as commercial, revenue-producing assets. Local government officials generally favor some such alterations in existing practices, but any effort to impose taxes upon organizations now enjoying tax-exempt status will obviously be met with heavy resistance.

REVENUE SHARING

There is, finally, a well-recognized need to offset the fiscal impact of urban government fragmentation, to overcome the inequitable distribution of taxable resources among units of government in urban areas. There are basically two ways in which this can be accomplished short of governmental consolidation. The first is through the use of shared taxes and grants-in-aid; the second is through the establishment of special taxing districts.

Illinois is already making use of shared taxes and grants-in-aid to reduce inequities in local government fiscal resources, but these systems could stand improvement. For example, the General Assembly can now make grants to local governments only for the achievement of "state purposes," not for general use by local governments. This restriction, imposed wholly by judicial interpretation and not by constitutional language, should be clarified so that the General Assembly could make grants to local governments for "general government" purposes.

Further, existing state grant-in-aid programs might be substantially strengthened if the General Assembly could allocate grants around the state on a "cost-of-living" or a "cost-of-doing-business" basis. For instance, the current state aid to education program is predicated upon the assumption that the per-pupil cost of education is the same in all parts of the state whereas in reality the per-pupil cost of education, exclusive of transportation costs which are supported by a separate aid arrangement, is higher in urban than in rural areas and higher in city than suburban areas. Any truly equitable aid arrangement should recognize such variations and make allowances accordingly. The same

might be true of other considerations as well: it may be most equitable, for example, to allocate aid on the basis of average family income, population density, occupational characteristics, educational levels, or similar socio-economic variables. The point is simply that the constitution should provide the flexibility necessary to permit the General Assembly to use its discretion in determining the uses to which grant funds can be put and the basis upon which fund allocations are to be made.

There has also been a growing tendency to espouse some form of special taxing district for governments in metropolitan areas. Such a district would be authorized to levy a tax of a stipulated amount against all taxable property within the district and then allocate the proceeds from the tax among all units of government in the district, basing the distribution upon a predetermined formula. Such a district, for example, might function in the following manner. A county (e.g., Du Page County) within a metropolitan area might be designated by statute as a taxing district. Under the statutory provisions, the county would levy a predetermined tax (e.g., $2.00 per $100.00 of assessed valuation) against all taxable property in the county. The proceeds of the tax would be allocated among the benefiting local government units (e.g., school districts) in accordance with a formula prescribed by the statute (e.g., an equal amount per pupil in attendance in each school district). These taxing districts would have no authority to formulate or review the operating policies of the units of governments receiving support from them; they would simply serve as tax collection and distribution agencies much as the county treasurer now serves in that capacity. The districts could also be used as a basis for apportioning rebates on other taxes such as motor vehicle taxes or the local share of the state sales tax, thereby eliminating some of the inequities involved in those tax systems.

The establishment of such districts has recently been recommended by the Advisory Commission on Intergovernmental Relations[15] and the National Commission on Urban Problems.[16] Both of these agencies supported the idea as a vehicle for equalizing the tax bases of local

[15] Advisory Commission on Intergovernmental Relations, *Fiscal Balance in the American Federal System* (Washington, D.C.: U.S. Government Printing Office, 1967), 2, p. 9.

[16] National Commission on Urban Problems, *op. cit.*, p. 365.

school districts; the scheme could also be applied to other units of local government.

Such districts are subject to attack principally on the grounds that they further complicate the overall structure of government in urban areas. Charges that such districts would infringe upon the autonomy of existing local governments are unfounded if the enabling acts establishing such districts are properly drawn (e.g., if the law makes clear the fact that such districts are strictly ministerial in nature). Proponents favor such districts because they do offer a viable way of equalizing the taxable resources available to urban governments without interfering with local autonomy.

CONCLUSION

It is apparent that the constitutional convention must make a number of complex judgments regarding approaches to the alleviation of urban problems. These judgments will involve many subtle distinctions and a careful blending of legal, social, and political considerations. All must be infused with a broadly conceived concern for equity and justice for every Illinois citizen, rural as well as urban.

This discussion has attempted to treat some of these complexities. In so doing, it has sought to dispel the feeling that some single program or solution can resolve urban ills. There is no single "right" answer to such ills but, instead, a multiplicity of possible, partial solutions with varying degrees of merit. "Solving urban problems," then, is not a task demanding conviction and assurance as much as sensitivity and doubt. No proposal, dogmatically advanced, will prove satisfactory. Governing urban society, like all "just" governing of men, is dependent upon the twin habits of compromise and reconciliation. As a process, it seeks not conclusions but the respite of dynamic, conflicting forces brought — even temporarily — into balance.

"Solving urban problems" is also not a simple matter of searching for the proper textbook prescriptions. This is particularly true when drafting constitutions. Constitutions are more than mere reflections of abstract principles about governmental organization: they are dynamic statements of the values and concerns of the populations which adopt them. Thus they are legitimate vehicles for the expression of the hopes,

desires, and expectations which the people hold for their system of government. In this sense, constitutions must contain not only clarity in legal statement but the rhetoric necessary to make them viable tools for the expression of popular goals.

It is this task, the blending of legal principle with social, goal-oriented rhetoric, that confronts the Illinois constitutional convention. It is the success in accomplishing this task that will ultimately determine a new constitution's political acceptability and its usefulness in resolving urban issues.

12. PUBLIC FINANCE

by Glenn W. Fisher

THE AUTHOR OF THIS PAPER argues that the present revenue article has produced neither a good tax structure nor the structure envisioned by its authors. Changing economic and social conditions require a different structure from that considered desirable when the present provisions were written. The constitution has not proved to be an impregnable obstacle to change, but it shares responsibility for the fact that change has often been sporadic, irrational, and uncoordinated. The revenue article has resulted in a diffusion of legislative power and has enabled the legislative branch to avoid responsibility for unpopular actions.

Provisions affecting borrowing, financial management, and state-local fiscal relations have been less restrictive than has the revenue article, but, here again, the results are often different from those intended in 1870.

This suggests that simple, flexible financial provisions are desirable, but because of the highly technical nature of the field, its great importance, and the well-organized interest groups which are active, it is likely that it will be difficult to write and secure the adoption of such an article.

The delegates to the 1970 constitutional convention will write financial provisions which will be important, controversial, and, if adopted, will have a somewhat unpredictable effect upon the future of the state. These provisions will be important because finances are the very lifeblood of government. They will be controversial because government finance has a visible economic impact upon every resident of the state and because the relevant interest groups are knowledgeable

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