

WILL ILLINOIS HOLD A CONSTITUTIONAL CONVENTION?

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SYNOPSIS

This paper describes the importance of the November 4, 2008 referendum on whether to call an Illinois Constitutional Convention (page 3) and summarizes the history of constitutional change in Illinois (page 4).

It also analyzes the four pre-requisites for a successful constitutional convention (page 8):

1. The major public figures in the state, especially the leaders of the political parties, must actively, seriously, and energetically support both the call for a convention and the convention's work product.
2. The delegates elected to the convention must want the convention to present a work product that is both good and acceptable by the electorate more than they want to have a single issue approved or defeated.
3. The issues addressed must be "issues for the future," not just responses to the moment.
4. Any provision suggested must take into account how future Illinoisans will be affected.

The paper then analyzes in depth the four major issues that dominate the campaign for and against the call:

1. Selection of judges (page 13).
2. Funding public pensions (page 18).
3. Financing public elementary and secondary education (page 20).
4. Recall of state and local officers (page 25).

The paper discusses other issues that may arise during a convention:

The death penalty and commutations (page 29);

Gay marriage, definition of marriage, and civil unions (page 29);

"Takings"; TIF's (page 30);

"Anti-lockstep" provision (page 31);

Method of electing State Representatives to the Illinois House of Representatives (page 31);

Legislative redistricting (page 35);

Amendatory veto (page 37);

Term limits (page 39);

Elimination of certain executive offices (combining the Comptroller and Treasurer; possibly eliminating the Lieutenant-Governorship) (page 40);

Revision of home rule powers (page 42);

Elimination of smaller special districts (page 43);

Removing restrictions upon or placing restrictions upon the state income tax (page 45);

Removing the replacement tax on corporations imposed to compensate local governments for the abolition of the ad valorem personal property tax (page 46);

Requiring a super-majority to raise any tax rate (page 46); and

Extending the initiative and referendum procedure for constitutional amendments and perhaps legislation (page 47).

The paper concludes with observations about state government and state constitutions in the twenty-first century, especially in Illinois (page 49). Appendix I is the text of Article XIV, Section 1 of the Illinois Constitution (page 51); and Appendix II is a summary of the seventeen amendments to the 1970 Illinois Constitution submitted to the voters (page 51).

Introduction---what is important about Nov. 4, 2008?

Each Illinoisan who votes on November 4, 2008, will be asked this question:

"Shall Illinois call a constitutional convention?"

With a hotly-contested presidential election on the top of the ballot, in which a resident of Illinois is expected to carry his home state, there is little interest in the "con con" issue. Barely three months before the election, most Illinoisans have not yet thought about the issue; indeed, many Illinoisans are totally unaware of the referendum.

Most voters are aware of one thing: their dissatisfaction with Illinois government. The perceived gridlock of government, largely caused by feuding between the Democratic Governor and his fellow Democrats in both the executive and legislative branches, has disgusted an unprecedented number of Illinoisans. The approval ratings of Governor Rod Blagojevich and some other key office-holders are as low as those of President Bush and the United States Congress.

Those voters who say they favor a constitutional convention usually claim that state government is so broken---and also "broke", because the state is in such a dismal fiscal condition---that only a restructuring of the basic charter can put Illinois back on the road to solvency and the efficient delivery of state services for the public good.

But is the condition Illinois is in worse than that of the other states? And can its problems be fixed by changes in its constitution? If so, is a convention likely to produce the needed amendments to the state constitution?

The purpose of this paper is to describe the history of the convention process, to analyze the political forces operating for and against constitutional change, and to assess the worth of several proposed changes. I freely admit that these are my personal opinions and that many observers of Illinois as experienced as I am may disagree with me. I ask the reader who may disagree with my views only to consider that I have labored in this vineyard for thirty-eight years and am passionately devoted to my native state.

What has happened in the past regarding constitutional conventions in Illinois?

Illinois has always had a state constitution. When Congress admitted Illinois territory as the twenty-first state in 1818, it was upon the condition that the territorial legislators produce a constitution acceptable to Congress. That was the 1818 Illinois Constitution.

A generation later this "statehood constitution" proved inadequate for a growing agricultural and industrial powerhouse. The 1848 constitution was an example of Jacksonian populism. A key feature of this populist constitution was the change from appointing most officers, including judges, to electing them on party ballots. Soon it was clear that immigrants had created a multi-ethnic society in the heart of the Midwest. Nativism and racism showed themselves often. During the Civil War, a convention meeting in 1862 tried to impose an anti-Black, Copperhead constitution upon Illinois. It failed.

The 1870 Constitution was a classic example of a post-war state constitution. It tried to protect agricultural interests against what was perceived as the growing power of banks and businesses. For example, it effectively forbade branch banking. This constitution's unique feature was the creation of a multi-member district and cumulative voting method of electing members of the Illinois House of Representatives. Each district was represented by three members, and when a voter cast his votes, he had three votes he could divide among the candidates as he wished. Because a voter could cast all three votes for one candidate--- called the "bullet vote"---it was easy for each major political party to elect one member from each district. Until this system ceased in 1980, virtually every House district sent two members of one party and one member of the other party to the Illinois House.

Bi-partisan control of the governmental process therefore prevailed. Many votes in the General Assembly required a two-thirds majority, which meant, as a practical matter, that the leaders of both parties had to exert control over their troops and to compromise on most controversial issues. Because Illinois used the party circle ballot until 1891, the two major parties controlled amendments to the constitution from 1870 to 1891. Each party prepared a

ballot, which the party printed privately and offered to each voter entering the polling place. The voter decided which of the ballots to cast in the voting booth. The ballot already indicated approval or disapproval of constitutional amendments. Even after 1891, when Illinois switched to the "Australian ballot" system used today, most amendments were the result of bi-partisan compromises.

By the time the twentieth century was underway, the strictures of the "party-controlled" constitution were apparent. In the early 1920's a star-crossed convention met, in a desultory fashion, for two years. Because traditional and strongly-partisan Republicans dominated the convention, virtually nobody else supported it. Its product went down to ignominious defeat.

By the middle of the twentieth century leaders of both parties were able to achieve only one success in constitutional revision: the Gateway Amendment of 1950, which made it moderately easier to amend the constitution. One result was the 1954 amendment changing the redistricting of the Illinois General Assembly, later superseded by the federal cases on one person-one vote; another was the 1962 amendment re-structuring the judicial branch. Yet, there was no chance of attempting the wholesale revision that only a convention can bring about.

Then a combination of unrelated events created a singular opportunity. One event was the 1964 at-large election of the Illinois House brought on by the federal redistricting cases. The General Assembly, hitherto implacably hostile to a convention, had many new members. It adopted a resolution to place the question of the call on the ballot in November, 1968. Seventy-five percent of the voters approved the call. The legislature and the Governor enacted legislation providing for the election of members of the convention---commonly called "delegates"---and for the infrastructure of the convention.

There is no need to recount the story of The Sixth Illinois Constitutional Convention here. The convention submitted its work product on December 15, 1970. As is common in Illinois constitutional practice, the convention submitted four controversial issues separated out from the vote upon the main document. However, the convention stipulated that none of these four propositions would become effective unless the proposed new constitution itself passed. This system of submission forced those favoring any of the four "separately-submitted questions" over the status quo to coalesce behind the constitution itself. Even with this procedure and the solid backing of almost every major political figure in Illinois, the proposed constitution garnered just 55% of the vote, a majority to be sure, but not an overwhelming one.

One feature of the 1970 Constitution led to the referendum to be held on November 4, 2008. This is the provision, in Article XIV, Section 1, for an "automatic submission" of the call issue. Illinois joined several other states in requiring the issue of a call to be placed on the ballot every twenty years. In effect, the General Assembly's approval is not necessary for a convention to take place.

This "legislative by-pass" provision is crucial to an understanding of the upcoming referendum. Neither the legislative branch nor a popular initiative/petition procedure is necessary to put the issue on the ballot. The theory behind this automatic submission is that it forces the public to think about constitutional issues every two decades. Perhaps the delegates

hoped that there would be conferences and seminars all over Illinois, a sort of statewide "taking stock" of the constitution. Perhaps they also thought that the General Assembly would forestall a campaign favoring a convention by placing several popular amendments on the ballot two years before the automatic submission.

The motive for the legislative by-pass is as old as the United States. The Continental Congress was operating in New York City in 1787 when it authorized a special meeting of delegates to a convention in Philadelphia "for the sole and express purpose of revising the Articles of Confederation" in order to "render the federal constitution adequate to the exigencies of government, and the preservation of the Union." That constitutional convention met in secret and drafted what could hardly be characterized as simply "revisions".

Constitutional conventions are, therefore, clearly rivals of the elected legislative bodies. Because the delegates do not stand for re-election, they are not subject to ordinary political constraints. I think of "con cons" as like the village of Brigadoon in the eponymous musical. A convention appears once a century, does what it does, and then the delegates disappear into the mist--or in the case of Illinois, into Lake Michigan and the Mississippi River.

The dynamics of a convention, therefore, are unique in American state government. Yet, the Illinois Constitution, Art. XIV, Sec. 1, also grants the General Assembly and Governor, those who "make laws," considerable power to shape the convention. They decide the "when" and "how" of the election of delegates. To some extent, "when" and "how" really decide "who" the delegates will be.

The General Assembly and Governor can decide whether the election of delegates will be on a partisan or non-partisan basis, whether there will be a primary and general election or just one election at which the two highest vote-getters are elected, and whether those who hold state and local offices can simultaneously be members of the convention. In 1969 the enabling act for the Sixth Illinois Constitutional Convention, as interpreted by the Illinois Supreme Court in Livingston v. Ogilvie, 43 Ill.2d 9, 250 N.E.2d 138 (1969), provided for the non-partisan election of delegates at a primary, from which the four highest vote-getters were chosen to run in the general election two months later. State legislators, local officials, and party officials could be delegates. State executive officers and judges could not be delegates. In the end, two legislators, at least one mayor, and a few party officials, such as elected committeemen, served as delegates. The legislators could not receive the per diem amount they received as delegates on days when they attended legislative sessions.

The delegates to The Sixth Illinois Constitutional Convention were aware of all of this. They decided that future legislatures would be as reluctant to authorize a referendum on whether to call a convention as previous legislatures had been before 1966. Indeed, one of the salient characteristics of the convention was the delegates' awareness that it was a once-in-a-lifetime opportunity, that the stars that came together to make the convention possible in 1968 might not be in conjunction again for another century. They knew that if they did not compromise and produce a document that the Illinois electorate was willing to ratify, it would be decades before another opportunity for a convention would arise.

In short, given the history of unsuccessful attempts to call conventions, the delegates decided to adopt the automatic submission or by-pass provision. What has been the result?

In 1988 the first automatic submission appeared on the ballot. As the delegates had hoped in 1970, this generated some spirited discussions of constitutional issues and the nature of state government. The General Assembly took the lead by appointing a "Committee of Fifty," all academics or politically active Illinoisans, to study the issues. This commission held hearings, took testimony, generated research papers, and even held a reunion of the surviving delegates and key staffers to solicit their opinions. The commission concluded that a convention was unnecessary.

Surprisingly, the General Assembly did not attempt to head off a "vote yes" campaign by submitting a package of popular amendments in 1986 or 1988.

The "pro-convention" and "anti-convention" forces organized well in 1988. The interest groups that favored holding a convention chiefly advocated having "merit selection" of judges (the so-called "Missouri plan") or having an initiative and referendum for constitutional amendments and/or legislation. In the summer of 1988 a group of business and labor leaders financed a "vote no" campaign. Most public officials opposed the call, largely on the grounds that the 1970 constitution had been in effect only since July 1, 1971, and had been generally well-received.

Both camps knew that the three-fifths approval vote needed to call a convention would be difficult to attain. Unless there is a public scandal, it is difficult to persuade Illinoisans to abandon the status quo on anything, especially if change will require spending money. To be sure, there was no scandal in 1968 when the last call was on the ballot and garnered the three-fifths support necessary under the 1870 Constitution. However, at that time there was near-unanimous support for a convention among political leaders, civic organizations, and opinion-makers. This situation was reversed in 1988. The majority of the state's leaders opposed holding a convention, and, for once, there was no great public scandal. In November, 1988, 75% of those voting on the call voted "no."

As the 2008 referendum approached, many observers, including me, expected that the General Assembly would appoint another study commission and/or submit some non-controversial amendments to the voters. This did not happen, probably because the legislature was in a constant battle with Governor Blagojevich even before his re-election to a second term in 2006. The "con con referendum" seemed far away. As May 4, 2008, the deadline for submitting amendments for the November, 2008, election, approached, it appeared that the General Assembly would approve at least one amendment. That was the amendment permitting the recall of executive officers and perhaps of legislators and judges. At the last minute, the resolution to submit a recall amendment to the voters failed.

In fact, the General Assembly spoke to the call only once: on June 7, 2007, the House of Representatives adopted a resolution sponsored by Rep. John Fritchey, a Democrat from Chicago, stating that the House approved calling a convention. At first, the vote was split evenly between ayes and nays, which meant that it would fail as a matter of parliamentary procedure.

Chicago Democrats cast most of the "aye" votes. Then the Speaker of the House, Michael J. Madigan, also a Chicago Democrat and the only former delegate still serving in the General Assembly, cast the deciding vote. He sided with those Chicago Democrats who favored holding a convention. Since then, the Speaker has not spoken publicly on the issue. I, for one, think he will oppose the call in November, 2008.

As of the summer of 2008, the pro-con con and anti-con con forces have begun to coalesce, at least after a fashion. The pro groups seem quite disorganized, each faction supporting a convention for different reasons. They have no umbrella organization. Some of the pro forces want a convention for very general and vague reasons, such as "let the people speak." Others want a convention to address just one or two specific issues, such as recall of officers or education funding. The anti-con con forces have organized an umbrella organization called the Alliance to Protect the Illinois Constitution. Many business and most labor groups, as well as several civic organizations, are part of the Alliance. I am a member.

What are the factors that make for a successful convention?

After two or three decades of "con cons", they seem to have gone out of favor. No state has held a state constitutional convention since 1990. Indeed, not all of the con cons held in the 1960's through the 1980's were successful in the sense that the electorate ratified the convention's proffered work product. Illinois was an exceptional success story.

I receive calls from civic leaders in other states who are considering holding conventions. From my discussions with these leaders and from my own assessment of the Illinois situations in 1968, 1988, and now 2008, I have concluded that there are four keys to a successful call (voters approve holding a convention) and then a successful revision (voters ratify the work product of the convention).

First, the major public figures in the state, especially the leaders of the political parties, must actively, seriously, and energetically support both the call for a convention and the convention's work product.

The major public figures, especially the Democratic and Republican leaders, are a major key to success. Some idealistic advocates of constitutional revision say they will succeed by running roughshod over the "entrenched interests." This is balderdash. Unless the civic leaders, "special" interests, and political organizations are behind a call and ratification, how can an effort succeed?

I have received calls from activists in other states who say that there is "general agreement that our state constitution is holding us back." When I ask what they specifically want to change, they make vague statements about "dissatisfaction" with the judiciary, the tax structure, political gridlock, public corruption, and often the financing of public education. When I point out that these changes will cost money or cause controversy, they often admit that no public figure will champion any specific proposals "because it might make somebody mad." I can only respond that they are wasting time and energy. Without the political will to take unpopular stands and propose controversial solutions, no convention can succeed.

In 1968-1970 the public figures in Illinois were almost unanimous in their sincere support for a convention and for its product. Mayor Richard J. Daley of Chicago had been active in constitutional revision since he was a member of The Chicago Bar Association's first "Committee on Constitutional Revision" in 1947. Among other reasons for supporting a convention and the proposed 1970 constitution, he knew that Chicago could never attain home rule except through a convention. The home rule provision drafted by the 1969-1970 convention was far more than he could reasonably have hoped for before as the convention began. He threw the weight of his legendary political organization behind the 1968 referendum on the call and the 1970 referendum on ratification of the convention's proposed constitution. The incumbent Governor, Samuel Shapiro, a Democrat, and the Republican candidate for Governor in 1968, Richard B. Ogilvie, also supported the call with enthusiasm.

During the 1970 ratification campaign, then-Governor Ogilvie supported ratification and the separate proposition for "merit selection" of judges. Mayor Daley held off his endorsement until November 29, 1970, when, I am told, two delegates whose judgment he trusted persuaded him that the proposed constitution was the best he could get. Of course, Daley knew that from his quarter-century in the field. He also knew that he could probably defeat the merit selection proposition with the help of the minority (primarily Afro-American) voters in Chicago and the local Republican leaders in the Downstate counties, *i.e.*, the ninety-six counties outside of the six metropolitan counties of northeastern Illinois.

Here let me add a historical footnote: the convention experience---call, election of delegates, and ratification---was the last time that the Illinois political parties could use their patronage-based "machines" to deliver votes in such a way in an issue-based campaign.

One of the four candidates for a con con seat from the Hyde Park area of Chicago was Michael Shakman, a Democrat who opposed the "regular Democratic organization" headed by Mayor Daley. The two delegates elected from Shakman's district were an Afro-American woman lawyer who was backed by the regular Democratic organization and an Afro-American man who was a noted civil rights leader long opposed to the regulars.

Shakman filed a lawsuit claiming that the Daley-backed candidate had defeated him primarily because the regular organization had required public employees paid by taxpayers to work in her campaign. Thus began the series of "Shakman decree" cases, concluded a third of a century later, that dealt a crushing, if not mortal, blow to the patronage systems then prevalent in Chicago and other large American cities. Ironically, the decline of strong party organizations makes it more difficult to pass important policy initiatives, such as a call for a convention and ratification of a proposed constitution.

In the run-up to the November, 2008, referendum, there has been virtually no party support for or against a call. Neither major political party has thrown political muscle into the campaigns. Those persons and groups advocating a convention are small ad hoc organizations, certainly not entrenched "machines." They advocate holding a convention for differing and perhaps contradictory reasons. Those Libertarians favoring smaller government, the anti-tax groups favoring caps on taxation and spending, and those progressives favoring increased school

funding seem to have little in common. Their programs are either vague and "populist" or narrow, centering upon one issue only.

For example, one Libertarian said at a recent public forum that he "was neutral on how to select judges." I responded that if he were a delegate, he could not remain "neutral" on that important issue and that he owed the voters an explanation of his views. Another proponent of a convention, a progressive, has said he wants a convention in order to have a state-wide debate on the nature of government.

The Democratic Lieutenant-Governor of Illinois, Pat Quinn, who helped lead the "pro con con" campaign in 1988, is the highest-ranking public official to support a call. He supports efforts to promote "honesty in government" and a variety of other causes, including "combating global warming." The Lieutenant-Governor has separated himself from the Governor with whom he was elected in 2002 and re-elected in 2006. He has not spared the Governor from criticism. At a debate on the con con issue on July 11, 2008, Quinn spoke of the widespread corruption in state government and all but called his Governor a crook.

Governor Blagojevich has other matters on his mind: his inability to join with the legislature in passing a budget for the July 1, 2008-June 30, 2009 fiscal year; the possibility that he will be indicted on charges of corruption; and, more recently, the efforts to file a bill of impeachment against him based on the evidence offered at recent trials of the Governor's fundraisers and political associates. Indeed, the indictment or impeachment may occur before November, 2008. Not surprisingly, the Governor has not spoken publicly on the con con issue.

Second, the delegates elected to the convention must want the convention to present a work product that is both good and acceptable by the electorate more than they want to have a single issue approved or defeated.

Let's assume that on November 4, 2008, three-fifths of the voters approve calling a convention. What will happen then? The General Assembly and Governor will decide the provisions of an enabling act regarding the convention. Within the perimeters of Art. XIV, Sec. 1, they can determine how the delegates will be elected. Beyond that, they will establish funding and staffing.

Because Illinois state government is teetering on the edge of insolvency, they may decide to skimp on staffing and assign members of the four legislative staffs to the convention. Seconding to convention duty some staffers already on the payroll of the General Assembly would save money, but it would effectively give the legislature control over the convention. In 1969-1970 the convention had a separate research staff, of which I was a member. From that experience, I know that control of research and other assistance can lead to control over issues and decisions.

Probably the delegates would be advocates for only one or two specific issues. We live in an era of public policy monomania. Many officials and even more voters seem to care about only one or two pet issues and refuse to recognize the view of others, much less compromise with those who disagree with them.

This is fatal to efficient, transparent democratic government. New York's state constitutional convention in the 1960's is reported to have failed because the delegates made aid to church-supported schools a major issue even though New York voters were split on that issue. The delegates to the 1969-1970 Illinois convention were at times on the verge of irretrievable splits. Passions were inflamed, blood pressure counts rose, some threatened to oppose any constitution that contained a provision opposite their wishes---but in the end the delegates wanted a new constitution more than they wanted to prevail on any one issue.

By a stroke of good fortune the delegates agreed to submit two major political issues---the selection of judges and the method of electing members of the Illinois House---and two emotional issues---abolition of the death penalty and lowering the voting age from 21 to 18---as separate propositions. This agreement took four contentious "I won't compromise" issues out of the document itself. Need I add that the document itself was the product of many compromises--on taxation, local governmental powers, election of statewide officials, future constitutional amendments, etc.?

In the end, only two delegates dissented from the proposed constitution, and most delegates campaigned hard for the document and their favorite separately-submitted propositions.

When I hear proponents for a convention in 2009-2010 say they want one specific provision in a new constitution and "I don't care what anybody else says," I know they are people who are not fit to sit in a body that will make group decisions.

Third, the issues addressed must be "issues for the future", not just responses to the moment; and fourth, any provision suggested must take into account how future Illinoisans will be affected.

These two requirements, which are inter-related, are perhaps the most complicated pre-conditions for success. What is one person's solution to a pressing current problem is another person's hamstringing of future generations.

The history of state constitutions is replete with examples of responses to problems of the moment. Often the responses, which may or may not solve those immediate problems, hamstring future generations that see the issues differently. For example, many late nineteenth-century constitutions prohibited lotteries and other forms of gambling. These were responses to many states' efforts to raise money by lotteries after the Civil War, most of which resulted in fiscal and social disasters. These prohibitions would be just antiquated curiosities, much like the federal constitution's grant to Congress of the power to issue "letters of marque and reprisal," except that modern states might want to use well-regulated lotteries as a source of revenue. It is difficult to amend a state constitution just to enable its government "to permit lotteries."

Few remember that one of the burning issues in 1968-1970 was the 1870 Illinois Constitution's effective prohibition of "branch banking." The ban was designed to prevent Eastern and Chicago banks from taking over the economic centers of Downstate counties. Today it is hard to appreciate the passion Downstaters felt about this issue. The principal organized

lobby at the convention (of the few lobbies active at the convention) was the banking lobby. Some of the bankers favored lifting the ban, but most were determined to fight to the death to prohibit branch banking. As a compromise, the delegates established a specific voting procedure for any bill authorizing branch banking (Art. XIII, Sec. 8).

The subsequent history of "branch banking in Illinois" illustrates my point. Even in the 1980's a bill authorizing A.T.M.'s, not full-service branches, faced opposition on the grounds it would lead to branch banking. As the saying went, "Continental Illinois Bank in Chicago will soon have branches on every corner in Peoria and Springfield." In the end, the anti-branch banking sources realized they were fighting a losing battle, and the General Assembly authorized "branch banking." A quarter of a century later, few Illinois banks operate only in one county, and the Continental Illinois Bank is no more, having been absorbed into a national financial giant, the Bank of America. Most Illinoisans born after 1970 cannot comprehend what the fuss was about.

In 2008 the "issue of the moment" is recall of elected officials, at least of state executive officers. This would not be an issue if Governor Arnold Schwarzenegger was not so popular in California and Governor Rod Blagojevich was not so unpopular in Illinois. Blagojevich's ratings in the polls are at record lows, and he is widely believed to be largely responsible for the "gridlock in Springfield."

It would be possible, perhaps even easy, to vote Blagojevich out of office at the primary in March, 2010, or at the general election in November, 2010. That would take care of the "issue of the moment." However, once placed into the constitution, "recall" would be permanent. Political consultants love recall mechanisms because they allow political consultants to determine the names of those who disapprove of an incumbent, even if the recall petitions are never filed. The consultants, armed with a computer printout of the signatures, can then advise a potential challenger to the incumbent on where his strength is.

When I point out to advocates of recall of Governors that it seems likely that Governor Richard B. Ogilvie, who championed a state income tax in 1969, would have been voted out of office via a "recall" system, they usually tell me that they favor the income tax, but are so angry at the current Governor that they "don't care if some good officials would decide not to propose controversial measures or would even be voted out of office because Blagojevich must go." I consider this attitude short-sighted and irresponsible.

This is the context of the November, 2008, referendum---the Illinois history and some observations on factors necessary for success in holding a constitutional convention. But what are the most likely issues to arise if there is a convention?

What will be the major issues in the call and at a convention?

In 2006 I thought that there would be three substantive issues that would dominate any discussion of constitutional revision, whether by legislatively-approved amendments or in a constitutional convention:

- 1) selection of judges ("merit selection", appointment systems, partisan or non-partisan elections);
- 2) funding public pensions (state and local pension funds are expected to run dry by 2020); and
- 3) financing public elementary and secondary education (increasing the state's share of funding, equalizing funding, reducing reliance on property taxes).

Recently, I have added a fourth critical issue:

- 4) a system for recalling elected state and local officials.

Besides these four issues, there are several other constitutional issues that have arisen. All of these problems are of importance to large segments of the public, some of whom advocate one solution and some of whom advocate a different, even opposite, solution. Following is my analysis of each issue and my preference for solving the problem. (This is not a campaign platform, as I would never run to be a con con delegate.)

Let's begin with the four paramount issues:

1) Selection of Judges

In Illinois, all seven members of the Supreme Court, all of the members of the Appellate Court, and about half the Circuit Court Judges are elected at popular elections on a party ballot basis. The other half of the Circuit Court Judges are Associate Circuit Judges, whom the elected Circuit Court Judges select for four-year terms; these Associate Circuit Judges stand for re-appointment at the end of their term.

The constitution lets the legislative process decide whether judges run for election on a partisan or non-partisan basis. The judges currently run in party primaries. This enables the political parties to have a strong hand in deciding who the judges will be. In areas of the state where one party dominates, the party primary effectively decides who the judges are. Indeed, no Republican has run for a Circuit Court position within Chicago in many years, and no Republican has filed petitions to be nominated for the Supreme Court from Cook County since 1990. The reverse is true in some parts of the suburbs and Downstate, where the Republican primary is the true election.

Until recently the endorsement of the political party's slating committee was a guarantee of success in the judicial primary. At the 1969-1970 convention proponents of an appointive system claimed the "party bosses" were those who decided who judges were, that popular elections were a sham. That is no longer true. Some judicial candidates, especially on the

appellate level, mount such vigorous, well-organized, and well-financed campaigns that they beat the party-endorsed candidates.

Now we have many true elections for judges. By that I mean that judges must raise campaign funds largely on their own, run their own campaigns, and even establish campaign platforms. Some party officials are upset that we now have "real elections". Reformers who want "to take politics out of the judiciary" are even more upset because they deplore the influence of money on judicial elections and presumably on judicial decisions.

During the 1969-1970 convention proponents of an alternative system advocated "merit selection". This is the popular name for the "Missouri Plan", the process by which a Governor appoints one judge from among three nominees submitted by a Judicial Nominating Commission. These commissioners, in turn are divided equally between lawyers, who are elected by members of the state bar, and non-lawyers, who are appointed by the Governor.

There are variations on the "merit selection" system. Some states, for example, have the Supreme Court of the state, not the Governor, appoint the judges. Indeed, each "merit selection" state seems to differ from the others; there is no uniform system. All have one factor in common, however: the appointing authority must choose one of the nominees selected by the nominating commissioners.

Several states have appointive systems, with or without judicial nominating commissions, but most states have a mixed system--some judges elected popularly and some appointed by either the Missouri Plan or another appointive system. I am not certain, but I believe that if Illinoisans had decided to adopt Separately Submitted Proposition 2B, which provided for "merit selection" of all judges except Associate Circuit Judges, Illinois might have been the only state to have "merit selection" for all judges except the Associate Circuit Judges.

Here are some little-known facts about the Missouri Plan. It was created by a 1940 constitutional amendment to combat the influence of the Tom Prendergast Democratic machine in the Kansas City-Jackson County area. Because the Governor was limited to one four-year term, he exercised only short-term power over appointing both the non-lawyer commissioners and judges. At no time has the plan operated throughout Missouri. Only the Supreme Court, the Appellate Court, and the trial courts of the two major metropolitan areas, St. Louis and Kansas City, were included in the original plan. Other areas of the state have the power to opt in for their trial courts, but only two areas have done so.

Since 1970 the list of those supporting "merit selection" for Illinois, which would indeed require a constitutional amendment to institute, has changed. The two major bar associations in Illinois, the Illinois State Bar Association and the Chicago Bar Association, officially supported Proposition 2B in 1970. Their governing boards still do, but it is unclear whether the majority of their members support it.

Illinois proponents of some kind of appointive system, including "merit selection", have regularly introduced bills for constitutional amendments in the General Assembly, all to no avail. In recent years many of these proposals have specified that non-lawyers constitute the majority

of each commission, that they be bi-partisan commissions, and that the lawyer commissioners be elected by members of the Illinois bar. Some of the proposals have made the Attorney General and the "next-highest-ranking officer of the other major political party" the people who appoint the non-lawyer commissioners. Most of the proposals have specified "merit selection" for the Supreme and Appellate courts only, leaving the Circuit system open to local option, *i.e.*, the residents of each circuit could decide whether to elect their judges or to establish judicial nominating commissions for their circuit.

In 1970 the Afro-American voters in Chicago overwhelmingly rejected Separately Submitted Proposition 2B. Now fifteen per cent of the population of Illinois is "minority", and most members of all kinds of minority groups remain implacably opposed to discarding popular election of judges. Of all the minority bar associations that have spoken on the issue, only the Asian-American Bar Association of Chicago has gone on record in support of any kind of appointive system.

In 1990 the Republican legislators from Cook County joined forces with the minority members of the Democratic Party in the legislature to enact the "sub-circuit" bill. This subdivided Cook County, which is coterminous with the First Judicial District, into smaller units for the purpose of electing many Circuit Court Judges. Previously, all Circuit Court Judges were elected just from Chicago (which meant they were all Democrats and almost always slated by the party leaders); were elected just from suburban Cook County (which meant that, with one or two exceptions, they were all Republicans and likewise slated by their party leaders); or were elected from the entire County (which meant they were invariably Democrats and likewise slated).

Since the sub-circuit bill for Cook County went into effect, many, perhaps most, of the Circuit Court Judges have been elected from these smaller units. These judges seem to like the system, and they certainly have a vested interest in keeping it. Some voters say they like "seeing their judicial candidates" and "their judges" around "the neighborhood." In short, the sub-circuiting of Cook County may have diminished the enthusiasm for "merit selection in the county.

The judicial sub-circuit system has spread beyond Cook County into the Chicago Metropolitan Area. All of Lake County, all of McHenry County, and part of Kane County have sub-circuits. The system has begun spreading beyond the six counties to Kendall County, Boone County, and even to Winnebago County, which is the home of Rockford, the second-largest-city in Illinois. All of these counties are in the northern part of the state.

In 1970 the suburbs of Cook County and the five "collar counties" bordering on Cook generally supported Separately Submitted Proposition 2B. Now that the sub-circuit system has been spreading to the collar counties, there is apparently less enthusiasm for "merit selection" in the suburbs. Perhaps these voters believe they now know their judicial candidates better and are reluctant to surrender the power to elect them.

I believe that the Downstaters, those Illinoisans living outside the Chicago Metropolitan Area, still remain skeptical about, if not downright opposed to, any kind of "merit selection" of

judges. Perhaps Downstaters believe that they know who their judges are and can make as valid decisions about judges as they do about other locally-elected officers.

The most important change in support since 1970 is the apparent change of heart by business groups. In 1970 business groups contributed the lion's share of the funds needed to finance the campaign for Proposition 2B. Since then, business groups in Illinois and around the country have organized themselves as "court reform" action committees. They seek to influence judicial elections. Where once they saw the elective system as the tool of "party bosses", unions, and plaintiff's personal injury lawyers, they now see the elective system as a way to elect "business-friendly" judges. Probably most businesspeople would still prefer a "merit selection" system, but, given that Illinois still elects judges, they are now willing to participate in judicial elections through campaign contributions.

The effect of business contributions upon judicial elections is clear. In 2004 Illinois and West Virginia set new records in funds raised and spent for campaigns for state Supreme Court seats. In Illinois, the figure was approximately \$9,300,000. This was for just one seat, that of the Fifth Judicial District, which covers the southernmost part of Illinois. The forces supporting the Republican candidate and the candidate's campaign spent a little more than the forces supporting the Democratic candidate and that candidate's campaign. Moreover, campaign organizations operating outside the candidates' campaigns spent much of the money; the candidates themselves had no control over raising and spending these outside funds, much less over their campaign ads.

Much of the campaign for the Republican candidate was really a negative campaign against the Democratic candidate, then an incumbent appellate judge also running to retain his seat. As a result, the Democrat not only lost the race, he became the first and only Appellate Court Judge to be defeated on the retention ballot. He thus lost twice.

In all probability, this is the way future Illinois Supreme Court and Illinois Appellate Court races will be conducted. The 2006 campaigns produced evidence of some involvement of business groups in appellate court races. Although the only Supreme Court seat up in 2008, one of the three in Cook County, is uncontested, probably future races will not be so quiet. Surely we can expect to see the growth of the influence of campaign contributions on judicial elections in Illinois.

One reaction to these campaign financing developments has been advocacy of public financing of judicial campaigns. If Illinois continues to elect its judges, then why shouldn't Illinoisans fund those campaigns, thereby removing many of the problems inherent in raising funds privately? So far, no bill on public financing of judicial elections has passed the General Assembly.

Along with this change in financing elections will come increased pressure upon judicial candidates to "announce" their positions on issues of public policy, such as abortion, the death penalty, and gay marriage---all emotional issues that may come before them in court. The cases in the line from Republican Party of Minnesota v. White, 536 U.S. 765 (2002) will haunt judicial campaigns around the country, including Illinois. These cases have held that a candidate for judicial office has a Free Speech right to speak about issues, arguably including issues that might

come before him or her in cases. Previously, most state canons of judicial ethics prohibited "announcing" those views.

I have no perfect solution to this quandary. In my view, the abolition of the rule prohibiting judicial candidates from "announcing" their positions in advance is an attack upon the independence of the judiciary. I deplore the questionnaires that interest groups now send judicial candidates asking their views on emotional issues that might come before them in court. But I do not know how to reconcile First Amendment free speech guarantees with guarantees of judicial independence and integrity.

If we seek only a statutory solution, I suggest two courses of action. First, make judicial elections non-partisan. Freeing judicial candidates from party labels would help free them from party influence. I vote in the Republican primaries in Chicago and thus have no real voice in who my judges are. The same is true of those who vote in the Democratic primaries in DuPage County, the largely-Republican county just west of Cook County.

The second statutory solution I suggest is to enact reasonably strong campaign finance and disclosure regulations, as well as campaign conduct rules, just for judicial campaigns. Judicial races are in so many respects different from races in the other two branches of government that I can justify treating them separately. Surely there must be a way to finance judicial campaigns through special assessments upon members of the bar; surely campaign contributions limits and disclosure regulations would be acceptable to judicial candidates; and surely there should be some limits upon the types of "announcements" judicial candidates can make.

If these and possibly other statutory enactments are insufficient, we may have to look to constitutional amendments. (Full disclosure: during the campaign for the 1970 constitution, I campaigned not only for the basic document, but also for Separately Submitted Proposition 2B.) I no longer believe in a total "Missouri Plan" system because I believe that no partisan elected official, not even the best-intentioned Governor, should have such power over selecting members of the modern state judiciary. We now see presidential candidates campaigning on what kind of judges they "will appoint" to the federal judiciary. Gubernatorial races would be the same, at least in Illinois.

In recent years, Governors of Illinois have served from four years to fourteen years in office. If, as reported, half of the judges in Illinois take office every eight years, then a Governor who served the "standard" two four-year terms would be able to appoint approximately half of the members of another branch of government.

Compare this with Missouri in 1940, when a Governor could serve only one four-year term. Indeed, there are reliable reports of growing dissatisfaction with the Missouri Plan in Missouri, largely on the grounds that recent Governors have reportedly exacted improper promises from appointees. In the spring of 2008 the incumbent Governor refused to appoint any of the three nominees sent to him, thereby creating an impasse rising to the level of a constitutional crisis.

Several recent Illinois Governors were lawyers. At least three went into private practice in Chicago after leaving office. So far as I can assess them, none would have appointed judges who would have given them, as ex-Governors, any special consideration when their cases appeared before those judges. But there certainly would have been lawyers and parties on the other side who would have thought such consideration was being given. (We do not seem to face this on the federal level, as recent presidents who were lawyers have not gone into private practice after leaving office.)

It seems to me that Illinois should have a split system of selecting judges: appointing the Supreme Court and Appellate Court judges, while electing the Circuit Court judges (preferably on a non-partisan basis) and maintaining the current Associate Circuit Judges system. Strange as it may sound at first, I would have the Illinois Supreme Court appoint the appellate judges and also their colleagues on the Supreme Court. Yes, this would make the Illinois Supreme Court a self-perpetuating body and give it great power.

I feel comfortable suggesting this because almost all of the members of the Illinois Supreme Court have voluntarily instituted a type of "judicial screening committee" system to deal with appointments to fill vacancies. When a judicial vacancy occurs, the members of the committee accept applications from lawyers seeking to fill the position. The committee then sends its recommendations on to the member of the Illinois Supreme Court who is charged by his or her colleagues with filling the vacancy. Usually, but not always, the justice appoints the person most-highly-recommended by the committee.

Perhaps a more regularized "screening committee" system could be built into the constitutional provision. In any event, I would expect the seven members of the Illinois Supreme Court to continue some form of the present screening system for filling vacancies in their appointment of judges on the supreme and appellate court levels.

One last point: although I have listed "selection of judges" as a paramount issue in constitutional revision, I am aware that this is more important to politicians and lawyers than it is to most members of the public. Sometimes I wonder if the public even cares how we select judges.

2) Funding Public Pensions

This issue is a perfect example of how a lack of political will on the part of officeholders can lead to a constitutional crisis.

Towards the end of the 1969-1970 convention a delegate from an area that included The University of Illinois proposed a floor amendment that purported to guarantee the pension rights of public employees. Eventually it became Art. XIII, Sec. 5. Because the provision did not originate in a committee, there is precious little "legislative history" or indication of what the delegates intended it to mean. There is, as one court opinion noted, no indication that the convention intended it to require adequate funding of public pensions. However, the record is sparse.

Some current commentators think the provision is unnecessary because the Contracts Clauses ("no impairment of contracts") of the federal and state constitutions are sufficient to protect the vested pension rights of all public employees. At the moment, I am inclined to think otherwise.

The Illinois provision is almost identical to the very first state constitutional guarantee of a public pension, enshrined in the New York Constitution in 1938, when teachers were paid in Depression-era "scrip", not in money. The case law in New York suggests that the guarantee applies only to the pension itself, not to companion benefits, such as health care.

Because it is always easier to put off to tomorrow (and future legislators) a problem that it would be onerous to decide today, the General Assembly has failed to fund properly almost all of the Illinois public pension funds. To be fair, many other states are in the same situation. It is easy to extend pension rights to long-term public servants, but hard to raise the revenue to support those rights. However, Illinois has one of the largest unfunded pension liabilities in the country; by one account, it ranks forty-ninth of the fifty states.

By most estimates, the crisis will come by 2020 or 2025 when an Illinois pensioner will not receive a pension check. The State Treasurer cannot issue a check on public funds unless the Comptroller authorizes the expenditure. At some point the Comptroller will have to admit that a fund is "broke" and refuse to authorize drawing the pension check. When the pensioner does not receive his or her pension check, he or she will sue the State of Illinois in the Court of Claims, and the issue will be joined.

The Court of Claims will probably grant the pensioner's claim. Because many funds will run out of money at about the same time, we can expect a political, as well as a constitutional and legal, crisis. The General Assembly will have to transfer funds from the "general revenue fund" to the pension funds in order to pay the claim. But how many times can the state transfer funds without raising taxes substantially?

I have raised these concerns with a few leaders of public employee unions. They are aware of the developing situation, but they tell me that most of their rank and file members are not concerned. Apparently most public employees do not think it will affect them personally. Many public employees do not think they will spend their entire careers in public service; therefore, as to them the pension will be of limited importance in planning their retirement years.

In the fall of 2007 I heard that retired Chicago police officers will not receive health care benefits after 2013 and that they will have to rely upon Medicare and private health plans. That is probably the wave of the future---cutting back on the health care benefits of public employees in retirement, forcing them onto Medicare.

As I see it, there are only two possible courses of action. The position of the public employee unions has been that only a drastic increase in taxes will prevent the coming shortfall. In the short run, the state could expand the base of the sales tax, which currently does not cover services. Eventually, however, there would have to be an increase in the state income tax. The position of some taxpayers' organizations and business associations has been that it is vital to

change the system of benefits, such as shifting from a defined benefit system, which most public employees now have, to a defined contribution system, which most private employees now have.

As a former state employee who foolishly cashed in her pension contribution upon leaving state government, I have no vested pension rights, but I know many who depend upon a governmental pension. I see no solution other than a somewhat modest increase in taxes before the disaster hits coupled with some tough negotiations over the types of benefits currently in place. Perhaps a shift to a defined contribution system is inevitable. However, the unions would fight this change tooth and nail. Perhaps such a shift would even be in violation of the pension guarantee in Art. XIII, Sec. 5, although I am not certain of this.

Clearly, however, the solution to this particular constitutional crisis requires a political will and willingness to face reality that has been sadly lacking in recent years.

(3) Financing Public Elementary and Secondary Education

Changing the system of financing public elementary and high schools in Illinois does not require a constitutional change, but many proponents of a change believe that only a constitutional amendment---and especially one hammered out in a constitutional convention---would effectuate any real change.

Most of the debate about school financing concerns only the financing of public schools at the elementary and secondary level, especially in Chicago. (Full disclosure: I am a graduate of the Chicago Public Schools, K through 12.)

A little constitutional background is in order. The United States Constitution says absolutely nothing about education although the framers valued formal schooling highly and thought an educated electorate was essential to the functioning of a representative democracy. They just thought that schooling was a purely local matter best left to local communities and the children's families.

Illinois, like most states, had no provision for education in its state constitution until the late nineteenth century. The 1870 Constitution was the first Illinois constitution to contain an education article. Like many state constitutions of that era, it mandated the General Assembly to "provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." Although some state constitutions specifically mention higher education, neither the 1870 nor the 1970 Constitution mentions colleges and universities.

In 1870 the ad valorem property tax on both real and personal property was the principal way to finance public elementary and secondary education. Indeed, the property tax was the principal method of financing all state and local government services.

By the time the 1969-1970 constitutional convention met, the situation had changed dramatically. During the 1950's, the federal government began financing sub-university public education through grants to school districts. On the state level, the Illinois version of a state

sales tax was almost forty years old and a major source of state financing. The Illinois state income tax was brand-new, but promised to be a major source of revenue, including the financing of public schools.

Yet, the principal source of financing Illinois public schools was still the locally-imposed, locally-collected, and locally-administered property tax. Although the General Assembly raised taxes for the "common school fund" to be distributed to the school districts, the state's contribution never came close to equaling the contribution of local property taxes.

Control over schools mirrored funding. State supervision of school districts was as meager as the state's contribution to financing. A "State Superintendent of Instruction", elected on a partisan basis, had only the loosest administrative authority over school districts.

At The Sixth Illinois Constitutional Convention the issues of funding and control were joined, first in the Committee on Education and then on the floor of the convention. Much of the debate arose over the allegation that the inequality of expenditures from school district to school district was resulting in marked inequality of educational opportunity available to the children in those districts. The villain of the piece was the reliance upon the local property tax.

The delegates stated a lofty goal in Article VIII, Section 1:

A fundamental goal of the people of the state is the educational development of all persons to the limits of their capacities...The state has the primary responsibility for financing the system of public education.

This language came into being because the Committee on Education could not agree upon whether a constitution should require 100% state funding, omit any reference to funding altogether, or draft language for something in between. Delegate Malcolm S. Kamin of Chicago, joined by others, proposed this constitutional language to the convention:

...Substantially all funds for the operational costs of the free public schools shall be appropriated by the General Assembly for the benefit of the local school districts. No local governmental unit or school district may levy taxes or appropriate funds for the purposes of such educational operation except to the extent of ten percent (10%) of the amount received by that district from the General Assembly for that year.

In effect, the state's contribution would set the operating budget, as opposed to the capital budget, of public schools. The proponents hoped that parents of schoolchildren would lobby the legislature to raise the state contribution per pupil each year.

The ensuing debate encapsulated all of the issues of state v. local control, state financing v. local financing, increased funding v. equality of funding, etc. We are scarcely any closer to resolving these deep-seated philosophical issues in 2008 than the convention was in 1970. For that reason, among others, I believe that if the convention had placed this provision into the

constitution, the suburban voters would have sunk the proposed constitution. Perhaps it might have succeeded as a separately-submitted proposal, but even that is problematical.

As a compromise, Delegate Dawn Clark Netsch proposed what is essentially the current language. In her remarks in the official transcript, she said it was not "legally enforceable." The pertinent quote is,

I concede that the language I have put down is, in the convention's usual fashion, hortatory. I do not believe that it states a legally enforceable duty on the part of the state through the General Assembly or otherwise. I do not intend that it state a legally enforceable duty.

Three years later, in Blase v. State, 55 Ill. 2d 94, 302 N.E.2d 46 (1973), the Illinois Supreme Court quoted that language. It held that a suit to compel the state to fund at least 50% of the cost of public sub-university education was justiciable and not a "political question." Most important, the court, relying upon the debates, said the language was merely aspirational.

In 1996, the Illinois Supreme Court considered a more direct challenge to the education funding system in Committee for Educational Rights v. Edgar, 174 Ill. 2d 1, 672 N.E.2d 1178, 220 Ill. Dec. 166 (1996). It held that the Education article envisioned educational opportunity as a "goal," but that education was not a fundamental right.

On August 20, 2008, an organization representing minority schoolchildren filed a lawsuit against the State of Illinois asking that the present school aid formula be declared unconstitutional on the grounds that it discriminates against both children from minority groups and children living in school districts with low assessed valuation per pupil. Chicago Urban League and Quad County Urban League v. State of Illinois and Illinois State Board of Education, Circuit Court of Cook County, Illinois, No. 08CH30490. The plaintiffs' lawyers, Jenner & Block, maintained that they can distinguish the two previous cases because "times have changed."

I quote this history because in the ongoing public policy debate since then, I have been dismayed to see these developments misquoted and mischaracterized by commentators on all sides of the issue. Here are some related aspects of this debate, which few commentators care to address:

---Does equal educational financing mean that each child should get the same number of dollars, even though we know that purchasing power around the state varies greatly? Housing and food are cheaper south of I-80 and west of the Fox River, and presumably central Illinois teachers could live just as well as their Chicago counterparts on a smaller salary.

---Concomitantly, does it mean that special needs children, including those living in poverty, should get exactly the same as more fortunate children, no more and no less?

---Does any change that bases the state contribution on "local efforts", such as tax swaps, take into consideration differing assessment practices? The real property taxation system in Cook

County officially classifies real estate by use. Other counties have that power and may be exercising it informally. How can we have a tax-swap system or state funding system without eliminating the Cook County classification system or having greater oversight of the county assessment process? A Cook County officer who favors a con con has told me that he wants to eliminate the Cook County classification system; I told him it had been entrenched for so long that it would take an earthquake to terminate it.

---What is the role of tax increment financing districts (TIF's) and other ways to re-distribute local tax burdens? TIF's, especially in Chicago, siphon off tax dollars from schools. Reportedly, they cost The Chicago Public Schools \$300,000,000 a year. Will school districts that contain few TIF's be willing to subsidize districts like Chicago that are enamored of TIF's?

---A related issue is the refusal of some citizens to pay for schools. We forget that some school districts have less money to spend per child because the residents of that district are unwilling, not just unable, to raise local property taxes. School bond referenda often fail. Sometimes residents are unwilling to allow shopping centers or large factories to be set up in their areas, even though those properties would pay sufficient real property taxes to increase the amount of local funding per child. In the 1990's I learned of one relatively low-income suburb that refused to let a noisy factory move into the area because it didn't want the smoke, noise, etc. Of course, that factory would also have increased their tax base, but the residents seemed not to care. Should Illinoisans who do live near shopping centers, with their traffic, or factories, with their smoke and noise, subsidize those who don't want these "nuisances" nearby?

---Will the industry built around real estate assessment and taxation practices oppose any lessening of the reliance upon local real property taxation to support the schools? Anyone familiar with assessments and appeals knows that the practices are arcane and often little-known. Lawyers and officials familiar with them have a vested interest in the status quo.

---If the state assumes more of the financing burden, will it also assume more control of the schools? I learned a wonderfully wise saying at con con: control of the course follows control of the purse. I think it is impossible to take more money from the state without also accepting more directives from the state. Of course, the General Assembly has passed so many laws regarding curriculum mandates and other aspects of running schools that one could say there is substantial state control today. Yet, school districts have sought to weaken the State Board of Education, which the 1970 Constitution created to provide state oversight of education. Local school officials, like many parents, want to keep local control of their schools.

---Would school districts simply increase their "needs" if they thought that other Illinoisans would fund their projects through increased state financing?

Residents of Glenview, a high-income suburb near Chicago, have told me that their school district recently issued bonds to build a new diving well in the high school swimming pool and that a junior high school principal in Glenview asked parents to donate funds so that each pupil could have two copies of a social studies text, one for school and one for home. (When I heard that, I thought, "wait until they discover how heavy law books are.")

Will other Illinoisans want to support these projects in Glenview, or will they demand diving wells of their own, thereby raising the spending level of each school district in the state?

Although the school aid formula can arguably be separated from capital expenditures, we should not forget that school districts willing and able to raise property taxes can build and maintain better buildings. Take the New Trier High School district in one of the highest-income areas of the country, Chicago's North Shore. After years of debate over the aging buildings, the district has sent taxpayers a letter saying it will either float a \$250 million bond issue to repair the school or a \$400 million bond issue to build an entirely new building.

One result would be certain: the residents/taxpayers outside of a school district will insist upon a say as to how their money is spent in that school district. If the residents of Glenview want to raise their own taxes to build diving wells and buy extra textbooks or New Trier residents want to raise their own taxes to build a state-of-the-art high school, fine, but if I, a Chicago resident, am asked to contribute to those expenditures, I shall insist upon having a say over them through my state legislators.

----Will parents seek other ways to finance their children's education? The Michigan school financing reform of the 1990's has shown that many school districts, and not just the wealthiest ones, have resorted to creating charitable funds to support the local schools, to the tune of hundreds of thousands of dollars per year per school.

Few people know it, but several Chicago public schools have also established "friends of the school" foundations entirely apart from the Chicago Public Schools administration and even the local school councils. The parents and alumni of the schools fund and administer them. In early 2008, one elementary school on the North side of Chicago raised \$500,000 to provide teacher's aides and other support that the CPS won't provide.

----Why should parents whose children attend non-public schools pay more taxes to support public schools, and why should parents who home-school their children pay more taxes to support public schools? Historically, "non-public schools" meant the Catholic schools and a few elite private academies. Increasingly, "non-public schools" are religious academies run by Jewish, Muslim, and conservative Christian organizations.

----Finally, there is the elephant in the room, which nobody wants to discuss: how does an increase in funding for schools translate into better educational opportunity for schoolchildren?

An expert on the Michigan school funding reform said in September, 2007, that on this question "the results in Michigan were mixed." The reform quickly produced higher test scores in the lower grades throughout Michigan. As those children entered high school, however, other forces affected their performance. Schoolchildren in northern Michigan and the Upper Peninsula still seemed to be scoring higher and graduating from high school. Among Afro-American teenagers in low-income areas of Detroit, the situation has been different. The incidence of drugs, gangs, and dropping out of school has remained higher than average. This anecdote suggests that while more funding helps all children and "equalized" funding helps give

disadvantaged children a better opportunity, we cannot ignore the other factors in a child's development.

One aspect of the school funding dilemma is absolutely clear: any increase in state funding will require an increase in state taxes. There is no way around it. In Chicago approximately 60% of the real estate tax revenue goes directly to the public schools; in the suburbs, the figure is about 80%. Any shift of most of that burden to the state will inevitably cause an increase in the state sales tax and eventually in the income tax, the only source of state revenue that can grow to absorb the shift in tax burden. When people tell me they want increased state funding, I say, "Ah, you've formed a committee to raise the state income tax." They are shocked and deny it, but in truth no other source, neither casino fees, nor sales taxes, nor user fees can possibly touch the state income tax as a source of revenue.

When Illinoisans, especially members of school boards and teachers' unions, complain that the General Assembly has not "solved the school funding crisis", I raise these issues with them. They are usually dumbfounded and say they had no idea that the issue is so complicated, but, of course, that is the reason why there has been no legislative solution. These issues probably also explain why the voters rejected a constitutional amendment in 1992 that would have required the General Assembly to set a minimum amount that the state would provide each public schoolchild.

I offer a semi-solution: a "delayed doomsday" provision. This would entail passage of a statute (or, if necessary, a constitutional amendment) that prohibited all elementary and secondary school districts from levying property taxes or floating bonds secured by property taxes after a set date, say five years hence, without obtaining taxpayer permission through a referendum. Some of the most successful provisions in the 1970 Illinois Constitution are those with "delayed doomsday" dates, e.g., the abolition of the ad valorem personal property tax set for nine years after the convention adjourned.

Of course, the state government, the school boards, the teachers' unions, the taxpayers, and the parents would hem and haw for a few years. However, as the drop dead date approached, there would finally be the political will to raise the state income tax, to revise the school aid formula, and to make some very hard decisions about revenue raising, revenue spending, and control. It won't be easy. But, faced with the possibility of an unfinanced school system, all parties concerned, especially the parents, will finally come to grips with the reality.

I do not know what their compromise solution would be, but I predict it would happen. And we would see a sharp reduction in the reliance upon local property taxes to fund schools when the school districts realized that they would have to go to the voters (read taxpayers) every time they needed property tax revenue.

4) Recall of state and local officers

The fourth major issue is one I did not predict two years ago. Largely because of public dissatisfaction with Governor Blagojevich, many observers now wish to have the constitutional power to recall at least the six elected officers of the executive branch (Governor, Lieutenant-

Governor, Attorney General, Secretary of State, Comptroller, and Treasurer). "Recall" is different from "impeachment, conviction, and removal from office" because there is no need to show that the officer has committed malfeasance while in office. The chief proponents of recall are the Lieutenant-Governor, Pat Quinn, and The Chicago Tribune.

Because many residents of Cook County are almost as angry at Todd Stroger, the President of the Cook County Board of Commissioners, some also lobby for the power to recall local officers. That suggestion is not as popular as the recall of state officers.

Some advocates also suggest instituting the power to recall members of the General Assembly and judges, at least judges who are elected. Indeed, a draft of the constitutional amendment on recall that almost passed out of the legislature in early May, 2008, would have extended to legislators and judges.

Nobody has suggested that this power should extend to appointed officers on any level. Therefore, I think we can say that those who advocate the recall power really want to negate the results of a popular election.

Perhaps some advocates also want to inhibit Governors and other officers from taking unpopular actions. When Governor John Peter Altgeld pardoned the Haymarket convicts in the 1890's, he was so despised that a recall movement would certainly have succeeded in removing him from office. When Governor Henry L. Horner proposed a sales tax in the Great Depression and Governor Richard B. Ogilvie proposed an income tax in 1969, they were so unpopular, at least for a few years, that a recall movement might well have succeeded in removing them from office. Ogilvie's championship of the income tax is widely blamed for his defeat for re-election in 1972. In short, recall can penalize courage.

As previously mentioned, Illinois has a "recall provision" already: primary and general elections. Well over a million people voted to re-elect Rod Blagojevich in 2006. He won a contested Democratic primary, and he won a contested election that November over a Republican opponent who had been elected as a state officer, the Treasurer. One would think that after observing him during his first four-year term as Governor, the voters would be able to judge his performance. Yet, some who voted to re-elect him have told me that they did so "because [we] thought he would change." Now they want to recall him, less than two years into his second term.

There is no surer way to keep campaign money flowing in politics than through initiatives, referenda, and recalls. That was not the original intention.

These three procedures---initiative, referendum, and recall---are the legacy of the Progressive Movement of the early twentieth century. At that time, few women could vote, rural interests dominated the mal-apportioned state legislatures, and Afro-Americans were effectively disenfranchised in much of the country. The movement had its strongest support west of the Mississippi, especially in the newer Western states.

Now, at the beginning of the twenty-first century, the legislatures are, by Heaven, re-districted every ten years, and the franchise truly extends to everyone who has reached his or her eighteenth birthday. The main reason people don't vote is because they don't want to.

Let's look at recall. Eighteen states have recall provisions in their constitutions. Most discussions of recall center upon recalling Governors. Only a Governor of North Dakota, who had been indicted, and Gray Davis of California have actually been recalled in over a century. (North Dakota voters apparently changed their minds, for they later elected the recalled Governor a U.S. Senator.) Each recall system operates differently. In most states, a successful recall would be followed by an election to fill a vacancy. In California, they held a free-for-all concurrent election, where Arnold Schwarzenegger and over a hundred others ran against Davis, an election that was conditioned upon the successful recall of Davis, the incumbent Governor.

The real problem with recall is not how infrequently it succeeds. The real issue is the method and motive for assembling a recall campaign. I suggest that the vast majority of recall campaigns (and initiative campaigns) exist not to succeed, but to gather petition names. It's about petitions. It's about signatures. Most recalls, like most initiatives for legislation or constitutional amendments, never get to a vote. Why? Because the folks engineering them don't intend them to get to a vote. They don't intend to file the petitions.

I saw this in operation in when I was visiting a California shopping mall in the 1980's. There was a "voter registration table" at one end of the mall. Some college-age people, all working for the local election authority, were registering voters. Some other college-age people were sitting next to them gathering signatures for a petition on some hot-button issue, probably gun control. At the other end of the mall was another voter registration table, with another group of petition-gathers. They were asking for signatures for the opposite side of the first group, say, "right to bear arms."

Suddenly it dawned on me that the organizers behind these petition drives had what every political operative considers pure gold: a list of targeted supporters for political candidates. They could sell those lists of signatures to potential candidates at a premium. This is what computers have done for petition drives, a development the Progressives could never have envisioned in 1900.

I had already learned about another aspect of recall at the 1969-1970 Convention: the motives of some circulators of petitions may be the opposite of what the petitions purport to do. The recall issue came up briefly at the convention, but failed for lack of substantial support. One delegate, who had lived in Arizona, told me privately that there was a petition to recall the Governor of Arizona a few years earlier. It garnered some signatures and then petered out. Because the organizers had not filed the petitions, the identity of the signers was not public knowledge.

The true reason for the petition appeared a few months later. A state senator asked to see the Governor about a favor for his district. The Governor graciously invited him to the executive mansion that evening. When the senator presented his request, he added, "the people in my district love you, Governor." The Governor replied, "That's not the way I see it", and pulled up a

sheaf of petition papers from the magazine rack next to his easy chair. He began reading the names of voters in the senator's district who had signed the recall petitions. Then it dawned on the senator: the Governor had started the recall drive himself, or at least paid the organizers for the petitions.

Now that's an "enemies list" that even Richard Nixon would have envied!

As skeptical as I am about the recall of officers of the executive branch, I am more hostile to recall of members of the General Assembly and the judiciary. Executive officers, after all, have reasonably long terms in office, four years, and often make decisions on their own. Therefore, one could arguably assess their performance on an on-going basis.

On the other hand, members of the House have two-year terms, and Senators have staggered terms of two four-year terms and one two-year term over a decade. Therefore, most legislators are in office only eleven months before they and their opponents must file petitions for the primary the following year. What is the point of recalling a legislator on that timetable? Moreover, legislators make group decisions, not individual decisions, because they cast votes in committees and on the floor. No legislator can pass a measure on his or her own. Vote-swapping and brokering are inevitable. Therefore, it is difficult to assess the performance of an individual legislator without considering his or her role within a group process.

Judges are also a different matter. It is true that there is a "judicial recall" system built into the constitution in that elected judges must stand for "retention" on a non-partisan basis at the end of their terms and must obtain at least 60% of the votes on their retention issue in order to retain their seats. Yet it is virtually impossible to "non-retain" a judge in Illinois. To all intents and purposes, they have safe seats, which is probably a good thing for judicial independence. We know that some Chief Judges do not assign controversial cases to judges who will "be up for retention" in a few months. If there were recall powers, how many judges would be willing to put their judicial positions on the line by taking cases that could result in unpopular decisions?

I am also skeptical about the recall of local officials. Apart from a few highly-visible ones like the President of the Cook County Board of Commissioners, Todd Stroger, there is comparatively little public knowledge of their performance. How many Illinoisans can name their alderman or county commissioner, much less say they have met either official? A recall provision would probably serve only as a means of harassing elected local officials, many of whom serve either without a salary or for a relatively low salary.

What are other issues that may arise during the call and at a convention?

Clearly there are four issues that eclipse all others in importance: selection of judges; the public pension crisis; funding public education; and recall of elected officers.

However, some other issues merit mention and analysis. In discussing each one, I shall try to give the major arguments on all sides of the issues and then my own opinion. The issues occur in the order in which they appear in the 1970 Constitution.

Article 1 Bill of Rights

The death penalty and pardons and commutations must be the first issue. One of the separately submitted propositions to the 1970 Illinois Constitution was whether, as a constitutional matter, the death penalty should be abolished. Although I supported it and campaigned for abolition, I now think that this is a matter for the legislative process, not a constitution. In any event, the voters overwhelmingly decided to keep abolition of the death penalty out of the 1970 Illinois Constitution.

Since then opposition to the death penalty has grown. As Governor George H. Ryan left office in 2003, he, who had been a staunch supporter of the death penalty while a legislator, commuted each death sentence to life imprisonment without parole. As he noted, if DNA tests and other modern methods now show that 13 of the 25 men on death row were innocent, how can we justify imposing the irreversible penalty?

On the other hand, many Illinoisans objected to his action. Governor-elect Rod Blagojevich immediately waffled on the matter, saying he did not really object to Ryan's commutations, just "to the way he did it", although he would not specify why. Some of those who objected to the commutations want the Illinois Constitution to restrict the gubernatorial power to pardon and commute sentences. Illinois, like most states, gives its chief executive unfettered power to pardon and commute. Texas, the execution capital of America, restricts that power, and we can expect that if Illinois restricted that power, there would be a substantial increase in executions in Illinois. (There has been none since the commutations in 2003.)

In any event, the issue of the death penalty and gubernatorial power regarding it is sufficiently important that it occasionally arises during the campaign for and against a convention. The issue would certainly arise at a convention. I favor the status quo on both issues.

A second issue is that of gay marriage, definition of marriage, and civil unions. This is the most emotional social issue of the day. Approximately nineteen states have amended their constitutions to define marriage as being only between a man and a woman. Some, including our neighbor, Michigan, have even outlawed civil unions in their constitutions.

Anyone who thinks state constitutions are irrelevant has not been reading the recent state Supreme Court cases on these issues. One of the earliest was Goodridge v. Dep't of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003), the Massachusetts case that established a right to same-sex marriages as a matter of that state's constitution. (Full disclosure: I was one of nine professors of state constitutional law who signed an amicus brief on the side of the petitioners.) That case began a series of maneuvers by the Massachusetts Governor, state legislature, and the Supreme Judicial Court, both for and against the decision. An additional complication is that Massachusetts is one of the few Eastern states with an initiative and referendum procedure, which means that the voters can have a direct say on the issue.

Other states have decided similar cases. The most recent cases are split, with California deciding, four to three, for same sex civil unions as the equivalent of "marriage," and Michigan deciding that since the Michigan constitution forbade both same sex marriages and civil unions, no public entity could extend "partners' benefits" to same-sex unmarried couples.

In Illinois, the issue would center around Art.I, Sec. 18, the "little equal rights amendment." Some conservative religious groups have already suggested that Illinois should amend that section to provide that nothing in the equal rights guarantee allows gay marriage because "marriage should be defined as being only between a man and a woman." However, there is little talk of prohibiting civil unions. In a convention, the issue of gay marriage and civil unions would be totally open, with "family values" groups probably advocating a ban on both. So far, the gay rights groups and others willing to entertain the idea of a civil unions statute have opposed a constitutional convention precisely out of fear of such a ban.

I would prefer leaving the issue entirely to the legislative process. Why prevent future generations from making necessary decisions on an important social issue? We know that the majority of Americans over sixty years of age oppose gay marriage and perhaps even civil unions, while a majority, perhaps an even greater majority, of Americans under forty favor both. Over the next decades Illinoisans should be able to address this without any constitutional restraints.

"Takings"; TIF's

Some libertarian and conservative organizations are vehemently opposed to Kelo v. City of New London, 545 U.S. 469 (2005), in which the United States Supreme Court allowed a municipality in Connecticut to condemn several residences as part of an economic development plan that centered upon giving private for-profit businesses land formerly occupied by homeowners. The businesses would be the prime beneficiaries of the "takings" by the government, in return for which they were expected to provide greater economic development to the community. The anti-Kelo movement has spread around the country.

Illinois has a somewhat different jurisprudence, based chiefly upon Southwestern Illinois Development Authority v. National City, 199 Ill. 2d 225, 268 N.E.2d 1 (2002), which arguably protected owners of private property in Illinois more than the federal constitution does. Still, there are forces within Illinois that want to strengthen the eminent domain provision in Art. I, Sec. 15 of the 1970 Illinois Constitution.

Some of the opponents of eminent domain would like to prohibit all "takings" through eminent domain for any purpose except a transfer of funds to a truly public entity, such as a public road or school. Others are concerned about the use of eminent domain as the key to a TIF, a tax increment financing district. Some local governments in Illinois, notably the City of Chicago, make great use of TIF's. It is alleged that some of the private entities that benefit most from the economic development of a TIF are political allies of the local governments enacting the TIF's. Within this context---strong emotions about private homes and small businesses v. large businesses, corruption, and lack of transparency in the TIF process---it is easy to see why some would seek to amend the constitution to provide for a (hopefully) better system.

The state and local governments, especially the latter, are adamantly opposed to any changes in the eminent domain or TIF systems. They see private economic development as a major function of a modern government and view individual private property owners who object as selfish opponents to progress for the general good.

Frankly, I know of no way to solve this dilemma. However, any attempt to resolve it on the floor of a convention will bring these emotions and policy issues into sharp conflict.

"Anti-lockstep" provision

Although few Illinoisans, even lawyers, are aware of it, the Illinois Supreme Court has regularly interpreted rights within the Illinois constitution as mirrors of the federal bill of rights. This is called the "lockstep doctrine", and I have publicly and forcefully opposed it for decades. I maintain that a court must consider and interpret any Illinois constitutional provision before it interprets any allegedly comparable provision in the federal constitution.

My colleague in the field of Illinois constitutional law, Jerome B. Meites, has suggested that it is appropriate to insert a provision into the Illinois Bill of Rights prohibiting the lockstep doctrine and mandating courts to consider Illinois rights separately and before considering federal rights. I have come to the conclusion that he is right. Because some recent "lockstep" cases have aroused the interest of the bar on this issue, a convention would probably have to deal with this suggestion.

Article IV The Legislature

The most controversial issue regarding the General Assembly in 1969-1970 may be the most controversial now: the method of electing State Representatives to the Illinois House of Representatives. When Joseph Medill of The Chicago Tribune proposed the cumulative voting system for multi-member districts in 1870, that system was almost unique in the United States. Under his proposal, the voters of each Legislative District elected one State Senator and three State Representatives. The method for electing the former was the common "single member districts" system, but the method for electing the latter three was unusual and sometimes rather complicated. Each voter cast three votes in the election and later the primary, when Illinois started holding primaries. If there were three candidates, whatever their party affiliation, the voter could cast one vote for each; 1 1/2 votes for two and none for the third; and, most important, could cast all three votes for one candidate and none for the others.

It was this last option, the "bullet vote", that made the system so powerful for minority interests and also so complicated. If a candidate could persuade enough voters to "bullet" for him, he or she could whiz past the other candidates in most cases and gain one of the three seats. Of course, the amount of "gaming" that went on, even among candidates from the same party, could be mind-bogglingly complicated. Most parties wanted their voters to cast 1 1/2 votes for each of the two party candidates, but sometimes the supporters for a candidate would break ranks and encourage "bullet voting" for their candidate, leaving the other candidate of the party out in the cold.

The purpose of Medill's system was to help de-polarize Illinois. Republicans lived in the northern part, while Democrats lived in the southern two-thirds of Illinois. Of course, in the twentieth century, Democrats found their stronghold in Chicago and a few Downstate urban areas, such as East St. Louis, while the Republicans held sway in most of Downstate and the developing suburbs. In any event, Medill wanted the voters who favored the "minority party" in each area to be able to elect a State Representative.

By the time the convention met in 1969, most of the Downstate delegates viewed the system as nothing but an octopus with its head inside the Cook County Democratic organization. They believed, with some justification, that Mayor Daley could call upon the Democratic State Representatives in every district to support a few issues he considered "core" to the Democratic Party in Illinois. Moreover, on key issues regarding Chicago, such as funding for the Chicago Transit Authority and the Chicago Public Schools, he could also call upon most of the Republican Representatives in Chicago for support. To Downstaters, this meant that the Chicago Democratic organization exerted influence in the House far beyond its numbers.

Of course, if the Republican Party had had a similar central organization, it could have done the same thing. Republicans had no central core, however. Moreover, by the mid-twentieth century, after the key federal redistricting cases had come down, it was clear that political representation would shift to Chicago (Democratic) and its suburbs (Republican, but not as well organized). When court cases forced the entire House to be elected at-large on the notorious bed sheet ballot in 1964, two-thirds of the House members were Democrats. As a result, one party in one chamber could override a gubernatorial veto and take many other actions requiring a super-majority under the 1870 Constitution.

By 1970 the chief result of the multi-member district and cumulative voting system was the effect it had on the majority party, not the election of one minority party member. In areas where the majority party had members who disagreed with each other almost as much as they disagreed with the minority party, the system provided an outlet for both points of view within the majority party. I saw this in the four years I worked on the House Republican staff after the convention, 1971-1975.

In the suburbs, Republican voters were split between conservatives and moderates. The former were pro-life and anti-E.R.A., while the latter were pro-choice and pro-E.R.A. Everyone knew that two Republicans and one Democrat would be elected from each suburban district. The only question was who? In almost every instance, the Republican Party primary yielded one conservative and one moderate Republican nominee. Thus, both sides of the majority party could claim a "voice" in the House.

On the Democratic side, the issue that divided Democratic voters, at least in Cook County and especially in Chicago, was ethnicity and race. If there were two strong, but not dominant, ethnic groups in the district, there would likely be one of each group within the delegation from that district. On the south and west sides of Chicago, the issue was not ethnicity, but race. In racially-mixed districts, there were usually one Afro-American and one White Democratic

Representatives. From my observation, they usually worked together in relative harmony on district issues.

Nonetheless, the Downstaters and other proponents of single member districts had a point. From a purely partisan point of view, it was dead certain that one party or the other would send two representatives and the minority party send a third. There were approximately five to ten "swing" districts where it was possible for the majority party to be either Democratic or Republican. It was claimed that on the west side of Chicago, long a strong Democratic bastion, the Republican candidate received only 10% of the vote and then proceeded to vote with his or her Democratic colleagues from the district except on purely partisan matters. The League of Women Voters of Illinois and some political theorists agreed with the Downstate Republicans and argued that the Medill-initiated system, as practiced in the 1960's, was a bad idea.

The convention nearly split apart irretrievably on the method of electing the Illinois House. In the end, the convention came up with a compromise on the two methods of electing the Illinois House. It placed the two types of election systems "outside the constitution" as separately-submitted propositions. Separately Submitted Proposition 1A was a modified form of the system then in place, while Separately Submitted Proposition 1B was the single member districts system. At that time, the Illinois House had 177 members, and both proposals kept that number of House members.

The modification to the old system made by Proposition 1A was designed to clear up the most-criticized feature of the old system: allowing the minority party to limit the number of candidates it would nominate to one, thereby insuring that the majority party would elect its two nominees. This was a "sweetheart deal" between the leaders of the two parties. The modification in Proposition 1A required any "limitation of number" to be set at "two" or more nominees. The purpose was to encourage, if not actually mandate, that there be four nominees (two Democrats and two Republicans) running in the general election.

On December 15, 1970, the voters approved Proposition 1A, which more closely reflected the system then in practice. (Full disclosure: I supported Proposition 1B because I thought that having three small districts within the larger senatorial district would enable each "minority bloc" or "smaller interest group" to continue electing a representative. When I began working for the Illinois House, I realized that the "smaller group", e.g., Democrats in a Republican-majority district, might well be scattered through the entire district and thus could not join forces to elect one representative in a single member district system.)

As soon as the 1970 Constitution became effective, the single member district proponents began their campaign to change the system. Art. XIV, Sec. 3 of the 1970 Illinois Constitution allows a limited citizens' initiative and referendum system for constitutional amendments. In effect, citizens can gather signatures to place an issue on the ballot that the General Assembly would never place because the issue pertains to "structural and procedural subjects" in the Legislative article. The effort to put single member districts on the ballot failed in 1974, but proponents continued claiming that the system was not "reformed" at all.

In 1980 an effort led by Pat Quinn, the League of Women Voters, some political theorists, and some notable Downstate Republicans bore fruit. The organizers of this campaign tied the abolition of the cumulative voting system with a reduction in the size of the House, from 177 members to 118. This was the "hook." They called it the Cutback Amendment. I believe few voters who signed the petitions to put it on the ballot knew that it was more than a simple reduction in the size of the house. When a young petition-gatherer approached me on Michigan Avenue and asked me to sign the petition, he said, "Lady, will you sign a petition to get rid of a third of the legislators in the House and thus save money?" I asked him what else was in the amendment and asked if I could read it and ask him questions about it. He replied, "Look, if you don't want to sign this, I'll talk with someone else." He would not let me read it. I surmise this procedure was common around the state.

The General Assembly foolishly aided the Cutback Amendment organizers by passing a pay raise for themselves shortly before the vote. Angered by this arrogance, many voters who were undecided voted for the amendment. As some friends said to me, "it's time to throw the rascals out." (Compare this to the controversy over recall now.)

The redistricting of the General Assembly took place in 1981. People involved in both the 1971 and 1981 redistricting have told me that it was harder to redistrict when they had to carve out 59 districts for the Senate and then divide each Senate district into two parts for House districts. It is like cutting a pie into six parts and then cutting each part again. What made it even harder was that everyone knew that at least one-third of the members of the House would lose their seats.

The result is obvious. The majority of Democrats in the suburbs and in most of Downstate simply choose not to run; likewise, Republicans in Chicago. It would simply cost too much for the "minority party" representatives to run. The minority party members in the House used to have to spend relatively little to campaign for the "third seat." As a result, they were relatively independent of special interests and often quite independent of their party's leadership.

The majority party representation also changed. The Republicans elected tended to be from the conservative wing only, and the Democrats elected tended to be from the "regular" organization in their district. Few can afford to offend their party leaders. Although many political theorists say they favor single member district elections because they "promote party unity" in voting, I think we have lost something in losing independence. Party policy is not necessarily made in party caucuses with the implication that everyone will go along with the democratically-arrived-at policy decision. Instead, it is more often made by the party leaders, who can control their members through campaign donations by the party finance committee.

Ironically, the concept of cumulative voting is back in vogue among political theorists. Professor Lani Guinier has long advocated some kind of cumulative voting to give a voice to minority groups. The United States Justice Department has advocated a variation of the system in federal court as a means of giving a voice to both Afro-Americans and Republicans in the Deep South. Peoria, Illinois, retains cumulative voting for the election of some members of its city council because it believes that that system facilitates the election of Afro-Americans. What

would Joseph Medill think of that development? What would those who favored the Cutback Amendment think of it?

In the twenty-first century the Midwest Center for Democracy, headquartered in Chicago, advocates a return to cumulative voting for the Illinois House. It can achieve this change the same way the organizers of the Cutback Amendment did: through petitions gathered under Art. XIV, Sec. 3. It is difficult to obtain over 300,000 signatures, however, when you are asking people to espouse a relatively esoteric proposition. "Throw the rascals out and save money" was an easy slogan in 1980.

My solution is a variation on the old cumulative voting system. It would require having two State Representatives and one State Senator from each "legislative district." The voter would then cast two votes, not three, in the state Representative contests. The "bullet vote" would be two votes cast for one candidate.

An advocate of cumulative voting has told me that election statisticians say that the old system could be summarized as 3:4. That meant that since there were three votes per voter, all a candidate had to do was persuade 25% (one-fourth) of the voters to "bullet" for him or her in order to be elected. If there were two Representative positions and each voter had two votes to cast, the relevant figures would be 2:3. That would mean that a candidate would need to persuade 33 1/3% (one-third) of the voters to "bullet" for him or her. Let's assume that there are scattered votes among the other candidates; with a third of the votes "bulleted" for one candidate, surely anyone would say that such a large "minority group" was entitled to representation.

The system I propose would certainly be better than what we have now. The two political parties know, within about five seats, what the political lineup in the House will be. Take DuPage County, long one of the "most Republican counties" in the country. For various reasons, there are a lot of citizens in DuPage who now want to vote for a Democratic candidate, at least some of the time. In fact, DuPage now turns in the second-highest number of votes for a statewide Democratic candidate in the state. Only the much larger Cook County turns in more Democratic votes. Yet not a single Democrat has represented DuPage in the General Assembly since the 1982 election, the first under the single member districts system. In 2006, one candidate from the eastern part of DuPage came within 200 votes of winning in an open seat contest, but his supporters, unable to "bullet", could not elect him.

Moreover, women candidates who ran under the cumulative voting system in the 1970's and then again under the single member district system in the 1980's have said that the old system was much easier for them to run under. That is because women candidates usually have a core of strong supporters, but find it difficult to raise funds. "Bullet" votes helped them greatly.

The second most controversial issue in the Legislative article is legislative redistricting. Art. IV, Sec. 3 may be unique in the country. It establishes a system of steps the redistricting process takes every ten years to effectuate redistricting. First the General Assembly and Governor, through the normal legislative process, can redistrict "by law." If they can't do it by June 30th of the year following the decennial census, then the four legislative leaders appoint a commission of eight members, two appointed by each leader. If the commission can't agree on a

map, then the Illinois Supreme Court nominates a Democrat and Republican, whose names are then "put into a hat"; the Secretary of State then draws one name. This ninth member, the "tie-breaker", then breaks the deadlock, presumably by siding with the four members of his or her party.

Critics have decried this as "redistricting by lottery." In fact, the situation is far more complicated. To begin with, when the 1969-1970 convention met, there were very few court cases to guide anyone trying to establish a redistricting procedure. (Full disclosure: I know, because I was asked to do some of the research.) Moreover, most state redistricting is now a creature of federal law---the Voting Rights Act and other Congressional legislation, U.S. Department of Justice directives, and federal cases---and not a matter of state law. As one Illinois legislator said after the 1981 redistricting, "the real tie-breaker is not the ninth member, but the U.S. district court judge assigned to hear the inevitable federal challenge."

The history of redistricting under this provision is enlightening. In 1971 there was no need to resort to the tie-breaker because the eight members of the commission agreed upon a map. In 1981 the commission had to use a tie-breaker because, as mentioned before, it was more difficult to draw a map with 59 Senate Districts and then slice each of those Districts into two more Representative Districts. People who were involved in both redistricting events have told me that the single member districts amendment was the principal reason that the 1981 process was more complicated.

When Secretary of State George H. Ryan had to draw the "tie-breaker" name in 1991, he announced that he would form a commission to study the process and devise a constitutional amendment that would create a better system. He named former con con delegate Jeffrey R. Ladd the Chair of the Redistricting Process Review Commission. I was a member. The commissioners and the staff researched every other state's system. It was clear, at least to some of us, that federal law had superseded much of what the states tried to accomplish in establishing redistricting procedures in their constitutions and statutes.

Many observers advocated adoption of the Iowa Plan, claiming that non-partisan staff members in Iowa "put the figures into a computer and the computer draws the map." In fact, the Iowa Plan depends upon a commission consisting of the four legislative leaders and a fifth person chosen by them. It is unclear, at least from my reading about the matter, how the four leaders "choose" the fifth person. It is theoretically possible that they choose that person almost by a lottery among themselves. I do not know, however, what has actually happened in Iowa. It is true that the five commissioners ask their non-partisan legislative research unit to draw the map with the aid of a computer, but it is only a first map. Through a complicated series of steps (which might remind one of the Illinois step system), the commission approves or amends the map, sends it back to the staff, etc. Clearly, the rank and file legislators appear to have no say. Nor do members of the executive and judicial branches.

The Redistricting Process Review Commission eventually devised an amendment that was a bold innovation. It bi-furcated the process between the Senate and House, which meant that Senate and House Districts would no longer be coterminous. The remainder of the procedure was also complicated. The Commission submitted its proposal to the Secretary of

State and four legislative leaders in January, 1999, but there was no interest in it. The proposal was, to all intents and purposes, dead on arrival. Predictably, the redistricting commission that met in 2001 to redistrict the legislature had to employ a tie-breaker again.

What should be the Illinois Plan? Redistricting is one of the few subjects that the citizens can address through a petition and referendum system in Art. XIV, Sec. 3, thereby by-passing the General Assembly. Of course, it would be difficult to obtain sufficient signatures to put a new system on the ballot. It might be equally difficult to persuade the General Assembly to devise an amendment and put it on the ballot.

If it is possible to put an amendment about redistricting on the ballot, however, I suggest a modified version of the Iowa Plan, one somewhat better suited to Illinois. I would remove the executive and judicial branches from the process entirely. I would even require the commission to pay for attorneys to defend the plan in court, with fees paid out of the appropriation for General Assembly expenses. I would have the four legislative leaders constitute the commission, as in Iowa, in the year following each decennial census. Rank and file legislators and the Governor would have no say. The four leaders would then ask the State Board of Elections to devise a stated number of alternative "maps" based on the census data available in the early part of the year following the census. The commissioners could then choose among the maps, amend the maps, or totally reject them, sending the project back to the Board.

If the commission could not agree upon a map by August, then the commissioners would select a fifth member. I have no objection to their selecting the "tie-breaker" by lottery among themselves. This seems to offend many Illinoisans, including some former delegates, but I see nothing wrong with it after other possibilities are exhausted. If two commissioners submit one name and two submit another and then "draw a name out of a hat", I see nothing wrong with it. At least the Illinois Supreme Court doesn't have to choose the names. Frankly, I can devise no better system for choosing the fifth member. I presume that the fifth commissioner would quickly resolve all disputes.

This proposal assumes two factors will continue: first, the growing and dominant role of computers, and second, the continuing role of the federal courts (and the federal government generally) in oversight of legislative redistricting. When Congress re-authorized the Voting Rights Act in 2005, it seemed clear that federal oversight will continue for a long time.

The third controversial issue in the Legislative article is one that perhaps only observers of the legislative process could ever enjoy discussing: the amendatory veto. I suggest abolishing it entirely. Not fixing it, but abolishing it.

A little history is in order. When The Sixth Illinois Constitutional Convention met in 1969-1970, Illinois Governors (and most Governors) already possessed two types of vetoes: the total veto (for all bills) and the item veto (vetoing an "item" of an appropriations bill).

The convention added a third veto, the second veto to the appropriations process, the "reduction" veto, allowing a Governor to reduce an item, but not veto it entirely. In my view, the reduction veto is a necessary companion to the item veto.

The fourth veto, the amendatory veto, exists in only a few states. It allows a Governor to "amend" both appropriations and non-appropriations bills and return them to the legislature for approval or disapproval. The exact process varies from state to state. I believe only four Governors enjoy all four vetoes---total, item, reduction, and amendatory.

Frankly, much of the good that an amendatory veto can do arose from the absence of computers. Without computers, it was very difficult to track the language of bills as they worked their way through the legislature and to track different bills on the same subject. With computers, tracking is not infallible, but it is much easier. (Full disclosure: computerized drafting came to the Illinois General Assembly about the time I came on staff in 1971, and I have drafted and tracked bills before computers and then with computers; it's easier with computers.) Before computers, Governors would receive literally hundreds of bills on their desks over the summer and have difficulty sorting everything out.

Against this background, especially the absence of computers, the convention decided to enable the Governor to propose "amendments" to bills that were passed, almost as if he were a supernumerary legislator proposing germane amendments. For the most part, that is the way the system has operated since 1971. I helped formulate the House's system of handling amendatory vetoes from 1971 to 1975 and am confident that the majority of gubernatorial amendatory vetoes were simply "clean-ups" and germane to the bill passed.

But there were other amendatory vetoes, admittedly a minority, but very troublesome. It soon became clear that Governor Dan Walker, who took office in 1973, saw the amendatory veto as a way to "propose legislation." In some cases, a gubernatorially-drafted amendment can make eye-catching headlines: "Guv proposes bill to cut taxes." A Governor can "lie low" during the legislative process and then "amendatorily veto" the bill passed, claiming he was "proposing legislation to the General Assembly." Governor Walker's successors have also seen these public relations possibilities.

Governor Blagojevich has continued this tradition and used the amendatory veto with a flourish in his sometimes acrimonious relationship with the legislature. In early 2008 he amendatorily vetoed a bill giving funds to the Chicago-area public transportation system by proposing an amendment that senior citizens, who already paid a reduced rate fare, should ride for free. The headline-getting value was obvious. In August, 2008, he proposed extending health care for children beyond that approved by the legislature in the spring of 2008.

Of course, the General Assembly can refuse to approve these gubernatorial amendments on various grounds, but doing so often requires taking political risks. In the 1970's the presiding officers of each chamber sometimes refused to allow a vote on a gubernatorial amendment on the grounds that it was "not germane" to the bill passed, the standard being that if a legislator had proposed that amendment during the legislative process, the chair would have invoked the "germaneness" rule in Art. IV, Sec. 8(d) of the Illinois Constitution and declared the amendment improper. The legislators could also refuse to approve free rides or extension of health care on the grounds that the state cannot afford it. But who wants to vote against a benefit to the very

young and very old? Governors, of whom Rod Blagojevich is only the latest example, know that. They use it as leverage to persuade legislators to approve gubernatorial amendments.

In my view, the amendatory veto is no longer useful as a legislative tool. If, after the summer vetoes are concluded, the Governor believes that some "conforming" amendments or even new bills are advisable, he can create a package of "revisory" bills or even new bills and ask a legislator to introduce them in the "veto session" held every autumn. If there is a consensus among the legislative leaders, the revisory bills will probably pass quickly. If there is a consensus among legislators regarding the new bills, such as giving seniors free rides or extending health care for children, the bills may also pass. When the autumn veto session opens, the General Assembly is more aware of how much the state can afford to spend and may or may not approve this use of funds.

In short, the advent of modern computers has rendered the amendatory veto power unnecessary. The inability of Governors to resist grabbing headlines with amendatory vetoes has rendered the amendatory veto power inadvisable. It is time for the amendatory veto to go.

Articles IV (The Legislature) and V (The Executive) Combined

The issue that involves both articles is term limits. One of the most popular issues that proponents for a constitutional convention advocate is that of establishing limits on the number of terms that legislators and the six statewide elected executive officers can have. Although a few have also proposed limits on judicial terms, that idea does not seem as popular, probably because most judges rise through the judicial ranks and then formally retire at approximately age seventy. Because most enter the judiciary only after age forty, there is a kind of built-in term limit by the nature of the judicial system.

Let's take limits on legislative terms. I start from the premise that if the citizens wish to keep voting someone into office, that is their right. If the voters in a given state want to put a U.S. Senator in his dotage back into office, I tend to feel that it is they who will suffer. Yet, it is also true that the body politic as a whole suffers when someone clearly "stays in office too long."

That is apparently not the motive for the term limits movement. The proponents seem to want to eliminate or at least discourage legislators from becoming too powerful. If that is the motive, I am shocked by the proposals requiring legislators to leave after only eight or ten years--in effect, a redistricting cycle. Don't the proponents understand that experience begets knowledge and that knowledge is the basis of real power?

When I worked for the Illinois House for four years, I saw the substantial benefits of having legislators who carried "the institutional history" in their heads. Of course, I also saw the downside: long-time legislators who did not want to change anything. Above all, I realized that their constituents had elected them, not me. As I provided the legislators with whatever knowledge and judgment I had, usually about the new Illinois Constitution, I realized that my knowledge gave me some power. When the legislators had my knowledge, they, too, acquired power.

If the legislators I knew had been forced out of office every ten years, the unelected staffers would have obtained and retained that knowledge and that power. Throughout Illinois state government there were, even then, certain long-time public servants who had acquired knowledge and therefore power. I tell proponents of term limits for legislators that they are really insisting that their laws be made by unelected, relatively unaccountable staff members.

If Illinois does impose term limits, I suggest that perhaps twenty years' service in each chamber should be the limit. I point out that when two decades have passed, most of the senior legislators have "positions of leadership", such as whips or even presiding officerships. Most advocates of term limits respond that twenty years is much too long a limit. My response is that the majority of the four legislative leaders who have served under the present constitution have been in office just under two decades at the time they became leaders. In effect, a twenty-year limit would mean that most presiding officers would serve one, two, or perhaps three terms as presiding officers before being forced to leave that chamber.

Another problem with term limits is that State Senators frequently, although not always, begin their legislative careers as State Representatives. If the number of years one could serve as a legislator were ten years total, then many, perhaps most, State Senators would serve only one two-or four-year term in that chamber before being forced out. The opportunity for the unelected Senate staff to run that chamber is obvious.

There is perhaps a better argument to be made for imposing limits upon the statewide elected executive officers. As individual decision-makers, their power is much greater than that of any individual legislator. All six of the executive officers have four-year terms (Governor; Lieutenant-Governor; Secretary of State; Attorney General; Comptroller; and Treasurer). All can be re-elected.

As a practical matter, almost all of those officers elected under the 1970 Illinois Constitution have served no more than two four-year terms and then either sought a different (and arguably "higher") office or retired from public life. The notable exception is, of course, James R. Thompson, who served as Governor from 1977 to 1991. I doubt anyone wishes to limit any executive officer to only one term. Again, imposing term limits, especially to only one or two terms, could give enormous power to the officer's professional, unelected staff. As is, almost every department responsible to the Governor has "old-timers" whose expertise is so invaluable that no incoming Governor would dare fire them.

In short, I doubt that imposing term limits on either legislative or executive officeholders would be beneficial. It would not prevent accumulations of power in a few people. Power would still be "accumulated" in one part of government, but it would be lodged in the unelected staff members.

Article V The Executive

The chief issue with the Executive article, at least in the debate over a con con, is over how many executive officers there should be. Admittedly, this is not a hotly-debated issue, but since it does arise occasionally, it seems appropriate to discuss the issue here.

If Illinois wishes to eliminate certain elected offices, which ones should be eliminated?

I suggest combining the Comptroller and the Treasurer and possibly eliminating the office of the Lieutenant-Governor. The 1969-1970 convention came within a few votes of eliminating the office of the Treasurer. As I recall, the incumbent Treasurer, Adlai E. Stevenson, III, supported the idea.

Since then, computers have taken over both the office of the Comptroller and the office of the Treasurer. The Comptroller is a pre-auditor, an important function, but he cannot decide whether it is "good policy" to spend money as the legislative process has determined. He also provides the government and citizens with fiscal information. The Treasurer has the significant discretionary power to decide where to invest the state's funds. He also issues warrants to pay the state's bills when the Comptroller authorizes the payment, but that is a ministerial duty. The Treasurer can also provide fiscal information.

To me, it is clear that these duties and powers are compatible and somewhat duplicative. What would be the harm in combining the offices (calling the new officer either the Comptroller or the Treasurer) and perhaps saving some funds now used in duplicative functions?

The Lieutenant-Governor is a different case. At one time, nineteen states had no Lieutenant-Governor, and that is probably so today. Most reasons for having one have vanished. Under the 1870 Constitution, the "light gov" presided over the Illinois State Senate and assumed the powers of the Governor when the Governor left the boundaries of Illinois. Under the present constitution, neither is the case. If the Governor must leave office (death, disability, resignation, removal from office after impeachment), it would be easy to call a special election throughout the state, filling the vacancy within a few weeks. As is true in the Vatican when a Pope dies, the Secretary of State could assume the necessary powers temporarily until the new Governor took office.

The current powers of the Lieutenant-Governor are simply those assigned to him by the Governor. Even though the present constitution requires the Governor to run jointly with the Lieutenant-Governor, a number of "paired" Governors and Lieutenant-Governors have not worked together. One went onto the floor of the legislature to work against a measure supported by his Governor. One resigned office mid-term to return to private life---as a disc jockey, as I recall---and another threatened to resign, saying he could not find anything to do. Could there be any better indication of the Lieutenant-Governors' disdain for their office?

Part of the difficulty stems from the refusal of the legislature to pass a bill providing for the joint-nomination of the gubernatorial and lieutenant-gubernatorial candidates of each party. If such were the case, the nominees would have to work together or at least put on a brave front of working together, before they became their party's nominees. Instead, many candidates for Governor have refused to name which one of the candidates for Lieutenant-Governor they would prefer. They sometimes say, "I am sure I could work with any one of these candidates." Could there be any better indication of the gubernatorial candidates' disdain for the office of Lieutenant-Governor?

Finally, the present Lieutenant-Governor claimed in early 2008 that he had not spoken with the Governor in over a year. If the system is that broke, it can't be fixed. What would be the harm in eliminating the position?

Article VII Local Government

In the debate over whether to hold a constitutional convention, many disaffected citizens claim they don't understand the powers and duties of their local governments. Of course, they think their taxes are too high and that local governments have too much power to tax.

Although much of the anger is directed towards the real property taxation system, several Illinoisans have questioned the value of home rule. As one who has watched the development of municipal and county home rule since the constitutional convention, I find this dismaying. Since 1971, approximately one hundred municipalities (cities, towns, and villages) have obtained home rule status either by attaining the population threshold of 25,000 inhabitants or by local referendum.

County home rule has a somewhat different history. The threshold for that status is the county-wide election of a chief executive officer. Because Cook County elected a chief executive officer on a county-wide basis in 1970, the President of the Cook County Board, it automatically received home rule status. Since then, no other county has opted for home rule status, and many have rejected it at a referendum.

Art. VII, Sec. 6 of the 1970 Illinois Constitution probably grants the most extensive home rule powers of any state constitution. Chief among these is an enhanced power to tax. Unfortunately, the only home rule power that most citizens seem to see is the power to impose different kinds of taxes---increased taxes on cigarettes, liquor, parking, gasoline, etc. They do not see these as alternatives to an increase in the tax on real property, but simply as "more taxation."

Those who object to home rule have said they would like to see a constitutional amendment restricting home rule powers. The most-frequently-mentioned home rule restriction is the abolition of county home rule. Although county home rule has allowed Cook County to assume some of the burdens formerly borne by smaller governments, the public sees only an increase in county home rule taxes.

As part of this tax revolt, several home rule units have "opted out" of home rule status by referendum. The most populous unit to opt out is Rockford, the second-largest city in the state.

The issue of home rule and the relationship of these units of local government to the state government is complicated. I have no solution to the problems people mention. It is probably a problem of perception, of public relations. The home rule units have not convinced their residents that increased taxes imposed under home rule powers have prevented increases in property taxes.

There are also some objections to the powers of various local governments. I think this arises from the proliferation of local governments in Illinois, especially special districts. The 1870 Illinois Constitution's limits on incurring debt forced many municipalities and counties to allow the creation of districts that could levy property taxes for one special use. Illinois now has over 6,000 units of local government, far more than any other state. Probably nobody knows for sure how many there are, where they are, and what they do.

Over a third of these local governments are special districts. Many exist totally within or coterminous with a municipality; others exist totally within or coterminous with a county. As best anyone can determine, their governing boards meet once a year to levy a property tax and direct the staff (often a skeletal staff) to provide one single service for the coming year.

Surely the time has come to reduce the number of special districts in order to promote transparency and efficiency. Although the 1970 Illinois Constitution provided ways to eliminate special districts, it is almost impossible, from a political standpoint, to force a government to dissolve. Perhaps it would be possible if Illinois were to adopt a "delayed doomsday" approach, such as I have already suggested regarding education financing.

Here's how it could work: if a constitutional provision prohibited certain special districts from levying property taxes after a date certain, say five years hence, the funding for the districts would evaporate and they would be forced to dissolve. I suggest that special districts smaller than or coterminous with a municipality should not be allowed to levy a property tax after a certain date and that the services provided by those special districts would then be taken over by the municipality. Likewise, special districts larger than a municipality, but smaller than or coterminous with a county would not be allowed to levy a property tax after a certain date and the services provided by those special districts would then be taken over by the county.

Doubtless, nothing would happen for the first two or three years. But as the "drop dead date" approached, the governing bodies and staffs of the special districts, the municipalities, and the counties would begin to make the necessary arrangements for the dissolutions and transfers of functions. Without funding, the smallest special districts would cease to exist. The larger special districts, such as The Regional Transportation Authority, which covers the six counties of the Chicago Metropolitan area, would continue unaffected.

Article IX Revenue

It is not surprising that many of the controversies surrounding the Illinois Constitution relate to revenue matters. Nobody likes to pay taxes although everybody likes to receive governmental services---paid for by "somebody else", of course.

In February, 2008, President Bush submitted a \$3.1 trillion budget to Congress, which included a projected deficit of \$407 billion for 2009. For almost fifty years, national deficits have been the norm. As several commentators noted, most Americans don't seem to care about a deficit, at least as long they continue to receive their entitlements.

The 1969-1970 Convention charged the Committee on Revenue and Finance with drafting an article on the budget and appropriations process, Article VIII- Finance, and with drafting an article on revenue, including taxation and debt, Article IX- Revenue. Because I was the legal researcher for that committee, I was able to learn much about public policy on fiscal and revenue matters. Four years working with these matters in the political sphere of the General Assembly taught me even more about them.

First, I learned a Southern Illinois phrase: "control of the course follows control of the purse." If a government collects revenue and then distributes it to other governments or private parties, it will demand accountability for those funds and probably demand a say in how the funds are spent. As Senator Barry Goldwater warned us four decades ago, you can't take government money without taking government control. Governments use money to exert control.

Second, I learned another saying, this one attributed to Senator Everett Dirksen: "Don't tax you, don't tax me, tax the fellow behind the tree." In other words, most taxpayers think that somebody they don't know should pay more taxes than they themselves pay.

Third, and a variation upon the second, was another phrase: "'Reform' means 'I pay less taxes, you pay some taxes, and people we don't know pay most of the taxes'." This is why most government officials prefer to tax someone other than their constituents. The hotel and motel taxes are a perfect example of taxes "paid by someone we don't know."

Fourth, I learned that restrictions on revenue in a constitution probably will not work. It is popular to place restrictions on raising revenue in a constitution, but in a generation or two the citizens will almost certainly want a different tax structure. For example, the 1870 Constitution provided for very limited kinds of taxes, largely because both the state and the local governments relied upon a broad-based tax on real and personal property. During the Great Depression the Illinois courts reversed prior decisions on tax limitations simply in order to meet the needs of the day.

The delegates to the 1969-1970 Convention were aware of an even more recent example. The jurisprudence on the 1870 Illinois Constitution held that an income tax was invalid. Yet, when a state income tax was passed in 1969, the Illinois Supreme Court reversed itself and held the tax valid in Thorpe v. Mahin, 43 Ill. 2d 36, 250 N.E.2d 633 (1969). That decision came down only months before the convention began, and the Illinois Department of Revenue was just beginning to collect the tax in 1970.

Fifth, I learned that the balance among the three major forms of state and local taxation is delicate. If one changes the state income tax, the state and local sales tax, or the local property tax, one is changing the situation regarding the other two types of taxes. Although Illinois taxpayers like to think they are heavily-taxed, we have approximately the fifth-highest income per capita in the nation, but only the fourteenth-highest combined state and local tax burden.

Sixth and last, I learned that governments invariably respond to demands for services by raising the necessary revenue by any means possible. If the political pressure to spend is great

enough, governments will somehow find the means to meet the expenditures. Of course, one popular way to do that is by incurring debt, so that future government officials and future taxpayers will be the ones to bear the burden of repayment.

In the run-up to the referendum in November, 2008, three major revenue issues have surfaced:

- 1) removing restrictions on or, conversely, placing restrictions upon the state income tax;
- 2) removing the replacement tax on corporations that was imposed to compensate local governments for the abolition of the ad valorem personal property tax; and
- 3) requiring a super-majority, probably three-fifths of those elected to both chambers, to raise any tax rate.

The Illinois income tax is the newest of the major Illinois taxes. The form of the income tax passed in 1969 mirrored that of the 1966 amendment to the 1870 Constitution that the various interest groups had agreed upon, but that the voters rejected. The delegates meeting later in 1969 had no desire to "rock the boat", especially when that boat was so new. One feature of the new tax was that it was to be at a flat rate, not a graduated rate. Another was that the ratio between the tax on corporations and the tax on individuals was set at a maximum of 8 to 5.

The convention essentially fixed this structure into the Revenue article. Knowing that the tax was brand-new and still not accepted by, let alone popular among, the people, the convention decided to place these provisions into the constitution. From the viewpoint of constitutional purity, one could argue that both the prohibition on a graduated rate and the 8 to 5 ratio had no place in a constitution. One could also argue that these are restrictions on government's power to tax.

Today some liberal or progressive groups advocate holding a convention to eliminate the prohibition on a graduated rate. They favor a "progressive income tax structure." Clearly, if there were a graduated rate, the 8 to 5 ratio provision would have to fall, too. As a matter of pure constitutional theory, this position is probably correct.

However, it is possible to achieve a striking degree of progressivity through the current system. The General Assembly can raise and lower the exemptions, deductions, and tax credits virtually free of constitutional restraints. The Illinois income tax does not follow the structure of the U.S. income tax. Illinois can, even within the current limits, obtain almost the same result as under a straightforwardly graduated income tax.

There are those who argue for a completely different approach to the income tax: they want to set a limit upon it. During the 1969-1970 convention, the delegates defeated all proposals to set a fixed rate on the state income tax, notably a 5% limit. During the campaign for the new constitution, many delegates reported that taxpayers were angry that there was no cap on the new income tax. This was especially true in the suburbs, where the Save Our Suburbs group decried the lack of caps on taxation in the constitution. Just before the ratification referendum,

one delegate said that if the constitution went down in the suburbs, "it will be because there is no 5% tax cap on the income tax." Yet, the delegates were aware that placing a cap on the income tax would prevent future legislatures from raising funds for schools and other purposes.

The second major revenue issue concerns the unique "replacement tax provision". If there were a constitutional convention, corporations would almost certainly advocate the repeal of Art. IX, Sec. 5(c). This provision was one of the great compromises of the convention, one that may have saved the constitution from defeat at the ratification referendum. For various reasons too lengthy to repeat here, the convention wanted to abolish the ad valorem tax on personal property. Forever and ever. It was clearly the most unpopular tax in Illinois and also the one that was most difficult to administer equitably and collect fairly.

However, the tax provided a substantial amount of revenue to local governments and school districts, all of which wanted those revenues replaced. In 1970 the personal property tax generated approximately 10% of the property tax collected in Cook County. School districts, faced with the loss of revenue from taxes on factory equipment, public utilities, and bank assets in their area, were desperate to find a way to "replace the revenues lost." Today most observers do not appreciate the dilemma facing the convention. They assume that the income tax has replaced those revenues. In 1970 there was no guarantee that the income tax would replace all those revenues expected to be lost forever.

The solution to this dilemma was the "replacement tax" in Subsection 5(c). It was a patently political solution to a fiscal dilemma. The corporations were to pay a surtax upon their income tax, above and beyond the 8 to 5 ratio, to make up the revenues lost to local governments and school districts after the ad valorem personal property tax would cease on or before January 1, 1979. Businesses were not happy with paying this surtax, but they accepted it as part of the compromise in which they no longer had to pay the hated ad valorem personal property tax.

If there is another constitutional convention, the situation would be different. Certainly businesses would counter any effort to revise the income tax along the lines discussed above by demanding a repeal of Art. IX, Sec. 5 (c). Several business leaders have so indicated, at least privately.

The third major issue regarding revenue that has arisen is totally different from the first two, both of which concern existing types of taxation. This is the suggestion that the constitution require a super-majority, probably three-fifths of each chamber, to raise any tax rate. In Art. IX, Sec. 9 such a super-majority is required for the state to incur debt. Most of those advocating a super-majority to raise any tax rate would like to mirror that provision.

There are several difficulties with this proposal. Any requirement of an extra-ordinary majority---anything beyond the usual requirement of a majority of those elected to each house---means that a substantial minority can thwart the will of the majority.

For example, when the super-majority is three-fifths, 41% of only one chamber can block the will of everyone else in the legislature. Keep in mind the population distribution of Illinois, and therefore the legislative apportionment: approximately 25-26% live in Chicago; 38-40% live

in suburban Cook County and the five suburban "collar counties"; and the remainder, perhaps 33%, live in Downstate, the remaining 96 counties.

What happens when the legislature is considering a bill to incur debt? Do the math. The "suburban bloc" can probably block a bill to incur debt, but it cannot pass such a bill unless it makes an alliance with either Chicago or Downstate. In my experience, all bills to incur state debt are "Christmas tree bills", i.e., bills granting a benefit to almost every interest group or every section of Illinois.

It would probably be the same situation if a super-majority were required to raise a tax rate. Take the income tax. If the proposal were to raise the income tax rate by 1%, with the understanding that the income raised would go to, say, school funding, it is certain that the bloc with 41% of the votes in just one chamber would want to revise the school funding formula to insure a "fair deal" for their school districts---or perhaps some other benefit for their areas. Even if a clear majority of the legislature wanted to raise the rate, this substantial bloc could prevent passage.

Moreover, it is not clear what "raising the tax rate" means. Does it simply mean raising the rate itself, or does it include extending the base of taxation? For example, the Illinois income tax currently does not tax "pensions"; would an attempt to extend the income tax to pensions constitute raising the tax rate? The Illinois sales tax (which is really a "tax upon occupations", not a true sales tax) does not extend to many kinds of services; would an attempt to extend the sales tax to those services constitute raising the tax rate?

Another problem arises from the residual effects of being unable to raise a tax rate: the manipulation of income tax deductions, exemptions, and credits. Instead of trying to raise the tax rate, the legislature may well decrease the deductions, exemptions, and credits. The effect would be the same: increased revenue for the state, less money in the pockets of the taxpayers.

During the 1980's an attempt to amend the constitution to impose a three-fifths super-majority to raise tax rates failed in the General Assembly. The proposal was, however, very popular among the voters/taxpayers. This constitutional amendment features in some debates on whether to hold a convention and doubtless would surface during a convention.

Article XIV Constitutional Revision (and a reprise of Article IV The Legislature)

One feature of Article XIV on constitutional revision has surfaced repeatedly during the debate on the present Illinois constitution: extending the initiative and referendum procedure for constitutional amendments, currently limited to "structural and procedural subjects contained in Article IV", to the entire constitution. In short, there could be a legislative by-pass for all constitutional amendments. Some who advocate this change also advocate allowing the legislative by-pass for legislation. In effect, the public could amend the constitution and pass laws without reference to the General Assembly. The Lieutenant-Governor, Pat Quinn, has long been a proponent of the legislative by-pass for both constitutional amendments and legislation.

The initiative and referendum procedure, like recall of elected officers, is a brainchild of the Progressive Movement of the early part of the twentieth century. As mentioned in the discussion of recall above, it was an attempt to circumvent legislatures that were districted to favor rural interests and almost never re-districted when populations shifted to urban areas. Today the legislative by-pass procedures exist primarily to obtain signatures on petitions, petitions that are often not filed and therefore not voted upon.

Anyone who wants to see the procedure in action should visit California in the months preceding an election. There are petitions for constitutional amendments and legislation on almost every street corner. Of course, sometimes the petitions make it to the ballot. Voters in California say that they receive a booklet with the text of the "propositions" shortly before the election and that there are often so many propositions to vote on that virtually nobody votes on all of the propositions. There are rules on actions the California legislature can take regarding the propositions if they pass, *i.e.*, whether it can amend the statutes enacted by the voters. The interplay between a popularly-enacted provision and subsequent legislatures is complicated.

The proponents of the initiative and referendum system in Illinois claim it is necessary to enable "the voice of the people" to prevail when the legislature will not act. Certainly, I share their frustration at seeing the General Assembly refuse to propose constitutional amendments or pass statutes that I might favor, or that a large percentage of the public favors. However, in states where the initiative and referendum system is used frequently, snafus occur when inconsistent propositions are passed at the same time. When a legislature passes inconsistent bills, the gubernatorial veto process is normally available to rectify the situation. That is not true if inconsistent propositions pass.

Perhaps the best recent example of this "law of unintended consequences" is the result of Colorado's Proposition 41, a constitutional amendment passed in 2006. The proposition imposed such stringent ethical standards upon public employees that, as the Attorney General advised, Nobel Prize winners on the University of Colorado faculty could not accept their prize money. Most Coloradans would now say that that was not their intent in voting for the proposition, but it is almost impossible, both legally and politically, for the Colorado legislature to undo the harm by changing the meaning of what is, after all, a provision in the state's basic charter.

Clearly, I am skeptical of the motives of those who advocate the initiative and referendum system for either constitutional amendments or legislation. They, like the proponents of recall of elected officials, seem to want petition signatures more than they want amendments or legislation. Before Illinois amends its constitution to provide for legislative by-pass procedures, Illinoisans should consider this very carefully.

My suggestions for changes to Article XIV are quite different. For example, I would like to reduce the number of votes needed for the electorate's adoption of a constitutional amendment from three-fifths of those voting on the amendment to a simple majority of those voting on the amendment. (Art. XIV, Sec. 2(b).) This would make it easier to amend the constitution on a piecemeal basis, perhaps obviating the need for a constitutional convention unless the public wishes a wholesale revision of the state's basic charter.

What should be done? Concluding Observations

Of course, there are minor revisions to the Illinois Constitution that I would like to see. I have not discussed them because I believe that the vast majority of Illinoisans are not interested in these proposals (maybe nobody except me, in fact) and that they probably would not even attract the attention of the most members of a convention.

At the beginning of this century, I suggested that there were three great challenges facing state governments:

- (1) nationalization---the trend towards uniformity and "federalization" of government;
- (2) internationalization---the growing role of states relating to foreign affairs; and
- (3) technology---the revolution brought about by the increasing use of sophisticated computers in state government.

None of these challenges has attracted the attention of specialists in state constitutions. Certainly, they have not been part of the current Illinois debate.

With tongue only half in cheek, I have suggested that the best way to improve the Illinois constitution would be to turn the entire project over to me. I could present to my fellow-Illinoisans their new constitution as a fait accompli. It won't happen, of course, and I am too firm a believer in participatory democracy to want it to happen. Change handed down from on high rarely, if ever, succeeds in the long run.

Moreover, I know that no one person can truly represent the people of Illinois. Often we seem to be a "state divided against itself". We are also parochial. Downstaters often don't regard the city that "stands beside her inland sea" as truly part of Illinois. In the 1980's the Illinois tourism bureau publicized a slogan, "Just outside Chicago there's a place called Illinois." I am not sure whether either Chicago-area residents or Downstaters appreciated the irony in that phrase.

We Chicagoans can be very snobbish about Illinoisans outside our metropolitan area. When I was growing up, we thought of "Downstate" as almost a foreign country. Ancient Roman mapmakers used a phrase to describe an area they did not know much about: hic sunt leones. It meant, "lions live here, not humans, don't go there." Chicagoans often felt and sometimes still feel that way about Downstate. Only when those drafting a constitution or legislation regard themselves as Illinoisans first and as representatives of districts second will their endeavor succeed.

Like others, I am frustrated with the way Illinois state government and some local governments function today. Even after six months serving on the staff of a constitutional convention and four years serving on the staff of the Illinois House of Representatives, I am mystified by the way Illinois state government sometimes operates now. In the past, state officers have disliked each other personally and have certainly disagreed with each other

politically, but they have ultimately been able to coalesce for the common good. It saddens me beyond words to see that this does not appear to be happening today.

The voters know it. They are justifiably angry. Some would like to lash out at the current officials in state government by trying to change their constitution. "Throw the bums out" translates into "recall power". As I have indicated in this paper, I do not believe this would be beneficial. Yet, I, too, am at a loss to suggest a way to stop the gridlock, the lack of transparency, and the absence of sense of responsibility to the citizens of Illinois.

When I hear a leader in the General Assembly say, "I need a pay raise", I wonder if he really knows how many Illinoisans are unemployed or that the state is on the brink of insolvency. When I hear people express disgust over the real possibility that the Governor may be indicted by a grand jury for corruption or become the first Governor to be impeached by the House and tried by the Senate, I sympathize with their anger. In 1980 many people voted for the Cutback Amendment because they were dismayed over the legislators' awarding themselves an end-of-term pay raise.

We could see that reaction again in November, 2008. Emotional reactions to statements and actions by elected officials with a tin ear could trigger a response I consider inappropriate: calling a convention to impose a permanent solution to what may be a temporary problem.

Yet I, too, find it difficult to get the attention of those in power. Therefore, I understand the anger of those who advocate "the constitutional convention solution", which I consider a "nuclear option" instead.

Thirty-eight years in this endeavor have taught me that we must keep on trying, through constitutional revision, electing more responsible public officials, and other methods. One of the most dedicated laborers in this vineyard was Robert W. Bergstrom, who has never received the credit he deserved. A few years ago, when he and I were commiserating over a constitutional dilemma to which we could find no solution, he shared with me a comment attributed to William of Orange. I close by sharing it with you in turn.

In the original French

Il n'est pas necessaire d'esperer pour entreprendre
ni de reussir pour perseverer.

In English,

It is not necessary to hope in order to try,
nor to succeed in order to keep on trying.

APPENDIX I. Article XIV, Section 1 of the Illinois Constitution

Section 1. Constitutional Convention

- (a) Whenever three-fifths of the members elected to each house of the General Assembly so direct, the question of whether a Constitutional Convention should be called shall be submitted to the electors at the general election next occurring at least six months after such legislative direction.
- (b) If the question of whether a convention should be called is not submitted during any twenty-year period, the Secretary of State shall submit such question at the general election in the twentieth year following the last submission.
- (c) The vote on whether to call a Convention shall be on a separate ballot. A Convention shall be called if approved by three-fifths of those voting on the question or a majority of those voting in the election.
- (d) The General Assembly, at the session following approval by the electors, by law shall provide for the Convention and for the election of two delegates from each Legislative District; designate the time and place of the Convention's first meeting, which shall be within three months after the election of delegates; fix and provide for the pay of delegates and officers; and provide for expenses necessarily incurred by the Convention.
- (e) To be eligible to be a delegate a person must meet the same eligibility requirements as a member of the General Assembly. Vacancies shall be filled as provided by law.
- (f) The convention shall prepare such revision of or amendments to the Constitution as it deems necessary. Any proposed revision or amendments approved by a majority of the delegates elected shall be submitted to the electors in such manner as the Convention determines, at an election designated or called by the Convention occurring not less than two nor more than six months after the Convention's adjournment. Any revision or amendments proposed by the Convention shall be published with explanations, as the Convention provides, at least one month preceding the election.
- (g) The vote on the proposed revision or amendments shall be on a separate ballot. Any proposed revision or amendments shall become effective, as the Convention provides, if approved by a majority of those voting on the question.

APPENDIX II SUMMARY OF CONSTITUTIONAL AMENDMENTS SUBMITTED TO THE ELECTORATE

Between 1971, the effective date of the 1970 Constitution, and the present, the voters have been asked to approve or disapprove seventeen amendments. The General Assembly submitted sixteen of them; of these, nine were approved. The Cutback Amendment of 1980, which was submitted through the initiative and referendum procedure of Article XIV, Section 3,

was also approved by the voters. Thus, the voters have approved ten of the seventeen amendments submitted to them. Here is a summary of those approved:

1980 The Cutback Amendment. Reduced the size of the House of Representatives from 177 to 118 and substituted single member districts for three-member districts with cumulative voting.

1980 Amendment to Article IX, Section 8 on sale of property for delinquent taxes.

1982 Amendment to Article I, Section 9 on bail.

1986 Amendment to Article I, Section 9 on bail and habeas corpus.

1988 Amendment to Article III, Section 1 to conform the voting eligibility requirements to federal standards.

1990 Amendment to Article IX, Section 8 on sale of property for delinquent taxes.

1992 Amendment adding Section 8.1 to Article I on rights of victims of crimes.

1994 Amendment to Article I, Section 8 on rights after indictment.

1994 Amendment to Article IV, Section 10 moving the date in the year after which bills passed and determined to be made effective before the next January 1st would require a three-fifths majority in each house from June 30th to May 31st.

1998 Amendment to Article VI, Section 15 regarding judicial discipline.

The voters disapproved seven amendments proposed by the General Assembly. They also rejected the automatically-submitted question of a call for a constitutional convention in 1988. Here is a summary of the rejected amendments proposed by the legislature:

1974 Amendment to Article IV, Section 9 revising the gubernatorial amendatory veto.

1978 Amendment to Article IX, Section 5 on the abolition of the ad valorem personal property tax.

1978, 1984, and 1986 Amendment to Article IX, Section 6 to exempt veterans' organizations' posts from real property taxes.

1988 Amendment to Article IX, Section 8 on sales of property for delinquent taxes.

1992 Amendment to Article X, Section 1 to require a minimum contribution of state aid per child.