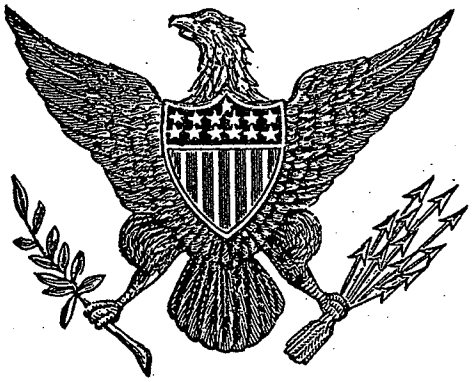

CONstitutional CONcepts

Occasional Paper

Number 4

From time-to-time the Union League Club has presented occasional papers on the subject of Con Con. The first of these, published in 1967, was entitled "CON CON — Why a Constitutional Convention for Illinois" by Robert W. Bergstrom. This became the major background tool for the civic groups supporting the Constitutional Convention proposal in the 1968 election. The second of these occasional papers presented the views of Henry L. Pitts, President of the Illinois Bar Association, and Frank Greenberg, President of the Chicago Bar Association, as to the need of constitutional change in the matter of selection, retention and discipline of judges. A third occasional paper by Alan R. Kidston was a summary of the "U.S. Supreme Court Decisions Regarding State Election Laws" and the implications of such decisions to the framing of a new Constitution. This paper by Robert W. Bergstrom is a similarly significant document, and deserves the attention of the Constitutional Delegates and the citizens of Illinois.

In addition to these four occasional papers, the Club is issuing summaries of the scholars' papers commissioned by Governor Ogilvie.

THE NEW ILLINOIS CONSTITUTION— What Should It Contain?

by
Robert W. Bergstrom

In late 1970 the Illinois Constitutional Convention will probably call a special election, at which it will submit to the electorate proposals for amendment or replacement of the Illinois Constitution of 1870. That century-old document is crumbling to bits all at once, like the Deacon's wonderful one-hoss shay, which fell into a fine powder on its hundredth anniversary.

Choices as to fundamental laws, which will shape the future of each one of us, should be shared by all informed citizens. Such policy decisions should not be the monopoly of specialists. Nonetheless, the citizen who wishes to participate needs some of the knowledge of the experts.

The discussion which follows attempts to do two things. It sets forth my suggestions as to what ought to be in the Illinois Constitution of 1970. It also distills and summarizes the applicable principles and background information, so that the thinking citizen can be equipped to measure his own evaluations against those of political leaders, lawyers, and editorialists.

The detailed structure of the Constitution is better understood if we first review three fundamentals. These are: First, the importance of streamlining state government and making it effective; second, the difference in nature between a federal constitution and a state constitution; and third, the proper contents of a state constitution.

The Importance of Effective State Government

Why should we streamline state government and make it more efficient and effective? Why not leave it hobbled about with restrictions? The answer is that such a course will give us not more liberty but less liberty.

Unless we modernize state government it will rapidly become obsolete, and there will be no local government between us and centralized government in Washington. In previous years state governments have been so unwieldy, so unrepresentative, and so inefficient that people concerned with getting things done just leap-frogged right over it. They did this by a new governmental device—the grant-in-aid, which was developed in the thirties in the Social Securities Laws. Under the grant-in-aid technique, the federal government levies a tax and then rebates ninety percent of the tax back to the municipalities if they do exactly as the federal government says. Therefore, if you're not in favor of modernizing state govern-

ment there's no use burying your head in the sand as to what choice you're adopting. You are proposing that everything be dominated from Washington, with the cities becoming mere departments of the federal government as they are in France, and with the state government bypassed and withering on the vine.

Anyone who views with concern the increasing centralization of powers in the national government in Washington and the expanding bureaucracy which dictates from there matters of local concern will wish to improve state government so that it is an efficient and desirable alternative to the national government. The Model State Constitution commentary says:

> "The limitations on state and local government actions were devised for the most part during an age when less was demanded of government than is the case today. In a period of expanding governmental activity, special limitations on state and local government may have a very different effect on the balance of power in the Federal system than they had when they were originally adopted. Even near the beginning of the century Professor Ford saw in these limitations one of the reasons for expanding Federal power. Retention of these limitations in the latter half of the century is even more clearly conductive to this end, a fact which is entitled to serious consideration by revisers of state constitutions."

The Illinois Commission on the Organization of the General Assembly has expressed its concern thus:

> "Responsible citizens in both major parties fear that if the neglect of state government continues, the states may cease to be important political units in the American system."

This means that a vote against constitutional reform is a vote for increasing delegation to a Washington bureaucracy of power over our education, our local government, our roads and highways, our scientific research, our tax revenue, and all other matters which those concerned with liberty insist should be controlled by the representative government closest to the citizens affected by such regulation. The Committee for Economic Development has said:

> "The time has come for a basic choice concerning the future role of American state government. State governments may be reconstituted to function effectively within the framework of a changing pattern of federalism. Or they may be permitted to follow the course many of them have taken in recent years—toward continuing decline in relative influence over major policy issues, and toward gradual transformation into administrative units commanded and directed from the seat of national government in Washington, D.C."

Or, as Senator Dirksen put it, "The only people interested in state boundaries will be Rand-McNally."

Our initial assumption, therefore, is that state government should be made effective and representative. The next question—what is the role of the constitution in this process—is answered in part by distinguishing the state and federal constitutions.

Federal Versus State Government

Our federal constitution is a delegation of power to the federal government, which started as a treaty among sovereign states, (to which territories were subsequently admitted), whereby any authority not expressly delegated to the federal government was reserved to the states. On the other hand, state constitutions are limitations upon powers that the sovereign state would otherwise have. Hence anything contained in a state constitution limits the state's powers, instead of being a grant of power as in the federal constitution.

The local governments, such as counties and municipalities, are not sovereign entities similar to states. They are mere instrumentalities of the state, deriving their powers from grants by the state. Hence the state government has all powers not expressly denied to it by the state constitution, and subsidiary governments are mere instrumentalities to be changed by the legislature of the state at will unless it is otherwise limited by the constitution.

The Proper Contents of a State Constitution

Therefore to keep state government flexible enough to adapt to new situations, the constitution should be as short as possible and should be limited to dealing with fundamental law instead of transitory legislative considerations. As Justice Cardozo put it: "A constitution states or ought to state not rules for the passing hour but principles for an expanding future."

The National Municipal League has said: "The ideal state constitution expresses fundamental law, law which is basic in providing the foundaton for a political system and the powers of government. The term 'fundamental' . . . is usually contrasted with 'statutory' law, the product of the legislature as that body pursues the daily task of meeting the common problems of the community . . . Fundamental law possesses greater permanence, is less detailed, requires fewer changes to keep it up-to-date than does statutory law. Statutory law deals with the emerging social, economic and political problems faced by the state within the broader framework of the governmental machinery and the 'rules of the political game' established by the constitution."

The Committee for Economic Development has affirmed the same principles: "Ideally, a constitution is a statement of basic principles, outlining powers, relationships, and responsibilities. It should not be encumbered with a vast bulk of ordinary statute law as so many state constitutions now are. Appropriate inclusions are a bill of rights, voting qualifications, provisions concerning political parties and elections, relationships between state and local governments, broad structural patterns for each of the three branches of government, the scope of gubernatorial authority in legislation and administration, and the means of amendment. Most, if not all, other matters are properly extraneous to this document."

Hence the constitutional convention should not become a super-legislature, righting all wrongs, a task which is always new. The convention should concentrate on creating an effective government which from time to time can turn its attention in the most efficient manner to righting those wrongs.

With these three principles—that the states must be improved or they will die; that a state constitution operates as a restriction upon state government, not as an addition to its powers; and that a state constitution should be a terse document creating an effective government and not legislation concerning the problems of the moment—we are ready to look at the constitution in perspective.

THE EXECUTIVE
(Article V)

Everyone who has studied state government agrees that a good executive department should have a chain of command which channels both authority and responsibility through the Governor. This makes him the master in his own house, so that he has the power to take corrective action, and so that the voters know whom to blame when the corrective action is not taken. As President Truman said, "The buck stops here."

However, if the Governor is really to be boss, he must have the power to hire and fire his department heads and to reorganize his departments, as the President of the United States and the president of any corporation can do. Instead, the 1870 Constitution provides for the election of numerous department heads, and this undermines the Governor's ability to give us an efficient and effective Executive Department.

Article V of the 1870 Constitution acknowledged the principle that the Governor should be top man, in authority and in responsibility. Section 6 provided:

> "The Supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed."

The 1870 Convention also adopted Section 21, requiring the officers of the Executive Department to file reports with the Governor ten days before each regular session of the General Assembly and giving the Governor power to require sworn reports at any time. The Convention's Chairman of the Committee on the Executive said about the change:

> "This is a new feature and is designed to give the executive such control over all state officers . . . that he can at least know what they are about, and have some check upon their administration. Heretofore the Governor of this State has been clothed with hardly any powers. He has been treated like a child under tutelage. He might complain, but he possessed no power to remedy any evil in the administration of public affairs."

But although the 1870 Convention said this and gave the Governor the form of authority, it took away the substance. The only executive officers which were required by the 1818 Constitution to be popularly elected were the Governor and Lieutenant-Governor; the 1848 Constitution added such election for the Secretary of State, Auditor of Public Accounts and State Treasurer; and the 1870 Constitution required the Attorney General and the Superintendent of Public Instruction to be elected by the people.

The Supreme Court of Illinois further weakened the Executive Department by holding that even if the Constitution specified no duties for these offices, each office had a constitutional right to the powers associated with such an office at common law; and neither the Governor nor the legislature could reduce their powers. The court also held that the Attorney General is the legal adviser to the state government; that he is the lawyer for all state agencies; and that he has as inherent powers the exclusive prerogative of conducting the law business of the State. This would give him a veto over any law enforcement by the Governor. When the Governor wanted to carry out his constitutional duty to "take care that the laws be faithfully executed," the Attorney General ruled that the enforcement of police laws, even though they were state laws, belonged not to the Governor but to the Attorney General and the State's Attorneys elected for the purpose.

The elected Secretary of State handles administrative duties regarding automobiles and corporations and employs the largest number of patronage employees—3,500 nonmerit employees. The Auditor of Public Accounts is an administrative officer without responsibility to the Governor, so that the 1956 Auditor was able to embezzle more than a million dollars. The numerous elected executives have hampered each other without being of value as a check on each other. It was an investigation by the press, not by the Attorney General, which unearthed the Auditor's defalcations. The system has not been a training ground for Governors; only four out of thirty-five governors had previously held a state elective office other than Lieutenant-Governor.

The Governor and Lieutenant-Governor should be elected jointly on a single ticket to assure continuity of administration. The Governor should have the power to appoint and to remove all department heads. Other appointments should be in whatever manner is provided by the legislature, to allow room for a merit system. Any appointments which require Senatorial approval, such as to quasi-judicial commissions, should follow the Michigan constitution, to the effect that Senatorial consent is automatic unless the Senate disapproves by a majority vote. This does away with the patronage in "senatorial courtesy" appointments. The "check and balance" upon this strong executive department should be in the form of a legislative officer, entitled Auditor General or Controller; and the constitution should be amended to give the legislature power to select such an officer and to continue him in office. This would complete the present stopgap reform, whereby the Governor, who is the subject of audit, appoints the Auditor General with the consent of the Senate.

The Governor should be elected in a nonpresidential year, as in 30 other states, and preferably in an odd-numbered year so as not to coincide with congressional elections. This minimizes competition between state and national candidates for newspaper space, and it minimizes coat-tail riding whereby good men are knocked out because of the top of the ticket. He should take office in December, so that he can have some say in his first budget. The Governor should be allowed to leave the state for short trips without giving up his power; and the legislature should be permitted to provide for determination of disability of the Governor, to avoid such situations as occurred in Governor Horner's last illness.

There are some who will be reluctant to adopt these reforms because of their impact on some specific candidate. I remind you that we are creating machinery for the long-term future. To block the development of a strong, responsible chief executive because one is biased toward a specific attorney general or secretary of state or superintendent of public instruction, and because one wants to preserve an elective berth for him, is to tailor the next century to the cut of today and to repeat 1870's mistakes.

THE LEGISLATURE
(Article IV)

The Illinois legislature has a House of 177 Representatives and a Senate of 58 Senators. This is the fifth largest legislature among the states, and it is too big and unwieldy. It compares with California's 40 Senators and 80 Representatives, and with New York State's House of 150 members.

The Constitution apportioned the 58 senatorial districts on a geographical basis, not by population; and this part of our Constitution was stricken by the "one man one vote" decisions of the federal courts. The present Senators are serving from districts jointly devised by the United States District Court and the Illinois Supreme Court.

In 1964 the Constitution's reapportionment procedures for the House failed to work, and all 177 Representatives were elected at large. Afterwards the General Assembly did succeed in reapportioning the House districts, but only by borrowing ideas from the court-fashioned Senatorial districts. Now a three-judge federal court has held that even the 1965 Senate and House districts do not comply with present precise requirements for numerical equality. The court has decreed that if the Senate and House districts are not reapportioned by July, 1971, the court itself will supply this lack. Would those who argue for a do-nothing policy on constitutional revision really prefer to turn our State government over to the federal courts?

Perhaps now you begin to see part of what I meant when I spoke of the whole Constitution falling apart at once. You no longer have a Constitution—you have a Swiss cheese, and before long you'll have nothing but the holes.

The legislators are part-time legislators, underpaid for the great amount of time they must devote to state affairs, neglecting their private businesses, and subject to possible conflicts of interest. Bills must be passed by a majority of those elected, not just those sitting; so that death of a legislator creates an automatic "no" vote.

Under Article IV, regular sessions commence in January in the year following the biennial election. Customarily the regular session has adjourned six months later, on June 30, because bills passed after July 1 must be passed by a two-thirds vote. The six-month regular sessions out of two years have made it impossible to develop continuity in expert staff and secretaries.

The appropriations must be enacted for a two-year period, until after the next regular session. This biennial budget means that the executive must guess what the sales tax receipts will be two years later; and it means that state departments must pad their budgets to allow for contingencies two years later. Local school boards find it necessary to meet at least twice a month. And yet this biennial vehicle for government action appropriated in 1965 as much money as the entire budget for the federal government in 1917, or as much as the combined amount spent by all the states in 1938.

Under these pressing circumstances, the Attorney General issued an opinion in 1966 that the General Assembly could have a regular session which continued through both years and could make annual appropriations, by the simple device of not adjourning on June 30 without date, but instead adjourning to specific dates from time to time. Since that time the General Assembly has had continued sessions by consent of both houses. In order to achieve this result the Attorney General had to construe some of the Constitution in a manner that is not too logical; and the legislature could still run into trouble with the question whether the budget in the second year has to be approved by a two-thirds vote.

Again an outdated Constitution is by necessity being eroded or bypassed. At a time when respect for law is desired, we need a basic law we can respect, to replace this dissolving document. The Illinois Constitution should expressly authorize annual sessions and annual budgets as do the constitutions of 27 other states, so that our tax money does not have to be wasted by exaggerated two-year expense estimates.

If the Constitution provided for fewer legislators, we could give them greater respect and visibility, pay them better, provide them with paid staff, and nonetheless save money. The Committee for Economic Development has recommended a maximum of 100 fulltime legislators, paid $25,000 a year, and meeting in annual sessions. If, as is probable, the convention decides that a unicameral legislature is impracticable, nonetheless the example of other large states shows that a smaller legislature is practical; the California model of 80 Representatives and 40 Senators would be a good one to emulate.

The 80 or more Representatives should be elected from single-member districts. We should abolish cumulative voting, whereby these legislators are elected from a single district and the voter can cumulate his three votes for one candidate. Illinois adopted this to overcome the sectionalism of the Civil War. No other state has ever adopted cumulative voting. The parties have frequently nominated only one or two candidates, depending on how many posts they feel they can win in each district, so as not to split their support. The result is that the voters in the general election have little real choice. Also, the built-in minority makes it almost impossible for the General Assembly to muster the two-thirds vote necessary to override a veto.

The Governor's veto power on appropriation bills should be improved to save the taxpayers needless extravagances. It is not enough to give him an "item" veto or a "line" veto, whereby he is permitted to cut specific items out without vetoing the whole appropriation; because the legislature may outwit him by combining several items under one description. He should be given the power to "strike out *or reduce*" individual appropriation items.

However, the Governor has at present practically an absolute veto which ought to be modified. In 1967 92 percent of the Governor's vetoes were filed after the legislature adjourned. The General Assembly's right to review vetoes ought to be carried forward to the next session.

Finally the legislature should not be judge and jury of its own reapportionment. Understandably, an individual legislator is more concerned about preserving his own district than about adjusting to population changes or even about an advantage to his party. Perhaps, as the Model State Constitution suggests, the Governor, on recommendation of a special board, should devise the new districts, subject to review by the Supreme Court; at any rate, some independent agency must do it. The State cannon continue in the demeaning posture of dependency upon the federal courts for the shaping of our legislative districts.

THE JUDICIARY
(Article VI)

The third great division of our State government is the judiciary. The welfare of our citizens and the health of industry depend upon the condition of the courts. If those courts do not act fairly, intelligently, speedily, and free from all political pressure, then criminal laws will not properly protect the people; property and liberty cannot be assumed to be safe; contracts cannot be relied upon; new businesses will avoid the state; and cynicism toward the law will encourage further breakdown of law and order.

The Judicial Reform Amendment of 1962 made important changes in the judicial article, but it did not do enough; and because of what it left out, some of the changes were the wrong changes. The amendment as first proposed by civic groups was designed to cure two evils. These were the "judge in politics" evil and the "administrative breakdown of the courts" evil.

The "judge in politics" evil meant that judges, who are required to dispense justice with equal treatment to all and with obligation to none, were required to campaign on a party ticket, to muster the support of precinct captains, and to argue that it would be better for the party if this particular judicial candidate won. The public could not inform itself sufficiently to vote on judges, because of the long ballots of unfamiliar names, and because the questions of judicial ability, fairness, and integrity are not adapted to public debate as in the case of those political offices which are issue-oriented.

The result was that in each county the central committee of the dominant party had control of the appointments to judicial office, and judgeships became patronage appointments as rewards for faithful party service as ward or township committeeman, state's attorney, or the like. The courts' appointive jobs—clerks, bailiffs, masters —were turned over to the party as additional patronage. Even those judges of outstanding merit and ability who have succeeded in working their way up through the system nonetheless had to work their way up as politicians.

The "administrative breakdown of courts" evil resulted from the chaos that passed for court structure. Throughout the state were a hodge podge of different trial courts—probate, county, circuit, superior, municipal, justice of the peace. Your case could be dismissed on the technical ground that your attorney filed it in the wrong court. The Supreme Court had no administrative authority over the lower courts, nor was it really a Supreme Court. The Constitution required the Supreme Court to hear unimportant land title and criminal matters, so that the important law was being announced in the Appellate Courts. There was no one with authority to reassign judges and to equalize the burden if one judge was hearing jury trials until eight at night while another went home at two in the afternoon.

The original judicial reform amendment, as submitted by civic groups, proposed remedies for both the "judge in politics" problem and the "administrative reform" problem. As to the first, they proposed to adopt the American Bar Association—Missouri plan, which was originally conceived in Illinois by professor Kales, but adopted elsewhere first. Under the Missouri plan, the Governor, or the Supreme Court if he defaulted, would fill each judicial vacancy by appointing one out of several nominees submitted to him by a blue ribbon panel composed partly of prominent laymen and partly of members of the bar in the judicial district. After a probationary one year in office, the public would have a chance to vote whether the Governor's choice should continue in office. Thereafter the same test was to be applied at the end of each regular term in office. This was the origin of the famous lengthy green ballots.

As to administrative reform, all courts within each county were to be consolidated into a single circuit court of that county. The Supreme Court was to be made a true Supreme Court, and it was to be given administrative power over all the circuit courts, including the power to appoint Chief Judges and the power to assign judges where they were needed.

However, when the judicial reform amendment was submitted to the legislature in the 1950's, it ran into heavy sledding from those who viewed it simply as a proposal to transfer the appointive power from the county central committees of the political parties to the Governor. In order to win approval, the civic organizations agreed to a compromise whereby in the first instance the judges would be elected on a political basis on party tickets, and thereafter they would be voted on by means of retention ballots. This of course destroyed the primary purpose of the retention ballots as a check upon the appointive power of the governor, and in practice has meant that political organizations can now provide faithful workers with lifetime judgeships. The county organizations also succeeded in inserting a provision that the local circuit judges could elect a Chief Judge with administrative powers in the county and he was given the right of veto over the Supreme Court's assignment of judges among counties. This change, in combination with the fact that magistrates were to serve at the pleasure of the circuit judges in the county, increased the power of political patronage in judicial selection.

In 1958 Floyd Thompon, a former Chief Justice of the Supreme Court of Illinois and a former President of the Illinois State Bar Association, argued that the civic organizations should refuse to go along with the Judicial Reform Amendment now that the politicians had cut its heart out. He contended that once the politicians had achieved administrative reorganization of the courts, which was needed to keep them from collapsing altogether, they would never agree to install merit appointment of the judges on a non-partisan basis. He said:

"The most important feature of the Joint Committee proposal was the provision governing selection and tenure of judges, and this is the feature that created the public sentiment for 'judicial reform.' This draft provided that . . . there should be submitted to the voters a statute providing for the non-partisan selection of judges . . . In order to get the support of . . . party organizations to submit the present legislative proposal, those in the General Assembly who were true friends of 'judical reform' were compelled to buy this support by giving to the organized politicians even stronger control over judicial selection and tenure than they now have. It should be obvious to any thinking citizen that the price that was paid for this support was too high."

The administrative reforms achieved in the Judicial Amendment of 1962 should now be completed by adopting nonpartisan merit appointment of judges under the Missouri plan and by providing more workable provisions as to their continuance in office. If the Convention does not accomplish this reform, it should abolish retention ballots and install again the old adversary party system, to terminate our present system, which ensures lifetime tenure for judges elected by routine adversary politics. But Illinois can do better than that. Most recent constitutional proposals have incorporated the Missouri plan of selection; fifteen states now use features of this plan; and only twenty states use partisan ballots to select judges. The reform is a joint proposal of the Illinois State Bar Association and the Chicago Bar Association. We should make Illinois one of the states which selects its judges on a nonpartisan merit basis.

REVENUE
(Article IX)

In examining the Revenue Article, remember the principle that a state constitution is a limitation upon state power, not a grant of power. If the entire Revenue Article were simply repealed and nothing substituted, the legislature would have just as comprehensive taxing power as it is possible to have. The Article must therefore be examined as a restriction of taxing powers, not a grant.

The first two sections are the important part of the Article. Section 1 grants power to the General Assembly to tax property by valuation so that everyone shall pay a tax in proportion to the value of his property; and similar property tax powers are given to local governments by other sections. Section 1 also grants the right to tax certain occupations, and also persons using franchises and privileges. Section 2 is more general, stating that the specification of these objects and subjects does not limit the power to require other subjects to be taxed, in a manner consistent with the Constitution.

The emphasis upon property taxes as the chief support of state and local governments made sense to the 1869 convention, which had before it the state auditor's report that Cook County was assessing 22,169 acres in wheat, 30,224 acres in corn, 16,527 horses, 40,909 meat cattle, 12,731 hogs, 7,357 carriages and wagons, 4,523 clocks and watches, and 602 pianos.

In 1932 the Supreme Court of Illinois held that a graduated income tax was unconstitutional. The court said that Section 1 limits the state to three kinds of taxes: (1) a general property tax, (2) occupation taxes, and (3) franchise and privilege taxes. The court said that the blanket general authority in Section 2 did not add any general taxing powers. The court held that income was property; therefore an income tax was a property tax; and therefore it had to be imposed in equal proportions. This case was the foundation of the folklore that the 1870 Constitution would allow a flat rate income tax but not a progressive one. The people who espoused this theory did not realize that under it the state could not impose a flat rate tax upon income as property unless it also levied a state real estate tax and personal property tax at the same rate.

This requirement that all property be taxed in proportion to its valuation means that if urban residential real estate is assessed at 50 percent of its full cash value, then farm lands, factories, machinery, household goods, and stocks and bonds must be assessed at the same rate of valuation and the same 6 or 7 percent tax rate applied to each. You know that assessors do in fact violate the Constitution by classifying property and assessing it at different rates—otherwise the tax would be confiscatory on bank accounts, for instance. Assessors doing so are sheltered by Illinois Supreme Court decisions which effectively prevent a disgruntled taxpayer from complaining about someone else's assessment. The Revenue Amendment which was defeated a few years ago would have permitted classification of property in Cook County but not elsewhere—which might well have rendered the Illinois Constitution unconstitutional under the federal "equal protection" clause.

Ninety percent of the revenue of county and other local governments comes from the property tax. Furthermore, although an estimated one-half to two-thirds of all the property in the state is personal property, this produces only 20 percent of the property tax revenue, 3 percent out of this being from intangibles such as stocks. Thus the property tax is primarily a real estate tax.

The State of Illinois itself has not levied a property tax since 1932. Its principal revenues have been derived from the sales tax, which had to be disguised as an occupation tax on retailers in order to come within the Constitution. To plug the loophole of purchases by Illinois residents in Milwaukee and St. Louis, the General Assembly enacted "use taxes" on the privilege of using the products in Illinois, the tax being at the same rate as the sales tax. The Illinois Supreme Court sustained these as constitutional. In so doing, the court so enlarged

the definition as to what is a taxable privilege that in 1967, in my study for The Union League Club entitled "Why a Constitutional Convention for Illinois," I predicted that an income tax would be ruled constitutional as a privilege tax under the existing Revenue Article and said that therefore the income tax was not an issue in whether a constitutional convention should be convened.

The panic struck in the last few days of the 1967 legislative session. The General Assembly suddenly saw that the State simply was not going to make it with the support of just the sales tax and the real estate tax. The legislators found themselves in a face-to-face confrontation with the grinning skull of possible state bankruptcy. Last-minute measures were born of desperation — an inheritance tax was imposed on widow's insurance proceeds and later repealed, and the legislature considered a service occupation tax which was bitterly opposed as in fact a gross income tax on a persecuted few. Finally temporary relief was obtained by borrowing earmarked motor fuel tax funds—from a privilege tax—for general purposes; and Illinois resignedly set itself on a course to join the other 34 states which levied income taxes. The present 4 percent corporate tax and 2½ percent individual tax is the result.

In 1969 the Illinois Supreme Court sustained this income tax as a privilege tax. What is more, the court expressly overruled the old limited classifications of state taxes and held that the general powers of taxation in Section 2 mean just what they say and do expand the state's taxing power. This means that in Sections 1 and 2 the existing Illinois Constitution gives the legislature the broadest possible taxing powers. The only limitation which apparently remains is the prohibition against classifying property for purposes of the property tax.

Therefore the 1970 Convention needs to look at this article not so much to grant any additional taxing powers to the State, but to determine whether any limitations should be placed upon the comprehensive taxing power which already exists. I am of two minds as to whether any top limit should be set. The national government has just realized for the first time that its system of taxing income, which penalizes one by progressively higher rates if he works harder and produces more, is not only unfair but discourages production and diminishes the total wealth of the nation. At a time when the national government is attempting to put some brakes on the crippling progressive features of its tax, it would be tragic if the states destroy this reform through the amount or form of state income taxes. On the other hand, a limit on public budgets or debts has never been effective when the pinch comes; and the gratuitous insertion of certain limits might be construed by the legislature as an implied statement that it is expected to raise taxes to the designated percentage.

Except for Sections 1 and 2, all the rest of the 13 sections of the Revenue Article should be repealed. The restriction upon the legislature of $250,000 total debt on a three-billion-dollar business forces the creation of independent authorities which must pay higher interest rates from our taxes. The rest of the provisions are either quasi-legislative provisions relating to redemptions from mortgage foreclosures and to exemptions, or they are revenue restrictions upon local government which ought to be statutory and subject to change by the General Assembly. This brings us to the fact that the revenue problem is only half answered now that we have considered revenue at the State level. Concurrently we must look at the problems of local government and taxation.

LOCAL GOVERNMENT AND TAXATION
(Article X; Article IX, Sections 8-13)

Today the metropolitan areas of the State include Chicago, Bloomington, Champaign-Urbana, Decatur, East St. Louis, Peoria, Rockford, Rock Island-Moline, and Springfield. There are smaller cities such as Carbondale, Charleston, DeKalb, Macomb, Belvedere, Cairo, Ottawa, Harrisburg, and Mount Vernon. The great majority of our population lives in such areas.

In contrast, in 1890 the rural population of the State was 55.3 percent of the total population. In 1960 it was down to 19.3 percent, with less than 6 percent actively engaged in agriculture. The contrast explains why the 1870 Constitution has an article consisting of thirteen sections (Article X) which applies to counties, and there is no similar article for city government.

The county article adds nothing to State powers; it simply restricts county government so that it cannot be improved. There are 102 counties, patterned on the rural Southern model, all but 17 of which have adopted the township form of government modeled after rural New England. They have large, unwieldy boards of supervisors—McLean, Madison, LaSalle, Sangamon, Champaign, and St. Clair Counties have boards of about fifty members and no full-time administrator. (Commencing in 1972, county boards will be limited to a maximum of 29 members.) The 1870 Constitution splits county administration among a number of elected offices—including sheriff, treasurer, county clerk, county (now associate circuit) judge, state's attorney, circuit clerk, recorder (in counties over 60,000), auditor (in counties over 75,000), and county superintendent of schools. The Illinois Supreme Court's decision that the legislature cannot deprive any of these offices of their "common law" or "usual" powers means that the constitution contains a locked-in prohibition against streamlining local government. The townships, organized under state law, have small turnouts for their elections of supervisors, clerk, assessor, highway commissioner, collector (in a few counties over 100,000), and a 3-member board of auditors.

Local government has been turned into a monstrosity by Section 12 of the Revenue Article, which prohibits any local government from incurring indebtedness in excess of five percent of the assessed value of the taxable property in its jurisdiction. This does not prevent the creation of new overlapping governments in the same geographical area, with new taxing and bonding powers in the same amount. As a result, the taxpayers in a single area can be loaded with duplicating salaries and expenses for a city or village, park district, elementary school district, high school district, sanitary or storm sewer district,

forest preserve district, mosquito abatement district, fire prevention district, and others.

Illinois has 6,453 local governments, more than any other state, each one with its own administrative salaries and expense. This includes 102 counties, 1,256 municipalities, 1,432 townships, 1,350 school districts, and 2,313 special districts. The special districts constitute 57 percent of our governmental units and exceed the number in any other state. How many Tuesdays and Saturdays of the year have you said, "What, another election?" and attempted to acquaint yourself with a new group of unfamiliar names?

The fact that each overlapping local agency must pay its own staff for the government work it shares with other governments means that tax money must go for large administrative expenses in proportion to benefits. In the 1968-69 fiscal year it cost Norwood Park Township $4,005 to dispense $100 in poor relief.

The Constitution's restrictions on local government even prevent the legislature from permitting local governments to do those things which everybody approves. Chicago and Cicero attempted to construct one continuous sewer, with the outlet in Cicero because there was no suitable location in Chicago. Only one-fifth of the construction cost was in Chicago but its property was to assume two-thirds of the cost because Chicago property was more greatly benefited and because the Cicero cost represented in large measure the outlet which benefited Chicago property. The Illinois Supreme Court held that the project was unconstitutional because Section 9 of the Revenue Article only permits financing of local improvements which are under control of a single municipality. Obviously such a provision should be removed from the Constitution so that the General Assembly can permit municipalities to fashion joint relationships in today's crowded world.

LOCAL GOVERNMENT AND HOME RULE

Some people who have not kept pace with the newer developments in constitutional reform have advocated a so-called reform which would actually be a step backwards. I refer to the proposals to give fixed constitutional status to "home rule" and taxing powers for municipalities.

This was much advocated during the first fifty years of the twentieth century. During that era the Supreme Court had not yet announced that state legislators must be elected from equal-sized districts, and in fact the courts had not even asserted the right to force legislatures to reapportion to meet changes in population. The result was that cities found themselves taxed and outvoted in the legislatures by Senators who represented geographical areas of soil and stone rather than people and by Representatives from "rotten boroughs" of shrinking population. The proposal that cities be given home rule charters by constitutional grant represented an attempt by the cities to secede from states which taxed them without representing them. In effect the cities would become little states, not subject to interference by the state legislature.

In this final third of the twentieth century, in which state legislatures have been reapportioned so that cities swing their weight in proportion to their numbers, the evil no longer exists to which constitutional home rule was designed as a counterweight. However, there is a danger that this old-fashioned idea may be carried forward to impede progress and reform in the changed conditions of the 1970's.

Remember, one of the fundamentals we first examined was that a modern constitution should contain a minimum of restrictions in order to allow the State flexibility to adapt to new challenges. It would be directly contrary to that principle—and it would be a grievous sabotage of constitutional reform—to split the State up into 6,453 little states and to enact home rule provisions which would bar the Illinois legislature from interfering with those little states in their taxation and their activities involving water, sewage, pollution, roads, and other matters.

What the proponents of the old-fashioned home-rule concept ignore is that cities are no longer isolated urban entities in the middle of a prairie. They are interwoven into a vast megalopolis, and problems such as transport, water supply, and disposal of wastes must be handled on a metropolitan or inter-state scale. There is no essential difference between the south side of Howard Street which is Chicago's northern boundary and the north side of Howard Street which is Evanston's southern boundary; and yet constitutional home rule would set up an artificial wall between them.

Louisiana has an amendment cause with built-in home rule protections. If the amendment affects any specific parish, the amendment must receive a majority within that parish as well as throughout the State. If a necessary new harbor authority affected a certain parish whose population had shrunk to fifty, presumably 25 people could block the needs of the entire population of the State.

Here is another example of how constitutional home rule would operate. In 1967, after certain scandals occurred which affected the Metropolitan Sanitary District of Greater Chicago, a Joint Legislative Committee, of which I was Special Counsel, recommended a law giving the General Superintendent additional powers, and the General Assembly enacted this into law. After the legislature adjourned, the District's Trustees refused to obey the law, and the Vice-President of the District wrote a memorandum in which he said that the new law was unconstitutional and he would not obey it unless so ordered by the highest court of the land. We returned to the Trustees of the District and invited to their attention that the District was merely a statutory creation by the legislature, and they agreed to obey the law. Had the District had constitutional home rule, the Vice-President would have been right as to their power to disregard the legislature, both as to the law in question and perhaps also as to the District's unbridled freedom to tax, and to pollute Illinois streams, without check by any other governmental authority.

Constitutional home rule as to taxation could create a new tyranny of taxation without representation. In the interdependent community of today's mobile population,

persons who must funnel their efforts and their wares through the populous urban centers could be charged tribute without their consent, as the medieval German barons who erected castles on bluffs over the Rhine levied upon the ships which sought to pass.

Where home rule has been tried, it has not lived up to advance billing. Ohio, which has extensive use of home rule, has the same urban problems as Illinois. In Minnesota cities operating under home rule charters find them obsolete and inflexible, rendering them far less capable of dealing with problems than are villages organized under the legislature's general enabling act.

In newer constitutions the legislature, not the constitution, is becoming the accepted authority to prescribe the forms of local government. The latest edition of the National Municipal League's Model State Constitution abandons its longtime advocacy of a direct constitutional grant of home rule, and now suggests that the legislature be authorized to provide the necessary general laws for local home rule.

Therefore I suggest that all existing local government provisions be repealed and the General Assembly be generally empowered to delegate specific powers of self-government to local governments, with the right to grant or take away such powers as it considers appropriate. This method has been adopted by 13 states. The constitution should also provide that the legislature shall have power to prescribe bonding and taxing powers of local units.

THE BILL OF RIGHTS
(Article II)

The Bill of Rights is meant to protect the citizen against arbitrary action by his government. He is guaranteed freedom of expression, the right to assemble and petition, freedom of religion, due process of law, trial by jury, and protection against self-incrimination, unreasonable searches and seizures, and double jeopardy for the same crime. This duplicates and in some respects supplements the Bill of Rights in the federal Constitution. At first the Supreme Court of the United States had held that the federal Bill of Rights applied only to the federal government. Now that it is held applicable to the states, the state provisions have less importance, but they can still add to the federal guarantees.

The Bill of Rights is a protection against arbitrary government action and is meant to restrain government. Some persons may attempt to expand it into a programmatic statement of social goals or even into specific legislation to implement those goals. For example, some may attempt to insert a "right-to-work" guarantee of the open shop; others may attempt to include pronouncements as to desired objectives regarding income, environment, or adequate housing. Such persons would be guilty of the same offense in 1970 that the rural convention was in 1870 when it included provisions about warehouse receipts, drainage ditches, and roads and cartways—the offense of using the constitution to legislate about current social problems, instead of taking those issues to the legislative arena where they belong.

Therefore there should be a minimum of tinkering with the Bill of Rights, for the reasons I have given and because these rights are so charged with tradition and emotion. I would suggest just two changes.

First, although Illinois has a due process clause, somehow it omitted an equal protection clause such as the federal government and other states have. We should confirm that it is the position of Illinois that no person shall be denied the equal protection of the laws nor be subject to discrimination by the State because of race, color, religion or national origin or ancestry.

Second, the provision as to trial by jury should be amended to allow decision by less than a unanimous vote. Other states allow this, and Britain has recently permitted a vote of eleven. This protects the court, jury, and litigants from the stubborn holdout who forces the foreman to send out for eleven beef sandwiches and one bale of hay. It also makes it much more difficult to "fix" a jury by threats or bribery.

OTHER ARTICLES
(Articles VII, VIII, XI, XII, XIII, I, XIV)

There are other articles which require some change. On voting rights (Article VII), the residence requirements should be reduced from a year to the minimum necessary to prevent fraudulent registration, so that numerous transferees are not disfranchised. As to the grant of the vote to 18-year-olds, we might watch the experience of England and four states before we make any change. Present evidence is that they make little use of the franchise.

The Education Article (Article VIII) provides explicitly that the General Assembly shall never make any appropriation to support any school controlled by any church. The aruments of those advocating a change in this Article, that the tax burden will be lightened by helping parochial schools to continue in existence, must be weighed not only against our traditional separation of church and state but also against the possible long-term loss of public-school funds to sectarian purposes. The bitter dispute over a recommended change on this question in the New York constitution was a major reason for its defeat. If the Convention recommends any change, it should be clearly separated from other recommendations, so as to jeopardize those reforms as little as possible.

Articles XI, XII, and XIII, regarding corporations, the militia, and warehouses, are legislation masquerading as constitutional provisions and should be removed from the streamlined document. The same is true as to the unnumbered sections concerning the Illinois Central Railroad, railroad subscriptions, the Illinois and Michigan Canal, and the use of convict labor.

The repeal of the corporation article would have the incidental effect of removing the requirement that amendments to the banking laws must be approved by public referendum. Contrary to popular belief, there is no prohibition of branch banking in the Constitution, but the referendum provision does have the effect of preventing the legislature from considering repeal of the law prohibiting branch banking, However, there is no reason why laws passed by the legislature as to banking

should be subject to public vote when all other corporation laws are not. The legislature is the proper arena for such issues.

Article I, which simply describes the state boundaries, should be repealed. It describes incorrectly the boundary with Wisconsin. The article cannot enlarge our jurisdiction in the federal system and it might some time limit it in some way.

Finally, the Amendment article (Article XIV), with its requirement of a two-thirds vote of the legislature to propose amendments or to convene a convention, and its requirement of ratification of the legislature's proposals by two-thirds of those voting on the question, has proven too restrictive. It should be relaxed, but not so much as to deprive constitutional changes of deliberation and solemnity. A relaxation of the two-thirds to three-fifths, with a simple majority required for ratification of a convention's proposals, would be the right middle course.

THE "SCHEDULE"

The suggested changes are a large order, and almost every one of them affects some long-standing vested interest which will oppose it. In order to secure a chance of passage, the amendments should be submitted for approval by separate articles or sections, so that those opposed to each measure do not unite to form a majority against a package constitution, as occurred in New York and Maryland, and very nearly in Michigan.

Opposition to the changes also can be minimized by judicious use of what is called the Schedule. This is an addendum which provides for the procedural details in the taking effect of a new amendment. The Schedule could provide, as to such matters as local government and officials, that repealed parts of the Constitution should continue in effect, not as constitutional provisions, but with the effect of statutes, until the General Assembly sees fit to modify them. This device preserves the basic function of the Convention of simply creating effective state machinery and keeps it from being a super-legislature where the jobs of township officials and others are at stake.

CONCLUSION

General Jimmy Doolittle is credited with saying that one trouble we Americans have is that we are fixers-up rather than preventers. For example, we can get excited, and banner headlines will issue, about the indictment and conviction for embezzlement of a state auditor. It is time we taught ourselves to care and to be just as excited about such things as the prosaic job of putting words together to give the Auditor General the proper position and authority so that such events do not happen again.

For it is important, you see, that we should all care about this new Constitution and that we try to make it the best we can possibly have. You have, as I have, some business-as-usual friends who say:

> "Better the devil I know that the devil I don't know. Why shouldn't I just sit with this imperfect Constitution, not bothering to change it, letting it constrict progress in Illinois, just minding my own business, going to my own job and drawing my own salary, or tending to my own business and taking my own profits?"

The answer is that we can't afford in this century to be at anything less than our absolute best, as humans, as citizens, and as a State. Of course Illinois isn't going to go totally out of business even if we leave the Constitution in such shape that an auditor of public accounts can embezzle millions of dollars without anyone being the wiser for a long time, or if we leave the Constitution in such shape that when we jump on a governor for not running an administrative department well he doesn't have authority to do anything about it, or even if we continue to multiply local taxing bodies faster than rabbits. The advantage of the lake and our central position in the continent and the inertial force of our past progress will keep the machinery creaking along. We'll close our eyes to the fact that the eight-county metropolitan area on Lake Michigan grew less than did the nation generally in the 1960's, and we'll never know about the electronic laboratory or research center which may pass Illinois by if the state elects to stay in the 19th century.

But I want to suggest to you that in today's competitive environment, where sociologists consider five years the equivalent of a generation, there is no room for human beings or for a state or a nation that does any less than its maximum best. If we say that we're unwilling to improve our State to make it a more effective part of the federal union and we prefer gradually to let it moulder and rust away and run down, then God, or Destiny, or whatever name your private theology gives to the great driving Force behind the universe, will turn thumbs down on us and say "Disregard these people and this place in the competition of life."

The challenge before us today is the one of which Pericles spoke to the Athenians when he said, "We do not say that a man who disregards public affairs and pays attention only to his own concerns minds his own business. We say that he has no business here at all."

We're going to care, of course, and we're going to bring Illinois into the twentieth century and provide the best structure and protection in the country for our citizens and their productivity, their culture, their education, their health, their work and business, and their happiness as humans. Illinois must be given the means to be keyed up to its peak of performance in the competition in the country and the world. The times demand of us in this State the maximum, our best, no less.

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