



CONstitutional CONcepts

Number 7

A series of condensations of the scholars' research papers prepared by the Illinois Constitutional Research Committee which was appointed by Governor Richard B. Ogilvie to furnish background material for delegates to the Constitutional Convention.

LEGISLATING BY THE CONSTITUTION: BANKING AND TRANSPORTATION

Irving Gordon
and
Edmund W. Kitch

Why are separate parts of the Illinois Constitution devoted to warehouses? To banks? To railroads?

Are these examples of legislating by constitutional fiat?

These and other questions were answered in the papers, "Constitutional Regulation of Banks and Warehouses: Expendable Provisions of the Illinois Constitution of 1870," written by Irving Gordon, Professor of Law, Northwestern University, and "The Constitutional Aspects of the Regulation of Transportation: The Railroad Provision of the 1870 Constitution," written by Edmund W. Kitch, Associate Professor of Law, University of Chicago. Commissioned for the Governor's Constitution Research Group, these will be background materials for use by the Constitutional Convention delegates.

This is a summary of the two scholarly papers and does not purport to contain all of the detail of the originals.

Even the delegates to the 1870 Constitutional Convention understood that they were placing material that was legislative in nature into the constitution they were writing when they wrote the sections dealing with warehousing, banks and railroads.

Illinois in 1870 was still essentially an agrarian state. Delegates reflected that fact and were convinced that the state (and particularly the farmers) "was subjected to extraordinary abuses at the hands of the banking and warehouse industries and," continues Gordon, "that the state legislature by reason of corruption, indifference or incompetence, or all three, would do nothing about it."

The Railroad in 1870

Outside of the Illinois and Michigan Canal, the railroads were the only system of transportation for inland Illinois. And all of the railroads centered upon Chicago. The railroad provisions now in our 1870 Constitution were an attempt by the delegates to assure that a primitive system of governmental controls would be placed over the transportation system which so vitally affected the prices and incomes of the farmers.

"We will place restrictions on these corporations which we may not find necessary to place on any other corporations," stated Delegate Cameron of Cook County. "The special abuses which have crept into the railway systems demand a special remedy."

The Grain Elevator Monopoly in 1870

In 1870 Chicago had a market monopoly of grain produced in the Midwest. It was the only market connected by rail to every major consumer market and seaport. All grain must pass through its huge elevators with a capacity of over 11.5 million bushels and an annual handling of 81.4 million bushels. But, 9 million bushels of the capacity was concentrated in a monopoly of 9 railroad and elevator operators.

Frauds from the lack of impartial inspection of grain received, false information on receipts which led to manipulated prices, false weight receipts and excessive storage charges resulted in protest meetings by the producers. Such meetings, together with pressure from the newspapers upon the delegates, resulted in the adoption of Article XIII of the 1870 Constitution.

The Early Dismal History of Illinois Banking

Banking had a dismal history in Illinois up until 1870. There was an almost uninterrupted record of failure and scandal in the banking industry. Starting from the very beginning, one of the two banks in Illinois at the time of becoming a state failed, following a scandal involving investment of public land funds. The two Illinois State-owned banks also met with failure amid great controversy.

Of the 29 banks chartered between 1851 and 1854, three failed in 1854, five in 1855 and six more in 1857. The Constitutional Convention of 1861 felt so strongly about banks that it prohibited the creation of new banks and forbade the extension of charters to existing ones and thereby would have abolished the corporate banking system had the constitution been adopted.

Issuance of bank notes for profit opened quick riches for promoters. This "wildcat" banking was successful as

long as the notes were not presented to the issuing bank for redemption. Thus, a bank located in the backwoods where only a wildcat could find it was a distinct advantage to the unscrupulous promoter.

Railroads Are Now an Interstate Matter

But, what was then true isn't necessarily so in 1970. For example, the specific provisions of the 1870 Constitution which deal with railroads, banks and warehouses are sadly out of date.

Control over the rates, services and corporate structure of American railroads has passed almost exclusively into the hands of the national Interstate Commerce Commission. But, ironically, the regulatory approach in the 1870 Constitution aimed at control of the then monopoly powers of the railroads has been converted by the Illinois courts into a system designed to preserve existing monopolies in the now competitive transportation system. Thus, it is now almost impossible for a common carrier to enter into a new transportation venture without infringing upon the rights of those already in the field.

Professor Kitch cites the recent case involving air passenger transportation to O'Hare from the northern Chicago suburbs as an example of the "Limited Monopoly Doctrine" developed by the Illinois Supreme Court from the railroad provision of the Constitution. In this case, Continental Air Transport provides the only bus service to O'Hare Airport; prior to March, 1965, it did not offer services from the northern suburbs. Waukegan-North Chicago Transit Company, operating bus service in those communities, filed to provide airport bus service for those living on the North Shore. The Illinois Commerce Commission approved the application by Waukegan, but the Illinois Supreme Court reversed their action and awarded service to Continental, since Continental was "first in field of service" to O'Hare. By implication, Kitch believes this means no other company may ever provide service to O'Hare, nor to a successor airfield, because Continental is "First in Service" to airports.

Only one of the railroad provisions in the 1870 Constitution is of contemporary importance. This is the one which provides in perpetuity the special charter of the Illinois Central Railroad with its unusual taxation provisions. Essentially, this results in 7% gross income tax upon the Illinois Central, to be paid to the State, as exemption from all other state and local taxes. Whether or not this tax provision is now favorable or unfavorable to the Illinois Central is not the relevant point. The question is, however, as to the desirability of the state permitting the revision of the 1851 charter of the railroad, and for a contemporary General Assembly to review taxation provisions.

Warehouses and Banks are Different Today

Similarly, since 1870 the grain warehouses of Chicago have ceased to be a monopoly, and are subject to controls and inspections which the law provides in excess of those contemplated by the constitution. So also have there been changes in banking laws and practices. The National Banking System of 1863 has become in actuality a strong system of control, eliminating issuance of state bank

notes and offering a competitive banking system. The Federal Reserve System exercises important supervisory controls over all banks. And, Federal Deposit Insurance has resulted in strict examination and financial reporting and in effect establishes reserve requirements. And, finally, the current statutes and regulations established by the General Assembly go far beyond any standards envisaged by the draftsmen of the 1870 Constitution.

Some who oppose branch banking in Illinois oppose any change in the current Illinois constitutional requirement that, to change the state banking law requires approval of the public at a referendum. But, Professor Gordon argues persuasively, it would be:

" . . . outrageous to perpetuate an outmoded anti-

democratic device in the constitution in order to lend possible assistance to one side of the banking industry in its struggle with the other."

Conclusion

According to the authors, the Banking Provisions (Article XI, Sections 5-8), the Warehouse Provisions (Article XII, Sections 1-7) and the Railroad Provisions (Article II, Section 13; Article XI, Sections 4, & 9-15; Article XIII, Section 4 & 5; and Separate Sections 1 & 2) should be eliminated and a new provision adopted which would eliminate legal barriers to qualified firms entering the transportation industry.

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WHY these DIGESTS?

Preparing for a constitutional convention requires advance background and research. Accordingly, Governor Richard B. Ogilvie called upon a group of scholars to prepare research papers for the use of delegates and appointed Dr. Samuel K. Gove, director of the Institute of Government and Public Affairs of the University of Illinois as project director. Sixteen papers on various aspects of state government are being assembled. These will be issued in condensed form in continuing issues of Constitutional Concepts. A sincere attempt has been made to retain the concepts and ideas of the writers whose papers run from up to 80 pages or more. Any errors which result from the condensations clearly

are not those of the scholars originating the research.

As no public funds were available to the Constitution Research Group, the Union League Club of Chicago made an initial grant of \$10,000 to the group so the work might proceed. The Club took no part in the selection of the scholars nor the topics to be researched; made no effort to influence either research or conclusion; and did not, in any manner, direct the group. Nor does the Club necessarily endorse any suggestions, proposals or ideas expressed by the scholars.

This is one of a series of condensed research papers, prepared and published as a public service by the Public Affairs Committee of the Union League Club of Chicago.

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