

Spring 1973

## State Debt under the 1970 Illinois Constitution: The Legislature Unbound, 6 J. Marshall J. of Prac. & Proc. 407 (1973)

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### Recommended Citation

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STATE DEBT UNDER  
THE 1970 ILLINOIS CONSTITUTION:  
THE LEGISLATURE UNBOUND

INTRODUCTION

On the first Saturday in July, 1870, the people of Illinois ratified a constitution.<sup>1</sup> Roughly one hundred years later, on December 5, 1970, their successors performed the same decisive act.<sup>2</sup> The significance of these acts of ratification is emphasized by the role a constitution plays in the traditional scheme of state government. The relationship which exists between a state constitution and the representative body in which legislative powers are vested is utterly different from the relationship which exists between the Federal Constitution and the representative body which is the United States Congress:

That the legislative power of the State has been conferred generally upon the legislature is not denied, and that all such power may be exercised by that body, except so far as it is expressly withheld, is a proposition which admits of no doubt. It is true that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, *but the opposite rule is the one to be applied to the construction of a State constitution.* The legislature of a State may exercise all powers which are properly legislative unless they are forbidden by the State or National Constitution. This is a principle that has never been called in question.<sup>3</sup>

Illinois courts accord with this fundamental principle of constitutional law and have consistently held that the office of the Illinois constitution is to restrain the General Assembly: "The Illinois constitution is not regarded as a grant of powers to the legislature, but rather as a restriction on the legislature's power to act."<sup>4</sup>

The theory upon which this canon of constitutional law is founded is a basic one: in a representative form of government, all powers of government belong ultimately to the people in their sovereign corporate capacity;<sup>5</sup> the people are the source of all governmental and political powers and the supreme authority or

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<sup>1</sup> ILL. CONST. schedule, § 8 (1870).

<sup>2</sup> ILL. CONST. adoption schedule, § 1 (1970).

<sup>3</sup> *Railroad Co. v. County of Otoe*, 83 U.S. (16 Wall.) 667, 672-73 (1872) (emphasis added).

<sup>4</sup> *North Shore Post No. 21 of American Legion v. Korzen*, 38 Ill. 2d 231, 233, 230 N.E.2d 833, 835 (1967). *Accord*, *Droste v. Kerner*, 34 Ill. 2d 495, 217 N.E.2d 73 (1966), *cert. denied*, 385 U.S. 456 (1967); *Locust Grove Cemetery Ass'n v. Rose*, 16 Ill. 2d 132, 156 N.E.2d 577 (1959).

<sup>5</sup> *Saxby v. Sonnemann*, 318 Ill. 600, 149 N.E. 526 (1925).

sovereignty ultimately resides with them.<sup>6</sup> It follows that the people may, at their pleasure, withhold such powers or delegate and distribute them among various departments of government.

State debt provisions have been woven into the fabric of Illinois constitutions since the Constitution of 1848.<sup>7</sup> Because the people may restrain the legislature in any way they choose and because the state debt provisions of the Illinois Constitution of 1970 substantially differ from those of prior Illinois constitutions, it is appropriate to examine the new state debt provision, article IX section 9, to determine what the new restraints are. If the people of Illinois are to be able to anticipate its performance, article IX section 9 must be brought from the chorus of other constitutional provisions and made to stand center stage; for the new state debt provision has a character which greatly differs from that of its veteran predecessor. After the drafters of the new charter determined that the old provisions were too restrictive, they embarked upon the bold experiment of their abolition. In order to illuminate the substantial changes worked by the delegates who went to Springfield in 1970, it will first be necessary to list in detail the state debt provisions of both the 1870 and 1970 Illinois Constitutions.

#### THE 1870 CONSTITUTION

The revenue and finance provisions of the 1870 Constitution are scattered among several articles of that instrument. The majority of provisions relevant to the purposes of this comment are found in article IV dealing with the powers of the legislature. Section 18, "Expenses of government — State debts," is the substantially controlling section. Regarding the legislature's power to incur state debt, the section imposes a number of conditions of clear restriction and absolute prohibition.

1. While a definition of the term "state debt" would seem appropriate, no such definition appears in section 18. Subsequent cases have given a widely accepted meaning to the term by judicially construing "state debt" to encompass instruments to be retired through a tax levied by the state<sup>8</sup> and obligations which are to be retired from revenues of the state, even though the levy of a direct tax is not involved.<sup>9</sup>

2. To meet casual deficiencies or failures of revenue, the

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<sup>6</sup> *People v. Barnett*, 344 Ill. 62, 176 N.E. 108 (1931).

<sup>7</sup> G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 186 (1969) [hereinafter cited as BRADEN & COHN].

<sup>8</sup> *People ex rel. City of Chicago v. Barrett*, 373 Ill. 393, 26 N.E. 478 (1940).

<sup>9</sup> *People ex rel. Greening v. Green*, 382 Ill. 577, 47 N.E.2d 465 (1943).

legislature was empowered to borrow an amount up to an absolute ceiling of \$250,000:

[T]he state may, to meet casual deficits or failures in revenues, contract debts never to exceed *in the aggregate* \$250,000 . . . .<sup>10</sup>

3. A referendum at a general election was required in order to pledge the full faith and credit of the state for a debt in excess of \$250,000:

[N]o other debt, except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war, (for payment of which the faith of the state shall be pledged,) shall be contracted *unless* the law authorizing the same shall, *at a general election*, have been submitted to the people, and have received a *majority* of the votes *cast for members of the general assembly at such election*.<sup>11</sup>

4. Publication of the law authorizing a debt in excess of \$250,000 was a condition precedent to its validity:

The general assembly shall provide for the publication of said law for three months at least before the vote of the people shall be taken upon the same . . . .<sup>12</sup>

5. Provision for retirement of the debt must also have been made:

[P]rovision shall be made, at the time, for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose or from other sources of revenue: which law, providing for the payment of such interest by such tax, *shall be irrevocable* until such debt be paid . . . .<sup>13</sup>

6. Submission to the people of the law authorizing the tax to retire the debt was also requisite:

[T]he law levying the tax shall be submitted to the people *with* the law authorizing the debt to be contracted.<sup>14</sup>

7. An imperative direction as to the disposition of funds obtained through state debt was included:

[M]oneys thus borrowed shall be applied to the purpose for which they were obtained, or to pay the debt thus created, and *no other purpose* . . . .<sup>15</sup>

In addition to the restrictions on state debt, section 18 of article IV checked the legislator's general power to appropriate.

8. All appropriations were limited as to their longevity:

Each general assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government *until the expiration of the first fiscal quarter after the adjournment of the next regular session* . . . .<sup>16</sup>

<sup>10</sup> ILL. CONST. art. IV, § 18 (1870) (emphasis added).

<sup>11</sup> *Id.* (emphasis added).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> *Id.* (emphasis added).

<sup>16</sup> *Id.* (emphasis added).

9. In the event that the legislature did not adhere to the durational limitation, section 18 provided for lapse:

[A]ll appropriations, general or special, requiring money to be paid out of the state treasury, from funds belonging to the state, *shall end* with such fiscal quarter . . . .<sup>17</sup>

10. The aggregate amount of appropriations could be increased only by following specific procedural steps:

[T]he aggregate amount [of all appropriations] shall *not* be increased *without* a vote of two-thirds of the members *elected* to each house, *nor exceed* the amount of revenue authorized by law to be raised in such time . . . .<sup>18</sup>

Section 20 of article IV is also relevant to this discussion in that it announced an absolute prohibition against using state revenues to pay debts incurred by entities or individuals other than the General Assembly:

The state shall *never* pay, assume or become responsible for the debts or liabilities of, *or in any manner give, loan or extend its credit to or in aid of any public or other corporation, association or individual.*<sup>19</sup>

Article V, the article of the 1870 Constitution dealing with the executive, had tucked within section 16 a pertinent provision affecting all appropriation bills:

Bills making appropriations of money . . . shall specify the objects and purposes for which the same are made . . . .<sup>20</sup>

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<sup>17</sup> *Id.* (emphasis added). For cases discussing the lapse provision, see *Bowes v. Howlett*, 24 Ill. 2d 545, 182 N.E.2d 191 (1962); *People ex rel. Millner v. Russel*, 311 Ill. 96, 142 N.E. 537 (1924); *People ex rel. Brinkerhoff v. Swigert*, 107 Ill. 494 (1883); *People v. Lippincott*, 64 Ill. 256 (1872). See also BRADEN & COHN 186-87 where it is stated:

The provision for appropriations is fuzzy and indefinite, but if the unexpressed assumptions of the drafters of the 1848 and 1870 Constitutions are considered, it is reasonably clear what was intended. In 1848, it was assumed that the General Assembly would appropriate enough money to run the government until the next General Assembly could again appropriate money to run the government. The drafters of the 1870 Constitution modified the earlier provision on the assumption that appropriations for running the government would be for a two-year period beginning July 1. This came about because Section 13 . . . made legislation effective July 1, and the delegates assumed that the General Assembly would normally finish its regular session prior to April 1. . . . The extra fiscal quarter was designed to provide a two-year 'budget.' . . .

Over the years, regular sessions got longer and June 30 became the normal adjournment target. Thus, the 'expiration of the first fiscal quarter' after adjournment became an 'overlapping' quarter in which the previous biennium's appropriations and the new biennium's appropriations were available. The proposed 1922 Constitution sought to clear up this confusion by providing that appropriations were for a two-year period from July 1 to June 30, but that money obligated before June 30 could be paid up to September 30.

The fuzzy language of Section 18 made it possible recently for the Attorney General to advise the Chairman of the Commission on the Organization of the General Assembly that not only could the legislature turn itself into an 'annual session' body [but] it could [also] adopt annual appropriation acts.

<sup>18</sup> ILL. CONST. art. IV, § 18 (1870) (emphasis added).

<sup>19</sup> *Id.* art. IV, § 20 (emphasis added).

<sup>20</sup> *Id.* art. V, § 16.

The foregoing litany of provisions and prohibitions amply manifests the attitude of the delegates who assembled to draft the third constitution of Illinois, the Constitution of 1870. Faced with the practical necessity of legislative appropriation, they drafted numerous safeguards intended to moderate the indispensable legislative entry into the public till. Aware of the possibility that future happenings might warrant the incurring of state debt to accomplish the legitimate purposes of government, they erected constitutional barriers intended to check any legislative propensity to postpone taxation through borrowing. In short, public funds and the full faith and credit of the state remained vested in the depository of legislative power, but each was well guarded by the vigilant sentries of constitutional mandate and prohibition. From an historical standpoint, it is not at all surprising that the mandates were numerous and the prohibitions absolute.

### *The Roots of Debt Limitation*

Eleven years before the ratification of the Constitution of 1848, which was the first Illinois constitution containing restrictions on either the appropriation process or the incurring of debt,<sup>21</sup> the nation was beset with the depression known as the Panic of 1837.<sup>22</sup> For more than a decade before the "panic," discussions about local internal improvements, especially regarding the building of railroads, canals and better roads, were in vogue in Illinois and other states:

[B]etween 1829 and 1836 various local projects for internal improvements had been broached, discussed, expanded, all of them being based on more and more extravagant calculations of profits. The time was ripe for their friends to unite, and by bargains of one sort or another to commit the state to putting under construction a wild and fantastic system of internal improvements.<sup>23</sup>

The Illinois General Assembly was caught in the rush for internal improvements and passed legislation which launched the state on what was later called "mad speculation."<sup>24</sup> The mania for internal improvement was not satisfied even by the legislatively approved internal government system itself; for private enterprise flourished side by side with it. But the speculative boom was short-lived, and the collapse which was ultimately to follow began in 1837. The panorama of the collapse has been ably

<sup>21</sup> Note 7 *supra*. See also ILL. CONST. art. III, §§ 37, 38 (1848).

<sup>22</sup> For a complete history of the factors surrounding the Panic of 1837 and its consequences in Illinois, see T. PEASE, *THE CENTENNIAL HISTORY OF ILLINOIS* (1922); J. KRENKEL, *ILLINOIS INTERNAL IMPROVEMENTS, 1818-1848* (1958); and A. COLE, *THE ERA OF THE CIVIL WAR, 1848-1870* (1919).

<sup>23</sup> 2 T. PEASE, *THE CENTENNIAL HISTORY OF ILLINOIS, The Frontier State 1818-1848*, at 205 (1922).

<sup>24</sup> *Id.* at 215.

summarized in a recent work on state debt as follows:

Much has been written about the causes of the 1837 depression . . . the rapid rise in state borrowing for unsuccessful internal improvements was undoubtedly a contributing factor. The severe panic of 1837 did not lead to an immediate reduction in state borrowing for several reasons. Many states had incomplete projects on their hands that had to be completed before revenues which would service the debt incurred for the projects could be realized. This fact, coupled with a general feeling that the recession was temporary and that business was 'fundamentally sound,' encouraged states to go ahead with their building programs.

The later collapse in 1839 and 1840 signaled the seriousness of the economic depression, and most state building programs came to a halt. States were beset by the problems of decreasing revenues due to the depression and mounting debt service requirements. Many canals and railroads constructed in this period were never completed and failed to provide any revenues, but nonetheless the debts had to be serviced. States were further hindered in their attempts to meet their debts by a general deficiency in state tax structures. Inevitably, the most burdened states defaulted on their debts and eventually, several states repudiated portions of their debts.<sup>25</sup>

In 1842 repudiation of Illinois' debts appeared to some to be inevitable, but under the leadership of an executive branch committed to fiscal integrity, the legislature adopted a resolution recognizing that the state had a moral and legal obligation to pay every cent contracted by its agents.<sup>26</sup> In 1880, more than four decades after repudiation seemed inevitable, the last bonds were called in.

In the interim, there was a widespread belief that the rapid development of Illinois made a revision of the 1818 Constitution advisable which culminated in the assemblage of one hundred and sixty-two delegates in the summer of 1848. With the dismal failure of internal improvement financing through state borrowing a graphic and recent memory to all of the delegates, they drafted the first Illinois constitution which restricted state borrowing.<sup>27</sup> As a recent historian put it:

No longer could the lawmakers plunge the state into debt through grandiose public works and banking schemes; only by referendum approval of a specific law could the legislature contract debts in excess of fifty thousand dollars. Another provision made it impossible to grant the state's credit to any corporation or association.<sup>28</sup>

When Illinois delegates once again assembled to draft the Constitution of 1870, they retained the rigid restrictions on

<sup>25</sup> A. HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT 7 (1963) [hereinafter cited as HEINS].

<sup>26</sup> R. HOWARD, ILLINOIS 227-36 (1972) [hereinafter cited as HOWARD].

<sup>27</sup> See BRADEN & COHN 186. See also ILL. CONST. art. III, §§ 37, 38 (1848).

<sup>28</sup> HOWARD at 233.

state borrowing of the 1848 Constitution.<sup>29</sup> The memory of the financial fiasco of the 1830's was strong enough to give rise to visions of the state once again teetering on the brink of bankruptcy, if the restrictions were removed.<sup>30</sup> Whatever visions danced in the heads of the framers of the 1970 Constitution, they were not visions of state bankruptcy.

#### THE 1970 CONSTITUTION

The state debt provisions of the 1970 Constitution are found in article IX, the Revenue Article, which specifically deals with the legislature's power to raise revenue and other related revenue matters. Section 9, "State Debt," is a comprehensive section outlining the legislature's power to pledge the full faith and credit of the state: "No State debt shall be incurred except as provided in this Section."<sup>31</sup> An examination of the subsections of this provision will begin to reveal the substantial alteration worked by the drafters of the 1970 charter.

1. A broad definition of "state debt," which incorporates prior judicial construction of the term and a great deal more, acts as a preface to the section:

For the purpose of this Section, 'State debt' means bonds or other evidences of indebtedness which are secured by the full faith and credit of the State or are required to be repaid, directly or indirectly, from tax revenue and which are incurred by the State, *any department, authority, public corporation or quasi-public corporation of the State, any State college or university, or any other public agency created by the State, but not by units of local government, or school districts.*<sup>32</sup>

2. No dollar limit is placed on the amount of debt that can be incurred by the legislature:

State debt for specific purposes may be incurred or the pay-

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<sup>29</sup> ILL. CONST. art. IV, §§ 18, 20; art. V, § 16 (1870). It is worthy of note that the 1848 Constitution differed from the 1870 Constitution in only three aspects: (1) appropriations were for the period ending with adjournment of the next legislature instead of at the end of a fiscal quarter following adjournment; (2) the lapsing of appropriations was not covered; and (3) the temporary deficit debt limit was only \$50,000. See BRADEN & COHN 186.

<sup>30</sup> See HEINS at vi where it is stated:

Constitutional prohibitions against state debt were born out of the financial difficulties encountered by numerous states prior to 1845. Caught by the depression of 1837 in an overextended debt position, nine states defaulted on their debt. Public revulsion in many states forced the adoption of constitutional amendments that prohibited future borrowing by state legislatures for works of internal improvement. In some states, the prohibition was mitigated by the inclusion of a referendum provision which permitted the electorate to approve borrowing for specific purposes; but in other states the restriction was absolute. Without exception, states joining the Union after 1845 wrote some form of debt restriction into their constitutions.

<sup>31</sup> ILL. CONST. art. IX, § 9(a) (1970).

<sup>32</sup> *Id.* (emphasis added). Note that "units of local government" are defined in the new constitution as: counties, municipalities, townships, special districts, and units designated as units of local government by law, which exercise limited gov-



ment of State or other debt guaranteed in *such amounts* as may be provided . . . .<sup>33</sup>

3. The referendum once constitutionally requisite to incurring state debt in excess of \$250,000 has been diluted to an alternative method of approving state debt legislation:

*either* in a law passed by the vote of *three-fifths* of the members elected to each house of the General Assembly or in a law approved by a majority of the electors *voting on the question at the next general election following passage*.<sup>34</sup>

4. Publication of the law authorizing the debt is no longer required, irrespective of whether the debt legislation is effected by referendum or by legislative action only.<sup>35</sup>

5. Provision for retirement of the debt must still be made: Any law providing for the *incurring or guaranteeing* of debt shall set forth . . . the manner of repayment.<sup>36</sup>

6. Submission to the people of the law which will effect retirement of the debt (by a direct tax or other means) is no longer required.<sup>37</sup>

7. No imperative direction as to the disposition of funds acquired through state debt is included, other than the "specific purposes" language mentioned below.<sup>38</sup>

8. Neither the Finance Article,<sup>39</sup> nor the Revenue Article,<sup>40</sup> contain either a time limitation on appropriations or state debt, or a lapse provision.

9. Neither the Finance Article nor the Revenue Article contain specific constitutional procedures which must be pursued in order to increase the aggregate amount of appropriations.<sup>41</sup>

10. The absolute and emphatic prohibition against assuming responsibility for the debts of entities other than the state no longer obtains:

'State debt' means bonds or other evidence of indebtedness . . . incurred by the State, *any* department, authority, public corporation or quasi-public corporation of the State, *any* State college or university, or *any other* public agency created by the State . . .<sup>42</sup>

11. The General Assembly is now empowered to authorize,

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ernmental powers or powers in respect to limited governmental subjects, but does not include school districts.  
ILL. CONST. art. VII, § 1 (1970).

<sup>33</sup> ILL. CONST. art. IX, § 9 (b) (1970) (emphasis added).

<sup>34</sup> *Id.* (emphasis added).

<sup>35</sup> *Id.* § 9.

<sup>36</sup> *Id.* § 9 (b) (emphasis added).

<sup>37</sup> *Id.* § 9.

<sup>38</sup> *Id.*

<sup>39</sup> ILL. CONST. art. VIII (1970).

<sup>40</sup> ILL. CONST. art. IX (1970).

<sup>41</sup> Notes 39 and 40 *supra*.

<sup>42</sup> ILL. CONST. art. IX, § 9 (a) (1970) (emphasis added).

by ordinary majority, limited amounts of short-term state debt:

State debt in anticipation of revenues to be collected in a fiscal year may be incurred by law in an amount not exceeding 5% of the State's appropriations for that fiscal year. Such debt shall be retired from the revenues realized in that fiscal year.<sup>43</sup>

State debt may be incurred by law in an amount not exceeding 15% of the State's appropriations for that fiscal year to meet deficits caused by emergencies or failures of revenue. Such law shall provide that the debt be repaid within one year of the date it is incurred.<sup>44</sup>

If the requisite circumstances exist, these authorizations can apparently be combined. In such a case, the General Assembly, by ordinary majority, could borrow (on short term) an amount equal to 20% of the state's annual appropriations.

12. The legislature has power to enact a bill incurring a new state debt to refund an outstanding debt by a majority vote, if the refunding debt matures within the term of the state debt being refunded:

State debt may be incurred by law to refund outstanding State debt if the refunding debt matures within the term of the outstanding State debt.<sup>45</sup>

13. Debts not pledging the full faith and credit of the state can also be authorized by the legislature by ordinary majority:

The State, departments, authorities, public corporations and quasi-public corporations of the State, the State colleges and universities and other public agencies created by the State, may issue bonds or other evidences of indebtedness which are not secured by the full faith and credit or tax revenue of the State nor required to be repaid, directly or indirectly, from tax revenue, for such purposes and in such amounts as may be authorized by law.<sup>46</sup>

14. Any law which provides for the incurrence of state debt must set forth the "specific purposes" for which the debt is incurred:

State debt for specific purposes may be incurred . . . .<sup>47</sup> Any law providing for the incurring or guaranteeing of debt shall set forth the specific purpose . . . .<sup>48</sup>

15. The general provisions of the Finance Article complement the "specific purposes" requirements noted above:

Public funds, property or credit shall be used only for public purposes.

The State, units of local government and school districts shall incur obligations for payment or make payments from public funds only as authorized by law or ordinance.<sup>49</sup>

<sup>43</sup> *Id.* § 9(c).

<sup>44</sup> *Id.* § 9(d).

<sup>45</sup> *Id.* § 9(e).

<sup>46</sup> *Id.* § 9(f).

<sup>47</sup> *Id.* § 9(b).

<sup>48</sup> *Id.*

<sup>49</sup> ILL. CONST. art. VIII, § 1, (a) & (b) (1970).

The mere enumeration of state debt provisions in the new charter begins to make the differences between the old and new constitutions and the changes in attitude between the drafters of each document prominent. A close comparison of the two instruments will bring the dissimilarities into high relief.

#### THE 1870 AND 1970 CONSTITUTIONS FACE TO FACE

The 1870 Constitution did not contain a Finance Article. It was the opinion of the Committee on Revenue and Finance of the 1970 Constitutional Convention, however, that it would be more appropriate to consolidate provisions relevant to fiscal control in a single article rather than scatter them among several articles, as was the case in the old constitution, and they so stated:

The Finance Article is new; the 1870 constitution contains nothing comparable. Several provisions dealing with various aspects of the fiscal procedures of the State appear in the Executive and Legislative Articles of the present constitution. They do not present a coherent finance system; many of the provisions are archaic and restrictive. The Committee recommends elimination of them in favor of a relatively simple and flexible Finance Article which allocates the responsibility for fiscal decision-making between the executive and legislative branches and opens up the entire fiscal process of the state and local government to public scrutiny.<sup>50</sup>

Though the 1870 Constitution did contain a Revenue Article,<sup>51</sup> the Committee on Revenue and Finance thought some restructuring was necessary here, too:

The Revenue Article presented by the Committee is shorter, simpler and, in our judgment, better-organized than Article IX of the 1870 Constitution.<sup>52</sup>

Even a cursory comparison of the two constitutions leads to the conclusion that at least from an organizational standpoint, the committee was justified in its assertion that the restructuring of these articles in the new constitution was more orderly and logical than they had been in the old constitution. This orderly

<sup>50</sup> REC. OF PROC., SIXTH ILL. CONST. CONV., *Committee Proposals* Vol. VII at 2001 (1969-70) [hereinafter cited as *Committee Proposals*].

From an organizational standpoint, the committee was justified in asserting that the structure of the new article was coherent and logical: Sections 1 and 2 were general provisions dealing with state and local government. Sections 3 through 6, in order, dealt with the various stages of state finance. Section 3 provided for an executive budget; sections 4 and 5 dealt with the appropriation process and section 6 provided for a post audit of state funds. Section 7 gave the General Assembly authority to establish local accounting and reporting systems. The article which finally emerged from the convention and was submitted to the people preserved this order, but with only four sections, making use of seven subsections.

<sup>51</sup> ILL. CONST. art. IX (1870).

<sup>52</sup> *Committee Proposals* at 2052. The organization of the committee's proposed Revenue Article was essentially the same as that ratified by the voters. Each contained nine sections (the 1870 Constitution had a Revenue Article composed of thirteen sections.) The only significant organizational change was the replacement of the proposed section 5, 'State Assessed Property' with proposed section 4.2, 'Personal Property Taxation.'

new structure assists inquiry into the content of the provisions, beginning with the new definition of "state debt."

As quoted earlier, "state debt" is broadly defined in the new constitution to include all evidences of indebtedness secured by the full faith and credit of the state, required to be repaid directly or indirectly from tax revenue, and which are incurred by the state or any agency thereof, but not by units of local government or school districts.<sup>53</sup> The etymology of the definition is somewhat difficult to trace. Its foundation was laid in the committee's first proposal.<sup>54</sup> The Style, Drafting and Submission Committee, in reordering the sequence of the entire section, defined "state" and "debt" individually.<sup>55</sup> The definition ratified by the voters appears to be a confluence of the two individual definitions,<sup>56</sup> which were united sometime before the final reading of the section.

In an effort to minimize the possibility that the courts might hold that an "agency" created by the legislature was not within the definition of "state," the Committee on Revenue and Finance included the words "and other agencies of the State, whether established by the Constitution or by law."<sup>57</sup> The Style Committee substituted the words "public agency created by the State" as more clearly establishing the same purpose.<sup>58</sup>

It appears that the underlying purpose of the Committee on Revenue and Finance in broadening the definition of "state" agency to include any "public agency created by the State" was

<sup>53</sup> Note 31 *supra*.

<sup>54</sup> See *Committee Proposals* at 2174 where it is stated:

This section shall apply to every department, authority, public corporation and quasi-public corporation of the State, and to State colleges and universities and other agencies of the State, whether established by this Constitution or by law, but shall not apply to any local government.

<sup>55</sup> See *Committee Proposals* at 2255 where it is stated:

For the purposes of this Section, 'State' includes every department, authority, public corporation and quasi-public corporation of the State; every State college and university; and every other public agency created by the State; but does not include units of local government or school districts. For purposes of this Section, 'debt' includes bonds or other evidence of indebtedness whether secured by the full faith and credit of the State or by specific tax or non-tax revenue.

<sup>56</sup> ILL. CONST. art. IX, § 9(a) (1970).

<sup>57</sup> See *Committee Proposals* at 2175-76 where it is stated:

These provisions apply to all state agencies including state colleges and universities, toll road authorities, building authorities and any agency set up in the future . . . .

<sup>58</sup> See *Committee Proposals* at 2256-57 where it is stated:

The draft adopted on First Reading included the words 'whether established by this Constitution or by law' at the end of the 'definition' of 'State.' The purpose of the phrase was to limit to the maximum extent the possibility of creating an 'agency' which the courts might hold was not an 'agency of the State.' The proposed substitution, 'public agency created by the State,' serves the same purpose.

It is interesting to note that the committee made a purposeful effort to emphasize the legislature's power to create state agencies for whose debts the full faith and credit of the state could be pledged.

to bring all such agencies within the proscription laid down at the beginning of the section — “No State debt shall be incurred except as provided in this Section,”<sup>59</sup> — and thereby obviate the possibility that any such agency “might, through lease or other arrangement, attempt to by-pass the requirements for authorizing the incurrence of debt.”<sup>60</sup> The committee supported the proposal on two grounds. First:

The proposal makes all forms of borrowing by the state and all its agencies and authorities subject to the same restrictions.<sup>61</sup>

And second:

The proposed section will prevent universities and toll road authorities [as well as other agencies] from entering into large construction projects to be paid from student fees or project revenues without legislative approval. On the other hand, clearly justifiable projects to be paid from earned revenues should encounter little difficulty in obtaining such approval.<sup>62</sup>

The committee’s effort to bring such “large construction projects” within legislative scrutiny is a laudable one. Indeed, it is advisable that the financing of statewide internal improvements be subjected to legislative inspection and study. But in broadening the definition of “state debt” to include any agency of the state which is arguably a “department, authority, public corporation or quasi-public corporation of the State, any State college or university, or any other public agency created by the State” and thereby bringing such agencies within the constitutional proscription that “state debt” shall be incurred only as provided in article IX section 9, the drafters concurrently extended the umbrella of the state’s full faith and credit to cover agencies heretofore left to fend for themselves in economic storms of their own creation. The Constitution of 1870, in the most forceful language, specifically prohibited any such extension:

The state shall *never* pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to or in aid of any public or other corporation, association or individual.<sup>63</sup>

The soft successor of this potent prohibition is found in article VIII section 1 (a) of the new constitution: “Public funds,

<sup>59</sup> ILL. CONST. art. IX, § 9(a) (1970).

<sup>60</sup> *Committee Proposals* at 2176.

<sup>61</sup> *Id.* at 2182.

<sup>62</sup> *Id.* at 2183.

<sup>63</sup> ILL. CONST. art. IV, § 20 (1870) (emphasis added).

See also BRADEN & COHN 197-98 where it is stated:

It would appear that this section was aimed at two mid-Nineteenth Century problems arising from the drive for internal improvements — particularly, railroads and canals. One was the use of state credit or funds to assist private entrepreneurs engaged in building such improvements. The other was fear that the state might be induced to bail out local governments that had gotten deeply into debt, usually in connection with internal improvements.

property or credit shall be used only for public purposes.”<sup>64</sup> The committee justified its proposed substitution on the following grounds:

Article IV, Section 20, of the present constitution prohibits the state from assuming the debts of or loaning credit to any public or private corporation or individual. Illinois courts have rarely utilized this section to prevent state financial aid to private persons or institutions . . . Instead, the courts have developed the public purpose doctrine to determine whether a given transaction accomplishes a proper governmental function . . . The proposed language removes the prohibition against assuming debts or loaning credit and substitutes the public purpose test.<sup>65</sup>

It is true that Illinois courts had infrequently applied the constitutional prohibition of article IV section 20 in a hard and fast manner,<sup>66</sup> but the substitution of an allegedly workable “public purpose test” seems more theoretical than real. The committee attempted to assist in the application of the substituted test by stating:

In this context, a public purpose is served whenever the appropriation is to be used for governmental purposes and a non-governmental organization is essentially a conduit or agent of the state in implementing its governmental purposes.<sup>67</sup>

The test sought to be substituted appears to be an unsatisfactory one for three reasons. First, Illinois courts have held “public purpose” to include a myriad of objectives.<sup>68</sup> Second, the contours of the “public purpose test” have never been clearly defined by Illinois courts. Indeed one case, by way of judicial dictum, has stated that “public purpose” is an elastic concept, capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of a constitution.<sup>69</sup> Third but most significant, Illinois courts have held

<sup>64</sup> ILL. CONST. art. VIII, § 1 (1970).

<sup>65</sup> *Committee Proposals* at 2010.

<sup>66</sup> Section 20 of article IV of the 1870 Constitution has frequently been invoked in cases which come before Illinois courts, but has seldom been the decisive issue. It appears that there have been only three successful invocations of section 20, two of which are rather indirect. See *Schuler v. Board of Education*, 370 Ill. 107, 18 N.E.2d 174 (1938); *Chicago Motor Club v. Kinney*, 329 Ill. 120, 160 N.E. 163 (1928); *Fergus v. Russell*, 270 Ill. 304, 110 N.E. 130 (1915).

<sup>67</sup> *Committee Proposals* at 2009-10. The committee prefixed the quoted statement with this remark:

The first sentence limits the use of public funds, property and credit to a public purpose. It permits the state and its political subdivisions to enter into financial arrangements with governmental or non-governmental organizations whenever a public purpose will be served thereby. (emphasis added).

<sup>68</sup> See generally *Krebs v. Board of Trustees of Teachers' Retirement System*, 410 Ill. 435, 102 N.E.2d 321 (1951); *People ex rel. Lawless v. City of Quincy*, 395 Ill. 182, 69 N.E.2d 892 (1946); *People v. Chicago Transit Authority*, 392 Ill. 77, 64 N.E.2d 4 (1945).

<sup>69</sup> *People ex rel. Adamowski v. Chicago R.R. Terminal Authority*, 14 Ill. 2d 230, 151 N.E.2d 311 (1958). See generally *Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Illinois State Toll Highway Comm'n*, 42

that what is for the public good and what are "public purposes" are questions to be decided, in the first instance, by the legislature and that in deciding a question of what is a "public purpose," the legislature is vested with wide discretion.<sup>70</sup> Against this background of decisional law, it appears that the limits of "public purpose" are bounded solely by the imagination and ingenuity of legislators. Moreover, it is difficult to perceive how the substituted "public purpose test" can be applied by the judiciary to check the legislature which, in the first instance and with wide discretion, decides for itself what is a "public purpose." In short, the legislature's determination on the matter appears, under the new charter, to be constitutionally decisive.

As the bureaucratic fingers of state government elongate and seek new areas to control, the institutionalization of the circular "public purpose test" in the new constitution leaves the judiciary without constitutional ground on which to stand to check legislative overborrowing. The unequivocal constitutional prohibition against assuming the debts of or loaning credit to any public or private corporation or individual was the strongest barricade the judiciary had at its disposal in restraining any hasty legislative propensity to solve through borrowing the financial difficulties of an insolvent "public or other corporation, association or individual." If one hundred years of case law demonstrates that the old prohibition was seldom a decisive issue, perhaps it is because the legislature was indisposed to run afoul of its absolute language. At any rate, the broad definition of "state debt" and the circular quality of the "public purpose test" provide practically no ground from which the bench may check legislative use of the full faith and credit of the state. The constitutionalization of these principles may, so far as judicial restraint on legislative borrowing is concerned, foreshadow a shift from infrequent restraint to no restraint.

A truly sound understanding of the ramifications of this increase in the number of potential beneficiaries under the expansive definition of "state debt" and the constitutionalization of the "public purpose test" cannot be developed until other similar extensions of the legislative power to borrow are examined. The most significant of these protracted powers follow from the removal of the dollar lid on casual borrowing and the emasculation of the once required referendum.

As stated earlier in this comment, the 1870 Constitution

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Ill. 2d 385, 251 N.E.2d 253 (1969); *Antle v. Tuchbreiter*, 414 Ill. 571, 111 N.E.2d 836 (1953); *People ex rel. Douglas v. Barrett*, 370 Ill. 464, 19 N.E.2d 340 (1939); *Martens v. Porardy*, 264 Ill. 178, 106 N.E. 266 (1914).

<sup>70</sup> *People ex rel. Gutknecht v. Chicago Regional Port District*, 4 Ill. 2d 363, 123 N.E.2d 92 (1954).

permitted the legislature to borrow, by simple majority vote, up to \$250,000 to meet casual failures in revenue.<sup>71</sup> Amounts exceeding that figure required a referendum at which the proposed law authorizing the debt had to receive a majority of votes cast for the members of the general assembly at such election in order to become law.<sup>72</sup> Other strict provisions with respect to publication,<sup>73</sup> retirement,<sup>74</sup> and disposition of funds generated by the debt<sup>75</sup> also impacted the enactment authorizing the debt.

Today, the amount of money the Illinois General Assembly is empowered to borrow is unlimited,<sup>76</sup> provided it can muster a three-fifths majority of the members elected to each house.<sup>77</sup> If the assembly is unable to do so, only then is it required to resort to the people for approval<sup>78</sup> and a mere majority of those voting on the question is needed<sup>79</sup> for the debt legislation to become law.

After having heard from over one hundred and fifty witnesses<sup>80</sup> and examined more than twenty other authorities, as well as statutes and staff papers,<sup>81</sup> the Revenue and Finance Committee proposed that the restrictions imposed on the legislature by the old constitution be eased. The proposal was supported by three committee contentions: (1) that the existing restrictions had not accomplished their intended purpose; (2) that constitutional state debt limitations restrain borrowing far less than was

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<sup>71</sup> ILL. CONST. art. IV, § 18 (1870).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> ILL. CONST. art. IX, § 9(b) (1970).

<sup>77</sup> *Id.* Initially the Committee on Revenue and Finance submitted a proposal calling for a two-thirds majority:

The act shall be approved either:

1. By a majority of the members elected and serving in each house of the General Assembly and by a majority of the electors voting on the question at a referendum held at the next general election; or
2. By *two-thirds* of the members elected and serving in each house of the General Assembly.

*Committee Proposals* at 2174 (emphasis added). This was later reduced to a three-fifths majority.

It is also worthy of note that the Style Committee inverted the order in which the alternatives appeared in the Revenue and Finance Committee's first proposal. See *Committee Proposals* at 2256 and ILL. CONST. art. IX, § 9(b) (1970).

<sup>78</sup> ILL. CONST. art. IX, § 9(b) (1970).

<sup>79</sup> See *Committee Proposals* at 2175 where it is stated:

The General Assembly may, by simple majority vote, submit the question of authorizing a debt issue to the people for referendum vote at a general election. Approval by a simple majority of those voting on the question is then required. (emphasis added).

Compare this language with that of the old constitution: shall . . . have been submitted to the people, and have received a majority of the votes cast for members of the general assembly at such election.

ILL. CONST. art. IV, § 18 (1870) (emphasis added).

<sup>80</sup> *Committee Proposals* at 2193-99.

<sup>81</sup> *Id.* at 2200-01.



commonly believed; and (3) that the present constitutional restrictions resulted in increased interest and other costs.

With respect to the first contention, the committee argued:

These provisions have not accomplished their intended purpose. In Illinois, as in other states, it has proved possible for the state to borrow by using revenue bonds, building authorities, and similar devices.<sup>82</sup>

In support of this contention, the committee chronicled legislative attempts to circumvent the constitutional debt limitation through the use of "building authorities."<sup>83</sup> The committee cited the Illinois Armory Board of 1935,<sup>84</sup> the Illinois State Public Building Authority of 1941,<sup>85</sup> the new Illinois Building Authority of 1961,<sup>86</sup> and finally, the Highway Trust Authority of 1969.<sup>87</sup> The committee pointed out that the constitutionality of each "building authority" was tested in the courts, resulting in apparently inconsistent holdings: (1) the act authorizing the 1935 Armory Board was held to be constitutional;<sup>88</sup> (2) the Act authorizing the 1941 Authority was held to be unconstitutional;<sup>89</sup> (3) as changed, the act authorizing the 1941 Authority was held to be constitutional,<sup>90</sup> but the act authorizing the 1969 Trust Authority was held to be unconstitutional.<sup>91</sup>

Any surface inconsistency among the four supreme court

<sup>82</sup> *Id.* at 2176.

<sup>83</sup> *Id.* at 2176-77. See also HEINS at vi where it is stated:

After 1900, mounting pressure to provide public improvements led some state legislatures to search for means of borrowing which would bypass constitutional restrictions. This search led to the development of revenue bonds, public corporations, lease-purchase agreements, and reimbursement obligations — devices which have enabled states to borrow funds without creating debt in the eyes of constitutional provisions. State debt created by these devices may be termed nonguaranteed debt in the sense that states do not pledge their general funds for the repayment of such debt.

<sup>84</sup> ILL. REV. STAT. ch. 129, §§ 223-228 (1971).

<sup>85</sup> ILL. REV. STAT. ch. 127, §§ 201-213 (1941).

<sup>86</sup> ILL. REV. STAT. ch. 127, § 213.1 *et seq.* (1971).

<sup>87</sup> Laws of July 8 & 10, 1969, ILL. REV. STAT. ch. 121, § 101-1 to 101-20 (repealed 1972 by P.A. 77-1861, §§ 7 & 8).

<sup>88</sup> See *Loomis v. Keehn*, 400 Ill. 337, 80 N.E.2d 368 (1948) holding that the Armory Board Act did not violate section 18 of article IV of the 1870 Constitution because the state did not irrevocably obligate itself to lease the buildings to be erected by the board.

<sup>89</sup> See *People ex rel. Greening v. Green*, 382 Ill. 577, 47 N.E.2d 465 (1943) holding that since the board to be established for the Illinois State Building Authority was to consist of all elected officials and a member of the Illinois Supreme Court, the Authority could not validly claim to be separate from the state and the authorized debt was therefore a debt of the state in violation of section 18 of article IV.

<sup>90</sup> See *Berger v. Howlett*, 25 Ill. 2d 128, 182 N.E.2d 673 (1962) holding that since the board of seven members created in conjunction with the new Illinois Building Authority could not have a member who was an elected official, this and other changes met the objection raised in the *Greening* case, *supra* note 89, and the act was valid.

<sup>91</sup> See *Rosemont Building Supply, Inc. v. Illinois Highway Trust Authority*, 45 Ill. 2d 243, 258 N.E.2d 569 (1970) holding that the act establishing the Highway Trust Authority was invalid because the financial structure of the Authority could not be considered independent of the state and,

decisions treating the above listed "building authorities" is resolved by close inquiry into the cases. The thread which unifies the cases is the Illinois Supreme Court's refusal to permit the legislature to circumvent the old debt limitation unless the entity it creates is clearly separate and distinct from the state itself. Other such independent agencies do exist, as the committee pointed out<sup>92</sup> and there is merit to the committee's drive for a constitutional solution eliminating the need for this kind of legislative "end-around." But after reviewing the cases, it appears that any legislative frustration might have been allayed by better draftsmanship. It is also worthy of note that with the first use of state public authorities for the purpose of circumventing section 18 of article IV occurring in 1935, the prohibition had, for sixty-five years, ably performed its intended purpose.

As to the second contention, the committee determined that:

It cannot be definitely proved that debt limits are completely ineffective in limiting the amount of state borrowing, but it is clear that they are far less effective than commonly believed.<sup>93</sup>

This determination was arrived at after the committee had reviewed studies of the effect of constitutional limitations on state debt and investigated the debt situation in those states having constitutional restrictions,<sup>94</sup> such as Delaware and Massachusetts, and those states which have none, such as New Hampshire, Vermont, Connecticut, Mississippi and Tennessee.<sup>95</sup>

Three delegates vigorously dissented from the committee's determination on this point.<sup>96</sup> Their position was that while the current debt limit was an anachronism and completely unrealistic, the majority proposal was an unacceptable modification because it denied the people the right to vote upon all large, long-term bond issues that must be repaid through the labor of

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therefore, the debts of the Authority were the debts of the state in violation of section 18 of article IV.

<sup>92</sup> See *Committee Proposals* at 2179 where the committee states:

Several other agencies of state government also issue bonds which are not subject to the debt limitation or referendum requirement of Section 18. For example, state colleges and universities issue bonds for construction of athletic facilities and student unions to be paid for by earnings and student fees. Other facilities, such as college dormitories and toll roads, are paid for from the proceeds of bonds which are retired solely from the earnings of the facilities.

It is true that these agencies may issue bonds unfettered by section 18 of article IV, but note that the issuance of such bonds does *not* involve the full faith and credit of the state.

<sup>93</sup> *Committee Proposals* at 2181-82.

<sup>94</sup> See HEINS at 9.

<sup>95</sup> *Committee Proposals* at 2181.

States can be divided into roughly four groups in regard to power to incur debt: (1) states with no significant constitutional limitation; (2) states with absolute limitations; (3) states with no limitations but requiring voter approval by referendum; and (4) states requiring referendum approval but still retaining a maximum debt limit.

<sup>96</sup> *Id.* at 2183.

taxpayers who had no voice with respect to incurring the debt. More immediate in rebuttal of the committee's majority contention, there was ample evidence to find that constitutional barriers did, indeed, prevent runaway borrowing and wasteful expenditure.<sup>97</sup> The following quote soundly states the dissenting position:

Debt limits do not provide perfect expenditure controls, but such limitations tend to discourage loose spending practices. If the legislature knows it cannot borrow to meet expenditures, it must take steps to keep expenditures within anticipated revenues. In addition, referenda requirements held the people to focus attention on the state's fiscal processes, thereby better insuring more effective, democratic control of state expenditures.<sup>98</sup>

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<sup>97</sup> *Id.* at 2184-85 where the dissenters stated:

The majority report contends that it cannot be definitely proven that constitutional debt limits are effective in limiting the amount of state borrowing. The majority report, however, failed to consider all of the evidence of this point.

B. V. Ratchford, an expert on state debt limits, has grouped the states into three groups according to the methods used to authorize borrowing — legislative action, constitutional amendment, and referenda. His findings showed that the states in which the legislatures authorize borrowing had debts which were more than twice as large, both in per capita terms and in relation to personal income, as the states in which borrowing must be authorized by constitutional amendment. The states which use referenda fell between these extremes on both bases of measurement. Ratchford, 'State and Local Debt Limitations,' *Proceedings of the National Tax Association* 215-29 (1958).

The Committee report infers that a constitutional requirement of a referendum on state debt tends to cause states to borrow through revenue bonds, building authorities, and similar devices in order to avoid the referendum requirements. The study by Professor Ratchford, however, refutes this inference.

Ratchford showed that non-guaranteed obligations have been used to a greater extent in those states in which the legislatures have freedom to borrow than in states with referenda requirements. He concluded that 'factors other than the avoidance of constitutional and statutory debt limits are involved in the use of revenue bonds.'

Frank M. Landers, director of the Michigan Budget Division, stated in regard to debt limits that 'it is not difficult to find situations where the existence of constitutional barriers prevented runaway borrowing and, presumably, wasteful expenditure.' *Major Problems in State Constitutional Revision* (edited by W. Brooke Graves) 233 (1967).

As indicated in the Committee report, 'in Delaware and Massachusetts the legislature is free to borrow any amount for any purpose but special majorities of three-fourths and two-thirds, respectively, are required.' The state debt of Delaware and Massachusetts in 1966, in per capita terms, was \$653.23 and \$329.19, respectively. The debt of all states for the same year, in per capita terms was only \$151.57. Advisory Commission on Intergovernmental Relations, *Fiscal Balance in the American Federal System* 286-87 (1967).

Connecticut, New Hampshire, Tennessee, and Vermont have no constitutional debt limits, as indicated in the Committee report. The state debt in each of these four states in 1966, in per capita terms, was \$429.24, \$197.21, \$59.51, and \$191.48, respectively. In each of these states except Tennessee, the state debt, in per capita terms exceeds that of the average for all states.

The Committee report indicates that Mississippi has no constitutional debt limit. This is in error, since the Mississippi Constitution provides that the State bonded indebtedness cannot be in excess of 1½ times the sum of all revenue collected in the state during any one of the four preceding fiscal years. *Mississippi Constitution*, Section 115.

<sup>98</sup> *Id.* at 2186.

As to its third contention, the committee found that:

[T]he existence of constitutional debt limitations has increased interest costs and has caused the expenditure of large sums of money for additional administrative and insurance costs, resulting from the use of authorities and other techniques devised to avoid state debt limits.<sup>99</sup>

This finding seems valid and was neither dissented from at the committee stage nor challenged on the floor. But whether the additional expense could be justified as constitutional "overhead" imposed by the people on those who daily run the business of government to insure restraint in pursuing credit transactions was never raised. Even though it was more costly to so inhibit their agents, if the restrictions protected the taxpayer from overborrowing, the price may well have been worth paying.

Having eliminated the ceiling on borrowing and having provided for passage of the debt producing enactments by a three-fifths majority, the drafters turned their attention to an alternative method of authorizing the legislation in the event a three-fifths majority could not be had.

As an alternative method of passing debt legislation, the new constitution provides that a simple legislative majority plus a simple majority of the electorate voting on the question will enact a bill proposing state debt into law.<sup>100</sup> Reduced to its operative impact, what this means is that the burden of proving the merit of putting the State of Illinois into debt is no longer upon those advocating the indebtedness. Prior to the 1970 Constitution, those advocating the debt were required to convince a majority of those *voting for members of the general assembly* of the merit of their proposal.<sup>101</sup> Under those circumstances, a voter indifferent to, opposed to, or ignorant of, the proposition would refrain from voting on it and this would operate to the disadvantage of those advocating the debt. The framers of the 1870 Constitution obviously believed that those who would put this state into debt ought to be charged with the burden of informing the electorate of the wisdom of doing so.

By allowing a *majority* of those *voting on the question* to effect enactment of debt legislation, those indifferent to, opposed to, or ignorant of, the proposition must now vote negatively on it to prevent enactment. It appears that the framers of the 1970 Constitution believe that those who would keep this state from going into debt ought to be charged with the burden of informing the electorate of the wisdom of *not* doing so.

The new constitution retains the requirement that the law

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<sup>99</sup> *Id.* at 2182. See also HEINS at 82-84.

<sup>100</sup> ILL. CONST. art. IX, § 9(b) (1970).

<sup>101</sup> ILL. CONST. art. IV, § 18 (1870).

authorizing the debt also provide for its retirement.<sup>102</sup> No specific reasons for eliminating the publication requirements or the constitutional directive as to the disposition of funds generated by the debt can be found, but in view of the general easing of restrictions contemplated by the drafters of the new constitution, it is not surprising that they were eliminated without mention and the utility of the provisions was somewhat questionable.

Founded on the three basic contentions discussed earlier, the committee stated the goals it sought to achieve in proposing the state debt provision of the new Revenue Article:

The Committee desires to limit state borrowing to reasonable amounts and for reasonable purposes. It also desires to reduce the cost of borrowing to a minimum and to insure that decisions to borrow are publicly arrived at by the proper authorities.

The proposal makes all forms of borrowing by the state and all its agencies and authorities subject to the same restrictions. Under this proposal, there would be no need to create authorities and commissions to circumvent debt restrictions.

The requirement of a two-thirds [later reduced to three-fifths] vote in the General Assembly, or a simple majority vote plus a referendum, is a wise check upon possible overborrowing. Clearly, legislators pressed between demands for higher spending and lower taxes face a strong temptation to satisfy both demands by postponing taxation through borrowing. The proposed section will insure that no borrowing will be authorized unless it has wide support among the voters or bipartisan support in the legislature. Moreover, in either case, the proposed debt limitation will be subject to closer public scrutiny.<sup>103</sup>

The committee's desire "to limit state borrowing to reasonable amounts and for reasonable purposes" is an admirable one. However, it is difficult to imagine how the omission of any sort of dollar limitation will assist in accomplishing this end, especially when coupled with the general relaxation of restrictions already discussed. Its desire to "reduce the cost of borrowing to a minimum" and to make "all forms of borrowing by the state and all its agencies and authorities subject to the same restrictions" is equally admirable, as are its efforts to eliminate the "need to create authorities and commissions to circumvent debt restriction." But as discussed earlier, these were not insurmountable impediments to truly necessary debt financing. The fact that the legislature need resort to the people's approval only if it fails to muster a three-fifths majority, which is somewhat less than the strongest "bipartisan support" imaginable, coupled with the difficulty in comprehending how "the proposed

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<sup>102</sup> ILL. CONST. art. IX, § 9(b) (1970).

<sup>103</sup> *Committee Proposals* at 2182.

debt limitation will be subject to closer public scrutiny"<sup>104</sup> than it was when a referendum and strict publication requirements were mandated, may leave many an Illinois taxpayer uneasy about this newly acquired legislative power.

In attempting to achieve the lofty new goals enumerated in the committee's comment on the proposed article, the drafters appear to have overlooked the possibility of future fiscal indiscretion which was anticipated and checked by the old constitution. Today, from a practical standpoint, the sanctuary of Illinois' credit is constitutionally unguarded. Under the banner of serving a "public purpose," the legislature stands at the portal empowered to open wide the doors to welcome a myriad of state agencies within; guaranteeing the debts of those who are insolvent or pledging the credit of the state on behalf of those who are not. All this by a mere three-fifths majority within the control of a General Assembly admittedly "pressed between demands for higher spending and lower taxes," and faced with "a strong temptation to satisfy both demands by postponing taxation through borrowing."

#### THE REVENUE ARTICLE'S FIRST-BORN, THE TRANSPORTATION BOND ACT

It is apparent from the foregoing discussion that the Committee on Revenue and Finance, the delegates to the 1970 Constitutional Convention, and even the voters who ratified the new constitution were all possessed of a significant degree of confidence in the fiscal responsibility of the Illinois General Assembly. The committee which proposed article IX section 9 believed that it had placed "wise checks" upon legislative overborrowing, but the majority proposal also seems to be founded on an assumption of internal legislative restraint with respect to borrowing.

In this regard it is significant to note that even before the 1970 Constitution became effective, the Illinois General Assembly passed legislation authorizing a \$900,000,000 bond issue. The Transportation Bond Act was passed by the Illinois House of Representatives on June 25, 1971 by a vote of 119 to 44.<sup>105</sup> Three days later it passed the Illinois Senate by a vote of 49 to 10.<sup>106</sup> The 1970 Illinois Constitution, ratified by the voters on December 15, 1970, became generally effective on July 1, 1971.<sup>107</sup> On July 2, 1971, the Transportation Bond Act was approved by

<sup>104</sup> See ILL. CONST. art. VIII, § 1(c) (1970) which provides:

Reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law.

<sup>105</sup> H.R. JOUR., 77th General Assembly, #81, June 25, 1971 at 359 (1971).

<sup>106</sup> S. JOUR., 77th General Assembly, #83, June 28, 1971 at 29 (1971).

<sup>107</sup> ILL. CONST. adoption schedule, § 1 (1970).

Governor Ogilvie.<sup>108</sup> The passage of the Transportation Bond Act two days before the 1970 Constitution became generally effective gave rise to a suit testing the power of the legislature to pass anticipatory legislation, *People ex rel. Ogilvie v. Lewis*.<sup>109</sup> While the *Ogilvie* case offered the Illinois Supreme Court one of its first opportunities to graft judicially interpretative flesh onto the skeleton of the new constitution, it is important in this discussion because it highlights the legislature's flexing of its new constitutional muscle at so early a date. While the arguments in favor of and opposed to the Transportation Bond Act are many, one thing remains clear: reduced to its simplest elements, *Ogilvie* spotlights the fact that the Illinois General Assembly did not pause long enough to permit the new constitution to become effective before it took steps to borrow \$900,000,000.

In upholding the constitutionality of the Act,<sup>110</sup> the court made judicial announcement of some of the changes worked by the new constitution and already commented on in this article.<sup>111</sup> In holding that the funds generated by the Transportation Bond Act were indeed to be expended for a "public purpose" the court relied upon article XIII section 7 of the new constitution, the Preamble to the Transportation Bond Act, and the Illinois view that whether a purpose is public or private is primarily to be determined by the legislature.<sup>112</sup> In other words, of the three legs which gave tripod support to the court's holding on the "public purpose" issue, two were enfeebled by the application of a circuitous *test* which commands that the constitutionality of an act be settled by the self-serving utterance of its draftsmen.<sup>113</sup> While the determinative issue in *Ogilvie* was the legislature's power to enact anticipatory legislation, the court's holding on the "public purpose" issue foreshadows an era of legislative prominence in the area with no apparent constitutional or decisional foundation from which it can be challenged.

### CONCLUSION

Though it is unquestioned that state constitutions restrict the powers of the legislature, no state constitution is a unanimous expression of the will of the people who ratify it or the

<sup>108</sup> LAWS OF ILL., 77th General Assembly, 1971 Session, Volume 1, P.A. 77-150 at 276 (1972).

<sup>109</sup> 49 Ill. 2d 476, 274 N.E.2d 87 (1971). For a full treatment of the anticipatory legislation question see: Comment, *People ex rel. Ogilvie v. Lewis: A Procedure for the Enactment of Anticipatory Legislation in Illinois*, 6 JOHN MAR. J. PRAC. & PROC. 347 (1973).

<sup>110</sup> 49 Ill. 2d 476, 482-83, 274 N.E.2d 87, 91-92.

<sup>111</sup> *Id.* at 484-89, 274 N.E.2d at 92-95.

<sup>112</sup> *Id.* at 485-87, 274 N.E.2d at 93-94. See also *People ex rel. Douglas v. Barrett*, 370 Ill. 64, 19 N.E.2d 340 (1939); *People v. Chicago Transit Authority*, 392 Ill. 77, 64 N.E.2d 4 (1945).

<sup>113</sup> See pages 419, 420 *supra*.

delegates who draft it; it is impossible for all to agree on each of its components. Inevitably, constitutions are the products of the give and take of compromise, the push and pull of differing political philosophies. The combat in Springfield which produced the new state debt provision has left the question of what *should* have been done utterly moot. Article IX section 9 is alive and well and it has already sired the Transportation Bond Act. The question for today is to what dimensions will the family of debt producing legislation be permitted to grow? In attempting to answer that question, this comment seeks to point out that in the dust overhanging the battlefield which became article IX section 9, there should linger more than a particle of concern.

The Committee on Revenue and Finance would have us believe that though the legislature be "pressed between demands for higher spending and lower taxes" while also faced with "a strong temptation to satisfy both demands by postponing taxation through borrowing," the General Assembly will be "wisely checked" by article IX section 9 and its own internal attitude of self-restraint. One hundred years of legislation attempts to circumvent the old restrictions and a ten minute understanding of human nature strongly suggest otherwise.

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