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**The Bill of Rights of  
the 1970 Illinois Constitution**

by  
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**A Background Paper for the  
Committee of 50 to Re-examine the Illinois Constitution**

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**Illinois Commission on Intergovernmental Cooperation**

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## THE BILL OF RIGHTS OF THE 1970 ILLINOIS CONSTITUTION

### Staff Introduction

This essay on the Bill of Rights of the Illinois Constitution has been prepared for the Committee of 50 to Re-examine the Illinois Constitution by Constitution Review Project Director John M. Garvey.

The bill of rights in Illinois' 1870 constitution was essentially the same as the one in the 1848 constitution, and during the 100-year period between 1870 and the adoption of Illinois' current constitution, there were no amendments to the bill of rights.

However, the 1970 constitutional convention made several significant changes in the bill of rights article. Article I of the 1970 Constitution:

- contains an explicit equal protection clause, an addition to the due process section;
- includes invasion of privacy and eavesdropping in the provision against unreasonable search and seizure;
- forbids racial, religious, or sexual discrimination in hiring, promotion, or the sale or rental of property;
- guarantees equal protection of the laws to women as well as men;
- forbids discrimination against the handicapped;
- condemns communications derogatory to any ethnic, racial, or religious group; and
- guarantees the individual's right to keep and bear arms.

The death penalty was thought to be too controversial to be included as part of the main document and was placed before the voters as a separate issue. The voters chose to retain it.

In the event of a new constitutional convention, several of the issues which were controversial in 1970 are likely to be matters of controversy once again. One of these is the right-to-life issue; abortion, as well as euthanasia and the "right to die" could be subjects of debate. The death penalty is likely to surface as a volatile issue, as is the issue of gun control. Public concern over AIDS and the possibility of civil liberties violations could make the issue of mandatory drug testing a feature of a Bill of Rights debate. A tough line on crime is also likely to influence discussion. One indication of this is the fact that two of the four constitutional amendments which have been passed since 1970 deal with the denial of bail.

Finally, recent conservative interpretations of the federal Bill of Rights have turned the attention of legal activists to state bills of rights. The Illinois Constitution, for example, grants some rights which are not explicitly mentioned in the federal Constitution. The most prominent is Illinois' equal rights provision, which may again be a subject of controversy. Since the Equal Rights Amendment failed at the national level, some persons may want to remove Illinois' provision.

# The Bill of Rights of the 1970 Illinois Constitution

by  
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From one point of view, the inclusion of a bill of rights in a recently adopted state constitution might be regarded as superfluous: the protections accorded individuals and groups can be provided by ordinary legislation, if they are not already protected by the federal Constitution. Before the Fourteenth Amendment to the United States Constitution was adopted in 1868, the legal importance of a state bill of rights was apparent. The power of the federal government is, in theory anyway, only that power which has been delegated to it by the states. A state has all of the power of a sovereign government, except as that power has been limited by the state constitution. To place certain rights beyond the scope of ordinary legislation by placing them in the constitution serves an important symbolic purpose: it clarifies those rights we find most important and worthy of protection. There are important legal ramifications as well.

Before the adoption of the Fourteenth Amendment, the legal necessity for a state bill of rights was based on the fact that the first ten amendments were commonly seen by the courts as protecting citizens and groups against actions which might be taken by the federal government. The Bill of Rights in the U.S. Constitution did not necessarily protect against the denial of the same rights by the governments of the states. The Fourteenth Amendment guarantees that "no state shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment represents an important shift in the American attitude towards government and federalism. A major argument against a federal bill of rights, brought up during the debates surrounding the proposed federal Constitution in 1787, was that strong central government was to be feared. A federal bill of rights was considered to be an infringement upon a state's bill of rights, and redundant as well: if a state had an adequate bill of rights, what reason was there for repetition at the federal level? In addition, many of the rights made explicit in most state constitutions were already implicit in the draft Constitution, and did not need to be specified separately.

In Federalist 84, Alexander Hamilton took the argument even beyond this point:

"I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is not power to do? Why for instance, should it be said, that the liberty of

the press shall not be restrained, when no power is given by which restriction may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge ... that the provisions against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights."

Thomas Jefferson was among the partisans of a national bill of rights, but agreed to put off the question of its inclusion in the constitution as long as it was a priority on the agenda of the administration. George Washington mentioned a bill of rights in his first inaugural address, a sign of its liveliness as a political issue, but the ten amendments which compose the federal bill of rights were, in fact, passed in 1791, three years after the ratification of the Constitution. The fact that they were passed as amendments to the original constitution says a lot about the concerns of the people who designed our form of government regarding the individual's place in relation to the power of government. A strong central authority was initially feared, and a minimalist approach to law at the federal level was seen as a protection rather than a threat: you cannot assume authority which has not been granted.

Following the civil war the emphasis had reversed: the Fourteenth Amendment was an assertion of authority at the federal level, which sought to protect citizens from encroachments against their liberty by particular states. The Fourteenth Amendment did not, however, make the entire U.S. Bill of Rights automatically applicable at the state level. The tendency has been for the U.S. Supreme Court to incorporate these rights gradually, by interpretation, with the Fourteenth Amendment seen as prohibiting states from abridging only those rights which are "fundamental to the concept of an ordered liberty."<sup>1</sup>

The fact that many rights, which were protected at the state level before the adoption of the Fourteenth Amendment, are now federally protected does not mean that state bills of rights are irrelevant. A state may grant its citizens more protection than is granted at the federal level, and this fact is, we shall see, relevant to any discussion of the 1970 Illinois Bill of Rights. In addition, the state is a unit of government which is closer to the people than the federal. A citizen who believes that his or her rights have been violated should be able to challenge that violation at a level closer to home than the federal courts.

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<sup>1</sup> Palko v. Connecticut, 302 U.S. 319, 1937, cited in "The State Bill of Rights," by Frank P. Grad, in Con-Con: Issues for the Illinois Constitutional Convention, U. of Illinois Press, 1970.

## The Illinois Bill of Rights: 1870-1970

The provisions of the 1870 Illinois Bill of Rights were essentially the same as the provisions found in the 1848 Illinois Constitution, and during the 100-year period between the 1870 and 1970 Constitutions there were no amendments added to the Bill of Rights section. In most respects the 1870 Bill of Rights were similar to those found in other state constitutions. One significant omission was the lack of an express equal protection guarantee -- not uncommon in state constitutions. Given the evolution of law at the federal level, a guarantee of equal protection under the law for all citizens was seen at the time of the 1970 convention as a desirable addition, even though courts in practice had interpreted the due process clause as including an implicit equal protection guarantee.

The differences between the 1870 and 1970 documents are best illustrated by a discussion of the changes made by the delegates at the convention in 1969-70.

### The Bill of Rights in the 1970 Constitution

The constitution passed by the delegates to the Sixth Illinois Constitutional Convention made several significant changes in Article I of the 1870 Constitution. Equal protection is expressly guaranteed in Section 2. Sections 17, 18, and 19 forbid discrimination against women and the handicapped in employment and in the sale or rental of property.

The Bill of Rights in the 1970 Constitution contains 24 sections which concern the following:

- inherent and inalienable rights;
- due process and equal protection;
- religious freedom and freedom of conscience;
- freedom of speech;
- right to assemble and petition;
- searches, seizures, privacy and interceptions of communications;
- grand jury indictment and the preliminary hearing;
- rights after indictment;
- bail and habeas corpus;
- self-incrimination and double jeopardy;
- limitation of penalties after conviction;
- right to legal remedy and justice;
- right to trial by jury;
- imprisonment for debt;
- right of eminent domain;
- ex-post facto laws, impairing contracts, grants of immunity and privilege;
- discrimination in employment, or the sale or rental of property;
- discrimination on the basis of sex;
- discrimination against the physically or mentally handicapped;
- individual dignity and the condemnation of bigotry;
- quartering of soldiers;
- right to keep and bear arms;
- fundamental principles of civil government and citizens' obligation; and
- rights retained beyond those enumerated in the Constitution.

Several of these sections are constitutional homilies -- that is, they do not establish specific legal rights of action, but indicate ideals. These include Section 1, which reiterates a belief in inherent and inalienable rights taken from the Declaration of Independence; Section 20, which calls for the promotion of individual dignity through the condemnation of all racial, national and religious bigotry; and Section 23, which calls upon citizens to be aware of their obligations and responsibilities.

Some of the changes in the 1970 Illinois Constitution indicate a shift in the citizens' expectations of their government and a shift in the role government has come to play in the lives of citizens. The Constitution's preamble, for example, adds language that calls for the elimination of poverty and inequality, the assurance of legal, social and economic justice, and the opportunity for the "fullest development of the individual."

The most significant additions to the Bill of Rights echo these concerns:

Section 6 of Article I expands the language of the 1870 Constitution to include the guarantee of freedom from unreasonable eavesdropping and invasions of privacy.

Section 7 continues the right to a grand jury indictment in cases involving criminal offense; although it permits the General Assembly to limit the use of the grand jury, as well as to abolish its use altogether.

Section 11 adds to the definition of the limitation of criminal penalties the requirement that the penalties should take into account the rehabilitation of the offender.

Section 12 tightens and strengthens the 1870 language which guarantees every person the right to remedy and justice, adding a remedy for the invasion of privacy. (It may be significant, and of some interest to lawyers, that the 1970 Constitution eliminated the language of the 1870 Constitution which guaranteed that a person's right to obtain justice is to be had "without being obliged to purchase it.")

Section 15, which deals with eminent domain, expands the federal guarantee of just compensation when property is taken for public use: compensation must be given if property is merely damaged. (Committee language which lost on the floor provided for "just compensation to the full extent of the loss.")

Section 17 prohibits discrimination in hiring, promotion, or the sale or rental of property where that discrimination is based on race, religion, ethnicity, or sex.

Section 18 explicitly prohibits the denial or abridgement of equal protection of the laws on the basis of sex.

Section 19 prohibits discrimination against the handicapped in the sale or rental of property and in hiring or promotion when the handicap is unrelated to the ability to perform a job.

Section 20 affirms the promotion of individual dignity by condemning "communications" which involve racial, religious, ethnic, national, or regional slurs.

Section 22 extends the U.S. Constitution's affirmation of the right of "the people" to keep and bear arms -- the justification being the need for communal security -- by stating that "the individual citizen" may keep and bear arms "subject only to the police power."

Constitutional historian Janet Cornelius characterizes the provisions changed by the 1970 Constitution as "examples of ways in which Illinois Constitution makers in 1969-70 struggled to respond to pressures of the items in their attempt to create a relevant, publicly acceptable document. Despite a desire to incorporate only broad statements of policy in the new constitution, the convention necessarily became involved with current issues." Cornelius cites the clause on individual dignity, against which few delegates dared to vote, and the assertion of the individual's right to keep and bear arms, "such a pressing issue in many downstate areas that ignoring it might have been a fatal blow to the proposed constitution." The issue of gun control may have seemed controversial enough to sink the convention if it were somehow included in the final document; but another issue, the death penalty, proved so controversial that the delegates finally submitted it as a separate question. The voters chose to retain the death penalty. There is some irony in the fact that during the debate over the issue, the death penalty was assumed, at several points, to be obsolete as a solution to the problem of violent crime.

As a further reflection of the influence of public concerns on the constitutional convention delegates, Cornelius cites the passage of Article 11, which asserts the duty of the state and its citizens to maintain a healthful environment and the right of citizens to live in a healthful environment. Though this creates a right of remedy in theory, in fact it has had no practical legal effect to date. This is not technically a bill of rights issue, but since it establishes a right and involves a potentially controversial field of legal action, it could become part of the debate at any future constitutional convention.

On the whole, Cornelius says, the debate surrounding the bill of rights during the constitutional convention "provided the best example of the benefits of open discussion." She cites the impressive mix of liberal and conservative people who composed the committee on the bill of rights, and says that apart from the bill of rights and environment article, the convention delegates "were often frustrated in their efforts or even their desire to accomplish substantive constitutional change." She goes on to add, "This was a difficulty in other states as well as in Illinois."<sup>2</sup>

Perhaps some of this difficulty is due to the fact that bill of rights issues, as exciting and controversial as they may be, are often assumed to be primarily determined by federal decisions and are not ordinarily seen as falling under state jurisdiction. At the same time they cause some of the most impassioned debate imaginable, in that the delegates and the people who send them to constitutional conventions must attempt to define legal limits on questions of value, morality, the ultimate purposes of law, and the limits of the law's coercive authority. The issues that surround the bill of rights incite popular passions in a way that revenue or redistricting issues cannot, as central to the conduct of state government as the latter might be.

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<sup>2</sup> Janet Cornelius, Constitution Making in Illinois, 1818-1970, University of Illinois Press, 1972, pp. 155-157.

The interest and controversy these issues provoke is clear from committee and floor debates. The original bill of rights committee report included a provision which stated that the unborn were entitled to equal protection and due process; this was eliminated in floor debate. A provision which stated that Illinois citizens "shall have adequate nourishment, housing, medical care and other needs of human life and dignity" was defeated, as was a provision which gave all public employees the right to organize and bargain collectively. There were attempts to provide state aid to parochial schools, which made use of the religious freedom provision of the bill of rights, and which sought to modify the provision of the education article forbidding aid to sectarian schools.

### Potential Issues

The provisions of the bill of rights article in the 1970 Constitution contain elements which are certain to come under renewed scrutiny in the event of another constitutional convention, in some cases because they are inherently controversial, and in others because they have not lived up to their sponsors' expectations. Some issues are perennially controversial. These include the death penalty, the right to keep and bear arms, abortion and the right to life (a concern likely to be expanded to include euthanasia and the right to die), and those issues involving tougher approaches to crime and punishment. (Two of the four amendments added to the 1970 Illinois Constitution allowed the withholding of bail rights.) Other issues which might be controversial include the guarantee of a healthful environment and the duty of the state to provide for its protection. The guarantee against invasions of privacy has taken on a new urgency, given the current arguments in favor of mandatory drug and AIDS testing.

Some court decisions are sure to make these issues areas of renewed controversy. The right to keep and bear arms, for example, has been qualified significantly in the decision of a federal appeals court to uphold an almost total ban on handguns in the village of Morton Grove. With regard to Section 18 of Article I, the Illinois version of the ERA, the Supreme Court has held that sex is a "suspect classification" in Illinois. In addition, an appellate court decision has ruled that Section 20 of Article I, the section which deals with the dignity of the individual and forbids expressions of racial, religious, or sexual bigotry, is hortatory and does not establish a right of action.

There is, in addition, a new movement by liberal judicial activists toward the consideration of the use of state bills of rights to offset the conservative readings of recent U.S. Supreme Court decisions. This movement, combined with the fact that the 1970 Illinois bill of rights grants Illinois citizens rights which are not guaranteed in the federal Constitution, will certainly have a major bearing on any debates which may surface on the way to, or during, a new constitutional convention.