

## Legislative Update

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### Amending the Illinois Constitution – History, Precedent & Tax Provisions

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Efforts to amend the Illinois Constitution to facilitate Governor Pritzker’s tax plan are in full swing and the policy debate over taxing all Illinoisans at the same rate, versus the proposal to tax higher income earners at higher rates, is contentious. Nearly lost in the debate is the significance of amending our state’s foundational governing document, and the legal mechanisms in play. Also given short shrift in the debate has been consideration of the actual amendatory language being considered, and how it compares to other states’ constitutional provisions on income taxation.

In some respects, the fact that a proposal to amend the Illinois Constitution has been made, and that the mere suggestion is not garnering exceptional attention (without regard to the subject matter), is a success that is fifty years in the making. For at least a century, the Illinois Constitution was considered difficult to amend. Under the Illinois Constitution of 1870, amendments to the Illinois Constitution required a two-thirds vote in both houses of the legislature, and approval by the majority of voters in the next general election. *See* ILL. CONST. 1870, art. XIV, § 2, <http://www.idaillinois.org/cdm/ref/collection/isl2/id/396>, at pp. 49-50.

Additionally, only one constitutional article could be amended per election, and each article could only be amended once every four years. *Id.* An amendment was passed in 1950 in the hopes of making it easier to amend the Illinois Constitution by allowing either a majority of the voters, or two-thirds of the electors voting on the amendment, to pass the amendment. *See* ILLINOIS BLUE BOOK 1961-1962, <http://www.idaillinois.org/cdm/ref/collection/bb/id/14562>, at p. 437. This was referred to as the “Gateway Amendment” because it was hoped it would be a gateway to significant constitutional change, but it did not have the desired effect.

Eighteen years after the Gateway Amendment, Illinoisans voted to hold a Sixth Constitutional Convention, which was convened in 1970. *See Sixth Illinois Constitutional Convention Address to the People, Adopted by the Convention*, CHI. TRIB., Nov. 22, 1970, p. T2. Pertinent to the Governor’s current tax proposal, the Constitutional Convention, or “Con-Con” as it was referred to in the press, resulted in a proposal to add a Revenue Article to the Illinois Constitution, which would “provide a structure upon which the General Assembly could build an equitable and adequate tax system.” *Id.* The Con-Con’s *Address to the People* also stated: “Any income tax is limited to a non-graduated tax. . . . Neither of these limitations is contained in the present Constitution.” *Id.* at p. T4.

The Con-Con also explained that changes were made to the article dealing with future constitutional amendments because a primary difficulty with the 1870 Constitution was amending it. *Id.* Senator Gertz, one of the delegates, publicly heralded these changes, noting that the proposed amending procedure is “so good that if there are any mistakes in our endeavors they can readily be corrected.” Elmer Gertz, *Voice of the People: Constitution of 1970 Commended*, CHI. TRIB., Nov. 19, 1970, p. 20. Likewise, Samuel Witwer, President of the Convention, described the new amendment process as “freeing the people from the straitjacket of the present Constitution.” Samuel Witwer, *Witwer Seeks Approval*, CHI. TRIB., Dec. 13, 1970, p. A1.

The culmination of the Con-Con was the passage of the current Illinois Constitution by a special election held on December 15, 1970. *See* Edith Herman, *Victory for Constitution—and Sam Witwer’s Joy Brims Over*, CHI. TRIB., Dec. 16, 1970, p. 1. The new process of amending the Illinois constitution included the following provisions:

Amendments proposed by the General Assembly shall be published with explanations, as provided by law, at least one month preceding the vote thereon by the electors. The vote on the proposed amendment or amendments shall be on a separate ballot. A proposed amendment shall become effective as the amendment provides if approved by either three-fifths of those voting on the question or a majority of those voting in the election.

ILL. CONST. 1970, art. XIV, § 2.

As the quoted provision indicates, the threshold for getting an amendment on the ballot was dropped from 66.67% to 60% of the General Assembly, and amendments could be passed by either the majority of Illinoisans voting in the election casting ballots in favor, or by 60% of those voting on the amendment casting their vote for the amendment.

The changes to the amendment process may seem somewhat modest, but they were consequential. In the years after passage of the 1970 Constitution, 24 amendments received sufficient General Assembly support to be presented to the electorate. These have ranged from amendments pertaining to an amendatory veto for the governor, an amendment dealing with pension benefits (both of which failed), to tax sales, crime victims’ rights, and transportation funds (which passed). Of the 24 attempts at amending the Illinois Constitution, ten have been rejected by voters, and fourteen have passed. *See* ILLINOIS GENERAL ASSEMBLY, *Constitution of the State of Illinois, Amendments and Conventions Proposed*, available at <http://www.ilga.gov/commission/lrb/conampro.htm>.

Interestingly, voters have demonstrated limited interest in being heard on amendments. Only four amendments, out of 24 proposals, were passed as a result of a majority of voters supporting the amendment. The other ten—*i.e.*, seventy percent of the amendments that passed—only became part of the Illinois Constitution because the number of voters that actually took the time to vote on the amendment met the three-fifths (60%) in favor threshold. In other words, seventy percent of the amendments to the Illinois Constitution were not able to garner the support of half the people voting in the election.

Governor Pritzker’s tax plan appears to have generated significant attention, which may make it more likely that voters actually complete the separate ballot on the amendment, but even that is not assured, given the current constitutional era indicates voters have a high degree of apathy when it comes to Constitutional issues.

Turning to the current proposed amendment, SJRCA0001, the proposal would strike the following language from the Illinois Constitution’s Revenue Article:

A tax on or measured by income shall be at a non-graduated rate. . . . At any one time there may be no more than one such tax imposed by the State for State purposes on individuals and one such tax so imposed on corporations.

ILL. CONST. 1970, art. IX, § 3(a).

The amendment then proposes to add: “The General Assembly shall provide by law for the rate or rates of any tax on or measured by income imposed by the State.” This will allow the General Assembly to impose a graduated taxation



approach by statute. In this regard, the passage of the amendment will take Illinois back to the status quo in place prior to passage of the 1970 Illinois Constitution. As explained by the President of the Con-Con back in 1970, eliminating the possibility of graduated taxation was one of the selling points for passage of the 1970 Illinois Constitution. *See Witwer Seeks Approval, supra.*

Looking to our neighboring states, the use of state constitutional provisions to mandate taxation limits is not common. Of the five states that have a physical border with Illinois (Wisconsin, Indiana, Kentucky, Missouri, and Iowa), only Indiana has a flat tax, and its constitutional provision on taxes does not mandate a flat tax. *See IND. CONST.* art. 10, § 8 (“The general assembly may levy and collect a tax upon income . . . at such rates, in such manner, and with such exemptions as may be prescribed by law.”); *see also* IND. CODE § 6-3-2-1 (setting a flat tax by statute). Wisconsin specifically permits graduated taxes under its constitution. WIS. CONST. art. VIII, § 1 (“Taxes . . . may be graduated and progressive.”). Missouri and Iowa simply permit income taxation, generally, without specific reference to a graduated taxation. MO. CONST. art. X, § 4(d); IOWA CONST. art. VII, § 7. Kentucky’s constitution is phrased in the negative; it provides that the state constitution does not prevent income taxation. KY. CONST. § 174.

Given the above, Illinois’ constitutional protection against a flat tax is unique, at least among our neighboring states. If voters decide to remove that protection, they reverse course on a protection added in 1970, but they will do so via an amendment process that was intended to provide voters the franchise to do exactly that.

### About the Author

**John Eggum** is a partner at *Foran Glennon Palandech Ponzi & Rudloff P.C.*, where he concentrates his practice on insurance coverage matters and commercial litigation. He represents insurers, TPAs, brokers, and captive managers in professional liability disputes, and also litigates cyber/technology liability claims. Mr. Eggum’s law degree was obtained, with distinction, from The University of Iowa College of Law, and following law school, he served as the law clerk to the Hon. Bruce A. Markell in the United States Bankruptcy Court for the District of Nevada, in Las Vegas. Mr. Eggum serves as the Vice-Chair of the IDC Legislative Committee and the Vice-Chair for the IDC’s Young Lawyers Division.

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