



BUILDING DEMOCRACY FOR THE 21ST CENTURY

## **Direct Democracy Series Week 2: The Courts**

As last week's installment showed, the Illinois Constitution and statutes provide only limited opportunities for initiative and referendum. State law defines only a few hundred opportunities for direct democracy, with many of these inapplicable or unhelpful to most Illinois residents.

Over the ensuing decades since the passage of the 1970 state constitution and the creation of the current initiative and referendum process, courts have confirmed the text's narrowness and enforced strict procedural barriers to ballot access. Arguments invoking constitutional rights, public policy benefits, and fairness have fallen flat, as courts have held to a rigid, four-corners reading of the limited sections in the Illinois Constitution. Efforts to creatively expand direct democracy, such as creating a local process for initiative and referendum, face high hurdles.

The bottom line is that improvements to direct democracy in Illinois, from subject matter opportunities to ballot access, will not come from the courts. This week's installment in the CAC Direct Democracy series explores the court cases that shape the current understanding of Illinois law surrounding the local initiative and referendum process. These cases provide lessons that advocates must use to successfully use the existing limited system and issues to address during future legislative efforts to improve direct democracy in Illinois.

Over the next two weeks, this series will provide the lessons we can learn from other states, changes that could be made to Illinois law, and a proposal to bring better, broader, more inclusive direct democracy to Illinois.

### **Direct Democracy Part 2: How Courts Address Initiatives and Referendums**

Illinois law includes three types of referendums: binding local initiatives, binding statewide constitutional amendments, and advisory questions of public policy. This series's focus is the first category, a limited avenue of direct democracy granted in the Illinois State Constitution. According to Article VII, Section 11:

Proposals for actions that are authorized by this Article or by law and which require approval by referendum may be initiated and submitted to the electors [...] by petition of electors in the manner provided by law.<sup>1</sup>

This passage grants power to the people of Illinois to change the law, but only where authorized by a provision in the Constitution or statute passed by the General Assembly. In practice, this leaves very few useful opportunities for direct democracy.

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<sup>1</sup> Ill. Const. Art. VII, § 11 (emphasis added).



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In the subsequent fifty years since the Constitutional Convention, advocates have initiated or attempted to initiate referendums on a wide range of subjects across the state. Many of these attempts fell short in the face of challenges and judicial scrutiny, creating a history of case law that displays the few protections for initiatives explicitly or implicitly guaranteed by the law and where significant barriers exist to direct democracy in Illinois.

The following cases represent a chronological framework of cases leading to the current understanding of the state's narrow, restrictive initiative and referendum process.

### **Home Rule Municipalities Enjoy Broad Power**

*Clarke v. Village of Arlington Heights* was the first case to test any provisions of the Article VII initiative power created by the 1970 Illinois Constitution.<sup>2</sup> Section (6) states that a home rule municipality has the power, subject to approval by referendum, to adopt, alter, or repeal a form of government provided by law,<sup>3</sup> and to "provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law."<sup>4</sup>

In *Clarke*, the plaintiff brought an action contending that provisions of the Arlington Heights Code which designated an appointed village clerk, and another requiring eight trustees to be elected at each election,<sup>5</sup> were in conflict with state statutes mandating both an elected village clerk and only six trustees and that state law must prevail.<sup>6</sup> The Illinois Supreme Court interpreted the question on appeal to whether a home rule municipality such as Arlington Heights may, by referendum approval as outlined in Section 6(f), make these changes contrary to the Illinois Municipal Code, which had been enacted before the 1970 Illinois Constitution.<sup>7</sup> Citing precedent, the court held that the power of home rule units of government must be read broadly under this new constitution. It noted that home rule was added to the state constitution to remedy the issue that municipal actions were too limited by only what had been explicitly authorized by state action.<sup>8</sup> In short, the home-rule powers set out in Article VII must be read as authority to effect structural changes according to that text, even if such changes conflict with state law.<sup>9</sup> The court noted that the form of government clause does not require municipalities to pick between certain forms of government that have already been approved by the

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<sup>2</sup> 57 Ill.2d 50 (1974).

<sup>3</sup> Known colloquially as the "form of government clause." Ill. Const. Art. VII, § 6(f).

<sup>4</sup> Known colloquially as the "officers' clause." Ill. Const. Art. VII, § 6(f). These are two of the primary clauses under which Article VII initiatives are brought.

<sup>5</sup> *Clarke* at 50.

<sup>6</sup> *Id.* at 52.

<sup>7</sup> *Id.* at 53.

<sup>8</sup> *Id.* at 53, citing *Kanellos v. County of Cook*, 53 Ill. 2d 161, 290 (1972).

<sup>9</sup> *Id.* at 54.



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legislature. It found that this novel modification was entirely in line with the plain meaning of the language.<sup>10</sup>

This case presents a useful lesson on the benefit of open-ended language, such as allowing local governing units to "adopt, *alter*, or repeal" a form of government in the manner provided by law. The drafters of the 1970 Constitution wanted to allow for free creative usage of this Article VII power.<sup>11</sup> They wanted local governments to have the authority to tailor their structures to fit local needs, acknowledging different municipalities would have different needs. Other cases make clear this flexibility does not extend to citizen-initiated measures, regardless of the drafters' intent.

### **Courts Should Consider the Totality of the Circumstances in Judging the Sufficiency of Ballot Referendum Language**

In *Hoogasian v. Regional Transp. Authority*, the Illinois Supreme Court set out a test for lack of clarity in a ballot initiative.<sup>12</sup> This case dealt with a special public referendum in the six counties that were to be affected by the Regional Transportation Authority Act's passage.<sup>13</sup> In that March 19, 1974 election, a majority of voters marked ballots in favor of creating the Regional Transportation Authority.<sup>14</sup> The Regional Transportation Authority Act was quite comprehensive, laying out in detail the powers, authority, and limitations of the new agency.<sup>15</sup> The question presented to the voters was the precise language as was mandated by the statute; nonetheless, the Plaintiffs claimed the proposition was "so vague, indefinite, uncertain, unclear, uninformative and broad as to deprive them of property without due process of law."<sup>16</sup> This can be restated as a contention that, because of the vague language of the referendum question, "the voter had no idea what he was being asked to vote for or against when confronted with the referendum ballot in the polling place."<sup>17</sup>

In responding to this assertion, the court identified that "[t]he sufficiency of the proposition cannot be totally divorced from the circumstances in which it was submitted."<sup>18</sup> Notably, many other transport authorities in the areas affected by this referendum had been in existence "for years." Hence, it is likely that many of the voters would have known their function.<sup>19</sup> Although the legislature did not fully summarize any of the specifics of the act in the referendum question, the court believed that it was reasonably apparent to the average citizen where they would go to obtain more information before

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<sup>10</sup> *Id.*

<sup>11</sup> *See, e.g.*, Record of Proceedings of the Sixth Illinois Constitutional Convention, vol. IV, p. 3204.

<sup>12</sup> 58 Ill. 2d 117 (1974).

<sup>13</sup> *Hoogasian v. Regional Transp. Authority*, 58 Ill 2d 117, 120–21 (1974).

<sup>14</sup> *Hoogasian*, 58 Ill. 2d at 121.

<sup>15</sup> *Id.* at 121–22.

<sup>16</sup> *Id.* at 122.

<sup>17</sup> *Id.* at 124.

<sup>18</sup> *Id.* at 125.

<sup>19</sup> *Id.*

election day.<sup>20</sup> The court took judicial notice of the extensive discussion and attention, in particular the extensive media coverage which had been generated by this question, and used that as an additional basis for its conclusion that the voters would have well understood on what issue they were voting.<sup>21</sup> To put the holding of this case another way, courts may not judge the sufficiency of the language used in a referendum question solely on the text which will appear on the ballot. Instead, they must look at the totality of the circumstances surrounding the question to determine whether or not the voters will understand what they are being called to vote yes or no on.

### **Ballot Referendums Require a Coherent Scheme and Must Stand On Their Own Terms**

*Lipinski v. Chicago Bd. of Election Com'rs* clarified and expanded on *Hoogasian* in examining the sufficiency of a referendum, which would have created a nonpartisan election process, including runoffs, for the mayor, treasurer, and clerk of the City of Chicago.<sup>22</sup> The referendum read:

Shall the mayor, the treasurer and the clerk of the City of Chicago be elected on a nonpartisan ballot, by at least a 50% majority vote, but if no candidate receives at least 50% of the votes cast for the respective office, then in a runoff election between the two candidates for the office who received the greatest number of votes for that office at the initial election?<sup>23</sup>

This referendum was challenged both because it had failed to get the requisite number of signatures to qualify for the ballot and that it was fatally vague and ambiguous.<sup>24</sup>

In addressing the issue of vagueness and ambiguity, the Illinois Supreme Court began by stating that Article VII, Section 6(f) of the Illinois Constitution required that voters approve "a *coherent* scheme for altering the election of their officials."<sup>25</sup> The court emphasized that a referendum submitted under Article VII, Section 6(f) of the Illinois Constitution must be able to "stand on its own terms"; if it is not self-executing and leaves gaps that must be filled in by a legislative body, the question presented to voters is "uncertain."<sup>26</sup> This is not to say that a referendum question must supply the answer to every possible sequence of events itself; local ordinances or state statutes may be able to fill the gap, and in

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<sup>20</sup> *Id.* at 125–26.

<sup>21</sup> *Id.* at 126.

<sup>22</sup> 114 Ill. 2d 95, 97 (1986).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* The Objectors also contended that this question was barred by a ballot crowding restriction known as the "Rule of Three."

<sup>25</sup> *Id.* at 99, quoting *Leck v. Michaelson*, 111 Ill. 2d 523, 530 (1986). *Leck* was another case decided by the Illinois Supreme Court in the same year as *Lipinski*, and both cases raised essentially the same issues and the Illinois Supreme Court reached essentially the same conclusion. As such, to avoid redundant case analysis, only the *Lipinski* opinion will be analyzed in full here, though this paper will acknowledge references to *Leck* when made by the Supreme Court.

<sup>26</sup> *Lipinski*, 114 Ill.2d at 99-100, citing to *Leck*, 111 Ill.2d at 530.



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that situation, a referendum would still be considered self-executing.<sup>27</sup> In this case, however, the court found that the Election Code could not "fill the gap."<sup>28</sup> Specifically, suppose this referendum had been adopted in the November elections. In that case, candidates for this new form of the consolidated primary could not begin to circulate petitions until, at most, 40 days before the statutory deadline, in contradiction of the statutorily mandated 90 day petitioning period."<sup>29</sup>

Additionally, the court expressed concern that, as the referendum was silent on the number of signatures required to get on a nonpartisan ballot, the requirement would default to the Election Code rule for third party candidates.<sup>30</sup> In the case of the mayor of Chicago, that would have made the requirement to qualify for the ballot 25,000 signatures, an approximately 500% increase over the number required at the time of the lawsuit.<sup>31</sup> The court expressed additional concern at the contradiction of the term "50% majority," as a majority is by definition greater than 50%.<sup>32</sup>

The court held that any referendum that has to be "interpreted, supplemented and modified in order to be implemented" is constitutionally defective, as voters cannot be said to have approved a coherent scheme for altering the election of their officials.<sup>33</sup> The court determined that the referendum, in this case, was equally constitutionally defective, as it left questions regarding implementation unanswered and provided details that conflicted with the Election Code.<sup>34</sup>

To distinguish this case from *Hoogasian*,<sup>35</sup> the court noted that voters had no outside information they could consult for additional clarity on the referendum's effect.<sup>36</sup> As a final matter, referenda brought under Article VII are specifically meant to be binding. Therefore any question which is specifically brought under those provisions may not be added to the ballot as an advisory question.<sup>37</sup> Therefore, the court found the contested referendum fatally vague and ambiguous and unfit for a spot on any future election ballot.<sup>38</sup>

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<sup>27</sup> *Lipinski*, 114 Ill.2d at 100. Note, however, that future applicability of this part of the *Lipinski* holding is anything but certain after the opinion rendered by the Court of Appeals for the First District in *Harned v. Evanston Municipal Officers Electoral Board*. The opinion in *Harned* will be discussed below, as its consequences on current ballot initiatives in Illinois reach far beyond clarity in language.

<sup>28</sup> *Lipinski*, 113 Ill.2d at 100.

<sup>29</sup> *Id.* at 101.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 101–102.

<sup>32</sup> *Id.* at 103.

<sup>33</sup> *Lipinski*, 114 Ill.2d at 104, citing *Leck*, 111 Ill. 2d at 530.

<sup>34</sup> *Lipinski*, 114 Ill.2d at 105.

<sup>35</sup> *Hoogasian* is one of the most cited Illinois cases for the issue of whether referendum language is sufficiently clear, and the court in this case remarked that it was strange that neither party cited *Hoogasian* in their briefs.

<sup>36</sup> *Lipinski*, 114 Ill.2d at 105.

<sup>37</sup> *Id.* at 106.

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



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From *Hoogasian*, *Leck*, and *Lipinski*, the central test regarding clarity arose: whether or not a referendum is genuinely "self-executing." Any future ballot questions must conform to this test.

### **Ballot Referenda Need Not Be Written in Optimal Form to Be Judged Sufficient**

*Johnson v. Ames* revisited the clarity and specificity rules of *Leck*, *Lipinski*, and *Hoogasian* in 2016.<sup>39</sup> The plaintiff in *Johnson* sought to place a question on the ballot about imposing term limits on the Village of Broadview's elected president.<sup>40</sup> Despite a strong dissent from the Village of Broadview Electoral Board Chair claiming that all the constituents she had talked to said they understood the question, the board held that the question could not appear on the ballot.<sup>41</sup> On judicial review, both the Circuit Court and the Court of Appeals agreed with the board's chair that the question was not vague or ambiguous and should be placed on the ballot.<sup>42</sup> Though the Illinois Supreme Court initially denied a petition for leave to appeal, this case reached came before it on a Rule 316<sup>43</sup> certificate of importance solely on the issue of whether the referendum was vague, which the Supreme Court accepted and took the case on the briefs which had been filed in the appellate court.<sup>44</sup>

The referendum at issue stated:

Shall the terms of office for those persons elected to the office of Village President in the Village of Broadview, at the April 4, 2017 consolidated election, and at each election for said office thereafter, be limited such that no person shall be eligible to seek election to or hold the office of Village President where that person has been previously elected to the office of Village President of the Village of Broadview for two (2) consecutive full four (4) year terms.<sup>45</sup>

Both parties to this case cited *Leck* and *Lipinski* as their primary authorities but disagreed as to how the cases should be applied.<sup>46</sup> The Illinois Supreme Court restated the test to whether a referendum could "stand on its own terms" or whether it would have gaps that would need to be filled by some legislative body.<sup>47</sup> In this case, the plaintiff contended that *Leck* and *Lipinski* required "clear, unequivocal language identifying [its] temporal reach."<sup>48</sup> The court found the fact that the referendum did not

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<sup>39</sup> 2016 IL 121563.

<sup>40</sup> *Id.*, at ¶3.

<sup>41</sup> *Id.*

<sup>42</sup> *Johnson* at ¶4.

<sup>43</sup> This rule essentially allows for the Appellate Court to certify that a case raises a question of such importance that it should be decided by the Illinois Supreme Court. This generally cannot be sought or issued after a Petition for Leave to Appeal is denied, and thus the certificate of importance in *Johnson* was legally ineffective (see *Johnson* at ¶9), however the Illinois Supreme Court took this case as an exercise of their supervisory authority anyway.

<sup>44</sup> *Johnson* at ¶6.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at ¶11.

<sup>47</sup> *Id.* at ¶14.

<sup>48</sup> *Johnson* at ¶15.

specifically identify when the consecutive four-year terms needed to begin was not fatally vague, as it could be determined that this referendum targeted individuals who wished to run for the office of Village President, starting with the 2017 election, who had been previously elected to that office.<sup>49</sup> In other words, reading the referendum in full answered all the questions as to that part of its applicability.

The plaintiff also contended that there were provisions in the referendum which were contradictory and that it was thus fatally vague on those grounds.<sup>50</sup> The contention was that the clause identifying when the referendum would begin would imply that the two-term limit would not apply to anybody running in the April 2017 election and that this contradicts the clause that prohibits anybody who has been previously elected to the office of village president for two terms to run again.<sup>51</sup> The Illinois Supreme Court disagreed, finding the plain meaning of those two clauses simply identified when the new requirements would be applied, as well as determining what the new requirements were.<sup>52</sup> Most importantly, the Illinois Supreme Court held that a valid referendum need not necessarily be presented in optimal form.<sup>53</sup> The court determined that *Leck* and *Lipinski* simply require that it be clear what voters approved.<sup>54</sup> If the voters approved this question, the effect would be sufficiently clear.<sup>55</sup>

The preceding four cases lay out an important ballot initiative protection: the ability for existing law to "fill the gap" when a ballot question does not explicitly provide the answer, as long as the question is as clear and thorough as necessary to be understood by the voter and implemented by the government. This is an important protection since many issues of local policy are not straightforward. Furthermore, few citizens could craft a ballot question that would have an answer for every possible series of events, regardless of whether answers could be found somewhere in the law, while still making the question as understandable as *Hoogasian* and its progeny require. The point of the ballot initiative as articulated by the Constitutional Convention delegates<sup>56</sup> and others around the country who have granted this right, is that it allows the voters to be creative.<sup>57</sup> The *Hoogasian* protection preserves the creativity of the ballot initiative, though it has been inconsistently applied.<sup>58</sup> To ensure this protection is maintained, the holdings of *Hoogasian* and its progeny should be codified.

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at ¶16.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at ¶17.

<sup>53</sup> *Id.* at ¶18.

<sup>54</sup> *Id.* This restatement of the holdings from *Leck* and *Lipinski* must also be briefly flagged, as this was another principle that appeared to be conspicuously absent from the Opinion of the Appellate Court in *Harned v. Evanston Municipal Officers Electoral Board*.

<sup>55</sup> *Johnson* at ¶19.

<sup>56</sup> Record of Proceedings, vol. IV, p. 3204.

<sup>57</sup> "Regardless of success or failure, direct democracy still has the ability to improve public safety and species conservation, as well as meet the concerns of both animal protectionists and hunters, but most do so through new and creative methods." Tyler M. Welch, Note, *Can Citizens Better Use The Ballot Initiative To Protect The Wildlife?: The Case Of The Mountain Lion In The West*, 25 Colo. Nat. Resources, Energy & Env'tl. L. Rev. 419, 438 (Summer 2014).

<sup>58</sup> See *Harned*, *infra*



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## **Home Rule Municipalities May Pass Ordinances Altering Their Form of Government and Place a Referendum on the Ballot Under the Ordinance**

In *Flowers v. City of Moline*, the Illinois Appellate Court analyzed Article VII's scope and interpreted what makes a referendum question legally sufficient to be presented to the voters.<sup>59</sup> In this case, the plaintiff challenged the City of Moline's authority to alter its form of government by altering appointment procedures for multiple city offices.<sup>60</sup> The city passed an ordinance making all of these changes and, on the same day, passed a resolution calling for submitting the ordinance in question form to the public through a referendum.<sup>61</sup> The plaintiff sought to both keep the referendum off the ballot and to enjoin the city from enforcing the ordinance.<sup>62</sup> As a brief initial matter, the court confirmed that, because the City of Moline was a home-rule unit, it was free to supersede the state statute which had previously defined how a city may adopt a managerial form of government.<sup>63</sup>

The court held that the term "by law" in Article VII does not mean that the forms of government must be explicitly provided by statute, as city ordinance is also "law" within the city.<sup>64</sup> Most importantly, the court noted that the form of government clause includes three words: adopt, alter, or repeal.<sup>65</sup> The interpretation of the form of government clause advanced by the plaintiff would essentially mean that home-rule municipalities would only have the authority to adopt a different form of government as provided by statute or to repeal their current form of government.<sup>66</sup> In other words, this interpretation renders the word "alter" completely meaningless.<sup>67</sup> The use of the word "alter" necessarily means that home-rule units have the authority to tailor their form of government to their own, specific needs.<sup>68</sup> Therefore, the city did not exceed its authority in making these novel changes to its form of government.<sup>69</sup>

## **Without State Law or Municipal Ordinance Underlying It, Citizen-Initiated Referendum Altering the Form of Government Fails**

The above cases set out cohesive interpretations of the processes in Article VII of the Illinois Constitution for citizens to propose changes through referendum and for local government to alter

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<sup>59</sup> 251 Ill. App. 3d 348 (3rd Dist. 1993).

<sup>60</sup> *Id.* at 350.

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

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

<sup>63</sup> *Id.* at 352.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Flowers*, 111 Ill. App. 3d at 352.

<sup>69</sup> *Id.*





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form. In 2020, *Harned v. Evanston Municipal Officers Electoral Board* dealt with questions involving both processes: an initiative for referendum to alter the form of Evanston government.

The case surrounded a comprehensive ballot question known as the “Evanston Voter Initiative,” or “EVI.” The EVI question stated:

"Shall the people of the City of Evanston provide for a voter petition and referendum process for the consideration and passage of city ordinances as follows: The people of Evanston provide that the offices of City Clerk, Mayor, and aldermen of the City Council have the power and duty to determine the necessary and proper procedural rules regarding the passage of city ordinances and the express duty to assist the people of Evanston in exercising their right to petition and make known their opinions regarding the consideration and passage of city ordinances. At the request of at least 25 Evanston electors, the City Clerk shall promptly cause a proposal to be drafted into ordinance form, including an official summary of the proposed ordinance. The official summary of the proposed ordinance may be introduced by a petition filed with the city clerk and signed by many electors equal to at least eight percent of the total votes cast in Evanston for candidates for Governor in the preceding gubernatorial election. The procedure for filing the petition and determining its validity and sufficiency shall be established by the City Clerk, who shall make the determination of validity and sufficiency within 21 days of a petition filing.

Upon the determination of a valid and sufficient petition, the City Clerk shall within one business day submit the ordinance proposed by the official petition summary on the agenda of the next City Council meeting for its consideration. The City Council shall take a record roll call vote on the proposed ordinance within 70 days of submission by the City Clerk. If the City Council does not pass the proposed ordinance within the 70 day period, the official summary of the proposed ordinance shall be submitted by the City Clerk to the electors for their approval by referendum at the next regularly scheduled election held in all precincts of the city and held at least 70 days after referendum submission by the City Clerk. If the official summary is approved by a majority of those voting on the question, the proposed ordinance shall have the force and effect of passage by the corporate authorities of the City of Evanston unless it is disapproved by a resolution of the City Council not more than 30 days after the election?"<sup>70</sup>

The objections to this question were that it: (1) presented a binding referendum question, in violation of state law; and (2) that the question as presented would confuse voters.<sup>71</sup>

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<sup>70</sup> 2020 IL App (1st) 200314 at ¶5.

<sup>71</sup> *Id.* at ¶6. The Appellate Court also ruled that the Electoral Board correctly denied the petitioners motion to dismiss on the grounds that the objectors had not “stated their interest,” as required by law.



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The appellate court began by affirming that Article VII, Section 11 only provides for voter-initiated referenda for "[p] for actions which are authorized by [article VII] or by law and which require approval by referendum."<sup>72</sup> The court also noted that Section 28 of the Election Code clarifies that, to qualify for the ballot, a referendum must be authorized independently by either statute or the state constitution.<sup>73</sup>

Evanston, by nature of its size, is automatically a home-rule unit. Much of the case analyzed Section 6(f) of Article VII, which defines the powers of home rule units to "adopt, alter or repeal a form of government provided by law," and "to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law."

Petitioner argued that the second clause was an appropriate vehicle for the petitioners' proposed change because it altered the duties which certain officers had: specifically by limiting a portion of the duties allocated to the City Council and the Mayor, and by increasing the duties of the City Clerk. The Court found that this second clause was only invoked when providing for new or different offices, changing the manner of selection of officers, or terms of office.

As to the first clause of Section 6(f), the court found that the EVI would not adopt or repeal any preexisting form of government.<sup>74</sup> The form of government clause does, of course, allow for alterations to a form of government, and the court stated that a proposal implicates that part of the clause when it "substantially change[s] the inherent powers belonging to one part of government."<sup>75</sup> However, the court declared that the EVI fails under the form of government clause because the novel "form of government" provided for by the proposal would not be one "provided for by law."<sup>76</sup>

The court distinguished this case from *Flowers* by stating that the city government in *Flowers* had passed an ordinance creating the form of government before submitting the proposal to the voters.<sup>77</sup> Because the EVI was initiated by the voters and the Evanston City Council had not acted beforehand, there was no law providing for this form of government.<sup>78</sup>

Though the court could have disposed of the case following analysis under Section 6(f), it chose to rule on the issue of vagueness and confusion as well, drawing on the tests from *Leck*, *Lipinski*, and *Ames*.<sup>79</sup> The court held that *Johnson v. Ames* was distinguishable from the case in front of it because the referendum at issue was significantly simpler: it created term limits, and the missing piece of the

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<sup>72</sup> *Harned*, at ¶33.

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

<sup>74</sup> *Id.* at ¶37.

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

<sup>76</sup> *Id.* at ¶38.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at ¶39.

<sup>79</sup> *Harned* at ¶40, ¶41, ¶42.



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referendum could be easily inferred.<sup>80</sup> The court read the EVI as requiring the city to decide, at some later date, the procedures for filing the voter-initiated petitions contemplated by the question, as well as the methods for determining validity and sufficiency.<sup>81</sup> The court was also concerned with potential situations the question was silent on, such as what happens if a voter-driven initiative is passed by the city council but vetoed by the mayor.<sup>82</sup> Applying these facts to the *Leck* and *Lipinski* test, the court found that the EVI was not sufficiently self-executing.<sup>83</sup>

### **Enhancing Direct Democracy in Illinois Requires Changing the Law**

As these cases show, the right to initiative and referendum enshrined in the Illinois Constitution remains constrained to the point that direct democracy in Illinois is nearly nonexistent. Would-be proponents must find narrow openings in the law and leap high hurdles to have an opportunity to change local law through a referendum. Though the record of proceedings at the constitutional convention point to the drafters' intent that local government remain flexible, the decades since have shown that flexibility exists only in the hands of home rule authorities

However, these cases also show opportunity: the need for home rule power has a corollary need in people power. Where the General Assembly has opened up limited opportunities for direct democracy, advocates have often taken advantage.

Next week, we will look to other states for models Illinois may follow in expanding direct democracy. In two weeks, finally, we will present a path forward to a broader and more inclusive initiative and referendum process.

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<sup>80</sup> *Id.* at ¶42.

<sup>81</sup> *Id.* at ¶43.

<sup>82</sup> *Harned* at ¶43.

<sup>83</sup> *Id.*