



BUILDING DEMOCRACY FOR THE 21ST CENTURY

Direct Democracy Part 1: How the Illinois Constitution and Laws Shape Direct Democracy in Illinois

The U.S. Constitution does not provide a right to direct democracy. The First Amendment protects all forms of speech, including political, although it does not reference direct democracy. The Constitution contains no direct reference to any form of citizen-led initiative. However, federal courts have held that if a state decides to grant the right to sign and circulate ballot initiative petitions to its citizens, that mechanism does find protection in the First Amendment. The state may not then place unconstitutional barriers upon it.¹ Ballot initiatives combine the expressive activities of presenting a stance and attempting to persuade others to agree with it, with an attempt to effectuate political change, thus facilitating self-governance, making it part of the core sphere of activities the First Amendment is designed to protect.²

Though "direct democracy" is not a phrase found in the U.S. Constitution, its history is long and well-established. Forms of direct democracy stretch from early colonial authorities through modern state and local governments.³ In contrast, Illinois enshrined the citizenry's right to initiate advisory referenda and to initiate limited types of binding referenda. It is one of few states that allows citizens to place advisory questions of public policy on the ballot and virtually without subject matter limitations.

¹ See, e.g., *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018), citing *Meyer v. Grant*, 486 U.S. 414, 424–25 (1988) ("The Court rejected that argument and ultimately struck down a statute—a state that does open the ballot cannot impose unconstitutional conditions—but did not reject the premise that the right to propose initiatives is an exclusively state-created right.")

² See, e.g., Anna Skiba-Crafts, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MILR 1305, 1318 (2009); *Burson v. Freeman*, 504 U.S. 191, 196 (1992).

³ *A Brief History of Town Meeting, From Election Cake to Lemon Meringue Pie*, New England Historical Society, available at <https://www.newenglandhistoricalsociety.com/a-brief-history-of-town-meeting-from-election-cake-to-lemon-meringue-pie>.

It stands to be repeated that opportunities to place binding initiatives, questions that will become law if approved by voters, are limited in Illinois. The authors of the 1970 Illinois Constitution were clear about the powers of initiative that they wanted to invoke, as will be detailed further below and in future installments, and they built in protections for those rights. While the text indicates some limitations on these opportunities, Illinois Appellate Court cases have very narrowly construed this privilege, establishing a tight framework in which direct democracy proponents must maneuver.

This paper will map a path forward. The right to petition to place binding questions on the ballot in Illinois must be amended to have any meaningful power. This week's installment offers a brief discussion of the two initiative-granting amendments of the Illinois Constitution and their contours. Next week will detail the relevant judicial decisions affecting the viability of citizen-initiated referenda at the local level. The third week will take a broad look at what lessons may be gleaned from other states, focusing specifically on United States Supreme Court cases. These cases have ruled that signing and circulating ballot initiative petitions are core political speech. The fourth and final week will provide suggestions towards a broader, more inclusive, and robust framework for direct democracy in Illinois.

I. A BRIEF OVERVIEW OF HOME RULE

In 1970, Illinois framed a new constitution, allowing for "home rule" municipalities and counties with far more ability to shape local law than before. The advocates who called for a constitutional convention wished to disperse power to the local level, including new ways to raise municipal revenue and shape laws unless restricted by the General Assembly or constitution. Municipalities reaching a population of more than 25,000 automatically become home rule; smaller municipalities may elect to become home rule via referendum.⁴ The Illinois Constitution goes on to define certain powers and limitations on home rule government.

In addition to additional taxing powers, "[h]ome rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."⁵ Over the subsequent fifty years, courts have read this provision broadly, confirming home rule municipalities' ability to enact a wide range of laws, set their own rules of legislative procedure, and ignore those rules upon a vote of the elected city council or village board. Though the constitution and laws passed by the General Assembly have limited home rule municipalities on specific subjects, it is clear that the framers successfully shifted significant decision making power to the local level.

While the constitution provides for mostly open-ended powers for home rule government, the opposite is true for direct democracy. Each opportunity for citizen-initiated referendum must be spelled out directly in the law.

⁴ Ill. Const. Art. VII, § 6.

⁵ Ill. Const. Art. VII, § 6(i).

II. STATE LAWS GOVERNING INITIATIVE AND REFERENDUM

Illinois law does not contain any comprehensive mechanism for voter-driven ballot initiatives. Instead, the right to citizen-initiated referenda is grounded in the Illinois Constitution, and its progeny are scattered throughout the Illinois Consolidated Statutes, and particularly so in the Election Code.

Generally speaking, Illinois law allows for three types of citizen-initiated referendum: (A) binding local initiatives, (B) binding statewide constitutional amendments, and © advisory questions of public policy. Though this series only addresses the first category, the sources for all three types of referendum follow.

A. Binding Ballot Initiatives at the Local Government Level

Article VII, Section 11 of the Illinois Constitution, which allows for ballot initiatives to make changes to local government, with varying impact depending on whether the local government is considered "home-rule" or not, provides as follows:

Proposals for actions which are authorized by this Article or by law which require approval by referendum may be initiated and submitted to the electors by resolution of the governing board of a unit of local government or by petition of electors in the manner provided by law.

Referenda required by this Article shall be held at general elections, except as otherwise provided by law. Questions submitted to referendum shall be adopted if approved by a majority of those voting on the question unless a different requirement is specified by this Article.⁶

B. Statewide Binding Ballot Initiatives

Article XIV, Section 3 of the Illinois Constitution, allowing for limited voter driven proposed amendments to the State Constitution, provides as follows:

Amendments to Article IV of this Constitution may be proposed by a petition signed by a number of electors equal in number to at least eight percent of the total votes cast for candidates for Governor in the preceding gubernatorial election. Amendments shall be limited to structural and procedural subjects contained in Article IV. A petition shall contain the text of the proposed amendment and the date of the general election at which the proposed amendment is to be submitted, shall have been signed by the petitioning electors not more than twenty-four months preceding that general election and shall be

⁶ Ill. Const. Art. VII, § 11.

filed with the Secretary of State at least six months prior to that general election. The procedure for determining the validity and sufficiency of a petition shall be provided for by law. If the petition is valid and sufficient, the proposed amendment shall be submitted to the electors at that general election and shall become effective if approved by either three fifths of those voting on the amendment, or a majority of those voting in the election.⁷

This is currently the only method in Illinois law that allows for a binding statewide referendum initiated by petition. Illinois law additionally allows non-binding advisory questions.⁸

C. Advisory Questions of Public Policy

At the outset, it should be noted that the only limits on questions of public policy that are not explicitly allowed by either Article XIV or Article VII are outlined in Section 28-6(c), which states as follows:

Local questions of public policy authorized by this Section and statewide questions of public policy authorized by Section 28-9 shall be advisory public questions, and no legal effects shall result from the adoption or rejection of such propositions.⁹

Section 5/28-9 of the Illinois Election Code sets out the process for initiating an advisory question for statewide referendum. The section states in pertinent part:

Petitions for **advisory questions** of public policy to be submitted to the voters of the entire State shall be signed by a number of voters equal in number to 8% of the total votes cast for candidates for Governor in the preceding gubernatorial election. **Such petition** shall have been signed by said petitioners not more than 24 months preceding the date of the general election at which the question is to be submitted and shall be filed with the State Board of Elections at least 6 months before that general election.¹⁰

While such advisory referendums are outside the scope of this paper, it is worth noting that courts, including the Seventh Circuit Court of Appeals, acknowledge these measures as a constitutionally protected forum.¹¹

⁷ Ill. Const. Art. XIV, § 3.

⁸ 10 ILCS 5/28-6.

⁹ 10 ILCS 5/28-6.

¹⁰ 10 ILCS 5/28-9.

¹¹ See, e.g., *Protect Marriage Illinois v. Orr*, 463 F.3d 604, 606 (7th Cir. 2006) (“If a state can thus ban advisory questions from the ballot altogether, it can impose requirements designed to avoid ballot clutter, provided the requirements are not jiggered in a way that discriminates against particular advocates or viewpoints.”).

D. State Laws Governing Petition Format and Ballot Access

Citizen-initiated referendums include set parameters for the petitioning and filing periods, the number of signatures required, and any limitations on the type of election where a referendum may be initiated. While some binding referendum provisions scattered throughout state law specify requirements for individual initiatives, the Election Code provides a default set for any referendum where state law does not provide specific requirements. Other sections of the Election Code set out verification and hearing procedures for Article XIV proposed amendments or for statewide advisory questions of public policy.¹²

III. THE ILLINOIS CONSTITUTION AND STATE STATUTES SEVERELY LIMIT OPPORTUNITIES FOR DIRECT DEMOCRACY

Currently, Illinois law provides for several hundred opportunities for binding referendums, ranging from questions on taxation to the creation of township mental health boards to discontinuation of a pig marketing program. Most Illinoisans would find a high number of the current opportunities inapplicable or unhelpful.

EXAMPLES OF BINDING REFERENDUMS

Most opportunities for binding referendums in Illinois are narrowly focused and dispersed throughout many sections of Illinois law. Each one may require a different number of petition signatures or other legal processes in order to make the ballot eventually. Unfortunately, this takes the narrow path to binding referendums described above and narrows access to those who have a reasonably sophisticated understanding of Illinois law, history, and advocacy.

The following short list illustrates the nature of this problem.

1. The Community Mental Health Act defines a citizen-initiated referendum to provide mental health facilities and services in a county, city, village, incorporated town, or township.¹³ The number of eligible voters signing the petition to initiate the referendum must be “equal in number to at least 10% of the total votes cast for the office which received the greatest total number of votes at the last preceding general governmental unit election.”¹⁴
2. According to the Illinois Counties Code, in counties with fewer than 500,000 people, voters may initiate a referendum to create a county road district.¹⁵ Depending on the organization of the county, petitions must be signed by the

¹² 10 ILCS 5/28-11, *et seq.*

¹³ 405 ILCS 20/6.

¹⁴ *Id.*

¹⁵ 605 ILCS 5/6-111.

fewer of “5% of the legal voters or 50 legal voters, whichever is fewer, in each of at least a majority of the townships [...] or road districts.”¹⁶

3. The Illinois Swine Market Development Act provides that, upon petition by 100 swine producers who are qualified in each of seven districts, the Illinois Swine Market Development Council must conduct a referendum within 90 days to determine if the Illinois Swine Market Development Program shall continue.¹⁷

Next week, we will lay out how courts have even more narrowly interpreted and limited the opportunities for direct democracy in Illinois.

¹⁶ *Id.*

¹⁷ 510 ILCS 101/70.