AN EXPEDITED REJECTION OF REDISTRICTING BALLOT INITIATIVES: *HOOKER V. ILLINOIS STATE BOARD OF ELECTIONS*, 2016 IL 121077

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I. INTRODUCTION

The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people.[1]

Under the representative system of democracy in the United States, the people collectively entrust certain sovereign rights, i.e., the power to make laws, to their elected representatives, while retaining to themselves the power to withhold other rights with "such limitations as they choose."[2] Ballot initiatives, also called direct democracy, is one of the mechanisms under the United States Constitution that allows voters to exercise their sovereign right to intervene in the democratic process and give voice on how their sovereign power may be exercised.[3] Depending on a state's ballot initiative system, the process grants citizens the ability to operate entirely outside the States' representative assemblies by providing the right to petition for statutes or constitutional amendments to be adopted or rejected by the voters at the polls.[4] Since its emergence, the ballot initiative process has had considerable influence on public policy, and remains "one of the most precious rights of our democratic process" and "is so fundamental that it is described not as a right granted the people, but as a power reserved by them."[5] Recently, the United States Supreme Court recognized that the "invention of the initiative was in full harmony with the Constitution's conception of the people as the

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1. THE FEDERALIST No. 37, at 223 (James Madison).
2. *In re* Pension Reform, 2015 IL 118585, ¶¶ 77–78 (citing Hawthorn v. People, 109 Ill. 302, 306 (1883)).
3. Arizona State Legislature v. Arizona. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2659–60 (2015).
4. *Id.*
5. *See* Ruggles v. Yagong, 135 Haw. 411, 426–27, 353 P.3d 953, 968–69 (2015) (internal citations omitted).

font of governmental power."[6] The Court noted that nearly a century before the formation of the United States Constitution, political philosopher John Locke reasoned that the people's ultimate sovereignty resides in the people who retain the power to dissolve the legislature when it violates the confidence given by the ultimate sovereign, the people:

> [T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.[7]

It was Locke's ideas on the government's role in society that guided the founding fathers during the creation of the United States.[8]

For most of Illinois' history, the initiative process could not be used to amend the Illinois Constitution.[9] Prior to the Sixth Illinois Constitutional Convention in 1970, which first adopted ballot initiatives,[10] the only methods for changing the constitution were through the process of convening a constitutional convention,[11] or by the General Assembly proposing amendments for approval by the voters.[12] The drafters of the 1970 Illinois Constitution acted in accordance with the basic principles of citizen-initiated ballot initiatives when they formulated the ballot initiative provision set forth in Article XIV, section 3.[13] The ballot initiative procedure in Illinois "was drafted and adopted as a check on the legislature's self-interest"[14] and as a

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6. *Arizona State Legislature*, 135 S. Ct. at 2674–75.
7. *Id.* at 2675 (citing Two Treatises of Government § 149, p. 385 (P. Laslett ed. 1964)).
8. *Arizona State Legislature*, 135 S. Ct. at 2675.
9. Hooker v. Illinois State Bd. of Elections, 2016 IL 121077, ¶ 103 (Opinion modified on denial of rehearing.) (Karmeier, J. dissenting joined by Garman, C.J., Thomas, J.).
10. ILL. CONST. 1970, art. XIV, § 3.
11. ILL. CONST. 1970, art. XIV, § 1.
12. ILL. CONST. 1970, art. XIV, § 2.
13. ILL. CONST. 1970, art. XIV, § 3 ("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. . . . 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.").
14. Coalition for Political Honesty v. State Bd. of Elections, 83 Ill. 2d 236, 247 (1980) (per curiam).

means by which the people could overcome "'a reluctance on the part of the General Assembly to propose changes in its own domain'"[15]

In an expedited appeal, the Illinois Supreme Court in *Hooker v. Illinois State Board of Elections*[16] considered a proposed citizen-initiated ballot initiative to change the manner in which state lawmakers design legislative boundaries. The procedure proposed under the ballot initiative would greatly reduce the General Assembly's role in the process of redistricting, and instead, place the primary responsibility for drawing the legislative maps in the hands of a new commission whose members would be selected by the Auditor General.[17] In a sharply divided opinion, however, the Illinois Supreme Court held that the proposed ballot initiative was not constitutionally eligible for the November 2016 ballot.[18]

Examining the recent landmark decision in *Hooker v. Illinois State Board of Elections*, this article begins with a brief background of the redistricting process in Illinois and proposed ballot initiative. The article will then detail the majority's holding and the concerns raised by the dissenters. Following an analysis on the effects of the majority's opinion, the article concludes with a discussion as to whether the majority's opinion provides a roadmap or a roadblock for future redistricting ballot initiatives.

II. BACKGROUND

Article XIV, section 3 of the 1970 Illinois Constitution authorizes the use of citizen-initiated ballot initiatives to amend Article IV, the legislative article, with the sole proviso that such initiatives "shall be limited to structural and procedural subjects contained in Article IV."[19] Article IV of the 1970 Illinois Constitution contains no fewer than fifteen different sections: (1) legislative power and structure, (2) legislative composition, (3) legislative redistricting, (4) election, (5) sessions, (6) organization, (7) transaction of business, (8) passage of bills, (9) veto procedure, (10) effective date of laws, (11) compensation and allowances, (12) legislative immunity, (13) special legislation, (14) impeachment, and (15) adjournment.[20] Under the current redistricting process found in Article IV, section 3, the Speaker and Minority Leader of the House of Representatives each appoint to a redistricting commission one Representative and one person who is not a

15. *Id.* at 246 (quoting Record of Proceedings, Sixth Illinois Constitutional Convention V.7 2677–78 (1972)).
16. 2016 IL 121077.
17. *Id.* at ¶ 6.
18. *Id.* at ¶ 44.
19. ILL. CONST. 1970, art. XIV, § 3.
20. ILL. CONST. 1970, art. IV.

member of the General Assembly.[21] Additionally, the President and Minority Leader of the Senate each appoint to the redistricting commission one Senator and one person who is not a member of the General Assembly.[22] In total, the redistricting commission is comprised of eight members.[23] After the members are certified by the Secretary of State, the redistricting commission files with the Secretary of State a redistricting plan approved by at least five members.[24] If, however, the redistricting commission fails to file an approved redistricting plan, the Illinois Supreme Court submits the names of two persons, not of the same political party, to the Secretary of State, one of which is randomly selected to serve as the ninth member of the commission and break the tie.[25]

Since adopting the 1970 Illinois Constitution, the General Assembly has only once agreed on a plan and redistricted itself.[26] Following each of the other four decennial censuses, a redistricting commission has been required.[27] In three of the four instances when resorting to the redistricting commission has been needed, the commission itself has deadlocked.[28] This result has triggered the provision for selection by the Illinois Supreme Court of an additional member to break the tie through the drawing of lots[29]—a process that has been strongly criticized by the court,[30] but upheld against federal constitutional challenge.[31] In each of the three instances where the commission failed to submit a redistricting plan, the resulting map favored the political party with which the winner of the draw was affiliated.[32]

In May 2016, Independent Maps, the proponent of the ballot initiative and intervening party, filed a petition to place on the November 2016 ballot a proposed amendment to Article IV, section 3 of the 1970 Illinois Constitution that would provide a new process for redrawing legislative

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21. ILL. CONST. 1970, art. IV, § 3(b).
22. *Id*.
23. *Id*.
24. *Id*.
25. *Id*.
26. *Hooker*, 2016 IL 121077, ¶ 5.
27. *Id*. (citing *People ex rel.* Scott v. Grivetti, 50 Ill. 2d 156 (1971); Schrage v. State Board of Elections, 88 Ill. 2d 87 (1981); *People ex rel*. Burris v. Ryan, 147 Ill. 2d 270 (1991); Cole-Randazzo v. Ryan, 198 Ill. 2d 233 (2001); Beaubien v. Ryan, 198 Ill. 2d 294 (2001)).
28. *Hooker*, 2016 IL 121077, ¶ 5. (citing Schrage v. State Board of Elections, 88 Ill. 2d at 92; *Burris*, 147 Ill. 2d at 277; *Beaubien*, 198 Ill. 2d at 299).
29. *Hooker*, 2016 IL 121077, ¶ 5.
30. *Id*. *See Burris*, 147 Ill. 2d at 308–14 (Bilandic, J., dissenting, joined by Clark and Freeman, JJ.) ("[w]e should not hasten to gamble away the government 'of the People, by the People, and for the People' on the turn of a card, roll of the dice, or even random selection").
31. *Hooker*, 2016 IL 121077, ¶ 5 (citing Winters v. Illinois State Bd. of Elections, 197 F.Supp.2d 1110 (N.D. Ill. 2001), *aff'd,* 535 U.S. 967 (2002)).
32. *Hooker*, 2016 IL 121077, ¶ 71 (Karmeier, J., dissenting joined by Garman, C.J., Thomas, J.).

districts in Illinois.[33] If allowed to proceed, Independent Maps' initiative would give the people of Illinois the opportunity to vote on the question of whether the existing system for redrawing this state's legislative and representative districts set forth in Article IV, section 3, should be replaced with an entirely new redistricting system in which districts would be redrawn by an Independent Redistricting Commission with no involvement by the General Assembly.[34] Under the new proposed redistricting system, an eleven member independent commission selected by the Auditor General through a multi-step process would replace the General Assembly's role of redrawing the legislative and representative districts.[35] If the Commission, however, was unable to agree to a redistricting plan, the Chief Justice of the Illinois Supreme Court and the senior Justice who is of the opposite political party jointly appoint a "Special Commissioner for Redistricting" who would break the deadlock by adopting and filing a redistricting plan.[36]

The intent of the proposed ballot initiative was to minimize the General Assembly's self-interest and involve non-legislative actors in the process of redistricting due to the fact there is an inherent conflict of interest "when legislators draw district lines that they ultimately have to run in."[37] Easily surpassing the minimum number of signatures required pursuant to the ballot initiative process under Article XIV, section 3, over 500,000 citizens of Illinois signed Independent Maps' petition.[38]

Days after Independent Maps submitted its petition to the Illinois State Board of Elections, a "taxpayer's suit" was filed seeking to enjoin the Board from disbursing funds to place the proposal on the ballot in the upcoming election.[39] The action was filed by a political committee called People's Map, along with its chairperson, John Hooker, and others.[40] The complaint consisted of eleven counts.[41] The first six counts argued that the proposed amendment was unconstitutional because it exceeded the scope of ballot initiatives permitted under Article XIV, section 3 of the 1970 Illinois Constitution.[42] The remaining counts sought a permanent injunction based

33. *Id.* at ¶ 4.
34. *Id.* at ¶ 6.
35. *Id.*
36. *Id.*
37. *See id.* at ¶ 54 (Garman, C.J., dissenting, joined by Thomas and Karmeier, JJ.); *see also Arizona State Legislature*,135 S.Ct. at 2661.
38. *Hooker*, 2016 IL 121077, ¶¶ 7, 74 (The required number of valid signatures needed to bring the ballot initiative was 290,216. The State Board of Elections determined that there were over 375,000 valid signatures.).
39. *Id.* at ¶ 85.
40. *Id.* at ¶ 9.
41. *Id.* at ¶ 11.
42. *Id.* Count I claimed that the initiative exceeds those limitations by adding to the existing duties of the Auditor General enumerated in Article VIII of the Illinois Constitution. Count II alleged the

on the allegations in the prior counts.[43] Specifically, for purposes of this article, according to count I, plaintiffs alleged that the initiative exceeded those limitations by adding to the existing duties of the Auditor General enumerated in Article VIII of the 1970 Illinois Constitution because it was not limited to those subjects under Article XIV, section 3.[44]

Following a hearing on plaintiffs' motions, the circuit court determined that the proposed ballot initiative failed to comply with the requirements in the Illinois Constitution.[45] Independent Maps immediately filed a notice of appeal to the appellate court and asked that the case be expedited.[46] At the same time, Independent Maps filed a motion to transfer the case directly to the Illinois Supreme Court.[47] The Illinois Supreme Court granted Independent Maps' motion on July 22, 2016, ordering an expedited briefing schedule for the parties and taking the matter under advisement without conducting oral arguments.[48]

Before the Illinois Supreme Court, plaintiffs advanced two basic lines of constitutional attack against Independent Maps' ballot initiative: (1) that the initiative exceeded the scope of amendments permitted through ballot initiative under Article XIV, section 3, because it was not "limited to structural and procedural subjects contained in Article IV," and; (2) that the initiative violated Article III, section 3, of the constitution, which provides that "[a]ll elections shall be free and equal," because it impermissibly combines into a single ballot proposition separate and unrelated questions.[49] The litigation before the Illinois Supreme Court did not call upon the court to make any ruling or express any opinion regarding whether the proposed amendment is wise or desirable. Rather, the sole function of the Illinois Supreme Court was to determine whether the voters should be allowed to consider the initiative. Thirty-four days after allowing to hear the case, on August 25, 2016, the Illinois Supreme Court in a 4-3 decision issued its

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initiative unconstitutionally modifies our courts' jurisdiction as currently stated in the judicial article. Count III asserted the proposal would improperly impose new duties on both the Chief Justice of Illinois Supreme Court and the most senior Justice who is not affiliated with the same political party as the Chief Justice. Count IV contended the proposed initiative is invalid because it would impose a new requirement that the members of the supreme court be affiliated with a political party. Count V alleged that the latter provision limited the ballot initiative process to proposing changes in the structure and procedure of the legislature. Count VI argued that the proposal exceeded the limits mandated in Article XIV, section 3, by eliminating the Attorney General's authority to commence actions pertaining to legislative redistricting. *Id.* at ¶¶ 12–13.

43. *Id.* at ¶ 11.
44. *Id.* at ¶¶ 11–13.
45. *Id.* at ¶ 17.
46. *Id.* ¶ 18.
47. *Id.*
48. *Id.*.
49. *Id.* at ¶ 22.

opinion affirming the circuit court's ruling that the proposed ballot initiative was unconstitutional.[50] The mandate was issued the same day.[51]

III. MAJORITY OPINION

Authored by Justice Kilbride, and joined by Justices Freeman, Burke, and Theis, the majority found a single issue—the proposed role of the Auditor General under count I of the plaintiffs' complaint—fatal to the proposed initiative.[52] Accordingly, the majority did not address the viability of the other aspects of the proposed initiative that were challenged by the plaintiffs or whether the proposal impermissibly combined into a single ballot initiative separate and unrelated questions.

Prior to addressing the merits of plaintiffs' challenge to count I, the majority discussed the history of ballot initiatives and the constitutional hurdles a proposed initiative must overcome in order to be placed on the ballot.[53] Referencing four prior decisions, the majority explained that the court applies a strict and narrow interpretation of proposed ballot initiatives brought under Article XIV, section 3, in order to maintain the drafter's intention that initiatives "be restricted to a subset of topics relating to that article, namely, structural *and* procedural subjects contained in Article IV."[54]

Turning to the merits of count I, Independent Maps argued that the ballot initiative comported with constitutional standards because it was "not being used as a subterfuge to undermine the duties the Constitution assigns to the Auditor General in Article VIII."[55] Moreover, Independent Maps claimed that because the proposed ballot initiative was not designed to change the current constitutional duties of the Auditor, the initiative was distinguishable from the court's prior decision in *CBA I*, which arguably limited the scope of constitutional initiatives.[56]

The majority rejected Independent Maps' claims, raising the concern that under the proposed ballot initiative the Auditor General would be, for

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50. *Id.* at ¶ 49.
51. *Id.* at ¶ 51.
52. *Id.* at ¶ 25.
53. *See id.* at ¶¶ 20-23.
54. *Id.* at ¶¶ 35-36 (citing Chicago Bar Ass'n v. State Bd. of Elections, 137 Ill. 2d 394, 396 (1990) (hereinafter *CBA I*), Chicago Bar Ass'n v. State Bd. of Elections, 161 Ill. 2d 502, 506 (1994) (hereinafter *CBA II*), Coal. for Political Honesty v. State Bd. of Elections, 65 Ill. 2d 453, 457 (1976) (hereinafter *Coalition I*), Coal. for Political Honesty v. State Bd. of Elections, 83 Ill. 2d 236, 247 (1980) (emphasis in original) (internal quotation marks omitted) (hereinafter *Coalition II*)).
55. *Hooker*, 2016 IL 121077, ¶ 31.
56. *Id.* at ¶¶ 23, 34–37. (For additional background information regarding the scope of constitutional ballot initiatives, *see, e.g.*, Suzanne M. Fitch, *Citizen Ballot Initiatives to Amend the Illinois Constitution*, 29 DCBA Brief 14 (2017)).

the first time, actively involved in the redistricting process.[57] Although acknowledging that it was unclear how great a burden the additional duties imposed by the proposed initiative would create, the majority perceived that the newly assigned duties impermissibly exceeded those explicitly assigned to the Auditor under Article VIII, section 3 of the 1970 Illinois Constitution.[58] The majority reasoned that the additional functions would be unduly burdensome on the current constitutional duties of the Auditor and have a material effect on those duties since it would divert the Auditor's time and resources.[59] Accordingly, the majority held that the alterations would have "a material effect on another section of our constitution, in violation of Article XIV, section 3"[60]

Similarly, the majority reasoned that because the office or duties of the Auditor have never been and are not "presently constituted" in the current redistricting process, the Auditor provision in the proposed initiative was not a proper "subject" of Article IV.[61] The majority's reasoning was that the proposed initiative attempted to change Article VIII, section 3 (Auditor General Article), thereby exceeding the scope of Article XIV, section 3, which pursuant to *Coalition I*, is "*limited* to structural and procedural subjects contained in Article IV."[62] In other words, the majority viewed the term "subject" as used in of Article XIV, section 3, as synonymous with the "actor" or the actor's duties who is contained in Article IV.[63] In the majority's view, the proposed ballot initiative violated of the scope of ballot initiatives under Article XIV, section 3, by creating changes that neither "attack [n]or . . . concern the actual structure or makeup of the legislature itself" since the initiative imposed duties that are not presently constituted to the Auditor under Article VIII, section 3, and that the Auditor or the Auditor's duties under Article III are not currently mentioned in Article IV.[64]

Independent Maps argued against striking down the Auditor General provision, as the majority ultimately did, because it would "make it largely impossible to make meaningful reforms in the redistricting process" if a ballot initiative could not involve a new "subject" to Article IV or impose new duties to those presently involved under Article IV.[65] The majority, nonetheless, rejected Independent Maps' claim, concluding that the "Auditor General is not the only potential non-legislative actor capable of filling the

57. *Id.* at ¶ 27.
58. *Id.* at ¶ 29.
59. *Id.*
60. *Id.*
61. *Id.* at ¶ 42.
62. *Id.* at ¶¶ 40–42 (quoting *CBA I*, 137 Ill. 2d 394, 405 (1990) (emphasis in original)).
63. *Id.*
64. *Id.* at ¶ 42 (quoting *Coalition I*, 65 Ill. 2d 453, 470 (1976)).
65. *See id.* at ¶ 43.

duties outlined in [the ballot initiative's] proposal" because there are "other offices or individuals that are unencumbered by the limitations expressed in Article XIV."[66] The majority, however, failed to provide a specific example of a non-legislative actor who complies with their holding.

IV. ELIMINATION OF CITIZEN-INITIATED BALLOT INITIATIVES: THE DISSENTS

In a collective outcry, Chief Justice Garman, Justice Thomas, and Justice Karmeier each wrote separately to voice their specific concerns, while also joining each other's dissents.[67] The common theme of the dissenters concerned the impact of the majority's conclusion on the future of redistricting ballot initiatives in Illinois. In the view of the dissenters, the majority foreclosed on the opportunity for citizens of Illinois to participate in the political process and produce meaningful changes to the constitution through citizen-initiated ballot initiatives, not only for the redistricting section of Article IV, but also as to the other sections of Article IV.[68] Of the three Justices who dissented, Justice Karmeier's dissent offers the most comprehensive analysis for holding that Independent Maps' ballot initiative passes constitutional muster, and should therefore, be placed on the ballot.[69]

This section of the article will focus primarily on the dissent's construction of Article XIV, section 3 ballot provisions due to the majority's determination that plaintiffs' challenge to the proposed role of the Auditor General to be dispositive of the litigation. The article will not address the dissent's rejection of plaintiffs' other constitutional challenges.

The dissent begins its analysis with multiple citations to prior case law that defines the scope of permissible ballot initiatives as well as references to statements made at the 1970 Constitutional Convention concerning the adoption of ballot initiatives.[70] The dissent determined that the standard used to interpret and apply Article IV, section 3, and Article XIV, section 3, is a liberal standard because the ballot initiative process should be construed to uphold the people's sovereign power of reserving the right to amend the redistricting provision through the ballot initiative process.[71] The dissent claimed that the majority's holding was contrary to the intent of the constitutional framers who explicitly expressed concern that the structure of the legislature posed special self-interest problems in modifying the Illinois

66. *Id.*
67. *Id.* at ¶¶ 56, 65, 156.
68. *See id.* at ¶¶ 53, 59–62, 151 (Garman, C.J., Thomas, J., Karmeier, J., dissenting).
69. *See id.* at ¶¶ 66–155 (Karmeier, J., dissenting).
70. *Id.* at ¶¶ 107–11.
71. *Id.* at ¶¶ 113–29.

Constitution because it was unlikely the legislature would propose meaningful changes that lessens their own powers.[72] In support of its view, the dissent citied numerous statements made by different constitutional delegates concerning the proposed provision that would ultimately become Article XIV, section 3.[73] In particular, the dissent referenced Delegate Garrison's statement on adopting citizen-initiated ballot initiatives:

> The initiative would provide a safety valve through which the people may act directly if sufficiently aroused. It would furnish a salutary effect on the legislature. For example, we could hardly expect the legislature *ever* to propose a Constitutional amendment to reduce the size of its membership, *to establish a reapportionment commission comprised entirely of nonlegislative members,* or perhaps even to establish single-member districts.[74]

The dissent noted when the Convention's Committee on the legislature subsequently made its report on what became Article XIV, section 3, it echoed Delegate Garrison's sentiments, stating:

> The primary reason for offering a limited constitutional initiative proposal for the Legislative Article is quite simple: members of the General Assembly have a greater vested interest in the legislative branch of government than any other branch or phase of governmental activity. Cognizant of this fundamental fact of life, the Legislative Committee proposes that the people of the State of Illinois reserve the right to propose amendments by the initiative process to the Legislative Article. * * * In addition to this primary reason for proposing a limited form of Constitutional initiative, the Legislative Committee believes:
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> (1) the greatest virtue in having this provision rests in the potential for keeping the General Assembly more responsive on matters directly and vitally affecting them;
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> (2) voters can better decide on the merits of proposals suggesting changes in the Legislative Article since they are not directly and personally involved; and
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> (3) this is a method to circumvent a legislature which might be dominated by interests opposing legislative changes.[75]

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72. *Id.* at ¶¶ 145–47.
73. *See, e.g., id.* at ¶¶ 107–09, 125–28.
74. *Id.* at ¶ 108 (citing 2 Proceedings 584 (emphasis in original)).
75. *Hooker*, 2016 IL 121077, ¶ 110.

According to the dissent, in light of the explicit statements made at the constitutional convention, the ballot initiative article of the 1970 Illinois Constitution was drafted and adopted as a check by the citizens of Illinois on the legislature's self-interest and a means by which the people could overcome a reluctance on the part of the General Assembly to propose changes in its own domain.[76] With this understanding, the dissent considered the proposed ballot initiative's plan to include different actors in the process of redistricting.[77] By analogy, the dissent argued that including the Auditor, or any other actor, would not prove to be fatal to the ballot initiative, because under the current redistricting plan, the Secretary of State, the Attorney General, and the Supreme Court are assigned duties not included in their respective Articles.[78] For that reason, the dissent refuted the majority's interpretation that the constitutional drafters intended to place a limit that all of a particular official's duties must be contained in a single article.[79] Further, the dissent claimed the additional duties placed on the Auditor, or any other actor, were not problematic because assigning a constitutional officer additional duties differed from changing the obligations already assigned under the constitution, which would be impermissible.[80] The dissent stated:

> To the extent the Auditor General's duties would change, the change would pertain solely and exclusively to the redistricting process, which, as set forth earlier, is a structural and procedural subject of article IV and therefore subject to amendment under article XIV, section 3 (Ill. Const. 1970, art. XIV, § 3). The change would have no effect at all beyond that limited sphere.[81]

Next, addressing the majority's concern that the inclusion of the Auditor in the redistricting process was an attempt to bypass the General Assembly's authority to enact legislation and was being used as a subterfuge to alter other substantive provisions of the constitution, the dissent claimed that the inclusion of the Auditor in the redistricting process only pertains to the redistricting mechanism of Article IV, section 3, and not any other article of the constitution.[82] The dissent noted that the constitutional framers made clear that any amendment proposed under Article XIV, section 3 "would be required to be limited to subjects contained in the Legislative Article, namely

76. *Id.* at ¶ 111 (internal citations omitted).
77. *Id.* at ¶¶ 132–45.
78. *Id.* at ¶¶ 143–45.
79. *Id.*
80. *Id.* at ¶¶ 110–11.
81. *Id.* at ¶ 144.
82. *Id.* at ¶ 145.

matters of structure and procedure and not matters of substantive policy."[83] In other words, the dissent determined that the initiative was valid because all of the proposed duties assigned to the Auditor applied only to the redistricting process and would not affect the Auditor's duties prescribed under Article VIII.[84] Accordingly, the dissent found the proposal valid since it was both limited to the subject matter of redistricting and provided a substantive plan that met the requirements of Article XIV, section 3.[85]

The dissent urged the majority to exercise judicial restraint and allow the initiative to proceed to a vote by the citizens of Illinois.[86] The dissent feared that without allowing the people to vote either in favor or against the proposed amendment, the majority rendered, "nothing less than the nullification of a critical component of the Illinois Constitution of 1970."[87] The dissent declared that the narrow interpretation adopted by the majority placed a "muzzle" on the people of Illinois and "their voices supplanted with judicial fiat."[88] This result, according to the dissent, directly contradicted the express intention of the constitutional drafters and the citizens who voted to adopt the ballot initiative provision under Article XIV, section 3 of the 1970 Illinois Constitution.[89]

Taking aim at the majority's promise that meaningful ballot initiative regarding redistricting is still attainable under a different proposal than that advanced by Independent Map, the dissent found the promise to be "an empty one" because any meaningful proposal would fail for the same reasons as this one "under the contorted and restrictive approach urged by the majority." [90]

Upon the denial for rehearing, Justice Karmeier, joined by Chief Justice Garman and Justice Thomas, addressed again the majority's "empty" promise, urging the majority to consider the various claims raised by Independent Maps and explain what non-legislative actors, as alluded to by them, could be involved in future redistricting ballot initiatives.[91] The dissent agreed with Independent Maps that the majority's approach precludes the assignment of any new role in the redistricting process to any non-legislative actor not currently involved in the redistricting process, because any such changes would be barred by the narrow requirements prescribed by the majority's rationale.[92] In particular, the dissent cited *City of Chicago v.*

83. *Id.* (citing 6 Proceedings 1400).
84. *See Hooker*, 2016 IL 121077, ¶¶ 144–45.
85. *Id.*
86. *Id.* at ¶ 153.
87. *Id.* at ¶ 59 (Thomas J. dissenting joined by Garman, C.J. and Karmeier, J.).
88. *Id.* at ¶ 62.
89. *Id.* at ¶ 59.
90. *Id.* at ¶¶ 148–51.
91. *Id.* at ¶ 170.
92. *Id.*

Reeves, 220 Ill. 274 (1906), to explain that the foundation of the majority analysis was flawed because the "subject" referred to in Article XIV, section 3, pertains to the redistricting process, not the "actor" involved.[93] The dissent reasoned that the redistricting is a structural and procedural subject of Article IV, section 3, and that everything in the proposed initiative is directed to that single purpose.[94] Therefore, the dissent found that the reasoning in *Reeves* rebutted the majority's claim that a ballot initiative proposal exceeded the constitutional limitation because it affected other sections of the constitution.[95] Rather, according to the dissent, as long as the changes in the other sections furthered the change in the core subject in Article IV, the proposed initiative should be constitutional.[96]

Despite the dissent's arguments, the majority declined to modify its opinion, reissuing the mandate on September 12, 2016.[97]

V. THE FUTURE FOR REDISTRICTING BALLOT INITIATIVES

In an attempt to dull the effect of its decision, the majority purported to limit its holding to the particular plan contested in the case while offering up the hope of an alternative plan involving a non-legislative actor other the Auditor General which could be formulated and would meet the requirements of Article XIV, section 3.[98] Is the majority's proposition conceivable? The answer is probably yes, but in a limited scope, and not to the extent of removing the General Assembly's self-interest in redistricting.

As outlined above, the majority opinion held that the particular duties the redistricting initiative assigns to the Auditor are out of bounds because adding them would "create[ ] changes that neither attack [n]or . . . concern the actual structure or makeup of the legislature itself."[99] If that is so, an initiative involving any other non-legislative actor would likely fail because the *duties* themselves cannot be viewed as addressing a structural and procedural subject. The initiative would, therefore, have the identical problem as in this case regardless of who is charged with responsibility for performing the tasks. Conversely, if the duties are the same as the current redistrict plan and the duties are the critical factor of the proposed amendment, merely substituting another non-legislative actor to perform

93. *Id.* at ¶¶ 161–68.
94. *Id.* at ¶ 167.
95. *Id.*
96. *Id.*
97. Hooker v. Illinois State Board of Elections, 2016 IL 121077 (Aug. 25, 2016) (Opinion modified on denial of rehearing by Hooker v. Illinois State Board of Elections, 2016 IL 121077 (Sept. 12, 2016)) (Karmeier, J. dissenting joined by Garman, C.J., Thomas, J.).
98. *Id.* at ¶ 44.
99. *Id.* at ¶ 42 (internal quotation marks omitted).

them instead of the Auditor would likely change very little. Rather, it would result in rearranging the current pieces of the redistricting puzzle.[100]

On the other hand, if the dispositive issue is the identity of the non-legislative actor who performs the duties rather than the duties themselves, the majority's reasoning makes it difficult for any other actor not currently involved in the redistricting plan to qualify. For example, if the non-legislative actor is not already mentioned in Article IV, a challenger would be able to cite paragraph 42 of the majority opinion for the proposition that the duties of that actor "have never been and are not now a 'subject contained in Article IV' as currently constituted," and therefore, they are "not a proper 'subject' of the legislative article."[101]

But, if a new ballot proposal used any of the three non-legislative actors who *are* currently mentioned in Article IV, section 3, namely, the Secretary of State, the Supreme Court, or the Attorney General, use of those actors would be subject to challenge by the same arguments made by the plaintiffs concerning new "burdensome" duties.[102] In other words, because the offices of the current actors are created in other articles (Article V, Article VI, and Article V, respectively), challengers could argue that any such initiative must fail because it "greatly expands the duties of that [actor's] office" and "has a material effect on another section of our constitution."[103] Consequently, it would seem hard to argue that an alternative redistricting measure involving another constitutional actor can be substituted without touching on the other constitutional articles in light of the complex nature of the redistricting process. To hold that the nature of the proposal dooms it because it touches on another constitutional article would be tantamount to holding that Article IV, section 3, is not subject to amendment through the ballot initiative notwithstanding the express authorization to use the ballot initiative process to amend the legislative article, which the people of Illinois reserved for themselves under Article XIV, section 3, when they ratified the 1970 Illinois Constitution.

In light of the explicit language of the majority's ruling, it would therefore appear that the majority in *Hooker* foreclosed on any avenue for meaningful change that would diminish the General Assembly's self-interest in the redistricting process. Rather, under the majority's position, the only foreseeable viable redistricting ballot initiative would be to rearrange the current non-legislative actors already identified in Article IV. However, any

100. *See id.* at ¶ 143.
101. *See id.* at ¶ 42.
102. *See id.* at ¶¶ 29–30.
103. *See id.* at ¶¶ 27, 29.

changes to the duties of the present actors could not impose a greater burden on their current duties.[104]

The majority's holding is the product of its narrow interpretation of Article XIV, section 3, which it claims is unambiguous.[105] Established principles of statutory and constitutional construction hold, however, that a provision *is* considered ambiguous "when it is capable of being understood by reasonably well-informed persons in two or more different senses."[106] Over forty years ago, the Illinois Supreme Court recognized that such was the case with the language of Article XIV, section 3, at issue here, when the Illinois Supreme Court first subjected it to the principles of construction applicable to provisions whose meaning is "thought to be doubtful."[107] Indeed, if the phrase was not ambiguous, the Illinois Supreme Court would not have spent decades debating, among other things, whether the subject of a ballot initiative proposal must be *both* structural *and* procedural in order for the proposal to pass constitutional muster.[108]

The standard formulated by the majority for interpreting Article XIV, section 3, is likewise at odds with other precedent from the Illinois Supreme Court. For instance, when the court in *Coalition II*, formulated the standard that Illinois courts should follow in considering challenges to ballot initiatives proposed under Article XIV, section 3, it relied heavily on decisions from other states, and the standard adopted was fully consistent with the approach those other states have taken.[109] In this case, the majority tried to make the case that ballot initiatives in Illinois are entitled to less deference because the range of topics that can be considered through the ballot initiative process is more limited than in other states.[110] That argument cannot withstand scrutiny either. It confuses the deference due the reserved sovereign power of the people with the permissible scope of the initiative process. For purposes of constitutional analysis, these are separate and distinct inquiries. The range of subjects that may be addressed through initiatives varies state by state,[111] but within whatever sphere or spheres of power the people have retained to modify the law, the deference due the

104. *See id.* at ¶ 29.
105. *See id.* at ¶¶ 35–36.
106. Home Star Bank & Financial Services v. Emergency Care & Health Organization, Ltd., 2014 IL 115526, ¶ 24.
107. *Coalition I*, 65 Ill. 2d at 467 (internal quotation marks omitted); see also *Coalition II*, 83 Ill. 2d at 246.
108. See *Coalition I*, 65 Ill. 2d 473–76 (Schaefer, J., dissenting); *CBA II*, 161 Ill. 2d at 518–19 (Harrision, J., dissenting, joined by Miller and Heiple, JJ.).
109. *Coalition II*, 83 Ill. 2d at 248–50; *see also Hooker*, 2016 IL 121077, ¶¶ 114–16 (Karmeier, J., dissenting).
110. *See, e.g.*, *Hooker*, 2016 IL 121077, ¶¶ 36–38.
111. *See* M. Dane Waters, The Initiative and Referendum Almanac 15 (2003).

exercise of that power is constant, and the responsibility of the courts are the same: to construe the measures so as to effectuate their purpose and facilitate rather than hamper the exercise of reserved rights by the people.[112] To hold otherwise would mean that the respect accorded by the courts to the reserved sovereign authority of the people to propose changes in the law would vary according to some sliding scale based on the number of different areas in which a state's constitution permitted the use of initiatives. The majority cites no authority for such a principle in American law.

When the majority gets down to actually stating the standard they believe controls under Illinois law, they are arguably incorrect. The majority repeatedly references the statements made in *CBA II* that to satisfy the requirements of Article XIV, section 3, a ballot initiative must pertain to a subject of Article IV that is *both* structural *and* procedural.[113] When the majority concludes that Independent Maps' proposal is invalid, however, its reasoning has nothing to do with any failure to meet *CBA II*'s dual requirement. Indeed, the majority seemed to concede that the redistricting measure contained the requisite structural and procedural components. Rather, the majority's complaint was that inclusion of the Auditor in the new system means the proposal is not *limited* to a structural and procedural subject of Article IV since the Auditor's auditing duties under Article VIII will be expanded.[114] In other words, unlike in *CBA II*, the majority was concerned with the definition of the term "subject" rather than analyzing whether the proposal was structurally and procedurally sound as to the redistricting process. As the dissent notes upon the denial for rehearing, the majority's reasoning is based on a flawed assumption that the only way to define the "subject" of Article XIV, section 3, is as relating to "the Auditor General's job duties."[115] As discussed in the dissent, that view is contrary to established law.[116] Arguably, each provision of the proposed ballot initiative is limited to redistricting in the sense that each provision relates directly to and only to redistricting and the new duties assigned to the Auditor are directly and solely related to the new procedures created to redistrict the General Assembly. Because redistricting is a "structural and procedural subject" in Article IV, it necessarily follows that the entire ballot proposal is limited to structural and procedural subjects contained in Article IV, as Article XIV, section 3 requires.

In addition, the majority's interpretation of the requirements for a valid Article XIV, section 3, ballot initiative conflicts with prior precedent for two

112. *See, e.g.*, *Hooker*, 2016 IL 121077, ¶¶ 115 (citing various cases from other jurisdictions); *see also* Note, *Making Ballot Initiatives Work: Some Assembly Required*, 123 HARV. L. REV. 959 (2010).
113. *See Hooker*, 2016 IL 121077, ¶¶ 23, 36.
114. *See id.* ¶ 42.
115. *Id.* at ¶¶ 144–45.
116. *Id.* at ¶ 167.

additional reasons not highlighted in the dissent. First, in *CBA I*, where the Illinois Supreme Court considered a situation involving whether a proposal was "limited to" a structural and procedural subject of Article IV, and which the majority cites in support of its position, the *CBA I* court quoted with favor Justice Schaefer's dissent in *Coalition I*, where he emphasized that the overriding concern behind the limitation was to prevent the use of initiatives to enact substantive changes to the law unrelated to the structure or procedure of the General Assembly, such as abolition of the death penalty or prohibition of abortions.[117] As the dissent noted, this case is factually distinguishable from *CBA I*, and no possible claim can be made that Independent Maps' proposal is in any way a subterfuge whose purpose is to revamp the Auditor's responsibilities.[118] That is likely true because to the extent that the Auditor's duties would expand, it would be for no purpose other than aiding in the redistricting process.

While the majority acknowledged Independent Maps' argument on this score,[119] it completely missed the point Justice Schaefer attempted to formulate in his dissent in *Coalition I* and that the court reiterated in *CBA I*.[120] Instead, the majority dismissed the argument by saying that "unexpressed underlying intent is simply not a factor in the text established in the plain language of [Article XIV, section 3]."[121] However, "unexpressed underlying intent" has nothing to do with anything when dealing with whether a ballot initiative is constitutionally valid. The point Justice Schaefer and the *CBA I* court were making was simply that the drafters did not want Article XIV, section 3, to be used to affect substantive changes to the law unrelated to structural and procedural subjects in the legislative article.[122]

Second, while the majority acknowledges the statement in *Coalition I* that "it was the intention of the constitutional convention that the courts were to determine whether constitutional requirements for a proposed amendment were satisfied," it never mentions the standard subsequently articulated in *Coalition II* to guide the court's action.[123] That standard, as noted in the dissent, is straightforward and fully consistent with the approach taken by every other court in every other jurisdiction that has considered the right reserved by the people to propose changes in the law through the initiative

117. *CBA I*, 137 Ill. 2d at 404–06.
118. *Hooker*, 2016 IL 121077, ¶ 145.
119. *Id.* at ¶ 31.
120. *CBA I*, 137 Ill. 2d at 405–06.
121. *Hooker*, 2016 IL 121077, ¶ 32 (emphasis omitted).
122. *See Coalition I*, 65 Ill. 2d at 473; *CBA I*, 137 Ill. 2d at 404–06.
123. *Hooker*, 2016 IL 121077, ¶ 34 (citing *Coalition I*, 65 Ill. 2d at 462).

process.[124] The Illinois Supreme Court in *Coalition II* held that Article XIV, section 3:

> . . . was drafted and adopted as a check on the legislature's self-interest, and the necessity to protect the rights conferred thereby from debilitating legislation is implicit in the convention's action. We believe it is clear from the convention proceedings that the quoted constitutional provisions are to be construed so as to effectuate the basic purpose of article XIV, section 3, to provide a workable initiative scheme unfettered by restraints which unnecessarily inhibit the rights which article XIV confers.[125]

By failing to properly recognize and apply this standard, the majority reached a result, which is arguably contrary to law. Even if the majority's narrow interpretation is consistent with established precedent, the significance of its reasoning and holding cannot be overstated.

The Illinois Supreme Court has long recognized that "the rights of those who seek to exercise their constitutional privilege to initiate an amendment to our constitution and the rights of those who vote thereon are intertwined."[126] Just as the right to vote is fundamental,[127] so, too, is the right reserved by the people under our constitution to exercise the power of initiative.[128] In fact, the Illinois Supreme Court has expressly held that attempts to constrain those who wish to exercise their right to propose an amendment to the constitution by means of an initiative must be judged with the same strict scrutiny applicable to limitations on the right to vote.[129] Such rights are "of the essence of a democratic society," and "any restrictions [thereon] strike at the heart" of the American system of government.[130]

Although Independent Maps took great care to formulate a proposal it believed fell well within the boundaries set by prior judicial decisions, the majority eliminated the proposal based on its narrow interpretation of Article XIV, section 3—an interpretation that the drafters of the Illinois Constitution might not recognize or have foreseen. It would seem, therefore, that the dissent is correct that the majority's ruling constructed a roadblock for future ballot initiatives.[131]

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124. *See id.* ¶¶ 113–16.
125. *Coalition II*, 83 Ill. 2d at 247.
126. *Id*. at 248 (citing Lubin v. Panish 415 U.S. 709 (1974)).
127. Tully v. Edgar, 171 Ill. 2d 297, 308 (1996); Fumarolo v. Chicago Board of Education, 142 Ill. 2d 54, 74 (1990); *see also* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).
128. *See* Gallivan v. Walker, 2002 UT 89, ¶ 27, 54 P.3d 1069, 1081 (2002) (citing various cases that stand for the proposition that because the right of the people to directly legislate through initiative is fundamental, the right should not be severely limited or unduly burdened by the procedures enacted to enable the right).
129. *Coalition II*, 83 Ill. 2d at 248.
130. *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964).
131. *See Hooker*, 2016 IL 121077, ¶ 170.

VI. CONCLUSION

In an expedited appeal, the Illinois Supreme Court rejected a citizen-initiated ballot initiative designed to bring meaningful change to the current redistricting process. In doing so, the Illinois Supreme Court narrowed the scope of redistricting ballot initiatives without providing a clear roadmap for future initiatives. As of today, it would seem that the only allowable plan would be to rearrange—in a limited and inconsequential way—the pieces of Article IV, section 3 of the 1970 Illinois Constitution. Without a definitive ruling by the court, any future ballot initiative could face a high-stakes game of whack-a-mole, where new ballot proposals are met with new and shifting objections, and proponents are left to guess which, if any, aspects of their proposals will survive the hammer.