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THE CONSTITUTIONAL INITIATIVE AND THE STRUCTURE AND PROCEDURES OF THE GENERAL ASSEMBLY

GORDON V. LEVINE*

The members¹ of the Sixth Illinois Constitutional Convention² were presented with a unique opportunity to address inadequacies in the organic law of the State of Illinois. The delegates had come to the convention with many differing viewpoints on the numerous complex issues with which they were to grapple over the next nine months.³ To the extent that the delegates could find workable solutions to the problems presented, those solutions were embodied in the Illinois Constitution of 1970. Often, however, the delegates could not agree on an unequivocal resolution to a complex problem which would have been acceptable to the voters of the State of Illinois.⁴ Thus, in the best democratic tradition, most solutions were the result of compromise.

One salient area of controversy concerned the composition of the Illinois General Assembly. The central question debated was whether the House of Representatives should be composed of single-member districts or rather of multi-member⁵ districts consisting of three representatives elected by the unique Illinois

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1. The correct title for the persons elected to the convention is "member"; however, they were informally referred to as "delegates" and will be referred to as such in this article.

2. There were 116 delegates to the convention, two from each of the 58 senatorial districts in the state.

3. The broad topics to which the convention directed its attention are well-represented by reference to the titles of the substantive committees established at the convention: Revenue and Finance, Education, Local Government, Suffrage and Amending the Legislation, the Judiciary, the Executive, the Bill of Rights and General Government. For a general discussion of the Sixth Illinois Constitutional Convention, see A. GRATCH & V. UBIK, *BALLOTS FOR CHANGE: NEW SUFFRAGE AND AMENDING ARTICLES FOR ILLINOIS* (1973).

4. When called upon to explain the drafting process, Samuel W. Witwer, President of the Constitutional Convention, often exclaims: "We tried to write the best constitution which could be adopted." His comment is directed to the awareness on the part of the delegates of the substantial efforts necessary to achieve the calling of the Sixth Illinois Constitutional Convention and of the rejection of earlier proposed constitutions by the voters of the State of Illinois in 1862 and 1922.

5. See *RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION*, vol. IV at 2791-2814 (1969-70) [hereinafter cited as *PROCEEDINGS*].

method of "cumulative voting."⁶ The inability of the convention to resolve this bitter controversy resulted, first, in the submission of the conflict to the electorate in the referendum on the ratification of the constitution;⁷ and, second, in the insertion of article XIV, section 3 in the constitution, providing the citizens with the means to change the composition of the legislature, particularly the House of Representatives. Thus the first provision in Illinois for constitutional amendment by any form of popular initiative came into being.⁸ It provided:

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 8% 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 filed with the Secretary of State at least six months before that general election. The procedure for determining the validity and sufficiency of a petition shall be provided 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.⁹

Historical analysis is, of course, a subjective process. It seems perfectly reasonable to argue that although certain delegates undoubtedly had the elimination of multi-member districts in mind when they approved article XIV, section 3, there

6. Cumulative voting is a system in which the voter has a number of votes equal to the number of offices to be filled. The voter may cast each of his ballots for a different candidate or he may "cumulate" his vote by concentrating the entire number of votes on one candidate.

7. The voters of the State of Illinois elected to retain multi-member districts (and cumulative voting) and to reject single member districts by a vote of 1,031,241 to 749,909 in the election for the ratification of the Illinois Constitution of 1970 held on December 15, 1970. The other questions separately presented to the voters at the election on ratification of the 1970 constitution were as follows: whether judges should be elected or whether they should be appointed by the governor from nominees submitted by a judicial nominating committee (vote: 1,013,559 to 867,230 in favor of electing judges); whether to abolish the death penalty (vote: 1,218,791 to 676,302 not to abolish the death penalty); and whether to lower the voting age to 18 (vote: 1,052,924 to 869,816 not to lower the voting age).

8. Prior to the Illinois Constitution of 1970, the only methods of amendment had been by proposals originating in the legislature or by convention calls. See ILL. CONST. art. VII, § 1 (1818); ILL. CONST. art. XII, §§ 1, 2 (1848); ILL. CONST. art. XIV, §§ 1, 2 (1870).

9. ILL. CONST. art. XIV, § 3 [hereinafter referred to as article XIV, section 3 or constitutional initiative]. Article XIV, section 3 was initially proposed as section 15 of the legislative article (article IV) in the Report of the Committee on the Legislative Article.

was no intent to limit the scope of the section to this one issue. After all, constitutions are general philosophical documents by nature.¹⁰ But while the study of the history of a constitution may be a subjective process, the actual words of the document as written by the framers, approved by the delegates, and ratified by the people of the state, are an objective fact.

Article XIV, section 3 provides that the amendments to the legislative article of the constitution may be proposed by initiative petition. In the second sentence of article XIV, section 3, the drafters used these crucial words to describe the permissible scope of proposed amendments: "[a]mendments shall be limited to structural and procedural subjects contained in Article IV."¹¹ The meaning, purpose, and scope of this language were presented for judicial interpretation in the consolidated cases of *Gertz v. State Board of Elections and Coalition for Political Honesty v. State Board of Elections*.¹² On December 3, 1976, in a per curiam opinion, the Illinois Supreme Court limited the nature of proposed amendments under article XIV, section 3 of the 1970 constitution to propositions seeking to change the structure and procedures of the legislature. By affirming the circuit court's opinion, the court held that in order to comply with the requirements set forth in article XIV, section 3, proposed amendments must involve and be limited to *both* structural *and* procedural subjects contained in the legislative article.¹³

10. An excellent and pertinent discussion of the nature of constitutional provisions is set forth in *State ex rel. Halliburton v. Roach*, 230 Mo. 408, 130 S.W. 689 (1910), in which the Supreme Court of Missouri considered a mandamus action seeking to compel the Secretary of State to submit to the vote of the electors a constitutional amendment proposed by citizens' initiative for the redistricting of the senatorial districts of the state. The court, in denying the writ of mandamus, stated as follows:

The line of demarcation between a constitutional amendment and a purely legislative act is well defined. That eminent author, Mr. Storey, [sic] in his 1st volume, (section 339), thus gives expression to his views as to the meaning of a constitution. It is there said: 'A Constitution is in fact a fundamental law or basis of government. . . . It is a rule, as contradistinguished from a temporary or sudden act; permanent, uniform, and universal.' The Supreme Court of the United States, in *Ware v. Hylton*, 3 Dall. 199, used this language: 'A constitution of a State is a fundamental law of a State.' Constitutional provisions and amendments to the Constitution relate to the fundamental law and certain fixed first principles upon which government is founded. Constitutions are commonly called the organic law of a State. The purpose of constitutional provisions and amendments to the Constitution is to prescribe the permanent framework and a uniform system of government, and to assign to the different departments thereof their respective powers and duties.

Id. at 412-13, 130 S.W. at 694.

11. ILL. CONST. art. XIV, § 3.

12. 65 Ill. 2d 453, 359 N.E.2d 138 (1976).

13. *Id.* at 466, 359 N.E.2d at 144, where the court stated:

The constitutional convention used "and" to limit initiative proposals under Article XIV, Section 3. As commonly understood, the

The issues presented in the *Gertz* case concerned several aspects of the initiative process. The most important question was the permissible subject matter of amendments brought by citizens' initiative. Also at issue was the justiciability of the case, an issue which required a definition of the role of both the State Board of Elections and the courts in relation to initiative petitions. A third issue presented by the *Gertz* case was whether a court could inquire into the substantive constitutionality of amendments proposed by initiative prior to their adoption by the electorate. Truly, the *Gertz* case provided a rare opportunity for Illinois courts to make a comprehensive declaration in several new areas of constitutional law. The purpose of this article is to analyze the *Gertz* decision and to assess its impact upon the constitutional initiative.

THE BACKGROUND OF THE GERTZ CASE

On April 30, 1976, a group of citizens calling itself the Coalition for Political Honesty¹⁴ filed an initiative petition containing approximately 635,000 signatures with the Secretary of State, requesting the presentation to the electorate of three proposed amendments to article IV of the constitution.¹⁵ Proposition I of the petition sought to amend subsection 2(e) of the legislative article to prohibit the practice known as "double-dipping." It would have prohibited members of the General Assembly from receiving compensation from any other governmental entity during their terms as members of the General As-

word "and" would thus limit initiatives to amendments whose subjects would be both structural and procedural, such as a proposal for the conversion from a bicameral to a unicameral legislature or for the conversion from multi- to single-member legislative districts. Giving effect to the language of Section 3 would produce no absurdity or unreasonable result. This court is without authority to substitute "or" for the "and" the constitutional convention used in stating "structural and procedural" unless a contrary intention is clearly manifested. We judge a contrary intention is not clearly manifested.

Justice Walter Schaefer dissented. He viewed article XIV, section 3 as allowing amendments by initiative of either structural or procedural subjects of the legislative article, but not as allowing the initiative procedure to be used to accomplish substantive changes. This was essentially the position argued by Assistant Attorney General Herbert L. Caplan on behalf of the State Board of Elections. Justice Schaefer, in his dissenting opinion, stated: "I do not find anything in the proceedings of the constitutional convention which suggests that no change in any of the numerous procedural provisions of Article IV can be brought about by initiative unless the same amendment brings about a change in the structure of the legislative body." *Id.* at 473, 359 N.E.2d at 148.

14. The Coalition for Political Honesty, in its original petition in the Illinois Supreme Court for a writ of mandamus, described itself as: "a nonpartisan coalition organization of individuals and groups which was formed for the purpose of amending Article IV of the Constitution of the State of Illinois as provided by law, in a specified manner."

15. See notes 16-19 and accompanying text *infra*.

sembly.¹⁶ Proposition II sought to prevent conflicts of interest. It would have amended subsection 8(c) of the legislative article to prohibit members of the General Assembly from voting on bills concerning subjects in which they had a personal, family, or financial interest.¹⁷ Proposition III sought to invalidate the statute which mandated the prepayment of salaries¹⁸ by amending section 11 of the legislative article to prohibit members of the General Assembly from receiving their salary at the beginning of their term.¹⁹

The Secretary of State then transmitted the petition, consisting of 27,644 pages, to the State Board of Elections, which was faced with the Herculean task of determining its validity and sufficiency.²⁰ The parties in *Gertz* stipulated that for the State Board of Elections to perform its statutory duties would require an expenditure of approximately \$250,000.²¹ Even with such a large expenditure, it is doubtful whether the State Board of Elections could have performed its task in sufficient time to pre-

16. Proposition I would have amended the first sentence of subsection 2(e) in the following manner: "No member of the General Assembly shall receive compensation [as a public officer or employee] from any other governmental entity [for the time which he is in attendance] *during his term as a member of the General Assembly.*" (Recommended deletions are set out in brackets; proposed additions are italicized.)

17. Proposition II would have amended subsection 8(c) to read as follows:

No bill shall become a law without the concurrence of a majority of the members elected to each house. Final passage of a bill shall be by record vote. In the Senate at the request of two members, and in the House at the request of five members, a record vote may be taken on any other occasion. A record vote is a vote of yeas and nays entered on the journal. *A member who has a conflict of interest as a result of a personal, family, or financial interest in a bill shall disclose that interest to the house of which he is a member, and shall not vote thereon. A member so precluded from voting shall not be counted as an elected member on that vote.* (Proposed additions are italicized.)

18. The goal which the Coalition sought to achieve by initiating Proposition III was accomplished by the enactment of P.A. 77-1333, which amended ILL. REV. STAT. ch. 63, § 14 (1975), to require the monthly payment of legislators. Public Act 77-1333 became effective on January 12, 1977, but it was passed in 1976 while the Coalition was circulating its petition.

19. Proposition III would have amended article IV, section 11 as follows:

A member shall receive a salary and allowance as provided by law, *except that no member shall receive payments of salary in advance of performance of duties as a member of the General Assembly.* [B]ut changes in the salary of a member shall not take effect during the term for which he has been elected. (Proposed additions are italicized.)

20. Under the Illinois statute, the State Board of Elections must "[d]etermine the validity and sufficiency of petitions filed under Article XIV, Section 3, of the Constitution of the State of Illinois of 1970." ILL. REV. STAT. ch. 46, § 1A-8(10) (1975). See also ILL. CONST. art. XIV, § 3 (1970).

21. Brief for Plaintiff at 41, *Gertz v. State Bd. of Elections*, Stipulation of Facts.

sent the proposed amendments at the general election to be held on November 2, 1976.²² If the State Board of Elections were able to certify the petition to the several county clerks of the State of Illinois, the county clerks and boards of election commissioners then would have been charged with conducting a constitutional referendum and canvassing the results of such a referendum,²³ at a cost of approximately \$1,500,000.²⁴ While it is true that the duties of the State Board of Elections, the county clerks, and the boards of election commissioners in relation to this petition were ministerial in nature, it is difficult to conceptualize the magnitude of the clerical task which confronted them.²⁵ Nonetheless, the State Board of Elections began to analyze how to go about performing its statutory duties.

22. The State Board of Elections was required to certify the proposed constitutional amendment to the 102 county clerks not later than 61 days before the general election. ILL. REV. STAT. ch. 46, § 7-60 (1975). See generally ILL. REV. STAT. ch. 7½, § 2(a) (1975); ILL. REV. STAT. ch. 46, § 1A-8(5) (1975).

23. ILL. REV. STAT. ch. 7½, §§ 2(a), 6, 7 (1975). See generally ILL. REV. STAT. ch. 46, §§ 7-60, 12-1, 12-3, 16-5, 22 (1975).

24. Brief for Plaintiff at 42, *Gertz v. State Bd. of Elections* (Stipulation of Facts).

25. The State Board of Elections, being somewhat less than ecstatic about performing its statutory duty of determining the validity and sufficiency of the Coalition's petition, sought to remain "neutral" in the *Gertz* case. However, the Board's legal representative, the Illinois Attorney General adopted a position that was anything but neutral. This led to some rather interesting and sometimes fiery interplay in the trial court between members of the State Board of Elections, the Assistant Attorney General, and Circuit Court Judge Nathan M. Cohen. Judge Cohen on several occasions inquired of Assistant Attorney General Caplan, "Just whom are you representing, Mr. Caplan?" Mr. Caplan explained that he represented all of the state defendants, including the State Board of Elections, even though the Board indicated that it had no desire to be represented by the Attorney General and disagreed with his position. This issue of representation has been examined in recent Illinois Supreme Court opinions. As Justice Clark has stated:

Article V, section 15 of the 1970 Constitution provides that the Attorney General is the legal officer of the State. It is unnecessary to trace the lengthy history of the powers of the Attorney General, since that has been very recently done in *People ex rel. Scott v. Briceland* (1976), 65 Ill. 2d 485. It is sufficient to observe that this court has consistently held, under both the 1870 and the 1970 constitutions, that the Attorney General is the chief legal officer of the State; that is, he or she is 'the law officer of the people, as represented in the State government and its only legal representative in the courts'. (*Fergus v. Russel* (1915), 270 Ill. 304, 337, which is the seminal case; *Stein v. Howlett* (1972), 52 Ill. 2d 570). Although there has been criticism of this *virtually exclusive grant of power to the Attorney General*, the court has not waived from that view, and critics recognize this is the law. (Comment, *The Illinois Attorney General: Exclusive Legal Counsel for the State?* 1975 U. Ill. L. F. 470, 476-478). There is also that this is the law under the 1970 Constitution. 3 Sixth Illinois Constitutional Convention, Record of Proceedings 1312-13; *People ex rel. Scott v. Briceland* (1976), 65 Ill. 2d 485, 359 N.E.2d 149 (1976).

Environmental Protection Agency v. Pollution Control Bd., 69 Ill. 2d 394, 395, 372 N.E.2d 50, 51 (1977) (emphasis added).

Initially, the petition sponsored by the Coalition for Political Honesty met with broad support. Few people would oppose an attempt to regulate the ethical conduct of legislators at a time when political leaders are viewed with deep distrust. Not everyone, however, applauded the proposed amendments. Many of the former delegates and other people intimately connected with the constitutional convention were extremely disturbed by the petition. Their concern did not focus on the merits of the three proposals. Rather, these individuals perceived the petition as a threat to the integrity of the 1970 constitution. They felt that there had been no intention to permit article XIV, section 3 to be used to place substantive questions of public policy, meritorious or otherwise, before the voters, and that although the petition may have been brought with the best of intentions, great harm could result from the initiation of these proposals. The central concern was that if the subject of ethical reform could be initiated under article XIV, section 3, then through artful drafting any subject, even those covered by the other articles of the constitution, could be the subject of a proposed amendment by initiative. If this occurred, article XIV, section 3 would become a general initiative provision, an idea firmly rejected by the convention.²⁶

A second prospect profoundly disturbed several of the delegates. They feared that the proposed amendments would be approved by the voters of the state only to be held invalid by the courts after the election on the ground that the propositions were not authorized by article XIV, section 3. These delegates also felt that this would have an extremely disturbing effect on the already shaken confidence of citizens in their government.²⁷

A third concern was that the \$1,750,000 required in administrative fees would have been wasted if the proposed amendments were initiated and then held invalid. In addition to the fact that the amendments appeared not to be authorized by article XIV, section 3, several of the delegates felt that Propositions I and II were violative of both the federal and state constitutions.²⁸

26. 7 PROCEEDINGS, *supra* note 5, at 2298. See notes 76-84 and accompanying text *infra*.

27. It was feared that most citizens would interpret a court decision striking down the ethical reform amendments after an election as a ploy by the court to protect the legislators from regulation, rather than an act to preserve the integrity of the constitution.

28. Proposition I was thought to violate the equal protection clauses of article I, section 2 of the Illinois Constitution and the fourteenth amendment of the United States Constitution, because it arbitrarily and unreasonably excluded from eligibility to election to the Illinois General Assembly all persons who had a desire to serve in any other governmental entity with compensation. Proposition I was also thought to violate the due process clauses of the United States and Illinois Constitutions be-

For all of these reasons, but primarily to prevent abuse of the constitutional initiative process, a petition for leave to file a complaint under the Public Moneys Act²⁹ was presented in the Circuit Court of Cook County on May 28, 1976, by seven plaintiffs who had been associated with the convention. Six plaintiffs, Elmer Gertz, Thomas J. McCracken, Louis J. Perona, Lucy Reum, Maurice W. Scott and Elbert S. Smith, had been delegates to the constitutional convention and the seventh, Ann M. Lousin, was a member of the research staff of the convention. Among the attorneys for the plaintiffs were Samuel W. Witwer, Sr., President of the Constitutional Convention, Thomas G. Lyons, a vice-president of the convention, and Louis Ancel, one of the leaders of the movement that succeeded in calling the convention and the drafter of its initial rules of procedure.³⁰ The complaint named the State Board of Elections, the Secretary of State, the State Comptroller, the County Clerk of Cook County (representing all other Illinois county clerks), and the Board of Elections Commissioners of the City of Chicago (representing all other boards of election commissioners in the state) as defendants.³¹ These defendants were the governmental officers of the State of Illinois and its political subdivisions³² who were charged by the

cause it placed an undue economic burden upon legislators who could serve in other public capacities only if they gave their services without pay. It was also felt that Proposition I violated the guarantee of representative government found in the preamble to the Illinois Constitution and the guarantee of a republican form of government of article IV, section 4 of the United States Constitution by abridging the right of the citizens to elect persons of their own choosing as their representative. Finally, it was felt that Proposition II violated due process and the guarantee of the right to representative government by establishing a standard of eligibility to vote on bills that was so ambiguous and capable of arbitrary interpretation that it would be void for vagueness. Brief for Plaintiff at 13-15, *Gertz v. State Bd. of Elections*, Supplemental Brief.

29. ILL. REV. STAT. ch. 102, §§ 11-17 (1975). The Public Moneys Act provides for a rather curious procedure whereby a petition for leave to file a complaint is required when citizens and taxpayers seek to enjoin the illegal disbursements of public funds. This procedure requires that a date be set for hearing on such petitions not less than five days nor more than ten days after the filing of the petition. It further provides for service upon the Attorney General, as well as upon the defendants. *Id.* § 14.

30. Stewart H. Diamond, partner in the firm of Ancel, Glink, Diamond & Murphy, P.C., and General Editor of *ILLINOIS MUNICIPAL LAW* (Ill. Inst. for Contin. Legal Educ., 1974) and *ILLINOIS SCHOOL LAW* (Ill. Inst. for Contin. Legal Educ., 1977), and this author were also of counsel. Plaintiff Ann M. Lousin, Associate Professor of Law at the John Marshall Law School, and Timothy R. Young, associate in the firm of Witwer, Moran, Burlage & Atkinson, contributed substantially to the preparation of the Gertz case.

31. The office of the Attorney General, Assistant Attorney General Herbert Lee Caplan of counsel, appeared on behalf of the state defendants. Ian Levin, of the law firm of Foran, Wiss & Schultz, appeared on behalf of the Board of Election Commissioners of the City of Chicago, merely to submit to the jurisdiction of the court.

32. Of course, were the State Board of Elections to be enjoined from

Illinois Election Code with responsibility for performing the ministerial duties required for the certification of initiative petitions and holding elections on proposed constitutional amendments contained in initiative petitions. The trial court allowed the Coalition for Political Honesty to intervene as a defendant, based on its obvious interest in the result of the *Gertz* case.

After a hearing on the petition, the trial court allowed the plaintiffs leave to file a complaint under the Public Moneys Act. The plaintiffs then filed their complaint, seeking to enjoin the defendants from wrongfully expending any public funds and from taking any action in relation to the Coalition's petition. The plaintiffs sought a declaration that each of the three propositions contained in the petition violated article XIV, section 3 of the constitution in that they were not limited to structural and procedural subjects contained in article IV. The plaintiffs also sought a declaration that Propositions I and II were unconstitutional in their substance on due process and equal protection grounds.³³

The parties entered into a stipulation of facts and filed cross motions for summary judgment supported by memoranda of law. The court heard oral argument in support of the motions on July 6, 1976. Recognizing that the issues at bar were of great urgency and realizing that an early decision would be necessary if the proposed amendments were to be placed before the voters at the November, 1976 general election, Judge Cohen entered his conclusions and ruling on August 10, 1976. The court held that proposed amendments could not be initiated unless they were both structural *and* procedural, and that none of the propositions contained in the Coalition's petition met this test. Further, the court found Propositions I and II to be substantively unconstitutional.³⁴ On August 12, 1976, Judge Cohen entered a judgment order for the plaintiffs, thereby enjoining all state, county, and local defendants from taking any further steps toward placing the proposed amendments before the voters at the November general election or at any other time. On August 18, 1976, Judge Cohen entered an extensive memorandum opinion and ruling explaining his decision.

The trial court's interpretation of article XIV, section 3 was

acting to certify the Coalition's petition, the duties of the other defendants would not arise. It was deemed advisable, however, to name as defendants all parties who would come into contact with the petition if it were initiated. Thus, the list of governmental bodies and public officials sued bore some resemblance to the passenger list of the Queen Mary.

33. See note 28 *supra*.

34. *Gertz v. State Bd. of Elections, Circuit Court Conclusions and Ruling* at 54.

based on the proceedings of the constitutional convention and on the court's conviction that to hold otherwise would permit the popular initiative to be used to abridge basic human rights. As Judge Cohen stated:

The liberalization of the popular initiative method of amending the Constitution is not universally recognized as being one of the noblest features of a democratic form of government. Limitations upon popular initiative have been recognized implicitly as more holy than profane. Justice Robert Jackson, in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, (1943), stated at page 638: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

A reading of the discussions of the delegates to the Sixth Illinois Constitutional Convention . . . will lead unalterably to the conclusion that the popular initiative process for amending the 1970 Constitution was to be limited to the legislative article and then further limited to matters which are both *structural and procedural*, in order to prevent a plethora of popular initiative petitions which could create chaos in the conduct of the work of the legislature and could be employed at the same time to distract the attention of the voters from the merits of candidates for important elective office.³⁵

When the defendants then petitioned for leave to appeal directly to the Illinois Supreme Court,³⁶ the *Gertz* case was consolidated with the Coalition's original petition for a writ of mandamus directing the State Board of Elections to certify its petition.³⁷ As presented to the Illinois Supreme Court, the issue was whether the 635,000 citizens who signed the Coalition's petition had a right to have the proposed amendments submitted to the electorate for approval. This would not have been an

35. *Id.* at 59-60.

36. See ILL. CONST. art. VI, § 4(a)-(b). See also ILL. S. Ct. R. 302 (d), ILL. REV. STAT. ch. 110A, § 302(d) (1975), which allows direct appeal to the Illinois Supreme Court in matters of public interest that require prompt adjudication.

37. *Coalition for Political Honesty v. State Bd. of Elections*, Docket No. 48746. The gist of the Coalition's petition was that since it was admitted that the duties of the State Board of Elections in relation to the petition were purely ministerial, the Board could not refuse to perform these duties. At the time that the Coalition brought this action, the State Board of Elections was subject to an order of the circuit court that no more than \$30,000 was to be expended by the Board in a preliminary investigation relating to the petition. The Coalition's petition was not independently considered and was dismissed based on the holding of the Illinois Supreme Court in *Gertz* that the proposed initiative amendments did not meet the requirements of article XIV, section 3. *Gertz v. State Bd. of Elections*, 65 Ill. 2d 453, 472, 359 N.E.2d 138, 147 (1976).

easy case to decide even if the language of article XIV, section 3 had been absolutely clear.

JUSTICIABILITY

One of the basic problems presented in the *Gertz* case was the issue of by whom the determination of whether a proposed amendment would be placed before the electorate was to be made. The language of article XIV, section 3 governing this matter merely states: “[t]he procedure for determining the validity and sufficiency of a petition shall be provided by law. If the petition is valid and sufficient, the proposed amendment shall be submitted to the electors” By law, the State Board of Elections was the instrumentality charged with the duty of determining the “validity and sufficiency” of constitutional initiative petitions.³⁸ But how far did this duty extend?

It was clear from the debates that the power to determine the “validity and sufficiency” of a petition was to be limited to technical questions of form and procedure.³⁹ During the floor debates, Delegate Dawn Clark Netsch questioned Delegate Louis J. Perona, spokesman for the majority on the Committee on the Legislature, concerning the procedure for determining the validity and sufficiency of initiative petitions; the following colloquy ensued:

MRS. NETSCH: If we assume that the provision of law would be that these petitions will be presented to some state election authority, or if there's a state electoral board, or whatever it may be, to determine their validity and sufficiency, I wonder whether the determination of validity and sufficiency of the petition would give that agency the right, also, to make a determination as to whether or not the proposed amendment was within the substantive context of this section; in other words, whether it was, in fact, one that dealt with the structural and procedural subjects of the legislative article.

MR. PERONA: This was the sufficiency of the petition insofar as signatures—insofar as compliance with the number required and whether they were obtained in a proper time sequence in order to be valid—I think that was the type of thing we had in mind when we included this provision.

38. ILL. REV. STAT. ch. 46, § 1A-8(10) (1975).

39. The State Board of Elections had the duty to determine the following: (1) the authenticity of the signatures on the petition; (2) whether there was any duplication of signatures; (3) whether the signatories to the petition were validly registered voters; (4) whether the signatures were secured in the presence of the persons who circulated the petitions; and (5) whether the notarizations of the petitions were accurate. ILL. CONST. art. XIV, § 3; ILL. REV. STAT. ch. 46, § 28-1.1 (1975). The parties stipulated that the duties of the State Board of Elections were solely ministerial in nature. Brief for Plaintiff at 40, *Gertz v. State Bd. of Elections*, Stipulation of Facts.

MRS. NETSCH: Then whatever agency is created by law with the authority to test those, *it would be limited to the technical requirements*; and would that, then, mean that any inquiry into whether or not the proposed amendment was within the subject matter of the constitutional initiative—that is, one dealing with structural and procedural requirements—would be determinable, if at all, only by the courts? It cannot be determined by an election agency. Is that correct?

MR. PERONA: That was my intention, yes.⁴⁰

This discussion also disposed of the intervening defendant's contention⁴¹ that the plaintiffs' exclusive remedy for challenging the initiative petition was under sections 23-24 and 28-1.2 of the Election Code.⁴² The Illinois Supreme Court dismissed the administrative remedies arguments categorically, stating: "The determination of whether a proposed amendment meets the Constitution's requirements for amendment is a question for the courts, not for an agency."⁴³

It was fairly easy for the court to hold that an administrative agency could not review the substance of a proposed amendment, but for the court to decide that the judiciary could review proposed amendments prior to referendum was a far more difficult question. Had it sought to avoid a substantive determination of the meaning of article XIV, section 3, the court could easily have based its action both upon the constitutional language and the defendants' persuasive arguments for submitting the proposed amendments to the citizens. The following language of article XIV, section 3 offered the court an easy course to avoid the main question of the case . . . "[i]f 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."⁴⁴ Moreover, the state defendants' memorandum of law framed the issue of the *Gertz* case as follows: "The gravamen of the complaint is the right of some 635,158 citizens and electors of the State of Illinois who have signed initiative petitions to have the proposed amend-

40. 4 PROCEEDINGS, *supra* note 5, at 2712 (emphasis added) (quoted in part in *Gertz v. State Bd. of Elections*, 65 Ill. 2d 453, 462-63, 359 N.E.2d 138, 142-43 (1976)).

41. 65 Ill. 2d at 463, 359 N.E.2d at 143.

42. See generally ILL. REV. STAT. ch. 46, §§ 15-1 to 30-3 (1975). The limited scope of election contests under the predecessor to section 23-24 of the Election Code was well established. See ILL. REV. STAT. ch. 46, § 120 (1941). In *Sanders v. Township of Salem*, 385 Ill. 362, 52 N.E.2d 708 (1944), the court held that only the canvass of an election could be tested under this section. *Accord*, *Mayes v. City of Albion*, 374 Ill. 605, 30 N.E. 2d 416 (1940).

43. 65 Ill. 2d at 463, 359 N.E.2d at 143 (1976).

44. ILL. CONST. art. XIV, § 3 (emphasis added).

ments to the Illinois Constitution submitted to the electorate for approval."⁴⁵ Furthermore, while the debates can be read to indicate that the Committee on the Legislature foresaw a role for the courts in protecting the initiative process from abuse, the debates also can be read as supporting the position that no court action could be taken prior to an election if a petition was technically valid and sufficient.⁴⁶

The defendants further eloquently argued that elections are the ultimate political expression of a democracy and that the judiciary could not enjoin coordinate branches of government from holding an election. The defendants cited *Fletcher v. City of Paris*,⁴⁷ which, like *Gertz*, was framed as a taxpayers' action to enjoin the wrongful disbursement of public funds for the holding of an election. Both the intervening defendants and the state defendants quoted the following language from the *Fletcher* case: "[T]hat the courts have no jurisdiction to enjoin the holding of an election has been long settled in this State."⁴⁸ The court in *Fletcher* held that the expense of holding an election was too trifling an injury to the plaintiffs to invoke the jurisdiction of the court.⁴⁹ The opinion then noted that the holding of an election is an exercise of a political right and equity will not interfere where only political rights are affected.⁵⁰

The plaintiffs cited an equally persuasive line of Illinois cases upholding the right of the courts to enjoin elections to prevent

45. Brief for Defendant at 1, *Gertz v. State Bd. of Elections*.

46. At the convention the following exchange took place:

MR. CONNOR: [S]omebody described by petition that this is an amendment of the legislative article; who says it isn't?

MR. PERONA: I think the courts could iron out those questions and protect against abuse. . . . We state that it shall be limited to structural and procedural subjects contained in this article on the legislature, and it is the position of the Committee, of course, that if some provision were enacted under this section, that it would basically become a question for the court to determine whether it was constitutionally done, whether it was a matter of structure or procedural subjects, and if the court would eventually hold that it was within that framework, then it would be approved, and if it was not, I think it would be held to be unconstitutional.

4 PROCEEDINGS, *supra* note 5, at 2711-12 (emphasis added).

47. 377 Ill. 89, 35 N.E.2d 329 (1941) (concerning a referendum on a proposed municipal ordinance).

48. *Id.* at 92, 35 N.E.2d at 331. *Accord*, *Walton v. Develing*, 61 Ill. 201 (1871).

49. 377 Ill. 89, 98, 35 N.E.2d 329, 333 (1941). *Accord*, *Payne v. Emmerson*, 290 Ill. 490, 495, 125 N.E. 329, 331 (1919).

50. 377 Ill. 89, 98, 35 N.E.2d 329, 333 (1941). *Accord*, *Slack v. City of Salem*, 31 Ill. 2d 174, 201 N.E.2d 119 (1964); *People ex rel. Schlaman v. Electoral Bd.*, 4 Ill. 2d 504, 122 N.E.2d 532 (1954); *Daly v. Madison County*, 378 Ill. 357, 38 N.E.2d 160 (1941); *Payne v. Emmerson*, 290 Ill. 490, 125 N.E. 29 (1919); *People ex rel. Fitnam v. City of Galesburg*, 48 Ill. 485 (1868).

a waste of public funds.⁵¹ In *Allen v. Powell*,⁵² the most recent Illinois Supreme Court decision on a taxpayer's suit to enjoin an unauthorized election prior to the *Gertz* case, the court accepted jurisdiction prior to the election.⁵³ The court noted that \$75,000 was involved and stated:

It has been held that injunctive relief will be granted to prevent a waste of public funds by the holding of an election under an unconstitutional election statute. It follows that any election called in violation of the Constitution likewise may be restrained and an action for injunctive relief is a proper remedy.⁵⁴

The plaintiffs also cited numerous cases from several other jurisdictions upholding the right of the courts to enjoin elections on amendments proposed by initiative which do not comply with the amending provisions of their constitution.⁵⁵

Presented with a multitude of conflicting authorities which tended to neutralize each other, the Illinois Supreme Court turned to a basic principle of representative government. The court cited Judge Thomas Cooley's treatise,⁵⁶ concerning limitations on the amendment process, as follows:

But the will of the people to this end can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the Constitution whose revision or amendment is sought, or by an act of the legislative department of the State, which alone would be authorized to speak for the people upon this subject⁵⁷

The Supreme Court characterized the issue before it in the following language: "We are not concerned with an election or a legislative referendum, but rather, with the question of whether proposed amendments to our constitution satisfy the Constitution's own requirements for its amendments."⁵⁸ The court went on to conclude that "Any offered amendments under the initiative obviously must comply with the procedure

51. *Allen v. Powell*, 42 Ill. 2d 66, 244 N.E.2d 596 (1969); *Niebling v. Town of Moline*, 8 Ill. 2d 11, 131 N.E.2d 535 (1956); *Moran v. Bowley*, 347 Ill. 148, 179 N.E. 526 (1932); *McAlpine v. Dimick*, 326 Ill. 240, 157 N.E. 235 (1927).

52. 42 Ill. 2d 66, 244 N.E.2d 596 (1969).

53. *Id.*

54. *Id.* at 68, 244 N.E.2d at 597 (citations omitted).

55. *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (1948); *Gray v. Winthrop*, 115 Fla. 721, 156 So. 270 (1934); *Mathews v. Turner*, 212 Iowa 424, 236 N.W. 412 (1931); *Cohen v. Attorney General*, 354 Mass. 384, 237 N.E.2d 657 (1968); *Moore v. Brown*, 350 Mo. 256, 165 S.W.2d 657 (1942); *Leach v. Brown*, 167 Ohio St. 1, 145 N.E.2d 525 (1957).

56. Judge Thomas Cooley, well-known 19th century scholar, Justice of the Michigan Supreme Court and Professor of Law at the University of Michigan Law School, wrote a treatise on constitutional limitations and state legislative powers.

57. 1 T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 84-85 (8th ed. 1927), cited in *Gertz v. State Bd. of Elections*, 65 Ill. 2d at 461-62, 359 N.E.2d at 138, 141-42.

58. 65 Ill. 2d at 460, 359 N.E.2d at 141.

and the limitations on amendments set out in Section 3 before it can be submitted to the electorate."⁵⁹

The court noted that if it waited until after an election were held on the proposed amendment, \$1,750,000 in public funds would be wasted. Further, the court's abstention would neither change nor clarify the main issue of whether the three propositions conformed to article XIV, section 3 of the Illinois Constitution of 1970. As the court phrased it, "No future events or consideration would or could sharpen or better define this issue for our decision."⁶⁰

The final aspect of justiciability in the case was whether the substantive constitutional questions of due process, equal protection, and the denial of representative government were ripe for determination. The trial court had implicitly found jurisdiction to decide the substantive constitutional questions.⁶¹ The Illinois Supreme Court raised this question, but did not decide it. Since the court had already held that all three of the proposed amendments failed to meet the requirements of article XIV, section 3 of the Illinois constitution,⁶² a consideration of the court's jurisdiction to review the substantive constitutionality of the propositions, involving essentially federal questions, was unnecessary. The few jurisdictions that have squarely faced this question are divided on the justiciability of substantive constitutional aspects of proposed amendments prior to a referendum.⁶³ The better view has been stated by the California Supreme Court, which held in *Harnett v. County of Sacramento*⁶⁴ that where proposed amendments are invalid on their face due to constitutional defects which render the proposed amendments incapable of ever being made operative under any circumstances, the court may enjoin their submission to the electorate. Although the issue is far from settled throughout the country, or even in Illinois after *Gertz*, the trial court was justified in finding that it had the power to strike down the proposed amendments as unconstitutional on their face, just as the Illinois Supreme Court was also correct in finding that such determinations were unnecessary once it had determined the proposed amendments were not

59. *Id.* at 460, 359 N.E.2d at 141.

60. *Id.* at 461, 359 N.E.2d at 142.

61. *Gertz v. State Bd. of Elections, Circuit Court Conclusions and Rulings* at 60-61.

62. 65 Ill. 2d at 472, 359 N.E.2d at 147.

63. See *Harnett v. County of Sacramento*, 195 Cal. 676, 235 P. 445, (1925). See also *Gray v. Winthrop*, 115 Fla. 721, 156 So. 270 (1934); *Kansas City v. McGee*, 364 Mo. 896, 269 S.W.2d 662 (1959); *State ex rel. Cranfill v. Smith*, 330 Mo. 252, 48 S.W.2d 891 (1932); *Nevada ex rel. Davies v. White*, 36 Nev. 334, 136 P. 110 (1913).

64. 195 Cal. 676, 235 P. 445 (1925).

authorized by article XIV, section 3 of the Illinois Constitution of 1970.

STRUCTURAL AND PROCEDURAL SUBJECTS CONTAINED
IN ARTICLE IV

Clearly, the greatest significance of the *Gertz* case is that it limits the subject matter of proposed amendments which may be initiated pursuant to article XIV, section 3 of the 1970 constitution to those propositions which affect *both* structural *and* procedural subjects contained in the legislative article. If an amendment affects only structure, but not procedure, or affects procedure, but not structure, it does not come within the constitutional requirements. This interpretation of "structural and procedural" by the Illinois Supreme Court rests upon two bases. First, the opinion in *Gertz* reflects the court's desire to adhere to the intention of the delegates of the constitutional convention in drafting article XIV, section 3; second, the court adopted the plaintiffs' use of the rule of construction that constitutional provisions are to be given their plain meaning unless a contrary meaning is clearly demonstrated.⁶⁵ In addition, both the Illinois Supreme Court opinion and the trial court opinion rely substantially upon the Record of Proceedings of the Sixth Illinois Constitutional Convention to support their holdings, particularly the conclusion that article XIV, section 3 limits proposed amendments to propositions affecting both structural and procedural changes in the legislative article. Reference to the Record of Proceedings as persuasive authority in construing the 1970 constitution has become a rule in Illinois constitutional cases.⁶⁶

The Meaning of "Structural and Procedural"

The plaintiffs argued that the express ordinary meaning of article XIV, section 3 limits its authority to proposals meeting two combined requirements, lacking either of which the proposal would be invalid. First, the proposed amendments must be "*structural and procedural*"; second, they must pertain to subjects contained in the legislative article. The plaintiffs maintained that article XIV, section 3 employed ordinary non-techni-

65. See, e.g., *Hamer v. Bd. of Educ.*, 47 Ill. 2d 480, 265 N.E.2d 616 (1970); *Locust Grove Cemetery Ass'n v. Rose*, 16 Ill. 2d 132, 156 N.E.2d 577 (1959).

66. See generally Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MAR. J. 189 (1974). This article makes the interesting observation that the Journal of Proceedings is often used as an aid in determining constitutional intent, even though an unambiguous intent rarely appears from the record.

cal language which, when interpreted denotatively, comported with the intention of the drafters of the constitution and gave rise to no absurd result. Abundant authority supported this first premise of the plaintiffs' syllogism.⁶⁷

The plaintiffs continued by defining the word "structural" according to its dictionary meaning, noting that if a proposed amendment is to be "structural" within the context of article XIV, section 3, it must refer to the manner of construction or the way in which the parts of the legislature are organized, formed, or made up.⁶⁸ By similarly defining the word "procedure," the plaintiffs maintained that for a proposed amendment to be "procedural," it must relate to the legislature's established way of conducting business, its parliamentary practice and order. It must relate to the machinery of the legislature, as distinguished from the substantive laws which are its product.⁶⁹

The essence of the plaintiffs' construction argument was that the use of the phrase "structural and procedural" in article XIV, section 3 meant that proposed amendments pursuant to that section must be *both* structural *and* procedural. The plaintiffs stated that the conjunction "and" is a coordinate conjunction, one

67. See, e.g., *Hamer v. Bd. of Educ.*, 47 Ill. 2d 480, 263 N.E.2d 616 (1970); *People v. Stevenson*, 281 Ill. 17, 117 N.E. 117 (1917); *Village of Elmwood Park v. Forest Preserve District*, 21 Ill. App. 3d 597, 316 N.E.2d 140 (1974); *Powers v. Telander*, 129 Ill. App. 2d 10, 262 N.E.2d 342 (1970). As the Illinois Supreme Court once phrased it:

"[T]he first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which, alone, we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add or to take away from that meaning."

People ex rel. Watseka Tele. Co. v. Emmerson, 302 Ill. 300, 303, 134 N.E. 707, 709 (1922) (quoting T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 89 (7th ed. 1927)).

68. "Structural" has been defined as "of or relating to, a structure." A "structure" is defined as "the manner of construction: the way in which the parts of something are put together or organized: form, make-up . . . the interrelation of parts as dominated by the general character of the whole." *WEBSTER'S NEW INTERNATIONAL DICTIONARY* 2266 (unabr. 3d ed. 1971).

69. "Procedural" has been defined as "of or relating to, the procedure used by courts or other bodies in the administration of substantive law." It has been further defined as "an established way of conducting business (as of a deliberative body); . . . the accepted usage of parliamentary bodies; established parliamentary practice; parliamentary order . . ." *Id.* at 3172. "Procedure" is "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding, the court is to administer; the machinery as distinguished from its product." *BLACK'S LAW DICTIONARY* 1367 (rev. 4th ed. 1968). See also *Ogden v. Gianokos*, 415 Ill. 591, 114 N.E.2d 686 (1953).

which signifies the relation of addition. The plaintiffs cited numerous cases to this effect, including *Gar Creek Drainage District v. Wagner*,⁷⁰ where the court stated:

It is true that the word "and" is sometimes substituted for "or," in the construction of statutes or contracts or wills to effectuate the intention of the parties, but this is only in cases where the intention is clearly manifested, and it is apparent that to construe the word according to its real meaning would involve an absurdity or produce an unreasonable result.⁷¹

An effective aspect of the plaintiffs' construction argument was that the interpretation of the word "and" in the conjunctive sense, requiring proposed initiative amendments to regulate both structural and procedural subjects contained in the legislative article, produced no absurd results; however, if the word "and" were to be read as the disjunctive "or," the entire phrase "structural and procedural" would have been surplusage. The supreme court adopted the plaintiffs' argument, stating:

The drafters of the Constitution, if the defendants' construction of the section were adopted, would have unnecessarily used the words "structural and procedural," for any change in the article would be either structural or procedural in character. This unnecessary language would have to be considered surplusage. However, the language of the drafters cannot be so facilely disregarded.⁷²

Thus, the plaintiffs effectively used established rules of construction to point out that the language used in article XIV, section 3 comports with the constitutional intent of the drafters. While it is clear that the language employed by the drafters, as construed by the plaintiffs and the court, is in accord with the "majority intent" as constructed from the record of the constitutional convention, one must wonder just how much thought went into the selection of the words "structural and procedural," and whether the importance of the use of the word "and" was recognized at the time.⁷³

70. 256 Ill. 338, 100 N.E. 190 (1912). See also *People ex rel. Watseka Tele. Co. v. Emmerson*, 302 Ill. 300, 134 N.E. 707 (1922); *Voight v. Industrial Comm'n*, 297 Ill. 109, 130 N.E. 470 (1921); *City of LaSalle v. Kostka*, 190 Ill. 130, 60 N.E. 72 (1901); *Chicago Land Clearance Comm'n v. Jones*, 13 Ill. App. 2d 554, 142 N.E.2d 800 (1957).

71. *Gar Creek Drainage Dist. v. Wagner*, 256 Ill. 338, 345, 100 N.E. 2d 190, 193 (1912).

72. 65 Ill. 2d at 466, 359 N.E.2d at 144. The court went on to quote from its opinion in *Hirschfield v. Barrett*, 40 Ill. 2d 224, 230, 239 N.E.2d 831, 835 (1968).

73. An interesting point neither raised by the parties nor discussed by the courts concerns internal consistency. Within article XIV, section 3, the drafter made use of the word "and" six times. On five occasions the unmistakable intent of the drafter was to convey the meaning "in addition to" and not the disjunctive "or." This is persuasive evidence that the use of the word "and" in clauses other than "structural and pro-

The Search for Constitutional Intent

The Illinois Supreme Court began its examination of the history of the constitutional initiative by noting that article XIV, section 3 is a novelty in Illinois constitutional history. Provision for constitutional amendment by any form of popular initiative had never before existed in Illinois.⁷⁴ The fact that it is treading upon unbroken ground will naturally incline a court to proceed with caution. Certainly nothing in the initiative provision gave any indication that it was to be interpreted liberally.⁷⁵ The next matter set forth by the supreme court was one which would justifiably make it doubly cautious. The court noted that the majority of the convention's Committee on Suffrage and Constitution Amending had voted against an initiative provision for all parts of the constitution.⁷⁶ The rejection of an unlimited general initiative was explained in the following manner:

The majority believed that the initiative is unnecessary in view of the liberalization of the amending procedures which the Committee is recommending, particularly the automatic, periodic submission of the question of calling a Constitutional Convention. They fear that the process will lend itself to abuse by special interest groups and to attempts to undo the work of this Convention before it is fully tested, and that it will also lead to hasty and ill-conceived proposals and to attempts to write ordinary legislation into the Constitution. They point out that the initiative was popular in the early part of this century, and is now in use in only 13 states. They believe that the process is not a traditional instrument of representative government, but reflects a basic and continuous distrust of representative institutions.⁷⁷

In its report proposing the language embodied by article XIV, section 3, the convention's Committee on the Legislature specifically stated that amendments by initiative were to be limited to "structural and procedural" subjects.⁷⁸ This committee was well aware of the convention's rejection of the unlimited initia-

cedural" was meant to reflect the conjunctive meaning. Perhaps internal consistency would require construing "and" in the conjunctive in each of its uses. J.N. Walters, *Illinois Initiative: A Limited Endeavor?* (Jan. 3, 1977) (unpublished note written for Professor Ann M. Lousin of the John Marshall Law School).

74. 65 Ill. 2d at 467, 359 N.E.2d at 145.

75. Compare ILL. CONST. art. XIV, § 3 with the "Home Rule" section, id. art. VII, § 6(m).

76. 7 PROCEEDINGS, *supra* note 5, at 2298.

77. *Id.* at 2298-99. It should be noted, however, that the popular initiative was rejected by only a five to four vote of the Committee on Suffrage and Constitution Amending. A minority of the Committee believed that the popular initiative offered a legitimate means for minority groups to bring significant issues before the voters. *Id.* The minority proposal of a general initiative was rejected by the Convention by a vote of 60 to 44. 2 PROCEEDINGS, *supra* note 5, at 587.

78. 6 PROCEEDINGS, *supra* note 5, at 1401.

tive and made it clear that it intended the initiative for the legislative article to be very narrow in scope, as it is an exception to the general rule that constitutional amendments should be proposed only by the legislature or by a constitutional convention. Delegate Perona, a member of the Committee on the Legislature and a plaintiff in the *Gertz* case, explained the intended meaning of the key words "structural and procedural," which were placed in quotation marks in the Committee report. He repeatedly asserted that they were intended to limit the process of initiative to matters of the structure, organization and make-up of the General Assembly and to only such procedural changes as were necessarily related to structural revisions, as the following statements to the convention exemplify:

MR. PERONA: Article XIV, section 3 provides for the constitutional initiative limited to the legislative article. We feel that this variation in the usual constitutional initiative serves two purposes. It introduces the initiative into the area of government where it probably would be most needed because of the vested interest of the legislature in its own makeup. We feel that it's unlikely that the legislature would propose an amendment reducing the number of legislators or in changing from cumulative voting as we have today to single-member districts. I'm not saying whether these issues might be better or not, but I'm saying that they're not likely to present these issues to the voter.⁷⁹

MR. PERONA: I think the limitation on this initiative eliminates the abuse which has been made of the initiative in some states. The attempt has been made here to prevent it being applied to ordinary legislation or to changes which do not attack or do not concern the actual structure of makeup of the legislation itself.⁸⁰

The following discussion between Delegates Perona and Peter A. Tomei illustrates why the convention adopted the language "structural and procedural" as words of limitation, rather than setting forth the particular sections of the legislative article which could be amended by initiative petition:

MR. PERONA: The explanation on page 100, I think, is rather definite that it's to be limited to the makeup—the organization and the makeup of the legislature itself

MR. TOMEI: With respect to this limitation, that I think has just been discussed, on structural and procedural subjects contained in this article, I take it is not the intention of the committee to limit the initiative just to those things presently contained in the legislative article.

MR. PERONA: Yes, that's correct. We—that's the problem. If you get too specific with the limitation, you inhibit the possi-

79. 4 PROCEEDINGS, *supra* note 5, at 2710 (the committee's legislative initiative was § 15 of the proposed article on the legislature).

80. *Id.* at 2911.

bility of change within the legislative setup; and if you leave it broad, of course, they say, "Well, you might be able to bring in something else under it." So we've attempted to do it by the explanation as to what our purposes are, and then to leave the question of abuse to the courts.

A unicameral legislature would be an area where you'd have to change many things that would be in here if anyone would ever want to go to that.

MR. TOMEI: So, in other words, that's a change in—that's a structure, a particular structure not contained in the present article, but one which would be a proper subject for initiative under this clause, that is, unicameral—

MR. PERONA: That is correct. *That is the major reason that we could not limit it to certain sections.*

MR. TOMEI: All right. And would the same be true for questions of election? And I amplify that by saying that you refer to structure, size, etc.; and under the pertinent sections of this proposed article, the first grouping of them—power, structure, composition, and apportionment—you did deal with size and with elections. You deal with cumulative voting—matters of that nature—and is that the kind of thing, also, that would be subject to initiative under article XIV, section 3?

MR. PERONA: Yes. Those are the critical areas, actually.⁸¹

There was language in the proceedings to support the argument that although the drafters had written "structural and procedural," the convention had intended the words to mean either "structural" or "procedural" or both. Under this interpretation the only subjects in the legislative article excluded from the limited initiative would have been those affecting substantive policy. The supreme court quoted the following salient language from the Report of the Committee on the Legislature: "Any amendments, so proposed, would be required to be limited to subjects contained in the Legislative Article, namely, matters of structure and procedure and not matters of substantive policy."⁸² This quotation from the committee report supported the strong argument made by the Attorney General on behalf of the State Board of Elections in oral argument before the Illinois Supreme Court that article XIV, section 3 permitted the initiation of matters of structure and/or procedure, but not matters of substantive policy. This argument had some persuasive force, based upon the above quotation, and other language in the record.⁸³ The court rejected this view, however, as it would have allowed the submission of proposed amendments

81. 4 PROCEEDINGS, *supra* note 5, at 2711-12 (emphasis added). Delegate Tomei was chairman of the Committee on Suffrage and Constitution Amending and had originally supported its minority proposal to allow an unlimited initiative.

82. 6 PROCEEDINGS, *supra* note 5, at 1400.

83. See note 85 *infra*.

whenever any part of a proposal was related to the procedure of the legislature. There was a danger in approving the Attorney General's proposed construction. Assume, for example, that all voting provisions are "procedural." By artful wording of a constitutional proposal, most of the provisions contained anywhere in the constitution could be amended merely by combining the amendment with language amending the legislative article to regulate the voting of legislators in areas affected by such changes. This, in effect, was what the Coalition had done in Proposition II, concerning conflict of interest, since a major conflict of interest provision was already in the constitution in another article.⁸⁴

Certainly, the Illinois Supreme Court's opinion recognized the ambiguities which appeared from reading the record, especially the comments of the Committee on Style, Drafting and Submission, a procedural committee which merely redrafted each provision adopted by the convention and was powerless to make any changes in the substantive meaning, or, presumably, to comment upon that meaning.⁸⁵ While a great deal of effort was spent in determining whether the word "and" was to be given a conjunctive or disjunctive meaning, both the trial court and the Illinois Supreme Court understood that the language of article XIV, section 3 must be interpreted in such a way that only amendments proposing changes in the basic composition of the legislative branch could be initiated. This interpretation was necessary in order to protect the initiative process from abuse by special interest groups attempting to write ordinary legislation into the constitution.

If the intent of the drafters appeared somewhat ambiguous

84. The major conflict of interest provision is ILL. CONST. art. XIII, § 2, but it concerns the disclosure of interests, not disqualification from voting. See note 17 *supra*. Justice Schaefer, in his dissenting opinion, would have adopted the interpretation that amendments proposed by initiative could be structural or procedural, or both, but not substantive. 65 Ill. 2d at 475, 359 N.E.2d at 148 (1976) (Schaefer, J., dissenting). In fact, he thought that Proposition II, concerning conflict of interest voting, related to both matters of procedure and structure in that it would affect both the composition of the legislature, a "structural" subject, and the disqualification of legislators from voting on particular bills, a "procedural" subject. *Id.* at 476, 359 N.E.2d at 148. The author does not use the word "composition" as it is employed by Justice Schaefer. Rather, it is used in the same sense as in the majority opinion and in the record in 4 PROCEEDINGS, *supra* note 5, at 2711-12. For example, the legislature may be *composed* of one or two chambers; or, the legislature may be *composed* of legislators elected from single-member districts or multi-member districts. The word is not used in the sense that "the legislature is composed of fewer legislators when some are ill than when all are present." To get the proper feeling for article XIV, section 3, one should concentrate on issues concerning the general manner in which the legislature is organized. See ILL. CONST., art. IV, §§ 1, 2.

85. 65 Ill. 2d at 470-71, 359 N.E.2d at 146-47. The court noted that

from a reading of the record, the statement of that intent by those delegates to the constitutional convention who were plaintiffs and counsel in the *Gertz* case was absolutely clear. The Illinois Supreme Court opinion gave unusual deference to the status of the delegates in the lawsuit: "The plaintiffs, who were members of the constitutional convention, and in a position to know the mind of the convention, declare that "and" was not to be given a disjunctive meaning."⁸⁶ By this the court implicitly

the view of the Committee on Style, Drafting and Submission should not be accorded the same weight as that of the Committee on the Legislature, or that of Delegate Perona, who had explained the proposal to the convention. The Committee on Style, Drafting and Submission was not a substantive committee of the constitutional convention; rather it was procedural, and concerned with style and form, not substance. *Id.* at 471, 359 N.E.2d at 147. All this being true, it is nonetheless this author's impression that the Committee on Style, Drafting and Submission understood the intent of the Committee on the Legislature to limit proposed amendments to those which affected primarily the structure of the legislature and to those merely incidental procedural changes necessitated by major structural changes. The significant quotations are as follows:

This [second sentence of article XIV, section 3] is designed to prevent use of initiative amendments to add substantive matter to the Constitution. There is one difficulty with the sentence. There is in fact nothing in the article except "structural and procedural subjects," and thus in a sense, the sentence appears superfluous. One way of nailing down the issue would be a sentence reading: 'Amendments proposed by petition shall be limited to the structure of the General Assembly, and to procedural provisions affected by changes in structure.'

6 PROCEEDINGS, *supra* note 5, at 1561.

Consider also the following colloquy between the respective chairmen of the Legislative and the Style and Drafting Committees:

MR. LEWIS: I have a question of Delegate Whalen and perhaps Delegate Tomei, to also get his opinion. On page 69 of section 3, we state: "Amendments shall be limited to structural and procedural subjects." There was some feeling by some of the staff that perhaps those things ought to be itemized. Do either, or both of them feel that those words are sufficiently descriptive to restrain constitutional initiative to the matter of function, and not to the matter of substance or change in other articles?

PRESIDENT WITWER: May we come to order please? Do you care to answer, Mr. Whalen?

MR. WHALEN: I think so. We had a proposed recommendation, if you will recall, on second reading that wasn't adopted, that would further limit this, but I think this still accomplishes the result.

5 PROCEEDINGS, *supra* note 5, at 4547. Presumably Delegate Whalen thought the result accomplished was that of eliminating the assertion of substantive policy changes through the device of attaching them to language changing procedural subjects.

86. 65 Ill. 2d at 472, 359 N.E.2d at 147. This deference was perhaps excessive, and should not become a regular practice in court opinions. The plaintiffs had sought to invalidate a petition signed by over 600,000 citizens of the State of Illinois, and, therefore, carried a substantial burden. The Illinois Supreme Court was persuaded by the plaintiffs' arguments, yet the court made it clear that certain doubts remained:

Justice Brandeis is reported to have observed that some questions can be decided, even if not completely answered. The process of decision, he said, does not demand that one point of view be accepted as entirely right and the other rejected as entirely wrong. It is suffi-

recognized that although the *Gertz* case was brought as a taxpayers' action, the interest of the plaintiffs and their counsel was more analogous to a parent fighting to protect the welfare of his child than to a taxpayer trying to protect his pocketbook.⁸⁷ Of course, since the constitutional convention had 116 members, it would be absurd to presume that article XIV, section 3 was supported by one "constitutional intent." Indeed, the comments of some delegates indicated that they considered the initiative even more narrow in scope than the plaintiffs contended.⁸⁸

The challenge, then, was to determine the convention's "majority intent." The judiciary has never felt comfortable in deciding cases, let alone in interpreting constitutional provisions, in reliance on subjective historical analysis. Counsel for the plaintiffs were acutely aware of this fact. Therefore, in presenting the *Gertz* case, substantial effort was directed toward giving the courts a well-worn path of judicial interpretation which would lead to the same result as the plaintiffs' interpretation of the constitutional intent underlying article XIV, section 3. The plaintiffs employed the rule of statutory construction that, in determining the intention underlying a constitutional or statutory provision, the language used should be given its plain and

cient that the scale of judgment tips. We judge that the scale has tipped in favor of the plaintiffs' position.
Id. at 472, 359 N.E.2d at 147.

87. Even at the stipulated cost of \$1,750,000 for the conduct of an election on the proposed amendments, the per capita cost to each citizen of the state would only have been approximately 15¢. Furthermore, it is noteworthy that all counsel for plaintiffs provided their services *pro bono publico*.

88. Delegate Lewis, Chairman of the Committee on Legislature, in explaining his roll call votes in favor of article XIV, section 3, indicated that the scope of the initiative petition was limited to the subjects of single-member or multi-member districts, cumulative voting, and the size of the legislature. He stated as follows:

MR. LEWIS: Mr. President, I vote yes, and in doing so respectfully must on this issue dissent from the distinguished Delegate Edward and my good friend, Delegate Coleman. It was a committee recommendation, and this is why I asked the questions to make certain that it is just restrained to the structure and procedure, and would then remind the convention that it was the Legislative Committee report that the size of the house be modestly reduced. This was dropped on the way because of the very difficult subject we had on single-member districts, and cumulative voting. It may very well be, that some day the people will want to accomplish that revision which I think this Convention was in the mood to do, but we were unable to do so because of the problems in working out these two separately submitted issues. So I think this is an excellent provision. It is very conservative and is restrained to just those two areas, and I believe it would be good for the Constitution.

5 PROCEEDINGS, *supra* note 5, at 4548. As discussed above, Delegate Perona interpreted article XIV, section 3 to allow the initiation of an amendment changing the legislature from bicameral to unicameral. On the other hand, Delegate Whalen, Chairman of the Styling and Drafting Committee, may have interpreted the scope of article XIV, section 3 even more broadly. See note 85 *supra*.

commonly understood "dictionary" meaning unless it could be shown that the language was used in a different sense.⁸⁹

Surprisingly scant attention was paid in both the Illinois Supreme Court and the circuit court opinions to the question of whether the three propositions contained in the Coalition's petition were, in fact, both structural and procedural. The majority opinion of the Illinois Supreme Court decided that they were not both structural and procedural without discussing the individual proposals at all.⁹⁰ Justice Schaefer, in his dissenting opinion, briefly discussed the issue and decided that neither Proposition I nor Proposition III related to either structural or procedural subjects but that Proposition II related to both structural and procedural subjects in the legislative article.⁹¹ Proposition II nevertheless appears primarily substantive in nature because it governs the ethical conduct of legislators, and is not limited to structural and procedural subjects. The trial court opinion, however, did discuss the issue, and found that neither conflict of interest, double-dipping, nor prepayment of salaries were subjects even arguably structural and procedural.⁹²

Once the Illinois Supreme Court held that any initiative amendment must be both structural and procedural, the Coalition's three propositions were effectively doomed. Even if the court had construed "and" to be a disjunctive, the propositions

89. The United States Supreme Court has held that if words have acquired "special meaning in trade or commerce, they must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice . . . and upon such a question dictionaries are admitted not as evidence, but only as aids to the memory and understanding of the Court." *Nix v. Hedden*, 149 U.S. 304, 306-07 (1903). The importance of the effective use of established rules of constitutional interpretation has been emphasized in the following manner:

The record is in fact a confusing and often contradictory potpourri of member proposals which were usually not adopted, committee reports written largely by staff, calculated attempts by sponsors of proposals to explain their views to future courts, sly attempts to amend a section substantively by suggesting stylistic changes, and carefully orchestrated campaigns to secure adoption or defeat of a proposal. Sometimes delegates made statements for the record in order to establish a given interpretation as the intent of the whole convention. Delegates sometimes purposely failed to discuss possible ramifications and problems of a section during debate, in order to leave the text and constitutional intent of a section broad enough to give reviewing courts the widest possible latitude in interpretation.

Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MAR. 189, 191 (1974) (footnote omitted).

90. 65 Ill.2d at 472, 359 N.E.2d at 147.

91. *Id.* at 476, 359 N.E.2d at 148 (Schaefer, J., dissenting). See also note 84 and accompanying text *supra*. Ethical conduct is covered in the constitution in a conflict of interest provision aimed at all state officials and not just legislative representatives. See note 84 *supra*.

92. *Gertz v. State Bd. of Elections*, Circuit Court Conclusions and Rulings at 55.

probably would not have survived attack due to the narrow definitions of "structural" and "procedural" adopted even by dissenting Justice Schaefer. The majority, apparently, implicitly adopted the same narrow definition which, in all likelihood, would have rendered at least two propositions invalid. The third, Proposition II is really not "procedural" either, since it relates to a subject contained in a substantive provision elsewhere in the constitution.

CONCLUSION

In *Gertz v. State Board of Elections*, the Illinois Supreme Court considered, for the first time, the limitations on the initiative method of amending the legislative article. The court recognized the constitutional convention's desire to walk a thin line between allowing the entire constitution to be subjected to attempts to amend it, at the whim of a small pressure group, and allowing no initiative at all. The convention's solution, to allow initiative only in those areas where the General Assembly was least likely to act, was intended to be a very limited initiative. While the court acknowledged that the textual limitations were vague, it sought to delineate those limits by analyzing the underlying purpose of the convention. The purpose was relatively clear: to permit initiative amendments *only* for those parts of the legislative article governing the basic composition and operation of the legislature, and not for essentially statutory matters or issues which could become the focus of emotional political campaigns.⁹³

Although the court's narrow construction of "structural and procedural" insures that statutory matters and complex emotional issues will not be interjected into the amending process, it is nevertheless still not clear just which matters are proper subjects for the initiative. Clearly, single member as opposed to multi-member districts, cumulative voting, bicameralism as opposed to unicameralism, size of the legislature, and reapportionment are "structural and procedural" subjects. What else might be a proper subject for the initiative? The court noted that the debates indicate that this list is not exhaustive,⁹⁴ but it

93. As the court noted:

[Article XIV, section 3] specifically limits amendments to "structural and procedural" subject matter. Clearly the subject matter of the proposed article could not be construed to permit initiative amendments of a statutory nature. Clearly, the subject matter of the proposed article is not laden with the highly complex and emotion-charged issues which have plagued the constitutional initiative process in other states.

65 Ill. 2d at 469, 359 N.E.2d at 146, citing 6 PROCEEDINGS, *supra* note 5, at 1401.

is difficult to conceive of any other subject which is both "structural and procedural."

If the General Assembly fails to make those changes in its basic composition and operations which the public feels are necessary, there will undoubtedly be another attempt to place an initiative amendment on the ballot. Perhaps the court will define "structural and procedural subjects" even more clearly when that occasion arises. Until then, only the four subjects listed in the court opinion seem safe from challenge. Citizens seeking fundamental changes in the legislative branch will have to lobby the General Assembly for amendments to the legislative article, just as they must lobby for statutory action.

94. See note 81 and accompanying text *supra*.

