Constitutional Law: The Prudence of Judicial Restraint under the New Illinois Constitution

Wayne W. Whalen
Paula Wolff
CONSTITUTIONAL LAW: THE PRUDENCE OF JUDICIAL RESTRAINT UNDER THE NEW ILLINOIS CONSTITUTION

WAYNE W. WHALEN* and PAULA WOLFF**

THE 1970 Illinois Constitution substantially enhanced the constitutional powers of the Illinois courts. The increased powers are, in part, generated by newly expressed constitutional grants of power to the courts.¹ Reasons for creation of the newly expressed judicial powers, often at the expense of the legislative and executive branches, are not altogether clear. For many delegates to the Sixth Illinois Constitutional Convention, the shift in responsibility to the courts was founded upon an optimism about judicial problem-solving generated by the activism of the Warren Court. There was also an expressed pessimism about the capacities of the other institutions of government, particularly the General Assembly, to perform responsibly.²

The court's powers are also increased by the inevitable interpretive responsibilities following the ratification of new basic law. Additionally, there were instances when the delegates were unable to agree

---

¹ The new constitution was proposed by the Sixth Illinois Constitutional Convention, was ratified by the voters on December 15, 1970 and became generally effective on July 1, 1971. Ill. Const. trans. sch. §§ 1 et seq. This article does not discuss the differences between the Judicial Articles of the 1870 and 1970 constitutions. See generally Cohn, Illinois Judicial Department—Changes Effected by Constitution of 1970, 1971 U. OF ILL. FORUM 355.

² See, e.g., 4 SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS (1972) (Hereinafter cited as TRANSCRIPT), for a discussion of the General Assembly's activity in the area of environmental control, during which Delegate Mary Lee Leahy said: "If government is doing its job in this field, if the General Assembly has acted properly in drawing up good legislation . . . then the individual will have no need to act . . ." 4 TRANSCRIPT 2991. See also Delegate Madigan's remarks concerning public transportation, 4 TRANSCRIPT 3518, Delegate Davis' statement regarding conservation. 4 TRANSCRIPT 3486.
upon a palatable solution to a particular problem and final resolution was left to the courts.

The increased power of the courts under the 1970 constitution represents potentially significant threats to the courts' traditional role in Illinois government and to their institutional responsibilities. The purpose of this article is to indicate areas of possible danger and to urge that the courts approach their work in the coming decades with prudence and restraint. A new jurisprudence characterized by temperate discussion, rational dialogue and continuity of decision must be developed to avoid the hazards for the courts inherent in this new constitution.

The article is divided into three parts. The first part outlines the interpretive responsibilities of the courts under the new constitution. The second part discusses the expressed constitutional mandates to the courts, and the final part discusses the political powers and supervisory authority assigned the courts by the new constitution. The article concludes with a discussion of the institutional framework provided the courts for approaching their new responsibilities and some comments on how institutional structure offers the opportunity for development of the new jurisprudence.

JUDICIAL RESPONSIBILITY FOR INTERPRETING THE CONSTITUTION

Shortly after the adoption of the United States Constitution, Chief Justice John Marshall and his Court assumed the responsibility of interpreting the Constitution. In *Marbury v. Madison,* the Court stated the doctrine of judicial review:

> It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Coupled with this assertion of the courts' power to interpret the Constitution and to apply it to statutory law and administrative action,

4. *Id.* at 177-78.
the Court also began to consider the limits of judicial power. In *Cohens v. Virginia*, the Court said: "It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should."

The power of judicial review is not contained in the text of the 1970 constitution; nor was it contained in its predecessor. The power of judicial review in the *Marbury* sense was, however, explicit during many of the debates of the Sixth Illinois Constitutional Convention. Today's Supreme Court of Illinois is in a position, following the adoption of the Illinois Constitution of 1970, almost comparable to that of the Marshall Court in the early years of the Republic because it is generally unrestrained by the doctrine of *stare decisis* when interpreting the provisions of the new constitution.

The political possibilities offered by subsequent judicial review were not lost on the delegates to the Sixth Illinois Constitutional Convention. Anticipation of judicial review provided the delegates with the opportunity to draft intentionally ambiguous provisions for inclusion in the constitution. The delegates envisioned that these ambiguities would be ultimately resolved by the courts. In some cases delegates even expected a specific interpretation by the courts which was politically impossible to obtain in the Constitutional Convention for want of majority agreement on the substantive issue.

For example, the convention was closely divided on the question of whether the ad valorem personal property tax should be abolished

---

6. *Id.* at 404.
8. See, e.g., 4 TRANSCRIPT 3157, wherein Delegate Thomas Kellegan said: "I think the problem is still before us, and that is the question of how individual justices sitting on the Supreme Court will interpret the language which we are placing in this Constitution. . . ."
9. To the extent the courts or the legislature had, prior to the adoption of the 1970 constitution, defined terms, however, those terms should be given the same meaning unless it is clearly apparent that some other meaning was intended. Bridgewater v. Hotz, 51 Ill. 2d 103, 109, 281 N.E.2d 317, 321 (1972).
by the constitution. The proponents of abolition introduced a successful amendment which stated: "On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes . . . ."  

The intent of some of the proponents was clear. The ad valorem personal property tax would be unconstitutional and therefore uncollectable after 1979 no matter what the General Assembly did. The opponents of abolition, on the other hand, contended that the amendment was simply a mandate to the General Assembly and that without legislative action the ad valorem personal property tax could continue to be imposed. Rather than face the issue squarely and provide any definite language as to whether or not the tax would be abolished, the convention approved an ambiguous amendment which will probably be interpreted in the courts. Thus, the courts, not the convention, must resolve the political question.

Perhaps the section of the new constitution most illustrative of the deferring of politically difficult decisions by the convention to the courts is the home rule provision of the local government article. Article VII, section 6(a) provides: "Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs . . . ." The Committee on Local Government recognized the amorphous nature of the provision granting a local governmental unit powers pertaining to "its government and affairs." However, it resisted efforts to define precisely those powers. The convention, as a whole, was similarly


11. ILL. CONST. art. IX, § 5(c).


13. Instead members of the Local Government Committee argued that the constitution should include a provision stating that home rule powers be "liberally construed." The reasoning behind this was stated by Delegate David Stahl when he said: "It's precisely because the Courts have acted in a confused and often very conservative way with regard to the grant of home rule power that . . . many . . . on the Local Government Committee, feel that the inclusion of this kind of a statement for whatever effect it will have on the Courts is worthwhile and necessary." 4 TRANSCRIPT 3138-39. Some delegates contended there was a limited role
unwilling to be specific. Thus, it will inevitably fall to the courts to delineate in a case by case basis the power of home rule units.14

The courts' interpretive task under the home rule provision is predictably monumental. For example, there is the question of whether regulation of transportation is a local or a state function. Certainly to the extent that a commuter train or bus travels into the jurisdiction of a governmental unit or a metropolitan region, other than the home rule unit asserting jurisdiction, it would seem unlikely that the regulation of such transportation would exclusively belong to the home rule unit. The question of jurisdiction over the regulation of transportation is further complicated by the inclusion in the 1970 constitution of the transportation section which states that "[t]he General Assembly by law may provide for, aid, and assist public transportation. . . within the State."15

Thus, even using a restrained view of their interpretive role, the courts are faced with substantial and difficult issues of interpretation which cannot be avoided. In such cases, the interpretations will concern highly volatile political issues, such as abolition of the personal property tax, the powers of home rule units or the authority of the Attorney General, which the convention was unable to resolve. The convention intentionally deferred these political decisions by leaving interpretation of an ambiguous text to the courts.

To this extent, it appears that the Convention did not properly perform its charge. In a political body such as the Convention, compromise is not only expected but proper. In some instances, the delegates did agree to compromise. Often, under such circumstances,


14. This is a substantial departure from the precedent under which the court applied Dillon's rule which stated that local governments had only those powers expressly granted by the General Assembly by law and that any grant of powers would be strictly construed by the courts. Professor Baum suggests that the General Assembly is primarily responsible under the 1970 constitutional scheme for establishing the relationship between the state and home rule units. "[T]he Courts should step in to compensate for legislative inaction or oversight only in the clearest cases of oppression, injustice, or interference by local ordinances with vital state policies." Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. OF ILL. L. FORUM 137, 157. However, the supreme court appears to have rejected this argument in at least one instance. Bridge-man v. Korzen, — Ill. 2d — (Docket No. 45290) (1972). *Compare* City of Evanston v. County of Cook, — Ill. 2d — (Docket No. 45132) (1972).

the ultimate resolution of a political problem was deferred to the General Assembly.\textsuperscript{16} Sometimes, when a compromise was reached by expressing the terms of the bargain in the document, there was proper consideration of the issues in the document.\textsuperscript{17} The propriety of the Convention's action is less clear, however, where a constitutional compromise was reached by including in the constitution ambiguous language, with various delegates claiming different interpretations. The result is that the political solution to the problem has been intentionally and improperly deferred to the courts for determination.

Notwithstanding the serious institutional questions facing the courts which are raised by the necessity for interpreting clauses in the new document which were deliberately left ambiguous, the Supreme Court of Illinois has seemed to assume an aggressive posture in interpreting the new constitution and, indeed, to have reached unnecessarily to decide other constitutional questions. In the process, the supreme court seems to have intruded upon the prerogatives of both the legislative and executive branches by developing new constitutional doctrine which is not entirely consistent from case to case and under which the principles of decision are obscure. Several recent decisions illustrate this aggressiveness.

In \textit{Lake Shore Auto Parts Co. v. Korzen},\textsuperscript{18} the supreme court was called upon to interpret the validity of the 1970 constitutional referendum concerning Proposition IX-A, approved by an overwhelming majority of the voters, which abolished the ad valorem personal property tax on "individuals." Proposition IX-A, amended the 1870 constitution but its effect was to carry forward to the 1970 constitution when it was ratified.\textsuperscript{19} The effect of the provision was to abolish the ad valorem property tax on "individuals" and to leave the tax imposed upon other taxpayers. The court held the abolition unconstitutional under the equal protection clause of the United States Constitution on the theory that it could not rationally be said that

\begin{footnotesize}
\begin{enumerate}
\item[16.] See e.g. \textit{ILL. CONST.} art. XIII, § 3, which provides "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."
\item[17.] See \textit{ILL. CONST.}, art. XIII, § 8.
\item[18.] \textit{Lake Shore Auto Parts Co. v. Korzen}, 49 Ill. 2d 137, 273 N.E.2d 592 (1971). The Supreme Court of the United States has granted certiorari in the \textit{Korzen} case. \textit{Lenhausen v. Lake Shore Auto Parts Co.}, 405 U.S. 1039 (1972). At the time of the writing of this Article, the case is fully briefed but not argued.
\item[19.] \textit{ILL. CONST.} art. IX, § 5(b).
\end{enumerate}
\end{footnotesize}
the prohibition of payment of ad valorem property taxes by individuals promotes "any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set." The court relied upon the dissenting opinion of Mr. Justice Brandeis in *Quaker City Cab Co. v. Pennsylvania.* However, it was the majority in *Quaker City,* not Mr. Justice Brandeis, which held that a distinction between a corporate taxpayer and other taxpayers could not be drawn for purposes of a state corporate gross receipts tax. The *Quaker City* dissenting opinion relied upon by the Illinois court took the position that a rational basis *did* exist for distinguishing between corporate and individual taxpayers. While the Illinois Supreme Court cited the doctrine, frequently stated by the United States Supreme Court, that a classification is not arbitrary or violative of the equal protection clause if any set of facts reasonably can be conceived that would sustain the classification, it is difficult to understand why Mr. Justice Brandeis' statement of the numerous reasons for distinguishing corporate and individual taxpayers in *Quaker City* does not meet the equal protection test. A year later in *Doran v. Cullerton,* the Illinois Supreme Court upheld a homestead exemption from real estate taxes for taxpayer-home owners over sixty-five. In *Doran,* where the sole distinction was between two classes of owners, one over sixty-five and one under sixty-five, the court did not refer to or distinguish *Korzen.*

Several lines of Illinois Supreme Court decisions under the 1870 constitution were non-reconcilable and were restrictive on the state's

20. 49 Ill. 2d at 151; 273 N.E.2d at 599.
22. *Id.* at 411.
23. *See, e.g., Jefferson v. Hackney, 406 U.S. 535, 546-551 (1972); Dandridge v. Williams, 397 U.S. 471, 485 (1970).* The *Dandridge* Court stated, "In the area of economics and social welfare, a State does not violate the equal protection clause merely because the classification ... 'is not made with mathematical nicety or because in practice it results in some inequality.'"
25. The *Doran* court sought to support its conclusion that a rational basis for the distinction between property owners exists by referring to the federal and state income tax exemptions for the elderly. *Id.* at 559-60, 283 N.E.2d at 868. The use of this analogy is surprising since the *Korzen* majority failed to meet the arguments of Mr. Justice Davis' dissent that since a distinction between corporate and individual taxpayers was constitutional for federal and state income tax purposes, the equal protection test was met for ad valorem personal property taxpayers as well. 49 Ill. 2d at 156-57, 273 N.E.2d at 602-3.
revenue raising powers, and thus provided a major reason for calling the Sixth Illinois Constitutional Convention. The convention sought to avoid a similar development under the 1970 constitution.\textsuperscript{26} However, Korzen and Doran appear to be setting precedent that may endanger this goal. The difficulty facing the convention in drafting adequate revenue provisions is illustrated by the remarks of Delegate James Thompson in discussing two alternative drafts relating to the taxation of real property:

\begin{quote}
My personal preference would be—now that we are where we are—would be to leave them both in and let the court knock out what they want to; and I think this would be the—apparently—the only solution left to us, . . . . So let's leave this in, and perhaps the Supreme Court will knock it out. . . .\textsuperscript{27}
\end{quote}

While the courts obviously have a responsibility to apply the provisions of the constitution to all statutes and administrative action, the courts should carefully defer to the General Assembly on questions where more than one interpretation can be placed upon a revenue statute. This would be somewhat similar to the equal protection test applied by the Supreme Court of the United States in the \textit{Jefferson v. Hackney}\textsuperscript{28} and \textit{Dandridge v. Williams}\textsuperscript{29} cases.

To avoid an aggressive interpretation of the revenue article provisions by the courts which might invalidate taxing legislation, the new constitution vests exclusive power in the General Assembly to impose taxes. “The General Assembly has the exclusive power to raise revenue by law except as limited or otherwise provided in this Constitution.”\textsuperscript{30} Of course, the courts must apply all the provisions of Article IX to any revenue statute and should do so. These provisions, as they relate to both property and non-property taxes, are, however, limitations upon General Assembly power which, as a general proposition, is plenary. As such, the limitations should be construed narrowly, and it would be only under the most extraordinary circumstances, both as a matter of constitutional law and as a matter


\textsuperscript{27} 5 TRANSCRIPT at 3909.


\textsuperscript{29} Dandridge v. Williams, 397 U.S. 471 (1970).

\textsuperscript{30} ILL. CONST. art. IX, § 1.
of public policy, that these provisions would seem appropriately applied to invalidate taxing legislation.\footnote{31}

In \textit{People ex rel. Klinger v. Howlett},\footnote{32} the supreme court interpreted the amendatory veto provisions of the new constitution. This veto section represents a substantial departure from the old provision and permits the Governor to return to the General Assembly a bill, which it had previously passed, with his "specific recommendations for change."\footnote{33} In the \textit{Klinger} case, the bills related to financial assistance for non-public education. After the passage of the bills by the General Assembly, the United States Supreme Court decided two cases which clearly would have made the proposed legislation unconstitutional under federal standards.\footnote{34} Before signing the bills, the Governor changed some of the provisions to bring the proposed legislation into compliance with the recent Supreme Court decisions. The subject matter of the Governor's amendatory recommendations expressly related to the financial assistance for non-public education. The bills also contained the same appropriation of funds as the prior bills. Nevertheless, the court struck down the bills which had been approved, as amended, by the General Assembly on the grounds that the Governor had improperly exercised the amendatory veto powers. The court said that while the record of the Convention and the text of the constitution were imprecise, it was clear that the amendatory veto provision was not intended to permit the complete substitution of new bills for old ones.\footnote{35} This interpretation of the language seems beyond dispute; its application is less clear. As pointed out above, the altered bills did pertain to the same subject matter and contained the same appropriation as the old bills. The amended bills did not contain a completely new text but relied extensively on the older provisions.

The new constitution does not expressly impose qualitative or quantitative restrictions upon the Governor's power to make specific recommendations for change but the court seemed to suggest that such

\begin{footnotesize}
\footnote{31. Professor Young suggests that a different standard of review might apply when a statute is being tested against the uniformity provision of Section 2 of article IX. Young, \textit{supra} note 26, at 317.}

\footnote{32. \textit{People ex rel. Klinger v. Howlett}, 50 Ill. 2d 242, 278 N.E.2d 84 (1972).}

\footnote{33. ILL. CONST. art. IV, § 9(e).}

\footnote{34. \textit{Lemon v. Kurtzman}, 403 U.S. 602 (1971); \textit{Tilton v. Richardson}, 403 U.S. 672 (1971).}

\footnote{35. 50 Ill. 2d at 249, 278 N.E.2d at 88.}
\end{footnotesize}
restrictions existed. To the extent that any limitation should pertain, it would seem that the ordinary interpretive rule that any amendment must be germane to the subject matter would apply. The court, however, was apparently dissatisfied with that rule and, while not articulating any other, suggested that there was a more appropriate standard somewhere between being germane and the power to make simple grammatical corrections.68

After the amended bills had been approved by the General Assembly, the Speaker of the House of Representatives and the President of the Senate had signed the bills which certified that "the procedural requirements for passage" were met.37 Thus both the executive and legislative branches indicated by procedural certification that they were in agreement that the laws reflected the substantive views of the two lawmaking branches of government. Nevertheless, in Klinger, the court injected itself into the procedural steps of the passage of legislation after the other two branches had agreed that such legislation was validly "passed." However, the constitution has committed to the other branches, not to the courts, the autonomous determination of this issue.38 In short, such procedural requirements, by virtue of certification, seemed not to be open to judicial review.

In County of Cook v. Ogilvie,39 the issue before the courts was the power of the Governor to transfer a portion of the public aid appropriation from the general assistance category to the aid to families with dependent children category, a program also included in the public aid appropriation. The appropriations bill provided that the director of the Illinois Department of Public Aid could transfer funds, with the approval of the Governor, between the programs as the need arose. The director, with the approval of the Governor, made the transfer, but the Circuit Court of Cook County directed the director and the Governor to retransfer the funds to the original categories. On appeal, the supreme court found that the transfer provision of the appropriations act was an unconstitutional delegation of legislative pow-

36. Id. See also discussion at note 62 infra.
37. Ill. Const. art. IV, § 8.
38. Compare 1970 Ill. Const., art. IV, § 13 which expressly provides for judicial review to determine if a law is or can be given "general" application. See note 49, infra, and accompanying text.
39. County of Cook v. Ogilvie, 50 Ill. 2d 379, 280 N.E.2d 224 (1972). W. Whalen was one of the counsel for appellants in this case.
er to the executive branch. It also held that the injunction issued by the Circuit Court of Cook County requiring the Governor to take specific action was valid.

What the court did not say in the *Cook County* case is important. The court's decision does not include consideration of the long line of Illinois cases which holds that a court may not direct the Governor to take specific executive action. In *People ex rel Bruce v. Dunn*, for example, the court said, "[I]n view of the division of powers of government there is no power on the part of the courts to enforce by *mandamus* the performance of any duty, whether discretionary or ministerial, imposed upon the chief executive by virtue of his office." In *Cook County*, the Supreme Court of Illinois, without discussion of these cases or generally of their effect upon the inter-relationships among the three branches of government, simply ordered the Governor to take executive action.

In the *Cook County* case, as in *Klinger*, the Illinois Supreme Court injected itself into the delicate question of institutional distribution of power. The ramifications of such action are especially graphic in the *Cook County* case. For one thing, it is not altogether clear what sanctions could have been imposed on the Governor had he refused to obey the court order. Furthermore, in the *Cook County* case, by the time the decision had reached the Supreme Court of Illinois, the funds (having been retransferred pursuant to the lower court order) were completely expended and therefore, the case was arguably moot. The court, however, rejected the executive branch claim of mootness and decided the case.

With both of these problems come the traditional considerations which enter into judicial restraint. With the court's direction for executive action, the doctrine of the political question is raised in its starkest form; since the funds at issue had been spent, the issue of ripeness presents itself for consideration.

Naturally, the court is cognizant of the importance of these fundamental questions which must be considered before entering into the

---


42. See cases at note 40, *supra*.
decision-making process in any case. The significance of the questions is, however, increased during the consideration of cases developing under a new constitution. Moreover, the supreme court's impact on trial courts' attitudes concerning judicial restraint is pronounced. Whatever the reasons may be for restraint at the appellate and supreme court level, they should be all the more compelling on trial courts. Nonetheless, much of the major legislation enacted by the 77th General Assembly was constitutionally invalidated by the Cook County Circuit Court, including, *inter alia*, the No Fault Insurance Law, the Illinois Ethics Act, Aid to Non-Public Schools, the 1972 Public Aid Appropriations and the Homestead Exemption on Real Property Taxes for the Elderly.\(^4^3\) We are not concerned here with the correctness of these decisions but rather their impact on the judicial process. In some cases the supreme court has upheld the trial courts and in others they have been reversed.

Nevertheless, the lines of cases set forth above suggest the court is not only establishing a pattern of increased judicial activism under the 1970 document, but it is also re-examining fundamental questions about the overall functioning of government. This re-examination is occurring despite the fact that the traditional court involvement in interpreting the constitution is, in 1972, dangerously magnified by intentional ambiguities concerning important political issues in the language of the 1970 Constitution.

**STATED JUDICIAL RESPONSIBILITIES**

The social issues viewed by delegates to the Sixth Illinois Constitutional Convention as the most dramatic and pressing facing them were: (1) discrimination on the basis of race, creed, national ancestry or sex in employment and in housing, and (2) protection of the environment for future generations of citizens of Illinois. The convention approached the problem of discrimination by enacting section 17 of article I of the new constitution which provides:

All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property.

\(^{43}\) One major legislative program declared constitutional was the transportation program where an original action was brought in the supreme court. People *ex rel.* Ogilvie v. Lewis, 49 Ill. 2d 476, 274 N.E.2d 87 (1971).
These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.

Discrimination of the type prohibited by section 17, if committed by a government, is probably prohibited by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the comparable provisions of the 1970 constitution. Section 17 extends the freedom from discrimination to a sphere beyond governmental action, however, and prohibits private persons from discriminating in employment or in the sale and rental of property. While the provisions in the first paragraph of section 17 are arguably enforceable in the courts without an expressed grant of jurisdiction, the constitutional convention decided to take no chances—particularly in view of what was believed by many to be inaction by the General Assembly and the courts in providing protection for these important rights. Thus the second paragraph of section 17 represents a departure from the prior Illinois Constitution and grants individuals a right to enforce the substantive provisions of the first paragraph in the courts without action by the General Assembly.

Providing protection from discrimination is a traditional responsibility of the courts. The courts are viewed as peculiarly suited to resolving such issues, and these questions have been generally recognized as within the proper institutional role of courts. Thus, this provision does not represent a sharp departure from precedent with respect to judicial functions.

The second issue mandating action from the courts does represent, however, a departure from such traditional understandings. The granting of the power to enforce another substantive right was extended by the convention in section 2 of Article XI which provides:

Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

This section of the environmental article takes the courts onto untested ground. Section 2 grants persons the right to “a healthful environment.” Unlike the right to freedom from “racial discrimination”

which has proved to be subject to judicial definition with a certain amount of precision, and with respect to which the courts have exercised a traditional and well-defined role, the right to a "healthful environment" will probably cause substantive difficulties for the courts.

Questions of what is and what is not a healthful environment are, in large part, scientific. For example, massive amounts of technical evidence are necessary to determine what constitutes a certain level of harmful noise pollution. Additionally, what constitutes harmful sulphur content in emissions from an industrial plant would appear to be essentially a scientific question. The Committee on General Government, which proposed the language found in section 2 of the environmental article stated:

The word "healthful" is meant to describe that quality of physical environment which a reasonable man would select for himself were a free choice available . . . . The word "environment" means the aggregate of all conditions affecting the existence, growth and welfare of organisms. 46

Of course, it is not altogether clear that a case-by-case resolution of the question of what amounts to a "healthful environment" is governmentally and socially the most desirable means of achieving a "healthful environment."

The convention, however, believed that the right to a "healthful environment" was so compelling that the right should be constitutionally protected from abridgement by the General Assembly. Moreover, the convention was unwilling to leave to statutory law the question of how this right was to be implemented and guaranteed. Therefore, section 2 expressly provides that the right can be enforced through appropriate legal proceedings. The General Government Committee said: "'Appropriate legal proceedings' is meant to include law suits, administrative proceedings, and any other legal proceedings." 47 This understanding of the role of courts raises serious questions about judicial as opposed to legislative determination of policy. In the legislative process, interest group pressures are essential to the resolution of particular problems, and "policy" questions such as the impact on the economy of a decision in a particular area—or indeed the state or the nation—are considered essential to the policy resolution. Under section 2, such a process is not man-

46. 6 Transcript 701.
47. Id. at 705.
dated and the introduction of such considerations is virtually foreclosed. Questions about the definition and application of the right to a healthful environment are to be resolved—not by the General Assembly and not by the executive branch—but by the courts in separate legal proceedings. This is a major, new and difficult responsibility for the courts which cannot be avoided since the duty is expressly imposed by the constitution.

In other areas, the role of the courts is enlarged through express grants of power. No procedural provision of the 1870 Constitution generated more litigation than the requirement that the General Assembly shall not pass a special or local law. The old constitution contained extensive lists of instances which were stated to be local or special in nature and thereby prohibited. The new constitution eliminated the list but continued the prohibition and further provides: "Whether a general law is or can be made applicable shall be a matter for judicial determination."

Prior to the passage of this provision, the General Assembly was the final constitutional authority for determining whether or not a general act had been passed. The problem posed to the legislature under the 1870 Constitution was: when is a general law applicable? The Sixth Illinois Constitutional Convention concluded that meaningful policing of the limitations on special legislation should be left to the courts. This addition specifically rejected the rule enunciated in a long line of decisions of the Illinois Supreme Court which held that whether a general law can be made applicable to a specific situation should be a legislative rather than a judicial determination. In *Bridgewater v. Hotz*, the Supreme Court of Illinois applied, for the first time, the provisions of section 13. The Illinois Election Code provides, *inter alia*, one method for electing members of a county board for a class of counties with populations of less than three million people or with the township form of government, and another method

48. ILL. CONST. art. IV, § 22 (1870).
50. See, e.g., Sommers v. Patton, 399 Ill. 540, 178 N.E.2d 313 (1948) and cases cited therein.
51. 51 Ill. 2d 103, 281 N.E.2d 317 (1972).
for a second class comprised of Cook County and counties under the commission form of government. The Bridgewater plaintiffs charged that this provision violated the prohibition against special or local legislation. The court recognized that the scope of judicial review of legislation had been enlarged by section 13; however, it concluded that the act in question did not constitute a special or local law.\textsuperscript{52}

In a second case in the same term, Grace v. Howlett,\textsuperscript{53} the court reviewed the constitutionality of Illinois' no-fault insurance law which was applicable to private passenger vehicles but not to four wheel motor vehicles "used primarily in the occupation, profession of the insured." Over the dissent of Chief Justice Underwood, the court invalidated the legislation, on the grounds, \textit{inter alia}, that a general law could be made applicable and that the no-fault law in question was a "special law." In its analysis, the court relied squarely on section 13 of Article IV although it noted that section 13 provides protection given in many cases by the new equal protection clause of the Illinois Constitution. To the extent that the no-fault insurance law was invalid under the equal protection clause (a question which the majority explicitly declined to consider),\textsuperscript{54} the \textit{Grace} case represents no enlargement of the court's jurisdiction since even prior to the new constitution, the court could invalidate legislation for violating the Equal Protection Clause of the United States Constitution. In \textit{Grace}, however, the court clearly relied on section 13 rather than the equal protection clause, and to that extent, implied the non co-extensive nature of those two provisions. In so doing, the majority raised the question of how section 13 should be judicially applied. In his dissent, Mr. Chief Justice Underwood indicates the problem:

[Although the scope of judicial review of legislation is to that extent [by the express grant of judicial review power in section 13] enlarged, section 13 requires no change in our definition of when a law is "general and uniform," "special," or "local."\textsuperscript{55}]

He seemingly points to the crucial issue skirted by the majority in \textit{Grace} when he continues:

Additionally, we there commented: "Whether the course chosen is wise or whether it is the best means to achieve the desired result is not a proper subject of judicial

\textsuperscript{52} 51 Ill. 2d at 110, 281 N.E.2d at 322.
\textsuperscript{53}  Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).
\textsuperscript{54}  Id. at 488, 283 N.E.2d at 480.
\textsuperscript{55}  Id. at 494, 283 N.E.2d at 482.
The dissent focuses on the question of the reasonableness of the classification and its relation to the purposes of the act as the necessary crux of the court’s determination as to whether or not the act violates the constitutional proscription against special or local laws. This understanding suggests that, at least in this case, section 13 and the equal protection clause are co-extensive and the constitutional role of the court in legislative evaluation is unchanged.

In still another area, the 1970 Constitution appears to sanction court intervention in a new direction although it does not contain so specific a grant or mandate to the courts as the sections previously discussed. The Bill of Rights of the new constitution provides: "No person shall be imprisoned for failure to pay a fine in a criminal case unless he has been afforded adequate time to make payment, in installments if necessary, and has willfully failed to make payment." The members of the Bill of Rights Committee which proposed this provision stated:

The . . . proposal would tend to equalize punishment as between rich and poor by requiring that the amount of a fine be proportionate to the wealth of the offender. $100.00 may be a fortune to an indigent but not have any significance to a wealthy defendant.

Prior to the passage of this provision, if two men were convicted of speeding and each fined $300.00, the requirement for payment was the same even if one were a millionaire and the other a pauper. The law did not permit the judges to inquire into the defendants' different economic status. The absence of authority of courts to assess economic status prevented the enlargement of judicial power enabling judges to determine any such economic distinctions among persons. The court's function was to find out whether or not an accused person was guilty and to assess a fine. Under section 14, however, the power of the courts is enlarged since judges are charged with

56. Id., 283 N.E.2d at 482-83.
57. Ill. Const. art. I, § 14. The provision of the new constitution anticipated, in part, the decision of Williams v. Illinois, 399 U.S. 235 (1970), by the Supreme Court of the United States. Williams prohibits the imprisonment of an indigent defendant for non-payment of fine and court costs where the imprisonment for failure to pay exceeds the maximum term provided in the statute for the primary offense.
58. 6 Transcript 196.
the responsibility of determining whether or not a defendant should be granted the opportunity to pay fines by installments.\textsuperscript{59} Such an extension of power seems to open the way for further court involvement in the highly controversial area of assessment of socio-economic factors surrounding crime and punishment.\textsuperscript{60}

The standards of judicial review are generally discretionary and the courts can often avoid the difficult and politically volatile questions, under the \textit{Marbury} doctrine, with accepted doctrines of "standing," "political question," "ripeness" and "case or controversy." In such cases, the role of the courts (discussed in part I of this article), is properly one of restraint and deference to the other branches of government. However, where the power of a court is anchored in the language of the Constitution, as is the situation in the instances described above, the court cannot escape its judicial obligation nor can its constitutional duty be attenuated.

\textbf{SUPERVISORY AND POLITICAL RESPONSIBILITIES}

One of the primary objectives of the drafters of the new constitution was to insure that the judicial branch be permitted to spend full-time performing the business of the court. Thus, the constitution provides explicitly that judges "shall devote full time to judicial duty."\textsuperscript{61} Moreover, the constitution also provides that officers of units of local government "shall not be appointed by any person in the Judicial Branch."\textsuperscript{62} During the course of the convention, however, some important exceptions to these principles were incorporated in the document. First, the judicial article provides that associate judges shall be appointed by the circuit court judges in each circuit.\textsuperscript{63} Under the 1870 Constitution, comparable appointments were to be made "[s]ubject to law . . . ."\textsuperscript{64} Thus the General Assembly and the Gov-

60. Id. This result is also suggested by Article I, section 11 of the new constitution which states that "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." The last phrase is new.
61. \textit{ILL. CONST.} art. VI § 13(b). The new constitution retains the provision which grants the supreme court general administrative and supervisory powers over the Judicial Branch. \textit{ILL. CONST.} art. VI, § 16.
63. \textit{ILL. CONST.} art. VI, § 8.
64. \textit{ILL. CONST.} art. VI, § 12 (1870).}
ernor, by the law-making power, had total control over the procedural aspects of the appointments. Under the new constitution, these appointments are to be made as “the Supreme Court shall provide by rule.” Thus, the rule-making power of the supreme court has been increased to guarantee that the judiciary shall have control over the appointment of the associate judges in the Illinois judicial system and the matters to be assigned associate judges with no direct check by the other two branches of government. Under the 1970 Constitution when a vacancy occurs in the office of supreme, appellate or circuit judge, that vacancy is filled by appointment by the supreme court unless a law exists which provides another method. The person appointed to fill the vacancy serves for a term of up to two years, depending upon the time remaining in the term left vacant.

With this new power and control over the appointment of associate judges comes a substantial increase in the role of the supreme court in determining the composition and quality of the judiciary in Illinois. Thus the court is propelled into a very controversial area of making qualitative and seemingly political judgments about the officers of the bench. Such a power demands a careful consideration of the standards which must be developed by the court in making appointments and of institutionalizing a tradition of excellence.

One of the significant alterations in the balance of power among the branches of government in the past two decades has been the role of the courts throughout the country in the reapportionment of legislatures. Under the new constitution, the Illinois Supreme Court retains the power to review any reapportionment scheme proposed by the General Assembly. To this extent there is no change in the current balance of power. The legislative article does, however, provide for the establishment of a reapportionment commission to be composed in part of representatives appointed in equal numbers by the two party leaders of the houses of the General Assembly. If the commission fails to arrive at an acceptable redistricting plan, the supreme court is required under the constitution “to submit the names of two persons, not of the same political party, to the Secretary

65. The new constitution also provides for the appointment, rather than the election, of supreme and appellate court clerks. ILL. CONST. art. VI, § 18(a).
66. ILL. CONST. art. VI, § 12(c).
67. ILL. CONST. art. IV, § 3(b).
DE PAUL LAW REVIEW [Vol. XXII:63

of State . . . ."88 The Secretary of State then draws at random the name of one of two persons to serve as the tie-breaker on the reapportionment commission. Thus, the new constitution injects the court directly into a highly political aspect of the redistricting process and also gives the court the power to review such a plan once it has been approved by the commission.89

The new constitution has substantially increased the additional rule-making power of the Supreme Court of Illinois over its appellate jurisdiction. The court is granted exclusive power over its own appellate jurisdiction with the exception of appeals from judgments of circuit courts imposing the death penalty.70 While the constitution provides for appeal, as a matter of right, from final judgments of circuit courts to the appellate court, the supreme court is provided rule-making power for other appeals.

Moreover, the supreme court has been expressly granted the power to establish rules for the conduct of judges and associate judges.71 These shifts in responsibility from the General Assembly to the court have further insulated the judicial branch from scrutiny

68. Id.

69. In People ex rel. Scott v. Grivetti, 50 Ill. 2d 156, 277 N.E.2d 881 (1971), the court held the legislative redistricting commission was not properly selected because the leaders of the legislature appointed themselves and their aides to the commission. The court said that the appointments of the aides were "[in] literal compliance with the language of section 3(b) . . . ." However they were "a subversion of the purpose of that language . . . ." Id. at 163, 277 N.E.2d at 886. The court also invalidated the self-appointment by the legislative leaders. Section 3(b) provides a detailed and somewhat intricate method for redistricting. Its language is closely drawn. The court went to the debates of the convention and found no clear answer to the issue before it. Nevertheless, it substituted its judgment for that of the General Assembly and the text of the constitution on the theory that "had such action [self-appointment] been contemplated, section 3(b) would have so stated, particularly when it is considered that the public policy against self-appointment is of long standing and well known." Thus here, as in Klinger, see text at note 32 supra, the court has read its standards, not articulated in the constitution, into the detailed procedures surrounding the legislative process. Additionally, it is far from clear where the court found a rule which prohibited legislative leaders from appointing themselves to sit on legislative commissions or committees.

70. ILL. CONST. art. VI, § 4(b). Under the 1870 Constitution, appeals, as of right, lay in cases with (a) revenue questions, (b) constitutional questions, and (c) habeas corpus. ILL. CONST. art. VI, § 5 (1870). Where the court was granted rule-making power under the 1870 Constitution, however, it has invalidated legislative attempts to assert some control under the 1870 Constitution. Illinois v. Taylor, 50 Ill. 2d 136, 277 N.E.2d 878 (1972).

71. ILL. CONST. art. VI, § 13(a).
and control by the executive and legislature through the law making process.

The new supervisory and political powers of the court must be viewed in two lights. First, the court must assume substantial authority in areas in which it was formerly not involved. In so doing, the court which now sits can establish procedures and standards which will affect generations of Illinois citizens. Like the power which accrues to the court in interpreting the language of the new constitution, these supervisory and political powers carry with them substantial responsibilities.

Viewed from another perspective, these new powers severely affect the responsibility of the court in its evaluation of the balance between judicial restraint and judicial activism. A prudent measure of that balance should depend to some extent on the judgment of the court as to its desired power in the political system and its impact on the political process. The popular reaction to the court and its relation to the other branches of government and to the substantive questions of policy in the state can be harshly affected, however, by the extent of the court's increased involvement in the political process. Given the new and—in traditional terms—quite extreme mandatory involvement in areas of supervisory and political power, it would appear to be prudent for the court to reassess with great care its stand on judicial activism in traditional decision-making. As its supervisory and political powers have been increased, the view of its interpretive role must, perforce, change. This change should be evaluated and considered in decisions about restraint.

CONCLUSION

The shifts in power under the new constitution and the strengthening of the court system are important events in the institutional development of Illinois courts and, particularly, the role of the supreme court. In the final analysis, however, the institutional strength of the courts depends upon the respect of the other two branches and of the citizens for its opinion and its moral authority. The supreme court cannot enforce direct sanctions or administer the law. Only the executive branch can do that. The court cannot impose taxes or make appropriations. Only the General Assembly has that power. Given these limitations, how the court approaches its
responsibilities under the new constitution and the integrity of its
decisions will substantially affect the court’s institutional role in our
system of government—notwithstanding the stated new constitutional
requirements for the court’s role.

To meet this new responsibility, a new jurisprudence is required
of the Supreme Court of Illinois. In the past the court has been
seriously hampered by an excessive caseload resulting from the
mandatory appellate jurisdiction contained in the 1870 constitution.72
Adequate consideration of all matters before the court was difficult
because of the extensive burden placed upon each of the individual jus-
tices of preparing decisions and of engaging in private colloquy with
other members of the court. This has unreasonably strained the capac-
ity of the justices to arrive at a reasoned decision in which the other
members of the court have confidence. The new constitution has pro-
vided the court with almost absolute control over its caseload and the
decisions which it will review. This power has been wisely exercised
by adoption of new rules which limit appellate review.73 The tradi-
tional devices of mootness, ripeness and jurisdiction are increasingly
available to the supreme court in its decision-making process. More-
over, the court should have increased time to reflect upon the impor-
tant questions of state and institutional authority which are argued be-
fore it. The new constitution, by authorizing the court to limit its case-
load, will permit the judges to engage in a meaningful public colloquy.
The constitution, by increasing the court’s powers, has accentuated the
importance of that colloquy. An increased number of dissenting opin-
ions should be expected as genuine controversies concerning important
issues arise before the court. The citizens of the State of Illinois and
members of the Bar have the right to expect from the court, given its
power to control its caseload and its other new institutional authorities,
an increased articulation of the issues by its members and a sharpening
of existing disputes and reasoning. Such colloquy, could result
in the constraint and limitation on decisions necessary for a prudent
implementation of the new constitution and the proper judicial re-
straint by the courts.

72. ILL. CONST. art. VI, § 5 (1870).
73. ILL. REV. STAT. ch. 110A, § 302 (1971).