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THE SECRET SAUCE OF BALLOT INITIATIVE APPROVAL: ELIMINATING ISSUES WITHIN ARKANSAS'S PRE-CIRCULATION REVIEW

Nancy Smith*

I. INTRODUCTION

As Justice Thurgood Marshall once said, “Where you see wrong or inequality or injustice, speak out, because this is your country. This is your democracy. Make it. Protect it. Pass it on.”¹ Democracy is essential to the American political system. Direct democracy, however, exists in only twenty-four states.² Known as citizen lawmaking, direct democracy allows citizens to place constitutional amendments and statutes on statewide ballots without legislative support or intervention.³ It places power directly into the hands of citizens through a petition process that cumulates in voters making the ultimate decision.⁴

In order to ensure that voters are presented with well-developed proposals, many states require a review of the initiative

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1. Mashaun D. Simon, *'Moral Authority': How Justice Thurgood Marshall Transformed Society*, NBC NEWS (July 7, 2017, 12:47 PM), [https://perma.cc/4T5K-YW4B].

2. M. DANE WATERS, *THE INITIATIVE AND REFERENDUM ALMANAC: A COMPREHENSIVE REFERENCE GUIDE TO THE INITIATIVE AND REFERENDUM PROCESS IN THE UNITED STATES* 12 (2d ed. 2018).

3. DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 3-4 (1989). In comparison, the indirect initiative process allows citizens to submit proposals to their state legislature. WATERS, *supra* note 2, at 14. If not adopted, the proposal is usually then placed on the general election ballot. *Id.*

4. See Jay Barth, *By the Numbers: Direct Democracy Across Time*, ARK. TIMES (July 11, 2012), [https://perma.cc/3NKB-VRS5].

that results in either initiative certification or rejection.⁵ This review occurs before initiative petitioners circulate a proposal across a state to gather the number of signatures required for an initiative to go on a ballot.⁶ It is the first major step in voters adopting a proposal.⁷ This mandatory review usually occurs at the hands of either an elected official, appointed individual, or a group of reviewers.⁸ In Arkansas, direct democracy requires: (1) a pre-circulation review that utilizes a single elected official to conduct a review based on adequate filing; and (2) a multi-person post-circulation review for ballot language that may confuse voters.⁹

Imagine raising \$9.8 million in support of a ballot initiative.¹⁰ That number represents how much committees raised in support of an Arkansas initiative that would authorize four new casinos.¹¹ Now imagine having such vast resources but being stopped from utilizing direct democracy and presenting that initiative to voters due to a reviewer's subjective opinion. That is exactly what happened to the casino initiative proposal five different times.¹² Before the Attorney General's pre-circulation language review was replaced with a post-circulation review by the Arkansas Board of Election Commissioners,¹³ the casino initiative was continually rejected because the Attorney General's decision-making authority during the language review was vague and opened-ended. Furthermore, in the 2018 election cycle alone, the Attorney General rejected sixty-three proposed initiatives.¹⁴ Although the standard is outlined in the state's statutory code,¹⁵

5. WATERS, *supra* note 2, at 18.

6. *Id.*

7. *See id.* at 14, 18.

8. *See* Logan T. Mohs, *Alaska's Initiative Process: The Benefits of Advance Oversight and a Recommendation for Change*, 31 ALASKA L. REV. 295, 302-03 (2014).

9. ARK. CODE ANN. §§ 7-9-107, -111 (2019).

10. *See* Michael R. Wickline, *Arkansas Casino Backers Spent \$9.7M, Files Show*, ARK. DEMOCRAT GAZETTE (Dec. 16, 2018), [<https://perma.cc/XWK5-2JHX>].

11. *Id.*

12. Michael R. Wickline, *Ballot Title Still Faulty, State Attorney General Says in 5th Rejection of Casinos Proposal*, ARK. DEMOCRAT GAZETTE (May 10, 2018, 4:30 AM), [<https://perma.cc/7HBM-DB74>].

13. ARK. CODE ANN. § 7-9-111(i)(3).

14. David Ramsey, *Attorney General Leslie Rutledge Rejects Proposed Ballot Initiative to Raise Minimum Wage to \$12*, ARK. TIMES (May 5, 2018), [<https://perma.cc/LH6S-3W9C>].

15. ARK. CODE ANN. § 7-9-111(i)(3).

the discretion given to the Attorney General, and now the Arkansas Board of Election Commissioners, to reject initiatives for language that may mislead voters is overly broad and open-ended. It was not until the casino initiative's petitioners sued the Attorney General and garnered Arkansas Supreme Court intervention that the initiative was approved.¹⁶ If no such recourse had been available to the petitioners following repeated rejection, even when the language was not misleading, the time and money spent to support the casino measure would have been wasted.

Pre- and post-circulation reviews can destroy a ballot initiative. A single decision-maker or small group of reviewers decides whether voters will have the opportunity to participate in direct democracy or be forced to wait for legislative action.¹⁷ While this review eliminates confusing proposals so that voters understand what they are voting for or against, the review standard must be clear. Due to the open-ended statutory mandate that gives the Arkansas Board of Election Commissioners discretionary power over initiative rejection decisions only after signatures are gathered, the Arkansas review process should return to a pre-circulation review and incorporate additional standards of approval.

This Comment offers pre-circulation review options that state governments can use to assess the status of their own processes. Part II of this Comment analyzes direct democracy generally, examines how state governments utilize pre-circulation review, and analyzes Arkansas's pre-circulation review issues. Part III examines two pre-circulation review models; the three types of reviewers who conduct the reviews; and how, when taken together, they can give state governments a way to assess which combination provides the best pre-circulation review to fit their needs. Part IV concludes by summarizing how states can take into account the various structure combinations to improve their own processes and provides an alternative to Arkansas's current pre- and post-circulation review system.

16. Rachel Herzog & John Moritz, *Arkansas Attorney General Approves 4 Ballot Measures Hours After High Court's Ruling*, ARK. DEMOCRAT GAZETTE (May 23, 2018), [<https://perma.cc/E3YD-C7CA>].

17. See Mohs, *supra* note 8, at 302-03.

II. BACKGROUND

Because direct democracy is a powerful force in states with such provisions, understanding its background is necessary. All mandatory, controlling reviews may face problems that must be addressed in order to ensure a fair application of direct democracy.

A. Direct Democracy in the United States

While direct democracy puts legislative power directly into the hands of citizens, special interest groups who financially support proposals that further their own agendas often control the direct democracy process.¹⁸ In response, legislators often fight back by tightening direct democracy provisions to alleviate the tension between supporting direct democracy and furthering special interests, thus making it harder for any proposals to pass review and signature gathering phases.¹⁹

1. History of Direct Democracy

The United States Constitution does not guarantee direct democracy.²⁰ Unlike certain areas of state law, the ballot initiative process in American states is not a reflection of the federal government.²¹ Rather than individual citizens proposing and making laws, elected representatives serve that role.²² The Constitution does not require states to provide an initiative process, nor do American citizens have a First Amendment right to place initiatives on ballots.²³ Our Nation's founders viewed

18. Caroline J. Tolbert, *Public Policy and Direct Democracy in the Twentieth Century: The More Things Change, the More They Stay the Same*, in *THE BATTLE OVER CITIZEN LAWMAKING: A COLLECTION OF ESSAYS* 35, 36 (M. Dane Waters ed., 2001).

19. Paul Jacob, *Silence Isn't Golden: The Legislative Assault on Citizen Initiatives*, in *THE BATTLE OVER CITIZEN LAWMAKING: A COLLECTION OF ESSAYS* 97 (M. Dane Waters ed., 2001).

20. *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018).

21. *Id.*

22. *Id.*

23. See *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295-97 (6th Cir. 1993); *Angle v. Miller*, 673 F.3d 1122, 1135 (9th Cir. 2012); *Molinari v. Bloomberg*, 564 F.3d 587, 597 (2d Cir. 2009).

direct democracy as a path to political instability and factionalism; thus, it is absent at the federal level.²⁴

A ballot measure is any ballot item that does not pertain to a candidate running for office.²⁵ The initiative process is defined as “a process by which voters may propose statewide or local legislative measures or acts and statewide amendments to the Constitution.”²⁶ More simply, initiatives are “the popular creation of a new law or amendment.”²⁷ Because direct democracy places average citizens on equal footing with elected officials, it can appropriately be described as a state government’s fourth branch.²⁸

The first proposal to give citizens this power was introduced in 1885, followed by South Dakota’s adoption of a statewide initiative process in 1898.²⁹ An important argument used in the push for direct democracy was that it would strengthen representative government by adding an “external check” on state legislatures.³⁰ Because the process was a flexible way to fight congressional takeover by special interest groups, citizens saw it as a way to directly propose binding solutions to their society’s problems.³¹

Over a series of forty-seven elections in thirty-two states, Americans decided whether to adopt direct democracy in their own states.³² Over half of those voting states approved adding a provision, with the last adoption occurring in Rhode Island in 1996.³³ Today, around 203 million people have the ability to use ballot initiatives to enact change, and seventy percent of

24. See generally THE FEDERALIST NO. 10 (James Madison).

25. WATERS, *supra* note 2, at 12.

26. MARK MARTIN, 2017-18 INITIATIVES AND REFERENDA: FACTS AND INFORMATION FOR THE 2018 GENERAL ELECTION 3 (2018), [<https://perma.cc/KGS7-NBQB>].

27. Steve Sheppard, *Intelligible, Honest, and Impartial Democracy: Making Laws at the Arkansas Ballot Box, or Why Jim Hannah and Ray Thornton Were Right About May v. Daniels*, 2005 ARK. L. NOTES 123, 124 (2005).

28. Jessica A. Levinson, *Taking the Initiative: How to Save Direct Democracy*, 18 LEWIS & CLARK L. REV. 1020, 1020-21 (2014).

29. SCHMIDT, *supra* note 3, at 5, 7; WATERS, *supra* note 2, at xix.

30. RICH BRAUNSTEIN, INITIATIVE AND REFERENDUM VOTING: GOVERNING THROUGH DIRECT DEMOCRACY IN THE UNITED STATES 2 (2004).

31. *Id.*

32. See WATERS, *supra* note 2, at 5-6.

33. *Id.* at 6.

Americans approve of direct democracy.³⁴ Since the first statewide initiative made it on a ballot in 1904, over 2900 measures have been voted on across the country.³⁵ Of those nearly 3000 proposals, forty percent have passed.³⁶ Since 1989, over 600 state laws or constitutional amendments have been adopted as a direct result of ballot initiatives.³⁷

2. *The Rationales for Direct Democracy*

Direct democracy embodies the American mantra “government of the people, by the people, for the people.”³⁸ It essentially allows the public to determine for themselves what is in the public interest.³⁹ Direct democracy gives recourse to citizens experiencing voter frustration even when traditional democracy methods are failing,⁴⁰ like when lawmakers disregard the reforms and policies that their constituents are passionate about.⁴¹ No matter if a state is experiencing congressional gridlock or partisan polarization, voters can still act by initiating their own ballot measures.⁴²

Initiatives are a strong force driving the policy agenda within state governments and are often used by voters to deal with pressing social issues.⁴³ For example, citizen initiatives created proposals that gave women the right to vote, enacted environmental protections, abolished poll taxes, and created the eight-hour workday.⁴⁴ More recently, initiatives have dealt with

34. Mohs, *supra* note 8, at 296; John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSPECTIVES 185, 186 (2005).

35. WATERS, *supra* note 2, at 8.

36. *Id.*

37. SCHMIDT, *supra* note 3, at 26.

38. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), [<https://perma.cc/9BZS-NGY3>].

39. SCHMIDT, *supra* note 3, at 25.

40. See Suzanne M. Fitch, *Citizen Ballot Initiatives to Amend the Illinois Constitution*, 29 DCBA BRIEF 14, 14 (2017); John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 268 (1998).

41. See M. Dane Waters, *The Elephant in the Room*, TIPPING POINT STRATEGIES (Sept. 19, 2017), [<https://perma.cc/HJ4X-BPY3>]; Vann R. Newkirk II, *American Voters Are Turning to Direct Democracy*, THE ATLANTIC (Apr. 18, 2018), [<https://perma.cc/KY7V-ZZRN>].

42. Newkirk II, *supra* note 41.

43. See Matsusaka, *supra* note 34, at 185; BRAUNSTEIN, *supra* note 30, at 143.

44. WATERS, *supra* note 2, at 7.

issues surrounding convicted criminal rights; bilingual education; the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) community; the right to die; and affirmative action.⁴⁵

Even when state officials oppose a ballot measure, they must respect voter decisions and uphold passed initiatives. For example, Arkansas Governor Asa Hutchinson did not support the initiative that granted four additional casino gaming licenses in certain Arkansas counties.⁴⁶ However, once the initiative passed, Governor Hutchinson responded by stating that “the people have spoken, and I respect their will.”⁴⁷

Direct democracy creates government accountability.⁴⁸ By giving citizens direct power, it prevents the risk of control by a sole entity, such as a state legislature, and is an additional check on government power.⁴⁹ And, even when initiatives do not pass, citizens are able to garner interest and create public discussion on topics not usually considered by their representatives.⁵⁰

3. *The Costs of Direct Democracy*

Direct democracy has continually faced adversity.⁵¹ Those who oppose the citizen power to pass legislation and constitutional amendments do so for a variety of reasons.⁵² One major critique of direct democracy is that financially powerful special interest groups control the process.⁵³ Because direct democracy bypasses a state legislature, no whipping of votes or lobbying efforts play a role in whether a vote is cast for or against a ballot initiative.⁵⁴ However, initiatives backed by special interest groups with vast economic and election-related resources bring that same persuasive action seen inside the legislature to

45. BRAUNSTEIN, *supra* note 30, at 143.

46. Michael R. Wickline, *Casino Measure Wins Arkansas Voters' Support*, ARK. DEMOCRAT GAZETTE (Nov. 7, 2018), [<https://perma.cc/FP5V-D6U5>].

47. *Id.*

48. *See* SCHMIDT, *supra* note 3, at 26.

49. *Id.* at 29.

50. BRAUNSTEIN, *supra* note 30, at 141.

51. *See* SCHMIDT, *supra* note 3, at 4.

52. *See id.* at 34.

53. Tolbert, *supra* note 18, at 36.

54. *See id.* at 38.

individual citizens.⁵⁵ As demonstrated through the Arkansas casino initiative,⁵⁶ these groups raise large sums to push their initiative forward. Such involvement lessens the chance that initiatives brought by petitioners who rely on word-of-mouth and grassroots efforts will be successful.⁵⁷ Thus, those special interest groups often control what initiatives are passed through their marketing labors.⁵⁸ Another critique is that direct democracy allows citizens to unfairly draft laws and dictate important policy decisions, rather than the men and women elected to serve in that capacity.⁵⁹

If a state's pre-circulation review process does not include review of the language's content, uninformed voters may unknowingly pass an initiative that imposes serious consequences on their way of life.⁶⁰ Unfortunately, such a vote may likely be the result of a powerful group whose initiative succeeds merely because of their expensive marketing campaign.⁶¹ As a result, even though direct democracy was created as an additional check on the legislative branch, legislators often attack such provisions through increased regulation.⁶² These regulations lengthen the process, making it harder for citizens to implement legislation without using the normal political methods.⁶³ Such attacks often arise when citizens contemplate proposing changes to the legislative branch organization, such as term limits or

55. See *id.* at 36; see also Daniel A. Smith, *Special Interests and Direct Democracy: An Historical Glance*, in *THE BATTLE OVER CITIZEN LAWMAKING: A COLLECTION OF ESSAYS* 59, 59 (M. Dane Waters ed., 2001).

56. Wickline, *supra* note 10.

57. See Crystal Ayres, *19 Pros and Cons of Direct Democracy*, VITTANA PERSONAL FINANCE BLOG, [<https://perma.cc/U3Z3-XSWC>] (last visited Sept. 3, 2019); see also Tolbert, *supra* note 18, at 36.

58. See Smith, *supra* note 55, at 60-61. *But see* Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform*, in *THE BATTLE OVER CITIZEN LAWMAKING: A COLLECTION OF ESSAYS* 73, 90-91 (M. Dane Waters ed., 2001) (concluding that large contributions by interest groups are often successful in defeating initiatives but much less successful in passing them).

59. See Tolbert, *supra* note 18, at 35-36.

60. Ayres, *supra* note 57.

61. *Id.*

62. Paul Jacob, *Silence Isn't Golden: The Legislative Assault on Citizen Initiatives*, in *THE BATTLE OVER CITIZEN LAWMAKING: A COLLECTION OF ESSAYS* 97, 97 (M. Dane Waters ed., 2001).

63. See *id.* at 97-98.

redistricting.⁶⁴ Changes to the initiative process brought by legislators often manifest through increased signature requirements, shortened timelines for approval, and redefined single-subject rules.⁶⁵ These limitations greatly decrease a citizen's ability to effectively utilize direct democracy because they make the process more difficult.⁶⁶

B. Pre-Circulation Review

Pre-circulation review is often the first, major step in direct democracy.⁶⁷ While each state that requires this review differs in its execution, reviews likely safeguard against any unfair balance of power within the process. However, pre-circulation review slows down a proposal's development and often gives too much discretionary power to the elected official, appointed individual, or group of individuals who guide the process.

1. *The Role of Pre-Circulation Review in Direct Democracy*

For the seven states that require a pre-circulation review within their direct democracy provision, that review is the most important step in the entire process.⁶⁸ A direct democracy process usually adheres to the following structure.⁶⁹ First, proponents of an initiative draft a ballot proposal that must be approved by the designated reviewer.⁷⁰ Once certified, states often require the ballot measure, which generally includes the title and summary, to be published in a major state newspaper.⁷¹ The proposal is then circulated throughout the state to gain the required number of signatures.⁷² Once signatures are submitted and verified, the initiative is placed on the statewide ballot.⁷³ If passed, the

64. Fitch, *supra* note 40, at 14.

65. See, e.g., Newkirk II, *supra* note 41; see also Jacob, *supra* note 62, at 102-03.

66. See Jacob, *supra* note 62, at 97-98.

67. WATERS, *supra* note 2, at 14, 18.

68. See *id.* at 18-20. Those seven states are unique because they employ direct democracy, as opposed to indirect democracy, and the pre-circulation review is both mandatory and binding on the petitioner. *Id.*

69. See Levinson, *supra* note 28, at 1023.

70. *Id.* at 1023.

71. WATERS, *supra* note 2, at 20-21, 37.

72. Levinson, *supra* note 28, at 1023.

73. WATERS, *supra* note 2, at 14.

initiative becomes the law, either through a constitutional amendment or statute.⁷⁴

There are two methods that lead to ballot rejection before circulation begins. First, initiatives are rejected for the proposal's failed adherence to subject limitations.⁷⁵ Second, initiatives are rejected for the proposal's form.⁷⁶ Each model gives varying amounts of discretion to the reviewer.⁷⁷ Thus, the type of reviewer who makes the rejection or approval decision is important to consider. Of the seven states that require pre-circulation review, the decision-maker is either an elected official, an appointed individual, or an appointed group of people.⁷⁸ The type of reviewer chosen to conduct the pre-circulation review determines the process's efficiency, the reviewer's source of accountability, and the activity's equitable value.

Oversight of direct democracy through a review period is beneficial.⁷⁹ By designating an elected official, appointing someone, or giving the power to a group of reviewers, states safeguard against any unfair balance of power.⁸⁰ If the judicial branch oversaw direct democracy, particularly what is contained within proposals, a citizen's opportunity to appeal a rejection would be eliminated.⁸¹ A reviewer or group of reviewers who are independent from the court system and are elected to serve in an administrative capacity present a unique connection to voters due to an elected officer's direct accountability to voters.⁸² On the other hand, an appointed individual or group is not concerned with the wills of the people and instead may only rely on the standard of review provided. Thus, the accountability aspect of direct democracy is determinative upon what type of reviewer is

74. *Id.* at 12.

75. *See, e.g.*, FLA. CONST. art. XI, § 3; MO. CONST. art. III, §§ 50-51; OKLA. CONST. art. XXIV, § 1; OR. CONST. art. IV, § 1, cl. 2.

76. *See, e.g.*, N.D. CONST. art. III, § 2; ARIZ. REV. STAT. ANN. § 19-101-01 (2015); ARK. CODE ANN. § 7-9-107(b) (2019); FLA. STAT. ANN. § 101.161(3)(a) (2014); MO. ANN. STAT. §§ 116.030-040 (2014); OKLA. STAT. ANN. tit. 34, § 9.B (2018).

77. *See* WATERS, *supra* note 2, at 18.

78. *See id.* at 18-20.

79. *See* Mohs, *supra* note 8, at 295, 303.

80. *Id.* at 304.

81. *See id.* at 305.

82. *Id.* at 307.

utilized during pre-circulation review.⁸³ All types of oversight, however, provide an independent official who is not associated with lawmaking of any kind, thus further ensuring that direct democracy allows citizens to bypass legislative bodies completely.⁸⁴

2. *Issues with Pre-Circulation Review*

States undoubtedly use pre-circulation review as an additional mechanism to control the ballot initiative process. Each pre-circulation review model empowers the reviewer with discretion.⁸⁵ The only difference between each review model is the level of discretion given to the reviewer, which is best understood on a continuum.⁸⁶ The subject adherence review gives the decision-maker ultimate discretion.⁸⁷ Because the topic limitation inherent in subject review restricts the areas of law an initiative can cover, the reviewer has ability to construe the language either broadly or narrowly.⁸⁸ In contrast, the review for form gives the decision-maker the least amount of discretion.⁸⁹ Whether an initiative meets the statutory form requirements involves no amount of subjectivity because the form is either correct or incorrect.⁹⁰

Large amounts of discretion create the risk that the discretion will be abused. The subject review gives such discretion that the reviewer alone decides whether an initiative will be given to the voters or not.⁹¹ While such discretion included in this review model may not be mistreated, the possibility still exists. By reducing the amount of discretion, as demonstrated in the form

83. BARRY C. BURDEN, ET AL., COMPARING ELECTED AND APPOINTED ELECTION OFFICIALS: THE IMPACT OF SELECTION METHOD ON POLICY PREFERENCES AND ADMINISTRATIVE OUTCOMES 4 (Mar. 22, 2010), [<https://perma.cc/M9VZ-ZAPX>].

84. See Mohs, *supra* note 8, at 302-03, 308.

85. See WATERS, *supra* note 2, at 18.

86. See *id.*

87. See FLA. CONST. art. XI, § 3; MO. CONST. art. III, § 50; OKLA. CONST. art. XXIV, § 1; OR. CONST. art. IV, § 1, cl. 2.

88. See FLA. CONST. art. XI, § 3; MO. CONST. art. III, § 50; OKLA. CONST. art. XXIV, § 1; OR. CONST. art. IV, § 1, cl. 2.

89. See WATERS, *supra* note 2, at 18.

90. See *id.*

91. See FLA. CONST. art. XI, § 3; MO. CONST. art. III, § 50; OR. CONST. art. IV, § 1, cl. 4.

review,⁹² states lessen that possibility. Without any personal influence of the reviewer, the decision to approve or reject an initiative is solely dependent on whether the initiative's petitioners followed the statutory guidelines.⁹³ The less discretion, the smaller the likelihood of the reviewer's own agenda affecting the approval process.

C. Direct Democracy in Arkansas

Arkansas has provided its citizens the power of direct democracy for over one hundred years.⁹⁴ The process currently requires: (1) pre-circulation review by an elected official who rejects ballot proposals for adherence to filing requirements; and (2) a post-circulation review by an appointed group of individuals who review for language that may mislead or confuse voters.⁹⁵

1. Arkansas's History of Direct Democracy

Arkansas voters adopted initiative and popular referendum provisions on September 5, 1910.⁹⁶ Although the Arkansas Populist Party used the initiative process as part of its platform in 1896, the movement did not succeed until George Donaghey became Governor in 1909.⁹⁷ Following his support, the legislature approved Article 5 to the Arkansas Constitution.⁹⁸ In addition to legislative power being vested in the General Assembly, power was now specifically reserved for the people through citizen-led ballots concerning both constitutional amendments and statutes.⁹⁹ Amendment VII later altered Article V in 1920,¹⁰⁰ and beginning in 1925, initiatives were used to enact

92. See WATERS, *supra* note 2, at 18.

93. See *id.* at 18-19.

94. *Id.* at 4.

95. See ARK. CODE ANN. §§ 7-9-107, -111(i) (2019).

96. History of Initiative and Referendum in Arkansas, INITIATIVE & REFERENDUM INST., [<https://perma.cc/Q8WN-CUFK>] (last visited Sept. 18, 2018).

97. *Id.*

98. ARK. CONST. art. V, § 1; History of Initiative and Referendum in Arkansas, *supra* note 96.

99. See ARK. CONST. art. V, § 1; History of Initiative and Referendum in Arkansas, *supra* note 96.

100. ARK. CONST. art. V, § 1; History of Initiative and Referendum in Arkansas, *supra* note 96.

statewide laws.¹⁰¹ Although legislators may also place initiatives on the ballot, those stemming from the legislature have historically received the same treatment as citizen-driven initiatives.¹⁰²

Arkansas has utilized the direct democracy process in a variety of ways, such as limiting congressional salaries, requiring Congress to use any constitutional means to block school integration, abolishing the poll tax, and approving medical marijuana.¹⁰³ In addition to bypassing the legislature, Arkansans bypass the Governor, which is true in any direct democracy state.¹⁰⁴ Since 1912, 139 measures have been presented to Arkansas voters.¹⁰⁵ Of those, sixty-four have passed and been enacted into law, which is a forty-seven percent passage rate.¹⁰⁶ When analyzing more recent initiatives, eighteen proposals landed on the ballot between 1996 and 2018.¹⁰⁷ Over those twenty-two years, eleven initiatives were adopted, thus resulting in a sixty-one percent passage rate.¹⁰⁸ In the November 2018 election, three measures appeared on Arkansas's statewide ballot.¹⁰⁹ Of those measures, two were citizen-led while the other was legislatively referred.¹¹⁰ The two citizen-led initiatives sought to increase the state's minimum wage and authorize four casinos licenses, while the referred initiative sought increased voter photo identification requirements.¹¹¹ Arkansas voters approved all three measures.¹¹² The legislatively referred initiative about voter identification was the most successful,

101. Sheppard, *supra* note 27, at 123.

102. *Id.* at 124.

103. WATERS, *supra* note 2, at 123-24; History of Initiative and Referendum in Arkansas, *supra* note 96.

104. See ARK. CONST. art. V, § 1; Sheppard, *supra* note 27, at 123-24.

105. See WATERS, *supra* note 2, at 124-31; *Arkansas 2018 Ballot Measures*, BALLOTPEdia, [<https://perma.cc/7F36-BFUJ>] (last visited Nov. 11, 2018).

106. See WATERS, *supra* note 2, at 124-31; *Arkansas 2018 Ballot Measures*, *supra* note 105.

107. See WATERS, *supra* note 2, at 130-31; *Arkansas 2018 Ballot Measures*, *supra* note 105.

108. See WATERS, *supra* note 2, at 130-31; *Arkansas 2018 Ballot Measures*, *supra* note 105.

109. *Arkansas 2018 Ballot Measures*, *supra* note 105.

110. *Id.*

111. *Id.*

112. *Id.*

passing with 79.49 percent in favor of the requirement.¹¹³ The citizen-led initiatives increasing minimum wage and granting casino gaming licenses passed with 68.45 percent and 54.1 percent, respectively.¹¹⁴

2. Arkansas's Pre-Circulation Form Review

To begin the ballot initiative process in Arkansas, the petitioner must file the correct documentation with the Secretary of State at least four months before the statewide election.¹¹⁵ Under the Arkansas Constitution, the petition's title is certified by the Secretary of State.¹¹⁶ However, Amendment VII was codified and Section 7-9-107 expanded upon Arkansas's citizen lawmaking process.¹¹⁷ While the codified version of Amendment VII previously empowered the Attorney General to certify or reject proposals, the General Assembly altered the statute on March 8, 2019, with Act 376.¹¹⁸ In accordance with Article V of the Constitution,¹¹⁹ the Arkansas Board of Election Commissioners is now involved with determining the sufficiency of initiative petitions.¹²⁰ To start the process, petition sponsors file an original draft of the initiative petition with the Secretary of State.¹²¹ This draft must include the full text, ballot title, and popular name of the proposed measure.¹²² The Secretary of State then returns a file-marked copy of the petition to the sponsors, which evidences that the draft was adequately filed.¹²³ The petition sponsor can now begin circulating the petition to gather the number of signatures required for placement on a statewide ballot.¹²⁴ Thus, Arkansas's pre-circulation review process merely consists of a review for form.

113. *Id.*

114. *Arkansas Ballot Issues in 2018*, ARK. DEMOCRAT GAZETTE, [https://perma.cc/Y96L-XQM8] (last visited Sept. 18, 2019).

115. ARK. CONST. art. V, § 1.

116. ARK. CONST. art. V, § 1.

117. ARK. CODE ANN. § 7-9-107 (2019).

118. S.B. 346, 92d Gen. Assem., Reg. Sess. (Ark. 2019).

119. ARK. CONST. art. V, § 1.

120. ARK. CODE ANN. § 7-9-111 (2019).

121. ARK. CODE ANN. § 7-9-107(a) (2019).

122. ARK. CODE ANN. § 7-9-107(b).

123. ARK. CODE ANN. § 7-9-107(c).

124. ARK. CODE ANN. § 7-9-107(d).

3. *Arkansas's Post-Circulation Language Review*

After circulation is complete, the petition sponsor resubmits the petition to the Secretary of State for the sufficiency of the signatures to be determined.¹²⁵ While the Secretary of State reviews the signatures, as of March 2019, he or she transfers review of the petition language to the State Board of Election Commissioners (“the Board”).¹²⁶ The Board improves election procedures by providing “education, assistance, and monitoring.”¹²⁷ This Board “assure[s] . . . consistent application of voter registration laws and fair and orderly election procedures.”¹²⁸ The Board is comprised of the Secretary of State and six individuals appointed by five separate offices.¹²⁹ These reviewers are experienced in the Arkansas voting process and provide multiple viewpoints due to the Board’s unique formation. Furthermore, only one of the seven Board members is a statewide elected official,¹³⁰ and thus, the review is less encumbered by re-election antics and other aspects coincidental to elected positions. Upon receipt of a ballot proposal, the Board has thirty days to certify or reject the petition’s title and popular name.¹³¹ The Board certifies the petition to be placed on the ballot if it determines that the petition presents the title, popular name, and nature of the issue in a manner that:

is not misleading and not designed in such manner that a vote “FOR” the issue would be a vote against the matter or viewpoint that the voter believes himself or herself casting a vote for, or, conversely, that a vote “AGAINST” an issue would be a vote for a viewpoint that the voter is against. . .

.¹³²

Additionally, the signatures must be determined sufficient.¹³³ Conversely, the Board can reject the petition and

125. ARK. CODE ANN. § 7-9-111(a).

126. ARK. CODE ANN. § 7-9-111(i).

127. *About Us*, ARK. ST. BD. OF ELECTION COMM’RS, [<https://perma.cc/36YD-J9AB>] (last visited Feb. 22, 2019).

128. *Rules*, ARK. ST. BD. OF ELECTION COMM’RS, [<https://perma.cc/6GBH-QRM6>] (last visited Feb. 22, 2019).

129. *About Us*, *supra* note 127.

130. *Id.*

131. ARK. CODE ANN. § 7-9-111(i)(2).

132. ARK. CODE ANN. § 7-9-111(i)(3).

133. ARK. CODE ANN. § 7-9-111(i)(3).

stop its placement on the ballot if those standards are not met.¹³⁴ The initiative may simply be rejected, or the Board can provide the sponsor with the reasons for the rejection.¹³⁵ Either way, the sponsor is unable to resubmit a redesigned initiative after rejection.¹³⁶ If the Board does not certify a proposed measure, the petition sponsor or a registered voter may petition the Arkansas Supreme Court to determine whether the title or popular name deserves to be certified.¹³⁷ Although the Supreme Court is required to review the rejection expeditiously and make a decision before the relevant election,¹³⁸ the review is not required to conclude before the election ballots are printed.¹³⁹

4. *The Problems with Arkansas's Process*

An Arkansas Attorney General once stated that “[t]he permissible scope of the initiative . . . has no limits except as stated in the provision granting the respective powers.”¹⁴⁰ While there is no limit on what initiatives can achieve, the Board has the primary power to stop an initiative in its tracks.¹⁴¹ Even though the Secretary of State conducts a form-specific pre-circulation review, the Board’s subject language review is only invoked after petitioners spend time, energy, and resources circulating their petitions and gathering thousands of signatures from across the state.¹⁴² Due to the inequitable timing of this power, the procedures governing initiatives must change to provide the direct democracy intended by the Arkansas Constitution.¹⁴³ The current Arkansas Attorney General, Leslie Rutledge, recognizes that there is a problem with the Arkansas initiative process.¹⁴⁴ Prior to appearing in court for the lawsuit resulting from her continual

134. ARK. CODE ANN. § 7-9-111(i)(4)(A)(i).

135. ARK. CODE ANN. § 7-9-111(i)(4)(A)(i)-(ii).

136. ARK. CODE ANN. § 7-9-111(i)(4)(A)(ii)(b).

137. ARK. CODE ANN. § 7-9-112(a) (2019).

138. ARK. CODE ANN. § 7-9-112(b).

139. *See* ARK. CODE ANN. § 7-9-112(b).

140. Ark. Op. Att’y Gen. No. 90-036 (1990).

141. *See* ARK. CODE ANN. § 7-9-111(i)(4)(A).

142. *Rutledge Calls on General Assembly to Fix Initiative Process*, ATT’Y GEN. LESLIE RUTLEDGE: NEWS RELEASES (May 17, 2018), [<https://perma.cc/U624-9BPH>] [hereinafter Press Release 2018].

143. *See* Levinson, *supra* note 28, at 1061.

144. Press Release 2018, *supra* note 142.

rejection of the casino ballot proposal in 2018, Rutledge expressed hopes to work with the General Assembly “to ensure Arkansans have a clear and fair process to have an initiative . . . placed on the ballot.”¹⁴⁵ Rather than having the Attorney General make a decision that can later be rejected by the Arkansas Supreme Court after an initiative is circulated, Rutledge suggested the process be streamlined during the pre-circulation review phase.¹⁴⁶ While there is no Arkansas case law that gives guidance to the Supreme Court’s review of the Board’s decision, the previous review by the Attorney General did generate some insight.¹⁴⁷ Ultimately, however, both the old review process by the Attorney General and the new review by the Board provide an unclear standard. While the Arkansas process allows for citizen authorship in addition to subsequent guidance by the reviewer, the standard that guides the Board’s post-circulation review is vague and open-ended because it allows for rejection if any language may mislead or confuse voters.¹⁴⁸

Because the post-circulation review standard is contingent on voter confusion,¹⁴⁹ the only criteria that matters for this review is language. This model operates solely under a subjective test, meaning that determinations are made according to personal judgment.¹⁵⁰ Reviewing an initiative’s language is important, and states have a legitimate interest in ensuring that voters have a clear understanding of what ballot measure they are supporting or rejecting. However, such subjective tests give petitioners no clear guide as to what secret sauce the reviewer is requiring for

145. *Id.*; see also John Moritz & Michael R. Wickline, *Arkansas AG to Ask Legislators to Fix Initiative System*, ARK. DEMOCRAT GAZETTE (May 18, 2018), [<https://perma.cc/D7WV-V2SR>].

146. Moritz & Wickline, *supra* note 145.

147. When the Arkansas Supreme Court accepts a petition to review the Attorney General’s decision, significance is given to the fact that the Attorney General approved it. *Fletcher v. Bryant*, 243 Ark. 864, 867, 422 S.W.2d 698, 701 (1968). However, the Court will not give the decision presumptive effect. *Bailey v. McCuen*, 318 Ark. 277, 284, 884 S.W.2d 938, 942 (1994); *Gaines v. McCuen*, 296 Ark. 513, 519, 758 S.W.2d 403, 406 (1988). Rather, the sufficiency of the ballot title and summary is a matter of law. *Gaines*, 296 Ark. at 519, 758 S.W.2d at 406. The standard of review is a proposal that is intelligent, authentic, and neutral. *Ark. Women’s Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846, 848 (1984).

148. ARK. CODE ANN. § 7-9-111(i)(4)(A) (2019).

149. ARK. CODE ANN. § 7-9-111(i)(4)(A).

150. *Subjective Test*, AM. PSYCHOL. ASS’N, [<https://perma.cc/R7MP-U77L>] (last visited Nov. 9, 2018).

certification. Furthermore, this substantive review takes place after the petition is circulated, while the form-specific review is the only evaluation beforehand.¹⁵¹

In accordance with the law at the time, three 2018 ballot initiatives received Attorney General approval and Secretary of State verification of gathered signatures.¹⁵² However, the discretionary role given to the Attorney General during the pre-circulation review process made the path for these three initiatives very complicated. The same will likely be true for future language reviews by the Board, even though this will now be a post-circulation review. In the 2018 election cycle alone, the Attorney General rejected sixty-three proposed initiatives.¹⁵³ Furthermore, the Attorney General rejected the minimum wage measure three times in April 2018.¹⁵⁴ Each submitted measure varied, but all three consecutive proposals were nonetheless rejected.¹⁵⁵ In addition, the Attorney General rejected a casino proposal for the fifth time in May 2018.¹⁵⁶ The Board will have this same ability, as they are the sole group to apply the ambiguous confusing-language standard that allows for rejections.¹⁵⁷ As a result of this review structure, the perfect formula to secure initiative certification in Arkansas is unclear, especially after a petition is circulated. Therefore, all Arkansans will benefit from a change in the mandate concerning the pre-circulation and post-circulation reviews.¹⁵⁸

III. ANALYSIS

States can determine which pre-circulation review best supports their goals by considering the relationship between the pre-circulation model and type of reviewer. By considering the reviewer's amount of discretion, the reviewer's source of

151. See ARK. CODE ANN. § 7-9-107 (2019).

152. *Arkansas 2018 Ballot Measures*, *supra* note 105.

153. Ramsey, *supra* note 14.

154. Michael R. Wickline, *Ballot Title for Measure Aimed at Increasing Arkansas' Minimum Wage Fails Again*, ARK. DEMOCRAT GAZETTE (May 16, 2018, 4:30 AM), [<https://perma.cc/7LZB-F87S>].

155. *Id.*

156. *Ballot Title Still Faulty, State Attorney General Says in 5th Rejection of Casinos Proposal*, *supra* note 12.

157. ARK. CODE ANN. § 7-9-111(i)(2)-(4)(A) (2019).

158. See Sheppard, *supra* note 27, at 131-32.

accountability, and the process's level of efficiency, states are able to conduct an informed evaluation of their direct democracy processes.

A. The Two Pre-Circulation Review Models

Pre-circulation review centers on whether a ballot proposal will be certified or rejected.¹⁵⁹ That important decision rests on whether the reviewer finds that the initiative passes the constitutional or statutory standards concerning the initiative's subject or form.¹⁶⁰

1. Rejection for Subject

Four states allow an official to reject an initiative due to its failed adherence to a single subject rule or other issue limitation.¹⁶¹ Examples of rejection based on subject deficiencies include when: (1) the initiative encroaches on more than one area of law;¹⁶² and (2) the initiative covers statutorily restricted subjects.¹⁶³ While other states have subject limitations for legislative bills,¹⁶⁴ Florida and Oregon are among the only states that employ the assessment during pre-circulation review.¹⁶⁵

While large, financially powerful groups that push initiatives likely have ample resources, an average voter suggesting an initiative does not. As a result, composing a proposal that does not concern more than one statutory or constitutional issue may be challenging. This model gives the decision-maker much discretion because the criteria examined is subject to the

159. See WATERS, *supra* note 2, at 18-20.

160. *Id.*

161. FLA. CONST. art. XI, § 3; MO. CONST. art. III, §§ 50-51; OKLA. CONST. art. XXIV, § 1; OR. CONST. art. IV, § 1, cl. 2.

162. FLA. CONST. art. XI, § 3; MO. CONST. art. III, §§ 50-51; OKLA. CONST. art. XXIV, § 1; OR. CONST. art. IV, § 1, cl. 2. The Florida review is considered "very strict," and although it starts before circulation, the circulation often begins before the Supreme Court makes a final determination. WATERS, *supra* note 2, at 295-96.

163. For example, while an initiative is rejected if it concerns the appropriation of money, initiatives about new revenue provisions are allowed. MO. CONST. art. III, § 51.

164. See *Ariz. Chamber of Commerce & Indus. v. Kiley*, 399 P.3d 80, 88-89 (Ariz. 2017) (holding that the single-subject rule only applies to acts and not to initiative petitions).

165. See FLA. CONST. art. XI, § 3; OR. CONST. art. IV, § 1, cl. 2; WATERS, *supra* note 2, at 18-19.

reviewer's personal analysis.¹⁶⁶ If a reviewer construes a subject limitation narrowly, any mention or combination of another subject would be grounds for rejection.¹⁶⁷ However, if a reviewer construes the subject limitation to only apply in obvious cases of an initiative encroaching on multiple or restricted areas, the reviewer may approve more initiatives.¹⁶⁸

2. *Rejection for Form*

Six states allow a public official, generally the Secretary of State, to reject a ballot proposal for its form.¹⁶⁹ This review focuses solely on whether the technical drafting requirements are satisfied, thus giving the decision-maker little to no discretion.¹⁷⁰

Examples of rejection based on form deficiencies include when: (1) the application has the correct contact information for the proposal's sponsors and includes the measure's full text;¹⁷¹ and (2) the initiative complies with statutory guidelines.¹⁷² The majority of these states determine whether the initiative complies with statutory guidelines; however, while some will disregard clerical and technical errors,¹⁷³ many strictly review initiatives.¹⁷⁴ This review specifically contemplates the reality that a passed initiative may overrule decisions made by the legislative body.¹⁷⁵

This form-based review is an objective test, which means there are right or wrong answers. Little to no ambiguity affects this approach because the options are clear. An initiative either meets the prescribed form requirements or it does not. A reviewer's opinion, judgment, or personal reaction to a proposal

166. See Daniel N. Boger, *Constitutional Avoidance: The Single Subject Rule as an Interpretive Principle*, 103 VA. L. REV. 1247, 1291-92; WATERS, *supra* note 2, at 18-19.

167. See, e.g., FLA. CONST. art. XI, § 3; see also WATERS, *supra* note 2, at 18.

168. See, e.g., MO. CONST. art. III, §§ 50-51; OR. CONST. art. IV, § 1, cl. 2.

169. N.D. CONST. art. III, § 2; ARIZ. REV. STAT. ANN. § 19-111.01(B) (2017); ARK. CODE ANN. § 7-9-107 (2019); FLA. STAT. ANN. § 101.161(2) (2014); MO. ANN. STAT. §§ 116.030-.040, .332 (2014) (requiring substantial compliance with the requirements, and allowing the Missouri Attorney General to weigh in); OKLA. STAT. ANN. tit. 34, § 9(B) (2018).

170. See MO. ANN. STAT. §§ 116.030-.040; WATERS, *supra* note 2, at 18.

171. See, e.g., N.D. CONST. art. III, § 2.

172. See, e.g., ARIZ. REV. STAT. ANN. § 19-101.01 (2015); FLA. STAT. ANN. § 101.161(2).

173. See, e.g., MO. ANN. STAT. §§ 116.030-.040.

174. See, e.g., OKLA. STAT. ANN. tit. 34, § 9(B), (D) (2018).

175. ARIZ. REV. STAT. ANN. § 19-101.01.

is irrelevant. This model lets the voters decide on the merits of each initiative. Unlike the subject and confusing language models, voters in form-review states are given the opportunity to propose initiatives without fear of the reviewer's discretionary powers playing a role. As long as petitioners determine what the form guidelines demand before submitting to the appropriate authority, they have an idea of what constitutes rejection.

B. The Different Types of Reviewers

Whoever controls pre-circulation review determines whether an initiative will have the opportunity to pass onto the next step in the direct democracy process.¹⁷⁶ The three types of reviewers used to conduct pre-circulation review include elected officials, appointed officials, and elected or appointed groups of individuals.¹⁷⁷

1. Elected Official

Six states empower an elected official to conduct a pre-circulation review of a proposed initiative.¹⁷⁸ This reviewer is an individual elected by the people to serve in an executive branch position and whose duties involve important participation in the ballot initiative process.¹⁷⁹ In Arizona, Arkansas, and North Dakota, the Secretary of State is the ultimate decision-maker in initiative rejection.¹⁸⁰ In Oregon and Oklahoma, the Attorney

176. See Mohs, *supra* note 8, at 296.

177. See *id.* at 302.

178. See ARK. CODE ANN. § 7-9-107 (2019); MO. ANN. STAT. § 116.332 (2014); *Arizona Secretary of State*, BALLOTEDIA, [https://perma.cc/84PC-AXH2] (last visited Jan. 20, 2019); *Attorney General of Oklahoma*, BALLOTEDIA, [https://perma.cc/9D7P-AQES] (last visited Jan. 21, 2019); *Attorney General of Oregon*, BALLOTEDIA, [https://perma.cc/D2AN-ZGJT] (last visited Jan. 20, 2019); *North Dakota Secretary of State*, BALLOTEDIA, [https://perma.cc/BZK2-4ECM] (last visited Jan. 20, 2019).

179. See ARK. CODE ANN. § 7-9-107; MO. ANN. STAT. § 116.332; *Arizona Secretary of State*, *supra* note 178; *Arkansas Secretary of State*, BALLOTEDIA, [https://perma.cc/S3HC-NPC5] (last visited Sept. 4, 2019); *Attorney General of Oklahoma*, *supra* note 178; *Attorney General of Oregon*, *supra* note 178; *North Dakota Secretary of State*, *supra* note 178.

180. See *Arizona Secretary of State*, *supra* note 178; *North Dakota Secretary of State*, *supra* note 178.

General controls the review process.¹⁸¹ In Missouri, the Secretary of State and Attorney General work together in reviewing the initiative.¹⁸²

Of the three types of reviewers, an elected official has the highest level of accountability to the people.¹⁸³ Because those officials are only able to serve because of direct voter approval, they are more likely to approve initiatives that their constituents support.¹⁸⁴ Because elected officials strive to keep their voters satisfied, they may be more lenient during review if large and powerful groups support the initiative. If officials are more lenient during a review, more initiatives will make it on the ballot and be placed in the hands of the voters. Furthermore, because elected officials are more concerned with voter turnout, they will be more likely to support popular initiatives.¹⁸⁵ If a well-liked initiative is placed on the ballot, more citizens will likely go to the polls to ensure it passes.

2. *Appointed Individuals*

Florida is the only state that utilizes appointed individuals to conduct pre-circulation reviews of proposed initiatives.¹⁸⁶ These reviewers direct the ballot initiative process and either reject or approve initiatives as they are filed.¹⁸⁷

In Florida, two appointed offices work together during the pre-circulation review process.¹⁸⁸ The Florida Supreme Court reviews an initiative for adherence to the single-subject rule, and the Secretary of State reviews an initiative for adherence to the

181. See *Attorney General of Oklahoma*, *supra* note 178; *Attorney General of Oregon*, *supra* note 178.

182. MO. ANN. STAT. § 116.332. Once the Secretary of State receives a proposal, it is sent to the Attorney General. MO. ANN. STAT. § 116.332(1). While the Attorney General reviews it and either suggests initiative rejection or approval, the Secretary of State makes the final decision. MO. ANN. STAT. § 116.332(4).

183. Burden, *supra* note 83, at 4.

184. *Id.*

185. *Id.*

186. See *Florida's Court System*, FLORIDA SUPREME COURT, [<https://perma.cc/X9YS-WP6Q>] (last visited Jan. 21, 2019); *Florida Secretary of State*, BALLOTEDIA, [<https://perma.cc/F5TD-YZ6F>] (last visited Jan. 21, 2019); *Laws Governing the Ballot Initiative Process in Florida*, BALLOTEDIA, [<https://perma.cc/X28B-WA3H>] (last visited Sept. 9, 2019).

187. *Laws Governing the Ballot Initiative Process in Florida*, *supra* note 186.

188. *Id.*

required form.¹⁸⁹ The Governor is involved in appointing the Florida Supreme Court Justices and the Secretary of State.¹⁹⁰

An appointed official has less accountability to voters.¹⁹¹ Because they are not chosen by the will of the people, they are likely not as concerned with the voters' opinions of their actions.¹⁹² This insulation from voters plays a role in the amount of potential bias initiatives may receive during the review process. While any government actor hopefully strives to place the state and its people first, an appointed official is subject to the bureaucratic nature of appointments and all the expectations that flow from them.

3. *Group of Reviewers*

Unlike the second type of reviewer, appointed individuals, who independently conduct a pre-circulation review, a group may instead conduct the review.¹⁹³ Two states, Florida and Missouri, empower more than one person to make pre-circulation review decisions.¹⁹⁴ Instead of a sole authority rejecting an initiative, two offices work together in guiding the direct democracy process.¹⁹⁵

In some cases, while states may require petitioners to file an initiative proposal with a sole officer like a secretary of state, that officer does not play a role in the pre-circulation review process, and thus the situation does not create a group review.¹⁹⁶ Instead,

189. *Id.*; FLA. STAT. ANN. § 101.161(2) (2014).

190. *Florida Secretary of State*, *supra* note 186; *Florida's Court System*, *supra* note 186. When there is a vacancy on the Supreme Court, the Florida Governor appoints the next justice from a list of qualified persons a nominating committee recommends. *Florida's Court System*, *supra* note 186. When a justice's term expires, her name is then placed on the general election ballot for a "merit retention vote." *Id.* If the incumbent justice does not earn enough votes, the Governor appoints another person to take the justice's place. *Id.* Thus, the Supreme Court is primarily an appointed body. *Id.*

191. Burden, *supra* note 83.

192. *Id.*

193. *See, e.g., Laws Governing the Ballot Initiative Process in Florida*, *supra* note 186; MO. ANN. STAT. § 116.332 (2014).

194. *See Laws Governing the Ballot Initiative Process in Florida*, *supra* note 186; MO. ANN. STAT. § 116.332. While Arkansas does use the State Board of Election Commissioners during a second review, which review only occurs after petitions are circulated. ARK. CODE ANN. § 7-9-111 (2019).

195. *See Laws Governing the Ballot Initiative Process in Florida*, *supra* note 186; MO. ANN. STAT. § 116.332 (2014).

196. *See, e.g., ARK. CONST. art. V, § 1.* In Arkansas, a petitioner must file documents with the Secretary of State at least four months before the statewide election. *Id.*

that officer merely passes the initiative to another decision-maker.¹⁹⁷ Furthermore, while states may offer recourse options following a rejected initiative,¹⁹⁸ that remedy is not part of pre-circulation review and thus does not create a joint decision-making body.¹⁹⁹

In Florida, the appointed and subsequently voter-approved Supreme Court justices work with the appointed Secretary of State during the review.²⁰⁰ The Supreme Court only participates in the single subject review, while the Secretary of State only participates in the form review.²⁰¹ In Missouri, the Secretary of State and the Attorney General both participate in reviewing the initiative's form.²⁰² Both of those offices are filled during a statewide general election.²⁰³

While Florida uses two appointed offices, and Missouri uses two elected offices, both types show how pre-circulation review models can avoid placing the discretionary authority in a single decision-maker. Furthermore, five other states also utilize groups to make pre-circulation review decisions.²⁰⁴ However, those reviews are only advisory.²⁰⁵ In California, Colorado, and Montana, a Legislative Council controls the review.²⁰⁶ The Revisor of Statutes conducts the review in Nebraska, and the Legislative Research Council conducts the review in South Dakota.²⁰⁷ While the petitioners in those five states are not required to heed any advice or verdicts resulting from the review,²⁰⁸ the groups illustrate further examples of states turning over pre-circulation review to a body of reviewers.

True joint participation during pre-circulation review is beneficial because group decisions naturally impose checks and

197. *See, e.g.*, ARK. CODE ANN. § 7-9-111(i)(1) (2019). Once the Secretary of State determines the sufficiency of the signatures, the ballot title and popular name are passed on to the State Board of Election Commissioners to conduct a post-circulation review. *Id.*

198. *See, e.g.*, ARK. CONST. art. V, § 1.

199. *See, e.g.*, ARK. CONST. art. V, § 1.

200. *Laws Governing the Ballot Initiative Process in Florida*, *supra* note 186.

201. *Id.*

202. MO. ANN. STAT. § 116.332 (2014).

203. MO. ANN. STAT. § 28.005 (1987); MO. ANN. STAT. § 27.010 (1987).

204. WATERS, *supra* note 2, at 19.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

balances. People naturally seek advice when they have a strong sense of accountability for their decisions.²⁰⁹ Because an individual reviewer may seek advice on whether an initiative meets the established criteria, implementing a multi-person review group will solve this natural tendency. Group assessments concerning decisions that are either correct or incorrect are usually more accurate than an individual's personal assessment.²¹⁰ While a person's opinions about an initiative may stem from that individual's established views and preferences, utilizing a group of decision-makers forces each reviewer to consider alternative views.²¹¹ Thus, pre-circulation reviews conducted by more than one person lessens the possibility of a single reviewer's personal opinions affecting the outcome.

C. The Correlation between Review Model and Type of Reviewer

Depending on the review model and the type of reviewer used, the pre-circulation review process can achieve different outcomes. In determining whether it is more or less likely that an initiative will be certified, states should consider the reviewer's amount of discretion, the reviewer's source of accountability, the process's level of efficiency, and the underlying equitable principles.

1. How to Choose a Reviewer Based on Model Used

If the subject review model is used, states should empower elected officials to conduct the pre-circulation review because such a subjective test relies on the reviewer's personal judgment. Because of the high accountability to voters, an official will likely serve the people, and not his own agenda, first. Whether that means that he will be more lenient during the subjective review or that he will follow the statutory guidelines more closely to avoid suggestions of bias, using an elected official lessens the possibility that an abuse of power will occur. Alternatively, states

209. Ilan Yaniv, *The Benefit of Additional Opinions*, 13 AM. PSYCHOL. SOC'Y 75, 75 (2004).

210. *Id.* at 76.

211. *Id.* at 77.

could empower group decision-makers to conduct a subject review. By having more people participate in reviews with no clear answers, states give reviewers fewer opportunities to rely on their own opinions instead of the statutory guidelines. Thus, a team of reviewers minimizes the risk that the review is tainted by the unlimited discretion usually afforded to a sole initiative reviewer.

However, a state should avoid allowing an appointed official to conduct pre-circulation reviews when a subject restriction is the criterion. Because an appointed reviewer's source of accountability stems from whoever made him the reviewer, he is more likely to follow that person's agenda. Consequently, an appointed reviewer may include both his personal biases and those of his appointer in his pre-circulation review decisions. If a state wants the governor to appoint an individual, and the governor's agenda greatly differs from a popular initiative proposal, the appointee may abuse his discretion and reject an initiative for the wrong reasons. Due to the large deference provided to the subject reviewer during the pre-circulation phase, the risk that the review will be tainted is especially high with an appointed reviewer.

If the form review model is used, states can utilize any type of reviewer. The form review offers the reviewer little discretionary power due to its rigid nature. As a result, neither an elected or appointed individual nor a group of reviewers endangers the pre-circulation review process. No matter the type used, the reviewer or reviewers would not have enough flexibility for personal considerations or sources of accountability to impact the final decision.

2. The Compromise between Equity and Efficiency

Equity is the driving principle of pre-circulation review, but the trade-off is the process's efficiency. Something is equitable when it "deal[s] fairly and equally with all concerned."²¹² When appointed or elected individuals conduct reviews, the equitable nature of the process suffers. Because the reviewer's constraints stem from the applicable statutory language only, the reviewer is

212. *Equitable*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020).

not forced to consider the entirety of the initiative, which is especially important when the reviewer has discretionary power. However, reviews managed by an elected or appointed individual are likely the most efficient. With a single person having full power to reject or accept an initiative, the initiative's petitioners will only be awaiting that one person's decision. While a sole reviewer may drag out the process by refusing to certify or deny initiatives, states can avoid this potential problem by allowing reviewers a limited number of days to make a decision. Thus, the decision will likely be announced sooner, and petitioners will have more time to submit an altered version of the initiative proposal before the deadline passes.

On the other hand, with a group pre-circulation review, the process is likely fairer and more equitable. The more people that participate in the review, the more opinions are taken into consideration when deciding to accept or reject an initiative. Unfortunately, efficiency declines with a multi-person review because the more people that are involved, the longer it may take to reach a decision. Furthermore, if the chosen review model gives the group wide discretion, then the process will be even less efficient because there will be no detailed standard to follow.

IV. CONCLUSION

Because the combination of review model and who conducts the review affects the pre-circulation review process, states should consider the consequences associated with each combination to improve their pre-circulation review processes. All states, specifically Arkansas, should employ a pre-circulation review that truly represents the promise of citizen lawmaking.

A. Assessing a Pre-Circulation Review

While remedies often exist when a pre-circulation review results in initiative rejection,²¹³ those remedies are not enough. A binding petition review is the most important step in the direct democracy process because it determines whether an initiative

213. *See, e.g.*, ARK. CONST. art V, § 1. Available remedies in Arkansas include modification of the initiative by the authorized public official or judicial review for certification denial. *Id.*

has any chance of making it on the ballot. The subject approach concentrates on the initiative's composition, but the reviewer has full discretion to interpret the restrictions either narrowly or broadly. The form-specific approach focuses only on the proposal's technical structure but allows even poorly worded or confusing initiatives to reach voters. While both of these review approaches are beneficial because they safeguard direct democracy essentials, one type is not more equitable than the other. Rather, states can assess their pre-circulation reviews by considering how much discretion they wish to give the reviewer, what they want to review for, and what type of reviewer implications best fits their needs. Through contemplating the ramifications of each aspect of the review process, states can each create their ideal pre-circulation review and ensure that their processes are fair and equitable for all.

B. The Solution for Arkansas

Because the Secretary of State's pre-circulation review is limited to form while the State Board of Election Commissioners conduct a post-circulation language review, the Arkansas ballot initiative process will benefit from change. Various government officials recognize the need for reform.²¹⁴ However, the Arkansas legislature may avoid making changes to the governing statute that make it any easier for citizens to pass initiatives without legislative support or guidance. As Arkansas is primarily known as a conservative state, recently passed ballot initiatives, such as the medical marijuana bill,²¹⁵ would likely not have become law if direct democracy was not available. No matter if ballot initiative reform is channeled through the Arkansas legislature in the form of a constitutional amendment referral or directly through a citizen ballot initiative, further reform is necessary to give all Arkansans a clear understanding of their right to direct democracy.

214. *See, e.g.*, Press Release 2018, *supra* note 144. In 2019, two bills were introduced that would alter, through a constitutional amendment, who conducts pre-circulation review and the corresponding signature and timeline requirements. *See generally* H.R. 1489, 92d Gen. Assemb., Reg. Sess. (Ark. 2019); H.R.J. Res. 1023, 92d Gen. Assemb., Reg. Sess. (Ark. 2019).

215. ARK. CONST. amend. XCVIII, § 3.

First, the process should still include a mandatory pre-circulation review that is binding on the initiative's petitioners. However, full initiative certification or rejection should take place before signatures are gathered due to the time and resources necessary to meet the circulation requirements. Waiting until after signatures are gathered to learn whether an initiative passes certification unnecessarily impedes the process at the expense of petitioners. Thus, when the Secretary of State conducts the form review, the State Board of Election Commissioners should also conduct the language review. Even though the language-centered approach provides no clear rubric for reviewers to follow, implementing both a form and language pre-circulation review will ensure that all initiatives that eventually land on the statewide ballot are adequate and well-developed.

If the Board is unable to adequately conduct a language pre-circulation review, a selected group of public officers could instead be used to improve the pre-circulation review process. This group could include the Secretary of State, one Commissioner from the Board, and the Chief Justice of the Arkansas Supreme Court. Because two reviewers are elected officials, while one is appointed, they will be attuned to voters' wishes and understand the importance of following established guidelines to avoid backlash. The Secretary of State oversees elections and is already tasked with receiving all ballot initiative proposals, so the position naturally fits into the review group.²¹⁶ As the Board already guides the review process, keeping that assignment for one individual Commissioner will reduce any problems that often follow new organization. While the entire Supreme Court conducts a review upon request after initiative certification and signature gathering,²¹⁷ including the Chief Justice in the initial certification review will bring that same perspective earlier in the process. If the decision is appealed to the Supreme Court, the Chief Justice will simply recuse him or herself. By utilizing either the Board of Election Commissioners or the described combination of elected and appointed officials, pre-circulation review decisions will inevitably be fairer and more impartial, no matter a proposal's subject area.

216. ARK. CONST. art. V, § 1.

217. ARK. CONST. art. V, § 1.

By incorporating these changes, the review ambiguity and unbalanced discretionary power within the Arkansas process will be lessened. Future ballot initiative petitioners will not have to guess the secret sauce needed for ballot certification. Rather, petitioners will be able to identify exactly what is required to pass review and thus utilize the direct democracy system they are guaranteed.