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We the People: A Needed Reform of State Initiative and Referendum Procedures

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COMMENT

We the People: A Needed Reform of State Initiative and Referendum Procedures

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I. INTRODUCTION

The landscape of the United States' political elections has been marked by many dramatic changes in the past century. While many are quick to point to several changes in political campaigning or the shift from a voting base predominated by white males to one that embraces women, minorities, and the youth vote, one largely unnoticed political trend that has grown substantially in recent decades is the use of the ballot initiative and referendum.[1] Ballot initiatives enable citizens to bypass their state legislatures by proposing a new or amended law to be placed on the ballot in the next election.[2] Referenda, on the other hand, are typically measures that originate with state legislatures and are placed on the ballot by the legislative body to allow citizens to vote on the legislation.[3] Having existed in some form in the United States since the 1600s,[4] the ballot initiative and referendum have served as two of the few remaining strongholds of direct democracy in the United States.

Today, all but one state require a citizen vote before the state constitution can be amended.[5] Even while many states, including Missouri,[6] offer the

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1. INITIATIVE & REFERENDUM INST., INITIATIVE USE 1 (2013) [hereinafter INITIATIVE USE], *available at* http://www.iandrinstitute.org/IRI%20Initiative%20Use%20%282013-1%29.pdf.

2. *Initiative, Referendum, and Recall*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/initiative-referendum-and-recall-overview.aspx (last visited Sept. 18, 2013).

3. *Id.*

4. M. Dane Waters, *Do Ballot Initiatives Undermine Democracy?*, CATO POLICY REPORT 6 (July/Aug. 2000), *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20Studies/Cato%20%20Policy%20Forum%20Do%20Ballot%20Initiatives%20Undermine%20Democracy%20IRI.pdf.

5. *Id.* Delaware is the only state that does not require approval by its citizenry to modify its state constitution. *Id.*

ballot initiative and referendum, procedural blights hinder the initiative process. Missouri's initiative procedure,[7] much like the procedures found in several other initiative states, vests a significant amount of authority in the secretary of state by allowing her to draft the summaries of the submitted initiatives that appear directly on the ballot.[8] Given that these ballot summaries are typically the last, if not the only, material that many voters will read prior to casting their vote,[9] the summaries are often the subject of litigation due to perceived unfairness or insufficiency. Part II of this Comment begins by detailing the history of the ballot initiative and referendum in the United States. Part III next details the different types of initiatives and referenda commonly used in the United States. Part IV discusses the merits of the ballot initiative, discussing both benefits and disadvantages. Part V gives an overview of various state approaches to initiative procedures. Part VI introduces some of the various procedural shortfalls in the initiative process. Part VII discusses Missouri common law and how the courts have helped shape Missouri's law in the initiative process. Part VIII examines *Brown v. Carnahan*, a case handed down by the Supreme Court of Missouri in 2012 that clarified many aspects of ballot initiative procedures. Part IX concludes by discussing the future of the ballot initiative in Missouri and detailing steps that could be taken by the Missouri General Assembly to slow the large increase in the number of ballot title challenges in recent years.

II. HISTORICAL BACKGROUND OF BALLOT INITIATIVES AND REFERENDA

A. National History of Ballot Initiatives and Referenda

Although the use of initiatives and referenda has greatly increased in recent decades, the initiative and referendum have existed in some form in the United States since the 1600s when citizens of colonial New England placed ordinances and other issues on town meeting agendas to bring the issues to a vote.[10] Thomas Jefferson first proposed the referendum process for inclusion

6. *Initiative and Referendum States*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/chart-of-the-initiative-states.aspx (last updated Sept. 2012).

7. JASON KANDER, SEC'Y OF STATE, MAKE YOUR VOICE HEARD: MISSOURI'S INITIATIVE PETITION PROCESS AND THE FAIR BALLOT ACCESS ACT 1 (Revised Feb. 2013), *available at* http://www.sos.mo.gov/elections/pubs/makeyourvoiceheard/MakingYourVoiceHeard.pdf.

8. *Preparation of Ballot Title and Summary*, NAT'L CONF. ST. LEGISLATURES (Jan. 2001), http://www.ncsl.org/legislatures-elections/elections/preparation-of-a-ballot-title-and-summary.aspx.

9. *Id.*

10. Waters, *supra* note 4, at 6. "It was here [in New England] that taxes were levied, lands divided, and officers chosen to promote the general welfare of the com-

in the 1775 Virginia State Constitution.[11] In 1778, Massachusetts became the first state to hold a statewide referendum for its citizens to ratify its constitution.[12] And in 1792, New Hampshire became the second state to do so.[13] Congress subsequently required that all new states admitted to the Union after 1857 employ referenda procedures for proposed changes to the states' constitutions.[14] However, while initiative and referendum procedures are very common at the state level, there is not a procedure for either initiatives or referenda at the federal level.[15]

Although constitutional referendum vested the power of direct democracy in the people, in the late 1800s Americans began to realize that they lacked the "ability to reign in an out-of-touch government or a government [marked] by inaction."[16] They realized that something needed to be done to protect the representative democracy.[17] The late nineteenth and early twentieth centuries saw the establishment of the Populist and Progressive movements, both based on feelings of general dissatisfaction with government and its inability to effectively address the most pressing contemporary issues.[18] Outspoken critics soon proposed "a comprehensive platform of political reforms that included women's suffrage, secret ballots, direct election of U.S. Senators, recall, primary elections, and the initiative process."[19] The "cornerstone" of the

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munity." MARCUS WILSON JERNEGAN, THE AMERICAN COLONIES, 1492-1750: A STUDY OF THEIR POLITICAL, ECONOMIC, AND SOCIAL DEVELOPMENT 168 (1929).

11. Waters, *supra* note 4, at 6.

12. *Id.*

13. *Id.* The next states to require voter approval of a state constitution and any subsequent amendments were Connecticut in 1818, Maine in 1819, New York in 1820, and Rhode Island in 1824. INITIATIVE AND REFERENDUM INST., A BRIEF THE HISTORY OF THE INITIATIVE AND REFERENDUM PROCESS IN THE UNITED STATES 1 [hereinafter HISTORY], *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/History%20of%20I&R.pdf (last visited Sept. 18, 2013).

14. HISTORY, *supra* note 13, at 1.

15. Dennis Polhill, *The Issue of a National Initiative Process*, INITIATIVE AND REFERENDUM INST., http://www.iandrinstitute.org/National%20I&R.htm (last visited Sept. 18, 2013).

16. HISTORY, *supra* note 13, at 2.

17. *Id.*

18. *Id.* The Populist movement was originally founded with the aim of "unit[ing] the farmers of America for their protection against class legislation and the encroachments of concentrated capital." Kathryn L. MacKay, *Farmers' Protest*, WEBER ST. U., http://faculty.weber.edu/kmackay/farmers_protest.htm (last visited Sept. 18, 2013). Progressivism, on the other hand, was more focused on the elimination of corruption in government, the regulation of business practices, the improvement in working conditions, and giving the public more direct control over government through their vote. *Progressive Era*, DIGITAL HIST., http://www.digitalhistory.uh.edu/era.cfm?eraID=11&smtID=2 (last visited Feb. 3, 2013).

19. HISTORY, *supra* note 13, at 2.

Populist and Progressive movements was the initiative process itself, for without it, many of the political reforms would have been blocked by state legislatures.[20] The Populists and Progressives took advantage of the modification clauses that were required in state constitutions for their admission to the Union and began "pushing state legislators to add an amendment allowing for the initiative and popular referendum process."[21]

The efforts of the Populists and Progressives began to pay off in 1897 when "Nebraska became the first state to allow cities to place initiative and referendum in their charters."[22] The reformists saw continued success when, in 1898, South Dakota adopted its own statewide initiative and referendum process.[23] By 1911, initiative and referendum amendments were found in the state constitutions of South Dakota, Utah, Oregon, Montana, Oklahoma, Maine, Michigan, and California.[24] Additional states would soon follow, but despite popular support for the movement, the elected class pushed back against the efforts to introduce initiative and referendum amendments.[25] Even though ballot initiative and referendum amendments were largely successful in western states, reformists in southern and eastern states faced greater hurdles to initiative amendments.[26] In particular, the legislators in southern and eastern states feared that the initiative process would be used as a tool by African-Americans, Irish-Catholics, and immigrants to "enact reforms that were not consistent with the beliefs of the ruling class."[27] By 1915, twenty-four states had adopted initiative or referendum procedures; however, the push for adoption in additional states was beginning to wane due to the perceived threat of German militarism.[28] For the next forty years no additional states adopted the initiative and referendum process.[29] In 1959, Alaska was admitted to the Union with initiative and referendum in its original constitution.[30] Following Alaska, the last four states to successfully adopt initiative

20. *See id.*

21. *Id.*

22. *Id.*

23. *Id.* The framework of South Dakota's initiative and referendum provisions were largely copied from the 1848 Swiss Constitution. *Id.*

24. *Id.* at 2-3.

25. *Id.* at 3. For example, in 1914 a majority of Texas's voters voted against initiative and popular referendum because the proposed procedures would have required that signatures be gathered from twenty percent of the state's registered voters, twice as many as what was required in any other state. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 4.

29. *Id.* at 4.

30. *Id.* at 5.

and referendum amendments in their state constitutions were Wyoming in 1968, Illinois in 1970, Florida in 1972, and Mississippi in 1992.[31]

This form of direct democracy serves as a complement, and not an alternative, to the representative democracy found in general elections.[32] Although aspects of the initiative and referendum process predate our Constitution,[33] the first true ballot initiative was not voted on until 1904 in Oregon.[34] Historians say that the modern national initiative movement did not begin until the late 1970s with Proposition 13 in California.[35] Proposition 13 and the initiative process that made it possible were driving forces in the tax revolt of the 1970s and, within two years of Proposition 13 passing, "43 states had implemented some form of property tax limitation or relief and 15 states lowered their income tax rates."[36] Proposition 13 was the catalyst and the ballot initiative provided the vehicle for the American populace to effect meaningful tax reform in a very short period of time.[37]

Several other statewide reforms were made possible through the initiative process. For example, women gained the right to vote, movie theatres and other stores were allowed to be open on Sunday, poll taxes were abolished, states were barred from funding abortions, the eight-hour workday was created, medical marijuana was legalized, physician-assisted suicide was legalized, campaign finance reform was passed, prohibition was adopted and then repealed, and the death penalty was adopted and abolished.[38]

While the use of the initiative and referendum has increased in recent decades, in order to fully appreciate the effects of the initiative and referendum on the legal framework of the United States, it is helpful to consider the passage rates of the initiatives, state-to-state disparity in their use, and the number of laws passed by legislatures as compared to the number passed through the initiative process. From 1904 through 2011, 2,372 state-level initiatives appeared on state ballots, and 968 (forty-one percent) were approved.[39] Oregon historically (and even today) votes on the most initia-

31. *Id.* In Mississippi, the initiative and referendum amendment was restored to the state's constitution as the election that originally established it had been invalidated by the Mississippi Supreme Court seventy years prior. *Id.*

32. Waters, *supra* note 4, at 7.

33. *See id.* at 6.

34. INITIATIVE USE, *supra* note 1. The 1904 initiative approved the direct primary in the state of Oregon. Or. Sec'y of State, *Initiative, Referendum and Recall Introduction***,** OREGON BLUE BOOK, http://bluebook.state.or.us/state/elections/elections09.htm (last visited Apr. 2, 2013).

35. INITIATIVE USE, *supra* note 1. Proposition 13 cut property taxes from 2.5% of market value to just 1%. HISTORY, *supra* note 13, at 6.

36. HISTORY, *supra* note 13, at 6.

37. *Id.*

38. *Id.* at 6-7.

39. INITIATIVE USE, *supra* note 1.

tives.[40] California is a close second.[41] "Even though 24 states have a statewide initiative process, over 60% of all initiative activities have taken place in just six states[:] Arizona, California, Colorado, North Dakota, Oregon, and Washington."[42] Although there have been many ballot initiatives, in California, for example, only twenty-six percent of all initiatives filed make it onto the ballot and only eight percent of those filed are actually adopted.[43] Nationally, about twenty-two percent of the ballot initiatives filed during the 2000 election made it to the ballot.[44] Additionally, the number of laws passed using initiative and referendum is very small in comparison to the number of laws passed by legislatures.[45] For example, in 1996, one of the peak years for initiatives, ninety-three initiatives made it onto ballots and forty-four statewide initiatives were passed and adopted, compared to approximately 14,000 laws and resolutions adopted by the legislatures in the same twenty-four states.[46]

B. History of Ballot Initiatives and Referenda in Missouri

The history surrounding Missouri's passage of the initiative and referendum process illustrates many of the challenges that various early proponents of the initiative and referendum process faced. In 1900, Scott Moser, the President of the Missouri Direct Legislation League, proposed a constitutional amendment to the lower house of Missouri's legislature that would allow for the use of the initiative and referendum for legislative bills.[47] Although most of the legislators initially supported the amendment, the proposed amendment was eventually defeated by one vote.[48] In 1904, the Missouri Direct Legislation League managed to persuade the legislators to bring the proposed amendment to another vote.[49] This time it passed in the legislature, but Missouri voters rejected it.[50]

In 1907, supporters of the amendment again persuaded the legislature to pass the proposed amendment.[51] To help ensure the passage of the

40. *Id.* From 1904-2011, Oregon has voted on 356 initiatives. *Id.*

41. *Id.* From 1904-2011, California has voted on 340 initiatives, Colorado is third with 216, North Dakota has voted on 179 initiatives, and Arizona has voted on 172 initiatives. *Id.*

42. HISTORY, *supra* note 13, at 7.

43. *Id.*

44. *Id.*

45. *See id.* at 8.

46. *Id.*

47. *Missouri*, INITIATIVE AND REFERENDUM INST., http://www.iandrinstitute.org/Missouri.htm (last visited Sept. 23, 2013).

48. *Id.*

49. *See id.*

50. *Id.*

51. *Id.*

amendment, supporters embarked on a voter-education campaign that included informational mailers and speaking engagements.[52] The campaigning paid off, and this time, Missouri voters passed the initiative and referendum amendment.[53]

After Missouri voters approved the initiative process, the first initiative was passed in 1920 when voters approved a bill that provided for the drafting of a new state constitution.[54] In 1924, Missouri voters approved bills to fund the state's highways as well as "an initiative to allow voters in St. Louis and St. Louis County to consolidate their local governments."[55] In 1940, voters approved a nonpartisan judicial selection plan, now known as the "Missouri Plan," for selecting Missouri's appellate judges.[56] Other notable successful Missouri ballot initiatives include the creation of public employee benefits, the creation of the Conservation Commission, the "Hancock Amendment" (which limited state and local taxes), term limits for elected officials, campaign finance reform, and riverboat gambling initiatives.[57]

III. TYPES OF BALLOT INITIATIVES AND REFERENDA

Although direct initiatives are the most common type of initiative, there are many different kinds of initiatives and referenda with each apportioning the control between the legislature and the citizenry in different ways.[58] While the various types of initiatives and referenda share many common characteristics, it is important to distinguish among these distinct forms as the process that each form undertakes can vary greatly.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* In 1924, there were three other initiatives: an initiative to exempt from taxation certain property used exclusively for religious worship, an initiative to consolidate St. Louis and St. Louis County territories and governments into one legal entity, and an act providing for the compensation of workmen injured in industrial accidents. *Statewide Initiative Usage*, INITIATIVE AND REFERENDUM INST., http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/Missouri.pdf (last visited Sept. 23, 2013).

56. *Missouri*, *supra* note 47.

57. *Id.*

58. NAT'L CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY 2 (July 2002) [hereinafter 21ST CENTURY], *available at* http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/IandR_report.pdf.

A. Direct Initiatives

Direct initiatives are citizen-initiated ballot measures that, if successfully passed, are directly enacted into law.[59] There are two common types of direct initiatives: state constitutional amendments and statutory initiatives.[60] Direct initiatives place the highest degree of power in the hands of the citizenry and the least in legislatures.[61] Arizona, Arkansas, California, Colorado, Idaho, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, and South Dakota all use direct initiatives.[62] Additionally, Utah and Washington allow for both direct and indirect initiatives.[63]

B. Advisory Initiatives

The advisory initiative is at the opposite end of the spectrum, as the legislature retains a majority of the power and citizens possess relatively little control outside of general elections.[64] An advisory initiative is effectively a poll that asks citizens to express their views on a particular issue without being able to enforce public preference in any way.[65] Advisory initiatives serve as tools of representative democracy because they allow legislators to gauge public opinion.[66] The legislators then may either choose to address the issue with legislation or simply ignore the initiative altogether.[67] In other words, advisory initiatives have no binding effect on the legislature and do not require the legislature to act.[68] Unlike direct initiatives, where a slim majority means that the law goes into effect, a slim majority in an advisory initiative "simply indicates a general lack of consensus."[69]

C. General Policy Initiatives

The general policy initiative is similar to the advisory initiative, except that it forces the legislature's hand to enact any specific laws that may be required to implement that general policy.[70] For example, if the citizens of a particular locality pass a general policy initiative that states that property tax

59. *Id.* at 65.
60. *See id.* at 10.
61. *See id.*
62. *Initiative and Referendum States*, *supra* note 6.
63. *Id.*
64. 21ST CENTURY, *supra* note 58, at 6.
65. *See id.*
66. *Id.*
67. *See id.*
68. *See id.*
69. *Id.*
70. *Id.* at 7.

revenue is to be used to fund education, the legislature must pass whatever laws may be necessary for the policy to be carried out.[71] Although the general policy initiative is still a form of direct democracy that results in the enactment of new legislation, it brings expert testimony, legislative findings, and deliberations to the legislature to determine the best means to bring that policy to life.[72]

D. Indirect Initiatives

Like direct initiatives, indirect initiatives are proposed by citizens who want a change in the law.[73] However, unlike direct initiatives, indirect initiatives are then referred to the legislature after the proponents have gathered the required number of signatures.[74] Upon receiving the proposed initiative, the legislature can enact, defeat, or amend the measure.[75] Depending on the legislature's decision, the proponents can still force the issue to a vote by getting it placed on the ballot.[76] Alaska, Maine, Massachusetts, Michigan, Nevada, Ohio, Wyoming, and the United States Virgin Islands use indirect initiatives.[77] As noted, Utah and Washington allow for both direct and indirect initiatives.[78]

E. Legislative Referenda

Unlike initiatives, which are measures proposed by citizens that appear on the ballot, legislative referenda are placed on the ballot by the legislature.[79] Legislative referenda involve the "[l]egislature refer[ring] a measure to the voters for their approval."[80] Many states require certain types of measures to appear as legislative referenda on the ballot.[81] The categories of issues that generally must be referred to the ballot include constitutional amendments, bond measures, and tax changes.[82] Legislative referenda are generally ap-

71. *See id.*
72. *See id.* at 7, 13.
73. *Id.* at 65.
74. *The Indirect Initiative*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/the-indirect-initiative.aspx (last visited Sept. 24, 2013).
75. *Id.*
76. *Id.* In Massachusetts, Ohio, and Utah, "proponents must gather additional signatures to place the measure on the ballot." *Id.* In Maine, Michigan, Mississippi, Nevada, and Washington, the measure "automatically goes on the ballot." *See id.*
77. *Initiative and Referendum States*, *supra* note 6.
78. *Id.*
79. *Initiative, Referendum, and Recall*, *supra* note 2.
80. *Id.*
81. *Id.*
82. *Id.*

proved at a higher rate than ballot initiatives and tend to be less controversial.[83] All fifty states allow the use of legislative referenda.[84]

F. Popular Referenda

The popular referendum, unlike the legislative referendum, appears on the ballot as a result of a voter petition drive and is generally used as a device to allow voters to approve or repeal an act of the legislature.[85] If voters disapprove of a law passed by the legislature, then citizens may gather signatures to demand a popular vote on the law.[86] After the required number of signatures is gathered, the law appears on the ballot for a popular vote and the law must be approved by voters before it can take effect.[87] Twenty-four states have popular referenda, and most also have ballot initiatives.[88]

G. Advisory Referenda

The advisory referendum is nearly identical to the advisory initiative in that they are both placed on the ballot merely to gauge popular opinion.[89] The results of the vote are non-binding on the legislature and serve only as a survey tool.[90]

H. Local Government Initiatives and Referenda

Although this Comment primarily pertains to state-level initiatives and referenda, the same procedures are commonly available at the city and county government levels.[91] Nearly ninety percent of American cities employ some form of referendum procedure.[92] There exists very little variation in adoption among different geographic regions, population sizes, and urban/suburban composure.[93] Surveys taken of American cities illustrate that there have been significant increases in the adoption of local initiatives in

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* Although, there is generally an enumerated time period after the law passes during which time the petitioning must take place. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See* Tari Renner, *Local Initiative and Referendum in the U.S.*, INITIATIVE AND REFERENDUM INST., http://www.iandrinstitute.org/Local%20I&R.htm (last visited Sept. 24, 2013).

92. *Id.* An American city, for the purposes of the survey, was any locality with a population of 2,500 or more. *Id.*

93. *Id.*

recent decades.[94] Three states lack the provisions for direct democracy at the local government level.[95]

I. Commonalities Among Various Initiative Approaches

Supplementing the various forms that initiatives and referenda may take, most states impose additional requirements on the content of the initiatives and referenda and on the ways in which they may later be repealed. Single subject rules mandate that proposed initiatives address only one subject.[96] Such rules serve two primary purposes: to simplify initiatives for the voting populace and to avoid popular initiatives being "earmarked" with less-savory measures that would otherwise not pass alone.[97] Single subject provisions are a common feature of many state legislatures; forty-one states have constitutional provisions mandating that all bills passed by the legislature be of a singular subject.[98] Of the twenty-four states with initiatives and referenda procedures, twelve also impose single subject requirements to the initiatives and referenda.[99]

In addition to single subject requirements, five states ban "the same or a substantially similar measure from reappearing on the ballot for a specified period of time."[100] Mississippi bans such measures from reappearing on the ballot for two years, Nebraska and Oklahoma both mandate three years, Wyoming requires five years, and Massachusetts requires six years (the next two biennial elections).[101] Generally, the state's chief election officer or the courts determine whether a measure should be banned based on the similarity restriction.[102]

A majority of the initiative states also place some restriction on the subject matter that may be addressed by the initiative process.[103] For example, many states, including Missouri,[104] have placed subject matter

94. *Id.* The city survey indicated a nine percent increase in the adoption of initiative procedures from 1991 to 1996 alone. *Id.*

95. *Id.* In addition to demonstrating how prevalent local direct democracy is in the United States, "this point also illustrates . . . that all local governments are considered to be 'creatures of the state.'" *Id.* The state legislature or constitution often will lay the framework for the procedures adopted within a particular locality. *Id.*

96. 21ST CENTURY, *supra* note 58, at 16.

97. *Id.*

98. *Id.*

99. *Id.* The states that have single subject requirements for initiatives are Alaska, Arizona, California, Colorado, Florida, Missouri, Montana, Nebraska, Oklahoma, Oregon, Washington, and Wyoming. *Id.*

100. *Id.*

101. *Id.* at 16-17.

102. *Id.* at 17.

103. *See id.* at 17-19.

104. *See* MO. CONST. art. III, § 51.

restrictions on the appropriation of revenue for initiatives, which is partially due to a fear that the initiative process could tie up a significant portion of a state's revenue.[105]

The legislature's power to repeal statutes passed by the initiative process is limited in some form in ten states.[106] One such state, California, entirely prohibits the legislature from amending or repealing the statute unless the initiative specifically permits it.[107] Some states, including Alaska, Nevada, and Wyoming, prohibit repeal solely within a specified time frame.[108] Other states, such as Arkansas, Arizona, and Michigan, impose supermajority requirements for the legislature to amend or repeal statutes passed by the voters.[109] The remaining three states, North Dakota, Oregon, and Washington, combine the two approaches and impose supermajority requirements for a specified time frame, but then treat the statute just like any other after the time frame expires.[110] In the other fourteen states that have initiative and referendum, legislatures are free to amend or repeal the statute at any time, making a constitutional amendment more desirable than a stat- utory initiative.[111]

IV. THE MERITS OF THE INITIATIVE AND REFERENDUM

Initiatives and referenda are by no means perfect processes for allowing the citizenry to influence their government. While there are many benefits of having an initiative and referendum process in place, it is very important to understand the negative aspects of initiatives and referenda to fully appreciate their role in the legislative landscape.

A. The Benefits of Initiatives and Referenda

Proponents of initiatives and referenda contend that the processes are a more democratic means of enacting legislation than representative democracy through the use of elected officials.[112] In addition to being more efficient than a legislature, initiatives and referenda are tools in the hands of the voters to override the ruling class with a class-blind process that places all citizens

105. 21ST CENTURY, *supra* note 58, at 20 (listing the subject matter restrictions placed on the initiative and referendum process by the various states).

106. *Id.* at 11.

107. *Id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *Id.*

112. Heather A. Paraino, Comment, *Missouri's Silenced Citizen Legislators: How the Initiative Is Denied to Citizens in Fourth-Class Missouri Municipalities*, 41 ST. LOUIS U. L.J. 1081, 1087-88 (1997).

on equal footing.[113] The issues found on ballot initiatives represent different ideologies: conservative, liberal, libertarian, and populist agendas.[114] Partially because of the wide range of issues on the ballot, in any given election year voter turnout in states with an initiative on the ballot has been three to eight percent higher than turnout in states without an initiative on the ballot.[115] One contributing factor to the increased turnout when initiatives and referenda are placed on the ballot is the sense of importance that many voters feel in relation to ballot initiatives: instead of voting someone into office and hoping that they will deliver on their campaign promises, the initiative empowers voters to decide on issues directly.[116]

Initiatives can be used as a tool to attack governmental inefficiency by reducing agency costs, which are costs associated with the supervision of agents – such as elected officials and bureaucrats.[117] For example, a politician up for re-election may bend to the influence of special interests groups or perhaps engage in illicit activities to raise campaign funds to help secure victory in the upcoming election. The costs of oversight committees, audit boards, and disclosure forms are all examples of agency costs associates with large bureaucracies. Increased citizen involvement and support necessarily reduces the need for increased scrutiny of the legislature by giving control back to the people for issues that are addressed by way of the ballot initiative.[118]

B. The Negative Aspects of Initiatives and Referenda

Although ballot initiatives and referenda may provide working alternatives when the wheels of representative democracy no longer mirror the will of the citizenry driving the political machine, these form of direct democracy are not without their own flaws.[119] Because most initiatives are drafted by individuals or small groups, rather than by elected officials, special interests often have a perverse effect on the initiative's creation.[120] Moreover, ballot initiatives are far from free of the corrosive effects of money in politics.[121] "Well-funded individuals or organizations that do not have enough voluntary support to qualify an initiative for the ballot may pay petitioners to gather signatures."[122] Although states have tried to restrict this practice, the Su-

113. *Id.* at 1088.
114. HISTORY, *supra* note 13, at 7.
115. *Id.*
116. *Id.*
117. Paraino, *supra* note 112, at 1088.
118. *Id.* at 1088-89.
119. K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045, 1046-47 (2007).
120. *Id.* at 1047.
121. *Id.* at 1048.
122. *Id.*

preme Court of the United States struck down a statute criminalizing payment to petition circulators as a violation of the First Amendment.[123] Furthermore, initiatives are still susceptible to the influence of lobbyists, as is the case with representative democracy.[124] For example, one study showed that lobbying interests provide sixty-eight percent of the contributions to initiative campaigns.[125] Although "buying an election" may be impractical, if not impossible, additional resources significantly influence the exposure and public perception of an issue.[126] During the 1998 election, for example, the amount spent on California ballot initiatives was fifty percent higher than the amount California federal candidates spent in the same election.[127] The obvious corollary to the effects of money in initiatives and referenda is the difficulty in mounting a signature or voter campaign for individuals who are not well-funded.[128]

Partisan politics are also found in the initiative and referendum processes.[129] Through a phenomenon that has been called "ballot proposition spillover," initiatives can direct the political agenda by forcing a candidate to state a position on the initiative issue.[130] Because of the increased voter turnout in states with initiatives on the ballot, political parties are believed to place controversial issues on the ballot during key election years to increase turnout for a candidate.[131] An often-cited example occurred in the 2006 race for one of Missouri's United States Senate seats, when Claire McCaskill's public "support for a stem-cell research initiative may have helped her win a U.S. Senate race against incumbent Jim Talent who opposed it."[132]

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123. *See* Meyer v. Grant, 486 U.S. 414 (1988).

124. DuVivier, *supra* note 119, at 1048.

125. *Id.*

126. *Id.* at 1048-49.

127. Dina E. Conlin, *The Ballot Initiative in Massachusetts: The Fallacy of Direct Democracy*, 37 SUFFOLK U. L. REV. 1087, 1096 (2004).

128. *See* Jonathan L. Walcoff, *The Unconstitutionality of Voter Initiative Applications for Federal Constitutional Conventions*, 85 COLUM. L. REV. 1525, 1543 (1985) (citing Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality,* 54 WASH. L. REV. 1, 20 (1978)) (noting that the gathering of signatures "is often accomplished by professional firms specializing in the area"); *see also id.* at 1543 n.127 (quoting Bell, *supra*) ("The success or failure of ballot- box legislation may depend less on the merits of the issue than as who is financing the campaign.").

129. DuVivier, *supra* note 119, at 1049.

130. *Id.*

131. *See id.* at 1049-50. Some political pundits believe the Republican Party placed several same-sex marriage ban amendments on state ballots during the 2004 election "to increase Republican turnout and help George W. Bush retain the presidency." *Id.* Conversely, some believe the Democratic Party placed minimum wage initiatives on the ballot in ten of the seventeen most competitive candidate races to increase Democratic voter turnout in the 2006 election. *Id.* at 1050.

132. *Id.* at 1049.

Another dilemma is the judicial interpretation of the measures passed by initiative and referendum.[133] Traditionally, courts have relied on legislative intent as one of the tools for interpreting a statute.[134] Unlike laws passed by legislatures, those passed by ballot initiative have no legislative hearings, committee reports, or other recorded legislative history.[135] Furthermore, voters are not lawmakers by trade, "so it is problematic to impute to the electorate the same knowledge about the law, legal terminology, and legislative context that courts routinely ascribe – if sometimes only as aspiration – to legislators."[136]

Critics of the initiative process have levied other criticisms as well. Many critics wish that the process were more flexible to accommodate more debate, deliberation, and compromise than is presently enjoyed.[137] While candidates for major elected offices frequently have televised debates and undergo intense public scrutiny throughout the campaign trail, initiative measures are rarely given the same thorough vetting. Because the initiatives are not given the same level of media coverage that political candidates receive, the voice of the neutral, reasoned commentator is likely to be drowned out in a sea of advertisements from either the proponents or opponents of the initiative. Another criticism is that, unlike with representative democracy, ballot initiatives are typically ill-suited to accommodate minority interests, possibly due to the lack of informed, neutral discussion about proposed ballot measures and because the very nature of representative democracy is that of political concessions and persistence.[138] While the author of a bill may agree to the inclusion of a rider that represents a small minority interest to earn a congressman's vote, that same political gamesmanship is not present in the initiative process.

One final criticism of ballot initiatives is that they ask voters to make an all-or-nothing decision about complex issues without the aid of expert analysis and a detailed cost-benefit analysis.[139] Due to these concerns, organizations such as the National Conference of State Legislatures have recommended that states that currently lack an initiative or a referendum process avoid adopting one.[140]

133. Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 109 (1995).

134. *Id.* at 110.

135. *Id.*

136. *Id.*

137. 21ST CENTURY, *supra* note 58, at 1.

138. *Id.*

139. *Id.*

140. *Id.* at 2.

V. PROCEDURE AND PROCESS: THE VARIOUS APPROACHES TO THE CREATION OF AN INITIATIVE

A. Drafting an Initiative Petition in Missouri

Although every state has different procedures for the initiative process, Missouri's procedure is a good starting point as it is very similar to the procedures found in several other states. To have an initiative placed on Missouri's ballot, the petitioner begins the process by drafting a sample petition and files it with the Missouri secretary of state, who in turn provides a receipt upon receiving of the sample petition.[141] The secretary of state then forwards copies of the petition to the attorney general for approval as to form and to the state auditor for preparation of the fiscal note and fiscal note summary statement.[142] The secretary of state and the attorney general must both approve the form of each petition.[143] The attorney general must approve or reject the sample petition and provide notice of the decision to the secretary of state within ten days of receiving the petition.[144] The secretary of state reviews the attorney general's comments as to the form of the petition and then makes a final decision to approve or reject the form of the petition.[145] Upon making the decision, the secretary of state issues a letter to the petitioner within thirty days of receiving the original petition, notifying him or her of the decision.[146]

Within twenty days of receiving the petition sample, the state auditor completes both the fiscal note and fiscal note summary and forwards it to the attorney general.[147] The attorney general then approves the legal content and form of the fiscal note summary prepared by the auditor and forwards notice of the approval to the auditor within ten days of receiving the fiscal note and fiscal note summary.[148]

If the petition form is approved, the secretary of state drafts the summary statement, a general summary of the initiative, within ten days of the approval and forwards it to the attorney general for his or her approval.[149] The attorney general has another ten days after receipt of the summary statement to approve the legal content and form.[150] Within three days of receiving the approved summary statement, the approved fiscal note summary, and the

141. MO. REV. STAT. § 116.332.1 (2000).
142. *Id.*
143. *Id.*
144. § 116.332.2.
145. § 116.332.3.
146. *Id.*
147. MO. REV. STAT. § 116.175.2 (Supp. 2012).
148. § 116.175.4.
149. MO. REV. STAT. § 116.334.1 (2000).
150. *Id.*

fiscal note, the secretary of state certifies the official ballot title, which includes the summary statement and the fiscal note summary.[151]

Each petition circulator must be at least eighteen years old and registered with the secretary of the state; signatures obtained by an unregistered circulator are not counted.[152] Any registered Missouri voter may sign the petition; however, each county must have its own page containing only signatures from residents of that county.[153] Anyone who forges another's name, knowingly signs more than once, or signs knowing he or she is not a registered Missouri voter shall be guilty of a class A misdemeanor.[154]

The number of signatures required varies depending on whether the initiative is a proposed statute or a constitutional amendment.[155] For statutes, five percent of the registered voters in each of two-thirds of the congressional districts of the state are needed to have the proposed statute placed on the ballot, and for constitutional amendments, eight percent are needed.[156] The petitioner must deliver the requisite signatures to the secretary of state not less than six months before the election.[157] After verifying the count of the signature pages, the secretary of state issues a receipt.[158] The signatures are sent to local election authorities to verify, typically with random sampling, the voter registration status of the signatures provided, and the results are provided to the secretary of state.[159] If the secretary of state determines the petition is sufficient, the secretary issues a certificate stating the petition has a sufficient number of signatures to comply with the law.[160] If the secretary of state determines the petition is insufficient, he or she then issues a certificate stating the reasons for the insufficiency.[161]

B. Drafting an Initiative Petition in Other States

Although the focus of this Comment is on ballot initiative summary statements and fiscal summary statements in Missouri, a cursory overview of the various approaches to petition drafting and review found in other states serves as a foundation for potential future improvements to Missouri's initiative and referendum process. While Missouri's petitions are reviewed only

151. § 116.180.
152. § 116.080.1.
153. § 116.060.
154. § 116.090.1. Offering money or anything of value in exchange for a signature also constitutes a class A misdemeanor. § 116.090.2.
155. *See* MO. CONST. art. III, § 50.
156. *Id.*
157. *Id.*
158. MO. REV. STAT. § 116.100 (2000).
159. MO. REV. STAT. § 116.130.1 (Supp. 2012).
160. MO. REV. STAT. § 116.150.1 (2000).
161. § 116.150.2.

for technical form,[162] the level of review undertaken and the tools available to proponents of initiatives varies among states.[163] Three states (Alaska, Illinois, and Ohio) do not review petitions before they are placed on the ballot, either for any technical requirements or for content.[164] The other twenty-one initiative states all provide some level of technical review, either mandatory or optional, to ensure that the petition is technically sufficient, such that the initiative meets the legal requirements for format and style of measures that are placed before voters.[165]

Review of petitions for content, found in eleven states and not offered in Missouri, goes beyond mere technical review and focuses more on the details and language of the petition itself in an effort to improve the quality and consistency of initiative proposals.[166] Unlike a legislature that has legal and drafting experts on staff to help draft proposals, in Missouri initiatives are commonly drafted by the proponent, who in many instances has little or no experience in the law or in drafting.[167] Content review seeks to bridge the knowledge gap between legal experts and lay individuals by allowing petitioners to submit a draft or even just an idea to an agency or individual who will provide a draft or make recommendations.[168] While these recommendations are typically optional, they are a great means of early identification of any constitutional issues or any unintended consequences of the measure before expensive signature collections or court battles are initiated.[169] Considering the many nuances of statutory interpretation, the location of a period or a comma may significantly alter the meaning of a statute. An optional recommendation to the proponent of the initiative greatly assists the proponent in ensuring that the petition draft accurately conveys the drafter's intended meaning. In addition, it solves the problem of having voters confused or driven off by a poorly-drafted petition and also prevents the state government from having to enforce an ambiguous law if the initiative passes.[170] Of the twenty-four initiative states, eleven provide for some form of content review.[171] In some states, content review is optional and is performed at the

162. *See* § 116.332.1.
163. *See* 21ST CENTURY, *supra* note 58, at 23.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 22.
168. *See id.*
169. *Id.*
170. *See id.*
171. *Id.* at 23. The states that provide content review include: Alaska, California, Colorado, Idaho, Massachusetts, Mississippi, Montana, Oregon, Utah, Washington, and Wyoming. *Id.*

petitioner's request, whereas in other states the petition's content must be reviewed before it can continue in the process to be placed on the ballot.[172]

For example, the Colorado Constitution requires drafts of petitions to be "submitted to the legislative research and drafting offices of the general assembly for review and comment."[173] Within two weeks of submission, the legislative research and drafting offices hold a public hearing where their comments are voiced to the proponent of the measure.[174] The comments and recommendations of the legislative research and drafting offices are strictly advisory in nature and the proponent of the petition is free to ignore them.[175] The meeting is typically held at the state capitol, and although opponents of the measure are permitted to attend, only the proponent of the initiative may provide testimony or make comments.[176] After the completion of the meeting, the proponent may move forward in the certification process and a tape of the meeting becomes a public record.[177]

VI. STATE-DRAFTED BALLOT SUMMARIES

A. Summary Statements in Missouri

Because the ballot summary is commonly the sole description of an initiative that a voter sees, the ballot summary has a great deal of influence on a voter's decision,[178] causing legal scholars to express concerns about the procedures used in the creation of the summaries.[179] One such concern is that state actors are not necessarily disinterested in the outcome of the initiative, which raises some potential red flags regarding any potential bias or misinformation communicated in the ballot summary.[180] Additionally, because voters may not appreciate the fact that state governments are not necessarily disinterested, some increased measure of credibility may be associated with the documents they circulate, including ballot summaries.[181] As a result of this credibility, state-drafted summaries have the capacity to be particularly influential on the voter.[182]

172. *Id.* Alaska, California, Oregon, and Washington all provide optional content review for petitioners. *Id.* Colorado, Idaho, Massachusetts, Mississippi, Montana, Utah, and Wyoming mandate content review as part of the review process. *Id.*

173. COLO. CONST. art. V, § 1(5).

174. *Id.*

175. *Id.*

176. 21ST CENTURY, *supra* note 58, at 24.

177. *Id.*

178. *Id.*

179. *See* Craig M. Burnett, Elizabeth Garrett & Matthew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305 (2010).

180. *Id.* at 318.

181. *Id.*

182. *Id.*

Another concern is the timeliness of information presented to the voter.[183] Important details or perceptions a voter may have recognized when originally reading the full petition (assuming, of course, the voter reads the full measure) may be lost due to a voter's poor memory.[184] Intertwined with this point is the fact that the ballot summary is commonly the source of information presented to voters nearest to the moment in which they cast their vote.[185] Although information is presented to voters throughout the course of the election season, including the full versions of the petitions, the information presented on the ballot is the source of information that every voter is sure to read and will be the least likely to forget.[186]

In some states, petitioners have resorted to a process called "ballot title shopping," where they file multiple versions of an initiative and obtain different summaries.[187] Armed with multiple summaries, petitioners then employ focus groups and polls to decide which version summarizes the petition in the most favorable light.[188] Not only does this practice waste government time and resources, it also increases financial strain on petitioners if they wish to increase the likelihood of the voters approving the measure.[189]

B. Challenging Ballot Titles in Missouri

In Missouri, the official ballot title includes the ballot summary statement and fiscal note summary.[190] The secretary of state drafts all ballot summaries, which are not to exceed 100 words, for inclusion on the ballot.[191] This summary, posed in the form of a question, must use language "neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure."[192] The secretary of state is also responsible for drafting "fair ballot language statements," that "explain what a vote for and . . . a vote against the measure represent" and are "posted in each polling place next to the sample ballot."[193] Both the ballot summary[194] and the fair ballot language statement must be approved by the attorney general.[195]

The fiscal note and fiscal note summaries are prepared by the state auditor and detail the "estimated cost or savings, if any, to state or local govern-

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 318-19.
188. *Id.* at 319.
189. *See id.*
190. MO. REV. STAT. § 116.010 (2000).
191. § 116.334.
192. *Id.*
193. MO. REV. STAT. § 116.025 (Supp. 2012).
194. MO. REV. STAT. § 116.334 (2000).
195. § 116.025.

mental entities."[196] The fiscal note summaries synthesize the content of the more detailed fiscal notes in no more than fifty words.[197] To prepare the fiscal note, "the state auditor may consult with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal."[198] Additionally, proponents or opponents of the proposed measure may submit proposed fiscal impact statements as long as they are "received by the state auditor within ten days of [receiving] the proposed measure from the secretary of state."[199] Much like with ballot summaries and fair ballot language statements, the attorney general must approve fiscal notes and fiscal note summaries from the auditor.[200]

To make a challenge, the state statute provides that: "Any citizen who wishes to challenge the official ballot title or fiscal note . . . may bring suit in the circuit court of Cole County . . . within ten days after the official ballot title is certified by the secretary of state."[201] The petition must state why the summary statement or fiscal note summary portions of the official ballot title are insufficient or unfair and must request a different summary statement or fiscal note summary.[202] Due to the special time constraints involved with elections, court challenges are "placed at the top of the civil docket."[203] When considering challenges to summary statements, the court must "consider the petition, hear arguments, and in its decision certify the summary statement . . . to the secretary of state."[204] However, when considering challenges to fiscal notes or fiscal note summaries, the court may "either certify the fiscal note or the fiscal note summary . . . to the secretary of state *or* remand the fiscal note or the fiscal note summary to the auditor for preparation of a new fiscal note or fiscal note summary."[205] The secretary of state must certify the language provided by the court.[206] Within ten days of the court's ruling, any party may appeal to the Supreme Court of Missouri.[207]

During Secretary of State Robin Carnahan's two terms in office, Missouri courts rejected her submitted ballot titles and summaries on five separate occasions.[208] Although Robin Carnahan is Missouri's first secretary of

196. MO. REV. STAT. § 116.175.3 (Supp. 2012).
197. *Id.*
198. § 116.175.1.
199. *Id.* Proponents or opponents wishing to provide the auditor with proposed fiscal impact statements must adhere to certain financial reporting guidelines. *Id.*
200. § 116.175.4.
201. MO. REV. STAT. § 116.190.1 (Supp. 2012).
202. § 116.190.3.
203. § 116.190.4.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. Elizabeth Crisp, *Ballot Language Issues Growing for Missouri Secretary of State*, ST. LOUIS POST-DISPATCH (Oct. 1, 2012, 12:10 AM), http://www.stltoday.

state to have a court rewrite her proposed summaries, this detail may partially be attributed to the large increase in the number of citizen-filed petitions, from sixteen in 2004 to 143 in 2012.[209] Of the 143 petitions filed in 2012, sixty-one came from one of three entities and addressed one of three topics, giving an appearance of ballot title shopping.[210]

One of the denied summaries, a measure dealing with state health care exchanges and the Patient Protection and Affordable Care Act, asked voters:

> whether state law should be amended to "*deny* individuals, families, and small businesses the ability to access affordable health care plans through a state-based health benefit exchange unless authorized by statute, initiative or referendum or through an exchange operated by the federal government as required by the federal health care act?"[211]

The two front-runners in Missouri's 2012 secretary of state election both criticized Carnahan's selected language as casting the measure in too negative a light through the use of the word "deny."[212] In relation to another contentious Missouri initiative in the 2012 election, proposing a change to Missouri's system for selecting appellate judges, supporters of the petition withdrew their support because they found the ballot summary language to be biased after their court challenge to the language failed.[213]

VII. MISSOURI COMMON LAW AND ITS EFFECTS ON THE INITIATIVE PROCESS

As Missouri's initiative and referendum procedures provide for judicial review,[214] Missouri's state courts have been an integral part of the initiative and referendum process. While early cases focused primarily on the initiative

com/news/local/govt-and-politics/ballot-language-issues-growing-for-missouri-secretary-of-state/article_dc69eaaa-01f1-5c77-8624-042eebefe168.html.

209. *Id*.

210. *Id*. Twenty-seven of the petitions came from the same group relating to local tobacco taxes, twenty-two came from the same group relating to income, earnings and sales taxes, and twelve came from the same group relating to statewide tobacco taxes. Ashley Jost & Kelsey Smith, *How It's Made: Ballot Initiative Petition Process*, MEASURE UP MO. (Oct. 5, 2012), http://measureupmissouri.wordpress.com/2012/10/05/how-its-made-ballot-initiative-petition-process/.

211. Crisp, *supra* note 208 (emphasis added) (quoting Secretary Cranahan's original summary).

212. *See id.*

213. Brett Emison, *Special Interests Attacking Missouri Court Plan Stand Down . . . But They'll Be Back*, LEGAL EXAMINER (Oct. 3, 2012, 12:34 PM), http://kansascity.legalexaminer.com/wrongful-death/special-interests-attacking-missouri-court-plan-stand-down-but-theyll-be-back.aspx?googleid=304624.

214. MO. REV. STAT. § 116.190.1 (2000).

process itself, recently Missouri courts have seen a marked increase in the number of challenges to ballot summary statements.

A. Early Case Law

The first major case discussing the initiative process was *State ex rel. Halliburton v. Roach* in 1910, which involved a proposed constitutional amendment to the method of drawing Missouri's senatorial districts.[215] In *Halliburton*, the Supreme Court of Missouri held that although the petitioner clearly intended and labeled the initiative as a proposed constitutional amendment, the proposed act could not be submitted as a constitutional amendment because it was merely legislative in nature.[216] In reaching the conclusion that the petition was improperly submitted as a constitutional amendment, the Court focused primarily on the limited time frame of the proposed amendment (specifically, that the proposed change was only set to last until 1920).[217] Furthermore, although the proposed amendment did seek to repeal another section of the Missouri Constitution, the petitioner's non-compliance with the requirements for initiative amendments, which mandates an inclusion of the full text of the amendment,[218] meant that the petition was not properly submitted as a proposed constitutional amendment.[219]

However, *Halliburton* also includes discussion of a second proposition, one far more pertinent to the present analysis: the authority of the secretary of state.[220] Specifically, the Supreme Court of Missouri addressed the authority of the secretary of state to decline to accept and file petitions that do not fall within the purview of the initiative and referendum amendment.[221] The Court held that although the secretary of state may not parse a petition for unconstitutionality, the secretary has discretion to refuse to submit petitions that do not meet the technical requirements for a proper constitutional amendment.[222]

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215. 130 S.W. 689, 691 (Mo. 1910).

216. *Id.* at 694.

217. *Id.* at 695.

218. This requirement was further discussed by the Supreme Court of Missouri in *Buchanan v. Kirkpatrick*, where the Court held that the petitioner need not disclose all provisions which could possibly or by implication be modified by the amendment. 615 S.W.2d 6, 15 (Mo. 1981) (en banc). The court held that it was sufficient that the petitioner only pointed out constitutional provisions that were in direct conflict with the proposed amendment. *Id. Halliburton*'s holding was further discussed in *Union Electric Co. v. Kirkpatrick*, stating that the delineation between constitutional amendments and statutes was made more distinct in the 1945 Missouri Constitution when all proposed amendments required an enacting clause and additional signatures. 678 S.W.2d 402, 404-05 (Mo. 1984) (en banc).

219. *Halliburton*, 130 S.W. at 695.

220. *Id.* at 696.

221. *Id.*

222. *Id.*

A matter largely omitted by the majority in *Halliburton*, but discussed by Judge Waller Graves in his concurrence, was the proper role of the secretary of state when considering the purpose of the initiative process.[223] The discussion of the proper role of the secretary of state arose from a point made at oral argument: that the secretary was more than a ministerial officer in his role in the initiative process and therefore was beyond the reach of a writ of mandamus.[224] Judge Graves wrote, "When you place the status of the Secretary of State upon any other basis than that of a ministerial, administrative, or executive officer, *you give him absolute control of what shall and what shall not be submitted to the people*."[225] In concluding that the role of the secretary of state in connection with the initiative process was in fact ministerial, Judge Graves stated that although the secretary is vested with some level of discretion with initiative petitions, "[h]is acts are but ministerial in connection with an election to be held."[226]

B. Single Subject Provisions

In *Union Electric Co. v. Kirkpatrick*, the Supreme Court of Missouri set forth the standard for determining whether a proposed law violates the single subject provision of the Missouri Constitution.[227] As the purpose of the single subject provision is to give interested voters notice of the subject of a proposed bill, the court held:

> If the title gives adequate notice, the requirement is satisfied. However, even a liberal construction as to the adequacy thereof requires that the "subject of the act" be evident with a sufficient clearness to give notice of the intent and purpose thereof to those interested or affected by the proposal. It is not required that the title set out "details" of the contents of the proposal. More recently, it was said that: "The ability of the voters to get before their fellow voters issues they deem signifi-

223. *Id.* at 698 (Graves, J., concurring).

224. *Id.*

225. *Id.* (emphasis added).

226. *Id.* In *State ex rel. Stokes v. Roach*, the Supreme Court of Missouri issued its first writ of mandamus to the secretary of state, ordering him to submit the petition. 190 S.W. 277 (Mo. 1916) (en banc). In holding that the acts of the secretary were merely ministerial, the Court held that the authority and discretion to interpret the laws, including the authority to determine whether the petition is properly that of a constitutional amendment or of a statute, is vested solely in the courts and not in the secretary. *Id.* at 279.

227. 606 S.W.2d 658, 660 (Mo. 1980) (en banc). For a brief discussion of single subject provisions, see 21ST CENTURY, *supra* note 58, at 16; *see also* MO. CONST. art. III, § 50.

> cant should not be thwarted in preference for technical formalities."[228]

In applying the test, the Court held that the ballot titles were sufficient.[229]

C. Fiscal Notes

In *Hancock v. Secretary of State*, the Missouri Court of Appeals discussed the sufficiency of fiscal notes and fiscal note summaries.[230] In reaching the conclusion that the fiscal note and fiscal note summary were not insufficient and unfair, the court began by providing a definition of insufficiency and unfairness: "inadequately and with bias, prejudice, deception and/or favoritism."[231] After discussing how the Oversight Division of the Committee on Legislative Research[232] is a unique institution with special knowledge and experience regarding the fiscal impact of proposed laws, the court held that the evidence indicated a virtual certainty of the impact on revenue.[233] The only uncertainty pertained to the amount of the impact, which was estimated to be between one and five billion dollars and did not make the fiscal note insufficient.[234] Furthermore, the fact that the fiscal note summary stated predictions that the spending cuts would affect broad categories of state expenditures, such as schools and prisons, did not render it unfair or insufficient.[235] Finally, in noting the limited nature of the fiscal note summary due to the word limit, the court noted that the test is not whether the fiscal note summary uses the best language for describing the fiscal impact.[236] Instead, "[t]he burden is on the opponents of the language to show that the language was insufficient and unfair[.]"[237]

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228. *Id.* (citations omitted) (quoting United Labor Comm. of Mo. v. Kirkpatrick, 572 S.W.2d 449, 454 (Mo. 1978) (en banc)).

229. *Id.*

230. 885 S.W.2d 42 (Mo. App. W.D. 1994).

231. *Id.* at 49.

232. When *Hancock* was decided, the Oversight Division of the Committee on Legislative Research was responsible for compiling fiscal note and fiscal note summaries, not the state auditor. This process was declared unconstitutional in *Thompson v. Committee on Legislative Research* as the duty assigned to the Committee was not "advisory to the general assembly," as required by the Missouri Constitution. 932 S.W.2d 392, 395 (Mo. 1996) (en banc) (per curiam), *superseded by statute* MO. REV. STAT. § 116.175 (Supp. 2012), *as recognized in* Brown v. Carnahan, 370 S.W.3d 637 (Mo. 2012) (en banc) (per curiam).

233. *Hancock*, 885 S.W.2d at 49.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

D. Clear Title Challenges

The Supreme Court of Missouri discussed the distinct, albeit related topic of clear title challenges to ballot titles in *United Gamefowl Breeders Ass'n of Missouri v. Nixon*.[238] The appellants claimed the secretary's submitted ballot title violated the clear title provision[239] of the Missouri Constitution by not detailing the exemption for most rodeos in a proposed law that banned animal fighting.[240] In rejecting this claim, the Court held that a ballot title is not insufficient or unfair if it makes the subject evident with sufficient clarity "to give notice of the purpose to those interested or affected by the proposal."[241] Furthermore, "[t]he ballot title need not resolve every question about cases at the periphery of the proposal."[242] Because "[t]he title . . . alerted those affected in the sporting dog, rodeo, and cockfighting groups, as acknowledged by the concerns and comments of their representatives before the election[,]" the ballot title was sufficient.[243]

E. Form of the Initiative

In another case, also entitled, *Union Electric Co. v. Kirkpatrick*, the Supreme Court of Missouri held that the secretary of state may look beyond the petition's face to determine whether the requirements as to form have been satisfied.[244] This limited inquiry does not, however, permit the secretary to inquire into the constitutionality of the law because even if the law is approved by a majority of voters, it is still subject to a constitutional challenge.[245]

F. Insufficient or Prejudicial Summary Statements

Although previous decisions involved challenges to ballot titles prepared by the secretary of state,[246] the past ten years have been marked by a substantial increase in the number of cases involving challenges to the sufficiency of

238. 19 S.W.3d 137 (Mo. 2000) (en banc).

239. "Petitions for laws shall contain not more than one subject which *shall be expressed clearly in the title* . . . ." MO. CONST. art. III, § 50 (emphasis added). Although the Court previously had not called this portion of the constitution the "clear title" provision, the Court has heard other clear title challenges to ballot titles. *See, e.g.*, Union Elec. Co. v. Kirkpatrick, 606 S.W.2d 658 (Mo. 1980) (en banc).

240. *United Gamefowl*, 19 S.W.3d at 140.

241. *Id.* (quoting *Union Elec. Co.*, 606 S.W.2d at 660).

242. *Id.* at 141.

243. *Id.*

244. 678 S.W.2d 402, 405 (Mo. 1984) (en banc).

245. *Id.*

246. *See, e.g.*, State *ex rel.* City of El Dorado Springs v. Holman, 363 S.W.2d 552 (Mo. 1962) (en banc); Bergman v. Mills, 988 S.W.2d 84 (Mo. App. W.D. 1999).

the ballot title.[247] In one of the first cases heard by the Supreme Court of Missouri that addressed the content of the summary statement, *State ex rel. City of El Dorado Springs v. Holman*, the Court discussed whether a state-drafted ballot summary was a sufficient summary of the initiative.[248] In addressing the appellant's claim that the certified summary failed to state fully the meaning and effect of the amendment, the Court held that it is the very nature of the summary to not delve into particularities due to the unavoidable brevity and directness required by the word limitation.[249] The Court held that, although it may have been desirable to explain the effects of the amendment in a more comprehensive manner in the summary, the absence of such language did not make the statement deficient, unfair, or misleading.[250]

Several decades later, the Missouri Court of Appeals extended most of *Hancock v. Secretary of State*'s analysis of fiscal notes and fiscal note summaries to summary statements prepared by the secretary of state in *Bergman v. Mills*.[251] As both fiscal notes and summary statements are reviewed according to the same standard,[252] whether or not they are insufficient and unfair, much of *Hancock* was directly applicable to the summary statement review in *Bergman*.[253] Therefore, the test is whether the summary "language fairly and impartially summarizes the . . . measure, so that the voters will not be deceived . . . ."[254] The language used in the summary need not be the best language available in describing the measure, and "[t]he burden is on the opponents of the language to show that the language was insufficient and unfair . . . ."[255]

In *Overfelt v. McCaskill*, the Missouri Court of Appeals addressed challenges to both the auditor's fiscal note and the secretary of state's summary statement.[256] The appellants argued that, because the auditor failed to assess the fiscal impact on local governments,[257] the court should remand the fiscal note to the auditor.[258] However, as this remedy was not permitted by statute

247. *See* Crisp, *supra* note 208. Even within this ten-year time frame, the number of challenges to ballot titles continues to increase. *See id.*

248. 363 S.W.2d 552 (Mo. 1962) (en banc).

249. *Id.* at 558.

250. *Id.*

251. 988 S.W.2d 84 (Mo. App. W.D. 1999).

252. *See* MO. REV. STAT. § 116.190 (Supp. 2012).

253. *See Bergman*, 988 S.W.2d at 92.

254. *Id.*

255. *Id.*

256. 81 S.W.3d 732 (Mo. App. W.D. 2002), *superseded by statute* MO. REV. STAT. § 116.175 (Supp. 2012) and § 116.190 (Supp. 2012), *as recognized in* Mo. Mun. League v. Carnahan, 303 S.W.3d 573 (Mo. App. W.D. 2010).

257. The assessment of costs or savings, if any, to local governments is mandated by MO. REV. STAT. § 116.175.3 (Supp. 2012).

258. *Overfelt*, 81 S.W.3d at 736.

when *Overfelt* was decided,[259] the court held that the only remedy available was for the opponent of the fiscal note or ballot title "to bear[] the burden of establishing what the fiscal note or ballot title should have stated," meet that burden "with evidentiary support for the proposed language," and allow the court to certify a corrected fiscal note or ballot title.[260] Because the appellants did not provide suggested language and evidentiary support to the trial court, the court had no choice but to certify the existing ballot title.[261] In ruling on the appellant's challenge to the secretary of state's ballot summary, the court noted that the opponent of the language bears the burden of showing "that the language is insufficient and unfair" and that the secretary need not use the best language for describing the proposed measure for the summary to be deemed sufficient.[262] Furthermore, the ballot title need not set out every detail or resolve every peripheral question, but rather must be sufficiently clear to give notice of the purpose to those interested in or affected by the proposal.[263] The court wrote, "The important test is whether the language fairly and impartially summarizes the purposes of the measure, so that the voters will not be deceived or misled."[264]

Following *Overfelt*, the Missouri Court of Appeals ruled on another ballot title claim in *Missourians Against Human Cloning v. Carnahan*.[265] The appellant's claim arose from a ballot summary for a proposed constitutional amendment that sought to align the stem cell research permitted under state law with that allowed under federal law (with a few additional restrictions).[266] The appeal focused primarily on whether one of the proposed restrictions, the proscription on cloning human beings, was deceptive to voters.[267] Before addressing the merits of the claim, the court noted:

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259. In the case of fiscal note or fiscal note summaries, Missouri statutes now permit courts to remand the fiscal note or fiscal note summary to the auditor to correct the deficiencies. § 116.175.5; *see also* § 116.190.4.

260. *Overfelt*, 81 S.W.3d at 736-37.

261. *Id.* at 737.

262. *Id.* at 738 (quoting Hancock v. Sec'y of State, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994)).

263. *Id.* at 738-39. Interestingly, the court here includes case law dealing primarily with clear title claims, which more commonly involve questions of notice. *Id.* at 738 (quoting United Gamefowl Breeders Ass'n of Mo. v. Nixon, 19 S.W.3d 137, 140 (Mo. 2000) (en banc)).

264. *Overfelt*, 81 S.W.3d at 738 (quoting Bergman v. Mills, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999)).

265. 190 S.W.3d 451 (Mo. App. W.D. 2006).

266. *Id.* at 453.

267. *Id.* Appellants argued that one of the permissible types of stem cell research, somatic cell nuclear transfer, was actually a type of human cloning. *Id.* Therefore, the summary's language that it would "ban all human cloning" was overly broad by encompassing methods of stem cell research that the proposed amendment sought to protect. *See id.* at 454.

> Our role is not to act as a political arbiter between opposing viewpoints in the initiative process: "When courts are called upon to intervene in the initiative process, they must act with restraint [and] trepidation . . . . Courts are understandably reluctant to become involved in pre-election debates over initiative proposals . . . [and] do not sit in judgment on the wisdom or folly of proposals."[268]

Ultimately, the Missouri Court of Appeals refused to adopt definitional language[269] detailing "human cloning" as the court believed that to do so would, in effect, be a "review of the merits of the initiative itself."[270] The court further cited the progeny of Missouri cases holding that the omission of certain details or the failure to use the best language possible in describing the measure are not the tests for unfairness or insufficiency.[271] The court wrote, "There may well be a situation where an initiative's language and purpose are so absurd or unsupportable that merely summarizing the initiative without explanation would be deceptive and misleading. That is not our case."[272]

Up until now, Missouri appellate courts have been seemingly very reluctant to intervene in the initiative process, deferring to the secretary of state or state auditor in nearly every appeal. However, in *Cures Without Cloning v. Pund*, the Missouri Court of Appeals affirmed, in part, the trial court's modification of the ballot summary.[273] In the 2006 election, Missouri voters approved the stem cell research amendment that was challenged in *Missourians Against Human Cloning v. Carnahan*.[274] Two years later, in *Cures*, a new ballot initiative was created to modify the amendment approved in 2006 by banning somatic cell nuclear transfer, a process explicitly permitted in the approved 2006 constitutional amendment.[275] The following language was certified by the secretary of state as part of the official ballot title:

> Shall the Missouri Constitution be amended to repeal the current ban on human cloning or attempted cloning and to limit Missouri patients' access to stem cell research, therapies and cures approved by voters in November 2006 by:

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268. *Id.* at 456 (quoting Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 827 (Mo. 1990) (en banc)).

269. The appellants effectively wanted to introduce additional language to highlight the "controversy surrounding the merits of the initiative," which the court refused, citing the controversy is one best "left to the political process." *Id.* at 457.

270. *Id.*

271. *Id.* (citing Overfelt v. McCaskill, 81 S.W.3d 732, 738 (Mo. App. W.D. 2002); Bergman v. Mills, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999)).

272. *Id.*

273. 259 S.W.3d 76 (Mo. App. W.D. 2008).

274. *Id.* at 78-79.

275. *Id.* at 79.

> • redefining the ban on human cloning or attempted cloning to criminalize and impose civil penalties for some existing research, therapies and cures; and
>
> • prohibiting hospitals or other institutions from using public funds to conduct such research?[276]

Because the petitioner believed the summary to be insufficient in stating the effect of the initiative to be to "repeal the current ban on human cloning" instead of its intended effect of continuing to ban human cloning and adding an additional procedure to fall within the human cloning ban, the language was challenged in court.[277] Sustaining the petitioner's challenge to the language of the summary statement as being insufficient and unfair, the trial court rewrote the summary statement for the secretary of state.[278] The Missouri Court of Appeals agreed that the summary was insufficient, noting that "Missouri voters are likely to be confused" by the language of the summary and that it is the primary responsibility of the secretary to "promote an informed understanding of the probable effect of the proposed amendment."[279] The court noted that merely changing the word "repeal" to "change" would be sufficient to accurately summarize the initiative.[280] However, the court of appeals rejected the claim that the rest of the summary, namely the language "limit[ing] Missouri patients' access to stem cell research," was intentionally argumentative and likely to create prejudice.[281]

Perhaps most significant in *Cures*, however, was the discussion about the proper authority and role of courts in remedying insufficient ballot titles. In *Cures*, the secretary of state argued that she had the "sole authority to 'prepare' a summary statement" and that a court is permitted to do no more than certify language it finds sufficient and remand insufficient language to the secretary to correct.[282] The secretary further argued that, because the executive branch was given the responsibility of preparing the summary statement, courts cannot modify or rewrite the summary "without violating the separation of powers doctrine in . . . the Missouri Constitution."[283] In rejecting the secretary's claim, the court noted that the suggested remedy, the remand of insufficient language to the secretary to correct, is not authorized by stat-

276. *Id.* at 80.

277. *Id.* at 81-82.

278. *Id.* at 80. The new language changed the opening clause of the summary to: "Should the Missouri Constitution be amended to change the definition of cloning and ban some of the research as approved by voters in November, 2006 . . . ?" *Id.*

279. *Id.* at 82 (citing Buchanan v. Kirkpatrick, 615 S.W.2d 6, 11 (Mo. 1981) (en banc)).

280. *Id.*

281. *Id.* at 81-82.

282. *Id.* at 82-83.

283. *Id.* (citing MO. CONST. art. II, § 1).

ute.[284] Although Missouri statute authorizes the "remand of fiscal note or fiscal note summary to the [s]tate [a]uditor," the same language is not found in connection to the remand of summary statements to the secretary of state.[285] The court further noted, "The statute implicitly allows the court to certify a corrected summary statement . . . ."[286] However, while the Missouri Court of Appeals held that courts had the authority to *modify* summary statements, the court also held that courts could not *rewrite* the summary entirely.[287] Accordingly, the court of appeals reversed the trial court's judgment and remanded a modified (and not rewritten) summary statement for them to certify to the secretary.[288]

Following *Cures*, in which it became very clear that the courts were willing to hold that a ballot title was insufficient, the next case to address the issue of insufficient ballot titles was *Missouri Municipal League v. Carnahan*.[289] In *Missouri Municipal League*, the petitioners challenged the summary statements of four ballot initiatives "to amend the eminent domain provisions of the Missouri Constitution."[290] The circuit court found all aspects of the ballot titles for the four initiatives to be fair and sufficient, with the exception of one summary statement, wherein the court deleted one sentence before certifying the ballot titles.[291] The summary statement in question originally read:

> Shall the Missouri Constitution be amended to restrict the use of eminent domain by:
>
> • Allowing only government entities to use eminent domain;
>
> • Prohibiting its use for private purposes, with certain exceptions for utilities;
>
> • Requiring that any taking of property be necessary for public use and that landowners receive just compensation;

284. *Id.* at 83.

285. *Id.* (emphasis omitted) (quoting MO. REV. STAT. § 116.190.4 (2000)); *see* MO. REV. STAT. § 116.175.5 (Supp. 2012); *see also* MO. REV. STAT. § 116.190.4 (Supp. 2012).

286. *Cures*, 259 S.W.3d at 83 (citing MO. REV. STAT. § 116.190.4 (2000)). "[T]hen 'the secretary of state shall certify the language which the court certifies to [her].'" *Id.* (quoting MO. REV. STAT. § 116.190.4 (2000)).

287. *Id.* at 83. One member of the court stated in a concurrence that he supported the trial court's authority to rewrite the statement. *Id.* at 84 (Smart, J., concurring in part and dissenting in part).

288. *Id.* at 83. The modified summary kept most of the secretary's original summary intact, only substituting "change" for "repeal." *See id.*

289. 303 S.W.3d 573 (Mo. App. W.D. 2010).

290. *Id.* at 575.

291. *Id.*

> • Requiring that the intended public use be declared at the time of the taking; and
>
> • Permitting the original owners to repurchase the property if it is not so used within five years or if the property is offered to a private entity within 20 years?[292]

The circuit court removed the third bullet point as those restrictions "are already part of the constitution."[293] *Missouri Municipal League* was the first case to discuss the auditor's duties in preparing fiscal notes and the courts' role in the remedial process after the statutes were amended to allow courts to remand insufficient language to the auditor to be corrected.[294] Most significantly, the Missouri Court of Appeals held that the auditor transcribing comments verbatim from various sources was sufficient for the purposes of the fiscal note.[295] Here, the auditor reached out to various state and local governmental entities and requested information on the estimated fiscal impact of the measure on their respective departments, which the auditor directly transcribed into the fiscal notes and fiscal note summaries.[296] As long as the fiscal note or fiscal note summary is "'neither argumentative nor likely to create prejudice . . . ,' then the [a]uditor has met her burden."[297] Essentially, fiscal notes and fiscal note summaries are viewed in the same way as summary statements from the secretary of state.[298] Whether the best language is used is not the test; it just must not be likely to create prejudice or be argumentative.[299] In regards to the summary statement, the court of appeals agreed with the circuit court's conclusion that part of the original language was misleading, but further modified the circuit court's version to add back in part of the deleted bullet point.[300] Much like in *Cures*, the Missouri Court of Appeals reversed the circuit court's judgment and remanded a modified version of the summary statement for the court to certify.[301]

VIII. *BROWN V. CARNAHAN*

In the couple of years before *Brown v. Carnahan* was decided, the perceived unfairness of summary statements had garnered heightened media coverage and Missouri's lower courts had appeared more willing to reject or

292. *Id.* at 578-79.
293. *Id.* at 579.
294. *See id.* at 582.
295. *Id.*
296. *Id.*
297. *Id.* (quoting MO. REV. STAT. § 116.175.3 (2000)).
298. *Id.* at 583.
299. *Id.* at 582-83.
300. *See id.* at 588.
301. *Id.* at 588-89.

modify insufficient summary statements than they once were. The Supreme Court of Missouri sought to clarify the proper analysis for judicial review of the various aspects of the ballot title in *Brown v. Carnahan*, a case argued before the Court in 2012.[302] Procedurally, *Brown v. Carnahan* was a consolidation of separate challenges to the ballot titles of three separate petitions.[303] These three petitions, one involving tobacco taxes, one on the state minimum wage, and one on payday loans, were all slated to appear on the ballot for the November 2012 election.[304] Each of the cases involved the constitutional validity of the statute granting the state auditor authority to draft fiscal notes and fiscal note summaries,[305] and each appeal challenged the sufficiency and fairness of the auditor's fiscal notes and fiscal note summaries, as well as the secretary of state's summary statements.[306]

Before addressing the merits of the claims, the Court noted:

> Nothing in our constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people. The people, from whom all constitutional authority is derived, have reserved the "power to propose and enact or reject laws and amendments to the Constitution."[307]

According to the Court, because of the importance and role of the initiative process, when called upon to intervene, courts "must act with restraint, trepidation and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course."[308] The Court also noted that when aspects of the initiative are challenged prior to the election, "courts may consider only those threshold issues that affect the integrity of the election itself, and that are so clear as to constitute a matter of form."[309] Therefore, "when initiative petitions are challenged, [the court's] primary duty is to determine 'whether the constitutional requirements and limits of power, as expressed in the provisions relating to the procedure and form of initiative petitions, have been regarded.'"[310]

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302. 370 S.W.3d 637, 643 (Mo. 2012) (en banc) (per curium).

303. *Id.*

304. *Id.* at 643-44.

305. *See* MO. REV. STAT. § 116.175 (Supp. 2012).

306. *Brown*, 370 S.W.3d at 644.

307. *Id.* at 645 (quoting MO. CONST., art. III, § 49) (citing Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 827 (Mo. 1990) (en banc)).

308. *Id.* at 645 (quoting *Blunt*, 799 S.W.2d at 827) (internal quotation marks omitted).

309. *Id.* (quoting United Gamefowl Breeders Ass'n of Mo. v. Nixon, 19 S.W.3d 137, 139 (Mo. 2000) (en banc)).

310. *Id.* (quoting *Blunt*, 799 S.W.2d at 827).

A. Fiscal Notes and Fiscal Note Summaries

The Court first addressed the challenges to "the auditor's authority to prepare fiscal notes and fiscal note summaries."[311] The Missouri Constitution provides:

> The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. *No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds*.[312]

The auditor was delegated the task of preparing parts of the ballot title only after the Supreme Court of Missouri declared unconstitutional the statute that originally delegated the authority to the joint committee on legislative research.[313] After the statute was declared unconstitutional, the legislature passed a new statute, which provided that "the auditor 'shall assess the fiscal impact of the proposed measure' and 'may consult with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal.'"[314] As such, the question before the court was whether the tasks delegated to the state auditor were an investigation related to the "supervising and auditing of the receipt and expenditure of public funds" or whether the legislature unconstitutionally granted the auditor additional duties beyond the scope of those permissible under the Missouri Constitution.[315]

The Court began by providing some context for the meaning of "investigation," defining it as a "detailed examination . . . study . . . research . . . [or] official probe."[316] The Court held that the auditor's practice of reaching out

311. *Id.* at 646-47. Although this first issue comprised a substantial portion of the Court's opinion, it is only addressed in a cursory manner in this Comment.

312. MO. CONST. art. IV, § 13 (emphasis added).

313. *Brown*, 370 S.W.3d at 648; *see* Thompson v. Comm. on Legislative Research, 932 S.W.2d 392 (Mo. 1996) (en banc) (per curiam), *superseded by statute* MO. REV. STAT. § 116.175 (Supp. 2012), *as recognized in Brown*, 370 S.W.3d at 648.

314. *Brown*, 370 S.W.3d at 648 (quoting MO. REV. STAT. § 116.175.1 (Supp. 2012)).

315. *Id.* (quoting MO. CONST. art. IV, § 13).

316. *Id.* at 649 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 131 (2002)).

to various state and local governmental entities and compiling the responses was consistent with the ordinary meaning of investigation.[317] Accordingly, the Court reversed the determination of the circuit court in one of the cases that found the statute unconstitutional and affirmed the judgments of the other courts that upheld the constitutionality of the statute.[318]

In his concurrence, Judge Zel M. Fischer stated that while he agreed with the majority opinion on all other issues, he would have found that the statute granting the auditor authority to prepare fiscal notes and fiscal note summaries was unconstitutional.[319] The Missouri Constitution states, "No duty shall be imposed on [the auditor] by law which is not related to the supervising and auditing of the receipt and expenditure of public funds."[320] Judge Fischer noted:

> While the principal opinion rationalizes that the auditor's power to conduct investigations as required by law is silent with respect to time restrictions, the plain and ordinary meaning of the words of the limiting provision in article IV, section 13, indicate a requirement that the auditor's duties relate to the "act or process of" receiving or expending public funds. Such an "act or process" is expressly a concurrent one. The preparation of a fiscal note and fiscal note summary, for inclusion in a ballot initiative petition, does not relate to the "act or process" of receiving or expending public funds.[321]

Judge Fischer concluded that nothing in the Missouri Constitution requires the inclusion of a fiscal note or fiscal note summary in the ballot title and that it should be the responsibility of the proponents or opponents of the initiative to inform the general public of its fiscal impact.[322]

B. Summary Statements

When a court reviews the sufficiency of a ballot title, appellate courts review the conclusions of trial court *de novo*, assuming there are no underlying factual disputes.[323]

317. *Id.* at 653. For a more detailed discussion of the various arguments and conclusions of the Court in upholding the constitutionality of the statute granting the auditor authority to draft fiscal notes and fiscal note summaries, see *id.* at 649-53.

318. *Id.* at 653.

319. *Id.* at 670 (Fischer, J., concurring).

320. MO. CONST. art. IV, § 13.

321. *Brown*, 370 S.W.3d at 673 (Fischer, J., concurring).

322. *Id.*

323. *Id.* at 653 (majority opinion).

1. The Tobacco Tax Initiative

The tobacco tax initiative proposed a law that would increase "taxes on certain tobacco products in an effort to fund a health and education trust fund to educate about tobacco use prevention and quitting tobacco use."[324] The proposed initiative also sought to amend current Missouri law to close what the petitioner believed was a "refund loophole" for tobacco manufacturers not participating in the current tobacco escrow program.[325] Accordingly, the secretary of state prepared the following summary statement:

> Shall Missouri law be amended to:
>
> • create the Health and Education Trust Fund with proceeds of a tax of $0.0365 per cigarette and 25 [percent] of the manufacturer's invoice price for roll-your-own tobacco and 15 [percent] for other tobacco products;
>
> • use Fund proceeds to reduce and prevent tobacco use and for elementary, secondary, college, and university public school funding; and
>
> • increase the amount that certain tobacco product manufacturers must maintain in their escrow accounts, to pay judgments or settlements, before any funds in escrow can be refunded to the tobacco product manufacturer and create bonding requirements for these manufacturers.[326]

The appellant contended that the second bullet point of the summary was insufficient because it mentioned only two possible uses of the fund's proceeds, not mentioning other possible uses of the funding, "including payment of administrative costs, replacement revenues for lost tobacco tax revenues that would result from decreased tobacco purchases, tobacco settlement agreement funding, and loan forgiveness for rural medical professionals."[327] The appellant further contended that the third bullet point was erroneous as the initiative would alter how much could be refunded and not how much must be maintained in the escrow account.[328] Finally, the appellant argued that the third bullet point's use of "these manufacturers" was not only unclear but also wrongly suggested who would be subjected to the bonding requirement.[329]

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324. *Id.* at 655.
325. *Id.*
326. *Id.* (alterations in original).
327. *Id.*
328. *Id.* at 656.
329. *Id.*

The Supreme Court of Missouri rejected these claims.[330] The Court held that the secretary's summary was an "accurate explanation of the proposed initiative's [effects]."[331] Although the summary could have been worded in a way to make it "*more* accurate," a rewording "was not . . . necessary to make the summary fair and sufficient."[332] The degree of specificity the appellant requested is not required for a summary statement fair and sufficient.[333] Given the 100-word limitation of summary statements, the summary "need not set out the details of the proposal[, and] . . . [t]he test is not whether increased specificity and accuracy would be preferable or provide the best summary."[334] It merely must state the legal and probable effects of the initiative accurately, which the Court held was satisfied.[335]

2. The Minimum Wage Initiative

Another appellant's proposed initiative increased the state's minimum wage to $8.25 per hour, with the minimum wage for tipped employees to be sixty percent of the minimum wage.[336] The proposed law also stated that "if the federal minimum wage is increased above the state minimum wage," then the state minimum wage would be increased to match the new federal minimum wage.[337] The secretary of state prepared the following summary statement:

> Shall Missouri law be amended to:
>
> • increase the state minimum wage to $8.25 per hour, or to the federal minimum wage if that is higher, and adjust the state wage annually based upon changes in the Consumer Price Index;
>
> • increase the minimum wage for employees who receive tips to 60 [percent] of the state minimum wage; and

330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* (citations omitted) (quoting United Gamefowl Breeders Ass'n of Mo. v. Nixon, 19 S.W.3d 137, 141 (Mo. 2000) (en banc)) (internal quotation marks omitted) (citing Missourians Against Human Cloning v. Carnahan, 190 S.W.3d 451, 457 (Mo. App. W.D. 2006)).
335. *Id.* (quoting Mo. Mun. League v. Carnahan, 303 S.W.3d 573, 584 (Mo. App. W.D. 2010)). The Court also upheld the sufficiency of the fiscal note and fiscal note summaries for the same reasons as the summary statement. *See id.* at 657-58.
336. *Id.* at 660.
337. *Id.*

> • modify certain other provisions of the minimum wage law including the retail or service business exemption and penalties for paying employees less than the minimum wage?[338]

The appellant first alleged that the summary statement was insufficient because state minimum wage can already be adjusted by the Consumer Price Index (CPI), yet the presence of the language in the first bullet point suggests otherwise.[339] The trial court originally held that the language was not insufficient, as "the reference to the CPI adjustment in the summary statement is necessary context to understand the proposed initiative's potential effects, as the CPI is not actually applied under Missouri's current minimum wage scheme."[340] Furthermore, references to existing law in order "to provide context to a summary statement do not render the summary statement unfair or prejudicial."[341] Accordingly, the appellant failed to persuade the Court "that the trial court erred in finding that the CPI reference was fair and sufficient in the summary statement for the minimum wage initiative."[342]

The appellant next alleged that the summary was inaccurate in that it suggested that the minimum wage for tipped employees was less than that of non-tipped employees rather than the proposed change of "increas[ing] the minimum *employer-paid* [portion of the] wage."[343] The trial court said that the appellant's "arguments suggested a need for a level of detail [that] could not and need not be provided to render a summary fair and sufficient."[344] The Supreme Court of Missouri found "no error in the trial court's reasoning on this issue."[345] Finally, the appellant argued that the summary statement failed to properly explain the effect of increases in the federal minimum wage.[346] The Court rejected this claim, restating that "the summary statement 'need not set out the details of the proposal' to be fair and sufficient."[347]

338. *Id.* (alteration in original).

339. *Id.*

340. *Id.*

341. *Id.* (citing Mo. Mun. League v. Carnahan, 303 S.W.3d 573, 660 (Mo. App. W.D. 2010)).

342. *Id.*

343. *Id.* (emphasis in original).

344. *Id.* at 661 (alteration in original) (internal quotations omitted).

345. *Id.*

346. *Id.*

347. *Id.* (quoting United Gamefowl Breeders Ass'n of Mo. v. Nixon, 19 S.W.3d 137, 141 (Mo. 2000) (en banc)). Much like the tobacco tax initiative, the petitioner here also challenged the fiscal note and fiscal note summary, which were both upheld because they need not use the best language or set out every detail. *See id.* at 661-62.

3. The Payday Loan Initiative

The final proposed initiative was one that would limit the interest rate for "payday, title, installment, and other high-cost consumer credit and small loans to 36 percent per year."[348] Accordingly, the secretary prepared the following language: "Shall Missouri law be amended to limit the annual rate of interests, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?"[349] The trial court found that the language of the summary statement was not specific enough as it did not reference the thirty-six percent interest rate cap and concluded that the summary was insufficient, "misleading[,] and likely to deceive voters."[350] Accordingly, the trial court rewrote the summary statement to read: "Shall Missouri law be amended to allow annual rates up to a limit of 36 [percent] including interests, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?"[351] The Supreme Court of Missouri reversed the trial court's judgment, finding the secretary of state's original summary to be fair and sufficient as it was "neither intentionally argumentative nor likely to create prejudice."[352] The secretary accurately stated the purpose of the initiative, and there is no requirement that the summary specifically articulate the thirty-six percent interest rate.[353]

The trial court also rejected the auditor's fiscal note and fiscal note summary because they failed to include evidence showing the impact on a certain type of lender and, therefore, the trial court held that the fiscal note and fiscal note summary were likely to deceive voters.[354] The Supreme Court of Missouri reversed the trial court's judgment as "the fiscal note and fiscal note summary complied with the auditor's obligations to create a fair and sufficient summary and inform the public of the fiscal consequences of the proposed measure without bias, prejudice, deception, or favoritism."[355] While additional information might have been helpful, "nothing required the auditor to look beyond the information he was provided in assessing the fiscal impact on those lenders."[356]

348. *Id.* at 663.
349. *Id.*
350. *Id.*
351. *Id.* (alteration in original).
352. *Id.* at 664 (quoting MO. REV. STAT. § 116.334 (Supp. 2012)).
353. *Id.*
354. *Id.* at 666.
355. *Id.*
356. *Id.* at 667.

IX. THE NEED FOR A CHANGE

Brown highlighted the defects in Missouri's initiative statutes that have given rise to so many ballot title challenges in recent elections. Given this increase in the number of ballot title challenges and, in the most recent election, the fact that some groups stopped campaigning for their initiatives due to summaries they perceived to be biased,[357] perhaps Missouri's ballot title process needs a change. The proponents of an initiative should believe the process is working for them, not against them. A system of direct democracy perceived to be biased is of no use; for direct democracy to function properly, citizens must believe that they have been given a fair opportunity to have their voices heard.

Missouri's current system vests a substantial amount of power in the secretary of state. The secretary of state's power encompasses not only the authority to draft the summary statements themselves, but also, as recognized in *Brown*, includes great deference afforded to the secretary of state if the summary statement is challenged. In most cases, whatever language the secretary of state submits as the summary statement will make it onto the ballot, unless the summary patently misrepresents the measure. Furthermore, the secretary of state is a partisan elected official who is generally affiliated with a political party. Assuming responsibility for drafting summary statements could reasonably be delegated to one individual, the responsibility should be given to a non-elected individual without official ties to any political organization. However, just as the government is constrained by a system of checks and balances to avoid the any one branch or individual becoming too powerful, a more meaningful system of checks and balances should be implemented in relation to Missouri's initiative and referendum procedures.

Admittedly, as previously mentioned, a number of states employ procedures that are very similar to those found in Missouri. However, one of the more unique approaches can be found in Colorado, which has a system with a greater diffusion of power and enhanced checks and balances.

A. Colorado's Ballot Title Process

In Colorado, the petitioner begins by drafting the initiative using plain and non-technical language.[358] After drafting the proposal, the petitioner must submit it to the Legislative Council Staff to schedule a review and comment meeting.[359] Within two weeks of the filing, a public review and comment meeting is held "to review the language of the initiative to ensure

357. *See* Emison, *supra* note 213.

358. *Guidelines for the Initiative Process*, SCOTT GESSLER, COLO. SECRETARY ST., http://www.sos.state.co.us/pubs/elections/Initiatives/guide/1-Guidelines.html (last visited Oct. 10, 2013).

359. *Id.*

that the measure accomplishes the proponents' intent and to give public notice that a proposal is under consideration."[360] The Council provides written comments and makes them available online.[361] Following the meeting, the petitioner has an opportunity to amend the proposal before submitting it to the secretary of state.[362] However, if substantial changes are made to the petition, other than those suggested by the Council, the petitioner must submit a new draft back to the Legislative Council.[363] If no substantial changes are made, the petitioner files the draft with the secretary of state.[364]

Most significantly, Colorado uses a Title Board in lieu of the secretary of state to set the ballot title.[365] The Title Board consists of "designated officials from Legislative Council, the Attorney General's Office, and the Secretary of State's Office."[366] During a public hearing, the Title Board will determine if the petition satisfies Colorado's single subject requirement; if it does, the Title Board will set the ballot title.[367] If the proponent, or any other registered elector, is not satisfied with the ballot title set by the Title Board, a motion for rehearing that outlines the problems with the ballot title is filed with the secretary of state for the Title Board to hold another public hearing on the petition.[368] If, after the rehearing, the petitioner or another registered elector is still not satisfied with the ballot title set by the Title Board, they may file an appeal directly with the Colorado Supreme Court.[369]

Colorado's initiative and referendum system features several benefits not found in Missouri's system. First, the use of the Title Board to set the ballot title instead of the secretary of state ensures that a greater number of individuals review the materials. Furthermore, the Title Board is staffed by members of various government departments and not elected officials. Another benefit of Colorado's system is the Legislative Council's assistance to the petitioner in ensuring the full draft of the measure accurately reflects the petitioner's intentions will help ensure the measure is less ambiguous and therefore easier to enforce if voters approve it. The Legislative Council promotes consistency in the passing and enforcement of the state's laws. It is also beneficial to petitioners to have the option for a rehearing with the Title Board if they are not satisfied with the ballot title set by the

360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. *Title Board Hearing*, SCOTT GESSLER, COLO. SECRETARY ST., http://www.sos.state.co.us/pubs/elections/Initiatives/guide/2-TitleBoard.html (last visited Oct. 10, 2013).
368. *Id.*
369. *Id.*

Title Board due to the deference generally afforded to the drafting officials by the court system.

B. Systems Found in Other States

In Arizona, Arkansas, Florida, Illinois, Ohio, and Oklahoma, the proponent of the measure drafts his or her own ballot summary and then submits it for approval to a designated government official.[370] The other initiative states use ballot title boards, the attorney general, the secretary of state, or some combination of the three to draft the ballot summaries.[371]

While having the petitioner draft his or her own summary statement might be preferable to having a partisan elected official draft it, this system still has its drawbacks unless the submitted summary is coupled with some form of meaningful review. Certainly, many of the issues surrounding the perceived unfairness of secretary of state-drafted ballot summaries would be solved. Furthermore, there would likely be a dramatic reduction in the number of court challenges if petitioners provided their own summaries. However, absent substantive review by a government official, many petitioners would simply submit summaries that either presented the issue in a biased manner or misrepresented the proposal to garner additional votes. In Arizona, Arkansas, Florida, Illinois, Ohio, and Oklahoma, the presence of a government official to review the summary statements submitted by the petitioner helps protect against defective or deceiving summaries. An initiative and referendum process that both allows the petitioner to draft the ballot summary and also requires meaningful content review appears to be the best of both worlds – alleviating the discontent that results from a petitioner's disagreement with the secretary of state's summary draft while also ensuring that the summary is accurate and not likely to deceive voters. Such a system not only helps to promote direct democracy by remediating a potential hurdle for petitioners but also helps alleviate the issues of ballot title shopping and the increasing number of court challenges to summary statements.

X. CONCLUSION

The initiative and referendum serve as complementary companions to laws passed by legislatures. In instances where an issue is particularly controversial, or where the legislature has refused to act, the initiative process vests direct power in the people to effect meaningful change. However, the initiative and referendum procedures of many states needlessly suppress that direct power by vesting partisan elected officials with significant authority in

370. *Preparation of a Ballot Title and Summary*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/preparation-of-a-ballot-title-and-summary.aspx (last visited Jan. 4, 2013).

371. *See id.*

the initiative process. The current process has led not only to a vast increase in the number of ballot title challenges in recent years but also, in some instances, to groups abandoning their campaign efforts after receiving a ballot title they perceive to be unfair.

Featuring a system common to many other initiative and referendum states, Missouri's initiative and referendum procedure grants too much authority to one individual, the secretary of state, with a procedure for review that is very deferential to the language the secretary provides. To remedy this, some states, such as Colorado, have created ballot title boards and a multi-tier review process in an attempt to provide petitioners with a more comprehensive system of checks and balances to protect a process envisioned as a form of direct democracy. Still other states take another approach, letting petitioners draft their own ballot summaries and then subjecting the summaries to governmental review. To reduce the number of court challenges and to better empower the people to be more directly involved in the process, Missouri, and other states with similar systems, should consider adopting aspects from one of these two systems for creating ballot titles. Namely, initiative and referendum states should adopt some form of a title board or allow petitioners to draft the initial versions of the ballot title and then have the draft undergo review by unelected officials.

A draft of a statute that modifies several aspects of Missouri's current initiative and referendum procedures may be found in the Appendix. First, the statute allows for petitioners to submit his or her own proposed summary statement instead of having the secretary of state provide the draft. This change should lead not only to a reduction in the number of court challenges to aspects of the ballot title but should also address most of the allegations of bias or impropriety with the current system's procedures.

The statute also adopts Colorado's system of having a ballot title board review ballot titles submitted by the petitioner. After reviewing the petitioner's ballot title, the ballot title board would suggest changes to the petitioner's ballot title. After viewing the suggested changes and, if desired, implementing the title board's suggestions, the petitioner would request the title board's determination as to the sufficiency of the ballot title. If the ballot title is deemed insufficient, the petitioner may make changes to the ballot title is deemed sufficient. However, the petitioner cannot have the ballot title certified without the ballot title board's approval. The ballot title board would be comprised of the director of policy and governmental affairs for the secretary of state's office, the chief counsel of governmental affairs from the attorney general's office, and the director of communications and senior policy advisor to the state auditor's office. Every member of the ballot title board would be an unelected governmental official and each is from a different department so as to help insulate the board from excessive influence by any one government official. The ballot title board is a crucial aspect of the statute – this review would ensure that the petitioner's ballot title accurately represents the petitioner's intentions and is presented in a neutral manner.

With these proposed changes, the initiative and referendum process would better serve as the conduit through which direct democracy passes. The use of the initiative and referendum has increased dramatically in recent decades and its importance should not be understated – initiative and referendum have been used in connection with many of the most significant modern political and social issues. The initiative and referendum processes have been hampered, however, by ill-designed state procedures that permit bias and influence to enter the process. Initiatives and referenda were created to be free from the partisanship and control of elected officials; Missouri's current system allows those two forces to remain largely unchecked.

APPENDIX: DRAFT STATUTE

Missouri Fair Initiative Voting Act

Section 010. Definitions

As used in this chapter, unless the context otherwise indicates,

(1) "Ballot Title Board" means a three person committee that reviews fair ballot language statements, as established by section 116.165, RSMo;

(2) "County" means any one of the several counties of this state or the city of St. Louis;

(3) "Election authority" means a county clerk or board of election commissioners, as established by section 115.015, RSMo;

(4) "General election" means the first Tuesday after the first Monday in November in even-numbered years;

(5) "Official ballot title" means the summary statement and fiscal note summary prepared for all statewide ballot measures in accordance with the provisions of this chapter which shall be placed on the ballot and, when applicable, shall be the petition title for initiative or referendum petitions;

(6) "Statewide ballot measure" means a constitutional amendment submitted by initiative petition, the general assembly or a constitutional convention; a statutory measure submitted by initiative or referendum petition; the question of holding a constitutional convention; and a constitution proposed by a constitutional convention;

(7) "Voter" means a person registered to vote in accordance with section 115.151, RSMo.

Section 020. Application of laws

This chapter shall apply to elections on statewide ballot measures. The election procedures contained in chapter 115, RSMo, shall apply to elections on statewide ballot measures, except to the extent that the provisions of chapter 116 directly conflict, in which case chapter 116 shall prevail, and except to the extent that a constitutional convention's provisions under section 3(c) of article XII of the constitution directly conflict, in which case the convention's provisions shall prevail.

Section 025. Fair ballot language statements

The proponents of a statewide ballot measure shall include with his or her petition, fair ballot language statements that fairly and accurately explain what a vote and what a vote against the measure represent. Upon receipt of the petition, the ballot title board shall review the substance of the measure to ensure that the fair ballot language statement is an accurate and unbiased representation of the measure's content. If the ballot title board approves the language of the fair ballot language statement by a simple majority vote, then the proposed statement will be sent to the attorney general for final approval. If the ballot title board finds the fair ballot language statement to be insufficient, the ballot title board will return the fair ballot language statement to the petitioner with suggestions on how to properly remedy any deficiencies. Upon approval, each statement shall be posted in each polling place next to the sample ballot. Such fair ballot language statements shall be true and impartial statements of the effect of a vote for and against the measure in language neither intentionally argumentative nor likely to create prejudice for or against the proposed measure. In addition, such fair ballot language shall include a statement as to whether the measure will increase, decrease, or have no impact on taxes, including the specific category of tax. Such fair ballot language statements may be challenged in accordance with section 116.190. The attorney general shall within ten days approve the legal content and form of the proposed statements.

Section 050. Initiative and referendum petitions, requirements – contents

1. Initiative and referendum petitions filed under the provisions of this chapter shall consist of pages of a uniform size. Each page, excluding the text of the measure, shall be no larger than eight and one-half by fourteen inches. Each page of an initiative petition shall be attached to or shall contain a full and correct text of the proposed measure. Each page of a referendum petition shall be attached to or shall contain a full and correct text of the measure on which the referendum is sought.

2. The full and correct text of all initiative and referendum petition measures shall:

(1) Contain all matter which is to be deleted included in its proper place enclosed in brackets and all new matter shown underlined;

(2) Include all sections of existing law or of the constitution which would be repealed by the measure; and

(3) Otherwise conform to the provisions of article III, section 28 and article III, section 50 of the constitution and those of this chapter.

Section 165. Ballot title board – membership and procedures

1. The ballot title board shall be comprised of the director of policy and governmental affairs for the secretary of state's office, the chief counsel of governmental affairs from the attorney general's office, and the director of communications and senior policy advisor to the state auditor's office.

2. The ballot title board shall review and approve all fair ballot language statements, as provided in section 025. The members of the committee shall share equal voting rights and the position represented by the majority vote shall be the official position of the ballot title board with respect to that particular fair ballot language statement.

3. While the petitioner is entitled to revise a deficient fair ballot language statement until the ballot title board approves of his or her submission, in no circumstance may revisions occur beyond the submission deadline specified in this chapter. Furthermore, the ballot title board shall not submit the fair ballot language statement to the attorney general over the objection of the petitioner.

Section 175. Proposed measure, assessment of fiscal impact – fiscal note and summary – approval of content

1. Except as provided in section 116.155, upon receipt from the secretary of state's office of any petition sample sheet, joint resolution or bill, the auditor shall assess the fiscal impact of the proposed measure. The state auditor may consult with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal. Proponents or opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140, RSMo, provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state.

2. Within twenty days of receipt of a petition sample sheet, joint resolution or bill from the secretary of state, the state auditor shall prepare a fiscal note and a fiscal note summary for the proposed measure and forward both to the attorney general.

3. The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities. The fiscal note summary shall contain no more than fifty words, excluding articles, which shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure.

4. Upon completion of the fiscal note and fiscal note summary, the state auditor shall send a copy of the proposed language to the petitioners for his or her review. If the petitioner believes the fiscal note and fiscal note summary to be argumentative or likely to create prejudice either for or against the proposed measure, the petitioner is entitled to suggest changes to the state auditor to remedy and alleged deficiency. The state auditor shall review the proposed changes to the fiscal note and fiscal note summary and, if the state auditor believes in good faith that the original language was a more accurate characterization of the projected fiscal impact, may forward the fiscal note and fiscal note summary to the attorney general, over the petitioner's objections.

5. The attorney general shall, within ten days of receipt of the fiscal note and the fiscal note summary, approve the legal content and form of the fiscal note summary prepared by the state auditor and shall forward notice of such approval to the state auditor.

6. If the attorney general or the circuit court of Cole County determines that the fiscal note or the fiscal note summary does not satisfy the requirements of this section, the fiscal note and the fiscal note summary shall be returned to the auditor for revision. A fiscal note or fiscal note summary that does not satisfy the requirements of this section also shall not satisfy the requirements of section 116.180.

Section 180. Official summary statement may be challenged, procedure – who are parties defendant – changes may be made by court

Within three days after receiving the official summary statement, the approved fiscal note summary, and the fiscal note relating to any statewide ballot measure, the secretary of state shall certify the official ballot title in separate paragraphs with the fiscal note summary immediately following the summary statement of the measure and shall deliver a copy of the official ballot title and the fiscal note to the speaker of the house or the president pro tem of the legislative chamber that originated the measure or, in the case of initiative or referendum petitions, to the person whose name and address are designated under section 116.332. Persons circulating the petition shall affix the official ballot title to each page of the petition prior to circulation and signatures shall not be counted if the official ballot title is not affixed to the page containing such signatures.

Section 190. Fiscal note or fiscal note summary may be challenged, procedure – who are parties defendant – changes may be made by court

1. Any citizen who wishes to challenge the fiscal note prepared for a proposed constitutional amendment submitted by the general assembly, by initiative petition, or by constitutional convention, or for a statutory initia-

tive or referendum measure, may bring an action in the circuit court of Cole County. The action must be brought within ten days after the official ballot title is certified by the secretary of state in accordance with the provisions of this chapter.

2. When the action challenges the fiscal note or the fiscal note summary prepared by the auditor, the state auditor shall be named as a party defendant.

3. The petition shall state the reasons why the fiscal note or the fiscal note summary portion of the official ballot title is insufficient or unfair and shall request a different fiscal note or fiscal note summary portion of the official ballot title.

4. The action shall be placed at the top of the civil docket. Insofar as the action challenges the fiscal note or the fiscal note summary portion of the official ballot title, the court shall consider the petition, hear arguments, and in its decision, either certify the fiscal note or the fiscal note summary portion of the official ballot title to the secretary of state or remand the fiscal note or the fiscal note summary to the auditor for preparation of a new fiscal note or fiscal note summary pursuant to the procedures set forth in section 116.175. Any party to the suit may appeal to the supreme court within ten days after a circuit court decision. In making the legal notice to election authorities under section 116.240, and for the purposes of section 116.180, the secretary of state shall certify the language which the court certifies to him.