

2020

## Execution on the Ballot: Lessons for Judicial Review of Ballot Measures from the Death Penalty Referendum in Nebraska

Kait Madsen

*University of Nebraska College of Law*

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

---

### Recommended Citation

Kait Madsen, *Execution on the Ballot: Lessons for Judicial Review of Ballot Measures from the Death Penalty Referendum in Nebraska*, 99 Neb. L. Rev. 254 (2020)

Available at: <https://digitalcommons.unl.edu/nlr/vol99/iss1/8>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Comment\*

# Execution on the Ballot: Lessons for Judicial Review of Ballot Measures from the Death Penalty Referendum in Nebraska

## TABLE OF CONTENTS

I. Introduction .....	255
II. Background .....	257
A. Current Climate: Increased Voter-Led Ballot Measures .....	257
1. Recent Trend Toward Policy Creation Through Voter-Led Ballot Measures .....	257
2. Reasons for the Trend: Americans' Heightened Distrust of Government and the Political Process .....	258
3. Voter-Led Ballot Measures Are Often Challenged in State Courts, Making Courts an Important Player in the Ballot Measure Process .....	260
B. Judicial Review of Ballot Measures: Three Perspectives .....	262
1. Perspective One: Ballot Measure Policies Reflect the Will of the People, and Courts Should Therefore Be Highly Deferential to Voters' Choice .....	262
2. Perspective Two: The Non-Legislative Origin of Ballot Measure Policies Mandates a Heightened Level of Judicial Scrutiny .....	265

---

© Copyright held by the NEBRASKA LAW REVIEW. If you would like to submit a response to this Comment in the *Nebraska Law Review Bulletin*, contact our Online Editor at lawrev@unl.edu.

\* Kait Madsen, J.D. Candidate, University of Nebraska College of Law, 2021. I would like to thank my husband, Brady Wells, and my family for their constant support and encouragement throughout law school and beyond. Thank you to the *Nebraska Law Review*, especially Executive Editor Hailey Hearn and Editor-in-Chief Shayna Bartow, for their work in preparing this Comment for publication.

3.	Perspective Three: Courts Should Examine Ballot Measures with the Same Level of Scrutiny Used for Comparable Policies Passed Through the Legislature .....	270
C.	Nebraska's Repeal & Reinstatement of the Death Penalty: A Case Study.....	271
1.	Background .....	271
2.	<i>Hargesheimer v. Gale</i> : The Pre-Election Challenge .....	273
3.	The Election and Aftermath: Ballot Confusion, Subsequent Legal Challenges, and an Execution .....	274
III.	Analysis .....	277
A.	Lessons from Nebraska: Adopting a Rule of Pre- Election Deference and Post-Election Legislative Mirroring .....	277
IV.	Conclusion .....	282

## I. INTRODUCTION

In 1934, a group of Nebraskans, excited about the possibility of a new form of efficient, transparent<sup>1</sup> state government, collected roughly sixty thousand signatures to place the following language on the general election ballot:

An amendment to the Constitution of Nebraska providing that beginning with the regular session of the legislature in 1937 the legislative authority of the state shall be vested in a legislature consisting of one house of not less than thirty nor more than fifty members, the members to be nominated and elected in a non-partisan manner.<sup>2</sup>

Nearly 60% of voters voted in support of the initiative and Nebraska adopted the only unicameral, non-partisan state legislature in the United States.<sup>3</sup> Like the introduction of ballot measures during the Progressive Reform movement in the early twentieth century, the creation of Nebraska's Unicameral responded to a desire to curb abuses of power and corruption in government.<sup>4</sup> While Nebraskans do not use

1. *See History of the Nebraska Unicameral: The Birth of a Unicameral*, NEB. LEGISLATURE, [https://nebraskalegislature.gov/about/history\\_unicameral.php](https://nebraskalegislature.gov/about/history_unicameral.php) [https://perma.unl.edu/3CVH-7PEM] (last visited Sept. 12, 2019).

2. TRAVIS MOORE, NEB. LEGISLATIVE RESEARCH OFFICE, INITIATIVE AND REFERENDUM IN NEBRASKA 9 (2017), [https://nebraskalegislature.gov/pdf/reports/research/initiative\\_referendum\\_2017.pdf](https://nebraskalegislature.gov/pdf/reports/research/initiative_referendum_2017.pdf) [https://perma.unl.edu/9Y8L-MY88].

3. *Id.*

4. *Id.* at 7. States' adoption of ballot measures as a means for enacting public policy, including Nebraska's adoption of such measures in 1912, grew out of the Progressive Era as American interest in forms of direct democracy increased in the 1880s and 1890s. *See also* Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 54 (1995)

ballot measures nearly as frequently as other states,<sup>5</sup> ballot measures play an important role in the state's history and raise questions about the role courts should play in reviewing challenges to ballot measures.

This Comment argues that the appropriate level of judicial review of ballot measures is (1) high deference to voters and “[liberal construction] to promote the democratic process”<sup>6</sup> in reviewing procedural challenges before the election, and (2) “legislative mirroring” for challenges to newly enacted laws *after* an election. This Comment uses the repeal and reinstatement of the death penalty in Nebraska as a case study on the use of ballot measures, the limitations of using ballot measures to create public policy, and the important role of Nebraska courts in recognizing that ballot measures are both “[t]he first power reserved by the people”<sup>7</sup> and the expression of a “majority . . . united by a common interest” where “the rights of the minority will be insecure.”<sup>8</sup>

Section II.A introduces the current trend toward more voter-led ballot measures in states across the country. Additionally, section II.A examines the reasons for this trend and how ballot measures provide a solution to voters' heightened disillusion with governmental institutions. A discussion of judicial responses to legal challenges to ballot measures follows in section II.B, which includes three different perspectives on the role courts should assume in reviewing the measures. Then, section II.C uses the death penalty ballot referendum in Nebraska as a case study, examining the background of the issue, the pre-election challenge to the ballot measure in *Hargesheimer v. Gale*, and subsequent legal challenges post-election. Part III argues that the voter-deferential approach adopted by Nebraska courts should continue to be applied pre-election, but post-election, laws enacted through ballot measures should be reviewed with the same level of scrutiny applied to comparable laws passed by the legislature. Finally, the conclusion in Part IV discusses the potential implications of the voter-led ballot measure trend in upcoming elections.

---

(noting that nineteen states authorized statewide ballot measures between 1898 and 1918).

5. See, e.g., CAL. SEC'Y OF STATE, INITIATIVE TOTALS BY SUMMARY YEAR 1912 – JANUARY 2019 (2019), <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/initiative-totals-summary-year.pdf> [<https://perma.unl.edu/YLM6-NZUJ>]. Between 1912 and January 2019, Californians qualified 376 ballot measures for their election ballots. *Id.*
6. *Stewart v. Advanced Gaming Techs., Inc.*, 272 Neb. 471, 485, 723 N.W.2d 65, 77 (2006).
7. NEB. CONST. art. III, § 2 (“The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature.”).
8. THE FEDERALIST NO. 51, at 265 (James Madison) (Ian Shapiro ed., 2009).

## II. BACKGROUND

### A. Current Climate: Increased Voter-Led Ballot Measures

#### 1. Recent Trend Toward Policy Creation Through Voter-Led Ballot Measures

Over the past few years, and particularly since the November 2016 election, legislative change through voter-led ballot measures has trended upwards.<sup>9</sup> This Comment uses the term “ballot measures” broadly to refer to instances where proponents of a particular policy collect a designated number of signatures to place the issue on an election ballot and allow voters to directly decide whether to support or oppose the issues without relying on elected officials.<sup>10</sup> During the 2018 elections, there were more than 150 ballot measures<sup>11</sup> in thirty-seven states.<sup>12</sup> The initiatives covered some of the country’s most contentious issues: health care, criminal justice reform, legalization of marijuana, transgender rights, and voting rights.<sup>13</sup>

Before the recent upward trend in ballot measures, there was a long-term trend of decreasing ballot measures in states since 2006, largely because state legislatures put fewer constitutional amendments on ballots.<sup>14</sup> However, 2016 marked a turnaround with “an un-

---

9. Vann R. Newkirk II, *American Voters Are Turning to Direct Democracy*, ATLANTIC (Apr. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/04/citizen-ballot-initiatives-2018-elections/558098/> [https://perma.unl.edu/EMH5-9RCF].

10. See NEB. CONST. art. III, § 2. In Nebraska, if the proposed ballot initiative is to enact a law, 7% of registered voters must sign the petition. *Id.* If the proposed initiative is for a constitutional amendment, 10% of registered voters must sign. *Id.* In both instances, the petition signatures must consist of at least 5% of registered voters in two-fifths of the Nebraska counties. *Id.* For ballot referendums, a total of 5% of registered voters must sign the petition and the signatures must be from 5% of the registered voters in two-fifths of the Nebraska counties. *Id.* at art. III, § 3. In Nebraska, ballot measures include both ballot initiatives and referendums. An *initiative* allows citizens to propose a statute or constitutional amendment. See MOORE, *supra* note 2, at 4. A *referendum* allows voters to “refer” laws passed by the legislature to the ballot for voters to repeal or approve. *Id.* at 5. Terms and definitions vary by state. Additionally, many ballot measures occur at the city level, both in Nebraska and elsewhere. For more information and terminology, see NEB. SEC’Y OF STATE, HOW TO USE THE INITIATIVE AND REFERENDUM PROCESS IN NEBRASKA: THE PETITION PROCESS (2019), <https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2018/state-initiative-and-referendum-packet.pdf> [https://perma.unl.edu/Z3BJ-PG2P].

11. Dana Goldstein & Kirk Johnson, *Voters Weigh In on Key Issues Through More than 150 Ballot Initiatives*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/us/politics/ballot-initiatives-referendum.html> [https://perma.unl.edu/RKD4-6YNR].

12. Jim Carlton, *Voters in 37 States to Decide Ballot Measures*, WALL ST. J. (Nov. 5, 2018, 5:30 AM), <https://www.wsj.com/articles/voters-in-37-states-to-decide-ballot-measures-1541413801> [https://perma.unl.edu/TR9V-UKME].

13. Goldstein & Johnson, *supra* note 11.

14. Newkirk, *supra* note 9.

deniable increase in the interest and the number” of ballot measures.<sup>15</sup> The total number of voter-led ballot measures that made it to the ballot in 2016 more than doubled the total amount from 2014.<sup>16</sup> This means that while state legislatures have been putting fewer issues on the ballot, voters themselves have been rapidly increasing the number of citizen-led measures.<sup>17</sup> Perhaps most significantly, ballot measures are becoming a more important vehicle for changing public policy in conservative states that have not traditionally used them, including Nebraska.<sup>18</sup>

## 2. *Reasons for the Trend: Americans’ Heightened Distrust of Government and the Political Process*

The increase in voter-led ballot measures corresponds with Americans’ heightened distrust of government and disillusion with voters’ ability to effect change through the political process.<sup>19</sup> According to the *Economist’s* annual Democracy Index report, the United States qualified as a flawed democracy for the third year in a row in 2018.<sup>20</sup> Explaining why voters seek alternative ways to change policy, the report states:

The US has fallen in the global rankings over the past decade . . . This primarily reflects a deterioration in the *functioning of government* category, as political polarisation has become more pronounced and public confidence in institutions has weakened. Public frustration with institutions has been brewing for years . . .<sup>21</sup>

While public frustration has been deepening for years, it recently reached a tipping point as President Donald Trump “tapped into parti-

- 
15. *Id.* (quoting a statement by Josh Altic, director of a ballot initiatives project for the online political encyclopedia Ballotpedia).
  16. *Id.* There were 71 ballot measures on state ballots in 2016, which represented a “high-water mark in elections over the past decade.” *Id.* That number more than doubled for the 2018 election. *See* Goldstein & Johnson, *supra* note 11.
  17. Newkirk, *supra* note 9.
  18. *See* Brady Dennis & David Weigel, *From Medicaid to Minimum Wage, Even Red State Voters Backed Progressive Measures*, WASH. POST (Nov. 7, 2018, 7:03 PM), [https://www.washingtonpost.com/national/health-science/from-medicare-to-minimum-wage-even-red-state-voters-backed-progressive-measures/2018/11/07/b0b61572-e2bc-11e8-ab2c-b31dcd53ca6b\\_story.html](https://www.washingtonpost.com/national/health-science/from-medicare-to-minimum-wage-even-red-state-voters-backed-progressive-measures/2018/11/07/b0b61572-e2bc-11e8-ab2c-b31dcd53ca6b_story.html) [<https://perma.unl.edu/6DZH-JSAL>].
  19. *See* Joshua J. Dyck & Edward L. Lascher Jr., *Expanding Direct Democracy Won’t Make Americans Feel Better About Politics*, SALON (Sept. 22, 2019, 10:59 AM), [https://www.salon.com/2019/09/22/expanding-direct-democracy-wont-make-americans-feel-better-about-politics\\_partner/](https://www.salon.com/2019/09/22/expanding-direct-democracy-wont-make-americans-feel-better-about-politics_partner/) [<https://perma.unl.edu/6VR3-QPZ3>] (arguing that Americans are using ballot measures in response to an increased dissatisfaction with representative democracy, partisan divisions, and a distrust that the system will produce their desired results).
  20. ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2018: ME TOO? 10–12 (2019), [https://275rzy1ul4252pt1hv2dqyuf-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Democracy\\_Index\\_2018.pdf](https://275rzy1ul4252pt1hv2dqyuf-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Democracy_Index_2018.pdf) [<https://perma.unl.edu/D4TK-GCM2>].
  21. *Id.* at 11.

san tensions,”<sup>22</sup> continuing Congress’s gridlock and ineffectiveness—so much so that members of Congress themselves express frustration with the disfunction.<sup>23</sup> Further, two-thirds of adults in the U.S. think that other Americans have little to no confidence in the federal government, and most think that faith in the government—and one another—continues to shrink.<sup>24</sup> The majority of Americans also believe that the distrust in other citizens and the government makes it more difficult to solve some of the country’s most pressing problems.<sup>25</sup>

In this environment of heightened distrust of political and governmental institutions, ballot measures serve a variety of benefits and give voters an outlet to directly decide policy issues without relying on elected officials. Citizen-led ballot measures provide an opportunity for voters to use direct democracy to bypass their state legislatures and create new laws, particularly “where a bipartisan consensus among voters on a specific policy wasn’t matched by members of the legislature.”<sup>26</sup> The widespread success of ballot initiatives across the ideological spectrum during the 2018 election showed the power of initiatives in furthering citizens’ political priorities, especially where the priorities did not align with the priorities of their elected officials.<sup>27</sup> Ballot measures further serve as a means for voters to take control of democracy and improve the effectiveness of government, as seen with ballot measures that attempt to end partisan gerrymandering, increase voter access, and increase transparency in campaign financing.<sup>28</sup>

---

22. *Id.*

23. Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html> [https://perma.unl.edu/3Q9Y-YSMX] (“The sense of gloom is bipartisan. . . . And few lawmakers can muster a word of pride in their institution.”).

24. LEE RAINIE ET AL., PEW RES. CTR., *Trust and Distrust in America* 3 (2019), <https://www.people-press.org/2019/07/22/trust-and-distrust-in-america/> [https://perma.unl.edu/68Z7-32SM].

25. *Id.* According to three surveys conducted by Pew Research Center between September 2018 and March 2019, American adults consider the following to be “very big problem[s]” facing the country: drug addiction, affordability of health care, ethics in government, affordability of higher education, the ability of Republicans and Democrats to work together, the role of special interest groups in Washington, the operation of the political system, the wealth gap between rich and poor, made-up news and information, violent crime, climate change, Americans’ level of agreement on basic facts, Americans’ level of confidence in the federal government, racism, illegal immigration, the quality of K-12 public schools, terrorism, sexism, Americans’ level of confidence in each other, and job opportunities. *Id.*

26. Newkirk, *supra* note 9.

27. See Ilana Cohen, *The Power of Ballot Initiatives*, HARV. POL. REV. (Dec. 10, 2018), <http://harvardpolitics.com/united-states/the-power-of-ballot-initiatives/> [https://perma.unl.edu/45L5-NQKP].

28. *Democracy on the 2018 Ballot: Voters Take on Reform in Their States and Towns*, CAMPAIGN LEGAL CTR. (Oct. 3, 2018), <https://campaignlegal.org/update/democ>

3. *Voter-Led Ballot Measures Are Often Challenged in State Courts, Making Courts an Important Player in the Ballot Measure Process*

The rise in voter-led ballot measures also means that state courts are placed in an important position because many ballot measures face legal challenges from opponents. There are generally two types of legal challenges to ballot measures: procedural and substantive.<sup>29</sup> Procedural challenges typically allege that the ballot initiative proponents did not comply with the required procedures to place the issue on the ballot,<sup>30</sup> including failure to meet deadlines or obtain sufficient signatures. Procedural challenges almost always occur before an election, which determines whether an issue can appear before voters on the ballot.<sup>31</sup>

Substantive challenges, on the other hand, generally allege that the topic or function of the ballot measure oversteps state-imposed subject matter requirements.<sup>32</sup> Many, but not all, courts postpone review of substantive challenges to ballot measures until after the election, unless the subject of the measure is clearly invalid.<sup>33</sup> Justifications of post-election review of substantive challenges to ballot measures include (1) preserving judicial economy by waiting to see if a measure passes before reviewing it, and (2) maintaining separation of powers by limiting a court's pre-election review of measures for the same reasons a court does not review legislation until after it is enacted.<sup>34</sup> However, the courts that conduct pre-election review of substantive challenges justify their actions by distinguishing between the legislative process and the ballot measure process; when legislatures propose a bill, the proposed law can be altered at any time until it is enacted, but the language submitted to voters in ballot measures cannot be altered.<sup>35</sup>

---

racy-2018-ballot-voters-take-reform-their-states-and-towns [https://perma.unl.edu/WR4N-RYX5]; see also Jon Kamp, *On the Ballot in Some States Ahead of 2020: The Right to Vote*, WALL ST. J. (Aug. 1, 2018, 8:02 AM), https://www.wsj.com/articles/fall-ballot-decisions-on-voters-rights-to-influence-2020-race-1533124929 [https://perma.unl.edu/FD9K-3N35] (stating that ballot initiatives across the country are giving voters the chance to “expand or limit access to the polls” ahead of the 2020 election).

29. ELIZABETH BIRCHER, ELECTION LAW MANUAL: CHAPTER 4: STATE REGULATION OF BALLOT MEASURES 9 (2008), <http://www.electionlawissues.org/Resources/Election-Law-Manual.aspx> [https://perma.unl.edu/S3WD-VY8U].

30. See *id.* at 9–10.

31. *Id.*

32. *Id.* at 11.

33. *Id.* A measure could be “clearly invalid” if the proposed law would be unconstitutional under the state or federal constitution or if the proposal exceeds the bounds of state-approved topics for ballot measures. *Id.*

34. *Id.* at 12.

35. *Id.*

After a wave of successful ballot measures in the 2018 election, legal challenges to these ballot measures arose across the country. In Florida, for example, courts reviewed several lawsuits against ballot measures passed in the 2018 election.<sup>36</sup> Other state courts reviewed multiple ballot measure lawsuits, including Arizona,<sup>37</sup> Missouri,<sup>38</sup>

- 
36. *See* *Cty. of Volusia v. Detzner*, 253 So. 3d 507 (Fla. 2018). Two counties sued the Florida Department of State and Secretary of State arguing that the ballot title and summary of a ballot measure, Amendment 10, misled voters by failing to describe the measure's chief purpose. *Id.* at 510. For more information about this pre-election lawsuit, see Mary Ellen Klas, *Miami-Dade Sues to Block Amendment That Would Force It to Have an Elected Sheriff*, MIAMI HERALD (July 17, 2018, 6:30 PM), <https://www.miamiherald.com/news/politics-government/election/article215034905.html> [<https://perma.unl.edu/NVG2-BN5B>] (explaining that Miami-Dade joined the two other counties seeking to invalidate Amendment 10, which was set to appear on the November ballot, arguing that it was misleading to voters). One of the counties involved in the first lawsuit, Volusia County, filed another lawsuit after Florida voters approved Amendment 10. *See* Jim Saunders, *Volusia County Sues to Get Exempted from Amendment 10*, ORLANDO SENTINEL (Dec. 18, 2018, 6:45 PM), <https://www.orlandosentinel.com/politics/os-ne-volusia-county-amendment-10-20181218-story.html> [<https://perma.unl.edu/M6L7-QXDZ>] (explaining that after voters approved Amendment 10, Volusia County sued the Governor and Secretary of State of Florida claiming that the measure should not have a retroactive effect). Additionally, there were other ballot measure lawsuits reviewed in Florida related to different ballot issues. *See* Gary Fineout, *Victims' Rights Amendment Could Be Taken off Florida Ballot*, ORLANDO SENTINEL (July 16, 2018, 8:25 PM), <https://www.orlandosentinel.com/politics/os-marsys-law-ballot-amendment-20180716-story.html> [<https://perma.unl.edu/Z4AX-MV3X>] (describing pre-election challenge to ballot measure establishing crime victims' rights); Dara Kam, *Greyhound Association Sues Over Amendment to Ban Dog Racing*, S. FLA. SUN SENTINEL (May 17, 2018, 2:20 PM), <http://www.sun-sentinel.com/news/politics/florida-politics-blog/fl-reg-greyhound-racing-challenge-20180517-story.html> [<https://perma.unl.edu/3DAF-BJ3N>] (describing pre-election challenge to ballot measure involving dog racing ban); P.R. Lockhart, *A Controversial Florida Law Stops Some Former Felons from Voting. A Judge Just Blocked Part of It*, VOX (Oct. 19, 2019, 2:53 PM), <https://www.vox.com/policy-and-politics/2019/7/2/20677955/amendment-4-florida-felon-voting-rights-lawsuits-fines-fees> [<https://perma.unl.edu/WU63-RT5B>] (explaining how a federal judge issued a preliminary injunction blocking part of a law opponents described as a "poll tax," which was passed by the Florida legislature and contradicted Floridians' voter-enacted ballot measure to restore felon voting rights).
37. *See* Howard Fischer, *Arizona Supreme Court Throws 'Invest in Ed' Initiative off Ballot*, ARIZ. DAILY STAR (Aug. 29, 2018), [https://tucson.com/news/local/arizona-supreme-court-throws-invest-in-ed-initiative-off-ballot/article\\_ff493910-7797-5ec7-b28a-d6c958a105fe.html](https://tucson.com/news/local/arizona-supreme-court-throws-invest-in-ed-initiative-off-ballot/article_ff493910-7797-5ec7-b28a-d6c958a105fe.html) [<https://perma.unl.edu/UF2G-XXMH>] (explaining the court's determination that the language of a ballot measure to increase education funding "create[d] a significant danger of confusion or unfairness" (quoting a statement by Chief Justice Scott Bales)); Howard Fischer, *Judge Rules Clean Elections Ballot Proposal Can Go Before Arizona Voters*, ARIZ. DAILY STAR (July 17, 2018), [https://tucson.com/news/local/judge-rules-clean-elections-ballot-proposal-can-go-before-arizona/article\\_072d1778-e21f-516d-99f6-d14f42b626af.html](https://tucson.com/news/local/judge-rules-clean-elections-ballot-proposal-can-go-before-arizona/article_072d1778-e21f-516d-99f6-d14f42b626af.html) [<https://perma.unl.edu/3NUR-VLF6>].
38. *See* Kurt Erickson, *Judge Says Missouri Gas Tax Question Can Stay on Ballot*, ST. LOUIS POST-DISPATCH (Aug. 14, 2018), <https://www.stltoday.com/news/local/>

and Utah.<sup>39</sup> Yet courts and scholars have given little attention to the relationship between direct democracy and the judiciary.<sup>40</sup> Accordingly, the role of the courts and the approach courts take to judicial review of ballot measures must be thoughtfully examined.

## B. Judicial Review of Ballot Measures: Three Perspectives

There are three perspectives as to what level of judicial review courts should use for reviewing challenges to ballot measures.

### 1. *Perspective One: Ballot Measure Policies Reflect the Will of the People, and Courts Should Therefore Be Highly Deferential to Voters' Choice*

One perspective on the approach courts should take in reviewing challenges to ballot measures is to be especially deferential to voters' decisions because ballot measures directly reflect the will of voters. Advocates of this approach argue that tools of direct democracy, like ballot measures, achieve a more effective government for several reasons.<sup>41</sup> First, placing the power to create laws in the hands of the voters reduces corruption and the influence of special interests in the

---

govt-and-politics/judge-says-missouri-gas-tax-question-can-stay-on-ballot/article\_bf63e56a-5a89-5398-b485-d1cdd616f1ad.html [https://perma.unl.edu/4UPT-PWUJ] (describing pre-election challenge to ballot measure increasing gas tax); Allison Kite, *Missouri Ethics Reform, Redistricting Initiative Tossed from November Ballot by Judge*, KAN. CITY STAR (Sept. 14, 2018, 11:57 AM), https://www.kansascity.com/news/politics-government/election/article218396050.html [https://perma.unl.edu/GH6S-DCVN] (describing pre-election challenge to ballot measure containing proposals for redistricting and lowering campaign donation limits); Tyler Wornell, *Marijuana Initiative Organizer Sues to Get Other Two Removed from Ballot*, JOPLIN GLOBE (Aug. 13, 2018), https://www.joplinglobe.com/news/local\_news/marijuana-initiative-organizer-sues-to-get-other-two-removed-from/article\_18629bde-9f91-5f12-a581-b0e6b9dfadf4.html [https://perma.unl.edu/97A6-HXJX] (describing pre-election challenge to two medical marijuana ballot measures).

39. See Bryan Schott, *Count My Vote Appeals to the Supreme Court Claiming Utah's Signature Removal Process for Initiatives is Unconstitutional*, UTAHPOLICY.COM (June 15, 2018), https://utahpolicy.com/index.php/features/today-at-utah-policy/16963-count-my-vote-appeals-to-the-supreme-court-claiming-utah-s-signature-removal-process-for-initiatives-is-unconstitutional [https://perma.unl.edu/9KKP-KSXS] (describing challenge to Utah election law that allows petition signers to remove their names after signatures are turned in to the state); Ben Winslow, *Opponents Sue to Block Medical Marijuana from Going on the November Ballot in Utah*, FOX 13 SALT LAKE CITY (May 18, 2018, 3:29 PM), https://fox13now.com/2018/05/18/opponents-sue-to-block-medical-marijuana-from-going-on-the-november-ballot/ [https://perma.unl.edu/7S5K-5T5Q] (describing pre-election challenge to ballot measure legalizing medical marijuana).

40. Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2749 (2005) [hereinafter *Judicial Approaches*].

41. *Id.* at 2754.

legislative process.<sup>42</sup> In the nineteenth and twentieth centuries, ballot measures originated as a means for circumventing monied influence in politics.<sup>43</sup> In this way, ballot measures have an instrumental value: curtailing the power and influence of special interest groups in order to satisfy majoritarian policy preferences.<sup>44</sup> They serve as a tool to advance agendas that are not otherwise able to withstand the legislative process.<sup>45</sup>

Second, proponents of a voter-deferential approach are concerned with the agency of voters and the ability of direct democracy to shape a better-informed—and more politically engaged—citizenry.<sup>46</sup> Ballot measures can “increase popular participation in and responsibility for government, provide a permanent instrument of civic education, and give popular talk the reality and discipline that it needs to be effective.”<sup>47</sup> Proponents of this approach view attempts by courts to interfere and overturn voters’ decisions as examples of elitism and

---

42. *Id.* at 2754–55.

43. Collins & Oesterle, *supra* note 4, at 56. The authors explain that the early proponents of ballot measures hoped to “allow citizens to enact measures to curb legal privileges of wealth. Populists saw the initiative as a means to enact redistributive measures.” *Id.*

44. Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1709 (2007). Mikos also argues that ballot measures safeguard federalism, as citizens tend to favor local and state governments and seek to protect themselves from federal encroachment. *Id.* at 1711–12.

45. K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 222–23 (2005).

46. *Judicial Approaches*, *supra* note 40, at 2755. *But see* Sherman J. Clark, *The Character of Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 341 (2004) (arguing that ballot measures foster a community where the function of law and government is to simply satisfy individual preferences and demands). Sherman writes:

[Ballot measures] encourage citizens to do one thing above all—announce their desires and preferences. Voting on an initiative or referendum, a citizen is not required to do anything that might be difficult or costly. There is no work involved, no service, and no sense of putting oneself on the line. The citizen is invited to exercise power, but is not required, or even encouraged, to come to terms with his or her agency in the consequences. Nor are voters in this context encouraged to think in terms of their connections with or potential obligations toward others. . . . Far from ‘civic maturation,’ this is arguably the participation of an infant, who has learned to say ‘I want,’ but little else.

*Id.* at 344. Sherman further compares ballot measures to military service, another activity known for fostering civic responsibility. *Id.* at 355. However, Sherman argues that the civic engagement fostered by military service differs from ballot measures in two key ways: (1) the military requires service and sacrifice, with a focus on contributing to the community rather than satisfying individual demands, and (2) military service demands accepting responsibility for one’s actions. *Id.* at 356–57.

47. Dyck & Lascher, *supra* note 19 (quoting BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 284 (1984)).

paternalism.<sup>48</sup> The attempts also show a lack of trust in voters' ability to make reasonable decisions for themselves.<sup>49</sup> When courts overturn the majority's will, voters can become cynical and disengaged from the political process.<sup>50</sup>

Finally, and most importantly, advocates of a voter-deferential approach argue that ballot measures more accurately reflect the will of the people and, therefore, better serve the public interest.<sup>51</sup> Ballot measures typically involve large numbers of voters, many of whom are not ordinarily involved in political processes.<sup>52</sup> Proponents argue that when voters pass a ballot measure, the newly-passed law reflects the will of the majority more effectively than a law passed through the legislature.<sup>53</sup> Ballot measures were designed specifically to address the problems of stalled representative governments.<sup>54</sup> Ultimately, proponents argue, majority rule is a fundamental principle of democracy, one that can improve the accuracy and efficiency of the government.<sup>55</sup>

---

48. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1584–85 (1990).

49. *Id.* For a discussion of an alternative approach demonstrating trust in voters' decision-making, see Ethan J. Leib, *Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch*, 33 RUTGERS L.J. 359 (2002) (proposing a fourth branch of government, the "Popular Branch," which would be a deliberative assembly comprised of citizens). Leib proposes that within the Popular Branch: "[O]rganizers in civil society could collect signatures to take action themselves. Political consultants would be hired, and experts would be consulted. A bill . . . would be drafted without state intervention." *Id.* at 404.

50. Eule, *supra* note 48, at 1585 ("Precisely because judicial actions regarding ballot measures are highly visible, there is a substantial danger that these decisions will engender popular cynicism . . . [W]e run the risk that these majorities will cease to see these issues as something they ought to care about.").

51. *Judicial Approaches*, *supra* note 40, at 2755.

52. Collins & Oesterle, *supra* note 4, at 57.

53. See *id.* at 58. Collins and Oesterle are critical of the conclusion that ballot measures more accurately reflect the majority will. They point to the influence of money, the fact that voters tend to be more affluent and better-educated, and that some measures are passed simply out of voter confusion. *Id.* Yet they acknowledge "[i]t is natural to assume that direct is better, more nearly perfect, than indirect—that the ideal of consent of the governed is better achieved by consenting to the laws themselves, rather than to representative lawmakers. This argument from the logic of democracy surely has much to do with the initiative's popularity." *Id.* at 55.

54. K.K. DuVivier, *Fast-Food Government and Physician-Assisted Death: The Role of Direct Democracy in Federalism*, 86 OR. L. REV. 895, 912 (2007) (arguing that ballot measures are a form of "fast-food government": not ideal in the long-term but the best option in certain situations, such as when people want to act when the legislature is unresponsive for social or political reasons).

55. Collins & Oesterle, *supra* note 4, at 58–63. Some scholars, economists, and ballot measure advocates argue that ballot measures make government more efficient and reduce costs overall. *Id.* Collins and Oesterle state that it is difficult to fully assess these claims. *Id.*

2. *Perspective Two: The Non-Legislative Origin of Ballot Measure Policies Mandates a Heightened Level of Judicial Scrutiny.*

Some scholars argue that laws enacted through ballot measures have several important flaws that mandate a heightened level of judicial scrutiny. First, critics like legal scholar Julian Eule argue that the Founding Fathers did not intend for the government to function as a direct democracy; rather, the U.S. Constitution creates and guarantees a republican form of government for states<sup>56</sup> so that a representative group of elected officials can limit the threat of oppressive majority and minority factions in the lawmaking process.<sup>57</sup> In other words, the gap between the will of the majority and the voice of the legislature exists by constitutional design.<sup>58</sup> In *The Federalist No. 51*, James Madison voiced his distrust of majority factions, writing:

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.<sup>59</sup>

Critics worry that ballot measures will serve as a vehicle for majority factions to limit the rights of unpopular minorities.<sup>60</sup> This worry is based on historical and current reality; there are recent examples of ballot measures that have targeted minority groups.<sup>61</sup> It is within this reality, critics argue, that courts should assume a larger role, “not because direct democracy is unconstitutional, nor because it frequently produces legislation that we may find substantively displeasing . . . but because the judiciary stands *alone* in guarding against the evils

---

56. U.S. CONST. art. IV, § 4.

57. Eule, *supra* note 48, at 1522–26; *see also* *Judicial Approaches*, *supra* note 40, at 2757–58 (“[T]he processes of direct democracy are antithetical to the form of republican government instituted by the Founders and guaranteed by the Constitution.”).

58. Eule, *supra* note 48, at 1514.

59. THE FEDERALIST NO. 51, *supra* note 8 (James Madison).

60. *See* Samir Junejo, Comment, *Majority Rule: How the Ballot Initiative Process Hurts Minorities*, 14 SEATTLE J. SOC. JUST. 875 (2016); *see also* Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1743 (2013) (“The populist backlash . . . mean[s] that direct-democracy campaigns over questions of minority rights are not simply about a particular right and a particular minority group, but may also reflect a reaction to counter-majoritarian aspects of democracy that are facilitated by courts and representative government.”).

61. *See, e.g.*, John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 154 (1993) (discussing Colorado’s Amendment 2 ballot measure, where Colorado voters amended the Colorado constitution to include a statement that prohibited existing ordinances and future legislation that sought to end discrimination on the basis of sexual orientation).

incident to transient, impassioned majorities that the Constitution seeks to dissipate.”<sup>62</sup>

In fact, Nebraskans have used the ballot box as a means for advancing policies that target minority residents. In 2009, citizens of Fremont, Nebraska circulated a petition proposing a city ordinance that would make it illegal for any person or business in Fremont to knowingly or recklessly rent property to an undocumented immigrant unless expressly permitted by federal law.<sup>63</sup> The ballot measure required prospective tenants to get an occupancy license from the Fremont Police Department, who then had to contact the federal government to verify that the prospective tenant could legally reside in the United States.<sup>64</sup>

The ballot measure responded to a growth in the number of Latino residents in the town—a 190% increase between 2000 and 2010<sup>65</sup>—largely due to a local meatpacking plant that employed immigrant workers.<sup>66</sup> The Fremont voters initially approved the ordinance, but it was put on hold while opponents mounted legal challenges, stating that federal immigration law and the Fair Housing Act preempted the ordinance.<sup>67</sup> The Eighth Circuit Court of Appeals upheld the validity of the city ordinance, and in February 2014, the city council held a second referendum vote on the ordinance.<sup>68</sup> Fremont residents voted to keep the ordinance, effectively banning undocumented immigrants from renting houses in the town.<sup>69</sup> In November 2018, residents of

---

62. Eule, *supra* note 48, at 1525.

63. *City of Fremont v. Kotas*, 279 Neb. 720, 721, 781 N.W.2d 456, 459 (2010).

64. *Id.* at 722, 781 N.W.2d at 459.

65. Nicholas Bergin, *Fremont Set to Vote on Immigration Ordinance Tuesday*, LINCOLN J. STAR (Feb. 9, 2014), [https://journalstar.com/news/state-and-regional/nebraska/fremont-set-to-vote-on-immigration-ordinance-tuesday/article\\_1ac49522-9890-56a3-be7a-dc5e450c53c6.html](https://journalstar.com/news/state-and-regional/nebraska/fremont-set-to-vote-on-immigration-ordinance-tuesday/article_1ac49522-9890-56a3-be7a-dc5e450c53c6.html) [<https://perma.unl.edu/DRU9-2KEJ>].

66. Monica Davey, *City in Nebraska Torn as Immigration Vote Nears*, N.Y. TIMES (June 17, 2010), <https://www.nytimes.com/2010/06/18/us/18nebraska.html> [<https://perma.unl.edu/H77T-N9XX>] (“If the population changes have shifted the way Fremont feels, so has the coming anti-illegal-immigration referendum. Hispanic residents say they once felt welcomed here or, at least, not noticed but the increasingly loud political fight, they say, seems to have changed the tone.”).

67. Bergin, *supra* note 65.

68. *Id.*

69. Emma G. Fitzsimmons, *Nebraska City Votes to Keep Rule Aimed at Illegal Immigrants*, N.Y. TIMES (Feb. 12, 2014), <https://www.nytimes.com/2014/02/12/us/nebraska-city-votes-to-keep-rule-aimed-at-illegal-immigrants.html> [<https://perma.unl.edu/2WYM-ZNQC>]. *But see* David Hendee, *Catch-22 Keeps Fremont from Acting on Controversial Housing Ordinance*, OMAHA WORLD-HERALD (Apr. 12, 2015), [https://www.omaha.com/news/metro/catch—keeps-fremont-from-acting-on-controversial-housing-ordinance/article\\_34091da3-ddd3-5643-8076-f474fd328260.html](https://www.omaha.com/news/metro/catch—keeps-fremont-from-acting-on-controversial-housing-ordinance/article_34091da3-ddd3-5643-8076-f474fd328260.html) [<https://perma.unl.edu/MWB8-KWTT>] (stating the ordinance was “toothless” because the federal government could not provide city officials with renters’ immigration status).

Scribner, Nebraska approved a nearly identical ordinance for their town.<sup>70</sup>

Proponents of a heightened level of judicial review also argue that ballot measures do not actually reflect the will of the majority.<sup>71</sup> First, less than half of the voting-eligible population in the U.S. votes in elections; for example, the 2018 midterm election saw a fifty-year record high voter turnout, yet only forty-seven percent of the eligible population actually voted.<sup>72</sup> Further, voters of color<sup>73</sup> and low-income voters<sup>74</sup> vote at a substantially lower rate than white voters, meaning votes that are cast disproportionately reflect the will of white, upper- and middle-class voters. This disparity in voter turnout can be traced to a variety of factors, including lack of transportation,<sup>75</sup> longer wait lines at polls in communities of color,<sup>76</sup> voter ID laws,<sup>77</sup> “ex-

- 
70. Paul Hammel, *Scribner Voters Approve Ordinance Barring Illegal Immigrants from Housing, Jobs*, OMAHA WORLD-HERALD (Nov. 7, 2018), [https://www.omaha.com/news/nebraska/scribner-voters-approve-ordinance-barring-illegal-immigrants-from-housing-jobs/article\\_59f8a313-86d2-515d-b0d8-22687fd91f13.html](https://www.omaha.com/news/nebraska/scribner-voters-approve-ordinance-barring-illegal-immigrants-from-housing-jobs/article_59f8a313-86d2-515d-b0d8-22687fd91f13.html) [https://perma.unl.edu/8WAZ-GRZH].
71. Collins & Oesterle, *supra* note 4, at 58. For a related discussion on political process theory, minority rights, and ballot measures, see Jane S. Schacter, *Ely at the Alter: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363 (2011).
72. Camila Domonoske, *A Boatload of Ballots: Midterm Voter Turnout Hit 50-Year High*, NPR (Nov. 8, 2018, 5:01 AM), <https://www.npr.org/2018/11/08/665197690/a-boatload-of-ballots-midterm-voter-turnout-hit-50-year-high> [https://perma.unl.edu/BLS6-34HQ].
73. Bernard L. Fraga, *The Turnout Gap Between Whites and Racial Minorities Is Larger than You Think — and Hard to Change*, WASH. POST (Sept. 25, 2018, 4:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/25/the-turnout-gap-between-whites-and-racial-minorities-is-larger-than-you-think-and-hard-to-change/> [https://perma.unl.edu/94NU-T433]. Only 36.7% of eligible voters voted in 2014, and 41% voted in 2010. *Id.* In 2014, 54% of white Americans reported voting, compared to just 49% of African Americans, 33% of Latinos, and 35% of Asian Americans. *Id.*
74. Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote?*, ATLANTIC (Jan. 10, 2014), <https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/> [https://perma.unl.edu/ZQ92-7V8E]. According to the U.S. Census, only 47% of eligible voters with annual earnings of less than \$20,000 voted in the 2012 election. *Id.* In contrast, 80% of eligible voters with incomes of \$100,000 a year or greater voted that year. *Id.*
75. *Id.*
76. *Id.*
77. Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/> [https://perma.unl.edu/UDQ2-RUFY].

act match” systems,<sup>78</sup> and issues with receiving requested absentee ballots.<sup>79</sup>

Additionally, other proponents of this approach express concerns that the high cost of successful ballot initiatives means that outside, special interest groups play a major role in influencing ballot measures. There is an emerging ballot measure industry, equipped with professional signature gatherers, marketing firms, and substantial resources, that can be deployed by special interest groups in local ballot measure campaigns.<sup>80</sup> In the 2018 election, it was estimated that proponents and opponents spent more than \$1 billion on 150 ballot measures across the nation.<sup>81</sup> In fact, ballot measure campaigns often cost more than campaigns for political office.<sup>82</sup> Researchers who have studied ballot measure campaign financing conclude that the influence of money is at least as great in ballot measures as it is on the legislative process.<sup>83</sup>

Finally, a major concern about laws enacted through ballot measures is that the public is not qualified, or at least not the best suited, to make informed decisions about complex policy issues.<sup>84</sup> Some ballot

---

78. Terry Gross, *Republican Voter Suppression Efforts Are Targeting Minorities*, *Journalist Says*, NPR: FRESH AIR (Oct. 23, 2018, 2:04 PM), <https://www.npr.org/2018/10/23/659784277/republican-voter-suppression-efforts-are-targeting-minorities-journalist-says> [<https://perma.unl.edu/Q448-HUC5>] (noting that “exact match” systems, where the name on a voter roll must be identical to the name in the state system for the vote to count, is “disenfranchisement by typo”).

79. Weeks, *supra* note 74.

80. *Judicial Approaches*, *supra* note 40, at 2757; see also Miriam Pawel, *California Ballot Initiatives Are Powerful. The Powerful Have Noticed.*, N.Y. TIMES (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/opinion/california-ballot-initiatives-direct-democracy.html> [<https://perma.unl.edu/H6KW-XW5V>] (explaining the initiative-industrial complex that has emerged in California as special interest groups pour money and resources into ballot measures).

81. Reid Wilson, *Corporations, Interest Groups Spend Fortunes on Ballot Measures*, HILL (Sept. 1, 2018, 4:16 PM), <https://thehill.com/business-a-lobbying/404555-corporations-interest-groups-spend-fortunes-on-ballot-measures> [<https://perma.unl.edu/QC89-B8AN>] (noting that in California, housing advocates and homeowners spent \$41 million fighting a ballot measure that would allow cities to implement rent control; in Florida, the Disney Corporation and Seminole Tribe spent \$27 million in support of a measure to limit the number of casinos in the state; billionaire hedge fund manager Tom Steyer spent \$8 million on an Arizona measure to require electric companies to rely on renewable energy; and even a fight over rules for hard rock mining in Montana cost almost \$2 million).

82. Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CALIF. L. REV. 1191, 1203–04 (2005) (explaining that in every election between 1996 and 2000, Oregonians and outside interest groups spent more money on ballot measures in the state than on all of the candidate campaigns for state office combined).

83. Collins & Oesterle, *supra* note 4, at 92–93.

84. *See id.* at 91–92. (“An initiative’s subject can be technical, not apparent to citizens without special knowledge. There can be so many initiatives and candidates that voters’ capacity to understand them is overwhelmed. And, as in all political cam-

measures are so complicated that it is unlikely many voters will fully understand what they are voting on.<sup>85</sup> Ballot measure propositions tend to be “lengthy, complex, technical, carelessly phrased, and ambiguous,” and if voters are ignorant or mistaken, it is less certain that the prevailing position actually reflects the majority’s opinion on the issue.<sup>86</sup> Additionally, proponents and opponents of ballot measures may unintentionally or deliberately confuse voters through tactics such as deceptive advertising, confusing the voter about the significance of a “yes” or “no” vote, and placing competing propositions on the ballot.<sup>87</sup>

Because ballot measures offer voters only binary choices, voters are also restricted to black-and-white options without the ability to select more nuanced alternatives.<sup>88</sup> Julian Eule explains, “Isolated decisions [like ballot measures] create few opportunities for trade-offs and little need for the establishment of continuing relationships.”<sup>89</sup> In contrast, Eule notes, representative legislative bodies engender coop-

---

paings, there can be misleading claims made for or against a measure, particularly in advertisements.”).

85. Eule, *supra* note 48, at 1516. For examples of complicated ballot measures, see Suevon Lee, *Five of the Most Confusing Ballots in the Country*, PROPUBLICA (Nov. 5, 2012, 10:58 PM), <https://www.propublica.org/article/five-of-the-most-confusing-ballots-in-the-country> [https://perma.unl.edu/6Z56-LXMW].

86. Eule, *supra* note 48, at 1516.

87. *Id.* at 1517–18. To see an example of a deceptive ballot measure, see John Schwartz, *Measure in Florida That Claims to Back Solar Power May Discourage It*, N.Y. TIMES (Oct. 27, 2016), <https://www.nytimes.com/2016/10/28/science/florida-solar-power-referendum.html> [https://perma.unl.edu/TB9S-ESAV] (explaining how the measure purported to “promote[] solar in the Sunshine State,” yet actually allowed utility companies to raise fees on solar customers).

88. Eule, *supra* note 48, at 1520–21; see also Alan Greenblatt, *Lawmakers Eye Changes to Ballot Measures—Passed and Future*, GOVERNING (Jan. 16, 2019), <https://www.governing.com/topics/politics/gov-lawmakers-block-ballot-measures.html> [https://perma.unl.edu/6G9V-TFHH] (“Ballot measures are a blunt instrument—requiring a binary yes-or-no response—and aren’t forced to jostle for funds against other proposals the way ordinary legislation does.”).

89. Eule, *supra* note 48, at 1527; see also Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 482 (1998) (arguing for a need to evaluate processes that claim to reflect popular will, particularly asking whether the process reflects both preferences *and* priorities). Clark explains:

If our goal were to measure issue-by-issue majority preference, more direct would indeed be more responsive, and the mediating devices of representative government would indeed be agency costs, noise, or interference. Recall, however, that in populist terms the goal is to hear the voice of the people as well and as fully as possible. Political processes respond to the legitimacy problem by ensuring that voters have as full an opportunity as possible to influence the rules (plural) under which they must live. For those whose aim is to give the people a voice in government, therefore, the goal of political processes should not be to permit each voter to describe, one issue at a time, his or her perfect world, as if describing what he or she would do if elected Czar. Rather, the goal should be to allow each person, who knows that his or her perfect world will not be enacted—who knows that he or she will win some and lose some—to speak most clearly about the world as a whole by telling us

eration, with shifting alliances, new issues, and winners and losers who “return to meet again.”<sup>90</sup> Some scholars have suggested remedies for this concern, including encouraging states to adopt mandatory periods of deliberation for proposed measures.<sup>91</sup>

3. *Perspective Three: Courts Should Examine Ballot Measures with the Same Level of Scrutiny Used for Comparable Policies Passed Through the Legislature.*

Often, courts disregard the manner in which a law is passed, and they approach legislation enacted through ballot measures the same way they approach legislation enacted through a legislature.<sup>92</sup> Proponents of this approach argue that adopting different standards of review for laws passed through ballot measures versus legislatures rests erroneously on procedural concerns.<sup>93</sup> They argue that the legislative process does not substantially differ from the ballot measure process in the way laws are created; specifically, the legislative process is not necessarily any more deliberative than the ballot measure process.<sup>94</sup>

In fact, because legislators must answer to their constituents and are concerned with re-election, legislators are prone to use the same oversimplifications and distortions of facts as ballot measures (assuming ballot measures use such tactics).<sup>95</sup> While the lack of deliberation

---

what he or she most wants to win and what he or she is most willing to lose.

*Id.* at 448.

90. Eule, *supra* note 48, at 1527.

91. Collins & Oesterle, *supra* note 4, at 112. Collins and Oesterle note that in order for a deliberation period to be useful, it should include reasonable procedures for reviewing drafts, public notice and hearing, consultation among proponents and opponents, consultation with public officials, and opportunities to amend or withdraw proposals in favor of legislative substitutes. *Id.*

92. *Judicial Approaches*, *supra* note 40, at 2751; see also Collins & Oesterle, *supra* note 4, at 110–11 (arguing that courts should treat laws passed through ballot measures the same as those enacted by the legislature).

93. Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1 N.Y.U. J. LEGIS. & PUB. POL’Y 1, 5 (1997); see also Raquel Frisardi, Note, *Missouri’s Health Care Battle and Differential Judicial Review of Popular Lawmaking*, 89 WASH. U. L. REV. 207, 209 (2011) (“[T]he proper way to balance the ideological weight of popular lawmaking with its non-constitutional status is to view popular legislation through the same lens as its traditionally enacted counterpart.”).

94. Tushnet, *supra* note 93, at 7; see also Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 531 (1994) (arguing that the perceived problem with judicial review of ballot measures does not arise out of inherent differences between legislative and popular lawmaking, but instead, arises from “what some view as cramped judicial interpretation of specific constitutional guarantees, particularly an overly restrained equal protection analysis”).

95. Tushnet, *supra* note 93, at 8 (“The simplifications and distortions associated with the direct legislation campaigns will surely be deployed in legislative election and

in passing laws through ballot measures is frequently given as a reason for needing heightened judicial scrutiny of such laws, legal scholar Mark Tushnet argues that the type of detached deliberation critics discuss is often reserved for those in positions of social power, which “reinforce[s] hierarchies of power that direct legislation is partly designed to overcome.”<sup>96</sup> Ultimately, Tushnet posits, those who argue for a difference in judicial review have a “fear of voting,” where “the people . . . are not as good as they ought to be.”<sup>97</sup>

There are drawbacks, however, to using the same approach for ballot measures. First, some interpretative canons rely on lawmakers’ expertise and familiarity with the practice and consequences of legislation, factors that are not at play in voter-led ballot measures.<sup>98</sup> For example, courts often ascribe meaning to terms in a statute based on the legislature’s use of the term in other contexts or by reviewing a statute’s legislative history, including previous versions of a statute, committee hearings, and floor debates.<sup>99</sup> Additionally, courts often look to legislative intent when interpreting a law enacted through the legislature.<sup>100</sup> When courts apply a similar “intentionalist approach” to laws popularly enacted through ballot measures, challenges arise, such as (1) difficulty in determining an aggregate voter intent from thousands of individual voters, (2) lack of voter knowledge about the legal context surrounding a ballot measure issue, and (3) the ballot measure’s use of technical language or legal jargon that obscures voters’ true intent.<sup>101</sup>

### C. Nebraska’s Repeal & Reinstatement of the Death Penalty: A Case Study

#### 1. Background

In May 2015, Nebraska received national attention when its conservative legislature voted to repeal the death penalty, overriding Governor Pete Ricketts’s veto in a vote that crossed party lines.<sup>102</sup> At that time, Nebraska became the nineteenth state in the United States

---

re-election campaigns. Anticipating this, a legislator would be unwilling to take a fully deliberated position on the matter.”).

96. *Id.* at 10–11.

97. *Id.* at 19.

98. *Judicial Approaches*, *supra* note 40, at 2752.

99. *Id.* at 2752–53.

100. Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 *YALE L.J.* 107, 110 (1995).

101. *See id.*

102. Julie Bosman, *Nebraska Bans Death Penalty, Defying a Veto*, *N.Y. TIMES* (May 27, 2015), <https://www.nytimes.com/2015/05/28/us/nebraska-abolishes-death-penalty.html> [<https://perma.unl.edu/W7XB-HZRH>].

to end capital punishment<sup>103</sup> and the first conservative state to do so since 1973.<sup>104</sup> Before the historic vote, Nebraska state senators had unsuccessfully introduced a bill to repeal the death penalty every year since 1981.<sup>105</sup> However, in 2015, the effort to repeal capital punishment had bi-partisan support, with both liberal and conservative lawmakers pointing to the waste and expense of executions,<sup>106</sup> religious and moral values,<sup>107</sup> cases of wrongful convictions,<sup>108</sup> and Nebraska's difficulty in obtaining lethal injection drugs.<sup>109</sup> Governor Ricketts fought against the repeal bill and strongly denounced its passage after the override vote stating that "the Legislature ha[d] lost touch with the citizens of Nebraska."<sup>110</sup>

In response to the repeal of the death penalty, proponents of capital punishment launched a ballot measure campaign—specifically, a referendum<sup>111</sup>—to repeal the legislature's vote and reinstate the death penalty in Nebraska.<sup>112</sup> Governor Ricketts helped "initiate, organize, and fund Nebraskans for the Death Penalty"—the organization in charge of the ballot measure campaign.<sup>113</sup> Governor Ricketts

- 
103. David Bailey & Fiona Ortiz, *Nebraska Legislature Repeals Death Penalty, Overriding Governor's Veto*, REUTERS (May 27, 2015, 4:24 PM), <https://www.reuters.com/article/us-usa-nebraska-deathpenalty/nebraska-legislature-repeals-death-penalty-overriding-governors-veto-idUSKBN0OC2RJ20150527> [https://perma.unl.edu/PX3F-ERTL].
104. Mark Berman, *Nebraska Lawmakers Abolish the Death Penalty, Narrowly Overriding Governor's Veto*, WASH. POST (May 27, 2015, 5:50 PM), <https://www.washingtonpost.com/news/post-nation/wp/2015/05/27/nebraska-lawmakers-officially-abolish-the-death-penalty/> [https://perma.unl.edu/97P9-3WFX].
105. Jessica Glenza, *Nebraska Legislature Narrowly Votes to Repeal Death Penalty*, GUARDIAN (May 27, 2015, 5:01 PM), <https://www.theguardian.com/us-news/2015/may/27/nebraska-legislature-repeal-death-penalty> [https://perma.unl.edu/H9TK-DH3E].
106. Bosman, *supra* note 102.
107. *Id.*
108. Berman, *supra* note 104.
109. Bailey & Ortiz, *supra* note 103.
110. Bosman, *supra* note 102.
111. A referendum petition is a type of ballot measure used to repeal a law recently passed by the Legislature. See HOW TO USE THE INITIATIVE AND REFERENDUM PROCESS IN NEBRASKA, *supra* note 10.
112. JoAnne Young, *Group Will Seek Signatures to Put Death Penalty on the Ballot*, LINCOLN J. STAR (June 1, 2015), [https://journalstar.com/legislature/group-will-see-signatures-to-put-death-penalty-on-the/article\\_ef2b4e5b-200d-52c9-8e46-489039c7ecc8.html](https://journalstar.com/legislature/group-will-see-signatures-to-put-death-penalty-on-the/article_ef2b4e5b-200d-52c9-8e46-489039c7ecc8.html) [https://perma.unl.edu/TF3A-XUCQ].
113. Sylvia Krohn, *Death Penalty Law Remains Unsettled in Nebraska*, A.B.A. (May 10, 2019), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2019/spring/death-penalty-law-remains-unsettled-in-nebraska/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2019/spring/death-penalty-law-remains-unsettled-in-nebraska/) [https://perma.unl.edu/7TA6-KYWN]. In addition to his role supporting Nebraskans for the Death Penalty, Governor Ricketts garnered attention for his failed attempt to import lethal injection drugs from India, a response to critics' argument that the necessary lethal injection drugs were not readily available to carry out executions in the first place. See Garrett Epps, *Out of Spite: The Gover-*

and his family donated \$425,000 of the \$1.3 million spent on the ballot referendum.<sup>114</sup> Of that total, \$300,000 was from Governor Ricketts directly.<sup>115</sup>

The campaign successfully collected nearly three times the number of signatures needed to put the issue on the ballot, with over 166,000 signatures collected from Nebraskans across the state.<sup>116</sup> Ultimately, there were enough signatures to postpone the repeal of the death penalty until after voters had a chance to vote on the ballot referendum in the election.<sup>117</sup>

## 2. Hargesheimer v. Gale: *The Pre-Election Challenge*

In *Hargesheimer v. Gale*, the Hargesheimers, opponents of the ballot referendum to re-instate the death penalty in Nebraska, sought pre-election review of the referendum on procedural grounds.<sup>118</sup> The Hargesheimers argued that the referendum petition failed to comply with chapter 32, section 1405(1) of the Nebraska Revised Statutes,<sup>119</sup> which requires a sworn statement containing the names of all petition sponsors to be filed with the Secretary of State's office prior to signature collection.<sup>120</sup> In particular, the Hargesheimers argued that Governor Pete Ricketts was a sponsor of the petition because of his substantial financial contributions to and management of the cam-

---

*nor of Nebraska's Threat to Execute Prisoners*, ATLANTIC (June 5, 2015), <https://www.theatlantic.com/politics/archive/2015/06/a-governor-threatens-to-execute-prisoners-out-of-spite/394949/#Correction> [<https://perma.unl.edu/Y6K8-9LZA>].

114. Paul Hammel, *Nebraskans Vote Overwhelmingly to Restore Death Penalty, Nullify Historic 2015 Vote by State Legislature*, OMAHA WORLD-HERALD (Nov. 9, 2016), [https://www.omaha.com/news/politics/nebraskans-vote-overwhelmingly-to-restore-death-penalty-nullify-historic-vote/article\\_38823d54-a5df-11e6-9a5e-d7a71d75611a.html](https://www.omaha.com/news/politics/nebraskans-vote-overwhelmingly-to-restore-death-penalty-nullify-historic-vote/article_38823d54-a5df-11e6-9a5e-d7a71d75611a.html) [<https://perma.unl.edu/BD9H-CY8N>].

115. *Id.*

116. Paul Hammel, *Death Penalty Backers Turn in 166,692 Signatures—Far More Than Needed—To Put Issue Before Voters*, OMAHA WORLD-HERALD (Aug. 28, 2015), [https://www.omaha.com/news/nebraska/death-penalty-backers-turn-in-signatures-far-more-than-needed/article\\_33250440-4c03-11e5-b181-1b2db6c6d958.html](https://www.omaha.com/news/nebraska/death-penalty-backers-turn-in-signatures-far-more-than-needed/article_33250440-4c03-11e5-b181-1b2db6c6d958.html) [<https://perma.unl.edu/66NF-GFQU>].

117. Paul Hammel, *Death Penalty Supporters Put Repeal on Hold Till 2016 Vote*, OMAHA WORLD-HERALD (Oct. 16, 2015), [https://www.omaha.com/news/nebraska/death-penalty-supporters-put-repeal-on-hold-till-vote/article\\_d713527e-6f20-5903-8654-cc5d283ba47a.html](https://www.omaha.com/news/nebraska/death-penalty-supporters-put-repeal-on-hold-till-vote/article_d713527e-6f20-5903-8654-cc5d283ba47a.html) [<https://perma.unl.edu/E9AX-VE44>].

118. *Hargesheimer v. Gale*, 294 Neb. 123, 125–26, 881 N.W.2d 589, 592–93 (2016).

119. *Id.*

120. NEB. REV. STAT. § 32-1405(1) (Reissue 2016) (“Prior to obtaining any signatures on an initiative or referendum petition, a statement of the object of the petition and the text of the measure shall be filed with the Secretary of State together with a sworn statement containing the names and street addresses of every person, corporation, or association sponsoring the petition.”). Broadly speaking, a *petition* is a list of several people signing their names on a paper to express their opinion. HOW TO USE THE INITIATIVE AND REFERENDUM PROCESS IN NEBRASKA, *supra* note 10.

paign, and that failure to include his name on the list of sponsors violated section 32-1405(1).<sup>121</sup> The Hargesheimers sought: (1) an injunction enjoining the Secretary of State from placing the referendum on the ballot, and (2) a declaratory judgment that the failure to list one of the sponsors on the petition's sworn statement constituted a material and fatal omission that made the petition invalid as a matter of law.<sup>122</sup>

In its analysis, the Nebraska Supreme Court feared that the Hargesheimers' suggestion of interpreting "sponsoring the petition" under section 32-1405(1) to mean parties who heavily participate in the petition process would restrict ballot initiative and referendum powers.<sup>123</sup> The court explained:

We have stated that the power of initiative must be *liberally construed to promote the democratic process*, that the right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter, and that the provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual.<sup>124</sup>

In acknowledging that the right to ballot measures is "precious to the people," the court narrowly defined "sponsoring the petition" under section 32-1405(1) as "assuming responsibility for the initiative or referendum petition process."<sup>125</sup> The court upheld the district court's dismissal of the Hargesheimers' complaint and the issue proceeded to the ballot.<sup>126</sup>

### 3. *The Election and Aftermath: Ballot Confusion, Subsequent Legal Challenges, and an Execution*

After the court in *Hargesheimer* determined that the ballot measure was sufficient on procedural grounds, Nebraskans voted overwhelmingly in the 2016 general election to nullify the legislature's decision and reinstate the death penalty.<sup>127</sup> Prior to the election, however, there was concern that the language chosen for the ballot—the language that voters would read when casting their votes in November—was confusing and misleading.<sup>128</sup> State

---

121. *Hargesheimer*, 294 Neb. at 126, 881 N.W.2d at 593.

122. *Id.* at 127, 881 N.W.2d at 593.

123. *Id.* at 134, 881 N.W.2d at 597–98.

124. *Id.* at 134, 881 N.W.2d at 597 (emphasis added) (citing *Stewart v. Advanced Gaming Techs., Inc.*, 272 Neb. 471, 485–86, 723 N.W.2d 65, 77 (2006)).

125. *Id.* at 131, 881 N.W.2d at 596 (adopting a definition first used by Chief Justice Hendry in his concurrence in *Loontjier v. Robinson*, 266 Neb. 902, 911, 670 N.W.2d 301, 308 (2003)).

126. *Id.* at 137, 881 N.W.2d at 599.

127. Hammel, *supra* note 114.

128. See Christopher Burbach, *Read It Carefully: Ballot Language for Death Penalty Referendum Is Correct, but Confusing*, OMAHA WORLD-HERALD (Sept. 20, 2016), <https://www.omaha.com/news/politics/read-it-carefully-ballot-language-for-death>

law<sup>129</sup> mandated that voters be asked whether to “retain” or “repeal” Legislative Bill 268<sup>130</sup>—the bill passed by the legislature to eliminate the death penalty.<sup>131</sup> The result was a double negative:<sup>132</sup> a vote to “retain” would get rid of the death penalty; a vote to “repeal” would keep the death penalty.<sup>133</sup> Nebraskans on both sides of the issue expressed concern about the confusing language.<sup>134</sup> Experience shows that voters tend to vote “no” on a ballot referendum when there is confusion, which may have benefitted the “repeal” side who wanted to keep the death penalty.<sup>135</sup> Ultimately, 60% of Nebraskans voted to keep the death penalty.<sup>136</sup>

On December 4, 2017, one year after the election, the American Civil Liberties Union of Nebraska (ACLU) filed a complaint seeking declaratory and injunctive relief for eleven inmates on death row.<sup>137</sup>

---

-penalty-referendum-is/article\_4bfcf695-94a2-55d0-ac2d-7ecc935b9d50.html [https://perma.unl.edu/GXY5-44GZ] (“If voters aren’t careful, they easily could become confused and vote the opposite of their desires on the death penalty ballot issue that Nebraskans are being asked to consider this fall.”).

129. NEB. REV. STAT. § 32-1410(2) (Reissue 2016) (“The Attorney General also shall prepare a statement to be printed in italics immediately preceding the ballot title on the official ballot. Such statement shall in clear and concise language explain the effect of a vote to retain and a vote to repeal the measure in such language that the statement will not be intentionally an argument or likely to create prejudice, either for retention or for repeal of the measure. The ballot title shall be so worded that those in favor of retaining the measure shall vote Retain and those opposing the measure shall vote Repeal.”).
130. Leg. 268, 104th Leg., 1st Sess. (Neb. 2015).
131. Burbach, *supra* note 128.
132. Josh Sanburn, *The Future of the Death Penalty Will Be Decided in These 3 States*, TIME (Nov. 7, 2016, 5:34 PM), <https://time.com/4561649/death-penalty-referendum-california-nebraska/> [https://perma.unl.edu/5JKP-C22W] (“In Nebraska, the state’s death-penalty wording is already leading to confusion because it’s essentially written as a double negative.”).
133. *Read the Death Penalty Referendum That Will Appear on the Nov. 8 Ballot*, OMAHA WORLD-HERALD (Sept. 17, 2016) [hereinafter *Read the Death Penalty Referendum*], [https://www.omaha.com/read-the-death-penalty-referendum-that-will-appear-on-the/pdf\\_54cdfb2-7d3e-11e6-80a1-1fa8ab844954.html](https://www.omaha.com/read-the-death-penalty-referendum-that-will-appear-on-the/pdf_54cdfb2-7d3e-11e6-80a1-1fa8ab844954.html) [https://perma.unl.edu/2SZV-UFBY] (“A vote to ‘Retain’ will eliminate the death penalty and change the maximum penalty for the crime of murder in the first degree to life imprisonment by retaining Legislative Bill 268 . . . . A vote to ‘Repeal’ will keep the death penalty as a possible penalty for the crime of murder in the first degree by repealing Legislative Bill 268 . . . .”).
134. Sanburn, *supra* note 132.
135. *Id.*; see also Eule, *supra* note 48, at 1519 (suggesting that it is “conventional wisdom” that confused voters tend to vote “no”).
136. See NEB. SEC’Y OF STATE, REVISED OFFICIAL REPORT OF THE BOARD OF STATE CANVASSERS: GENERAL ELECTION NOVEMBER 8, 2016 (2016), <https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2016/2016-canvass-book.pdf> [https://perma.unl.edu/C5JR-7K9Q].
137. *Sandoval v. Ricketts*, 302 Neb. 138, 140, 922 N.W.2d 222, 224 (2019); see also Josh Saul, *Don’t Kill Us: Death Row Inmates Sue Nebraska Governor, Claiming He Illegally Funded Push to Execute Them*, NEWSWEEK (Dec. 4, 2017, 2:39 PM),

Like the plaintiffs in *Hargesheimer*, the ACLU challenged Governor Ricketts's involvement in the referendum, seeking a declaratory judgment that the ballot referendum was not legally sufficient.<sup>138</sup> Instead of arguing that the campaign violated a statutory procedure by failing to list Governor Ricketts as a sponsor like the plaintiffs in *Hargesheimer*, the ACLU argued that the Governor's involvement was altogether unconstitutional.<sup>139</sup> Specifically, the ACLU maintained that Governor Ricketts and the executive branch "proposed, initiated, financed, organized, managed, and directed the process" in violation of the separation of powers provision of the Nebraska constitution, rendering the referendum legally insufficient.<sup>140</sup>

In addition, the ACLU argued that the inmates' death sentences were converted to life sentences when the death penalty repeal passed in the Nebraska legislature,<sup>141</sup> and the announcement that the campaign had collected enough signatures to suspend the operation of Legislative Bill 268 did *not* reinstate the death penalty for those whose sentences had been converted to life sentences.<sup>142</sup> Instead, the ACLU argued, Nebraskans' vote to restore capital punishment only applies to future first-degree murders.<sup>143</sup> The court affirmed the dis-

---

<https://www.newsweek.com/death-row-inmates-sue-nebraska-governor-730534> [<https://perma.unl.edu/B86L-HBS6>] (noting that all of Nebraska's death row inmates filed a lawsuit "in an attempt to save their lives").

138. *Sandoval*, 302 Neb. at 140, 922 N.W.2d at 224.

139. *Id.*

140. *Id.*; see also JoAnne Young, *ACLU Files Lawsuit on Behalf of Death Row Inmates Against Ricketts, Corrections Department*, LINCOLN J. STAR (Dec. 4, 2017), [https://journalstar.com/news/state-and-regional/govt-and-politics/aclu-files-lawsuit-on-behalf-of-death-row-inmates-against/article\\_799fb7e2-ef88-5381-863b-07ec052a3b8a.html](https://journalstar.com/news/state-and-regional/govt-and-politics/aclu-files-lawsuit-on-behalf-of-death-row-inmates-against/article_799fb7e2-ef88-5381-863b-07ec052a3b8a.html) [<https://perma.unl.edu/FS7R-QTBN>] ("In Nebraska, our state Constitution . . . establishes a strong tradition with a clear separation of powers. The governor can't have it both ways and serve both as a member of the executive and legislative branches." (quoting Danielle Conrad, Executive Director of the ACLU of Nebraska)).

141. *Sandoval*, 302 Neb. at 141, 922 N.W.2d at 224; see also Paul Hammel, *ACLU of Nebraska Sues to Block Executions, Says Ricketts Overstepped in Referendum Process*, OMAHA WORLD-HERALD (Dec. 4, 2017), [https://www.omaha.com/news/nebraska/aclu-of-nebraska-sues-to-block-executions-says-ricketts-overstepped/article\\_f246b9e6-772a-5f8e-8d57-a5eadbda5f3.html](https://www.omaha.com/news/nebraska/aclu-of-nebraska-sues-to-block-executions-says-ricketts-overstepped/article_f246b9e6-772a-5f8e-8d57-a5eadbda5f3.html) [<https://perma.unl.edu/T5PH-48Q8>] ("The ACLU of Nebraska charged that the death penalty repeal, enacted by the State Legislature over a veto by Gov. Pete Ricketts, was in effect long enough to convert the death sentences for the 11 men to life in prison."); Paul Hammel, *Nebraska's Death Penalty Repeal Was Temporary but It Changed Inmates' Sentences, ACLU Argues*, OMAHA WORLD-HERALD (Dec. 6, 2018), [https://www.omaha.com/news/courts/nebraska-s-death-penalty-repeal-was-temporary-but-it-changed/article\\_3f218d89-3627-503d-8694-ea4ff287ac5c.html](https://www.omaha.com/news/courts/nebraska-s-death-penalty-repeal-was-temporary-but-it-changed/article_3f218d89-3627-503d-8694-ea4ff287ac5c.html) [<https://perma.unl.edu/WK45-ASLM>] ("Because a repeal was in effect, [the inmates] no longer face the death penalty." (quoting Brain Stull, an attorney for the ACLU)).

142. *Sandoval*, 302 Neb. at 141, 922 N.W.2d at 224.

143. Hammel, *ACLU of Nebraska Sues to Block Executions, Says Ricketts Overstepped in Referendum Process*, *supra* note 141.

missal of the ACLU's claims on the ground that the inmates have other equally serviceable remedies and did not address the constitutional separation of powers or sentence conversion issues.<sup>144</sup> In August 2018, before the *Sandoval* decision, Nebraska executed Carey Dean Moore.<sup>145</sup> It was the first execution in the state in twenty-one years.<sup>146</sup>

### III. ANALYSIS

#### A. Lessons from Nebraska: Adopting a Rule of Pre-Election Deference and Post-Election Legislative Mirroring

The Nebraska Supreme Court repeatedly articulates that its approach to pre-election review is highly deferential to voters. The court summarized this perspective in the pre-election death penalty referendum challenge in *Hargesheimer* when it stated, “the power of initiative must be liberally construed to promote the democratic process [as] the right of initiative is precious to the people and is one which the

144. *Sandoval*, 302 Neb. at 144, 922 N.W.2d at 226. The issue of whether death row inmates' sentences were converted to life sentences when LB 268 passed was raised again in the case of death row inmate Nikko Jenkins, represented by the national ACLU. *See State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019). The court rejected the argument, adopting the rule that “upon the filing of a referendum petition appearing to have a sufficient number of signatures, operation of the legislative act is suspended so long as the verification and certification process ultimately determines that the petition had the required number of valid signatures.” *Id.* at 710, 931 N.W.2d at 879.

145. *See Joe Duggan et al., 'A Monumental Day': Nebraska Executes Carey Dean Moore in State's First Lethal Injection*, OMAHA WORLD-HERALD (Aug. 15, 2018), [https://www.omaha.com/news/crime/a-monumental-day-nebraska-executes-carey-dean-moore-in-state/article\\_83cf2f84-9894-5de8-b58f-8140dcfd11f1.html](https://www.omaha.com/news/crime/a-monumental-day-nebraska-executes-carey-dean-moore-in-state/article_83cf2f84-9894-5de8-b58f-8140dcfd11f1.html) [https://perma.unl.edu/F8EL-5K7N].

146. *Id.* Nebraska also became the first state to use fentanyl in an execution as part of a four-drug cocktail that had never been tested before. *See Mitch Smith, Fentanyl Used to Execute Nebraska Inmate, in a First for U.S.*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/carey-dean-moore-nebraska-execution-fentanyl.html> [https://perma.unl.edu/UK7M-BEQA]. Several days before the planned execution, the pharmaceutical company that manufactured two of the drugs in the cocktail unsuccessfully attempted to prevent Nebraska from using the drugs for lethal injection, claiming that the drugs were obtained improperly. Mark Berman, *Nebraska Cleared to Carry Out County's First Fentanyl Execution, Judge Says*, WASH. POST (Aug. 10, 2018, 5:41 PM), <https://beta.washingtonpost.com/news/post-nation/wp/2018/08/10/nebraska-cleared-to-carry-out-county-s-first-fentanyl-execution-judge-says/> [https://perma.unl.edu/Z9T6-YBPJ]. Additionally, concerns arose about the transparency of the execution as curtains were closed to reporters when the lethal injection IV lines were set and for a fourteen-minute span when Moore was declared dead. Joe Duggan, *Transparency Concerns Surface After Nebraska's First Lethal Injection Execution*, OMAHA WORLD-HERALD (Aug. 18, 2018), [https://www.omaha.com/news/crime/transparency-concerns-surface-after-nebraska-s-first-lethal-injection-execution/article\\_b3f73933-c076-5a84-9a55-2c876df8b3fe.html](https://www.omaha.com/news/crime/transparency-concerns-surface-after-nebraska-s-first-lethal-injection-execution/article_b3f73933-c076-5a84-9a55-2c876df8b3fe.html) [https://perma.unl.edu/R9WE-WQYY].

courts are zealous to preserve.”<sup>147</sup> Further, the court noted that the constitutional right to ballot measures should not be circumscribed by restrictive legislation or narrow and strict interpretation of the related statutes.<sup>148</sup>

The reasons for this pre-election deference are twofold. First, courts can only review issues that are justiciable.<sup>149</sup> The Nebraska Supreme Court has held that “[a] justiciable issue requires a present, substantial controversy between parties with adverse legal interests that is susceptible to immediate resolution and capable of present judicial enforcement.”<sup>150</sup> For this reason, Nebraska courts can only review procedural, and not substantive, challenges to ballot measures prior to an election.<sup>151</sup> An opinion on substantive issues prior to an election would be merely advisory.<sup>152</sup>

Second, there are practical reasons for the pre-election deference. There are already relatively high procedural barriers to getting an issue on the ballot in Nebraska.<sup>153</sup> Additionally, many voters feel invested in ballot measure campaigns, as they participate by signing petitions, volunteering to collect petition signatures, writing opinion letters in local newspapers, and meaningfully engaging in conversations about the ballot measure issue in their communities. When courts make every attempt to ensure issues actually make it to the ballot, it strengthens the public’s faith in government and the political process.<sup>154</sup>

After the election, when voters have enacted or repealed a law, the role of the courts can and *should* change from the extreme deference used before an election. Nebraska’s experience with the death penalty referendum illustrates several concerns critics like Julian Eule point to in their defense of a more intense judicial review of ballot measures. First, the population involved is a very unpopular minority: most narrowly, the ballot measure impacts those convicted of first-degree mur-

---

147. Hargesheimer v. Gale, 294 Neb. 123, 134, 881 N.W.2d 589, 597 (2016).

148. *Id.*

149. City of Fremont v. Kotas, 279 Neb. 720, 726, 781 N.W.2d 456, 462 (2010) (“We have long held that the existence of a justiciable issue is a fundamental requirement to a court’s exercise of its discretion to grant declaratory relief.”), *abrogated on other grounds by* City of N. Platte v. Tilgner, 282 Neb. 328, 803 N.W.2d 469 (2011).

150. *Id.* at 727, 781 N.W.2d at 462 (citing Ellis v. Cty. of Scotts Bluff, 210 Neb. 495, 315 N.W.2d 451(1982)).

151. *Id.* at 725, 781 N.W.2d at 461 (“Substantive challenges to proposed initiatives are not justiciable before the measure is adopted by voters.”).

152. Christensen v. Gale, 301 Neb. 19, 35, 917 N.W.2d 145, 158 (2018).

153. See NEB. CONST. art. III, § 2 (describing the procedures for ballot initiatives); *Id.* art. III, § 3 (describing the procedures for ballot referendums).

154. See Eule, *supra* note 48, at 1585–86.

der. Further, in Nebraska, like most states,<sup>155</sup> felons cannot vote while incarcerated, so arguably the minority most impacted by the measure is not voting on the issue. More broadly, the measure affects those who interact with the criminal justice system who are disproportionately people of color and low income.<sup>156</sup> As discussed in subsection II.B.2, those populations are also less likely to vote because of a variety of systemic and personal factors.<sup>157</sup>

Second, the confusing language on the ballot (voting “retain” to end the death penalty and “repeal” to keep it) may have confused and misled voters. This highlights the dangers of voters who are ignorant, ill-informed, or simply confused, as discussed in subsection II.B.2.<sup>158</sup> It is difficult to determine whether a majority vote on a measure is truly the will of the people when it is not clear that “the people” knew what they were voting for. Additionally, the ballot contained only two distinct options: voters were either for the death penalty or against it.<sup>159</sup> However, polling of Nebraskans prior to the election showed that 58.8% of Nebraskans favored alternatives to the death penalty, while only 30% of those surveyed supported the death penalty above other alternatives.<sup>160</sup> The binary nature of ballot measures did not leave much room for nuance, such as discussion of alternatives, in voters’ decision to repeal Legislative Bill 268.

Finally, Governor Ricketts’s personal involvement in funding over one-third of the campaign highlights the danger of special interests

---

155. Jane C. Timm, *Most States Disenfranchise Felons. Maine and Vermont Allow Inmates to Vote from Prison*, NBC NEWS (Feb. 26, 2018, 3:43 AM), <https://www.nbcnews.com/politics/politics-news/states-rethink-prisoner-voting-rights-incarceration-rates-rise-n850406> [<https://perma.unl.edu/XC5M-7UNV>].

156. See SENTENCING PROJECT, REPORT TO THE UNITED NATIONS REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.unl.edu/4AXR-Y2K6>]. The report findings include that African Americans are 5.9 times as likely to be arrested as white Americans, and Latinos are 3.1 times as likely. *Id.* at 1. The introduction to the report states, “The wealthy can access a vigorous adversary system replete with constitutional protections for defendants. Yet the experiences of poor and minority defendants within the criminal justice system often differ substantially from that model . . . .” *Id.*

157. See *supra* notes 71–79 and accompanying text.

158. See *supra* notes 84–87 and accompanying text.

159. See *Read the Death Penalty Referendum*, *supra* note 133.

160. *New Poll: Majority of Nebraska Voters Support Alternatives to the Death Penalty*, ACLU (Apr. 16, 2015), <https://www.aclu.org/press-releases/new-poll-majority-nebraska-voters-support-alternatives-death-penalty> [<https://perma.unl.edu/B34A-M5XT>]; PRISM SURVEYS, SURVEY ON THE DEATH PENALTY (2015), [https://www.aclu-nebraska.org/sites/default/files/field\\_documents/Necappu01\\_Report\\_Memo\\_1.pdf](https://www.aclu-nebraska.org/sites/default/files/field_documents/Necappu01_Report_Memo_1.pdf) [<https://perma.unl.edu/JJS7-6X5G>]. Life without the possibility of parole is a commonly-discussed alternative to the death penalty. See Opinion, *Discussing Death Penalty Alternatives*, NEB. CITY NEWS-PRESS (Aug. 28, 2018, 7:49 PM), <https://www.nnewspress.com/opinion/20180828/discussing-death-penalty-alternatives> [<https://perma.unl.edu/9CD4-CXFQ>].

influencing ballot measures since the campaigns are extremely expensive. In the death penalty case, the funding from Governor Ricketts was at least funding from a Nebraskan; as discussed in subsection II.B.2, often, outside funders and special interest groups fund successful ballot measure campaigns.<sup>161</sup>

Yet ballot measures are still the will of the people, or at least of the majority of voters. As discussed in subsection II.A.1, ballot measures are an effective means for voters to enact legislation when elected officials cannot—or will not—work together to legislate.<sup>162</sup> When Americans distrust the government and feel isolated from the political process,<sup>163</sup> ballot measures are a vehicle for civic engagement and policy change.<sup>164</sup> For example, in 2018, Nebraska voters approved a ballot measure to expand Medicaid in the state<sup>165</sup> after the Nebraska legislature failed to pass similar legislation for six years.<sup>166</sup> Medicaid expansion is a program created by the divisive Affordable Care Act, which many state legislators—and Governor Ricketts—were reluctant to support.<sup>167</sup> The ballot measure energized volunteers across Nebraska on both sides of the issue.<sup>168</sup> Some Nebraskans saw the suc-

---

161. See *supra* notes 80–83 and accompanying text.

162. See Cohen, *supra* note 27 (“Many successful [ballot measures] seemed to rebuke the polarizing and prejudicial rhetoric coming from the White House. With voters across the political spectrum disillusioned by party leadership and the prevalence of special interests [in] politics, the initiatives seemed to reassert the power of the people, testifying to the impact of bottom-up democracy.”).

163. See *supra* notes 19–28 and accompanying text; see also David Lauter, *Voters Distrust Government in General, but Like Many Specifics, Poll Finds*, L.A. TIMES (Nov. 23, 2015, 6:47 AM), <https://www.latimes.com/politics/la-na-voter-trust-20151123-story.html> [<https://perma.unl.edu/EG7A-AJUC>] (highlighting results of large-scale survey by the nonpartisan Pew Research Center in which “six in 10 respondents said they feel ‘frustrated’ by the government”).

164. For a discussion on how both political parties used ballot measures to increase voter turnout in North Dakota, see John Hudak, *How Ballot Initiatives Will Impact Voter Turnout in the 2018 Midterms*, BROOKINGS (Oct. 22, 2018), <https://www.brookings.edu/blog/brookings-now/2018/10/22/how-ballot-initiatives-will-impact-voter-turnout-in-the-2018-midterms/> [<https://perma.unl.edu/8FJK-NF9W>].

165. Bruce Japsen, *Nebraska Voters Approve Medicaid Expansion in Snub to Gov. Ricketts*, FORBES (Nov. 7, 2018, 1:04 AM), <https://www.forbes.com/sites/brucejapsen/2018/11/07/nebraska-voters-approve-medicaid-expansion/#5bf4b2ab1565> [<https://perma.unl.edu/L7ER-S4ED>].

166. Henry J. Cordes, *Nebraskans Approve Expanding Medicaid to Cover More of the State’s Low-Income Residents*, OMAHA WORLD-HERALD (Nov. 7, 2018), [https://www.omaha.com/livewellnebraska/health/nebraskans-approve-expanding-medicaid-to-cover-more-of-the-state/article\\_389878a4-74a3-5a82-a482-3bc43bb1bb79.html](https://www.omaha.com/livewellnebraska/health/nebraskans-approve-expanding-medicaid-to-cover-more-of-the-state/article_389878a4-74a3-5a82-a482-3bc43bb1bb79.html) [<https://perma.unl.edu/8R9P-HKDT>].

167. Japsen, *supra* note 165.

168. For a discussion of Medicaid expansion volunteer activities and citizen perspectives before the election, see Michael Ollove, *The Ground Game for Medicaid Expansion: ‘Socialism’ or a Benefit for All?*, PEW (Nov. 5, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/11/05/the-ground-game->

cess of the ballot measure as proof that “Nebraska legislators and [Governor] Ricketts were ignoring their constituencies on a key healthcare issue.”<sup>169</sup>

Unlike the death penalty referendum, where voters were deciding whether or not to *take away a right* (freedom from execution) from an unpopular minority (individuals convicted of murder), in the Medicaid expansion initiative, Nebraskans voted to *grant a right* (access to healthcare) to an unpopular minority (uninsured, low-income Nebraskans). Despite the challenges discussed by critics like Professor Eule, ballot measures can be an effective way for voters to address a perceived lack of social progress in the face of legislative inaction.<sup>170</sup>

Additionally, Nebraska’s constitution plainly states: “The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature.”<sup>171</sup> This is a powerful statement—one that says citizens can enact laws independent of the legislature. It does not say that citizens can enact laws with a power lesser or greater than that of the legislature; rather, the “first power [of the]

---

for-medicaid-expansion-socialism-or-a-benefit-for-all [https://perma.unl.edu/A6BB-7EU6] (“Although there has been no public polling, even the speaker of the state’s unicameral legislature, Jim Scheer, one of 11 Republican state senators who signed an editorial last month opposing the initiative, said he is all but resigned to passage. ‘I believe it will pass fairly handily,’ he told *Stateline* late last month.”); Hari Sreenivasan et al., *Will Conservative Nebraska Vote to Expand Medicaid?*, PBS (Oct. 21, 2018, 4:54 PM), https://www.pbs.org/newshour/show/will-conservative-nebraska-vote-to-expand-medicaid [https://perma.unl.edu/2TQ2-KDML].

169. Japsen, *supra* note 165. In 2017, Nebraska’s Grant County, with a population of less than 650, was the county with the highest percentage of Affordable Care Act (“ACA” or “Obamacare”) enrollees in the United States. Jessica Ravitz, *Where Trump Support and Obamacare Use Soar Together*, CNN (Jan. 24, 2017, 4:22 AM), https://www.cnn.com/2017/01/24/health/nebraska-trump-obamacare-aca-prise/index.html [https://perma.unl.edu/Z75N-QPYT] (noting that 33% of the county’s residents were enrolled in the ACA, compared to the national average of 5%). According to the article, the residents held complicated, and sometimes contradictory, views of the health care act. *Id.*
170. See DuVivier, *supra* note 54, at 898 (“Addressing controversial issues through ‘fast-food government’ can promote the evolution of innovation. Because initiatives have been the first, or sometimes the only, successful mechanisms for addressing some progressive issues, they illustrate the benefits of this dispersed form of federalism.”).
171. NEB. CONST. art. III, § 2. Additionally, the Nebraska constitution states:  
 The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, *independent of the Legislature*, which power shall be called the power of initiative. The people also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature, which power shall be called the power of referendum.  
*Id.* art. III, § 1 (emphasis added).

people”<sup>172</sup> is simply independent. Accordingly, the appropriate level of post-election judicial review of ballot measures is “legislative mirroring”: courts should review the laws enacted as a result of a ballot measure with the same level of judicial scrutiny they would use for a comparable piece of legislation passed or repealed by the legislature.

Thus, Nebraska courts should adopt a rule of pre-election deference to voters and post-election legislative mirroring when reviewing ballot measures. In many ways, Nebraska courts are already putting this rule into practice, but it is necessary to articulate it. Ultimately, a pre-election deferential approach will mean that courts will largely allow ballot measure issues to be placed on the ballot for voters to decide unless there are serious procedural deficiencies in proponents’ efforts to get the issue on the ballot. It puts faith in the majority of voters to make informed decisions, to be cognizant of the rights and perspectives of minorities, and to participate meaningfully in democracy. Yet by reviewing laws passed through ballot measures post-election with the same level of deference used for laws passed through the legislature, Nebraska courts will protect the rights of minorities and individual liberties. Further, in treating popularly enacted laws the same as legislatively created laws, Nebraska courts demonstrate that voters are, in fact, “as good as they ought to be.”<sup>173</sup>

#### IV. CONCLUSION

The 2020 election is promising a continuation of the trend toward voter-led ballot measures,<sup>174</sup> including in Nebraska. In Nebraska, campaigns are up and running for several proposed ballot measures, including legalizing medicinal marijuana<sup>175</sup> and casino gambling,<sup>176</sup>

---

172. *Id.* art. III, § 2.

173. See Tushnet, *supra* note 93, at 19.

174. See Bruce Japsen, *More Red State Medicaid Ballot Campaigns Emerge for 2020*, FORBES (Sept. 8, 2019, 8:00 AM), <https://www.forbes.com/sites/brucejapsen/2019/09/08/more-red-state-medicaid-ballot-campaigns-emerge-for-2020/#4c7a41655fa9> [https://perma.unl.edu/28SA-VYMG]; Caroline Kelly, *Minimum Wage Activists Look to 2020 Ballots After Midterm Success*, CNN (Nov. 9, 2018, 1:35 PM), <https://www.cnn.com/2018/11/09/politics/minimum-wage-midterms-arkansas-missouri/index.html> [https://perma.unl.edu/2XSB-JZ8P].

175. Tom Angell, *Nebraska Could Vote on This Medical Marijuana Ballot Measure in 2020*, FORBES (Feb. 5, 2019, 1:45 PM), <https://www.forbes.com/sites/tomangell/2019/02/05/nebraska-could-vote-on-this-medical-marijuana-ballot-measure-in-2020/#74c9971252c7> [https://perma.unl.edu/M96F-4UY2]; Associated Press, *Medical Marijuana Petition Drive Running Strong in Nebraska*, KMTV NEWS NOW OMAHA (July 21, 2019, 11:51 AM), <https://www.3newsnow.com/news/community/vista-semanal/local/medical-marijuana-petition-drive-running-strong-in-nebraska> [https://perma.unl.edu/A8CV-8GHS].

176. Associated Press, *Nebraska Voters May Vote on Casino Gambling*, FOX BUS. (June 30, 2019), <https://www.foxbusiness.com/personal-finance/nebraska-voters-may-vote-on-casino-gambling> [https://perma.unl.edu/V7RN-WEZL].

and capping high payday loan interest rates.<sup>177</sup> Other measures may be on the horizon.<sup>178</sup> Ultimately, direct democracy, including voter-led ballot measures, “has a strong emotional pull cutting clear across the political spectrum.”<sup>179</sup>

Yet state governors and legislatures are also pushing back against voter-led ballot measures in two key ways: through overturning passed measures and through passing legislation to make it more difficult for ballot measures to pass in the first place.<sup>180</sup> Lawsuits are a traditional method of delaying implementation of passed ballot measures.<sup>181</sup> Recently, however, some lawmakers are seeking to outright overturn ballot measures or change provisions of the voter-enacted law.<sup>182</sup> State legislatures are also passing new laws that make it more difficult for issues to make it to the ballot in the first place,<sup>183</sup> including requiring a specific number of signatures per county or district,<sup>184</sup> raising the percentage of the ballot vote needed for a measure to pass,<sup>185</sup> and moving up the signature collection deadline.<sup>186</sup>

Now, perhaps more than ever, the judiciary plays a crucial role in improving the public’s trust in the “great experiment” that is the

- 
177. Martha Stoddard, *Capping Payday Lending Rates at 36% in Nebraska Is Goal of New Petition Drive*, SCOTTSLUFF STAR HERALD (Sept. 14, 2019), [https://www.starherald.com/news/regional\\_statewide/capping-payday-lending-rates-at-in-nebraska-is-goal-of/article\\_7bd4f9fa-16b4-5176-816f-6f3eb5ade3a8.html](https://www.starherald.com/news/regional_statewide/capping-payday-lending-rates-at-in-nebraska-is-goal-of/article_7bd4f9fa-16b4-5176-816f-6f3eb5ade3a8.html) [<https://perma.unl.edu/4BEH-7PNV>].
178. Don Walton, *Redistricting Ruling Could Prompt Nebraska Ballot Initiative*, LINCOLN J. STAR (July 2, 2019), [https://journalstar.com/legislature/redistricting-ruling-could-prompt-nebraska-ballot-initiative/article\\_94e4b7ee-39aa-5f88-8be2-244c043a5a4b.html](https://journalstar.com/legislature/redistricting-ruling-could-prompt-nebraska-ballot-initiative/article_94e4b7ee-39aa-5f88-8be2-244c043a5a4b.html) [<https://perma.unl.edu/DC73-72KT>].
179. Eule, *supra* note 48, at 1507.
180. Greenblatt, *supra* note 88.
181. *Id.*
182. *Id.*; see also Martha Stoddard, *Nebraska Appleseed Files Lawsuit Seeking Earlier Start Date for Expanded Medicaid Coverage*, OMAHA WORLD-HERALD (Aug. 29, 2019), [https://www.omaha.com/livewellnebraska/health/nebraska-appleseed-files-lawsuit-seeking-earlier-start-date-for-expanded/article\\_98ec93b0-5037-5978-899a-c616d1945838.html](https://www.omaha.com/livewellnebraska/health/nebraska-appleseed-files-lawsuit-seeking-earlier-start-date-for-expanded/article_98ec93b0-5037-5978-899a-c616d1945838.html) [<https://perma.unl.edu/44CH-UMGC>] (explaining that the nonprofit Nebraska Appleseed filed a lawsuit to order the Nebraska Department of Health and Human Services to implement voter-approved Medicaid expansion after the Department announced it would not implement the program until two years after the ballot measure passed).
183. See Gary Fineout, *Florida Lawmakers Tighten Ballot Measure Rules Ahead of 2020 Election*, POLITICO (May 3, 2019, 10:28 PM), <https://www.politico.com/states/florida/story/2019/05/03/florida-legislature-takes-aim-at-ballot-measures-ahead-of-2020-election-9178437> [<https://perma.unl.edu/T85U-W86J>] (describing how Florida lawmakers passed legislation that requires ballot measure signature gatherers to register with the state, prohibits paying hired signature gatherers on a per-signature basis, and requires that ballot measures include language about the budgetary and economic impacts of the measure).
184. Newkirk, *supra* note 9.
185. Greenblatt, *supra* note 88.
186. *Id.*

United States.<sup>187</sup> A rule of pre-election deference and post-election legislative mirroring serves this interest as it balances respect for the will of Nebraska voters with the concern for the rights of minority factions. If the current trend continues, there will be even more ballot measures in Nebraska's future. Thus, Nebraska courts should adopt the pre-election deference, post-election legislative mirroring approach when reviewing challenges to those ballot measures.

---

187. Letter from George Washington to Catharine Sawbridge Macaulay Graham (Jan. 9, 1790) (on file with the National Archives, Washington, D.C.). The letter reads, "The establishment of our new Government seemed to be the last great experiment, for promoting human happiness . . . in civil Society." *Id.*