

A CRITICAL LOOK AT THE FIRST 50 YEARS OF FLORIDA'S "CITIZEN" INITIATIVE PROCESS

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I. INTRODUCTION

Beginning in 1970, Floridians could make nearly permanent changes to their state's foundational document by directly proposing and voting on constitutional amendments.¹ However, over the last fifty years, this process has been taken over by well-organized special interests² because, unlike other states, there are only the faintest of safeguards.³ For instance, Florida's initiative process has no subject-matter limitations nor do any government officials have a constructive role.⁴ Once on the ballot, citizen petitions tend to pass—only eight of the thirty-eight citizen petition measures that have made it on the ballot have failed.⁵ Not only are the proposed constitutional changes presented to voters by an opaque system of special interests; the amendments themselves have also become increasingly complex over the last thirty years. Reforms are thus needed.

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1. FLA. CONST. art. XI, § 3, gives the people the "power to propose the revision or amendment of any portion or portions of this constitution by initiative" subject to some limitations. For an overview of how Florida's Constitutions changed over time with respect to direct democracy, see Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STETSON L. REV. 393, 393 n.4 (1995).

2. Like other states, Florida's modern petition process amounts to a "proposal by well-organized interests and ratification by the electorate." Philip P. Frickey, *Interpretation on the Borderline: Constitutions, Canons, Direct Democracy*, 1 N.Y.U. J. LEGIS. & PUB. POL'Y 105, 146 (1997). Professor Frickey also correctly notes that popular constitutional amendments reside in an uneasy middle ground of interpretation between constitutions and statutes. *Id.*

3. Eric S. Matthew, *A New Prescription: How a Thorough Diagnosis of the "Medical Malpractice" Amendments Reveals Potential Cures for Florida's Ailing Citizen Initiative Process*, 14 U. MIAMI BUS. L. REV. 331, 334–35 (2006).

4. See generally FLA. CONST. art. XI, § 3.

5. *Initiatives / Amendments / Revisions Database*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/> (last visited July 18, 2021) [hereinafter *Florida Initiatives*].

In Part II, this Article outlines the history of Florida's citizen initiative process and the state government's rather limited role. Part III details the legal process for placing a measure on the ballot. In Part IV, the Article examines how special interest groups use the system. This Part identifies the unwritten political steps for Florida's citizen initiative process: a multimillion-dollar budget, paid political consultants, and paid signature gatherers. This Part also focuses on an emerging step that takes place after the passage of a successful amendment: suing the state actors responsible for implementing the ballot language for not doing it in the way the special interest desires.

In Part V, this Article surveys problems with interpreting these amendments. In Part VI, this Article discusses the unrestrained and uniquely powerful position that the citizen initiative process has within the Florida Constitution, which otherwise is wary of power consolidated in one entity. The Florida Constitution, for instance, limits the three branches of government further than its federal counterpart.⁶ The Florida Constitution also limits the delegation of policymaking authority and places restraints on both lobbyists and lawyers.⁷ After discussing the wisdom and utility of these measures, Part VII turns to discuss the need for more guardrails on the citizen initiative process and briefly analyzes several proposed adjustments.

II. A BRIEF HISTORY OF THE PETITION PROCESS IN FLORIDA

When compared to other states, direct democracy arrived relatively late to Florida.⁸ During the Progressive Era, many states instituted citizen referenda processes to return power to the populace.⁹ Opposition from establishment interests soon followed.¹⁰ Florida, however, spent the Progressive Era with its antiquated 1885 Constitution that could be amended only with the approval of the Florida

6. FLA. CONST. art. VI, § 4, provides an example of how Florida's Constitution differs from the U.S. Constitution by adding term limits.

7. *Id.* art. II, § 8.

8. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 400 n.18 (2003).

9. See Daniel A. Smith & Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer?*, 14 J. POL'Y HIST. 349, 349–51 (2002).

10. One of the earliest and most important challenges to a state initiative process was the case of *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 118 (1912), where the United States Supreme Court ruled against a telegraph company on a citizen-proposed tax. The Court found that a citizens' initiative process did not violate the republican form of government guaranteed under the U.S. Constitution under Article IV, Section 4. *Id.* at 151.

legislature.¹¹ Even without an initiative process, the 1885 Constitution was amended 133 times in its eighty-year history.¹² Partially due to the constitution's increasingly unwieldy length, as well as many unconstitutional and racist provisions, the 1966 Florida Legislature established a statutory Constitution Revision Commission (1966 CRC) to revise the 1885 Constitution.¹³

The 1966 CRC modernized much of Florida's government by creating a new foundational document that has served Florida well for the last half-century. Its work product, now known as the 1968 Constitution, was far slimmer than the 1885 Constitution¹⁴ and included a citizens' initiative process.¹⁵ The 1966 CRC was not the first Florida committee to consider adding direct democracy into the constitution. An earlier attempt at constitutional reform known as the Sturgis Committee included an initiative proposal in its 1957 recommendations.¹⁶ Surprisingly, despite being a radical addition to the Florida Constitution, the initiative petition itself was uncontroversial during the debates of the 1966 CRC and was easily approved.¹⁷ The 1968 Constitution also included other methods of amendment, including by convention,¹⁸ by

11. One modern commentator has correctly called the 1885 Constitution "worse than a relic of a horse-and-buggy age." Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What it Has Become*, 19 FLA. COASTAL L. REV. 5, 8 (2016).

12. Initial Brief of the Florida House of Representatives in Opposition to the Initiative at 16–17, Advisory Op. to Att'y Gen. re: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice & Advisory Op. to Att'y Gen. re: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice (Financial Impact Statement), 287 So. 3d 1256 (Fla. 2020) (SC19-328 & SC19-479 consolidated), https://efactssc-public.flcourts.org/casedocuments/2019/328/2019-328_brief_133085_initial20brief2dmerits.pdf (citing transcript at 21, March 25, 1966, Fla. St. Archives, Record Group 720, Box 1, Folder 6—a quote from Judge Thomas H. Barkdull, Jr.) It should be noted that the modern Florida Constitution has been amended roughly the same number of times in its fifty-year existence. Perhaps it is the fate of Florida Constitutions to be rewritten before they turn one hundred years old.

13. See MARY E. ADKINS, MAKING MODERN FLORIDA: HOW THE SPIRIT OF REFORM SHAPED A NEW STATE CONSTITUTION 55–56 (David R. Colburn & Susan A. MacManus eds., 2016).

14. According to a contemporaneous report by the Clerk of the House of the Florida House of Representatives, "[t]he Constitution of 1885, as amended, contains 36,230 words; the Revised Constitution of 1968 will contain 21,286 words. The Revision, therefore reduced the number of words in the Constitution by approximately 42%." *Constitution of 1885 and Proposed Constitution of 1968 – Section by Section Analysis*, CLERK OF FLA. HOUSE (July 24, 1968), <https://ufdc.ufl.edu/AA00007510/00001/1x>.

15. FLA. CONST. art. XI, § 3; see Little, *supra* note 1, at 393 n.4 (describing the history of Florida's older constitutions); see also Jim Smith, *So You Want to Amend the Florida Constitution? A Guide to Initiative Petitions*, 18 NOVA L. REV. 1509, 1509 (1994).

16. ADKINS, *supra* note 13, at 23.

17. *Id.* at 150–51.

18. FLA. CONST. art. XI, § 4, gives the people the "power to call a convention to consider a revision of the entire constitution." This power has never been used. *Florida Constitution Revision Commission 2017-2018 A Citizens' Guide*, FLA. SCH. BD. ASS'N., <http://fsba.org/wp-content/uploads/2015/08/Constitution-Revision-Commission-brochure.pdf> (last visited July 19, 2021).

reoccurring commission,¹⁹ and by legislation,²⁰ all of which require citizen approval. But the petition-based process is the only means to amend the Florida Constitution “without the filtering mechanism inherent in representative democracy.”²¹ In the 1968 election, Floridians approved this new, more malleable constitution.²²

Use of this extraordinary process started out slowly but steadily increased over time. For its first ten years (1970–1979), only two initiative proposals successfully made it to the ballot, and only one passed.²³ For the second decade (1980–1989), only four proposals made it to the ballot, and Floridians only approved two.²⁴ As recently as 1994, a former Florida Secretary of State²⁵ wrote that the process was “not an easy task.”²⁶ In retrospect, 1994 may have been a turning point because two records were broken: ten proposals were registered with the Secretary of State and three petition proposals were placed on the ballot.²⁷ During the review process that year, Florida Supreme Court Justice Grimes said in dicta that the “constitutional amendment by initiative is being overused.”²⁸ Since then, the use of the initiative

19. FLA. CONST. art. XI, § 2, establishes the Constitution Revision Commission that meets every twenty years. FLA. CONST. art. XI, § 6, establishes the Taxation and Budget Reform Commission that meets every twenty years, staggered ten years from the Constitution Revision Commission.

20. FLA. CONST. art. XI, § 1, gives the Legislature the authority to propose changes to the constitution by joint resolution agreed to by three-fifths of the membership. This power is more frequently used. See *Florida Initiatives*, *supra* note 5 (showing which sponsor proposed each amendment for each year dating back to 1978).

21. Robert M. Norway, *Judicial Review of Initiative Petitions in Florida*, 5 FLA. COASTAL L. REV. 15, 15 (2004). Florida’s modern constitution can be amended one of six ways: five ways through Article XI and one way through a joint resolution for certain technical changes. See Christopher Emmanuel, *Limiting Florida’s Constitution Revision Commission*, 47 FLA. ST. U. L. REV. 733, 735–36 (2020). The “filters” for the two vicinal constitutional commissions are also in need of some work. *Id.* at 735. But see Donna Blanton, *The Taxation and Budget Reform Commission: Florida’s Best Hope for the Future*, 18 FLA. ST. U. L. REV. 437, 437–38 (1991).

22. See generally ADKINS, *supra* note 13.

23. The successful measure was backed by the Governor and promised ethics reform. *The People’s Business*, MY FLA. HOUSE 300–01, <https://www.myfloridahouse.gov/filestores/Adhoc/FloridaHandbook/The%20People%27s%20Business%202013-2014.pdf> (last visited July 19, 2021) (explaining that in 1976 the “Sunshine Amendment” was passed and incorporated into the Florida Constitution, and displaying a photo of Governor Reubin Askew advocating for the amendment).

24. *Florida Initiatives*, *supra* note 5.

25. At the time, the Secretary of State was a statewide elected official who supervised the Florida Division of Elections. Smith, *supra* note 15, at 1512 (laying out the duties of the Secretary of State at the time); *id.* at n.24 (explaining that the Secretary of State’s duties “are handled by the Division of Elections of the Department of State”).

26. *Id.* at 1510.

27. *Florida Initiatives*, *supra* note 5; see also Daniel R. Gordon, *Protecting Against the State Constitutional Law Junkyard: Proposals to Limit Popular Constitutional Revision in Florida*, 20 NOVA L. REV. 413, 417 (1995).

28. Advisory Op. to Att’y Gen. re: Stop Early Release of Prisoners, 642 So. 2d 724, 728 (Fla. 1994) (Grimes, J., dissenting).

process has only increased. Fourteen amendments passed from 2000–2009, and another six passed from 2010–2019.²⁹ By 2020, roughly one hundred amendments had been reviewed by the Florida Supreme Court, and as of July 21, 2021, forty-one amendments have been filed for potential inclusion on the 2022 ballot—a number subject to change prior to the election.³⁰ Most proposals are backed by increasingly savvy political committees and single-issue donors.³¹ Indeed, scholars have insisted that “ballot initiatives should no longer be romanticized as lawmaking by ‘the people’” but be viewed as lawmaking by “initiative proponents whose general objective is either ratified or rejected by the electorate.”³² One respondent brief opposing a measure said it best: “[o]ne thing this citizen initiative is lacking, is citizens.”³³

Meaningful safeguards are also missing. At its most basic level, Florida’s petition process is comprised of two simultaneous tracks, one legal and one political. The legal process requires a series of steps with official state actors, which serve more as checkpoints rather than filtering mechanisms.³⁴ The political process is the accumulation of support in the form of signatures and ultimately at the ballot box, typically through money and paid consultants.³⁵ Separating these processes is difficult—even Justice Grimes’ above comment has been described as a “patently political evaluation in judicial discourse of a purely legal question.”³⁶

III. THE LEGAL PROCESS FOR PETITION GATHERING

Placing an initiative on the ballot only involves the executive and judicial branches, rendering the legal processes fairly straightforward. This involvement, however, is superficial at best because these branches can only disqualify an initiative on narrow and technical grounds, and

29. *Florida Initiatives*, *supra* note 5.

30. *Id.*

31. This is an expected outcome and one that has been noted by scholars in Florida for at least twenty-five years. *See generally* Gordon, *supra* note 27, at 425 (illustrating an instance in which a Florida scholar made such an observation over twenty-five years ago which still holds true today). “The money infused into the battles over those proposals also evidences the enormity of the perceived impact of these amendment proposals on social status and corporate bottom lines.” *Id.*

32. Staszewski, *supra* note 8, at 420.

33. Reply Brief of Opponent at 1, Advisory Op. to Att’y Gen. re: Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice, 287 So. 3d 1256 (Fla. 2020) (No. SC19-328), https://efactssc-public.flcourts.org/casedocuments/2019/328/2019-328_brief_133905_reply20brief2dmerits.pdf.

34. FLA. CONST. art. XI, §§ 2, 6.

35. *Id.* art. XI, §§ 1, 4–5.

36. Little, *supra* note 1, at 1.

savvy political groups can easily move through this process with proper planning and sufficient funds.

Before any official action, an individual or group seeking to sponsor an amendment must register as a political committee with the Department of State within ten days of its organization.³⁷ After organizing, the political committee sponsoring the initiative submits the complete petition proposal to the Department of State's Division of Elections.³⁸ The title of the initiative may not exceed fifteen words, and the ballot summary may not exceed seventy-five words.³⁹ Only after the format is approved by the Division of Elections and a serial number is assigned may the individual or group lawfully begin circulating petitions for signatures.⁴⁰

To put a proposal on the ballot, a group must collect signatures equaling eight percent of the voters in the last presidential election statewide, as well as eight percent in at least half of the state's congressional districts.⁴¹ For the November 2020 ballot, the deadline for submitting signatures was February 1, 2020.⁴² After signatures are

37. FLA. STAT. § 100.371(2) (2020). The head of the Department of State is the Secretary of State. Prior to 1998, the Secretary of State was a statewide elected member of the Cabinet, meaning that the Governor or their appointees had zero role in the process for the first thirty years of its existence. *Restructuring the Florida Cabinet*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/11-4.pdf> (last visited July 19, 2021) (showing that prior to the 1998 amendment, the Secretary of State was a member of the state cabinet and a statewide elected official). This was changed via constitutional amendment proposed by the 1998 Constitution Revision Commission. See FLA. CONST. art. IV, § 4 (amended 1998) (sponsored by Constitution Revision Commission) (amending the Florida Constitution by restructuring the state cabinet to exclude the Secretary of State).

38. FLA. STAT. § 100.371(2).

39. *Id.* § 101.161.

40. *Id.* § 100.371(2); *2018 Initiative Petition Handbook*, FLA. DIV. OF ELECTIONS 4 (2017), <https://dos.myflorida.com/media/697659/initiative-petition-handbook-2018-election-cycle-eng.pdf>.

41. FLA. CONST. art. XI, § 3. This is currently fourteen out of twenty-seven congressional districts. *2018 Initiative Petition Handbook*, *supra* note 40, at 8. Note that when Florida has an odd number of congressional districts, the number is rounded up. *Id.* This requirement has not changed since 1968. Each congressional district has a different number of voters voting in the prior presidential election, which ranges from 21,556 to 34,256. *Id.* In 2020, the Florida Legislature debated a constitutional amendment that would have required eight percent of each congressional district. See H.R.J. Res. 7093, 2020 Leg. (Fla. 2020) (demonstrating debate).

42. FLA. STAT. § 101.371(1); see also *2018 Initiative Petition Handbook*, *supra* note 40, at 5. In practice, the act of signature gathering straddles the line between being a legal process and a political process and is discussed further in Part III. See *infra* pt. III.

gathered, the petitions must be verified, with some costs covered by the sponsoring political committee.⁴³ Signatures expire after two years.⁴⁴

While the ultimate goal is obtaining 766,200 verified signatures, the second round of official state action is triggered when a proposal has obtained and verified a quarter of the number of total signatures required statewide in one-half of the congressional districts.⁴⁵ After reaching this lower threshold, a proposal is considered to have “made review,” which triggers actions by the Secretary of State, the Attorney General, an estimating conference, and the Florida Supreme Court.⁴⁶

First, the Secretary of State sends the amendment to the Attorney General’s office for review. Then, per Article IV, Section 10, the Attorney General:

shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.⁴⁷

Florida’s Attorney General has discretion in determining the scope of the advisory opinion request.⁴⁸ For example, the request may point out “specific factual issues that the Attorney General believes would require

43. *2018 Initiative Petition Handbook*, *supra* note 40, at 4. Florida law provides an avenue to waive these costs for volunteer-only committees who have an “undue burden.” *Id.* However, if the individual or committee raises any monies for their effort, the “undue burden” affidavit becomes void, and the committee must pay the Supervisors of Elections for verification costs. *Id.*

44. FLA. STAT. § 100.371(11); *see also 2018 Initiative Petition Handbook*, *supra* note 40, at 2. A 2020 change in statute changed this from four years to two years, beginning in 2022; *see* S.B. 1794, 2020 Leg. (Fla. 2020).

45. Senate Bill 1794 (2020) changed these numbers. S.B. 1794, 2020 Leg. (Fla. 2020). Prior to 2020, only a tenth of signatures were needed from one quarter of the districts. *Id.* In 2017, this number was 76,632 from seven congressional districts. *2018 Initiative Petition Handbook*, *supra* note 40, at 8. For 2020, the numbers by congressional districts range from 2,156 to 3,426. *Id.* After local level verification, these numbers are sent to the Secretary of State and posted on their website. S.B. 1794, 2020 Leg. (Fla. 2020). A petition is not considered valid until it has been verified by this process. *Id.* The sponsors of this measure said that the higher threshold would protect the resources of the Florida Supreme Court. *2/11/20 Senate Committee on Judiciary*, FLA. CHANNEL, at 1:00:01 (Feb. 11, 2020), <https://thefloridachannel.org/videos/2-11-20-senate-committee-on-judiciary/> (recording Senator Hutson stating, “[t]here are several citizen initiatives that go through court review that either get approved or denied and never make it to . . . our ballots for a constitutional vote. *So rather than wastevaluable Supreme Court time*, we are upping that threshold to make sure that somebody can get closer to being on that ballot.”) (emphasis added).

46. FLA. STAT. § 16.061 (2020).

47. FLA. CONST. art. IV, § 10. Interestingly, this judicial requirement is found in the executive article of the Florida Constitution.

48. FLA. STAT. § 16.061(1).

a judicial determination.”⁴⁹ While nonbinding, these transmittal letters can show opposition to an effort and signal that the Attorney General intends to argue the issue before the Florida Supreme Court.

The action can also have political utility, leveraging the Attorney General’s bully pulpit to comment on a particular policy before a statewide audience. For example, in 2019, Florida Attorney General Ashley Moody opposed several amendments seeking to be on the ballot, including the deregulation of the energy markets;⁵⁰ one of the recreational marijuana amendments;⁵¹ the assault weapon ban;⁵² and the jungle primary amendment;⁵³ because she claimed each proposal was inappropriate for constitutional action and could be accomplished via statutory change. Each of these four stances has earned considerable press, which could change public opinion on a measure. Like the initiative process itself, the Attorney General’s actions can be both legal and political.

Besides the Attorney General’s actions, an entity known as the Financial Impact Estimating Conference (FIEC) must act. The FIEC’s role in the process was instituted in 2002, when Floridians approved a constitutional amendment that directed the Florida Legislature to create “a statement to the public regarding the probable financial impact of any amendment proposed by initiative.”⁵⁴ The FIEC consists of four individuals: an appointee from the Executive Office of the Governor, the coordinator of the Office of Economic and Demographic Research or a designee, a House appointee, and a Senate appointee.⁵⁵ Starting in the 2020 election, the FIEC’s financial impact statement has been included on the ballot, giving voters more information at the time of voting;

49. *Id.*

50. Letter from Ashley Moody, Att’y Gen., State of Fla., to the Sup. Ct. of Fla. (Mar. 1, 2019), https://efactssc-public.flcourts.org/casedocuments/2019/328/2019-328_petition_72546_e12b.pdf.

51. Letter from Ashley Moody, Att’y Gen., State of Fla., to the Sup. Ct. of Fla. (Sept. 11, 2019), [http://myfloridalegal.com/webfiles.nsf/WF/GPEY-BFWRWH/\\$file/Petition+for+Adv+Op+recreational+Marijuana.pdf](http://myfloridalegal.com/webfiles.nsf/WF/GPEY-BFWRWH/$file/Petition+for+Adv+Op+recreational+Marijuana.pdf).

52. Attorney General’s Initial Brief at 1, Advisory Op. to Att’y Gen. Prohibits Possession of Defined Assault Weapons, 296 So. 3d 376 (Fla. 2020) (SC19-1266 & SC19-1601 consolidated), https://efactssc-public.flcourts.org/casedocuments/2019/1266/2019-1266_brief_135503_initial20brief2dmerits.pdf.

53. Attorney General’s Initial Brief at 5, Advisory Op. to the Att’y Gen. re All Voters Vote in Primary Elections for State Legis., Gov., and Cabinet., 291 So. 3d 901, 905 (Fla. 2020) (SC19-1267 & SC19-1505 consolidated), [http://myfloridalegal.com/webfiles.nsf/WF/GPEY-BGJUAS/\\$file/Initial+Brief+On+Merits.pdf](http://myfloridalegal.com/webfiles.nsf/WF/GPEY-BGJUAS/$file/Initial+Brief+On+Merits.pdf). The “jungle primary amendment” is a phrase referring to the amendment that sought to allow “all registered voters to vote in primaries for state legislature, governor, and cabinet regardless of political party affiliation.” *Id.*

54. FLA. CONST. art. XI, § 5.

55. FLA. STAT. § 100.37(13)(c) (2020).

however, it remains to be seen if disclosing the financial impact of a measure will change voter preferences.⁵⁶

After receiving the proposal from the Attorney General, the Florida Supreme Court reviews the petition, but only to determine if the measure relates to one subject and that the title is not misleading.⁵⁷ The court may not “address the merits or wisdom of the [i]nitiative.”⁵⁸ The Florida Supreme Court “has traditionally applied a deferential standard of review to the validity of a citizen initiative petition and ‘has been reluctant to interfere’ with ‘the right of self-determination for all Florida’s citizens’ to formulate ‘their own organic law.’”⁵⁹ The Florida Supreme Court has also recognized the inherent difficulty of explaining proposals in so few words and therefore, has “never required that the summary explain the complete details of a proposal at great and undue length”⁶⁰ Defective ballot summaries, however, cannot be corrected.⁶¹ The Florida Supreme Court also has a limited oversight role towards the FIEC, through which it can remand the fiscal impact statement if it is “not . . . in accordance with [proper procedures].”⁶² To date, the Florida Supreme Court has not used this power.

So far, at least two successful citizens’ initiatives were subsequently found unconstitutional, though future problems may begin to be

56. Some states have prohibited constitutional petitions from levying taxes or allocating revenue. *See infra* note 179. Florida only requires that the voters know the best estimate of what the fiscal impact of the proposal will be on local and state budgets. FLA. STAT. § 100.371(13)(a) (2020).

57. FLA. STAT. § 101.161 (2020); *see* *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000) (noting that amendment language cannot be misleading). When “a proposed amendment changes more than one government function, it is clearly multi-subject” and must be rejected. *Advisory Op. to the Att’y Gen.*, 778 So. 2d 888, 895 (Fla. 2000) (quoting *Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984)).

58. *Re Prohibits Possession of Defined Assault Weapons*, 296 So. 3d at 380 (quoting *Advisory Op. to Att’y Gen. re Amend. to Bar Gov’t from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 891 (Fla. 2000)).

59. *Advisory Op. to Att’y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 794 (Fla. 2014) (quoting *Advisory Op. to Att’y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses*, 818 So. 2d 491, 494 (Fla. 2002)).

60. *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992). The Florida Supreme Court has recognized the difficulty in summarization under these constraints, ruling that “the seventy-five-word limit on ballot summaries prevents the summary from revealing all the details or ramifications of the proposed amendment. Accordingly, we have never required that the summary explain the complete details of a proposal at great and undue length” *Id.*; *see also* *Advisory Op. to Att’y Gen. re Right to Treatment & Rehab.*, 818 So. 2d 491, 498 (Fla. 2002); *Advisory Op. to Att’y Gen. re Ltd. Casinos*, 644 So. 2d 71, 74–75 (Fla. 1994).

61. *See* *Advisory Op. to the Att’y Gen. Re People’s Prop. Rights Amendments*, 699 So. 2d 1304, 1312 (Fla. 1997) (striking proposed amendments with defective summaries from the ballot rather than allowing the opportunity for correction); *see also* *Smith*, *supra* note 15, at 1516.

62. FLA. STAT. § 16.061(3) (2020).

identified earlier. In 1992, voters approved Amendment 9,⁶³ which in part imposed term limits on federal offices and was found unconstitutional by the United States Supreme Court in *United States Term Limits, Inc. v. Thornton*.⁶⁴ Similarly, in 2008, voters approved Amendment 2, which defined marriage as the legal union of only one man and one woman, which the United States Supreme Court ultimately overturned in *Obergefell v. Hodges*.⁶⁵ Both of these unconstitutional amendments passed with convincing supermajorities.⁶⁶ Beginning in 2020, the Attorney General must ask the Florida Supreme Court if a proposal facially violates the United States Constitution.⁶⁷ Since this constitutional analysis will be done before enactment, this new requirement may help stop similarly unconstitutional measures from making it on the ballot.

By design, only the voters address the merits of a proposal, and they do so at the ballot box, where a supermajority is needed to adopt an amendment.⁶⁸ Oddly, the threshold for approval varies based on subject area. Originally, a mere majority was needed.⁶⁹ Then in 1994, special interest organizations changed the voting threshold for new state taxes or fees.⁷⁰ These taxing amendments must pass “by not fewer than two-thirds of the voters voting in the election.”⁷¹ In 2006, the Florida

63. FLA. CONST. art. IV, § 4 (amended 1992) (sponsored by Citizens for Limited Political Terms PAC); *Limited Political Terms in Certain Offices*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/1066-1.pdf> (last visited July 19, 2021) (showing full text of Amendment 9, which was incorporated into Article IV, § 4).

64. 514 U.S. 779, 784 (1995).

65. 576 U.S. 644, 681 (2015). Amendment 2 (2008) was struck down by state circuit courts and then the United States District Court for the Northern District of Florida. *See, e.g.*, Russell v. Pasik, 178 So. 3d 55, 61 (Fla. 2d Dist. Ct. App. 2015); *see also* Brenner v. Scott, 999 F. Supp. 2d 1278, 1293 (N.D. Fla. 2014), *order clarified*, 4:14CV107-RH/CAS, 2015 WL 44260 (N.D. Fla. 2015). Those appeals were on hold until after *Obergefell*.

66. *Compare supra* note 65, with *Valid Petition Signatures*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initSignDetailCounty.asp?account=41550&seqnum=1&ctype=CSV&elecyear=2008> (last visited July 19, 2021) (showing voting data per district surrounding Amendment 2). The Florida Marriage Protection Amendment received 61.92% of the statewide vote and a majority vote in all but one Florida county. *Id.* Additionally, the Limited Political Terms in Certain Offices Amendment received 76.76% of the statewide vote. *Official Results Constitutional Amendment*, FLA. DIV. OF ELECTIONS, <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/3/1992&DATAMODE=> (last visited July 18, 2021) (providing the voting data per district for Amendment 9).

67. *See* S.B. 1794, 2020 Leg. (Fla. 2020) (setting this requirement).

68. Not every constitutional change in Florida requires an affirmative vote of the citizenry. The Legislature is allowed to make narrow, technical changes to the Florida Constitution, subject to judicial review in specific circumstances. *See* FLA. CONST. art. V, § 20(i); *id.* art. VIII, § 6(h); *id.* art. XII, § 11 (allowing the Legislature to delete obsolete schedule items from Article V (Judiciary), Article VIII (Local Government), and Article XII (Schedule), respectively).

69. FLA. CONST. art. X, § 12(d).

70. *Id.* art. XI, § 7.

71. *Id.* (emphasis added).

Legislature proposed, and the citizens approved, a measure that raised the threshold for the non-taxing amendments. A non-taxing proposal must now be “approved by a vote of at least sixty percent of the electors *voting on the measure*.”⁷² Thus, the Florida Constitution has not only two different numerators but also two denominators for calculating the proper passage rate for a constitutional measure.⁷³ Essentially, if someone does not vote on a particular proposal, that inaction harms the chances of a taxing amendment but improves the chances of a non-taxing amendment.⁷⁴ After passage, the only way an amendment can be edited or removed is through another amendment.⁷⁵ To date, Floridians have removed only one initiative amendment: a constitutional mandate for public high-speed rail was added in 2000 and was removed in 2004.⁷⁶

IV. THE POLITICAL PROCESS OF PETITION INITIATIVES

While each step of the legal process is visible to the public, successful initiative campaigns also follow a series of political steps that

72. *Id.* art. XI, § 5 (emphasis added).

73. *See id.* § 7; *id.* § 5 (requiring different percentages of voters in the overall election for taxing amendments and on the specific measure for non-taxing amendments). This can partially be explained by the fact that these two sections had three different authors. The 1966 CRC originally had a mere majority for constitutional change. A 1994 initiative petition created section 7, which brought a new standard for the taxing and fee amendments. *No. 1 Constitutional Amendment Article XI, Section 7*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/14537-15.pdf> (last visited July 21, 2021) (showing the full text of the Amendment as it was to be incorporated into the Florida Constitution). A 2005 Joint Resolution approved by the voters in 2006 then changed section 5 from a majority to the sixty percent threshold. *Article XI Amendments*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/10-63.pdf> (last visited July 5, 2021) (showing full text of the Amendment as it was to be incorporated into the Florida Constitution).

74. *See* FLA. CONST. art. XI, § 7; *id.* § 5 (allowing abstentions for just the proposal to count as “no” votes for a proposed non-taxing amendment).

75. Other states have mechanisms by which a sponsoring organization can remove its own amendment prior to the election. While the utility of this system is debatable, the argument is not hypothetical. In 2019, John Morgan floated the idea of pulling his minimum wage amendment if a legislative alternative were provided. A.G. Gancarski, *John Morgan Tells Minimum Wage Push Critics to “Put Up or Shut Up”*, FLA. POLS. (Dec. 20, 2019), <https://floridapolitics.com/archives/314186-john-morgan-tells-minimum-wage-push-critics-to-put-up-or-shut-up>.

76. Prior to its repeal, FLA. CONST. art. X, § 19 (repealed 2004) mandated, in part, a high-speed rail “capable of speeds in excess of 120 miles per hour, be developed and operated in the State of Florida.” *Id.* It was subsequently removed in the next election by another petition. *Repeal of High Speed Rail Amendment 04-03*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/34876-2.pdf> (last visited July 25, 2021) (giving the details of the amendment passed to repeal Article X, Section 19 of the Florida Constitution). In Federalist No. 63, James Madison warned about a worry of democracy that there would be “particular moments in public affairs when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.” THE FEDERALIST NO. 63 (James Madison). For Floridians in the early 2000s, that irregular passion might have been a train.

are largely invisible to the average citizen. They include fundraising, direct marketing, and paid signature gathering.⁷⁷

Perhaps the strongest indicator of a proposal's chance of success is found in its financial reporting, not in the content of the proposal, because absent a groundswell of support, a successful proposal needs roughly four to five million dollars.⁷⁸ Many proposals languish without the backing of wealthy sponsors or a large donor base.⁷⁹ As one proponent of a 2020 citizen initiative in the weeks before the 2020 deadline said: "[w]e need someone with big, deep pockets to step up in a very short period of time in order for us to make the ballot."⁸⁰

77. Perhaps these rules can be best illustrated by a tweet. In the months leading up to the 2020 election, prominent plaintiff's attorney John Morgan tweeted the following: "I have decided that I am too old to care. I believe that #marijuana should be legal!! I think we have time and I think there is money to get it done. I already have the minimum wage signatures. Let's do this maybe, forget Tallahassee! #ForThePeople - #PotDaddy." John Morgan (@JohnMorganESQ), TWITTER (Aug. 6, 2019, 9:23 AM), <https://twitter.com/JohnMorganESQ/status/1158730228564410368>. This tweet highlights two needs: time for the legal process and money for the political process. *Id.* Before passage, money needs to be spent both on publicity and signature gathering. *See infra* note 78 (showing that one initiative cost \$3,000,000 to fund); Ellis, *infra* note 85, at 37 (explaining that signature gatherers are often paid); FLA. STAT. § 106.011 (listing a variety of paid political communications that may further an initiative campaign, such as communications media and political advertisements). The tweet itself, with its reach boosted by ad dollars, is one such example of paid political communication. Twitter has since changed its policy on political tweets, and such a message would likely not be allowed in 2021 under its new terms and conditions. *See Political Content*, TWITTER, <https://business.twitter.com/en/help/ads-policies/ads-content-policies/political-content.html> (last visited July 21, 2021).

78. In 2020, the proponents of the 2014 Land Conservation Amendment said in legislative committee meetings that their effort cost \$3,000,000 but would likely cost more today. *Constitutional Amendments Proposed by Initiative: Hearing on H.B. 7037 Before the H. Comm. on Appropriations*, 2020 Leg., 122nd Sess. (Fla. 2020) (statement of Alike Moncrief, Executive Director, Florida Conservation Voters).

79. Two measures on the 2020 ballot that have made review were backed by billionaires. Mike Fernandez of Miami backed jungle primaries, while John Morgan backed a minimum wage increase. *See Gary Fineout, 'I'm Very Scared About Our Future': Florida Billionaire Pitches Jungle Primary to Fight Political Extremism*, POLITICO (Sept. 18, 2019), <https://www.politico.com/states/florida/story/2019/09/18/im-very-scared-about-our-future-florida-billionaire-pitches-jungle-primary-to-fight-political-extremism-1189078>; Jacob Pramuk, *Meet the Rich Personal Injury Lawyer Who Is Pouring Millions into an Effort to Get a \$15 Minimum Wage on Florida's Ballot*, CNBC (Sept. 15, 2019), <https://www.cnbc.com/2019/09/15/rich-lawyer-john-morgan-tries-to-get-15-minimum-wage-on-2020-florida-ballot.html>. In 2021, the Florida Legislature passed and the Governor signed Senate Bill 1890 (2021), which holds political committees sponsoring or opposing a constitutional initiative to the same \$3000 individual contribution limit for campaigns for elected office until the Supreme Court approves the language. *See S.B. 1890*, 2021 Leg. (Fla. 2021). The ACLU sued over the constitutionality of the law and the United States District Court for the Northern District of Florida has granted a preliminary injunction. Complaint at 17, *ACLU of Fla., Inc. v. Laurel Lee* (No. 4:21-CV-190), https://www.scribd.com/document/507107632/Complaint#fullscreen&from_embed; Order on Motions for Preliminary Injunction and Motion to Dismiss at 16–17, *ACLU of Fla., Inc. v. Laurel Lee* (No. 4:21-CV-190), <https://www.politico.com/states/f/?id=0000017a-639b-d0b6-ad7e-e7bffb3f0000>.

80. Steven Lemongello, *Florida's Legalize Marijuana Petitions Are Short on Signatures and Time*, ORLANDO SENTINEL (Nov. 7, 2019), <https://www.orlandosentinel.com/news/florida-marijuana/os-ne-marijuana-petitions-20191107-dh6wsggdc5gkjzh2d7jnzurci-story.html>.

The first step seen by the public is the selection of the ballot title and summary. Florida ballots only show the title and summary, and citizens do not see the full text of the constitutional amendment unless they seek it out themselves.⁸¹ Thus, the success of a measure depends largely on the favorability of the title and summary, which cannot be misleading, contain multiple subjects, or exceed fifteen and seventy-five words, respectively.⁸² Every word matters, and thus the planning for a successful constitutional change must be done well ahead of the first public efforts and usually involves hiring both constitutional lawyers and political consultants. The political advisors workshop titles through focus groups, interviews, and other modern marketing systems to gain a few points on Election Day.⁸³ Even the sponsor organization names are workshopped, leading to committees with vague, yet somewhat positive, names like: "Floridians for Redeemable People" and "Keep Our Constitution Clean."⁸⁴

The second political step is the signature-gathering process, a process that was intended to show public support but now could seem "merely a function of money."⁸⁵ One scholar has observed that "the true hurdle for qualifying measures for the ballot is not having a proposal that people want to sign but inducing enough people to go out and circulate the petitions."⁸⁶ Most political groups in Florida contract with opaque signature-gathering firms rather than relying on a network of volunteers.⁸⁷ These firms tend to cater to a specific end of the political spectrum. For causes perceived to be more politically liberal, there is a California-based firm that specializes in targeting gathering locations that are more likely to be Democratic, while others cater to more

81. Florida law requires that each polling station has a copy of the full text of the amendment. FLA. STAT. § 101.171 (2020).

82. See *supra* pt. II.

83. The use of political consultants, paid contractors, and attorneys is hardly new. See Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 128–29 (1995). However, the technology and ease of testing has certainly increased since Professor Schacter's 1995 criticism.

84. Both committees registered to support measures for inclusion on the 2020 ballot. See *Offender Reentry Program Amendment 18-09*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=73683&seqnum=1> (last visited July 21, 2021) (2020 ballot measure sponsored by Floridians for Redeemable People); *Voter Approval of Constitutional Amendments 19-08*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=74114&seqnum=2> (last visited July 21, 2021) (2020 ballot measure sponsored by Keep Our Constitution Clean).

85. Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 38 (2003).

86. Daniel Hay Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L. Q. 175, 203 (1989).

87. See *supra* pt. II.

conservative and Republican-leaning groups.⁸⁸ These firms receive millions of dollars per election cycle for their work.⁸⁹ They also benefit from bundling proposals from different groups.⁹⁰ For example, a signature gatherer in 2020 for liberal causes may have collected signatures for an assault weapons ban, a raise in the minimum wage, and a recreational marijuana measure at the same time, targeting the same voter for three signatures, while their employer was paid by three entities. Groups on one end of the ideological spectrum likely do not want to share costs with their political opponents, which may explain reports of non-compete clauses among signature gatherers.⁹¹ A 2019 South Florida Sun Sentinel piece reports that the “signature-gathering industry has grown so competitive [that] one firm rewards top performers with trips to Europe and the Caribbean.”⁹²

Unlike volunteers, these paid signature gatherers have legal responsibilities and regulations to follow, including new requirements passed by the Florida Legislature in 2019.⁹³ Beginning in 2019, petition gathering firms must register paid signature gatherers with Florida’s Secretary of State before they gather petitions⁹⁴ and turn in all signed petitions.⁹⁵ This new law provides a mechanism to challenge a signature gatherer’s lack of registration in circuit court.⁹⁶ And these firms may no longer compensate paid petition gatherers by the signature.⁹⁷ These measures have not been met with much praise from some in the media.⁹⁸

88. See John Ryan, *Paying for Signatures Used to be Illegal. Now it’s Making this Californian Rich*, KUOW PUB. RADIO (Aug. 13, 2016), <https://www.kuow.org/stories/paying-signatures-used-be-illegal-now-its-making-californian-rich>.

89. *Id.*

90. See John Kennedy, *‘Bundling’ May Send Constitution Panel Packing*, FLA. TIME-UNION (Sept. 17, 2019), <https://www.jacksonville.com/news/20190917/bundling-may-send-constitution-panel-packing>.

91. See Skyler Swisher & Aric Chokey, *Voters Beware: You Have No Idea Who’s Behind That Petition They Want You to Sign*, SUN SENTINEL (Nov. 22, 2019), <https://www.sun-sentinel.com/news/politics/fl-ne-petition-signature-gathering-industry-20191122-rofgdcdgvmzpjqltueobeza-story.html>.

92. *Id.*

93. The new law did not change any requirements for volunteers. Some scholars have discussed the philosophical issues with paid signature gatherers versus volunteers, going as far as to suggest that signatures gathered by volunteers should be given a bonus in count. See Lowenstein & Stern, *supra* note 86, at 219, 221. Instead of attempting to create a new system that could be gamed, the Florida Legislature instead kept volunteers free of these new regulations.

94. FLA. STAT. § 100.371(3) (2020).

95. *Id.* § 100.371(7).

96. *Id.* § 100.371(3)(b).

97. *Id.* § 104.186.

98. The South Florida Sun Sentinel Editorial Board said that this was “the most arrogant abuse of political power since the rural cabal known as the Pork Chop Gang was banished in 1968 . . . [it is] a spiteful, nakedly partisan attempt to hobble, confuse and complicate the citizen petition-

One signature-gathering consultant—based in California—said these changes made it harder for the people of Florida to be heard.⁹⁹ But if campaign transparency is expected from state legislative candidates who can only draft laws, it follows that private actors should be transparent when drafting constitutional changes. Although the 2019 reforms created more regulations for signature gatherers, it is too early to tell what impact, if any, they will have on this system.

The third step is the actual marketing campaign. These political campaigns differ from a traditional candidate's effort for public office because the sponsors are advocating for a specific proposal rather than a person.¹⁰⁰ Thus, a campaign must both explain the change and advocate for passage. For sponsors, the best legal advice may also be the best political advice: be vague. Operatives are generally mindful of what they say because these campaign statements can later be used in litigation over the amendment's purpose and scope.¹⁰¹

V. THE INCREASING COMPLEXITY AND PROBLEMATIC INTERPRETATION OF AMENDMENTS

Without subject-matter limitations, nearly any policy proposal can be a constitutional amendment. Over time, successful proposals have had less to do with the rights of citizens or structure of government and more to do with specific policy changes that could be accomplished by statute.¹⁰² For example, Floridians have passed initiative measures related to limitations on marine net fishing,¹⁰³ confinement for pregnant pigs,¹⁰⁴ and class sizes.¹⁰⁵ Other successful initiative measures could be seen to have an air of discriminatory intent, such as designating English as the official language of Florida,¹⁰⁶ defining marriage as between a man and a woman,¹⁰⁷ and a reiteration that only citizens can vote.¹⁰⁸

gathering process." *Gov. Ron DeSantis' Arrogant Abuse of Public Power*, SUN SENTINEL (Jun. 14, 2019), <https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-desantis-abuse-power-20190614-ciftfr4ljfc7xatqzj6oxlj35e-story.html>.

99. Swisher & Chokey, *supra* note 91.

100. See Ellis, *supra* note 85, at 36.

101. See Schacter, *supra* note 83, at 129.

102. An interesting argument can be had over finding the line between legislating and defining the scope of government or whether such a line could ever be meaningfully drawn. What seems inarguable is that there is plenty of constitutional clutter that was best suited for statute.

103. FLA. CONST. art. X, § 16 (amended 1994) (sponsored by a citizens initiative group).

104. *Id.* art. X, § 21 (amended 2002) (sponsored by a citizens initiative group).

105. *Id.* art. IX, § 1 (amended 2002) (sponsored by a citizens initiative group).

106. *Id.* art. II, § 9 (amended 1988) (sponsored by a citizens initiative group).

107. *Id.* art. I, § 27 (amended 2008) (sponsored by a citizens initiative group).

108. *Id.* art. VI, § 2 (amended 2020) (sponsored by a citizens initiative group).

Furthermore, to influence how an initiative is implemented, petition sponsors have increased the length and complexity of their proposals to be more prescriptive.¹⁰⁹ Questions over interpreting these complicated proposals often lead to litigation.¹¹⁰ In fact, as discussed below, the structure of the petition process almost invites a second review by the Florida Supreme Court.

After passage of a ballot initiative, the courts have held that they “are obligated to give effect to [the] language [of a Constitutional amendment] according to its meaning and what the people must have understood it to mean when they approved it.”¹¹¹ This approach of construing the ballot initiative in a manner that is “consistent with the intent of the framers and the voters”¹¹² is much like the canon of legislative intent. This legislative intent doctrine, however, is regularly criticized in American jurisprudence given the difficulties and utility associated with establishing the Legislature’s or Congress’ intent.¹¹³

But, unlike voters, the legislative branch creates a seemingly endless number of source materials through which a court can determine intent, such as committee reports, floor debates, and other statements generated throughout the legislative process. Voters, in

109. By way of example, Proposal 16-02 (2016) relating to regulating marijuana in a manner similar to alcohol is gathering signatures for inclusion on the 2022 ballot and has made review. *Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions 16-02*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64837&seqnum=1> (last visited July 18, 2021). The constitutional proposal is ten pages long. *Constitutional Amendment Full Text*, FLA. DIV. OF ELECTIONS, https://initiativepetitions.elections.myflorida.com/InitiativeForms/Fulltext/Fulltext_1602_EN.pdf (last visited July 18, 2021). Sometimes even the sponsors of amendments hedge whether a proposal is constitutional itself, as seen in the five severability clauses in the Florida Constitution. FLA. CONST. art. VII, § 4(d)(7); *id.* art. X, § 24(g); *id.* art. X, § 25 (note B); *id.* art. X, § 26 (note C); *id.* art. X, § 29(f). At its most basic, a severability clause is a hedge against a portion of a document being found impermissible. Such clauses are inappropriate for a state constitution.

110. See *e.g.*, *Oliva v. Fla. Wildlife Fed’n, Inc.*, 281 So. 3d 531, 534 (Fla. Dist. Ct. App. 2019), *reh’g denied* (Oct. 21, 2019), *rev. denied*, No. SC19-1935, 2020 WL 3525953 (Fla. June 29, 2020) (interpreting the 2014 Land Acquisition Trust Fund amendment); *Fla. Dept. of Health v. Redner*, 273 So. 3d 170, 171 (Fla. Dist. Ct. App. 2019), *reh’g denied* (May 28, 2019), *rev. denied*, No. SC19-1066, 2019 WL 6249328 (Fla. Nov. 22, 2019) (interpreting the 2014 Marijuana Amendment); *Fla. Dept. of Health v. Florigrown, LLC*, No. 1D18-4471, 2019 WL 2943329 (Fla. Dist. Ct. App. July 9, 2019), *rev. granted*, No. SC19-1464, 2019 WL 5208142 (Fla. Oct. 16, 2019), *and decision quashed, cause remanded*, No. SC19-1464, 2021 WL 2149362 (Fla. May 27, 2021) (interpreting the 2014 Marijuana Amendment).

111. *City of St. Petersburg v. Briley, Wild & Assocs., Inc.*, 239 So. 2d 817, 822 (Fla. 1970).

112. *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm’n*, 838 So. 2d 492, 501 (Fla. 2003).

113. Justice Scalia summarized this in his famous Tanner Lecture, “It is the *law* that governs, not the intent of the lawgiver. . . . Men may *intend what they will*; but it is only the *laws that they enact which bind us*.” Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (Amy Gutmann ed., 1997) (emphasis added).

contrast, only leave their ballots. As discussed earlier, citizens see just the ballot title and summary, so their understanding of a measure may largely reflect a synopsis.¹¹⁴ It is doubtful that millions of voters hold one consistent view on a particular topic.¹¹⁵ Florida's 2018 electoral ballot, for example, had several conflicting and unusual ballot measures, and most of these proposals were approved by the voters. Specifically, Florida voters approved Amendment 4, giving felons the right to vote,¹¹⁶ while approving Amendment 6, known as Marcy's Law, which expands the protections given to victims.¹¹⁷ Voters also limited the expansion of gambling by passing Amendment 3¹¹⁸ while uncoupling dog racing from pari-mutuel establishments, which could seem like an expansion of mini casinos through Amendment 13.¹¹⁹ Finally, the electorate made it harder to raise taxes in Amendment 5,¹²⁰ yet voted against a tax break for

114. FLA. STAT. § 101.161 (2020).

115. Staszewski, *supra* note 8, at 408. See also Frickey, *supra* note 2, at n. 67., for a discussion on the difficulty of divining the intent of the electorate compared to that of a legislative body. Professor Frickey argues that the discriminatory intent necessary to invalidate a piece of legislation is relatively clear under *Personnel Adm'r v. Feeny*, 442 U.S. 256 (1979), but either difficult or impossible to judicially find in an electorate. *Id.*

116. FLA. CONST. art. VI, § 4 (amended 2018) (sponsored by a citizens initiative group). *Compare Voting Restoration Amendment 14-01*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64388&seqnum=1> (last visited July 18, 2021) (showing a summary of the proposed amendment), with *Constitutional Amendment Petition Form*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/64388-1.pdf> (last visited July 18, 2021) (showing the full text of the proposed amendment).

117. FLA. CONST. art. I, § 16; *id.* art. V, §§ 8, 21; *id.* art. XII, § 37 (amended 2018) (sponsored by the 2018 Constitution Revision Commission). *Compare Right of Crime Victims; Judges*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=11&seqnum=20> (last visited July 18, 2021) (showing a summary of the proposed amendment), with *Revision 1 Proposal*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/11-20.pdf> (last visited July 18, 2021) (showing the full text of the proposed amendment).

118. FLA. CONST. art. X, § 29 (amended 2018) (sponsored by a citizens initiative group). *Compare Voter Control of Gambling in Florida 15-22*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64995&seqnum=1> (last visited July 18, 2021) (showing a summary of the proposed amendment), with *Constitutional Amendment Form*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/64995-1.pdf> (last visited July 18, 2021) (showing the full text of the proposed amendment).

119. FLA. CONST. art. X, § 32; *id.* art. XII, § 39 (amended 2018) (sponsored by the 2018 Constitution Revision Commission). *Compare Ends Dog Racing*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=11&seqnum=27> (last visited July 18, 2021) (showing a summary of the proposed amendment), with *Revision 8 Proposal*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/11-27.pdf> (last visited July 18, 2021) (showing the full text of the proposed amendment).

120. FLA. CONST. art. VII, § 19 (amended 2018) (sponsored by the Florida Legislature). *Compare Supermajority Vote Required to Impose, Authorize, or Raise State Taxes or Fees*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=97> (last visited July 18, 2021) (showing a summary of the proposed amendment), with H.R.J. Res. 7001, 2018 Leg. (Fla. 2018).

homeowners in Amendment 1.¹²¹ Thus, with voters behaving inconsistently because they are a conglomeration of millions of individuals with varying desires, beliefs, and levels of information, courts should be wary of voter intent as it is extremely difficult to divine—if it exists at all.¹²²

Proponents of voter intent rightfully point out that voters signed onto the idea put forth by the initiative organizers, so several viewpoints would not preclude a court from looking at how the special interests thought their amendment should function. Unfortunately, while all supporters can claim to speak for the voters on an amendment, proponents themselves can have different interpretations of the same measure.¹²³ For example, in 2018, Florida voters approved Amendment 4, which aimed to restore the voting rights of certain felons that completed “all terms of [their] sentence;” the meaning of this term meant different things to different sponsors—a discrepancy that soon became the source of much debate in the legislature and the focus of

121. FLA. CONST. art. VII, § 6; *id.* art. XII, § 37 (amended 2018) (sponsored by the Florida Legislature). *Compare Increased Homestead Property Tax Exemption*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=95> (last visited May 15, 2021) (showing a summary of the proposed amendment), *with* H.R.J. Res. 7105, 2017 Leg. (Fla. 2017).

122. A rarely used mechanism exists to hear from Florida voters on a specific issue at the ballot box. J. Michael Marshall, *Close Encounters of the Referendum Kind*, 84 FLA. B.J. 56 (2010), <https://www.floridabar.org/the-florida-bar-journal/close-encounters-of-the-referendum-kind/>. The Florida Legislature can pass a bill that places a popular referendum on the ballot. *Id.* These referenda are non-binding but instructive. *See id.* (differentiating between voluntary and mandatory referenda). In a politically purple state like Florida, the feeling of the voting population is more helpful to policymakers than their draftsmanship. Though at first glance a non-binding measure might not appear to have any power, resolutions also show solidarity with causes. The system is informed by these norms, and political actors change behavior in reaction to many non-binding actions. Though unusual, Florida has used this process at least four times in the last half century: the 1972 election saw three proposals. *See Official Ballot, Special Election Citrus County, Florida*, VOTE CITRUS (March 14, 1972), https://www.votecitrus.com/portals/citrus/documents/SampleBallots/1972/1972_official_ballot_special_election_314.pdf (showing a Straw Ballot regarding forced busing, opposing segregation in schools, and prayer in public schools). The 2010 election saw a fourth. H.B. 1525, 2010 Leg. (Fla. 2010). Perhaps Florida needs to return to asking for the opinion of the electorate more often.

123. In a Washington Post Op-Ed, the Vice President of the Florida League of Women Voters called the legislative implementation of Amendment 4 (2018) “a transgression of the people’s will.” Cecile Scoon, *Florida’s Change to Amendment 4 is Travesty and a Transgression of the People’s Will*, WASH. POST (July 5, 2019), https://www.washingtonpost.com/opinions/floridas-change-to-amendment-4-is-travesty-and-a-transgression-of-the-peoples-will/2019/05/15/3b859318-75bf-11e9-b7ae-390de4259661_story.html.

several court cases in both the state and federal systems.¹²⁴ Such uncertainty likely leads to an increase in distrust of the whole system.¹²⁵

With litigation over a ballot initiative's meaning becoming increasingly prevalent, sponsoring groups also have an inherent incentive not to clarify the textual ambiguities surrounding their proposal so that they can potentially assert greater influence in any post-enactment lawsuit that is filed. This incentive is especially true when amendments compel the government to act in a particular way. Additionally, the primary goal of a sponsoring organization is not to clarify texts, but to win an election.¹²⁶ One scholar has argued that amendments should sometimes be construed against the party who wrote them,¹²⁷ in some ways like the rule of lenity in criminal cases.¹²⁸ Such a proposal might not work in Florida, but what seems clear is that framers' intent can be just as problematic as voter intent.

124. In their defense of Amendment 4's ballot title and summary before the Florida Supreme Court, a proponent of the measure said during oral argument that "all terms of sentence" included fines, court fees, and restitution. Appendix to Initial Brief of Secretary of State, Laurel M. Lee at 12-13, Advisory Op. to the Governor re: Implementation of Amendment 4, the Voting Restoration Amendment, 288 So. 3d 1070 (Fla. 2020) (No. SC19-1341) (available at <https://www.brennancenter.org/sites/default/files/legal-work/09-18-2019%20SOS%20Initial%20Brief%20on%20Merits.pdf>) (providing Attachment B, an audio transcript of oral arguments in which Mr. Mills asserts that "all terms means all terms within the four corners... [.] including the payment of fines). Other supporters of Amendment 4 have said in the press and in testimony before legislative committees that fines, fees, and restitution are not considered a portion of the sentence and should not preclude a felon from voting. Patricia Mazzei, *Florida Law Restricting Felon Voting Is Unconstitutional, Judge Rules*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/05/24/us/florida-felon-voting-court-judge-ruling.html>. The Florida Legislature passed a bill in 2019 that assumed fines, fees, and restitution were included in the amendment's language. S. 7066, 2019-162 (Fla. 2019). That law, called a "poll tax" by supporters of felon re-enfranchisement, was challenged in both state and federal court as unconstitutional. *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020). Two years after passage, the Florida Supreme Court found that "all terms of sentence" included fines, fees, and restitution. *See* Advisory Op. to Gov. re: Implementation of Amend. 4, The Voting Restoration Amendment, 288 So. 3d 1070, 1083-84 (Fla. 2020). In 2020, the Eleventh Circuit sitting en banc found that the legislation did not violate the Equal Protection Clause. *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020).

125. As Professor Eule explained in his 1990 article, "[a] judicial decision striking down a voter effort also risks engendering a perception by the public itself that its will has been subverted. Neglecting voter expressions thus carries with it a measure of political discomfort unlike that associated with invalidating legislation." Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1506-07 (1990).

126. As Professor Staszewski explains, "there are currently no formal mechanisms for requiring the initiative proponents to communicate with interested parties to exchange ideas and make compromises during ballot campaigns. As a result, the initiative proponents and opponents spend virtually all of their time and money lobbying to win the electorate's vote rather than attempting to improve the policy at issue." Staszewski, *supra* note 8, at 447-48.

127. Frickey, *supra* note 2, at 145. Frickey argues that, at least in some instances, "it seems fair to construe... ambiguities against [the authors], particularly on issues where one interpretation would result in their receiving a windfall." *Id.*

128. Florida has codified the rule of lenity, which states that ambiguities should be held against the state in a criminal context. FLA. STAT. § 775.021 (2020).

VI. THE RESTRAINING ROLE OF CONSTITUTIONS

What makes constitutional change by initiative so odd in Florida jurisprudence is that it has far more power with far fewer restraints than any other part of the governing system. As discussed below, the Florida Constitution constrains each branch of government far more than the U.S. Constitution. It is cautious of policymaking outside the traditional legislative process. It also regulates non-governmental actors in ways not found at the federal level. These restrictions protect civil liberties and minority groups and should be adapted and expanded to Florida's initiative process.

The traditional policymaking body of American government is the legislature and "the legislative authority necessarily predominates."¹²⁹ The "legislative process . . . affords minority groups a role that they lack in the [initiative process]" through debate, deliberation, and exposure to elected officials with different constituencies.¹³⁰ Additional actors and constituencies help ensure more deliberative and protective policies. Further, legislation can be vetoed by the executive branch,¹³¹ giving "minority groups an additional ear on legislation that affects them."¹³²

The Florida Constitution is even more wary of power than its federal counterpart, as seen by the significant limitations it places on each branch of government. Unlike the American presidency, the executive branch is constitutionally divided among five statewide elected officials: the jointly elected Governor and Lieutenant Governor, the Chief Financial Officer, the Commissioner of Agriculture and Consumer Services, and the Attorney General.¹³³ The Governor and the Cabinet hold various constitutional roles, and thus executive power is diffused among different politicians,¹³⁴ all of which have term limits.¹³⁵ The judiciary has constitutional age limits on judges,¹³⁶ who are in many cases selected through independent Judicial Nominating Commissions.¹³⁷ Perhaps the most restrained branch is the Legislature. While the United States Constitution places only a few subject limitations on Congress (such as salary increases¹³⁸), the Florida

129. THE FEDERALIST NO. 51 (James Madison).

130. Eule, *supra* note 125, at 1555.

131. U.S. CONST. art. I, § 7.

132. Eule, *supra* note 125, at 1557.

133. FLA. CONST. art. IV.

134. *Id.* art. IV, § 4.

135. *Id.* art. IV, § 5.

136. *Id.* art. V, § 8.

137. *Id.* art. V, § 12.

138. U.S. CONST. amend. XXVII.

Legislature cannot raise taxes without a supermajority,¹³⁹ must pass a balanced budget,¹⁴⁰ and must abide by a single subject requirement.¹⁴¹ The part-time legislature has a time limited session,¹⁴² and, unlike Congress, has term limits.¹⁴³ The Florida Constitution is most wary of the power to make policy, and thus constrains the powers of the Legislature more than the U.S. Constitution constrains Congress.

The Florida Constitution also contemplates and constrains the non-traditional policymaking system of administrative law. Executive branch rulemaking arose when some of the policymaking powers of the legislative branch were given to specialized executive branch entities.¹⁴⁴ In most cases, those delegations were voluntary and calculated, although perhaps "constitutionally suspect."¹⁴⁵ In Florida, such rules, which have the force of law, are promulgated through a deliberate process.¹⁴⁶ After the passage of Amendment 6 in 2018, Florida courts review agency rules *de novo*.¹⁴⁷ Thus, unlike constitutional amendments, Florida courts do not defer to the intent of the authoring agency. A *de novo* standard may provide greater protections and better outcomes. Depending on how this works in the coming years, Florida might consider using this standard for interpreting constitutional amendments. After all, constitutional changes can threaten civil liberties far more than an agency rule.

The Florida Constitution also places many restrictions on non-governmental actors that seek to influence the respective decision-making processes of each branch for compensation. For the legislative and executive branches, the Florida Constitution limits lobbyists. For instance, to lobby either the executive or the legislative branch of government on behalf of another, an individual must register with the government,¹⁴⁸ identify their clients, and disclose ranges of

139. FLA. CONST. art. VII, § 19.

140. *Id.* art. III, § 19.

141. *Id.* art. III, § 6.

142. *Id.* art. III, § 3.

143. *Id.* art. VI, § 4. It should be noted that this measure was added by citizen initiative.

144. Staszewski, *supra* note 8, at 440–41.

145. *Id.* at 400. Professor Eule has used similar language when discussing citizen petitions, claiming that "direct democracy is constitutionally suspect." Eule, *supra* note 125, at 1545.

146. In Florida, rulemaking can be done through a notice and comment process or a negotiated rulemaking process under FLA. STAT. § 120.54 (2020). See Gregory L. Pitts, Jr., *An Introduction to Negotiated Rulemaking*, 91 FLA. B. J. 3, 50 (2017), <https://www.floridabar.org/the-florida-bar-journal/an-introduction-to-negotiated-rulemaking/>.

147. FLA. CONST. art. V, § 21 (amended 2018) (sponsored by the Constitution Revision Commission).

148. *Id.* art. II, § 8.

compensation.¹⁴⁹ The Florida Constitution also sets bans on lobbying for executive and legislative branch officials for several years after their public service has ended.¹⁵⁰ Although it may seem counterintuitive, regulating the practice of law is a similar check on those interacting before the judicial branch. To argue a case, an individual must hold a Florida Bar license and subject themselves to regulation.¹⁵¹ Backgrounds are checked, and addresses are taken.¹⁵²

Although the Florida Constitution restrains the branches of government far more than the United States Constitution, the Florida Constitution allows itself to be amended far easier and with far fewer protections from outside influences. The citizen initiative process deserves constitutional and statutory safeguards because, by elevating a policy to constitutional level, it cannot be easily changed even when circumstances shift, preferences change, technology advances, or knowledge grows.¹⁵³ Successful initiatives can also dominate the work of the other branches of government. The petition, after all, often triggers the legislature's bill implementation process; the Governor's Office is similarly required to execute the policy requirements, the judiciary must address any litigation related to the initiative.¹⁵⁴ Few other political mechanisms can place obligations on all three branches in one act. Most importantly, the petition process can adjust the fundamental rights of Floridians or decrease the limitations the Florida Constitution places on government. The citizen initiative process can wield significant power without significant limitations, a dangerous combination in a democratic republic.

VII. PROPOSALS TO IMPROVE

The initiative power, which commentators have called a "fourth branch of government,"¹⁵⁵ needs more checks on its considerable power. After all, "[i]f a majority be united by a common interest, the rights of the minority will be insecure."¹⁵⁶ The need is more urgent because the

149. FLA. STAT. §§ 11.044–45, 112.3215 (2020).

150. FLA. CONST. art. XII, § 38; *id.* art. II, § 8.

151. *Id.* art. V, § 15.

152. *Rules of the Supreme Court Relating to Admissions to the Bar*, FLA. BD. OF BAR EXAM'RS (Nov. 25, 2020), <https://www.floridabarexam.org/web/website.nsf/rule.xsp>.

153. See P. K. Jameson & Martha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417 (1995).

154. See *id.* at 425–30.

155. See CTR. FOR GOVERNMENTAL STUD., *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* 31 (2d ed. 2008).

156. THE FEDERALIST NO. 51 (James Madison).

citizen initiative process can and often does make near permanent policy changes for Florida and is doing so at a more frequent rate. Fortunately, both the United States and Florida Constitutions offer specific examples on how to constrain and moderate this process. First, policymaking deserves more debate, broader consensus, and better information. Second, limitations need to be placed on what subjects are appropriate for citizen initiative to add or remove. Fundamental rights, for instance, should not be as easily adjusted as casino regulations. Finally, as with lawyers before the judicial branch and lobbyists before the legislative and executive branches of government, Florida should recognize that petition initiatives are a professionalized business and set reasonable restrictions on this occupation. Recently, several different entities have pushed proposals that attempt to accomplish these three goals.

A. More Debate and Consensus

The 2018 Constitution Revision Commission debated a measure that would have required a larger majority of voters to approve a measure, but the proposal ultimately failed to advance.¹⁵⁷ As discussed earlier, both the numerator and the denominator are different for amendments depending on whether they are taxing amendments. Proposal 97 sought to bring consistency to this section by making the denominators the same for both proposals and picked the higher threshold of “voters voting in the election.”¹⁵⁸ This policy change has merit because it requires more voters to engage on the issue to change their constitution. Such a system would also punish amendments incomprehensible to the average voters. A proposal skipped by a voter would be a proposal penalized. This proposal, however, failed in part because it is as confusing as the problem it seeks to remedy. One CRC Commission member even remarked during the floor debate that “if I had a gun I would shoot myself.”¹⁵⁹ This inconsistency will likely remain in the Florida Constitution until the document is replaced whole cloth.

In 2019, 2020, and 2021, the Florida Legislature considered but did not pass a constitutional proposal that would have increased the necessary majority needed for approval—raising the numerator of non-taxing amendments from sixty percent to two-thirds for voter

157. *Proposal 0097*, CONST. REVISION COMM’N 1 (Nov. 7, 2017), <https://crlaw.fsu.edu/Proposals/Commissioner/2017/0097.html?Tab=BillText> (text available under the ‘Proposal Text’ tab).

158. *Id.*

159. *Constitutional Revision Commission P.M. Session Volume II*, CONST. REVISION COMM’N 342 (Mar. 19, 2018), <https://crlaw.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript03-19-2018Vol2.pdf> (statement of Commissioner Coxe).

approval.¹⁶⁰ Yet history suggests that this proposal will have limited impact because since adopting the sixty percent threshold in 2006, only one proposal has passed with over sixty percent without getting at least sixty-six percent.¹⁶¹ Without more changes to the process, initiative campaigns are likely to satisfy a slightly higher voter threshold through the investment of additional capital. The protections are limited; requiring a slightly broader consensus only prevents the tyranny of a narrower majority.

In 2020, the Florida House of Representatives debated a measure that would have required broader geographic diversity during the signature-gathering process.¹⁶² The Florida Constitution requires that a proposal must gather signatures from half of the congressional districts. The purpose of this provision is to “obtain[] a cross-section of the electors of the state in support of the proposed amendment.”¹⁶³ This requirement would permit a petition to make it to the ballot with signatures gathered from only fourteen of Florida’s now twenty-seven congressional districts. House Bill 7037 sought to close this loophole by requiring organizers to collect signatures from eight percent of voters in each congressional district.¹⁶⁴ Opponents of this measure argued it effectively vested each congressional district with the ability to veto a ballot initiative, and even though this analogy is incorrect because vetoes are effective acts, it contributed to the resolution’s defeat in the

160. H.R.J. Res. 57, 2019 Leg. (Fla. 2019). The House Bill passed two of its three committees but was not heard in its final committee stop. *Id.* (can be viewed under the ‘Bill History’ tab). The Senate version was Senate Bill 232 (2019), which never received a hearing. S.J. Res. 232, 2019 Leg. (Fla. 2019). These measures were refiled in 2021 as H.B. 61, 2021 Leg. (Fla. 2021) and S.B. 1238, 2021 Leg. (Fla. 2021). Interestingly enough, the measure was also filed by the single purpose group Keep Our Constitution Clean for the 2020 ballot but never moved. *Requiring Broader Public Support for Constitutional Amendments 19-05*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=74114&seqnum=1> (last visited July 24, 2021).

161. FLA. CONST. art. VII, § 3; *id.* art. XII, § 31 (amended 2010) (sponsored by The Florida Legislature). Homestead Ad Valorem Tax Credit for Deployed Military Personnel (2010) passed with sixty-four percent of the vote. *Compare Homestead Ad Valorem Tax Credit for Deployed Military Personnel*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=72> (last visited June 4, 2021) (showing summary of and votes on the proposed amendment), with *Enrolled CS/HJR 833*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/10-72.pdf> (last visited July 24, 2021) (showing the full text of the proposed amendment). It is not completely fair to compare proposed voting thresholds with past performance of a measure, because the political operatives framed their campaigns around the structure as it existed during that campaign. Essentially, such a comparison is guessing who would have won a 110-yard race by looking at the prior year’s racers in a 100-yard dash.

162. H.R. 7037, 2020 Leg. (Fla. 2020) (formerly Proposed Committee Bill JDC20-01).

163. 72-314 Fla. Att’y Gen. Ann. Rep. 529 (1972).

164. Jim Saunders, *New Proposals Could Squeeze Florida Ballot Initiatives*, TALLAHASSEE DEMOCRAT (Feb. 18, 2020, 9:56 AM), <https://www.tallahassee.com/story/news/2020/02/17/new-proposals-could-squeeze-florida-ballot-initiatives/4787884002/>.

state senate.¹⁶⁵ Therefore, it remains possible that a regional geographic interest can amend the Florida Constitution.

Scholars have noted how the administrative law model could be applied to direct democracy using a negotiated process¹⁶⁶ or a notice-and-comment process.¹⁶⁷ Both suggested systems would create more information for interpretation and debate but would likely be complicated to enact.

Ironically, the proposal most likely to rein in Florida's petition initiative process was itself led by an initiative political committee called Keep Our Constitution Clean. This initiative political committee successfully added Amendment 4 to the 2020 ballot, and under this proposal, voters would have to favorably vote for a proposed constitutional amendment in two elections in a row for it to be approved.¹⁶⁸ Much like the Nevada model,¹⁶⁹ this process would have applied to all amendments, not just citizen initiative petitions, and in practice, means that the debate around amendments would take place across three calendar years, one year before the first election plus the two years until the next election.¹⁷⁰ History illuminates how this approach could have improved voting outcomes. For example, Floridians voted on medical marijuana twice in two years, rejecting an expansive 2014 proposal entitled Use of Marijuana for Certain Conditions and passing a more limited 2016 measure entitled Use of Marijuana for Debilitating Conditions.¹⁷¹ Perhaps seeing something twice gives the citizenry more time to debate the utility of a measure. At the very least, it would have guaranteed that a majority of citizens will see a proposal more than once before voting a measure into the Florida Constitution. Whatever its merits, Floridians rejected Amendment 4 in

165. See, e.g., Deborah Foote, *Legislative Alert: HB 7037 is the Nail in the Coffin for Citizen Initiatives- Take Action!*, SIERRA CLUB FLA. NEWS (Mar. 3, 2020, 3:55 PM), <http://www.sierraclubfloridanews.org/2020/03/legislative-alert-hb-703-is-nail-in.html?m=1>.

166. Troy M. Yoshino, *Still Keeping the Faith?: Asian Pacific Americans, Ballot Initiatives, and the Lessons of Negotiated Rulemaking*, 6 ASIAN L. J. 1, 42 (1999).

167. Staszewski, *supra* note 8, at pt. III.

168. *Voter Approval of Constitutional Amendments 19-08*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=74114&seqnum=2> (last visited July 4, 2021) (sponsored by Keep Our Constitution Clean PC, Inc.) (amendment defeated in 2020).

169. NEV. CONST. art. XIX, § 2, cl. 4.

170. See *Voter Approval of Constitutional Amendments 19-08*, *supra* note 168.

171. *Compare Use of Marijuana for Certain Conditions 13-02*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=50438&seqnum=2> (last visited July 4, 2021) (amendment defeated in 2014), with *Use of Marijuana for Debilitating Conditions 15-01*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=50438&seqnum=3> (last visited July 4, 2021).

2020 by such a convincing margin that a similar proposal is unlikely to ever be attempted again.¹⁷²

B. Subject-Matter Limitations

Nothing prevents the addition or subtraction of new rights by citizen petition. Article I of the Florida Constitution is the Declaration of Rights and has been amended twice by initiative—once for the benefit of personal injury attorneys and another for defining marriage.¹⁷³ Other proposed initiatives seek to limit other rights.¹⁷⁴ The Florida Constitution already has one subject-matter limitation for constitutional amendments: a higher threshold for taxes.¹⁷⁵ Florida should consider similar process restrictions based on subject-matter, especially when fundamental rights are concerned.

Other states have placed reasonable restrictions and sometimes outright prohibitions on certain subjects that merit consideration. Many states have limited the dedication of revenue by initiative.¹⁷⁶ Nebraska prohibits measures that would limit the power of its legislature.¹⁷⁷ Alaska and Montana prohibit constitutional special laws.¹⁷⁸ Massachusetts prohibits measures that would change the declaration of rights section.¹⁷⁹ Such changes would likely require a constitutional

172. Florida voters rejected Amendment 4 (2020) by a vote of 47.5% in the affirmative to 52.4% in the negative. *Voter Approval of Constitutional Amendments 19.08*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=74114&seqnum=2> (last visited July 18, 2021) (showing Amendment 4 was defeated with 4,853,402 votes for the amendment and 5,356,792 against).

173. The petition process was used to add a claimant's right to fair compensation in FLA. CONST. art I, § 26, and the definition of marriage in FLA. CONST. art I, § 27.

174. For example, a 2022 measure sought to further limit the possession of some firearms before the ballot summary was declared unconstitutionally misleading. *Advisory Opinion v. Prohibits Possession*, 296 So. 3d 376, 382 (Fla. 2020). Several other measures seek to limit abortions. *See, eg, Human Life Protection 19-14*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=74660&seqnum=1> (last visited July 4, 2021).

175. *See supra* notes 71–74 and accompanying text.

176. States such as Alaska, Massachusetts, Montana, Nevada, and Wyoming have prohibited the spending of funds through a petition. *See e.g.,* ALASKA CONST. art. XI, § 7. States such as Missouri have limits on the types of funds and the amounts that can be expended through a petition. *See* MO. CONST. art III, § 51 (stating that an “initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution.”).

177. NEB. CONST. art. III-1; *id.* art. III-2.

178. ALASKA CONST. art. XI, § 7 (stating that initiatives “shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation.”); MONT. CONST. art III, § 4 (stating that “[t]he people may enact laws by initiative on all matters except appropriations of money and local or special laws.”).

179. MASS. CONST. art. XLVIII, § 2 (reading in part that “[n]o proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall

amendment but may provide more protections for Floridians than currently exist.

C. Regulations on Non-State Actors

Florida has recently recognized the professional nature of constitutional changes through initiative and has begun to take steps towards appropriate regulation. The reforms of the 2019-2020 Florida Legislature will hopefully bring more transparency and accountability to paid petition gathering. The effectiveness of these measures should be reviewed to see what, if any, impact they had on the citizen initiative process.

The same attention should be given to the other activities of political consultants, especially the drafting of the title and summary. As discussed earlier, these titles and summaries have limited restrictions and need not fully describe the proposal, yet the title and summary is the only information the voter sees at the ballot box.¹⁸⁰ Troublingly, these titles and summaries are also written by the sponsors who necessarily have a bias for passage.¹⁸¹ Some states have addressed this problem by having the Attorney General involved in the drafting of the summary and title.¹⁸² Other states have an indirect initiative process where the legislature may fill this role.¹⁸³ Rather than drafting it themselves, Florida's 2018 Constitution Revision Commission hired outside counsel to draft and review the proposed titles and summaries of their constitutional proposals.¹⁸⁴ Though it may take any number of forms, the

be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.”).

180. *See supra* pt. IV.

181. *See supra* pt. IV.

182. States such as Idaho, Montana, Ohio, and Oklahoma have created a process for the attorney general to review a proposal for legal accuracy, while Illinois gives the attorney general the ability to rewrite the proposal subject to certain restrictions. *See Initiative and Referendum Processes*, NAT'L CONF. OF STATE LEGISLATURES (July 4, 2021), <https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx#/> (click on map to view specific process of each state). In states such as Colorado, Massachusetts, and Washington, the attorney general drafts the title and summary. *Id.*

183. States such as Maine, Massachusetts, Michigan, Nevada, and Washington allow the legislature to place an alternative measure on the ballot. *See The Indirect Initiative*, NAT'L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/the-indirect-initiative.aspx> (last visited July 24, 2021).

184. Mary E. Adkins, *What Florida's Constitution Revision Commission Can Teach and Learn from Those of Other States*, 71 RUTGERS U. L. REV. 1177, 1224 (2019).

need for more check on this power is clear. A good system would also satisfy the goal of having more, not less, actors in the process.

VIII. CONCLUSION

Over the past fifty years, the Florida Constitution has tripled in size and contains nearly twice as many words as the 1885 Constitution that it replaced.¹⁸⁵ In 2018, Floridians approved eleven amendments to their constitution¹⁸⁶—the same number of successful amendments the U.S. Constitution has seen in the last 100 years. Each method of amendment deserves scrutiny, and a close examination of Florida’s citizen initiative process shows the need for more safeguards. The power of the people is paramount, but it should not be limitless. The American republic hinges on the checking of governmental power by other institutions. Such constitutional and legal limitations accomplish an important political purpose: protecting citizens from those government and non-government entities that seek to steer the power of the state. The reforms passed by the 2019-2020 Florida Legislature are a good start, but more is needed because, to paraphrase U.S. Supreme Court Chief Justice John Marshall, we must never forget, that it is *a constitution* we are expanding.¹⁸⁷

185. The Florida Constitution is now 65,146 words, compared to its original length of 21,286. *See supra* note 14 and accompanying text.

186. Of course, the citizen initiative process is not fully responsible for this high number. The Constitution Revision Commission placed eight, the Florida Legislature placed three, and special interest groups placed two through the citizen initiative process. *Initiatives/Amendments/Revisions Database*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/> (last visited July 4, 2021).

187. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).