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Don't Change the Subject: How State Election Laws Can Nullify Ballot Questions

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Don't Change the Subject: How State Election Laws Can Nullify Ballot Questions

Cole Gordner*

ABSTRACT

Procedural election laws regulate the conduct of state elections and provide for greater transparency and fairness in statewide ballots. These laws ensure that the public votes separately on incongruous bills and protects the electorate from uncertainties contained in omnibus packages. As demonstrated by a slew of recent court cases, however, interest groups that are opposed to the objective of a ballot question are utilizing these election laws with greater frequency either to prevent a state electorate from voting on an initiative or to overturn a ballot question that was already decided in the initiative's favor. This practice is subverting the original intent of procedural election laws and stripping citizens of the right to participate in a direct democratic process by nullifying their votes.

While procedural election laws were originally implemented as a means of safeguarding the average voter, they have now be-

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come an important tool for special interest groups to block legislation they oppose without having to attack the actual substance of the bill. This Comment will argue that parties are misusing procedural election laws and that such election laws must either be amended or replaced to once again achieve their underlying purpose of protecting voters. It will begin by examining the history and purpose of some of the most common procedural election laws on the books. It will then examine how some of these laws are used to block the Marsy's Law initiative, which has recently been proliferating throughout the states. Finally, this Comment will emphasize some of the more serious consequences resulting from these practices and provide recommendations for how to alleviate them while still protecting the public interest.

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I. INTRODUCTION

Every year, millions of citizens across the United States engage in the democratic process and cast votes for their preferred candidates to win public office.¹ In addition to casting votes for people, many citizens will also find themselves deciding on matters of public policy, typically in the form of ‘yes’ or ‘no’ ballot questions. Ballot questions—also called ballot measures—are “proposals to enact new laws or constitutional amendments or repeal existing laws or constitutional amendments that are placed on the ballot for approval or rejection by the electorate.”²

Interest groups and other organizations who are opposed to a ballot question’s underlying objective frequently utilize procedural election laws to exploit statewide ballots and nullify legislative initiatives, thereby stripping the electorate of a meaningful voice.³ For example, opponents of Marsy’s Law—the package of “victim’s rights” bills which has been percolating throughout the states over the last decade—have been using single-subject and separate-vote requirements to prevent a legitimate referendum either from occurring or being counted. States need to begin responding to these undemocratic practices and amend their ballot procedures to ensure that legislation, which may be the culmination of years of hard work, is not overturned on what amounts to a technicality.⁴

Although the United States is a representative democracy—meaning a government comprised of representatives chosen by the people⁵—the concept of allowing all eligible voting citizens to make decisions via ballot has been present since its foundation.⁶ The popularity of the idea of direct democracy has waxed and waned throughout American history, peaking during the Progressive Era of the 19th Century.⁷ Today, nearly every state allows for some form of direct governing by the statewide electorate, and most of these states also have a number of procedural election laws in

1. *Voter Turnout*, FAIRVOTE, <https://bit.ly/3dfFred> [<https://perma.cc/8GF4-3HCA>] (last visited Oct. 10, 2020).

2. *What Are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST., <https://bit.ly/34N8odJ> (last visited Dec. 2, 2020).

3. *Infra* Part II.C.

4. *Infra* Part III.

5. *Representative Democracy*, BALLENTINE’S LAW DICTIONARY (2010).

6. *Infra* Part II.A.

7. *Infra* Part II.A.

place.⁸ The laws were meant to protect the public from voting on omnibus bills and other ambiguous legislation, the actual effects of which may have been entirely unknown to the average voter.⁹ Organizations like the American Civil Liberties Union (“ACLU”)¹⁰ are now subverting this purpose and taking advantage of these laws to prevent the public from voting on a proffered bill at all.¹¹

Part II of this Comment will discuss the history of direct democratic processes in the United States: how they were formed, why they were formed, and how they gradually expanded throughout the states.¹² It will then examine some of the most common procedural election laws that states have adopted for their ballot initiatives and which form the basis for most of the litigation relating to challenging ballot questions.¹³ Finally, a string of cases challenging Marsy’s Law, with varying degrees of success, will be considered to demonstrate the arguments typically offered to invalidate ballot questions and the judicial outcomes that may follow such challenges.¹⁴

Part III of this Comment will examine some of the negative consequences arising from the use of procedural election laws to obstruct public referenda.¹⁵ It will then offer some recommendations that states may adopt to alleviate these unwanted consequences and provide for more just outcomes given the minute scope of these challenges which may sometimes amount to little more than formatting errors.¹⁶

II. BACKGROUND

A. *History and Purpose of Statewide Referendums and Direct Democracy*

Direct democracy, the creation and/or approval of laws by the people as a whole,¹⁷ is a concept that has been present in the

8. *Infra* Part II.A.

9. *Infra* Part II.B.

10. The mention of the ACLU in this Comment is purely for illustrative purposes and does not express any personal views towards the organization or the controversy in this Comment.

11. *Infra* Part II.C.

12. *Infra* Part II.A.

13. *Infra* Part II.B.

14. *Infra* Part II.C.

15. *Infra* Part III.A.

16. *Infra* Part III.B.

17. STEPHEN MICHAEL SHEPPARD, *Democracy*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

United States since its origin as a British colony.¹⁸ In the early 17th Century, direct democracy took its earliest form in the United States as New England town meetings, which were communal gatherings for the purpose of enacting community laws.¹⁹

The U.S. Constitution's preamble enshrines the idea of governing via the popular will: "We the people of the United States, in Order to form a more perfect Union."²⁰ The Framers, however, were weary of the notion of the popular will and feared mischievous factions that might utilize the non-deliberative process to propose stark political policies that would infringe upon property rights and the rights of others.²¹ As a result, direct democracy on the federal level was originally limited to the election of representatives to the Constitutional Conventions and, subsequently, the election of U.S. Representatives²²—although the federal government did eventually allow for the direct election of U.S. Senators by passing the 17th Amendment.²³ The United States remains one of the few significant democracies in the world to never hold a truly nationwide public referendum, one in which all eligible U.S. citizens may vote for or against a federal law.²⁴

Unlike the federal government, states have demonstrated a readiness to embrace the popular will of direct democracy and public referendums.²⁵ Each of the original 13 states, except Virginia, submitted its state constitution to the people for ratification²⁶—the process of approving a governing document via popular will or

18. Steven Frias, Note, *Power to the People: How the Supreme Court Has Reviewed Legislation Enacted Through Direct Democracy*, 31 SUFFOLK U. L. REV. 721, 733–34 (1998) (explaining that the Founding Fathers recognized two forms of democracy—representative and direct—and chose the former as the foundational structure for the U.S. government).

19. *Id.* at 735; see also Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 419 (2017) (providing a description from John Adams who characterized New England town meetings as communal gatherings and collective effort).

20. U.S. CONST. pmbl.

21. K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 TEMP. L. REV. 821, 825 (2006); see also THE FEDERALIST No. 10 (James Madison) (arguing that a faction comprised of a majority of the electorate would hold all others subservient to them in a "pure democracy").

22. DuVivier, *supra* note 22, at 825–26.

23. U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years . . .").

24. DuVivier, *supra* note 22, at 823.

25. *Id.* at 830.

26. *Id.*

statewide convention.²⁷ The voters in Massachusetts were even able to utilize this method of approval to make changes to their constitution before ratification.²⁸ Most recently, Rhode Island continued the tradition of ratification through popular vote by submitting a new state constitution to its voters for approval in 1986.²⁹

Following the passage of state constitutions, the practice of direct democracy remained relatively stagnant in the United States for nearly a century.³⁰ The Progressive movement, which formed in the late 19th Century as a result of concerns over large, wealthy political machines controlling the democratic process, brought with it a renewed desire for government by popular will.³¹ Professor DuVivier provides the rationale behind the desire to revisit and expand the practice of direct democracy:

The Progressives turned away from legislatures controlled by special interests. They proposed the citizen-initiated referendum as an alternative mechanism for creating laws—a means of circumventing legislatures rather than working with them. The Progressives argued that referendums could correct the control of government by moneyed interests and could force action when elected officials became “paralyzed by inaction.”³²

Between 1898 and 1918, 25 states adopted one, or both, of two forms of statewide referendum procedures: citizen-initiated referendums and legislature-initiated referendums.³³ Citizen-initiated referendums allow citizens to refer a law that has passed a legislature to the ballot by collecting a set number of signatures from eligi-

27. *Id.* at n.50.

28. See Matthew V. Sirigu, Note, *Relatedness Requirement in Flux: Why Uncertainty Surrounds Massachusetts Ballot Questions and Their Corporate Sponsors*, 51 SUFFOLK U. L. REV. 159, 164 n.28 (2018) (“The legislative body in existence at the time prepared the first draft of the constitution and failed to include a bill of rights, which led to an overwhelming rejection by Massachusetts voters in 1778.”).

29. *State Constitution*, BALLOTPEDIA, <https://bit.ly/2DwylB7> [<https://perma.cc/6HE9-9D8Q>] (last visited Dec. 2, 2020); see also *Constitution of the State of Rhode Island and Providence Plantations*, STATE OF R.I. GEN. ASSEMBLY: R.I. CONST., <https://bit.ly/2LaGijF> [<https://perma.cc/QCU4-9KBC>] (last visited Dec. 2, 2020).

30. DuVivier, *supra* note 22, at 830–31.

31. William Sparks & Malinda Morain, *Usurping Democracy and the Attempts to Ban Hydraulic Fracturing*, 5 LSU J. OF ENERGY L. & RES. 313, 313–14 (2017); see also DuVivier, *supra* note 22, at 830–831.

32. DuVivier, *supra* note 22, at 831.

33. *Id.*; see M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 3 (2003) (explaining that these states included Arizona, Arkansas, California, Colorado, Idaho, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming).

ble voters.³⁴ The voters may then vote on whether to uphold or repeal the law.³⁵ Legislature-initiated referendums (or legislative referrals) refer to a process by which a state assembly passes legislation, typically a state constitutional amendment, and then submits it to the general public for final approval.³⁶ Over time, many states began to enact laws regulating the content and conduct of such procedures in order to protect them from undue influence or political manipulation.³⁷

B. *Common Procedural Election Laws and the Rationale Behind Them*

Some of the most common challenges to ballot questions fall into one of three categories: single-subject, separate-vote, and overly vague. Challengers to initiatives will sometimes allege multiple defects in the formatting or substance of the question to increase their chances of nullifying the ballot question altogether.³⁸ Each of them will now be discussed in turn.

1. *Single-Subject Requirement*

Single-subject laws are a common procedural election law found in state constitutions or codified in state statutes.³⁹ These laws require that state-wide ballots contain only one issue or subject when they present amendments or legislation on which citizens will vote.⁴⁰

34. J. Michael Marshall, *Close Encounters of the Referendum Kind*, 84 FLA. B. J. 56, 57 (2010).

35. *Citizen Referendum*, BALLOTPEDIA, <https://bit.ly/37UrmQj> [<https://perma.cc/6J7S-NR44>] (last visited Dec. 2, 2020).

36. *Legislatively Referred Constitutional Amendment*, BALLOTPEDIA, <https://bit.ly/2P0f7sV> [<https://perma.cc/VTW5-LM5G>] (last visited Dec. 2, 2020).

37. *Infra* note 42 and accompanying text; *see also infra* note 43 and accompanying text.

38. *See, e.g.*, *Mont. Ass'n of Ctys. v. State*, 389 Mont. 183, 185 (2017) (alleging violations of both the separate-vote and single-subject requirements); *see also League of Women Voters of Pa. v. Boockvar*, 2019 Pa. Commw. Unpub. LEXIS 623, 5–7 (Pa. Cmmw. Ct. 2019) (alleging a violation of the separate-vote requirement and that the language used did not “fairly, accurately, and clearly” inform the public of the nature of the bill).

39. Justin W. Evans & Mark C. Bannister, *The Meaning and Purpose of State Constitutional Single Subject Rules: A Survey of States and the Indiana Example*, 49 VAL. U.L. REV. 87, 88 (2014).

40. *Single Subject Rule*, BALLOTPEDIA, <https://bit.ly/2NNObxb> [<https://perma.cc/3SFC-M8Y9>] (last visited Dec. 2, 2020); *see also Single Subject*, BALLENTINE'S LAW DICTIONARY (2010); *see, e.g.*, PA. CONST. art. III, § 3; FLA. CONST. art. III, § 6.

Currently, 41 of the 50 states have some general form of the single-subject rule.⁴¹ New Jersey introduced the first of these rules in 1844.⁴² The following outlines the overall goals of such laws:

The primary and universally recognized purpose of the one-subject rule is to prevent log-rolling in the enactment of laws—the practice of several minorities combining their several proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal of each minority could have obtained majority approval separately.⁴³

In the context of ballot questions, single-subject requirements protect the voter from having to cast a decisive vote on a package of bills, the contents of which may be entirely unknown to the voter, aside from a very brief ballot title and question.⁴⁴ Another primary function of single-subject laws, as mentioned above, is protecting voters from political logrolling.⁴⁵ A classic scenario of logrolling looks like this: Lawmaker A and Lawmaker B both have proposals that will likely not pass by themselves, so the two lawmakers combine both of their proposals into a larger omnibus bill, and both lawmakers agree to vote favorably for the bill.⁴⁶ This process may involve multiple lawmakers and lead to a bill whose contents encompass multiple subjects with little to no relationship between them.⁴⁷ Single-subject rules prevent electors from having to accept part of an initiative that they would otherwise oppose to achieve a change to the constitution that they support.⁴⁸

Although the parameters of single-subject rules are relatively clear, their actual application presents difficulties.⁴⁹ Some courts

41. Evans, *supra* note 40, at 88.

42. Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 389 (1958); Daniel N. Boger, Note, *Constitutional Avoidance: The Single Subject Rule as an Interpretive Principle*, 103 VA. L. REV. 1247, 1253 (2017); see also N.J. CONST. art. IV, § VI, ¶ 4 (amended . . .) (requiring that all laws which shall create debts or liabilities on behalf of the state shall only be authorized by a law with a single object).

43. Ruud, *supra* note 43, at 391.

44. Boger *supra* note 43, at 1248–49.

45. *Id.*

46. *Id.* at 1253–54.

47. STEPHEN MICHAEL SHEPPARD, *Omnibus Bill*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

48. See *Fine v. Firestone*, 448 So.2d 984, 988 (Fla. 1984) (noting that an initiative proposal with multiple subjects, in which the public has had no representative interest in drafting, places voters with different views on the subjects contained in the proposal in the position of having to choose which subject they feel most strongly about).

49. Evans, *supra* note 40, at 90.

have been criticized for interpreting the requirement haphazardly, or even not at all.⁵⁰ Furthermore, when judges do decide to enforce the requirement aggressively, they are likely to do so based on their personal views towards the specific legislation, rather than neutral judicial principles.⁵¹ In states that do aggressively enforce their single-subject requirement, the rate of upholding an initiative drops from 83 percent when the judge favors the policy to 42 percent when the judge disagrees with the policy.⁵² As the judiciary is designed to be a non-political organ of our government,⁵³ the skewed application of single-subject requirements is problematic.

2. *Separate-Vote Requirements*

Separate-vote requirements are similar to single-subject requirements in terms of purpose, but they have a much broader scope of application. Whereas single-subject laws address the substance of the initiative being put to a vote, separate-vote laws focus on the potential change to the current constitution and “the degree to which a proposed amendment would modify the existing constitution.”⁵⁴ Separate-vote laws typically require that a state’s citizens vote separately on any proposed amendments to their state constitution.⁵⁵ Essentially, if passing a law would change more than one section of a constitution or statute, the state must provide the electorate with the opportunity to vote on each of the changes individually.⁵⁶

In some instances, separate-vote laws either contain language or incorporate a judicial test that asks, for example, would “the pro-

50. *Id.* at 89; *see also* *Ind. State Teachers Ass’n v. Bd. Of Sch. Comm’rs of the City of Indianapolis*, 679 N.E.2d 933, 935 (Ind. Ct. App. 1977) (noting that the court has historically taken a laissez-faire approach to determining whether a violation of the single-subject rule has occurred and recognizing that this approach has resulted in the implied authorization for the state’s General Assembly to accord minimal attention to the requirement).

51. John Matsusaka & Richard Hasen, *Aggressive Enft of the Single Subject Rule*, 9 ELECTION L.J.: RULES, POL., & POL’Y 399, 427 (2010) (finding that judges upheld initiatives they disagreed with only 42.1 percent of the time while they upheld initiatives they agreed with 83.2 percent of the time).

52. *Id.*

53. THE FEDERALIST NO. 78 (Alexander Hamilton) (positing that the judicial branch is to be distinct from the other so-called “political branches”).

54. *See* F. Troupe Mickler IV, Note, *The Oregon Supreme Court Disregards the “Closely Related” Requirement of its Separate-Vote Doctrine in Upholding a Property Forfeiture Initiative. Lincoln Interagency Narcotics Team V. Kitzhaber*, 145 P.3d 151 (Or. 2006), 39 RUTGERS L.J. 1037, 1046 n.64 (2008).

55. *See* Philip Bentley, *Armatta v. Kitzhaber: A New Test Safeguarding the Oregon Constitution from Amendment by Initiative*, 78 OR. L. REV. 1139, 1146 (1999).

56. Mickler, *supra* note 55, at 1046 n.64.

positional make two or more changes to the constitution that are substantive and that are not *closely related*[?]”⁵⁷ What constitutes a change that is “substantive” is generally not at issue for courts that hear cases involving the single-subject requirement.⁵⁸ What counts as being “closely related,” however, is more of a gray area and permits judges significant freedom in making their decision.⁵⁹

Some state judiciaries, such as Oregon’s, have attempted to define a judicial standard that will allow judges to rule more predictably and consistently on whether two or more provision/amendments are closely related. The Oregon Court of Appeals outlined a “necessary implication” test which asks whether the two or more substantive changes to the constitution are so closely related that a vote in favor of one proposed amendment necessarily implies a vote in favor of the other.⁶⁰ Ultimately, in a later case, the Oregon Supreme Court rejected the necessary implication standard, along with a few other proffered tests.⁶¹

While single-subject and separate-vote requirements are, for the most part, clearly defined laws that organizations can use to challenge the validity of ballot questions, they are not the only means to dispose of an unwanted initiative.

3. *Word Limits, Plain Statements of Fact, and the Vagueness Defense*

Some states require that ballot questions fall below a specified word limit to be eligible for placement on the ballot.⁶² Additionally, a state may require its Secretary of State or other administrative official to publish a short and plain statement of fact regarding the relevant ballot question and the effect it likely will have in the state.⁶³ Both of these types of laws serve the purposes of keeping

57. *See, e.g.*, *Mont. Ass’n of Counties (“MACo”) v. State*, 404 P.3d 733, 742, 196 (Mont. 2017) (emphasis added).

58. *Id.* (pointing to a generally accepted definition of *substantive* as found in *Black’s Law Dictionary*).

59. *Lincoln Interagency Narcotics Team v. Kitzhaber*, 145 P.3d 151, 162–66 (Or. 2006) (Durham, J., concurring) (detailing Oregon’s struggle to determine a uniform standard for “closely related” and explaining the various ways the state courts had defined it up until that opinion was issued).

60. *Dale v. Keisling*, 999 P.2d 1229, 1233–34 (Or. Ct. App. 2000).

61. *Lincoln Interagency Narcotics Team*, 145 P.3d at 163–64.

62. *See, e.g.*, CAL. ELEC. CODE § 9051(b) (West 2015).

63. *See, e.g.*, 25 PA. CONS. STAT. § 201.1 (1986) (“Whenever a proposed . . . ballot question shall be submitted to the electors of the Commonwealth in referendum, the Attorney General shall prepare a statement in plain English which indicates the purpose, limitations and effects of the ballot question on the people of the Commonwealth.”).

the electorate informed about the bill on which they will be voting and ensuring as little confusion as possible when it comes to the substance and readability of the question.⁶⁴

Word limits and plain statements of fact are both susceptible to the challenge of being unconstitutionally vague or misleading, meaning the ballot question impermissibly confused or deceived the average voter.⁶⁵ To withstand these challenges, a statute generally must meet the standard of being “specific enough to give persons of common intelligence and understanding adequate warning of the proscribed conduct.”⁶⁶ It is difficult to define “vagueness” with great specificity, but a successful challenge will result in the termination of the entire bill in question.

Recently, the League of Women Voters asserted a vagueness challenge against Florida’s *Amendment 8*, which was on the ballot for voters in 2018.⁶⁷ Among other provisions, the bill would have stripped school boards of the authority to control, operate, and supervise charter schools.⁶⁸ The proffered question, however, did not specifically mention charter schools but instead described them as “public schools not established by the school board.”⁶⁹ The Supreme Court of Florida determined that by not explicitly mentioning charter schools, the question was inherently misleading to Florida voters, and therefore it overturned the ballot initiative.⁷⁰

It is also worth mentioning that in 2017, Ballotpedia and researchers at Georgia State University conducted an assessment on how the average ballot question reads.⁷¹ They found the average ballot question typically necessitates at least some college-level education to be understandable.⁷² This is due in some part to the “legalese” that is inherent to any question pertaining to a bill, but it demonstrates the level of clarity lawmakers must ensure they reach in order to prevent a vague/misleading challenge.

64. See *Ballot Title*, BALLOTPEDIA, <https://bit.ly/2uGSAuV> [<https://perma.cc/E49U-N7T6>] (last visited Feb. 21, 2020).

65. See *Johnson v. Ames*, 76 N.E.3d 1283, 1284 (Ill. 2016); see also *Sprague v. Cortes*, 145 A.3d 1136, 1137 (Pa. 2016) (Baer, J., concurring).

66. Jay M. Zitter, *Validity, Construction, and Application of State Statutory Voting Offense*, 5 A.L.R.6th 1, 2 (2005).

67. *Detzner v. League of Women Voters*, 256 So. 3d 803, 806 (Fla. 2018).

68. *Id.*

69. *Id.*

70. *Id.* at 810–11.

71. Sierra Hatfield, *Unclear Ballot Language Comes Under Fire*, THE COUNCIL OF STATE GOV'T (Nov. 2, 2018), <https://bit.ly/3adNR2Y> [<https://perma.cc/2TAH-J3SH>].

72. *Id.*

C. Challenges to Ballot Questions in Practice

1. Marsy's Law

Marsy's Law is one ballot initiative that is frequently at the center of lawsuits about procedural election law infringements.⁷³ While this is by no means the only initiative to face election law challenges, the frequency and contemporaneous nature of the challenges' make Marsy's Law a valuable resource to dissect the current misuse of procedural election laws.

This Comment will focus primarily on cases from Montana, Kentucky, and Pennsylvania because they are useful in illuminating how election law challenges function in practice and the drastic consequences they can have. *Montana Association of Counties v. State* ("MACo")⁷⁴ demonstrates a statewide interest group adjudicating a ballot initiative pursuant to a separate-vote/single-subject law.⁷⁵ *Westerfield v. Ward* ("Westerfield")⁷⁶ not only demonstrates a vagueness challenge, but the Kentucky Supreme Court also provides one possible method for states to avoid the potential dangers of procedural election laws.⁷⁷ Lastly, *League of Women Voters of PA & Haw v. Boockvar* ("Boockvar")⁷⁸ provides a case that is being adjudicated concurrently with the writing of this Comment and has potential to be resolved utilizing the model outlined in *Westerfield v. Ward*, which will be discussed in the following section.⁷⁹

a. Background

Henry Nicholas started the Marsy's Law initiative in California.⁸⁰ He began this following the rape and murder of his sister Marsy by her ex-boyfriend.⁸¹ While out on parole, the ex-boyfriend

73. See *Marsy's Law Crime Victim Rights*, BALLOTPEdia, <https://bit.ly/2CzIg8u> [<https://perma.cc/E5QV-7ALV>] (last visited Dec. 2, 2020). *Westerfield v. Ward*, 599 S.W.3d 738 (Ky. 2019) (alleging that the proposed ballot question failed to comply with constitutional requirements with respect to the adoption of an amendment). See also *Mont. Ass'n of Ctys. v. State*, 404 P.3d 733 (Mont. 2017) (alleging that the proposed constitutional amendment violated Montana's separate-vote requirement); *League of Women Voters of Pa. v. Boockvar*, 219 A.3d 594 (Pa. 2019) (alleging that the proposed constitutional amendment violates the state constitution's requirement that separate amendments receive separate votes).

74. *Supra* note 39.

75. See *Mont. Ass'n of Counties* ("MACo") *v. State*, 404 P.3d 733 (Mont. 2017).

76. *Westerfield v. Ward*, 599 S.W.3d 738 (Ky. 2019).

77. *Id.* at 751–52.

78. *Supra* note 39.

79. *Supra* note 39.

80. *About Marsy's Law*, MARSY'S LAW, <https://bit.ly/32apyPH> [<https://perma.cc/RUN4-9683>] (last visited Dec. 2, 2020).

81. *Id.*

would harass Nicholas and his family while they were in public places, which they found extremely traumatic.⁸² As a result, Nicholas started a nationwide lobbying effort for states to amend their constitutions to include a “Victim’s Bill of Rights” to safeguard others from having to endure a similar experience.⁸³

The actual substance of Marsy’s Law varies from state to state, but it is typically a package of 10 to 14 amendments that all have the purpose of securing rights for victims of crimes equal to those of defendants in criminal proceedings.⁸⁴ The amendments include, but are not limited to, the right to receive notification of and be present at criminal justice proceedings; the right to refuse discovery requests; the right to confer with prosecutors; the right to restitution; the right to be made informed of rights; and the victims’ role at parole consideration hearings.⁸⁵

The attempt to equate a victim’s rights with those of a criminal defendant has drawn opposition from numerous organizations, notably the ACLU and the League of Women Voters.⁸⁶ Whenever Marsy’s Law percolates into a new state, these groups file lawsuits against it alleging as many procedural defaults as is feasible. They do this to prevent the ballot measure from being voted on or taking effect, as demonstrated by the following series of cases.⁸⁷

82. *Id.*

83. *Id.*

84. Marsy’s Law Crime Victim Rights, *BALLOTPEDIA*, <https://bit.ly/2CzIg8u> [<https://perma.cc/2EJM-Z7KZ>] (last visited Dec. 2, 2020).

85. *California Annual Review: Summary: 2008 California Criminal Law Ballot Initiatives*, 14 *BERKELEY J. CRIM. L.* 173, 176–90 (2009). See *CAL. CONST.* art. I, § 28(b). See also S.B. 1011, 2018 Leg., Reg. Sess. (Pa. 2018).

86. Katie Meyer, *Marsy’s Law Explained*, *WITF*, <http://bit.ly/36wubHB> [<https://perma.cc/J3JP-XNJT>] (Oct. 2019); Jeanne Hruska, ‘Victims’ Rights’ Proposals Like Marsy’s Law Undermine Due Process, *ACLU* (May 3, 2018, 10:00 AM), <https://bit.ly/3jqK2fa> [<https://perma.cc/KL2N-82JX>] (arguing that a criminal defendant’s rights are protections from a state that is attempting to deprive said defendant of their personal liberties, so such rights cannot be equated with a victims rights). For these reasons, defendants’ rights should have greater protection. *Id.*

87. See Elizabeth Hardison, *Opponents of Marsy’s Law Are Suing to Keep the Crime Victims Measure off the Nov. 5 Ballot*, *PA. CAP. STAR* (Oct. 10, 2019), <https://bit.ly/3osIMM0> [<https://perma.cc/V7T3-69G3>]. See also *Montana Marsy’s Law Crime Victims Rights Initiative, CI-116 (2016)*, *BALLOTPEDIA*, <https://bit.ly/2qOEOE8> [<https://perma.cc/T9SE-6RVP>] (last visited Nov. 9, 2019); *Victim’s Rights*, *ACLU OF IA.*, <https://bit.ly/2O9ZQFi> [<https://perma.cc/DVK2-RHZZ>] (last visited Nov. 9, 2019); *Ryland Barton, Kentucky Supreme Court Blocks ‘Marsy’s Law’ Constitutional Amendment*, *WFPL*, <https://bit.ly/2O73BeQ> [<https://perma.cc/J6F8-8EUX>] (last visited Dec. 2, 2020); *Vote NO on Ballot Amendment 6 (“Marsy’s Law”)*, *ACLU OF FLA.*, <https://bit.ly/2NHGsFt> [<https://perma.cc/D9FS-KEBJ>] (last visited Dec. 2, 2020).

b. *Mont. Ass'n of Counties ("MACo") v. State*

In 2017, *MACo* involved the first successful challenge to a Marsy's Law ballot initiative.⁸⁸ Montana is one of the states that allows its citizens to bypass the need for the state legislature to first pass legislation. Montana permits citizens to place initiatives on the ballot if a requisite number of its electorate signs a petition in favor of the measure. That is how Marsy's Law earned its place on the ballot in this instance.⁸⁹

The Montana electorate voted on the Marsy's Law ballot question on November 8, 2016, and it received significant approval, with 66 percent of the voters affirming the initiative.⁹⁰ Marsy's Law was set to take effect on July 1, 2017; however, ten days before this date, the Montana Association of Counties, along with other parties, filed a lawsuit alleging that the ballot question Montana citizens had voted on violated two election procedures codified in the Montana constitution.⁹¹ Specifically, the petitioners alleged violations of the single-subject requirement⁹² and the separate-vote requirement.⁹³

The court quickly disposed of the single-subject challenge.⁹⁴ It reviewed the constitutional provisions language and held that the express wording clearly indicated that the single-subject requirement was meant only to apply to bills the state legislature passed.⁹⁵ Because Marsy's Law was placed on the ballot through the citizen initiative process, it was never technically a "bill" and, as a result, was not subjected to this requirement.⁹⁶

The ballot initiative did not fare as well against the separate-vote requirement. The Supreme Court of Montana had previously determined that a single amendment could potentially violate the

88. *Mont. Ass'n of Ctys. ("MACo") v. State*, 404 P.3d 733 (Mont. 2017) (holding that the proposed constitutional amendment violated the state's separate-vote requirement). *Id.*

89. MONT. CONST. art. III, § 4; *Mont. Ass'n of Counties ("MACo")* 404 P.3d 733, 735.

90. *Mont. Ass'n of Counties ("MACo")* 404 P.3d 733, 735–36; see also Holly K. Michels, *Voter-approved Marsy's Law Declared Void by Montana Supreme Court*, INDEPENDENT RECORD (Nov. 1, 2017), <https://bit.ly/2pYcQGe> [<https://perma.cc/3JUL-WNXC>].

91. *Mont. Ass'n of Counties ("MACo")*, 404 P.3d at 736.

92. *Mont. Ass'n of Counties ("MACo")* 404 P.3d 733, 736–37; see also MONT. CONST. art. V, § 11(3).

93. *Mont. Ass'n of Counties ("MACo")*, 404 P.3d at 736–37; see also MONT. CONST. art. XIV, § 11.

94. *Mont. Ass'n of Counties ("MACo")*, 404 P.3d at 740.

95. *Id.* at 740.

96. *Id.* at 740–41.

separate-vote requirement if it had the effect of amending more than one section of the state constitution.⁹⁷ In *MACo*, the court upheld that principle and ruled that the Marsy's Law ballot initiative violated the separate-vote requirement by attempting to amend numerous constitutional provisions through a singular vote.⁹⁸ The court nullified the vote and rendered the Marsy's Law initiative defeated.⁹⁹

It is worth noting that getting a potential law placed on the election ballot via citizen initiative is a difficult and often time-consuming process.¹⁰⁰ In states like Pennsylvania, the legislature must pass a constitutional amendment in two separate, consecutive sessions before it can submit the amendment to the public for a vote.¹⁰¹ Further, the Montana Marsy's Law initiative received approval by a wide margin of votes.¹⁰² Despite these efforts, a court nullified the initiative in its entirety due to one procedural election law.¹⁰³ This is an outcome that could be avoided simply by dividing the initiative into separate questions or by having the initiative vetted for potential violations prior to being placed on the ballot.¹⁰⁴

c. *Westerfield v. Ward*

In early 2018, the Kentucky legislature passed its version of the Marsy's Law amendment.¹⁰⁵ The amendment was scheduled to appear on the November 6, 2018 Kentucky ballot, and the question that the voters would be presented with was published on July 22, 2018.¹⁰⁶ The question read as follows: "Are you in favor of providing constitutional rights to victims of crime, including the right to be

97. *Marshall v. State by & Through Cooney*, 975 P.2d 325, 331–32 (Mont. 1999) (holding that ballot initiative CI-75 violated Montana's separate-vote requirement because it sought to amend Article VIII, II, and VI of the constitution through one all-encompassing vote).

98. *Mont. Ass'n of Counties* ("MACo"), 404 P.3d at 746–47 (overturning the Marsy's Law ballot initiative because it would have created a new section to Article II of Montana's constitution, as well as amended Article VII § 2(3) and Article II § 9, 10, 20, 21, and 24).

99. *Id.* at 734–35.

100. *Initiative Process 101*, NAT'L CONF. OF STATE LEGISLATURES, <https://bit.ly/34Vcqiv> [<https://perma.cc/4PUA-X5N3>] (last visited on Dec. 2, 2020).

101. PA. CONST. art. XI, § 1.

102. *Montana Marsy's Law Crime Victims Rights Initiative, CI-116 (2016)*, BALLOTPEDIA, <https://bit.ly/2Sgc4Qw> [<https://perma.cc/WRT8-C6VE>] (last visited Dec. 2, 2020) (showing that 66% of votes were in favor of the initiative).

103. *Mont. Ass'n of Counties* ("MACo"), 404 P.3d at 746–47.

104. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 723 (2010).

105. S.B. 3, 2018 Leg., Reg. Sess. (Ky. 2018).

106. *Westerfield*, 599 S.W.3d at 743–44.

treated fairly, with dignity and respect, and the right to be informed and to have a voice in the judicial process?”¹⁰⁷ In response to the question, the Kentucky Association of Criminal Defense Lawyers, Inc. filed a declaratory judgment action seeking a declaration that the ballot question pertaining to SB 3 failed to adequately inform the voters of the substance of the amendment in violation of Kentucky’s statutory and constitutional requirements.¹⁰⁸ In other words, the Kentucky Association of Criminal Defense Lawyers challenged the ballot question for being unconstitutionally vague.

The state circuit court that first adjudicated the dispute allowed the question to appear on the November ballot but enjoined the Kentucky Secretary of State from certifying the ballots cast for or against the proposed amendment until the Kentucky Supreme Court could hear and decide the case.¹⁰⁹ Marsy’s Law ultimately received about 63 percent approval from Kentucky voters on election day.¹¹⁰ Considering the positive wording of the question, this was not surprising to many people.¹¹¹ In fact, while the Kentucky Supreme Court was reviewing the case, Justice Michelle Keller commented to a reporter, “[W]ho other than a sociopath is going to answer any way but yes to that question?”¹¹²

On June 13, 2019, the Kentucky Supreme Court handed down its ruling on the legitimacy of the Marsy’s Law question, nearly a year after the ballot question was first introduced.¹¹³ The Court held that the proposed amendment, as submitted to the voters through the aforementioned question, was invalid under the Kentucky Constitution.¹¹⁴

The Kentucky Supreme Court took an interesting approach to resolving this issue. It primarily looked to two sections of the Kentucky Constitution that pertained to the procedure and publication of proposed amendments to the constitution.¹¹⁵ Section 256 of the constitution provides that after a constitutional amendment has passed each house of the General Assembly, “such proposed

107. *Id.*

108. *Id.*

109. *Id.* at 744–45.

110. *Kentucky Marsy’s Law Crime Victims Rights Amendment (2018)*, BALLOTPEdia, <https://bit.ly/3kOleOS> [<https://perma.cc/8K7A-BS5R>] (last visited Dec. 21, 2019).

111. Ryland Barton, *Ky. Supreme Court Hears Arguments Over Marsy’s Law Ballot Language*, 89.3 WFPL (Feb. 8, 2019), <http://bit.ly/32mkLwH> [<https://perma.cc/WF83-NXZK>].

112. *Id.*

113. *See generally Westerfield*, 599 S.W.3d 738.

114. *Id.* at 740–41.

115. *Id.* at 2–5. *See* KY. CONST. § 256; KY. CONST. § 257.

amendment or amendments shall be submitted to the voters of the State for their ratification or rejection at the next general election for members of the House of Representatives, the vote to be taken thereon in such manner as the general assembly may provide”¹¹⁶ The court stated that it had previously interpreted this as a grant of exclusive authority to the General Assembly to determine the process for submitting a proposed amendment to the electorate.¹¹⁷ In fact, granting the General Assembly control over amendment procedures had been established precedent of the Court for over 70 years,¹¹⁸ and the General Assembly relied on it to enact election procedures.¹¹⁹

The other provision considered by the Court, Section 257, provided:

Before an amendment shall be submitted to a vote, the Secretary of State shall cause such proposed amendment, and the time that the same is to be voted upon, to be published at least ninety days before the vote is to be taken thereon in such manner as may be prescribed by law.¹²⁰

Put another way, the Secretary of State must publish the proposed amendment to be voted on by the electorate 90 days before the vote.¹²¹ This typically necessitates that the proposed amendment be circulated in at least two statewide newspapers in the weeks leading up to the vote.¹²²

In considering these two sections, the Supreme Court of Kentucky determined that it could no longer justify its historic interpretation that these provisions granted the General Assembly exclusive authority to determine election ballot-measure procedures.¹²³ After dissecting the legislative intent and applying some rules of statutory construction, the court concluded that the language “such proposed . . . amendments shall be submitted to the voters” and “such proposed . . . amendments to be published” actually establish a constitutional requirement that the entirety of an amendment must be published statewide prior to election day, and the entirety of the amendment must appear on the ballot on elec-

116. KY. CONST. § 256.

117. *Westerfield*, 599 S.W.3d, at 747–48.

118. *Hatcher v. Meredith*, 173 S.W.2d 665, 670 (Ky. Ct. App. 1943).

119. *Westerfield*, 599 S.W.3d, at 747–48.

120. 120. KY. CONST. § 257.

121. *Id.* at 745.

122. *Id.* at 745–46; *see, e.g.*, PA. CONST. art. XI, § 1. The Pennsylvania Constitution requires the Secretary of the Commonwealth to publish the proposed amendment in at least two newspapers in each county. *Id.*

123. *Westerfield*, 599 S.W.3d, at 747–48.

tion day.¹²⁴ By reevaluating the constitutional language and reversing decades of precedent, the Kentucky Supreme Court has provided other states with one potential method for solving claims that ballot questions are unconstitutionally vague.

d. *League of Women Voters of Pa. v. Boockvar*

One of the more recent lawsuits filed against a Marsy's Law ballot initiative is *League of Women Voters of Pa. v. Boockvar*,¹²⁵ which is currently proceeding through the Pennsylvania court system.¹²⁶ The Pennsylvania electorate voted on the Marsy's Law ballot question on November 5, 2019.¹²⁷ One month prior, however, the Pennsylvania League of Women Voters filed a lawsuit in opposition to the ballot question in Pennsylvania's Commonwealth Court, alleging that it violated the separate-vote requirement of the Pennsylvania Constitution.¹²⁸

On October 30, 2019, only six days prior to the vote, the Commonwealth Court issued an injunction on the ultimate result of the vote.¹²⁹ The injunction allowed voters to cast their ballots regarding Marsy's Law; however, the votes will not be counted until after the separate-vote question is resolved.¹³⁰ The Supreme Court of Pennsylvania reaffirmed the injunction the day before election day.¹³¹

124. *Id.* at 747–52.

125. *League of Women Voters of Pa. v. Boockvar*, 2019 Pa. Commw. Unpub. LEXIS 623 (Pa. Cmmw. Ct. 2019).

126. *Pennsylvania Marsy's Law Crime Victims Rights Amendment (2019): Status of the Ballot Measure*, BALLOTPEDIA, <https://bit.ly/2pcx1zE> [<https://perma.cc/DWP7-VH8X>] (last visited Dec. 2, 2020). The Commonwealth Court is hearing the case following the Pennsylvania Supreme Court upholding the preliminary injunction issued by the Commonwealth Court “preventing Secretary of State Boockvar from counting and certifying votes on the ballot measure, pending a final ruling.” *Id.*

127. Erin McCarthy Holliday, *Pennsylvania Voters Approve Marsy's Law Victims' Rights Amendment with Constitutional Question Pending*, JURIST (Nov. 6, 2019), <https://bit.ly/2ENnT8E> [<https://perma.cc/2VJC-5KBM>].

128. *Id.*

129. Ivey DeJesus, *Marsy's Law Question Will Appear on Ballot but Won't be Counted After Court Injunction; Advocates Slam Ruling*, PENNLIVE (Oct. 30, 2019), <https://bit.ly/36W6fg9> [<https://perma.cc/66BL-JQMA>].

130. *Id.*

131. Paula Reed Ward, *Pa. Supreme Court Backs Ruling to Not Count Marsy's Law Votes*, PITTSBURGH POST-GAZETTE (Nov. 4, 2019, 5:52 PM), <https://bit.ly/2Kh9IMu> [<https://perma.cc/WD2L-SW7M>]; Matt Miller, ‘The Voices of the People Should be Heard.’ Pa. Judges Hear Arguments on Marsy's Law Victim Rights Referendum, PENNLIVE (June 11, 2020), <https://bit.ly/2Gga3jv> [<https://perma.cc/SK2S-VHR4>].

As is demonstrated by *MACo*, *Westerfield*, and *Boockvar*, there are some serious drawbacks to procedural election laws. Some of these drawbacks will now be addressed further, followed by a series of recommendations for how to counteract such consequences.

III. ANALYSIS

As it currently stands, opponents of ballot questions have ample means to prevent or delay the adoption of any given bill.¹³² In 15 states, oppositional forces can rely on single-subject and separate-vote requirements as one method of nullifying ballot questions.¹³³ In the 40 states that provide their citizens with some form of referendum/ballot initiative process, adversaries may also allege that the question that appears on the ballot is misleading or overbroad.¹³⁴ Further, if opponents to a bill prevail on their challenges, they may do more than just retroactively get the proposed amendment removed from the ballot.¹³⁵ In states like Pennsylvania, where the amendment process is difficult and takes a minimum of two years to move the proposed legislation from the state legislature to the election ballot, successful opponents may effectively destroy any chance of the amendment being voted on again.¹³⁶ And all of this can be done through a procedural challenge—without even considering the substance of the proposed amendment.

Part A of this section will examine the common procedural election laws and challenges discussed in Part II of this Comment. This includes the negative consequences of such laws and how opponents are subverting their intended purpose by using them to block proposed amendments. Part B will then consider some of the possible solutions to this problem and propose certain “best practices” for states to follow to abate these challenges.

A. *Negative Impacts of Procedural Election Laws on Ballot Questions/Initiatives*

The use of procedural election laws to block ballot questions leads to numerous ramifications. These range from the nullification

132. *Supra* Part II.C.

133. *Single-subject Rule*, BALLOTPEDIA, <https://bit.ly/2NNObxb> [<https://perma.cc/6R54-N9AH>] (last visited Dec. 2, 2020).

134. *Id.*; see *Westerfield*, 599 S.W.3d 738.

135. PA. CONST. art. XI, § 1; see also *Legislatively Referred Constitutional Amendment, Two-session Requirements*, BALLOTPEDIA, <https://bit.ly/2SiH6aA> [<https://perma.cc/2SBZ-A4UR>] (last visited Dec. 2, 2020).

136. PA. CONST. art. XI, § 1.

of an entire bill because it was formatted incorrectly to stripping a state electorate from making a meaningful choice without even challenging the substance of the bill.¹³⁷ This section will highlight some of the major issues with current election laws.

1. *Nullification Due to Bad Formatting*

As previously mentioned, both single-subject and separate-vote requirements allow opponents of a ballot question to prevent a statewide vote simply because the bill encompasses more than one area.¹³⁸ The objective of such laws is to ensure that the public will not have to vote on bills that may have hidden or unintended consequences not readily apparent to the average voter.¹³⁹ While that is a just rationale, it neglects to consider that some bills may be so intertwined that separating them may be unfeasible. For instance, imagine a citizen-initiated referendum focused on achieving changes in labor conditions. Specifically, the referendum would increase the minimum wage and also provide sick-leave and maternity-leave. In a jurisdiction that strictly applies a separate-vote or single-subject rule, voters may have to decide on each of these issues piecemeal or risk having the court reject their efforts.

That scenario highlights another major issue with procedural election laws: the consequences of standard judicial remedies in cases where a court finds a ballot question in violation of an election law are disproportionate to the relatively minor nature of the offense—such as not parsing a bill into separate questions or not being clear enough in the wording of the question.¹⁴⁰ Assume that a state legislature wanted to enact a constitutional amendment prohibiting negative political advertising campaigns and also imposing a monetary penalty on any person/party who engaged in such activity. If this change were to be presented to voters in a single ballot question, it would risk violating the separate-vote requirement as it likely would change or create two constitutional provisions—one for the prohibition and one for the penalty. Even though the bill is relatively clear, the public may never have a chance to cast a vote on it should a court strike it down as violating a separate-vote requirement. This would render useless all the time activists and legislators took to get that amendment to the people, which could be upwards of two years.¹⁴¹ It also has the potential to

137. *Supra* Part II.C.

138. *Supra* Part II.B.

139. *Supra* note 43.

140. *See, e.g., Mont. Ass'n of Cty.s.*, 404 P.3d at 746–47.

141. *See, e.g., PA. CONST.* Art. XI, § 1.

dissuade the legislature from attempting to pass the amendment again. This outcome is unjust, especially considering the issue could be alleviated by simply dividing the proposed amendment into two distinct ballot questions.

2. *Misleading Questions*

As discussed earlier, drafting the wording of a ballot question comes with inherent dangers.¹⁴² Such dangers include complicated legalese that confuse the average voter and fail to describe the facets of a bill in great enough detail, as was the case with *Amendment 8* in Florida regarding charter schools.¹⁴³ In addition to these concerns, the drafters of the ballot language could write a misleading question, regardless of whether a state imposes a word limit and/or plain statement of fact.

One clear example of this comes from Pennsylvania and was adjudicated in *Sprague v. Cortes*.¹⁴⁴ The Republican-controlled legislature wanted to amend the state's constitution to increase the mandatory judicial retirement age from 70 to 75.¹⁴⁵ This was largely seen as a political move as the then-Chief Justice of the Supreme Court of Pennsylvania—a Republican affiliate—was 70 and on the verge of mandatory retirement.¹⁴⁶ The legislature passed the amendment and submitted it to the public with a ballot question that read, “Shall the Pennsylvania Constitution be amended to require that justices of the Supreme Court, judges, and magisterial district judges be retired on the last day of the calendar year in which they attain the age of 75?”¹⁴⁷ Nowhere on the ballot did it mention that there already was a mandatory retirement age in place, and this would simply be raising the threshold. Consequently, it manipulated voters who were in favor of enacting a judicial retirement age by leading them to believe that this would be the first time such a retirement age existed in Pennsylvania.¹⁴⁸

The problematic nature of misleading questions is underscored by the fact that, despite the plaintiffs in *Sprague* alleging that the ballot question was unlawfully misleading/vague, the Supreme

142. *Supra* Part II.B.3.

143. *Id.*

144. *Sprague v. Cortes*, 150 A.3d 17 (Pa. 2016).

145. *Id.* at 17–18.

146. Harold Jackson, *Inquirer Editorial: Misleading Ballot Question May Raise Judge's Retirement Age*, PHILA. INQUIRER, <https://bit.ly/2vqsj47> [<https://perma.cc/UKQ8-U2EK>] (Sept. 2, 2016).

147. *Sprague*, 150 A.3d at 24 n.2.

148. *Id.* at 28 (Dougherty, J., dissenting).

Court of Pennsylvania upheld the wording of the question.¹⁴⁹ This demonstrates that even where a ballot question is clearly misleading, the judicial standards are fluid enough that a deciding court may still uphold the language. As noted earlier, the rate of a judge upholding an initiative contested on single-subject grounds drops from 83 percent when the judge favors the policy to 42 percent when the judge disagrees with the policy.¹⁵⁰ At the very least, this demonstrates that voters cannot always trust state judges to make unbiased rulings in situations where a policy question is involved. Unfortunately, this is always the case for procedural election laws where the decision to nullify a question de facto eliminates the proposed law, at least for a period of time.¹⁵¹

3. *Invalidating the Voice of the People*

In many instances, a procedural election law that successfully blocks a proposed amendment nullifies the vote that the state electorate casts.¹⁵² This can occur either when a plaintiff files a challenge after the electorate has already voted on the proposal or when one files a challenge prior to the election, and the deciding court allows the question to be on the ballot but issues an injunction preventing the votes from being counted until after it has made its final decision.¹⁵³ While this may not always be a negative outcome—for example, in instances where the ballot question actually is misleading¹⁵⁴—there is still the potential for unjust consequences.

One of the driving factors behind the push for direct democracy by the Progressives in the late 19th Century was the undue control of state legislatures by special interest groups.¹⁵⁵ That is still a legitimate fear as procedural election laws provide special interest groups an opportunity to block certain proposals that they may not favor on a basis as simple as the wording of the ballot question being too vague. This is already an issue, as demonstrated by the constant battle between Marsy's Law and opposition groups like the ACLU in most states where the initiative has been, or will be, placed on the ballot.¹⁵⁶ These groups are steadfast in their op-

149. *Id.* at 17–18.

150. *Supra* note 53.

151. *See supra* Part II.C.1.c.

152. *See generally Westerfield*, 599 S.W.3d 738; *see also League of Women Voters*, 219 A.3d 594.

153. *See League of Women Voters*, 219 A.3d 594.

154. *Supra* Part III.A.2.

155. *Supra* note 33.

156. *Supra* Part II.C.

position to Marsy's Law,¹⁵⁷ so all they must do is wait for a state to begin implementing the policy and then file a lawsuit against it alleging a violation of any of the procedural election laws mentioned previously in this Comment. If any of their challenges to the ballot measure are successful, then the measure is defeated without any consideration for the actual substance of the proposed law and without any input from the state electorate. Progressives likely did not anticipate these challenges when they began advocating for direct democracy.

B. Methods for Resolving the Abuse of Procedural Election Laws

While there may not be a single solution to the negative consequences of procedural election laws, there are certainly steps that states could take to alleviate some of the harm. The following section will recommend some potential solutions states can implement to prevent these negative consequences moving forward.

1. Publishing the Entirety of the Proposed Amendment

The first recommendation for combating the negative consequences of procedural election laws is to take the approach outlined by the Supreme Court of Kentucky in *Westerfield v. Ward*.¹⁵⁸ There, the court decided that the statutory language of the state constitution required that the proposed amendment be published in its entirety on the ballot that the public would be voting on, as well as in newspapers, during the months leading up to the vote.¹⁵⁹

This approach would eradicate any challenges of the amendment being unconstitutionally vague or misleading. If the language of the amendment is published in its entirety, then an opponent could not possibly allege that the ballot was vague. There is an argument to be made that the legalese involved in a bill may still be too confusing for the average person to understand. A state could avoid this concern by requiring the Secretary of State to publish a short and plain statement of the bill and its consequences to the public in the months leading up to the vote—something that is already required in many states.¹⁶⁰ By requiring the entirety of the bill to be published and supplementing that with a plain statement by the Secretary of State, there will be virtually no grounds to argue

157. See Hruska, *supra* note 87.

158. *Westerfield v. Ward*, 599 S.W.3d 738, 751–52 (Ky. 2019).

159. *Id.* at 741–43.

160. See, e.g., PA. CONST. art. XI, § 1; see also 25 PA. ELECTION CODE § 201.1 (2004).

that a bill is unconstitutionally vague or misleading. Members of the public will have an opportunity to educate themselves on the substance and nature of the proposed amendment, and if there is still confusion, they will have ample time to seek clarification. Further, and as will be discussed in the following section, a state legislature may grant its judiciary the authority to redraft plain statements of fact should it determine that the language was misleading. So long as the court's revision falls within the specified timeline for publishing plain statements, the bill would have to prevail and be successfully submitted to the ballot.

A state judiciary could also adopt the principle from criminal law of *ignorantia juris non excusat*, which dictates that somebody who violates a law he or she is unaware of is not excused from criminal prosecution given that he or she had the resources to inform him or herself that such a law existed.¹⁶¹ Used in the context of ballot questions, the judiciary could say that given the publication of the amendment, the plain statement by the secretary, and the opportunity to clarify any uncertainties in the law, there are no grounds to assert that a ballot question is misleading or vague.

2. *Lenient Judicial Remedies*

Next, state judicial systems should begin issuing remedies that are more appropriate, given the relatively minor offense of not complying with a procedural requirement. The process of getting a bill from the legislature to the ballot is time consuming, and having to repeat the effort just to have it overturned on a procedural technicality may frustrate the legislature into giving up on an otherwise good law.¹⁶² State judiciaries should move away from the outright nullification of a proposed amendment in favor of granting the state legislature a reasonable amount of time to correct the error and resubmit the amendment. Following the correction, the state could either hold a special election with the sole purpose of voting on the ballot question or simply wait until the next primary or general election.

Doing either of these would result in a number of positive outcomes. The most obvious is still allowing the public to vote on a policy, even if the vote is a little delayed. One of the biggest issues with procedural election laws is that special interest groups utilize them to prevent the public from ever making a decision on the pol-

161. *Ignorantia juris non excusat*, THE LAW DICTIONARY (2002).

162. PA. CONST. art. XI, § 1.

icy.¹⁶³ This recommendation would ensure that the ultimate arbiters of good and bad amendments are the people, as the Progressives intended.

Another positive outcome would be remedies that are more proportional to the relatively benign nature of the offense. In a case where a ballot question violates a separate-vote or single-subject requirement, the courts could split the question into multiple questions on their own accord rather than throw away the entire bill. Alternatively, if a state court determines that splitting a ballot question is a non-justiciable political question, it could call upon the legislature to split the question itself.

In Pennsylvania, at least, there is already some precedent for the courts giving the political branches a second chance to conform otherwise unconstitutional legislation. In *League of Women Voters of Pa. v. Commonwealth*, the plaintiffs alleged that the Pennsylvania Congressional Redistricting Map of 2011 violated redistricting requirements codified in the state constitution.¹⁶⁴ Upon finding a violation, the Supreme Court of Pennsylvania provided the legislative and executive branches a timetable by which they could submit a new map, which would then be subjected to judicial scrutiny.¹⁶⁵ If the branches did not submit a new map within that timetable, the court asserted that it would draft a new, acceptable map itself.¹⁶⁶ This approach mitigates the negative consequences of procedural ballot challenges, and the court should implement it to correct deficiencies in ballot questions.

3. *Bipartisan Legislative Committees*

A third recommendation is to create bipartisan committees within the state legislature whose entire function is to draft permissible ballot questions. This recommendation may be the most challenging to implement as it would require the mutual cooperation of the major parties in each state. Nonetheless, some of the negative consequences of procedural election laws could be fixed were the legislature of a state to establish a bipartisan committee dedicated to drafting and publishing ballot questions.

When a proposed amendment is ready to be submitted to the public, it would first have to go through the bipartisan committee in which the members would work out the language of the prepared

163. Meyer, *supra* note 87.

164. *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282, 289–90 (Pa. 2018).

165. *Id.*

166. *Id.*

question. The hope is that, through consensus, any potential partisan manipulation of the question would be rendered impossible through the cooperation of both parties.

There are some potential drawbacks to this idea. Namely, the parties may be so gridlocked that the proposed amendment may die in committee. Also, the minority party may use the committee as solely a means to block amendments that it does not support, which is already the primary issue surrounding special interest groups and procedural election laws. However, a judicial safety net could guard against both of these issues in a similar fashion as lenient judicial remedies.¹⁶⁷ If the legislature cannot agree on the wording of a ballot question, or if one party is obstructing the process, the legislature could call upon the courts to resolve the issue and draft its own ballot question based on the substance of the law. Because judges in many states still may have party affiliation, even this could be mired in undue partisan influence, but it is nevertheless a step in the right direction.

IV. CONCLUSION

Interest groups are subverting the purpose of procedural election laws. Rather than protecting voters from misleading ballots and partisan influence, interest groups use said laws strategically to prevent otherwise valid legislation from being submitted to a state's electorate for a public vote. Organizations that vehemently oppose an initiative can have boilerplate complaints ready to be submitted to a court the moment a ballot question is scheduled to appear in a state election.

Publication of the entirety of a bill's language and the allowance of more lenient judicial remedies will help alleviate these issues. If policies are put in place to prevent a bill from being overturned in its entirety based on a successful challenge, oppositional groups will no longer depend on procedural election laws and will instead have to focus on attacking the substantive aspects of the legislation. Until then, these groups will continue to stifle or discount citizens' voices and good laws before they have a chance to receive a vote.

167. *Supra* Part III.B.2.