

PRE-ELECTION JUDICIAL REVIEW OF PROPOSED
CITIZEN INITIATIVES: AMENDING THE ROLE OF THE
FLORIDA SUPREME COURT

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INTRODUCTION

On April 1, 2024, the Florida Supreme Court handed down two significant rulings. First, in the wake of the overturning of *Roe v. Wade*, the Court departed from longstanding precedent, concluding that Florida's right to privacy does not encompass a right to abortion.¹ In the second ruling, the Court deemed a proposed citizen initiative seeking to amend Florida's Constitution to restrict government interference with abortion to be fit for inclusion on the ballot.² Of course, these decisions presented diverse circumstances and analyses. But the results of each illustrate the foundational principle of our republican form of government: While “it is emphatically the province and duty of the judicial department to say what the law is,” the absolute sovereign power resides in the people.³

Article XI, section 3 of the Florida Constitution enables the people to recommend changes to the Florida Constitution directly, without the deliberative procedural framework in effect when elected

1. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Sw. and Cent. Fla. v. State*, 384 So. 3d 67, 97 (Fla. 2024).

2. *Advisory Op. to the Att’y Gen. re Limiting Gov’t Interference with Abortion*, 384 So. 3d 122 (Fla. 2024).

3. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

representatives mediate the public's will.⁴ Floridians have used the citizen initiative process to speak to a host of issues, including abortion, marriage, restoration of voting rights, legalizing marijuana use, and even the confinement of pregnant pigs.⁵ This process, though lacking typical institutional checks and balances, involves a series of procedural barriers that must be met before a proposed initiative is placed on the ballot, including the pre-election judicial review of any proposed initiative to ensure its validity.⁶ The judiciary serves dual purposes: safeguarding the integrity of the electoral process while protecting the people's right to exercise political power.

This Note examines the pre-election judicial review procedure of Florida's citizen initiative process. Part II details the distinction between direct and representative democracy to provide a theoretical and philosophical underpinning of the initiative process. This Part also provides a brief overview of the origin of the citizen initiative as a form of direct democracy. Part III describes the citizen initiative process in Florida, explaining its history, process, and procedures. Part IV scrutinizes the standards for pre-election judicial review of proposed initiatives in Florida. Part V examines the role of the Florida Supreme Court in this process from a descriptive perspective and argues the Court should broadly construct the restrictions in place for proposed initiatives, returning to its original philosophy of judicial restraint. Finally, this Note concludes by advocating for a pre-election judicial review of proposed initiatives guided by the principle that all political power is reserved for the people, and the ultimate sovereign power is derived from the people.

I. ORIGINS OF THE INITIATIVE

A. *Direct & Representative Democracy*

The controversy over direct versus representative lawmaking is an ancient polemic.⁷ In a direct democracy, all laws and policies imposed by the government are determined by the people themselves, rather than by their representatives. For some, pure democracy serves as most restorative of the sovereignty of the people. In other words, direct democracy is the most effective way for the people to maintain control over political power and decisionmaking. As Rousseau recognized, "Sovereignty, being nothing less than the exercise of the general will,

4. Robert M. Norway, *Judicial Review of Initiative Petitions in Florida*, 5 FLA. COASTAL L. J. 15, 15 (2004).

5. Advisory Opinion to the Att'y Gen. re Limiting Gov't Interference with Abortion, 384 So. 3d 122 (Fla. 2024); FLA. CONST. art. VI, § 4; FLA. CONST. art. X, § 29; FLA. CONST. art. X, § 21.

6. FLA. STAT. §§ 16.061, 100.371, 101.161 (2024).

7. David J. Jordan, *Constitutional Constraints on Initiative and Referendum*, 32 VAND. L. REV. 1143, 1143 (1979).

can never be alienated, and that the Sovereign, who is no less than a collective being, cannot be represented except by himself: the power indeed may be transmitted, but not the will.”⁸ Accordingly, he asserted, “Every law the people has not ratified in person is null and void—is, in fact, not a law.”⁹

Guided by the failures of the past, the Framers sought to enact an enduring system of government that protected the people against the tyranny of the majority.¹⁰ Praising the virtues of a representative democracy, James Madison warned of dangers inherent to direct democracy.¹¹ In his view, the tyranny of the majority could be prevented through a republican form of government, which he defined as “a government in which the scheme of representation takes place.”¹² Madison envisioned representation as a means to promote the views of the people by channeling them through representatives selected by the people themselves, who would best discern and promote their interests and who would be least likely to compromise them.¹³

Proponents of direct democracy view the citizen initiative process as “a governing technique [that] is purer than, and therefore preferable to, representative government.”¹⁴ In a representative system, voters too often express their preferences not objectively as to the issue at hand, but based instead on personal merit.¹⁵ In other words, one is more likely to vote for an individual than to vote for an idea. Direct democracy proves more favorable if an elected body fails to identify and effectuate the will of the people. As such, the citizen initiative process serves somewhat as a catch-all to the accountability of the electoral process. That process, by engaging individuals in public issues of concern, may also serve to develop a more informed electorate.

On the other hand, the effect of a representative democracy is “to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the

8. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES*, bk. II, ch. I (1762).

9. *Id.*

10. *See generally* THE FEDERALIST NO. 51 (James Madison)

(“If a majority be united by a common interest, the rights of the minority will be insecure Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”)

11. THE FEDERALIST NO. 10 (James Madison); Jordan, *supra* note 7, at 1147.

12. THE FEDERALIST NO. 10 (James Madison).

13. *Id.*

14. Gilbert Hahn III & Stephen C. Morton, *Initiative and Referendum—Do They Encourage or Impair Better State Government?*, 5 FLA. ST. U. L. REV. 925, 938 (1977).

15. William E. Rappard, *The Initiative and the Referendum in Switzerland*, 6 AM. POL. SCI. REV. 345, 365 (1912).

true interest of their country.”¹⁶ Social good, therefore, can be advanced by the wisdom of the elected body.¹⁷ Direct democracy, however, operates under the presumption of access to the majoritarian will. The “more direct the process,” it is assumed, “the clearer the voice of the people.”¹⁸ But the tyranny of the majority is just as dangerous as the tyranny of a single ruler.¹⁹ “America's form of representative democracy was developed to balance minority and civil rights against the dangers of popular rule.”²⁰ The Constitution was crafted “to provide a system of government that would prevent either a tyranny of the majority or a tyranny of the few.”²¹ The American form of representative government thus installs protections against tyrannical rule by the majority, providing for the election of representatives that must be accountable to the majority and minority, ensuring all are afforded equal treatment under the law.

Direct democracy is also capable of dismantling the separation of powers doctrine, the very mechanism designed to prevent the concentration of any one power.²² Direct legislation is vulnerable to siphoning legislative power from the Legislature and placing it in the hands of the people, weakening the effectiveness of the legislative branch. The electorate as a whole cannot function as a deliberative body in the same way as the members of an elected body.²³ The electorate is also not a designated branch of government to which the judicial and executive branches must defer to preserve the separation of powers balance and guard against institutional conflict.²⁴ The nature of direct democracy also makes forms of it vulnerable to the influence of special interest groups.²⁵ Special interest groups are capable of exercising influence over the procedural hurdles of a form of direct democracy like the citizen initiative process by means of funding.

16. THE FEDERALIST NO. 10 (James Madison).

17. Hahn & Morton, *supra* note 14, at 940.

18. Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 435–36 (1998).

19. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 129, 217 (Henry Reeve trans., Vintage Books 2000) (1838).

20. P.K. Jameson & Marsha Hosack, *Citizen Initiatives In Florida: An Analysis Of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 421 (1995).

21. ALFRED BALITZER, *THE INITIATIVE AND REFERENDUM: A STUDY AND EVALUATION OF DIRECT LEGISLATION*, THE CALIFORNIA ROUNDTABLE 13 (1981).

22. See FLA. CONST. art. I, § 1 (“All *political* power is inherent in the people.”) (emphasis supplied); compare FLA. CONST. art. 3, § 1 (The *legislative* power of the state shall be vested in a legislature of the State of Florida.) (emphasis supplied).

23. Jordan, *supra* note 7, at 1147.

24. *Id.*

25. See Frederick J. Boehmke, *The Initiative Process and the Dynamics of State Interest Group Populations*, 8 STATE POL. & POL'Y Q. No. 4, 362 (2008).

B. *The Initiative Process*

A derogation of the Madisonian vision and American democracy's traditional form of representative government, lawmaking by the people has become widely accepted.²⁶ Such is the “logical byproduct of declining popular trust in the judgment and integrity” of the members of an elected body coupled with the allowance for such a process to be popularized by elected officials themselves.²⁷ One form of lawmaking by the people is through an initiative provision, which reserves lawmaking power to the voters of a state.²⁸ This process enables voters to sidestep the legislative process by placing proposed statutes and, in states like Florida, constitutional amendments on the ballot.²⁹ The initiative process “give[s] citizens a voice on questions of public policy.”³⁰

The initiative process is a modern revival of a long-standing institution.³¹ All ancient democracy was direct democracy, and all legislation was enacted, in effect, by the people themselves. “When Aristotle wrote about democracy, he meant direct democracy, in which all citizens are ‘to rule and be ruled in turn.’”³² In turn, the Anglo-Saxons vested authority within a representative body known as the Witan, which spoke for the whole nation.³³ A system of direct democracy also developed in early Switzerland, where monarchical absolutism failed to take hold, and a framework enabling the participation of all Swiss citizens in governance is maintained.³⁴

Even in the United States, the initiative process took hold to address the challenges presented by a newly established form of government. The initiative obtained recognition when the people granted only to themselves the right to alter the Georgia Constitution in 1777.³⁵ Other state constitutions include similar provisions, though not explicitly providing for initiative. The Massachusetts Constitution vests citizens with the right to instruct their representatives.³⁶ South Dakota

26. Hahn & Morton, *supra* note 14 at 925.

27. WILLIAM BENNETT MUNRO, *THE INITIATIVE REFERENDUM AND RECALL* 1, 2 (William Bennett Munro ed. 1912).

28. *Id.*

29. *Initiative and Referendum Processes*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 10, 2022), <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes> [<https://perma.cc/5AXT-JZ6W>].

30. *James v. Valtierra*, 402 U.S. 137, 141 (1971).

31. MUNRO, *supra* note 27, at 4.

32. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 716 (2001).

33. J.R. MADDICOTT, *THE ORIGINS OF THE ENGLISH PARLIAMENT, CH. 1: GENESIS: THE WITAN OF THE ENGLISH PEOPLE* (2010).

34. MUNRO, *supra* note 27, at 4-5; *see also* Micol Lucchi, *This Is How Switzerland's Direct Democracy Works*, WORLD ECONOMIC FORUM (July 31, 2017), <https://www.weforum.org/agenda/2017/07/switzerland-direct-democracy-explained/> [<https://perma.cc/9RAG-R9W9>].

35. MUNRO, *supra* note 27, at 5; GEORGIA CONST. of 1777, art. LXIII.

36. MASS. CONST. art. XIX.

became the first state to implement a statutory and constitutional initiative process, doing so in 1898.³⁷ The initiative movement further materialized from the populist and progressive eras of the late nineteenth and twentieth centuries.³⁸ Many people viewed state governments as being controlled by special interest groups and devised mechanisms by which they could restore their power.³⁹ The initiative process has enabled the people to overcome structural impediments to true representative democracy.⁴⁰ Today, twenty-four states have a citizen initiative process.⁴¹

II. CITIZEN INITIATIVES IN FLORIDA: PROCESS & PROCEDURES

While still a territory, Florida's first Constitution was drafted in 1838 in anticipation of statehood.⁴² The second Constitution was written in 1861, sixteen years after Florida attained statehood.⁴³ The central purpose of Florida's second Constitution was to declare secession from the Union at the commencement of the Civil War.⁴⁴ Voters never adopted the third Constitution, drafted in 1865, and Florida's fourth Constitution was written in the aftermath of the Civil War in 1868, embodying the values of the Radical Republicans.⁴⁵ Florida adopted its fifth Constitution in 1885.⁴⁶ Described by one commentator as "worse than a relic of a horse-and-buggy age," Florida's antiquated fifth Constitution could only be amended by legislative approval.⁴⁷ In response to its defective nature, legislators established Florida's Constitution Revision Commission during the 1966 Regular Session to revise the Constitution.⁴⁸ The product of the Constitutional Revision Commission, Florida's sixth Constitution, was adopted in 1968.⁴⁹ No prior

37. Jameson & Hosack, *supra* note 20, at 422.

38. *Id.* at 421.

39. *Id.*

40. Sara Carter, Alice Clapman & Alexi Comella, *Politicians Take Aim at Ballot Initiatives*, BRENNAN CENTER FOR JUSTICE (Jan. 16, 2024), <https://www.brennancenter.org/our-work/research-reports/politicians-take-aim-ballot-initiatives> [https://perma.cc/S358-VWPQ].

41. *Initiative and Referendum Processes*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 04, 2022), <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes> [https://perma.cc/5AXT-JZ6W].

42. Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What it Has Become*, 18 FLA. COASTAL L. REV. 5, 7 (2016); FLA. CONST. of 1838.

43. Adkins, *supra* note 42, at 7.

44. FLA. CONST. of 1861.

45. Adkins, *supra* note 42, at 7.

46. FLA. CONST. of 1885.

47. Adkins, *supra* note 42, at 8; FLA. CONST. of 1885.

48. 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).

49. FLA. CONST. of 1968.

version of Florida's Constitution provided for the citizen initiative process—statutory or constitutional. Consequently, Florida's sixth Constitution reshaped the framework of how the people themselves could alter the structure and substance of the Constitution. Specifically, the Constitution vested in the people the “power to propose amendments to any section of this constitution.”⁵⁰

In 1972, the Legislature adopted a joint resolution expanding the scope of the initiative power.⁵¹ The resolution reserved to the people the power to revise or amend the Constitution by initiative and required any proposed initiative to adhere to “one subject and matter directly connected therewith.”⁵² The Legislature imposed additional procedures to the initiative process in 1979, compelling the sponsor of a proposed initiative to prepare the ballot language subject to approval by the Secretary of State.⁵³ In 1980, the Legislature enhanced these procedures, obligating an initiative's sponsor to craft a ballot summary in no more than seventy-five words to describe the initiative's substance and chief purpose in “clear and unambiguous language.”⁵⁴ The purpose of this legislation was to properly advise voters of the amendment's effect in terminology commonly understood.⁵⁵ Enacted in 1980, these procedures remain in effect today. The Legislature proposed an amendment to the Constitution in 1986 providing that, as directed by general law, the Attorney General must request an advisory opinion from the Florida Supreme Court as to the validity of any proposed initiative circulated under article XI, section 3 of the Florida Constitution.⁵⁶

Practically speaking, an individual or group seeking to sponsor an initiative to revise or amend the Florida Constitution must register as a political committee and submit the language of the proposed amendment to Florida's Department of State (hereinafter referred to as “the Department”) to trigger the start of the citizen initiative petition process.⁵⁷ The petition must meet these technical standards: The ballot title must not exceed fifteen words, and the ballot summary must not exceed seventy-five words.⁵⁸ The Division of Elections (hereinafter referred to as “the Division”) within the Department then places the language into an electronic petition template established by

50. FLA. CONST. art. XI, § 3 (amended 1972).

51. Fla. Const. Rev. Comm'n., H.J. RES. 2835, 2d Leg., Reg. Sess., 1972 FLA. LAWS 1665.

52. FLA. CONST. art. XI, § 3.

53. Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STET. L. REV. 393, 396 (1995); 1979 FLA. LAWS CH. 365, § 16.

54. 1980 FLA. LAWS CH. 305, § 2 (amending FLA. STAT. § 101.161 (1971)).

55. Staff of Fla. H. Comm. on Ethics, Elections, and Open Government, HB/536 Staff Analysis (1986) (available from Fla. Div. of Archives).

56. FLA. CONST. art. IV, § 10.

57. FLA. STAT. § 100.371(2).

58. FLA. STAT. § 101.161(1).

administrative rule, assigns a serial number to the petition, and provides it to the sponsoring political committee.⁵⁹ The Division only reviews the format of the form itself and does not review the proposal for legal sufficiency.⁶⁰ After the Division assigns a serial number to a petition, the sponsoring political committee may begin circulating the petition to collect signatures from registered Florida voters.⁶¹ The Secretary of State submits the petition to the Attorney General when a sponsoring political committee obtains verified signatures on the petition equal to 25 percent of the number of signatures required for ballot placement (“which is 8% of the votes cast in the last General Election”) and in at least 50 percent of the congressional districts in Florida.⁶² The Attorney General must then petition the Florida Supreme Court for an advisory opinion as to the validity of any initiative petition circulated pursuant to article XI, section 3 of the Florida Constitution.⁶³

III. STANDARDS FOR PRE-ELECTION JUDICIAL REVIEW

Among all twenty-four states with an initiative process, Florida is the only state mandating pre-election judicial review. This review is designed to make an early test of the technical compliance of a proposed initiative’s substance and ballot language.⁶⁴ Presumably, the overarching purpose is to open the initiative process for greater use by reducing the risk of costly and irretrievable mistakes.⁶⁵ This review helps prevent the placement of proposed initiatives that may be unconstitutional, misleading, or in violation of legal requirements of the ballot, thereby safeguarding the integrity of the electoral process and enabling voters to make informed decisions.

The aim of this judicial review “is to allow the Court to rule on the validity of an initiative petition *before* the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot.”⁶⁶ As a result of the limited review, a proposed initiative that is unconstitutional under either the federal or Florida Constitutions, that is more legislative than constitutional in nature, or that suffers from some other defect, may nevertheless receive approval and be placed on the ballot.⁶⁷ Historically, the Court purportedly declined to interfere with the right of the people to vote

59. *Initiative Petition Handbook*, FLORIDA DIVISION OF ELECTIONS (Jan. 2022), <https://files.floridados.gov/media/705249/final-updated-20220124-initiative-petition-sponsoring-political-committee-user-guide.pdf> [https://perma.cc/FKS8-NXX8].

60. *Id.*

61. *Id.*

62. *Id.*

63. FLA. CONST. art. IV, § 10.

64. Little, *supra* note 53, at 396.

65. *Id.* at 397.

66. *Armstrong v. Harris*, 773 So. 2d 7, 13 n.18 (Fla. 2000).

67. *Id.*

upon a proposed constitutional amendment without a showing in the record that the proposal is “clearly and conclusively defective.”⁶⁸ To be “clearly and conclusively defective,” the proposal plainly “contravenes existing controlling organic prescriptions.”⁶⁹

The imposition of mandatory pre-election judicial review in this context thus forces the Court to exercise careful discretion, walking the finest line against the constitutional principle that “[a]ll political power is inherent in the people.”⁷⁰ In *Gray v. Childs*, Justice Buford duly noted:

It is not for the courts to determine what is a wise proposed amendment or what is an unwise one. . . . But it is the duty of the courts, when called upon so to do, to determine whether or not the procedure attempted to be adopted is that which is required by the terms of the organic law.⁷¹

Without scrutinizing the substance of a proposed initiative, pre-election judicial review is limited to these issues: (1) whether the proposed initiative complies with the constitutional single-subject rule; (2) whether the proposed ballot title and summary comply with section 101.161, Florida Statutes; and (3) whether the proposed initiative is facially invalid under the United States Constitution.⁷²

A. *Single-Subject Rule*

The single-subject rule is a provision that the people themselves incorporated into the Florida Constitution “to protect it against precipitous and spasmodic changes in the organic law.”⁷³ Like the single-subject rule applicable to legislation prescribed by article III, section 6 of the Florida Constitution, the single-subject rule delineated in article XI, section 3 of the Florida Constitution provides that a proposed citizen initiative must “embrace but one subject and matter directly connected therewith.”⁷⁴ The citizen initiative process is the only method to amend or revise the Florida Constitution that mandates compliance with the single-subject rule. This rule of restraint applies specifically to the citizen initiative process because it does not readily provide a legislative filtration process, precluding the opportunity to provide input in the drafting stage.⁷⁵ Requiring a single-subject rule further renders the proposed constitutional change comprehensible to the

68. *Goldner v. Adams*, 167 So. 2d 575, 575 (Fla. 1964).

69. *Id.*

70. FLA. CONST. art. I, § 1.

71. 115 Fla. 816, 829 (1934).

72. FLA. STAT. § 16.061(1).

73. *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970).

74. FLA. CONST. art. XI, § 3.

75. *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984).

ordinary person, making it amenable and intelligible.⁷⁶ Limiting the proposed initiative in this way also helps to improve transparency and enhance legitimacy by limiting special interest logrolling and riding.⁷⁷ For this purpose, logrolling refers to the trading of favors, *quid pro quo*, where two or more proposals—agreed upon by a minority—reach the ballot together to appeal to the majority, while riding involves the tacking on of provisions unrelated to a proposed initiative with the aim of securing its passage.⁷⁸ Voters are otherwise placed in the position of having to choose among the subjects within a proposal—a proposal they had no representative interest in drafting—that align most with their values.⁷⁹ Justice Cooley reiterated the very purpose of such a provision as follows: first, to prevent logrolling legislation; second, to prevent surprise or fraud upon the people through a ballot title and summary that give no intimation of essential meaning and effect and might therefore be overlooked and carelessly and unintentionally adopted; and third, to fairly apprise the people of the subjects considered.⁸⁰

In its first decision addressing the citizen initiative process after the enactment of the 1972 constitutional amendment, which required any proposed change to the Florida Constitution by initiative to adhere to the single-subject rule, the Court embraced a “pragmatic and common sense judicial philosophy” to reason that “the one subject limitation should be viewed broadly rather than narrowly.”⁸¹ The Court based its broad interpretation of the single-subject rule on the evolution of these principles following the passage of the 1972 amendment:

First, the 1972 change was designed to enlarge the right to amend the Constitution by initiative petition. Second, the burden upon the opponent is to establish that the initiative proposal is clearly and conclusively defective. Third, the one subject limitation was selected to place

76. Scott L. Kafker & David A. Russcol, *The Eye of a Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1306 (2012).

77. Jonathan L. Marshfield, *The Single-Subject Rule and the Politics of Constitutional Amendment in Initiative States*, 101 NEB. L. REV. 71, 83 (2022).

78. See also Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV., 688, 706–07 (2010) (explaining “[logrolling occurs when two proposals each supported by a minority are combined into one ballot proposition supported by a majority, and the two minorities support the combination of policies but respectively prefer to enact one policy and not enact the other,” whereas “[r]iding occurs when a proposal commanding majority support is combined with a proposal commanding minority support, and a majority supports the combination, even though it would prefer to enact the first proposal and not enact the second.”).

79. Marshfield, *supra* note 77, at 83; *Fine*, 448 So.2d at 988.

80. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 143–44 (Little, Brown, and Co. ed., 1868).

81. Fla. Const. Rev. Comm’n., FLA. H.J.R. NO. 2835 (1972) (codifying FLA. CONST. ART. XI, § 3); *Floridians Against Casino Takeover v. Let’s Help Florida*, 363 So. 2d 337, 340 (Fla. 1978).

a functional, as opposed to locational, restraint on the range of authorized amendments.⁸²

In *Fine v. Firestone*, the Court departed from this broad reading of the single-subject rule, distinguishing the rule in the context of the citizen initiative and legislative processes. There, the Court determined “the language ‘shall embrace but one subject and matter *properly connected* therewith’ in article III, section 6 regarding statutory change by the legislature” to be “broader than the language ‘shall embrace but one subject and matter *directly connected* therewith,’ in article XI, section 3 regarding constitutional change by initiative.”⁸³ The single-subject rule applicable to the legislative process is notably broader because of the opportunity within the process for legislative debate and public comment.⁸⁴ The Court also argued strict compliance with the single-subject rule in the initiative process context is necessary because it applies to constitutional change.⁸⁵

As such, to determine whether a proposal addresses a single subject, the “propositions submitted may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme.”⁸⁶ “Unity of object and plan is the universal test.”⁸⁷ The Court noted, “It is only when, *in the light of common sense*, several propositions are submitted as one and have to do with different subjects which are so essentially unrelated that their association is purely artificial, that they are not one within the constitutional mandate.”⁸⁸

The Court has developed a three-part test as to the single-subject rule in the citizen initiative context.⁸⁹ First, the Court “reviews the effect the [proposed initiative] will have on the Florida Constitution as a whole.”⁹⁰ Second, the Court determines whether the proposed initiative violates the single-subject rule with respect to its impact upon government affairs.⁹¹ Third, the Court assesses whether the portions of the proposal “have a natural relation and connection as a single dominant plan or scheme.”⁹²

Despite its seemingly laudable purpose, the single-subject rule has proven vague. Critics of the rule contend it may give the Court too

82. *Floridians*, 363 So. 2d at 340 (internal quotations omitted).

83. *Fine*, 448 So. 2d at 988–89.

84. *Id.*

85. *Id.*

86. *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944).

87. *Id.*

88. *Id.* (emphasis supplied).

89. *Jameson & Hosack*, *supra* note 20, at 429.

90. *Id.*

91. *Id.* at 429–30 (citing *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984)).

92. *Id.* at 430 (citing *Fine*, 448 So. 2d at 990).

much power and discretion in regulating the citizen initiative.⁹³ The Court has applied “the rule inconsistently across time” suggesting it is “not guided by a meaningful legal standard.”⁹⁴ As Justice Kogan pointed out in the advisory opinion regarding a proposed initiative to limit political terms in certain elective offices:

[T]he erratic nature of our own case law construing article XI, section 3 shows just how vague and malleable this “oneness” standard is. What may be “oneness” to one person might seem a crazy quilt of disparate topics to another. “Oneness,” like beauty, is in the eye of the beholder, and our conception of “oneness” thus has changed every time new members have come onto this Court.⁹⁵

Professor Lowenstein, too, contends the term “subject” itself proves ambiguous and thus infinitely malleable:

[A]ny collection of items, no matter how diverse and comprehensive, will fall “within” a single (broad) subject if one goes high enough . . . and, on the other hand, the most simple and specific idea can always be broken down into parts, which may in turn plausibly be regarded as separate (narrow) subjects.⁹⁶

In *Ray v. Mortham*, Justice Lewis wrestled with this tension, examining “whether the language of the proposed initiative may act as objective evidence that the initiative encompasses multiple subjects in violation of the single-subject” rule.⁹⁷ The proposed initiative at issue included a severability clause, which stated if one part of the proposed initiative was found to be invalid, the remaining provisions would still be valid and enforceable. Justice Lewis asserted that “it should be beyond debate that any initiative petition containing a severability clause telegraphs the message that even its proponents realize it does not contain a ‘single,’ discrete subject.”⁹⁸ Anything capable of division is not, by its nature, single.⁹⁹ The Court has yet to apply this idea.

B. Ballot Title and Summary Requirements

The ballot title and summary of the proposed initiative are crucial, as it is unlikely many voters will read beyond these elements.¹⁰⁰ Section 101.161 of the *Florida Statutes* requires the proposed initiative’s

93. Marshfield, *supra* note 77, at 85.

94. *Id.*

95. Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 231 (Fla. 1991) (Kogan, J., concurring).

96. Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 940-41 (1983).

97. *Ray v. Mortham*, 742 So. 2d 1276, 1286-87 (Fla. 1999) (Lewis, J., concurring in result only); Norway, *supra* note 4, at 28-29.

98. *Ray*, 742 So. 2d at 1289 (Fla. 1999) (Lewis, J., concurring in result only).

99. *Id.*

100. Kafker & Russcol, *supra* note 76, at 1297.

ballot title and summary to be written in clear and unambiguous language to ensure fair notice of the proposed initiative's purpose and effect.¹⁰¹ The Court limits its analysis to two questions: "(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and (2) whether the language of the ballot title and summary, as written, misleads the public."¹⁰²

The Court acknowledged that "[w]hat the law requires is that the ballot be fair and advise the voter sufficiently to enable him [or her] intelligently to cast his [or her] ballot."¹⁰³ At the time of the drafting of section 101.161, legislative staff noted that the language of the proposed initiatives could create challenges for the average voter to interpret the effect or intent of the proposal.¹⁰⁴ The people approving a proposed initiative "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be."¹⁰⁵ Thus, the statute was designed to ensure the average voter is apprised of the proposal's effect and purpose to effectuate an informed choice.

The Court has also recognized the risks inherent to the meaning of "clear and unambiguous language." It has consistently held that a ballot summary must explain the proposed initiative's chief purpose without detailing its every possible effect.¹⁰⁶ As asserted by Justice Drew:

It is a matter of common knowledge that many weeks are consumed, in advance of elections, apprising the electorate of the issues to be determined and that in this day and age of radio, television, newspaper and the many other means of communicating and disseminating information, it is idle to argue that every proposition on a ballot must appear at great and undue length.¹⁰⁷

The Court has rejected ballot titles and summaries that were false and misleading, failed to identify affected constitutional provisions, did not adequately inform voters of significant changes in governmental functions, inadequately briefed voters of the proposed initiative's key points, and neglected to note the proposed initiative's primary implication.¹⁰⁸ As Justice Shaw noted, the ballot title and summary must

101. FLA. STAT. § 101.161 (2024).

102. Fla. Dep't of State v. Slough, 992 So. 2d 142, 147 (Fla. 2008) (citation omitted).

103. Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954).

104. Staff of Fla. H. Comm. on Ethics, Elections, and Open Government, HB/536 Staff Analysis (1980) (available from Fla. Div. of Archives).

105. Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976).

106. Miami Dolphins, Ltd. v. Metro. Dade Cnty., 394 So. 2d 981, 987 (Fla. 1981); Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986).

107. Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954).

108. Norway, *supra* note 4, at 26 (citations omitted).

not “hide the ball” nor “fly under false colors.”¹⁰⁹ The voter must be aware of the proposed initiative’s true effect.¹¹⁰

This standard invites a number of concerns. First, the Court may not give legal meaning to the summary. The summary itself may not dictate the meaning of the proposed initiative’s language. Should a ballot summary prove vague or ambiguous, the Court risks delving into the very substance of the proposed initiative to take a position on its vagueness or ambiguity. Doing so is prohibited, having the potential to place a limitation as to what the substance of a proposed initiative may include.

Second, case decisions are unclear as to precisely where the language of a proposed initiative crosses the threshold into being “misleading.” Ambiguous words contained within a proposed initiative may lack a consistent definition that cuts across the ordinary voter’s understanding. Words may also have different meanings across jurisdictions and fields. This lack of clarity may also unwittingly invite the Court to examine the substance of a proposed initiative. This is a more apparent concern in circumstances in which the terms contained within the proposed initiative are undefined. From a political perspective, proposed initiative sponsors have an “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.”¹¹¹

Third, the Court must ascertain whether the chief purpose of the proposed initiative is contained in the ballot summary through the lens of the ordinary voter. This is a complex assessment. In addition to different interpretations, rules of grammar, and varying levels of legal understanding among voters, societal norms and linguistic nuances further complicate the assessment, making it challenging for the Court to determine the ordinary voter’s understanding of a proposed initiative. The Legislature leaves behind the text and supplemental conduits to assess meaning. A voter leaves behind only the ballot.

IV. AMENDING THE ROLE OF THE FLORIDA SUPREME COURT

In 1970, the Florida Supreme Court first addressed Florida’s citizen initiative process, invalidating a proposed initiative that called for a unicameral legislature.¹¹² In *Adams v. Gunter*, the Court concluded the proposed initiative at issue did not seek to amend the Florida Constitution, but rather to revise it.¹¹³ According to the Court, the people did

109. *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000).

110. *Id.*

111. Christopher S. Emmanuel, *A Critical Look at the First 50 Years of Florida’s “Citizen” Initiative Amendment Process*, 51 STET. L. REV. 1, 19 (2021).

112. *Adams v. Gunter*, 238 So. 2d 824 (Fla. 1970).

113. *Id.* at 831-32.

not reserve the power to revise the Florida Constitution by initiative, only to amend it.¹¹⁴ The Court believed the proposed initiative to be troublesome “because it expressly anticipated the legislature’s need to propose additional amendments to conform the remainder of the Constitution to the unicameral legislature; thus, the proposed amendment was not complete within itself.”¹¹⁵ The Court’s first decision relating to the citizen initiative sent a clear message indicating it would intervene to preclude the people from approving a flawed proposed initiative at the ballot box.¹¹⁶

The question of whether the Court *should* engage in pre-election judicial review of proposed initiatives is not merely semantic; it is a matter of substance that necessitates examining the judiciary’s proper role in a framework that allows for direct democracy.¹¹⁷ The citizen initiative process enlarges the role and power of the people while diminishing the role of institutions like the judiciary. However, because the Court reviews the proposed initiative before its placement on the ballot, it can intrude on the legislative function and may prematurely or improperly exercise judicial power. Should the conflict between the lawmaker and judge play out differently when the people express their preferences directly rather than through a representative? The proper level of scrutiny and judicial interference in a process of direct democracy remains subject to ongoing discussion. Professor Eule argues:

If the people are the sovereign from which all power originates, then why should their expression of will not carry more weight than the legislature's crude effort to approximate it? If the root difficulty of judicial review is its counter-majoritarian nature, why does the argument for judicial intervention not abate as it becomes clearer what the majority prefers?¹¹⁸

“All political power is inherent in the people.”¹¹⁹ The people of Florida have established the citizen initiative process as a legitimate law-making process, and the judiciary must afford it proper deference per the doctrine of separation of powers, expressly codified in the Florida Constitution.¹²⁰ However, “the legislative authority necessarily

114. *Id.* at 831.

115. Little, *supra* note 53, at 394 (citing *Gunter*, 238 So. 2d at 831-32).

116. *Id.*

117. Michael J. Farrell, *The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?*, 53 FORDHAM L. REV. 919, 922-23 (1985).

118. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L. J. 1503, 1506 (1990).

119. FLA. CONST. art. I, § 1.

120. FLA CONST. art. II, § 3. In light of this contention, whether the existing constitutional and statutory restraints on the citizen initiative process are constitutional is a question that is outside the scope of this comment, which seeks only to assess the present role of the judiciary in this process and advocate for a return to its original judicial philosophy in this context.

predominates.”¹²¹ Otherwise, taking action against a proposed initiative before it reaches the ballot could lead people to believe that the judiciary is unjustly meddling with the citizen initiative process. That process is “anti-governmental by nature—it serves as an escape valve for people whose causes have been or probably will be unsuccessful in the ordinary processes of representative government.”¹²² It is deliberately shielded from conventional political limitations.¹²³ But this also means it is a process that lacks the requisite checks and balances inherent to representative democracy. Recognizing this, threshold constitutional and statutory constraints were enacted by and for the people to be fulfilled upon review by the Court.

The Court is tasked with “policing the integrity of the process.”¹²⁴ Its role may also prevent extensive public and private expense. Thus, the Court plays a dual role: ensuring the power of the people while simultaneously protecting the people. Yet the citizen initiative process is a proceeding missing a systemized and concrete “support structure to defend it from judicial encroachment.”¹²⁵ It is “far more vulnerable to judicial usurpation than is the legislature.”¹²⁶

“Infringing on the people’s right to vote on [a proposed initiative] is a power the Court should use only where the record clearly and convincingly establishes that the public is being misled on material elements” of a proposed initiative.¹²⁷ Accordingly, the Court “must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.”¹²⁸ Although the Court has expressed this view, many find the current process of pre-election judicial review concerning.¹²⁹ Critics note the Court’s decisions on proposed initiatives have “smacked of a paternalistic attitude that says a proposal is good for the people or bad for the people.”¹³⁰ One could argue the Court wades too far into the substance of proposed initiatives, concerning itself with policy rather than confining itself to an analysis of technicality and procedure. It has also been said, and acknowledged by those on the bench, that the Court lacks consistency in its approach

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

122. James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 306 (1989).

123. *Id.* at 300.

124. *Id.* at 315.

125. Farrell, *supra* note 117, at 929.

126. *Id.*

127. *Askew v. Firestone*, 421 So. 2d 151, 157 (Fla. 1982) (Overton, J., concurring specially).

128. *Id.* at 156.

129. Jameson & Hosack, *supra* note 20, at 453-54.

130. *Id.* at 454 (citation omitted).

and has not established clear guidelines upon which drafters can reasonably rely.¹³¹

The Court can and should alleviate these concerns by returning to its original “pragmatic and common sense judicial philosophy” of restraint with respect to the citizen initiative process.¹³² First, the Court must address its misplaced reliance on the advisory opinion, which contributes to the creation of a political role for the Court in this context. Second, the Court must recede from its strict construction of the prescribed constitutional and statutory standards and return to its original broad interpretation. Third, the Court must carefully exercise its discretion by adhering to known legal principles.

A. *Cautionary Use of the Advisory Opinion*

Advisory opinions are answers given by the justices of the highest court of a state to questions of law submitted by a house of a legislature or chief executive. Historically, in England, the courts advised the Crown. “This advisory role was politically fraught but doctrinally unproblematic thanks to a jurisprudential orthodoxy that treated judges’ opinions as evidence of a preexisting law.”¹³³ Put simply, the advisory role of judges was politically controversial but accepted because their opinions were seen as interpretations of existing law, rather than the creation of new law. Traditionally, advisory opinions were issued by judges, not by courts.¹³⁴ Accordingly, advisory opinions impose neither a precedential nor binding judgment.¹³⁵ Gradually, thought shifted because of the precedential and changing nature of legal authority.¹³⁶

The Supreme Court of the United States has routinely refused to issue advisory opinions. The origin of this refusal extends not from the text of the Constitution nor a statute, but rather from a four-sentence letter in which Chief Justice John Jay declined to respond to President George Washington’s request to answer questions of international law in 1793, reasoning that doing so would be a violation of the separation of powers principle.¹³⁷ While the letter did not carry *stare decisis* effect,

131. See Advisory Opinion to the Att’y Gen.—Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 231 (Fla. 1991) (Kogan, J., concurring in part, dissenting in part); see also Advisory Opinion to the Att’y Gen. re Limiting Gov’t Interference with Abortion, 384 So. 3d 122, 152 (Fla. 2024); Jameson & Hosack, *supra* note 20, at 454.

132. Floridians Against Casino Takeover v. Let’s Help Florida, 363 So. 2d 337, 340 (Fla. 1978).

133. Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 623 (2021).

134. *Id.* at 622.

135. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 153 (1893).

136. Burset, *supra* note 133 at 623.

137. *Id.* at 622.

it is widely considered an interpretation of Article III of the United States Constitution forbidding the issuance of advisory opinions.¹³⁸

Today, federal courts are not permitted to issue advisory opinions on the basis of separation of powers and the constitutionally prescribed case or controversy requirement, which limits the exercise of judicial power by means of adjudication to actual legal disputes between parties with real and concrete interests.¹³⁹ By limiting adjudication this way, federal courts are prohibited from deciding abstract, hypothetical, or contingent questions.¹⁴⁰ Yet eleven states, including Florida, encourage their state supreme court to supply advisory opinions to the executive branch, or at times, the legislative branch.¹⁴¹ State courts ordinarily have discretion as to offering guidance through an advisory opinion, and the questions to be examined must relate to the powers exercised by the requesting branch of government.¹⁴²

The Florida Constitution mandates the Attorney General seek an advisory opinion from the Florida Supreme Court as to the validity of any proposed citizen initiative.¹⁴³ When the constitutional provisions creating this advisory process were under consideration before the Legislature in 1986, the legislative staff analyses indicated that any such opinion would not be binding precedent and would only constitute persuasive authority as to any later adversarial legal challenge.¹⁴⁴ Indeed, those opinions are not binding, the Court not resolving a concrete dispute. Judicial review in this context is meant to prevent the unnecessary expenditure of time, money, and effort on placing a proposed initiative on the ballot if it is only destined to fail. It has morphed beyond its limited purpose—ensuring the proposed initiative complies with the single-subject rule and statutory ballot title and summary requirements—into a dissection of a proposed initiative’s merits as though the Court is adjudicating a concrete dispute.

By its very nature, the process of issuing an advisory opinion in the citizen initiative context “compels judicial engagement in policy and politics,” casting doubt upon “judicial impartiality and independence.”¹⁴⁵ In doing so, the justices must, essentially, declare what the

138. Richard H. Fallon Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1773-74 (2015).

139. Gordon & Magleby, *supra* note 122, at 305.

140. *Id.*

141. Alicia Bannon, *Judicial Advisory Opinions Explained*, STATE COURT REPORT (Nov. 17, 2023), <https://statecourtreport.org/our-work/analysis-opinion/judicial-advisory-opinions-explained> [<https://perma.cc/E6DX-LKJQ>].

142. *Id.*

143. FLA. CONST. art. IV, § 10.

144. *Roberts v. Brown*, 43 So. 3d 673, 681 (Fla. 2010) (citing Staff of Fla. H.R. Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986) (available from Fla. Div. of Archives)).

145. Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. REV. MICH. ST. U. DET. C. L. 101, 102 (2001).

law is before the law exists. In determining the proposed initiative's "chief purpose," "true meaning," and "legal effect," the Court must assess what the law would be. The nature of the advisory opinion invites abstract judicial thinking to interpretation, whereby a justice's personal ideology may influence interpretation. Although the Court is prohibited from examining the substance of the proposed initiative, making this assessment inherently creates a political role for it. Rather than retroactively apply established legal principles to a set of facts to resolve a dispute, the Court must use the ballot title and summary to create hypothetical factual scenarios as to the summary's effect as would be contemplated by the ordinary voter. This leads to advisory opinions based on speculation, which can be mistakenly treated as binding precedent in each subsequent advisory opinion. This approach streamlines judicial review, but shapes the political nature of the Court's role in the citizen initiative process.

Where procedural guardrails of deliberation and debate are lacking in the citizen initiative process, judicial review becomes a necessity. Yet as Justice Frankfurter said, "It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay."¹⁴⁶ While the Court lacks the power to block a proposed initiative from reaching the ballot, it must take care to balance the necessity of judicial review with its constitutionally designated advisory role, ensuring it does not overstep its intended function.

B. Validity of Proposed Initiatives: Interpretation & Discretion

A judge makes a host of choices within the bounds of the law, ranging from sentence severity to how an ambiguous statute should be interpreted, all while exercising discretion. Judicial discretion is the power or privilege to *use* a way of deciding or *the* way of deciding.¹⁴⁷ Discretion is inevitable, even where laws are meant to be uniformly and equally enforced or administered and independently adjudicated. A system of governance predicated in entirety upon the government of laws is not feasible. We cannot operate in an inflexible system. Although it invites uncertainty in the law, judicial discretion mitigates its severity. The law otherwise loses its vitality. A judge must have the discretion to see beyond what the law may obscure.

Professor Dworkin asserts that a judge is "subject to the overriding principle that good reasons for judicial decision must be *public* standards rather than *private* prejudice."¹⁴⁸ He acknowledges three sources of these principles: those developed from prior case decisions that may be used as precedent; those issued from community institutions, such

146. Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1008 (1924).

147. Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 635 (1963).

148. *Id.* at 634-35.

as the Legislature or an administrative agency; and judgments from the majority.¹⁴⁹ A judge's choice must be justified in terms of "the most fundamental community conceptions of social or political justice."¹⁵⁰ Difficulty arises from the third source of these public standards: judgments of the community at large. This source invites the subjective interpretation of principles and opens the door for a judge to inject his or her beliefs into interpretations of the law, especially in circumstances where more than one principle may be at play or where a principle fails to provide clear guidance.

The constitutional single-subject rule and statutory ballot title and summary requirements are standards created by and for the people that a justice must adhere to in the examination of the validity of a proposed citizen initiative in Florida. These standards are infinitely ambiguous and malleable in nature. Because these standards are strictly applied and lack clarity and consistency, a justice may rely more heavily on subjective beliefs and values to fill in the gaps, potentially leading to interpretations that are influenced by individual perspectives rather than by established and accepted legal principles.¹⁵¹

As Justice Shaw observed, the purpose of these standards "is above reproach—it is to ensure that each voter will cast a ballot based on the *full* truth."¹⁵² He further maintained that "[t]o function effectively—and to remain viable—a constitutional democracy must require no less."¹⁵³ However, these standards have proven easily susceptible to hyper-technical misapplication, imbuing subjectivity and judgment as to the wisdom and merits of a proposed initiative into the pre-election judicial review of proposed initiatives.¹⁵⁴

In April 2024, the Court found a proposed initiative limiting government interference with abortion complied with all requirements for ballot placement.¹⁵⁵ There, the Court moved beyond its advisory capacity, examining the merits of the proposed initiative in a discussion cutting across five opinions, with one opinion recognizing the significance of the principle that "[a]ll political power is inherent in the people" as the guiding force to assess the validity of any proposed initiative.¹⁵⁶ Yet it also suggested the substance of the proposed initiative would impose constitutional limits on the people's ability to enact laws to

149. *Id.*

150. *Id.* at 636.

151. *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984).

152. *Armstrong v. Harris*, 773 So. 2d 7, 21 (Fla. 2000).

153. *Id.*

154. *Evans v. Firestone*, 457 So. 2d 1351, 1361 (Fla. 1984) (Shaw, J., specially concurring).

155. Advisory Opinion to the Att'y Gen. re Limiting Gov't Interference with Abortion, 384 So. 3d 122 (Fla. 2024).

156. *Id.*

protect groups of people from private harm.¹⁵⁷ Two opinions acknowledged the Court was meant to have a “narrow” role in the citizen initiative process, but noted the review of this proposed initiative is different because “abortion is fundamentally different,” seemingly employing its substance to argue against its placement on the ballot.¹⁵⁸

An opinion also contended the proposed initiative infringes upon the unborn’s competing right to life and the state’s moral duty to protect that life because the “Florida Constitution recognizes ‘life’ is a ‘basic right’ for ‘all natural persons.’”¹⁵⁹ The Florida Constitution is silent as to the rights of the unborn, and the Court has yet to examine whether any such right exists. Another opinion suggested that a person’s right to know should not be compromised because the law is silent as to the unknowns introduced by abortion.¹⁶⁰ That places an undue burden upon the sponsor of a proposed initiative to highlight any and all potential legal uncertainty. That is a line that cannot be drawn with finality. Grappling with the scope of vague and ambiguous language, those opinions point to questions of unsettled law.

Through this five-part exchange on potential policy implications and unsettled legal questions, the Court exceeded its advisory role, nearly approaching the realm of political decisionmaking reserved to the people through the ballot process. This reflects an expansion of the Court’s constitutionally designated advisory role beyond its limited design, as well as the strict interpretation of the standards governing any proposed initiative.

In 1978, the Court first held it would broadly construe restrictions on the citizen initiative process so as to not infringe upon the people’s right to petition.¹⁶¹ In 1984, the Court receded from its holding, determining that a narrow construction of restrictions on the citizen initiative process was necessary because the initiative process lacks the checks and balances inherent to the legislative process and involves changes to the state’s governing document.¹⁶² With particular applicability to the single-subject rule, this interpretation has extended to all restrictions applicable to the citizen initiative process.

Empirical scholarship reveals that judicial bias is severe with aggressive application of the single-subject rule, but modest with restrained application.¹⁶³ This is a novel concept, and whether aggressive application leads to partisan decisionmaking in other contexts remains

157. *Id.* at 139-40 (Fla. 2024) (Muñiz, C.J., concurring) (quoting FLA. CONST. art. I, § 1).

158. *Id.* at 140, 147 (Grosshans and Francis, JJ., dissenting).

159. *Id.* at 147 (Francis, J., dissenting) (quoting FLA. CONST. art. I, § 2).

160. *Id.* at 144 (Grosshans, J., dissenting).

161. *Floridians*, 363 So. 2d at 340.

162. *Fine*, 448 So. 2d at 990.

163. See John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L. J. 399, 400 (2010).

to be seen.¹⁶⁴ As it pertains to the single-subject rule, the crux of the issue is the malleability of the term “subject,” as the act of defining it seems to open the door for partisanship.¹⁶⁵

The Court’s strict interpretation of these standards, as well as its expansion beyond its advisory role, permits further judicial scrutiny and has the potential to position the Court as “the master of the constitution with unfettered discretion to find a proposed amendment ambiguous and then to deprive the people of the right to be the judges of the merits of the proposal.”¹⁶⁶ Yet in today’s media-saturated society, one can naturally expect voters to have made up their minds well before entering the election booth, making the Court’s potential for overstep even more troublesome.¹⁶⁷ Rather, guided by the principle that “[a]ll political power is inherent in the people” and rationale “that voters may be presumed to have the ability to reason and draw logical conclusions’ from the information they are given,” the Court should return to its limited role and original broad interpretation of the standards to assess proposed initiatives.¹⁶⁸ Doing so secures for the people the exercise of expressly reserved political power.

CONCLUSION

Our system of government entrusts lawmaking power to representative entities.¹⁶⁹ A lack of public control over the outcomes of the exercise of this power is a fundamental flaw within this system.¹⁷⁰ Just as the Framers modernized their inherited system of government; we likewise must engage in the modernization of our own. Since 1968, Florida has permitted its citizens to propose changes to the Florida Constitution by means of the citizen initiative. This assertion of power is the sole means of definitively expressing the public will.¹⁷¹

While the standards for pre-election judicial review proposed initiatives have not changed since 1980, the interpretations as to how these standards must be construed have drifted further from the principles meant to safeguard the people’s right to exercise political power. To preserve “the means of instituting on a permanent basis the responsible kind of representative government which our fathers lived and died

164. *Id.* at 401.

165. *Id.* at 399.

166. Advisory Opinion to the Att’y Gen. re Limiting Gov’t Interference with Abortion, 384 So. 3d 122, 138 (Fla. 2024).

167. *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954).

168. *Id.* at 139 (quoting FLA. CONST. ART. I, § 1) (Muniz, J., concurring) and 136 (quoting *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992)).

169. LEWIS JEROME JOHNSON, *THE INITIATIVE AND REFERENDUM: AN EFFECTIVE ALLY OF REPRESENTATIVE GOVERNMENT* 4 (6th ed. 1911) (available at [https://www.loc.gov/item/ca11002811/\[https://perma.cc/QS9C-G5PE\]](https://www.loc.gov/item/ca11002811/[https://perma.cc/QS9C-G5PE])).

170. *Id.*

171. *Id.* at 15.

to secure,” the Court must recede from its rigid construction of these standards and reassess its increasingly expansive role in the citizen initiative process.¹⁷² Otherwise, the Court may inadvertently challenge the democratic principles foundational to our system of government, constraining the people’s ability to exercise their power.

172. *Id.* at 24.

