A Practitioner's Guide to Challenging and Defending Legislatively Proposed Constitutional Amendments in Arkansas

Stephen B. Niswanger

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A PRACTITIONER’S GUIDE TO CHALLENGING AND DEFENDING LEGISLATIVELY PROPOSED CONSTITUTIONAL AMENDMENTS IN ARKANSAS

Stephen B. Niswanger

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INTRODUCTION

There are two different ways to propose constitutional amendments to the voters in Arkansas. One method permits the people of the state to propose amendments through the initiative process. Amendment VII to the Arkansas Constitution provides the requirements for the initiative process. The other method permits the General Assembly to propose amendments and submit them to the electorate for approval or rejection. Article XIX, Section 22 of the Arkansas Constitution provides the requirements for the process by which the General Assembly proposes amendments.

1. ARK. CONST. amend. VII; ARK. CONST. art. XIX, § 22; see Becker v. McCuen, 303 Ark. 482, 484-85, 798 S.W.2d 71, 72 (1990); Timothy J. Kennedy, Initiated Constitutional Amendments in Arkansas: Strolling through the Mine Field, 9 U. ARK. LITTLE ROCK L.J. 1, 3 (1986-87).
2. ARK. CONST. amend. VII; see Becker, 303 Ark. at 485, 798 S.W.2d at 72; Kennedy, supra note 1, at 3. Under the initiative process, any group or person may propose an amendment, gather the requisite number of signatures on petitions, and submit the proposal for a vote. Kennedy, supra note 1, at 3 (citing E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 47 (1940)).

During the weeks immediately prior to the 1994 general election, the Arkansas Supreme Court struck from the ballot several proposed initiated constitutional amendments. See, e.g., Walmsley v. McCuen, 318 Ark. 269, 885 S.W.2d 10 (1994); Bailey v. McCuen, 318 Ark. 277, 884 S.W.2d 938 (1994). The court's decisions were controversial because some of the public believed the court was taking away its right to vote on the issues. See John Brummet, Democratic Process Undercut, ARKANSAS DEMOCRAT-GAZETTE, Oct. 20, 1994, at 7B. Notwithstanding public perception, however, the Arkansas Supreme Court did not do anything unusual; in most cases the court merely applied the same legal requirements it had for years. See, e.g., Bailey, 318 Ark. at 284, 884 S.W.2d at 942; Christian Civic Action Comm. v. McCuen, 318 Ark. 241, 243, 884 S.W.2d 605, 606 (1994).
3. ARK. CONST. amend. VII; see Kennedy, supra note 1, at 3.
4. ARK. CONST. art. XIX; see Becker, 303 Ark. at 485, 798 S.W.2d at 72; Kennedy, supra note 1, at 3.
5. ARK. CONST. art. XIX, § 22 provides:
Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all members elected to each house, such proposed amendments shall be entered on the journals with the yeas and nays, and published in a least one newspaper in each county, where a newspaper is
The two methods for proposing amendments employ different procedures and have separate legal requirements. In addition, and perhaps surprisingly, the requirements of the initiative process generally do not govern constitutional amendments proposed by the General Assembly. Because the two methods are each governed by a separate and complex body of law, a single law journal comment cannot adequately cover both. Thus, this comment only concerns the method by which the General Assembly proposes amendments to the Arkansas Constitution. More specifically, it is intended to be a practitioner's guide to challenging and defending legislatively proposed amendments.

This comment discusses the history of the constitutional provision governing legislatively proposed amendments and attempts to demonstrate why amendments proposed by the General Assembly should be subject to some of the same legal propositions that govern initiated amendments under Amendment 7 of the Arkansas Constitution. In particular, the requirements for ballot titles and popular names in amendments initiated under Amendment 7 should be applicable to ballot titles and popular names in amendments proposed by the General Assembly under Article XIX, Section 22.

I. HISTORY OF ARTICLE XIX, SECTION 22

The State of Arkansas has had five constitutions. Arkansas's current constitution was drafted and adopted in 1874. The other four constitutions were drafted in 1836, 1861, 1864, and 1868.

published, for six months immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the State for approval or rejection; and if a majority of the electors voting at such election adopt such amendments the same shall become a part of this Constitution, but no more than three amendments shall be proposed or submitted at the same time. They shall be so submitted as to enable the electors to vote on each amendment separately. Ark. Const. art. XIX, § 22.

6. Becker, 303 Ark. at 485, 798 S.W.2d at 72; Chaney v. Bryant, 259 Ark. 294, 296, 532 S.W.2d 741, 743 (1976).

7. Becker, 303 Ark. at 485, 798 S.W.2d at 72; Berry v. Hall, 232 Ark. 648, 651, 339 S.W.2d 433, 435 (1960). A constitutional amendment could conceivably pass the legal requirements under one method but not the other. Becker, 303 Ark. at 489, 798 S.W.2d at 74. This situation has been called questionable and a "double standard" by the Arkansas Supreme Court, and as such, the court has put the legislature on notice that it will reconsider the predicament. Id.

8. Legislatively proposed amendments are governed by Ark. Const. art. XIX, § 22. For a thorough discussion of the law governing Amendment VII proposals, see Kennedy, supra note 1.

9. See Becker, 303 Ark. at 485, 798 S.W.2d at 72; Walter Nunn, The Con-
A. The Early Provision for Amendment of the Constitution

The first three constitutions were essentially the same. In particular, the provision for amending the constitution remained similar throughout each of the first three constitutions. However, this provision (the "early provision") possessed several differences from the current provision. For example, the early provision required that the General Assembly approve a proposed amendment by a two-thirds vote of each House. Then the subsequently elected General Assembly had to approve the proposed amendment by a two-thirds vote of each House for the amendment to be adopted into the constitution. Under the current constitution, however, the General


10. See supra note 9.
11. See Goss, supra note 9, at 1-10.
12. Nunn, supra note 9, at 181. The first constitution, which was written in 1836, was a prerequisite for admission to the Union. Nunn, supra note 9, at 181; Goss, supra note 9, at 1. The second, drafted in 1861, was revised to gain admission to the Confederacy. Nunn, supra note 9, at 181; Goss, supra note 9, at 3. In 1864, the constitution was rewritten to satisfy the requirements for reentry into the Union. Nunn, supra note 9, at 181; Goss, supra note 9, at 4.
13. See Ark. Const. of 1836, art. IV; Ark. Const. of 1864, art. IV. The changes made in the first three constitutions were minor, such as references to the supremacy of the United States or the Confederacy. Nunn, supra note 9, at 181. Punctuation marks, such as commas and colons, were added to the provision for amending the constitution between 1836 and 1864, but the language remained the same. See, e.g., Ark. Const. of 1838, art. IV; Ark. Const. of 1864, art. IV.
14. Compare the text of the early provision with the text of Article XIX, § 22. See supra note 5. Article IV of the Constitution of 1864, under the section entitled "Mode of Amending the Constitution," provided:

The General Assembly may at any time propose such amendments to this constitution as two-thirds of each house shall deem expedient, which shall be published in all the newspapers published in this State three several times, at least twelve months before the next general election, and if, at the first session of the general assembly after such election, two-thirds of each house shall, by yeas and nays, ratify such proposed amendments, they shall be valid to all intents and purposes as parts of this constitution. Provided, That such proposed amendments shall be read on three several days in each house, as well when the same are proposed as when they are finally ratified.

Ark. Const. of 1864, art. IV, § 32.
15. The word "approve" and its derivatives will be used to refer to the process by which the legislature proposes an amendment. The word "adopt" and its derivatives will be used to refer to the amendment's ultimate ratification into the constitution by the electorate, or, in the case of the early provision, the legislature.
16. Ark. Const. of 1864, art. IV, § 32; see supra note 14 for the text of the provision.
17. Ark. Const. of 1864, art. IV, § 32; see supra note 14 for the text of the provision.
Assembly must approve a proposed amendment by only a majority vote of each House.\textsuperscript{18} Then, the proposal must be adopted by a popular vote of the people.\textsuperscript{19}

Another significant difference is that the early provision did not expressly require entry in the legislative journals of either the text of the proposals or the tally of the votes cast on the proposals.\textsuperscript{20} The early provision also did not limit the number of amendments that the General Assembly could propose.\textsuperscript{21} Today, the current provision requires that the text of the proposed amendment be entered in the House and Senate journals along with the yeas and nays.\textsuperscript{22} The current provision also restricts the General Assembly to three amendments proposed per regular\textsuperscript{23} session.\textsuperscript{24}

Clearly, fundamental changes in the requirements for legislatively proposed amendments took place between the early provision and the current provision contained in Article XIX, Section 22. These changes suggest the drafters of the constitutions written in 1868 and 1874 wanted to drastically alter the way that the legislature could amend Arkansas’s Constitution.

B. The 1868 Constitution and the Provision for Legislatively Proposed Constitutional Amendments

The Constitution of 1868 was the centerpiece of Reconstruction in Arkansas after the Civil War.\textsuperscript{25} The drafters of this constitution,

\begin{footnotes}
\item[18] Ark. Const. art. XIX, § 22; see supra note 5 for the text of Article XIX, § 22; see also infra notes 52-56 and accompanying text.
\item[19] See supra note 5.
\item[20] Ark. Const. of 1864, art. IV, § 32; see supra note 14 for the text of the provision. The “tally of the votes” will hereinafter be called the “yeas and nays.”
\item[21] Ark. Const. of 1864, art. IV, § 32.
\item[22] Ark. Const. art. XIX, § 22; see also Bryant v. Rinke, 252 Ark. 1043, 1043, 482 S.W.2d 116, 117 (1972). For the text of § 22, see supra note 5. See also infra notes 75-90 and accompanying text.
\item[23] The legislature cannot propose amendments in a special session. See infra notes 69-72 and accompanying text.
\item[24] Ark. Const. art. XIX, § 22; see also infra notes 73-74 and accompanying text. There are other minor differences. For example, the early provision required a proposed amendment to be published in every newspaper in the state twelve months before the next general election. Ark. Const. of 1864, art. IV, § 32. Article XIX, § 22 requires a proposed amendment to be published in a major newspaper in each county six months before the next general election. Ark. Const. art. XIX, § 22; see also infra notes 91-94 and accompanying text.
\item[25] Cal Ledbetter, Jr., The Constitution of 1868: Conqueror’s Constitution or Constitutional Continuity?, 44 Ark. Hist. Q. 16 (1985). The 1868 Constitution would come to exemplify the perceived ills of Reconstruction. Id. “[T]o the ex-Confederates it was a symbol of radical Reconstruction, carpetbaggers, and scalawags.” Id. at 16-17; see infra notes 32-35 and accompanying text for a discussion of what actually resulted from the Reconstruction era.
\end{footnotes}
Arkansas's fourth, intended to destroy white supremacy, weaken political leaders with Confederate ties, establish public schools, and give broad appointive powers to the governor.\(^{26}\)

In their zeal to effect change in Arkansas, the drafters of the 1868 Constitution substantially altered the process for amending the Constitution.\(^{27}\) For example, the 1868 Constitution required the General Assembly to approve an amendment by a majority vote rather than a two-thirds vote.\(^{28}\) In addition, the subsequently elected General Assembly needed only to approve the proposed amendment by a majority vote of both Houses.\(^{29}\) Furthermore, the 1868 Constitution added the requirement that the voters adopt the amendment by a simple majority.\(^{30}\) Another significant addition to the 1868 Constitution required both the text of the proposed amendment and the yeas and nays to be entered on the journals of the General Assembly offering the amendment.\(^{31}\)

In spite of the drafters' zeal to effect what they viewed as progressive change in Arkansas, the 1868 Reconstruction legislature was marked by corruption.\(^{32}\) It spent millions of dollars on nonexistent railroads, levees, and buildings.\(^{33}\) In addition, the state debt rose

\(^{26}\) Goss, supra note 9, at 6.

\(^{27}\) See ARK. CONST. of 1868, art. XIII, §§ 1, 2. Article XIII provided:

Any amendments to this Constitution may be proposed in either House of the General Assembly, and if the same shall be agreed to by a majority of the members elected to each of the two Houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election, and shall be published as provided by law, for three months previous to the time of making such choice; and if the General Assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each House, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner and at such time as the General Assembly shall provide; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly voting thereon, such amendment or amendments, shall become a part of the Constitution of this State.

If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors, shall vote for, or against, each of said amendments separately.

ARK. CONST. of 1870, art. XIII, §§ 1, 2.

\(^{28}\) Compare the text of the 1870 Constitution, supra note 27, with the text of the early provision, supra note 14.

\(^{29}\) See supra note 27.

\(^{30}\) See supra note 27.

\(^{31}\) See supra note 27.

\(^{32}\) Goss, supra note 9, at 7; see also Ledbetter, supra note 25.

\(^{33}\) Goss, supra note 9, at 7.
from three to twelve million dollars with only about one hundred thousand dollars to show in public improvements. The ex-Confederates, conservatives, and other Arkansas natives desperately sought honest administration and a chance to wrest control of state government from the domination of the Reconstructionists' legislature. The Arkansas natives' desire to regain control of government culminated in the Constitutional Convention of 1874.

C. The 1874 Constitution and the Provision for Legislatively Proposed Constitutional Amendments

After several years of Reconstruction government, a strong reactionary spirit marked the Constitutional Convention of 1874. During the Convention, two prevalent themes came to the fore. First, delegates generally distrusted government, and, second, they called for the empowerment of the People. During his acceptance speech as president of the convention, Grandison D. Royston called for a constitution that would provide for a government under which "the people [would] be the source of power." In their "Address to the People of the State," the convention members wrote that "[t]he new Constitution is framed with a view for correcting these abuses [of the Reconstruction legislature] by keeping as nearly as may be all power in the hands of the people."

Article XIX, Section 22 of the 1874 Constitution, the state's current constitution, incorporated many of the changes that the drafters at the Constitutional Convention of 1868 had made to the

34. Nunn, supra note 9, at 182.
35. Goss, supra note 9, at 7. "Eventually, the Republicans began fighting among themselves, . . . allowing the Democrats to take advantage of the political vacuum that was thus created." Goss, supra note 9, at 7.
36. See Goss, supra note 9, at 8. As one commentator stated, "Rather than viewing a constitution as a document to enable the government to operate effectively and responsibly, the citizens emerging from Reconstruction looked upon it as a means of protection from their own government." Nunn, supra note 9, at 201. The Constitution of 1874 "incorporated more changes than any of the other constitutions in the state's history, and most of [its] revisions were highly rural, restrictive, and negative in nature." Goss, supra note 9, at 8.
37. Nunn, supra note 9, at 190.
38. 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PEOPLE OF THE STATE OF ARKANSAS 126 (July 14, 1874). The address also provided that the Constitution was framed with the intent of "holding [the people's] agents in office directly responsible to them." Id.
constitutional amendment provision. However, consistent with the theme of empowerment, the drafters deleted the clause requiring approval of a proposed amendment by the subsequently elected General Assembly. Under the current constitution, once the General Assembly approves a proposed amendment, they are required to submit the proposal to the voters for adoption. In addition, consistent with the distrust of government theme, the drafters limited the General Assembly so that no more than three amendments can be legislatively proposed or submitted at the same time. Clearly, Article XIX, Section 22 furthered the two articulated purposes of the Constitutional Convention of 1874.

D. The People’s Role in Adoption of Legislatively Proposed Constitutional Amendments

The history of Article XIX, Section 22 would not be complete without some mention of the people’s role in the process of adopting legislatively proposed constitutional amendments under the current constitution. Statistics indicate that the electorate has consistently provided an important check on the power of the legislature.

For example, an average of two legislatively proposed constitutional amendments have reached the ballot each general election since 1938. Of these proposals, the electorate has adopted an average of one per election. Additionally, the electorate has refused to

40. See supra notes 27-31 and accompanying text for a discussion of the provision for amendment in the 1868 Constitution. Only a brief mention of the significant changes are mentioned here. See infra notes 48-155 and accompanying text for a more fully developed discussion of the law governing Article XIX § 22.

41. Compare Ark. Const. art. XIX, § 22 with Ark. Const. of 1868, art. XIII, § 1; see supra notes 5, 27.

42. See supra note 41.

43. Ark. Const. art. XIX, § 22; see infra notes 73-74 and accompanying text.

44. Proposed Constitutional Amendments, Initiatives, and Referenda 1938-1992, compiled by the Secretary of State of Arkansas. It is possible that more than two amendments were proposed each legislative session. However, the Secretary of State has kept records only of the proposals that actually reached the ballot. See id. The courts have probably stricken several of the proposals from the ballot. In fact, all three legislatively proposed amendments were stricken from the ballot in 1994. See, e.g., Walmsley v. McCuen, 318 Ark. 269, 885 S.W.2d 10 (1994). However, some of the cases do not reach the Supreme Court, and thus, cannot be found in a reporter. See infra notes 131-32 for a discussion of the Arkansas Supreme Court’s appellate jurisdiction. Accordingly, it would be pure conjecture to estimate how many proposed amendments have been stricken from the ballot or how many proposed amendments the legislature has approved each session.

adopt any legislatively proposed amendments seven times since 1938 and has adopted every legislatively proposed amendment on the ballot only five times. Clearly the people of this state have not blindly adopted every proposed amendment submitted by the General Assembly. Thus, and perhaps as the drafters of the 1874 Constitution intended, the electorate has played an essential role in limiting the legislature's ability to amend the Arkansas Constitution.

II. Article XIX, Section 22

The process of adopting a legislatively proposed constitutional amendment is roughly divided into three stages. First, during the legislative stage, the General Assembly proposes and approves an amendment. Second, during the pre-election stage, the Secretary of State prepares the proposal for adoption by the electorate. Third, the people vote on the proposed amendment. This comment will discuss in chronological order the law governing each of these stages before finally addressing the issues directly affected when judicial review takes place.

A. The Legislative Stage

The Arkansas Supreme Court has stated that when the General Assembly proposes amendments to the Arkansas Constitution, it acts not in its legislative capacity but rather in the nature of a constitutional convention. Thus, the court has concluded that in proposing


47. See id. Those election years were 1948, 1958, 1976, 1988, and 1992. See id.

48. See supra note 15.

49. Although some legal concepts may arguably be associated with a different stage of the adoption process, this comment nevertheless places the concepts where they are currently located to facilitate organization and discussion.

50. Coulter v. Dodge, 197 Ark. 812, 819, 125 S.W.2d 115, 118 (1939); McAdams v. Henley, 169 Ark. 97, 103, 273 S.W. 355, 357 (1925); Mitchell v. Hopper, 153 Ark. 515, 518, 241 S.W. 10, 12 (1922). The court appears to make a distinction between statutes and proposed amendments. Statutes passed by the legislature are presumed to be constitutionally valid. Beck v. State, 317 Ark. 154, 159, 876 S.W.2d 561, 564 (1994). Conversely, legislatively proposed amendments generally do not enjoy the same presumption. See McAdams, 169 Ark. at 102, 273 S.W. at 357. Nevertheless, once the electorate adopts a proposal, the court will presume the amendment is valid. See infra notes 136-47 and accompanying text.
amendments to the constitution, something more is required than in passing ordinary legislation.  

1. **Approval of the Proposed Amendment**

   a. **Majority of All Members**

   Either house of the General Assembly may propose an amendment to the Arkansas Constitution. In addition, the proposed amendment must be "agreed to by a majority of all members elected to each house." Although the Arkansas Supreme Court has not construed either provision, the provision that requires approval by a majority of each House has been mentioned in dictum by the court. The provision probably requires a majority approval by all the members of each House rather than a majority approval by a mere quorum of each House.

   b. **The Governor's Role in Approval**

   There is no constitutional provision requiring the Governor to approve a proposed amendment before it is placed on the ballot. Case law supports the view that the Governor does not have a legal role in the approval of an amendment proposed by the General Assembly.
Assembly. In *Mitchell v. Hopper*, the Arkansas Supreme Court held that the Governor had no power to veto a resolution that proposed a constitutional amendment. The Court reaffirmed *Mitchell* in *Coulter v. Dodge*, holding that the Governor's approval of a proposed amendment neither added to nor detracted from the validity of the legislature's approval.

2. *Scope of Legislative Authority to Propose Amendments*

a. One Subject Per Amendment

There is no express constitutional provision which stipulates that an amendment must encompass only one subject. However, there is some authority that may support this requirement.

Proposed amendments must be submitted so that electors can cast their votes on each amendment separately. In *Brockelhurst v. State*, a party challenging a legislatively proposed amendment argued that because electors must be able to cast their votes on each amendment separately, the "[l]egislature was without power to submit two questions in one amendment." The Arkansas Supreme Court upheld the amendment, stating that the two sections of the proposed...
amendment in *Brockelhurst* did, in fact, relate to the same subject. Because it specifically addressed the petitioner's argument, the court gave at least theoretical validity to the petitioner's reasoning. Thus, the decision in *Brockelhurst* provides some authority, albeit indirectly, to support the proposition that a constitutional amendment must encompass only one subject.

b. During the Regular Session

The General Assembly can propose and approve constitutional amendments during a regular session. In *Wells v. Riviere*, the Arkansas Supreme Court construed this provision to mean that amendments proposed and approved during an unlawful extension of the legislature's regular session could not be placed on the ballot.

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67. *Id.* at 72-73, 111 S.W.2d at 530. Section One of the proposed amendment provided that "prosecuting attorneys may file information or indictments may be had by grand juries, to charge one with crime." *Id.* at 72, 111 S.W.2d at 530. Section Two authorized the General Assembly to determine the amount, method, and salaries of prosecuting attorneys. *Id.* The court strained to uphold the amendment's validity, reasoning that in the broadest sense, both sections "relate to the prosecuting attorney." *Id.* at 72-73, 111 S.W.2d at 530.


69. Ark. Const. art. XIX, § 22. "Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution ...." *Id.* It is important to note there are only two types of sessions for which the General Assembly may convene. See *Wells v. Riviere*, 269 Ark. 156, 160-61, 599 S.W.2d 375, 377 (1980). The Legislature may meet during a biennial regular session, as provided under Ark. Const. art. 5, §§ 5, 17, or during an extraordinary session convened by the Governor, as provided under Ark. Const. art. VI, § 19. See *Wells*, 269 Ark. at 160-61, 599 S.W.2d at 377. Extraordinary sessions are commonly referred to as "special" sessions. Although the issue has not been directly addressed by the Arkansas Supreme Court, it is very likely the legislature does not have the authority to propose and approve amendments during a special session. The Court emphatically stated in *Wells* that proposed amendments must be approved "at a regular session of the General Assembly." *Id.* at 160, 599 S.W.2d at 377.

70. 269 Ark. 156, 599 S.W.2d 375 (1980).

71. *Id.* at 166-67, 599 S.W.2d at 380. Both Houses had approved during the regular session a proposed amendment to the constitution regarding property taxation. *Id.* at 167, 599 S.W.2d at 380. The legislature proposed and approved the other two amendments, which involved usury and court jurisdiction, during an extension of the regular session. *Id.* The court concluded that the extension of the regular session was unlawful. *Id.* at 168, 599 S.W.2d at 381. Thus, a majority of the court concluded that only the property taxation amendment could be placed on the ballot. *Id.* at 169-70, 599 S.W.2d at 381.

One could construe the holding in *Wells* to indicate that so long as a proposed amendment is approved during a lawful regular session, it will remain valid even if subsequent changes are made to the proposed amendment during an unlawful regular session. The property taxation amendment, proposed during the regular session, had been subsequently changed during the unlawful extension of the regular
Thus, it is likely that legislatively proposed amendments can be placed on the ballot only if they are proposed and approved during a regular session or a lawful extension of a regular session.\textsuperscript{72}

c. The Three Amendment Limit

Although the General Assembly is authorized to propose amendments to the Constitution, the legislature cannot propose more than three amendments to be voted on by the people at the same time.\textsuperscript{73} If the General Assembly proposes more than three amendments, the three that shall be voted upon by the people are likely to be determined by the order in which the legislature approves them.\textsuperscript{74}

3. Journal Entry Requirements

a. Yeas and Nays on Final Passage

When an amendment is approved by a majority of all members from both houses,\textsuperscript{75} Article XIX, Section 22 requires that the yea

session and "was a different proposal than that approved back during the regular session." \textit{id.} at 167, 599 S.W.2d at 380. A majority of the court nevertheless upheld its validity. \textit{id.} at 170, 599 S.W.2d at 381.

In addition, an argument could be made that when a proposed amendment is approved during a lawful regular session, it will remain valid even if subsequent changes are made to the proposed amendment during a special session. However, the decision in \textit{Wells} only indirectly supports this proposition.

72. There is a strong argument that amendments proposed and approved during an extraordinary, or special, session will not be placed on the ballot. \textit{See supra} note 69.

73. \textit{ARK. CONST.} art. XIX, § 22; \textit{see Wells}, 269 Ark. at 160, 599 S.W.2d at 377. This limitation of three amendments per session, or the "limitation of three" rule, should also operate to account for those amendments proposed during a lawful extension of a regular session. \textit{See, e.g., id.}

During the regular session of 1995, Senator Malone introduced a proposed amendment that would allow the legislature to refer five constitutional amendments to the electorate for adoption rather than just three. S.J. Res. 7, 80th Gen. Assembly, Reg. Sess. (1995). This measure was referred to the Senate Committee on State Agencies and Governmental Affairs, but the committee had taken no further action on the measure at the time the regular session adjourned. \textit{See S.J. Res. 7, 80th Gen. Assembly, Reg. Sess. (1995) (as summarized in the Westlaw Bill Tracking database, April 9, 1995}).

74. \textit{See State ex rel. Little Rock v. Donaghey}, 106 Ark. 56, 65-66, 152 S.W. 746, 749 (1912). This will be referred to as the "priority rule." The court in \textit{Donaghey} applied the priority rule to amendments proposed under both Amendment XIII, the Amendment VII precursor which governed initiated amendments, and Article XIX, § 22. \textit{See id.} However, the later passage of Amendment VII impliedly repealed the limitation rule as to initiated amendments. \textit{See Kennedy, supra} note 1, at 51 n.398. Although the decision in \textit{Donaghey} no longer applies to Amendment VII proposals, the reasoning behind the priority rule likely still applies to amendments proposed by the General Assembly.

75. Approval requires a majority of all members of both houses rather than a majority of a mere quorum. \textit{See supra} notes 55-56.
and nay votes be entered on the journals of the legislature. Failure of the journals to reflect the yea and nay vote of each house is fatal to the proposed amendment.

However, in Bryant v. Rinke, the Arkansas Supreme Court indicated that it might be willing to allow the legislature to correct any flaws in its journal entries during a subsequently convened extraordinary session. The court in Bryant held that a proposed amendment was invalid where the journal did not reflect the yea and nay vote on two resolutions after amendment, explicitly noting that the legislature made a failed attempt during an extraordinary session to correct the problem.

b. Entering the Amendment in the Journals

Article XIX, Section 22 stipulates that "proposed amendments shall be entered on the journals . . . ." The Arkansas Supreme Court, in construing this provision, has established that it is essential to the validity of a legislatively proposed constitutional amendment that the journals of both Houses, when read together, show "certainly" and "definitely" that both Houses concurred in the submission of the same amendment.

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78. 252 Ark. 1043, 482 S.W.2d 116 (1972).
79. Id. at 1044, 482 S.W.2d at 117. The General Assembly approved a proposed amendment during the 1971 regular session. Id. at 1043, 482 S.W.2d at 117. After the plaintiff filed a complaint, and after it was discovered that the journal entries did not reflect the yea and nay vote or the text of the proposed amendments, the Governor called an extraordinary session to, inter alia, remedy the problem. Id. at 1043-44, 482 S.W.2d at 117.
80. Id. at 1044, 482 S.W.2d at 117; see also Jernigan v. Niblock, 260 Ark. 406, 409, 540 S.W.2d 593, 595 (1976). The Arkansas Supreme Court affirmed the chancellor's decision to invalidate the amendment, but the court adopted only one of the chancellor's two grounds for invalidation. Bryant, 252 Ark. at 1044, 482 S.W.2d at 117. The court agreed with the chancellor in that neither of the resolutions, after amendment, were entered in the journal with the yea and nay votes. Id. The court did not specifically address the chancellor's other ground, which was that the failure of the General Assembly, in a regular session, to conform to the requirements could not be cured by action of a subsequent special session. Id. Thus, the question whether the court might be willing to allow the legislature to correct flaws in its journal entries during a subsequently convened extraordinary session is open to argument.
Knowledge of the development of this rule is important to understanding its application. In *McAdams v. Henley*, the Arkansas Supreme Court first addressed this issue, holding that “an amendment to the constitution is void unless the amendment is entered *in extenso* on the journals of each of the two Houses of the General Assembly, and . . . a mere identifying reference by title of otherwise is insufficient.” However, in its subsequent decision in *Coulter v. Dodge*, the court clarified its prior holding, stating that the “*in extenso*” rule is limited to the facts in *McAdams*.

Most recently, in *Jernigan v. Niblock*, the court reaffirmed the holding in *Coulter*, establishing the rule that it is essential to

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83. 169 Ark. 97, 273 S.W. 355 (1925). The court summarized the facts in *McAdams* this way:

> [The House amendment to the [original Senate] resolution was never entered on the journals of the Senate, and . . . the [originally] proposed amendment which was entered at large on the journals of the Senate is materially different in its language and import from that which was submitted to the people at the next general election. Id. at 102, 273 S.W. at 357. In other words, the Senate journal did not explicitly reflect that the Senate had passed the House’s amended version of the proposed amendment. The court held that the amendment was invalid because the omission in the Senate’s journal was of a substantial change made by the House. Id. at 111, 273 S.W. at 360.

84. “*In extenso*” means “at full length; from beginning to end, leaving out nothing.” BLACK’S LAW DICTIONARY 777 (6th ed. 1990).

85. *McAdams*, 169 Ark. at 110, 273 S.W. at 360. The court appeared to immediately retreat from the “*in extenso*” rule in the very same opinion, indicating that different parts of the journals could be read together to determine whether both Houses had passed the same amendment. *Id.* “Different parts of the journals of the respective Houses may, if connected up to that the whole of the amendment as finally adopted by both Houses, appears upon the journal of each House, be treated as sufficient to make a complete record . . . .” *Id.* In addition, the court stated that “the omission of an immaterial portion of an amendment—one not affecting its meaning or interpretation—would not affect its validity.” *Id.* at 111, 273 S.W. at 360.

86. 197 Ark. 812, 125 S.W.2d 115 (1939). In this case, unlike *McAdams*, “[t]he resolution was properly entered upon the journal of the Senate, and the resolution was passed by the House without amendment of any kind, material or otherwise.” *Id.* at 820, 125 S.W.2d at 118. The Senate journal referenced the proposed amendment, which, at that point, had already passed both the Senate and the House and had been entered on the journals. *Id.* at 817-18, 125 S.W.2d at 117. The court held that the amendment was valid because the journals of the two Houses, when read together, reflected that the same proposal had passed each House. *Id.* at 822, 125 S.W.2d at 119.

87. *Id.* at 820-21, 125 S.W.2d at 118-19. In *McAdams*, the House made a material change to the proposed amendment, but the Senate’s journal did not reflect that the Senate approved of this change. *See supra* note 83.

88. 260 Ark. 406, 540 S.W.2d 593 (1976). The Senate materially amended the proposed amendment, which was originally proposed and passed by the House. *Id.* at 408-09, 540 S.W.2d at 594-95. The amendatory language did not appear in
the validity of a legislatively proposed amendment that the journals of both Houses, when read together, show "certainly" and "definitely" that both Houses concurred in the submission of the same amendment. The court added that when reviewing the journals it could not make an "assumption or rewrite the journals, but must scrutinize them as recorded." 

B. The Pre-Election Stage

1. Publication Requirements

a. Publication Six Months Preceding the Next Election

After the proposed amendment has been approved by both Houses, it must be "published in at least one newspaper in each county, where a newspaper is published, for six months immediately preceding the next general election for Senators and Representatives." The Arkansas Supreme Court has construed this provision to mean that the full text of the amendment, not just notice of the amendment, must be published at least six months prior to the general election to which the amendment is subject. The court did not specifically address how frequently an amendment should be published, but Arkansas statutory law provides some guidance on this issue. The

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89. Id. at 409-10, 540 S.W.2d at 595-96. The court in Jernigan may have reaffirmed the application of the McAdams "in extenso" rule where one of the Houses has materially changed the proposed amendment. See id. at 410, 540 S.W.2d at 595-96.

90. Jernigan, 260 Ark. at 410, 540 S.W.2d at 596.

91. Ark. Const. art. XIX, § 22. Because the Constitution does not provide who shall be responsible, the legislature has charged the Secretary of State with the responsibility of publishing the proposed amendment. Ark. Code Ann. § 7-9-113 (Michie 1991); see, e.g., Walmsley v. McCuen, 318 Ark. 269, 885 S.W.2d 10 (1994).

92. Walmsley, 318 Ark. at 273, 885 S.W.2d at 12 (1994). In this case, Secretary of State McCuen had published notice of the amendment six months prior to the election, but, as of the filing of the original action, his office had failed to publish the entire text of the amendment. Id. at 271, 885 S.W.2d at 11.

93. Ark. Code Ann. §§ 7-9-113(b)(1) and 16-3-102(b) provide that notice of the proposed amendment shall be published four times within the six month period. Section 7-9-113(b)(1) of the Arkansas Code Annotated provides in relevant part that "notice shall be published in four (4) weekly issues of some newspaper in
court has also suggested in other cases that a legislatively proposed amendment should probably be published once a month for six months prior to the election to which the amendment is subject.\textsuperscript{94}

b. Statutory Requirements

In addition to insuring that the proposed amendment is published six months before the election, the Secretary of State has other publication duties which may affect an amendment's validity. Although there is no constitutional requirement that a ballot title be placed on a legislatively proposed amendment,\textsuperscript{95} Section 7-9-113 of the Arkansas Code Annotated requires that the Secretary of State include the popular name, the ballot title, and the text of the amendment in at least one of the published notices.\textsuperscript{96} After publication, the Secretary of State is to "furnish the election commissioners the popular name and ballot title for the official ballot."\textsuperscript{97}

c. Compliance with Statutory Requirements

The Arkansas Supreme Court has held that provisions of the election laws,\textsuperscript{98} which include publication requirements, are mandatory
if enforcement is sought prior to an election, but only directory if relief is sought after an election. Despite this rule, in Becker v. McCuen, the court refused to invalidate an amendment prior to an election even though the Secretary of State failed to strictly comply with the statutory requirements regarding publication of amendments. The court stated that although the Secretary of State’s duties were mandatory, the plaintiff waited until the election was too close at hand before challenging the Secretary’s action. In addition, the court stated that mandamus would have been the proper remedy if timely filed.

In the wake of Becker, it is logical to conclude that an amendment may be placed on the ballot even if the Secretary of State does not follow the statutory publication requirements precisely. However, even in a situation like that in Becker, it would be proper for a court to “strike the matter from the ballot” if the Secretary of State’s actions caused “real prejudice” to either side of an issue.

99. Donn v. McCuen, 303 Ark. 415, 417, 797 S.W.2d 455, 456 (1990). This means that if a complainant applies for a writ of mandamus prior to the election and can prove an election officer has failed to comply with the election laws, the court will issue mandamus to compel the officer’s compliance. See, e.g., id.; Becker, 303 Ark. at 488-89, 798 S.W.2d at 74.

100. 303 Ark. 482, 798 S.W.2d 71 (1990). In Becker, the Secretary of State, apparently inadvertently, added to the designated ballot title language from the title of the joint resolution. Id. at 486, 798 S.W.2d at 72. The court concluded that the Secretary of State substantially complied with the statutory requirement that he place a ballot title on publication notices, and thus, the amendment remained on the ballot. Id. at 489, 798 S.W.2d at 74.

101. Id. at 488-89, 798 S.W.2d at 74. The court characterized the timing of the filing of the action as an “eleventh hour” challenge. Id. at 489, 798 S.W.2d at 74.

102. Id. at 488-89, 798 S.W.2d at 74. In Hannah v. Deboer, 311 Ark. 215, 843 S.W.2d 800 (1992), the Arkansas Supreme Court referred to the decision in Becker and suggested that the mandatory nature of the election laws is not preserved when the plaintiff seeks the wrong remedy:

   In Becker, ... we dealt with a mistaken pre-election notice publication by the Secretary of State. Although a mistake was made, the challengers did not take advantage of the proper remedy available to them but waited until the eleventh hour and asked a court to strike the matter from the ballot. ... The seeking of the wrong remedy in the wrong court in the case now before us did not preserve the mandatory nature of the election laws after the election.

Id. at 220, 843 S.W.2d at 803 (citation omitted).

103. It is worth noting, however, the court would likely require strict compliance if the requirements for publication were stipulated by the Arkansas Constitution rather than by statutory law. See, e.g., Walmsley v. McCuen, 318 Ark. 269, 885 S.W.2d 10 (1994) (discussing the six-month publication rule); see supra notes 91-94 and accompanying text.

104. Becker, 303 Ark. at 489, 798 S.W.2d at 74.
2. Ballot Title Requirements

The requirements for judicial review of ballot titles on legislatively proposed amendments are presently unclear and may, in fact, be ripe for change. Currently, the ballot title requirements for the initiative process are not understood to govern constitutional amendments proposed by the General Assembly. The ballot title requirements for the initiative process mandate that the ballot title be (1) intelligible, (2) honest, and (3) impartial. On the other hand, when the General Assembly submits a proposed amendment, the ballot title is only required to (1) be sufficient to "distinguish and identify" the proposal and (2) not be a manifest fraud upon the public. Thus, the current standards for legislatively proposed amendments are less demanding than the standards for the initiative process.

105. See id. at 489, 798 S.W.2d at 72. A ballot title is explicitly required by Ark. Code Ann. § 7-9-113(c) (Michie 1993). See supra note 96 and accompanying text.

106. Becker, 303 Ark. at 485, 798 S.W.2d at 72; Berry v. Hall, 232 Ark. 648, 651, 339 S.W.2d 433, 435 (1960); see supra notes 6-7 and accompanying text. Interestingly, though, the Arkansas Supreme Court has strayed from this premise. For example, in Becker, the court quoted language from cases reviewing Amendment VII ballot titles during its discussion about whether an Article XIX, § 22 ballot title constituted a manifest fraud. Becker, 303 Ark. at 487, 798 S.W.2d at 74.

107. Leigh v. Hall, 232 Ark. 558, 339 S.W.2d 104 (1960). The requirements for ballot titles of initiated amendments subject to Amendment VII are beyond the scope of this comment. For a good place to begin research, see Bailey v. McCuen, 318 Ark. 277, 884 S.W.2d 938 (1994), where the standards for Amendment VII ballot titles were recently discussed by the Arkansas Supreme Court:

A ballot title must be free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring. In addition, a ballot title must be intelligible, honest, and impartial so that it informs the voters with such clarity that they can cast their ballots with a fair understanding of the issues presented.

Bailey, 318 Ark. at 284, 884 S.W.2d at 942 (citations omitted).

108. Becker v. McCuen, 303 Ark. at 487, 798 S.W.2d at 73; see also Becker v. Riviere, 277 Ark. 252, 641 S.W.2d 2 (1982).

109. Becker, 303 Ark. at 487, 798 S.W.2d at 73. The ballot title requirements for legislatively proposed amendments grant a high level of deference to the legislature. In fact, every Article XIX, § 22 ballot title that has been challenged before the Arkansas Supreme Court has survived judicial scrutiny. See id. at 482, 798 S.W.2d at 71; Becker v. Riviere, 277 Ark. 252, 641 S.W.2d 2 (1982); Chaney v. Bryant, 259 Ark. 294, 532 S.W.2d 741 (1976).

In Walmsley v. McCuen, 318 Ark. 269, 885 S.W.2d 10 (1994), the Arkansas Supreme Court explained that the reason for the different standards is that the purpose for the ballot title is different for Article XIX, § 22 than for Amendment VII:

'Amendment 7 does not require publication of the proposed amendment except as may be required by the General Assembly, but it does provide
As a result of the differing standards, the ballot title of a constitutional amendment could conceivably withstand scrutiny under Article XIX, Section 22 but fail under Amendment VII. In fact, the differing ballot title requirements have been called questionable and a "double standard" by the Arkansas Supreme Court. Nevertheless, because the court has not yet addressed this issue, the requirements for ballot titles remain unclear. A practitioner would be wise to err on the side of caution and apply both sets of requirements to any challenged amendment.

3. Popular Name Requirements

The Arkansas Supreme Court has held that the popular name's function is to enable the electors to vote on each proposed amendment a safeguard by specifically requiring that the proposed amendment have a ballot title, the purpose of which is to 'inform the voter so that he can mark his ballot with a fair understanding of the issues presented.' *Id.* at 271-72, 885 S.W.2d at 11 (quoting Becker v. Riviere, 277 Ark. 252, 641 S.W.2d 2 (1982)). The court further explained that:

(Article XIX § 22) does not specifically require a ballot title. All that is required is that the proposed amendments be so submitted as to enable the electors to vote on each amendment separately.' So, the purpose of the 'Ballot Title' under art. 19, § 22, is not to inform the voter, but merely to distinguish and identify the amendment. Voters can be presumed to be informed as to the contents of the amendment since art. 19, § 22, specifically requires an extended publication period of six separate monthly insertions in one newspaper in each county prior to the election. See *Jones v. McDade*, 200 Ala. 350, 75 So. 988 (1917).

*Walmsley*, 318 Ark. at 272, 885 S.W.2d at 11. 110. See *Becker*, 303 Ark. at 489, 798 S.W.2d at 74. The court's explanation for the differing requirements suggests rationalization rather than concrete reasoning. See *supra* note 109. The court's analysis fails to account for the reality that the average voter enters the voting booth with little knowledge about the contents of a proposed amendment and will "derive their information about it from the ballot title." *Westbrook v. McDonald*, 184 Ark. 740, 748, 43 S.W.2d 356, 360 (1931); see also Kennedy, *supra* note 1, at 9 n.42. In addition, the court's entire explanation hinges on the immaterial fact that Amendment VII explicitly requires a ballot title. Nevertheless, Amendment VII does not explicitly require the ballot title to be intelligible, honest, and impartial. See Ark. Const. amend. VII. Instead, the Amendment VII ballot title requirements are merely a judicial creation. See Kennedy, *supra* note 1, at 9. At least for now, the court appears unwilling to articulate a legitimate reason for its position that judicial creation of strict standards is appropriate for initiated amendments but not for legislatively proposed amendments.

111. *Becker*, 303 Ark. at 489, 798 S.W.2d at 74. In *Becker*, the Arkansas Supreme Court stated that it "question[ed] the propriety of such a double standard" and gave "notice of [its] intention to prospectively reconsider [its] cases at the next opportunity." *Id.* (emphasis added). The court had its "next" opportunity to address this issue in *Walmsley v. McCuen*, 318 Ark. 269, 885 S.W.2d 10 (1994), but decided the case on other grounds. *Walmsley* indicates a reluctance by the court to overrule past decisions on Article XIX, § 22 ballot title standards.
separately. In addition, the popular name is used to facilitate voter discussion and proposal identification before the election. The popular name cannot, however, contain catch phrases or slogans that tend to mislead or give partisan coloring to a proposal. Although it may seem that these standards are more restrictive than the standards for ballot titles, the Arkansas Supreme Court has not found the popular name of a single legislatively proposed amendment insufficient. Thus, the popular name standards for legislatively proposed amendments are probably no more exacting than the ballot title requirements.

C. Adoption by the Electorate

1. Majority of Electors

Article XIX, Section 22 provides that "if a majority of the electors voting at . . . [the] election adopt such amendments the same shall become a part of this Constitution." The plain meaning of the provision indicates that a proposed amendment is adopted only if a majority of electors who voted at the general election, rather than a majority of electors who voted on the amendment, cast their votes in favor of the proposed amendment. This interpretation, however, is not the law.

In Combs v. Gray, the Arkansas Supreme Court construed the "majority of electors" provision in Article XIX, Section 22

113. Becker, 303 Ark. at 488, 798 S.W.2d at 74 (quoting Pafford v. Hall, 217 Ark. 734, 233 S.W.2d 72 (1950)). Ironically, even though the court has gone to great lengths to establish that Amendment VII requirements do not govern Article XIX, § 22, Pafford is an Amendment VII case cited as authority in an Article XIX, § 22 case. See infra note 114.
114. Becker, 303 Ark. at 488, 798 S.W.2d at 74 (citing Arkansas Women's Political Caucus v. Riviere, 283 Ark. 463, 677 S.W.2d 846 (1984)). Notice that although Amendment VII requirements presumably do not govern Article XIX, § 22, Arkansas Women's Political Caucus is an Amendment VII case cited as authority in an Article XIX, § 22 case. See supra note 113.
115. See supra note 108 and accompanying text.
116. See Becker, 303 Ark. at 482, 798 S.W.2d at 71; Chaney, 259 Ark. 294, 532 S.W.2d at 741.
117. ARK. CONST. art. XIX, § 22 (1874) (emphasis added).
together with a similar provision in Amendment VII. Amendment VII provides that a proposed amendment is required to receive a majority of the votes cast on the proposed amendment, rather than the votes cast at the election, in order to become a part of the constitution. The court decided that this provision in Amendment VII should also apply to amendments proposed by the General Assembly pursuant to Article XIX, Section 22. Thus, an amendment proposed by the General Assembly is adopted when a majority of electors voting on the amendment cast their votes in favor of the amendment.

120. Combs, 170 Ark. at 967, 281 S.W. at 922. The court has occasionally cited a case construing one provision and applied it to the other. See supra notes 113-14, where the court cited Amendment VII cases for authority in Article XIX, § 22 cases. However, Combs is unusual because the court construed the language of Amendment VII together with Article XIX, Section 22. Yet, the court has historically and consistently repeated the proposition that the law governing Article XIX, Section 22 is separate from the law governing initiated amendments. See supra notes 6-7 and accompanying text. Clearly, the accuracy of this proposition is questionable.

The decision in Combs is unusual for another reason. Generally, when language in a constitutional provision is unambiguous and complete, a court will give the provision the effect of its plain meaning. See, e.g., Rockefeller v. Matthews, 249 Ark. 341, 459 S.W.2d 110 (1970) (holding that statutory requirements which provided for a special election in elections where no candidate receives a majority of votes cast contravened a plurality provision of a constitutional article and was therefore void). But see infra note 122 for an explanation of the court’s decision in Combs.

121. Ark. Const. amend. VII; see also Combs, 170 Ark. at 962, 281 S.W. at 920. Amendment VII specifically provides:

Any measure submitted to the people as herein provided shall take effect and become law when approved by a majority of the votes cast upon such measure, and not otherwise, and shall not be required to receive a majority of the electors voting at such election.

This section shall be not construed to deprive any member of the General Assembly of the right to introduce any measure, but no measure shall be submitted to the people by the General Assembly, except a proposed constitutional amendment or amendments as provided for in this Constitution.

Ark. Const. amend. VII.

122. Combs, 170 Ark. at 962, 281 S.W. at 920. The court reasoned that requiring an amendment proposed by the General Assembly to be adopted by a majority of votes cast at the election, rather than a majority of votes cast on the amendment, would “result in the practical abrogation of submitting amendments by the Legislature; ... [because] persons interested in amending the Constitution ... would, in the very nature of things, adopt the initiative method.” Id. Amendment VII, by its plain language, requires only a majority of votes cast upon the measure. See Ark. Const. amend. VII (emphasis added). This requirement makes adoption of an amendment easier than where adoption by a majority of votes cast at the election is required. Thus, if the court required a legislatively proposed amendment to be adopted by a majority of votes cast at the election, rather than a majority of votes cast on the amendment, everyone seeking to amend the constitution would choose Amendment VII over Article XIX, § 22 for its easier adoption requirement.

123. Combs, 170 Ark. at 962, 281 S.W. at 920.
2. Determining that an Amendment Has Received the Required Number of Votes

Whether or not a proposed amendment has been adopted by the requisite number of votes is a judicial question. However, the legislature may prescribe evidentiary rules for determining whether an amendment has received the required number of votes, so long as the rules reasonably tend to prove the fact of adoption.

Accordingly, the legislature has enacted rules governing the determination of whether an amendment has received sufficient votes. The rules provide that precinct judges, clerks, and the election commissioners in each county shall count, tabulate, and return the vote on each measure at the same time and in the same manner as the vote for candidates is tabulated, canvassed, and returned. Additionally, the county election board shall certify and deliver an abstract of all votes cast on a measure to the Secretary of State within fifteen days after the election. The Secretary of State then has ten days to canvass and certify to the Governor and the State Board of Election Commissioners all the returns on each measure. Unless a measure specifies otherwise, an adopted measure shall go into effect within thirty days after the election, provided the Governor makes a proclamation that the measure has been adopted. No decisions of the Arkansas Supreme Court have directly addressed the issue whether these provisions are mandatory or directory.

125. Kavanaugh, 78 Ark. at 475-76, 96 S.W. at 412; see also Op. Att'y Gen. 82-152 (Sept. 23, 1982). This issue is unlikely to be a problem now that an amendment needs to receive only a majority of those votes cast on the measure in order to become law. Kavanaugh was decided during the time when an amendment proposed by the General Assembly needed a majority of votes cast at the general election. See, e.g., Combs, 170 Ark. at 962, 281 S.W. at 920. Determining the number of votes cast at an election is much more difficult than determining the number of votes cast on a measure. See, e.g., Kavanaugh, 78 Ark. at 474-75, 96 S.W. at 412.
126. ARK. CODE ANN. § 7-9-119(a) (Michie 1993). For the time and manner of tabulation, canvassing, and returning of votes on candidates, see ARK. CODE ANN. §§ 7-5-315, -701 to -706 (Michie 1993).
127. Id. § 7-9-119(b).
128. Id. § 7-9-119(c).
129. Id. § 7-9-119(d); see also Op. Att'y Gen. 82-152 (Sept. 23, 1982).
130. As a general rule, enforcement of the election laws is considered mandatory before the election, but only directory after the election. Donn v. McCuen, 303 Ark. 415, 417, 797 S.W.2d 455, 456 (1990). The question then becomes: Does the determination of the number of votes occur before or after the election? Technically at least, the determination of the number of votes occurs after the electorate votes,
D. Judicial Review

1. Jurisdiction and Standard of Review

The Arkansas Supreme Court has only appellate jurisdiction over cases involving legislatively proposed amendments. Stated another way, the court does not have original jurisdiction over challenges to legislatively proposed amendments. There is some authority, however, to suggest that even in cases involving these challenges, the court may have original jurisdiction in the issuance of a writ of quo warranto.

The standard of review for cases involving challenges to the validity of amendments proposed by the General Assembly is de novo. An appeal “opens the whole case for review as if no decision had been made” in the lower court.

and thus, one might logically conclude that the determination occurs after the election. On the other hand, the determination of the number of votes is part of the larger process of an election. Even when the voting portion of the election is over, the tabulation portion still needs to be completed to determine the outcome. Thus, it is unclear whether the determination of the number of votes occurs before, during, or after an election, and consequently, it is unclear how the rule in Donn will affect judicial review of compliance with these provisions.

131. Becker v. McCuen, 303 Ark. 482, 485, 798 S.W.2d 71, 72 (1990). However, the court has original and exclusive jurisdiction over cases attacking the sufficiency of petitions of initiated amendments, pursuant to Amendment VI. Ark. Const. amend. VII; Berry v. Hall, 232 Ark. 648, 650, 339 S.W.2d 433, 434 (1960).

During the regular session of 1995, Representative Courtway proposed an amendment that would give the Arkansas Supreme Court original jurisdiction over any challenges to legislatively proposed amendments. H.J. Res. 1012, 80th Gen. Assembly, Reg. Sess. (1995). The General Assembly referred the measure to the House Committee on State Agencies and Governmental Affairs, but the committee had taken no action on the measure at the time the regular session was adjourned. See H.J. Res. 1012, 80th Gen. Assembly, Reg. Sess. (1995) (as summarized in the Westlaw Bill Tracking database, April 9, 1995).

132. Berry, 232 Ark. at 653, 339 S.W.2d at 436. The Arkansas Constitution provides that “[t]he Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only . . . .” Ark. Const. art. 7, § 4. The constitution, however, does not provide “otherwise”; in other words, the constitution does not expressly provide that the court has original jurisdiction in cases involving Article XIX, § 22 amendments. Berry, 232 Ark. at 653, 339 S.W.2d at 436. See supra note 131.

133. Berry, 232 Ark. at 653, 339 S.W.2d at 436 (quoting Road Improvement Dist. No. 4 of Prairie County v. Mobley, 150 Ark. 149, 150, 233 S.W. 929, 929 (1921)). This proposition was stated by the court in dictum. See id. A writ of quo warranto is a common law writ “designed to test whether a person exercising power is legally entitled to do so. . . . [T]he writ is not ordinarily available to regulate the manner of exercising such powers.” Black’s Law Dictionary 1256 (6th ed. 1990).


135. Becker, 303 Ark. at 486, 798 S.W.2d at 73. “It has been the invariable
2. Presumption of Validity Upon Adoption by the People

There is an advantage to challenging the constitutionality of an amendment proposed by the General Assembly before the people have an opportunity to vote on the measure at an election. After a proposed constitutional amendment has been adopted by the people, "every reasonable presumption, both of law and fact, will be indulged in favor of its validity." However, a party can overcome or rebut this presumption where constitutional requirements for submission of a legislatively proposed amendment "are disregarded or compliance [has been] totally omitted."

A review of some cases will illustrate how this presumption of validity affects judicial review of legislatively proposed amendments. In Chaney v. Bryant, the most recent case on this issue, the Arkansas Supreme Court adjudged as valid an amendment which...
had already been adopted by a majority vote. The court stated that it would be "absurd" to invalidate the amendment merely because the ballot title might be misleading, reasoning that the amendment had already been adopted by the people. The court further justified its holding, stating that no specific constitutional or statutory provision required a ballot title for amendments proposed by the General Assembly.

In the earlier case of McAdams v. Henley, however, the Arkansas Supreme Court held an amendment invalid despite the fact that it had been adopted by a majority vote. The court reasoned that when the journals do not reflect that the house and senate passed the same measure, the amendment is "void on account of the failure of the General Assembly to enter the proposal in accordance with the express mandate of the Constitution." The court in McAdams did not explicitly mention the presumption of validity, but the court in Chaney cited McAdams as an example of how the presumption can be rebutted.

In Coulter v. Dodge, a case decided after McAdams but before Chaney, the Arkansas Supreme Court upheld the validity of an amendment after it had been adopted by a popular vote notwithstanding the fact that the journal entries failed to reflect an immaterial portion of the proposed amendment which had been approved by both houses. Although the majority opinion did not specifically refer to any presumption created by the adoption of an amendment by popular vote, the concurring opinion of Justice Mehaffy

140. Id. at 300, 532 S.W.2d at 745.
141. Id.
142. 169 Ark. 97, 273 S.W. 355 (1925). In this case, a proposed amendment was introduced and approved in the Senate. Id. at 100, 273 S.W. at 356. The House subsequently made an amendment to the resolution and returned it to the Senate. Id. at 101, 273 S.W. at 356. The Senate approved the amended resolution, but the journals did not reflect that the resolution contained the House's amendment. Id. at 102, 273 S.W. at 357. The measure entered in the Senate's journal was materially different than the measure submitted to the people. Id.; see supra notes 83-85 and accompanying text.
143. McAdams, 169 Ark. at 112, 273 S.W. at 360.
144. See Chaney, 259 Ark. at 298, 532 S.W.2d at 744.
145. 197 Ark. 812, 125 S.W.2d 115 (1939). In Coulter, the complainant argued that the amendment should be invalidated because the proposed amendment had not been entered "in extenso" on the journals of the Houses of the General Assembly. See id. at 818, 125 S.W.2d at 117. See supra notes 75-90 and accompanying text for a discussion of this case regarding journal entry requirements.
146. See Coulter, 197 Ark. at 822, 125 S.W.2d at 119 ("When the journals of the two houses are read together in the instant case, it is made certain that both houses passed the same amendment.").
specifically referred to the presumption as a reason for upholding the validity of the amendment.\textsuperscript{147}

3. \textit{Eleventh Hour Challenges}

The advantage to challenging amendments proposed by the General Assembly before an election is somewhat weakened when the lawsuit is filed at the "eleventh hour," or just before the election.\textsuperscript{148} Still, the mere fact that the lawsuit was filed at the eleventh hour is probably not sufficient, by itself, to preclude a court from addressing the merits of the challenger's case.\textsuperscript{149} Instead, a last minute filing probably must be coupled with another infirmity before a court will explicitly cite the eleventh hour challenge as a reason for upholding the validity of a legislatively proposed amendment. For example, where the lawsuit is filed at the last minute in an incorrect forum\textsuperscript{150} or where mandamus would have been a proper remedy,\textsuperscript{151} the court is likely to either refuse to decide the case on the merits or hold that the proposed amendment is valid.\textsuperscript{152}

\textsuperscript{147} Id. at 828, 125 S.W.2d at 122 (Mehaffy, J., concurring). Justice Mehaffy's concurring opinion was the first in Arkansas to articulate the presumption. However, the court in \textit{Chaney} did not cite to Mehaffy's concurrence as authority for the presumption. \textit{See Chaney}, 259 Ark. at 298-300, 532 S.W.2d at 744-45.

\textsuperscript{148} See, e.g., \textit{Hannah v. Deboer}, 311 Ark. 215, 843 S.W.2d 800 (1992); \textit{Becker v. McCuen}, 303 Ark. 482, 798 S.W.2d 71 (1990); \textit{cf.} \textit{Berry v. Hall}, 232 Ark. 648, 339 S.W.2d 433 (1960) (refusing on other grounds to hear a challenge to a proposed amendment which was filed at the eleventh hour).

\textsuperscript{149} \textit{See supra} note 148. \textit{But see} \textit{Becker v. McCuen}, 303 Ark. at 490, 798 S.W.2d at 75 (Glaze, J., concurring) (stating that the measures should appear on the ballot in light of the last minute circumstances); \textit{see also infra} note 152. Practically speaking, however, eleventh hour filing can be detrimental to a challenge of a proposed amendment. The justices will have less time to weigh all the arguments. In addition, an eleventh hour filing makes it impossible for the court to strike the proposal from the ballot because the ballots will have already been prepared; the only available relief would be to enjoin the Secretary of State from certifying and canvassing the results of the election. \textit{See, e.g.}, \textit{Christian Civic Action Comm. v. McCuen}, 318 Ark. 241, 884 S.W.2d 605 (1994); \textit{see infra} notes 153-54 and accompanying text.

\textsuperscript{150} \textit{Berry v. Hall}, 232 Ark. 648, 339 S.W.2d 433 (1960) (holding that the challenge was made at the last minute and the lawsuit was filed originally and wrongly with the Arkansas Supreme Court rather than a chancery court).

\textsuperscript{151} \textit{Becker}, 303 Ark. at 482, 798 S.W.2d at 71 (holding that the challenge was made at the last minute and mandamus would have been the proper relief).

\textsuperscript{152} \textit{See, e.g.}, \textit{Hannah v. Deboer}, 311 Ark. 215, 220, 843 S.W.2d 800, 803 (1992); \textit{Becker}, 303 Ark. at 482, 798 S.W.2d at 71; \textit{cf.} \textit{Berry v. Hall}, 232 Ark. 648, 339 S.W.2d 433 (1960) (refusing on other grounds to consider an eleventh hour challenge). The concurring opinion by Justice Glaze in \textit{Becker} lays the foundation for an argument that a last minute challenge, by itself, should preclude a
4. Relief

Typically, a party challenging the validity of an amendment proposed by the General Assembly seeks to enjoin the acting Secretary of State from placing the proposed amendment on the general election ballot. If it appears that the lawsuit will be decided after the Secretary of State has printed the ballots, a party may, in the alternative, seek to enjoin the Secretary of State from canvassing and certifying the results of the election. Of course, if the relief requested by the petitioner is impossible or impracticable under the circumstances, the court may exercise its equitable powers and fashion a proper remedy.

CONCLUSION

The Arkansas Supreme Court should reconcile the current ballot title and popular name requirements for legislatively proposed amend-
ments with the requirements for initiated amendments. The constitutional history of the amendment process demonstrates why the requirements for ballot titles and popular names should be the same for both types of proposed constitutional amendments. Adhering to a standard that is more deferential to the legislature does not comport with the intent of the drafters of our current constitution. The state adopted the current method for amending the constitution at a time when the drafters did not trust politicians and wished to place more power in the people. Thus, it is contrary to the spirit and intent of the original drafters to subject ballot titles on amendments proposed by the legislature to lesser scrutiny than ballot titles on amendments initiated by the people.

Apart from the drafters’ intent, another reason Arkansas should have the same standards for ballot titles and popular names on both types of proposed amendments is that having two standards is fundamentally unfair. The General Assembly’s ballot title standard is far easier to meet, but the court has advanced no legitimate reason why the legislature should be given more deference than the people. It is unfair for the court to impose strict, judicially created requirements on only Amendment VII ballot titles and popular names without at least articulating a legitimate reason for the double standard.

156. The author hopes that the conclusion in this “practitioner’s guide” aids the lawyer in her efforts to persuade the Arkansas Supreme Court to change the ballot title and popular name requirements for legislatively proposed amendments. Although this comment covers a broad spectrum of issues, the ballot title and popular name requirements present the most obvious target for reform. Consequently, this conclusion narrowly focuses on the reasons such reformation is necessary.

157. It is a general rule of construction that the intent of the drafters at the time the law was enacted is controlling. See Mears v. Arkansas State Hosp., 265 Ark. 844, 846, 581 S.W.2d 339, 340 (1979).

158. See supra notes 36-43 and accompanying text.

159. See supra notes 109-10 and accompanying text.

160. See supra note 110 and accompanying text.

161. Generally, the people's reserved power of initiative is greater than the power of the legislature. Rossi v. Brown, 889 P.2d 557 (Calif. 1995). If the people's power be greater than the legislature's, why are people's initiated amendments subject to a stricter scrutiny than legislatively proposed amendments in Arkansas? There is very likely no legitimate reason. Other states typically have more stringent requirements for legislatively proposed amendments than for initiated amendments. Cf. Hilsinger v. Secretary of the Commonwealth, 444 N.E.2d 936 (Mass. 1983) (stating that under the Massachusetts Constitution, an initiated amendment must be approved by the legislature, but it requires fewer votes than a legislatively proposed amendment to be submitted to the people for adoption). The reasoning adopted by the Arkansas Supreme Court is partly based on the proposition that
Another reason that Arkansas should have the same standards for ballot titles and popular names for both initiated amendments and legislatively proposed amendments is that it seems logical to have one uniform standard. In *Becker v. McCuen*, Justice Glaze illuminated the simple logic of a uniform standard in his concurring opinion when he wrote: "Certainly, no one would seriously argue that public officials should have greater discretion or latitude to mislead voters when wording ballot titles than do citizens who initiate constitutional proposals."

Consistent with the principles of fairness and logic, and in light of the drafters' intent, requirements for ballot titles and popular names on amendments initiated under Amendment VII should be applicable to ballot titles and popular names on amendments proposed by the General Assembly. However, if the court's past reluctance to address the issue is any indication of its future disposition, the double standard may remain a part of Arkansas law despite the preponderant arguments in favor of reform.

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162. Uniform standards might be beneficial for other matters besides just requirements for ballot titles and popular names. For example, both publication requirements and jurisdiction are different for the two methods of proposing amendments. See supra notes 92, 131 and accompanying text. However, the plain language of the constitution requires differing standards for publication and jurisdiction. See supra notes 91, 132 and accompanying text. In fairness to the court, these are not matters that can be changed by judicial interpretation; rather, the Arkansas Constitution would have to be amended.

Interestingly, several members of the 80th General Assembly during the 1995 Regular Session attempted to amend the constitutional provisions that govern constitutional amendments. They introduced proposed amendments that were intended to change publication requirements and give the Arkansas Supreme Court original jurisdiction over cases involving legislatively proposed amendments. See supra notes 93, 131. The concept of uniform standards apparently appeals to more people than simply law students and legal scholars.


164. *See supra* note 111.