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Constitutional Law—Ballot Initiatives and Direct Democracy—Amendment 100 to the Arkansas Constitution: Constitutional Issues Surrounding Ballot Initiatives and Local Legislation

Michael Stiritz

CONSTITUTIONAL LAW—BALLOT INITIATIVES AND DIRECT DEMOCRACY—AMENDMENT 100 TO THE ARKANSAS CONSTITUTION: CONSTITUTIONAL ISSUES SURROUNDING BALLOT INITIATIVES AND LOCAL LEGISLATION

I. INTRODUCTION

The local politics of Pope County, Arkansas, erupted into turmoil in the summer of 2018. After uneventful decades, proposed Amendment 100 to the Arkansas Constitution came on the horizon in the form of a ballot initiative circulating the state. The proposed amendment, "The Arkansas Casino Gaming Amendment of 2018" (hereinafter "Amendment 100" or "the Amendment"), upset the political equilibrium of Pope County. The Amendment sought to authorize casino gaming in Arkansas, but in a very specific form.[1] The Amendment's regulations (exceptionally long and detailed for a constitutional amendment) specify four counties for authorized casino licenses: Garland, Crittenden, Jefferson, and Pope.[2] From its uncertain start as a ballot initiative petition that summer, the Amendment became a more concrete possibility when the Secretary of State certified the petition signatures and the issue was placed on the November 2018 statewide ballot.[3] At the election, the Amendment passed by a four percent margin across the state and became part of the Arkansas Constitution.[4]

The Amendment, before and after passage, has divided Pope County and brought on serious accusations of local government corruption. While the issue was "up in the air," county residents divided on the desirability of having a casino. Some challenged the sufficiency of the ballot title.[5] A county-wide ballot initiative offered Pope County voters the choice to vote for or against an ordinance designed to give control over the casino decision to local voters by requiring the quorum court or county judge to wait until county residents had voted to approve the issuance of a letter of support, a necessary part of the casino license application under Amendment 100.[6]

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1. ARK. CONST. amend. C, § 3, cl. (a).
2. *Id.* at § 4, cl. (i)–(k).
3. ARKANSAS SECRETARY OF STATE, NOTICE FOR CONSTITUTIONAL AMENDMENT PROPOSED BY PETITION OF THE PEOPLE (2018), https://www.sos.arkansas.gov/uploads/elections/Issue_4_for_Website.pdf.
4. Arkansas Secretary of State, *Issues*, 2018 GENERAL ELECTION RESULTS FOR ARKANSAS, https://results.enr.clarityelections.com/AR/92174/Web02-state.226435/#/c/C_4 (last updated June 6, 2019, 10:09 AM).
5. *See, e.g.*, Knight v. Martin, 2018 Ark. 280, 556 S.W.3d 501; Stiritz v. Martin, 2018 Ark. 281, 556 S.W.3d 523.
6. ARK. CONST. amend. C, § 4, cl. (n).

Pope County voters passed the ordinance sixty-eight percent to thirty-two percent in the same election where they rejected the proposed constitutional amendment sixty percent to forty percent.[7]

Since the Amendment's passage, vocal groups of Pope County residents on both sides of the issue have continued to war about the desirability of a casino. The issue has also made a rift between local officials and their constituents. Even though an overwhelming percentage of Pope County voters voted for the local ordinance, the Pope County Quorum Court voted in August 2019 to issue a resolution in favor of a would-be casino applicant.[8] In issuing the resolution, the quorum court did not comply with the ordinance's requirements, even though no court had yet ruled on the validity of the ordinance.[9] The quorum court eventually repealed the ordinance, and the county judge issued a letter of support for the same applicant.[10]

The conflict continues to play out at both state and local levels. For example, over a year after Amendment 100 passed, the casino issue dominated the justice-of-the-peace races in Pope County.[11] The Arkansas Racing Commission, tasked with choosing a casino licensee, did not choose an applicant until the summer of 2020; the Commission then chose an applicant whose local support came from outgoing officials immediately following the Amendment's passage.[12] Litigation between rival casino applicants is ongoing.[13]

This situation is not the result of some underlying turmoil in Pope County that finally broke out. An unusual, perhaps unprecedented, set of circumstances sparked the action: through the ballot initiative process, the people of Arkansas (the whole state) approved a constitutional amendment

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7. Arkansas Secretary of State, *2018 General Election Results for Pope County, Arkansas*, https://results.enr.clarityelections.com/AR/Pope/92233/Web02.221448/#/ (last updated Nov. 16, 2018, 4:19 PM).

8. Jeannie Roberts, *JPs Opt to Back Cherokee Group for New Casino, Hotel near I-40*, ARK. DEMOCRAT GAZETTE (Aug. 14, 2019, 7:08 AM), https://www.arkansasonline.com/news/2019/aug/14/jps-opt-to-back-cherokee-group-for-new-/.

9. *Id.* A Pope County judge later ruled that the ordinance unconstitutionally conflicted with Amendment 100; the Supreme Court of Arkansas dismissed the appeal of the decision as moot after the quorum court repealed the ordinance. Citizens for a Better Pope Cty. v. Cross, 2020 Ark. 279, at 2, 606 S.W.3d 580, 580.

10. *Citizens for a Better Pope Cty.*, 2020 Ark. 279, at 2–4, 606 S.W.3d at 580–81.

11. Jeannie Roberts, *Divisions on Pope County Casino Fueling Justice-of-the-Peace Races*, ARK. DEMOCRAT GAZETTE (Feb. 9, 2020, 9:13 AM), https://www.arkansasonline.com/news/2020/feb/09/divisions-on-casino-fueling-jp-races-20/.

12. Jeannie Roberts, *Consultant Picks Cherokees' Casino Bid as Best*, ARK. DEMOCRAT GAZETTE (July 23, 2020, 7:20 AM), https://www.arkansasonline.com/news/2020/jul/23/consultant-picks-cherokees-casino-bid-as-best/?business.

13. *See, e.g.*, *Tribe Suing Rival Company Over Casino Annex in Pope County*, AP NEWS (Oct. 14, 2020), https://apnews.com/article/arkansas-lawsuits-russellville-courts-29644809aef93a0bbb6ccc95ed704b0a.

that acts as local legislation, affecting far less than the state as a whole, over the opposition of an affected location. The aftermath in Pope County demonstrates the inadequacy of a statewide ballot initiative process to create local legislation in a dependably healthy manner. A close look at the text of the ballot initiative provision itself combined with interpretive aids casts doubt on the proposition that such a use of the ballot initiative process is itself constitutional. This note argues that the ballot initiative resulting in Amendment 100 to the Arkansas Constitution of 1874 was unconstitutional because the people of Arkansas as a whole have not reserved the power to enact local legislation, and further that the ballot initiative process is unsuited generally for enacting local legislation on a statewide level.

Part II of this note gives a brief explanation of how the ballot initiative works and traces the sometimes-murky path the Supreme Court of Arkansas has followed in defining local legislation. Part III then explores the history of the ballot initiative in Arkansas and how Arkansans have used the process to enact legislation. Part IV examines how Arkansans have approached enacting local legislation in the past, especially through the ballot initiative process. In particular, Part IV focuses on the amendment to the ballot initiative provision, which clarified counties' and municipalities' power to use the ballot initiative process to enact local legislation. Part V examines the textual arguments against Arkansans' exercise of local legislative power at the state level, while Part VI looks at the policy arguments against it. Lastly, Part VII applies these concepts to Amendment 100, arguing that in enacting Amendment 100, the people of Arkansas exceeded the power they reserved in the ballot initiative process.

II. OVERVIEW OF BALLOT INITIATIVES AND LOCAL LEGISLATION

Understanding how ballot initiatives and local legislation intersect in the passage of Amendment 100 requires a general knowledge of each of those concepts separately. Part A of this section looks at how ballot initiatives work, both in the United States more broadly and the particular form the process has taken here in Arkansas. Part B focuses only on Arkansas in discussing how to define local legislation and how the voters, legislators, and Supreme Court of Arkansas have treated it over the years.

A. Ballot Initiatives[14]

Ballot initiatives are a common legislative device, available in nearly half the states.[15] Arkansas is one of fourteen states, along with the District of Columbia, which have a "direct initiative" process.[16] An additional seven states have a modified "indirect initiative" process.[17]

A direct initiative is characterized by "submission of proposed statutes to the ballot for a popular vote without any intervention of the state legislature."[18] Arkansas has a typical direct initiative provision. Arkansas's Initiative and Referendum provision is incorporated into the beginning of the Legislative Department section of the Arkansas Constitution.[19] The current text provides as follows: "The legislative power of the people of this State shall be vested in a General Assembly, . . . but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly."[20]

The purpose of the ballot initiative process is to provide voters with a way around the legislative process, but the initiative is a potentially dangerous tool. Ballot initiatives are specifically designed to bypass the traditional legislative process,[21] and the very circumvention ballot initiatives achieve is a double-edged sword, drawing both praise and blame. When ballot initiatives first became popular in the early 1900s, they were introduced as a way to counteract legislatures overly influenced by "monied interests."[22] To this day ballot initiatives are often touted as pure expressions of the People's will.[23] Practical developments, though, have cast doubt on the legitimacy of

14. The initiative process generally has been challenged as a violation of the Guaranty Clause of Section 4, Article IV of the Constitution of the United States, though the Supreme Court of the United States held soon after states began using these processes that the issue is a non-justiciable political question. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). That discussion is beyond the scope of this note but is an important aspect of the conversation surrounding direct democracy.

15. HAREL ARNON, A THEORY OF DIRECT LEGISLATION 18 (2008); *see also* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1509 n.22 (1990) (discussing the variations on direct democracy available in different states and listing the states in which they are available).

16. ARNON, *supra* note 15, at 18; ARK. CONST. art. V, § 1.

17. ARNON, *supra* note 15, at 18.

18. *Id.*

19. *See* ARK. CONST. art. V, § 1.

20. *Id.*

21. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 396 (2003).

22. John M.A. DiPippa, *The Constitutionality of the Arkansas Ballot Question Disclosure Act*, 12 U. ARK. LITTLE ROCK L. REV. 481, 481 (1989).

23. Staszewski, *supra* note 21, at 399.

the claim that ballot initiative measures avoid the influence of well-resourced private interests.[24] Scholars have also noted that voters-as-a-whole are rarely the true source of ballot initiatives; instead, voters are typically accepting or rejecting initiatives put forth by special interest groups.[25]

Ballot initiatives have inherent dangers in their operation and application because none of the accountability or safeguards built into our political system of representative democracy check the ballot-initiative method of legislating.[26] The representative legislative process "offers time for reflection, exposure to competing needs, and occasions for transforming preferences."[27] "Popular masses," on the other hand, "too quickly form preferences, fail adequately to consider the interests of others, and are overly susceptible to contagious passions and the deceit of eloquent and ambitious leaders."[28] Compounding these problems in practice, ballot initiative measures often enact law in vexed and controversial areas of policy, even while they leave behind the safeguards intended to keep legislation well-grounded and rational.[29]

The initiative process operates beyond the statewide level. In Arkansas, the current initiative provision specifically provides for ballot initiatives at the county and municipal levels.[30] The people of Arkansas emphatically intended for the ballot initiative to function on this smaller scale: after the Supreme Court of Arkansas held that there was no such power in the initiative provision as originally adopted, voters amended the Constitution to clarify that the voters of municipalities and counties can use the process to enact local legislation.[31]

B. Local Legislation

Local legislation in Arkansas has had a troubled history. At the state legislature level, Amendment 14 to the Arkansas Constitution prohibits the General Assembly from passing any local or special act.[32] Arkansans passed

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24. *See* DiPippa, *supra* note 22, at 481–82 (summarizing concerns surrounding the power of financial interests and citing a study that found "the financially dominant side won eleven out of the fourteen ballot contests studied").

25. Staszewski, *supra* note 21, at 399.

26. *Id.* at 398.

27. Eule, *supra* note 15, at 1527.

28. *Id.* at 1526–27.

29. Staszewski, *supra* note 21, at 396, 398.

30. *See* ARK. CONST. art. V, § 1.

31. *See infra* Part III.

32. ARK. CONST. amend. XIV. Local laws are also distinct from special laws in that special laws apply to specific people or groups of people, while "local" refers specifically to geographical distinctions. Streight v. Ragland, 280 Ark. 206, 213, 655 S.W.2d 459, 463 n.10 (1983).

this amendment by ballot initiative at a time when the General Assembly was spending massive amounts of time considering and enacting local legislation.[33] The new amendment replaced earlier constitutional provisions that had tried to hedge the legislature's involvement in local legislation, but that the legislature had routinely ignored.[34]

A prohibition against local legislation of course requires an answer as to what constitutes local legislation. On its face, Arkansas case law draws a deceptively simple distinction between general and local legislation. Early cases define the difference straightforwardly, but later courts have applied the law in surprising or even twisted ways without explicitly overruling prior decisions. The difference between a general law and a local law is easy to say but harder to identify in action: a general law applies to the whole state without making any geographical distinctions;[35] a local law applies only to part of the state rather than applying equally to the entire state.[36] A law cannot be a general law and a local law at the same time; the two are incompatible.[37]

The effect of a law is what renders it local legislation, not its language.[38] For example, the Supreme Court of Arkansas held in *Thomas v. Foust* that a law that applied only to "those portions of school districts which become cut off from the body of the district by a reservoir and in cases where the students of the portion cut off must travel more than 20 miles through another school district to attend school in their own district" was a local or special law, impermissibly enacted by the legislature.[39] What made it local, though, was not the classification itself, which might have been permissible,[40] but instead it was the "nonprospective" nature of the classification—to fall under the statute, the school district must have qualified on January 1, 1964.[41] Thus, the specific areas to which the law applied were already determined, and there was no way for the law's remedies to apply to other school districts that might later find themselves in the same situation.[42]

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33. Mark James Chaney, Comment, *Streight Curve: The Knuckleball Interpretation of "Local and Special Acts"*, 66 ARK. L. REV. 705, 708–10 (2013).

34. *Id.*

35. Bd. of Trs. v. Beard, 273 Ark. 423, 426, 620 S.W.2d 295, 296 (1981) (quoting Thomas v. Foust, 245 Ark. 948, 951, 435 S.W.2d 793, 795 (1969)).

36. *Id.*; *see also* Webb v. Adams, 180 Ark. 713, 23 S.W.2d 617 (1929) (finding a law to be local legislation that applied to all of Arkansas except for two counties and a school district).

37. *Webb*, 180 Ark. at 716, 23 S.W.2d at 619.

38. *Id.*

39. 245 Ark. 948, 952, 435 S.W.2d 793, 795–96 (1969).

40. *See infra* notes 39–42 and accompanying text.

41. *Thomas*, 245 Ark. at 952, 435 S.W.2d at 796.

42. *Id.*

In practice, Amendment 14 has not acted as an absolute bar to legislation that applies to less than the whole state.[43] The Supreme Court of Arkansas explained in *Simpson v. Matthews* that the legislature may enact laws that only apply to specific areas of the state so long as the geographical classifications have a "reasonable relation" to legislative goals.[44] The *Simpson* court further clarified that to meet this standard, the classification had to "be based upon substantial distinction which makes one class really different from another . . . . [and] some material reason suggested by some difference in the situation of the subject which would suggest the necessity for different legislation with respect to them."[45] A strong presumption of constitutionality under standards of judicial review has led to a body of case law upholding a variety of classifications as reasonably related to legislative purposes, even when they apply only to a very small portion of the state.[46]

At the time the court decided *Phillips v. Giddings* in 1983, it still emphasized that the class in the statute in question was an open class and "[p]rospectively, a substantial number or all of the state's [school] districts could fall within this classification," but the prohibition on local legislation had lost much of what force it ever had.[47] Less than fifteen years later, the court upheld a statute that expressly applied only to Pulaski County because it found there was a rational basis for geographically limiting the application of the law.[48] Despite the sometimes bizarre interpretation and the strong reluctance of the Supreme Court of Arkansas to invalidate any laws on the basis of this definition, the statement that local legislation "arbitrarily applies to one geographic division of [the] state to the exclusion of the rest of the state" remains the letter of the law.[49]

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43. *See generally Webb*, 180 Ark. 713, 23 S.W.2d 617.

44. 184 Ark. 213, 217–18, 40 S.W.2d 991, 992–93 (1931).

45. *Id.* at 218, 40 S.W.2d at 993. The court held that there was no reasonable relationship between a law granting county courts the right to condemn lands to build reservoirs in hilly and mountainous counties and the same law's requirement that the county have a population of 75,000 or more. It therefore invalidated the law as improperly enacted local legislation. *Id.*

46. *See, e.g.*, Phillips v. Giddings, 278 Ark. 368, 646 S.W.2d 1 (1983) (upholding statute that applied at the time of enactment only to one county); Le Maire v. Henderson, 174 Ark. 936, 298 S.W. 327 (1927) (same).

47. *Phillips*, at 371, 646 S.W.2d at 2.

48. McCutchen v. Huckabee, 328 Ark. 202, 210, 943 S.W.2d 225, 228 (1997). By this logic-defying linguistic trick, the court found that the act "was not local legislation," despite its explicit application to one county only, with no other possible participants. *Id.*

49. *Id.* at 208, 943 S.W.2d at 227.

III. ARKANSAS'S BALLOT INITIATIVE PROVISION

A. History and Development

Arkansas's Initiative and Referendum provision has developed over time, and the changes it has sustained are important to understanding how it interacts with local legislative power. As originally enacted in 1910, the initiative and referendum provision said, "'The people of each municipality, each county and of the State reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly.'"[50] Later the court would note that "no one doubts . . . that the people . . . thought they were providing for local legislation in counties by initiating acts."[51]

In *Hodges v. Dawdy*, however, the court found that there was no way to interpret the original provision in such a way as to allow counties and municipalities to enact local legislation without leading to untenable results.[52] Of particular note for the purposes of this note, the *Hodges* court held that the people of the counties could not reserve the power to themselves to enact any legislation because they did not have that power in the first place; they had no inherent legislative power apart from the people of the state as a whole.[53] The court added the caveat that it did "not mean to say that the word 'reserve' could not be used in a sense which meant a delegation of power."[54]

After *Hodges*, the people of Arkansas amended the Initiative and Referendum provision to clarify the power of the people of the counties and municipalities to use direct democracy procedures for local legislative purposes.[55] The newly amended provision, still in force today, covers that power in a section entitled "Local for Municipalities and Counties."[56] It provides that "[t]he initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties."[57] The only limitation given as to subject

50. Dozier v. Ragsdale, 186 Ark. 654, 655–56, 55 S.W.2d 779, 780 (1932) (quoting 1909 Ark. Acts 1239).
51. *Id.* at 656, 55 S.W.2d at 780.
52. 104 Ark. 583, 597, 149 S.W. 656, 662 (1912).
53. *Id.* at 595, 149 S.W.2d at 660–61.
54. *Id.* at 595, 149 S.W.2d at 661; *see also infra* Part V.
55. *See generally Dozier*, 186 Ark. 654, 55 S.W.2d 779.
56. ARK. CONST. art. V, § 1.
57. *Id.*

matter is that local legislation may not contradict the Arkansas Constitution or a general law of the state.[58]

The court's reasoning in *Dozier v. Ragsdale*, one of the first cases to interpret the freshly amended initiative provision, sheds light on the intended use of the initiative in the context of local laws.[59] The *Dozier* court found a great deal of significance in the people revising the amendment to plainly give initiative power to the counties.[60] The court notes that the reframing in plain language demonstrated a clear intention on the people's part to keep the power to pass all local laws.[61] Importantly, the court found that the people demonstrated that intention by putting in place a mechanism for county and municipality-level initiatives.[62]

The court also drew a connection between the amendment of the initiative provision and the passage of Amendment 14.[63] Amendment 14 forbade the legislature from creating local and special legislation.[64] This restriction can only be significant in combination with the initiative provision amendment allowing local initiatives if the court held the underlying assumption that the initiative process would only be used on a county or municipality level to enact local legislation. If the court had a statewide initiative in mind, there would be no significance between the co-incident enactment of Amendment 14 and the amendment to the initiative provision.

Later cases developed this same theme of the significance of the amended provision in the context of local legislation. In *Tindall v. Searan*, the Supreme Court of Arkansas again discussed the amendment to the initiative process, saying, "The fact that the people adopted this provision [allowing county and municipal-level initiatives] a second time, . . . shows clearly that the people intended to reserve to themselves the right to pass all local laws affecting the counties."[65] Again, this change does not bear the significance the court attributes to it if the original provision (on a statewide level) allowed for local legislation.

58. *Id.*
59. 186 Ark. 654, 55 S.W.2d 779 (1932).
60. *Id.* at 656–58, 55 S.W.2d at 780.
61. *Id.*
62. *Id.*
63. *Id.* at 657–8, 55 S.W.2d at 780–81.
64. *See supra* Part II.B.
65. 192 Ark. 173, 177, 90 S.W.2d 476, 478 (1936).

B. Putting It into Practice: Arkansans and the Ballot Initiative in Action

Over the years, Arkansans have used the initiative power many times on a statewide level.[66] A review of ballot titles and election results from 1938 until 2018 shows that initiated acts and amendments have appeared in most general elections,[67] and such measures both pass and fail regularly.[68] The initiative has typically been used to enact statewide laws and amendments that apply throughout Arkansas.[69]

There have been some attempts to use statewide ballot initiatives to enact legislation that only applies to specific counties.[70] These have had a surprisingly focused subject matter: there has been a strong connection between local legislation and proposed amendments dealing with gambling.[71] As discussed below, this is the type of controversial subject matter that is particularly problematic at the intersection of ballot initiatives and local legislation.[72] One of the previous gambling amendments naming a specific county has been passed.[73]

It does not appear that anyone has challenged the use of the statewide ballot initiative to enact local legislation, possibly because attempts to use the ballot initiative that way have been fairly rare and no amendment until now has passed over the opposition of the affected locale. Because no one has asked, the question of whether Arkansans have the power to use the initiative this way remains open. The rest of this note attempts to answer that question.

IV. THE TEXTUAL ARGUMENT: DO ARKANSANS HAVE THE POWER TO ENACT LOCAL LEGISLATION BY STATEWIDE INITIATIVE?

Arkansans' power to enact legislation through the initiative comes directly from Article V, Section I, of the Arkansas Constitution (hereinafter

66. *See* Arkansas Secretary of State, Initiatives and Amendments 1938–2018, https://www.sos.arkansas.gov/uploads/elections/Initiatives_and_Amendments_1938-2018_1.pdf (last visited Dec. 16, 2020) (listing nearly one hundred initiated acts and amendments since 1938).

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.*

71. *Id.* (*See, e.g.*, Proposed Amendment 50 of 1956, to permit horse racing and pari-mutuel wagering in Hot Springs; Proposed Amendment 55 of 1964, to allow wagering in Garland County; Proposed Amendment 4 of 1996, to allow voters in Hot Springs to authorize gambling and to establish a lottery; Proposed Amendment 5 of 2000, to authorize casino gambling in Sebastian, Pulaski, Garland, Miller, Crittenden, and Boone Counties.).

72. *See infra* Part VI.

73. ARK. CONST. amend. XLVI ("Horse racing and pari-mutuel wagering thereon shall be lawful in Hot Springs, Garland County, Arkansas.").

the "Initiative and Referendum provision" or "I & R provision"). The I & R provision, though broad, is not all-encompassing. The provision begins with the statement, "The legislative power of the people of this State shall be vested in a General Assembly."[74] Accordingly, the legislative power is by default vested in the legislature, not the people. The I & R provision reserves specific, delineated powers to the people, rather than a general legislative power.[75] The effect of the I & R provision is to carve out specific powers reserved to the people, and nothing in the provision implies that the people have reserved any powers beyond those named and described in the provision.[76]

The text of the portion relating to local initiatives supports the idea that the provision intended to leave local legislation to the counties and municipalities. The language authorizing counties and municipalities to utilize the initiative and referendum powers sweeps as broadly as possible: "The initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties."[77] The only limitation is that the local legislation cannot contradict the Constitution or a general law of Arkansas.[78]

The wording of this very limitation on subject matter suggests that the I & R provision was drafted with the expectation that local legislation would not be enacted on a statewide level. General laws are by definition not local legislation,[79] so by including the Constitution in the same phrase as "general laws," the I & R provision as amended assumes that the Constitution will function as generally applicable principles, not a substitute for local legislation. Under the I & R provision, it is barely more difficult to enact a constitutional amendment than a general law.[80] An initiative for a constitutional amendment requires the signature of ten percent of voters, while an initiative for any other type of law requires the signatures of only eight percent.[81] However, any measure, including an initiated amendment to the Constitution, becomes law if it receives a majority of votes cast on that measure.[82] Interpreting the I & R provision to mean that the people can enact only gen-

74. ARK. CONST. art. V, § 1.
75. *Id.* ("The first power reserved by the people is the initiative. . . The second power reserved by the people is the referendum.").
76. *See id.*
77. *Id.*
78. *Id.*
79. Webb v. Adams, 180 Ark. 713, 716, 23 S.W.2d 617, 619 (1929).
80. *See* ARK. CONST. art. V, § 1.
81. *Id.*
82. *Id.*

eral laws but may freely enact constitutional amendments that function as local legislation would make such a limitation toothless.

The history behind the amendment of the initiative provision also supports the proposition that the text was not intended to convey local legislative power to the people of the state as a whole. As discussed above,[83] the I & R provision was amended in response to *Hodges v. Dawdy*.[84] The *Hodges* court based its holding that the original I & R provision did not permit local initiatives in part by reasoning from the premise (based in the language of the provision) that "[t]he [I & R provision] does not confer power. It reserves it."[85] Therefore, the court reasoned, the I & R provision as originally enacted did not include a local legislation power because the people of each municipality and county did not have any pre-existing legislative power to reserve.[86] However, the court left open that possibility that "the word 'reserve' . . . could be used in a sense which meant a delegation of power."[87]

Evidently, the amendment to the I & R provision after *Hodges* used "reserve" in precisely the sense that the *Hodges* court contemplated as a possibility but rejected in the context of the earlier provision. As it stood after the amendment and to this day, the I & R provision "reserve[s]" the initiative and referendum powers to the voters of the municipalities and counties.[88] Under the *Hodges* court's reasoning, this use of the word "reserve" cannot mean that the voters of the municipalities and counties intended to keep power they already had, and instead must mean that the I & R provision delegates local legislative power to the smaller political units in question. Delegation, as a concept, usually implies that the delegating party has entrusted the task to the delegate, rather than simultaneously maintaining authority or responsibility to complete the same task.

The *Dozier v. Ragsdale* court implicitly followed this same line of reasoning when it interpreted the amendment to the I & R provision as "show[ing] clearly that [the people] intended to reserve to themselves the right to pass all local laws affecting the counties."[89] If the people's reservation of statewide power included the power to enact local legislation, then the significance of the amendment would not be to ensure the power to enact local legislation. Instead, its significance would only be that the people of the municipalities and counties *also* have the power to enact certain legislation. Accordingly, the amendment of the I & R provision constituted a dele-

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83. *See supra* Part III.
84. 104 Ark. 583, 149 S.W. 656 (1912).
85. *Id.* at 595, 149 S.W. at 660.
86. *Id.*
87. *Id.* at 595, 149 S.W. at 661.
88. ARK. CONST. art. V, § 1.
89. 186 Ark. 654, 655–57, 55 S.W.2d 779, 780 (1932).

gation of local legislative authority to the counties and municipalities, rather than simply an additional way to pass local legislation.

V. THE POLICY ARGUMENT: SHOULD ARKANSANS ENACT LOCAL LEGISLATION BY STATEWIDE INITIATIVE?

Regardless of whether or not Arkansans in fact reserved the power to enact local legislation through the statewide initiative process, there are compelling reasons not to use this method of legislating. Flaws common to the initiative process at any level make it uniquely unsuited for enacting local legislation.

To begin with, initiatives are frequently used to address controversial topics, making the resulting legislation unusually inflammatory.[90] The history of ballot initiatives in Arkansas is illustrative of the unintended consequences this phenomenon can have when a statewide initiative undertakes to enact local legislation.[91] Gambling, one of the most controversial topics Arkansas ballot initiatives has addressed consistently, has historically been tied to attempted local legislation.[92] When statewide initiatives impose particular controversial regulations on a subset of the state (regardless of whether that portion wants it), the process should increase concern over the specter of the "tyranny of the majority" already raised by direct democracy.[93]

Relatedly, voters will inevitably have varying degrees of interest in a particular measure.[94] This circumstance is known as the "intensity problem."[95] The intensity problem, though a concern in any exercise of direct democracy, is exacerbated by the use of a statewide initiative to enact local legislation.[96] Local legislation by definition applies only to part of the state, so the portion of the population living in that area will automatically have a greater interest than the rest of the state, while the remaining population will

90. Staszewski, *supra* note 21, at 396–97 ("The 2000 elections . . . placed directly before voters the issues of school vouchers, physician-assisted suicide, same-sex marriage and other gay and lesbian rights, gun control, campaign finance reform, bilingual education, gambling, medical use of marijuana, and sentencing for drug offenders, as well as . . . tax reform and environmental policy.").

91. *See infra* Part VI.

92. *See infra* notes 116–19 and accompanying text.

93. *See* Staszewski, *supra* note 21, at 401–06.

94. Sherman J. Clark, *Commentary: A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 450–51 (1998).

95. *Id.* ("The paradigmatic case of the intensity problem is that of a relatively apathetic majority prevailing over a significant minority with a great stake in the issue at hand.").

96. *See generally* Dennis C. Mueller, et al., *Solving the Intensity Problem in Representative Democracy*, *in* ECONOMICS OF PUBLIC CHOICE 54 (Robert D. Leiter & Gerald Sirkin eds., 1975), for a fuller discussion of the intensity problem in both direct and representative democracy, with a particular emphasis on the effects of geographical interests and representation.

have a correspondingly diminished interest. In short, such a process by its very nature amplifies the intensity problem beyond rescue.

The same circumstance opens the door to an unusual abuse: the people of the state can "pawn off" the immediate downsides of a piece of legislation onto a portion of the state, while the rest of the people reap only the benefits. Even if people disagree over the degree to which a measure has downsides, as in the case of the casino licensing amendment, people do not necessarily want to force a change on a specific group of people that does not want it. The people who would not choose to impose a measure on unwilling recipients are left in the dark because the entire state votes on initiative measures at once.[97] Someone who, knowing that the county opposed the law, would vote against a local law enacted at the state level might vote for the same law under the impression that "most people" would want whatever the proposed change was. Such a voter would not find out until after the vote that the county in question would not have chosen to enact that legislation.

The lack of political accountability in initiatives and the difficulty of amending an initiated measure hinder any potential response to local conditions following the election. First, there is no inherent political accountability to prevent abuses of the initiative process.[98] Voters are not up for reelection, nor do they necessarily have an interest in keeping a minority of the state happy, even if the majority does not particularly care about the outcome.[99] The checks and balances vital to our form of government disappear almost entirely in the context of initiatives, leaving portions of the state vulnerable to majoritarian tyranny influenced by special interest groups.[100]

Furthermore, initiated acts, particularly amendments to the Constitution, are difficult to amend or repeal. In the case of all initiated legislation besides constitutional amendments, measures can be amended or repealed only by another vote on another initiative, or by a two-thirds vote of the relevant legislative body.[101] In the case of local legislation, even if originally enacted on a statewide level, the General Assembly is limited to amending the law to make it a general law or repealing it altogether.[102] Either option still requires a two-thirds majority.[103]

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97. *See* ARK. CONST. art. V, § 1 ("All measures initiated by the people . . . shall be submitted only at the regular elections.")

98. Staszewski, *supra* note 21, at 398.

99. *See* Clark, *supra* note 94, at 450–51.

100. *See* Staszewski, *supra* note 21, at 421, 436.

101. ARK. CONST. art. V, § 1.

102. ARK. CONST. amend. XIV; Hall v. Ragland, 276 Ark. 350, 358, 635 S.W.2d 228, 233 (1982).

103. ARK. CONST. art. V, § 1.

For constitutional amendments, the legislature has no direct way to change the initiated amendment.[104] A majority of the legislature may approve a proposed amendment to the Constitution for submission to the voters, but the legislature may refer no more than three proposed amendments in any given election.[105] As with other legislation, voters can repeal or even make slight adjustments to the initiated amendment only by amending the Constitution once again.

This situation is particularly problematic given the circumstances under which voters adopt or reject initiatives. Typical voters, unlike legislators, do not spend extensive time debating and considering proposed legislation.[106] In fact, in its emphasis on making sure that the ballot title and popular name of the measure are sufficient, the Supreme Court of Arkansas has acknowledged that voters may consider an initiative for the first time in the ballot box.[107]

Consider this process in a situation like Amendment 100, which is too long and detailed to include in its entirety on a ballot. When voters were presented with the proposed amendment in the ballot box, this is what they saw:

> An amendment to the Arkansas Constitution to require that the Arkansas Racing Commission issue licenses for casino gaming to be conducted at four casinos in Arkansas, being subject to laws enacted by the General Assembly in accord with this amendment and regulations issued by the Arkansas Racing Commission ("Commission"); defining "casino gaming" as dealing, operating, carrying on, conducting, maintaining, or exposing for play any game played with cards, dice, equipment, or any mechanical, electromechanical, or electronic device or machine for money, property, checks, credit, or any representative value, as well as accepting wagers on sporting events; providing that individuals under 21 are prohibited from engaging in casino gaming; providing that the Commission shall issue four casino licenses, one to Southland Racing Corporation

104. The I & R Provision's requirement that "[n]o measure approved by a vote of the people shall be amended or repealed" except by a two-thirds vote of the relevant legislative body, combined with its definition of measure, which includes constitutional amendments, can possibly be read as affirmatively conveying power to the legislature to amend an initiated amendment. The Supreme Court of Arkansas, however, has rejected this reading as "inconceivable." Ark. Game & Fish Comm'n v. Edgmon, 218 Ark. 207, 209–11, 235 S.W.2d 554, 556–57 (1951).

105. ARK. CONST. art. IXX, § 22.

106. *See* Staszewski, *supra* note 21, at 398 ("Those structural safeguards [of representative democracy] are designed to encourage careful deliberation and reasoned decisionmaking [sic] in the legislative process.").

107. *See* Cox v. Daniels, 374 Ark. 437, 443, 228 S.W.3d 591, 595 (2008) ("[T]he ultimate issue is whether the voter, while inside the voting booth, is able to reach an intelligent and informed decision for or against the proposal and understands the consequences of his or her vote based on the ballot title.").

("Southland") for casino gaming at a casino to be located at or adjacent to Southland's greyhound track and gaming facility in Crittenden County, one to Oaklawn Jockey Club, Inc. ("Oaklawn") to require casino gaming at a casino to be located at or adjacent to Oaklawn's horse track and gaming facility in Garland County, one to an applicant to require casino gaming at a casino to be located in Pope County within two miles of Russellville, and one to an applicant to require casino gaming at a casino to be located in Jefferson County within two miles of Pine Bluff; providing that upon receiving a casino license, licensees will be required to conduct casino gaming for as long as they have a casino license providing that Southland and Oaklawn do not have to apply for a license and will automatically receive a casino license upon the Commission adopting rules and regulations to govern casino gaming; providing that the Commission shall require all applicants for the two remaining casino licensees, one in Pope County and one in Jefferson County to pay an application fee, demonstrate experience in conducting casino gaming, and submit either a letter of support from the county judge or a resolution from the county quorum court in the county where the casino would be located and, if the proposed casino is to be located within a city, a letter of support from the mayor of that city; providing that the Commission shall regulate all casino licensees; defining "net casino gaming receipts" as casino gaming receipts less amounts paid out or reserved as winnings to casino patrons; providing that for each fiscal year, a casino licensee's net casino gaming receipts are subject to a net casino gaming receipts tax of 13% on the first $150,000,000 of net casino gaming receipts or any part thereof, and 20% on net casino gaming receipts exceeding $150,000,001 or any part thereof; providing that no other tax, other than the net casino gaming receipts tax, may be imposed on gaming receipts or net casino gaming receipts; providing that the net casino gaming receipts tax shall be distributed 55% to the State of Arkansas General Revenue Fund, 17.5% to the Commission for deposit into the Arkansas Racing Commission Purse and Awards Fund to be used only for purses for live horse racing and greyhound racing by Oaklawn and Southland, as the case may be, 8% to the county in which the casino is located, and 19.5% to the city in which the casino is located, provided that if the casino is not located within a city, then the county in which the casino is located shall receive the 19.5%; permitting casino licensees to conduct casino gaming on any day for any portion of all of any day; permitting casino licensees to sell liquor or provide complimentary servings of liquor during all hours in which the casino licensees conduct casino gaming only for on-premises consumption at the casinos and permitting casino licensees to sell liquor or provide complimentary servings of liquor without allowing the residents of a dry county or city to vote to approve the sale of liquor; providing that casino licensees shall purchase liquor from a licensed Arkansas wholesaler; permitting shipments of gambling devices that are duly registered, recorded, and labeled in accordance with federal law into any county in which casino gaming is authorized; de-

> claring that all constitutional provisions, statutes, and common law of the state that conflict with this amendment are not to be applied to this Amendment.[108]

Expecting typical voters either to have a detailed knowledge of a proposal ahead of time or take in all this detail during the brief time in the ballot box strains credulity. In particular, voters have little incentive from a purely personal perspective to be familiar with the details of a proposal when the details do not necessarily affect them directly. Yet local legislation voted on at a state level creates this very situation.

Real-life dynamics of ballot initiatives, as opposed to their mythical status as direct expressions of the people's will, exacerbate the problems outlined above. Actual events cast serious doubts on the idea that ballot initiatives can avoid the influence of well-monied interest groups, the influence that concerned the original adopters of initiative provisions.[109]

Instead, ballot initiatives usually get to the ballot through the efforts of interest groups with a particular angle.[110] Those interest groups are motivated to write the proposed initiatives in a way that favors the group as much as possible while still passing the popular vote.[111] The initiative process does not have a debate or amendment stage—instead, the petition must be circulated with the full text of the proposal as it will be certified.[112] Voters who favor the general idea of a particular initiative enough to vote for it but would choose different details for enacting it have no opportunity to try to make those adjustments.

After an initiative has become law, it is very difficult to undo or amend.[113] The petition process is difficult, lengthy, and expensive for both sides, with some campaigns drawing millions of dollars to support the initiative process and promotion.[114] Resources can make all the difference in the

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108. Knight v. Martin, 2018 Ark. 280, 2–3, 556 S.W.3d 501, 504–05. Contrast this ballot title with the only other amendment to name a particular county, the entire text of which is as follows: "Horse racing and pari-mutuel wagering thereon shall be lawful in Hot Springs, Garland County, Arkansas, and shall be regulated by the General Assembly." ARK. CONST. amend. XLVI.

109. *See* DiPippa, *supra* note 22, at 481–82.

110. *See* Staszewski, *supra* note 21, at 420–21. Julian Eule provides an extreme example of a petroleum company that opposed a citizens' initiative with one of its own that tried to "mandate onshore drilling" but "incredibly appeared to oppose offshore drilling." Eule, *supra* note 15, at 1517–18.

111. *See* Staszewski, *supra* note 21, at 422.

112. ARK. CONST. art. V, § 1 ("[E]very such petition shall include the full text of the measure so proposed.").

113. *Supra* notes 101–05 and accompanying text.

114. *See* DiPippa, *supra* note 22, at 481; *see also* Arkansas Ethics Commission, *Local-Option/Ballot/Legislative Question Committee Filings*, ARKANSAS ETHICS COMMISSION,

outcome of a particular initiative.[115] Concerned voters may be left to the mercy of the interest groups with the necessary resources to push legislation through this cumbersome mode of enactment. All these considerations underlie the question of whether Amendment 100 was validly enacted by the voters of Arkansas.

VI. IN CONTEXT: THE VALIDITY OF AMENDMENT 100

To determine whether Amendment 100 was enacted through a valid initiative, the first question to answer is whether it is in fact local legislation. On its own terms, Amendment 100 applies only to four counties out of the entire state.[116] While the Garland and Crittenden County licenses were clearly intended to attach to the existing gambling facilities in those counties, Jefferson and Pope Counties do not appear to have particular characteristics that make them better suited to the purposes of the act than any number of other counties.[117] Accordingly, the amendment arbitrarily singles those counties out for different treatment without justification. The analysis does not even require an inquiry into the effect of the legislation to determine whether it is local or not because it is local on its face.

The policy reasons laid out above for not enacting local legislation through a statewide initiative are highlighted in the circumstances surrounding Amendment 100's enactment. Gambling has been a hotly contested topic in Arkansas for years.[118] Although Arkansas voters have rejected proposals to legalize various forms of gambling before, the state as a whole is apparently ready to accept casino gaming, at least in the form in which Amendment 100 presented the option.[119] Pope County, however, soundly

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http://www.arkansasethics.com/filings/ (last visited Oct. 27, 2019) (providing required filings listing campaign contributions to committees).

115. *See* DiPippa, *supra* note 22, at 481–85.

116. ARK. CONST. amend. C, § 4, cl (i)–(j).

117. *See generally id.* (providing no explanation for why Jefferson or Pope County was chosen). This conclusion is further supported by the fact that numerous other counties have been included in similar proposed amendments. *See, e.g.*, Lange v. Martin, 2016 Ark. 337, 500 S.W.3d 154 (dealing with proposed amendment to license casinos in Boone, Miller, and Washington Counties); Walmsley v. Martin, 2012 Ark. 370, 423 S.W.3d 587 (same in Pulaski, Miller, Franklin, and Crittenden Counties); Stilley v. Priest, 341 Ark. 329, 16 S.W.3d 251 (2000) (same in Sebastian, Pulaski, Garland, Miller, Crittenden, and Boone Counties); Scott v. Priest, 326 Ark. 328, 932 S.W.2d 746 (1996) (same in Boone, Garland, Chicot, Pulaski, and Miller Counties).

118. *See supra*, note 117, for a sampling of proposed amendments that would have allowed casinos to operate in various parts of Arkansas.

119. Arkansas Secretary of State, *Issues*, 2018 GENERAL ELECTION AND NON-PARTISAN JUDICIAL RUNOFF RESULTS FOR ARKANSAS, https://results.enr.clarityelections.com /AR/92174/Web02-state.216038/#/ (last updated June 6, 2019, 10:09 AM).

rejected the measure in the 2018 election.[120] Gambling is a divisive topic in Arkansas, and the "take-it-or-leave-it" nature of a ballot measure makes it all too easy to force, unwittingly or otherwise, the consequences of a controversial decision squarely onto an unwilling recipient.

The difficulty of amending an initiated provision may have exacerbated the turmoil over the past year. For example, neighboring Johnson County expressed an interest in having the casino instead of Pope County, since Pope County residents are fighting it.[121] Pope County, though, is now enshrined in the state constitution as one of only four places in the state that can legally have a casino.[122] There is no simple way to make a change to that provision. Both sides are thus stuck battling because of what was surely a tactical error in the casino proponents' drafting—it is hard to believe that the would-be casino operators *want* to have to fight the county tooth and nail for the necessary support for their license applications when neighboring counties are ready to welcome a casino.

Finally, Amendment 100 is the epitome of the "monied interest" concerns. It is no secret that casinos were behind the push to get the initiative on the ballot. Potential casino operators poured money into promoting the measure as well as actually getting the measure through logistically.[123] In contrast, the opposition to the measure was strongest in Pope County, but the groups fighting the provision were very low on resources.[124] Here we have a clear instance of a well-funded, very interested party using the ballot

120. Arkansas Secretary of State, *2018 General Election Results for Pope County, Arkansas*, https://results.enr.clarityelections.com/AR/Pope/92233/Web02.221448/#/ (last updated Nov. 16, 2018, 4:19 PM).

121. Max Brantley, *Now Comes the Promised Effort to Move a Casino from Pope to Johnson County. Lawsuit to Come.*, ARKANSAS TIMES: ARKANSAS BLOG (Feb. 26, 2019, 12:56 AM), https://arktimes.com/arkansas-blog/2019/02/26/now-comes-the-promised-effort-to-move-a-casino-from-pope-to-johnson-county-lawsuit-to-come. The referenced bill failed approximately a month later. Arkansas State Legislature, *Bill Status History of HB1563*, http://www.arkleg.state.ar.us/assembly/2019/2019R/Pages/BillInformation.aspx?measureno=HB1563 (last visited Oct. 25, 2019).

122. The locations are limited even further than the named counties. It is not just Pope County as a whole that is one of only four acceptable places; the Amendment requires that the casino be within two miles of the county seat. ARK. CONST. amend. C, § 4, cl. (k).

123. *See* Arkansas Ethics Commission, *Local-Option/Ballot/Legislative Question Committee Filings*, ARKANSAS ETHICS COMMISSION, http://www.arkansasethics.com (last visited Oct. 27, 2019). The three main ballot committees in support of Amendment 100 (then "Issue 4"), Driving Arkansas Forward, It's Our Turn, and Jobs for Pope County, received total contributions of $7,052,830.00, $2,629,426.65, and $70,000.00 respectively. *Id.*

124. *Id.* In contrast to the above, Family Council Action Committee BCQ, Ensuring Arkansas' Future, and Citizens for a Better Pope County a/k/a Citizens for Local Choice, the ballot committees opposing the amendment, received $1,600.00, $4,600.00, and $5,215.00 respectively. Vote No on Issue 4, Inc., also registered as a ballot committee opposing the amendment and reported $150,300.00 in contributions but did not report any expenditures as of the election. *Id.*

initiative to push through a measure that strongly favors casinos. Coupled with the amendment's localized effect, these factors have turned the amendment into poison for Pope County's local government.[125]

A. What This Note Is *Not* Arguing

This article is not arguing that the subject matter of Amendment 100 as a constitutional amendment is somehow in and of itself unconstitutional. It is a well-established principle that any amendment to a constitution automatically amends any portion of the existing constitution that is contrary to the amendment.[126] Furthermore, Amendment 100 explicitly states that any conflicting provisions of the Constitution or other laws are voided by the amendment.[127] If validly enacted, then, Amendment 100 abrogates any contradictory provisions and must be "constitutional." The question is whether the people of Arkansas reserved to themselves the power to enact Amendment 100 in the particular manner set forth in the I & R provision.

Amendments must be enacted according to set procedures; this principle underlies provisions like the I & R provision,[128] which lays out one way to amend the Constitution.[129] By extension, then, if a measure is enacted out of accord with the prescribed procedures, it is invalid.[130] Otherwise there would be no point in establishing any procedures at all. The people, like the legislature, must follow the guidelines set forth in the Constitution; "it is fundamental that the people, themselves, are bound by their own Constitution."[131]

Similar uncontroversial limitations extend to the people's power to enact measures on particular subject matter. For example, in *Donovan v. Priest* the Supreme Court of Arkansas struck down a proposed measure on the grounds that it was an attempt to indirectly propose an amendment to the Constitution of the United States.[132] In coming to that conclusion, the court

125. *See supra* Part I.

126. Hodges v. Dawdy, 104 Ark. 583, 591, 149 S.W. 656, 659 (1912) ("The amendment being the last expression of the popular will in shaping the organic law of the State, all provisions of the Constitution which are necessarily repugnant thereto must, of course, yield, and all others remain in force.").

127. ARK. CONST. amend. C, § 10.

128. *See supra* Part III.

129. Other provisions govern additional procedures for amending the Arkansas Constitution and specify the procedures that must be followed in those instances. *See, e.g.*, ARK. CONST. art. IXX, § 22; ARK. CONST. amend. LXX, § 2.

130. *See Martin v. Humphrey*, 2018 Ark. 295, at 8, 558 S.W.3d 370, 376 (holding an attempted referred amendment unconstitutional because it did not comply with article IXX, section 22 of the Arkansas Constitution).

131. Moore v. Brown, 165 S.W.2d 657, 659 (Mo. 1942) (citing 1 COOLEY ON CONSTITUTIONAL LIMITATIONS 81 (8th ed.)).

132. 326 Ark. 353, 371, 931 S.W.2d 119, 119 (1996).

adopted this language: "the pertinent issue in cases such as this one 'is *not* the hypothetical question whether the law, if passed, would be constitutionally defective; rather it is . . . *whether the measure's proponents are entitled to invoke the direct legislation process at all*.'"[133] The *Donovan* court was dealing with a potential conflict with the United States Constitution, but it recognized that there are "constitutional limitations [on the I & R powers that] derive from both the United States Constitution and this state's constitution."[134] Thus, the people's right to invoke the initiative power is bounded by the guidelines laid out in Article V. For all the reasons discussed above, the I & R provision does not permit the enactment of an amendment like Amendment 100.

The initiative process in Illinois provides an analogous situation, but one where this principle is easier to see in action because the Illinois Constitution so clearly delineates limitations on the subject matter for which voters can invoke the initiative process. Under the Illinois Constitution, voters can propose constitutional amendments through the initiative process, but initiated amendments may only deal with "structural and procedural subjects contained in Article IV."[135] For other subject matter, the initiative is not a valid way to amend the Constitution.[136] This subject-matter requirement is a threshold issue for the validity of a proposed amendment: in order for a proposed initiated amendment to go to Illinois voters, it "must comply with the procedure and the limitations on amendment set out in section 3."[137]

If the people of Arkansas wish to use the initiative process to enact local legislation in the form of constitutional amendments, then the proper course would be for them to first amend the initiative provision itself to permit that use of the initiative process, like the people did post-*Hodges* to allow for local use of the initiative and referendum processes.[138] Of course, everyone would then bear the risk that his or her own county, town, school district, or other division would someday be targeted for a measure that the voter opposes.[139] Unless and until the people of Arkansas go down that road, initiated amendments should be restricted to the general laws and correspondingly general amendments that the current I & R provision authorizes at a statewide level.

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133. Id. at 359, 931 S.W.2d 119, 119 (second emphasis added) (quoting James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 314 (1989)).

134. *Donovan*, 326 Ark. at 358, 931 S.W.2d at 119.

135. ILL. CONST. art. XIV, § 3.

136. Hooker v. Ill. State Bd. of Elections, 63 N.E.3d 824, 826 (2016).

137. Coal. for Political Honesty v. State Bd. of Elections, 359 N.E.2d 138, 141 (Ill. 1976).

138. *See supra* Part II.A.

139. This problem is in addition to all the policy problems discussed in Part VI, *supra*, which counsel strongly against such a choice.

There are certain situations, including invalid subject matter, that can call into question the ability of the electorate to use the initiative process in the first place. The ballot initiative that is now known as Amendment 100 exceeded the scope of the power the people of Arkansas reserved to themselves under the I & R provision. When the people are not entitled to invoke the direct legislation process, the resulting legislation cannot retroactively validate itself.

VII. CONCLUSION

Amendment 100 and the turmoil it has caused highlight the weaknesses of the underlying legislative procedures. Ballot initiatives, regardless of their other potential benefits, do not lend themselves to enacting local legislation on a statewide level. A careful reading of the I & R provision reveals that the Arkansas constitution does not grant voters the right to use this risky method of law-making, nor should it. The fallout is too ruinous.

When voters try to use initiatives to legislate for a smaller subset of the state, the process amplifies the weaknesses that already exist within a direct democracy system: the intensity problem, the potential for a "tyranny of the majority," the lack of checks on the legislative process, the difficulty of amending initiated provisions to reflect what voters want, and the ability of monied interests to push through legislation. These problems plague direct democracy in some measure regardless of the form it takes, but the inherent inequality between the group legislating and the group primarily affected makes these problems even worse in the situation described above.

The text of the I & R provision does not reserve to voters the right to use the initiative process in such a manner, the history and interpretation of the provision support that conclusion, and policy counsels strongly against using the initiative process that way. The ballot initiative process behind Amendment 100 was faulty, invalidating the amendment.

*Michael Stiritz**

* J.D. candidate, University of Arkansas at Little Rock, William H. Bowen School of Law; M.A., Arkansas Tech University; B.A., Wheaton College (IL). Thanks to the UALR Law Review staff for their excellent editing and support.