

CONSTITUTIONAL LAW – THE HISTORY OF THE INITIATED MEASURE IN NORTH DAKOTA: REMOVING THE PEOPLE’S POWER OR WATCHING FOR THE WOLF IN SHEEP’S CLOTHING?

North Dakota’s Initiated Measure System

W. LOGAN CALDWELL*

ABSTRACT

“We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this Constitution.”¹At the signing of the North Dakota Constitution, the citizenry created a state government to oversee them with the understanding that the people would ultimately hold the sovereign power. North Dakota also has checks and balances similar to the federal government. However, North Dakota also has a direct check by the people on the government in the form of initiatives and referendums. This direct democracy system exists in several states, and with it comes a few challenges.

In 1914, North Dakota adopted the initiative and referendum process, which gave its citizens the ability to enact laws, strike down laws, and amend the state constitution. This process has led to a lot of controversy within the state regarding whether the ability to change the North Dakota Constitution so easily is a good idea. In response to concerns, the Legislative Assembly has attempted to amend the constitution several times. So far, while there is some general acknowledgment that something needs to change, North Dakota has rejected every proposal to amend the constitutional amendment process since 1978. However, North Dakota is not the only state that has recognized an issue with its constitutional amendment process. As the laboratories of democracy continue their experiments, North Dakota should observe other states while working to resolve this issue.

*†Associate Attorney at Crowley Fleck PLLP in Bismarck, North Dakota. J.D., 2021, University of North Dakota School of Law, Grand Forks, North Dakota. M.B.A., 2016, University of Phoenix, Phoenix, Arizona. B.S., 2014, Biology, University of Jamestown. I would like to specifically thank my wife Annika for her steadfast support and ability to indulge my frequent rambblings regarding North Dakota’s Constitution. Also, I would like to thank the North Dakota Law Review and all those who advised and assisted in revising and editing this article.

1. N.D. CONST. pmbl.

I. INTRODUCTION	219
II. HISTORY OF THE INITIATED MEASURE SYSTEM	220
A. 1889: THE ORIGINAL NORTH DAKOTA CONSTITUTION.....	220
B. THE 1914 AMENDMENT: THE INITIATIVE PROCESS COMES TO NORTH DAKOTA.....	222
C. THE 1918 AMENDMENTS: LOWERING THE WALLS AROUND THE CONSTITUTION	223
D. THE POST 1918 AMENDMENTS: THE BATTLE OF SIGNATURES	224
E. THE 1978 AMENDMENTS: THE CONSTITUTIONAL CONVENTION’S LEFTOVERS.....	225
III. THE PROBLEMS WITH INITIATED CONSTITUTIONAL MEASURES	227
A. THE PROBLEM OF OUTSIDE INFLUENCE.....	228
B. THE PROBLEM OF JUDICIAL INTERPRETATION	230
C. THE PROBLEM OF CONSTITUTIONAL NATURE	233
IV. STRENGTHENING THE NORTH DAKOTA CONSTITUTION....	235
A. LIMIT THE SCOPE OF CONSTITUTIONAL AMENDMENTS – THE SINGLE SUBJECT RULE & SUBJECT RESTRICTIONS	235
B. REINSTATE THE SECRETARY OF STATE’S PETITION PAMPHLET	237
C. CHANGE THE MECHANICS OF INITIATED AMENDMENTS.....	237
1. <i>Petition Signatures</i>	238
2. <i>Ballot Box Vote</i>	239
3. <i>Review Vote</i>	241
V. CONCLUSION	243

I. INTRODUCTION

In North Dakota, “[t]he people are supreme in determining what the constitution shall be.”² The State Constitution not only creates the state government but also enshrines state values and protects individual liberties.³ While initially there was no mechanism for the people to initiate a constitutional amendment,⁴ North Dakota later amended the Constitution to allow the citizenry to hold this reserved power.⁵ North Dakota’s initiated amendment model is a recognition that the citizens of North Dakota hold sovereign power, and the electorate may only use that power as authorized.⁶ However, this model has created problems and left North Dakota’s Constitution in a weakened and vulnerable state.

Since adopting the initiated measure process in 1918, the people of North Dakota and the Legislative Assembly have been in tension over the Constitution. Part II of this note serves as a historical record of the initiated constitutional amendment process in North Dakota. Part III outlines problems that have arisen with the current initiated amendment process, and Part IV analyzes other states as sources of possible solutions to North Dakota’s Constitution.

First, some definitions need to be provided. *Pure democracy* refers to a system of government where the people hold sovereign power and can exercise that power at any time through specific channels.⁷ *Direct democracy*, also called *direct lawmaking*,⁸ refers to “any mechanism for an electorate to exercise political power without an intervening representative.”⁹ A *republic* is a system of government in which the people hold the sovereign power and exercise it through their elected representatives (collectively referred to as

2. Larkin v. Gronna, 285 N.W. 59, 60 (N.D. 1939); see N.D. CONST. art. III, § 8; N.D. CONST. art. IV, § 16.

3. *Constitution*, BLACK’S LAW DICTIONARY (10th ed. 2009) (“1. The entire plan or philosophy on which something is constructed. 2. The fundamental and organic law of a country or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties[.]”); see also N.D. CONST. art. I; THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 21 (reprint 2011); JOHN LOCKE, BOOK II OF CIVIL GOVERNMENT, ch. II, § 6 (1764) [hereinafter LOCKE, BOOK II OF CIVIL GOVERNMENT].

4. *History of Initiative and Referendum in North Dakota*, N.D. SEC’Y STATE (2020), <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=125&ptlPKID=1#content-start>; *Measures Before the Voters*, N.D. SEC’Y STATE, 2 (2020), <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=125&ptlPKID=1#content-start>.

5. N.D. CONST. art. III, § 1.

6. See, e.g., N.D. CONST. art. III, § 1; *Republic*, BLACK’S LAW DICTIONARY (10th ed. 2009).

7. *Republic*, BLACK’S LAW DICTIONARY (10th ed. 2009) (defining pure democracy as “the people or community as an organized whole wield the sovereign power of government[.]”).

8. Arizona State Legis. v. Arizona Indep. Redistricting Com’n, 576 U.S. 787, 793 (2015).

9. David A. Carrillo et al., *California Constitutional Law: Direct Democracy*, 92 S. CAL. L. REV. 557, 559 (2019).

the “electorate”).¹⁰ In a system of government where there is both an electorate and direct democracy, a natural tension will form. This tension can cause the government to be inefficient as the people (“citizenry”), and the people’s elected representatives (“electorate”) spend their time fighting over this power instead of acting together for the best interest of the state.¹¹

The threat of direct democracy keeps the citizenry more involved in their local government and forces the electorate to be more responsive and thoughtful about enactment.¹² The citizenry and electorate are forced to grapple with issues rather than ignoring them. “In other words, voters are more likely to get what they want, and the government they deserve, which may imply a difference between what scholars think is a measure of effective government and what that concept means to the electorate.”¹³

North Dakota’s direct democracy system is an overall good when viewed in a vacuum. However, when advocacy groups, sister states, or federal interests differ from North Dakota, amending the North Dakota Constitution is an easy way to get North Dakota to change policy stances in order to align with a larger movement. Some measure of protection should be in place to keep North Dakota’s Constitution safe.

II. HISTORY OF THE INITIATED MEASURE SYSTEM

North Dakota’s original Constitution did not include a mechanism for an initiated amendment. However, once added in 1914, tension arose and North Dakota has continually grappled with how to protect the liberty of the citizenry, while still protecting the state constitution from improper amendment and external attacks. The best way to consider the current issue is to view it in the context of the history of the state constitution and the initiated measure system.

A. 1889: THE ORIGINAL NORTH DAKOTA CONSTITUTION

On February 22, 1889, President Grover Cleveland signed The Enabling Act, which invited statehood for North Dakota, South Dakota, Montana, and Washington.¹⁴ Following the signing of The Enabling Act, North Dakota’s convention delegates met in Bismarck from July 4 to August 17, 1889, to

10. *Id.*

11. Carrillo, *supra* note 9, at 591; SHAUN BOWLER & AMIHAI GLAZER, DIRECT DEMOCRACY’S IMPACT ON AMERICAN POLITICAL INSTITUTIONS 16 (Palgrave Macmillan eds., 2008).

12. Carrillo, *supra* note 9, at 591.

13. *Id.*

14. Enabling Act, ch. 180 25 Stat. 676 (1889).

prepare a constitution for North Dakota.¹⁵ On October 1, 1889, North Dakotans approved the state's Constitution,¹⁶ leading to North Dakota's admission into the Union on November 2, 1889.¹⁷ The original Constitution for North Dakota laid out the process for a constitutional amendment in Article XV.¹⁸

Sec. 202. Any amendment or amendments to this Constitution may be proposed in either house of the Legislative 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 the journal of the house with the yeas and nays taken thereon, and referred to the Legislative Assembly to be chosen at the next general election ... and if in the Legislative 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 Legislative Assembly to submit such proposed amendment or amendments to the people ... and if the people shall approve and ratify such amendment or amendments by a majority ... such amendment or amendments shall become a part of the constitution of this state.¹⁹

As initially drafted, the North Dakota Legislative Assembly had the sole authority to propose amendments to the Constitution.²⁰ This was not uncommon as direct democracy was “virtually unknown when the Constitution of 1787 was drafted.”²¹ The Assembly would pass a proposed amendment in both chambers in two successive sessions. The measure could then be ratified by a majority vote of the people.²² This allowed for the elected officials to propose amendments in the ordinary course of legislation, but still protected the people's rights to liberty by affording them a veto right by simple majority vote.

15. JOURNAL OF THE CONSTITUTIONAL CONVENTION FOR NORTH DAKOTA, HELD AT BISMARCK, THURSDAY JULY 4 TO AUG. 17, 1889 353-400 (Bismarck, N. D.; Tribune, State Printers and Binders).

16. *A Clean Sweep*, BISMARCK TRIB., Oct. 4, 1889, at 1, col. 1.

17. Benjamin Harrison, *Proclamation 292: Admission of North Dakota Into the Union* (Nov. 2, 1889), <https://www.presidency.ucsb.edu/documents/proclamation-292-admission-north-dakota-into-the-union>.

18. R. M. TUTTLE, OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA, ASSEMBLED IN THE CITY OF BISMARCK; JULY 4TH TO AUG. 17TH, 1889 xxxiv (1889) [hereinafter OFFICIAL REPORT].

19. *Id.*

20. *Id.*

21. DONOVAN & BOWLER, AN OVERVIEW OF DIRECT DEMOCRACY IN THE AMERICAN STATES, IN *CITIZENS AS LEGISLATORS 1* (S. Bowler, T. Donovan, & C. Tolbert eds. 1998).

22. *Id.*; *History of Initiative and Referendum in North Dakota*, *supra* note 4.

Consistent with the United States Constitution, the amendment process was very strict.²³ During the debates of the convention in North Dakota, Erastus Williams from Burleigh County proposed increasing the burden to amend the Constitution even more, requiring a two-thirds vote rather than a majority vote in both chambers of the Legislative Assembly.²⁴ However, Williams's proposal to increase the threshold failed because the delegates saw the two successive session requirement as sufficiently burdensome.²⁵ From 1889 until the initiated constitutional amendment process was adopted in 1914, 19 amendments were proposed and 15 amendments were adopted.²⁶

B. THE 1914 AMENDMENT: THE INITIATIVE PROCESS COMES TO NORTH DAKOTA.

Shortly after adopting the North Dakota Constitution, the push for direct democracy²⁷ began with L. A. Ueland of Edgeley and Katherine King of McKenzie in 1902.²⁸ The measure to change the constitutional amendment process and add the initiative process was first introduced in 1907 and passed.²⁹ However, the measure did not pass in 1909 and was therefore not referred to the people for final vote. Ueland and King reintroduced the initiative and referendum amendment in 1911 where it successfully passed in two successive legislative sessions.³⁰ In 1914, North Dakotans approved the initiative and referendum process allowing citizens to amend the Constitution.³¹

The 1914 amendment did not allow citizens to directly change the Constitution. Instead, a petition signed by 25 percent of the voters in a majority of counties would be placed on the ballot for a vote.³² After a majority vote,

23. U.S. CONST. art. V; OFFICIAL REPORT, *supra* note 18, xxxiv; *History of Initiative and Referendum in North Dakota*, *supra* note 4.

24. OFFICIAL REPORT, *supra* note 18, at 497, 625. Incidentally, Williams was the one who introduced the draft constitution to the convention and had significant involvement in its amending and adopting; even though he concealed the true authorship of the draft constitution. Nicholas S. Samuelson, *Digging for Roots in all the Wrong Places: Rethinking the use of Secret Drafting Documents in Interpreting the North Dakota Constitution*, 95 N.D. L. REV. 495, 497 (2020).

25. OFFICIAL REPORT, *supra* note 18, at 497, 625.

26. *Measures Before the Voters*, *supra* note 4.

27. See generally Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295 (2008) (discussing the differing mechanisms of direct democracy in the United States).

28. *North Dakota*, INITIATIVE & REFERENDUM INST., <http://www.iandrinsti-tute.org/states/state.cfm?id=20> (last visited Dec. 9, 2021). Western states began a push of direct democracy around this time. Theories of why this push came from the west was because the west was settled by people who left the east coast in the 1890's and were frustrated with "the stagnant and sham political institutions controlled by the corporate trusts." Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 40 (1997).

29. *Id.*

30. *Id.*

31. *Measures Before the Voters*, *supra* note 4, at 2.

32. *Id.*

the amendment went through a *Legislative Review Vote*,³³ where the Legislative Assembly ratified or rejected the amendment.³⁴ If the Legislative Assembly passed the amendment, it became part of the Constitution. If the Legislative Assembly rejected the amendment, the people could override the Legislative Assembly by a subsequent majority vote.³⁵

C. THE 1918 AMENDMENTS: LOWERING THE WALLS AROUND THE CONSTITUTION

Only four years after adding the initiative and referendum process, the newly formed Non-Partisan League,³⁶ which later merged with the Democrat party,³⁷ put seven initiated constitutional amendments on the ballot for 1918.³⁸ Two of those amendments changed the initiative and referendum process, making it still easier to amend the North Dakota Constitution. The first amendment removed the legislative review vote and changed the signature requirement from 25 percent of the legal voters in a majority of counties to only needing 20,000 signatures total.³⁹ This change removed the Legislative Assembly from the initiated measure process and eliminated Legislative oversight over the North Dakota Constitution.

The second proposed amendment changed the Legislative Assembly's threshold for constitutional amendment from two successive Legislative sessions to one,⁴⁰ thereby making it easier for the Legislative Assembly to refer amendments to the people. The effect of these two amendments dropped the walls around the North Dakota Constitution, making it *vastly* easier to amend by both initiative and legislative referral.

33. *See infra* Part IV.C.iii.

34. *Id.*

35. The 1914 amendment was repropoed by the Legislative Assembly as Measure 2, placed on the November 2020 ballot. Measure 2 failed by a vote of 125,460 yes to 201,343 no. Statewide Measure Results, Official 2020 General Election Results, (Nov. 3, 2020) <http://www.iandrinstiute.org/states/state.cfm?id=20>.

36. *Our History*, N.D. DEMOCRATIC-NPL, <https://demmpl.com/about/> (last visited Apr. 6, 2022).

37. *Id.*

38. *Measures Before the Voters*, *supra* note 4, at 3.

39. *Id.* It is also important to note that at that time, 20,000 signatures represented roughly 3.2% of the entire population of the state. *See North Dakota*, DATA COMMONS PLACE EXPLORER (2020), <https://datacommons.org/place/geoId/38>.

40. *Measures Before the Voters*, *supra* note 4, at 3. This change in particular shows the deep shift in mindset from the first Legislative Assembly that wanted to build a protective procedural wall around the State Constitution. *See OFFICIAL REPORT*, *supra* note 18, at 625 (while discussing a majority versus a three-fourths vote of the Legislative Assembly for constitutional amendment, Delegate William E. Purcess from Richland stated, “[A constitutional amendment] will require a majority of two successive Legislatures before it can be submitted to the people, and it seems to me that that is safeguard enough to be thrown around our Constitution.”).

At the same time, the Legislative Assembly proposed three constitutional amendments.⁴¹ Notably, one of the legislative referrals increased the North Dakota Supreme Court's burden to strike down a law as unconstitutional.⁴² This change weakened the Supreme Court's oversight of the interpretation of the Constitution and shifted power to the Legislative Assembly, who enjoys presumed constitutionality.⁴³

All ten of the 1918 constitutional amendments were adopted.⁴⁴ This dramatically shifted control and oversight of the Constitution away from the Supreme Court and Legislative Assembly.⁴⁵ Regardless of opinion on whether the changes were positive or negative for the state, it is irrefutable that these amendments significantly lowered the protective walls around the North Dakota Constitution. From 1918 to 2020, North Dakota's Constitution has undergone 261 proposed constitutional amendments with 133 amendments adopted.⁴⁶

D. THE POST 1918 AMENDMENTS: THE BATTLE OF SIGNATURES

After removing the Legislative Review Vote in 1918, North Dakota began tweaking the initiative process.⁴⁷ Before an initiated amendment can be placed on the ballot, a petition must be approved by the Secretary of State.⁴⁸ Then, the approved petition must get the appropriate number of signatures.⁴⁹ The 1918 amendment set the signatures required on a petition at 20,000.⁵⁰ While the Legislative Assembly has never tried to remove the initiative process, there have been several attempts to increase the scrutiny of constitutional amendments.⁵¹ These attempts occurred from 1918-1978 and were generally a battle of signatures, with proposed measures attempting to

41. *Measures Before the Voters*, *supra* note 4, at 3.

42. *Id.* (mandating that the North Dakota Supreme Court needs a supermajority to hold something unconstitutional).

43. *Verry v. Trenbeath*, 148 N.W.2d 567, 571 (N.D. 1967).

44. *Measures Before the Voters*, *supra* note 4, at 3.

45. *Id.*

46. *Id.* at 3-34.

47. *Id.* at 3-23.

48. N.D. CENT. CODE § 16.1-01-09.

49. N.D. CONST. art. III, § 4.

50. *Measures Before the Voters*, *supra* note 4, at 3. In order for an initiated constitutional amendment to be placed on the ballot, 20,000 eligible North Dakota voters must sign the petition with their names and mailing addresses.

51. *See, e.g., id.* at 17 (a 1958 Legislative Constitutional Amendment changing the number of signatures required to initiate a constitutional amendment from 20,000 to 10 percent of the vote cast for Governor).

increase the number of signatures a petition must achieve before being placed on the ballot.⁵²

For 60 years, North Dakotans rejected every proposal sent by the Legislative Assembly.⁵³ During this time, the Legislative Assembly proposed eight different amendments to change the initiated measure system.⁵⁴ During the same time, 25 initiated constitutional measures were proposed⁵⁵ and North Dakota adopted 12 of them.⁵⁶

E. THE 1978 AMENDMENTS: THE CONSTITUTIONAL CONVENTION'S LEFTOVERS

In the 1960's, North Dakotans began contemplating updates to the Constitution.⁵⁷ There were a few attempts to tweak and modernize the language by amendment, but they ultimately failed.⁵⁸ As the public began to vocalize their concern over the Constitution, the 1969 Legislative Session reacted by passing a resolution calling for a constitutional amendment authorizing a State Constitutional Convention.⁵⁹ The people approved this amendment on September 2, 1970 (65,734 to 40,094), officially beginning the North Dakota Constitutional Convention process.⁶⁰

At the constitutional convention, there were four issues the delegates wanted the voters to decide on rather than the delegates decide.⁶¹ One of these changes was to the initiative and referendum process.⁶² Voters were given

52. *See, e.g.*, S.B. 144, 22nd Legis. Assemb., Reg. Sess. (N.D. 1931). This was the first attempt which would have increased the required signatures on the petition from 20,000 to 40,000. It was defeated at the ballot 51,459 (for) to 104,953 (against).

53. *See, e.g.*, H. Con. Res. 63, 27th Legis. Assemb., Reg. Sess. (N.D. 1941). After the two to one failure of the 1931 proposal, the Legislative Assembly was more modest in their second attempt by only proposing a signature increase from 20,000 to 30,000. This measure was on the ballot in June of 1942 and failed 52,275 (for) to 69,904 (against); Technically, the people did approve a constitutional amendment in 1972. However, that approval was part of the constitutional convention in 1972 which ultimately failed. *See infra* Part II.E.

54. *Measures Before the Voters*, *supra* note 4, at 8, 10, 12, 13, 17, 21, 23.

55. *Id.* at 7-8, 11-13, 15-20, 22.

56. *Id.*

57. David P. Gray, *Constitutional Convention, 1971-1972*, STATE HIST. SOC'Y OF N.D. (2020), <https://www.history.nd.gov/archives/stateagencies/consoncon1971.html#:~:text=Following%2016%20special%20public%20hearings,the%20government%20of%20North%20Dakota.>

58. *See, e.g.*, S.L. 1967, ch. 518, 40th Legis. Assemb., Reg. Sess. (N.D. 1967) (failed amendment that would have rewritten the constitution to remove unnecessary and archaic language).

59. Gray, *supra* note 57.

60. *Id.*

61. *Id.* Two of the four changes gave an “either or” option: 1) whether North Dakota would have a bicameral or unicameral legislature, and 2) whether the initiative amendment process should be stricter or not. The second two changes were “up or down” votes that would: 1) declare persons 18 or older to be adults for all purposes, and 2) prohibit the Legislative Assembly from having any power to authorize lotteries or gift enterprises. These four votes were all contingent on the passing of the 1972 proposed constitution. Because the Constitution failed to pass, these four votes became irrelevant.

62. *Id.*

two options.⁶³ Before being placed on the ballot, an initiated constitutional amendment would either require: 1) 25 sponsors,⁶⁴ Secretary of State approval of the petition before circulation, and four percent of the population to sign the petition, or 2) five sponsors and 20,000 signatures.⁶⁵ Between the two choices, the voters opted for option one, which was the more strict option.⁶⁶

However, the change to the initiated measure system voted on during the special election of 1972 would not become part of the Constitution unless the delegates' proposed constitution passed.⁶⁷ Public debate over the proposed new constitution was intense, but ultimately the proposed constitution failed to get enough support and was defeated on April 28, 1972.⁶⁸ Along with the failed constitution, the amendment to increase the threshold for an initiated constitutional amendment failed as well.⁶⁹

After the failed constitutional convention, the Legislative Assembly referred 23 amendments over the following six years, attempting to piecemeal the failed constitution's palatable updates.⁷⁰ One of the adopted amendments was the change to the initiated constitutional amendment process.⁷¹ This amendment now serves as the current article III, section 9,⁷² after being adopted in 1978.⁷³

63. *Id.*

64. *Initiating and Referring Law in North Dakota*, N.D. Sec'y State, 4 (2022), <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=7&ptlPKID=1#content-start>. Twenty-five qualified North Dakota voters must agree to be on a sponsoring committee for the petition. The names and addresses of the sponsors must be on the front page of the petition. The sponsors are sometimes also referred to as organizers.

65. *Measures Before the Voters*, *supra* note 4, at 21.

66. *Id.* This change was a huge shift in the public's stance, considering that in the preceding 60 years they had rejected everything. However, at a time where the entire constitution was being rewritten, there might have been less tension between the two branches and a realization that a fixed number, as opposed to a percentage, would likely need to be amended anyway as the population of the state either increased or decreased.

67. Gray, *supra* note 57.

68. *Id.*

69. *Id.*

70. *Measures Before the Voters*, *supra* note 4, at 21-23.

71. *Id.* at 23.

72. *Id.* at 21. This amendment passed 102,182 (for) to 75,413 (against).

73. H. Con. Res. 3088, Legis. Assemb., Reg. Sess. (N.D. 1977). This amendment passed with a final vote of 102,182 to 75,413.

III. THE PROBLEMS WITH INITIATED CONSTITUTIONAL MEASURES

Our static United States Constitution was the result of a deep in-depth examination of governing structures throughout history.⁷⁴ States' delegates stayed quiet, and press and visitors were not allowed during the debates so the delegates could focus on their task.⁷⁵ One of the pillars generally accepted in the United States Constitution is that, while not perfect, it is an incredible document that should not be easily amended.⁷⁶ For the country's stability, the Constitution must be difficult to amend, requiring a thoughtful consensus of the overwhelming majority.⁷⁷ North Dakota thoughtfully enshrined this traditional ideal in the original state constitution.⁷⁸

Similar to the United States Constitution, the North Dakota Constitution is something to be protected. Constitutions set our form of government and protect certain rights by removing them from the democratic process.⁷⁹ Every elected official in our state takes an oath to support and defend the Constitution of North Dakota.⁸⁰ Naturally, it follows that any amendment to the Constitution should get heightened scrutiny from both the electorate and the citizenry before adoption. States that allow initiated amendments have observed three problems with initiated measures: exposure to outside influence, judicial interpretation of initiated amendments, and amendments that are statutory in nature. Each of these uniquely presents challenges to a state and require different solutions depending on the initiated measure at issue.

74. THE FEDERALIST NO. 85 (Alexander Hamilton); Laurie Asseo, *The Amendment Process*, HARRY S. TRUMAN PRESIDENTIAL LIBR. & MUSEUM (2020), <https://www.trumanlibrary.gov/education/three-branches/amendment-process>.

75. *The Delegates, Constitution of the United States: A History*, NAT'L ARCHIVES (Jan. 11, 2021), <https://www.archives.gov/founding-docs/more-perfect-union>.

76. THE FEDERALIST NO. 43 (James Madison) ("That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.").

77. U.S. CONST. art. V (two-thirds of the states required to ratify).

78. OFFICIAL REPORT, *supra* note 18, at 497-503.

79. *A Conversation on the Constitution: Judicial Interpretation with Justice Antonin Scalia and Justice Stephen G. Breyer*, YOUTUBE (Sept. 13, 2018) [hereinafter "*Conversation with Scalia and Breyer*"], https://www.youtube.com/watch?v=5VNRxF_9VU8&t=1265s (14:30, "Every time we make a Bill of Rights decision, it is an anti-democratic decision. The only thing that enables us to do that is that the People themselves authorized us to make that decision. The People themselves said you can't quarter troops in our home, even if the majority wants to. The People themselves said you cannot suppress freedom of religion, even if the majority wants to. The People said those things.").

80. N.D. CONST. art. XI, § 4.

A. THE PROBLEM OF OUTSIDE INFLUENCE

While there might have been less need for a tall protective wall around the state constitution in 1918, the ease of access and globalization caused by the internet and social media has caused an increased interest in state constitutions from outside special interest groups.⁸¹ Additionally, the ever expanding federal government and crumbling federalist structure of America has made state constitutions more of a second thought in jurisprudence.⁸² Amendments to the fragile system of government that North Dakota has should only be made with thoughtful, precise, and infrequent tweaks, and at the very least should be made by North Dakotans without the influence of outside special interest groups.⁸³

Changing federal law is very difficult, and most difficult would be amending the United States Constitution.⁸⁴ In order to influence policy, advocates frequently appeal to the United States Supreme Court to request a single federal policy.⁸⁵ The practice in the several states could be considerably persuasive to the Court when considering a federalized change.⁸⁶ The more states that have adopted a specific policy, the easier it is to convince the

81. John B. Anderson & Nancy C. Clampa, *Ballot Initiatives: Recommendations for Change*, 71 FLA. B. J. 71, 72 (1997); Stu Whitney, *The Fading Mystique of Marsy's Law*, ARGUS LEADER (Feb. 22, 2019), <https://www.argusleader.com/story/news/columnists/stu-whitney/2019/02/22/south-dakota-marsys-law-henry-nicholas-stu-whitney-column/2929074002>.

82. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 7-8 (Oxford University Press 2018) (remarking how attorneys frequently litigate a law on federal constitutional grounds and do not argue their constitutionality on state grounds as well).

83. Note, *Making Ballot Initiatives Work: Some Assembly Required*, 123 HARVARD L. REV. 959, 978 (2010) (“The ballot initiative process allow[s] a special interest group with an extreme view to title and word ballot initiatives misleadingly in numerous states, such that some would argue the initiatives seemed to voters that they would have the opposite effect of their actual intended goal.”); *Measure 2: Hearing on S. Con. Res. 4001 Before the H. Comm. on Gov. and Veterans Affairs*, 66th Legis. Assemb., Reg. Sess. (2019) (statement of Representative Steiner) (“[A] billionaire from California who wants to spend \$6 million to put something in our constitution, is he truly the will of the people? You keep referring to the people as if the people are always North Dakota people bringing the measures to change the constitution when in fact, in the last couple elections, it has been individuals who are very wealthy from out of state.”); see also Rob Port, *It's Easy to Amend the State Constitution When Hollywood Celebrities and Billionaires Are Paying to Collect Signatures*, SAYANYTHINGBLOG.COM (Feb. 28, 2019), <https://www.sayanythingblog.com/entry/its-easy-to-amend-the-state-constitution-when-hollywood-celebrities-and-billionaires-are-paying-to-collect-signatures/>; Rob Port, *A Bunch of Hollywood Celebrities Just Bought Their Way Onto North Dakota's Ballot*, SAYANYTHINGBLOG.COM (July 24, 2018), <https://www.sayanythingblog.com/entry/a-bunch-of-hollywood-celebrities-just-bought-their-way-onto-north-dakotas-ballot> (talking about funding for Measure 1, The Ethics Commission: https://www.scribd.com/document/384588943/ND-Public-Integrity-Donations#download&from_embed).

84. U.S. CONST. art. V; *Conversation with Scalia and Breyer*, *supra* note 79 (14:30, Justice Scalia explaining that the Constitution keeps the people from doing something that they want to do, thereby protecting the minority from the majority).

85. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015) (federalizing gay marriage); *D.C. v. Heller*, 554 U.S. 570 (2008) (federalizing the Second Amendment for personal weapons); *Lawrence v. Texas*, 539 U.S. 558 (2003) (federalizing the legality of homosexual relations); *Roe v. Wade*, 410 U.S. 113 (1973) (federalizing the legality of abortion).

86. Sutton, *supra* note 82, at 19-20.

Federal Executive, Congress, or the Court to decide an issue on the federal level.

Unified state policy has the same power. Most notably, states' adoption of marijuana legalization amendments has dethroned federal law and replaced it with a uniform consensus of state laws.⁸⁷ This shift in state policies has forced the federal government to consider changing federal law.⁸⁸ With this in mind, some special interest groups have been accused of using state constitutions as a method of quickly having their policies adopted regardless of the state's current policy and any conflicts an amendment might cause.⁸⁹ Money plays a large role in the influence of direct democracy,⁹⁰ and so long as an idea can be funded, it can make its way onto North Dakota's ballot where 50 percent plus one vote can amend the state's constitution.⁹¹

North Dakota has occasionally used initiated amendments to grant rights to North Dakotans,⁹² but the primary use of initiated measures has been to make structural changes to the government.⁹³ What is sometimes discussed as the public's "inherent distrust of government" and desire to have the final say regarding the state sovereign's powers,⁹⁴ echoes Persily's article, *The*

87. COLO. CONST. art. XVIII, § 16 (initiated amendment to legalize recreational marijuana). Colorado legalizing marijuana in 2012 very quickly led to a nationwide shift in state laws. As of February, 2022, 47 states have legalized marijuana/CBD in some form or another with only Idaho, Nebraska, and Kansas maintaining its illegality. Additionally, 18 states, two territories, and the district of Columbia have legalized recreational marijuana. *Cannabis Overview*, NAT'L CONF. OF STATE LEGIS. (July 6, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>. Within eight years, 47 states have created laws in direct conflict with federal law in violation of the Supremacy Clause. However, by passing laws in nearly every state, the states have effectively overridden federal law.

88. Natalie Fertig, *Democratic-led Senate Could Clear a Path to Marijuana Legalization*, POLITICO (Jan. 8, 2021), <https://www.politico.com/news/2021/01/08/senate-democrats-marijuana-legislation-456074>.

89. *See, e.g.*, *Montana Ass'n of Cnty. v. State*, 2017 MT 267, ¶ 3 (striking down Marsy's Law for violating the Montana Constitution's initiative requirements).

90. *See, e.g.*, Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. R. 1845, 1847 (1999); *see generally* Ethan J. Leib & Christopher S. Elmendorf, *Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties*, 100 CAL. L. R. 69 (2012) (stating the importance for informing the public via media campaigns on issues that will go to popular vote).

91. ND. CONST. art. III, § 8.

92. *Measures Before the Voters*, *supra* note 4, at 8 (repealing prohibition), 26 (making the right to bear arms a state right), 31 (allows state to join multi-state lotteries), 33 (moves some defendant rights into the Constitution, [Marcy's Law]).

93. *Id.* at 3 (the 1918 amendments), 8, 11*, 12, 15-19, 22, 30-34.

*In 1938, four massive structural changes were made. The Legislative Assembly was banned from having state employment during their term in office. 1939 N.D. Laws 496. The Tax Commissioner was changed to be an elected no-party position. 1939 N.D. Laws 497. The State Board of Higher Education was created to replace the Board of Administration. 1939 N.D. Laws 499. Finally, a directive to the State Treasurer on which public funds are deposited in the state treasury for appropriation and which are kept in trust and revolving accounts without specific appropriation. 1939 N.D. Laws 497.

94. N.D. CONST. art. III (discussing the referred and initiated measure process); *Measure 2: Hearing on S. Con. Res. 4001 Before the H. Comm. On Gov. and Veterans Affairs*, 66th Legis. Assemb., Reg. Sess. (N.D. 2019) (statement of Representative Schauer).

Peculiar Geography of Direct Democracy, which discusses at length the skepticism built into those who moved west and established states like North Dakota.⁹⁵ When this skepticism is coupled with experiences, such as misleading tactics used by signature gatherers,⁹⁶ the public's general distrust only grows. Building a higher wall around the Constitution would decrease the outside influence by giving the public enough time and information to make an informed decision when signing a petition or voting at the ballot box.⁹⁷

From the Legislative Assembly's perspective, the concern is not the people's *authority* to amend the constitution, only that the current procedure leaves the constitution in a weakened state and vulnerable to well-funded outside attacks.⁹⁸ As the people who have taken an oath to support the Constitution and defend its principles,⁹⁹ the electorate, who are the ones who intimately operate under its structure and guidance, should have some say in whether a constitutional change is a good or bad idea.¹⁰⁰ It is also in the interest of citizens to seek advice from the electorate (those who have been hired by the citizens to *be* the government) on what changes might need to be made and how a specific change might affect the state.

B. THE PROBLEM OF JUDICIAL INTERPRETATION

“The fruits of direct democracy—state constitutional amendments and state statutes—present an inordinate number of constitutional problems and interpretive quandaries.”¹⁰¹ When interpreting an initiated constitutional amendment, the interpretative goal is to understand the intent of the people who adopted the amendment.¹⁰² However, scholars have debated whether a true “intent” or unified understanding can even exist.¹⁰³ When interpreting

95. See Persily, *supra* note 28.

96. Brief for Petitioner ¶ 20, *Haugen v. Jaeger*, 2020 ND 177 (No. 20200213). The Secretary of State reported receiving multiple phone calls of people trying to take their name off of the petition and stating they were misled as to what the initiated measure would do when adopted.

97. *Infra* Part IV.C.

98. *Hearing on S. Con. Res. 4001 Before the S. Comm. on Gov. and Veterans Affairs*, 66th Legis. Assemb., Reg. Sess. (N.D. 2019) (statement of Senator Hogue) (“[This is not] a power struggle between the people of North Dakota and their elected representatives.... [This is a] struggle between ideologues from outside of North Dakota who realize that they can amend our constitution and shape our values in their mold just by writing out a check.”).

99. N.D. CONST. art. XI, § 4.

100. To be clear, having “some say” is very different than having “final say.”

101. John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1996 ANN. SURV. AM. L. 535 (1996).

102. *Thompson v. Jaeger*, 2010 ND 174, ¶ 7, 788 N.W.2d 586 (citing *Kelsh v. Jaeger*, 2002 ND 53, ¶ 7, 641 N.W.2d 100).

103. Michael D. Gilbert, *Interpreting Initiatives*, 97 MINN. L.R. 1621, 1625-26 (2013) (“Scholars reject [judges getting ‘voter intent’] on the ground that such intent does not exist or cannot be ascertained”); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL’Y 295, 321 (2008); see generally Julian N. Eule, *Judicial Review of Direct*

the U.S. Constitution, the Supreme Court typically refers to the intent of the framers at the time of ratification when faced with ambiguity.¹⁰⁴ North Dakota and many other states, interpret the State Constitution “so as to give effect to the intention of the people who adopted it . . . primarily from the language of the constitution itself.”¹⁰⁵ However, similar to the United States Supreme Court, if faced with ambiguity, the court’s “overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement.”¹⁰⁶ The courts also “presume the people do not intend absurd or ludicrous results in adopting constitutional provisions, and [] therefore construe such provisions to avoid those results.”¹⁰⁷ Even still, determining the understanding of the people when adopting an amendment can be very challenging.¹⁰⁸

Originally, the Secretary of State would circulate publicity pamphlets to every voter in the state.¹⁰⁹ At the time, the Constitution mandated publicity pamphlets.¹¹⁰

All measures submitted to the Electors shall be published by the state as follows: ‘The Secretary of State shall cause to be printed and mailed to each elector a publicity pamphlet, containing a copy of each measure together with its ballot title to be submitted at any election. Any citizen, or the officers of any organization may submit to the Secretary of State, for publication in such pamphlet, arguments concerning any measure therein upon first subscribing their names and addresses thereto and paying the fee therefor, which, until otherwise fixed by the Legislature, shall be the sum of two hundred dollars per page.

Democracy, 99 YALE L.J. 1503 (1990) (asserting that elected judges have a political pull to interpret direct democracy measures in a way that will not risk them losing reelection).

104. *United States v. Sprague*, 282 U.S. 716, 731 (1931); *see also* *Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L.Ed. 23 (1824).

105. *State v. Feist*, 93 N.W.2d 646, 649 (N.D. 1958) (citing *Barry v. Traux*, 99 N.W. 769 (N.D. 1904); *Egbert v. City of Dunseith*, 24 N.W.2d 907 (N.D. 1946); *Dawson v. Tobin*, 24 N.W.2d 737 (N.D. 1946)).

106. *Thompson v. Jaeger*, 2010 ND 174, ¶ 7, 788 N.W.2d 586 (citing *Kelsh v. Jaeger*, 2002 ND 53, ¶ 7, 641 N.W.2d 100); COOLEY, *supra* note 3, at 38 (“The deficiencies of human language are such that if written instruments were always carefully drawn, and by persons skilled in the use of words, we should not be surprised to find their meaning often drawn in question, or at least to meet with difficulties in their practical application. But these difficulties are greatly increased when draughtsmen are careless or incompetent, and they multiply rapidly when the instruments are to be applied, not only to the subjects directly within the contemplation of those who framed them, but also to a great variety of new circumstances which could not have been anticipated, but which must nevertheless be governed by the general rules which the instruments establish.”).

107. *Thompson*, 2010 ND 174, ¶ 7, 788 N.W.2d 586.

108. *See, e.g., Miller v. Taylor*, 133 N.W. 1046 (N.D. 1911); *see also* Jane S. Schacter, *The Pursuit of ‘Popular Intent’: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

109. *State ex rel. Byrne v. Baker*, 262 N.W. 183, 183-84 (N.D. 1934).

110. *Id.* at 183.

This section shall be self-executing and all of its provisions shall be treated as mandatory. Laws may be enacted to facilitate its operation, but no law shall be enacted to hamper, restrict or impair the exercise of the rights herein reserved to the people.¹¹¹

Because these pamphlets provided voters with a copy and description of an initiated measure, the pamphlets aided courts in determining what the citizenry understood the measure to mean when they adopted it.¹¹²

In 1965, the constitution was amended by a referred measure of the Legislative Assembly repealing the pamphlet requirement.¹¹³ With the courts no longer able to look to the pamphlets, courts must use other methods to find public intent.¹¹⁴ In a world of social media, courts might look to a measure's official website or social media presence to see how a measure is being advertised and discussed by the public.

North Dakota caselaw expresses a "consistent effort to interpret constitutional provisions according to the intent of the people who adopted it, the framers who drafted the provision, or both."¹¹⁵ In the case of a referred constitutional amendment by the Legislative Assembly, the intent of the drafters can be determined from the plain meaning of the language as understood at the time of adoption.¹¹⁶ However, if the language is ambiguous, the courts may look to the intent of the drafters in the form of committee hearings, testimony, and floor debates in order to ascertain the meaning of the language as understood at the time of adoption.¹¹⁷ This is the same process North Dakota courts look at when interpreting statutes.

Scholars have suggested courts take a middle of the road approach to direct democracy amendments by 1) avoiding constitutional invalidation, 2) narrowly construing amendments that conflict with existing law, and 3) pay more attention to established canons and other rules such as the rule of lenity and void for vagueness doctrine if ever applicable.¹¹⁸ These principles are excellent guideposts for courts when determining how to interpret a constitutional measure with ambiguous language and even more ambiguous public understanding.

111. *Id.* at 183 (quoting the North Dakota Constitution).

112. *State v. Hagerty*, 1998 ND 122, ¶ 24, 580 N.W.2d 139; *Newman v. Hjelle*, 133 N.W.2d 549, 557 (N.D. 1965).

113. 1965 N.D. Laws 968; 1963 N.D. Laws 887.

114. *State v. Hagerty*, 1998 ND 122, ¶ 17, 580 N.W.2d 139; *Newman*, 133 N.W.2d at 557 (using not only the pamphlets, but also looking to advertisements and editorial comments to assist in their interpretation).

115. Jerod Tufte, *The North Dakota Constitution: An Original Approach Since 1889*, 95 N.D. L. REV. 417, 447 (2020).

116. *See, e.g., Barry v. Truax*, 99 N.W. 769 (N.D. 1904).

117. *See, e.g., State ex rel. Ohlquist v. Swan*, 44 N.W. 492, 493 (N.D. 1890).

118. *See Philip P. Frickey, Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 522-23 (1996).

C. THE PROBLEM OF CONSTITUTIONAL NATURE

The third problem caused by initiated constitutional amendments is the improper addition of statutory material into the constitution. What is the difference between an idea fit for the constitution and one fit for statute? John Locke answers this question by pointing to the core of a civil society. A group of people must “[agree] with other[s] to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.”¹¹⁹ When the group’s agreement is written down, it serves as a constitution.¹²⁰ State constitutions allocate sovereignty from the people to the branches of government and set limits on the exercise of that granted power.¹²¹ Therefore, from a purely constitutional view, material in a constitution should involve: (1) the structure of the government, or (2) the allocation of power from people to government.

On the other hand, statutes are actions of the legislative body, or the citizenry in the case of an initiated statute, and set out specific rules that must be followed in order to live and participate in the established society.¹²² Statutes serve as the meat on the bones. In North Dakota, the Constitution grants authority,¹²³ and the Legislative Assembly acts on that authority by passing bills.¹²⁴ In North Dakota, because the Constitution is easily amendable, initiated measures have historically been added or attempted to be added to the Constitution in an attempt to make that statute “permanent.”¹²⁵

Because state constitutions are relatively easy to amend,¹²⁶ many constitutions have lost their overall “fundamental” nature by the addition of material generally found in statute.¹²⁷ State constitutions are considerably more wide-ranging and detailed than the U.S. Constitution. They expand in many ways to unusual topics such as the width of ski trails,¹²⁸ the taxation of golf

119. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, CH. VIII, § 95 (1690).

120. *See generally id.*; Haugen v. Jaeger, 2020 ND 177, ¶ 10, 948 N.W.2d 1; Dyer v. Hall, 199 N.W. 754 (N.D. 1924); Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN. STATE L.R. 837, 841 (2011).

121. Landau, *supra* note 120, at 841; *see, e.g.*, TEX. CONST. art. III, § 15 (relating to the punishment of hecklers during session of the legislature).

122. *Statute*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A law enacted by a legislative body.”).

123. N.D. CONST. art. IV, § 13, cl. 2.

124. N.D. CONST. art. IV.

125. *See, e.g.*, N.D. CONST. art. I, § 25; *see* Haugen v. Jaeger, 2020 ND 177, ¶ 10, 948 N.W.2d 1.

126. Landau, *supra* note 120, at 839.

127. *See, e.g.*, OR. CONST. art. I, § 39 (the sale of liquor by the individual glass).

128. N.Y. CONST. art. XIV, § 1; *see also* Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 17, 19 (1988).

courses,¹²⁹ and the prohibition of keeping pregnant pigs in cages.¹³⁰ As some scholars have pointed out, state constitutions no longer satisfy the basic Lockean requirements of “constitutional positivism,”¹³¹ the idea that state constitutions have legitimacy as ‘fundamental’ law derived from the voluntary choice of autonomous and independent individuals. A state constitution should reflect the character of the people of the state and protect those things they hold most dear. Surely, Floridians would not place pregnant pigs in that category, nor are New Yorkers “a people who cherish their liberty to ski[.]”¹³²

State constitutions and statutes have been so conflated that often initiated amendments seem to serve as nothing more than statutes in fancy dress. Proponents of initiated measures have even gone so far as to simply try to place statutes by reference directly into the Constitution.¹³³

One of the major differences between constitutions and statutes is that statutes frequently require change as time demands differences in the law. When statutory material is placed into the constitution via an initiated measure, the only way to fix an error or oversight in the law is by an additional constitutional amendment. The North Dakota Constitution contains provisions which do not meet the traditional Lockean requirements of a constitution.¹³⁴ This is not to mock or to state that statutory state constitutional provisions are *bad*.¹³⁵ They might very well be good ideas, but they simply do not fit into the requirements of a Lockean constitution.¹³⁶

129. CAL. CONST. art. XIII, § 10.

130. FLA. CONST. art. X, § 21.

131. See James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 212-13 (1990); James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L. J. 1025, 1046-54 (1993); Landau, *supra* note 120, at 840; see generally Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797 (1993).

132. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 819 (1992).

133. *Dyer v. Hall*, 199 N.W. 754, 755 (N.D. 1924). In *Dyer*, the proposed amendment provided:

Chapter 147 of the 1919 Session Laws of North Dakota, as amended, and senate bill Number 250, passed at the legislative session of 1923, amending and re-enacting the depositors’ guaranty fund law, shall not be repealed until the bonds issued under this amendment have been paid in full and the rate of assessments provided for shall not be amended in any manner except that section 10 is amended to read: (Then follows section 10 of senate bill No. 250, being chapter 200 of the Session Laws of 1923, with proposed amendments.)

134. See, e.g., N.D. CONST. art. I, § 25.

135. Some of these unusual amendments are perfectly reasonable. For example, the Texas Constitution discusses banks’ use of “unmanned teller machines.” This might very well be a reasonable *statute* but do these provisions really get to the core of what is important to Texans? Does it *belong* in a constitution?

136. A simple question to ask is whether a proposed amendment will still be just as important to the citizenry in 300 years. If the answer is no, or is uncertain, then perhaps the provision would be better suited for statute. This allows flexibility to the state whereas the constitution provides only rigidity. As one scholar rather harshly put it, “If we are to take seriously the notion that the state

IV. STRENGTHENING THE NORTH DAKOTA CONSTITUTION

Building a taller wall around the state constitution is long overdue. Recently, the Legislative Assembly has made attempts to change the constitutional amendment process in order to require a more cooperative agreement on a change.¹³⁷ There are three main levers that states can pull to adjust the initiated measure process. North Dakota should consider pulling some of these levers in order to shore up the state constitution's defenses. The amendment process can be changed to adjust the scope of initiated constitutional measures, provide neutral information to voters, and adjust the initiated amendment mechanics such as the signature requirement. Each of these three options provides unique possibilities that North Dakota, or any other state, could use to customize the state's constitution to fit the state's beliefs and policy.

A. LIMIT THE SCOPE OF CONSTITUTIONAL AMENDMENTS – THE SINGLE SUBJECT RULE & SUBJECT RESTRICTIONS

In protecting the nature of a constitution, some states have adopted a *single-subject rule*.¹³⁸ A single-subject rule is a requirement that initiatives only address a single issue or subject at a time.¹³⁹ This rule acts to stop *log-rolling*¹⁴⁰ items and increases transparency of how the electorate stands on specific issues. Put another way, a single-subject rule “avoids voters having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution, which they support.”¹⁴¹ North Dakota already has this rule in place for the Legislative Assembly,¹⁴² and as of 2022, 11 states

constitution reveals the character of the people, we may be forced to the unappetizing conclusion that the people of New York, or California, or Texas are simply a frivolous people who are unable to distinguish between things that are truly important and things that are not.” Gardner, *supra* note 132, 819-20.

137. *Measure 2: Hearing on S. Con. Res. 4001 Before the S. Comm. on Gov. and Veterans Affairs*, 66th Legis. Assemb., Reg. Sess. (N.D. 2019) (statement of Senator Hogue).

138. *See, e.g.*, S.D. CONST. art. 23, § 1 (“[N]o proposed amendment may embrace more than one subject.”).

139. *Single-Subject Rule*, BALLOTPEDIA.ORG, https://ballotpedia.org/Single-subject_rule (last visited Apr. 14, 2022).

140. *Logrolling*, BLACK'S LAW DICTIONARY (11th ed. 2019). The legislative practice of including several propositions in one measure or proposed constitutional amendment so that the legislature or voters will pass all of them, even though these propositions might not have passed if they had been submitted separately. Many state constitutions have single-subject clauses that prohibit this practice.

141. *Fine v. Firestone*, 448 So. 2d 984, 993 (Fla. 1984).

142. N.D. CONST. art. IV, § 13, cl. 2 (“No bill may embrace more than one subject, which must be expressed in its title; but a law violating this provision is invalid only to the extent the subject is not so expressed.”).

have this rule for initiated constitutional measures.¹⁴³ Having a single-subject rule in a state's Constitution eliminates logrolling, ensures that voters are notified of the potential effects of an amendment, and generally reduces confusion.

Similar to single-subject rules, *subject restrictions* are also useful to keep more important state interests protected. For example, some states do not allow initiated measures relating to appropriations,¹⁴⁴ judicial process,¹⁴⁵ religious expression, or reversal of judicial decisions.¹⁴⁶ Mississippi does not allow the initiative process to alter the state Bill of Rights, the Mississippi Public Employees' Retirement System, alter the state's constitutional right to work, or to amend the initiative process.¹⁴⁷

Currently, North Dakota has no restrictions on the initiative process, leaving the North Dakota Declaration of Rights and other constitutional provisions exposed to change by simple majority. North Dakota should consider

143. CAL. CONST. art. II, § 8(d); COLO. CONST. art. V, § 1(5.5); FLA. CONST. art. XI, § 3 (“The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith.” Florida’s Constitution is not only limited in scope, but restricts initiated measures on certain issues.); MO. CONST. art. III, § 50; MONT. CONST. art. XIV, § 11 (Montana requires an amendment encompassing multiple subject areas to be split and voted on separately. This is an example of a *single-vote* requirement which is slightly different than a single-subject rule. While Montana’s single-subject rule only applies to legislative action and not to constitutional amendments, the single-vote requirement applies to constitutional amendments. This has the same principled effect of avoiding logrolling); NEB. CONST. art. III, § 2; NEV. CONST. art. XIX, § 2 (The single subject rule is a restriction stemming from state statute. NEV. REV. STAT. § 295.009 (2021)); OHIO REV. CODE ANN. § 3519.01(A) (“Only one proposal of law or constitutional amendment to be proposed by initiative petition shall be contained in an initiative petition to enable the voters to vote on that proposal separately.”); OKLA. CONST. art. V, § 57, art. XXIV, § 1 (*see Douglas v. Cox Ret. Prop., Inc.*, 2013 OK 37, ¶ 14, 302 P.3d 789 (stating that the single-subject rule applies to initiative petitions)); OR. CONST. art. IV, § 1(2)(d); S.D. CONST. art. XXIII (“no proposed amendment may embrace more than one subject.”).

144. ALASKA CONST. art. 11, § 7; MICH. CONST. art. II, § 9 (“The power of referendum does not extend to acts making appropriations for state institutions[.]”); NEV. CONST. art. XIX, § 6 (requiring any initiated appropriation to include a tax on the people to cover the appropriation).

145. ALASKA CONST. art. 11, § 7; MASS. CONST. art. XLVIII, § 2.

146. MASS. CONST. art. XLVIII, § 2.

No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition ; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

147. MISS. CONST. art. XV, § 273.

restrictions on the initiative process to protect not just Article I of the Constitution¹⁴⁸ but also to protect from ballot box appropriations.¹⁴⁹

B. REINSTATE THE SECRETARY OF STATE'S PETITION PAMPHLET

The Secretary of State's petition pamphlet helped both voters and courts determine what an amendment would do once enacted.¹⁵⁰ While this was historically a constitutional requirement,¹⁵¹ this could be reinstated by statute. While a summary of a constitutional amendment is sometimes on the ballot,¹⁵² the Secretary of State is no longer required to provide an analysis to the voters. By statutory change, the Secretary could be required to post an analysis of a constitutional measure on the Secretary of State website and in a mailer to all citizens. In the 2021 Legislative Session, the Legislative Assembly took a positive step in this direction by introducing a bill that would require the entire text of the amendment to be printed on the ballot.¹⁵³ Ultimately, this bill ended up failing.¹⁵⁴ Moving forward, the Legislative Assembly, or the citizenry by initiated measure, should consider reimplementing the Secretary of State's Petition Pamphlet. A neutral source of information would be useful for both the voters in deciding whether to adopt an amendment and give courts assistance in the future when looking back at the voters' intent when adopting a measure.¹⁵⁵

C. CHANGE THE MECHANICS OF INITIATED AMENDMENTS

Changing the Initiative and Referendum process is one of the broadest options as there are many "levers" that could be pulled to customize the mechanics in North Dakota.¹⁵⁶ Currently, a petition for initiated amendment needs to be signed by four percent of the population before being placed on the ballot.¹⁵⁷ Once on the ballot, the amendment is ratified by a simple

148. N.D. CONST. art. I.

149. *Id.* art. X, § 26. When the Legacy Fund was created, it was made with a significant defense against appropriation. The current initiated amendment process leaves the Legacy Fund exposed to a knee jerk treasury raid by simple majority.

150. *See State v. Hagerty*, 1998 ND 122, ¶ 24, 580 N.W.2d 139 (discussing the Secretary of State's pamphlet in interpreting an amendment).

151. *Measures Before the Voters*, *supra* note 4, 19; 1965 N.D. Laws 968; 1963 N.D. Laws 887. After three attempts at removing this requirement from the Constitution, the Legislative Assembly's referred amendment passed in November of 1963 by a vote of 125,117 to 96,283.

152. N.D. CENT. CODE § 16.1-06-09 (2021).

153. S.B. 2256, 66th Legis. Assemb. Reg. Sess. (N.D. 2021).

154. S.J. at 1673, 66th Legis. Assemb. Reg. Sess., (N.D. 2021), <https://www.legis.nd.gov/assembly/66-2019/journals/sr-dailyjnl-69.pdf#Page1673>.

155. *State v. Kostelecky*, 2018 ND 12, ¶¶ 7-10, 906 N.W.2d 77; *Johnson v. Wells Cnty. Water Res. Bd.*, 410 N.W.2d 525, 528 (N.D. 1987).

156. N.D. CONST. art. III (laying out the procedure for initiated and referred measures in the state).

157. N.D. CONST. art. III, § 9; *supra* Part II.E.

majority vote.¹⁵⁸ After the vote, the measure becomes part of the Constitution. This process has three areas that could be changed in order to increase the scrutiny of an amendment by the citizenry: petition signatures, ballot box vote, and a review vote. The goal of making changes would not be stopping initiated measures altogether. Rather, the goal is to encourage cooperation of the citizenry when amending the constitution and creating a more unified understanding and appreciation for the solemn task of amending the state's foundational document.

I. Petition Signatures

The petition is a source of much litigation in North Dakota¹⁵⁹ because this is the threshold to access to the ballot. The Constitution gives ultimate say over the approval of a petition to the North Dakota Supreme Court.¹⁶⁰ “[M]any of the cases brought to the Court relate to correctness of the petition such as number of signatures, sufficient address of the signors, complete ballot title, a full text of the measures being proposed or referred, and whether the petition contains ‘extraneous material.’”¹⁶¹ Once the petition is approved, it is circulated in order to get the required number of signatures of qualified electors.¹⁶² The petition signatures are the step in the initiative process that has undergone the most attempts at constitutional modification.¹⁶³ The 1914

158. N.D. CONST. art. III, § 8.

159. *Mun. Servs. Corp. v. Kusler*, 490 N.W.2d 700, 705 (N.D. 1992); *Dyer v. Hall* 199 N.W. 754, 756 (N.D. 1924) (defining “full text of the measure”); *Haugland v. Meier*, 335 N.W.2d 809, 811 (N.D. 1983) (holding the petition contained “extraneous statements.”); *Haugland v. Meier*, 339 N.W.2d 100, 102 (N.D. 1983) (holding that the phrase “at the next general election” was not extraneous information); *Wood v. Byrne*, 232 N.W. 303, 304 (N.D. 1930) (upholding the constitutionality of 1925 N.D. Laws 159, which required petition circulators sign an affidavit affirming the signatures were in their presence and were qualified electors); *Husebye v. Jaeger*, 534 N.W.2d 811, 812 (1995) (challenging the timeliness of turning in the petition signatures).

160. N.D. CONST. art. III, § 7; *Preckel v. Byrne*, 243 N.W. 823, 825 (N.D. 1932) (“The question we must decide is, is the petition sufficient under the Constitution, and the Constitution makes it our duty to decide it.”).

161. JAMES E. LEAHY, *THE NORTH DAKOTA STATE CONSTITUTION* 83 (G. Alan Tarr, 2011).

162. N.D. CONST. art. III, § 4; *Moses v. Thorson*, 299 N.W. 309, 310 (N.D. 1941) (holding that the petition did not have the required 7,000 signatures and was therefore invalid).

163. *Measures Before the Voters*, *supra* note 4, at 8 (S.L. 1931, ch. 106 (S.B. 144) referred measure changing signature requirement for initiated constitutional measures to 40,000 voters) (S.L. 1933, p. 493 disapproved by a vote of 104,953 to 51,459), 10 (S.L. 1935, ch. 103 (S.C.R. W) referred measure changing signature requirement to 20,000 signatures) (S. L. 1937, p. 514, disapproved by a vote of 127,511 to 41,500), 12 (S.L. 1939, ch. 112 (S.C.R. 135) referred measure changing signature requirement to 15,000 signatures) (S.L. 1941, p. 590, disapproved by a vote of 61,573 to 64,636), 13 (S.L. 1941, ch. 114 (H.C.R. 64) changing signature requirement to 20,000 and abolishing the publicity pamphlet) (S.L. 1943, p. 415, disapproved by a vote of 70,927 to 53,925), 17 (S.L. 1957, ch. 400 (H.C.R. R) changing the signature requirement to 10 percent of the vote cast for Governor and abolish the publicity pamphlet) (S.L. 1959, ch. 434, disapproved by a vote of 127,290 to 47,814), 23 (S.L. 1977, ch. 613 (H.C.R. 3088) changing the vote requirement to two-percent of the resident population of the state at the last federal decennial census) (S.L. 1979, ch. 696, approved by a vote of 102,182 to 75,413); *see supra* Part II.E.

amendment, required the petition be signed by 25 percent of the voters from a majority of the counties.¹⁶⁴ This method ensured that an amendment came from the entire state citizenry, not just a small portion of the state. Because the North Dakota Constitution requires signatures of four percent of the resident population according to the federal decennial census,¹⁶⁵ the signature requirement changes every 10 years. Currently, the signature requirement is 31,164,¹⁶⁶ which could be accomplished by visiting only one of North Dakota's larger cities. By having a county requirement, citizens would be sure that an amendment is not being pushed by only one or two counties or only one side of the state. This is the model that Montana adopted in their Constitution requiring signatures from two-fifth of legislative districts.¹⁶⁷

There are other actions that could be taken regarding petition signatures, most of which could be accomplished by simple legislative action. Most importantly, North Dakota could increase the information that has to be provided with the petition in order to better inform those signing the petition. After all, “[t]he average voter does not have conveniently at hand the text of the Constitution or the statutes of this state[.]”¹⁶⁸ Currently, the Constitution requires the full text of the measure to be included with the petition.¹⁶⁹ However, it could be advantageous to require a short neutral summary of what the measure does or other information, similar to the old Secretary of State Petition Pamphlet.¹⁷⁰

2. *Ballot Box Vote*

Similar to a change in petition signatures, North Dakota should consider requiring more than a simple majority to amend the Constitution.¹⁷¹ By having the same ballot box scrutiny for constitutional amendments and initiated statutes, North Dakota's official position is that the prohibition of slavery in North Dakota¹⁷² is just as important as the prohibition of throwing snowballs

164. *Supra* Part II.B.

165. N.D. CONST. art. III, § 9.

166. *Initiated Ballot Measure Filing Deadlines and Signature Requirements*, N.D. SEC'Y OF STATE (2022), <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlPKID=6&ptlPKID=1#content-start>.

167. MONT. CONST. art. XIV, § 9 (“The people may also propose constitutional amendments by initiative. Petitions including the full text of the proposed amendment shall be signed by at least ten percent of the qualified electors of the state. That number shall include at least ten percent of the qualified electors in each of two-fifths of the legislative districts.”).

168. *Dyer v. Hall*, 199 N.W. 754, 756 (N.D. 1924).

169. N.D. CONST. art. III, § 2 (“The secretary of state shall approve the petition for circulation if it is in proper form and contains the names and addresses of the sponsors and *the full text of the measure.*”) (emphasis added).

170. *See supra* Part IV.B.

171. N.D. CONST. art. 1, § 8.

172. *Id.* at art. I, § 6.

from a ski lift.¹⁷³ After all, both of these provisions can just as easily be changed. Surely, if one was more important than the other, it would be protected much more in North Dakota's Constitution. Yet, the citizenry could currently remove either of these two by action of a simple majority. This must change. Similarly, North Dakota's Right to Bear Arms¹⁷⁴ is just as easily removable as the requirement to have a peace officer present at a public dance.¹⁷⁵ North Dakota needs to clarify that the North Dakota Constitution contains provisions that should not change, "even if the majority wants to,"¹⁷⁶ change them. Increasing the ballot box vote corrects this flaw and raises walls around the state foundational document.

Requiring a supermajority vote on constitutional changes has been a growing trend in the country. Colorado recently changed its referred and initiated amendment vote from a simple majority to a supermajority of 55 percent.¹⁷⁷ Illinois¹⁷⁸ and Florida¹⁷⁹ require 60 percent of those voting to vote in favor of an amendment, and New Hampshire¹⁸⁰ requires a three-fifths vote in both chambers of the general court and a ratification vote of the citizenry of two-thirds. North Dakota should consider raising its threshold for an amendment to make certain that changes in the State Constitution are not the will of only a simple majority.¹⁸¹ While states vary in their tweaks to the ballot box vote,¹⁸² all are of the same mindset of ensuring that 51 percent do not rule 49 percent.

Other than simply increasing the vote threshold, there are measures that would increase transparency that could be enacted by simple statute. The Legislative Assembly considered such a statute in 2021.¹⁸³ This bill would have required that the entire text of the initiated measure be printed on the

173. N.D. CENT. CODE § 53-09-05(2) (2021).

174. N.D. CONST. art. I, § 1.

175. N.D. CENT. CODE § 53-02-08 (2021).

176. *Conversation with Scalia and Breyer, supra* note 79.

177. COLO. CONST. art. XIX, § 2 ("In order to make it more difficult to amend this constitution, a constitutional amendment shall not become part of this constitution unless the amendment is approved by at least fifty-five percent of the votes cast thereon[.]").

178. ILL. CONST. art. XIV, § 3. Illinois has also limited the scope of initiated constitution amendments to only "structural and procedural subjects contained in Article IV[.]" which is labeled *The Legislature*.

179. FLA. CONST. art. XI, § 5.

180. N.H. CONST. art. 100(c).

181. ELISE HOFNER & SUZANNA SHERRY, *The Case for Judicial Review of Direct Democracy*, 4 JNLAW 49, 59 (2014).

182. *See, e.g.*, OR. CONST. art. XVII, § 1; OR. CONST. art. IV, § 1; OR. REV. STAT. § 250.036 (requiring a majority to pass but also requiring a 50 percent voter turnout).

183. H.B. 1173, 67th Leg. Assemb., Reg. Sess. (N.D. 2021).

ballot, rather than a simple explanation written by the secretary of state.¹⁸⁴ However, there was large push back on this legislation by the secretary of state,¹⁸⁵ the North Dakota Association of Counties,¹⁸⁶ and the Burleigh County auditor's office,¹⁸⁷ which caused the bill to fail in the Senate.¹⁸⁸

3. *Review Vote*

A review vote could take one of two forms, a Legislative Review or a Citizen Review. A review vote conditions that if the citizenry voted to approve a constitutional amendment, the proposed amendment would either require a second vote in a subsequent election or require ratification by the Legislative Assembly. In either situation, the goal of a review vote is to force the citizenry and legislature step back and take the time to debate an issue before amending the constitution. Similar to how software might include confirmation dialogue to reduce user errors,¹⁸⁹ a review vote asks North Dakotans: "are you sure you want to amend the Constitution?"

184. N.D. CENT. CODE § 16.1-06-09 ("initiated measures . . . must, unless otherwise determined by the secretary of state, be stated in full in a legible manner on the ballot. If the secretary of state concludes the amendment or measure is too long to make it practicable to print in full, the secretary of state in consultation with the attorney general shall cause to be printed a concise summary that most fairly represent the substance of the constitutional amendment . . .").

185. *Hearing on H.B. 1173 Before the H. Comm. on Gov. and Veterans Affairs*, 67th Leg. Assemb. Reg. Sess. (N.D. 2021) (testimony on January 28, 2021 by Jim Silrum, Deputy Secretary of State on behalf of Secretary of State Al Jaeger). The secretary of state was concerned with a requirement in the bill which stated the ballot must have the entire text of the initiated measure *and* the secretary of state would list "*all significant effects*" of the amendment's implementation. The secretary of state was concerned that this language was insufficient and would not have the intended effects. Once this offending language was amended out of the bill by the House of Representatives, the secretary of state testified in a neutral position in the Senate.

186. *Id.* (testimony on January 28, 2021 by Donnell Presky on behalf of the North Dakota Association of Counties and the North Dakota County Auditors Association). The testimony revealed that there was concern on this bill would double election costs for the counties, cause voters to be confused by the ballot, and could create discrepancies into the ballot scanning causing voter distrust and election integrity concerns. Presky commented that a better solution would be sending election packets to voters. Essentially asking for the Secretary of State Pamphlet to be reinstated.

187. *Hearing on H.B. 1173 Before the S. Comm. on Gov. and Veterans Affairs*, 67th Leg. Assemb., Reg. Sess. (N.D. 2021) (testimony on March 4, 2021 by Erika White, Burleigh County Election Manager). The county auditor's office was concerned that placing the entirety of an initiated amendment's text on the ballot would cause ballots to be unreasonably long causing problems for absentee ballots, increased cost of printing and mailing, and cause voters to incorrectly vote, or to get frustrated and not vote. White proposed instead that the Assembly consider sending an information packet to each voter. Similar to the testimony of the North Dakota Association of Counties, *supra* note 185-86, White encouraged reinstatement of the Secretary of State Pamphlet.

188. S. J. at 1073, 67th Legis. Assemb. Reg. Sess., 1073 (2021) <https://ndlegis.gov/assembly/67-2021/journals/sr-dailyjnl-55.pdf#Page1> <https://ndlegis.gov/assembly/67-2021/journals/sr-dailyjnl-55.pdf#Page1073>.

189. Jakob Nielsen, *Confirmation Dialogs Can Prevent User Errors – If Not Overused*, NIELSEN NORMAN GROUP (Feb. 18, 2018), <https://www.nngroup.com/articles/confirmation-dialog/> ("A confirmation dialog asks users whether they are sure that they want to proceed with a command that they have just issued to a system.").

In 2019, the Legislative Assembly attempted to add a review vote.¹⁹⁰ This measure, known as Measure 2, mirrored the 1918 amendment by restoring the Legislative Review Process.¹⁹¹ Measure 2 would have amended the North Dakota Constitution to read as follows:

Section 9. A constitutional amendment may be proposed by initiative petition. If signed by electors equal in number to four percent of the resident population of the state at the last federal decennial census, the petition for a constitutional amendment may be submitted to the secretary of state. An initiative to amend the constitution may be placed on the ballot only at a general election. If electors approve an initiative for a constitutional amendment, the amendment must be submitted to the subsequent legislative assembly. If the initiative is approved by a majority of members of each house in the legislative assembly, the initiative is deemed enacted. If the legislative assembly does not approve the initiative, the initiative must be placed on the ballot at the next general election. If the majority of votes cast on the initiative are affirmative, the initiative is deemed enacted. All other provisions relating to initiative measures apply to initiative measures for constitutional amendments.¹⁹²

However, after mixed messaging on Measure 2,¹⁹³ and the simultaneous controversy with the initiated constitutional amendment termed Measure 3,¹⁹⁴ North Dakotans rejected all constitutional amendments in 2020.¹⁹⁵ For better or worse, it seems many feel that the safest thing to do when contemplating a constitutional amendment is to vote “no” when unsure.

Because North Dakotans do not have much of an appetite for a Legislative Review Vote, a more palatable review might be the Nevada model of a citizen review.¹⁹⁶ In Nevada’s model, initiated amendments must be passed in two consecutive elections.¹⁹⁷ Florida recently attempted to make a similar change to their constitution¹⁹⁸ but narrowly failed by a margin of five

190. S. Con. Res. 4001, 66th Legis. Assemb., Reg. Sess. (N.D. 2019).

191. *Id.*

192. *Id.* This would have amended N.D. CONST. art. I, § 9. The underlined text indicates language that would be added to the current text. Removed language has been excluded.

193. *See, e.g., Conversation with Scalia and Breyer, supra* note 79.

194. *See* Haugen v. Jaeger, 2020 ND 177, 948 N.W.2d 1 (ruling Measure 3 as unconstitutional and enjoining the Secretary of State from placing it on the ballot).

195. *Official General Election Results, SEC’Y OF STATE* (Nov. 12, 2020), <https://results.sos.nd.gov/ResultsSW.aspx?text=BQ&type=SW&map=CTY&eid=313>.

196. NEV. CONST. art. 19, § 2 (requiring a majority vote in two consecutive elections).

197. *Id.*

198. Voter Approval of Constitutional Amendments, Official Results, Florida Department of State Division of Elections, General Elections (Nov. 3, 2020), <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/3/2020&DATAMODE=>

percent.¹⁹⁹ Implementing a citizen review process would be a positive way to keep the majority vote North Dakota currently has while still ensuring the Constitution is sufficiently protected.

V. CONCLUSION

Valuables are kept in a vault, not left out in the open. The State Constitution enshrines our governmental structure, values, and ideals for which we all strive to live. There is a mistrust of governance that seems to cause a reluctance in making the Constitution harder to change. Suspicion and skepticism of governance is older than the United States itself.

Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one; for when we suffer, or are exposed to the same miseries *by a government*, which we might expect in a country *without government*, our calamity is heightened by reflecting that we furnish the means by which we suffer.²⁰⁰

That skepticism of government is the exact reason the constitution should be fixed and more difficult to change. Most scholars agree that some level of direct democracy is healthy for the American and North Dakotan political systems.²⁰¹ Direct democracy provides a check on government by threat of action of the people. After all, if the Legislature fails to adopt a desired statute, the people may adopt that statute by initiated statutory measure.

There is growing concern that national interference in state affairs threatens our federalist union. One example is Californians successfully pushing for a change to North Dakota's Constitution.²⁰² Another was the State of Texas suing the State of Pennsylvania because of the Pennsylvania Supreme Court's interpretation of the Pennsylvania Constitution.²⁰³ The United States is undoubtedly at a time where the several states are increasingly aware of each other's actions and have begun interfering in their actions.

North Dakota should strongly consider building higher walls around its constitution. While North Dakota history is clear that citizens want final say in the state constitution, constitutions should be kept in a vault unless the rare

199. *Id.*

200. THOMAS PAINE, COMMON SENSE (American in Class from the National Humanities Center 2014) (emphasis in original).

201. Ryan S. Appleby, *Proposition 9, Marsy's Law: An Ill-Suited Ballot Initiative and the (Predictably) Unsatisfactory Results*, 86 S. CAL. L. REV. 321, 322-23 (2013).

202. *Measure 2: Hearing on S. Con. Res. 4001 Before the H. Comm. on Gov. and Veterans Affairs*, 66th Legis. Assemb., Reg. Sess. (N.D. 2019) (statement of Representative Steiner) (“[A] billionaire from California who wants to spend \$6 million to put something in our constitution, is he truly the will of the people?”).

203. *Texas v. Pennsylvania*, 141 S. Ct. 1230, (2020) (“Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections.”).

need arises. If such need does arise, constitutional amendments should proceed through a strict process that encourages pensive cooperation between the electorate and the citizenry.