

ALASKA'S INITIATIVE PROCESS: THE BENEFITS OF ADVANCE OVERSIGHT AND A RECOMMENDATION FOR CHANGE

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ABSTRACT

Alaska's initiative process is unique – Alaska is the only state with a robust initiative culture and advance oversight over the content of initiatives by the Lieutenant Governor. This state of affairs is appropriate because it recognizes both the savings to the state and the benefit to citizens that advance oversight can achieve. It also places the power of advance oversight in the hands of the individual most qualified in Alaska to wield it. However, despite being generally commendable, the Alaskan initiative oversight process is not perfect. Because the Lieutenant Governor has this unique power, it is inappropriate for them to be elected on the same ticket with the Governor. This Note proposes that the Lieutenant Governor and Governor positions should be more distinct, by holding separate elections for the two offices and by establishing a standardized line of succession to the fill vacancies in the office of the Lieutenant Governor. On the way to this conclusion, this Note discusses a number of factors that should be considered before any change to the initiative process is made. The proposed change, however, does not run afoul of any of the concerns over changing the initiative process, and therefore should be adopted.

INTRODUCTION

Over the past hundred years, direct democracy has established itself as a key component of the American system. Thirty-four states and the District of Columbia have some process for initiatives, recalls, or

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referenda.¹ As a result, approximately 203 million people, more than 275 times the population of Alaska,² are able to direct their government through ballot actions on individual issues.

While the pervasiveness of direct democracy around the country may at first appear to negate any special claim Alaska might have to the process, Alaska is unique in that the Lieutenant Governor alone has the power to prevent an unconstitutional initiative from reaching the ballot.³ Protecting Alaskan citizens' constitutional rights against the will of a temporary majority within the state is vital.⁴ However, placing a metaphorical shield in the hands of a single elected individual rather than in the courts is much less clearly commendable.⁵

This Note will argue that the Alaskan system should be preserved, despite its acknowledged shortcomings, but that the legislature should make some minor modifications. This Note will not address the more fundamental question of whether or not direct democracy itself is a beneficial or admirable aspect of a government. Instead, beginning with the presumption that some sort of direct democracy should exist in the form of initiative legislation, this Note will explore the Alaskan system and make some minor proposals for change, without arguing for either the overhaul or abolition of the system as a whole.

The following Parts will each focus on different aspects of the Alaskan initiative process. To set up a framework for understanding how and why the Alaskan initiative process works as it does, Part I examines the Alaska Supreme Court decision of *DesJarlais v. State, Office of Lieutenant Governor*,⁶ which determined that the Lieutenant

1. Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Washington, Washington, D.C., Wisconsin, and Wyoming. KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 35-36 (2009).

2. United States Census Bureau, Population Div., *Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2013 (NST-EST2013-01)*, <http://www.census.gov/popest/data/state/totals/2013/tables/NST-EST2013-01.xls> (last visited Oct. 2, 2014).

3. See ALASKA STAT. § 15.45.080 (2012) ("The lieutenant governor shall deny certification [of an initiative] . . .") (emphasis added).

4. See THE FEDERALIST NO. 10 (James Madison) (demonstrating a concern with "the superior force of an uninterested and overbearing majority" and noting that "there is nothing [in a pure democracy] to check the inducements [of a majority] to sacrifice the weaker party or an obnoxious individual.").

5. See THE FEDERALIST NO. 78 (Alexander Hamilton) ("I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'") (quoting 1 MONTESQUIEU, SPIRIT OF THE LAWS 186 (n.p. 1748)).

6. 300 P.3d 900 (Alaska 2013).

Governor's had the power to refuse to place a particular initiative on the ballot. Part II looks at the history of the initiative oversight process in Alaska by examining various lawsuits similar to *DesJarlais*. Part III examines other states' initiative oversight processes to demonstrate what makes the Alaskan method so special. Part IV argues both that the initiative process should have strong oversight in some form, and that the office of the Lieutenant Governor should perform that oversight. Lastly, Part V argues that the legislature should be hesitant to make changes to Alaska's system, paying particular attention to the reasons for maintaining strong oversight addressed in Part IV. However, Part V does also argue for a single minor change to the election code that would alleviate at least one potential problem.

I. *DESJARLAIS V. STATE, OFFICE OF LIEUTENANT GOVERNOR*

In late 2010, Clinton DesJarlais filed an application with the Alaska Office of the Lieutenant Governor to certify his initiative relating to abortion.⁷ The "Natural Right to Life" initiative proposed would have added a new section to the Alaska Statutes declaring that "the natural right to life and body of the unborn child supercedes [sic] the statutory right of the mother to consent to the injury or death of her unborn child."⁸ The initiative also provided that "the law of necessity shall dictate between the life of the mother and her child" in life-threatening situations.⁹

Lieutenant Governor Mead Treadwell asked the Department of Law to ensure that DesJarlais's application complied with Alaska's initiative process as laid out by statute.¹⁰ After determining that the proposed initiative would be clearly unconstitutional,¹¹ the Department of Law recommended that Lieutenant Governor Treadwell deny the application.¹² Treadwell accepted the recommendation and did just that. Subsequently, DesJarlais sued.¹³

7. *Id.* at 901; *Initiative Petition List*, STATE OF ALASKA DIV. OF ELECTIONS, http://www.elections.alaska.gov/pbi_ini_status_list.php#10NRTL (last visited Sept. 17, 2014).

8. *DesJarlais*, 300 P.3d at 901; *10NRTL Sponsor Language*, STATE OF ALASKA DIV. OF ELECTIONS, available at http://www.elections.alaska.gov/petitions/10NRTL/10NRTL_Sponsor_Language.pdf [hereinafter *10NRTL Sponsor Language*] (last visited Sept. 17, 2014).

9. *DesJarlais*, 300 P.3d at 901; *10NRTL Sponsor Language*, *supra* note 8.

10. *DesJarlais*, 300 P.3d at 901.

11. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (establishing a woman's right to privacy).

12. *DesJarlais*, 300 P.3d at 902.

13. *Id.*

The Alaska Supreme Court held that DesJarlais's initiative was clearly unconstitutional, and therefore that Lieutenant Governor Treadwell's denial was appropriate.¹⁴ The court examined United States Supreme Court precedent and determined that "DesJarlais's proposed bill would preclude abortion to at least the same extent as the Texas criminal statutes at issue in *Roe v. Wade*."¹⁵ Indeed, because DesJarlais's initiative contained no exception to the prohibition based on maternal safety, instead providing for the "law of necessity" to govern in a criminal prosecution, it prohibited abortion to an even greater level than the statute in *Roe*.¹⁶ Because abortion would be restricted even more than the Supreme Court had previously held unconstitutional, DesJarlais's initiative was clearly unconstitutional.

In deciding *DesJarlais*, the Alaska Supreme Court held that "[t]he State can refuse to certify an initiative where controlling authority establishes its unconstitutionality."¹⁷ This power is based in the Alaska Constitution and its initiative statutes. The Alaska Constitution allows the people to exercise only a subset of "the law-making powers assigned to the legislature."¹⁸ And while a general rule exists in Alaska that prevents review of an initiative's constitutionality before enactment, that rule does not apply when the initiative is challenged as being clearly unconstitutional, for reasons discussed in detail in Part II.¹⁹

Lieutenant Governor Treadwell's action in denying DesJarlais's application was therefore an appropriate use of his statutory authority over initiatives.²⁰ The Lieutenant Governor may deny a proposed initiative that would be clearly unconstitutional under current controlling authority.

II. THE HISTORY OF INITIATIVE OVERSIGHT IN ALASKA

DesJarlais was hardly the first time that the issue of denying an initiative has arisen. Since the state's founding, Alaskan citizens have put forward 179 initiative applications.²¹ Of these, forty-nine have appeared on a ballot, fifty-four were successful but did not appear on

14. *Id.* at 904-05.

15. *Id.* at 904.

16. *Id.*

17. *Id.*

18. ALASKA CONST. art. XII, § 11.

19. *DesJarlais*, 300 P.3d at 903.

20. See ALASKA STAT. § 15.45.080 (2012) (granting the Lieutenant Governor the power to deny certification of an initiative petition).

21. *Initiative History*, STATE OF ALASKA DIV. OF ELECTIONS, <http://www.elections.alaska.gov/doc/forms/H26.pdf> (last visited Oct. 7, 2014); *Initiative Petition List*, *supra* note 7.

the ballot, and seventy-two were denied or withdrawn.²² Four initiative applications are currently active.²³ These numbers, last updated by the Division of Elections prior to the November 2014 election, only reflect statewide initiatives and not those proposed as local ordinances.²⁴

All initiatives are subject to the constitutional and statutory restrictions and requirements imposed on direct legislation. Outside of those limitations, an initiative may, in general, cover any subject that the legislature can affect.²⁵ However, it may not deal with some specific matters, such as dedicating revenues, creating or defining the jurisdiction of courts, or local or special legislation.²⁶ To be approved by the Lieutenant Governor, an initiative must be confined to a single subject, must have that subject expressed in the title, must have an enacting clause, and must not include any restricted subject.²⁷ Municipal initiatives must also “be enforceable as a matter of law.”²⁸

In 1974, the Alaska Supreme Court decided *Boucher v. Engstrom*,²⁹ which involved an initiative to relocate the state capital.³⁰ The case was brought, however, before the vote on the initiative occurred.³¹ The court, relying on assumptions present in *Starr v. Hagglund*³² and *Walter v. Cease*,³³ explicitly held that “our courts are empowered to review an initiative to ascertain whether it complies with the particular constitutional and statutory provisions regulating initiatives.”³⁴ In support of this holding, the court noted the Massachusetts Supreme Judicial Court’s decision in *Bowe v. Secretary of the Commonwealth*,³⁵ which held that “[u]nless the courts [have] power to enforce those exclusions [provided by the people], they would be futile.”³⁶

In 1999, *Brooks v. White*³⁷ clarified the holding of *Boucher*. Review of an initiative before its enactment is appropriate only when inquiring whether the initiative complies with constitutional and statutory

22. *Initiative History*, *supra* note 21.

23. *Initiative Petition List*, *supra* note 7.

24. *Id.*; see ALASKA STAT. § 29.10.030 (2012) (requiring home rule charters to provide procedures for initiatives).

25. ALASKA CONST. art. XII, § 11.

26. ALASKA CONST. art. XI, § 7.

27. ALASKA STAT. §§ 15.45.040, 15.45.080 (2012).

28. ALASKA STAT. § 29.26.110 (2012).

29. 528 P.2d 456 (Alaska 1974).

30. *Id.* at 458.

31. *Id.* at 458–59.

32. 374 P.2d 316 (Alaska 1962).

33. 394 P.2d 670 (Alaska 1964).

34. *Boucher*, 528 P.2d at 460.

35. 69 N.E.2d 115 (Mass. 1946).

36. *Id.* at 128.

37. 971 P.2d 1025 (Alaska 1999).

requirements and limitations on what the initiative must and may contain.³⁸ However, review of the constitutionality of the provisions within an initiative is inappropriate.³⁹

In 2001, Edward Mahoney filed an initiative with his municipal clerk that would have imposed term limits on the Mayor of Kodiak Island Borough.⁴⁰ The clerk refused to place this initiative on the ballot because she was unable to conclude that it would be enforceable as a matter of law.⁴¹ The Alaska Supreme Court made clear, however, that the issue is not whether the clerk could conclude with certainty that the initiative *was* constitutional, but rather, based on controlling authority, she could conclude with certainty that it *was not* constitutional.⁴²

The court compared its holding in *Kodiak Island Borough* with the ability of executive agencies to hold state statutes unconstitutional. In Alaska, “the executive branch may abrogate a statute which is clearly unconstitutional under a United States Supreme Court decision dealing with a similar law, without having to wait for another court decision.”⁴³ The court in *Kodiak Island Borough* granted that same authority to municipal clerks in regard to rejecting initiative proposals.⁴⁴

In *State v. Trust the People*,⁴⁵ the court alluded to the idea that the *Kodiak Island Borough* advance oversight was exercisable by the Lieutenant Governor, and that the office was not simply limited to abrogating already enacted statutes.⁴⁶ *Trust the People* involved an initiative that would have repealed the Governor’s ability to make a temporary appointment to fill a United States Senate vacancy.⁴⁷ The state argued that this initiative would violate the 17th Amendment.⁴⁸ The court, however, refused to allow the Lieutenant Governor to decline to place the initiative on the ballot himself.⁴⁹ Instead, the court held that pre-election review and oversight was only allowed in cases where Alaska law “expressly addresses and restricts Alaska’s constitutionally-established initiative process,” or where the proposal is “clearly

38. *Id.* at 1027.

39. *Id.*

40. *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 897 (Alaska 2003).

41. *Id.*

42. *Id.* at 900.

43. *O’Callaghan v. Coghil*, 888 P.2d 1302, 1304 (Alaska 1995).

44. 71 P.3d at 900.

45. 113 P.3d 613 (Alaska 2005).

46. *See id.* at 624 (failing to reference any possible prior limitation).

47. *Id.* at 620.

48. *Id.* at 624; *see* U.S. CONST. amend. XVII (“[T]he legislature of any State may empower the executive thereof to make temporary appointments.”) (emphasis added).

49. *Trust the People*, 113 P.3d at 629.

unlawful under controlling authority," which the one at issue was not.⁵⁰ The court therefore drew on *Kodiak Island Borough's* holding and applied the standard used there for municipal clerks to the Lieutenant Governor.⁵¹

The next year, the Alaska Supreme Court decided *Kohlhaas v. State, Office of Lieutenant Governor*.⁵² In *Kohlhaas*, the court reviewed an initiative that would have allowed Alaskans to vote to secede from the United States.⁵³ Unlike in *Trust the People*, the court in *Kohlhaas* upheld the Lieutenant Governor's decision to decline to certify the initiative petition, because it dealt with a clearly unconstitutional subject.⁵⁴ While *Kohlhaas* argued that his initiative was not clearly unconstitutional because no specific provision in either the Alaska or United States Constitutions prohibits secession, the Alaska Supreme Court relied on United States Supreme Court precedent to determine that secession was in fact clearly unconstitutional.⁵⁵

Alaska's path to recognizing the Lieutenant Governor's ability to exercise advance oversight over the initiative process was therefore a bit circuitous. *Boucher* acknowledged pre-election review by the courts, and clarified the concept in *Brooks*, but such review was limited to ensuring compliance with the constitutional and statutory provisions governing the technical procedure of the initiative process.⁵⁶ Similarly, the executive's ability to abrogate an unquestionably unconstitutional statute, recognized in *O'Callaghan*, did not clearly extend to *proposed* laws, but instead simply allowed the executive to react to rulings by the Supreme Court and abrogate *existing* laws.⁵⁷

The ability to abrogate, however, made sense to transfer to municipal clerks dealing with initiative applications because of the requirement that a municipal initiative be enforceable as a matter of law.⁵⁸ If an initiative was clearly unconstitutional, it would not be enforceable, and therefore the abrogation could occur before, rather than after, passage. *Trust the People* brought pre-election oversight back around to apply to the Lieutenant Governor.⁵⁹ There, the court recognized two instances for pre-election review: in addition to the

50. *See id.*

51. *See id.* at 628–29.

52. 147 P.3d 714 (Alaska 2006).

53. *Id.* at 715–16.

54. *Id.* at 720.

55. *Id.* at 715–16, 718–20.

56. *Boucher v. Engstrom*, 528 P.2d 456, 460 (Alaska 1974); *Brooks v. White*, 971 P.2d 1025, 1027 (Alaska 1999).

57. *O'Callaghan v. Coghill*, 888 P.2d 1302, 1304 (Alaska 1995).

58. *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003).

59. *State v. Trust the People*, 113 P.3d 613, 624–25 (Alaska 2005).

subject-matter restrictions acknowledged in *Boucher* and *Brooks*, the Lieutenant Governor also had the power to refuse to place on the ballot a clearly unconstitutional initiative, just as municipal clerks had since *Kodiak Island Borough*.⁶⁰ Although *Trust the People* overturned the Lieutenant Governor's decision, both *Kohlhaas* and *DesJarlais* affirmed his denial of an initiative petition because both secession and abolishing abortion are clearly unconstitutional.⁶¹ Therefore, advance initiative oversight by the Lieutenant Governor, which was once considered inappropriate, was justified by first routing that power through municipal clerks who operated under a different set of statutory obligations.⁶²

III. INITIATIVE OVERSIGHT IN OTHER JURISDICTIONS

While Alaska is not the only state that allows its citizens to create laws through the initiative process, its granting of advance initiative oversight to an elected official is rare. As noted above, thirty-four states and the District of Columbia have some provision allowing for a form of direct democracy.⁶³ Of those, twenty-four states and the District allow the ballot initiative.⁶⁴

The most common method of oversight in these states is simply to ensure that the initiatives have taken the correct form. Eight states require the Secretary of State, the Attorney General, or a special council to review an initiative petition in this manner.⁶⁵ Nine states have some

60. *Id.* at 614 n.1.

61. *Id.* at 629; *Kohlhaas v. State, Office of Lieutenant Governor*, 147 P.3d 714, 720 (Alaska 2006); *DesJarlais v. State, Office of Lieutenant Governor*, 300 P.3d 900, 904-05 (Alaska 2013).

62. The correctness of this line of reasoning is beyond the scope of this Note. While certainly great deference should be afforded to the Alaska Supreme Court in its jurisprudence here, there is a strong argument that could be made that *Trust the People* and *Kohlhaas* were based on a faulty assumption that municipal clerks and the Lieutenant Governor operate under the same authority. In reality however, the requirement of enforceability is only present for *municipal* initiatives. While a further exploration of this discrepancy and a call for reconsidering the state of initiative law since *Trust the People* may be warranted, it is left to future authors to address. This Note instead focuses on the policy reasons why advance oversight by the Lieutenant Governor is desirable, rather than the legal justification for such oversight.

63. *See supra* note 1 (listing states that have some process for initiatives, recalls, or referenda).

64. Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Washington, D.C., and Wyoming. MILLER, *supra* note 1, at 36.

65. Arizona, Maine, Missouri, Nevada, North Dakota, Oklahoma, South Dakota, and Wyoming. M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC

form of non-binding, content-based oversight.⁶⁶ This form of review includes public hearings, content reviews that the sponsor may reject, and assistance from state bodies.⁶⁷ While seven states have some form of mandatory content review,⁶⁸ only Alaska, Massachusetts, and Utah allow a single individual—in Massachusetts the Attorney General, and in Alaska and Utah the Lieutenant Governor—to substantively modify or reject a proposed initiative based on the subject matter.⁶⁹ Massachusetts, however, only limits initiatives that deal with specifically delineated subject matters or which infringe upon the rights of individuals as established in the state constitution; Massachusetts does not limit initiatives that are contrary to the United States Constitution or decisions of the Supreme Court.⁷⁰

Alaska and Utah are therefore the only states in which a single individual can refuse to place an initiative on the ballot based on the federal constitutionality of the initiative's content before that initiative is enacted. However, Utah's history with initiatives is less robust than Alaska's. Early restrictions such as having to sign all petitions "in the office and in the presence of an officer to administer oaths," and recent legislation increasing distribution requirements, have resulted in Utah only voting on eighteen initiatives through 2003—despite having the initiative for fifty-nine years before Alaska became a state.⁷¹ As such, Alaska is the only state with a meaningful initiative process where an individual has the ability to review and reject initiatives prior to their enactment based on their federal constitutionality.

IV. THE ALASKAN INITIATIVE SYSTEM, WITH STRONG OVERSIGHT BY THE LIEUTENANT GOVERNOR, IS BENEFICIAL AND COMMENDABLE

Assuming initiatives themselves are desirable, Alaska's laws surrounding initiative oversight are beneficial for two reasons. First, advance oversight in general, by some agency or individual, is preferable to the situation that would exist without such oversight.

15 (2003).

66. California, Idaho, Michigan, Mississippi, Montana, Nebraska, Ohio, South Dakota, and Washington. *Id.*

67. *Id.*

68. Alaska, Colorado, Florida, Idaho, Massachusetts, Oregon, and Utah. *Id.*

69. *Id.* While Idaho requires the Attorney General to review content, his or her recommendations are purely advisory. IDAHO CODE ANN. 34-1809(1)(b) (West, Westlaw through 2014 Legis. Sess.).

70. MASS. CONST. art. XLVIII, pt. II, § 2.

71. WATERS, *supra* note 65, at 400.

Second, instilling the oversight power in the Lieutenant Governor, rather than in the court system or any other body, allows the political process to check the use of that power.

A. Advance Initiative Oversight Should Exist In Some Way

There are two primary reasons why advance oversight of popular initiatives is advantageous to Alaska. First, advance oversight prevents the waste of state resources on elections that will have no actual effects. Second, advance oversight prevents unconstitutional initiatives from being in effect for even a fraction of time, during which constitutional violations could occur.

Running an election is costly,⁷² and passing a clearly unconstitutional amendment would likely result in “needless litigation.”⁷³ While the courts “are primarily responsible for constitutional adjudication,” allowing another person to make that judgment, when the initiative is clearly unconstitutional, saves time and money at both the electoral and litigation stages.⁷⁴

Furthermore, advance oversight of the initiative process prevents unconstitutional laws from taking effect, even for a limited time. If a clearly unconstitutional initiative is prevented from being voted on, it cannot be enacted.⁷⁵ If it is not enacted, it cannot be enforced. And if it cannot be enforced, no constitutional violation can occur.

Imposing a strong check on unconstitutional initiatives before they have the chance of taking effect preserves constitutional freedoms and liberties. For example, an initiative completely banning abortion would presumably prevent at least some women from receiving their constitutionally guaranteed medical care.⁷⁶ It would be wrong to allow that important constitutional right to be infringed until a case can make its way through the judicial system. It is better for rights like this to never be stripped away in the first place, rather than simply having

72. See, e.g., State and Consumer Initiatives, *The High Price of Uncontested Elections*, THE PEW CHARITABLE TRUSTS (Nov. 26, 2013), <http://www.pewtrusts.org/en/about/news-room/news/2013/11/26/the-high-price-of-uncontested-elections> (describing various election costs for specific local contests as between \$10,000 and \$100,000).

73. *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003).

74. *Id.*

75. See ALASKA STAT. § 15.45.220 (2012) (stating that a proposed law is enacted only when the majority of votes cast favor adoption—with no votes there can be no majority).

76. See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (“A state criminal abortion statute of the current Texas type . . . is violative of the Due Process Clause of the Fourteenth Amendment.”).

them reinstated after their removal.

This is especially important for rights that may be unable to be recovered once lost. A woman seeking an abortion may have to endure her entire pregnancy while an unconstitutional initiative banning abortion is in effect. Alternatively, she could seek an illegal abortion, which would pose its own risks.⁷⁷ Either way, a court decision that strikes down the initiative only after extended litigation would be of little help to her. Therefore, not only does advance oversight of the constitutionality of initiatives preserve rights generally, it also is the only method of guaranteeing at least some those rights and preventing possibly irreversible harms.

However, a determination that a proposed initiative is unconstitutional made before it takes effect "is necessarily advisory,"⁷⁸ and therefore judicial review is generally unavailable.⁷⁹ Even though this Note considers administrative and executive review, rather than judicial review, that difference does not eliminate the general concern about the quality of a decision made without a specific case and fact-pattern to be argued by parties with a genuine interest at stake.

But while the difference between executive and judicial review might not change the advisory-opinion analysis, the reasons for requiring a specific case do not apply when the initiative at issue is clearly unconstitutional. The reason for that is simple: the legal question is settled and the debate is done. Specific laws may be written in such a way that it is questionable as to whether or not the precedent would apply, but at that point they cease to be *clearly* unconstitutional.⁸⁰ Only when "controlling authority establishes [an initiative's] unconstitutionality" should it be excluded from the ballot.⁸¹ Making that determination beforehand does not require any specific facts beyond the text of the proposed law itself.⁸²

77. See *The Safety of Legal Abortion and the Hazards of Illegal Abortion*, NARAL PRO-CHOICE AMERICA 2, <http://www.prochoiceamerica.org/media/factsheets/abortion-distorting-science-safety-legal-abortion.pdf> ("The legalization of abortion in the United States led to the near elimination of deaths from the procedure.") (last visited Oct. 7, 2014).

78. *Kohlhaas v. State*, Office of Lieutenant Governor, 147 P.3d 714, 717 (Alaska 2006).

79. See *id.* (stating only two grounds for judicial review in this context).

80. See *Alaska Action Ctr., Inc. v. Mun. of Anchorage*, 84 P.3d 989, 992 (Alaska 2004) (stating that a measure should be rejected only if controlling authority unequivocally asserts its unconstitutionality); *Carmony v. McKechnie*, 217 P.3d 818, 820 (Alaska 2009) (requiring that an initiative be liberally construed in considering its constitutionality).

81. *Kodiak Island Borough*, 71 P.3d at 900.

82. See *id.* (referring to a clerk determining the enforceability of an initiative during the petition stage, therefore implicitly not requiring the facts of any

Therefore, because advance oversight of the initiative process saves time, effort, and money for the state and its citizens, and because only through advance oversight can constitutional violations be prevented, Alaska's establishment of such oversight is commendable.

B. The Lieutenant Governor Should Exercise Advance Oversight Over Initiatives

Assuming that advance oversight over the initiative process is valuable, the question then arises as to who exactly should have that oversight power. Alaska's choice to vest the Lieutenant Governor with the power to prevent clearly unconstitutional initiatives from being placed on the ballot is a wise decision for three reasons, one of which is uniquely Alaskan and two of which are generally applicable to any other state considering enacting an advance-oversight provision.

The first reason—unique to Alaska—is that, by virtue of his or her office, the Lieutenant Governor is the elected official in charge of statewide elections.⁸³ Other states typically designate an official such as the Secretary of State to oversee elections,⁸⁴ but Alaska eliminated its Secretary of State position in 1970, re-designating and renaming it the Lieutenant Governor.⁸⁵

As the controller and supervisor of the Division of Elections,⁸⁶ it is appropriate for the Lieutenant Governor to be the individual making the determination of whether or not a proposed initiative is clearly unconstitutional. This is a significant responsibility, and not one to be

specific instance of enforcement).

83. *Duties of the Lieutenant Governor*, OFFICE OF THE LIEUTENANT GOVERNOR MEAD TREADWELL, <http://ltgov.alaska.gov/treadwell/lieutenant-governor/lt-governor-duties.html> (last visited Oct. 7, 2014).

84. See, e.g., *Secretary's Duties*, OFFICE OF THE MINNESOTA SEC'Y OF STATE MARK RITCHIE, <http://www.sos.state.mn.us/index.aspx?page=1456> (last visited Sept. 17, 2014) ("The secretary of state is the state's chief election official and ensures the office meets its statutory responsibilities."); *Elections and Voting*, DEPT. OF THE SEC'Y OF STATE, BUREAU OF CORPS., ELECTIONS & COMMISSION, STATE OF MAINE, <https://www.maine.gov/sos/cec/elec/index.html> (last visited Jan. 11, 2014) ("The Division supervises and administers all elections of federal, state and county offices and referenda . . ."). But see UTAH LIEUTENANT GOVERNOR SPENCER J. COX, <http://www.utah.gov/ltgovernor/> (last visited Sept. 17, 2014) (listing "Elections" under the Lieutenant Governor's "Responsibilities"). As discussed above, however, Utah's restrictive initiative regulations make Alaska a better example of a state with true constitutional initiative oversight vested with the Lieutenant Governor. See *supra* Part IV.

85. *Article 3 - The Executive*, OFFICE OF THE LIEUTENANT GOVERNOR MEAD TREADWELL, <http://ltgov.alaska.gov/treadwell/services/alaska-constitution/article-iii-96A0the-executive.html> (last visited Oct. 2, 2014).

86. *Id.*

entrusted to anyone further down in the administrative hierarchy. While other states that are considering allowing an individual to stop an initiative from reaching the ballot should delegate such power to their Secretary of State or other elected official, the Lieutenant Governor is most suited for that task in Alaska.

Second, the Lieutenant Governor is an elected official and is accountable to the people.⁸⁷ Unlike an appointed official or individual serving in an administrative position, the Lieutenant Governor has a unique connection to the voters themselves and is best able to know and effectuate their wishes. Allowing some other individual, disconnected from the voting public, to exercise oversight over the initiative process would be a form of fairly extreme counter-majoritarianism.⁸⁸ Since the people directly choose the Lieutenant Governor,⁸⁹ a public concerned about an abuse of oversight power would be able to select a different individual who was able to assuage their worries. Similarly, if the current Lieutenant Governor were to overstep his or her authority and strike down initiative after initiative without regard for whether or not they truly were clearly unconstitutional, the public would be able to vote a new person into office at the next election.⁹⁰ Thus, the political nature of the Lieutenant Governor weighs in favor of having him or her be the decision-maker with regards to placing initiatives on the ballot.

Third, the Lieutenant Governor is the appropriate individual to control what initiatives appear on the ballot because he or she occupies a high-profile position in which any abuse of power would be noticed. The same cannot necessarily be said of a lesser office, even an elected one, which may be less visible. Even the members of the Alaska Supreme Court, while high-profile as a collective institution, may not carry the individualized name-recognition needed to check an abuse of power. Furthermore, a decision by that court to refuse an initiative's appearance on the ballot would involve multiple justices, each of whom might share a part of the blame.⁹¹ With the power in the hands of the Lieutenant Governor, however, there is no question about who made a mistake (if one was in fact made). The voters would be able to assign

87. ALASKA CONST. art. III, § 8.

88. See Michael Richard Dimino, Sr., *Counter-Majoritarian Power and Judges' Political Speech*, 58 FLA. L. REV. 53, 95-96 (2006) (describing how a Supreme Court Justice's vote to strike down an initiative would indicate a Justice's counter-majoritarian inclinations).

89. ALASKA CONST. art. III, § 8.

90. See *id.*, § 7 ("He shall . . . serve for the same term [as the governor.]"); *id.*, § 4 ("The term of office of the governor is four years . . .").

91. All majority decisions must include at least three justices because three justices constitute a quorum. ALASKA R. APP. P. 105(a).

blame where it was properly due and react accordingly.

All this is not to say that there are no potential problems with assigning the power to refuse to place an initiative on the ballot to the Lieutenant Governor. However, the arguments in favor of the Lieutenant Governor retaining control over placing initiatives on the ballot outweigh the arguments that the Lieutenant Governor is the wrong individual to entrust with this responsibility.

One danger with allowing the Lieutenant Governor to have the power to prevent an initiative from moving forward is that it seems to defeat the very reason the initiative exists. The initiative was first introduced, at least in part, as a way for citizens to create laws without having to worry about corruption in the legislative and executive branches.⁹² When the Lieutenant Governor is involved in the initiative process, however, this bypass around corruption is less effective.

This argument is not persuasive, however, for two reasons. First, despite appearances, the Lieutenant Governor is not actually a part of the system the initiative process was meant to bypass. The Lieutenant Governor has no hand in the law-making process and is therefore not subject to the same level of distrust as the Governor or legislature would be. While it is true that in Alaska the Governor and Lieutenant Governor run on the same ticket,⁹³ the assumption that this alone makes the Lieutenant Governor unfit for this task condemns him based on his associations rather than his own deeds.

Second, even if the line between the Lieutenant Governor and the political organs the initiative is meant to bypass were still too narrow for comfort, the decision of the Lieutenant Governor to refuse to put an initiative question on the ballot is reviewable by the courts.⁹⁴ The Lieutenant Governor is therefore checked in his ability to manipulate the system and to squash the will of the people. This judicial review of the Lieutenant Governor's oversight, however, does not simply fold Alaska's system into the same mold as that of some other states. For example, Florida's supreme court is the body that makes the constitutional determination initially, while Alaska's court can only

92. See MILLER, *supra* note 1, at 23 (“[Many Americans in the 1890s] believed that the government had been captured by powerful economic interests and . . . the constitutional design prevented majorities from breaking the corrupt axis of economic and political power”). *But see* RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 177* (2002) (“This mythic portrayal exaggerates the corruption of state legislatures.”). Exaggeration, however, does not mean there is not a grain of truth to the story.

93. See ALASKA CONST. art. III, § 8 (“The candidate whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor.”).

94. ALASKA CONST. art. XI, § 2.

review a determination already made by the Lieutenant Governor.⁹⁵ Therefore, while the courts can check the Lieutenant Governor's power, he or she still possesses the ability to prevent an initiative from appearing on the ballot, unlike in states like Florida.

Another possible danger with allowing the Lieutenant Governor to exercise this sort of initiative oversight is the fact that the public does not vote for the Lieutenant Governor directly. While the Lieutenant Governor is an elected position, Alaska uses a joint ticket system for the Governor and Lieutenant Governor offices.⁹⁶ A voter is therefore unable to cast a vote for the Gubernatorial candidate from one ticket and the Lieutenant Governor candidate from another.

This joint-election arrangement would not be much of a problem if the role of the Lieutenant Governor were simply to advise the Governor, but the position in Alaska has many independent responsibilities, including overseeing the Division of Elections.⁹⁷ It is conceivable that an individual voter may prefer one individual for Governor but disagree with that individual's choice of who should run the Division of Elections. Therefore, the connection between the two offices' elections is concerning. However, this problem could be solved by the adoption of the proposal in Part V, and therefore while it may engender academic concern for now, it is easily rectifiable by the people of Alaska if they so choose.

Yet another concern with the Lieutenant Governor having the power to stop initiatives before they reach the ballot is that the Lieutenant Governor's powers are largely granted by law rather than by the Alaska Constitution.⁹⁸ Those laws, and the Lieutenant Governor's powers with them, can be made or altered by the people through initiatives.⁹⁹ Therefore the Lieutenant Governor has the ability to reject an initiative that would directly pertain to his or her own powers and duties.

There are two possible problems that this could cause. First, the Lieutenant Governor could prevent an initiative that would limit the office's powers in order to retain as much control and authority over the government as possible. This sort of institutional power-grabbing has a long tradition in the United States,¹⁰⁰ and it is inconceivable that no

95. WATERS, *supra* note 65, at 48, 176.

96. ALASKA CONST. art III, § 8.

97. ALASKA STAT. § 15.10.105(a) (2012).

98. ALASKA CONST. art III, § 7. *But see* ALASKA CONST. art. XI, § 2 (assigning the power to certify initiatives to the Lieutenant Governor).

99. ALASKA CONST. art. XII, § 11.

100. *See* THE FEDERALIST NO. 51 (James Madison) (describing how assigning various powers to various branches allows those branches to resist

Lieutenant Governor would ever be tempted to prevent some aspect of his or her authority from being stripped. The second problem is that some particular Lieutenant Governor may not want an initiative to *expand* the powers and responsibilities of the office, either because of the simple laziness of the individual currently in office, or because of his or her political views. A libertarian-leaning Lieutenant Governor, for example, may be philosophically opposed to most government activity,¹⁰¹ and an increase in responsibility would be antithetical to that position. As such, the Lieutenant Governor may prevent an initiative from reaching the voters simply because it would expand the powers of the office beyond what the current officer believes they should be, despite the possibility that the people themselves desire more from their government.

These problems, however, are ameliorated by the fact that the courts can review the decision of the Lieutenant Governor. This oversight-of-the-oversight means that the Lieutenant Governor's own personal feelings—based in greed, laziness, or political alignment—will be unable to control whether or not an initiative makes it to the ballot. Only when an initiative is clearly unconstitutional, under existing controlling precedent, will a court uphold the Lieutenant Governor's decision to prevent it from coming to a vote.¹⁰²

Therefore, while valid and serious concerns about the Lieutenant Governor's power to prevent initiatives from appearing on the ballot do exist, those concerns do not outweigh the benefits when they are properly weighed with their solutions. The Lieutenant Governor, by virtue of his or her high-profile political position, and by virtue of his or her authority over the Division of Elections, is the ideal individual to oversee voter initiatives. That, combined with the time, effort, and monetary savings advance oversight generates, and the fact that advance oversight of unconstitutional initiatives will prevent constitutional violations from taking place while a challenge works its way through the court, make Alaska's initiative process highly commendable.

encroachments of the others and how ambitions counteract)

101. See generally *Libertarian Party Platform*, LIBERTARIAN PARTY 1 (MAY 2012) <https://www.lp.org/files/LP%20Platform%202012.pdf> (“[Libertarians] challenge the cult of the omnipotent state.”).

102. *DesJarlais v. State*, Office of Lieutenant Governor, 300 P.3d 900, 903 (Alaska 2013).

V. WHILE RESTRICTIONS ON THE LIEUTENANT GOVERNOR'S ADVANCE INITIATIVE OVERSIGHT MUST BE IMPOSED WITH CARE, ONE CHANGE IS WARRANTED

As argued in Part IV, the current laws surrounding the Lieutenant Governor's oversight of the initiative process are beneficial to the state and people of Alaska. With that in mind, any change to these laws must be made cautiously and with a full understanding of the potential ramifications. That does not mean that no changes are warranted, but it does mean that, in proposing any modification, one must fully outline (1) exactly what the change would do, (2) why it would improve some aspect of the process, and (3) how it would protect against any negative effects. This Part will argue for one such change—splitting the elections of the Governor and Lieutenant Governor—and address these three areas. However, this Part will first address two concerns associated with any changes calling for a reduction in the amount of initiative process oversight.

Because there are two main reasons why advance initiative oversight in general is beneficial (as discussed in the Part IV) any attempt to restrict that oversight power must recognize and address those issues. First, no change should be made to the initiative oversight process unless that change does not lead to a waste in state resources. Second, no change should be made unless the constitutional rights of the people, especially those likely to be subject to discrimination, are protected.

While certainly nothing legally prevents the state from eliminating this prior oversight—or even eliminating the initiative in its entirety—practical concerns over how the state would be affected do. Because advance oversight over initiatives saves Alaska time, money, and effort,¹⁰³ it would be unwise to make any change which would do away with those savings. Eliminating advance oversight of the initiative process would allow more initiatives to reach the ballot, which alone would increase the cost of elections. Assuming any of those initiatives passed into law, the resulting lawsuits would further consume the resources of the Alaskan judicial system. That in turn would result in either a heavier burden to the taxpayers (to pay for the additional staff needed for the increase in work), or in a reduction in the quality of service (because judges and lawyers would have more cases). These burdens may not be great, but it is hard to imagine how they would not exist in some form. For that reason, any attempt to reduce or eliminate

103. See discussion *supra* Part IV.A.

advance initiative oversight is unwise on a practical level.

Furthermore, because advance initiative oversight process protects the constitutional rights of Alaskans, it is unwise to modify the system without considering the issues that would arise if the oversight were reduced. Without the advance oversight process, laws could be passed which might hurt individuals in a clearly unconstitutional manner, and those individuals would have to seek relief after the fact. But if something is known to be unconstitutional, it would clearly be better, morally and politically, for it to not happen in the first place. The advance oversight process realizes this goal. Any modifications to the advance oversight of initiatives should therefore address this issue.

Keeping those concerns in mind, there is still at least one change to Alaska's initiative process that would benefit the state and its people: the Lieutenant Governor should have no direct connections to the Governor and instead be a truly independent office.

It is worth noting at the outset that this is not a change that would benefit most states. Alaska's unique system of elections with the Lieutenant Governor, instead of the Secretary of State, at the head of the Division of Elections,¹⁰⁴ however, makes the position particularly powerful and worthy of independent analysis and decision by the voters.

There are two parts to this proposal. First, the Governor and Lieutenant Governor should be voted on and elected independently from each other. Second, a vacant Lieutenant Governor position should be filled by election, or by following a consistent line of succession, rather than by the appointment process currently in place.

Currently, Alaska requires that the Governor and Lieutenant Governor be elected as a joint ticket.¹⁰⁵ But because the Lieutenant Governor's office has unique responsibilities, it would be more appropriate to have the two positions selected independently. For example, the people may wish for a particular individual to hold the position of Lieutenant Governor, but that individual may have personal disagreements with the candidate likely to win the governorship and therefore be unable to convince that candidate to include him or her on the ticket. Alternatively, the people may actively desire to have individuals from different political parties hold the two offices as some form of check on the consolidation of power. This Note does not mean to argue that the Governor and Lieutenant Governor will often represent opposite parties, but giving Alaskans the ability to make that

104. ALASKA STAT. § 15.10.105(a) (2012).

105. ALASKA CONST. art. III, § 8.

determination for themselves could be beneficial.

The second half of this proposal is more technical, but it stems from the same concerns as the first. While the constitution specifically forbids holding elections to fill such vacancy in the office of the Lieutenant Governor, it allows laws to be passed which would establish a continuing line of succession to the governorship.¹⁰⁶ The current statute that governs this issue provides that “the governor shall appoint, from among the officers who head the principle departments of the state government or otherwise, a person to succeed to the office of lieutenant governor if the office of lieutenant governor becomes vacant.”¹⁰⁷ Therefore, the line of succession to the office of Lieutenant Governor is entirely determined, with legislative confirmation,¹⁰⁸ by the Governor at the point of vacancy, and is not necessarily consistent between administrations.

The current process for filling Lieutenant Governor vacancies leaves too much power in the hands of the Governor. Just as a particular gubernatorial candidate may prevent a qualified candidate from running on the same ticket as him or her, so too might a particular Governor refuse to appoint an otherwise qualified successor. Instead of allowing the Governor to determine who will be the Lieutenant Governor in the case of a vacancy, Alaska should establish either a standardized line of succession or allow for the election of a new individual to fill the vacancy. Of these two possibilities, the former is preferable.¹⁰⁹

Having a standardized line of succession is preferable to the current state of affairs because it would remove some of the influence the Governor currently has over the Lieutenant Governor's position. Under the current system, if a Lieutenant Governor leaves office, the new Lieutenant Governor is whomever the Governor has handpicked for the position.¹¹⁰ With a set line of succession, the individual who would ascend to the position of Lieutenant Governor would likely still be selected by the Governor initially,¹¹¹ but this is of less concern. As the

106. *Id.* § 13.

107. ALASKA STAT. § 44.19.040 (2012).

108. *Id.*

109. Establishing elections to fill vacancies in the Lieutenant Governor's office would require even more tinkering with Article III, Section 8 of the Alaska Constitution, and may lead to counterintuitive results. For example, it would be odd to have the Lieutenant Governor replaced via election while the Governor is replaced by direct succession.

110. ALASKA STAT. § 44.19.040 (2012).

111. A rational line of succession would likely begin with the heads of the various principal departments, who are themselves appointed by the Governor and confirmed by the legislature. ALASKA CONST. art. III, § 25.

head of a principal department, presumably he or she will have been chosen for that role based on his or her skills at performing that particular job. It is mere happenstance that that position *also* places them in the line of succession. This may at first seem unappealing, because the alternative would be to have the Governor decide the next Lieutenant Governor based on qualifications for that position rather than to have the person chosen by chance. But if the Lieutenant Governor is truly independent from the Governor (which the independent elections discussed above are intended to reinforce), then allowing that single individual to make the determination seems odd. The Governor should not be the ultimate arbiter as to who would make the best Lieutenant Governor, and therefore a consistent line of succession should be established to remove the Governor from the decision-making process.

It is important to keep the concerns set out at the beginning of this Part in mind when considering the two parts of this proposal: holding separate elections for the Governor and Lieutenant Governor, and establishing a standardized line of succession for the latter. Those concerns are ensuring that the change would not increase the costs to the state and taxpayers, and guaranteeing that the change would protect Alaskans' constitutional rights.

However, this proposal does not run afoul of those concerns to any level that should be worrisome. While there may be some increase to costs for the state to print slightly longer ballots to cover two races rather than one, and to enact the laws necessary to realize the proposal, these are minimal and not the sort of costs that raise concern. Costs are concerning when they would lead to a large increase in the number of questions being presented to voters or when litigation would result.¹¹² But here no litigation will result from having two races for Governor and Lieutenant Governor, or from having a clearly established line of succession. Therefore, the first concern is alleviated.

This proposal also does not affect any individual's constitutional rights. Advance oversight over the initiative process would remain; the only changes being made are to how the official who performs that oversight is selected. By making that individual more accountable to the people, and by ensuring that the Governor is as removed from the selection of Lieutenant Governors as possible,¹¹³ this proposal simply

112. See discussion *supra* Part V.A.

113. See DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE, THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES xiii ("Initiatives are the last resort of desperate citizens, a way to check the power of remote or arrogant lawmakers.") (quoting Jeff Jacoby, *A Jewel in the Crown of American Self-Government*, BOSTON GLOBE (June 7, 2001), <http://www.realdemocracy.com/jewel.htm>).

establishes the Lieutenant Governor's position as one deserving of careful consideration and respect.

Because establishing the Lieutenant Governor's position as truly independent from that of the Governor would neither interfere with Alaskans' constitutional rights nor lead to a substantial increase in state expenditures, this proposal is not the sort that raises concerns about tampering with the existing advance oversight of initiatives.

CONCLUSION

This Note has examined Alaska's unique approach to the initiative process. While Alaska is not alone in requiring initiatives to not be clearly unconstitutional before placement on the ballot, it is unique among states with an active initiative culture in placing the responsibility for that determination in the hands of the Lieutenant Governor. However, there are strong reasons both for advance oversight of initiatives generally, and for having the Lieutenant Governor, at least in Alaska, be the individual to exercise that power.

While the Alaskan initiative process is therefore commendable, it is not without its minor flaws. In order to allow the people to truly choose the person who will represent them for such an important task, the Lieutenant Governor's office should be more institutionally separated from that of the Governor. This separation should take two forms: first, the Lieutenant Governor and Governor should be elected separately rather than as a single ticket; and second, the Lieutenant Governor's line of succession should be consistent between administrations and not left entirely to the discretion of the Governor. But in making this change, and especially in weighing any other modifications that would more directly affect the substance of advance initiative oversight, Alaska should be careful to consider both the costs to the state and the risk of constitutional harm that could befall its citizens.