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Direct Democracy: From Theory to Practice Symposium Direct Democracy: From Theory to Practice Symposium: Introduction

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Introduction
Direct Democracy: From Theory to Practice

TABLE OF CONTENTS

I. INTRODUCTION

On November 13, 2021, the University of Nebraska College of Law convened four panels of experts to discuss direct democracy in Nebraska. The articles appearing in this issue of the *Nebraska Law Review* are a result of that symposium. These articles are one part of the larger project. A video recording of the symposium is available on YouTube,[1] and subsequent work will be connected to the project's website.[2]

* Associate Professor of Law, Associate Dean for Faculty, University of Nebraska College of Law. Thank you to the Lane Foundation and the University of Nebraska College of Law for its generous support of this symposium. Thank you as well to the presenters and participants on November 13, 2021, and the law review staff who has been very helpful in compiling and editing this issue.

1. Anthony Schutz, *Direct Democracy Symposium*, YOUTUBE (Dec. 7, 2021) https://www.youtube.com/watch?v=A0CPaTiZ1Ng.
2. *2021 Lane Lecture & Direct Democracy Symposium*, NEB. COLL. OF L., https://law.unl.edu/direct-democracy-symposium/ [https://perma.cc/L52G-SD2L] (last visited June 23, 2022).

This brief introduction situates the articles appearing here within the larger project in three parts. Part II describes the events that necessitated the symposium, focusing on uncertainty attending the single-subject rule for Nebraska constitutional amendments proposed through the initiative process. Part III recounts the panels and associated works. Part IV addresses the work yet to be done.

II. UNCERTAINTY SURROUNDING THE SINGLE-SUBJECT RULE

Lawmaking in Nebraska, for present purposes, creates products that are housed in two places: the Nebraska statutes and the Nebraska Constitution, the latter of which serves to bind the instrumentalities of state government until voters change the text. Both lawmaking efforts can be taken up by the people directly under article three, section one of the Constitution of the State of Nebraska, where "the people reserve for themselves" the power of initiative, which allows petitions to be circulated for the placement of an initiated measure on the general election ballot "to propose laws and amendments to the Constitution."

The people have used this power for notable purposes, which recently include constitutional amendments limiting the number of legislative terms, prohibiting the ownership of livestock and farmland by non-family corporations, and supporting Congressional term limits. Perhaps our most famous initiative was the creation of our unicameral legislature.[3]

The parameters of this reserved power are spelled out in some detail in article III, section 2 of the Nebraska Constitution. This provision has been the source of amendment over the years, including through the initiative.[4] One of those amendments is the single-subject rule. Until 1998, initiated statutes were limited in scope under article three, section two: "[t]he constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative."[5] Legislatively created statutes fall under article three, section fourteen, which provides that "[n]o bill

3. Kim Roebak, *The Nebraska Unicameral and Its Lasting Benefits*, 76 NEB. L. REV. 791 (1997).

4. In 2004, voters approved Initiative Measure 418, which provided that the legislature may not "amend, repeal, modify, or impair" an initiated law. *Nebraska Legislative Majority to Modify Initiatives, Measure 418 (2004)*, BALLOTPEDIA, https://ballotpedia.org/Nebraska_Legislative_Majority_to_Modify_Initiatives,_Measure_418_(2004) [https://perma.cc/MD2L-Q6MP]. The 1912 adoption of Nebraska's direct-democracy provisions is discussed in A.B. Winter, *Constitutional Revision in Nebraska: A Brief History and Commentary*, 40 NEB. L. REV. 580, 591–92 (1961).

5. NEB. CONST. art. III, § 2.

shall contain more than one subject."[6] But initiated constitutional amendments had no such limitation.

In 1997, this caught the attention of the Nebraska Constitutional Revision Commission, which suggested that the legislature propose an amendment to "level the playing field," by requiring a single-subject rule for initiated constitutional amendments.[7] This was, to those watching closely, a bit confusing. The playing field between initiated statutes and initiated constitutional amendments was, indeed, rough—there was no single-subject rule for initiated constitutional amendements, but there was one for initiated statutes. However, the playing field between the legislature and the people was the focus of the commission. That playing fioeld had never been subject to a survey. In Nebraska, legislative proposals for constitutional amendments are made through resolutions, and there is no constitutional single-subject rule for legislative resolutions.

The closest thing to a single-subject rule that applies to a legislatively proposed constitutional amendment is found in article sixteen, section one, which provides that, "[w]hen two or more amendments are submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately." This language from the 1875 Nebraska Constitution, however, is not a limitation on the legislature's ability to include multiple subjects in its resolutions proposing constitutional change. Rather, it is a requirement that if there are "two or more amendments" they must be submitted to the people for separate votes. This does not prohibit the legislature from proposing multiple amendments in a single resolution. Rather, the amendments must be submitted to the voters separately. And this restriction can be read in a way that allows the Secretary of State to separate the questions presented to voters.

This progression was confusingly overlooked by the Nebraska Supreme Court in *State ex rel. Loontjer v. Gale*, decided in 2014. In that case, the court concluded that the 1875 separate-vote requirement of article XVI, section 1, contained the same single-subject rule as that found in article three, section two.[8] Of course, article III, section 2 did not contain the single-subject rule for initiated constitutional amendments until 1998 and the Court had not yet had an occasion to interpret or apply it.[9]

In 2018, the court was faced for the first time with applying the 1998 single-subject amendment to an initiated constitutional amend-

6. *Id.* § 14.
7. 1997 Commission Report 19, ROBERT D. MIEWALD, PETER J. LONGO & ANTHONY B. SCHUTZ, THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE 112 n.35 (2d ed. 2009).
8. State *ex rel.* Loontjer v. Gale, 288 Neb. 973, 853 N.W.2d 494 (2014).
9. *Id.* at 997, 853 N.W.2d at 511.

ment in *Christensen v. Gale*.[10] There, the court concluded that Nebraskan's initiated effort at Medicaid expansion could be placed on the ballot, even though it expanded Medicaid's scope *and* directed that such expansion be conducted to maximize federal funding.[11] The court cited *Loontijer v. Gale* as its primary authority.[12]

From these cases emerged a "natural and necessary" test for the single-subject rule, insofar as initiated or legislatively proposed constitutional amendments are concerned. This test remains in some flux, but the typical embodiments of the standard are as follows:

> Where the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition. The controlling consideration in determining the singleness of a proposed amendment is its singleness of purpose and the relationship of the details to the general subject. The general subject is defined by its primary purpose.[13]

Another oft-cited statement of the rule has three parts: A measure offends the single-subject rule

> [I]f it would (1) compel voters to vote for or against distinct propositions in a single vote—when they might not do so if presented separately; (2) confuse voters on the issues they are asked to decide; or (3) create doubt as to what action they have authorized after the election.[14]

The evolution of this standard was further complicated by different standards that had emerged in the legislative single-subject fray. For legislation, the court had taken a less-demanding stance, requiring that bills satisfy the following test: "If an act has but one general object, no matter how broad that object may be, and contains no matter not germaine thereto, and the title fairly expresses the subject of the bill, it does not violate Article three, section fourteen, of the Constitution."[15] *Loontijer* rejected this test for constitutional amendments, opting instead for the natural and necessary test, which persisted in subsequent cases.[16] Nevertheless, the text of article III, section 2 and its cross-reference to article III, section 14, it would appear that initiated statutes are subject to the same single-subject standard as that attending legislative bills.

Notably, both tests have had as their ultimate purpose the elimination of "logrolling," which includes,

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10. Christensen v. Gale, 301 Neb. 19, 917 N.W.2d 145 (2018).
11. *Id.*
12. *Id.*
13. *Id.* at 32, 917 N.W.2d at 156. (footnotes omitted) (quoting *Loontijer*, 288 Neb. at 999, 853 N.W.2d at 513).
14. *Loontijer*, 288 Neb. at 1000, 853 N.W.2d at 513 (quoting City of North Platte v. Tilgner, 282 Neb. 328, 349, 803 N.W.2d 469, 487 (2011)).
15. *Id.* at 995–96, 853 N.W.2d at 510 (quoting Anderson v. Tiemann, 182 Neb 393, 408–09, 155 N.W.2d 322, 332 (1967)).
16. *Loontijer*, 288 Neb. 973, 853 N.W.2d 494.

> [T]he practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately. It is sometimes described as including favored but unrelated propositions in a proposed amendment to ensure passage of a provision that might otherwise fail.[17]

Despite this common concern for both legislation and constitutional amendments, when the constitution is at issue, the court has concluded that the "general object . . . germaine" test is not strong enough.[18]

Two very difficult question lurk in the court's single-subject test for constitutional amendments: (1) what is the purpose of an initiated measure or legislative proposal, and (2) how closely related to that purpose must different provisions of the measure or proposal be in order constitute a single subject?

In the fall of 2020, two initiative efforts to amend the constitution brought the court squarely to these questions. The first effort aimed to authorize casino gaming in Nebraska, which required modifying existing constitutional language that prohibits "games of chance."[19] The second proposed amendment would have made medical marijuana available in Nebraska. While there is no state constitutional prohibition on medical marijuana, proponents of the initiative sought to create a right to it in the state constitution.

Both subjects are politically heated. Gambling in Nebraska has been a source of contention for decades. Indeed, *Loontijer* involved a legislative proposal to allow more Nebraskans to play the ponies on Memorex.[20] Because the prohibition on such games of chance is rooted in the state constitutional, all modern efforts to expand gambling concern state constitutional amendments. The debates surrounding these proposed amendments often focus on process challenges that keep the matter from getting to the ballot and, consequently, to the people. In *Loontijer*, the ponies-on-tape question did not get to the people because the legislature had presented two amendments for one vote.

This gaming history is important because it explains the form of the initiative petitions that were circulated in 2020. Proponents created three separate petitions, each a part of authorizing casino gaming in Nebraska, and each geared at different aspects of the subject. Briefly, initiative measure 429, was to add a constitutional provision to article three, section twenty-four, as follows:

> This section shall not apply to any law which is enacted contemporaneously with the adoption of this subsection or at any time thereafter and which provides for the licensing, authorization, regulation, or taxation of all forms of

17. *Id.* at 995, 853 N.W.2d at 510 (footnote omitted).
18. *Loontijer*, 288 Neb. 973, 853 N.W.2d 494.
19. NEB. CONST. art. III, § 24.
20. *Loontijer*, 288 Neb. 973, 853 N.W.2d 494.

> games of chance when such games of chance are conducted by authorized gaming operators within a licensed racetrack enclosure.[21]

Two other initiative measures, 430 and 431, proposed statutory changes that would allow and regulate racetrack gaming, tax the revenues therefrom, and provide for the distribution of that revenue.[22]

On the medical-marijuana initiative, proponents sought to amend the Nebraska Constitution with the creation of a new article nineteen, section one. The *State ex rel. Wagner v. Evnen* court described it as follows:

> If approved, the NMCCA would, in nine subsections, (1) establish a constitutional right for adults 18 years or older with serious health conditions "to use, possess, access, purchase, and safely and discreetly produce" medicinal cannabis as recommended by a licensed physician or nurse practitioner; (2) establish the same right for minors younger than 18 years of age, provided they obtain the consent of a parent or legal guardian; (3) provide that private entities "may grow, cultivate, process, possess, transport, sell, test, or transfer possession of cannabis, cannabis products, and cannabis-related equipment for sale or delivery to an individual authorized" under the first two subsections; (4) decriminalize the medicinal use of cannabis for persons who qualify under the first two subsections; (5) subject persons' rights to use cannabis under the first two subsections to reasonable laws, rules, and regulations; (6) set forth certain limitations on the expansion of medicinal cannabis; (7) provide that employers are not required to allow employees to work while impaired by cannabis; (8) provide that insurance providers are not required to provide coverage for the use of cannabis; and (9) define cannabis.[23]

The litigation that ensued, regarding gaming and marijuana initiatives, started with letters to Secretary of State Robert Evnen, urging him to withhold the initiated measures from the general-election ballot. The Secretary of State responded to those letters with his own letters notifying the casino proponents that they would not be allowed on the ballot, while the marijuana proponents were notified that their measure would be placed on the ballot.[24] These determinations were made on August 25 and 27, 2020.

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21. State *ex rel.* McNally v. Evnen, 307 Neb. 103, 107, 948 N.W.2d 463, 470 (2020) (quoting the text of initiative measure 429).
22. *Id.* at 107–09, 948 N.W.2d at 470–71 (quoting initiative measures 430 and 431 and referring to them as "the Regulatory Initiative" and "the Tax Initiative").
23. State *ex rel.* Wagner v. Evnen, 307 Neb. 142, 146, 948 N.W.2d 244, 250 (2020). The full initiative text is available at *Petition: Medical Marijuana*, NEB. SEC'Y OF STATE (Feb. 5, 2019), https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2018/Medical_Cannabis.pdf [https://perma.cc/A2ZX-Z827].
24. Letter from Robert B. Evnen, Sec'y of State, State of Nebraska, to David A. Lopez, J.L. Spray & Andre R. Barry (Aug. 25, 2020) https://d1vmz9r13e2j4x.cloudfront.net/NET/misc/GamblingPetitionDecision-3522.pdf [https://perma.cc/J72J-DHTL] (addressing casino proponents); Letter from Robert B. Evnen, Sec'y of State, State of Nebraska, to Mark Fahleson, Jason Grams & Hon. Max Kelch (Aug. 27, 2020) (addressing marijuana proponents), https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/news-releases/Medical%20Cannabis%20Initiative%20Determination%20Letter%202020.pdf [https://perma.cc/893W-ZQNY].

Those who were disappointed by the Secretary of State's decision filed actions in the Nebraska Supreme Court, seeking mandamus relief ordering the Secretary of State to reverse course. In both instances, they won, and the Secretary lost. The Secretary of State was ordered to place the casino-gaming initiatives on the ballot in *State ex rel. McNally v. Evnen*,[25] and he was ordered to withhold the medical-marijuana initiative from the voters in *State ex rel. Wagner v. Evnen.*[26] Both opinions were issued on September 10, 2020, after arguments had been held on September 2 and 3, 2020. Ultimately, all three casino-gaming measures were adopted, by wide margins.[27]

The ensuing legislative session included various proposals for statutory changes to the initiative process, as well as a proposal that would amend the constitution to change the court's standard.[28] Secretary Evnen and members of the law faculty (myself included) were drawn to the idea of a deeper study of the subject. To that end, we arranged a symposium and I testified about the event during the committee hearing devoted to the proposals. The proposals did not advance from committee in 2020. These proposals were carried over to the 2022 second session, but, again, did not advance.

III. DIRECT DEMOCRACY: FROM THEORY TO PRACTICE

The *Direct Democracy: From Theory to Practice* symposium convened on November 13, 2021, at the University of Nebraska College of Law. Video recordings of the proceedings are available on the symposium's website.[29] The symposium consists of four panels. The first panel addresses the constitutional values at stake with direct-democracy provisions. The second panel addresses the substantive parameters of the constitutional provisions related to direct democracy. The third panel addresses the procedural aspects of these provisions, focusing primarily on who decides whether constitutional restraints have been observed. And the final panel includes Nebraskans who

25. *McNally*, 307 Neb. 103, 948 N.W.2d 463.
26. *Wagner*, 307 Neb. 142, 948 N.W.2d 244.
27. 2020 NEB. SEC'Y OF STATE OFF. REP. OF THE NEBRASKA BD. OF STATE CANVASSERS 82–84, https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2020/2020-General-Canvass-Book.pdf [https://perma.cc/DU6B-P263].
28. LR24CA, 107th Leg., 1st Sess. (Neb. 2021) (amending "single subject" to include a general subject with provisions connected to the general subject); LB475, 107th Leg., 1st Sess. (Neb. 2021) (requiring an Attorney General advisory opinion indicating whether the initiative meet the single subject rule); LB477, 107th Leg., 1st Sess. (Neb. 2021) (requiring the Secretary of State to issue an advisory opinion to the legality of a proposed initiative); *Hearing Before the Comm. on Government, Mil. & Veterans Affs.*, 107th Leg., 1st Sess. (Neb. Feb. 18, 2021) (discussing LR24CA, LB475, and LB477).
29. *2021 Lane Lecture & Direct Democracy Symposium*, NEB. COLL. OF L., https://law.unl.edu/direct-democracy-symposium/ [https://perma.cc/L52G-SD2L] (last visited June 23, 2022).

have a great deal of experience with Nebraska's provisions and provide input on the need for change in light of prior panels' discussions.

A. Theoretical Accounts of Direct-Democracy Provisions

Miriam Seifter and Robinson Woodward-Burns comprise the first panel. Professor Seifter's recent work focuses on the extent to which state constitutions exhibit a democracy principle that may be helpful to both situating direct democracy provisions in our constitutional order and in designing appropriate limits on their use.[30] Importantly, state constitutions' direct democracy provisions are increasingly being used as pathways for majoritarian policy that cannot be achieved in an increasingly deadlocked federal government.[31]

But the dangers of majoritarian overreach remain relevant to state-level reforms. Professor Seifter argues that these dangers can be better understood as encompassing discrimination and entrenchment dangers, which sometimes attend majority rule and sometimes do not. In response to these dangers, Professor Seifter proposes "*structural tailoring*: a way of separating problematic incursions [on majoritarian rule] from harmless ones."[32] To do so, she proposes that we differentiate "weak" from "strong" constraints and deploy different levels of justification for each, akin to the standards of review employed for fundamental and non-fundamental rights.[33] As an example, she cites the Idaho Supreme Court's refusal to allow the Idaho legislature's statutory effort to require a geographic distribution of voter signatures spanning all Idaho legislative districts.[34] There, employing a strict-scrutiny standard, the court concluded that there had been no showing of abuse that would justify such a significant change to Idaho's direct-democracy process and, thus, fell outside of the Idaho Constitution's language which allows the legislature to prescribe the conditions and manner of initiatives.[35]

Professor Seifter concludes with remarks substantiating the need for attention to state constitutions and state public law more generally. Her recent work on "constitutional communities" bolsters the case for state constitutional law attention, "No constitutional provision or constitutional ruling does much work without a constitutional community to digest it, discuss it, apply it, and invoke it."[36] Our work

30. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).
31. *Id.*
32. Miriam Seifter, *State Institutions and Democratic Opportunity*, DUKE L.J. (forthcoming 2022) (manuscript at 49) (on file with SSRN) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4042959 [https://perma.cc/23SQ-ZG2Z].
33. *Id.*
34. *Id.* at 55–56.
35. Reclaim Idaho v. Denney, 497 P.3d 160 (2021).
36. Miriam Seifter, *Extra-Judicial Capacity*, 2020 WIS. L. REV. 385, 386–87.

in this symposium is precisely the sort of constitutional community work that is necessary for robust state constitutional law.

Professor Woodward-Burns follows on the theme of state direct-democracy efforts, viewing these provisions as a way to "vent pressure for national constitutional reform,"[37] citing the direct election of US Congressional Senators and late twentieth-century tax reform efforts. In both cases, Article Five of the US Constitution stymied efforts to effectuate federal constitutional change. As a result, state-level reforms ultimately drove the Seventeenth Amendment the United States Constitution and resulted in national dispersed attention to fiscal concerns at the state level and helped usher in political pressure at the federal level for fiscal restraint. As a result, direct-democracy provisions in state constitutions provide an important service to the development of national policy. His paper, included here, provides a more detailed explanation of these observations, tracking the history of these two aspects of national policymaking and the correlated efforts at state policymaking.[38]

B. Substantive Restrictions on the Initiative Process

The second panel moves into the substantive changes made to direct-democracy processes, providing explanations for these changes and raising questions about their goals. Professor Dinan's work, included in this issue, provides a thorough accounting of when these sorts of changes (mostly limiting, but sometimes enabling) are likely to emerge:

> Efforts to change initiative process rules generally emerge in response to disjunctions in the views of the public and elected officials, whereby legislators block policies supported by voters. When these disjunctions result in groups relying on initiative measures to bypass legislators on high-profile issues on a routine basis, the party that controls the state legislature will begin to consider ways of limiting initiatives.[39]

Professor Dinan thoroughly recounts the drivers of these changes, the political dynamics in play, and the resulting changes. Importantly, the single-subject rule is one of these modifications, but it is only part of one of four common changes that include increased difficulty associated with ballot access, higher ratification standards once placed on the ballot, subject-matter limitations, and limitations or expansions of legislative power to change initiated policies. His thorough assessment places the single-subject debate in a broader context of initia-

37. Robinson Woodward-Burns, *Federal Experimentation Through State Constitutional Initiatives*, 101 NEB. L. REV. 19, 38 (2022).

38. *Id.*

39. John Dinan, *Changing the Rules for Direct Democracy in the Twenty-First Century in Response to Animal Welfare, Marijuana, Minimum Wage, Medicaid, Elections, and Gambling Initiatives*, 101 NEB. L. REV. 40, 41 (2022).

tive-process-rule changes that is driven by political backlash, borne of what Professor Seifter might deem legislative entrenchment.

To conclude, Professor Dinan draws our attention to the source of these rule changes: they were non-judicial. While the focus on judicial interpretation is important, the reader should not forget that rule changes can come at the hands of voters, legislators, or both. And these politically driven changes have not gone so far as to eliminate direct democracy. Given popular support, "the debate between supporters and opponents of the initiative process now focuses on tailoring the rules of initiative processes."[40]

Professor Briffault focuses attention on the single-subject limitation, analyzing the doctrinal challenges attending such limits and their purposes. Professor Briffault's work on the subject originated in the legislative use of these limitations. His article, *The Single-Subject Rule: A State Constitutional Dilemma*,[41] was cited by the *Wagner* court[42] and in the *McNally* dissent.[43] These opinions cite Professor Briffault's proposition that courts have not come up with a good way of defining a subject. This generality problem plagues every effort to interpret and deploy the constitutional or statutory text containing a single-subject rule.

As Professor Briffault explains, courts often enunciate the reasons for these provisions as they interpret them. Again, from the legislative context, these provisions can enhance deliberation in the legislative body, provide transparency to a watchful public, increase representative accountability, protect legislators from coercion at the hands of party leadership, protect the gubernatorial veto when no line-item veto power exists, and perhaps slow the growth of government by stopping omnibus legislation.

Professor Briffault goes on to discuss the enigmatic idea of "logrolling." As a conceptual matter, the idea is simple enough. Banding together two items that independently have one third of the electorate's support could produce a majority where none exists. And, as Professor Gilbert has also observed, adding last-minute "riders" that enjoy very little political support to things with massive political support is also problematic.[44] The reason why this is problematic, however, is difficult to pin down. Sometimes legislative dealmaking is perfectly acceptable; vote buying is kept in-check by other structural

40. *Id*. at 69.
41. Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629 (2019).
42. State *ex rel.* Wagner v. Evnen, 307 Neb. 142, 153 n.34, 948 N.W.2d 244, 254 n.34 (2020) (per curiam).
43. State *ex rel.* McNally v. Evnen, 307 Neb. 103, 138 n.11, 139 n.14, 948 N.W.2d 463, 488 nn.11 & 14 (2020) (Heavican, C.J., Stacy, and Freudenberg, JJ., dissenting)
44. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687 (2010).

constraints.[45] Moreover, the concept of political support is not as simple as "for" or "against." Convincing a legislator to forgo indifference through inclusion of something they support is hardly coercion, much less a difficult choice.

All of this, however, raises significant questions to Professor Briffault as he considers how these operate in the direct-democracy context. A more aggressive doctrine could, perhaps, find support because initiatives are created without a legislative apparatus. When the components of state lawmaking are absent—like multiple readings designed to establish internal consistency, professional staff creating language that fits into an existing legal landscape, and so on—perhaps a more aggressive doctrine would be desirable. Stated simply, the amateur nature of direct-democracy may counsel in favor of limiting the scope of initiatives. But it is difficult to tie that principle to an inquiry geared at differentiating between multiple and single subjects. Further, the political debates leading up to the vote are probably sufficient to expose linguistic or structural deficiencies, or at least garner opposition.

Perhaps a more demanding standard should apply in the direct-democracy context because there is no legislative compromise, given the nuance of political support. In many instances, there is also no opportunity for further compromise post-enactment. However, it is difficult to conclude that voters are coerced by a yes or no question. Nonetheless, the idea that votes can be garnered by the inclusion of something less objectionable also seems important. Perhaps a less-demanding standard—a broad notion of "subject"—would serve to differentiate illegitimate voter support from legitimate voter support. But, again, the basis for illegitimacy seems weak, at least if coercion is the animating principle.

The absence of many of the legislative concerns may counsel in favor of a less-demanding standard (or perhaps no single-subject rule). There is no legislator accountability to preserve, there is no prospect of surprise last-minute riders, and voters are not subject to party leadership pressure to support a package of assembled legislation.

Professor Briffault also questions the need for judicial oversight. In the legislative context, one argument for a more stringent single-subject rule is that legislators are not well-suited to police themselves. The coercion or temptation that underlies the logrolling problem also infects single-subject objections in legislative debate. Thus, courts are necessary, sometimes, to enforce these provisions. However, in the direct-democracy context, much of this is lacking. Voters may be well-suited to reject things that are, for example, too complicated. As more

45. *See, e.g.*, Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2013).

and more provisions are added to a proposal, uncertainty enters the fray and it seems likely that voters would withhold their support and opponents would mount a successful campaign.

In sum, the direct-democracy context for single-subject rules does not alleviate the indeterminacy associated with creating a workable standard, much less deploying it. To make the deployment point, Professor Briffault concludes with some analysis of *Wagner* and *McNally*. In *McNally* in particular, Professor Briffault is struck by the Secretary of State's invocation of the single-subject rule to withhold ballot placement because the separate measures were "too related" to be multiple subjects. Such an interpretation serves none of the purposes animating existing single-subject doctrine. The dissent in *McNally* did not make this error, but it also did something that could be attributed to the court in *Wagner*. In both of these cases, the additional subjects (the location of casino gaming in *McNally* and the production of medical marijuana in *Wagner*) appeared to be instances in which voters were faced with voting for "more or less of the same thing." Narrowing the scope of a provision to garner more support would not seem to constitute logrolling, unless everything is logrolling.

Of course, Professor Briffault carefully notes that this is but one view. Reasonable minds can differ (though perhaps not on the question of whether the single-subject rule somehow prohibits the separation of related matters because they comprise one subject). Rather, the indeterminacy comes at a very high cost. To Professor Seifter's "constitutional community" these decisions reasonably appear to be driven by underlying political preferences associated with the initiated measure. Such impressions (which may very well be wrong) delegitimize the court in the eyes of the public.

Professor Marshfield rounds out the panel, and his article appears in this issue.[46] His focus is primarily on the single-subject rule again, but he places it in a broader context of constitutional give and take. As his article demonstrates, the single-subject rule can be understood as undermining political majorities' ability to avoid post-adoption legislative maneuvering that effectively nullifies initiatives.

The article provides a helpful history of the single-subject rule; a sophisticated account of the paradox attending logrolling concerns; a robust depiction of counter-majoritarianism in the legislative, executive, and judicial branches; and an alarming collection of the ways that these bodies undercut voter initiatives and thwart popular preferences. Avoiding these minoritarian efforts to scuttle initiated measures often means expanding the scope of initiatives and adding detail. Such changes, however, increase the likelihood that multiple

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

subjects will be found in an initiative. In this way, the single-subject rule does not serve the ends for which it was designed. Rather, it entrenches minority legislative power to avoid the initiative and thereby works against the core purpose of the initiative: to "provide[ ] democratic majorities with an efficient and effective process for correcting and controlling wayward government."[47]

Professor Marshfield's analysis goes far beyond concerns for public perceptions about judicial illegitimacy. Rather, his critique draws into question whether a single-subject rule can be presently employed to do anything more than bolster the power of undemocratic institutions. If not, it should be avoided or dismantled. If so, it will require doctrinal attention, with structural roots. This article opens an important door toward a more coherent doctrinal approach that may protect the underlying purpose of direct-democracy provisions.

C. Implementation Components of Initiative Oversight

The third panel transitions slightly to the structural apparatus attending initiative processes, drawing close connections to Professor Marshfield's structural take on how the single-subject rule thwarts the preference-protecting and misalignment-correcting functions of direct democracy vis-a-viz minoritarian legislatures, courts, and executives. This panel's main focus is on implementation of the initiative, with a primary emphasis on "who decides" within the process for initiatives, what the scope of that authority is, and who might be involved in designing those processes.

Professor Johnstone is the first member of this panel and his remarks are also embodied in an article appearing in this issue.[48] In his article, he explores initiatives from a separation-of-powers perspective, arguing that rights-based conceptions of the initiative are ill-suited to the task of policing incursions on the initiative. The specific incursions he addresses are those found in implementing legislation, and, as such, he offers specific guidance for those seeking to provide rules for the initiative process through implementing legislation.

The article begins with the fundamental premise that the initiative power is often placed in state constitutions as co-equal to the legislature. After establishing the constitutional parameters of initiated measures, the article demonstrates how ill-fitting a rights-based approach is to judging legislative work affecting the initiative, and it proceeds to discuss legislative facilitation through a separation-of-powers lens akin to that found in the plural executive aspect of state constitutions.

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47. *Id.* at 74.
48. Anthony Johnstone, *The Separation of Legislative Powers In the Initiative Process*, 101 NEB. L. REV. 125 (2022).

Notably, the plurality of legislative power is somewhat different than the executive plurality that is a common state-constitutional law feature. For instance, executive powers are often independent and exclusive to the office (Governor, Attorney General, Secretary of State, etc.), but legislative powers are concurrent and unitary in the sense that both the legislature and the people may act on most subjects and there is only one body of statutory work created from those concurrent spheres.

With this conceptual frame in mind, the article examines the proper scope of facilitative legislation and the correlating, often textual, limit on impairment it entails. Professor Johnstone groups these limits into three areas: subject matter restraints, ballot-placement qualifications, and a third category enveloping other legislative actions affecting initiative processes that generally must observe a parity principle. From there, he examines the case law within each category to helpfully distill the principles attending the parameters of a power-based approach to the intra-branch relationship between the people's power and the legislature.

Judge Sutton concludes the panel on implementation. Judge Sutton's recent book, *Who Decides? States as Laboratories of Constitutional Experimentation*, is featured as part of the symposium and he delivered a Lane Lecture on the book before the symposium. Those remarks are included on the symposium website.[49] His book contains a helpful chapter on single-subject limits in the legislative context[50] and observations on the initiative power to propose state constitutional amendments.[51] Judge Sutton's symposium remarks focus on providing a check on the people's power. He begins by noting the absence of federal restraint emanating from the Guarantee Clause in Article Four, Section Four of the U.S. Constitution and *Pacific States Telephone and Telegraph v. Oregon*,[52] though there have been important cases where the federal judiciary has used federal constitutional rights to reign in the initiative power.[53]

Congressional power under the Commerce Clause is also an important check[54] with a judicial apparatus found in the dormant Com-

49. *2021 Lane Lecture & Direct Democracy Symposium*, NEB. COLL. OF L., https://law.unl.edu/direct-democracy-symposium/ [https://perma.cc/L52G-SD2L] (last visited June 23, 2022).

50. JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 237–65 (2022).

51. *Id*. at 331–66.

52. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

53. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); Obergefell v. Hodges, 576 U.S. 644 (2015); Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291 (2014).

54. Gonzalez v. Raich, 545 U.S. 1 (2005)

merce Clause doctrine.[55] But the primary means of judicial oversight has been through mechanisms like the single-subject rule, which raises a host of issues including difficult questions of severability when a single-subject challenge is considered post-adoption. The relative suitability of state courts, legislatures, and executive-branch actors in checking the people's will, before or after presentment, also presents important concerns, replete with practical problems attending intervention.

D. Practical Considerations and Nebraska's Experience

The final panel is comprised of practitioners familiar with the initiative process in Nebraska. Andre Barry is a lawyer with Cline, Williams, Wright, Johnson and Oldfather, who helped shepherd Medicaid expansion and the *McNally* casino-gaming initiatives through the initiative process. Wayne Bena is a lawyer and the Deputy Secretary of State who leads the elections division. Formerly, he was a county election commissioner in Sarpy County, Nebraska. Adam Morfeld is a lawyer and a state senator who helped lead the *Wagner* medical-marijuana provision through the initiative process. During their discussion, they raise important points about the practicalities of the initiative process.

Their most pressing concern relates to the timing of the initiative process. Constitutionally, the petitions must be filed with the Secretary of State at least four months before the general election at which they would be presented to voters, and signature gathering does not generally begin in earnest until six to nine months before the filing deadline. After filing, the signatures must be verified by the county election officials in the counties where the signatures were collected, up to 110% of the requisite number necessary to garner placement with the constitutionally required geographic distribution. Given further statutory requirements requiring ballot certification at least 50 days before the general election,[56] post-filing litigation must end in early to mid-September.

All of this provides an incredibly short time frame in which to operate, depending on the number of petitions that are filed. As Deputy Secretary Bena pointed out, the five petitions that were filed in 2020 pushed verification of the casino and medical-marijuana petitions into August. The Secretary's determination on the single-subject rule, which later sparked litigation, occurred after that, leaving litigants with very few weeks to test the Secretary's determination. Briefing,

55. One important local example is the Eighth Circuit's use of the doctrine to strike down Nebraska's Initiative 300. *See* Anthony Schutz, *Nebraska's Corporate-Farming Law and Discriminatory Effects under the Dormant Commerce Clause*, 88 NEB. L. REV. 50 (2009).

56. NEB. REV. STAT. § 32-801 (Reissue 2016).

arguments, and opinion delivery occurred very quickly in both cases, a process in need of change. The matter will become dire if more than five petitions are filed close to the four-month deadline.

The panelists unanimously agree that a single-subject determination needs to be made earlier in the process, perhaps preceding signature collection. The most compelling argument in favor of such a change comes from Senator Morfeld near the end of the discussion. He recounts the experience of thousands of people who participated in the collection effort who donated time—sometimes 10 to 15 hours a week for two years—and money, believing they had been successful. When *Wagner* was decided, it generated a great deal of distrust in the state's courts and the election apparatus. Avoiding such a situation is an imperative for future reform efforts.

Broader enthusiasm for updating the nineteenth-century process for petition circulation also surfaces over the course of the discussion. Such changes raise questions of security, developing political connections for successive ballot campaigns, and perhaps adjustments to ballot-placement thresholds. But the primary issue associated with the process in its current form is money. Senator Morfeld reports that a successful petition effort requires at least $1 million for paid circulators and administrative costs. Litigation further drives up the costs of an initiative effort. As it stands, very few causes can generate the funding necessary to pursue direct democracy.

Notably, the indeterminacy of the single-subject rule does not factor largely in these later discussions. Practically, an early determination will allow petition proponents to adjust their measures to comply with the constitutional requirement, and they seem willing to do so. Short of an early determination, a more predictable standard of singularity is quite important.

There is some discussion of the Secretary of State's role as the initial arbiter of single-subject compliance.[57] Under current practice, no deference is given to the Secretary's determination and a modest statutory change could enlist other executive actors, like the Attorney General, or direct judicial review of the proposed initiative. Such options may be reasonable responses as well.

Finally, legislative attitudes toward the initiative are discussed. Senator Morfeld recounts many instances during his tenure where fellow legislators would support taking a measure to the people, even though they did not support its passage in the legislature. In response to audience questions, the senator agreed that the legislature would

57. This was established in State *ex rel.* Loontjer v. Gale, 288 Neb. 973, 853 N.W.2d 494 (2014) (relying on NEB. REV. STAT. §§ 32-201, -801 (Reissue 2016)), with regard to legislative proposed constitutional amendments, and in State *ex rel.* Lemon v. Gale, 272 Neb. 295, 721 N.W.2d 347 (2006) (relying on NEB. REV. STAT. § 32-1409(3) (Supp. 2019) for initiated measures).

likely be willing to provide for funding needs. Thus, at least among those in the room, there did not seem to be significant concerns that the legislature is hostile to the people directly taking the lawmaking reins.

IV. THE ROAD AHEAD

The road ahead largely travels the path marked by the symposium's progression. A necessary first step is to consider the values that direct democracy plays in Nebraska's constitutional order, if not its relevance to national policymaking.

From there the constitutional parameters of Nebraska's direct-democracy provisions are worth examining, with primary emphasis on the continued need for a single-subject rule. Given the difficulties attending their management, their emergence in response to disgruntled and often anti-majoritarian legislatures, and the harm they are doing to the foundational goals of the initiative process, it may be time to abandon the exercise and await a problem that needs a solution.

Abandonment may also be a reasonable response, given the effects of our existing signle-subject doctrine. The single-subject rule appears to drive constitutional initiatives to higher levels of abstraction with fewer details. The effect of this is to keep the legislature involved in implementation policymaking on an initiated general subject. But, perhaps, Nebraskans do not trust the people to make those finer judgments directly or, if they do, they perhaps prefer to have an independent say on each judgment.

Another effect of the single-subject doctrine's generality preference is the role of the judiciary. As constitutional amendments are framed broadly to comply, it opens the door to continued judicial review of the legislature's work as consistent or inconsistent with a broadly framed constitutional provision. The desirability of continued judicial oversight is worth considering.

Short of an amendment repealing the provision, there is the prospect of changing the Nebraska Supreme Court's standard for what constitutes a single subject. With predictability as a goal, this probably means the standard should be broader or weaker, eliminating only the most egregious instances of joinder, for example, packaging casino gaming with marijuana legalization in a single measure. Such a change could be done in the constitutional text, clearly. But there is some support for doing so statutorily. The competing province of the legislature and the court in defining constitutional text raises a host of issues, but article III, section 4 grants facilitative authority to the legislature and article III, section 30's necessary-laws provision provides a sound basis for legislative intervention, provided such work does not impair the initiative.

Indeed, that legislative authority may extend to vesting different decisionmakers with the authority to judge constitutional compliance. This diminishes the role of courts in the process and, perhaps, saves the time that is necessary in a reformed process. At the very least, the timing could be adjusted to give decisionmakers a better window within which to hear and decide disputes.

As Nebraskans continue down the path of their experiment in self-governance, one thing is clear: there is no present desire to abandon the enterprise. The constitutional community that is so central to the state appears committed to its people's house, even though it may need some modifications. As the Capitol Building proclaims from its main entrance, "The Salvation of the State is Watchfulness in the Citizen."