

COMMENT

BEGGING THE QUESTION: JUDICIAL REVIEW OF
BALLOT QUESTIONS FOR REFERRED STATE
CONSTITUTIONAL AMENDMENTS IN WISCONSIN

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Among the most powerful instantiations of popular sovereignty is the people’s right to amend their state constitutions. In Wisconsin, the legislature refers proposed state constitutional amendments to the electorate, who decide whether to ratify based on a brief ballot question. Because a single question often cannot inform voters of the scope or import of an amendment with multiple provisions, voter consent to constitutional amendments becomes a legal fiction, especially where ballot questions are vague, incomplete, or misleading. Insufficient ballot questions that obscure or misrepresent the underlying amendment allow the legislature to manipulate the referendum process. This practice erodes popular sovereignty and abrogates constitutional accountability mechanisms. Effective procedural safeguards are thus necessary to legitimize referenda outcomes. However, the Wisconsin Legislature has created few statutory procedural safeguards to ensure accurate, clear, and complete ballot questions. Additionally, the Wisconsin Supreme Court’s inconsistent approach to judicial review of ballot questions renders these limited safeguards largely ineffective.

State constitutional amendment epitomizes a high-stakes, low-information process. With the proliferation of state constitutional amendments, often involving polarizing and significant policy issues, preserving state constitutions’ structural commitment to popular sovereignty in the referendum process has become increasingly important. State courts can best preserve this commitment by ensuring that legally sufficient ballot language elicits voter consent to the underlying amendment. Because the Wisconsin Constitution requires voter consent to ratify constitutional amendments, the Wisconsin Supreme Court has a constitutional duty to ensure that ballot questions elicit that consent. This Comment argues that rigorous pre-election judicial review of ballot language is imperative to combat legislative subversion of popular sovereignty in Wisconsin’s constitutional amendment process.

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INTRODUCTION

Referred state constitutional amendments¹ often do not appear on the ballot in their entirety. Instead, voters see a single question that strives

1. Legislatively referred state constitutional amendments originate in state legislatures. The legislature then submits the proposed amendment to voters, who must approve the amendment for it to be ratified. Legislatively referred state constitutional amendments are distinct from general referenda, which follow a similar procedure to enact or amend statutes, and ballot initiatives, which allow voters to directly propose statutes or constitutional amendments. For additional discussion of direct democracy terminology, see *infra* Part I.

to encompass the proposed amendment's essential elements or overarching purpose. While this approach has benefits, such as conserving ballot space and translating "legal-ese" into plain language, it also comes with serious potential disadvantages, including oversimplifying the referred amendment or misrepresenting the amendment's effect. These disadvantages have grave implications because they impede voters' ability to create their desired form of government. Often, where a ballot question is inaccurate or unclear, voters may challenge its legal sufficiency in state court. In Wisconsin, doctrinal standards for judicial review of ballot language are vague and applied inconsistently.² Many state courts employ similar tests,³ which begs the question: how should state courts conduct judicial review of ballot language in order to safeguard the people's role in the constitutional amendment process?

Case law, statutes, and constitutional provisions govern the manner of submission and judicial review of referred constitutional amendments to the Wisconsin electorate. Synthesizing this general legal scheme points to two unsettling conclusions: (1) the Wisconsin Legislature has created few procedural safeguards to ensure that ballot questions are accurate, clear, and complete;⁴ and (2) the Wisconsin Supreme Court's inconsistent approach to judicial review of allegedly insufficient ballot questions renders these limited procedural safeguards largely ineffective.⁵ Thus, in Wisconsin's current legal landscape, aggrandized legislative authority and inconsistent judicial review undermine voters' ability to create their desired form of government via constitutional referenda. In contrast, clearer requirements for phrasing ballot questions and more effective judicial review of incomplete or misleading ballot language would empower voters by giving them a more informed choice on the ballot.

In Wisconsin, the legislature crafts both the referred constitutional amendment and the corresponding ballot question and approves both by vote as a package deal.⁶ The referred amendment is then submitted to the electorate in the form prescribed by the legislature without further review.⁷ Where Wisconsin voters question the sufficiency of ballot questions, review of the legislature's phrasing has historically occurred

2. See *infra* Part I.

3. See *infra* note 167 and accompanying text.

4. See *infra* Section II.B.

5. See *infra* Section II.C.

6. WIS. STAT. § 13.175 (2021–22).

7. See *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 990 N.W.2d 122, 125 (Wis. 2023) (citing Wis. CONST. art. XII, § 1) ("A proposed amendment must be approved by a majority of both houses of the legislature in two successive legislative sessions. . . . Once it passes that test, the proposed amendment is submitted to the people.").

via post-election judicial review.⁸ Wisconsin voters have only challenged ballot questions a handful of times.⁹ Therefore, the Wisconsin Supreme Court has not had much opportunity to grapple with its proper role in reviewing the sufficiency of ballot language for referred state constitutional amendments. As a result, the nascent law regarding the proper test for allegedly insufficient ballot questions is vague, malleable, and difficult for lower courts to apply.¹⁰

The Wisconsin Supreme Court recently considered the proper scope of judicial review for ballot questions in *Wisconsin Justice Initiative v. Elections Commission*.¹¹ In 2020, the Wisconsin electorate voted on a proposed constitutional amendment known as Marsy's Law,¹² which passed in an overwhelming majority.¹³ However, the text of the

8. See, e.g., *State ex rel. Hudd v. Timme*, 11 N.W. 785 (Wis. 1882) (establishing a precedent for post-election review of referred constitutional amendments under the separate amendment rule); see also Certification by Wisconsin Court of Appeals at 6–7, *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, No. 2020AP2003 (Wis. Ct. App. Dec. 21, 2021) [hereinafter WJI Certification], <https://www.wicourts.gov/ca/cert/DisplayDocument.pdf?content=pdf&seqNo=466212> (“Four months before the April 2020 election, WJI sought a temporary injunction to prevent the ballot question from being submitted to the voters. The circuit court denied the motion.”). However, after the election, the circuit court agreed with the plaintiffs’ allegation that the ballot question did not sufficiently conform to constitutional requirements. Decision and Ord. at 2, 12, *EXPO Wis., Inc. v. Wis. Elections Comm'n*, No. 2023CV000279 (Dane Cnty. Cir. Ct. Feb. 20, 2023), <https://www.wpr.org/sites/default/files/9431093.pdf> (holding that plaintiffs had standing to challenge a referendum’s procedural shortcomings before the election but finding that they did not allege sufficient irreparable harm to warrant injunctive relief). For a discussion of the possibility and preferability of rigorous pre-election judicial review of ballot question sufficiency, see *infra* Section III.A.

9. See, e.g., *Timme*, 11 N.W. 785; *State ex rel. Ekern v. Zimmerman*, 204 N.W. 803 (Wis. 1925); *State ex rel. Thomson v. Zimmerman*, 60 N.W.2d 416 (Wis. 1953); *Milwaukee All. Against Racist & Pol. Repression v. Elections Bd.*, 317 N.W.2d 420 (Wis. 1982); *McConkey v. Van Hollen*, 783 N.W.2d 855 (Wis. 2010); *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 990 N.W.2d 122 (Wis. 2023).

10. See WJI Certification, *supra* note 8, at 3 (acknowledging the lack of guiding case law and referring the parties’ appeal from the circuit court directly to the Wisconsin Supreme Court); *Metro. Milwaukee Ass’n of Com. v. City of Milwaukee*, 798 N.W.2d 287, 302 (Wis. Ct. App. 2011) (questioning the workability of current standards).

11. 990 N.W.2d 122 (Wis. 2023).

12. Marsy’s Law, also known as the Victim’s Bill of Rights, seeks to strengthen crime victims’ procedural rights within the criminal legal system. Several states have approved some version of the law. However, Marsy’s Law has faced considerable criticism for eroding rights of criminal defendants within the already prejudicial criminal legal system. *Marsy’s Law: Harmful to Defendants*, HARV. C.R.-C.L. L. REV. (Nov. 10, 2018), <https://journals.law.harvard.edu/crcl/marsys-law-harmful-to-defendants/> [<https://perma.cc/S6LY-9RJB>].

13. Shawn Johnson, *Constitutional Amendment to Protect Crime Victims Was Presented Unfairly, Group Argues at Wisconsin Supreme Court*, WIS. PUB. RADIO (Sept.

constitutional amendment did not appear on the ballot itself, as the Wisconsin Constitution empowers the legislature with discretion to prescribe the manner in which proposed amendments are presented on the ballot.¹⁴ Thus, the legislature reduced the approximately 850-word amendment to a 69-word ballot question.¹⁵

In *Wisconsin Justice Initiative*, the Wisconsin Supreme Court considered whether this ballot question (1) referenced every essential part of the proposed amendment; (2) was misleading; and (3) encompassed two possible subjects, which would have required two separate ballot questions.¹⁶ Wisconsin case law has invoked two different tests for examining the sufficiency of ballot language: the separate amendment rule, which requires separate ballot questions for sufficiently distinct propositions within one amendment,¹⁷ and the every essential test, which requires ballot language to reference every essential element of the amendment.¹⁸ However, Wisconsin case law establishing the every essential test does not develop or apply what “every essential” means.¹⁹ *Wisconsin Justice Initiative* thus offered an opportunity to strengthen a promising standard that could guard against dangers of over-simplifying or misrepresenting referred amendments, thereby ensuring that voters are empowered in their decisionmaking. *Wisconsin Justice Initiative* is the

6, 2022, 5:15 PM), <https://www.wpr.org/wisconsin-supreme-court-hears-challenge-marsys-law-amendment> [<https://perma.cc/K76S-GYAX>] (stating that Marsy’s Law referendum “passed with nearly 75 percent of the vote”). Marsy’s Law is currently enumerated in WIS. CONST. art. I, § 9m.

14. WIS. CONST. art. XII, § 1.

15. Compare WIS. CONST. art. I, § 9m, with Decision and Ord. at 6, *Wis. Just. Initiative, Inc.*, No. 2019-CV-3485 (Dane Cnty. Cir. Ct. Nov. 3, 2020) [hereinafter WJI Circuit Court Decision], https://www.wjiinc.org/uploads/6/1/2/9/61290857/53_2020_11_03_circuit_court_decision.pdf (stating the ballot question that was presented to voters).

16. *Wis. Just. Initiative, Inc.*, 990 N.W.2d at 141–44; see also Brief of Plaintiffs-Respondents, *Wis. Just. Initiative, Inc. v. Wis. Elections Comm’n*, No. 2020AP2003 (Apr. 11, 2022) [hereinafter WJI Plaintiffs’ Brief], <https://acefiling.wicourts.gov/document/eFiled/2020AP002003/510911>.

17. *State ex rel. Hudd v. Timme*, 11 N.W. 785, 791 (Wis. 1882) (establishing the separate amendment rule).

18. *State ex rel. Ekern v. Zimmerman*, 204 N.W. 803, 811 (Wis. 1925) (establishing the every essential test). Note that the court recently characterized the every essential test as dicta in *Wisconsin Justice Initiative*, stating that “we do not understand *Ekern* as adopting or creating a new, undefined, and strict constitutional test for detail and accuracy in constitutional amendment ballot questions.” *Wis. Just. Initiative, Inc.*, 990 N.W.2d at 139. See *infra* Section II.C.2 for further discussion regarding the court’s recent treatment of the every essential test.

19. Precedent provides the nebulous instruction that ballot questions “must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment.” *Ekern*, 204 N.W. at 811. See also WJI Certification, *supra* note 8, at 9.

first case in which the court has considered how the separate amendment and every essential tests should be construed together.²⁰

Unfortunately, the Wisconsin Supreme Court did not take advantage of the opportunity presented by *Wisconsin Justice Initiative* to clarify a workable standard for judicial review of ballot questions.²¹ Additionally, the court's assurance "that the government the people have authorized remains in their hands" is ultimately contradicted by its conclusion that the legislature has "substantial discretion and freedom" in crafting ballot questions.²² With this reasoning, the court fails to consider its role within Wisconsin's referendum process as the sole body with the power to review ballot questions crafted by the legislature.²³ Although the Wisconsin Supreme Court has previously espoused the importance of upholding election outcomes in the name of popular sovereignty,²⁴ it should eschew a rigid approach of blind deference to the legislature's chosen ballot language. Instead, the court should conduct rigorous pre-election judicial review to ensure that voters are presented with legally sufficient ballot questions.

Part I of this Comment explores the people's role in the constitutional amendment process and the importance of clear ballot language as a constitutional concern. Part II examines Wisconsin's statutory and doctrinal framework for crafting and reviewing ballot language, respectively, and points out shortcomings of Wisconsin's current approach. Part III urges the importance of rigorous judicial review for allegedly insufficient ballot questions, proposes that the Wisconsin Supreme Court conduct pre-election review for such allegations, and offers preliminary suggestions for refining current standards for judicial review.

I. WISCONSIN'S DIRECT DEMOCRACY TOOL: MANDATORY REFERENDA OF STATE CONSTITUTIONAL AMENDMENTS

The Wisconsin Constitution, like all state constitutions, emphasizes a commitment to popular sovereignty.²⁵ In addition to enumerating a right

20. See WJI Certification, *supra* note 8, at 3.

21. See *Wis. Just. Initiative, Inc.*, 990 N.W.2d at 163–64 (Dallet, J., concurring).

22. *Id.* at 135 (Dallet, J., concurring).

23. *Id.* at 174 (A. Bradley, J., dissenting) (criticizing the majority for "essentially surrendering our responsibility for judicial review to the legislature").

24. See *State ex rel. Thomson v. Peoples State Bank*, 76 N.W.2d 370, 375 (Wis. 1956) ("The will of the electors as indicated by their ballots should not be defeated by a mere irregularity in the procedure of submission of the amendment.").

25. See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 881 (2021).

to vote,²⁶ the Wisconsin Constitution states that the government “deriv[es] [its] just powers from the consent of the governed.”²⁷ The constitution’s promise of popular sovereignty is thus a “present structural commitment” that “place[s] the people themselves above government.”²⁸ In keeping with this structural commitment, the Wisconsin Constitution requires voter consent to ratify legislatively proposed constitutional amendments.²⁹ By providing for mandatory referenda, the constitution makes the legislature accountable to the people and ensures that voters have a voice in creating their own government. Centering voters in the constitutional amendment process is critical to maintaining popular sovereignty and the people’s position as the source of government power.³⁰ However, because the ballot only presents voters with a single question that strives to summarize the broad purpose of the underlying amendment, voter consent becomes a legal fiction, especially where ballot questions are vague, misleading, incomplete, inaccurate, or otherwise insufficient.

This Part describes the constitutional aspects underlying judicial review of ballot language for legislatively referred constitutional amendments. After presenting a brief primer on direct democracy, this Part identifies the people’s power in the constitutional amendment process and discusses the importance of accurate, clear, and complete ballot language in safeguarding that power. Ultimately, the role of Wisconsin courts is to avoid legislative erasure of the people’s sovereignty by ensuring that ballot questions elicit voters’ informed consent for legislatively referred constitutional amendments.

A. Direct Democracy Primer

Direct democracy aims to give voters a voice outside of the representative context by placing policy issues directly on the ballot.³¹

26. Wis. CONST. art. III, § 1.

27. Wis. CONST. art. I, § 1.

28. Bulman-Pozen & Seifter, *supra* note 25, at 880. *See also* Wis. CONST. art. I, § 22 (“The blessings of a free government can only be maintained by . . . frequent recurrence to fundamental principles.”).

29. Wis. CONST. art. XII, § 1.

30. *See* Bulman-Pozen & Seifter, *supra* note 25, at 881–82.

31. David A. Carrillo, Stephen M. Duvernay, Benjamin Gevercer & Meghan Fenzel, *California Constitutional Law: Direct Democracy*, 92 S. CAL. L. REV. 557, 560 (2019); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11, 27–29 (1997) (describing historical intentions for direct democracy and its roots in the Progressive Movement).

While direct democracy tools have faced criticism and controversy,³² these tools offer an opportunity for citizens to achieve desired policies.³³ Participating states achieve the goals of direct democracy via different tools, which are applied uniquely in each state. One such tool is the referendum,³⁴ where citizens exercise a veto power on the state legislature's passage of a statute or constitutional amendment.³⁵ Referenda may be mandatory, where a state constitution requires the legislature to submit particular enactments to voters; voluntary, where the legislature may choose to refer measures to voters; or popular, where voters may petition to force a referendum on a certain legislative act.³⁶

32. Election outcomes may not represent a true majority due to undue influence by corporate interests, voter disenfranchisement, low voter turnout, or opt out by voters. Furthermore, those who vote on ballot propositions are disproportionately White and affluent. Thus, direct democracy is also criticized for the propensity of an unrepresentative voter base to limit the rights of political minorities, especially where the minority group may be “unpopular” or expressly disenfranchised, or where low or disproportionate voter turnout may have a decisive effect on the measure's outcome. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1515–22 (1990); Kait Madsen, Comment, *Execution on the Ballot: Lessons for Judicial Review of Ballot Measures from the Death Penalty Referendum in Nebraska*, 99 NEB. L. REV. 254, 265, 278–79 (2020); Carrillo, Duvernay, Gevercer & Fenzel, *supra* note 31, at 563. These criticisms ring especially true in the context of the Marsy's Law amendment, which has implications for the rights of criminal defendants, who are expressly disenfranchised and not likely to fall within the affluent, White voter base that disproportionately votes on ballot propositions. See Neil L. Sobol, *Defeating De Facto Disenfranchisement of Criminal Defendants*, 75 FLA. L. REV. 287, 290 (2023).

33. The use of direct democracy tools has proliferated in recent years as voters seek to pass legislation on pressing (and often contentious) policy issues amidst increased partisanship and distrust of government. Madsen, *supra* note 32, at 257–59. See also Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 79 (2019) (“[S]tate [constitutional] amendments have great substantive and political significance. They address almost every aspect of public life from contentious cultural issues . . . to high-stakes regulatory and structural issues State amendments have become a go-to political device for citizens, interest groups, and public officials.”); *Ballot Measure Results 2022*, NBC NEWS (Nov. 8, 2022), <https://www.nbcnews.com/politics/2022-elections/ballot-measures> [<https://perma.cc/LNK4-TN8V>] (summarizing election results for statewide ballot measures covering abortion, healthcare, elections and voting rights, firearms, marijuana legalization, and minimum wage).

34. Other primary direct democracy tools include the initiative, where voters circumscribe the state legislature to place proposed statutes or constitutional amendments directly on the ballot; and the recall, where voters may remove government officials from office. Persily, *supra* note 31, at 14.

35. Carrillo, Duvernay, Gevercer & Fenzel, *supra* note 31, at 568.

36. Eule, *supra* note 32, at 1512.

State statutes and constitutions outline procedures for submitting referenda to voters.³⁷

Each state prescribes a unique procedure for crafting ballot language for referred state constitutional amendments. For example, some states charge a specific government official³⁸ or non-partisan commission³⁹ with crafting ballot language upon the state legislature's approval of the amendment. If voters challenge the ballot question's accuracy or clarity, state courts will review the ballot language and the referred amendment according to each state's prescribed rule for judicial review.⁴⁰ While these procedures vary across states, rules prescribing effective procedural safeguards are important to maintain an informed voter base, effect voters' true intent, and legitimize referenda outcomes.⁴¹

37. *E.g.*, OHIO CONST. art. II, § 1g (describing procedural requirements to place referred measures on the ballot); MO. REV. STAT. §§ 116.010–.270 (2016) (detailing procedural requirements for initiatives and referenda).

38. *E.g.*, CONN. GEN. STAT. § 141-9-4(7) (2023) (charging Connecticut's Secretary of State with preparing ballot language for referred state constitutional amendments).

39. *E.g.*, OHIO CONST. art. II, § 1g (tasking the Ohio Ballot Board with preparing ballot language for referred state constitutional amendments); OHIO REV. CODE ANN. § 3505.061 (LexisNexis 2023–24) (detailing the appointment of Ballot Board members to create a nonpartisan board chaired by the Ohio Secretary of State).

40. *E.g.*, N.D. CONST. art. III, §§ 6–7 (giving the North Dakota Supreme Court original jurisdiction for challenges to ballot language, which must be brought prior to the election; measures approved by the electorate may not be invalidated by post-election judicial review).

41. *See* Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 64 (1995) (“[R]egulation of initiatives . . . minimiz[es] voter confusion, defin[es] the extent of legal change that can be made in a single initiative, and inform[s] voters on the issues.”); Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395 (2003) (advocating for stronger procedural requirements within direct democracy to legitimize election outcomes); *State ex rel. Ekern v. Zimmerman*, 204 N.W. 803, 811 (Wis. 1925) (stating the importance of requirements for ballot language clarity and accuracy to ensure an election's legitimacy); *see also* PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE*, at xv (1990) (“[C]onsent [to a constitutional amendment] is only valid if certain conditions are met. For an onerous or unfair procedure could thwart amendment long after desire for change became widespread and intense. An amending procedure that was undemanding for a privileged class might result in frequent use that did not reflect the desires of the larger public. Hence, . . . the amending power will not really indicate consent unless the procedure is fair and neither too difficult nor too easy.”).

B. The People's Role in the Constitutional Amendment Process

Wisconsin's government derives its power "from the consent of the governed."⁴² Although the U.S. Constitution favors a mediated representative government, the Wisconsin Constitution, like all state constitutions, positions "the majority of the political community as the principal and normatively superior decisionmaker."⁴³ Thus, unlike the federal Constitution, the Wisconsin Constitution does not conflate the people and their legislative representatives, instead giving each a distinct governance role.⁴⁴ This is especially true in the constitutional amendment process, where the Wisconsin Legislature may propose an amendment or recommend a constitutional convention, but the ultimate power to take either action resides with the people.⁴⁵

The Wisconsin Constitution provides for mandatory referenda of state constitutional amendments.⁴⁶ Under this scheme, constitutional amendments proposed by the legislature cannot be ratified without voter approval.⁴⁷ The mandatory referendum is thus a constitutional accountability mechanism "intended to keep legislators responsive to the public and to facilitate public monitoring of government action."⁴⁸ Because the constitution has given voters a direct role in the amendment process, Wisconsin courts must prevent legislative erasure of that role by empowering voters in the exercise of their veto authority.

C. The Importance of Clear Ballot Language

Sufficient ballot language is a constitutional concern. When deciding how to cast their votes, voters often rely on the ballot question itself.⁴⁹

42. WIS. CONST. art. I, § 1.

43. Bulman-Pozen & Seifter, *supra* note 25, at 899.

44. *See id.* at 899-901.

45. WIS. CONST. art. XII. *See also* Bulman-Pozen & Seifter, *supra* note 25, at 882 ("Since the eighteenth century, [state] constitutional amendment has been among the most prominent instantiations of popular sovereignty.").

46. WIS. CONST. art. XII, § 1 ("[I]t shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become part of the constitution.").

47. *Id.*

48. Bulman-Pozen & Seifter, *supra* note 25, at 874.

49. DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 179 (1984) ("[M]ost voters make snap judgments on the measure in the voting place."); *see also* Craig M. Burnett & Vladimir Kogan, *When Does Ballot Language Influence Voter Choices? Evidence from a Survey*

Because the Wisconsin Constitution requires voter approval to ratify amendments,⁵⁰ ballot questions must provide enough detail to elicit voters' informed consent to the underlying amendment.

Wisconsin's process of constitutional lawmaking unites two elements of popular sovereignty: popular authorship and present consent.⁵¹ Vague, misleading, incomplete, inaccurate, or otherwise insufficient ballot language frustrates both elements and violates the Wisconsin Constitution's commitment to popular sovereignty. First, popular authorship requires that the people are "in a genuine, non-obscurantist way . . . the original source of authority" for the constitutional amendment.⁵² Insufficient ballot language violates ideas of popular authorship by obscuring the underlying amendment. Second, popular sovereignty requires present consent, as the constitution derives its authority from "the consent of the people now living under it, who constitute the present sovereign."⁵³ Without accurate, clear, and complete ballot questions, voters cannot knowingly consent to the underlying amendment. Thus, insufficient ballot language that obscures or misrepresents the underlying amendment allows the legislature to manipulate the referendum process and undermine popular sovereignty.

Insufficient ballot questions are a legislative tactic to erode constitutional accountability mechanisms by hindering voters' ability to check legislative abuses of power. As the guardian of the Wisconsin Constitution, the Wisconsin Supreme Court has a duty to uplift the constitution's structural commitment to popular sovereignty.⁵⁴ Judicial review can best safeguard the people's role in the amendment process by ensuring that the legislature presents referred amendments to voters via accurate, clear, and complete ballot questions.

Experiment, 32 POL. COMM'N 109, 112 (2015) ("[E]very voter reads the ballot at the critical point of decision making.").

50. WIS. CONST. art. XII, § 1.

51. Bulman-Pozen & Seifter, *supra* note 25, at 896; David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 686 (2018).

52. Grewal & Purdy, *supra* note 51, at 681–82.

53. *Id.* at 682.

54. See Scott L. Kafker & David A. Russcol, *The Eye of a Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1289 ("The state judiciary is the ultimate guardian of the procedural and substantive provisions of state constitutions, including [direct democracy] provisions.").

II. WISCONSIN'S EXISTING STATUTORY AND DOCTRINAL FRAMEWORK FAILS TO SAFEGUARD THE PEOPLE'S ROLE.

Procedural safeguards that guarantee accurate, clear, and complete ballot questions are critical to legitimize referenda outcomes. This Part examines Wisconsin's statutory and doctrinal framework for crafting and reviewing ballot language. After identifying approaches used by other states to ensure an informed voter base, this Part discusses Wisconsin's sparse statutory scheme and its failure to create procedural safeguards for ballot language. Finally, this Part examines the Wisconsin Supreme Court's current approach to judicial review of ballot language and identifies the ways in which current standards erode popular sovereignty.

A. *The Dilemma: How to Inform Voters of What They Are Voting On*

To maintain popular sovereignty, the people must understand the constitutional amendments referred to them by the legislature. States employ various tools to distribute information about referred amendments to voters. For example, California distributes information guides to registered voters before the election.⁵⁵ These guides contain the text of the proposed amendment; an impartial description of the amendment's provisions and effects; the ballot language that will represent the amendment at the election, including the official summary and total number of votes cast for and against the proposed amendment by the California Legislature; arguments and rebuttals for and against ratification; and a fiscal impact statement.⁵⁶ While this broad distribution of information shows a commendable commitment to popular sovereignty, California's extensive use of direct democracy measures means that voter information pamphlets are often quite long and arduous to wade through.⁵⁷

Other states inform voters by including information on the ballot itself. For example, Kentucky law requires that ballots include the text of the proposed amendment accompanied by a brief question stating "the substance of the amendment."⁵⁸ Although the Kentucky Supreme Court

55. CAL. ELEC. CODE § 9081 (West 2023).

56. CAL. ELEC. CODE §§ 9050, 9084–87 (West 2023).

57. See Eule, *supra* note 32, at 1508–09 (describing California's voter information guide as a "massive booklet" comparable to a "local phone directory" with "print so small that a magnifying glass, if not a microscope, was required to read it"); MAGLEBY, *supra* note 49, at 136–39 (describing prior research and survey results showing "that most voters do not read the [information guide] or use it as a source of information for decisions on propositions" and that the guides were so difficult to read that "the vast majority of voters . . . could not effectively use it").

58. KY. REV. STAT. ANN § 118.415(1) (West 2021).

has held that including the amendment’s text on the ballot is critical to preserving popular sovereignty,⁵⁹ ballot questions that use plain language are more likely to elicit voters’ informed consent.⁶⁰ Summarizing a referred amendment and describing its potential effect on the ballot is a more accessible and effective approach that has been adopted by several states.⁶¹

Although these tools would be helpful to safeguard the people’s role in the constitutional amendment process, Wisconsin’s statutory scheme does not provide for effective information distribution or permit the inclusion of additional information on the ballot. Instead, Wisconsin statutes provide for limited information distribution via media outlets,⁶² and judicial review only requires that the ballot question communicate the broad purpose of the amendment.⁶³ Thus, Wisconsin’s current legal framework fails to ensure that ballot questions convey comprehensive information to voters. The rest of this Part investigates how Wisconsin’s current legal framework fails to guarantee sufficient ballot questions and ensure voter consent to constitutional amendments.

B. Shortcomings of Wisconsin’s Current Statutory Scheme

The Wisconsin Constitution provides for mandatory referenda of state constitutional amendments but does not prescribe specific procedural rules for their submission to the electorate.⁶⁴ Instead, the constitution directs the Wisconsin Legislature to prescribe this procedure.⁶⁵ However, the legislature has promulgated few statutes prescribing requirements for information distribution and ballot question

59. *Westerfield v. Ward*, 599 S.W.3d 738, 748–49 (Ky. 2019).

60. *See* Ellen E. Hoffman, *Getting to “Plain Language,”* 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 47, 48–49 (2009) (stating that, given the general population’s reading level, using plain language, *i.e.*, “easily understood words, correct grammar, a direct writing style, and clear presentation,” is essential to ensure widespread understanding).

61. *See, e.g.*, FLA. STAT. § 101.161(1) (2023) (requiring a summary of the amendment and its financial impact); IDAHO CODE § 34-1810 (2023) (requiring a ballot title and statement of effect of a “yes” or “no” vote); 5 ILL. COMP. STAT. 20/2(a) (2023) (requiring a “brief explanation” of the amendment and arguments for and against ratification); S.D. CODIFIED LAWS § 12-13-9 (2023) (requiring a fiscal impact statement and a summary of the proposed amendment and its effects, including “a description of the legal consequences of the proposed amendment [and] . . . the likely exposure of the state to liability if the proposed amendment . . . is adopted”).

62. *See infra* Section II.B.1.

63. *See Wis. Just. Initiative, Inc. v. Wis. Elections Comm’n*, 990 N.W.2d 122, 141 (Wis. 2023).

64. *See* WIS. CONST. art. XII, § 1.

65. *Id.*

phrasing. This Section discusses the implications of the Wisconsin Legislature's failure to create statutory procedural safeguards.

1. WISCONSIN LACKS RIGOROUS REQUIREMENTS FOR INFORMATION DISTRIBUTION TO VOTERS

Accurate and effective information distribution to voters is a valuable potential tool to combat insufficient ballot questions. The Wisconsin Legislature has passed statutes prescribing the manner in which voters receive information about referred constitutional amendments leading up to elections.⁶⁶ The statutory scheme requires publication of notices in local newspapers⁶⁷ at various points leading up to the election.⁶⁸ In particular, a "Notice of Referendum" contains the entire text of the ballot question and referred constitutional amendment, as well as an explanation of the effect of either a "yes" or "no" vote.⁶⁹ The Wisconsin Attorney General prepares the explanatory statements,⁷⁰ and the Wisconsin Elections Commission sends these notices to county clerks, who bear the responsibility of publication.⁷¹ Thus, newspaper publication is the primary method of disseminating information about referred constitutional amendments to voters and has the most thorough statutory scheme. A separate statute also tasks the Legislative Reference Bureau with publishing the text of referred constitutional amendments online at least three months before a general election.⁷² Finally, the Wisconsin Elections Commission must maintain a toll-free telephone line for voters to obtain election information.⁷³

Information distribution to voters, especially regarding the proposed amendment's potential effects, is important because this information does not appear on the ballot itself. If this information is not reliably communicated to voters before the election, the ballot question becomes the sole point of contact between the voter and the referred constitutional amendment. Relying on periodic print publication in local newspapers is

66. See WIS. STAT. § 10.01 (2021–22).

67. WIS. STAT. § 10.04 (stating guidance for newspaper selection). When there is not a newspaper available meeting these requirements, towns may post notices in lieu of publication. WIS. STAT. § 10.05.

68. WIS. STAT. §§ 10.01, 10.06.

69. WIS. STAT. § 10.01(c).

70. *Id.*

71. WIS. STAT. § 10.06.

72. See WIS. STAT. § 5.02(5) (2021–22) (scheduling general elections for the Tuesday after the first Monday in November); WIS. STAT. § 35.07 (2021–22) (tasking the Legislative Reference Bureau with publishing proposed amendments no later than the first day of August preceding a general election).

73. WIS. STAT. § 5.05(13)(a) (2021–22).

not the most effective or wide-reaching method for distributing voter information in the modern digital age.⁷⁴ In the wake of deficient information distribution, voters are more likely to rely on information communicated through political advertisements and the ballot question itself when voting for referred amendments.⁷⁵ This highlights the gravity of misleading, incomplete, or incorrect ballot language. First, where a ballot question is vague or overbroad, interest groups can more easily fill in the question's gaps with their preferred political spin.⁷⁶ Second, if the ballot language is the only touchstone for voters, any misleading effect may have undue influence in the referendum's outcome.⁷⁷ The potential for misleading effects thus increases where procedural safeguards do not define substantive requirements for ballot questions.

2. THE WISCONSIN LEGISLATURE HAS SIGNIFICANT DISCRETION IN PHRASING BALLOT QUESTIONS

Wisconsin's statutory scheme has also left ambiguities in how to best frame ballot questions. One statute provides the following requirements for presenting referred constitutional amendments to voters: (1) referred constitutional amendments shall appear on a separate ballot; (2) the ballot will provide "a concise statement of each question"; and (3) the question shall be worded so that affirmative votes approve the amendment.⁷⁸ The proposed constitutional amendment must include "the precise wording of the referendum question" in order to pass the legislature.⁷⁹ Outside of the affirmative phrasing requirement, the Wisconsin Legislature has not passed statutes prescribing the content or phrasing of ballot language. No

74. Collins & Oesterle, *supra* note 41, at 102.

75. *Id.* at 102–03.

76. *Id.* See also Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1155 (2003); Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 36–37 (discussing how proponents of a ballot initiative can mislead voters about its intended effect).

77. See MAGLEBY, *supra* note 49, at 99, 166 ("[O]nly a small fraction of the citizenry can read and understand the ballot measures, voters' handbooks, or actual propositions[,] yet "many voters appear willing to vote on propositions, regardless of how little they may know about them."); Hillary C. Shulman, Matthew D. Sweitzer, Olivia M. Bullock, Jason C. Coronel, Robert M. Bond & Shannon Poulsen, *Predicting Vote Choice and Election Outcomes from Ballot Wording: The Role of Processing Fluency in Low Information Direct Democracy Elections*, 39 POL. COMM'N 652, 666–68 (2022) (finding that voters relying exclusively on ballot questions tend to make decisions based on ballot question phrasing and are more likely to support simply worded ballot measures).

78. WIS. STAT. § 5.64(2)(am) (2021–22).

79. WIS. STAT. § 13.175 (2021–22).

statute offers guidance for concision, clarity, scope, or impartiality. In the absence of such guidance, the legislature has significant discretion over how to present referred amendments to voters, as long as both houses agree on the precise wording.⁸⁰

By declining to enumerate statutory requirements for ballot question phrasing, the Wisconsin Legislature has shirked its constitutional duty to establish procedural requirements for referring constitutional amendments to voters.⁸¹ Moreover, unfettered legislative discretion over ballot question phrasing frustrates the constitutional purpose of mandatory referenda as an accountability mechanism. Vague, misleading, or incomplete ballot questions obfuscate the underlying referred amendment, thereby impeding the people's constitutional right to amend their constitution.⁸² By maximizing its discretion over the presentation of referred amendments to voters, the legislature has aggrandized its own power at the expense of popular sovereignty.

C. Shortcomings of Wisconsin's Current Approach to Judicial Review

Given Wisconsin's limited statutory procedural safeguards, rigorous judicial review of ballot language is critical to vindicate Wisconsin voters' constitutional right to ratify amendments. However, Wisconsin's current doctrinal framework takes a deferential approach, rendering these limited procedural safeguards largely ineffective. In doing so, the Wisconsin Supreme Court fails to defend the Wisconsin Constitution's democratic commitment. This Section identifies specific shortcomings within Wisconsin's current doctrinal approach that permit legislative erasure of popular sovereignty.

1. CASE LAW RENDERS PROCEDURAL REQUIREMENTS INEFFECTIVE

Judicial review of procedural shortcomings and insufficient ballot language has failed to uphold procedural safeguards and protect popular sovereignty. This failure stems both from explicit disregard of procedural violations and blind deference to legislative phrasing of ballot questions. In *State ex rel. Thomson v. Peoples State Bank*,⁸³ the Wisconsin Supreme Court upheld the outcome of a referendum election, even though the notice of election published by the Wisconsin Secretary of State contained

80. *See id.* As discussed *infra* Section II.C, the Wisconsin Supreme Court's overly deferential approach to judicial review has resulted in virtually unfettered legislative discretion for phrasing ballot questions.

81. *See* WIS. CONST. art. XII, § 1.

82. *See supra* Part I.

83. 76 N.W.2d 370 (Wis. 1956).

false and misleading information about the referred amendment.⁸⁴ The court reasoned that the erroneous explanation appeared embedded within a “lengthy notice of election,” and, although there was no way to know how many voters read the explanation, “it [was] inconceivable” that such a high number of voters “would read it or . . . [be] misled in their voting” so as to render a different election outcome.⁸⁵ Thus, the Wisconsin Supreme Court explicitly held that procedural shortcomings did not invalidate the referendum’s election outcome.⁸⁶

Even where a reviewing court does not explicitly waive procedural shortcomings, the high level of deference to legislative drafting renders procedural requirements effectively moot. In *McConkey v. Van Hollen*,⁸⁷ the Wisconsin Supreme Court stated that “the constitution assigns considerable authority and discretion to the legislature in the way it submits amendments to the people.”⁸⁸ Recently, the court in *Wisconsin Justice Initiative* doubled down on this troublesome constitutional interpretation.⁸⁹ This deferential reading gravely misinterprets the Wisconsin Constitution’s structural commitment to popular sovereignty.⁹⁰ In fact, the constitution’s first provision centers the people as the source of constitutional authority,⁹¹ and the constitutional amendment process utilizes the referendum to keep the legislature accountable to the people.⁹² As part of its deferential approach, the *McConkey* Court evaluated the allegedly insufficient ballot question by asking whether the legislature’s chosen phrasing was “reasonabl[e] and

84. *Id.* at 378. The notice incorrectly explained the effect that the proposed amendment would have on school districts’ debt ceilings. Although the amendment would “permit cities authorized to issue bonds for school purposes to incur indebtedness aggregating eight percent of assessed value,” the notice quoted a figure of five percent. *Id.* at 373–74 (cleaned up).

85. *Id.* at 374.

86. *Id.* at 375 (“The will of the electors as indicated by their ballots should not be defeated by a mere irregularity in the procedure of submission of the amendment.”); *but see Nevadans for Nev. v. Beers*, 142 P.3d 339, 350 (Nev. 2006) (“[W]hen inaccurate information about a proposed initiative is widely disseminated, as it was here, the integrity of the electoral process is jeopardized.”).

87. 783 N.W.2d 855 (Wis. 2010).

88. *Id.* at 862.

89. *See Wis. Just. Initiative, Inc. v. Wis. Elections Comm’n*, 990 N.W.2d 122, 141 (Wis. 2023) (“We must give significant deference to the legislature in making these choices [about ballot question phrasing] because the constitution affords the legislature substantial discretion in submitting an amendment to the people. While the legislature could have decided that more be said, WJI’s legal argument depends on its erroneous contention that the constitution demands a more exacting review of the legislature’s choices. It does not.”).

90. *See supra* Part I.

91. WIS. CONST. art. I, § 1.

92. *See Bulman-Pozen & Seifter, supra* note 25, at 881–82.

within their constitutional grant of authority and discretion.”⁹³ However, the Wisconsin Legislature does not have constitutional authority to amend the Wisconsin Constitution without the electorate’s consent.⁹⁴ Insufficient ballot questions that do not elicit voters’ informed consent to amendments are thus unconstitutional and per se unreasonable.⁹⁵

Peoples State Bank, McConkey, and *Wisconsin Justice Initiative* demonstrate that overly deferential judicial review undermines the electorate’s power to ratify proposed constitutional amendments. In these cases, the court’s excessive deference to the legislature and state officials superseded procedural requirements for the submission of referred constitutional amendments to voters. Instead of this historical approach, the Wisconsin Supreme Court should exercise its authority as a check on government officials to constrain abuses of power.⁹⁶

2. CASE LAW ESTABLISHES TWO DISCRETE, UNDERDEFINED INQUIRIES FOR REVIEWING BALLOT LANGUAGE

Although Wisconsin’s current legal framework gives the legislature significant discretion over referred constitutional amendments,⁹⁷ voters have challenged insufficient ballot language in Wisconsin courts.⁹⁸ In these cases, the Wisconsin Supreme Court has invoked two tests to review the sufficiency of ballot language: the separate amendment rule and the every essential test.⁹⁹ However, the court has not defined an effective standard for either test. Additionally, the court has not defined the circumstances under which each test should be invoked or how the tests overlap. Thus, the resulting precedent regarding judicial review of ballot questions is sparse and confusing at best.

First, the court has not defined an effective standard for the separate amendment rule.¹⁰⁰ This rule derives from the constitutional requirement

93. *McConkey*, 783 N.W.2d at 862 (quoting *Milwaukee All. Against Racist & Pol. Repression v. Elections Bd.*, 317 N.W.2d 420, 425 (Wis. 1982)).

94. *See supra* Section I.B; Marshfield, *supra* note 33, at 119–20.

95. *See supra* Section I.C.

96. *See infra* Section III.B for suggestions to achieve more rigorous judicial review.

97. *See supra* Section II.C.1.

98. *See supra* Section II.C.1 for a discussion of cases in which the Wisconsin Supreme Court considered challenges to ballot language sufficiency.

99. *See State ex rel. Hudd v. Timme*, 11 N.W. 785, 789–92 (Wis. 1882) (establishing the separate amendment rule); *State ex rel. Ekern v. Zimmerman*, 204 N.W. 803, 810–11 (Wis. 1925) (establishing the every essential test).

100. Several other states have a similar single subject rule. The similarities and differences between separate amendment and single subject rules are discussed *infra* Section III.B.3.

that when a referendum represents more than one amendment, each amendment must be submitted to the electorate and voted on separately.¹⁰¹ The Wisconsin Supreme Court first construed this provision in *State ex rel. Hudd v. Timme*,¹⁰² where it held that “separate amendments” were those that “relate to more than one subject, and have at least two distinct and separate purposes.”¹⁰³ In *Timme*, the court considered whether a referred constitutional amendment containing more than one provision constituted “separate amendments” under Article XII, Section 1 of the Wisconsin Constitution.¹⁰⁴ The amendment at issue sought to change legislative sessions from annual to biennial and contained four distinct provisions regarding the election of assembly members and senators, the meeting of the legislature, and compensation for legislators.¹⁰⁵ The court reasoned that while the amendment at issue did contain “several propositions,” the legislature voted on them as a single resolution, and each provision promoted the same overall objective.¹⁰⁶ Moreover, adopting the entire amendment was necessary to accomplish the amendment’s purpose of altering the frequency of legislative sessions.¹⁰⁷ Therefore, the referred amendment had one purpose relating to one subject and satisfied the newly established “separate amendment” rule.¹⁰⁸

While *Timme* established a baseline single purpose requirement, the court did not provide guidance as to how broadly or narrowly an amendment’s purpose should be construed, nor what factors should be considered in that construction.¹⁰⁹ Without this guidance, the court has relied primarily on the ballot question itself when construing an amendment’s purpose.¹¹⁰ The court did not enumerate relevant factors until its decision in *McConkey* over a century later.¹¹¹ The *McConkey* Court held that a referred amendment’s general purpose should be construed based on the amendment’s text and context, including historical context, the previous constitutional structure, legislative history,

101. WIS. CONST. art. XII, § 1.

102. 11 N.W. 785 (Wis. 1882).

103. *Id.* at 790–91.

104. *Id.* at 789.

105. *Id.* at 786.

106. *Id.* at 790–91.

107. *Id.*

108. *Id.* at 791–92.

109. See *infra* Section II.C.3 for a discussion of how the Wisconsin Supreme Court has applied the separate amendment rule with inconsistent scope.

110. See, e.g., *State ex rel. Thomson v. Zimmerman*, 60 N.W.2d 416, 418–21 (Wis. 1953).

111. *McConkey v. Van Hollen*, 783 N.W.2d 855, 867 (Wis. 2010).

information submitted to voters, and the ballot question itself.¹¹² Although the court enumerated several factors, its continued reliance on the ballot question as a factor in determining the underlying amendment's purpose is misplaced. A reviewing court should not rely on the ballot question itself when determining the scope of the underlying amendment. This approach creates a presumption of validity for the ballot question and diminishes the court's ability to assess the appropriateness of the question's scope under the separate amendment rule.

Second, although the Wisconsin Supreme Court has primarily invoked the separate amendment rule when determining the sufficiency of ballot questions, it has also invoked an "every essential" test. In *State ex rel. Ekern v. Zimmerman*,¹¹³ the court considered the validity of a constitutional amendment that limited legislative expenditures for both highway and forestry purposes, where the ballot question and published notice only referenced the limitation on forestry expenditures.¹¹⁴ The court did not consider the validity of this measure under the separate amendment rule. Instead, it considered whether voters were "adequately enlightened as to the true nature" of the underlying amendment.¹¹⁵ Under this framework, the court held that the ballot question "must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment."¹¹⁶ The court construed this "every essential" test from the constitutional requirement that the legislature prescribe the "manner" with which a given referred amendment is submitted to the electorate.¹¹⁷ The court interpreted the term "manner" to mean "a mode of procedure or execution" and reasoned that the framers meant to distinguish between "matters of substance and matters of mere form."¹¹⁸ Thus, to comply with constitutional requirements, the legislature must submit referred amendments in a manner that presents "an intelligent and

112. *Id.* at 867. Notably, the court only cursorily mentioned some of these factors in *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 990 N.W.2d 122, 144 (Wis. 2023) ("[W]e have no difficulty concluding Marsy's Law did not violate the constitutional prohibition on submitting multiple amendments as one. The amendment broadly protects and expands crime victims' rights. This is plain from the text and history of its adoption. In so doing, it amends only Section 9m of Article I. Even if WJI is correct that it will impact those accused of crimes as well (an issue we need not decide), all of the changes relate to the same, general purpose of expanding and protecting the rights of crime victims.").

113. 204 N.W. 803 (Wis. 1925).

114. *Id.* at 805–08.

115. *Id.* at 808.

116. *Id.* at 811.

117. *Id.* at 810–11 (citing Wis. CONST. art. XII, § 1).

118. *Id.* at 811.

comprehensive” question, so that citizens “may be fully informed” in their votes.¹¹⁹

Although the *Ekern* Court sought to establish a framework for judicial review of ballot questions that would empower voters in their franchise, it did not clearly define what constitutes an “essential” element or a “comprehensive” ballot question.¹²⁰ The Wisconsin Supreme Court did not revisit the every essential test for nearly one hundred years, although it did invoke *Ekern* to state that ballot questions cannot “by error or mistake” mislead voters.¹²¹ In *Wisconsin Justice Initiative*, the court minimized the effect of *Ekern*, stating that it did not “adopt[] or creat[e] a new . . . constitutional test for detail and accuracy in constitutional amendment ballot questions.”¹²² Instead, the court held that *Ekern* “is best read as affirming the unremarkable position” that the ballot question must pose “the real question, not an entirely different question.”¹²³ According to the court, “a ballot question could violate this constitutional requirement only in the rare circumstance that the question is fundamentally counterfactual such that voters were not asked to approve the actual amendment.”¹²⁴ With this holding, the court effectively dismisses the every essential test, “giving the legislature carte blanche in crafting ballot questions.”¹²⁵ By neglecting the every essential test, the Wisconsin Supreme Court has overlooked a promising standard to safeguard popular sovereignty.¹²⁶

Finally, although the case law has acknowledged both the separate amendment rule and every essential test, it does not clarify how these standards should be construed together when examining the sufficiency

119. *Id.*

120. *Id.* In its current construction, the every essential test is particularly ambiguous because the *Ekern* Court did not define what “every essential” means. Although the reasoning’s language contemplates “elements,” the holding merely states “every essential of the amendment.” *Id.* See also *Metro. Milwaukee Ass’n of Com. v. City of Milwaukee*, 798 N.W.2d 287, 302 (Wis. Ct. App. 2011) (questioning whether the “every essential” test provides a workable standard for lower courts).

121. *State ex rel. Thomson v. Zimmerman*, 60 N.W.2d 416, 422–23 (Wis. 1953) (referencing the “every essential” test established in *Ekern* but applying a separate amendment analysis). See also *Milwaukee All. Against Racist & Pol. Repression v. Elections Bd.*, 317 N.W.2d 420, 424–27 (Wis. 1982) (applying separate amendments rule but not the every essential test); *McConkey v. Van Hollen*, 783 N.W.2d 855, 870 (Wis. 2010) (applying separate amendment rule but not the every essential test).

122. *Wis. Just. Initiative, Inc. v. Wis. Elections Comm’n*, 990 N.W.2d 122, 139 (Wis. 2023).

123. *Id.*

124. *Id.* at 141.

125. *Id.* at 169 (A. Bradley, J., dissenting).

126. See *infra* Section III.B.2.

of ballot questions.¹²⁷ The two tests originate from different constitutional clauses and prescribe distinct procedural requirements for the legislature.¹²⁸ Thus, every case involving allegedly insufficient ballot questions should examine the question at issue using both standards. By failing to articulate the complementary nature of the separate amendment rule and every essential test, the court has failed to define a workable standard for judicial review of ballot language.¹²⁹

3. THE WISCONSIN SUPREME COURT APPLIES THE SEPARATE AMENDMENT RULE WITH INCONSISTENT SCOPE

The Wisconsin Supreme Court has applied the separate amendment rule inconsistently, which has rendered the constitutional mandate largely ineffective. Applying the separate amendment rule hinges upon the court's construction of an amendment's subject matter and purpose.¹³⁰ Ideally, the reviewing court would construe amendments' purposes with a similar scope across cases. Although the court has established factors for defining an amendment's purpose,¹³¹ the court has provided little direction regarding how these factors should be weighed to construe an amendment's purpose with consistent scope. Thus, an amendment's purpose, and therefore the separate amendment rule itself, may be construed either narrowly or broadly to achieve a desired policy outcome.¹³² Within the limited case law, the Wisconsin Supreme Court has in fact applied the separate amendment rule both narrowly and broadly for proposed amendments with multiple provisions depending on

127. See WJI Certification, *supra* note 8, at 3.

128. See WIS. CONST. art. XII, § 1 (requiring the legislature to submit multiple amendments to voters separately); *State ex rel. Ekern v. Zimmerman*, 204 N.W. 803, 810–11 (Wis. 1925) (citing WIS. CONST. art. XII, § 1) (construing the every essential test from the constitutional requirement that the legislature prescribes the manner of submission of referred constitutional amendments to voters).

129. See *infra* Section III.B.2 for further discussion of the complementary nature of these two standards.

130. See *State ex rel. Hudd v. Timme*, 11 N.W. 785, 791 (Wis. 1882) (holding that “separate amendments” are those that “relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other”).

131. *McConkey v. Van Hollen*, 783 N.W.2d 855, 867 (Wis. 2010) (stating that a referred amendment's general purpose should be construed based on the amendment's text and context, including historical context, the previous constitutional structure, legislative history, information submitted to voters, and the ballot question itself).

132. The breadth with which the court applies the separate amendment rule is outcome determinative. See *infra* notes 136–43 and accompanying text for an example illustrating this point.

the amendment's subject matter.¹³³ Often, this inconsistent construction has had the practical effect of permitting judicial policymaking based on judges' political preferences.¹³⁴

For example, in *State ex rel. Thomson v. Zimmerman*,¹³⁵ the Wisconsin Supreme Court applied a narrow construction of the separate amendment rule.¹³⁶ In that case, the court examined a referred amendment that altered election districting requirements.¹³⁷ The amendment included provisions that considered area as a factor in apportioning senate districts, included previously excluded groups in population calculations, and altered requirements for assembly district boundary lines.¹³⁸ However, the ballot question only referenced the inclusion of area as a factor for district apportionment, without referencing the additional provisions.¹³⁹ Based on this ballot question, the court construed the referred amendment's purpose narrowly, reasoning that its main purpose was to "consider[] area in apportioning the senate."¹⁴⁰ Under this construction, the additional provisions altering population calculations and assembly districts were distinct from the amendment's main purpose and should have constituted separate amendments.¹⁴¹ Although the court could have broadly interpreted the amendment's purpose under an umbrella of election reform, the court's chosen narrow construction had the practical effect of hindering the legislature's attempts to combat gerrymandering.

The Wisconsin Supreme Court has also construed the separate amendment rule broadly. In *Milwaukee Alliance v. Elections Board*,¹⁴² the Wisconsin Supreme Court once again considered the sufficiency of a referred constitutional amendment that made several changes to the constitution's criminal procedure provisions.¹⁴³ In addition to the textual

133. Compare *State ex rel. Thomson v. Zimmerman*, 60 N.W.2d 416, 421–23 (Wis. 1953) (narrowly construing the separate amendment rule), with *McConkey*, 783 N.W.2d at 865–66 (broadly construing the separate amendment rule).

134. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 690–91 (2010).

135. 60 N.W.2d 416.

136. *Id.* at 421–23.

137. *Id.* at 420.

138. *Id.*

139. *Id.* at 419.

140. *Id.* at 420.

141. See *id.* at 420–22.

142. 317 N.W.2d 420 (Wis. 1982).

143. *Id.* at 420. The amendment modified Wis. CONST. art. I, § 8, cls. 1–4 by changing three rights enumerated in subsection (1) from mandatory to discretionary with the following phrasing: "(1) No person shall may be held to answer for a criminal offense without due process of law, and no person for the same offense shall may be put twice in jeopardy of punishment, nor shall may be compelled in any criminal case to be a witness

changes that affected multiple constitutional rights, plaintiffs argued that the changes resulted in two different substantive effects (conditional release and anti-monetary bail), which should have been submitted to voters separately.¹⁴⁴ However, the court held that the referred amendment did not violate the separate amendment rule because each provision effected the amendment's single purpose, which was "to change the historical concept of bail."¹⁴⁵ The court's broad construction of the amendment's purpose thus allowed the legislature to logroll multiple substantive changes to the Wisconsin Constitution into a single ballot question.¹⁴⁶

In contrast to *Zimmerman*, the *Milwaukee Alliance* court found that the legislature correctly submitted to the electorate an amendment that made several substantive changes to the Wisconsin Constitution as a single referendum.¹⁴⁷ With the exception of the policy goals underlying each amendment, the facts of *Zimmerman* and *Milwaukee Alliance* are indistinguishable. In both cases, the legislature placed on the ballot a proposed amendment with multiple provisions that made several substantive changes to the constitution.¹⁴⁸ In both cases, the ballot question allegedly did not fully encompass each provision, and parties argued that the amendment should have been submitted to the electorate

against himself *or herself*"; altering subsection (2) as: "(2) All persons ~~shall~~, before conviction, ~~be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great, and the~~ shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses. Monetary conditions of release may be imposed at or after the initial appearance only upon a finding that there is a reasonable basis to believe that the conditions are necessary to assure appearance in court. The legislature may authorize, by law, courts to revoke a person's release for a violation of a condition of release."; adding a subsection (3) detailing conditional release; and altering subsection (4) language around the writ of habeas corpus. *Id.* at 423–24.

144. *Id.* at 424–27. The ballot question merely asked voters, "Shall section 8 of article I of the constitution be amended so that the legislature may permit courts to deny or revoke bail for certain accused persons; and so that courts may set conditions, including bail, for the release of accused persons to assure appearance in court, protect members of the community or prevent intimidation of witnesses?" *Id.* at 424.

145. *Id.* at 427.

146. Logrolling is the practice of combining multiple measures that would not pass on their own into a single proposition capable of receiving a majority of votes. A related phenomenon is riding, where an unpopular provision is added to a popular measure to secure its passage. Cooter & Gilbert, *supra* note 134, at 689–90. See also Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1638, 1644–45 (discussing an example of logrolling in Georgia).

147. *Milwaukee All.*, 317 N.W.2d at 427–28.

148. *Compare State ex rel. Thomson v. Zimmerman*, 60 N.W.2d 416, 418–19 (Wis. 1953), with *Milwaukee All.*, 317 N.W.2d. at 423–24.

as separate questions.¹⁴⁹ In both cases, the Wisconsin Supreme Court applied the separate amendment rule.¹⁵⁰ Yet, in each case, the court reached a different conclusion.¹⁵¹ There is no factual or legal basis for distinguishing these two cases. Truly, the two discernible differences between the cases are (1) the underlying policy goals of each amendment, and (2) the scope with which the court applied the separate amendment rule to construe each amendment's purpose.

Although recent cases demonstrate a trend towards a broader construction of the separate amendment rule,¹⁵² *Zimmerman* has not been overturned and remains good law. Moreover, *Zimmerman* is one of only four cases applying the separate amendment rule. Thus, the court could still cherry-pick precedent to support either a broad or narrow application of the separate amendment rule and achieve a desired policy outcome. However, the Wisconsin Constitution does not empower reviewing courts to craft policy¹⁵³ or influence the creation of the state constitution.¹⁵⁴ Inconsistent judicial review of ballot questions based on preferred policy outcomes thus aggrandizes the court's own authority and violates the constitution's commitment to popular sovereignty.

III. RECOMMENDATIONS FOR JUDICIAL REVIEW OF BALLOT QUESTIONS

Wisconsin needs improved procedural safeguards around constitutional referenda to protect the people's role in the amendment process. Procedural safeguards may come in the form of specific statutory requirements or less deferential judicial review. Some positive statutory innovations might include drafting requirements for ballot

149. Compare *Thomson*, 60 N.W.2d at 418–21, with *Milwaukee All.*, 317 N.W.2d at 421–24.

150. Compare *Thomson*, 60 N.W.2d at 421, with *Milwaukee All.*, 317 N.W.2d at 425–26.

151. Compare *Thomson*, 60 N.W.2d at 421–23, with *Milwaukee All.*, 317 N.W.2d at 427–28.

152. See *Milwaukee All.*, 317 N.W.2d at 425–26 (weakening the phrasing of the separate amendment rule established in *Timme* from “two distinct and separate purposes” to “one general purpose”); *McConkey v. Van Hollen*, 783 N.W.2d 855, 865 (Wis. 2010) (rejecting the plaintiff's claim that provisions “must be mutually dependent” to be considered a single amendment).

153. See WIS. CONST. art. IV, § 1 (vesting lawmaking authority in the Wisconsin Legislature); WIS. CONST. art. VII, § 2 (vesting judicial power in the Wisconsin courts). See also M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1156 (2000).

154. See *supra* Part I.

questions,¹⁵⁵ providing for executive branch review of ballot questions,¹⁵⁶ allowing public comment on proposed ballot language,¹⁵⁷ distributing information directly to voters,¹⁵⁸ and including more information on the ballot itself.¹⁵⁹ However, any statutory innovations would require buy-in from the Wisconsin Legislature and may necessitate a broader restructuring of Wisconsin’s referendum process. Within the current procedural framework, clearer requirements for phrasing ballot questions and more effective judicial review of incomplete or misleading ballot language represent achievable solutions for strengthening procedural safeguards.

Discerning judicial review of ballot language is important not only for the passage of the referred amendment at stake, but also for subsequent judicial interpretations of the referred amendment. When interpreting referred constitutional amendments in later cases, the Wisconsin Supreme Court presumes that voters were informed in their votes.¹⁶⁰ Thus, one way to strengthen judicial review could be to look at information distributed to voters to determine if they had a full and accurate picture of the amendment outside of the ballot question at issue.¹⁶¹ However, this kind of extensive fact-finding could strain judicial

155. *E.g.*, COLO. REV. STAT. § 1-40-106(3)(b) (2023) (“In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a ‘yes/for’ or ‘no/against’ vote will be unclear. The title for the proposed law or constitutional amendment . . . shall correctly and fairly express the true intent and meaning thereof Ballot titles shall be brief, . . . and, shall be in the form of a question which may be answered ‘yes/for’ (to vote in favor of the proposed law or constitutional amendment) or ‘no/against’ (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.”).

156. *E.g.*, OKLA. STAT. tit. 34, § 34-9(C) (2022) (providing for state attorney general review of the legislature’s drafted ballot language).

157. *E.g.*, CAL. ELEC. CODE § 9051(e) (2023) (“The Attorney General shall invite and consider public comment in preparing each ballot title and summary.”).

158. *E.g.*, ALASKA STAT. § 15.58.010 (2021) (requiring mail distribution of election information pamphlets to registered voters); ALASKA STAT. § 15.58.020(6) (listing requirements for election pamphlet contents, which include the full text of the proposed amendment, the ballot language, a neutral summary of the amendment, and arguments for and against ratification).

159. *See supra* note 58 and accompanying text.

160. *See Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 426 (Wis. 2006) (“This court presumes that, when informed, the citizens of Wisconsin are familiar with the elements of the constitution and with the laws, and that the information used to educate the voters during the ratification campaign provides evidence of the voters’ intent.”).

161. Wisconsin courts conduct similar factual inquiries when interpreting the meaning of voter-approved state constitutional amendments. *Id.* at 426–27 (summarizing key points from several news articles appearing in newspapers across the state); *id.* at

resources and would likely lead to competing results depending on voters' preferred information outlets.¹⁶² A more effective approach to determining whether a ballot question clearly represents the underlying amendment is to examine the ballot question itself.

When examining the sufficiency of ballot questions, the Wisconsin Supreme Court should center the constitution's commitment to popular sovereignty in its analysis. This Part argues that pre-election judicial review of ballot language is imperative to combat legislative erasure of this constitutional commitment via insufficient ballot questions. This discussion identifies other states that utilize pre-election judicial review and offers preliminary thoughts on how the Wisconsin Supreme Court could refine its approach to reviewing the sufficiency of ballot questions.

A. Conduct Pre-Election Judicial Review

To conduct stronger judicial review of ballot questions, the Wisconsin Supreme Court must first resolve an optics problem. Post-election judicial review of allegedly insufficient ballot questions facially presents as a check on the electorate rather than on the legislature simply due to its procedural placement. Moreover, court findings of insufficient ballot questions will always overturn the electorate's vote because post-election judicial review can only happen where voters approve the amendment.¹⁶³ Thus, to truly clarify the court's function as a check on the legislature, judicial review of ballot language should occur before the ballot question at issue is presented to voters.¹⁶⁴ A procedural structure that accommodates pre-election judicial review would better suit the court's role within the mandatory referendum process—preventing

448 (Prosser, J., concurring in part, dissenting in part) (recognizing that the case law “permits courts to consider the debates surrounding amendments to the constitution”); *Schilling v. Crime Victims Rts. Bd.*, 692 N.W.2d 623, 631 (Wis. 2005) (referencing a voter information brief prepared by the Legislative Reference Bureau); *Applying v. Doyle*, 826 N.W.2d 666, 676–77 (Wis. Ct. App. 2012) (referencing statements of legislators who sponsored the amendment).

162. See generally Jane S. Schacter, *The Pursuit of “Popular Intent”*: *Interpretive Dilemmas in Direct Democracy*, 105 *YALE L.J.* 107 (1995).

163. Alleged procedural shortcomings for ballot measures that voters rejected would not present justiciable claims. See *PRN Assocs. v. State Dep’t of Admin.*, 766 N.W.2d 559, 568 (Wis. 2009) (“An issue is moot when its resolution will have no practical effect on the underlying controversy.”).

164. See Staszewski, *supra* note 76, at 41–42 (stating that post-election enforcement of procedural rules is “inherently problematic” because it is “unlikely to prevent voter surprise or confusion about the particular consequences of” a ballot measure, while providing accurate ballot language prior to the election “is a more promising way to notify voters of the contents” of a proposed amendment).

legislative erasure of popular sovereignty by ensuring that ballot questions elicit voters' informed consent to the underlying amendments.

Although some states have raised justiciability issues regarding pre-election judicial review,¹⁶⁵ many states accommodate pre-election review of procedural defects and insufficient ballot language.¹⁶⁶ State courts that conduct pre-election review often cite state constitutional commitments to popular sovereignty.¹⁶⁷ Gordon and Magleby have even hypothesized that procedural requirements could be viewed as immediately justiciable jurisdictional limitations because legislators do not have jurisdiction to submit referred amendments to voters without complying with these requirements.¹⁶⁸

The separate amendment rule and every essential test are procedural requirements that preserve the integrity of the referendum election by ensuring that voters “can make an informed decision on a comprehensible constitutional question.”¹⁶⁹ Moreover, the separate amendment rule

165. *E.g.*, *Calzone v. Ashcroft*, 559 S.W.3d 32, 34 (Mo. Ct. App. 2018) (holding that a challenge to a referred measure's ballot language was not ripe for pre-election review); *Reichart v. State*, 278 P.3d 455, 473–74 (Mont. 2012) (stating that the court should not conduct pre-election judicial review for procedural claims regarding referenda, although pre-election review may be warranted where a challenged ballot measure is facially unconstitutional).

166. *E.g.*, *State ex rel. Loontjer v. Gale*, 853 N.W.2d 494, 504 (Neb. 2014) (“[A] claim that a proposed ballot measure violates a constitutional or statutory rule that governs the form of the measure or the procedural requirements for its placement on the ballot is a challenge to the legal sufficiency of a ballot measure. Such challenges are ripe for resolution before an election.”); *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 643–44 (Minn. 2012) (holding that a pre-election challenge to allegedly insufficient ballot language was justiciable); *State v. Vote Yes for Alaska's Fair Share*, 478 P.3d 679 (Alaska 2021) (conducting pre-election review of challenged ballot language but declining to interpret the measure's effect prior to the election). Some state legislatures have conferred statutory standing to challenge ballot language before elections. *E.g.*, ARK. CODE ANN. § 7-9-205 (2023); FLA. STAT. § 101.161(3)(c) (2023). *See also* James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 313–14 (1989); Douglas C. Michael, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CALIF. L. REV. 1216, 1226 (1983).

167. *E.g.*, *League of Women Voters*, 819 N.W.2d at 644 (“[T]his court has subject-matter jurisdiction over the narrow claim of whether the ballot question is so misleading that it violates the Minnesota Constitution because it deprives voters of the constitutional right to cast a vote for or against the proposed constitutional amendment.”); *Vote Yes for Alaska's Fair Share*, 478 P.3d at 687–88 (“Alaskans exercise their constitutional lawmaking right when they cast their ballots for or against a proposed initiative. . . . Because a ballot is the paper upon which voters give expression to their choices and exercise their lawmaking right, ‘[a] biased, misleading, or inaccurate ballot undermines the voting process.’ In short, the lieutenant governor may not improperly interfere in the people's ability to cast informed ballots.”).

168. Gordon & Magleby, *supra* note 166, at 314.

169. Kafker & Russcol, *supra* note 54, at 1288.

enshrined within the Wisconsin Constitution describes the separate submission of more than one amendment as a mandatory duty of the Wisconsin Legislature.¹⁷⁰ This constitutional language implies that the electorate shall not vote on a referendum that encompasses more than one amendment.¹⁷¹ Because the Wisconsin Supreme Court is the ultimate guardian of the Wisconsin Constitution, it has a duty to ensure compliance with constitutional requirements and to protect the people's right to amend their constitution.¹⁷² Less deferential, pre-election judicial review is better suited to weed out ballot questions that fail the separate amendment rule and every essential test and is thus more faithful to the constitutional vision for referred amendments in Wisconsin.

In addition to protecting constitutional procedural requirements and empowering voters in their right to amend the Wisconsin Constitution,¹⁷³ pre-election judicial review of ballot questions has several further benefits. First, if ballot questions fail the every essential test or separate amendment rule, the Wisconsin Legislature could easily remedy the error before the question is placed on the ballot. Remediating a ballot question that fails the every essential test would be as simple as rephrasing the question to give more detail about the underlying amendment. Similarly, a ballot question that fails the separate amendment rule could be rephrased into two questions that could be voted on separately. Thus, not only does pre-election review ensure the submission of valid ballot questions to voters, it also ensures more efficient allocation of public resources than post-election judicial review.¹⁷⁴ Additionally, pre-election review alleviates the fear of anti-judicial sentiment that may accompany post-election invalidation of ballot questions, which appear to interfere with election outcomes.¹⁷⁵ Rigorous pre-election judicial review of ballot questions may even have a positive political bend, as enforcing procedural requirements for mandatory referenda defends both voters' right to participate in the constitutional amendment process and the integrity of the constitution itself.¹⁷⁶

170. WIS. CONST. art. XII, § 1.

171. See Kafker & Russcol, *supra* note 54, at 1307 (“The single-subject rule is . . . designed to be enforced prior to the election.”).

172. See *id.* at 1289.

173. See Collins & Oesterle, *supra* note 41, at 87 (stating that pre-election review gives the single subject rule “greater effect” because it circumvents the presumption of validity that accompanies post-election review and thereby accommodates more rigorous judicial review).

174. Post-election judicial review that invalidates a ballot question requires the question to be redrafted and resubmitted to voters, thus requiring two elections worth of taxpayer funds. See Michael, *supra* note 166, at 1231.

175. Kafker & Russcol, *supra* note 54, at 1326–27.

176. *Id.*

B. Strengthen Existing Standards for Judicial Review

While this Comment urges the importance of pre-election review, the Wisconsin Supreme Court must also invoke more rigorous standards when reviewing ballot questions to defend the people's right to amend their constitution. This Section offers preliminary suggestions on how the Wisconsin Supreme Court could strengthen existing standards for judicial review of allegedly insufficient ballot questions. However, these suggestions are merely a starting point, and future scholarship should build on this foundation.

1. ENFORCE PROCEDURAL REQUIREMENTS AND LIMIT LEGISLATIVE DISCRETION

Overly deferential judicial review of procedural shortcomings undermines popular sovereignty.¹⁷⁷ The Wisconsin Supreme Court should renounce its prior approaches in *Peoples State Bank*, which upheld a referendum even though the government's election notice promulgated false and misleading information about the referred amendment,¹⁷⁸ and *McConkey*, which misconstrued the legislature's constitutional role in the referendum process.¹⁷⁹ Doing so would empower voters. If the court had held in *Peoples State Bank* that voters were entitled to accurate and complete information about the amendment, the electorate would have been better able to consent to the amendment. Similarly, if the court in *McConkey* had focused its inquiry on the people's constitutional authority, it would have given voters greater agency to craft their desired constitution. Moreover, these envisioned outcomes would have preserved the integrity of procedural safeguards for future referendum elections.¹⁸⁰ The court should thus decline to extend *Peoples State Bank* and *McConkey* to future cases evaluating alleged procedural shortcomings and insufficient ballot questions. Instead, the court must prevent erasure of the people's constitutional role in the amendment process by strictly enforcing procedural requirements and limiting deference to legislative phrasing of ballot questions.

177. See *supra* Section II.C.1.

178. See *supra* notes 83–86 and accompanying text.

179. See *supra* notes 87–93 and accompanying text.

180. See *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 990 N.W.2d 122, 126 (Wis. 2023) (following the deferential approach in *McConkey v. Van Hollen*, 783 N.W.2d 855 (Wis. 2010)).

2. CLARIFY THE EVERY ESSENTIAL TEST

The separate amendment rule and every essential test are complementary inquiries derived from different constitutional requirements for mandatory referenda.¹⁸¹ Each standard seeks to preserve a distinct procedural safeguard. The separate amendment rule establishes a permitted scope for a given ballot question (*i.e.*, one constitutional amendment), and protects popular sovereignty by prohibiting the legislature from logrolling multiple substantive constitutional changes into a single amendment.¹⁸² The every essential test examines the sufficiency of a given ballot question (*i.e.*, the question's accurate and comprehensive distillation of the amendment), which safeguards popular sovereignty by limiting the legislature's ability to obscure the underlying amendment via insufficient ballot language.¹⁸³ Thus, both inquiries are essential to prevent legislative erosion of popular sovereignty and preserve constitutional accountability mechanisms. When applied robustly, both standards play a vital role in protecting the people's authority in the constitutional amendment process.

To ensure that future courts can apply both standards as complementary inquiries, the Wisconsin Supreme Court must fortify the every essential test. To do so, the court should expand on *Ekern's* framework, which held that the legislature must draft a "comprehensive" ballot question that "fully inform[s]" voters of the underlying amendment.¹⁸⁴ *Ekern's* more robust framework will better safeguard popular sovereignty than the "overly permissive" counterfactual approach taken by the majority in *Wisconsin Justice Initiative*.¹⁸⁵ To ensure that the every essential test represents a workable standard, the court must define what constitutes a "comprehensive" ballot question: What information must be included in the question? Should the question reference every provision of the underlying amendment? Should the question clarify how the current constitutional provision operates and what, specifically, the amendment would change? Should the question reference the amendment's practical effect or potential fiscal impact? The every essential test in its current ambiguous form does not even hint at

181. See *supra* notes 127–29.

182. See *supra* Sections II.C.2–3.

183. See *supra* Section II.C.2.

184. *State ex rel. Ekern v. Zimmerman*, 204 N.W. 804, 811 (Wis. 1985). Under *Ekern's* formulation of the every essential test, the court held that the ballot question at issue was insufficient because it only referenced one of the two provisions stated in the underlying constitutional amendment. See *supra* notes 113–21 and accompanying text.

185. *Wis. Just. Initiative, Inc.*, 990 N.W.2d at 168–69 (A. Bradley, J. dissenting).

the correct answers to these questions. Clarifying that the test requires the ballot question to serve as an accurate and comprehensive summary of the underlying amendment's provisions and effects would strengthen the every essential test and provide lower courts with a workable standard that centers the people's right to approve proposed constitutional amendments.

To improve the workability of the every essential test, Wisconsin should look to other state courts for guidance.¹⁸⁶ In particular, the Arkansas Supreme Court has articulated rigorous standards for ballot language.¹⁸⁷ The Arkansas Supreme Court takes such an approach because it recognizes that most voters decide how to cast their vote based on the ballot language; therefore, ensuring "honest, impartial, and intelligible" ballot language is essential to preserving popular sovereignty.¹⁸⁸ Arkansas has thus articulated the following requirements for ballot language:

The ballot title must be an impartial summary of the proposed amendment and it must give voters a fair understanding of the issues presented and the scope and significance of the proposed changes. The ballot title must be free from misleading tendencies that, whether by amplification, omission, or fallacy, thwart a fair understanding of the issues presented. It is insufficient if it omits material information that would give the voter serious grounds for reflection. . . . Our long-settled rule is that a ballot title is sufficient if it recites the general purposes

186. See, e.g., *Ward v. Priest*, 86 S.W.3d 884, 896 (Ark. 2002) (holding that challenged ballot language was legally sufficient because it "present[ed] the voter with a fair understanding of the issues presented and the scope and significance of the proposed changes[,] . . . track[ed] the language in the proposed amendment[,] defined key terms, and informed the voter of the measure's fiscal impact); *Wagner v. Sec'y of State*, 663 A.2d 564, 568 (Me. 1995) (stating that when reviewing the sufficiency of ballot language, the court "focuses on whether the description of the subject matter is understandable to a reasonable voter reading the question for the first time" and whether the question will "mislead a reasonable voter who understands the proposed legislation into voting contrary to the voter's wishes"); *Douan v. Charleston Cnty. Council*, 590 S.E.2d 484, 490 (S.C. 2003) (holding that ballot language cannot "persuade and ultimately mislead voters into voting in favor of the [measure] by obscuring" the referendum's provisions because "the fundamental integrity of the election process requires that the voters be presented with an objectively phrased choice on election day"); *Let Mia. Beach Decide v. Mia. Beach*, 120 So. 3d 1282, 1291-93 (Fla. Dist. Ct. App. 2013) (invalidating a local referendum that asked voters to approve a lease of city property to a real estate development company because the ballot question "[did] not provide the voter with the material terms of the lease [and] . . . [w]ithout such information, the voters are simply not in a position to intelligently cast their ballots to approve or disapprove the lease").

187. See *Ward*, 86 S.W.3d at 891-93 (reviewing relevant precedent).

188. *Kurrus v. Priest*, 29 S.W.3d 669, 675 (Ark. 2000).

of the proposed law and that the ballot title contains enough information to sufficiently advise voters of the true contents of the proposed law.¹⁸⁹

Applying this proposed approach to the ballot question in *Wisconsin Justice Initiative*¹⁹⁰ would likely render the question insufficient on several grounds.¹⁹¹ First, the ballot question does not mention that the amendment removes state constitutional protections for criminal defendants.¹⁹² Thus, the question does not inform voters of significant and material consequences of an affirmative vote, which may influence voter opinion.¹⁹³ Moreover, the question’s statement that the amendment leaves defendants’ federal constitutional rights intact further obscures the underlying amendment’s controversial provisions affecting defendants’ rights.¹⁹⁴ Voters unfamiliar with the measure may misconstrue this guarantee as a broad assurance that defendants’ rights are not limited under the proposed amendment.¹⁹⁵ Additionally, the ballot question did

189. *Ward*, 86 S.W.3d at 891 (citations omitted). *See also Kurrus*, 29 S.W.3d at 672 (holding that ballot language cannot conceal controversial aspects of a proposed measure by focusing voters’ attention on a more popular provision); *Christian Civic Action Comm. v. McCuen*, 884 S.W.2d 605, 609 (Ark. 1994) (holding that ballot language cannot use “abstract terminology to mask” the true nature of the proposed measure); *Ark. Women’s Pol. Caucus v. Riviere*, 677 S.W.2d 846, 848–49 (Ark. 1984) (declaring that a proposed constitutional amendment was ineligible for the ballot because its popular name, “The Unborn Child Amendment,” was misleading and had “partisan coloring”).

190. WJI Certification, *supra* note 8, at 6 (“The challenged ballot question provides: . . . **Additional rights of crime victims.** Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?”).

191. Note that the Arkansas Supreme Court has not applied its standard for ballot language sufficiency to any Marsy’s Law measures. However, the court may have an opportunity to do so in the near future, as the Arkansas Senate proposed a Marsy’s Law amendment on February 8, 2023. *See* Sen. SJR10, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

192. WJI Plaintiffs’ Brief, *supra* note 16, at 7–8.

193. *Cf. Kurrus*, 29 S.W.3d at 673–74 (holding that ballot language did not inform voters of “the far-reaching consequences of” ratifying the proposed amendment because it did not inform voters that approval would “risk losing valuable government services”). *Contra. Ward*, 86 S.W.3d at 896 (“The ballot title also tells the voter unequivocally that the proposed amendment ‘will result in a loss of revenue for state, county, and city governments, as well as school districts’ and that ‘a reduction in the services provided by those entities and/or an increase in other taxes may be required.’”).

194. *See* WJI Plaintiffs’ Brief, *supra* note 16, at 26–27.

195. *Cf. Kurrus*, 29 S.W.3d at 672–73 (stating that the ballot language “focuses the voter’s attention on the more popular initial provision, . . . while hiding the more controversial and less publicized issues”).

not track the language of the underlying amendment when describing the relationship between victims' and defendants' rights, thereby misrepresenting the amendment to voters.¹⁹⁶ Finally, the ballot question used abstract language by granting victims "additional rights," without defining the substantive nature of those rights or their relation to other constitutional provisions.¹⁹⁷

The Wisconsin Supreme Court should adopt Arkansas's rigorous approach to examining the sufficiency of ballot language. Doing so would be consistent with *Ekern's* original conception of the every essential test. Both approaches seek to determine "whether the ballot question reasonably, intelligently, and fairly referenced every essential part of the proposed amendment and whether the question fully informed" voters of the underlying amendment.¹⁹⁸ The value of Arkansas's approach stems both from (1) the abundance of available precedent defining the contours of ballot language sufficiency, and (2) its attention to the people's role in the direct democracy process.¹⁹⁹ Thus, if the Wisconsin Supreme Court were to follow Arkansas's approach, the court would realize two benefits. First, this approach would open the door to an abundance of persuasive precedent. The ability to rely on precedent would improve the workability of the every essential test by allowing lower courts to compare fact patterns between cases and identify relevant factors for ballot question sufficiency. Second, a more workable standard would have more force to protect popular sovereignty and ensure that ballot questions do not mislead voters or conceal an amendment's effects.

3. STRENGTHEN THE SEPARATE AMENDMENT RULE

In addition to clarifying the every essential test, the Wisconsin Supreme Court must also strengthen the separate amendment rule. Recent

196. The ballot question stated that victims' rights would be "protected with equal force to the protections" afforded to defendants, while the amendment stated that this protection would be "no less vigorous" than that afforded to defendants. WJI Circuit Court Decision, *supra* note 15, at 15. "Reasonable people might understand different things from these three words. . . . Clearly, if something is to be done no less vigorous it can be greater to that which is equal." *Id.* at 18. *Cf. Ward*, 86 S.W.3d at 896 (holding that ballot language fairly informed voters of the issues presented because the ballot language "track[ed] the language in the proposed amendment").

197. WJI Circuit Court Decision, *supra* note 15, at 15. *Cf. Ward*, 86 S.W.3d at 896 (holding that ballot language fairly informed voters about the scope of the underlying amendment because it "reveal[ed] that the proposed amendment will eliminate taxes on food and medicine[,] . . . track[ed] the language in the proposed amendment[,] and use[d] an established benchmark to define food and medicine").

198. WJI Circuit Court Decision, *supra* note 15, at 15 (applying the every essential test).

199. *See supra* notes 186–89 and accompanying text.

cases have weakened the rule by permitting the construction of amendments' purposes in broad, general terms and holding that a single amendment may contain multiple provisions that are not mutually dependent.²⁰⁰ In its current construction, the Wisconsin Supreme Court applies the separate amendment rule to distill a single purpose from multiple provisions.²⁰¹ Wisconsin's separate amendment rule thus operates like a "single subject" rule. This operation is facially evident to litigants. The Plaintiffs-Respondents challenging the Marsy's Law constitutional amendment argued that the amendment failed the separate amendment rule because "the amendments were not limited to one subject."²⁰²

As the name suggests, single subject rules restrict the subject of an amendment to a single topic.²⁰³ While single subject rules aim to limit ballot questions to a distinct issue, they often fail to achieve this objective because they are vague and subject to broad construction.²⁰⁴ Although the single subject rule has garnered widespread criticism,²⁰⁵ some scholars have noted that the rule offers a promising approach to limiting logrolling or riding of multiple provisions.²⁰⁶ However, these scholars often note the need for narrowing the scope of the inquiry to realize these benefits.²⁰⁷

The separate amendment rule represents a narrower inquiry than the single subject rule. Under the Wisconsin Supreme Court's original conception of the rule in *Timme*, multiple provisions constituted a single amendment when they were mutually dependent and each played a role in promoting the amendment's overall objective.²⁰⁸ This framework represents a more rigorous inquiry than restricting an amendment's subject matter to a single general topic. In a single subject framework, provisions need not be mutually dependent or integral components of an

200. See *supra* note 152.

201. E.g., *Milwaukee All. Against Racist & Pol. Repression v. Elections Bd.*, 317 N.W.2d. 420, 423-28 (Wis. 1982).

202. WJI Plaintiffs' Brief, *supra* note 16, at 12.

203. Rachael Downey, Michelle Hargrove & Vanessa Locklin, *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579, 579 (2004); Marshfield, *supra* note 33, at 72-73.

204. Marshfield, *supra* note 33, at 73-74.

205. E.g., *id.* at 74 ("[I]n today's political environment, the single-subject rule is at risk of undermining rather than enhancing [direct democracy]. Instead of protecting voters and improving transparency, the single-subject rule has the potential to shield recalcitrant legislatures and governors and undermine consolidated statewide majorities."); Cooter & Gilbert, *supra* note 134, at 690 ("The [single subject] rule often fails to generate clear and determinate outcomes.").

206. E.g., Collins & Oesterle, *supra* note 41, at 125.

207. *Id.* at 111; Kastorf, *supra* note 146, at 1636.

208. *State ex rel. Hudd v. Timme*, 11 N.W. 785, 790-92 (Wis. 1882).

overall objective, as long as they relate to one overarching theme.²⁰⁹ Therefore, a stronger separate amendment test that moves away from the single subject inquiry would more effectively avoid logrolling and riding while empowering popular sovereignty. A stronger separate amendment rule that requires mutual dependence of provisions would also better capture the spirit of the underlying constitutional directive.²¹⁰

Other states with separate amendment requirements engage in rigorous inquiries like the approach urged here.²¹¹ In particular, the Pennsylvania Supreme Court has held that its constitution's separate vote clause²¹² requires mutual dependence of multiple provisions within a single referred amendment.²¹³ According to this formulation, amendments that make multiple changes to the constitution should be submitted to the electorate separately, unless "those changes are sufficiently interrelated to justify their presentation to the electorate in a single question."²¹⁴ Sufficiently interrelated changes are those that "when viewed together, form an interlocking package necessary to accomplish one overarching objective, such that the amendment stands or falls as a whole."²¹⁵

Applying this standard to the Marsy's law amendment proposed in Pennsylvania, the Pennsylvania Supreme Court held that the ballot question violated the separate amendment rule.²¹⁶ First, the court

209. Downey, Hargrove & Locklin, *supra* note 203, at 579.

210. See Wis. CONST. art. XII, § 1. *Timme* was decided in 1882, just thirty-four years after the ratification of the Wisconsin Constitution. The court's reasoning in this case thus offers clues about original intent and meaning of the constitution's separate amendment requirement. See *Timme*, 11 N.W. at 790–92.

211. E.g., *League of Women Voters v. Degraffenreid*, 265 A.3d 207, 236–37 (Pa. 2021); *Armatta v. Kitzhaber*, 959 P.2d 49, 63 (Or. 1998) (describing the separate-vote requirement for constitutional amendments, which focuses on "the potential change to the existing constitution," as opposed to the single-subject rule, which "focuses in isolation only upon the text of a proposed amendment"); *Mont. Ass'n of Cnty. v. State*, 404 P.3d 733, 739 (Mont. 2017) (citing *Marshall v. State*, 975 P.2d 325, 331 (Mont. 1999)) ("[A] proposed amendment could relate to a single plan or purpose, but still violate the separate-vote requirement because it contain[s] more than one amendment to Montana's Constitution.").

212. PA. CONST. art. XI, § 1 ("When two or more amendments shall be submitted they shall be voted upon separately.").

213. *Degraffenreid*, 265 A.3d at 236–37.

214. *Id.* at 236 (quoting *Grimaud v. Commonwealth*, 865 A.2d 835, 841 (Pa. 2005)) (internal quotations omitted).

215. *Id.* at 208.

216. *Id.* at 210–12 ("The Ballot Question read in full: Shall the Pennsylvania Constitution be amended to grant certain rights to crime victims, including to be treated with fairness, respect and dignity; considering their safety in bail proceedings; timely notice and opportunity to take part in public proceedings; reasonable protection from the accused; right to refuse discovery requests made by the accused; restitution and return of

reasoned that the newly enumerated rights for crime victims were not functionally interrelated.²¹⁷ Each operated independently of the rest, and a voter could easily support some of these rights but disagree with others.²¹⁸ Second, the court found that the list of victims' rights would make several substantive changes to other constitutional provisions, including those guaranteeing a right to bail, granting the court authority to create procedural rules, and conferring the executive pardon power.²¹⁹ Like the enumerated rights, these changes were not mutually dependent; therefore, voters had "a sacrosanct right" to vote on each separately.²²⁰ If Wisconsin adopted a more rigorous separate amendment inquiry, the court may have reached a similar result in *Wisconsin Justice Initiative*.²²¹

Like Wisconsin's original application of the separate amendment rule in *Timme*, Pennsylvania's separate vote rule requires mutual dependence of multiple provisions.²²² Additionally, Pennsylvania's formulation explicitly defines the requisite level of interdependence to constitute a single amendment.²²³ In contrast, although *Timme*'s application of the separate amendment rule contemplates mutual dependence for a single amendment, its explicit holding defines separate amendments as those that are not related.²²⁴ Pennsylvania's formulation therefore has a stronger phrasing that provides a more workable standard than that in *Timme*. Thus, to strengthen the separate amendment rule, the Wisconsin Supreme Court should follow Pennsylvania's lead by defining a required level of interdependence for multiple provisions within a single amendment.²²⁵

Strengthening the separate amendment rule by requiring mutual dependence of provisions will better enable judicial review to identify referred amendments that make multiple constitutional changes. This

property; proceedings free from delay; and to be informed of these rights, so they can enforce them?").

217. *Id.* at 240.

218. *Id.*

219. *Id.* at 240–41.

220. *Id.* 241–42.

221. See WJI Circuit Court Decision, *supra* note 15, at 30 ("If the Legislature wanted to expand the definition of a crime victim and to give crime victims greater rights and at the same time curtail the rights of persons only accused of committing a crime, it was required to frame the issues to elicit voter ratification by asking two separate questions. . . . Conflating the separate questions of creating something new for crime victims and deleting something old for persons only accused of committing a crime was a mistake of constitutional proportions.").

222. Compare *State ex rel Hudd v. Timme*, 11 N.W. 785, 790–92 (Wis. 1882), with *Degraffenreid*, 265 A.3d at 240.

223. *Degraffenreid*, 165 A.3d at 208.

224. See *Timme*, 11 N.W. at 791.

225. See *Degraffenreid*, 265 A.3d at 240.

approach would thus create a more workable standard, while uplifting popular sovereignty by giving voters greater control over granular changes to the constitution. Together, a stronger separate amendment rule and a clearer every essential test would create a more effective doctrinal framework for judicial review of ballot questions.

CONCLUSION

The Wisconsin Constitution, which emphasizes a structural commitment to popular sovereignty, endows Wisconsin voters with the power to accept or reject legislatively referred constitutional amendments. With the proliferation of referred amendments—often over polarizing policy issues—the ability for voters to wield that power is increasingly important. However, procedural safeguards that fail to secure accurate, clear, and complete ballot questions also fail to elicit voters' informed consent for constitutional amendments.

The Wisconsin Supreme Court's current approach to judicial review of allegedly insufficient ballot questions renders minimal procedural safeguards largely ineffective. In addition to waiving procedural shortcomings, the court has established two underdefined inquiries for examining the sufficiency of ballot questions. Within the limited case law, the court has applied the separate amendment rule inconsistently to generate preferred policy outcomes and has generally ignored the every essential test, which is a promising standard for ensuring legally sufficient ballot questions. Finally, post-election judicial review of allegedly insufficient ballot questions allows the court to cite deference to election outcomes while obfuscating blind deference to legislative drafting. The Wisconsin Supreme Court's current approach to judicial review thus aggrandizes its own authority by permitting judicial policymaking, as well as the Wisconsin Legislature's authority by diminishing constitutional procedural requirements for ballot question phrasing. Aggrandized government authority removes power from voters and diminishes their ability to veto undesired state constitutional amendments.

The Wisconsin Supreme Court should eschew this historical approach and instead guard against legislative erasure of popular sovereignty by protecting procedural requirements, strengthening existing standards for judicial review of ballot language, and minimizing deference to the legislature. By providing for mandatory referenda, Wisconsin's Constitution positions the people as the ultimate sovereign in the constitutional amendment process. As the guardian of the Wisconsin Constitution, the Wisconsin Supreme Court has a duty to uplift the constitution's structural commitment to popular sovereignty.

Judicial review can best safeguard the people's role in the amendment process by ensuring that the legislature presents referred amendments to voters via accurate, clear, and complete ballot questions.

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