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ADMINISTRATIVE LAW—Initiative and Referendum. Initiative Petitions in Wyoming—The Presumption of Validity and the Secretary of State's Review. ***Thomson v. Wyoming In-Stream Flow Committee,*** **651 P.2d 778 (Wyo. 1982).**

The Wyoming In-Stream Flow Committee proposed a law to be voted on by the people of Wyoming in a statewide general election.[1] After approval of the application the Committee submitted petitions on December 11, 1981 containing 30,822 signatures to the Secretary of State, as provided by law.[2]

Thereafter, the Secretary began her review of the petitions, initially employing two random samplings. Because there was a thirteen percent variance in the validity rates between the two random samples[3] the Secretary determined that all 30,822 signatures required individual verification by comparing each signature with corresponding lists of registered voters from the twenty-three counties in Wyoming.[4] The ultimate conclusion was that only 25,888 signatures were valid. The Committee was notified that the petitions lacked a sufficient number of signatures to be placed on the ballot.[5]

The Committee then brought suit in Laramie County District Court. The court held that the Secretary was only a ministerial administrative officer and had no authority to challenge or inquire into the validity of signatures, or the qualifications of the persons signing, and that the petitions should have been presumed valid.[6]

1. The proposed initiative measure was not an issue. However, the summary of the proposed initiative measure, as it appeared on the petitions circulated for signatures was quoted in footnote 1 of the opinion, Thomson v. Wyoming In-Stream Flow Comm., 651 P.2d 778,781 (Wyo. 1982), as follows:

   > This bill proposes to create new statutes authorizing the Game and Fish Commission to acquire water rights in Wyoming streams by purchase, lease, agreement, gift or devise and to appropriate unappropriated water for in-stream flows to protect fish and wildlife, livestock watering, aquatic habitat, aesthetic beauty, recreation, sub-irrigation, riparian habitat and water quality. Said act will not grant the Commission condemnation of existing water rights. The preservation of in-stream flows of water is declared to be a beneficial use.

2. WYO. CONST. art. 3, § 52; WYO. STAT. § 22-24-115 (1977). The application was submitted on October 14, 1980, and approved on October 20, 1980. Fourteen months had passed from the approval of the application until the petitions were submitted.
3. Thomson v. Wyoming In-Stream Flow Comm., 651 P.2d 778, 783 (Wyo. 1982). In the first sample there was a 70% validity rate and in the second there was on 83% validity rate. Validity of signatures under the random samples was determined by comparing signatures against county voter registration lists. Office Memorandum, *Procedure for Checking In-Stream Flow Committee Petitions,* Office of the Secretary of State, State of Wyoming (Dec. 29, 1981) (on file at *Land & Water Law Review* office).
4. 651 P.2d at 783.
5. *Id.* at 783-84. It was determined that 27,154 signatures were needed.
6. *Id.* at 780. *See also id.* at 794-95 (Rose, C.J., dissenting) (excerpt of district court's letter opinion).

The Secretary of State appealed and the Wyoming Supreme Court reversed the district court, holding that the presumption of validity of signatures did not apply in Wyoming and that the Secretary of State had a statutory duty to review the petitions to determine whether the signers were qualified registered voters.[7]

BACKGROUND

Initiatives are a method of direct legislation whereby voters reserve the power to propose and enact laws or constitutional amendments.[8] Currently, only twenty-three states and the District of Columbia provide for the right of initiative or referendum, of which only seventeen provide for constitutional amendment by initiative.[9]

Historically, initiatives have received mixed support. The majority of initiative and referendum provisions which have been adopted occurred shortly after the beginning of the twentieth century as a reaction to the corruption and unresponsiveness of state legislators.[10] Proponents view direct legislation as the purest form of democracy.[11] Opponents make numerous claims of the inherent dangers of direct legislation, including "that the process results in poorly drafted proposals . . . . that the signature gathering process to qualify proposals is subject to abuse . . . . [and] that voter understanding of complex ballot issues is minimal."[12] Underlying criticism of direct legislation is the claim that the representative form of legislation "increase[s] the likelihood of perspective, deliberation, and moderating compromise."[13]

7. *Id.* at 785.
8. This case note is primarily concerned with the initiative and discussion will not specifically address the referendum. However, the discussion related to procedural aspects of the initiative may apply to the referendum as well.
9. *See* Comment, *Judicial Review of Initiative Constitutional Amendments,* 14 U.C.D. L. REV. 461 (1980) [hereinafter cited as *Initiative Constitutional Amendments*].
10. Note, *Initiative and Referendum — Do They Encourage or Impair State Government?* 5 FLA. ST. U.L. REV. 925 (1977) [hereinafter cited as *Initiative and Referendum*].
11. Grossman, *The Initiative and Referendum Process: The Michigan Experience,* 28 WAYNE L. REV. 77, 80 (1981).
12. *Id.* at 80-81. For additional sources discussing the direct legislation debate, see *Initiative and Referendum, supra* note 10 at 940-48, and Note, *Constitutional Constraints on Initiative and Referendum,* 32 VAND. L. REV. 1143, 1146-47 (1979).
13. Sirico, *The Constitutionality of the Initiative and Referendum,* 65 IOWA L. REV. 637, 640 (1980).

One commentator has suggested that the initiative process has generally performed at least as well as its representative counterpart.[14] Claims that the direct legislation process would be another medium for special interest politics may be largely accurate; however, there is support that it also serves as a check on special interest groups.[15]

Initiative and referendum powers, nonetheless, can be used to promote various types of legislation, both the laudable and the notorious. One author has suggested that "environmental advocates and liberal reformers have discovered that [direct legislation] might furnish a way to successfully circumvent balky state legislatures."[16] Another view is that the initiative and referendum process has generally prompted legislators to become more attuned to the wishes of the electorate.[17]

PROCEDURAL OVERVIEW

Among the twenty-three states and the District of Columbia that reserve the rights of initiative or referendum, there is little uniformity with respect to procedural requirements.[18] However, the basic process may be characterized by four steps: (1) determination by a state official that pre-circulation requirements, if any, have been met; (2) preparation of the petitions and circulation by the proponents of the measure to obtain the requisite number of signatures; (3) submission of petitions to a state official for review of compliance with petition requirements and for certification of the proposed measure to be placed on the ballot; and (4) determination of the requisite number of votes by the electorate at an election.[19]

14. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965, 1009-14 (1979). Professor Allen discusses the few available studies that consider the initiative process. This writer questions what factors can be fairly indicative of how well the initiative process performs compared to its representative counterpart. Presumably, his statement that "There is no evidence from any extensive study that legislation enacted by initiative is, as a whole, more 'biased,' . . . more 'poorly drafted,' or less deliberative than the workproduct of the legislative branch," suggests some factors. *Id.* at 1010-11. However, these factors seem to beg the question; that is, what or who makes the qualitative determination regarding inferior drafting, bias, etc.
15. *See Initiative and Referendum, supra* note 10, at 946 (discussing experience of those states permitting direct legislation). *Cf. supra* note 13, at 639 (listing some of the issues which have been topics of initiatives).
16. Sirico, *supra* note 13, at 637.
17. *See Initiative and Referendum, supra* note 10, at 945 and n.123.
18. Note, *supra* note 12, at 1144.
19. *See Initiative Constitutional Amendments, supra* note 9, at 463-65 and nn.13-17 (discussion of general characteristics of initiative procedures). *Cf. Initiative and Referendum, supra* note 10, at 927-37; THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 243-45 (1979).

Initiatives also may be classified as direct or indirect.[20] The direct initiative is placed on the ballot without the legislature's playing an intermediary role, while the indirect initiative proposal is submitted to the legislature, which may pass the measure into law or take other action.[21]

Before an initiative measure can be submitted to the voters at a general election (or special election where provided), the proponents are required to submit petitions containing a requisite number of signatures[22] to a state official.[23] Most states require the state official to review the petitions and attest to their validity.[24] Many of these states authorize a procedure whereby county officials compare the signatures on the petition against voter registration lists.[25] Because of the large number of signatures on the petitions, the prescribed procedures reduce the state official's burdens of validating the petitions and determining their authenticity.

Since most states reserve the right of initiative by state constitution, there is a general view that the requirements of the constitutional and statutory provisions should be liberally construed.[26] The rationale is that the voters should be given an

20. *But see, e.g.,* WASH. REV. CODE ANN. §§ 29.79.090 and .100 (1965) which permits both.
21. Note, *supra* note 12, at 1145.
22. This is usually expressed as a percentage, ranging from three to fifteen percent of the voters. *See Initiative and Referendum, supra* note 10, at 930; Table 1 at 928-29. The signature requirement in Wyoming is fifteen percent of those who voted in the preceding general election, which also must represent at least two-thirds of the counties in the state. WYO. CONST. art. 3, § 52(c). Wyoming is the only state which has a fifteen percent signature for legislative initiatives. *See* COUNCIL OF STATE GOVERNMENTS, *supra* note 19, at 243. Perhaps this is insignificant given Wyoming's smaller population compared with other states; however, it is curious that Wyoming has a relatively high signature requirement. The percentage of signatures for constitutional initiatives where provided may be higher than legislative initiatives. *See Initiative and Referendum, supra* note 10, at 930.
23. This is usually the Secretary of State. *See, e.g.,* IDAHO CODE § 34-1804 (1981); ME. REV. STAT. ANN. tit. 21, § 1355 (Supp. 1981-1982). Also, in Wyoming, initiative petitions may be submitted to the Secretary of State. WYO. CONST. art. 3, § 52(c); WYO. STAT. § 22-24-115 (1977). However, one state requires the circulators to submit the petitions to the county clerk who checks the names of signers against the official registration lists of his county and indicate whether or not each signature is of a "duly registered voter." The county clerk then submits the petitions to the Secretary of State who counts the number of verified names. UTAH CODE ANN. § 20-11-16 (Supp. 1981). *Cf.* ALASKA CONST. art. XI, § 2 (petitions filed with the lieutenant governor).
24. *See Initiative Constitutional Amendments, supra* note 9, at 465 and accompanying notes for list of states.
25. *Id.* at 465-66 and n.24.
26. *See, e.g.,* Boucher v. Engstrom, 528 P.2d 456, 462 (Alaska 1974). This case is particularly noteworthy since the Wyoming and Alaska constitutional and statutory provisions relating to initiative and referendum are very similar. However, this writer was unable to determine of Wyoming's provisions were actually modeled after Alaska's. *See also* Colorado Project-Common Cause v. Anderson, 178 Colo. 1, 495 P.2d 220, 221 (1972).

opportunity to approve or reject the proposed measure by a vote.[27] Therefore, " 'all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose.' "[28] One state has disregarded statutory requirements, such as a requirement that circulators witness the signing of the petitions by the voter and that improperly notarized petitions be invalidated, reasoning that the right of initiative and referendum is so important that the procedures designed to effectuate the right should be liberally construed to "avail the voters with every opportunity to exercise these rights."[29]

Accordingly, many states limit the state official's scope of review to an examination of the facial validity of the petitions, sometimes to the extent of just counting the number of signatures.[30] Where there are a sufficient number of signatures (with requisite geographic distribution where required),[31] the state official has an affirmative duty to file the petitions[32] or perform some other statutorily prescribed duty.[33] In most states, the state official's scope of review is limited because (1) there is a procedure in which other officials determine whether the signers of the petition are registered voters,[34] or (2) a presumption of validity attaches to the signatures.[35]

It has been suggested that a presumption of validity arises from a required verfication under oath and from criminal sanctions for placing an improper signature on the intitiative peti-

27. Boucher v. Engstrom, 528 P.2d at 462 (Alaska 1974).
28. *Id.* (quoting Cope v. Toronto, 8 Utah 2d 255, 332 P.2d 977, 979 (1958)).
29. United Labor Comm. of Mo. v. Kirkpatrick, 572 S.W.2d 449, 454 (Mo. 1978). *See also* Sudduth v. Chapman, 88 Wash. 2d 247, 558 P.2d 806, 810 (1977) (liberal construction required secretary of state, by exercising duties in determining whether signer was a registered voter, to preserve the people's right to exercise the legislative power).
30. *See Initiative Constitutional Amendments, supra* note 9, at 469-74 and nn.36-76.
31. *See, e.g.,* ALASKA CONST. art. XI, § 3; ALASKA STAT. § 15.45.160 (1982).
32. *See, e.g.,* Iman v. Bolin, 98 Ariz. 358, 404 P.2d 705, 710 (1965); Durell v. Brown, 29 Ohio App. 2d 133, 279 N.E.2d 624, 629 (1971); WASH. REV. CODE ANN. § 29.79.150 (1965).
33. *See, e.g.,* ALASKA STAT. § 15.45.180 (1982) (prepare ballot title with assistance of attorney general); UTAH CODE ANN. § 20-11-17 (1976) (transmit sufficient petitions to attorney general).
34. *See Initiative Constitutional Amendments, supra* note 9, at 465-67 and nn.23-29. Many states, either by statutory provision or judicial construction, require petition signers to be registered voters. *See, e.g.* Dredge Mining Control - Yes!, Inc. v. Cenarrusa, 92 Idaho 480, 445 P.2d 655, 657 (1968); Scott v. Kirkpatrick, 513 S.W.2d 442, 444 (Mo. 1974).
35. *See, e.g.,* Jaffe v. Allen, 87 Mich. App. 281, 274 N.W.2d 38, 40 (1979). *See also* 42 AM.JUR. 2D *Initiative and Referendum* § 54 (1969).

tion.[36] The legal effect of the presumption is that it places the burden of persuasion on those seeking to invalidate the signatures. If the presumption is rebutted, the burden of production is shifted to the proponents to show the underlying validity of the signatures.[37] The initial hurdle opponents must clear is to show fraud, forgery or illegality.[38] It has also been suggested that the presumption operates to prevent the state official from challenging the signatures.[39]

The two reasons suggested for the limited scope of the state official's review strengthen the proposition that a state official's duties are generally regarded as ministerial, involving no discretion.[40] The general policy to liberally construe constitutional and statutory provisions regarding initiatives reinforces this proposition.

Although most states limit the state official's review to the facial validity of the petition, some states permit the state official to go beyond the facial validity of the petition. For example, the state official may have discretion to review the initiative petition regarding substantive matters,[41] but not whether the proposed initiative measure is unconstitutional.[42]

To summarize, the right of initiative is construed as an important right. The general policy of liberal construction of constitutional and statutory provisions reflects a concern that the right of initiative not be restricted or unreasonably burdened by procedure. The procedures established to effectuate the right of initiative reflect a tendency to limit the state official's scope of review, and describe the nature of his or her duties in

36. *Id.*
37. United Labor Comm. of Mo. v. Kirkpatrick, 572 S.W.2d at 453 (Mo. 1978).
38. State *ex rel.* Kemper v. Carter, 257 Mo. 52, 165 S.W. 773, 780 (1914).
39. *Id. See also* 42 AM. JUR. 2D *Initiative and Referendum* § 54 (1969).
40. State *ex rel.* O'Connell v. Kramer, 73 Wash. 2d 85, 436 P.2d 786, 788 (1968).
41. *See, e.g.*, Boucher v. Engstrom, 528 P.2d at 460-61 (Alaska 1974) (state official (lieutenant governor) is obliged to determine that the initiative is in compliance with the statutes regulating initiatives). In this case, the issue was whether the proposed initiative was special or local legislation which is prohibited by Alaska's constitution and parallel statutory provision. *See also* Cappalletti v. Celebrezze, 58 Ohio St. 2d 395, 390 N.E.2d 829, 831 (1979) (Secretary of State's finding that the petitions were sufficient contemplates a determination that the petitions contain the requisite signature of electors of the state). This case also held that the presumption of sufficiency of the petitions and its signatures did not eliminate further steps of determining whether the petition had been properly verified and establishing the eligibility of signers as electors. *Cf.* 42 AM. JUR. 2D *Initiative and Referendum* § 38 (1969).
42. *See, e.g.*, State v. Kramer, 436 P.2d at 788 (1914); Iman v. Bolin, 404 P.2d at 709 (1965).

determining an initiative petition's sufficiency. Therefore, the right of initiative is to be encouraged and procedural requirements should only serve to protect the basic integrity of the process.

ANALYSIS

The Wyoming Supreme Court, in upholding the Secretary of State's determination that the petitions submitted by the Wyoming In-Stream Flow Committee were improperly filed, based its decision primarily on its determination that the rule relating to the presumptive validity of signatures on an initiative petition does not apply in Wyoming.[43] Consequently, the Secretary had a duty not only to count the number of signatures but also to review the petitions to determine whether there were an "insufficient number of signatures of *qualified registered voters*."[44] Whether the Secretary's duties were ministerial or discretionary was considered immaterial because the court concluded that she had performed her duties "in accordance with the dictates of the constitution and the statutes."[45]

Applicability of Presumption

Both the district court and the Committee relied on a quotation from American Jurisprudence Second as authority for applying the rule of presumptive validity of the signatures on an initiative petition.[46] The Wyoming Supreme Court considered this reliance misplaced.

First, the Supreme Court focused in a 1914 Missouri case cited in section 54, *State ex rel. Kemper v. Carter*,[47] and

43. 651 P.2d at 784-85.
44. *Id.* (emphasis in original).
45. *Id.* at 786.
46. *Id.* at 784. The section relied upon recognizes a presumptive validity of initiative or referendum petitions that have been circulated, signed and filed. The presumption was understood to arise because of the effect of the required verification under oath and the deterrent effect of criminal sanctions for an improper signature. As a result, an administrative officer has no authority to challenge the signatures. 42 AM. JUR. 2D *Initiative and Referendum* § 54 (1969).
47. 257 Mo. 52, 165 S.W.2d 773 (1914). It is curious that the *In-Stream Flow Committee* court chose to focus on this case. Another case not considered was Tyler v. Secretary of State, 229 Md. 397, 184 A.2d 101 (1962). The *Tyler* court held that proof that an affidavit was false, in that signatures on a referendum petition were not actually those of registered voters, rebuts the presumption of validity of the petition. 184 A.2d at 104-05. The proponents then must affirmatively show that the remaining signatures on the petition were

considered it inapplicable[48] since the Missouri form of verification was "positive as to 'the qualifications of the signers.' "[49] The court further reasoned that the method of verification in Wyoming did not ensure that the signers were qualified registered voters,[50] but only provided a lesser assurance that the "signatures are those of the persons whose names they purport to be."[51] Therefore, the Wyoming Supreme Court concluded that the method of verification in Wyoming was insufficient to give rise to a presumption of validity.[52]

Second, in construing the relevant statute[53] directing the Secretary's review of petitions, the court concluded that the Secretary was not authorized to apply a presumption to the signatures.[54] In fact, the court considered it the Secretary's duty, under the statute, to determine whether the signatures were those of qualified registered voters.[55] Thus, in view of the combined factors of a clear statutory directive, an inadequate method of verification in Wyoming and an absence of a deterrent effect of criminal sanctions,[56] the court ultimately concluded that a presumption of validity of signatures should not apply.[57]

Significantly, by holding that the Secretary has a mandatory duty to determine whether the signatures were those of qualified registered voters, the court expressed a substantive

genuine, at least to the extent of the particular petition to which the affidavit was attached. The effect of the affidavit by the circulators was viewed as giving the petition a prima facie presumption of validity. 184 A.2d at 104. The relevant constitutional provision required that the affiant attest by personal knowledge, that, among other things, the signer was a registered voter.

Although *Tyler* involved a referendum petition, at the time, the constitutional provision also applied to initiatives. However, Maryland currently only provides for a right of referendum. MD. CONST. art. XVI, § 1.

48. 651 P.2d at 784-85.
49. *Id.* at 785. Presumably, the court understood Missouri's form of verification not to require that petition signers be registered voters.
50. *Id.*
51. WYO. STAT. § 22-24-114 (1977). The section states in pertinent part: "(a) Before petition is filed, it shall be verified by the sponsor who personally circulated it. The verification shall be in affidavit form and shall state in substance that: . . . (iii) To the best of his knowledge, such signatures are those of the persons whose names they purport to be."
52. 651 P.2d at 785, 787.
53. WYO. STAT. § 22-24-116 (1977). This section requires that a petition be determined improperly filed if there is an insufficient number of qualified registered voters.
54. 651 P.2d at 787.
55. *Id.*
56. Wyoming's penalty for improperly placed signatures on an initiative or referendum petition is a fine of not more than one thousand dollars or imprisonment for not more than one year or both, a high misdemeanor. WYO. STAT. § 22-24-123 (1977).
57. 651 P.2d at 787-88.

requirement created by statute. Indeed, voter registration is a condition precedent to signing an initiative petition in a majority of states reserving the right of initiative.[58] As a substantive requirement (instead of a procedural one), even if the Secretary's duties were largely ministerial, the Secretary would be permitted to exercise discretion in validating signatures,[59] since the statute prescribes no procedure for determining the authenticity of signatures.

The dissent considered the majority's finding that the Secretary's duties were a combination of both ministerial and discretionary functions a "contradiction in concepts."[60]

Apparently, the dissent's primary concern was that the absence of a clear procedure in the relevant statutes created a risk that some procedures determined necessary by the Secretary for review of initiative petitions could effectively circumvent a proposed initiative measure from reaching the ballot. In other words, administrative convenience could become an underlying rationale for determining a procedure concerning whether certain signatures, such as initials, nicknames, or surnames, should be counted.[61] Therefore, rather than expanding what many jurisdictions consider to be a purely ministerial function, it seems that the dissent would prefer the application of a presumption rather than risk the possible restriction of an important constitutional right.

The Initiative in Wyoming

Wyoming amended its constitution in 1968 to include a constitutional right of legislative initiative.[62] The majority of states reserving the right of legislative initiative had done so

58. *See supra* note 34.
59. *See supra* note 41 and accompanying text. *See also infra* notes 72-79 and accompanying text (further discussion of ministerial and discretionary duties).
60. 651 P.2d at 797 (Rose, C.J., dissenting). Indeed, on another occasion, the Wyoming Supreme Court held that "it is obvious that an official's act . . . cannot be *ministerial and discretionary.*" Oyler v. State, 618 P.2d 1042, 1051 (Wyo. 1980) (emphasis in original).
61. The majority indicates that in this case, signatures were validated although they were not signed in the fashion as they appear on registration lists, nicknames were allowed, and that the Secretary may have gone too far to validate questionable signatures. 561 P.2d at 786-87.
62. WYO. CONST. art. 3, § 52. Subsection (a) provides: "The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum."

by 1918.[63] One other state, Alaska, recently adopted a provision for legislative initiatives.[64] Wyoming's provisions, both constitutional and statutory, bear little resemblance to other states' provisions, with the notable exception of Alaska.[65]

As previously noted, most states require the respective state official to review petitions and attest to their validity.[66] Significantly, the majority of these states provide a procedure by which a subordinate county official assists the state official in his review by comparing the signatures with county voter registration lists, which are returned to the state official for

63. Massachusetts amended their constitution in 1918 to provide for legislative as well as constitutional initiatives. MASS. CONST. art. XLVIII, § 150. *See supra* note 10, at 937-38. Some states have recently amended their constitutions to include constitutional initiatives. *See, e.g.*, FLA. CONST. art. XI, § 3 (1968); MONT. CONST. art. XIV, § 9 (1972); S.D. CONST. art. XXIII, § 1 (1972).

64. Alaska amended its constitution in 1959. ALASKA CONST. art. XI, § 1. The language in section 1 is identical to subsection (a) of article three, section 52 of the Wyoming Constitution. *See supra* note 62.

65. Since this casenote is concerned with the Secretary of State's review of initiative petitions, only those relevant provisions will be compared. The Wyoming constitutional provision provides:

> After certification of the application, a petition containing a summary of the subject matter shall be prepared by the Secretary of State for circulation by the sponsors. If signed by qualified voters, equal in number to fifteen per cent (15%) of those who voted in the preceding general election and resident in at least two-thirds (⅔) of the counties of the state, if [sic] may be filed with the secretary of state.

WYO. CONST. art. 3, § 52(c).

The Wyoming statutory provision parallels the constitutional provision cited above. WYO. STAT. § 22-24-115 (1977). Regarding the review of petitions by the Secretary of State, section 22-24-116 provides in pertinent part:

> (a) Within not more than sixty (60) days of the date the petition is filed, the secretary of state shall review it and shall notify the committee whether the petition was properly or improperly filed. The petition shall be determined improperly filed if: (i) There is an insufficient number of qualified registered voters; (ii) The subscribers were not resident in at least two-thirds of the counties of the state. . . .

WYO. STAT. § 22-24-116 (1977).

In comparison, the Alaska constitutional provision provides:

> After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters, equal in number to ten per cent of those who voted in the preceding general election and resident in at least two-thirds of the election districts in the state, it may be filed with the lieutenant governor.

ALASKA CONST. art. XI, § 3.

The Alaska statutory provision also parallels the constitutional provisions cited above. ALASKA STAT. § 15.45.140 (1982). Regarding the bases for determining whether the petition was improperly filed, section 15.45.160 provides:

> The lieutenant governor shall notify the committee that the petition was improperly filed if he determines (1) that there is an insufficient number of qualified subscribers, or (2) that the subscribers were not resident in at least two-thirds of the election districts of the state.

ALASKA STAT. § 15.45.160 (1982). The term "qualified subscriber" is not defined. The lieutenant governor also has 60 days to review the petition. ALASKA STAT. § 15.45.150 (1982). *See, e.g.*, IDAHO CODE §§ 34-1801 to -1822 (1981) (provisions that differ from Wyoming's).

66. *See supra* notes 23-25 and accompanying text.

counting.[67] On the other hand, neither Wyoming nor Alaska have such a procedure.

Unlike the states that limit the scope of the state official's review by outlining a specific procedure, it follows that in Wyoming, the Secretary of State is not relegated to an exclusively ministerial role. The legislature, while not establishing a procedure to guide the Secretary's review, set out statutory requirements that were to guide her review. These requirements are that the Secretary, in reviewing initiative petitions, must determine (1) that the petitions contain a sufficient number of signatures; (2) that the subscribers as a whole are representative of at least two-thirds of the counties of the state; and (3) that the signatures are those of qualified registered voters.[68]

The purpose of the first requirement, regarding a sufficient number of registered voters, is to ensure that a sufficient number of voters consider an issue important enough that it should be put to a vote before the people of the state.[69] Also it has been suggested that legislative or constitutional provisions set the signature requirement sufficiently high to curb excessive use.[70]

Presumably, the purpose of the second requirement, that the signatures demonstrate representation of two-thirds of the counties in the state, is to ensure that a proposed measure does not have the effect of providing benefits to a small segment of the state at the expense of another. Neither requirement imposes an unreasonable burden on the proponents of an initiative measure to obtain the requisite signatures.

The purpose of the requirement that the subscribers be qualified registered voters appears two-fold: (1) to determine the eligibility of the subscriber to sign the petition and (2) to facilitate a determination of the subscriber's eligibility to sign. The *In-Stream Flow Committee* court recognized that the pur-

67. *Id.*
68. WYO. STAT. § 22-24-116 (1977). *See supra* note 65.
69. *See* United Labor Comm. v. Kirkpatrick, 572 S.W.2d at 453 (Mo. 1978) (a similar purpose is recognized).
70. Sirico, *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637, 659 (1980).

poses of the statutory controls are to safeguard and facilitate the use of the initiative for the benefit of the people of the state, as well as to discourage abuse, minimize mistakes and facilitate the checking of petitions.[71]

The first two requirements suggest that the functions regarding the Secretary's review are ministerial, since the first requires a counting task and the second requires a tabulation of counties represented. The third requirement may also suggest a ministerial duty, such as comparison with voter registration lists; however, the Wyoming Supreme Court, in the *In-Stream Flow Committee* opinion, never reached this question.[72] The State argued that, since the statute did not define the means by which the Secretary was to determine whether the signatures were those of qualified registered voters,[73] her duties in this regard were not ministerial but discretionary.[74]

It has been suggested that it is often difficult to draw the line between what is a ministerial and what is a discretionary duty.[75] In addition, it is said that the character of the duty is to be determined by the nature of the act to be performed and not by the office of the performer.[76] The Wyoming Supreme Court has held that "A public official's duty is ministerial when 'it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes the time, mode and occasion of its performance with such certainty that nothing remains for judgment of discretion.' "[77]

As previously noted, because the *In-Stream Flow Committee* court held that the Secretary had a mandatory duty to determine whether the signatures on initiative petitions were those of qualified registered voters, the requirement that

71. 651 P.2d at 790.
72. The Supreme Court stated that it was immaterial whether the Secretary's duties were ministerial or discretionary. 651 P.2d at 786.
73. WYO. STAT. § 22-24-116(a)(i) (1977). *See supra* note 65.
74. Brief for Appellant at 10, Thomson v. Wyoming In-Stream Flow Comm., 651 P.2d 778 (Wyo. 1982).
75. 67 C.J.S. *Officers* § 199 (1978).
76. *Id. Cf.* 63 AM. JUR. 2D *Public Officers and Employees* § 28 (1972) ("whether . . . a person is or is not a ministerial officer depends not so much on the character of the particular act . . . or whether he exercises a judgment or discretion . . . as upon the general nature and scope of the duties devolving upon him").
77. Oyler v. State, 618 P.2d at 1048-49 (Wyo. 1980).

signers be qualified registered voters is a substantive requirement.[78] The effect of this holding is that, since the statute does not direct how the Secretary is to determine whether the signatures are those of qualified registered voters, she is permitted discretion to develop a procedure that will permit her to discharge her duties.[79] This is the most disturbing implication of the opinion.

For example, the statute does not indicate a time limit within which initiative petitions must be submitted to the Secretary of State.[80] Conceivably, the period that petitions are circulated may extend beyond a single election year.[81] A question would then arise whether signatures of persons registered at the time of signing, but not when the petition is ultimately submitted, are to be counted. Other questions also may arise, including whether certain forms of signatures, such as nicknames, will be acceptable or whether substantial compliance will be the standard.[82] In general, one wonders what conditions, other than those contained in the statute, may permissibly be imposed.

The differences between Wyoming's statutory provisions and the procedures outlined by statute in the majority of other states would seem to justify the inapplicability of a presumptive validity of signatures that those states recognize. The substantive requirement that subscribers be qualified registered voters is not inconsistent with the majority of states. However, permitting discretion over the procedure used to determine a signer's eligibility creates a risk that the procedures utilized may have the effect of restricting the exercise of the right of initiative.

78. *See supra* notes 53-59 and accompanying text.
79. This would appear to be permissible according to Tri-State Generation & Transmission Ass'n v. Environmental Quality Control, 590 P.2d 1324 (Wyo. 1979). Quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), the Wyoming Supreme Court stated that "absent constitutional constraints or extremely compelling circumstances, administrative agencies are free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their duties." 590 P.2d at 1332.
80. Alaska, in comparison, requires that the sponsors must file a given initiative petition within one year from the time the sponsors received notice from the lieutenant governor that the petitions were ready for delivery to them. ALASKA STAT. § 15.45.140 (1982).
81. This occurred in the In-Stream Flow Committee's case. *See supra* note 2.
82. *See supra* note 61 and accompanying text.

A recent change in Michigan's procedures, in which a board of state canvassers is charged with determining the validity and sufficiency of signatures on initiative and referendum petitions, is illustrative.[83] The board of canvassers began using random sampling techniques to validate petitions without express statutory authority, contrary to a prior practice of facial review.[84] This new procedure was criticized for the possibility of erroneous disqualification of otherwise valid signatures, and therefore, creating a risk of improperly restricting the right of initiative.[85] The commentator considered this particularly significant since the strong policy previously had been to construe direct lawmaking rights liberally to facilitate their exercise.[86]

In the *In-Stream Flow Committee* opinion, it is apparent that the Secretary had a difficult task determining what method should be used to review the petitions that the Committee filed with her. Her only guide was the review permitted by statute, and subscribers were only required by statute to sign their name and list their address.[87] Considering a consolidated statewide voter registration list to be impractical, the Secretary decided to compare signatures with corresponding voter registration lists from the twenty-three Wyoming counties.[88] This was the first time a procedure had been developed to review petitions.[89]

83. Grossman, *The Initiative and Referendum Process: The Michigan Experience*, 28 WAYNE L. REV. 77, 124-32 (1981).
84. *Id.* at 126-27.
85. *Id.* at 127-28.
86. *Id.* at 126.
87. WYO. STAT. § 22-24-113 (1977).
88. 651 P.2d at 783. The opinion also suggested that a statewide list might not permit the Secretary to determine whether the subscribers were residents of two-thirds of the counties of the state.
89. Apparently, before the Wyoming In-Stream Flow Committee initiative drive, only seven applications for initiatives were filed with the Secretary of State. However, none of the seven thereafter filed petitions with the required number of signatures. Subsequent to the Committee's application, three more applications were filed, and petitions currently are being circulated. The status of the three initiative drives is undetermined. Summary of Applications for Initiative, Office of the Secretary of State, State of Wyoming (Oct. 1982) (on file at *Land & Water Law Review* office).

The procedure use by the Secretary of State for the In-Stream Flow Committee petition was described in two memoranda entitled *Procedure for Checking In-Stream Flow Committee Petitions*, dated December 29, 1981, and January 8, 1982, respectively (on file at *Land & Water Law Review* office). In substance, the former provides for a random sampling method. In the latter, every signature not previously checked by the samples was to be checked and every invalid signature was to be re-checked. Both methods used computer printouts of county voter registration lists. Petitions were arranged by county, by order of the most recent petitions.

The majority opinion concluded that the Secretary's procedure had not worked to prejudice the Committee.[90] Indeed, the court took judicial notice that the Committee's own instructions to its sponsors expressed an awareness that the signers must be registered voters.[91]

The dissent, on the other hand, though recognizing that the Secretary had a duty to compare the petitions with registration lists,[92] did not believe she went far enough. The dissent reasoned that the Secretary was "without authority to impose a condition which goes beyond the statutory requirements imposed by § 22-24-113 and § 22-24-116(a)(i) that the signer be a 'qualified registered voter' in the state."[93] Further, the dissent was disturbed that at most only two county registration lists were checked in order to determine whether a given signer was a registered voter.[94] The Committee noted that at most only two of twenty-three counties were checked, and some signers were disqualified because they were registered in one county but signed a petition circulated in a different county.[95] Therefore, the dissent considered the Secretary to be obligated to check every county's voting lists to properly perform her duty, despite the fact that signers may not have given their addresses where they were registered.[96]

The variance between the majority and dissenting opinions reflects the potential for dispute regarding what constitutes a "proper procedure" where the state official is permitted discretion to set the procedure for reviewing initiative petitions. Although the majority approved the Secretary's procedure in this case, the opinion provided little insight by which future proponents or the Secretary may determine what procedure serves to protect the integrity of the direct lawmaking process consistent with preserving and encouraging the right of initiative.

90. 651 P.2d at 786-87.
91. *Id.* at 788-89.
92. *Id.* at 800 (Rose, C.J., dissenting).
93. *Id.* at 801 (Rose, C.J., dissenting). Section 22-24-113 only requires the subscriber to sign his name and list his address.
94. 651 P.2d at 801 (Rose, C.J., dissenting).
95. Brief for Appellee at 19, Thomson v. Wyoming In-Stream Flow Comm., 651 P.2d 778 (Wyo. 1982).
96. 651 P.2d at 801 (Rose, C.J., dissenting).

Qualified Voter or Qualified Registered Voter?

Another significant part of the decision was the court's treatment regarding whether the signer of an initiative petition is required to be a registered voter. The court held that there was no inconsistency between the constitutional language and the statutory language.[97]

The Wyoming Constitution states that an initiative petition may be filed with the Secretary of State if "signed by *qualified voters,* equal in number to fifteen per cent (15%) of those who voted in the preceding general election and resident in at least two-thirds (⅔) of the counties of the state."[98] On the other hand, the parallel statutory provision requires that a petition be determined improperly filed if there is an "insufficient number of signatures of *qualified registered voters.*"[99]

The court concluded that there was no inconsistency between the above two provisions since it was a constitutional requirement that a person be registered before he was qualified to vote.[100] Thus, the registration requirement was considered a condition precedent to signing an initiative petition. If a signer was not a registered voter, his signature was invalid and would not be counted.

As previously noted, a majority of states require, either by statutory provision or judicial construction, that a person who signs an initiative petition be a registered voter. One state considers the requirement to be fundamental for constitutional reservation of the right of initiative.[101] Some states also require circulators to affirm that all of the signers are registered voters when the petition is signed.[102]

Presumably the rationale for a requirement that signers be registered voters is to enable the state official to determine the

97. 651 P.2d at 790.
98. WYO. CONST. art. 3, § 52(c) (emphasis added).
99. WYO. STAT. § 22-24-116(a)(i) (1977) (emphasis added). *See supra* note 65.
100. 651 P.2d at 789. The constitutional provision provides in pertinent part: "No person qualified to be an elector of the State of Wyoming, shall be allowed to vote at any general election or special election hereafter to be holden in the state, until he or she shall have registered as a voter according to law." WYO. CONST. art. 3, § 12.
101. *See, e.g.,* Cappelletti V. Celebrezza, 390 N.E.2d at 831 (1979).
102. *See, e.g.,* ARIZ. CONST. art. IV, pt. 1, § 1 (9); ARIZ. REV. STAT. ANN. § 19-112 (Supp. 1980).

qualification of the signer. Indeed, the *In-Stream Flow Committee* court stated that:

> The purpose of statutory control with respect to initiative and referendum is to safeguard and facilitate the use of the initiative and referendum for the benefit of the people of the state by discouraging fraud and abuse and minimizing mistakes that might occur in the use of the right, as well as facilitating the checking of petitions.[103]

In addition, the Alaska constitutional and statutory provisions, which are similar to Wyoming's, consistently use the term "qualified voter."[104] It is possible that when the Wyoming legislature drafted its statutory provision, it chose to codify the general rule that signers are required to be registered voters. Likewise, it may be that the legislature considered the term "qualified voter" to be unclear, and therefore, "qualified registered voter" was preferred.

CONCLUSION

The *Thomson v. Wyoming In-Stream Flow Committee* decision leaves many unanswered questions. The most disturbing implication of the decision is that the Secretary is permitted to exercise discretion concerning the procedure for her review of initiative petitions. The opposite conclusions of the majority and dissenting opinions reflect the possible conflicts regarding what procedure should be used. The question remains unanswered whether the Secretary's procedure in this case imposed improper restrictions on the right of initiative or whether the procedure was a proper means of protecting the integrity of the direct legislation process.

The *In-Stream Flow Committee* decision, while correct in affirming the Secretay of State's exercise of discretion regarding the substantive requirement that signers of initiative petitions be qualified registered voters, provides little insight into

103. 651 P.2d at 790.

104. ALASKA CONST. art. XI, § 3; ALASKA STAT. § 15.45.120 (1982). Thus far, the question of whether "qualified voter" requires the signer to be a registered voter has not been considered in Alaska.

what standards or conditions may permissively be imposed without violating the constitution. As an important constitutional right, the initiative should not be subject to risks that would restrict its exercise.

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