CLEAN ELECTIONS INSTITUTE, INC. V. BREWER: THE SEPARATE AMENDMENT RULE OF THE ARIZONA CONSTITUTION

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I. INTRODUCTION

In the 1998 general election, Arizona voters approved the "Citizens Clean Elections Act,"[1] creating the Clean Elections Commission.[2] The Commission is responsible for financing political campaigns,[3] conducting voter education,[4] and enforcing the law's requirements.[5] In 2004, a group called "No Taxpayer Money for Politicians"[6] filed Proposition 106, a constitutional amendment that would have significantly altered the Clean Elections Act by forbidding the use of "taxpayer money"[7] to finance political campaigns.[8] Several groups sued in superior court to enjoin the Secretary of State from certifying Proposition 106.[9] The groups claimed that the proposition violated the "separate amendment rule" contained in Article 21, section 1 of the Arizona Constitution and therefore should be removed from

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1. ARIZ. REV. STAT. §§ 16-940 to 16-961 (2004).
2. *Id.* at § 16-955.
3. *Id.* at § 16-951.
4. *Id.* at § 16-956(A)(1)(2).
5. *Id.* at § 16-956(A)(7).
6. Clean Elections Inst., Inc. v. Brewer, 99 P.3d 570, 571 (Ariz. 2004) (internal quotations omitted). The Clean Elections Institute is the non-profit organization that originally filed the Clean Elections Act ballot initiative (for more information, see http://www.azclean.org). The Clean Elections Commission is the state agency mentioned above that oversees campaign financing, voter education, and election law enforcement (for more information, see http://www.ccec.state.az.us).
7. In the initiative, "taxpayer money" was defined as "any tax, fee, assessment, surcharge, forfeiture, penalty, fine, other revenue or funds collected by the state, a political subdivision, department, agency or instrumentality of the state, city or town or any contribution, donation or expenditure that is eligible for a state tax reduction, deduction, exemption, exclusion, credit, donation, check-off or other tax feature." *Clean Elections Inst.*, 99 P.3d at 575 n.10.
8. *Id.* at 575.
9. *Id.* at 571–72.

the ballot.[10] The superior court agreed and ordered that Proposition 106 not be certified.[11] The Arizona Supreme Court affirmed the superior court's decision.[12]

II. THE SEPARATE AMENDMENT RULE

A. Background

The Arizona Constitution states, "If more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately."[13] The Arizona courts refer to this section of the constitution as the separate amendment rule,[14] and apply the rule by using the "common purpose or principle" test announced in *Kerby v. Luhrs*[15] and updated in *Korte v. Bayless*.[16] The *Clean Elections Institute* court further clarified this test and applied it to Proposition 106.

The Arizona Supreme Court first addressed Arizona's separate amendment rule in *Kerby v. Luhrs*.[17] Judge Lockwood gave an account of separate amendment rules throughout the United States and provided a thorough description of "logrolling,"[18] the practice that these rules were designed to prevent.[19] The *Kerby* court established the following standard for determining whether a proposed amendment violated the separate amendment rule:

> If the different changes contained in the proposed amendment all cover matters necessary to be dealt with in some manner, in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, and if, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted. But, if any one

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10. *Id.* at 572.
11. *Id.* at 571.
12. *Id.*
13. ARIZ. CONST. art. XXI, § 1. Proposed constitutional amendments relating to several topics have withstood challenge under the separate amendment rule. *See, e.g.*, Regner v. Bayless, 16 P.3d 209, 211 (Ariz. 2001) (telecommunications competition); Korte v. Bayless, 16 P.3d 200 (Ariz. 2001) (state trust land management); Slayton v. Shumway, 800 P.2d 590, 595 (Ariz. 1990) (victims' rights); Tilson v. Mofford, 737 P.2d 1367 (Ariz. 1987) (tort awards); State v. Lockhart, 265 P.2d 447 (Ariz. 1953) (composition of the legislature); Hood v. State, 539 P.2d 931 (Ariz. Ct. App. 1975) (tax exemption scheme). However, several proposed amendments have been removed from the ballot because they violated the separate amendment rule. *See, e.g.*, Taxpayer Prot. Alliance v. Arizonans Against Unfair Tax Schemes, 16 P.3d 207 (Ariz. 2001) (elimination of state income tax and ballot tax pledge for federal candidates); Kerby v. Luhrs, 36 P.2d 549 (Ariz. 1934) (modification of mine and utility taxes and creation of an independent tax commission).
14. *Clean Elections Inst.*, 99 P.3d at 575–77.
15. 36 P.2d 549, 554 (Ariz. 1934).
16. 16 P.3d at 204.
17. 36 P.2d at 554.
18. Logrolling is a process where proponents of several separate proposals join them together in hopes of gaining votes for each that they would otherwise not receive. *Id.* at 552.
19. *Id.* at 552–54.

> of the propositions, although not directly contradicting the others, does not refer to such matters, or if it is not such that the voter supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted, and the proposed amendment falls within the constitutional prohibition.[20]

Subsequent Arizona Supreme Court decisions have referred to this standard as the common purpose or principle test.[21]

In *Korte v. Bayless*, the Arizona Supreme Court clarified how to apply *Kerby*.[22] The court began its analysis by rejecting the notion that *Kerby* provided two separate tests for the separate amendment rule: one asking whether "the proposal can be said to constitute a consistent and workable whole on the general topic embraced that, logically speaking, should stand or fall as a whole,"[23] and the other asking whether "the voter supporting one proposition would not reasonably be expected to support the principle of the others."[24] Instead, the court said that these phrases provide two "alternate approach[es]" to applying *Kerby*'s single common purpose or principle test.[25] Unfortunately, the opinion did not elaborate on the distinction between an alternate test and "alternate approach[es]" to the same test.[26]

The *Korte* court also announced a set of non-exclusive factors for courts to consider when applying the common purpose or principle test. These include "whether various provisions are facially related, whether all the matters addressed by an initiative concern a single section of the constitution, whether the voters or the legislature historically has treated the matters addressed as one subject, and whether the various provisions are qualitatively similar in their effect on either procedural or substantive law."[27]

B. Clean Elections Institute v. Brewer

1. Analytical Framework for the Separate Amendment Rule

The *Clean Elections Institute* court laid out the legal tests used to analyze different types of changes to Arizona law.[28] All amendments to the Arizona constitution must comply with the separate amendment rule.[29] In contrast, statutes enacted by the legislature must follow the "single-subject rule."[30] Finally, ballot

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20. *Id.* at 554.
21. *See, e.g.*, Clean Elections Inst., Inc. v. Brewer, 99 P.3d 570, 573 (Ariz. 2004); Taxpayer Prot. Alliance v. Arizonans Against Unfair Tax Schemes, 16 P.3d 207, 208 (Ariz. 2001); *Korte*, 16 P.3d at 203.
22. *Korte*, 16 P.3d at 204.
23. *Id.* (internal citations omitted).
24. *Id.* (internal citations omitted).
25. *Id.*
26. *Id.*
27. *Id.* (internal citations omitted).
28. *Clean Elections Inst.*, 99 P.3d at 572–73.
29. *Id.*
30. *Id.*

initiatives that make statutory modifications need only contain "*some* title and *some* text."[31]

Previous opinions had referred to both the rule for legislative statutes and the rule for constitutional amendments as the single-subject rule,[32] but the *Clean Elections Institute* court made clear that there are two separate tests.[33] The single-subject rule for legislatively-enacted statutes provides that "[e]very Act shall embrace but one subject and matters properly connected therewith,"[34] while the separate amendment rule for constitutional amendments states that "proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately."[35]

The court explained that the separate amendment rule is a "stricter test" because the single-subject rule allows statutes to cover "one subject *and matters properly connected therewith*," while the separate amendment rule has no such extension.[36] Courts may sever portions of statutes that fail the single-subject rule, but they may not sever portions of proposed amendments that fail the separate amendment rule.[37] Instead, amendments that violate the separate amendment rule are removed from the ballot entirely.[38] While the single-subject and separate amendment rules are similar, the *Clean Elections Institute* court applied the stricter separate amendment rule to Proposition 106 because it was a proposed constitutional amendment.

The *Clean Elections Institute* court also restated the test that proposed amendments to the Arizona constitution must pass to comply with the separate amendment rule.[39] The court explained that when evaluating a proposed amendment, courts should continue to utilize *Kerby*'s common purpose or principle test and consider *Korte*'s list of non-exclusive factors.[40] Any amendment that fails the test and violates the rule must be removed from the ballot completely.[41]

2. Application of the Separate Amendment Rule to Proposition 106

Proposition 106 contained two main provisions that the court found to be relevant to its analysis. First, section A prohibited the use of all public funds to finance political campaigns.[42] The court found that this section would clearly invalidate the portion of the Clean Elections Act that provided public money for

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31. Iman v. Bolin, 404 P.2d 705, 710 (Ariz. 1965) (quoting Barth v. White, 14 P.2d 743, 746 (Ariz. 1932)) (emphasis in original).
32. *See* Taxpayer Prot. Alliance v. Arizonans Against Unfair Tax Schemes, 16 P.3d 207, 208 (Ariz. 2001); *Korte*, 16 P.3d at 204.
33. *Clean Elections Inst.*, 99 P.3d at 572 n.1.
34. ARIZ. CONST. art. IV pt. 2, § 13.
35. ARIZ. CONST. art XXI, § 1.
36. *Clean Elections Inst.*, 99 P.3d at 573 (emphasis in original).
37. *Id.* (citing *Taxpayer Prot. Alliance*, 19 P.3d at 209).
38. *Id.*
39. *Id.* at 573–74.
40. *Id. See supra* notes 18–26 and accompanying text.
41. *Clean Elections Inst.*, 99 P.3d at 573.
42. *Id.* at 575.

campaigns.[43] Second, section C stated that all the money that is currently placed in the Clean Elections Fund would instead be deposited into the state general fund.[44] The Clean Elections Fund finances all of the Commission's activities, and it is supported by a variety of sources including an optional tax credit, partial donations of taxes owed, and a ten percent surcharge on all criminal and civil fines and penalties throughout the state.[45] The court stated that this section would dramatically change the way the Commission financed its remaining duties.[46] Instead of receiving funds directly, the Commission would be required to request money from the legislature.[47]

After identifying the problematic sections, the court applied the common purpose or principle test to determine whether the initiative satisfied the separate amendment rule.[48] The court noted, "No facial relationship exists between sections A and C, and the sections advance no common purpose or principle," as required by the *Kerby* test.[49] The court explained that while the purpose of section A was to eliminate public financing of political campaigns, the purpose of section C was clearly different.[50] Section C would divert *all* the money previously earmarked for the Commission into the general fund, not simply the money that would have been used to finance political campaigns.[51] This led the court to conclude that "[o]ne purpose of section C must be to deprive the Commission of its authority to make independent budgeting decisions."[52] The court stated that it could not "conceive of a common principle that underlines [sections A and C]."[53] In short, the court found that a voter's decision about public financing of political campaigns was different from his decision about requiring the Commission to receive its funding through legislative appropriation, and therefore the two provisions could not be contained in the same proposition.

The proponents of Proposition 106 argued that any separate effect of Section C would be negligible because the legislature would be required by law to fund the Commission's voter education programs at their statutorily-prescribed levels.[54] However, the court pointed out that, under the Clean Elections Act, the Commission may use "up to ten percent" of the money it receives for administration and enforcement.[55] Therefore, under Proposition 106 the Commission's current discretion in deciding how much money to spend enforcing the Clean Elections Act would be given instead to the legislature.[56] Seeing as the

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43. *Id.*
44. *Id*.
45. *Id.* at 574.
46. These include voter education, administrative, and enforcement responsibilities. *Id.* at 575–76.
47. *Id.*
48. *Id.*
49. *Id.* at 575.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 576.
54. *Id.*
55. *Id.*
56. *Id.*

members of the legislature are inherently potential targets for any Clean Elections enforcement efforts, the court found that this was a change that the voters should be able to approve or disapprove separately from deciding whether to finance political campaigns with public funds.[57]

Finally, the court pointed out that another effect of section C would be a ten percent surcharge on all civil and criminal fines and penalties that would be sent directly into the general fund instead of the Clean Elections Fund.[58] The court found no connection in purpose or principle between a ban on public financing of political campaigns and the imposition of a surcharge on all fines and penalties to support the general fund.[59] Therefore, the court held that Proposition 106 violated the separate amendment rule as interpreted by *Kerby* and *Korte*, and affirmed the superior court order removing it from the ballot.[60]

3. Concurring Opinion by Justice Hurwitz

Justice Hurwitz concurred in the court's decision, but suggested a new path for future separate amendment rule cases.[61] Justice Hurwitz agreed that the Court had reached the proper result under *Kerby*'s "common purpose or principle" test, but added that a different test for the separate amendment rule may be preferable.[62] Justice Hurwitz expressed hesitation about the *Kerby* test because "it involves the Court in a prediction of voter preferences and behavior that is often somewhat subjective and that will subject most proposed multi-faceted constitutional amendments to attack."[63] He continued:

> It may well be that a different approach to the separate amendment rule would provide greater certainty in interpretation while still achieving the critical goal of Article 21, Section 1 . . . . For example, an approach that focused on such objective factors as whether one proposal *logically* follows from another and is *necessary* for the practical implementation of the first might well provide more predictable adjudication.[64]

However, because the parties in the case did not advocate a change to the *Kerby* test, Justice Hurwitz left the question for another day.[65]

Justice Hurwtiz's suggestions are helpful, but they seem to suggest a refinement of the *Kerby* rule more than an entirely new test. As mentioned above, a court's determination as to whether "the voter supporting one proposition would not reasonably be expected to support the principle of the others" is only one approach to applying the *Kerby*'s "common purpose or principle" test.[66] The other

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57. *Id.*
58. *Id.*
59. *Id.* at 576–77.
60. *Id.* at 577.
61. *Id.* (Hurwitz, J., concurring).
62. *Id.*
63. *Id.*
64. *Id.* (emphasis in original).
65. *Id.*
66. Korte v. Bayless, 16 P.3d 200, 204 (Ariz. 2001).

Kerby approach, asking whether the different aspects of a proposed amendment "constitute a consistent and workable whole on the general topic embraced that, logically speaking, should stand or fall as a whole,"[67] is similar to Justice Hurwitz's proposed test that would ask "whether one proposal logically follows from another and is necessary for the practical implementation of the first."[68]

However, Justice Hurwitz's argument that objective factors should be used to review proposed amendments instead of subjective conjectures deserves further consideration. It is likely that an objective test would provide more consistent results than a subjective test. This could be accomplished by utilizing the objective approach to applying the "common purpose or principle" test and leaving the subjective method behind.[69]

III. CONCLUSION

The *Clean Elections Institute* court drew a clear line between the single-subject rule for statutes and the separate amendment rule for constitutional amendments.[70] The court also reaffirmed the *Kerby* test for the separate amendment rule,[71] despite some hesitation by Justice Hurwitz.[72] The court demonstrated how to apply the test to a proposed amendment,[73] which should provide guidance to future drafters seeking to meet the somewhat vague legal standards of the separate amendment rule.

67. *Id.*
68. *Clean Elections Inst.*, 99 P.3d at 577 (Hurwitz, J., concurring).
69. *See Korte*, 16 P.3d at 204.
70. *Clean Elections Inst.*, 99 P.3d at 572–74.
71. *Id.* at 573.
72. *Id.* at 577 (Hurwitz, J. concurring).
73. *Id.* at 574–77.