

**DIRECT DEMOCRACY AS “SUPER-PRECEDENT”?:
POLITICAL CONSTRAINTS OF CITIZEN-INITIATED
LAWS**

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I. Introduction	192
II. Conditions Required for Initiatives to Act as “Super- Precedents”	195
III. Legislative Attempts at Amending Voter Approved Initiatives	201
A. Voter consistency under Nevada’s successive-majority requirement.....	201
B. Voter consistency when facing similar measures across time	202
C. Washington State voters, legislative response, and transportation taxes.....	203
D. Legislative response to citizen-initiated term limits	205
E. Oregon physician-assisted suicide	208
F. Bears, cougars, wolves, and chickens	208
G. Voters, legislators, and fiscal policy in Washington state.....	210
H. The ultimate “third-rail”: Property taxes and the tax revolt.....	213
I. Campaign finance and other examples.....	219
J. Summary: The relative scarcity of initiative super- precedents	221
IV. Conditions that Facilitate Legislative Amendment of Initiatives	223
A. Constraints on legislative amendment to voter-initiated laws.....	225
B. Conditions facilitating legislative amendment.....	227
C. Diffuse public support for an initiative	227
D. Contradictory public votes.....	227
E. Limited threat of electoral retribution	228
F. Court decisions offer political cover	229
G. Enduring policy crisis and time	230

V. Prospects for Greater Legislative Influence Over Voter- Approved Initiatives	231
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I. INTRODUCTION

For much of the last forty years, the institution of direct democracy has proven to be rather unpopular with prominent social scientists, legal scholars, elected officials, and journalists. Several themes persist in critical evaluations of direct democracy. Citizen-initiated legislation can be of dubious quality, such legislation can be the product of pure politics, and stark and dichotomous choices create the legislation rather than an iterative process of deliberation among representatives.¹ Voters at times may be unable to make informed decisions on complicated matters of policy and may be too quick to approve policies that harm the civil rights of minority groups.² Powerful, narrowly-based corporate interests have replaced broad-based, “grassroots” public-interest actors as dominant players in direct democracy.³ Initiatives also have been criticized as threatening democratic governance by failing to reflect the will of the people,⁴ or

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1. See generally Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994); Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735 (1998).

2. See generally

2007]

CONSTRAINTS TO CITIZEN-INITIATED LAWS

193

by representing the ill-will of well-informed people all too well.

2007] *CONSTRAINTS TO CITIZEN-INITIATED LAWS* 195

II. C

Additional research provides evidence that campaign spending by narrowly-based economic interest groups rarely advances initiatives that advantage powerful corporations.¹⁸ Corporate spending does, however, have a powerful effect on defeating initiatives that threaten narrow economic interests, but it has much less effect on advancing the policies promoted by narrow economic interests.¹⁹ There is a firm empirical basis for expecting that voter decisions on initiatives generally, or at least often, reflect substantive preferences of voters,²⁰ rather than random outcomes or manipulative campaigns. Thus, unless the aggregate preferences of an electorate shift over time, voters will likely make consistent decisions when presented with similar legislation in different elections.

These factors have implications for how legislators may respond to citizen-initiated laws. If representatives are aware that outcomes of initiative elections reflect firm, enduring, substantive preferences of voters, there are limits to representatives' autonomy to amend or repeal citizen-initiated laws. Elected representatives likely have less discretion to act independent of their constituents' preferences regarding issues that constituents are aware of, and attentive to, compared to when constituents are unaware of the issues.²¹ The more an initiative directs public attention to an issue that legislators are considering, the more the role of the legislator changes from a trustee to a delegate.²² Legislators who generally view themselves as delegates, rather than trustees, may be inclined to heed to voter preferences they interpret from vi08(u[08 Tcvi08(of the)5.t)6.6(5 213.54 3w(21)Thee.5

legislators interpret voter support for a citizen-initiated law as reflecting firm substantive preferences about an issue voters are attentive to, those legislators who disagree or seek to amend it may anticipate electoral retribution. If these conditions hold, we might expect that initiatives have an enduring effect on policy, due to legislators' general reluctance to amend or alter citizen-initiated laws.

Indeed, theory and empirical data supports the idea that the initiative process causes legislation to more closely reflect public preferences for policy, but less clear is how initiatives might cause public policies to more closely match public opinion.²⁴ There are some examples of direct effects where popular policies that incumbent legislators might resist were adopted directly via citizen initiative (e.g., term limits²⁵ and regulations on campaign finance).²⁶ However, the nature of the relationship between public opinion, the initiative, and state policy is not automatic. Initiatives are not self-implementing.

Scholars note that the mechanism for policy responsiveness to public opinion expressed via ballot initiatives is largely indirect.²⁷

opinion about potential initiatives and referendum when making decisions on legislation,²⁹ with the mere *presence* of the initiative process thus indirectly making policies more representative of state opinion.³⁰ Groups also may succeed in writing legislation by passing an initiative, but this still leaves the legislative and executive branches in charge of crafting policy demanded by the citizen initiative. These branches have the task of writing enabling legislation associated with initiated laws, passing enabling legislation that may circumvent some elements of citizen-initiated legislation, appropriating revenues, and administering the implementation of citizen-initiated policy.

Legislative willingness to use this autonomy in attempts to deviate from the proponent's intentions may explain, at least in part, why studies of the relationship between public opinion and state policy find contradictory evidence about whether or not initiatives have clear effects on state policies.³¹ Examples of initiatives indirectly causing state policy to match state public opinion more closely have been demonstrated in some areas of policy, but not others.³² Parental notification of abortion laws and the death penalty more often were adopted in initiative states where voters preferred these policies than in non-initiative states where voters had similar preferences,³³ serving as evidence that the mere existence of the

LEGISLATURES 35 (1998). For a more sympathetic treatment, see MATSUSAKA, *supra* note 24, at 11-12; Elisabeth R. Gerber, *Pressuring Legislatures Through the Use of Initiatives: Two Forms of Indirect Influence*, in C

on some ballot measures (dealing with agricultural policy and environmental policy bills), but floor-voting was relatively less representative of constituency voting on ballot measures when legislators considered bills dealing with gender, abortion, and sexual orientation.³⁹

2007] *CONSTRAINTS TO CITI*

amendments,⁴⁴ so Nevada voters occasionally face identical ballot questions in different years. Most Nevada constitutional initiatives that pass in the first round and then are subject to the successive majority requirement are approved with similar levels of support in the second round.⁴⁵ This includes pairs of measures dealing with medical use of marijuana, term limits for legislators, a prohibition of income taxation, sales tax limits on household goods, and super-majority requirements for legislative tax increases.⁴⁶ One major exception to this occurred in a situation where support for a citizen-initiated property tax limitation measure approved at the first vote subsequently declined significantly after the legislature adopted legislation similar to the initiative proposal prior to the second vote on the citizen-initiated version of the law.⁴⁷

B. Voter consistency when facing similar measures across time

Opinion polls in Ohio and Michigan over the course of a decade show consistency in voter support for citizen-initiated term limits, supporting the idea that voters tend to remain supportive of initiatives previously approved.⁴⁸ In the 2004 election, Montana and Arkansas voted down proposals to soften terms that were initiated a decade before.⁴⁹ Arizonans have demonstrated consistency in evaluating proposals to allow physicians to prescribe marijuana for medical use. Sixty-five percent of voters participating in the 1996 Arizona election approved Initiative 200, authorizing medical use of marijuana (and other Schedule 1 drugs) under a physician's prescription. The legislature repealed some sections of Initiative 200 in 1997⁵⁰ and passed legislation blocking a physician's ability to prescribe Schedule 1 drugs.⁵¹ Both actions of the legislature became the subject of popular referendums (Proposition 300 and Proposition 301 of 1998), with 57% of voters supporting the medical use of Schedule 1 drugs when the issue appeared on the ballot the second time.⁵² Arizonans

44. NEV. CONST. art. 19, § 3 (amended 1958).

45. ELLIS, *supra* note 3, at 134.

46. *See id.* at 134-35.

47. *Id.* at 135.

48. Weisert & Halperin, *supra* note 43.

49. Parry & Donovan, *supra* note 43.

50. S.B. 1373, 1997 Leg., 43rd Sess. (Ariz. 1997).

51. H.B. 2518, 1997 Leg., 43rd Sess. (Ariz. 1997).

52. National Conference of State Legislatures, <http://www.ncslorg/ncslldb/elect98/irsrch.cfm> (last visited Jan. 9, 2007) (Arizona Proposition 300 of 1998) (failed, 42.7%

latter rejected an initiative proposal to reduce penalties for possession of less than one ounce of marijuana to a civil fine.⁵³

Large scale campaign spending can also prove ineffective in reducing public support for citizen-initiated legislation previously approved. Montana voters approved a ban on the practice of open-pit (heap-leach) cyanide mining in that state in 1998.⁵⁴ A mining company qualified a 2004 initiative to repeal the 1998 citizen-initiated ban on cyanide mining, spending \$3 million in favor of the repeal proposals⁵⁵ and outspending their opponents 395-to-1.⁵⁶ Fifty-eight percent of participating Montana voters opposed repealing the ban.⁵⁷

The campaign spending disparity in the Montana example is atypical, but the Montana, Nevada, and Arizona examples, and cases discussed below, show that across a range of policies—including property taxes, motor vehicle fees, term limits, drug policy, hunting regulations, physician assisted suicide, education spending, and campaign finance regulations—voters seldom reverse course when presented with an opportunity to repeal or amend legislation that

voting on transportation tax initiative and referendums since 1998, at least with regard to their position on the Motor Vehicle Excise Tax (MVET). This may not mean, however, that transportation taxes are such a “third-rail” phenomena to cause Washington legislators to avoid passing transportation taxes. Fifty-seven percent of Washington voters participating in the state’s 1998 general election voted to approve a legislative referred measure that cut the MVET used to fund road transportation.⁵⁸ A year later, 56% again voted to cut the unpopular MVET and change it into a flat fee.⁵⁹ The State Supreme Court ruled Initiative 695 unconstitutional.⁶⁰ However, the Legislature and Governor responded to the initiative by passing an MVET cut equal to that approved by voters in I-695.⁶¹ When the legislature allowed incremental additions to the flat fee, advocates of the flat fee subsequently qualified another initiative in 2002, which voters approved—restating their support for the original level of the flat fee.⁶²

After the proportion of state house Democrats increased slightly after the 2000 election (producing a Democratic House majority), the next legislature offered voters another proposal for raising and spending MVET funds in 2002. Participating voters rejected the 2002 legislative referenda proposing an MVET increase for trucks coupled with sales tax increase on cars and a two-year, nine cent gas tax increase to fund more roads.⁶³ After the 2002 election, Democrats gained additional house seats (but were in the minority by one seat in the Senate). Pressure on both parties to mitigate transportation problems led the 2003 legislature to pass (and the Governor sign) a scaled-back version of the gas tax that voters rejected in 2002 (a five

58. *Id.* (Washington Referendum Bill 49 of 1998) (passed, 57.1% yes).

59. *Id.* (Washington Initiative 695 of 1999) (passed, 56.2% yes). This measure would require voter approval for any increase in taxes imposed by state or local government and would impose a license tab fee for each vehicle of \$30 per year. *Id.*

60. *Amalgamated Transit Union Local 587 v.vd.*

cent increase in the gas tax).⁶⁴ After the 2004 election, Democrats held solid majorities in both houses of the state legislature. In 2005, the legislature passed an additional 9.5 cent gas tax increase, to be phased in over four years. A citizen's group circulated an initiative to repeal the four year, 9.5 cent gas increase, but that initiative was rejected by voters in 2005.⁶⁵ Thus, across several years of voters signaling consistent hostility to transportation taxes, the legislature continued attempts to fund transportation via revenue sources voters had been rejecting at the ballot box.

D. Legislative response to citizen-initiated term limits

Since 1990, citizens in twenty states adopted citizen-initiated proposals that limited the tenure of state legislators and members of Congress. Term limits were wildly popular with voters when introduced and generally remain popular.⁶⁶ In all but two states (California and Michigan) at least 60% of participating voters approved term limit initiatives. Elected representatives have been much less enthusiastic about term limits. Only one state adopted term limits in the absence of the threat of a citizen initiative (Louisiana), and only one other state (Utah) has adopted term limits via the legislature. Utah legislators voted in 1994 to limit themselves to 12 year terms (with limits becoming effective in 2006); a move that likely helped defeat a citizen-initiative proposal for six year limits.

Despite the initial popularity of voter-initiated term limits with voters, legislators in several states have attempted to eliminate voter-approved limits on their tenure—several times with success. In 1995, state-imposed term limits on candidates for U.S. Congress were rejected by the U.S. Supreme Court,⁶⁷ and legislators in four states were successful in having their respective state courts overturn

64. In inflation-adjusted 2005 dollars, the post 2003 gas tax increase produced a tax level equivalent to that existing in 1977 and 1984. Marilyn P. Watkins, *Washington Gas Tax in Historical Perspective*, Economic Opportunity Policy Memo 3 (Aug. 2005), available at <http://www.eoionline.org/Taxes/GasTax0805.pdf>.

65. National Conference of State Legislatures, <http://www.ncsl.org/ncsl/db/elect98/irsrch.cfm> (last visited Jan. 9, 2007) (Washington Initiative 912 of 2005) (failed, 47.1% yes)ur s-imp83 Twis Wasw97ryTaxes/GnVI:(t) 7fmo Pe vehicTJfuelcrease produc-15.901 cTJfuel901 ceT2

citizen-initiated term limit laws for violating a state single-subject rule (Oregon)⁶⁸ and for violating rules for amending state constitutions (Massachusetts, Washington, and Wyoming).⁶⁹

Additionally, some legislatures have amended and repealed voter-approved term limit initiatives. A 1992 Wyoming initiative limiting legislative terms to six years received 77% voter support.⁷⁰ Prior to the Wyoming Court holding that term limits were unconstitutional, the Wyoming legislature amended the citizen-initiated law in 1993 to extend the length of terms to 12 years (with the clock starting in 1992).⁷¹ Term limit supporters subsequently qualified a popular referendum campaign to repeal the amendment in 1996.⁷² The referendum received 54% but had no effect because of the state's requirement that ballot measures receive majority support from the total voters participating in the election.⁷³

Fifty-nine percent of participating Idaho voters approved an omnibus 1994 term limit measure that applied to federal, state, and local offices. The *Thornton* decision removed limits on federal offices,⁷⁴ but Idaho's limits on state legislative terms remained in effect. The Idaho legislature attempted to repeal state term limits with a 1998 referendum asking voters to reconsider whether they wished to retain limits on the tenure of state and local elected offices.⁷⁵ Fifty-three percent of participating voters approved retaining limits on state and local offices in 1998, thus keeping limits in place.⁷⁶ After two largely uncompetitive state legislative contests, the 2002 Idaho

68. *Lehman v. Bradbury*, 37 P.3d 989, 1001 (Or. 2002) (overturning Oregon Measure 3 of 1992).

69. The Massachusetts, Washington and Wyoming constitutions do not allow constitutional changes to be made by initiative. See *League of Women Voters v. Sec'y of the Commonwealth*, 681 N.E.2d 842, 846-47 (Mass. 1997); *Gerberding v. Munro*, 949 P.2d 1366, 1377 (Wash. 1998); *Cathcart v. Meyer*, 88 P.3d 1050, 1068 (Wyo. 2004).

70. See Wyo. Elections Div., *Initiative and Referendum Summary Sheet* 3 (Dec. 26, 2006), <http://soswy.state.wy.us/election/IRSum.pdf> (last visited Jan. 9, 2007) [hereinafter *Summary Sheet*].

71. S.B. 52, 53rd Leg., Gen. Sess. (Wyo. 1995).

72. See *Summary Sheet*, *supra* note 71, at 4.

73. See *id.* The referendum received 104,555 votes yes, 90,138 votes no. Because 215,844 participated in the 1996 Wyoming election, the measure needed 107,923 votes to pass. *Id.*

74. *Id.*

75. Idaho Advisory Vote, Nat'l Conf. of State Leg., *State Legis. Elections: Initiatives and Referenda* (2007), <http://www.ncsl.org/programs/legismgt/elect/dbintro.htm> (last visited Jan. 10, 2007).

76. *Id.*

2007]

CONSTRAINTS TO CITIZEN-INITIATED LAWS

207

legislature voted 26-8 to repeal the citizen-initiated term limit statute,⁷⁷ and to overturn the governor's veto of their term limit repeal bill.⁷⁸ Supporters of term limits then qualified a "repeal the repeal" referendum for the November 2002 ballot.⁷⁹ The 2002 referendum asking if the legislatures' repeal of the 1994 initiative should be upheld received a vote of 50.2% in favor, thus repudiating the 1994

majority needed to repeal an initiative) to completely repeal I-713,⁹² but the repeal bill did not pass the House. The legislature did respond to concern from rural communities about increasing cougar/human interactions, and to pressure from hunters, and further amended I-655 to allow “pilot programs” of locally managed cougar hunts in designated counties (counties where I-655 and I-713 failed).⁹³

Oregon voters approved a similar citizen-initiated statute in 1994 that prohibited “bear baiting” and hound hunting of cougars.⁹⁴ Four months after Measure 18 was approved, ten bills were introduced in the legislature to amend the initiative but, unlike in Washington, none passed. In 1996, Oregonians rejected an initiative placed on the ballot by supporters of hound hunting, proposing that Measure 18 be repealed.⁹⁵ As of 2005, the legislature was still considering bills to amend Measure 18 to allow pilot programs for cougar hunting in designated counties.⁹⁶

Legislative willingness to amend citizen-initiated hunting laws can be found in other states. Alaska voters approved a citizen-initiated ban of hunting wolves from aircraft.⁹⁷ The state legislature responded in 1998 by amending the citizen-initiated law to grant wildlife managers more discretion than legislated by the initiative. In 1999, the legislature further altered Measure 3 by passing a bill that reinstated “land and shoot” wolf hunting in designated areas from aircraft.⁹⁸ The governor vetoed the bill, but the legislature over-rode his veto. Anti-hunting activists responded in 2000 with another successful initiative to again prohibit same-day “land and shoot” hunting of wolves.⁹⁹ The measure received less public support in 2000 than in 1998.

92. See Chris McGann, *Teachers, Trapping Foes Heave Sigh of Relief*,

Similarly, rural Oklahoma legislators responded to a 2002 initiative proposing a ban on cockfighting¹⁰⁰ by placing a proposal on the same ballot to increase the signature qualification standards for anti-hunting and animal welfare initiatives.¹⁰¹

inflation.¹⁰⁶ Revenues collected above the limit were directed to two reserve funds: an emergency fund that could only be spent after a vote of two-third of the legislature and the Governor's signature (and only if the spending did not exceed limits set by the fiscal growth formula), and a school construction fund that could be spent only if approved by a two-thirds vote of the legislature and approval by voters at a referendum. The law provided two means for the legislature to exceed the spending limits: voters could approve spending above the limit¹⁰⁷ or, in the event of an "emergency,"¹⁰⁸ a two-thirds vote of the legislature and the Governor's signature could approve spending above the limit for a two year period.

There is some evidence that Washington's citizen-initiated expenditure limits may have initially reduced the growth rate of state spending,¹⁰⁹ but the slower spending growth rates began prior to adoption, and also correspond with a recession and with Republican takeover of the state legislature in 1994. State expenditures remained below the initial I-601 limits through 1999.¹¹⁰ By 2000, Democrats narrowly held a majority in the Senate and a tie in the State House.¹¹¹ Initiative 601's (I-601) expenditure limits presented an obstacle to the Democrats' goal of increasing state spending in several budget areas, including education.¹¹² The 2000-2001 legislature revised how the limit would be calculated, effectively raising it to allow state spending to increase.¹¹³ The 2001 legislature also shifted monies out of the general fund to other funds not covered by the I-601 limits.¹¹⁴

Washington's voters changed the fiscal dynamic further in November 2000 by approving two popular initiatives that increased state spending: Initiative 728, mandating class size reductions in K-12 education, and Initiative 732, authorizing cost-of-living pay increases

106. WASH. REV. CODE § 43.135.025 (2006).

107. WASH. REV. CODE § 43.135.035(2)(a) (2006).

108. WASH. REV. CODE § 43.135.035(3)(a) (2006) ("to alleviate human suffering and provide humanitarian assistance").

109. LeLoup & Herzog, *supra* note 105 at 193; New, *supra* note 104, at 13.

110. Irv Lefberg, *Changing the Rules of the Game: Washington Fiscal Developments Before and After Initiative 601*, Institute of Public Policy and Management 10 (Nov. 1999), available at <http://www.ofm.wa.gov/fiscal/i-601/doc99.pdf>.

111. LeLoup & Herzog, *supra* note 105, at 198.

112. *Id.* at 196-97.

113. WASH. REV. CODE § 43.135.035.5 (2001).

114. David Postman & Ralph Thomas, *Deal scraps tax limits, taps reserves*, SEATTLE TIMES, March 13, 2002, available at <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=repeal13m&date=20020313&query=initiative+601>.

for K-12 teachers.¹¹⁵ Combined, these initiatives added hundreds of millions of dollars in annual spending to the state budget. In November 2001, 65% of participating voters approved Initiative 775. This costly initiative, a collective bargaining agreement between home care workers and the state Health Care Quality Authority, added approximately \$100 million in additional costs to state expenditure.¹¹⁶ These initiatives included provisions to amend I-601 spending limits, but none included means for raising new revenue to pay for spending increases.

By 2002, Democrats controlled both houses of the state legislature and faced a budget deficit of over \$2 billion created by a state recession, revenue constraints imposed by I-601 and Referendum 49, large business tax breaks recently granted by the legislature,¹¹⁷ and by spending authorized by I-728, I-732, and I-775. Despite predictions that elimination of teacher pay raises was “politically verboten”¹¹⁸ and “would face stiff opposition from the powerful teachers union,”¹¹⁹ the Governor proposed and the legislature approved the budget, which was balanced, in part, by suspending nearly \$500 million in spending approved by citizen-initiated legislation. The 2005 legislature, through majority vote, further amended I-601 to remove the 2/3 vote requirement for the legislature to raise taxes, and changed the formula used to calculate the revenue limit to account for state income growth, rather than population and inflation.¹²⁰ During the 2006 session, the legislature raised spending limits and amended I-601’s reserve fund rules.¹²¹

The sum effect of these legislative and citizen-initiated amendments to Initiative 601 was to substantially reduce the

115. Initiative 728 (Wa.

constraints that I-601 placed on budgeting in Washington. Washington's experience with changing and amending I-601 is not unique as an example of the weak precedential value associated with some voter-approved tax and spending limitations. Because the legislature has autonomy over the implementation of California's Proposition 4 (discussed below) and voters have been willing to amend it, the citizen-initiated spending limitation measure from the tax-revolt era has had little effect on state spending.¹²²

Colorado voters approved the most rigid expenditure limit in the nation in 1992, the Taxpayer's Bill of Rights (TABOR), at a time when fiscally conservative Republicans were in firm control of both houses of the state legislature.¹²³ Even Colorado's radical TABOR expenditure limit eventually was suspended by voters after some prodding from elected officials.¹²⁴ Eight years after adopting TABOR, that state's voters later amended TABOR in 2000 by approving Amendment 23 which increased spending for K-12 education. In 2004, after 13 years of TABOR-induced declines in state services, a state legislature closely balanced between Democrats and Republicans referred a measure to Colorado voters, Referendum C, proposing that the state keep revenues in excess of the TABOR limits, adopt a more liberal formula for calculating future expenditure limits, and nullify the payment of billions in potential tax rebates. Voters narrowly approved Referendum C in 2005 and effectively suspended TABOR.¹²⁵ During the 2004 election, Colorado voters elected Democratic majorities to both houses of the state legislature for the first time since 1960.¹²⁶

H. The ultimate "third-rail": Property taxes and the tax revolt

California's Proposition 13 of 1978 is one of the most dramatic examples of major substantive legislation adopted by a state's

122. See GERBER ET AL., *supra* note 85, at 109-10.

123. For general information about TABOR, see Talking Points on Tabor, <http://www.ncsl.org/programs/fiscal/taborpts.htm> (last visited Jan. 26, 2007).

124. Legislative Council Staff, Amendment 32: A Brief Overview, Feb. 2001, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2001/research/01Amendment23.htm.

125. Americans for Tax Reform, Owens Wounds TABOR—But TABOR Critically Wounds Owens, Nov. 2, 2005, <http://www.atr.org/content/pdf/2005/nov/110205pr-co-results.pdf>.

126. Tim Storey, 2004 Legislative Elections, SPECTRUM: THE J. OF ST. GOV'T, (Winter 2005) 9, available at <http://www.allbusiness.com/public-administration/executive-legislative-other-general/360702-1.html>.

electorate that shows state legislators unwilling, or unable, to amend problematic citizen-initiated legislation across time. Proposition 13 is a constitutional amendment that returned assessed property values to pre-1978 levels, limited property tax to 1% of value, and limited

2007]

CONSTRAINTS TO CITIZEN-INITIATED LAWS

215

Proposition 62 (1986) and Proposition 218 (1996) both restated voter support for the 2/3 super-majority vote requirement for local tax increases.¹³³ Anti-tax activists qualified Proposition 218 because many local governments had been avoiding some of the constraints of Proposition 13 by relying increasingly upon non-property tax revenue tools to finance local services (including assessments, property-related fees, and various general purpose taxes such as hotel, business license, and utility user taxes).c0.021]gl-, br10.1 8d utilit6316 Tw-1

declines were offset by increases in other revenue sources.¹³⁹ California's total public revenues (adjusted for inflation) were substantially larger in 2003 than they were 25 years earlier when citizens initiated the tax revolt.¹⁴⁰ In 2004, total state and local spending per capita in California remained high and the state ranked fifth in the nation in spending per capita.¹⁴¹ Proposition 13 has made it more difficult for the California legislature to pass a budget, but its overall effect on state spending may be exaggerated.¹⁴² California's lower contemporary standing in terms of per capita spending on K-12 education (relative to other states) may reflect changing income levels,¹⁴³ increased education spending in other states, 16 years of fiscal conservatives in the governor's office (1983-99), an aging electorate with spending preferences that fail to reflect the state's overall population,¹⁴⁴ legislative decisions about allocating revenues, as well as constraints imposed by citizen initiatives over the last 30 years. The larger political process—not Proposition 13—has resulted in policies that give California the nation's best compensated K-12 teachers and some of the nation's most crowded schools.

Although Proposition 13 has been left largely intact, and the initiative continued to cast a shadow over statewide candidate races as recently as 2006, that initiative's twin tax revolt measure has been

139. Bowler & Donovan, nK-12

2007]

CONSTRAINTS TO CITIZEN-INITIATED LAWS

217

revolt to 6.25% by 2004.¹⁵⁵

The legislative response to citizen-initiated property tax limits in Oregon is a record of compliance with voter support for property-tax reductions that voters approved in 1990, when 52% of participating voters approved the citizen-initiated Measure 5. Measure 5's property tax reductions became popular as rapid appreciation in home values led to local property tax payment increases for many homeowners.¹⁵⁶ Measure 5 placed constitutional limits on property taxes used to fund public education, reduced the proportion of assessed value subject to taxation, and equalized school funding across districts by lowering revenues directed to wealthier districts.¹⁵⁷ Property tax opponents also placed initiative Measure 47 on the 1996 ballot to further reduce property taxes and cap future increases.¹⁵⁸ Measure 47 received 52% support (in a higher turnout election than when Measure 5 was approved in 1990). The legislature disagreed with proponents of Measure 47 about its intent, which made it difficult to implement the voter-approved initiative.¹⁵⁹ Although problems with the language in Measure 47 could have provided the legislature an opportunity to block its implementation, the legislature placed a measure on the 1997 ballot featuring the legislatures' position on how further property tax reductions should be implemented (Measure 50). The legislature argued that "the legality of Measure 47 has been called into question threatening any tax relief" and that Measure 50 would better implement tax-cuts promised by Measure 47. the legislature pla.004 Tc26uag47he0009(turi

I. Campaign finance and other examples

There are additional examples of citizen-initiated legislation that state legislatures have avoided implementing. Florida voters passed a 1988 constitutional initiative declaring English to be the “official language” of the state.¹⁶² The Florida legislature did not pass legislation to implement the amendment. Colorado’s voter-approved “Official English” measure also required action of the General Assembly for any implementation.¹⁶³ Likewise, Arizona voters approved a more explicit and extreme “English-Only” law requiring that public officials “act in English and no other language.”¹⁶⁴ Prior to the Ninth Circuit rejecting the Arizona law on First Amendment grounds, two Arizona attorneys general concluded the initiative language did not prevent the use of Spanish.¹⁶⁵

The Massachusetts Legislature also repealed in 2003 a “Clean Elections” initiative authorizing public financing for campaigns that voters had approved in 1998 by a 2-to-1 margin.¹⁶⁶ The repeal came one year after a legal battle over whether the Massachusetts Legislature had a constitutional obligation to fund the Clean Elections program. Although opponents of public-funded elections in the Massachusetts Legislature failed to pass amendments to the voter-approved legislation, the legislature did not appropriate funds for financing the campaigns of candidates during the 2002 election cycle.¹⁶⁷ However, the Supreme Judicial Court of Massachusetts, during the election season, considered a challenge to the legislature’s actions and held that the legislature was constitutionally obligated to provide the election funds.¹⁶⁸ Later that year, the state legislature referred a non-binding ballot referendum to voters re-framing the

162. FLA. CONST., art. II, § 9. “English is the official language of Florida. (a) English is the official language of the State of Florida. (b) The legislature shall have the power to enforce this section by appropriate legislation.” *Id.*

163. COL. CONST., art. II, § 30 (adopted by initiative in 1988).

164. Steven W. Bender,

question from whether they supported “Clean Elections,” to asking if they supported paying more in taxes to fund political campaigns.¹⁶⁹ A larger majority voted against the legislatively referred measure than supported the initial public campaign finance proposal.¹⁷⁰ The legislature and Governor cited the failure of the legislature’s referendum, and the state court’s decision, when they repealed the

2007]

CONSTRAINTS TO CITIZEN-INITIATED LAWS

221

elements of Proposition 208 that would have been litigated.¹⁷⁶ Voters approved Proposition 34, thus trumping the contribution limits (and other regulations) that would have been established by Proposition 208.¹⁷⁷

The Maine Legislature has also proved willing to challenge and amend citizen-initiated legislation. In 2003, it responded to a citizen-

social/morality policy measures such as abortion, gay rights, and immigration, may provide additional examples of popular initiatives that meet the conditions of having both enduring voter support *and* legislative reticence to amend. However, voters in some states may be more willing to reverse course on how drug crimes should be prosecuted compared to when “three-strikes” initiatives were initially adopted,¹⁸⁰ suggesting there may be limits to the political precedent value of “three-strikes” initiatives. Court action in overturning voter-approved social/morality policy initiatives that violate civil rights¹⁸¹ may limit the range of such initiatives that can endure long enough to assume status as a political precedent.¹⁸²

Other examples discussed above, although they are drawn from a biased set of cases, illustrate that legislators will frequently exercise (or attempt to exercise) substantial autonomy in response to citizen-initiated laws. Legislatures in Maine and Washington amended citizen-initiated tax and spending proposals. Legislatures in Idaho, South Dakota, Wyoming, and Utah amended or repealed term limit rules, including one that voters had passed by a nearly 4-to-1 margin; legislators in other states referred amendments to existing term limits back to voters. Legislatures in Maine and Washington delayed authorizing funds that would implement popular citizen-initiated measures. The Oregon legislature attempted to repeal physician-assisted suicide by referendum. Citizen-initiated hunting and animal welfare regulations have been amended or repealed by legislators in Washington and Alaska.

Although there are numerous examples of voters remaining steadfast in support of initiative measures previously approved in their state, there are also prominent cases where voters do reverse course to amend or suspend something that voters in their state had previously approved. The Colorado electorate eventually reversed course on TABOR, Idaho’s electorate on term limits, Washington’s and California’s electorates amended earlier decisions on expenditure

180. Voters in Arizona (Proposition 200 of 1996), California (Proposition 36 of 2000;

limits, and Massachusetts' electorate rejected a re-framed campaign finance measure. Similarly, voters have also passed new citizen-initiated legislation that contradicts policies previously approved by voters. After the 1978 California electorate approved property tax limits in California, voters subsequently rejected limits on income tax in 1982 and approved increases in other state taxes. After passing expenditure limits, Washington voters also authorized increased spending and taxes. Such behavior might represent incoherent fiscal preferences or reflect that voters may judge some taxes to be less burdensome than others and some spending programs more valued than others. Using either interpretation, these outcomes challenge the assumption that a specific initiative against property taxes, or an individual initiative limiting general spending increases, represent any broad, general precedent of opposition to all forms of taxation and spending.

IV. CONDITIONS THAT F

requiring legislative super-majorities to amend voter-approved initiatives. Arizona and Michigan require a 3/4 super-majority.¹⁹⁸ Arkansas, North Dakota, and Washington require a 2/3 super-majority to amend, with the latter two states' super-majority rules only applying during "waiting periods" after voter approval.¹⁹⁹ After that time period, amendments in North Dakota and Washington are permitted by simple majority.²⁰⁰ Other states have blanket restrictions on amendments during designated waiting periods: Nevada (3 years), Alaska (2 years), and Wyoming (2 years), with the latter two states' waiting periods applying to repeal of initiatives, rather than amendment.²⁰¹

The examples described in Part III illustrate that these legal constraints need not always preclude a legislature or executive from

precedent status of Measure 5 and Proposition 13.²⁰³ That is, opinions about the initiative need be enduring and have some basis of intensity. Restrictions on amendment, combined with enduring, intense opinions may cement an initiative's status as a political super-precedent.

B. Conditions facilitating legislative amendment

The examples in Part III also illustrate several *political* factors that might affect a legislature's ability (or willingness) to amend a citizen-initiated law, independent of many formal constitutional rules regulating amendment of citizen-initiative laws in their state.

C. Diffuse public support for an initiative

The examples in Part III illustrate that some initiatives that are widely popular need not achieve the status of unassailable political precedents. Experience with term limits and anti-hunting initiatives in some states suggests that these measures may find widespread but diffuse voter support from a majority and intense opposition from a minority of citizens *and* from key legislators, as in the case of hunting and animal welfare measures, or intense opposition from legislators, as in the case of term limits and campaign finance rules. If perceived benefits to supporters are diffuse, and perceived costs to opponents

authorize spending after voters approved tax or spending limits, or

2007]

CONSTRAINTS TO CITIZEN-INITIATED LAWS

229

resonating that voters were able to connect the actions of an elected official to the fate of a ballot initiative.²⁰⁹ More commonly, a state legislator who votes to amend or repeal a citizen-initiated law that was supported by a majority of the legislator's voting constituents may have little reason to fear electoral retribution. Many legislators represent homogeneous, one-party districts and thus often run for re-election unopposed by a rival major party candidate; such incumbents rarely lose re-election.²¹⁰ The prospects of retribution would likely be minimal, or nonexistent, for a similarly situated legislator who votes

for openings from courts when their goal is to amend citizen-initiated legislation. Relying on state courts for such opportunities places greater pressure on elected courts to rule against initiated legislation. This is an option that is likely to apply to the limited range of initiatives.

G. Enduring policy crisis and time

Legislators respond to signals from state-level elites, as well as signals from their own constituents expressed via votes on ballot initiatives. Elites' responses to policy crises such as declining bond ratings, failing schools, and traffic congestion that threatens business investment may also publicize how voter-approved initiatives contribute to policy crisis in a state. This discourse may move public opinion toward supporting amendments to initiatives that voters previously approved.²¹⁴

Time also plays a role in re-shaping the composition of state legislatures and executive offices. The enduring effects of TABOR in Colorado, Measure 5 in Oregon, and Proposition 13 in California correspond with the strong influence of fiscal conservative Republican control of the Governor's office and/or at least one house of the state legislature. Citizen-initiated laws will be less likely to be amended if supporters of the law remain in control of legislative or executive institutions. This situation complicates the characterization of an initiative as political super-precedent. A voter-approved initiative may remain in force unamended across time not simply because of special "third-rail" status associated with voter approval

disagreed.²¹⁸ Voters in California admit that they themselves are not as well-suited as representatives to craft laws.²¹⁹ Voters in Washington also admit that initiatives make bad laws and that initiative campaigns are misleading.²²⁰ Eighty-percent of these same voters also respond that ballot initiatives are “good things,” and fewer than one-third agree that there are too many initiatives.²²¹

Despite their skepticism about contemporary direct democracy, these survey respondents support the initiative process because they believe it makes legislators “more representative” of “the people” rather than “special interests.”²²² Overwhelming majorities of survey respondents in Washington agree that initiatives “give people a voice,” “get the attention of parties,” “allow greater opportunities for change,” and encourage people to become informed.²²³ Many proposals to grant legislators more autonomy to amend citizen-initiated legislation require constitutional amendment. These reform proposals thus require approval from voters who find the initiative process a well-regarded “necessary evil.” In spite of the all of the flaws the public associates with direct democracy, they remain more suspicious of their elected representatives than they do of the initiative process.

Such attitudes suggest that there may be substantial resistance to proposals designed to increase the autonomy that a legislature has for dealing with citizen-initiated laws. Voters perceive initiatives as an important way to send signals to legislators about policy, and a majority of survey respondents in Washington and California were opposed to proposals to limit the number of initiatives on the ballot.²²⁴ Most legislators, when they are surveyed, express support for the general idea that the legislature should be allowed to “correct” flaws in citizen-initiated laws after voters approve them, but barely one-fifth of Washington voters (and less than one-third of California voters surveyed) support this concept.²²⁵ However, voters may be more

218. Todd Donovan, Survey of Washington Voters, (March 2001) (unpublished manuscript, on file with author).

219. See The Field Institute, California Field Poll 99-02 80 (1999) (on file with author).

220. Shaun Bowler et al., *Institutional Threat and Partisan Outcomes: Legislative Candidates' Attitudes toward Direct Democracy*, 14 STATE POL. & POL'Y Q. 371 (2001).

221. *Id.*

222. The Field Institute, *supra* note 219, at 82.

223. Bowler et al., *supra* note 220.

224. *Id.*

225. *Id.*

receptive to allowing legislators and the executive greater *pre-election* influence over initiatives; large majorities of voters surveyed favor greater pre-election review by secretaries of state “for conformity with existing law and clarity of language.”²²⁶ A large majority of Californians surveyed in 2005 also supported a hypothetical proposal to have a “waiting period” after qualification for initiative sponsors and the legislature “to compromise.”²²⁷

This, when considered alongside the fact that most voters surveyed fail to think there are too many initiatives, suggest the public may be receptive to formal or informal variants of the indirect initiative process. These variants include situations in which the legislature offers voters counter-proposals after initiative measures qualify and situations where, over time, the legislature reframes and

election ballot.”²²⁹ Just 31% of legislators and legislative candidates surveyed agreed with this proposal.²³⁰ This suggests that many candidates and legislators do not want their position on initiatives to be part of the public record. This may reflect the assumption, made by many legislators, that ballot-qualified initiatives reach a “third-rail” status even before most voters have become aware of the initiative and voted on it. I hope that the examples of legislative