

**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-<br>Precedents” .....      | 195 |
| III. Legislative Attempts at Amending Voter Approved<br>Initiatives .....           | 201 |
| A. Voter consistency under Nevada’s successive-majority<br>requirement .....        | 201 |
| B. Voter consistency when facing similar measures across<br>time .....              | 202 |
| C. Washington State voters, legislative response, and<br>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<br>state .....              | 210 |
| H. The ultimate “third-rail”: Property taxes and the tax<br>revolt .....            | 213 |
| I. Campaign finance and other examples .....  | 219 |
| J. Summary: The relative scarcity of initiative super-<br>precedents .....          | 221 |
| IV. Conditions that Facilitate Legislative Amendment of<br>Initiatives .....        | 223 |
| A. Constraints on legislative amendment to voter-initiated<br>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-<br>Approved Initiatives ..... | 231 |
|--|-----|

## 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.<sup>1</sup> 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.<sup>2</sup> Powerful, narrowly-based corporate interests have replaced broad-based, “grassroots” public-interest actors as dominant players in direct democracy.<sup>3</sup> Initiatives also have been criticized as threatening democratic governance by failing to reflect the will of the people,<sup>4</sup> 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 Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Cynthia L. Fontaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997); Hans A. Linde, *When Initiative Lawmaking is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

3. See, e.g., DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000); *DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* (Larry J. Sabato et al. eds., 2001); RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 178-89* (2002) (discussing the enduring role of narrow economic interests in Oregon initiative politics); JOHN HASKELL, *DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT?: DISPELLING THE POPULIST MYTH* (2001); PETER SCHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE* (2004); Hans A. Linde, *Taking Oregon's Initiative Toward a New Century*, 34 WILLAMETTE L. REV. 391 (1998).

4. See DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 100-21* (Johns Hopkins University Press 1984); see generally Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421 (1998); see also Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 434-36 (1998).

by representing the ill-will of well-informed people all too well.<sup>5</sup>

Furthermore, a series of tax-limitation initiatives approved by voters since 1978 and term-limit initiatives approved since the 1990s have led some candidates and observers to note that changes to voter-approved initiatives are beyond the realm of political discussion,<sup>6</sup> and that “because of the nature of initiative politics, legislators are legally prohibited from tampering with a successful initiative measure or are politically unlikely to do so.”<sup>7</sup> Constitutional initiatives are particularly problematic because they allow voters to embed contradictory fiscal priorities into rules that representatives cannot amend or repeal.<sup>8</sup> One result of this “lawmaking without government”<sup>9</sup> is that, rather than legislating, elected officials are left to conduct long-term crisis management of public education, transportation, health care, criminal justice, and other policies.

What many of these critiques fail to examine is how legislators and voters respond to citizen-initiated legislation, and how much citizen-initiated legislation might actually be immune from change.<sup>10</sup> In this paper, I discuss how legislators and voters have responded to several prominent citizen-initiated laws over time, in order to assess if either set of actors generally treat citizen-initiated laws as “super-precedents.”<sup>11</sup> I use the concept of precedent here in a political, rather than judicial sense. That is, I assess if, and when, a citizen-initiated law may achieve a status such that it is immune from reconsideration across moderate spans of time—such that voters do not challenge the wisdom of their own decision over time *and* the citizen-initiated law also achieves a level of authority, such that it binds and constrains the

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5. See Raymond Wolfinger & Fred Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753, 767 (1968); see generally Bell, *supra* note 2; see generally Gamble, *supra* note 2.

6. See, e.g., Matthew Yi, *Jobs, Buffett to Advise Kerry on the Economy Big Names May Bring Democrat a Political Lift*, S.F. CHRON., May 4, 2004, at A4 (recalling his 2003 gubernatorial campaign and his advisor’s, Warren Buffett, public consideration of repealing California’s Proposition 13, Arnold Schwarzenegger warned, “if [Warren Buffett] mentions Prop. 13 one more time, he has to do 500 sit-ups”).

7. See MAGLEBY, *supra* note 4, at 186.

8. See Linde, *supra* note 1, at 1737-38.

9. See *id.* at 1736.

10. See generally Richard Briffault, *District of Democracy Direct Legislation: Voting on Ballot Propositions in the United States*, 63 TEX. L. REV. 1347 (1985) (discussing examples of citizen-initiated legislation that are immune from change).

11. See Jeffrey Rosen, *So, Do You Believe in ‘Super-Precedents’?*, N.Y. TIMES, Oct. 30, 2005, at 41 (appearing in Justice Roberts’ confirmation hearings, Senator Arlen Specter used the phrase “super-precedent”).

behavior of legislators over time and prevents them from reconsidering, or reversing, citizen-initiated legislation.

I assume at the outset that legislation, including citizen-initiated legislation, benefits from being changed, updated, amended, and reviewed, and that the implementation of legislation requires periodic oversight over time to produce change.<sup>12</sup> Although oversight of legislation enacted by a legislature often falls low on the list of a legislator's priorities,<sup>13</sup> political constraints may cause post-enactment oversight of citizen-initiated laws to prove even less attractive. I suggest that citizens rarely change their minds when re-evaluating laws passed by citizens in their state, but high levels of initial voter support for some initiatives is not a necessary or sufficient condition for citizen-initiated laws to become untouchable "third-rails" in state politics. Legislators in many states, however, respond to citizen-initiated laws with counter-proposals, post-enactment amendments, delays in funding, delays in implementation, and in some cases, outright repeal. Voters also show some willingness to alter policies enacted by citizens in their states.

In Part II, I begin by assessing the political conditions—consistency in voter response to initiated laws and legislative awareness (or fear) of voter preferences expressed via initiatives—that might lead legislators to be reluctant to amend citizen-initiated laws. Part III then provides illustrations of voter consistency in supporting previously approved citizen-initiated laws using numerous examples of legislative attempts to amend citizen-initiated laws. Many of the cases in Part III run counter to the assumption that legislators treat citizen-initiated laws as "super-precedents." Following this, in Part IV, I draw from examples in Part III to isolate the institutional and political conditions under which legislators and voters may be more or less likely to amend citizen-initiated laws. The article concludes with a discussion of the political prospects of statutory and constitutional reforms that might enhance a legislature's ability to more freely amend citizen-initiated laws.

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12. See generally DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 111 (1974) (discussing oversight as applied broadly here, to include post-enactment review of implementation that includes the prospect for future legislation affecting implementation).

13. See *id.* at 124-25.

## II. CONDITIONS REQUIRED FOR INITIATIVES TO ACT AS “SUPER- PRECEDENTS”

If voters know little about the ballot issues, we might expect outcomes from initiative elections to shift across time when voters cast their decisions about the same topic at different elections. This could result from voter regret over having passed policies they later learn they did not actually want, or from random occurrences associated with shallow, shifting voter preferences. Likewise, if legislators were aware that voter preferences for citizen-initiated laws were shallow, ill-formed, and likely to shift across time, legislators might be free to amend or ignore citizen-initiated laws without fear of any electoral retribution.

However, empirical studies suggest that these conditions do not hold. Recent studies demonstrate that poorly-informed voters, like poorly-informed legislators,<sup>14</sup> are typically able to use readily available information cues to assist themselves when making decisions on initiatives;<sup>15</sup> these cues may lead voters to make decisions that are quite similar to those they would have made had they been more fully informed about the policy question.<sup>16</sup> One study of California ballot measures over time found very high levels of consistency in voting patterns at the legislative district level.<sup>17</sup>

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14. See generally JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS (1973) (discussing legislative voting in Congress in response to cues, rather than a personal reading of bills); David Ray, *The Sources of Voting Cues in Three State Legislatures*, 44 J. POL. 1074 (1982) (discussing state legislatures).

15. See generally SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY (1998) (discussing the use of information from TV ads and other sources); Shaun Bowler & Todd Donovan, *Do Voters Have a Cue? Television Advertisements as a Source of Information in Citizen-Initiated Referendum Campaigns*, 41 EUR. J. POL. RES. 777 (2002) (discussing the use of information from TV ads and other sources); Regina P. Branton, *Examining Individual-Level Voting Behavior on State Ballot Propositions*, 56 POL. RES. Q. 367 (2003) (discussing the role of partisanship in initiative voting); Michael S. King, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus"*, 50 UCLA L. REV. 1141 (2003) (discussing the role of campaign funding sources).

16. See DANGEROUS DEMOCRACY?, *supra* note 3, at 66; see generally Elizabeth Garrett, *Voting With Cues*, 37 U. RICH. L. REV. 1011 (2003); Arthur Lupia, *Busy Voters, Agenda Control, and the Power of Information*, 86 AM. POL. SCI. REV. 390 (1992); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Initiatives*, 88 AM. POL. SCI. REV. 63 (1994).

17. See generally James M. Snyder, Jr., *Constituency Preferences: California Ballot Propositions, 1974 – 1990*, 21 LEGIS. STUD. Q. 463 (1996) (discussing legislative district-level votes on eight different K-12 school bonds on ballots from 1982-90 which were correlated at .89 to .97. The correlation between district-level votes on four higher education bonds

Additional research provides evidence that campaign spending by narrowly-based economic interest groups rarely advances initiatives that advantage powerful corporations.<sup>18</sup> 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.<sup>19</sup> There is a firm empirical basis for expecting that voter decisions on initiatives generally, or at least often, reflect substantive preferences of voters,<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> Legislators who generally view themselves as delegates, rather than trustees, may be inclined to heed to voter preferences they interpret from public votes on initiatives.<sup>23</sup> If

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appearing between 1986-90 ranged from .96 to .99. District level votes on California's 1984 and 1988 English language ballot measures had a correlation of .93.).

18. ELIZABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* 110-13 (1999); Todd Donovan et al., *Contending Players and Strategies: Opposition Advantages in Initiative Campaigns*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 80, 90 (Shaun Bowler et al. eds., 1998).

19. GERBER, *supra* note 18, at 113-16; Donovan et al., *supra* note 18, at 90-91.

20. Andrew Skalaban, *The Mostly Sovereign People: Sophisticated Voting and Public Opinion about Term Limits in California*, 20 *POL. BEHAV.* 35, 48 (1998) (empirical study finding citizens capable of purposeful issue and sophisticated voting in referendum elections).

21. See Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 *AM. POL. SCI. REV.* 45, 45-57 (1963); James H. Kuklinski with Richard C. Elling, *Representational Role, Constituency Opinion, and Legislative Roll-Call Behavior*, 21 *AM. J. POL. SCI.*, 135, 135-47 (1977).

22. See Kuklinski, *supra* note 21, at 135-47.

23. Thomas Romer & Howard Rosenthal, *Bureaucrats Versus Voters: On the Political Economy of Resource Allocation by Direct Democracy*, 93 *Q. J. ECON.* 563, 579 (1979).

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.<sup>24</sup> There are some examples of direct effects where popular policies that incumbent legislators might resist were adopted directly via citizen initiative (e.g., term limits<sup>25</sup> and regulations on campaign finance).<sup>26</sup> 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.<sup>27</sup> Groups external to the legislature may produce legislative action on some matter the legislature was otherwise unwilling to consider by threatening to use a ballot initiative that might produce a more extreme policy outcome.<sup>28</sup> Legislators also may anticipate voter

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24. See, e.g., Elisabeth R. Gerber, *Legislatures, Initiatives, and Representation: The Effects of State Legislative Institutions on Policy*, 49 POL. RES. Q. 263, 263-86 (1996); JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY (2004); John G. Matsusaka, *Problems with a Methodology Used to Evaluate the Voter Initiative*, 63 J. POL. 1250, 1250-56 (2001); Shaun Bowler & Todd Donovan, *Measuring the Effect of Direct Democracy on Policy: Not All Initiatives are Created Alike*, 4 ST. POL. & POL'Y Q. 344 (2004). But see Edward L. Lasher et al., *Gun Behind the Door? Ballot Initiatives, State Policies and Public Opinion*, 58 J. POL. 760, 760-75 (1996) (finding no evidence that initiatives lead to more responsive policy).

25. Bowler & Donovan, *supra* note 24, at 357; Caroline Tolbert, *Changing Rules for State Legislatures: Direct Democracy and Governance Policies*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 171, 173-76 (Shaun Bowler et al. eds., 1998). For a study of support for term limits in California, see Todd Donovan & Joseph R. Snipp, *Support for Legislative Term Limits in California: Group Representation, Partisanship, and Campaign Information*, 56 J. POL. 492, 492-501 (1994).

26. See John Pippin, Shaun Bowler & Todd Donovan, *Election Reform and Direct Democracy: Campaign Finance Regulation in the American States*, 30 AM. POL. RES. 559, 559-82 (2002).

27. See, e.g., Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99, 99-128; Gerber, *supra* note 24, at 263-86.

28. For a critical perspective, see ALAN ROSENTHAL, THE DECLINE OF REPRESENTATIVE DEMOCRACY: PROCESS, PARTICIPATION, AND POWER IN STATE

opinion about potential initiatives and referendum when making decisions on legislation,<sup>29</sup> with the mere *presence* of the initiative process thus indirectly making policies more representative of state opinion.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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,<sup>33</sup> serving as evidence that the mere existence of the

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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 CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 191, 191-205 (Shaun Bowler et al. eds., 1998).

29. GERBER, *supra* note 18, at 124.

30. *Id.* at 99-128; see also THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 224 (1989).

31. See, e.g., *supra* note 24.

32. One difficult point in this literature is determining how the relationship between initiatives and voter preferences for policies should be modeled. *Id.*

33. GERBER, *supra* note 18, at 132-34 (reporting that parental notification of abortion laws and the death penalty are more likely to be adopted in initiative states where voters prefer these policies, respectively). See also Elisabeth R. Gerber & Simon Hug, *Minority Rights and Direct Legislation: Theory, Methods, and Evidence* (Sept. 2003) (unpublished manuscript, on file with author) (reporting that initiative states may have laws regarding discrimination based on sexual orientation that more closely reflect opinion in a state). Other studies identify some effects of initiatives on policy without accounting for public opinion about the specific policy in question. For evidence that initiatives affect fiscal policy, broadly defined, see MATSUSAKA, *supra* note 24, at 29-52; John G. Matsusaka, *Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years*, 103 J. POL. ECON. 587, 587-623 (1995); John G. Matsusaka & Nolan M. McCarty, *Political Resource Allocation: Benefits and Costs of Voter Initiatives*, 17 J. L., ECON., & ORG. 413, 413-48 (2001). Additional studies identify effects of initiatives on policy, but with no accounting of public opinion for policies. E.g., D. Roderick Keiwiet & Kristen Szakaly, *Constitutional Limits on Borrowing: An Analysis of State Bond*



initiative may compel representatives to move policy toward the opinion of the median voter.<sup>34</sup> Another study found evidence suggesting that the presence of the initiative process may move state abortion policies closer to voter preferences.<sup>35</sup> Two other empirical studies conclude that the initiative process may be associated with the adoption of legislation that is *less* representative of public opinion than that which legislators approve in states that do not possess a citizen initiative process,<sup>36</sup> but there is a methodological dispute about whether these latter findings are sound.<sup>37</sup>

Whatever the mechanism may be by which initiatives shape policy, there is a relationship between public votes on initiatives and legislative behavior. Legislators are likely to be aware of their constituents' aggregate opinions on matters that reach the ballot (assuming they examine election results from their district), and a representative's behavior in the legislature is sometimes, but not always, consistent with preferences their constituents express when voting on initiatives. District-level votes on ballot measures are a strong example—but an imperfect predictor—of how representatives will vote on similar measures in the legislature.<sup>38</sup> Furthermore, in California, legislative floor voting closely mirrored constituent votes

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*Indebtedness*, 12 J. L., ECON., & ORG. 62, 62-97 (1996) (finding that states with a referendum requirement for debt approval had less guaranteed debt); James C. Clingmayer & B. Dan Wood, *Disentangling Patterns of State Debt Financing*, 89 AM. POL. SCI. REV. 108, 108-20 (1995).

34. GERBER, *supra* note 18, at 124. See also CRONIN, *supra* note 30, at 224.

35. See Kevin Arceneaux, *Direct Democracy and the Link Between Public Opinion and State Abortion Policy*, 2 ST. POL. & POL'Y Q. 372, 372-83 (2002).

36. Lascher et al., *supra* note 24, at 760-75 (finding no relationship between direct democracy, the general liberalism of state public opinion and state adoption of the Equal Rights Amendment, criminal justice policy, or consumer policy, but failing to account for specific public attitudes about each policy); John F. Camobreco, *Preferences, Fiscal Policies, and the Initiative Process*, 60 J. POL. 819, 819-29 (1998) (finding no relationship between state opinion liberalism and taxation per capita); Todd Donovan & Shaun Bowler, *The Rush to Defend Marriage: State Institutions, Opinion, and Adoption of Same Sex Marriage Bans* (2000) (unpublished manuscript, on file with the author) (finding no relationship between the presence of the state initiative process and the pace of state adoption of Defense Against Marriage Amendments (DOMAs) in the 1990s, even when state opinions about homosexuality were accounted for).

37. John G. Matsusaka, *Problems with a Methodology Used to Evaluate the Voter Initiative*, 63 J. POL. 1250, 1250-56 (2001).

38. Snyder, *supra* note 17, at 478; Elisabeth R. Gerber, *Legislatures, Initiatives, and Representation: The Effects of State Legislative Institutions on Policy*, 49 POL. RES. Q. 263, 276 (1996) (also shows a strong, significant relationship between legislative floor voting on tobacco tax and transportation bond legislation, and district-level support for tobacco tax and transportation bond initiatives, respectively).

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.<sup>39</sup>

Thus, legislative behavior is not always a perfect mirror of how each representative's constituents vote on initiatives. There are numerous examples of legislatures amending, repealing, and ignoring voter-approved initiatives across a range of policy areas. Legislative willingness to do so suggests that the situations where initiatives act as political super-precedents may be limited. One important discussion of the potential capacity of citizen-initiated laws to have politically binding effects—and the potential limits of such effects—can be found in the large literature examining the “tax and expenditure limits” (or TELs) on state fiscal policy generally, and the effects of California's Proposition 13, specifically.<sup>40</sup> California's Proposition 13 of 1978 inspired a national “tax-revolt” against property taxes<sup>41</sup> and may be seen as the ultimate example of a citizen-initiated law acting as a “third-rail” in state politics, but citizen-initiated TELs have proven to have less enduring effects as political precedents.<sup>42</sup> I assess these examples, and others, in the next Part.

To summarize, there is convincing evidence that voters send clear, consistent signals to legislators via their support for citizen-initiated laws. There is, furthermore, evidence that signals from citizen-initiated laws, at most, imperfectly affect the actions of state legislators, and that the relationship between voters, initiatives, and public policy is largely indirect. All of this suggests that legislators have some degree of autonomy in responding to citizen-initiated

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39. Snyder, *supra* note 17, at 478; see also Daniel A. Smith, *Homeward Bound?: Micro-Level Legislative Responsiveness to Ballot Initiatives*, 1 ST. POL. POL'Y Q. 50, 50-61 (2001). Smith found a strong relationship between floor voting on HB 1245, a bill adding sexual orientation to the list of categories protected from discrimination, and legislative district-level voting on Colorado's Amendment 2 of 1992 (the voter approved ban on discrimination protections at issue in the 1996 *Romer v. Evans* decision). He found legislators' floor votes on amendments to a campaign finance regulation initiative much less influenced by district-level votes for the initiative. *Id.*

40. Shaun Bowler & Todd Donovan, *Evolution in State Governance Structures: Unintended Consequences of State Tax and Expenditure Limitations*, 57 POL. RES. Q. 189, 189 (2004).

41. DAVID O. SEARS & JACK CITRIN, *TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA* (1982); David Lowery & Lee Sigleman, *Testing Explanations of the Tax Revolt*, 75 AM. POL. SCI. REV. 963, 970-71 (1981).

42. See *infra* Part III.H.

legislation—whether they choose to exercise this autonomy is another matter.

### III. LEGISLATIVE ATTEMPTS AT AMENDING VOTER APPROVED INITIATIVES

Setting aside judgment about whether it is a good thing, it is important to consider that the way direct democracy operates to reflect public opinion more closely depends on how legislators actually respond to citizen-initiated laws. Legislative response depends on how representatives interpret the signals that voters send via initiatives, and on how much legislators are willing to behave in a manner that is consistent or inconsistent with preferences voters express at the ballot box. Consistent signals from voters increase the likelihood that initiatives may have binding, enduring effects on policy.

As for the consistency of signals sent to legislators by voters, there are few examples of approved citizen initiatives where voters later reverse course when they face the same (or similar) question at a subsequent election. Case studies suggest that voters do not reject initiatives they have previously approved often,<sup>43</sup> but this need not mean legislators rarely attempt to amend these measures and/or attempt to convince voters that *voters* should reconsider what they previously approved via an initiative.

#### *A. Voter consistency under Nevada's successive-majority requirement*

Nevada provides a rich environment for assessing how voters treat laws that they already have approved. Only Nevada requires successive majorities to adopt citizen-initiated constitutional

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43. Susan Banducci, *Searching for Ideological Consistency in Direct Legislation Voting*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 132, 146-47 (Shaun Bowler et al. eds., 1998) (noting ideological consistency in voting across ballot initiatives on the same ballot); Janine Parry & Todd Donovan, *Leave the Rascals In? Explaining Support for Extending Term Limits* (May 12, 2005) (paper presented at the 5th Annual State Politics and Policy Conference, East Lansing, Michigan, on file with author) (demonstrating substantial consistency in voter support for term limits in Arkansas); Carol Weissert & Karen Halperin, *Public Knowledge, Attentiveness and Voter Dissatisfaction: Public Opinion On Term Limits Over Time and Across Two States* (April 29, 2004) (paper presented at the 2004 Term Limits Conference, Akron, Ohio, on file with author) (demonstrating substantial consistency in voter support for term limits in Ohio and Michigan).

amendments,<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

*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.<sup>48</sup> In the 2004 election, Montana and Arkansas voted down proposals to soften terms that were initiated a decade before.<sup>49</sup> 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 1997<sup>50</sup> and passed legislation blocking a physician's ability to prescribe Schedule 1 drugs.<sup>51</sup> 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.<sup>52</sup> Arizonans

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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/ncsl/db/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.<sup>53</sup>

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.<sup>54</sup> 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 proposals<sup>55</sup> and outspending their opponents 395-to-1.<sup>56</sup> Fifty-eight percent of participating Montana voters opposed repealing the ban.<sup>57</sup>

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 voters in their state had previously approved. Over time, these electorates do make decisions that can be seen as inconsistent or contradictory (e.g., approving tax cuts and then spending increases, in short succession). However, when they face specific choices about legislation they have approved in the past, they typically let the decision stand. The Montana and Arizona examples, and others, also illustrate that voter approval of citizen-initiated legislation does not deter legislators and opponents of an approved initiative from attempting to amend or repeal citizen-initiated laws.

### *C. Washington State voters, legislative response, and transportation taxes*

Washington voters also have shown some consistency in their

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yes).

53. *Id.* (Arizona Proposition 203 of 2002) (failed, 42.7% yes).

54. *Id.* (Montana Initiative 127 of 1998) (passed, 52.3% yes).

55. Jennifer McKee, *Voters Maintain Cyanide Mine Ban*, HELENA INDEP. REC., November 3, 2004.

56. Blaine Harden, *Gold in Montana Hills May Not be in the Ground*, WASH. POST, September 5, 2004, at A03.

57. National Conference of State Legislatures, <http://www.ncsl.org/ncsl/db/elect98/irsrch.cfm> (last visited Jan. 9, 2007) (Montana Initiative 147 of 2004) (failed, 42.0% yes).

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.<sup>58</sup> A year later, 56% again voted to cut the unpopular MVET and change it into a flat fee.<sup>59</sup> The State Supreme Court ruled Initiative 695 unconstitutional.<sup>60</sup> However, the Legislature and Governor responded to the initiative by passing an MVET cut equal to that approved by voters in I-695.<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup> 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

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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. State of Washington*, 142 Wash. 2d 183 (2000).

61. David Postman, *I-695 Ruling Saves \$30 Tabs, Sets Off Scramble in Olympia Legislators Eager to Show the Voters They Got the Message*, SEATTLE TIMES, Mar. 15, 2000, at A1.

62. National Conference of State Legislatures, <http://www.ncsl.org/ncsl/db/elect98/irsrch.cfm> (last visited Jan. 9, 2007) (Washington Initiative 776 of 2002) (passed, 53.9% yes). This measure would require license tab fees at \$30 per year for motor vehicles, including light trucks. Certain local-option vehicle excise taxes and fees used for roads and transit would be repealed. *Id.*

63. *Id.* (Washington Referendum Bill 51 of 2002) (failed, 37.2% yes).

cent increase in the gas tax).<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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,<sup>67</sup> and legislators in four states were successful in having their respective state courts overturn

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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.ncslorg/ncsl/db/elect98/irsrch.cfm> (last visited Jan. 9, 2007) (Washington Initiative 912 of 2005) (failed, 47.1% yes). This measure would repeal motor vehicle fuel tax increases of 3 cents in 2005 and 2006, 2 cents in 2007, and 1.5 cents per gallon in 2008, enacted in 2005 for transportation purposes. *Id.*

66. Carol Wiessert & Karen Halperin, *Public Knowledge, Attentiveness and Voter Dissatisfaction: Public Opinion on Term Limits Over Time and Across Two States* (2004) (presented at the 2004 Term Limits Conference, University of Akron).

67. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995).

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

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.<sup>70</sup> 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).<sup>71</sup> Term limit supporters subsequently qualified a popular referendum campaign to repeal the amendment in 1996.<sup>72</sup> 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.<sup>73</sup>

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,<sup>74</sup> 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.<sup>75</sup> Fifty-three percent of participating voters approved retaining limits on state and local offices in 1998, thus keeping limits in place.<sup>76</sup> After two largely uncompetitive state legislative contests, the 2002 Idaho

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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.*



legislature voted 26-8 to repeal the citizen-initiated term limit statute,<sup>77</sup> and to overturn the governor's veto of their term limit repeal bill.<sup>78</sup> Supporters of term limits then qualified a "repeal the repeal" referendum for the November 2002 ballot.<sup>79</sup> 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 citizen-initiated law.<sup>80</sup> No term limit initiatives have been filed in Idaho since 2002.

One year after Idaho's legislative repeal of citizen-initiated term limits, in 2003, Utah's legislature voted to repeal limits on legislative tenure in that state.<sup>81</sup> Four years before the Supreme Court held such laws unconstitutional,<sup>82</sup> a 1996 "instruct and inform" term limit initiative approved by South Dakota voters was quickly repealed by South Dakota legislators.<sup>83</sup> In addition to mandating term limits, California's voter-initiated term limit law (Proposition 140 of 1990) also mandated limits on pensions and on legislative staff spending (limited to \$950,000 per member).<sup>84</sup> A court overturned the limits on pensions, and legislative control over budgeting allowed legislators to soften the impact of staff funding reductions by cutting legislative staff budget lines that existed prior to Proposition 140, while creating new budget lines to fund similar staff work.<sup>85</sup>

Term limits have radically altered the political landscape in some states, but legislative willingness to amend, repeal and/or take control of implementation of citizen-initiated term limit laws have limited the effects of these laws in some states.

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77. Nat'l Conf. of State Leg., *Idaho Makes Term Limits History* (Feb. 1, 2002), <http://www.ncsl.org/programs/legman/about/idahorepeal.htm> (last visited Jan. 4, 2007).

78. Daniel A. Smith, *Overturning Term Limits: The Legislatures' Own Private Idaho*, 36 PS: POL. SCI. & POLITICS 215, 215-16 (2003) (reporting that local officials lobbied heavily for the repeal, in part because of difficulty finding candidates to replace local elected officials who were to be term-limited out of office).

79. *Id.* at 218.

80. *Id.*

81. S.B. 240, 2003 Leg., Gen. Sess. (Utah 2003).

82. See *Cook v. Gralike*, 531 U.S. 510 (2001).

83. H.B. 1188, 72nd Gen. Assemb., Reg. Sess. (S.D. 1997).

84. Cal. Prop. 140 of 1990, Nat'l Conf. of State Leg., *State Legis. Elections: Initiatives and Referenda* (2007), <http://www.ncsl.org/programs/legismgt/elect/dbintro.htm> (last visited January 10, 2007) (passed, yes 52%).

85. ELISABETH R. GERBER ET AL., *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* 54-56 (2001).

*E. Oregon physician-assisted suicide*

As another potential “third-rail” example, consider how voters and legislators reacted to Oregon’s highly salient citizen-initiated law authorizing physician-assisted suicide. Fifty-one percent of participating Oregonians voted to approve physician-assisted suicide in 1994.<sup>86</sup> The relatively narrow margin of initial victory, combined with confusion about how the legislature should implement the law,<sup>87</sup> and legal challenges,<sup>88</sup> led the Oregon legislature to later attempt to repeal the “Death with Dignity” Act via a 1997 referendum, which was rejected by 60% of participating voters.<sup>89</sup> As with the Montana mining initiative, the Oregon suicide measure received a higher percent of support after being returned to voters for reconsideration.

*F. Bears, cougars, wolves, and chickens*

During the 1990s, animal welfare activists qualified initiative measures in several states to further regulate the hunting and trapping of wildlife. At least two dozen citizen-initiated limits on hunting were approved in states that include Washington, Oregon, Alaska, and Colorado. In 1996, 65% of participating Washington voters approved Initiative 655, a law banning bear baiting and hound hunting of bears, cougars, and bobcats. Despite the measure’s margin of victory, legislators proved willing to amend the initiative. Opponents of the citizen-initiated law succeeded in having the legislature amend I-655 to reinstate some hound hunting of cougars in 2000 (when justified by cougar sighting).<sup>90</sup> In the 2000 election, Washington voters approved another citizen-initiated anti-hunting measure (I-713), a ban on the poison and steel-jawed leg hold (‘body-gripping’) traps for animal control.<sup>91</sup> In 2002, the State Senate voted 38-11 (greater than the 2/3

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86. Or. Measure 16 of 1994, 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) (passed, 627,980 yes, 596,018 no).

87. Patrick M. Curran, Jr., *Regulating Death: Oregon’s Death with Dignity Act and the Legalization of Physician-Assisted Suicide*, 86 GEO. L.J. 725, 729 (1998).

88. See, e.g., *Lee v. Oregon*, 891 F. Supp. 1429, 1431 (D. Or. 1995).

89. Or. Measure 51 of 1997, 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) (failed, 40.1% yes).

90. S.B. 5120, 56th Gen. Assem., 1st Reg. Sess. (Wash. 1999).

91. Wash. Initiative 713 of 2000, 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) (passed, 54% yes).

majority needed to repeal an initiative) to completely repeal I-713,<sup>92</sup> 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).<sup>93</sup>

Oregon voters approved a similar citizen-initiated statute in 1994 that prohibited “bear baiting” and hound hunting of cougars.<sup>94</sup> 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.<sup>95</sup> As of 2005, the legislature was still considering bills to amend Measure 18 to allow pilot programs for cougar hunting in designated counties.<sup>96</sup>

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.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> The measure received less public support in 2000 than in 1998.

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92. See Chris McGann, *Teachers, Trapping Foes Heave Sigh of Relief*, SEATTLE POST-INTELL. ONLINE, Feb. 26, 2002, [http://seattlepi.nwsourc.com/local/59797\\_initiatives26.shtml](http://seattlepi.nwsourc.com/local/59797_initiatives26.shtml) (last visited Jan. 10, 2007).

93. S.B. 6118, 58th Leg., Reg. Sess. (Wash. 2004).

94. Measure 18 (Or. 1994) (629,527 yes, 586,026 no), <http://bluebook.state.or.us/state/elections/elections21.htm> (last visited Jan. 12, 2007).

95. Measure 34 (Or. 1996) (762,974 yes, 570,803 no), <http://bluebook.state.or.us/state/elections/elections22.htm> (last visited Jan. 12, 2007).

96. H.B. 2759, 73rd Leg. Assem., Reg. Sess. (Or. 2005) (50 co-sponsors, not enacted); H.B. 2781, 73rd Leg. Assem., Reg. Sess. (Or. 2005) (not enacted).

97. Measure 3 (Alaska 1996) (passed, 59% yes), <http://www.gov.state.ak.us/lrgov/elections/results/summary.txt> (last visited Jan. 12, 2007).

98. S.B. 74, 21st Leg., 1st Sess. (Alaska 1999).

99. Measure 6 (Alaska 2000) (passed, 53% yes), <http://www.ltgov.state.ak.us/elections/elect00/00genr/data/results.pdf> (last visited Jan. 12, 2007).

Similarly, rural Oklahoma legislators responded to a 2002 initiative proposing a ban on cockfighting<sup>100</sup> by placing a proposal on the same ballot to increase the signature qualification standards for anti-hunting and animal welfare initiatives.<sup>101</sup> After voters approved the cockfight ban and rejected the petition requirement increase, the Oklahoma Senate approved a 2005 bill allowing some forms of cockfighting that did not pass the house.<sup>102</sup> Arizona legislators responded to a 1998 citizen-initiated ban on cockfighting by endorsing an initiative on the 2000 ballot that required a super-majority to pass future animal-welfare initiatives (the measure failed).<sup>103</sup>

*G. Voters, legislators, and fiscal policy in Washington state*

Voter preferences on fiscal policy expressed through ballot measures is, as discussed below, perhaps the most frequently cited example of initiatives creating laws that establish precedents that shape policy for decades. Recent experience in Washington state, however, provides examples of legislators showing willingness and ability to substantially amend and control fiscal policies enacted by citizen-initiated laws.

Voters participating in Washington's 1993 election narrowly approved (by a 1% margin) Initiative 601, a spending limitation measure created at a time when the state was running a budget surplus.<sup>104</sup> A decade after voter approval of the measure, academic observers labeled I-601 "perhaps the most important budget constraint imposed on elected officials by the voters" in Washington.<sup>105</sup> The law created a limit to the growth in state general fund spending that was linked to state population growth and

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100. S.Q. 687 (Okla. 2002) (passed, 56% yes), <http://www.ok.gov/~elections/02gen.html> (last visited Jan. 12, 2007).

101. S.Q. 698 (Okla. 2002) (failed, 46% yes), <http://www.ok.gov/~elections/02gen.html> (last visited Jan. 12, 2007).

102. S.B. 835, 49th Leg., 1st Reg. Sess. (Okla. 2003).

103. Joseph Lubinski, *The Cow Says Moo, the Duck Says Quack, and the Dog Says Vote! The Use of the Initiative to Promote Animal Protection*, 74 U. COLO. L. REV. 1109, 1141 (2003).

104. Michael J. New, *Limiting Government Through Direct Democracy: The Case of State Tax and Expenditure Limitations*, CATO POL'Y ANALYSIS NO. 420, Dec. 13, 2001, at 12-13.

105. Lance T. LeLoup & Christina Herzog, *Budgeting and Public Finance in Washington*, in WASHINGTON STATE GOVERNMENT AND POLITICS 189, 193 (Cornell W. Clayton et al. eds., 2004).

inflation.<sup>106</sup> 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 limit<sup>107</sup> or, in the event of an "emergency,"<sup>108</sup> 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,<sup>109</sup> 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.<sup>110</sup> By 2000, Democrats narrowly held a majority in the Senate and a tie in the State House.<sup>111</sup> Initiative 601's (I-601) expenditure limits presented an obstacle to the Democrats' goal of increasing state spending in several budget areas, including education.<sup>112</sup> The 2000-2001 legislature revised how the limit would be calculated, effectively raising it to allow state spending to increase.<sup>113</sup> The 2001 legislature also shifted monies out of the general fund to other funds not covered by the I-601 limits.<sup>114</sup>

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

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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.<sup>115</sup> 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.<sup>116</sup> 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,<sup>117</sup> and by spending authorized by I-728, I-732, and I-775. Despite predictions that elimination of teacher pay raises was “politically verboten”<sup>118</sup> and “would face stiff opposition from the powerful teachers union,”<sup>119</sup> 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.<sup>120</sup> During the 2006 session, the legislature raised spending limits and amended I-601’s reserve fund rules.<sup>121</sup>

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

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115. Initiative 728 (Wa. 2000) available at [http://www.elc.wa.gov/sub/initiative\\_728\\_sl.pdf](http://www.elc.wa.gov/sub/initiative_728_sl.pdf); Initiative 732 (Wa. 2000) available at <http://browstedocs.leg.wa.gov/Browse%20for%20Documents%20from%201991%20to%202002/PDF%20Documents/2001-02/Session%20Law/SL01/INITIATIVE%20732.SL.PDF>.

116. Washington Research Council, *Initiative 775: Wrong Road to Health Care*, Oct. 25, 2001, <http://72.14.253.104/search?q=cache:cXP00iDT14J:www.researchcouncil.org/Briefs/2001/PB01-26/I-775.htm>

117. LeLoup & Herzog, *supra* note 105, at 196.

118. Ralph Thomas, *Once Sacred, Education Becomes Target in Battle Over Washington State Budget*, SEATTLE TIMES, Feb. 24, 2002.

119. Angela Galloway, *State Budget Menu has no Sacred Cows*, SEATTLE POST-INTELLIGENCER, Sept. 27, 2002, available at [http://seattlepi.nwsourc.com/local/88855\\_budget27xx.shtml](http://seattlepi.nwsourc.com/local/88855_budget27xx.shtml).

120. S.B. 6087, 2005 Leg., Reg. Sess. (Wa. 2005).

121. S.B. 6896, 2006 Leg., Reg. Sess. (Wa. 2006).

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.<sup>122</sup>

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.<sup>123</sup> Even Colorado's radical TABOR expenditure limit eventually was suspended by voters after some prodding from elected officials.<sup>124</sup> 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.<sup>125</sup> During the 2004 election, Colorado voters elected Democratic majorities to both houses of the state legislature for the first time since 1960.<sup>126</sup>

#### *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

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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](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 assessment increases on certain properties to 2% per year.<sup>127</sup> The proposition also required a 2/3 majority in both houses of the legislature for future state tax increases and stipulated that local governments can only raise taxes if the increase is approved by a two-third super-majority vote of the public.<sup>128</sup> The measure was approved by 65% of participating voters, at a time when assessments of rapidly increasing home values produced dramatic increases in property tax payments, and a multi-billion dollar state budget surplus.<sup>129</sup> Given that Proposition 13 was a constitutional amendment it can only be amended by another voter-approved, citizen-initiated constitutional amendment, or by a constitutional amendment approved by both houses of the legislature and referred to the voters for their approval.<sup>130</sup>

The California legislature and various citizen initiatives have presented voters with many opportunities to amend various parts of Proposition 13 since 1978; voters have rejected most proposals to alter core provisions that would make it easier for governments to increase *property* taxes.<sup>131</sup> California voters have approved minor revisions to Proposition 13—usually approving legislative referred amendments that extend protections against property assessment increases to new categories of property and property owners—broadening the class of property protected from increased taxation.<sup>132</sup>

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127. See CA. CONST. art. XIII A.

128. *Id.* It is unlikely this initiative would pass California or Oregon's single-subject standards as applied by state courts today. See generally CA. CONST. art. II, § 8(d); CA. CONST. art. IV, § 9; *Armatta v. Kitzhaber*, 959 P.2d 49 (Or. 1998). For a discussion of state courts recent application of single-subject rules, see Dan Lowenstein, *Initiatives and the New Single Subject Rule*, 1 Election L.J. 1, 35-48 (2002) (showing the use of more exacting single subject tests to find violations of single subject provisions); Kenneth Miller, *Courts as Watchdogs of the Washington State Initiative Process*, 24 SEATTLE U. L. REV. 1053, 1079-83 (2001).

129. DAVID O. SEARS & JACK CITRIN, *TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA* 22-23, 29 (1982).

130. PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPINIONS AND COMPARISONS* 73 (Bernard Grofman ed., 1998).

131. One such rejected ballot proposition was Proposition 26. Cal. Sec'y of State, 2000 Primary Election Ballot Pamphlet 66 (2000), [http://library.uchastings.edu/ballot\\_pdf/2000p.pdf](http://library.uchastings.edu/ballot_pdf/2000p.pdf).

132. CAL. CONST. art. XIII A, § 1, *amended by* Proposition 13. From 1984 to 1996 at



Proposition 62 (1986) and Proposition 218 (1996) both restated voter support for the 2/3 super-majority vote requirement for local tax increases.<sup>133</sup> 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).<sup>134</sup> Local government also funded general government services with increased revenues from assessments and property-related fees that were not approved by voters.<sup>135</sup>

California voters did approve a major revision to the 2/3 requirement in November 2000 when they passed Proposition 39, allowing passage of school construction bonds by a 55% (rather than 2/3) vote. In the same election, voters rejected an initiative that would have extended the 2/3 super-majority requirement to fee increases.<sup>136</sup> They have also voted to approve new *non-property* taxes (see below).

Overall, however, Proposition 13 remains much as it was when voters adopted it in 1978. It had a clear negative effect on state and local government spending for at least five years,<sup>137</sup> but the effect of Proposition 13 on total state and local revenues soon dissipated. The effect of Proposition 13 may have been overwhelmed by the fact that demographic shifts caused per capita income (hence, per capita state spending) in California to rank lower relative to many other states.<sup>138</sup> Although revenues from property taxes declined dramatically, these

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least a dozen legislative constitutional amendments to Prop. 13 were placed on the ballot. CAL. CONST. art. XIII A, § 2(e), (f), *amended by* Proposition 50; CAL. CONST. art. XIII A, § 2(e)(3), *amended by* Proposition 171 (giving assessment breaks to property owners harmed by natural disasters); CAL. CONST. art. XIII A, § 2(h)(2)(A), (B), *amended by* Proposition 193 (granting tax breaks to children who inherit Prop. 13 assessment-protected property); CAL. CONST. art. XIII A, § 2(c)(4), *amended by* Proposition 127 (granting tax break for seismic retrofitting of existing buildings).

133. CAL. GOV'T CODE §§ 53720-53730 (West 2006); CAL. CONST. art. XIII(C), (D), *amended by* Proposition 218.

134. Elizabeth G. Hill, Legis. Analyst's Off., Understanding Proposition 218, at 6 (1996), [http://www.lao.ca.gov/1996/120196\\_prop\\_218/understanding\\_prop218\\_1296.pdf](http://www.lao.ca.gov/1996/120196_prop_218/understanding_prop218_1296.pdf).

135. *Id.*

136. CAL. CONST. art. XIII A § 1(b)(3), *amended by* Proposition 37; Cal. Secretary of State, Official Voter Information Guide (2001), <http://vote2000.ss.ca.gov/VoterGuide/pdf/summary32-39.pdf>.

137. GERBER ET AL., *supra* note 85, at 106.

138. *Id.* at 106-07.

declines were offset by increases in other revenue sources.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> California's lower contemporary standing in terms of per capita spending on K-12 education (relative to other states) may reflect changing income levels,<sup>143</sup> 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,<sup>144</sup> 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

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139. Bowler & Donovan, *supra* note 40, at 195 (2004) (demonstrating that the citizen-initiated tax and expenditure limitations may lead states to establish new special service districts that are exempt from limitations). When the early 1990 recession reduced state revenues, local borrowing increased dramatically. GERBER, *supra* note 85, at 83-84; MATSUSAKA, *supra* note 24 at 47-52 (also demonstrating that initiatives may cause a shift from state revenues to higher locally generated revenues, including user fees).

140. Michael J. New, *Proposition 13 and State Budget Limitations: Past Successes and Future Options*, 83 CATO INST. BRIEFING PAPERS 1 (2003), available at <http://www.cato.org/pubs/briefs/bp83.pdf>.

141. U.S. Dep't of Com., Bureau of the Census, *State and Local Spending Per Capita Fiscal Year 2004* (2006), <http://www.taxfoundation.org/files/statelocalspending-20060601.pdf>.

142. D. Roderick Kiewit, *Californians Can't Blame Everything on Proposition 13*, 40 PUB. AFF. REP. (1999), <http://www.igs.berkeley.edu/publications/par/Nov1999/Kiewiet.html>; See also Ronald J. Shadbegian, *Do Tax and Expenditure Limitations Affect the Size and Growth of State Government?*, CONTEMP. ECON. POL'Y, Jan. 1996, at 22, 29-34 (describing the weak effects of early TELs).

143. Kiewit, *supra* note 142; see also Nat'l Educ. Ass'n, *How California Ranks: The State's Expenditure for K-12 Education*, EDSOURCE, Aug. 2003, at 1, available at <http://www.edsource.org/pdf/RankingsFinal03.pdf> (describing how, in 1996-97, California rated 41st in per capita spending on K-12 education and in 2000-01 it ranked 27th).

144. Mark Baldassare, *California's Exclusive Electorate*, 2006 PUB. POL'Y INST. OF CAL., [http://www.ppic.org/content/pubs/atissue/AI\\_906MBAI.pdf](http://www.ppic.org/content/pubs/atissue/AI_906MBAI.pdf).

largely eviscerated by voters and legislators. One year after limiting property tax increases via Proposition 13, the California electorate approved Proposition 4, an expenditure limitation also known as the Gann Amendment.<sup>145</sup> Proposition 4 passed with 74% of the vote at a special election contested when the state was running a substantial budget surplus.

Voters and legislators subsequently modified and weakened Proposition 4 to permit higher levels of expenditure.<sup>146</sup> Inflation and rapid population growth caused the limit set by the Gann Amendment to be higher than actual revenues collected until the late 1980s.<sup>147</sup> Only once, in 1987, did the Gann rule result in a tax rebate of revenues collected in excess of the Gann spending limit (since state revenues finally grew faster than the Gann limit).<sup>148</sup> The 1987 tax rebate did little to solidify any political precedential value of the Gann Amendment.<sup>149</sup> The next year, in 1988, California voters approved of Proposition 98, a citizen-initiated amendment requiring that a share of the revenues collected in excess of the limit be spent on K-12 education.<sup>150</sup> That same year, voters approved Proposition 99, another citizen-initiated amendment instituting new tobacco taxes that were exempt from the Gann limit.<sup>151</sup> Two years later, voters approved Proposition 111, a measure that further amended the Gann limit to increase K-12 spending, increase capital outlay spending, increase gas taxes, and adopt a more liberal formula for setting annual spending limits.<sup>152</sup> Approval of Proposition 111 has made any remaining constraints from Proposition 4 rather meaningless.<sup>153</sup> California voters approved another tobacco tax initiative in 1998 that exempted additional spending from the Gann limit.<sup>154</sup> California voters and legislators have also approved general statewide sales tax increases that raised the state rate from 4.75% prior to the 1978 tax

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145. CAL. CONST. art. XIII B, amended by Proposition 4.

146. Inst. of Gov't Studies, Univ. of Cal., *Tax and Expenditure Limitation in California: Proposition 13 & Proposition 4*, Hot Topic, (2005), <http://www.igs.berkeley.edu/library/htTaxSpendLimits2003.html>.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

revolt to 6.25% by 2004.<sup>155</sup>

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.<sup>156</sup> 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.<sup>157</sup> Property tax opponents also placed initiative Measure 47 on the 1996 ballot to further reduce property taxes and cap future increases.<sup>158</sup> 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.<sup>159</sup> 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 legislature's 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.<sup>160</sup> Measure 50 was approved by 56% of voters participating in a low-turnout special election held in May 1997, and was subsequently implemented by the legislature.<sup>161</sup>

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155. See Cal. State Bd. of Equalization, *History of Sales & Land Use Tax Rates* (2006), <http://www.boe.ca.gov/sutax/taxrateshist.htm>.

156. THOMAS L. MASON, GOVERNING OREGON: AN INSIDE LOOK AT POLITICS IN ONE AMERICAN STATE 172-73 (1994); see also Patty Wentz, *The Ballot Measure that Ate Oregon*, WILLAMETTE WEEKLY 25 YEARS, available at <http://www.wweek.com/html/25-1990.html> (last visited Jan. 30, 2007).

157. See OR. CONST. art. XI, § 11.

158. Full text of Measure 47 (The Property Tax Reduction Act) is available at <http://www.sos.state.or.us/elections/nov596/voters.guide/MEASURES/MEAS47/M47.HTM>.

159. See *Chart Development Corp. v. Dept. of Revenue*, Or. T.C. 4359 (2000), available at <http://www.publications.ojd.state.or.us/TC4244.htm>.

160. Or. Office of the Sec'y of State, *Legislative Argument in Support of Measure 50*, Voter's Guide (May 1997), <http://www.sos.state.or.us/elections/may2097/voters.guide/M50/M50OLA.HTM> (emphasis in original).

161. S.B. 1215, 1997 Leg., 69th Sess. (Or. 1997) (legislation implementing Measure 50 of 1997).

*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.<sup>162</sup> 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.<sup>163</sup> Likewise, Arizona voters approved a more explicit and extreme “English-Only” law requiring that public officials “act in English and no other language.”<sup>164</sup> 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.<sup>165</sup>

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.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> Later that year, the state legislature referred a non-binding ballot referendum to voters re-framing the

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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, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1045 (1996).

165. *Id.*

166. *Massachusetts Legislature Repeals Clean Elections Law*, N.Y. TIMES, June 21, 2003, at A16. Similarly, the Maine Legislature, to help balance the state’s budget, borrowed a total of \$6.7 million from Maine’s voter-approved clean elections fund between 2001 and early 2006. A.J. Higgins, *Clean Elections Fund Seeks \$5.7M*, BANGOR DAILY NEWS, Feb. 16, 2006, at B1.

167. *Bates v. Dir of the Office of Campaign & Political Fin.*, 763 N.E.2d 6, 11-13 (Mass. 2002).

168. *Id.* at 23-28.

question from whether they supported “Clean Elections,” to asking if they supported paying more in taxes to fund political campaigns.<sup>169</sup> A larger majority voted against the legislatively referred measure than supported the initial public campaign finance proposal.<sup>170</sup> The legislature and Governor cited the failure of the legislature’s referendum, and the state court’s decision, when they repealed the 1998 “Clean Money” initiative during the 2003 legislative session. The initiative was repealed when the Senate inserted a rider amendment into the state’s budget, structuring the vote such that supporters of the campaign finance law would have had to vote against the entire budget.<sup>171</sup>

The California Legislature also avoided complying with popular voter-approved campaign contribution limits for state legislative and executive races. In November 1996, California voters approved Proposition 208, authorizing very low contribution limits to candidates for state and local office.<sup>172</sup> After a November 1997 trial, a federal district court issued a preliminary injunction in January 1998 against Proposition 208 being enforced.<sup>173</sup> The state appealed the ruling to the Ninth Circuit, which ordered a second trial in January 1999.<sup>174</sup> Rather than qualify a revised measure in response to the lower court ruling, proponents of Proposition 208 expected that the Ninth Circuit would rule in their favor given the U.S. Supreme Court’s decision in *Nixon v. Shrink Missouri Government PAC*, which upheld a Missouri statute imposing contribution limits that, at the time the lawsuit was filed, ranged from \$275 to \$1,075, depending on the office sought and the size of the constituency.<sup>175</sup> This left the legislature with time to place rival campaign finance legislation on the ballot. Prior to the 1999 trial, the California Legislature referred their own campaign finance counter-proposal to voters, a proposal with much higher limits (Proposition 34 allowed \$3000 contributions to legislative candidates), and with provisions that repealed most of the

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169. Rick Klein, *Voters Reject Question on Public-Funding*, BOSTON GLOBE, Nov. 6, 2002, at B11.

170. *Id.*; Raphael Lewis, *Romney Faults Clean Elections*, BOSTON GLOBE, June 26, 2003, at B1.

171. *Massachusetts Legislature Repeals Clean Elections Law*, *supra* note 166.

172. Dan Bernstein, *Election Reform Endorsed: Prop. 208’s Support Tops Rival Measure*, SACRAMENTO BEE, Nov. 6, 1996, at A7.

173. *Cal. ProLife Council Political Action Comm. v. Scully*, 989 F.Supp. 1282 (E.D. Cal. 1998).

174. *Cal. ProLife Council Political Action Comm. v. Scully*, 164 F.3d 1189 (1999).

175. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000).

elements of Proposition 208 that would have been litigated.<sup>176</sup> Voters approved Proposition 34, thus trumping the contribution limits (and other regulations) that would have been established by Proposition 208.<sup>177</sup>

The Maine Legislature has also proved willing to challenge and amend citizen-initiated legislation. In 2003, it responded to a citizen-initiated property tax cut measure (Measure 1A, which also increased the proportion of state revenues funding local education) with a rival ballot measure (Measure 1B) that proposed a gradual increase in state funding of education. Neither measure passed, but Measure 1A was returned to the ballot in spring of 2004, and was approved with 55% support. Despite this measure of public approval, the legislature and Governor maintained that Measure 1A was fiscally irresponsible. In 2005, the legislature approved (and the Governor signed) a bill revising Measure 1A so that it more closely resembled the legislature's 2003 counter-proposal.<sup>178</sup> In 2004, the Maine Legislature also voted to amend substantively a measure authorizing casino gambling at race tracks that voters had approved in 2002.

*J. Summary: The relative scarcity of initiative super-precedents*

These examples, drawn from several states, illustrate that at times, the conditions necessary for initiatives to act as political precedents are present. That is, voters often are consistent in their support of measures that they previously approved *and* legislators respond to signals that voters send by implementing the policies voters approved by initiative. The clearest examples of this may be property tax limitation initiatives: California's Proposition 13 of 1978, and Oregon's Measure 5 of 1990.<sup>179</sup> Both received relatively consistent support from voters across time and both remain in effect and continue to affect state politics and policy. Citizen-initiated property tax limitations may retain "third-rail" status in these states.

Although I do not examine these issues in this paper, "three-strikes" and related criminal justice measures, and contentious

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176. Jon Matthews, *Prop. 208 Battle Fades in Wake of Prop. 34's Reforms*, SACRAMENTO BEE, Nov. 16, 2000, at A3.

177. Jon Matthews, *Campaign Limits Approved; Pensions Lose; Fee Caps Trail*, SACRAMENTO BEE, Nov. 8, 2000, at EL3.

178. A.J. Higgins, *Tax Relief Measure Passes; Baldacci Lauds 'Historic Moment'*, BANGOR DAILY NEWS, Jan. 21, 2005, at A1.

179. See *supra* Part III.H (discussing California's Proposition 13 of 1978, and Oregon's Measure 5 of 1990).

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,<sup>180</sup> 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 rights<sup>181</sup> may limit the range of such initiatives that can endure long enough to assume status as a political precedent.<sup>182</sup>

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

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180. Voters in Arizona (Proposition 200 of 1996), California (Proposition 36 of 2000; 61% yes), and Washington DC (Measure 62; 78% yes) all approved measures substituting drug treatment for incarceration for some crimes; Voters in Oregon (Measure 3, 2000; 67% yes) and Utah (Initiative B; 69% yes) have repealed drug-related forfeiture laws.

181. Miller, *supra* note 128, at 154-57 (discussing rate at which courts strike down such initiatives); e.g., *Romer v. Evans*, 517 U.S. 620 (1996).

182. See Todd Donovan, Jim Wenzel & Shaun Bowler, *Direct Democracy and Gay Rights Initiatives After Romer*, in *THE POLITICS OF GAY RIGHTS* 161 (Craig A. Rimmerman et al. eds., 2000) (on the effects of *Evans v. Romer* on future ballot initiatives).



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 FACILITATE LEGISLATIVE AMENDMENT OF INITIATIVES

Elected officials' responses to citizen-initiated laws range across a continuum, with full compliance and implementation of a voter-initiated law at one end and full repeal of a citizen-initiated law at the other. At one end, legislatures and executives can adopt and implement major components of voter-approved laws, even if the ballot measure had been ruled unconstitutional<sup>183</sup> or had not yet met the full legal requirement for voter approval.<sup>184</sup> Similarly, legislatures may adopt authorizing legislation to faithfully implement a successful initiative,<sup>185</sup> govern for the most part as mandated by the initiative,<sup>186</sup> or refer a ballot measure to voters that clarifies how a voter-approved initiative will be implemented in a manner somewhat consistent with what the initiative proponents intended.<sup>187</sup> Measures at this end of the continuum might assume the status of political super-precedents, where they attain a "third-rail" status such that voters and legislators perceive them as binding policy mandates that endure over time.

Moving toward the other end of the continuum, a legislature

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183. *E.g.*, I-695, the MVET cut in Washington. *See supra* notes 63-64.

184. *E.g.*, Nevada's property tax limitation. *See supra* Part III.A.

185. *E.g.*, Oregon Measure 5 property tax measure. *See supra* Part III.H.

186. *E.g.*, Proposition 13, California's property tax measure. *See supra* Part III.H.

187. *E.g.*, Measure 50, Oregon's property tax referendum implementing the property tax initiative Measure 47. *See supra* note 156.

and/or executive branch less receptive to a citizen-initiated law may act to dilute or repeal the voter-approved measure. Legislatures may pass amendments that run counter to the initiative proponent's intent,<sup>188</sup> resist adopting legislation to enable a voter-approved constitutional measure,<sup>189</sup> or resist appropriating funds required to implement a statutory initiative.<sup>190</sup> At the far end of this compliance/implementation continuum are instances where both houses of a legislature vote for a full repeal of a citizen-initiated law.<sup>191</sup> These are cases where citizen initiatives—at least in their initial voter-approved form—appear to have little value as political precedents.

In the center of this continuum is a range of “let the voter decide” responses to initiatives, where elected officials, troubled by voter-initiated laws, either refer these laws back to voters for reconsideration or the legislature offers voters an alternative measure in response to a popular initiative proposal. This response may allow elected officials some discretion in moving to block voter approval of an initiative proposal, or alter how a voter-approved initiative will be implemented, without placing a legislator in the position of having to cast a floor vote that might appear to be directly counter to the preferences of a majority of the state's voters (or a majority of the representative's constituents).

Again, these “let the voter decide” responses range across a continuum. Legislators may offer rival “counter-proposal” legislative referendums to initiatives that appear on the same ballot; this is the indirect-initiative model,<sup>192</sup> as institutionalized in Maine and Switzerland.<sup>193</sup> Such counter-measures may include less sweeping versions of the citizen-initiative proposal, such as the Maine property

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188. *E.g.*, Washington's cougar hunting initiative; Alaska's wolf hunting initiative. *See supra* Part III.F.

189. *E.g.*, “Official English” in Florida, and Colorado. *See supra* Part III.I.

190. *E.g.*, Washington's I-728 and I-732 education spending initiatives; the Massachusetts' legislature's initial response to the “Clean Money” initiative. *See supra* Part III.G, I.

191. *E.g.*, “Clean Money” in Massachusetts; term limits in Idaho and Utah; term limit “ballot notification” in South Dakota. *See supra* Part III.D, G.

192. *See* Susan Banducci, *Direct Legislation: When is it Used and When Does it Pass?*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 109, 111 (Shaun Bowler et al. eds., 1998) (explaining variations in uses of initiatives and counter-proposals).

193. *See generally* Georg Lutz, *The Interaction Between Direct and Representative Democracy in Switzerland*, in 42 *REPRESENTATION* 45-57 (2006) (describing Switzerland and the indirect-initiative model).

tax example, and Proposition 8 of 1978, as well as the California legislature's unsuccessful referendum alternative to Proposition 13. Legislators and executives also work outside of their institutions to help craft new citizen-initiatives designed to change the rules established by previously approved initiatives.<sup>194</sup> And, the legislature can refer previously approved measures back to voters asking voters to suspend<sup>195</sup> or repeal something that voters previously approved.<sup>196</sup>

As the discussion in Part III illustrates, voters do not always follow the legislatures' lead when the legislature offers alternatives, amendments, and repeal proposals to voters. However, the fact that legislatures are willing to attempt such changes in citizen-initiated laws, and that voters may (at times) support such proposals for change, suggest there are frequent instances where legislators, and sometimes legislators *and* voters, fail to treat citizen-initiated laws as political precedents. This then begs the question: Which conditions are required for legislators to have enough political (and legal) autonomy to attempt to amend, and succeed at amending, citizen-initiated laws?

*A. Constraints on legislative amendment to voter-initiated laws*

States differ in the constitutional rules that govern how and when legislators may amend a voter-approved initiative. Initiative constitutional amendments, as permitted in California, Oregon, and most other initiative states, must be amended according to rules governing constitutional change. California's constitution places onerous restrictions on post-election amendment of voter-approved initiatives: the legislature is prohibited from amending initiated constitutional amendments unless legislative amendment is explicitly permitted in the language of the initiative; otherwise, any amendment must be referred to voters for approval.<sup>197</sup> Other states restrict legislative amendment to constitutional or statutory initiatives by

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194. *E.g.*, I-732, Washington's class size reduction measure that amended I-601, the voter-approved expenditure limits; California's Proposition 98, Proposition 99, and Proposition 111—each of which amended California's Gann spending limit. *See generally supra* Part III.G, H.

195. *E.g.*, TABOR in Colorado. *See supra* Part III.G.

196. *E.g.*, assisted suicide in Oregon; term limits in Idaho. *See supra* Part III.D, E.

197. *See* Elisabeth R. Gerber, *Reforming the California Initiative: A Proposal to Increase Flexibility and Legislative Accountability*, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 292 (Bruce E. Cain & Roger G. Noll eds., 1995).

requiring legislative super-majorities to amend voter-approved initiatives. Arizona and Michigan require a 3/4 super-majority.<sup>198</sup> 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.<sup>199</sup> After that time period, amendments in North Dakota and Washington are permitted by simple majority.<sup>200</sup> 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.<sup>201</sup>

The examples described in Part III illustrate that these legal constraints need not always preclude a legislature or executive from amending, or attempting to alter, the effects of a voter-initiated law, particularly if the law requires authorizing legislation from the legislature or the appropriation of funds. Washington's legislature, furthermore, amended hunting initiatives and important fiscal initiatives after the mandated waiting period, and Wyoming's legislature amended a term limit initiative after the waiting period. The Washington State Senate and both chambers in Idaho have also mustered 2/3 super-majorities on votes to repeal initiatives.<sup>202</sup> Nonetheless, constitutional prohibitions against legislative amendment to California's Proposition 13 likely have added to that measure's status as a political super-precedent.

Political constraints—rather than constitutional rules—also limit a legislature's ability to amend citizen-initiated legislation. As noted in Part II, one condition required for an initiative to achieve "third-rail" status is that voter support for the measure must remain constant across time and representatives are responsive to those voter preferences. Hostility to property taxes—particularly in regions with rapid inflation in property values—and the fact that increases in property taxes are more likely to translate into tax hostility than increases in other major revenue sources, may cause support for limits on property taxation to endure across time, adding to the super-

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198. RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 126 (2002) (discussing how Arizona's Constitution was amended in 1998 to also prohibit legislative repeal of initiatives).

199. Gerber, *supra* note 197, at 294.

200. *Id.*

201. *Id.*

202. *See supra* Part III.

precedent status of Measure 5 and Proposition 13.<sup>203</sup> 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 are concentrated, the legislature may have greater autonomy in amending (or greater incentives to amend) citizen-initiated legislation, in part because the nature of the distribution of public opinion mitigates the potential for electoral retribution on the matter.

Put differently, a reasonably apathetic majority can pass an initiative that provides the majority no immediately visible material benefits, while having a disproportionate effect on a minority who are intensely aware of the measure's implementation (e.g., hunting regulations, gun controls, term limits). This increases the chances that the initiative might be amended or repealed.

*D. Contradictory public votes*

Voters may also redefine, or narrow, the meaning of a previously approved initiative by passing subsequent measures that run counter to the previous voter-approved measures. Initiative measures that

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203. See Shaun Bowler & Todd Donovan, *Popular Responsiveness to Taxation*, 48 POL. RES. Q. 77 (1995).

authorize spending after voters approved tax or spending limits, or public votes on referendums that contradict previous electoral outcomes, are likely to frustrate legislators but they also give legislators some opportunity to claim that the most recent signals from voters require the legislature change policy in ways that might be seen as contrary to signals that voters sent in a previous initiative vote.

*E. Limited threat of electoral retribution*

If proponents are well-organized, have standing to sue to enforce legislative compliance with an initiative, and have resources to mobilize to engage in either litigation or voter education, then legislators may have less opportunity to control the implementation of a citizen-initiated law. Conversely, if proponents lack resources and/or an enduring political organization, the potential for electoral retribution associated with amending or repealing an initiative is reduced.<sup>204</sup> There are few well-publicized examples of elected officials—particularly legislators—being defeated for voting to amend or repeal a citizen-initiated law. Former U.S. House Speaker Thomas Foley was a visible part of the successful campaign to defeat a 1991 term limit initiative in Washington (I-553).<sup>205</sup> Opinion research shows voters responded to Foley's position on term limits when voting on I-553, with the direction of their response (support or oppose term limits) contingent upon whether they liked or disliked Speaker Foley.<sup>206</sup> Washington voters later approved a different term limit measure in 1992 (Initiative 573), and Foley was a plaintiff in the case that led to portions of that initiative being held unconstitutional in 1994.<sup>207</sup> Foley's opposition to term limits was cited frequently by his opponent during the 1994 election, and may have been a political liability associated with Foley losing reelection in 1994.<sup>208</sup>

The Foley example may be a rare case where an elected official's position on an initiative measure was so highly visible and

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204. See generally GERBER, *supra* note 85.

205. David J. Olson, *Term Limits Fail in Washington: The 1991 Battleground*, in *LIMITING LEGISLATIVE TERMS* 82 (Gerald Benjamin & Michael J. Malbin eds., 1992).

206. Jeffrey A. Karp, *The Influence of Elite Endorsements*, in *INITIATIVE CAMPAIGNS, IN CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 160-61 (Shaun Bowler, Todd Donovan & Caroline J. Tolbert eds., 1998).

207. See *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994).

208. JEFFREY R. BIGGS AND THOMAS S. FOLEY, *HONOR IN THE HOUSE: SPEAKER TOM FOLEY* 223-24 (1999).

resonating that voters were able to connect the actions of an elected official to the fate of a ballot initiative.<sup>209</sup> 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.<sup>210</sup> The prospects of retribution would likely be minimal, or nonexistent, for a similarly situated legislator who votes to amend or repeal an initiative that passed state-wide but failed to gain majority support in the legislator's own district.

*F. Court decisions offer political cover*

Legislators may find greater autonomy in offering counter-proposals, amending, or repealing citizen-initiated legislation when state or federal courts in other states (or federal courts in other regions) rule against initiatives voters have approved elsewhere. When such courts rule against citizen-initiated legislation approved by voters in other states, a legislature may be in a better position to amend, repeal, or refuse to enable similar legislation approved by voters in their own state—given that legislators may show they are anticipating that similar rulings will apply in their state.<sup>211</sup> Likewise, courts' decisions that directly affect an initiative approved by voters in the legislatures' own state also provide impetus for counter-proposals, as with the California legislature's response to Proposition 208's campaign finance regulations<sup>212</sup> and the Massachusetts legislature's repeal of citizen-initiated publicly financed elections.<sup>213</sup>

It would be unfortunate, however, for legislators always to wait

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209. See also Lubinski, *supra* note 103, at 1131 (describing how former Seattle Seahawk and former U.S. House Member Steve Largent's opposition to the 2000 Oklahoma cockfighting ban has also been cited as a liability associated with Largent's defeat in the 2000 Oklahoma Governor's race).

210. See, e.g., Todd Donovan, *The Legislature*, in GOVERNMENT AND POLITICS IN WASHINGTON STATE 175 (Cornell W. Clayton, Lance T LeLoup & Nicholas P. Lovrich eds., 2004).

211. See, e.g., FLA. CONST., art. II, § 9; COL. CONST., art. II, § 30 (adopted by initiative in 1988); Bender, *supra* note 161 (delay in enabling "English Only" initiatives in some states); Cook v. Gralike, 531 U.S. 510 (legislative repeal of term limit ballot notification in South Dakota prior to the Cook v. Gralike decision); U.S. Term Limits, 514 U.S. 779 (the Idaho legislature offering voters an advisory vote on term limits after the Thornton decision).

212. See *supra* Part III.I.

213. *Massachusetts Legislature Repeals Clean Elections Law*, *supra* note 166.

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.<sup>214</sup>

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 and legislative concern about voter retribution upon amendment, but because a Governor or a majority of a legislative chamber support the measure and have little interest in amending it. The presence of a majority of legislators in a chamber who are sympathetic to an initiative and who win re-election across time may reflect enduring public preferences for policies associated with the initiative. If changes in public attitudes result in the election of different representatives (e.g., partisan change in control of legislative seats), then fewer supporters of the initiative will remain in government and the initiative is more likely to be amended.<sup>215</sup>

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214. *E.g.*, Colo. Referendum C. *See supra* Part III.G.

215. *E.g.*, WASH. REV. CODE § 43.135.025 (2006) (Washington's TEL Initiative 601). *See also*, TODD DONOVAN & SHAUN BOWLER, REFORMING THE REPUBLIC: DEMOCRATIC INSTITUTIONS FOR THE NEW AMERICA 39-47 (Paul S. HERNSON ed., 2004) (stating that



#### V. PROSPECTS FOR GREATER LEGISLATIVE INFLUENCE OVER VOTER-APPROVED INITIATIVES

There are several reforms that a state could adopt to increase the legislature's ability to participate in the development of legislation that voters are asked to approve via the initiative process, as well as proposals to increase the legislature's role in post-adoption amendment and implementation of citizen-initiated legislation. Proposals for changing the legislature's role in the pre-election or post-election phase of the initiative process have been documented and discussed well elsewhere.<sup>216</sup> Some of these pre-election proposals included requiring super-majorities from voters for constitutional initiatives to pass; requiring successive majorities (as in Nevada for constitutional amendments); using various aspects of the indirect initiative process so initiatives are voted on by the legislature prior to going to the ballot; and giving the legislature the option to offer voters amended versions of proposed initiatives, as in Maine, Massachusetts, or Switzerland.<sup>217</sup> Other pre-election proposals that might increase a legislature's role in shaping initiatives include mandatory legislative hearings on initiatives that qualify for the ballot, mandatory roll-call votes, and processes that allow legislators to offer proponents pre-election amendments to qualified initiatives. Post-adoption reform proposals include eliminating waiting periods for amendment and eliminating super-majority requirements for amendments.

Rather than evaluate the merits of various proposals, I consider the practical prospect of any such reform being approved by voters and legislators. Most voters, for their part, express opinions that suggest they expect their representatives to play an instructed delegate role, and follow voter preferences over the legislators' own judgment. When Washington voters were asked if they agreed or disagreed with whether "[r]epresentatives should do what their district wants them to do even if they think it is a bad idea," 52% agreed and 38%

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uncompetitive legislative elections may make representative institutions very weakly responsive—or unresponsive—to changes in statewide public preferences for policy; legislative elections that fail to reflect changes in voter preferences may institutionalize legislative majorities that defend citizen-initiated laws beyond the point that the laws remain popular with a majority of a state's participating voters).

216. See, e.g., DUBOIS & FEENEY, *supra* note 130; ELLIS, *supra* note 3 at 122-47; Gerber, *supra* note 197; Charlene Wear Simmons, Ph.D., *California's Statewide Initiative Process*, Cal. Res. Bureau, Cal. St. Libr., Sacramento, Cal., (May 1997).

217. E.g., NEV. CONST. art. 19, §2; ME. CONST. art. 4, pt. 3, § 18; MASS. CONST. art. 48, ch. 3, § 2; SWITZ. CONST. ch. 2, art. 139.

disagreed.<sup>218</sup> Voters in California admit that they themselves are not as well-suited as representatives to craft laws.<sup>219</sup> Voters in Washington also admit that initiatives make bad laws and that initiative campaigns are misleading.<sup>220</sup> 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.<sup>221</sup>

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.”<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup> 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.<sup>225</sup> However, voters may be more

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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.”<sup>226</sup> 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.”<sup>227</sup>

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 refers voter-approved legislation back to voters for reconsideration (as per the Massachusetts and California campaign finance initiative examples discussed above).<sup>228</sup> The potential super-precedent status of any individual citizen-initiated law may be diluted, and legislative influence strengthened, if legislators offer voters multiple proposals across time that clarify how a measure will be funded, amended, and implemented. If, for example, voters authorize new programs, spending increases for existing programs, or new regulatory schemes via initiatives, legislators can return with ballot measures framed by the legislature asking voters to approve new revenues to fund the measures. By taking more control of the questions voters decide upon, legislators may gain more control over answers delivered by voters. If voters reject such revenue proposals, legislators may have more autonomy to amend or repeal the original initiative and, perhaps, less worry about electoral retribution.

Legislators, for their part, may have only tepid interest in assuming a greater *pre-election* role in interacting with ballot-qualified initiative proposals; perhaps less than what the voting public may be willing to grant them. Nearly half (42%) of California voters surveyed approved the idea of an indirect initiative process where legislators vote first on ballot-qualified initiatives and, if “the legislature fails to pass it or passes it in an unacceptable form, sponsors would then have the option of placing it on the statewide

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226. *Id.*

227. Joshua J. Dyck, *The Limits to Support for Direct Democracy* 10 (2006) (unpublished manuscript, on file with author).

228. *See supra* notes 163, 169.

election ballot.”<sup>229</sup> Just 31% of legislators and legislative candidates surveyed agreed with this proposal.<sup>230</sup> 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 action in response to citizen-initiated laws in Part III serve to illustrate that many citizen-initiated laws need not be seen as “third-rail,” political super-precedents. As more initiatives promoting the economic goals of relatively narrowly-based interests reach state ballots, we might expect that legislators would have even less concern about electoral retribution when they take pre-election positions on ballot-qualified measures, offer counter-proposals, and post-enactment amendment.

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229. THE FIELD INSTITUTE, A DIGEST ON HOW CALIFORNIA VOTERS VIEW STATEWIDE BALLOT PROPOSITION ELECTIONS 5 (1997), <http://www.field.com/fieldpollonline/subscribers/COI-97-Oct-Props.pdf>.

230. See Bowler et al., *supra* note 220 at 370, 376.