

State Constitutional Initiative Processes and Governance in the Twenty-First Century

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INTRODUCTION

Of the direct democratic devices available in American states, none has generated more scrutiny than constitutional initiative processes. There is no denying the key role played by other direct democratic mechanisms. Governors in California and Wisconsin have recently been subjected to—and in one case removed from office by—recall elections,¹ a device available in nineteen states.² Citizen-initiated statutory referendums, available in twenty-four states,³ were employed recently in Ohio to overturn a statute limiting collective bargaining and in Maine to restore election-day voter registration.⁴ Citizens have relied on the statutory initiative process to enact a range of policies⁵ in the twenty-one states providing for this device.⁶ However the constitutional initiative process, available in eighteen states,⁷ attracts particular interest in view of the importance of state constitutions and the ability to make changes in governing institutions, rights, and policies.

Consider a sample of changes achieved through constitutional initiative processes in the twenty-first century alone. Minimum-wage increases were adopted in Florida, Nevada,

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¹ *Recall of State Officials*, NAT'L CONF. ST. LEGISLATURES (Sept. 11, 2013), <http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx> [<http://perma.cc/D3U6-6BNJ>].

² HENRY S. NOYES, *THE LAW OF DIRECT DEMOCRACY* 32 (2014).

³ *Id.* at 78.

⁴ Shanna Rose & Cynthia J. Bowling, *The State of American Federalism 2014–15: Pathways to Policy in an Era of Party Polarization*, 45 *PUBLIUS* 351, 356 (2015).

⁵ Caroline J. Tolbert, *Public Policy and Direct Democracy in the Twentieth Century: The More Things Change, the More They Stay the Same*, in *THE BATTLE OVER CITIZEN LAWMAKING* 35, 38–39 (M. Dane Waters ed., 2001).

⁶ *Initiative and Referendum States*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [<http://perma.cc/8NV3-SVZL>] (last updated Sept. 2012).

⁷ *Id.*

Colorado, and Ohio.⁸ Limits on affirmative action were imposed in Michigan and Nebraska.⁹ Colorado legalized recreational marijuana.¹⁰ Class sizes in Florida public schools were reduced.¹¹ The sales tax, as well as income taxes on upper-income earners, was raised in California.¹² Citizen-initiated amendments in Arizona, California, and Florida brought significant changes in the rules and procedures for drawing state and congressional districts.¹³

In view of the importance of constitutional initiative processes, scholars have been led to assess their consequences and consider ways they might be designed to best harness their beneficial effects and minimize their harms. A number of scholars have analyzed the constitutional initiative as part of broader studies of direct democratic devices.¹⁴ Some have focused on constitutional initiative processes in particular.¹⁵ Among other things, scholars have considered whether these processes permit enactment of reforms resisted by self-interested legislators¹⁶ or blocked by powerful groups,¹⁷ and on the other hand, whether they facilitate passage of measures unduly constraining policy

⁸ John Dinan, *Policy Provisions in State Constitutions: The Standards and Practice of State Constitution-Making in the Post-Baker v. Carr Era*, 60 WAYNE L. REV. 155, 190–91 (2014).

⁹ *Id.* at 190.

¹⁰ *Id.* at 189.

¹¹ See John Dinan, *The Past, Present, and Future Role of State Constitutions*, in GUIDE TO STATE POLITICS AND POLICY 19, 28–29 (Richard G. Niemi & Joshua J. Dyck eds., 2014).

¹² CAL. CONST. art. XIII, § 36(f); see also Dinan, *supra* note 8, at 192.

¹³ Dinan, *supra* note 8, at 187; Dinan, *supra* note 11, at 28.

¹⁴ See generally THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989); RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA (2002); ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION (1999); DANIEL C. LEWIS, DIRECT DEMOCRACY AND MINORITY RIGHTS: A CRITICAL ASSESSMENT OF THE TYRANNY OF THE MAJORITY IN THE AMERICAN STATES (2013); DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984); JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY (2004); KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS (2009); DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION (1989).

¹⁵ See generally Janice C. May, *The Constitutional Initiative: A Threat to Rights?*, in HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING (Stanley H. Friedelbaum ed., 1988); Dennis W. Arrow, *Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition*, 17 OKLA. CITY U.L. REV. 3 (1992); John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227 (1998); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295 (2008).

¹⁶ See discussion *infra* Section II.A.

¹⁷ See discussion *infra* Section II.B.

flexibility¹⁸ or impairing rights.¹⁹ As for the design of these processes, analysts have focused on the wide range of rules for placing citizen-initiated amendments on the ballot and securing their ratification.²⁰

I revisit these scholarly analyses by compiling and drawing on a data-set of the full range of proposed and enacted constitutional initiatives in the twenty-first century. My purpose is to assess the extent to which citizen-initiated amendments adopted from 2000–2014 offer support for scholarly claims about their consequences, with the aim of evaluating options available for structuring these processes so they contribute to effective governance.

I. USE OF CONSTITUTIONAL INITIATIVE PROCESSES IN THE TWENTY-FIRST CENTURY

A total of 203 citizen-initiated amendments appeared on state ballots from 2000–2014, and 83 were approved.²¹ However, these measures were not distributed evenly across this period,²² or among the states.²³ Additionally, some topics were addressed on a particularly frequent basis.²⁴

¹⁸ See discussion *infra* Section II.C.

¹⁹ See discussion *infra* Section II.D.

²⁰ See discussion *infra* Part III.

²¹ These totals are drawn in nearly all cases from annual totals reported in *The Book of the States*, as modified for the year 2006 so as not to count one Nevada amendment that was approved on the first of two required passages and also not to count one Colorado measure that was mislabeled in *The Book of the States* as a rejected amendment but was actually a rejected statutory initiative, and as modified also for the year 2008 so as not to count one Colorado measure that was mislabeled in *The Book of the States* as a rejected amendment but was actually a rejected statutory initiative. See Janice C. May, *State Constitutions and Constitutional Revision 2000-2001*, in 34 THE BOOK OF THE STATES 2002, at 3, 22 tbl.1.6 (2002); Janice C. May, *Trends in State Constitutional Amendment and Revision*, in 35 THE BOOK OF THE STATES 2003, at 3, 18 tbl.1.6 (2003); 2003 Ballot Measures, BALLOTPEdia, http://ballotpedia.org/2003_ballot_measures [http://perma.cc/X73K-NUZX]; Janice C. May, *State Constitutional Developments in 2004*, in 37 THE BOOK OF THE STATES 2005, at 3, 18 tbl.1.6 (2005); John Dinan, *State Constitutional Developments in 2005*, in 38 THE BOOK OF THE STATES 2006, at 3, 16 tbl.1.5 (2006); John Dinan, *State Constitutional Developments in 2006*, in 39 THE BOOK OF THE STATES 2007, at 3, 16 tbl.1.5 (2007); John Dinan, *State Constitutional Developments in 2007*, in 40 THE BOOK OF THE STATES 2008, at 3, 6 tbl.C (2008); John Dinan, *State Constitutional Developments in 2008*, in 41 THE BOOK OF THE STATES 2009, at 3, 7 tbl.C (2009); John Dinan, *State Constitutional Developments in 2009*, in 42 THE BOOK OF THE STATES 2010, at 3, 7 tbl.C (2010); John Dinan, *State Constitutional Developments in 2010*, in 43 THE BOOK OF THE STATES 2011, at 3, 7 tbl.C (2011); John Dinan, *State Constitutional Developments in 2011*, in 44 THE BOOK OF THE STATES 2012, at 3, 9 tbl.C (2012); John Dinan, *State Constitutional Developments in 2012*, in 45 THE BOOK OF THE STATES 2013, at 3, 6 tbl.C (2013); John Dinan, *State Constitutional Developments in 2013*, in 46 THE BOOK OF THE STATES 2014, at 3, 6 tbl.C (2014); John Dinan, *State Constitutional Developments in 2014*, in 47 THE BOOK OF THE STATES 2015, at 3, 6 tbl.C (2015).

²² See discussion *infra* Section I.A.

²³ See discussion *infra* Section I.B.

²⁴ See discussion *infra* Section I.C.

A. Use by Year

The rate of proposed and enacted citizen-initiated amendments varied during the years covered by this period, as shown in Table 1.²⁵ As is generally the case with other ballot measures, and largely because many states permit such measures only in even-numbered years, citizen-initiated amendments are considered less frequently in odd-numbered years. In several odd-numbered years, not a single citizen-initiated amendment appeared on a state ballot. But even-numbered years occasionally featured more than thirty citizen-initiated amendments.²⁶

Table 1: Constitutional Initiative Use by Year: Number of Enactments/Proposals²⁷

| Year | Number of Enactments/Proposals |
|------|--------------------------------|
| 2000 | 13/32* ‡ |
| 2001 | 0/0 |
| 2002 | 9/21 |
| 2003 | 0/3 |
| 2004 | 17/31* |
| 2005 | 0/8 |
| 2006 | 10/31* |
| 2007 | 0/0 |
| 2008 | 12/28 |
| 2009 | 1/1 |
| 2010 | 9/17 |
| 2011 | 3/4 |
| 2012 | 7/18 |
| 2013 | 0/1 |
| 2014 | 2/8 |

* These totals exclude instances where Nevada voters gave the first of two required approvals to constitutional initiatives, as occurred in 2000, 2004 (two amendments), and 2006. In each of these cases, Nevada amendments are considered to have been proposed and enacted in the year they received their second and final approval by voters.

‡ The number of enacted amendments excludes one Oregon amendment, Proposition 7, that appeared to secure a majority, but the Secretary of State was precluded from conducting a final canvass of votes due to a legal challenge.

It is also worth noting that citizen-initiated amendments were proposed and enacted more frequently in the earlier part of the 2000–2014 period than in recent years. The year 2000 was the high-water mark for proposals (thirty-two), and the year 2004

²⁵ See *infra* Table 1. For an historical perspective on the rate of proposals and enactments by decade up through the mid-1980s, see May, *supra* note 15, at 165.

²⁶ See *supra* note 21.

²⁷ See *id.*

²⁷ See *id.*

featured the highest number of enactments (seventeen). At the other end of the spectrum, fewer constitutional initiatives were proposed (eight) and enacted (two) in 2014 than in any other even-numbered year in the twenty-first century.²⁸

B. Use by State

Constitutional-initiative use varied significantly across the eighteen states with such processes, as shown in Table 2.²⁹ On one hand, voters in two states—Illinois and Massachusetts—did not vote on any citizen-initiated amendments during this period. On the other hand, voters in several states considered constitutional initiatives on a regular basis. In California and Colorado, voters encountered, on average, more than two citizen-initiated amendments per year, with Oregon voters passing judgment on just under two citizen-initiated amendments per year. Florida voters approved more citizen-initiated amendments than any other state, voting in favor of seventeen of nineteen citizen-initiated amendments appearing on the ballot.

**Table 2: Constitutional Initiative Use by State from 2000–2014:
Number of Enactments/Proposals, as Well as the
Purpose of Each Enacted Measure**

| State | Enactments/ Proposals | Purpose of Each Enacted Measure |
|------------|--------------------------|---|
| Arizona | 2/8 | establish redistricting commission; ban real-estate transfer tax |
| Arkansas | 2/5 | ban same-sex marriage; authorize state lottery |
| California | 13/41 | reduce percentage of popular vote needed to approve local school bond referendums; facilitate local governments' ability to contract with architects and engineers; fund stem-cell research; limit eminent domain power; ban same-sex marriage; establish re-districting commission for state legislative districts; expand role of redistricting commission to apply to congressional districts; eliminate legislative supermajority requirement for passing appropriations bills; extend current legislative supermajority requirement for tax increases to cover fee increases; limit state's ability to use local revenue for non-designated purposes; expand victims' rights; increase sales tax and income tax rates; relax legislative term limits |
| Colorado | 11/36 | legalize medical marijuana; mandate annual increases |

²⁸ *See id.*

²⁹ *See infra* Table 2. For historical data on use of the process by each state, up through the mid-1980s, see May, *supra* note 15, at 165. Patterns for twenty-first century constitutional-initiative use generally follow the patterns through the mid-1980s, in that California, Colorado, and Oregon are the top three states in proposals in both periods. *See infra* Table 2; May, *supra* note 15, at 165.

| State | Enactments/ Proposals | Purpose of Each Enacted Measure |
|---------------|--------------------------|--|
| | | in school spending; limit campaign contributions and expenditures; increase cigarette tax; limit gifts to elected officials; increase minimum wage; ban same-sex marriage; allow longer hours and higher wagers at casinos; limit campaign contributions from groups contracting with state; legalize recreational marijuana; instruct congressional delegation to support federal campaign-finance amendment |
| Florida | 17/19 | build high-speed rail system connecting major cities; limit confinement of pregnant pigs; ban workplace smoking; expand pre-K schooling; reduce K-12 class sizes; establish local board of trustees for each public university; repeal requirement to build high-speed rail system; limit contingency-fee arrangements in medical-malpractice cases; prevent licensing of doctors with three malpractice judgments; grant patient access to information about doctors' adverse medical incidents; increase minimum wage; allow voters in two counties to approve slot machines at horse-racing tracks; require tobacco-settlement funds to be used for smoking prevention; ban same-sex marriage; bar consideration of party and incumbency when drawing state legislative districts; bar consideration of party and incumbency when drawing congressional districts; dedicate proceeds from document tax to land acquisition trust fund |
| Illinois | 0/0 | none |
| Massachusetts | 0/0 | none |
| Michigan | 4/13 | require voter approval for new forms of gambling; ban same-sex marriage; limit affirmative action; authorize stem-cell research |
| Missouri | 3/7 | authorize stem-cell research; ban real-estate transfer tax; ensure gas tax only funds transportation programs |
| Mississippi | 2/3 | impose voter ID requirement; limit eminent domain power |
| Montana | 2/2 | ban same-sex marriage; ban real-estate transfer tax |
| Nebraska | 4/6 | adopt legislative term limits; ban same-sex marriage; limit legislative modification of statutes passed through initiative process; limit affirmative action |
| Nevada | 5/9 | legalize medical marijuana; ban same-sex marriage; increase minimum wage; limit eminent-domain power; require legislature to pass education appropriation bill before other appropriation bills |
| North Dakota | 4/7 | authorize state to join multi-state lottery; ban same-sex marriage; limit eminent domain-power; guarantee right to farm |
| Ohio | 4/13 | ban same-sex marriage; increase minimum wage; authorize casinos in four cities; bar enforcement of health-insurance mandate |
| Oklahoma | 0/2 | none |
| Oregon | 9/27 | establish commission to regulate home health-care; require legislature to fund schools adequately; limit civil-asset forfeiture; strengthen restrictions on paid signature-gatherers for initiatives; ban same-sex marriage; renew provision dedicating portion of |

| State | Enactments/ Proposals | Purpose of Each Enacted Measure |
|--------------|--------------------------|--|
| | | lottery revenue to environmental program; ban real-estate transfer tax; require excess revenue from corporate taxes to be placed in the general fund rather than refunded; ban unequal treatment on account of sex |
| South Dakota | 1/5 | repeal inheritance tax |

C. The Subjects of Constitutional Initiatives

In surveying the subjects addressed via constitutional initiative processes from 2000–2014, several topics attracted particular attention. Tax and finance measures appeared regularly on state ballots. The constitutional initiative process was also a frequent vehicle for proposing and, in some cases, enacting measures regarding education and gambling. Although the following survey is not an exhaustive list—and other amendments will be noted in the following section—it might be useful in highlighting topics taken up on a regular basis.

1. Taxes

Voters approved six constitutional initiatives limiting taxes, while defeating a number of other tax-limit measures. On the approval list were a 2000 South Dakota amendment repealing the inheritance tax;³⁰ a 2010 California amendment extending a two-thirds legislative-vote requirement for tax increases to also apply to fee increases;³¹ and bans on real-estate transfer taxes in Arizona in 2008,³² Missouri³³ and Montana³⁴ in 2010, and Oregon in 2012.³⁵ As for defeated measures, voters rejected a number of general limits on taxing and/or spending inspired, in some fashion, by Colorado's 1992 Taxpayers Bill of Rights (TABOR)

³⁰ *South Dakota Inheritance Tax, Amendment C (2000)*, BALLOTPEdia, http://ballotpedia.org/South_Dakota_Inheritance_Tax,_Amendment_C_%282000%29 [http://perma.cc/Y94F-MLUM].

³¹ *California Proposition 26, Supermajority Vote to Pass New Taxes and Fees (2010)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_26,_Supermajority_Vote_to_Pass_New_Taxes_and_Fees_%282010%29 [http://perma.cc/4FHM-TSDZ].

³² *Arizona Protect Our Homes, Proposition 100 (2008)*, BALLOTPEdia, http://ballotpedia.org/Arizona_Protect_Our_Homes,_Proposition_100_%282008%29 [http://perma.cc/7U72-R2A2].

³³ *Missouri Real Estate Taxation, Amendment 3 (2010)*, BALLOTPEdia, http://ballotpedia.org/Missouri_Real_Estate_Taxation,_Amendment_3_%282010%29 [http://perma.cc/U4PX-PTFJ].

³⁴ *Montana New Property Tax Elimination, CI-105 (2010)*, BALLOTPEdia, http://ballotpedia.org/Montana_New_Property_Tax_Elimination,_CI-105_%282010%29 [http://perma.cc/TF4W-GSXN].

³⁵ *Oregon Real Estate Transfer Tax Amendment, Measure 79 (2012)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Real_Estate_Transfer_Tax_Amendment,_Measure_79_%282012%29 [http://perma.cc/U52E-JCYS].

amendment,³⁶ whether in Colorado³⁷ and Oregon³⁸ in 2000, Nebraska³⁹ and Oregon⁴⁰ in 2006, or Michigan in 2012.⁴¹ Several narrowly tailored tax-limitation amendments were also rejected, including a 2002 Arkansas measure eliminating taxes on food and medicine,⁴² a 2010 Colorado measure reducing property taxes,⁴³ and a 2012 North Dakota measure eliminating property taxes.⁴⁴

Constitutional initiatives seeking to increase taxes were also prevalent, although the vast majority were rejected. A 2012 California measure increasing the sales tax and the income tax on upper-income earners was the most prominent tax-increase measure enacted through the constitutional initiative process.⁴⁵ Voters generally defeated other constitutional initiatives increasing taxes and dedicating the revenue to particular purposes. Voters defeated measures in California, increasing telephone taxes to fund emergency rooms (in 2004),⁴⁶ increasing income taxes on upper-income earners to fund pre-K schooling (in 2006),⁴⁷ imposing a parcel tax on land to fund school spending

³⁶ *Colorado Taxpayer Bill of Rights, Initiative 1 (1992)*, BALLOTPEdia, [http://ballotpedia.org/Colorado_Taxpayer_Bill_of_Rights_Initiative_1_\(1992\)](http://ballotpedia.org/Colorado_Taxpayer_Bill_of_Rights_Initiative_1_(1992)) [<http://perma.cc/TU7G-964H>].

³⁷ *Colorado Tax Cuts, Initiative 21*, BALLOTPEdia, http://ballotpedia.org/Colorado_Tax_Cuts_Initiative_21_%282000%29 [<http://perma.cc/P5BL-6HDP>].

³⁸ *Oregon Limits on State Appropriations from Personal Income Tax, Measure 8 (2000)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Limits_on_State_Appropriations_from_Personal_Income_Tax_Measure_8_%282000%29 [<http://perma.cc/AM3B-5VCH>].

³⁹ *Nebraska State Spending Limit, Measure 423 (2006)*, BALLOTPEdia, http://ballotpedia.org/Nebraska_Spending_Limit_Amendment_Initiative_Measure_423_%282006%29 [<http://perma.cc/ZR7S-2VRK>].

⁴⁰ *Oregon Ballot Measure 48, State Government Spending Limits (2006)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Ballot_Measure_48_State_Government_Spending_Limits_%282006%29 [<http://perma.cc/K67G-N2TZ>].

⁴¹ *Michigan Taxation Amendment, Proposal 5 (2012)*, BALLOTPEdia, http://ballotpedia.org/Michigan_Taxation_Amendment_Proposal_5_%282012%29 [<http://perma.cc/7WMR-VQ6K>].

⁴² *Arkansas Taxes on Food and Medicine, Amendment 3 (2002)*, BALLOTPEdia, http://ballotpedia.org/Arkansas_Elimination_of_Taxes_on_Food_and_Medicine_Amendment_3_%282002%29 [<http://perma.cc/PAG9-Y3WJ>].

⁴³ *Colorado Property Taxes, Initiative 60 (2010)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Property_Taxes_Initiative_60_%282010%29 [<http://perma.cc/PT73-2QGU>].

⁴⁴ *North Dakota Property Tax Amendment, Measure 2 (June 2012)*, BALLOTPEdia, http://ballotpedia.org/North_Dakota_Property_Tax_Amendment_Measure_2_%28June_2_012%29 [<http://perma.cc/8A3V-Q6ZY>].

⁴⁵ *California Proposition 30, Sales and Income Tax Increase (2012)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_30_Sales_and_Income_Tax_Increase_%282012%29 [<http://perma.cc/6DUQ-JSCR>].

⁴⁶ *California Proposition 67, Tax on Telephone Calls (2004)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_67_Tax_on_Telephone_Calls_%282004%29 [<http://perma.cc/RB8N-P9PP>].

⁴⁷ *California Proposition 82, Free Half-Day Public Preschool Program (June 2006)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_82_Free_Half-Day_Public_Preschool_Program_%28June_2006%29 [<http://perma.cc/7UJ3-6NZ5>].

(in 2006),⁴⁸ and levying an oil severance tax to fund alternative energy programs (in 2006).⁴⁹ Other defeated constitutional initiatives took similar approaches, as in Colorado, where voters in 2008 turned back a series of measures that would have increased the sales tax to fund programs for the developmentally disabled,⁵⁰ used revenue from an existing severance tax to create a highway trust fund,⁵¹ and eliminated TABOR-mandated refunds of tax revenue and dedicated the money to schools instead.⁵² Colorado voters in 2013 also rejected a measure increasing income taxes to fund schools.⁵³

2. Education

Education-related measures were also prevalent. Along with various tax measures dedicating tax revenue to schools, voters also encountered—and in a handful of instances approved—several other school-related measures, most of which sought to boost spending or expand programs. Most importantly, Colorado voters in 2000 approved Initiative 23, which required funding for schools to increase by at least the rate of inflation plus one percentage point for each of the next ten years, and by at least the rate of inflation for each year thereafter.⁵⁴ Oregon voters in 2000 approved a measure altering the education clause to require the state to provide adequate funding for school “quality goals.”⁵⁵ Florida voters in 2002 approved a pair of education amendments: one established pre-K schooling⁵⁶ and the other set

⁴⁸ *California Proposition 88, Statewide \$50 Parcel Tax (2006)*, BALLOTPEdia, [http://ballotpedia.org/California_Proposition_88,_Statewide_\\$50_Parcel_Tax_%282006%29](http://ballotpedia.org/California_Proposition_88,_Statewide_$50_Parcel_Tax_%282006%29) [<http://perma.cc/B5UW-92TW>].

⁴⁹ *California Proposition 87, Alternative Energy Oil Tax (2006)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_87,_Alternative_Energy_Oil_Tax_%282006%29 [<http://perma.cc/DU6W-NX6H>].

⁵⁰ *Colorado Sales Tax for Developmentally Disabled, Initiative 51 (2008)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Sales_Tax_for_Developmentally_Disabled,_Initiative_51_%282008%29 [<http://perma.cc/D3AB-YY3J>].

⁵¹ *Colorado Severance Tax Revenue for Highways, Initiative 52 (2008)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Severance_Tax_Revenue_for_Highways,_Initiative_52_%282008%29 [<http://perma.cc/6RUV-45AP>].

⁵² *Colorado Education Funding and TABOR Rebates, Initiative 59*, BALLOTPEdia, http://ballotpedia.org/Colorado_Education_Funding_and_TABOR_Rebates,_Initiative_59_%282008%29 [<http://perma.cc/LN49-HX2W>].

⁵³ *Colorado Tax Increase for Education, Amendment 66 (2013)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Tax_Increase_for_Education,_Amendment_66_%282013%29 [<http://perma.cc/V9W7-PS7X>].

⁵⁴ *Colorado Funding for Public Schools, Initiative 23 (2000)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Funding_for_Public_Schools,_Initiative_23_%282000%29 [<http://perma.cc/F63J-XKRG>].

⁵⁵ *Oregon Public School Funding and Equalization, Measure 1 (2000)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Public_School_Funding_and_Equalization,_Measure_1_%282000%29 [<http://perma.cc/2P9P-8KVS>].

⁵⁶ *Florida Universal Pre-Kindergarten, Amendment 8 (2002)*, BALLOTPEdia, http://ballotpedia.org/Florida_Universal_Pre-Kindergarten,_Amendment_8_%282002%29

maximum K–12 class sizes.⁵⁷ A Nevada amendment had a different aim. In response to a complex state supreme court decision, *Guinn v. Legislature of Nevada*,⁵⁸ Nevada voters gave final approval in 2006 to an “education first” amendment, requiring the legislature to pass an education appropriations bill before approving any other appropriations bills.⁵⁹

Voters also rejected a sizable number of education-related constitutional initiatives. Voters in Nevada in 2004⁶⁰ and in Oklahoma in 2010⁶¹ rejected measures requiring K–12 per-pupil spending to be at least as high as the average of other states, whether all states (as in the Nevada measure) or neighboring states (as in the Oklahoma proposal). Vouchers for students attending private schools were rejected in California⁶² and Michigan⁶³ in 2000, as were measures tying teacher pay to student learning outcomes in Oregon⁶⁴ and Missouri (in 2014).⁶⁵ Colorado voters rejected measures requiring use of English in K–12 schools (in 2002)⁶⁶ and requiring districts to spent at least 65% of their budget on classroom learning (in 2006).⁶⁷

[<http://perma.cc/5GN9-6X25>].

⁵⁷ *Florida Reduce Class Size, Amendment 9 (2002)*, BALLOTPEdia, http://ballotpedia.org/Florida_Reduce_Class_Size,_Amendment_9_%282002%29 [<http://perma.cc/PH96-YUXP>].

⁵⁸ *Guinn v. Legislature of Nev.*, 71 P.3d 1269 (Nev. 2003), *overruled by Nevadans for Nev. v. Beers*, 142 P.3d 339 (Nev. 2006).

⁵⁹ *Nevada Fund Education First, Question 1 (2006)*, BALLOTPEdia, http://ballotpedia.org/Nevada_Fund_Education_First,_Question_1_%282006%29 [<http://perma.cc/HL5D-2L8K>].

⁶⁰ *Nevada Per Pupil Expenditure, Question 2 (2004)*, BALLOTPEdia, http://ballotpedia.org/Nevada_Per_Pupil_Expenditure,_Question_2_%282004%29 [<http://perma.cc/D3Q3-UN59>].

⁶¹ *Oklahoma State Funds for Common Schools, State Question 744 (2010)*, BALLOTPEdia, http://ballotpedia.org/Oklahoma_State_Funds_for_Common_Schools,_State_Question_744_%282010%29 [<http://perma.cc/CEE5-ZB3Z>].

⁶² *California Proposition 38, School Vouchers (2000)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_38,_School_Vouchers_%282000%29 [<http://perma.cc/G66R-NPTC>].

⁶³ *Michigan Vouchers and Teacher Testing Amendment, Proposal 1 (2000)*, BALLOTPEdia, http://ballotpedia.org/Michigan_Vouchers_and_Teacher_Testing_Amendment,_Proposal_1_%282000%29 [<http://perma.cc/PKD8-NFF4>].

⁶⁴ *Oregon Teacher Pay Determined by Student Learning, Measure 95 (2000)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Teacher_Pay_Determined_by_Student_Learning,_Measure_95_%282000%29 [<http://perma.cc/4KVP-UFMT>].

⁶⁵ *Missouri Teacher Performance Evaluation, Amendment 3 (2014)*, BALLOTPEdia, http://ballotpedia.org/Missouri_Teacher_Performance_Evaluation,_Amendment_3_%282014%29 [<http://perma.cc/QAH2-NQG6>].

⁶⁶ *Colorado English Language Education, Initiative 31 (2002)*, BALLOTPEdia, http://ballotpedia.org/Colorado_English_Language_Education,_Initiative_31_%282002%29 [<http://perma.cc/4RTA-BSEX>].

⁶⁷ *Colorado School District Spending Requirements, Initiative 39 (2006)*, BALLOTPEdia, http://ballotpedia.org/Colorado_School_District_Spending_Requirements,_Initiative_39_%282006%29 [<http://perma.cc/RQ98-V32G>].

3. Gambling

Gambling measures figured prominently on state ballots. On rare occasions, constitutional initiatives sought to limit gambling, as with a voter-approved measure in Michigan in 2004 requiring voter approval for most new forms of gambling⁶⁸ and a voter-rejected measure in South Dakota in 2000 disallowing video lottery games.⁶⁹

For the most part, constitutional initiatives sought to authorize or expand gambling. Voters approved several gambling-expansion amendments: North Dakota voters in 2002 allowed the state to join a multi-state lottery;⁷⁰ Florida voters in 2004 authorized residents of two counties to vote on approving slot machines at horse-racing tracks;⁷¹ Colorado voters in 2008 approved an amendment allowing extended hours at casinos and higher limits on wagers;⁷² and Arkansas voters in 2008 authorized a state lottery.⁷³ An amendment approved by Ohio voters in 2009 authorized construction of four casinos and designated their particular locations.⁷⁴

Voters rejected other gambling-expansion measures. They turned back measures to implement video lottery games (in Colorado in 2003),⁷⁵ allow floating gambling facilities (in Missouri in 2004),⁷⁶ expand allowable slot machines (in Ohio in 2006),⁷⁷ authorize a casino in the southwest part of the state

⁶⁸ *Michigan Gambling Outlets Amendment, Proposal 1 (2004)*, BALLOTPEdia, http://ballotpedia.org/Michigan_Gambling_Outlets_Amendment_Proposal_1_%282004%29 [http://perma.cc/XMQ7-472V].

⁶⁹ *South Dakota Repeal Video Lottery, Amendment D (2000)*, BALLOTPEdia, http://ballotpedia.org/South_Dakota_Repeal_Video_Lottery,_Amendment_D_%282000%29 [http://perma.cc/92MZ-CBZ5].

⁷⁰ *North Dakota Multi-State Lottery, Initiated Constitutional Measure 2 (2002)*, BALLOTPEdia, http://ballotpedia.org/North_Dakota_Multi-State_Lottery,_Initiated_Constitutional_Measure_2_%282002%29 [http://perma.cc/7JJP-EE7H].

⁷¹ *Florida Slot Machines, Amendment 4 (2004)*, BALLOTPEdia, http://ballotpedia.org/Florida_Slot_Machines,_Amendment_4_%282004%29 [http://perma.cc/Z2HX-BR45].

⁷² *Colorado Limited Gaming in Central City, Black Hawk and Cripple Creek, Initiative 50 (2008)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Limited_Gaming_in_Central_City,_Black_Hawk_and_Cripple_Creek,_Initiative_50_%282008%29 [http://perma.cc/XN5K-26TH].

⁷³ *Arkansas State Lottery, Proposed Constitutional Amendment 3 (2008)*, BALLOTPEdia, http://ballotpedia.org/Arkansas_State_Lottery,_Proposed_Constitutional_Amendment_3_%282008%29 [http://perma.cc/6Z2Z-LE8L].

⁷⁴ *Ohio Casino Approval and Tax Distribution, Amendment 3 (2009)*, BALLOTPEdia, http://ballotpedia.org/Ohio_Casino_Initiative,_Issue_3_%282009%29 [http://perma.cc/E274-XB2E].

⁷⁵ *Colorado Video Lottery and Tourism Promotion, Initiative 33 (2003)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Video_Lottery_and_Tourism_Promotion,_Initiative_33_%282003%29 [http://perma.cc/C8F7-GFA7].

⁷⁶ *Missouri Floating Gambling Facilities, Amendment 1 (August 2004)*, BALLOTPEdia, http://ballotpedia.org/Missouri_Floating_Gambling_Facilities,_Amendment_1_%28August_2004%29 [http://perma.cc/Q36H-6KBV].

⁷⁷ *Ohio Casino Gambling, Amendment 3 (2006)*, BALLOTPEdia, <http://ballotpedia.org/>

(in Ohio in 2008),⁷⁸ authorize private casinos (in Oregon in 2012),⁷⁹ and expand gambling at horse-tracks (in Colorado in 2014).⁸⁰ California voters in 2004 rejected a pair of measures that would have facilitated negotiation of tribal gaming compacts.⁸¹

4. Tobacco

Constitutional initiatives were, on various occasions, a vehicle for increasing cigarette taxes or regulating smoking, although most of these measures were defeated. Voters in Colorado approved a 2004 amendment increasing the cigarette tax,⁸² but cigarette-tax hikes were defeated in Missouri⁸³ and California⁸⁴ in 2006. Meanwhile, voters in Florida approved a 2002 amendment banning “smoking in enclosed indoor workplaces,”⁸⁵ but Ohio voters in 2006 turned back a tobacco-company backed amendment that would have overturned local public-smoking bans in favor of a statewide public-smoking policy.⁸⁶ Additionally, voters in Florida in 2006 approved an amendment requiring the state to reserve funds received as part of a legal settlement between the state and tobacco companies solely for smoking-prevention programs,⁸⁷ but Michigan voters in

Ohio_Casino_Gambling_Amendment_3 (2006) [<http://perma.cc/K9DC-V99Y>].

⁷⁸ *Ohio Casino Approval and Tax Distribution, Amendment 6 (2008)*, BALLOTPEdia, [http://ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution_Amendment_6_\(2008\)](http://ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution_Amendment_6_(2008)) [<http://perma.cc/H2FY-H6RH>].

⁷⁹ *Oregon Privately-Owned Casinos Amendment, Measure 82 (2012)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Privately-Owned_Casinos_Amendment_Measure_82_%282012%29 [<http://perma.cc/LKU5-W598>].

⁸⁰ *Colorado Horse Racetrack Limited Gaming Proceeds for K-12 Education, Amendment 68 (2014)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Horse_Racetrack_Limited_Gaming_Proceeds_for_K-12_Education_Amendment_68_%282014%29 [<http://perma.cc/U6PK-HB8C>].

⁸¹ *California Proposition 68, Tribal Gaming Compact Renegotiation (2004)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_68_Tribal_Gaming_Compact_Renegotiation_%282004%29 [<http://perma.cc/FB5T-TY9C>]; *California Proposition 70, Tribal Gaming Compacts Amendment (2004)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_70_Tribal_Gaming_Compacts_Amendment_%282004%29 [<http://perma.cc/9FLC-SRVK>].

⁸² *Colorado Tobacco Tax Increase for Health-Related Purposes, Initiative 35 (2004)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Tobacco_Tax_Increase_for_Health-Related_Purposes_Initiative_35_%282004%29 [<http://perma.cc/2QNN-3S48>].

⁸³ *Missouri Healthy Future Trust Fund, Amendment 3 (2006)*, BALLOTPEdia, http://ballotpedia.org/Missouri_Healthy_Future_Trust_Fund_Amendment_3_%282006%29 [<http://perma.cc/E4F3-9DAL>].

⁸⁴ *California Proposition 86, Cigarette Taxes (2006)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_86_Cigarette_Taxes_%282006%29 [<http://perma.cc/BF8U-M4TN>].

⁸⁵ *Florida Prohibit Workplace Smoking, Amendment 6 (2002)*, BALLOTPEdia, http://ballotpedia.org/Florida_Prohibit_Workplace_Smoking_Amendment_6_%282002%29 [<http://perma.cc/R7WP-24NC>].

⁸⁶ *Ohio Partial Smoking Ban, Amendment 4 (2006)*, BALLOTPEdia, http://ballotpedia.org/Ohio_Measure_4_Partial_Smoking_Ban_%282006%29 [<http://perma.cc/353N-4N6R>].

⁸⁷ *Florida Amendment 4, Use of Tobacco Settlement Funds (2006)*, BALLOTPEdia, http://ballotpedia.org/Florida_Amendment_4_Use_of_Tobacco_Settlement_Funds_%282006%29 [<http://perma.cc/ECK5-P7SR>].

2002 rejected an amendment specifying the purposes for which such funds could be used.⁸⁸

5. Labor Unions

Constitutional initiatives restricting or expanding the rights of labor unions appeared with some regularity on state ballots. However, only one of these amendments was approved: a 2008 Colorado amendment, later invalidated by the state supreme court,⁸⁹ which would have had the effect of limiting labor unions' ability to contribute to political campaigns.⁹⁰ Voters rejected all other constitutional initiatives limiting unions. This included two other measures on the 2008 Colorado ballot, one that would have banned union-shop arrangements⁹¹ and another that would have barred payroll deductions for union dues,⁹² as well as a 2000 Oregon measure that would have barred payroll deductions for political purposes without each worker's express consent.⁹³ Constitutional initiatives seeking to expand collective-bargaining rights fared no better, as voters defeated amendments of this sort in Michigan⁹⁴ and Missouri⁹⁵ in 2002 and then again in Michigan in 2012.⁹⁶

6. Abortion

Constitutional initiatives with implications for abortion appeared regularly on certain state ballots but were never

⁸⁸ *Michigan Relocation of Tobacco Revenue Amendment, Proposal 4 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_Relocation_of_Tobacco_Revenue_Amendment,_Proposal_4_%282002%29 [http://perma.cc/SB9M-5FD9].

⁸⁹ *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010) (invalidating state constitutional amendment enacted by voter approval of Amendment 54 for violating the Federal Constitution).

⁹⁰ *Colorado Campaign Contributions from Government Contractors, Initiative 54 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Campaign_Contributions_from_Government_Contractors,_Initiative_54_%282008%29 [http://perma.cc/4HET-BYQW].

⁹¹ *Colorado Mandatory Labor Union Membership Prohibition, Initiative 47 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Mandatory_Labor_Union_Membership_Prohibition,_Initiative_47_%282008%29 [http://perma.cc/E4ZX-9M6G].

⁹² *Colorado Limitation on Public Payroll Deductions, Initiative 49 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Limitation_on_Public_Payroll_Deductions,_Initiative_49_%282008%29 [http://perma.cc/TY2T-WE46].

⁹³ *Oregon Prohibits Payroll Deductions for Political Purposes, Measure 92 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Prohibits_Payroll_Deductions_For_Political_Purposes,_Measure_92_%282000%29 [http://perma.cc/F5BY-LC83].

⁹⁴ *Michigan Collective Bargaining Amendment, Proposal 3 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_Collective_Bargaining_Amendment,_Proposal_3_%282002%29 [http://perma.cc/K6A4-2PMW].

⁹⁵ *Missouri Collective Bargaining, Amendment 2 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Missouri_Collective_Bargaining_Amendment_2_%282002%29 [http://perma.cc/2DMR-738G].

⁹⁶ *Michigan "Protect Our Jobs" Amendment, Proposal 2 (2012)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_%22Protect_Our_Jobs%22_Amendment,_Proposal_2_%282012%29 [http://perma.cc/P2GK-Y9W3].

approved by voters during this period. California voters rejected parental notification measures in 2005,⁹⁷ 2006,⁹⁸ and 2008.⁹⁹ Additionally, voters in Colorado in 2008¹⁰⁰ and 2010¹⁰¹ and in Mississippi in 2011¹⁰² defeated personhood amendments that generally defined life as beginning at conception and, in a way, intended to challenge U.S. Supreme Court precedent limiting state restrictions on abortion.¹⁰³ Voters in Colorado in 2014 defeated another personhood amendment that was more narrowly tailored, in that it sought to define fetuses as persons for purposes of the state criminal code and wrongful death act.¹⁰⁴

II. CONSEQUENCES OF STATE CONSTITUTIONAL INITIATIVES FOR GOVERNANCE

The benefit of compiling a record of citizen-initiated amendments enacted between 2000 and 2014 is to be able to test various claims about the consequences of constitutional initiative processes. On one hand, they are said to facilitate passage of institutional reforms at odds with the interests of public officials¹⁰⁵ and secure passage of policies blocked due to legislative unresponsiveness or interest-group opposition.¹⁰⁶ At the same time, they are said to limit policy flexibility¹⁰⁷ and

⁹⁷ *California Proposition 73, Parental Notification for Minor's Abortion (2005)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_73_Parental_Notification_for_Minor%27s_Abortion_%282005%29 [http://perma.cc/VT59-EPEC].

⁹⁸ *California Proposition 85, Parental Notification for Minor's Abortion (2006)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_85_Parental_Notification_for_Minor%27s_Abortion_%282006%29 [http://perma.cc/2NYE-AT5G].

⁹⁹ *California Proposition 4, Parental Notification for Minor's Abortion (2008)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_4_Parental_Notification_for_Minor%27s_Abortion_%282008%29 [http://perma.cc/W2BA-F2KT].

¹⁰⁰ *Colorado Definition of Person, Initiative 48 (2008)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Definition_of_Person_Initiative_48_%282008%29 [http://perma.cc/GC8G-QKSF].

¹⁰¹ *Colorado Fetal Personhood, Initiative 62 (2010)*, BALLOTPEdia, [http://ballotpedia.org/Colorado_Fetal_Personhood_Initiative_62_\(2010\)](http://ballotpedia.org/Colorado_Fetal_Personhood_Initiative_62_(2010)) [http://perma.cc/8EKS-4E99].

¹⁰² *Mississippi Life Begins at the Moment of Fertilization Amendment, Initiative 26 (2011)*, BALLOTPEdia, http://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment_Initiative_26_%282011%29 [http://perma.cc/C3CX-8WMZ].

¹⁰³ See Dinan, *State Constitutional Developments in 2011*, *supra* note 21, at 5 (“Personhood amendments have been proposed in several states in recent years, with supporters viewing them as a means of creating a conflict between state and federal law and thereby helping to generate a legal challenge to the U.S. Supreme Court’s abortion jurisprudence, in the hopes that a majority of justices might be open to modifying prior precedents.”).

¹⁰⁴ *Colorado Definition of “Personhood” Initiative, Amendment 67 (2014)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Definition_of_%22Personhood%22_Initiative_Amendment_67_%282014%29 [http://perma.cc/KXP7-E89T].

¹⁰⁵ See Cooper, *supra* note 15, at 233–34.

¹⁰⁶ See *id.* at 234–36.

¹⁰⁷ Elisabeth R. Gerber, *Reforming the California Initiative Process: A Proposal to Increase Flexibility and Legislative Accountability*, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 291, 298–99

restrict minority rights.¹⁰⁸ However, few empirical analyses have assessed these claims in a systematic fashion across the full set of states.¹⁰⁹

Janice C. May's 1988 study of constitutional initiative use through the mid-1980s is the most comprehensive analysis to date. Although ostensibly focused primarily on the consequences for the protection of rights, May's study of the 628 proposed and 221 adopted constitutional initiatives from 1906–1986 was actually much broader and took note of some effects on government institutions and processes.¹¹⁰

My purpose is to conduct an empirical analysis of the kind undertaken by May. As she wrote, referring in particular to the claim—which she concluded was only partly supported—that the constitutional initiative threatens rights:

After eighty years of experience with the constitutional initiative, a record exists on which to make an informed judgment about such a serious charge. The record consists of initiative proposals and adoptions from the time of the first initiative proposal in 1906 to the present. Although questions may always be raised about the data, the compilation of statewide initiatives provides essential information about the number and general categories, as well as the specific content of propositions.¹¹¹

My aim is to follow May's approach by making use of data from twenty-first century constitutional-initiative adoptions to assess the degree of support for the leading claims about consequences for governance.

(Bruce E. Cain & Roger G. Noll eds., 1995).

¹⁰⁸ See James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 69 (1983).

¹⁰⁹ There are, to be sure, additional claims that I am not able to address based on the evidentiary record I have compiled. For instance, much attention has been paid in recent years to the question of whether ballot measures boost voter turnout and, therefore, have the capacity to affect the results of other elections on the ballot. A full assessment would require examining voter turnout records and in a way that goes beyond the focus of this study. In general, scholars have concluded that certain types of initiated measures can boost turnout, especially in midterm elections and occasionally in presidential elections. See, e.g., DANIEL R. BIGGERS, *MORALITY AT THE BALLOT: DIRECT DEMOCRACY AND POLITICAL ENGAGEMENT IN THE UNITED STATES* 88–89 (2014). Perhaps most important, in a claim subjected to scrutiny elsewhere, critics express concern that the constitutional initiative process enables well-financed groups to prevail over the public interest. A full assessment would require examining the campaign-finance records for each of the citizen-initiated amendments from 2000–2014 and, therefore, would go beyond an analysis of the purpose and effects of these amendments, which is the focus of this study. For two leading studies, see generally GERBER, *supra* note 14, and MATSUSAKA, *supra* note 14. The dominant view in the literature is that well-financed groups can succeed in blocking passage of measures backed by a popular majority but are rarely able to secure passage of measures in their favor. GERBER, *supra* note 14, at 138–39.

¹¹⁰ May, *supra* note 15, at 165.

¹¹¹ *Id.* at 164, 167.

A. Bypassing Self-Interested Legislators

Constitutional initiative processes have been touted as beneficial, in part, because they facilitate adoption of governmental reforms targeting legislators' interests or prerogatives. As Delos Wilcox, a Progressive-era champion of direct democracy, argued in a 1912 book, *Government by All the People*:

By what right of reason can we expect a partisan legislature to consent to the establishment of a non-partisan legislative ballot? . . . How can we appeal to a state legislature to divest itself of the powers of interference in municipal affairs? How can legislators and aldermen be expected to forbid themselves to use railroad passes?¹¹²

Prior studies of twentieth century constitutional initiatives have found evidence that the process was indeed a vehicle for adopting political reforms of this kind.¹¹³ Meanwhile, in her study of the twentieth century record, May found evidence that the process was a vehicle for adopting reforms of this kind, including "Nebraska's unicameral legislature, Missouri's merit selection of judges, Illinois' reduction in the size of the lower house of the state legislature and the substitution of single-member districts for the unique cumulative voting system, Florida's 'sunshine amendment' on ethics and financial disclosure, Ohio's county home rule amendment, and countless others."¹¹⁴

The twenty-first century record demonstrates that the constitutional initiative process continues to perform this function on a regular basis. Several structural reforms adopted via the constitutional initiative process would likely not have been enacted in the absence of such a process. The particular reforms adopted in the twenty-first century differ in some respects from reforms enacted in earlier decades. But the common theme is the reliance on constitutional initiative processes to enact reforms opposed by legislators who view them as a threat to their tenure in office, prerogatives, or powers.

Legislative term limits present the clearest case of a measure adopted on a regular basis through the constitutional initiative process and rarely enacted through other mechanisms.¹¹⁵ Of the fifteen states that currently limit the number of terms state legislators can serve, all but two did so

¹¹² DELOS F. WILCOX, *GOVERNMENT BY ALL THE PEOPLE: THE INITIATIVE, THE REFERENDUM AND THE RECALL AS INSTRUMENTS OF DEMOCRACY* 118 (Da Capo Press 1972) (1912).

¹¹³ See, e.g., SCHMIDT, *supra* note 14, at 15.

¹¹⁴ May, *supra* note 15, at 179.

¹¹⁵ MILLER, *supra* note 14, at 162.

through the constitutional initiative process.¹¹⁶ The exceptions are Maine, where term limits were adopted via the statutory initiative process in 1993,¹¹⁷ and Louisiana, which is the truly exceptional case because term limits were adopted via a legislature-referred amendment in 1995.¹¹⁸ In all other states where legislative terms are currently limited, citizen-initiated amendments were the means of accomplishing this goal and overcoming legislative resistance, beginning in 1990 with passage of term-limits amendments in California, Colorado, and Oklahoma, and concluding in 2000 with Nebraska,¹¹⁹ the one occasion when a measure enacting legislative term limits was adopted during the 2000–2014 period covered by this study.¹²⁰

The constitutional initiative process also played a key role during the twenty-first century in adopting limits on drawing congressional and state legislative districts. To be sure, on several occasions in prior years, legislatures were willing to cede responsibility for line-drawing by referring for voter approval amendments establishing redistricting commissions.¹²¹ For the most part, however, legislators have been reluctant to part with this responsibility, such that during the twenty-first century, the principal redistricting reform measures have been adopted via the constitutional initiative process, generally in the face of legislative resistance.¹²² A 2000 Arizona constitutional initiative established an independent commission to re-draw congressional and state legislative districts.¹²³ California voters resorted to the constitutional initiative process for this purpose on two

¹¹⁶ *Id.* at 163.

¹¹⁷ *Maine State Official Term Limits, Question 1 (1993)*, BALLOTPEDIA, http://ballotpedia.org/Maine_State_Official_Term_Limits_Question_1_%281993%29 [<http://perma.cc/VHS7-BZWR>].

¹¹⁸ MILLER, *supra* note 14, at 162 n.28.

¹¹⁹ *Id.* at 163.

¹²⁰ It should be noted that on one occasion during this 2000–2014 period, in California in 2012, the constitutional initiative was a vehicle for *relaxing* legislative term limits. *California Proposition 28, Change in Term Limits (June 2012)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_28_Change_in_Term_Limits_%28June_2012%29 [<http://perma.cc/KAN8-3639>].

¹²¹ In the twentieth century, Washington, Montana, and Idaho adopted independent redistricting commissions via legislature-referred constitutional amendments. Dinan, *supra* note 8, at 187.

¹²² Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 332, 388–89 (2007). One exception is a 2014 legislature-referred amendment in New York establishing a commission, but it fell short of an independent commission. *New York Redistricting Commission Amendment, Proposal 1 (2014)*, BALLOTPEDIA, http://ballotpedia.org/New_York_Redistricting_Commission_Amendment_Proposal_1_%282014%29 [<http://perma.cc/4H4U-8Q3N>].

¹²³ *Arizona Creation of a Redistricting Commission, Proposition 106 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Arizona_Creation_of_a_Redistricting_Commission_Proposition_106_%282000%29 [<http://perma.cc/8L7Y-826D>].

occasions—first in 2008 to establish a commission to draw state legislative districts¹²⁴ and then in 2010 to add congressional districting to the commission's charge.¹²⁵ Florida voters took a different approach. A pair of citizen-initiated amendments, approved in 2010, permitted legislators to retain control over redistricting but restricted their ability to consider partisanship or incumbency in drawing legislative¹²⁶ and congressional¹²⁷ districts.

On two occasions in the twenty-first century, voters approved citizen-initiated amendments imposing campaign finance or lobbying restrictions in ways that threatened legislators' tenure or prerogatives. The connection between passage of campaign finance and ethics reforms and the availability of constitutional initiative processes is not quite as strong as in the case of term-limits and redistricting reform. Legislatures have been willing to limit the campaign donations or gifts they can receive in a way that they have been invariably opposed to do when it comes to limiting their own terms and generally reluctant to do when it comes to ceding control of drawing the districts in which they run for office.¹²⁸ Nevertheless, the constitutional initiative process has been essential for enacting campaign finance restrictions in several instances in Colorado—including passage of campaign finance and disclosure rules in 2002,¹²⁹ and passage of a strict ban on gifts to elected officials and creation of an ethics commission in 2006.¹³⁰ The 2002 Colorado measure is of particular interest. Colorado voters initially enacted a package of campaign-finance restrictions via the statutory initiative process in 1996, only to watch as

¹²⁴ *California Proposition 11, Creation of the California Citizens Redistricting Commission (2008)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_11,_Creation_of_the_California_Citizens_Redistricting_Commission_%282008%29 [<http://perma.cc/JJ4S-YLNC>].

¹²⁵ *California Proposition 20, Congressional Redistricting (2010)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_20,_Congressional_Redistricting_%282010%29 [<http://perma.cc/EV2T-HTYQ>].

¹²⁶ *Florida Legislative District Boundaries, Amendment 5 (2010)*, BALLOTPEdia, http://ballotpedia.org/Florida_Legislative_District_Boundaries,_Amendment_5_%282010%29 [<http://perma.cc/XE7D-3CCL>].

¹²⁷ *Florida Congressional District Boundaries, Amendment 6 (2010)*, BALLOTPEdia, http://ballotpedia.org/Florida_Congressional_District_Boundaries,_Amendment_6_%282010%29 [<http://perma.cc/82BA-RLD2>].

¹²⁸ *Legislator Gift Restrictions Overview*, NAT'L CONF. ST. LEGISLATURES (Dec. 19, 2014), <http://www.ncsl.org/research/ethics/50-state-table-gift-laws.aspx> [<http://perma.cc/37LP-YGQC>].

¹²⁹ *Colorado Campaign Finance, Initiative 27 (2002)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Campaign_Finance,_Initiative_27_%282002%29 [<http://perma.cc/D2N-J-GQT2>].

¹³⁰ *Colorado Standards of Conduct in Government, Initiative 41 (2006)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Standards_of_Conduct_in_Government,_Initiative_41_%282006%29 [<http://perma.cc/2MFS-VCJG>].

legislators “‘gutted’ the statutory campaign finance reforms in 2000.”¹³¹ At that point, voters turned to the constitutional initiative process and reenacted a number of these reforms on a constitutional basis, with an eye toward preventing further legislative interference.¹³²

In each of the preceding cases, voters resorted to constitutional initiatives to overcome resistance rooted in legislators’ concern about their careers or the perks of office, but the process is also used to overcome legislative resistance to ceding institutional power. On various occasions in prior years, constitutional initiatives have been a vehicle for reducing legislative control over local government powers and policies, at times by adopting home-rule provisions.¹³³ The one twenty-first century occasion when voters approved a constitutional initiative of this sort occurred with passage of a 2010 California amendment preventing the state from delaying distribution of tax revenue designated for distribution to local governments.¹³⁴

To conclude that the constitutional initiative process has played a notable role in securing passage of governmental reforms in the face of legislative resistance, as is evident from a review of term-limits, redistricting, campaign-finance, and home-rule measures, is not to pass judgment on the wisdom of these measures. Reasonable persons can disagree about whether and to what extent they are effective in accomplishing their intended goals. The point is that the record of twenty-first century citizen-initiated amendments provides strong support for claims that constitutional initiative processes facilitate passage of structural changes that would otherwise fail to pass.

B. Overcoming Unresponsive Legislatures

Another claim about the effects of constitutional initiative processes is that they secure passage of policies blocked due to

¹³¹ Anne G. Campbell, *Direct Democracy and Constitutional Reform: Campaign Finance Initiatives in Colorado*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 175, 180, 182 (G. Alan Tarr & Robert F. Williams eds., 2006).

¹³² Dinan, *supra* note 8, at 191–92.

¹³³ SCHMIDT, *supra* note 14, at 15 (noting the use of initiatives to adopt “home rule for municipalities” in Colorado and Oregon). On passage of a 1906 citizen-initiated amendment in Oregon, see *Oregon Power to Amend City and Town Charters, Measure 6 (June 1906)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Power_to_Amend_City_and_Town_Charters_Measure_6_%28June_1906%29 [http://perma.cc/G4KW-4X9K]. On passage of a 1912 citizen-initiated amendment in Colorado, see *Colorado Home Rule for Cities and Towns, Measure 8 (1912)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Home_Rule_for_Cities_and_Towns_Measure_8_%281912%29 [http://perma.cc/LM76-P5WF].

¹³⁴ *California Proposition 22, Ban on State Borrowing from Local Governments (2010)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_22_Ban_on_State_Borrowing_from_Local_Governments_%282010%29 [http://perma.cc/2Q5K-BTJA].

legislative unresponsiveness, on account of a disconnect between legislators' and citizens' preferences or interest-group influence in the legislative process. This claim figured prominently in Progressive-era debates surrounding adoption of the constitutional initiative process, as when Lawton Hemans, delegate to the Michigan Constitutional Convention of 1907–1908, argued that legislatures were sometimes unduly influenced by powerful groups that prevented passage of policies with broad popular support:

When the contest comes between the great commercial and industrial interests, and what might be termed the popular interest, then too often the great commercial interests by reason of their great strength, as compared with the numerical strength of the constituency, exercise a preponderating influence upon the minds of the legislature.¹³⁵

The intent of providing for the constitutional initiative process was in part to overcome these obstacles and interests.

The twenty-first century record provides ample support for claims that the constitutional initiative process can at times secure passage of policies that would otherwise have been blocked or delayed. However, it is important to be clear about what the evidence demonstrates. In most cases where voters resorted to the constitutional initiative process to secure passage of policy reforms and prevent future legislative interference with them, legislatures in other states were enacting these same policies. Therefore, for the most part, the evidence does not point to universal failings of the legislative process in terms of an inability to respond to voter preferences, but rather supports a more modest conclusion. In some states and in some circumstances, constitutional initiatives played a role in securing speedy enactment of policies.

The constitutional initiative process is occasionally a vehicle for enacting policies opposed by influential groups. On two occasions in the twenty-first century, voters approved citizen-initiated amendments opposed by tobacco companies. In Florida, which provides for the constitutional initiative process but does not allow statutory initiatives, voters resorted to the constitutional initiative process in 2002 to enact a ban on workplace smoking.¹³⁶ In addition, in Colorado, which provides for the constitutional and statutory initiative process and sets similar requirements for qualifying measures for the ballot under

¹³⁵ See JOSEPH H. BREWER, CHAS H. BENDER, & CHAS H. MCGURRIN, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 592 (1908).

¹³⁶ *Florida Prohibit Workplace Smoking, Amendment 6 (2002)*, *supra* note 85.

both processes, voters approved a 2004 constitutional initiative increasing the cigarette tax by sixty-four cents a pack.¹³⁷

On other occasions, constitutional initiative processes have been a vehicle to overcome doctors' groups seen as particularly influential in the legislative process. Florida voters in 2004 approved two constitutional initiatives imposing restrictions on doctors. One measure denies medical licenses to doctors with three or more malpractice judgments.¹³⁸ Another grants patients access to information about doctors' adverse medical incidents.¹³⁹

In weighing the importance of the constitutional initiative process for overcoming group influence in the legislative process, however, it is important to note that legislatures in other states were generally enacting the same policies. This includes legislation restricting smoking in the workplace and other public places,¹⁴⁰ as well as increasing cigarette taxes by significant amounts and on a regular basis.¹⁴¹ The one policy with no counterpart in statutes or legislature-referred amendments in other states—and the chief piece of evidence in favor of the group-bypassing function of constitutional initiatives—is the passage of Florida's three-strike medical-malpractice amendment, which is stricter than any physician-related measure enacted by a state legislature.¹⁴²

The twenty-first century record provides somewhat more support for claims that the constitutional initiative process can overcome legislative unresponsiveness to citizen preferences. On several matters from 2000 to 2014—namely marijuana legalization, stem-cell research, minimum-wage hikes, and eminent domain limits—voters in multiple states resorted to constitutional initiatives to secure speedy passage of a policy change. In each instance, it should be stressed, legislative statutes and legislature-referred constitutional amendments

¹³⁷ *Colorado Tobacco Tax Increase for Health-Related Purposes, Initiative 35 (2004)*, *supra* note 82.

¹³⁸ *Florida Medical Malpractice Protection, Amendment 8 (2004)*, BALLOTPEdia, http://ballotpedia.org/Florida_Medical_Malpractice_Protection,_Amendment_8_%282004%29 [<http://perma.cc/U9U3-8QG8>].

¹³⁹ *Florida Patient's Right to Know, Amendment 7 (2004)*, BALLOTPEdia, http://ballotpedia.org/Florida_Patient%27s_Right_to_Know,_Amendment_7_%282004%29 [<http://perma.cc/98P6-PTKV>].

¹⁴⁰ *State Smoke-Free Laws and Health*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/enacted-indoor-smoke-free-laws.aspx> [<http://perma.cc/RLZ2-NNF7>] (last updated Feb. 2013).

¹⁴¹ *State Cigarette Excise Taxes: 2011 and 2012*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/2011-state-cigarette-excise-taxes.aspx> [<http://perma.cc/BB7Z-YM5D>] (last updated Aug. 1, 2013).

¹⁴² *See Florida Passes Three-Strikes Malpractice Law*, N.Y. TIMES (Nov. 26, 2004), http://www.nytimes.com/2004/11/26/us/florida-passes-threestrikes-malpractice-law.html?_r=0 [<http://perma.cc/U4KB-NATH>].

were the vehicle for passing the same policy in other states. Nevertheless, legislatures were unresponsive to popular preferences on multiple occasions and in a way that was addressed through the constitutional initiative process.

Marijuana legalization is the leading case. By 2015, twenty-three states had legalized medical marijuana and four had legalized recreational marijuana.¹⁴³ Eleven of the twenty-three medical-marijuana legalization measures were enacted through the initiative process, generally through statutory initiatives but on two occasions—in Colorado and Nevada in 2000—through constitutional initiatives.¹⁴⁴ Meanwhile, all four states that legalized recreational marijuana have done so through the initiative process, and in one case—Colorado in 2012—through a constitutional initiative.¹⁴⁵ In short, legislatures have regularly been unresponsive to popular support for marijuana legalization measures, necessitating a resort to initiative processes to accomplish this goal. For the most part, the statutory initiative process was the method of choice. On three occasions, however, voters relied on constitutional initiatives for medical and recreational legalization measures.

A disjunction between legislators' and citizens' preferences was also evident regarding support for embryonic stem-cell research and addressed at times through passage of constitutional initiatives.¹⁴⁶ In some states, to be sure, legislatures enacted statutes authorizing and funding research in this area.¹⁴⁷ But some legislatures were unwilling to fund or

¹⁴³ 23 *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> [<http://perma.cc/3YGU-7AQD>] (last updated July 7, 2015, 4:32 PM) (listing the twenty-three states that have passed medical marijuana policy); *State Marijuana Laws Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [<http://perma.cc/N6BE-6QLU>] (last updated June 19, 2015).

¹⁴⁴ Dinan, *supra* note 8, at 189 n.205 (noting the eleven states approving medical marijuana measures through the initiative process); 23 *Legal Medical Marijuana States and DC*, *supra* note 143 (listing the twenty-three states that have passed medical marijuana policy); *State Marijuana Laws Map*, *supra* note 143.

¹⁴⁵ *Alaska Marijuana Legalization, Ballot Measure 2 (2014)*, BALLOTPEdia, [http://ballotpedia.org/Alaska_Marijuana_Legalization_Ballot_Measure_2_\(2014\)](http://ballotpedia.org/Alaska_Marijuana_Legalization_Ballot_Measure_2_(2014)) [<http://perma.cc/AN4R-B5LD>]; *Colorado Marijuana Legalization Initiative, Amendment 64 (2012)*, BALLOTPEdia, [http://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative_Amendment_64_\(2012\)](http://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative_Amendment_64_(2012)) [<http://perma.cc/MNV4-EUXX>]; *Oregon Legalized Marijuana Initiative, Measure 91 (2014)*, BALLOTPEdia, [http://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative_Measure_91_\(2014\)](http://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative_Measure_91_(2014)) [<http://perma.cc/E6X8-9NH5>]; *Washington Marijuana Legalization and Regulation, Initiative 502 (2012)*, BALLOTPEdia, [http://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation_Initiative_502_\(2012\)](http://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation_Initiative_502_(2012)) [<http://perma.cc/EHQ4-WRDP>].

¹⁴⁶ John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1020–21 (2011).

¹⁴⁷ JUDITH A. JOHNSON & ERIN D. WILLIAMS, CONG. RESEARCH SERV., RL33524, STEM CELL RESEARCH: STATE INITIATIVES 2–4, 6–7 (2006).

authorize this type of research at a time when the public was supportive, necessitating a resort to the constitutional initiative process. California voters approved a 2004 amendment funding stem-cell research, at a time when the Legislature balked at providing the desired funding.¹⁴⁸ Voters in Missouri (in 2006)¹⁴⁹ and Michigan (in 2008)¹⁵⁰ approved constitutional initiatives in situations where legislatures had banned or were considering bans on stem-cell research.¹⁵¹

Minimum-wage increases above the federal minimum level have generally been supported and enacted by legislatures,¹⁵² but on multiple occasions during the twenty-first century, advocates resorted to the initiative process, often because Republican-controlled legislatures opposed increases supported by a wide majority of voters.¹⁵³ On seven occasions, the statutory initiative process was the chosen mechanism for raising the minimum wage.¹⁵⁴ But in four states—Florida in 2004 and Colorado, Nevada, and Ohio in 2006—the minimum wage was increased and annual inflation adjustments mandated by constitutional initiatives.¹⁵⁵

Limits on the eminent domain power were also adopted on several occasions in the twenty-first century via the constitutional initiative process, in situations where legislatures were seen as insufficiently supportive of restrictions commanding broad popular support. In the wake of public backlash against the U.S. Supreme Court's 2005 ruling in *Kelo v. City of New London*,¹⁵⁶ that the Federal Takings Clause did not bar use of

¹⁴⁸ *California Proposition 71, Stem Cell Research (2004)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_71_Stem_Cell_Research_%282004%29 [http://perma.cc/WL7T-EKV8].

¹⁴⁹ *Missouri Stem Cell Research, Amendment 2 (2006)*, BALLOTPEdia, http://ballotpedia.org/Missouri_Stem_Cell_Research_Amendment_2_%282006%29 [http://perma.cc/ABB2-GJUS].

¹⁵⁰ *Michigan Stem Cell Amendment, Proposal 2 (2008)*, BALLOTPEdia, http://ballotpedia.org/Michigan_Stem_Cell_Amendment_Proposal_2_%282008%29 [http://perma.cc/ACR3-JY6M].

¹⁵¹ Dinan, *supra* note 146, at 1021.

¹⁵² *State Minimum Wages: 2015 Minimum Wage by State*, NAT'L CONF. ST. LEGISLATURES (June 30, 2015), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> [http://perma.cc/GGX7-6CNV].

¹⁵³ J.B. Wogan, *4 Red States that May Raise the Minimum Wage*, GOVERNING (April 4, 2014), <http://www.governing.com/news/headlines/gov-four-red-states-that-may-raise-minimum-wage.html> [http://perma.cc/A378-UPAV].

¹⁵⁴ In 2006, minimum-wage increases were achieved through initiated statutes in Arizona, Missouri, and Montana. Dinan, *supra* note 146, at 1018 n.68. In 2014, minimum-wage increases were passed through the statutory initiative process in Alaska, Arkansas, Nebraska, and South Dakota. *2014 Minimum Wage Ballot Measures*, NAT'L CONF. ST. LEGISLATURES (Nov. 6, 2014), <http://www.ncsl.org/research/labor-and-employment/minimum-wage-ballot-measures.aspx> [http://perma.cc/2ZRD-3LD3].

¹⁵⁵ Dinan, *supra* note 146, at 1018–19.

¹⁵⁶ *Kelo v. City of New London*, 545 U.S. 469 (2005).

eminent domain to condemn land for economic-development purposes, a number of legislatures enacted statutes or approved constitutional amendments limiting situations when government can condemn private property or strengthening guarantees that must be followed in the eminent domain process.¹⁵⁷ On several occasions, however, eminent domain limits restrictions were enacted through constitutional initiative processes, as with amendments in 2006 in North Dakota,¹⁵⁸ in 2008 in Nevada,¹⁵⁹ and in 2011 in Mississippi,¹⁶⁰ that generally provided stronger protection than measures passed through legislative statutes or legislature-referred amendments,¹⁶¹ as well as a less stringent 2008 California amendment.¹⁶²

C. Constraining Policy Flexibility

Whereas supporters of the constitutional initiative process stress benefits such as overcoming legislative resistance and unresponsiveness, critics contend that constitutional initiatives tend to impose undue limits on legislative flexibility. In characterizing this claim, Elizabeth R. Gerber wrote: “opponents of the initiative argue that the use of initiatives reduces policy flexibility. By flexibility, I mean the ability of policy actors to alter legislation that has unintended consequences, that is poorly written, or that ceases to attract popular support.”¹⁶³ In particular, Gerber cited, as have a number of other scholars, the consequences for California of citizen-initiated amendments in the 1970s and 1980s that “severely constrain[ed] the ability of state and local governments to raise taxes” and also “constrain[ed] the legislature’s flexibility by earmarking general fund revenues for narrowly specified purposes.”¹⁶⁴

In considering whether and to what extent this concern is borne out by the 2000–2014 record, it should be acknowledged

¹⁵⁷ ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 2, 145 (2015).

¹⁵⁸ *North Dakota Taking of Private Property, Measure 2 (2006)*, BALLOTPEdia, http://ballotpedia.org/North_Dakota_Taking_of_Private_Property,_Measure_2_%282006%29 [<http://perma.cc/FX2L-5TT8>].

¹⁵⁹ *Nevada Property Owner’s Bill of Rights Amendment, Question 2 (2008)*, BALLOTPEdia, http://ballotpedia.org/Nevada_Property_Owner%27s_Bill_of_Rights_Amendment,_Question_2_%282008%29 [<http://perma.cc/Y92X-8WSG>].

¹⁶⁰ *Mississippi Eminent Domain Amendment, Initiative 31 (2011)*, BALLOTPEdia, http://ballotpedia.org/Mississippi_Eminent_Domain_Amendment,_Initiative_31_%282011%29 [<http://perma.cc/4B2H-GS2U>].

¹⁶¹ SOMIN, *supra* note 157, at 157, 160.

¹⁶² *California Proposition 99, Rules Governing Eminent Domain (June 2008)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_99,_Rules_Governing_Eminent_Domain_%28June_2008%29 [<http://perma.cc/3THU-9ZLD>].

¹⁶³ Gerber, *supra* note 14, at 298.

¹⁶⁴ *Id.* at 291–92.

that objective criteria and standards are particularly lacking in this area. That is, the intended purpose of a number of constitutional provisions, whether generated by legislatures or the citizenry, is to constrain policy flexibility: to proscribe certain courses of action and prescribe others. The question, therefore, is not whether constitutional initiatives reduce policy flexibility, but—and Gerber’s framework is useful in pinpointing the concern—whether they impose undue constraints on policy-makers’ ability to respond to changing preferences and circumstances.

By this standard, several twenty-first century constitutional initiatives lend support to critics’ concerns. There are, to be sure, other citizen-initiated amendments enacted during this period that limited policy flexibility. A 2010 Oregon amendment dedicating a certain portion of lottery revenue to an environmental program¹⁶⁵ and a 2014 Florida amendment dedicating revenue from a document tax to a land acquisition trust fund both limited legislative discretion in allocating revenue.¹⁶⁶ Similarly, the four amendments enacted between 2008 and 2012 banning real-estate transfer taxes limit the potential revenue sources from which legislators could draw.¹⁶⁷ But none of these amendments have had the wide-ranging and occasionally unintended consequences of the kind seen with several other amendments that have generated varying degrees of concern.

At times, twenty-first century citizen-initiated amendments have interacted with prior citizen-initiated amendments in such a way as to generate concerns about undue constraints on policy flexibility, as with a 2000 Colorado amendment requiring school spending to increase each year by the inflation rate plus 1% for the next ten years and by the rate of inflation each year afterward.¹⁶⁸ This amendment followed the passage of Colorado’s TABOR amendment in 1992, which imposed caps on annual increases in spending and also limited the ability to raise revenue.¹⁶⁹ The overall effect of these provisions—and this resembles in some ways the effects in California of certain constitutional initiatives limiting tax rates and increases and

¹⁶⁵ *Oregon Lottery Funds for Natural Resources Amendment, Measure 76 (2010)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Lottery_Funds_for_Natural_Resources_Amendment,_Measure_76_%282010%29 [http://perma.cc/8AWR-P6P5].

¹⁶⁶ *Florida Water and Land Conservation Initiative, Amendment 1 (2014)*, BALLOTPEdia, http://ballotpedia.org/Florida_Water_and_Land_Conservation_Initiative,_Amendment_1_%282014%29 [http://perma.cc/WS9V-AEVB].

¹⁶⁷ See *supra* notes 31–34.

¹⁶⁸ *Colorado Funding for Public Schools, Initiative 23 (2000)*, *supra* note 54.

¹⁶⁹ *Colorado Taxpayer Bill of Rights, Initiative 1 (1992)*, *supra* note 36.

other constitutional initiatives requiring a certain portion of the budget to be dedicated to school spending¹⁷⁰—has been to constrain budgeting flexibility to a significant degree.¹⁷¹

Another education-related measure, a 2002 Florida amendment limiting K–12 class sizes, has generated even more concern from the standpoint of policy inflexibility. The Florida measure specifies that kindergarten through third grade classes must be capped at eighteen students, classes from fourth through eighth grade can have no more than twenty-two students, and high-school classes are limited to twenty-five students. Approved by voters by a 52–48% margin, the measure generated significant opposition in subsequent years.¹⁷² Some public officials contend that the requirement prioritizes class-size goals to the detriment of other priorities.¹⁷³ And some districts have been led to take steps that are not seen as improving educational outcomes.¹⁷⁴ In fact, when voters in 2010 considered a legislature-referred constitutional amendment to ease these constitutional limits, they supported easing the class-size limits by a 54–46% margin.¹⁷⁵ However, an intervening change in Florida’s constitution required post-2006 amendments to secure support of 60% of voters,¹⁷⁶ leading to the amendment’s defeat. These and other developments provide strong evidence that this 2002 amendment has unduly constrained policy flexibility, in a judgment shared by commentators and public officials across the political spectrum.¹⁷⁷

Two other twenty-first century constitutional initiatives—one in Florida and another in Ohio—are also widely viewed as imposing undue constraints on policy flexibility to the extent that they generated subsequent amendments bringing about their

¹⁷⁰ Dinan, *supra* note 11, at 29.

¹⁷¹ See, e.g., THERESE J. MCGUIRE & KIM S. RUEBEN, *THE COLORADO REVENUE LIMIT: THE ECONOMIC EFFECTS OF TABOR 3* (2006), <http://www.epi.org/files/page/-/old/briefingpapers/172/bp172.pdf> [<http://perma.cc/GZ82-R9ZA>] (noting that the ultimate result is “less revenue left for other categories of spending”).

¹⁷² Jeffrey S. Solocheck & Kathleen McGrory, *After a Dozen Years, Florida Class-Size Foes May Finally Prevail*, MIAMI HERALD (Apr. 6, 2015), <http://www.miamiherald.com/news/politics-government/article17583149.html> [<http://perma.cc/76EX-XXEP>]; Rhema Thompson, *Florida State Legislators Re-examine Class-Size Mandate*, WJCT (Jan. 15, 2004), <http://news.wjct.org/post/florida-state-legislators-re-examine-class-size-mandate> [<http://perma.cc/VS5M-NRUC>].

¹⁷³ Solocheck & McGrory, *supra* note 172.

¹⁷⁴ *Id.*

¹⁷⁵ *Florida Class Size, Amendment 8 (2010)*, BALLOTPEdia, http://ballotpedia.org/Florida_Class_Size_Amendment_8_%282010%29 [<http://perma.cc/PSB6-T9BH>].

¹⁷⁶ *Florida Amendment 3, Supermajority Vote Required to Approve a Constitutional Amendment (2006)*, BALLOTPEdia, http://ballotpedia.org/Florida_Amendment_3_Supermajority_Vote_Required_to_Approve_a_Constitutional_Amendment_%282006%29 [<http://perma.cc/MGK2-KTUX>].

¹⁷⁷ See Solocheck & McGrory, *supra* note 172.

repeal or modification. In 2000, Florida voters approved a citizen-initiated amendment calling for construction of a high-speed rail system to “link the five largest urban areas of the State” and proclaiming: “The Legislature, the Cabinet and the Governor are hereby directed to proceed with the development of such a system by the State and/or by a private entity . . . with construction to begin on or before November 1, 2003.”¹⁷⁸ However, after the amendment’s approval by 53% of voters, critics expressed increasing concern about the cost, which was eventually calculated as amounting to at least \$20 billion and perhaps more.¹⁷⁹ In response, Florida voters in 2004 approved, by a 64–36% margin, a citizen-initiated amendment repealing the original amendment in its entirety.¹⁸⁰

No twenty-first century constitutional initiative has generated more concern about undue constraints on policy inflexibility than a 2009 Ohio amendment authorizing construction of casinos in four cities and going so far as to designate the precise location of each casino.¹⁸¹ For instance, the amendment designated that the Columbus casino—the descriptions of the sites for several of the other casinos are even longer—would be built in the following site: “Being an approximate 18.312 acre area in the city of Columbus, Franklin County, Ohio, as identified by the Franklin County Auditor, as of 03/05/09, as tax parcel numbers 010-005518-80, 010-005518-90, 010-020215-80, 010-020215-90, 010-008443-80 and 010-008443-90.”¹⁸² As one indication of the undue constraints imposed by this constitutional initiative, shortly after it was approved by voters in November 2009, officials of Columbus and the surrounding Franklin County objected to the site of the planned Columbus casino.¹⁸³ However, because the location was now enshrined in the text of the Ohio Constitution, it could not be changed merely by passage of a legislative statute. This change would have to be achieved by passage of another constitutional amendment

¹⁷⁸ *Florida Monorail, Amendment 1 (2000)*, BALLOTPEdia, http://ballotpedia.org/Florida_Monorail,_Amendment_1_%282000%29 [<http://perma.cc/CC23-NKBF>].

¹⁷⁹ Jack Lyne, *Derailed: Florida Amendment for \$25B Bullet Train Bites Dust in Vote*, SITE SELECTION (Nov. 8, 2004), <http://www.siteselection.com/ssinsider/snapshot/sf041108.htm> [<http://perma.cc/E98S-W732>].

¹⁸⁰ *Florida High Speed Rail, Amendment 6 (2004)*, BALLOTPEdia, http://ballotpedia.org/Florida_High_Speed_Rail,_Amendment_6_%282004%29 [<http://perma.cc/9T2S-CWKY>].

¹⁸¹ *Ohio Casino Approval and Tax Distribution, Amendment 3 (2009)*, BALLOTPEdia, [http://ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution,_Amendment_3_\(2009\)](http://ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution,_Amendment_3_(2009)) [<http://perma.cc/KKY9-JD9A>].

¹⁸² OHIO CONST. art. XV, § 6.

¹⁸³ See Jim Siegel, *Ohioans Will Vote on Moving Columbus Casino*, COLUMBUS DISPATCH (Jan. 27, 2010, 3:33 PM), <http://www.dispatch.com/content/stories/local/2010/01/27/columbus-casino-issue-going-to-statewide-ballot.html> [<http://perma.cc/9KFP-4CS9>].

modifying the original amendment. To this end, the Legislature approved, and voters in a May 2010 election ratified, a legislature-referred constitutional amendment changing the site of the Columbus casino “from the area known as ‘The Arena District’ to the site of a former General Motors/Delphi Corp. manufacturing plant.”¹⁸⁴

In assessing the degree to which concerns about undue constraints on policy flexibility have ultimately been borne out, the twenty-first century record provides solid supporting evidence. To be sure, the number of constitutional initiatives generating these concerns between 2000 and 2014 is not high. Moreover, citizens and public officials have, in various ways, been able to overcome some of the constraints imposed by problematic measures by enacting subsequent citizen-initiated or legislature-referred amendments overturning or modifying the earlier amendment. However, in several instances, constraints on policy flexibility imposed via the constitutional initiative process have been significant and, at times, enduring.

D. Impairing Minority Rights

None of the claims about the consequences of the constitutional initiative process has attracted more scholarly attention than the possibility that it facilitates passage of measures impairing individual rights. For the most part, scholars analyzing this question have focused on the broad question of the consequences of measures enacted through any direct democratic devices, whether on a statutory or constitutional basis.¹⁸⁵ Janice May’s 1988 study is notable in that it focused specifically on the *constitutional* initiative.¹⁸⁶ May drew several conclusions from the 1906–1986 record. She noted that, “[i]n view of the concern over the threat to liberty posed by the constitutional initiative, the fact that the device has been used to promote rights has been overlooked,”¹⁸⁷ although on balance, “[t]here is considerable evidence that, although not numerous, more of the electorally successful constitutional initiatives have reduced rather than expanded rights.”¹⁸⁸ Having offered this overall negative

¹⁸⁴ *Ohio Columbus Casino Relocation, Amendment 2 (May 2010)*, BALLOTEDIA, http://ballotpedia.org/Ohio_Columbus_Casino_Relocation_Issue_2_%28May_2010%29 [<http://perma.cc/X7JC-CBFT>].

¹⁸⁵ For some of the leading studies, see generally LEWIS, *supra* note 14; MILLER, *supra* note 14, at 124–56; Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997).

¹⁸⁶ See generally May, *supra* note 15.

¹⁸⁷ *Id.* at 168.

¹⁸⁸ *Id.* at 169.

assessment, May nevertheless stressed that the empirical record did not offer strong support for claims about the negative consequences for rights: “The prediction that the constitutional initiative would destroy rights and liberties has not been borne out, although it is true that a few proposals were designed to reduce rights.”¹⁸⁹ Her ultimate conclusion was that the constitutional initiative process had its shortcomings, but these had to be understood in relation to the record of representative institutions.¹⁹⁰

The twenty-first century record provides little ground for modifying May’s assessment. In keeping with May’s observation about the passage of rights-protecting measures, several twenty-first century constitutional initiatives protect rights. The leading example is a 2014 Oregon amendment prohibiting unequal treatment on account of sex.¹⁹¹ One could also point to protections for property rights, including a 2000 Oregon amendment requiring a conviction before government officials can begin a civil-asset forfeiture proceeding,¹⁹² as well as eminent domain amendments protecting property rights in North Dakota in 2006, California and Nevada in 2008, and Mississippi in 2011.¹⁹³ Additionally—although this is a contested case that illustrates the challenges of categorizing measures as either rights-protecting or rights-impairing¹⁹⁴—one could point to the passage of Marsy’s Law, a 2008 California citizen-initiated measure combining constitutional and statutory changes.¹⁹⁵ On one hand, this measure extended protection for victims’ rights. On the other hand, a provision intended to help victims of crime—later invalidated by a federal district court—required longer wait times between parole hearings with the effect of limiting the rights of imprisoned persons.¹⁹⁶

As for passage of rights-impairing measures, an assessment of the 2000–2014 record would also generally follow May’s conclusion, in that voters on several occasions approved

¹⁸⁹ *Id.* at 170.

¹⁹⁰ *Id.* at 179.

¹⁹¹ *Oregon Equal Rights for Women Initiative, Measure 89 (2014)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Equal_Rights_for_Women_Initiative,_Measure_89_%282014%29 [http://perma.cc/ND5E-GPU7].

¹⁹² *Oregon Property Forfeiture Requirements, Measure 3 (2000)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Property_Forfeiture_Requirements,_Measure_3_%282000%29 [http://perma.cc/YQ2Y-TQL8].

¹⁹³ See *supra* notes 158–60, 162.

¹⁹⁴ For discussions of this challenge, see MILLER, *supra* note 14, at 124–25, 155, and May, *supra* note 15, at 168.

¹⁹⁵ *California Proposition 9, Marsy’s Law (2008)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_9,_Marsy%27s_Law_%282008%29 [http://perma.cc/88Z3-2H6W].

¹⁹⁶ See *Valdivia v. Brown*, No. CIV. S–94–671 LKK/GGH, 2012 WL 219342, at *1, *5 (E.D. Cal. Jan. 24, 2012).

citizen-initiated amendments that were opposed by racial, ethnic, or gender minorities, but these amendments generally did not differ greatly from similar measures approved by legislatures. The main evidence for claims that constitutional initiative processes are more threatening to minority groups than processes requiring legislative participation comes from passage of citizen-initiated amendments limiting affirmative action in Michigan in 2006¹⁹⁷ and Nebraska in 2008¹⁹⁸ (voters in Colorado defeated a similar measure in 2008).¹⁹⁹ Of course, reasonable persons can disagree about whether these measures might also be considered rights-protecting measures. Moreover, similarly framed measures were adopted through other processes—through legislature-referred constitutional amendments in Arizona in 2010²⁰⁰ and Oklahoma in 2012²⁰¹ and through a legislative statute passed in New Hampshire in 2011²⁰² and an executive order issued in Florida in 1999.²⁰³ Nevertheless, when considering the pre- and post-2000 period, a full half of the measures limiting affirmative action have been approved through citizen-initiated measures, whether constitutional initiatives, as in California (1996), Michigan (2006), and Nebraska (2008), or statutory initiatives, as in Washington (1998).²⁰⁴ Additionally, several of the measures enacted through means other than the initiative process, as in Florida, were proposed in reaction to groups that were seeking support for constitutional initiatives limiting affirmative action, and, therefore, could be attributed indirectly to the availability of the constitutional initiative process.²⁰⁵

Drawing lessons from the eleven citizen-initiated amendments barring recognition of same-sex marriage is more

¹⁹⁷ *Michigan Civil Rights Amendment, Proposal 2 (2006)*, BALLOTPEdia, http://ballotpedia.org/Michigan_Civil_Rights_Amendment,_Proposal_2_%282006%29 [<http://perma.cc/6LY5-B4EY>].

¹⁹⁸ *Nebraska Civil Rights, Measure 424 (2008)*, BALLOTPEdia, http://ballotpedia.org/Nebraska_Civil_Rights_Initiative,_424_%282008%29 [<http://perma.cc/H6TA-26NN>].

¹⁹⁹ *Colorado Discrimination and Preferential Treatment by Governments, Initiative 46 (2008)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Discrimination_and_Preferential_Treatment_by_Governments,_Initiative_46_%282008%29 [<http://perma.cc/GB6F-C5HM>].

²⁰⁰ *Affirmative Action: State Action*, NAT'L CONF. ST. LEGISLATURES (April 2014), <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx> [<http://perma.cc/P65V-LKVW>]. The reliance on constitutional initiative processes to adopt the California, Michigan, and Nebraska measures is noted in Dinan, *supra* note 146, at 1017. The reliance on the statutory initiative process to adopt the Washington measure is noted in *id.* at 1017 n.58.

²⁰¹ *Affirmative Action: State Action*, *supra* note 200.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* A Texas measure was passed by the legislature at the instigation of a federal court and is therefore not included in this count. *Id.*

²⁰⁵ LEWIS, *supra* note 14, at 43.

difficult. These were passed in several waves; first in response to a 1993 Hawaii Supreme Court decision signaling that the court was poised to recognize a state constitutional right to same-sex marriage and then, later, in response to a 2003 Massachusetts Supreme Court decision recognizing a state constitutional right to same-sex marriage.²⁰⁶ The first wave saw passage of a Nebraska amendment in 2000²⁰⁷ and a Nevada amendment that received its requisite second and final approval in 2002.²⁰⁸ The second wave included passage of same-sex marriage-ban citizen-initiated amendments in Arkansas,²⁰⁹ Michigan,²¹⁰ Montana,²¹¹ North Dakota,²¹² Ohio,²¹³ and Oregon²¹⁴ in 2004, Colorado in 2006,²¹⁵ and Florida²¹⁶ and California²¹⁷ in 2008. In only one case, in Arizona in 2006,²¹⁸ did voters reject a citizen-initiated same-sex marriage-ban amendment.

However, caution is in order in interpreting this evidence. In nearly all of these states, and with the notable exception of the

²⁰⁶ *Id.* at 18.

²⁰⁷ *Nebraska Marriage Definition, Measure 416 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Nebraska_Marriage_Definition_Amendment,_Initiative_416_%282000%29 [http://perma.cc/2VSS-VYVT].

²⁰⁸ *Nevada Marriage Amendment, Question 2 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Nevada_Marriage_Amendment,_Question_2_%282002%29 [http://perma.cc/8D-WK-9SBC].

²⁰⁹ *Arkansas Same-Sex Marriage Ban, Proposed Constitutional Amendment 3 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Arkansas_Same-Sex_Marriage_Ban,_Proposed_Constitutional_Amendment_3_%282004%29 [http://perma.cc/UW33-DWWL].

²¹⁰ *Michigan Marriage Amendment, Proposal 2 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_Marriage_Amendment,_Proposal_2_%282004%29 [http://perma.cc/RV-35-XQHT].

²¹¹ *Montana Definition of Marriage, CI-96 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Montana_Definition_of_Marriage,_CI-96_%282004%29 [http://perma.cc/2LYQ-MJAG].

²¹² *North Dakota Definition of Marriage, Constitutional Measure 1 (2004)*, BALLOTPEDIA, http://ballotpedia.org/North_Dakota_Definition_of_Marriage,_Constitutional_Measure_1_%282004%29 [http://perma.cc/2WJ9-C3M6].

²¹³ *Ohio Definition of Marriage, Amendment 1 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Ohio_Issue_1,_the_Marriage_Amendment_%282004%29 [http://perma.cc/FEL7-HZMT].

²¹⁴ *Oregon Marriage Measure 36 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Marriage_Measure_36_%282004%29 [http://perma.cc/5WBZ-NY7Z].

²¹⁵ *Colorado Definition of Marriage, Initiative 43 (2006)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Definition_of_Marriage,_Initiative_43_%282006%29 [http://perma.cc/ZKE7-ZNQ6].

²¹⁶ *Florida Definition of Marriage, Amendment 2 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Definition_of_Marriage,_Amendment_2_%282008%29 [http://perma.cc/ZD2K-K2ZW].

²¹⁷ *California Proposition 8, the "Eliminates Right of Same-Sex Couples to Marry" Initiative (2008)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_8,_the_%22Eliminates_Right_of_Same-Sex_Couples_to_Marry%22_Initiative_%282008%29 [http://perma.cc/U9D3-U73S].

²¹⁸ *Arizona Protect Marriage, Proposition 107 (2006)*, BALLOTPEDIA, http://ballotpedia.org/Arizona_Protect_Marriage,_Proposition_107_%282006%29 [http://perma.cc/BZY6-YSAU].

2008 California amendment that overturned a state supreme court decision legalizing same-sex marriage, the constitutional initiatives barring recognition of same-sex marriage were confirming policies already in place, many of which were enacted via legislative statute.²¹⁹ Additionally, and focusing on the total universe of thirty same-sex marriage-ban constitutional amendments, although eleven were generated via the initiative process, the others were enacted via legislature-referred amendments.²²⁰ Moreover, there is little indication that legislatures were more reluctant than citizens to support same-sex marriage-ban amendments²²¹ or that amendments enacted via legislature-referred processes were less restrictive than amendments enacted via constitutional initiative processes.²²²

In summary, the conclusions to be drawn from the twenty-first century record regarding constitutional initiatives and rights parallel May's assessment of the 1906–1986 era. Constitutional initiative processes were occasionally used to

²¹⁹ See LEWIS, *supra* note 14, at 20–21.

²²⁰ A total of thirty constitutional amendments were enacted between 1998 and 2012 that prohibited the state legislature from recognizing same-sex marriage. In addition, a 1998 Hawaii constitutional amendment reserved the definition of same-sex marriage to the Legislature and thereby prohibited the state supreme court from legalizing same-sex marriage. The states adopting same-sex marriage-ban amendments and the dates of enactment are listed in *States with Constitutional Amendments Banning Gay Marriage*, PROCON.ORG, <http://gaymarriage.procon.org/view.resource.php?resourceID=003979> [<http://perma.cc/BGL5-JASK>] (last updated May 10, 2012).

²²¹ When one takes into account a number of factors, it appears from an empirical analysis that states with direct democracy were more likely than other states to approve same-sex marriage bans. But in this case, it would be important to distinguish between states with constitutional initiative processes and states that only provide for statutory initiative processes, given that the key concern was with enacting *constitutional* provisions designed to prevent state courts from issuing decisions requiring legalization of same-sex marriage. LEWIS, *supra* note 14, at 20, 33–34.

²²² Of the thirty same-sex marriage-ban amendments, twenty were seen as comparatively more restrictive, in that they limited recognition of both same-sex marriage and civil unions, and in some cases domestic partnerships (Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin), whereas ten were seen as comparatively less restrictive in that they only barred recognition of same-sex marriage (Alaska, Arizona, California, Colorado, Mississippi, Missouri, Montana, Nevada, Oregon, and Tennessee). For this categorization and a list of states in each category, see Daniel R. Pinello, *The Difference Between Super-DOMAs and Mini-DOMAs*, DANPINELLO.COM, <http://www.danpinello.com/SuperDOMAs.htm> [<http://perma.cc/AZ7S-56GA>]. There is little indication that amendments passed through the constitutional-initiative process were more restrictive than amendments referred to voters by the legislature. Five of the ten *less* restrictive amendments were passed through the constitutional initiative process (California, Colorado, Montana, Nevada, and Oregon), whereas the other five were referred to voters by the legislature. Meanwhile, six of the twenty *more* restrictive amendments (Nebraska, Arkansas, Michigan, North Dakota, Ohio, and Florida) were passed through the constitutional initiative process, whereas the other fourteen were referred to voters by the legislature. See *supra* notes 200–18 and accompanying text.

protect rights. They were used more frequently to pass measures that could be seen as impairing rights, even allowing for disagreement about what counts as a rights-impairing measure. However, when comparing constitutional initiative processes with processes requiring legislative participation, constitutional initiative processes were generally no more likely to be a vehicle for approving measures opposed by minority groups, with the exception of affirmative-action limits.

III. OPTIONS FOR DESIGNING CONSTITUTIONAL INITIATIVE PROCESSES

An analysis of twenty-first century constitutional initiative use might be helpful not only for scholars interested in whether the empirical record supports various claims in the literature, but also for citizens and public officials concerned with designing constitutional initiative processes to harness their benefits and minimize their harms. Citizens and officials in the thirty-two states not currently providing for the constitutional initiative might benefit from considering various options when establishing such a process. Likewise with residents of the eighteen constitutional-initiative states—which vary significantly in the rules for qualifying measures for the ballot, approving them, and specifying the topics they can address. My purpose in this final section is identifying the main options to be considered in designing a constitutional initiative process and assessing which decisions might secure the main benefits (primarily overcoming self-interested legislators and secondarily bypassing unresponsive legislatures) while also minimizing the main harms (primarily constraining policy flexibility and secondarily impairing minority rights).

Students of the constitutional initiative process, and direct democratic institutions more broadly, have given some attention to reforms that might contribute to more effective governance.²²³ Marvin Krislov and Daniel M. Katz, in a 2008 article, “Taking State Constitutions Seriously,” analyzed a number of reform options, such as increasing signature requirements for qualifying constitutional initiatives, adopting an indirect constitutional initiative process, requiring a supermajority popular vote to approve constitutional initiatives, or requiring popular approval

²²³ See generally GERBER, *supra* note 14; COLO. CONSTITUTION PANEL, UNIV. OF DENVER, FOUNDATION OF A GREAT STATE: THE FUTURE OF COLORADO'S CONSTITUTION (2007), http://www.du.edu/issues/media/documents/Constitution_Report.pdf [<http://perma.cc/83WY-DQ77>]; NCSL I&R TASK FORCE, NAT'L CONF. ST. LEGISLATURES, INITIATIVE AND REFERENDUM IN THE TWENTY-FIRST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE (2002), http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/IandR_report.pdf [<http://perma.cc/XP5F-W53B>].

in consecutive elections.²²⁴ Their concerns were primarily with improving “the information environment so that voters can obtain the proximate data necessary to ensure they vote consistent with their individual interests”²²⁵ and also better distinguishing “between the methods for modifying mere statutory law and methods for modifying a state’s constitution.”²²⁶

The concerns guiding my analysis in this Article overlap to some degree with the concerns of other scholars, especially the concern about not entrenching matters in constitutions that are more properly placed in statutes, but are also somewhat different. In particular, I am concerned with determining how constitutional initiative processes can be designed to maximize their benefits, while at the same time minimizing harms associated with their use. As the previous section demonstrated, based on a review of the twenty-first century record, constitutional initiative processes have been beneficial primarily insofar as they have secured passage of governmental reforms resisted by legislators and, secondarily, to the extent that they have facilitated enactment of policies blocked by unresponsive legislatures. Meanwhile, the record of constitutional initiatives enacted in the twenty-first century indicates that the chief concern is passage of measures imposing undue constraints on policy flexibility, and a secondary concern is the passage of measures impairing minority rights. The question is how to design a process that maximizes these particular benefits while minimizing these specific harms.

To preview my conclusions, I argue that several proposals, such as making it more difficult to qualify measures for the ballot or secure voter approval, are unlikely to achieve the desired goals of securing the benefits and reducing the harms of the process. However, other options—such as permitting legislatures to craft alternatives to citizen-initiated amendments as part of an indirect constitutional initiative process, requiring voter approval of constitutional initiatives in consecutive elections, limiting the subject-matter of constitutional initiatives, and protecting statutory initiatives—are well tailored to preserving the main benefits of the process while reducing the principal harms.

²²⁴ Krislov & Katz, *supra* note 15.

²²⁵ *Id.* at 329–38.

²²⁶ *Id.* at 336.

A. Increasing Signature Requirements for Proposing Constitutional Initiatives

One option available to public officials in designing constitutional initiative processes is making it more difficult to place measures on the ballot, by increasing the signature requirements. The eighteen states vary widely in the signature requirements they impose, thereby leading some commentators to urge states with lower requirements to increase them as a way of limiting harmful effects of these processes.²²⁷

Comparing state signature requirements is difficult, because of the wide range of ways that states calculate the signatures needed to qualify amendments for the ballot. Most states require signatures equal to a certain percentage of votes cast for governor in the last election.²²⁸ But some states base this percentage on the number of votes cast for some other office. Still other states require signature-gatherers to obtain support from a percentage of the state population or of registered voters. Nevertheless, and despite the difficulty in making comparisons, it is possible to distinguish between certain states that set low barriers and others that establish high barriers. Massachusetts (3% of votes for Governor) and Colorado (5% of votes for Secretary of State) are among the most accessible. At the other end of the spectrum are Arizona and Oklahoma, both of which require signatures equal to 15% of votes for governor. Nearly half of the states go further and mandate that signature-gatherers must satisfy a geographic-distribution requirement. These range from rules that no more than a certain percentage of the signatures can come from a single county (as in Massachusetts) or congressional district (as in Mississippi) to rules requiring a certain percentage of signatures to be collected in each of one-half of the counties (as in Ohio) or in each of one-half of the congressional districts (as in Florida).²²⁹

Although increasing the signature requirement and tightening geographic-distribution rules are prominent reform proposals,²³⁰ upon consideration, it is not clear that they would

²²⁷ *Id.* at 315, 336.

²²⁸ For a list of the signature requirements set out in this paragraph, see Dinan, *State Constitutional Developments in 2013*, *supra* note 21, at 14 tbl.1.3.

²²⁹ *Id.* It should be noted that several court rulings have invalidated geographic-distribution requirements. See NOYES, *supra* note 2, at 256 tbl.6.6.

²³⁰ Voters in Oregon in 2000 rejected an amendment increasing the signature requirement. *Oregon Increased Signature Requirements for Constitutional Initiative, Measure 79 (May 2000)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Increased_Signature_Requirements_for_Constitutional_Initiative,_Measure_79_%28May_2000%29 [<http://perma.cc/Z9LH-RW85>]. Voters in Colorado in 2008 defeated an amendment increasing the signature requirement and imposing a geographic-distribution

harness the benefits and minimize the harms of the process. Higher signature requirements are just as likely to reduce the ability to enact measures overcoming resistant or unresponsive legislatures as to reduce the likelihood of passing measures constraining policy flexibility or restricting rights. There is no apparent reason why erecting higher barriers to placing measures on the ballot would keep out the harmful measures more so than the beneficial measures.

Additionally, to the extent that the consequences of higher signature requirements are likely to cut in favor of certain measures and against others, this is likely to be in the direction of making it tougher to pass beneficial measures that overcome influential and well-organized groups. This has been the judgment reached by several groups and commissions who have studied the constitutional initiative process. For instance, a 2007 Colorado Constitution Panel noted in its final report that panelists considered increasing the signature requirement (and increasing the voter ratification requirement), but ultimately rejected this option, because it was

not likely to reduce the number of petitions from large, well-funded special interests. What raising these thresholds is likely to do, however, will be to make it more difficult for Colorado-based grassroots organizations to get their issues on the ballot. These groups, typically less well funded than large national organizations, would likely be the ones disadvantaged by changing signature and election requirements.²³¹

B. Increasing Thresholds for Ratifying Constitutional Initiatives

Proposals to increase the threshold for voter ratification of constitutional initiatives have been advanced with nearly the same regularity as proposals to increase signature requirements for placing them on the ballot.²³² Although there is not a great

requirement. *Colorado Citizen-Initiated State Laws, Referendum O (2008)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Citizen-Initiated_State_Laws,_Referendum_O_%282008%29 [<http://perma.cc/U3GD-978R>].

²³¹ COLO. CONSTITUTION PANEL, *supra* note 223, at 11–12.

²³² In recent decades, measures have occasionally been placed on the ballot to raise the threshold for ratifying amendments. At times, they have sought to impose supermajority requirements on voter passage of all amendments, as with a failed measure in Colorado in 1996. *Colorado Amendment Approval, Referendum A (1996)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Amendment_Approval,_Referendum_A_%281996%29 [<http://perma.cc/3LDE-MQHW>]. Such a measure was successfully passed in Florida in 2006. *Florida Amendment 3, Supermajority Vote Required to Approve a Constitutional Amendment (2006)*, BALLOTPEdia, http://ballotpedia.org/Florida_Amendment_3,_Supermajority_Vote_Required_to_Approve_a_Constitutional_Amendment_%282006%29 [<http://perma.cc/692F-SX3W>]. Other proposals would have imposed a supermajority requirement on initiated amendments only. See *Initiative and Referendum in the 21st Century*, NAT'L CONF. ST. LEGISLATURES 61, www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/landR_

deal of variation among constitutional-initiative states in their voter-ratification thresholds, the differences have given rise to discussion about the effects of adopting higher thresholds.²³³

Most of the eighteen constitutional-initiative states permit approval by a majority of voters, but several set higher thresholds.²³⁴ In a rule that rarely makes a practical difference, several states require the majority of voters approving a constitutional initiative to exceed a certain percentage of voters participating in the entire election: 35% in Nebraska (a rule that also applies to legislature-referred amendments), 30% in Massachusetts and 40% in Mississippi. Illinois stipulates that constitutional amendments (citizen-initiated as well as legislature-referred) must be ratified by either a majority of voters participating in the entire election or three-fifths of voters casting ballots on the question. Florida sets the highest threshold.²³⁵ Since 1996, Florida has required two-thirds of voters participating in the election to approve all amendments imposing new taxes or fees.²³⁶ Additionally, after 2006, Florida has required other amendments to be approved by three-fifths of voters.²³⁷

In assessing the consequences of these different rules, it is worth focusing on Florida and comparing the proposal and enactment rate of constitutional initiatives before and after the post-2006 change (for non-tax increases) from a majority to a three-fifths supermajority rule. In the four even-year elections in the twenty-first century prior to this change taking effect (2000, 2002, 2004, and 2006), thirteen constitutional initiatives qualified for the ballot and voters ratified all of them.²³⁸

report.pdf [<http://perma.cc/SE7T-QP23>].

²³³ See Krislov & Katz, *supra* note 15, at 338.

²³⁴ For a list of the approval requirements, see Dinan, *State Constitutional Developments in 2013*, *supra* note 21, at 14 tbl.1.3. One might also take note of another requirement along these lines. Oregon requires that initiatives that establish a supermajority requirement for approving future acts must themselves be approved by an equivalent supermajority of voters. *Id.*

²³⁵ The voter-approval requirements for citizen-initiated amendments in these states are found in *id.* For comparison, the voter-approval requirements for legislature-referred amendments in each of these states are found in *id.* at 12–13 tbl.1.2. The voter-approval requirement for Nebraska legislature-referred amendments is found in *id.* at 13 tbl.1.2(f). The voter-approval requirement for Illinois legislature-referred amendments is found in *id.* at 13 tbl.1.2(g).

²³⁶ *Florida Tax Limitation, Amendment 1 (1996)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Tax_Limitation_Amendment_1_%281996%29 [<http://perma.cc/4V62-UH9M>].

²³⁷ *Florida Amendment 3, Supermajority Vote Required to Approve a Constitutional Amendment (2006)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Amendment_3,_Supermajority_Vote_Required_to_Approve_a_Constitutional_Amendment_%282006%29 [<http://perma.cc/G98Z-VHJ8>].

²³⁸ The specific totals for each election are as follows. In 2000, voters approved the one constitutional initiative on the ballot. May, *State Constitutions and Constitutional*

However, in the four even-year elections held after this change (2008, 2010, 2012, and 2014), six constitutional initiatives qualified for the ballot and only four of them were approved.²³⁹ It is reasonable to conclude that increasing the ratification requirement prevented some individuals and groups from proposing amendments they would otherwise have worked to place on the ballot; moreover, the higher ratification threshold definitely led to the defeat of one amendment, a 2014 medical-marijuana legalization measure that attracted the support of more than 57% of voters but fell short of the 60% threshold.²⁴⁰

There is little reason to conclude, however, that increasing voter ratification requirements in this or other ways would, in particular, increase the prospects of passing beneficial measures or reduce the prospects of passing harmful measures. By definition, the effect of increasing the ratification requirement would be to reduce the likelihood of enacting measures enjoying the support of a majority of voters, but less than a supermajority. But measures defeated with this level of support (a majority but not a supermajority) are as likely to be beneficial measures that overcome resistant or unresponsive legislatures as harmful measures that limit policy flexibility or impair rights. In short, if the goal is to reduce the passage rate of all measures, this option is likely to be effective; but in so far as the goal is to design the process to harness the benefits and minimize the harms, this strategy is not well-tailored to this end.

C. Requiring Constitutional Initiatives to Be Approved by Voters in Consecutive Elections

Another option adopted by one state, Nevada, and endorsed by some commentators, is to require voters to approve

Revision 2000-2001, *supra* note 21, at 22 tbl.1.6. In 2002, voters approved all five constitutional initiatives on the ballot. May, *Trends in State Constitutional Amendment and Revision*, *supra* note 21, at 18 tbl.1.6. In 2004, voters approved all six constitutional initiatives on the ballot. May, *State Constitutional Developments in 2004*, *supra* note 21, at 18 tbl.1.6. In 2006, voters approved the one constitutional initiative on the ballot. Dinan, *State Constitutional Developments in 2006*, *supra* note 21, at 16 tbl.1.5.

²³⁹ The specific totals for each election are as follows. In 2008, voters approved the one constitutional initiative on the ballot. Dinan, *State Constitutional Developments in 2008*, *supra* note 21, at 7 tbl.C. In 2010, voters approved two of the three constitutional initiatives on the ballot. Dinan, *State Constitutional Developments in 2010*, *supra* note 21, at 7 tbl.C. In 2012, no constitutional initiatives qualified for the ballot. Dinan, *State Constitutional Developments in 2012*, *supra* note 21, at 6 tbl.C. In 2014, voters approved one of two constitutional initiatives on the ballot. Dinan, *State Constitutional Developments in 2014*, *supra* note 21, at 6 tbl.C.

²⁴⁰ *Florida Right to Medical Marijuana Initiative, Amendment 2 (2014)*, BALLOTPEdia, http://ballotpedia.org/Florida_Right_to_Medical_Marijuana_Initiative,_Amendment_2_%282014%29 [http://perma.cc/D5TH-T7U2].

constitutional initiatives in two separate elections.²⁴¹ Nevada is the one state to require amendments of any sort to be approved by a majority of voters on two separate occasions.²⁴² This requirement, dating from 1962, applies only to citizen-initiated amendments.²⁴³ Legislature-referred amendments are approved in a single election.

Based on the twenty-first century record, it is not evident that this requirement has had a meaningful effect. Of the nine citizen-initiated amendments appearing on the Nevada ballot from 2000–2014, five were approved in consecutive elections and took effect; the other four were defeated in the initial vote, with no need for a second vote.²⁴⁴ That is, no measures during this period (as distinct from the pre-2000 period when this occurred on several occasions)²⁴⁵ secured majority support in the first election, only to be defeated in the second election.

Although the double-passage rule has not had an apparent effect in Nevada in the twenty-first century, this rule might, nevertheless, be considered well-tailored, in certain situations, to preserving the benefits of the constitutional initiative process while minimizing some potential harms. It is unlikely that this requirement would reduce the prospects of passing reforms blocked by resistant or unresponsive legislatures but backed by a popular majority capable of sustaining such support through multiple ballot campaigns. Therefore, adding such a requirement

²⁴¹ Krislov & Katz, *supra* note 15, at 338.

²⁴² Dinan, *State Constitutional Developments in 2013*, *supra* note 21, at 14 tbl.1.3. Recent efforts have occasionally been made to impose double-passage rules for all constitutional amendments, whether legislature-referred or citizen-initiated, as in Nebraska in 2000, where voters rejected such a change. *Nebraska Two Votes to Amend Constitution, Amendment 3A (2000)*, BALLOTPEdia, http://ballotpedia.org/Nebraska_Two_Votes_to_Amend_Constitution_Amendment_3A_%282000%29 [<http://perma.cc/KJ4H-NL9S>].

²⁴³ MICHAEL W. BOWERS, *THE NEVADA STATE CONSTITUTION* 180 (2d ed. 2014).

²⁴⁴ Regarding the five times that constitutional initiatives were approved in consecutive elections during this 2000–2014 period, Nevada voters gave their second required approval to one constitutional initiative in 2000, one constitutional initiative in 2002, two constitutional initiatives in 2006, and one constitutional initiative in 2008. As for the four times during this 2000–2014 period that constitutional initiatives were rejected during the initial presentation—eliminating the need for a second election—Nevada voters rejected one amendment in 2002 on its initial presentation and three amendments in 2004 on their first presentation. See May, *State Constitutions and Constitutional Revision 2000-2001*, *supra* note 21, at 22 tbl.1.6; May, *Trends in State Constitutional Amendment and Revision*, *supra* note 21, at 18 tbl.1.6; May, *State Constitutional Developments in 2004*, *supra* note 21, at 18 tbl.1.6; Dinan, *State Constitutional Developments in 2006*, *supra* note 21, at 16 tbl.1.5; Dinan, *State Constitutional Developments in 2008*, *supra* note 21, at 7 tbl.C.

²⁴⁵ This occurred on three occasions—in 1980, when a limit on property taxes was defeated in the second vote; in 1982, when a ban on taxing food was defeated in the second vote; and in 1996, in an unusual situation, in that a measure limiting the terms of judges and other state officials had passed in the first vote but when a court ordered the measures to be split into separate measures voters defeated term limits for judges and approved term limits for other officials. NCSL I&R TASK FORCE, *supra* note 223, at 60.

would still allow beneficial measures to pass. On the other hand, requiring voter approval on separate occasions with a two-year intervening period could well reduce the likelihood of passing measures violating minority rights. That is, to the extent that rights-violating measures might be a product of temporary passion rather than reasoned judgment, the double-passage requirement could help distinguish between measures that are supported by an ephemeral majority rather than an enduring majority. Measures of the latter kind would withstand the double-passage requirement; the former measures might survive the initial election only to fail in the next election as popular support dissipates.

D. Providing for the Indirect Constitutional Initiative

Another option, in effect in two states and occasionally recommended for consideration by other states,²⁴⁶ is to provide for an indirect, rather than a direct, constitutional initiative process. In sixteen constitutional-initiative states, the legislature does not play a role in approving or amending citizen-initiated amendments before they are placed on the ballot.²⁴⁷ However, Massachusetts and Mississippi provide that citizen-initiated amendments receiving the requisite number of signatures must first be submitted to the legislature, which has several options for responding, depending on the state.²⁴⁸

In Massachusetts, which adopted the constitutional initiative process in 1918, the Legislature can prevent a citizen-initiated amendment from appearing on the ballot, or craft a substitute amendment to be placed on the ballot alongside the original measure, or amend the original measure before it appears on the ballot.²⁴⁹ In particular, citizen-initiated amendments must secure the approval of one-fourth of the members of a joint meeting of both houses of the Legislature and in two consecutive legislative sessions.²⁵⁰ The Massachusetts Legislature exercised this power to block voter consideration of citizen-initiated amendments on one notable occasion in the twenty-first century. In response to the Massachusetts Supreme Court's 2003 same-sex marriage legalization ruling, opponents secured the requisite signatures in 2005 for a citizen-initiated amendment limiting marriage to opposite-sex couples.²⁵¹ The

²⁴⁶ *Id.* at 7–8.

²⁴⁷ Dinan, *State Constitutional Developments in 2013*, *supra* note 21, at 14 tbl.1.3.

²⁴⁸ *Id.*

²⁴⁹ MASS. CONST. art. XLVIII.

²⁵⁰ *Id.* art. XLVIII, pt. IV, § 4.

²⁵¹ Dinan, *State Constitutional Developments in 2007*, *supra* note 21, at 4–5.

Legislature eventually gave the requisite first approval to this amendment, by a 62–132 vote, on the last day of the legislative session, January 2, 2007.²⁵² However, when the amendment was taken up in the next session, on June 14, 2007, it failed to secure the requisite one-fourth of the votes, failing on a 45–151 vote.²⁵³ The Legislature has two other options for responding to citizen-initiated amendments aside from blocking them. It can, by a majority vote, approve a substitute amendment that appears on the ballot alongside the initiated amendment.²⁵⁴ It can also, by a three-fourths vote, amend the original amendment and place this on the ballot instead of the initiated amendment.²⁵⁵ The Legislature has rarely exercised these options, whether in the twenty-first century or in prior years.²⁵⁶

The Mississippi Legislature is not empowered to block citizen-initiated amendments; but it can, by majority vote, craft an amended or alternative amendment to be submitted to voters alongside of the original measure.²⁵⁷ Mississippi has not had extensive experience with the constitutional initiative process (originally adopted in the early 1900s, then invalidated by the state supreme court in 1922, but reestablished in 1992) and the Legislature did not, prior to 2014, exercise its option to craft alternative amendments.²⁵⁸ All three citizen-initiated amendments securing the requisite number of signatures between 2000 and 2014 appeared on the Mississippi ballot unaccompanied by legislative alternatives. However, in 2015 the Mississippi Legislature, for the first, time approved an alternative amendment for submission to voters, in response to a citizen-initiated amendment that would revise the state's education clause to guarantee a fundamental right to educational opportunities to be enforced by the state chancery courts.²⁵⁹ The alternative legislature-crafted amendment would make more modest revisions to the education clause and would not include fundamental-right or judicial-enforcement language.²⁶⁰ When presented with a citizen-initiated amendment and a

²⁵² *Id.* at 5.

²⁵³ *Id.*

²⁵⁴ MASS. CONST. art. XLVIII, pt. III, § 2.

²⁵⁵ *Id.* art. XLVIII, pt. IV, § 3.

²⁵⁶ Memorandum from Steven H. Steinglass, Senior Policy Advisor, Ohio Constitution Modernization Comm'n, on Indirect Constitutional Initiative to Members of the Constitutional Revision Comm. 3 (Dec. 10, 2013), <http://www.ocmc.ohio.gov/ocmc//uploads/Constitutional%20Revision%20and%20Updating%20Committee/2014-10-09%20%20CRU%20Meeting%20Materials.pdf> [<http://perma.cc/LDG3-RVUD>].

²⁵⁷ MISS. CONST. art. 15, § 273(6)–(7).

²⁵⁸ Steinglass, *supra* note 256, at 1, 3; *see also* Dinan, *State Constitutional Developments in 2014*, *supra* note 21, at 6–7.

²⁵⁹ Dinan, *State Constitutional Developments in 2014*, *supra* note 21, at 6–7.

²⁶⁰ *Id.*

legislature-approved alternative, Mississippi voters are asked whether they want to make any change to the current constitutional language and, if so, which of the two proposals they prefer.²⁶¹

In view of the infrequent use of indirect constitutional initiative processes in the twenty-first century, any assessment of the consequences has to be based less on the empirical record than on tendencies of legislative behavior.²⁶² Such an analysis would likely lead to a mixed assessment in terms of whether the indirect constitutional initiative would preserve the benefits of the process while reducing the harms. On one hand, and focusing first on the Massachusetts approach, permitting the legislature to block initiated amendments would be potentially meritorious in preventing passage of harmful measures that violate minority rights, given the capability of representative institutions to gain distance from popular passions. On the other hand, the Massachusetts approach might be just as likely to sacrifice some potential benefits of the constitutional initiative, by enabling the legislature to block amendments designed to overcome legislators' self-interest. As for the Mississippi approach and the ability of legislatures to craft alternative amendments, this would not seem to put at risk any of the potential benefits of the constitutional initiative, in the sense of overcoming resistant or unresponsive legislatures, and it might, under some circumstances, minimize the potential harms, in the sense of allowing legislators to craft alternative measures imposing fewer constraints on policy flexibility.

E. Limiting the Subject Matter of Constitutional Initiatives

Of all the options for designing constitutional initiative processes to secure the benefits and reduce the harms, none is perhaps better tailored to this goal than specifying the subjects that can be addressed through these processes. This approach, which has been encouraged by some commentators,²⁶³ has been followed by several constitutional-initiative states,²⁶⁴ whether in the form of provisions specifying permissible topics or prohibitions on other topics.²⁶⁵

²⁶¹ See MISS. CONST. art. 15, § 273(8).

²⁶² There is much more experience with indirect *statutory* initiative processes, available in seven states. For a list of states, see NCSL I&R TASK FORCE, *supra* note 223, at 8 tbl.1.

²⁶³ See generally GERALD BENJAMIN, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177 (G. Alan Tarr & Robert F. Williams eds., 2006).

²⁶⁴ See *id.* at 189.

²⁶⁵ MATSUSAKA, *supra* note 14, at 153–55 tbl.A1.2.

Illinois follows the first approach, in specifying that citizen-initiated amendments “shall be limited to structural and procedural subjects contained in Article IV,” the legislative article of the state constitution.²⁶⁶ The logic of confining constitutional initiatives in this fashion is apparent. As Gerald Benjamin has written, “this is the area of the constitution in which the legislature is likely to be most self-interested, and therefore least likely to initiate change.”²⁶⁷

Other states have pursued the second type of approach and marked certain subjects as off limits for constitutional initiatives.²⁶⁸ In part out of a concern that the process could be used to impose undue constraints on budget policy, two states prevent initiatives that require specific appropriations of funds.²⁶⁹ Massachusetts prohibits initiatives making “a specific appropriation of money from the treasury of the commonwealth.”²⁷⁰ Missouri does not allow the initiative process to “be used for the appropriation of money other than of new revenues created and provided for thereby.”²⁷¹ Meanwhile, after passage of a 2004 amendment,²⁷² Arizona initiatives providing for appropriation of money for any purpose must “provide for an increased source of revenues sufficient to cover the immediate and future costs of the proposal.”²⁷³

Out of a concern that initiatives could violate individual rights, two states prevent initiatives dealing with bills of rights in general or certain rights in particular. Among other limitations, Mississippi disallows use of the initiative process “[f]or the proposal, modification, or repeal of any portion of the Bill of Rights” of its constitution.²⁷⁴ Massachusetts lists a number of items off limits for initiatives, including proposals

inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights . . . [t]he right to receive compensation for private property appropriated to public use;

²⁶⁶ ILL. CONST. art. XIV, § 3.

²⁶⁷ BENJAMIN, *supra* note 263, at 186.

²⁶⁸ *Id.* at 189–90.

²⁶⁹ North Dakota voters in 2014 rejected a legislature-referred amendment that would have prohibited initiated amendments making an appropriation of funds or requiring the legislature to make such an appropriation. *North Dakota Referral and Initiative Reform Amendment, Measure 4 (2014)*, BALLOTPEdia, http://ballotpedia.org/North_Dakota_Referral_and_Initiative_Reform_Amendment,_Measure_4_%282014%29 [<http://perma.cc/2VPD-QVFU>].

²⁷⁰ MASS. CONST. art. XLVIII, § 2.

²⁷¹ MO. CONST. art. III, § 51.

²⁷² *Arizona Initiative and Referendum Measures, Proposition 101 (2004)*, BALLOTPEdia, http://ballotpedia.org/Arizona_Initiative_and_Referendum_Measures,_Proposition_101_%282004%29 [<http://perma.cc/3M2Z-VC8K>].

²⁷³ ARIZ. CONST. art. IX, § 23.

²⁷⁴ MISS. CONST. art. XV, § 273(5)(a).

the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.²⁷⁵

Massachusetts also bars use of the initiative process for any “measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts.”²⁷⁶

The advantage of specifying permissible and impermissible subjects is that this allows designers of constitutional initiative processes to tailor them so they can secure the main benefits and minimize the harms associated with their use. To the extent that the primary benefit of constitutional initiatives is overcoming self-interested legislators, the process can be designed to allow citizen-initiated amendments on these matters. In so far as the primary concern associated with constitutional initiatives is that they impose undue constraints on policy flexibility, and fiscal policy in particular, the process can be structured to bar measures of this sort. If a secondary concern about constitutional initiatives is that they are used to violate individual rights, this can be addressed by prohibiting measures dealing with this topic.

F. Encouraging Use of Statutory Initiative Processes

Although the preceding reform options all deal with the design of constitutional initiative processes, scholars and public officials are aware that the design of *statutory* initiative processes has implications for constitutional initiative usage. In particular, some scholars and commentators have argued that groups advocating policy changes will sometimes face a choice between proceeding through the statutory initiative process or through the constitutional initiative process. In a number of instances, this choice will not present itself. Changes in government structure, for example, will often require passage of a constitutional amendment. But in other cases, advocates of policy changes will face such a choice of whether to frame their proposal on statutory or constitutional grounds and are likely to be influenced by the availability of a statutory initiative process, the relative ease of proceeding through the statutory or constitutional initiative process, and the degree to which initiated statutes are protected from legislative interference

²⁷⁵ MASS. CONST. art. XLVIII, § 2.

²⁷⁶ *Id.* art. XLVIII, § 1.

post-enactment. On the view that advocates might in some cases choose to propose statutory initiatives when such a process is available,²⁷⁷ and more accessible than the constitutional initiative process,²⁷⁸ and there is some assurance that initiated states are protected from legislative interference,²⁷⁹ analysts have recommended that states with the constitutional initiative process consider various design options regarding the *statutory* initiative process.²⁸⁰

In considering the current relationship between constitutional and statutory initiative processes, it should first be noted that all but three states providing for a constitutional initiative process also allow statutory initiatives. Florida (1968), Illinois (1970), and Mississippi (1992) adopted the constitutional initiative process long after most other constitutional-initiative states did so in the Progressive Era,²⁸¹ and without also adopting the statutory initiative process.

In the fifteen states providing for both processes, all but one state makes it easier to enact statutory initiatives than constitutional initiatives. This distinction is generally achieved in the ballot qualification stage, by requiring more signatures for initiated amendments than for initiated statutes.²⁸² Nevada, one of only two states maintaining the same signature-gathering requirements, achieves this distinction at the ratification stage, by requiring constitutional initiatives, but not statutory initiatives, to secure voter approval in consecutive elections.²⁸³ Colorado is the only state that does not make a distinction between initiated amendments and initiated statutes in ballot-qualification or voter-ratification rules.²⁸⁴

As for the rules regarding post-enactment modification of initiated statutes in the fifteen states with constitutional and statutory initiative processes, seven states provide some level of protection against legislative amendment or repeal.²⁸⁵ This is

²⁷⁷ See NCSL I&R TASK FORCE, *supra* note 223, at 10 (advancing this recommendation).

²⁷⁸ See Krislov & Katz, *supra* note 15, at 337 (advancing this recommendation).

²⁷⁹ COLO. CONSTITUTION PANEL, *supra* note 216, at 11.

²⁸⁰ See NCSL I&R TASK FORCE, *supra* note 223, at 10–11.

²⁸¹ Montana and South Dakota are the only other two states to adopt the constitutional initiative process after the Progressive Era. Both states initially provided only for statutory initiatives and then added the constitutional initiative process in 1972. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 313 n.132 (2006); MATSUSAKA, *supra* note 14, at 149–52 tbl.A1.1.

²⁸² See MATSUSAKA, *supra* note 14, at 149–52 tbl.A1.1.

²⁸³ *Id.* at 151 tbl.A1.1.

²⁸⁴ *Id.* at 149. Colorado voters in 2008 rejected a legislature-referred amendment that would, among other things, have introduced such a distinction. *Colorado Citizen-Initiated State Laws, Referendum O (2008)*, *supra* note 230.

²⁸⁵ NOYES, *supra* note 2, at 337 tbl.8.3.

generally achieved by requiring any efforts by the legislature to amend or repeal an initiated statute to secure a legislative supermajority vote, whether a two-thirds vote, as in Arkansas, Nebraska, and North Dakota (during the first seven years post-enactment), or a three-fourths vote, as in Michigan or Arizona.²⁸⁶ Some of these states go even further. Arizona does not allow the Legislature to repeal initiated statutes; it may only amend them in keeping with the purpose of the statute. Nevada does not allow legislative repeal or amendment for three years after enactment. California imposes a permanent bar against the Legislature repealing or amending an initiated statute unless expressly permitted by the ballot initiative.²⁸⁷ These various protections for statutory initiatives were in some cases adopted in recent decades. For instance, some of the heightened protections for Arizona statutory initiatives were adopted via a 1998 constitutional initiative.²⁸⁸ And the Nebraska rule was adopted in 2004, through a constitutional initiative backed by pro-gaming groups who were also supporting several other pro-gaming statutory initiatives on the ballot the same year.²⁸⁹

In assessing whether proposals to increase the accessibility and attractiveness of the *statutory* initiative process would secure the benefits and minimize the harms associated with the *constitutional* initiative process, the main consideration is whether they would reduce the prospects of enacting any harmful constitutional initiatives by diverting advocates to the statutory initiative process. That is, any effort to add a statutory initiative process in constitutional-initiative states currently lacking such a process, or reduce the signature requirements for qualifying statutory initiatives for the ballot, or prevent legislative impairment of initiated statutes is unlikely to sacrifice any of the benefits associated with the constitutional initiative process; but some of these proposals (especially ensuring the availability of a statutory initiative process and protecting initiated statutes) could, under some circumstances, reduce potential harms (especially regarding constraints on policy flexibility).

To consider the effects of specific reforms, it is reasonable to conclude that the absence of a statutory initiative process in Florida could have accounted for the sizable number of

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Arizona Voter Protection, Proposition 105 (1998)*, BALLOTPEDIA, http://ballotpedia.org/Arizona_Voter_Protection,_Proposition_105_%281998%29 [<http://perma.cc/X7VR-LGFJ>].

²⁸⁹ *Nebraska Legislative Majority to Modify Initiatives, Measure 418 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Nebraska_2/3_Legislative_Majority_to_Modify_Initiatives_Amendment,_Measure_418_%282004%29 [<http://perma.cc/46LF-TFGV>].

constitutional initiatives enacted between 2000 and 2014, more than any other state. To the extent that some constitutional initiatives in Florida were motivated by a desire to adopt policies blocked by the Legislature, this energy might have been diverted to the statutory initiative process if such a process were available, and with the effect of reducing constraints on policy flexibility. Additionally, to the extent that some constitutional initiatives adopted in other states were motivated by a desire to entrench policies against legislative interference, this energy might have been diverted to the statutory initiative process if initiated statutes were afforded a greater degree of protection from legislative changes. Here as well, diverting this energy to the statutory initiative process and requiring a supermajority legislative vote for changes to initiated statutes would impose somewhat fewer constraints on policy flexibility than enshrining these policy changes in constitutional provisions.

CONCLUSION

State constitutional initiative processes are a vehicle for enacting a number of consequential measures and have attracted significant attention from scholars and public officials concerned with whether these processes are beneficial or harmful for governance and with how they might be designed to contribute to effective governance. My purpose has been to compile a data-set of twenty-first century constitutional initiatives in order to permit an empirical assessment of various claims about the effects of these processes and thereby contribute to a better understanding of the consequences of leading reform proposals.

Several lessons can be drawn from the eighty-three citizen-initiated amendments enacted from 2000–2014. On one hand, constitutional initiatives have regularly enacted structural reforms resisted by self-interested legislators and occasionally adopted policies in the face of unresponsive legislatures. At the same time, constitutional initiatives have imposed undue constraints on policy flexibility in notable ways and led to passage of measures opposed by minority groups on an occasional basis.

In considering how constitutional initiative processes can be designed to promote the potential benefits and minimize the possible harms associated with use of these processes, it becomes possible to identify several proposals that are better tailored than others to achieving this goal. On one hand, making it more difficult to place constitutional initiatives on the ballot or for voters to approve them would be as likely to sacrifice the benefits as to reduce the harms of the process. On the other hand,

requiring voter approval of citizen-initiated amendments in consecutive elections, permitting legislatures to craft alternatives to citizen-initiated amendments, and instituting and providing greater protection for statutory initiatives are all capable, in certain circumstances, of reducing the harms while preserving the main benefits of the process. Finally, the design option that is best tailored to achieving this goal is limiting the subject matter of constitutional initiatives in various ways.