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**The 'Will of the Voters':  
Examining Trends in Legislative Repeal of State Ballot  
Initiatives**

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The “Will of the Voters”: Examining Trends in Legislative Repeal of State Ballot Initiatives

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Abstract:

Direct democracy plays a significant role in 24 states across the country. The process of allowing the public to gather signatures, place an issue on the ballot, and then approve it represents the purest form of democracy and provides the ultimate check on unresponsive legislatures. However, in some cases ballot initiatives are repealed by state legislatures after being approved by voters. This research paper asks the following question: are there identifiable trends to the legislative repealing of direct ballot initiatives after they have been approved by the majority of the voting public? After considering past arguments and history surrounding initiatives, this paper observes five case studies that state legislatures tried to repeal. It finds that the legislature tends to use outside entities to justify repeal (blaming out-of-state groups and utilizing the judiciary), and that if repeal is taken up, total repeal bills are generally introduced first. It also observes that states with less rules surrounding legislative alteration will introduce repeal easier, and can apply “emergency clauses” to pass repeal bills with no possibility of voter referendum. Finally, it finds that the governor’s role in the repeal process is less about party and more about optics. This is distinct from the state legislature, whose members will usually side with their party even if their constituents hold the opposite opinion. Based on these trends this project proposes solutions— most notably increased oversight of emergency clauses and more voter awareness of the process. It also gives recommendations for future research in the subject.

On June 19<sup>th</sup>, 2018 voters in Washington D.C. approved “Initiative 77,” which proposed an increased minimum wage for tipped workers. Citizens put the measure on the ballot via a petition and the direct ballot initiative was approved by 55.7% of the D.C. voters at the polls.<sup>1</sup> However, Initiative 77 was blocked by the D.C. Council, which voted to repeal the measure on October 2<sup>nd</sup>, 2018.

Taken at face value, the repealing of Initiative 77 hardly seems in line with America’s democracy. People complained that the D.C. legislators were “ignoring the will of the voters,”<sup>2</sup> and it would appear that they are right. However, this is hardly the first time a direct ballot initiative has been completely or partially repealed by its elected officials, and each time numerous discussions ensue. Even more recently, Idaho’s state legislature attempted to repeal a Medicaid initiative, and Utah’s state legislature succeeded in repealing a similar measure.<sup>3</sup> While there are some regulations surrounding most states that have direct democracy written into their state constitution, 11 states do not have any restrictions on legislative alteration. Repealing the voters’ decisions deserves a closer examination.

In this research paper, I ask the following question: are there identifiable trends to the legislative repealing of direct ballot initiatives after they have been approved by the majority of the voting public? To answer this, I begin my paper by including a literature review, which examines the history, debates, and current regulations surrounding various components of ballot initiatives to set up my research. After that, I discuss the selection of data and variables. I then present five case studies of initiatives that had significant repeal attempts in the past 25 years, and use these examples to identify trends in my analysis section. Finally, I provide my conclusions and recommendations for future research.

## Literature Review

Every state has ballot measures, which are questions that voters directly approve or deny. The type of ballot measure can vary based on what it is relating to and how it is placed on the ballot. Referrals are questions put forth by the state or local legislature. Initiatives are questions placed on the ballot via petitions by constituents. Finally, referendums allow the public to vote on current legislation, and are also put forth by the people. For my research, I look specifically at state ballot initiatives. These are statewide questions that were placed on the November ballots because supporters of the initiative collected enough signatures, and if the initiative is passed it becomes a state law.

To understand the previous research surrounding this topic, this literature review will begin by analyzing the history of the debate over ballot initiatives, and then transition to the more recent arguments over the validity and purpose of ballot initiatives. It will then discuss the varying requirements to get an initiative on the ballot, and the legislative action that has taken place to regulate that process. Then, it will examine the existing rules on restricting (or not restricting) legislative action on ballot initiatives, while finally transitioning to the questions my research hopes to answer.

### *History of the Ballot Initiative Debate in America*

The concept of ballot measures has been in the United States since the beginning of the country's existence, with records of legislative referrals dating back to the American Revolution. It was during this early time of ballot measures that Thomas Jefferson and Alexander Hamilton were engaging in the debate over scope of power and public capacity that provided the foundation for the discussion today. Hamilton wanted a strong central government to create

order, which required the complete faith and support of the citizens of the nation. Jefferson on the other hand believed in a strong rural community, and was against too large a government because he saw it as a form of suppressing the freedom of the everyday man.<sup>4</sup> Some New England colonies had history of utilizing town meetings to pass laws (and on the local level some of these meetings still occur today), but the establishment of a new country created a divide in the way to proceed with the direct democracy format. Jefferson and Hamilton established the two dominant ways of thinking, shaping the arguments that would evolve and continue to this day.

In fact it was Jefferson who was one of the first to suggest a form of direct democracy when he recommended voter ratification of the proposed Virginia Constitution in 1775.<sup>5</sup> Despite Jefferson's proposal not reaching the Virginia delegates in time to be considered in the state constitutional convention, the idea began to spread around the country. Massachusetts and New Hampshire became the first states to succeed in holding a vote on their constitutions before the turn of the 19<sup>th</sup> century, and then the rest of the northern states like Rhode Island, Connecticut, Maine, and New York did the same.<sup>6</sup> These states put their constitutions to voters for approval or disapproval, and provided clauses in their constitutions that required voter approval for any amendments to the constitutions after that.<sup>7</sup> After that, most all states that entered the Union put their constitutions to the voters for approval, and in 1857 the U.S. Congress required voter approval of state constitutions.<sup>8</sup> This was the first step in the process of increased voter involvement in state decision-making.

At this point however, voters would only be voting on legislative referrals. State legislatures would propose questions to the voters regarding amendments to state constitutions, and the voters could approve or deny. Statistics on early legislatively referred constitutional amendments are practically impossible to find, but research has detailed that voter referral

became the norm by the end of the nineteenth century.<sup>9</sup> These referrals allowed for increased voter control of some issues, but overall the legislature still had control over what was put on the ballot. Despite this, an effect of the increased usage of legislative referrals was that voters began to understand the legislative process and their role in it.<sup>10</sup> This allowed them to feel like they had some control, and that certain issues were meant for the voters themselves to directly decide.<sup>11</sup>

After years of just voting on legislative referrals, a new concept proposed more power to the voters. The ballot initiative was introduced during the late 1800s and was a key part of the Progressive Era. Inspired by Switzerland's direct democracy processes, initiatives were seen by Americans as a way to challenge the perceived lack of representation by Congress as well as the increased role of corporations and special interest groups in the political process.<sup>12</sup> The Swiss had implemented their initiative system in the 1860s in large part due to the industrialization in their country.<sup>13</sup> Now Americans were facing the same situation. Supporters of initiatives saw an opportunity to return the country to its roots of "New England town meetings" and bring about "peaceful political revolution."<sup>14</sup> This message gained support from notable individuals like Samuel Gompers of the American Federation of Labor. Gompers began touting the potential benefits in his speeches about initiative and referendum because he believed it was a peaceful way to achieve his union objectives as opposed to the violent and costly strikes that had been occurring. Gompers' influence caused union groups to lead the charge for the implementation of initiative, increasing its popularity in the country's minds.<sup>15</sup>

Another influential leader in the movement was Eltwed Pomeroy. As a chief partner at a manufacturing firm, he was able to travel the country advocating for change. He praised Switzerland's model and made his ultimate goal to form a "cooperative commonwealth."<sup>16</sup> Pomeroy was radical in his views, believing that representative democracy overall was a failure

and plagued with corruption.<sup>17</sup> He, and many other Populists at the time, saw the economic and social inequalities of the time as consequences from the general public being left out of decision-making.<sup>18</sup> They labelled representative democracy as antiquated, and saw a system of initiative and referendum as the solution to the problems of the time. Some research claims that the separation of the pro-initiative “moral crusaders” and the “corrupt politicians” is an unfair picture of the Gilded Age, and that the machine politics of the time were potentially exaggerated.<sup>19</sup> Nevertheless, the perception was there during the 1890s that the game was rigged, and it strengthened the movement across the nation. The issue of initiatives was starting to be put in front of extremely hesitant legislatures, and the debate between the two sides began.

As the turn of the twentieth century approached, Pomeroy and other advocates saw the support growing, and began to formalize their efforts. The reform movement became more organized, as many smaller groups saw this as an opportunity to have their voices heard. By largely claiming non-partisan affiliation, the movement brought Populists, unions, prohibitionists, single taxers, and Progressive members from both parties to collaborate for the cause of direct democracy.<sup>20</sup> Many of these groups had different opinions about the value of initiatives and how they were going to utilize them to their advantage, but all together they created a strong base that was centered around the cause.<sup>21</sup> Beginning in New Jersey and Massachusetts, “Direct Democracy Leagues” in the mid-1890s demanded for direct legislation principles to be accepted in party platforms and amended to state constitutions. While the mainstream newspapers did not cover the direct democracy movement, Pomeroy in 1894 created the *Direct Legislation Record* to report on the various campaigns that had begun around the nation in states like South Dakota, Oregon, and Kansas. Running until Pomeroy’s retirement in



1904, this again increased awareness of the issue, and gave the reform leaders a platform to spread their views.<sup>22</sup>

At first, these proposals were not accepted by the existing legislatures of either party that they were brought before.<sup>23</sup> Both parties had cases made to them during the 1896 presidential election season, but both were rejected on a national scale by nominees and party conventions.<sup>24</sup> However, during the next four years, with Republicans in control of much of the states outside the South, Democrats saw this as an opportunity to attack.<sup>25</sup> Democratic parties in these Midwest and Western states to begin to endorse direct democracy as a way to negatively portray the Republicans as corrupt. Because of this power dynamic, the Democrats became the party the National Direct Legislation League (NDLL) would eventually utilize for reform, while the Republicans remained skeptical.<sup>26</sup>

While the pro-initiative crowd touted a more democratic process reminiscent of town halls, the opposition saw these as impractical returns to less-effective ways of governing.<sup>27</sup> Opponents cited the U.S. Constitution as proof that initiatives violated the foundations of the nation—going against the representative democracy and checks and balances to limit an overwhelming power of a majority. They also saw the system as vulnerable to abuse by well-organized minority groups that would impose an issue onto voters without careful deliberation like the Founders had intended.<sup>28</sup> As I will examine later in the literature review, this line of logic is still part of the debate.

The league intensified their efforts and created the NDLL in 1896, which oversaw campaign efforts all over the country and converted direct democracy to a mainstream political talking point.<sup>29</sup> While the national campaign failed for numerous reasons, the battle for the states proved more successful, as the strong Populist sentiments of the Midwest and Western farmers

led to change. In 1897, Nebraska allowed for its cities to adopt initiative and referendum, and in 1898 South Dakota became the first state to have the process written into its state constitution. Similar to Jefferson's original argument in favor of the independence and self-sufficiency of the rural farmer, the belief in from the Populist farmers in the Midwest and Western states was that direct democracy would allow them to control their own destiny and create policies that benefitted them.<sup>30</sup> Utah and Oregon were the next two states to pass amendments allowing for direct democracy during 1900-1902. A backlash did occur, with opponents challenging initiatives in Oregon in court. However, the legitimacy of direct democracy was upheld in every court all the way up to the Supreme Court, which in 1912 dismissed the issue as outside the purview of the court.<sup>31</sup> By that time, 19 other states had already adopted initiative processes, and with the Supreme Court's ruling, the constitutionality of the matter was settled.<sup>32</sup> This meant that for the states that adopted, ballot initiatives were here to stay as a viable part of the political process.

In all, 24 states ended up changing their states constitutions to allow some elements of direct democracy. Some states even entered the union with direct democracy in their constitutions (New Mexico's original constitution in 1911 included a process for referendum, and Alaska's in 1956 included initiatives).<sup>33</sup> But in some states the popularity among voters did not translate to their state legislatures. Illinois took two non-binding advisory votes on the matter in 1902 and 1910. The voters overwhelmingly approved the proposal each time, but it was not until 1970 that Illinois passed an initiative process. Delaware also held an advisory vote on a referendum process in 1906, but the state legislature did not listen when voters approved the mandate and has not even implemented voter approval of constitutional amendments to this day. Michigan voters passed initiative and referendum in 1908, but the original process was very

confusing and difficult for them to place legislation on the ballot. It wasn't until 1913 that the state approved an easier method. Other states had have trouble with the voting process.

Wyoming and Mississippi voters both approved direct democracy processes in 1912, but because their state constitutions required for a majority of all votes, and not just those on the amendment itself, blank votes were counted as “no's” and the amendment failed. Amendments in the two states finally passed in 1914 for Mississippi and 1968 for Wyoming. Minnesota had the same provision for blank votes counted as no in its constitution, leading to failed votes in 1914, 1916, and 1980, and has not implemented direct democracy.<sup>34</sup>

After the initial excitement around ballot initiatives in the early part of the century, direct democracy was used less frequently until the late 1960s.<sup>35</sup> Until the Vietnam War era, trust in the government was higher, and initiatives were seen as “relics” of a different era. The initiative revival had to do with the decreased trust in government that occurred in the 1960s and 1970s.<sup>36</sup> The period from 1977 to 1996 saw a 164% increase in the average amount of initiatives during a four-year election cycle.<sup>37</sup> This surge, continuing to today, brought up old debates, and spawned new ones.

### *The Contemporary Debate- Voter Competence*

Today 24 states, plus Washington D.C., permit citizen-led ballot initiatives. But there is still controversy and pushback against them. Much research has been done on the impacts and legalities that ballot measures have had, and continue to have, on our political process. This has allowed each side of the debate to be well-equipped with ammunition for their respective viewpoint. As ballot initiatives continue to be utilized for various issues in the country, the

questions surrounding them are essential to how America defines its democracy and how important issues are addressed in areas of the country.

A main question is whether voters are well-informed enough to change law in a state. This is important because there is a split in the intentions of the initiative movement that some researchers have identified as having influenced the process today. Populists saw initiatives as how the people could be in complete control, in place of a corrupt government, while Progressives saw them more as checks on power than a means to replace a representative style.<sup>38</sup> While the original days saw the groups fighting together for legalizing direct democracy, both ideologies are now at odds with the future of the initiative, and this split draws scrutiny to how much responsibility voters should have.

Proponents of ballot initiatives will turn to studies that say that direct democracy increases political participation because of the higher turnout for non-presidential election years. Presidential elections usually see less initiatives come to the ballot because much more attention is put on the presidential candidates and the parties try not to divide over an issue raised in a measure.<sup>39</sup> The presence of ballot initiatives generally increases turnout in midterm elections, as certain key issues like marijuana and Medicaid generally motivate certain voters to come to the polls.<sup>40</sup> While the positive impact on turnout is not widely disputed, voters' understanding of the issue presented is. Some studies have shown that voters from states that utilize larger amounts of initiatives improve their political knowledge over a long period of time.<sup>41</sup> However, there is research on the other side that sees any knowledge increase as modest, and therefore not significant enough to credit direct democracy as the reason.<sup>42</sup> This is an important question because when debating the initiatives' impacts on society, if true, fostering a more politically

active and knowledgeable voting population would be a major point for proponents to use in their argument.

Before going to the polls, opponents question voter awareness on initiatives on the ballot. If initiatives are not publicized by the media, or do not have a lot of spending on their behalf, then voters are less likely to be aware of them, and therefore less knowledgeable about what they are voting on.<sup>43</sup> Certain divisive issues like gay marriage are much more likely to get attention because of these factors, while initiatives that deal with less-appealing issues like taxes or small-business regulations struggle to gain people's attention.<sup>44</sup> In addition, states that overload their voters with initiatives on the ballot can create voter fatigue, which decreases the likelihood that voters will want to study and learn about all the different issues that they face.<sup>45</sup>

Another reason voters can be negatively impacted on election day is the confusing language of the initiatives themselves. This has become such a noticeable problem for voters in the initiative states that readability scores have been assigned to each ballot measure based on the syllables, words, and sentences in the measure.<sup>46</sup> According to Ballotpedia and the Flesch-Kincaid Grade Level formula, in 2018 the average question on the ballot (which included referrals, initiatives, and referendums) required between 19 or 20 years of U.S. formal education.<sup>47</sup> When looking at the education statistics in the country, this means that only 8 to 9 percent of the U.S. population can completely grasp the average ballot measure.<sup>48</sup> Summaries and explanations meant to assist voters in their decision are marginally better, but still required on average 16 years of formal education to understand.<sup>49</sup> Research has shown that based on the difficulty of interpreting a question on the ballot, voters will skip voting on certain measures that they find too hard to read.<sup>50</sup> Beyond that, there is concern that if some initiatives are too complex, voters will vote no on an initiative, therefore not providing an informed vote.<sup>51</sup>

All of these variables can impact voter competency on ballot initiatives, and are reasons opponents use to demonstrate the unreliability of the results of initiative elections. Proponents advocate that the people deciding is a more democratic process than the government because of less corruption and a more honest look at what the people care about. Opponents state that representative democracy is in place for a reason, as a typical voter might not be aware, or not have the ability to comprehend an initiative. However, voters might not necessarily be the problem with the direct democracy process.<sup>52</sup> Proponents advocate that voters will typically not vote on issues that are not in their personal best interests, despite what opponents claim. While many can get overwhelmed by various parts of the process, some polls have shown that people enjoy the concept of direct democracy in their state and value it.<sup>53</sup> Therefore, while debates over voter competency are relevant, they are not unanimously accepted as the only reason that ballot initiatives are controversial. There are other issues at play.

### *The Contemporary Debate- Majority Tyranny*

Direct democracy has traditionally been seen as a way to subvert an unresponsive government that does not speak for the people. When first implemented, minority groups like prohibitionists, woman suffragists, and labor unions utilized them as way to get their issues on the ballot through signatures, which had been blocked or ignored by the states up until then.<sup>54</sup> However, a major topic in the initiative debate has been how they can be abused by the majority. The argument that this directly conflicts with the Founders' vision of America, and with representative democracy, is prevalent, as opponents argue that initiatives are less democratic. Their reasoning is that initiatives do not allow for refinement of ideas or for intelligent deliberation of issues.<sup>55</sup> Furthermore, initiatives are decided at the polls by a simple majority,

which strays away from compromise. America's representative system, complete with checks and balances was put in place to limit the concentration of power.<sup>56</sup> Opponents cite the potential abuse as why initiatives are dangerous.

Unfortunately, there have been examples of ballot initiative abuse throughout American history. In certain instances, initiatives have resulted in discrimination against minority communities, such as banning gay marriage, cancelling affirmative action programs, and stalling school desegregation plans.<sup>57</sup> Research has found that whether placed on the ballot by supporters or opponents of a civil rights cause, when put to a popular vote the minority communities are at risk because of the lack of representative filter.<sup>58</sup> It has also sadly been proven that initiative is usually not effective in extending minority rights, as nearly 90% of the time, the minority group has lost these types of questions, no matter which side put them on the ballot.<sup>59</sup> In addition, initiatives that have looked to restrict minorities have traditionally been more likely to succeed.<sup>60</sup>

Today's America is not like it was in the 1960s or 1970s, but initiatives are still not an effective way for minority voices to be heard. While the Supreme Court has not explicitly stated that initiatives repealing civil rights are unconstitutional, they have ruled several times against initiatives that restrict minorities in the political process.<sup>61</sup> This is encouraging, but still does not instill confidence for minorities in the system. Overall, initiatives have too many examples of restricting minorities to demonstrate a new system of government. This is important and demonstrates the need for some control of the process, and represents how the current consensus on responsible initiative use favors the Progressivist viewpoint of them being checks on an unresponsive government as opposed to replacing representative democracy.

Another developing issue throughout the years is the business side of ballot initiatives. The concept of everyday citizens rallying up their peers to get enough signatures to place an issue on a ballot is becoming less common in the face of special interest groups utilizing the initiative process to further their policy goals. Some see this phenomena as a good thing, creating a more organized system to get issues on the ballot. Others see this as an out of control business that threatens America's democracy.<sup>62</sup>

As with most aspects of the political world, the cost of initiative campaigns is rising each year. While 2017 saw only four citizen initiatives put on state ballots, only one support campaign raised less than \$10 million, and an opposition campaign in Ohio generated \$59 million in contributions.<sup>63</sup> The 63 citizen initiatives in 2018 accounted for more than 80 percent of the \$1.185 billion campaign contributions, with total contributions reaching over \$100 million in some cases.<sup>64</sup> Some see interest groups as the problem, as the millions spent on advertising creates an increased reliance on capital in the initiative process.<sup>65</sup> Others have stated that more money in an initiative campaign makes the public more aware, and allows them to vote based on their ideology as opposed to a random "no" vote.<sup>66</sup> Research has shown that outspending an opponent on a ballot measure campaign increases the likelihood of success.<sup>67</sup> Because of the increased reliance on finances, it has become the norm in nearly all initiative campaigns to pay signature collectors, which has opponents saying that this is buying the vote.<sup>68</sup> Proponents will point to paid signature gatherers as being more effective at doing their job, as there is a monetary motivator.<sup>69</sup> However, this puts larger, more financially equipped groups at an advantage over others, and allows them to get initiatives on ballots easier.<sup>70</sup> Overall, the increased influence of money in the initiative process is an unintended consequence of the "pure" process of direct democracy.<sup>71</sup> A concept started by groups that were anxious to eliminate corporate power in the



political process ended up creating a system where interest groups and powerful individuals still have a great influence.<sup>72</sup>

This influence extends beyond the monetary aspect, as the political game of initiatives is apparent in how some are placed on a ballot. Interest groups will look to initiatives if the legislative process has proven too difficult, sometimes to generate media attention to their issue.<sup>73</sup> In addition, the concept of a “counter-initiative” can be utilized by groups that want to nullify an existing proposition on the ballot.<sup>74</sup> By creating an initiative that is similar to ones already on the ballot but with minor changes, businesses can confuse voters so that they just vote no to every initiative on the ballot.<sup>75</sup> Leveraging ballot initiatives for their own gain is how businesses can get around the legislature, or shoot down an opponent group. Opponents argue that this is inherently wrong and that it, and many other aspects of the initiative process should be reformed.

### *Reform Recommendations and Legislation*

In December 2001, the National Conference of State Legislatures (NCSL) assembled a task force to “review the growing use of initiatives and referendums around the country and to examine their effect on representative democracy as a whole.”<sup>76</sup> They expressed concern over too much special interest involvement, and recommended drafting, certification, signature-gathering, and financial disclosure reform. They also advocated for initiatives to only be allowed on general election ballots.<sup>77</sup> Many of these recommendations are already implemented, but only in certain states. This is where the debate over ballot initiatives can most notably be seen, as the battle between state legislatures and initiative advocacy groups have made regulation rules different across the country. Through examination of the regulation efforts, one can learn about

each state's unique process for getting an initiative on the ballot, as well as what stands in an initiative's way.

One of the most common regulations is on initiative subject. These can either limit the amount of issues that can be addressed at once, or restrict what topics can be covered overall.<sup>78</sup> Depending on the state, proposals concerning topics like religion, judiciary, or even the initiative process itself are subject to restriction. Other states do not have the same restrictions but make petitioners detail their sources of funding before allowing the ballot to be campaigned.<sup>79</sup> Single-subject rules are implemented so that proponents of an initiative cannot “logroll” several unrelated issues into a single initiative.<sup>80</sup> However, that has not stopped petitioners from continuing to push the boundaries of what an initiative does. “Distributive logrolling” has emerged as an option for groups to get around the single subject laws by making an initiative about funding which goes toward several different projects.<sup>81</sup> This creates coalitions between groups to pass omnibus-like spending proposals, which they use to gain more signatures and more support on election day.<sup>82</sup> In addition, several states require “sponsors” signatures before an initiative can even be considered official. Further signature requirements are implemented for then placing initiatives on the ballots. These regulate how many signatures are needed, the deadlines to turn them in, and verification. The number of signatures needed is usually a percentage of the number of votes cast in a previous election.<sup>83</sup>

While many of these regulations were put in place to manage the process of putting initiatives on the ballot in efficient ways, proponents have said that this makes the process harder and is potentially unconstitutional.<sup>84</sup> Some opponents have argued that they do not go far enough.<sup>85</sup> However, both sides agree that voter awareness is an issue that can and needs to be addressed. The NCSL report described the importance of voter education, and recommended that

states provide pamphlets and engage the public to ensure issue awareness increases.<sup>86</sup> In the context of this paper, voter education is important not just because it allows voters to make an informed choice on election day, but also because voter awareness of the rules surrounding the initiative process can potentially allow for more legislative accountability and oversight.

### *Rules on Legislative Repealing of Ballot Initiatives*

Just as some state legislatures have made rules on the initiative process, some laws have been implemented to limit a legislature's repeal power. And just like putting an initiative on the ballot, the nullification of one differs from state to state. There are a few commonalities in restrictions on legislative alteration that can be broken down into three distinct categories. One is passage of time restrictions, meaning that some states have periods which the state legislatures cannot amend or repeal an initiative. The length of time varies in the five states that have this restriction in their constitutions. The time period that is restricted is two years in Alaska, Washington, and Wyoming, three years in Nevada, and seven years in North Dakota.<sup>87</sup> All of these states restrict immediate repeal, but adding an amendment to an initiative can occur immediately in Alaska and Wyoming. This represents one way in which those state legislatures could get around the restriction if they desired.

North Dakota and Washington both combine the passage of time restriction with a supermajority restriction. This process allows the state legislatures to repeal or amend an initiative, but only by at least a 2/3 majority vote in both chambers. Along with North Dakota and Washington, Nebraska and Arkansas require a 2/3 majority vote. Arizona and Michigan require even more than those states with a 3/4 majority vote.<sup>88</sup> This forces the legislature to come to more of a consensus when it comes to completely or partially repealing an initiative. While it

might not prove a challenge for some states that have one-party control, it still provides a slight check on the legislature's ability to strike down initiatives they do not agree with.

Finally, in California and Arizona, any proposed changes to a ballot initiative must be put back to the voters for them to decide.<sup>89</sup> This requirement puts most all of the control in the hands of the voters, as the only way that a legislature can repeal or amend an initiative is if they place a new measure before the public via a legislative referral. While only those two states have that option, this is by far the most restrictive on the legislature.

However, 11 states (Colorado, Idaho, Maine, Massachusetts, Missouri, Montana, Ohio, Oklahoma, Oregon, South Dakota, Utah) and D.C. have no laws governing against legislative alteration.<sup>90</sup> This means that representatives in these states can repeal or alter ballot initiatives immediately, with a simple majority vote, and without any voter input. In addition to the lack of rules, the legislatures can use methods to prevent voters from holding referendums on passed bills. The most common are exemptions against referendums that deal with laws concerning state fiscal matters, or have an "emergency clause" attached.<sup>91</sup> When placed on a bill, the emergency clause puts it immediately into effect and prevents the voters from holding a referendum on it.

All of the states that have referendum written into their constitutions have some sort of limitation on that referendum, and the emergency clause has been controversial because of its broad interpretation.<sup>92</sup> According to several court decisions in the early 20<sup>th</sup> century on the issue, the choice to declare an emergency was originally completely up to the legislature and not subject to judicial review.<sup>93</sup> Other court opinions have brought the issue back to a debate, but regardless there is still tremendous power in the legislature's ability to restrict access to referendums.<sup>94</sup> The usage rate of emergency clauses is high in some states, and has shown no signs of slowing down.<sup>95</sup> This suggests misuse of the emergency clause on the part of legislators,

as if they know they can deem any bill a matter of public safety, then they can effectively shut down any public response on it.

In no state does the governor have veto power over passed initiatives, so the power to repeal an initiative lies with the judiciary and the legislature. The courts will strike down unconstitutional initiatives when they appear, and that process is separate from the research I will be doing. However, the legislative side of repealing ballot initiatives is one that has yet to have much research conducted on it. With all of the contemporary protest and distrust in America's political representatives, it remains a question whether citizens should be worried about elected officials reversing decisions made by constituents. The repeal process is imperfect, and not standardized, but if there are tendencies in it, that could change how initiatives are seen on the ballot and how closely they are monitored after approval. I aim to identify these tendencies in the following case studies and analysis.

## **Methodology**

Finding suitable cases to study was a very important task for this research, and therefore I implemented clear guidelines for my search. First, all ballot measures being examined had to be direct initiatives. This means they could not come from states where initiatives go through the legislature for approval to be placed on the ballot. I did this to isolate the purest form of direct democracy that America has, free from any legislative action on the initiative before the voters have their say. I also only analyzed state-level ballot initiatives because while there are many more examples in local elections, I wanted to keep the government level of each initiative constant.

Another constant in my research involved the distinction between initiated state statutes and initiated constitutional amendments. While there are direct forms of both types, the process of overturning constitutional amendments is much more complicated since different states have different rules for that procedure. It is a much easier and standardized process for state legislatures to overturn state statutes because they can pass laws and receive gubernatorial approval as opposed to revising their state constitution. For those reasons, I decided that to keep my case studies consistent by only observing initiated state statutes. Given these parameters, my search was limited to 14 states.

After limiting my scope, I transitioned to case selection. Finding cases that fit the parameters proved initially difficult. Some media websites do not archive their stories and a lot of information I was searching for was not stored on government websites. There is not a database of initiatives that have been repealed, so finding each was a unique search. Part of what qualified a case for me to analyze was the volume of information that was available on it. Certain cases could have been selected, but there was not enough information on them either because of poor recordkeeping or lack of information originally published. For example, Utah's 2018 Propositions 2 and 3 were not case studies because they were still ongoing repeal processes when I was writing this paper, in addition to the fact that since they were so current there would not be enough time to analyze the impact repeal had on the initiative movement.

Again, since information on repeal is difficult to find, I had no feasible way of identifying initiatives that the public voted against which state representatives then created legislation for. These situations are important to the issues this paper presents since they are still going against the voters' wishes, but could not be a part of the analysis.

All of the cases that I examine here were chosen because there was a significant repeal attempt by the respective state legislatures. I considered initiatives that legislatures repealed completely (South Dakota's 2016 Measure 22 and Idaho's 1994 Initiative 2) and repealed partially (Montana's 2004 I-148, Missouri's 2010 Proposition B and Proposition C).

I utilized the political website Ballotpedia.org to get the basic information about initiatives and their results before exploring further. I used state websites to view official state documents. For my analysis, I focused on the time periods when the state legislatures were deliberating repeal. I paid attention to the actions that representatives took in that process, as well as relevant public statements. I closely followed the representatives whose actions went against the expressed preferences of their constituents, because if a member's district voted against an initiative, then objecting lawmakers are not necessarily misrepresenting them. To do this, I utilized voting records and state congressional journals to identify how each representative acted on each bill. I also highly relied on local newspaper coverage of the timelines of repeal, as often members of the legislatures gave comments that allowed me to examine what they were telling their constituents. Newspapers also allowed me to initially find these measures, as the act of attempting to overturn the will of the voters is often controversial and is closely covered by the papers. By identifying which representatives were going against their constituents, and analyzing the timelines toward repeal, I was able to search for trends in the process to determine if there is a standard way that state legislatures look to repeal ballot initiatives.

## **Case Studies**

### ***Idaho Initiative 2, 1994***

The initiative is seldom used in Idaho, as there have only been 28 initiative questions on ballots since the state Constitution allowed for them in 1933.<sup>96</sup> Despite a national movement for legislative term limits starting with California, Colorado, and Oklahoma, previous legislation to enact term limits in Idaho had largely failed.<sup>97</sup> However, signature gatherers were finally able to get the issue on the ballot via an initiative in 1994. To get an initiative on the ballot in Idaho, the signatures must equal 6% of the number of registered voters at the time of the most recent general election.<sup>98</sup> In the 1992 general election, there were 521,171 registered voters, which meant that 31,271 signatures were needed to get an initiative on the ballot.<sup>99</sup>

Initiative 2 (also called Proposition 2) received enough signatures and was placed on the Idaho ballot in 1994. Its purpose was to establish term limits for federal, state, county, municipal and school district officials.<sup>100</sup> Under the proposal, U.S. House of Representative members from the state would be limited to six years in office over an 11-year period and U.S. Senate members would be limited to 12 years over any 23-year period.<sup>101</sup>

It was approved with a 18.70 point margin, with 234,703 (59.35%) voting for, and 160,748 (40.65%) voting against. It passed in 36 out of the 44 counties in the state.<sup>102</sup> Since the 1995 U.S. Supreme Court case, *U.S. Term Limits, Inc. v. Thornton*, ruled that states could not place term limits on members of the U.S. Congress beyond those stated in the Constitution, those provisions of Initiative 2 were disregarded.<sup>103</sup> This still left the term limits of state and local officials to eight years in office over any 15-year period, and county commissioners and school board members to six years of service over any 11-year period.<sup>104</sup> These term limits were to be implemented beginning 10 years later in 2004.

Idahoans for Term Limits was the largest supporter of the 1994 initiative campaign, with a large percentage of their donations coming from the national organization, U.S. Term



Limits.<sup>105</sup> Overall, proponents spent a total of \$942,000 on three successful initiatives on the ballot in 1994, 1996, 1998.<sup>106</sup> All of them aimed at reforming Idaho's electoral system through term limits. The 1996 initiative, accepted with 56.05% of the vote, instructed candidates for U.S. Congress and the state legislature to support congressional term limits and indicate non-support on the ballot.<sup>107</sup> The 1998 initiative, approved with 54.66% of the vote, allowed congressional candidates to sign a term limits pledge and informed voters on the ballot if a candidate signs or breaks that pledge.<sup>108</sup> With all these citizen-led statutes being accepted, the legislature soon began to search for ways to undue the original 1994 initiative that had started the term limits discussion for the state and local level.

The dispute over Initiative 2 was immediate from many members of the state legislature, and it was not reserved for a single party. Republican Senate President Pro Tempore Mike Crapo expressed his concern that the initiative would have negative consequences for local elections, which caused fellow Republican U.S. Sen. Larry Craig to pull his previous support.<sup>109</sup> The concern over local elections grew over time, as county clerks and sheriffs eventually would heavily support repeal efforts based on functional need in rural areas.<sup>110</sup> On the other side, there were Republicans like Helen Chenoweth who supported term limits, while her Democrat opponent did not.<sup>111</sup> Therefore, the issue was not completely partisan at the beginning, and since Idaho was a heavily Republican-controlled state, it would come down to the party's stance in future years. At the Republican Party convention in 2000, a contentious debate ended with the passage of a platform opposing term limits by a vote of 162-155.<sup>112</sup> This created a partisan divide over the issue that would only grow as the debate continued, as Democrats saw the Republican desire to potentially overturn the will of the voters as a way to gain political points in future elections.<sup>113</sup>

The fight over term limits would increase further seven years after Initiative 2. In 2001, some legislators argued that Initiative 2 was unconstitutional, and successfully challenged that in Idaho's 6<sup>th</sup> District Court in the case *Rudeen v. Cenarrusa*.<sup>114</sup> Secretary of State Pete Cenarrusa, along with several other county, city and school district clerks were named as defendants in the case.<sup>115</sup> The central argument against Initiative 2 was that the right of candidates to run for office was a fundamental right protected by the Idaho Constitution. The petitioners argued that this fundamental right was a right of suffrage, meaning that suffrage included the right to hold public office.<sup>116</sup> The 6<sup>th</sup> district court ruled that Initiative 2 "unconstitutionally infringe[s] upon the fundamental right of suffrage that the Idaho Constitution guarantees," which temporarily proved that argument valid for the legislators.<sup>117</sup>

This decision was appealed to the Idaho Supreme Court by Cenarrusa and defendant-intervenor Citizens for Term Limits later that year. The Idaho Supreme Court ruled unanimously to overturn that decision, upholding the constitutionality of Initiative 2's term limits on state government officials.<sup>118</sup> The court found that while the right to suffrage was extended beyond simply the right to vote, it did not encompass the right to hold office.<sup>119</sup> This decision overturned the 6<sup>th</sup> district, but the court continued in their analysis to address another argument. This argument was made by the petitioners that stated Initiative 2 was discriminatory, and in violation of equal protection rights. The Idaho Supreme Court ruled that the concept of term limits was "rationally related" to the "legitimate government goal of giving more individuals the opportunity to hold government offices."<sup>120</sup> On this basis, the court concluded that Initiative 2 did not violate the candidates' equal protection rights under the Federal or Idaho Constitution.<sup>121</sup> While this case did not result in the preferred outcome for the legislators that were against Initiative 2, it did provide a glimpse into their initial reasoning for repeal.

Having the court strike it down would have absolved the legislators from much of the responsibility of eliminating Initiative 2. Since it did not, after the court's ruling, Idaho's state legislators decided to take matters into their own hands and began to draft repeal legislation. HB425 was brought to the Idaho House in January 2002, with the simple text and purpose of repealing the code that Initiative 2 had implemented.<sup>122</sup> HB425 passed through the House with a vote of 50-20, and through the Senate 27-8.<sup>123</sup> However, despite the Republican platform officially being against term limits, Republican Governor Dirk Kempthorne vetoed HB425. Kempthorne had been supportive of Initiative 2 from the beginning, and had left the 2000 convention before the deciding platform vote had been taken.<sup>124</sup> Kempthorne backed the original decision in his veto of the bill, saying "the will of the voters cannot be ignored and must be protected."<sup>125</sup>

Just 24 hours after Kempthorne's veto Idaho's House and Senate held their supermajority vote to override it, with only one less "aye" than its original passage through both chambers (50-20 in the House, 26-8-1 in the Senate).<sup>126</sup> Legislators pleased with the outcome defended their repeal vote against the scrutiny that arose. Republican Speaker Bruce Newcomb cited out-of-state money for influencing the voters, stating that Idaho was "a cheap state to buy" and that "it was not in the public interest."<sup>127</sup> Republican Doug Jones exclaimed that "If people don't like the way I vote, they should get rid of me."<sup>128</sup> Jones was a nine-term member at the time, which would have made him subject to the term limits sooner. But younger members explained their decisions as well. Freshman Republican legislator Eulalie Langford explained that her concern was over rural Idaho, and how since there are fewer people in the rural areas, term limits hurt local elected officials more. She and other representatives argued that term limits for the local

officials deprive the communities of experienced politicians and give them less influence in the areas they serve.<sup>129</sup>

An analysis of these votes by Daniel A. Smith examined several variables that could have predicted the outcome based on the representative. Out of all the variables he tested, only political party and district type (urban or rural) had a statistically significant effect.<sup>130</sup> The voting percentage of the representative's district on Initiative 2 in 1994 and the number of terms a representative has served both were expected to have impacts on the vote. Smith expected representatives to agree with the way their constituents voted in 1994, and he expected the longer the tenure of a representative would increase the chances of support for repeal. However neither variable was statistically significant. In addition, the district's competitiveness showed no major correlation, even though one might expect that if there was not a significant opponent who posed a threat, the representative could more easily go against the wishes of his or her district. The variables that did prove impactful were party and district type. If a representative was a Republican, they were very likely to vote for repeal. If the congressperson was representing a largely rural district, they were also likely to want to overturn Initiative 2.<sup>131</sup>

The backlash was apparent after the passage of HB425, with some incumbents losing primary bids, and a voter referendum being placed on the ballot.<sup>132</sup> This referendum was citizen-driven, and concerned the acceptance or rejection of HB425. The result of the referendum was not what proponents of Initiative 2 wanted, as the voters of Idaho narrowly elected to accept HB425 as law with 50.2% of the vote.<sup>133</sup> There was some speculation that the wording of the referendum was confusing to voters, causing them to select the wrong option, but others believe that it was because the meaning to rural voters resonated just enough with them to support HB425.<sup>134</sup> Here is the text of the long-form ballot title below:

Rejection of H425, by this referendum will enact ballot access restrictions that will have the practical effect of imposing term limits on state elected officeholders, state legislative elected officeholders, county elected officeholders, and municipal elected officeholders and school board members.<sup>135</sup>

The initiative campaign never got back to its former support, which represents a win for incumbents in the Idaho legislature. Citizens of the state utilized the initiative process and implemented term limits all the way down to the local level, but lawmakers were able to repeal the measure without any long term backlash.<sup>136</sup> While first trying to utilize the courts to strike down Initiative 2, drafting and passing a bill proved to not be difficult because of the willingness of the members to vote with their party. While the impact on rural representatives was definitely a factor, this example showcases some key tactics legislatures use to attempt repeal, and demonstrates how the political party of a representative can have a substantial impact on the decision to repeal.

### ***Montana I-148, 2004***

Marijuana has been a very popular initiative topic in the past 20 years. Between 1972 and the end of 2017, 14 states legalized medical marijuana via a statewide ballot measure.<sup>137</sup> In 2004, Montana joined the trend by gaining the required signatures to get I-148 on the ballot. In Montana, the signatures required to place an initiated state statute on the ballot are to equal five percent of the votes cast for governor in the most recent gubernatorial election.<sup>138</sup> Since 410,192 people voted in the 2000 gubernatorial election, 20,507 signatures were needed.<sup>139</sup>

I-148 legalized the “production, possession, and use of marijuana by patients with debilitating medical conditions.”<sup>140</sup> These conditions included those resulting from cancer, glaucoma, or HIV/AIDS. It also allowed for some leeway by providing for other conditions that the state could define beyond those of severe or chronic pain, severe nausea, seizures, and

muscles spasms.<sup>141</sup> The initiative would allow for the patient or the patient's caregiver to grow or possess "limited amounts of marijuana" by showing the state a doctor's note that described them as having a condition that would benefit from the use of marijuana. The official ballot language stated that there would be "no measurable cost" for the state if I-148 was approved by the voters.<sup>142</sup>

The initiative was approved by a wide margin of 23.62 percentage points, with 276,042 people voting in favor (61.81%), and 170,579 (38.19%) voting against.<sup>143</sup> 47 out of 56 counties voted in favor of the measure.<sup>144</sup> At the time, this was the second-largest margin of victory for a medical marijuana ballot measure.<sup>145</sup> The Medical Marijuana Policy Project of Montana (MMPMM) donated \$555,082 in support of the initiative.<sup>146</sup> There is no record of donations in opposition of the initiative.<sup>147</sup>

To go along with the national debate over marijuana at the time, the two sides in disagreement over the initiative followed much of the same arguments that the rest of the country was making. The official proponent argument was made by Democratic Representative Ron Erickson, Paul Befumo of MMPMM, and a Montanan named Robin Prosser, who had personally used marijuana to treat chronic pain due to an immunosuppressive illness.<sup>148</sup> The opposition argument was made by Republican Representative Jim Shockley, and Roger Curtis, president of the Association for Addiction Professionals.<sup>149</sup> The health benefits of marijuana were a key divider, as proponents of I-148 cited the American Nurses Association, the American Public Health Association, and the American Academy of Family Physicians as organizations that had declared support for the benefits of medical marijuana. The opponents of I-148 disputed the positive benefits of marijuana, iterating that legalization advocates were attempting to confuse the people about marijuana and already approved drugs like Marinol (which can be used to treat

nausea in cancer patients or treat loss of appetite).<sup>150</sup> They also mentioned that the respiratory problems associated with smoking the plant could outweigh benefits, despite the fact that there are several other ways to ingest the substance.<sup>151</sup>

Beyond the health argument, both sides examined the current policies around the nation regarding medical marijuana to make their cases. Opponents pointed to the current federal stance that designated marijuana as a Schedule 1 drug with dangerous side effects as reasoning for keeping the current rules. They stated that even if Montana legalized the use of medical marijuana in the state, the federal government prohibited the growth or use of it. Proponents of I-148 advocated that legalization would allow patients to not have to worry about facing punishment for seeking out treatment.<sup>152</sup> The state law at the time saw users of marijuana in Montana be subject to up to six months in prison and a \$500 fine.<sup>153</sup> Proponents also detailed that I-148 was similar to laws in nine other states, so there was precedent for the initiative. Based on a study of those states, proponents stated that the health benefits were real, and that there was no burden on law enforcement.<sup>154</sup>

Despite open disagreement from some state representatives, no immediate legislative action was taken on I-148. This is most likely due to its high support among citizens in 2004, and the federal rules that prevented widespread usage in the state. However, in 2009, the U.S. Justice Department said that that prosecution of medical marijuana users would not be a priority in states where legalization had occurred.<sup>155</sup> This loosening of federal oversight significantly increased the number of medical marijuana cardholders in Montana, rising from 3,921 to approximately 30,000 in 2011.<sup>156</sup> It also saw dispensaries increase from 1,403 to 4,848.<sup>157</sup> In response to this increase, critics of I-148 began to allege problems with the medical marijuana system of the state. They reported caravans signing people up around the state, along with sign-offs on

marijuana cards by doctors that only required extremely short visits.<sup>158</sup> This strengthened the anti-marijuana interest groups and legislators in Montana to take action.

The repeal effort began with the introduction of HB161 in January 2011. The proposed bill was introduced by Republican Representative and Speaker of the House, Mike Milburn, whose district voted in favor of I-148 in 2004.<sup>159</sup> In reaction to the growing number of users in the state, Milburn called the situation “a totally uncontrolled epidemic,” and that it was “time to take back the state and its culture.”<sup>160</sup> HB161 aimed to completely repeal I-148 from the Montana code.<sup>161</sup> While proponents like Milburn and many other Montana Republicans talked about the danger and potential for corruption that the current policy could have, Democratic opponents questioned why a full repeal was necessary. House Representatives Diane Sands (D) and Pat Noonan (D) expressed concern over repealing a voter initiative, citing that any problems that had arisen were not the voters’ fault, and instead should be on the state to regulate. They pointed to compromise legislation that could help curb the issues like concerns over illegitimate signups or illegal activity while also recognizing that marijuana was a part of the community.<sup>162</sup>

Despite Democrat efforts, HB161 passed through the Montana House 63-37, and then through the Senate 28-22.<sup>163</sup> The votes were almost exclusively along party lines, with Republicans in favor and Democrats opposed. No Democrat in the House supported the legislation, and only one Senate Democrat voted in favor. Six Republicans voted against HB161 in the House, and one Republican voted against it in the Senate.<sup>164</sup> The one Democrat who supported the measure was Sen. Larry Jent. While he never gave reasoning other than moral opposition on legalizing the drug, in his run for State Attorney General in 2016 Jent expressed regret for voting for repeal and said he has changed his stance on medical marijuana.<sup>165</sup> Besides



the outliers, this suggests that loyalty to party or personal values were more important than catering to the original wishes of the constituents.

HB161 was then put on Democratic Governor Brian Schweitzer's desk for approval. This would have made Montana the first out of the 15 states that had enacted medical marijuana laws to then decide to repeal them.<sup>166</sup> However, following the logic of other Montana Democrats, Governor Schweitzer vetoed HB161, stating that it was draconian to go against the wishes of the voters, and that regulation of the industry was the way to proceed.<sup>167</sup> He pointed toward existing proposed legislation as measures that he would potentially support.<sup>168</sup> This ended the effort for total repeal of I-148, and shifted the legislature's focus onto bills that dealt with partial repeal.

The bill that they ended up passing was SB423, which placed several provisions on the cultivation, manufacturing, possession, and use of medical marijuana. The bill required patients to have more clearly defined symptoms, changing the term "severe" to "intractable," requiring patients with serious diseases like cancer to be symptomatic, and requiring those applying not to be on probation or parole.<sup>169</sup> It also required that patients carry their cards and provide the card and photo identification if requested by law enforcement or a court.<sup>170</sup> Regulations on physicians included restrictions on using telemedicine to give cards, accepting or soliciting a certain provider, and performing evaluations at places where marijuana was cultivated or manufactured.<sup>171</sup> The bill also required physicians to include various statements in their written certificates. Physicians would now have to detail the patient's disease, that other options had been discussed, and that they would manage and monitor the patient's treatment and condition.<sup>172</sup> SB423 changed the terminology of the person growing the marijuana from "caregiver" to "provider" and limited the number of people to whom they could give marijuana to three (however, of those three people, two had to be relatives).<sup>173</sup> In addition, the bill made

providers ineligible to be paid for their service.<sup>174</sup> Further provisions of the bill included a ban on marijuana advertisement, allowing local governments to ban providers from opening storefront businesses, and granting schools the right to prohibit cardholders from participating in extracurricular activities.<sup>175</sup>

SB423 passed through the House 78-17, and through the Senate 35-15.<sup>176</sup> While this time there was more Democrat support (17 approval votes from Democrats in the House, 8 in the Senate), the vote was again largely partisan, with all but seven Republicans voting for the bill.<sup>177</sup> Governor Schweitzer's allowed SB423 to become law without his signature, demonstrating his reluctance to support. He stated that while he did not like the fact that some of the marijuana businesses were going to have to shut down, overall reform was needed.<sup>178</sup>

SB423 was deemed by many I-148 supporters as a "repeal in disguise," and Montana's medical marijuana industry spiraled after passage.<sup>179</sup> The number of patients dropped to 9,000 in just a year, and providers decreased to less than 400.<sup>180</sup> The restrictiveness of the law caused many to resort back to illegal means of acquiring marijuana as opposed to going through the state system.<sup>181</sup> In recent years, Montana has been pushing back on the restrictions. Some of the bill's restrictions were challenged in court, but the Montana Supreme Court ruled that most were constitutional. However, the court did strike down the provision that prohibited providers from receiving compensation.<sup>182</sup> Ballot initiatives aimed at loosening restrictions have been introduced, but only one made it to the ballot. I-182 in 2016 passed, repealing the three-patient limit and continuing the lengthy debate over medical marijuana in the state.<sup>183</sup>

### ***Missouri Proposition C, 2008***

In 2008, an initiative called Proposition C was placed on the ballot in Missouri which attempted to increase renewable energy in the state. Efforts to create renewable energy standards via the state legislature had failed, so citizens of Missouri decided to take up the issue themselves.<sup>184</sup> The signature requirement in Missouri for initiated statutes to reach the ballot is five percent of legal voters in any six of the eight congressional districts based on the totals of the last gubernatorial election. In 2008, the requirement was 94,060 signatures.<sup>185</sup> After a successful signature recovery lawsuit was filed by supporters (which I address later in this case study), Proposition C supporters gained enough signatures and then turned toward convincing voters to support the initiated statute.<sup>186</sup>

Proposition C created a renewable energy standard for businesses, requiring that utility companies generate or purchase electricity from renewable energy sources such as solar, wind, biomass and hydropower.<sup>187</sup> This only impacted three large utility companies in the state. These companies were Kansas City Power and Light, AmerenUE, and Empire District Electric.<sup>188</sup> The renewable energy sources were to equal percentages of retail sales by certain years. This included 2% by 2011, 5% by 2014, 10% by 2018, and 15% by 2021.<sup>189</sup> Of the total renewable energy sources required to be sold, at least 2% were to be solar energy. Also, any rate increase to consumers resulting from Proposition C could not be more than 1%.<sup>190</sup> The official ballot question detailed that the estimated cost of the measure to state government entities would be \$395,183, with no estimated direct costs to local government entities.<sup>191</sup>

The initiative was approved by a 32.06 percentage point margin, with 1,777,500 (66.03%) voting for, and 914,332 (33.97%) voting against.<sup>192</sup> The campaign committee that supported Proposition C was called Missourians for Cleaner Cheaper Energy (MCCE). It included donations from the American Wind Energy Association (AWEA), the Missouri

Coalition for the Environment, the Missouri Votes Conservation, Renew Missouri, and the Sierra Club. The MCCE totaled \$949,285 in expenditures during the election cycle in their support of the initiative.<sup>193</sup> Supporters believed that Proposition C was a step toward moving Missouri to energy independence, and saw it as a chance to address the growing concern over climate change.<sup>194</sup> They wanted to invest in the future of Missouri by localizing energy production and become less reliant on other states for coal. They argued that in addition to fighting climate change, this could create jobs and investment in rural areas.<sup>195</sup> Kansas City Power and Light endorsed the committee, while the other two utility companies remained neutral in their support.<sup>196</sup> Another notable group that supported the initiative was the League of Women Voters of Missouri. They stated that the coal produced is harmful, and that diversifying the electricity sources in the state would improve the electric system as a whole.<sup>197</sup>

While AmerenUE did not officially take a side in the debate, spokesman Tim Fox said the company disagreed with government mandates and that they would prefer the market to dictate renewable energy efforts based on the rise and fall of prices.<sup>198</sup> In addition to Fox's comments, Empire District Electric said it would refuse to pay the solar rebates that would be required under the initiative.<sup>199</sup>

#### *Exemption Lawsuit and Supreme Court Ruling*

In response to Empire District Electric's refusal they passed a law granting the company exemption from paying the solar rebates. This allowance was added to a bill the day before the legislative session ended that year and 11 days after Proposition C was determined eligible for the November ballot. It exempted any company from paying the installation subsidies, fees, or rebates to customers for solar energy systems, and eliminated the solar energy requirement from those companies as long as they met the overall 15% renewable energy requirement.<sup>200</sup> A lawsuit

was filed by Renew Missouri, a supporting group of Proposition C. They alleged that this law was unconstitutional because it was a clear targeting of Proposition C, and that this was an example of tampering with a pending initiative. They also argued that the law was written so narrow as to essentially only apply to Empire District Electric that was also a violation of the Missouri Constitution.<sup>201</sup>

This lawsuit was ruled on in 2013 by the Missouri Public Service Commission. The Commission found that the solar rebates would be an “extra compliance burden” on the electric company because they were already meeting the 15% renewable energy standard that Proposition C detailed.<sup>202</sup> This allowed Empire District Electric to not pay solar rebates, unlike their two competitors. This led to AmerenUE and Kansas City Power and Light spending over \$150 million to incentivize the use of solar energy from 2008-2014, while Empire District Electric installed almost no solar panels in their service territory.<sup>203</sup>

An appeal to the Missouri Supreme Court was filed, and in 2015 it reversed the ruling. The court ruled 5-2 against Empire District Electric, stating that the PSC violated voter rights by preemptively overturning a part of a ballot initiative.<sup>204</sup> This represented a big victory for the supporters of Proposition C, and proponents of direct democracy in the state. However, a key component of the court’s decision was that the legislature could still pass laws dealing with approved initiatives.<sup>205</sup> This protected the series of events that had occurred right after Proposition C’s approval.

#### *Repeal Efforts After Approval*

After Proposition C was approved by voters, the implementation of the statute proved difficult. Missouri’s Public Service Commission (PSC) had to calculate how much of the utilities' electricity would be generated from renewable energy sources and how much customers

could be billed. A year after Proposition C was passed, the PSC gave their rule to the Missouri Secretary of State.<sup>206</sup> The PSC had turned the 1,000 word initiative into a 10,000 words of administrative rules detailing the implementation of Proposition C that was to take place in September 2010.<sup>207</sup> This became a point of emphasis for the opposition.

The PSC's ruling came with immediate controversy from the state representatives, and the legislature began to disregard some of the rules. One of the points of contention was over the electric rates that consumers would be required to pay. The PSC ruled that the 1% limit would be capped at an average over the next 10 years. However, some calculations found that this could mean rates could increase by around 5% but be counted only as a 0.7% increase, because the increase would be averaged over time.<sup>208</sup> Supporters of the measure argued that this would not be the case and that the 1% cap would promote renewable energy. Opponents stated that the details were too complicated and that the voters did not approve of those terms.<sup>209</sup>

The largest point of dispute was the purchase location of the renewable energy. The PSC ruling and the writers of Proposition C wanted the energy to be bought in Missouri or the surrounding states so that Missouri consumers would receive the benefit.<sup>210</sup> The utility companies disagreed with this stipulation based on the fact that prices could rise. They contended that they should be able to purchase the renewable energy on the open market, even if that meant the energy never ended up in Missouri.<sup>211</sup> The Joint Commission on Administrative Rules disapproved of this language, and the state legislature began the process to reject that requirement as well.<sup>212</sup>

On January 24<sup>th</sup>, 2011, the Missouri State Senate passed Republican-sponsored SCR1 29-2 to reject this part of the PSC's ruling.<sup>213</sup> While Governor Jay Nixon did not directly approve of SCR1, his rendering of the resolution as "moot" meant that SCR1 became effective soon after.<sup>214</sup>

This meant that investor-owned utilities could subsidize projects in other states, therefore not necessarily delivering the power to Missourians. Lawmakers in Missouri argued that Proposition C language allowed for companies to go out-of-state for lower prices, and that the PCS was overstepping by implementing the rule.<sup>215</sup>

Democrat-sponsored HB613 sought to reinstate some of those provisions by creating a new renewable energy act, but it never was taken up for a vote since their party was in the minority.<sup>216</sup> A 2012 ballot measure was drafted by supporters of Proposition C with the goal of solving the dispute as well as increasing the amount of renewable energy produced, but it never made it to the ballot because of technical issues.<sup>217</sup> The issue became stagnant, with both sides pushing for their cause with no real action taken.

As Missouri continues to debate its renewable energy policy, this case study is important because it provides an example of how state legislatures can sometimes get involved before the initiative is voted on. This process demonstrated the numerous attempts that the legislature made to undermine Proposition C, and another example of a Republican-led legislature doing so. In the end, the initiative did not get entirely repealed, but the legislature was able to target parts of it to make it less effective than originally intended.

### ***Missouri Proposition B, 2010***

Missouri Proposition B was placed on the ballot by way of 190,000 signatures.<sup>218</sup> The signature requirement in Missouri for initiated statutes to reach the ballot is five percent of legal voters in any six of the eight congressional districts based on the totals of the last gubernatorial election. In 2010, the requirement was approximately 92,000. Proposition B put regulations on the dog breeding process. This included requirements for six main tenets of proper treatment of

the animals: sufficient food and clean water, veterinarian care, housing, and space to move freely, exercise, and rest.<sup>219</sup> Each point was defined further to clarify the terms listed. Proponents wanted to clearly define the terms to dictate how breeders were to act so there would be a standard set for the state. According to the official statute:

The purpose of this Act is to prohibit the cruel and inhumane treatment of dogs in puppy mills by requiring large-scale dog breeding operations to provide each dog under their care with basic food and water, adequate shelter from the elements, necessary veterinary care, adequate space to turn around and stretch his or her limbs, and regular exercise.<sup>220</sup>

The initiative also put a 50-dog cap on the amount of dogs breeders could own.

Furthermore, it detailed criminal codes for committing the crime of “puppy mill cruelty”—making it a class C misdemeanor for the first offense, and a class A for repeat offenders.<sup>221</sup>

It was approved by a slim margin of 3.18 percentage points, with 997,870 people voting in favor (51.59%), and 936,190 (48.41%) voting against.<sup>222</sup> The supporters of the initiative raised just under \$2 million in their efforts, with a large percentage coming from out-of-state groups. The funding became a point of contention for opponents of the bill, as they would argue that the proposal was not representing the views of Missourians and was being corrupted by outside forces such as the Humane Society of the United States.<sup>223</sup> This coincided with an urban versus rural split in voting totals, as many farmers saw this as a direct attack on their livelihood and worried that it could signal future agricultural regulations.<sup>224</sup> Notable supporters included the Humane Society of Missouri, the Humane Society of the United States, Missouri Alliance for Animal Legislation, and the American Society for the Prevention of Cruelty to Animals. Notable opposition included the American Kennel Club, the Missouri Veterinary Medical Association, the Missouri Federation of Animal Owners, the Missouri Farm Family Agricultural Alliance, Missouri Farm Bureau, and the Missouri Pork Producers Association.<sup>225</sup>



After its passage, the debate over repeal began. Supporters of the bill cited that the will of the voters should not be denied, however, repeal efforts were under way in the state legislature. Missouri SB4 and HB94 were both introduced in their respective chambers with the purpose of completely overturning the initiative. One was sponsored by a Republican and the other was sponsored by both a Democrat and a Republican. However both bills never made it out committee.<sup>226</sup> Therefore, since complete repeal was not going to happen, the legislature began to look for ways to repeal parts of Proposition B.

The Senate then put forth SB113, which completely removed the ownership cap. Advocates of this removal argued that Proposition B's ownership cap only served to hurt those licensed breeders that followed the law, and that quantity of dogs did not have an impact on the quality of care.<sup>227</sup> Proponents of Proposition B argued that this was a major portion of the bill that was gutted.<sup>228</sup> The statute's name was switched from "Puppy Mill Cruelty Act" to "Canine Cruelty Act," and SB113 redefined and reworded some key phrases of the law.<sup>229</sup> In addition to the name change, the terms that the bill altered broadened definitions to allow veterinarians to make judgement calls on requirements regarding rest, exercise, and periodic checkups. Furthermore, the definitions regarding food and water, housing, and space to move were broadened to align with "departmental regulations."<sup>230</sup> SB113 also removed the criminal codes that Proposition B had implemented for the crime of puppy mill cruelty. Therefore, under this new bill, the crime of "puppy mill cruelty" would cease to exist, and instead it was replaced with clarification of the criminal codes referring to violation of the existing Animal Care Facilities Act.<sup>231</sup> The changes in these definitions and criminal codes were seen by proponents of Proposition B as essentially gutting the initiative, as they determined these new meanings were vague and therefore not going to be enforced properly.<sup>232</sup>

The bill passed through the Missouri Senate by a vote of 20-14. The vote was largely partisan, as 7 of 8 Democrats and 7 of 26 Republicans in the Senate voted against SB113.<sup>233</sup> There was also an “emergency clause” introduced which would have made the bill effective within 90 days.<sup>234</sup> Since the Missouri Constitution does not allow for referendum on legislation that has an emergency distinction, this clause would have prevented a referendum vote on SB113. This was seen by proponents of Proposition B as a clear attempt to silence their voices. Fortunately for supporters, an emergency clause required a two-thirds majority vote, so while the clause received an 18-15 vote in favor, the clause was ultimately not implemented.<sup>235</sup>

All of the Senators who voted against the SB113 represented districts that approved Proposition B by over 60 percent. All but four Senators who supported the partial repeal bill represented districts that voted under 50 percent for Proposition B. These four Senators were Democrat Victor Callahan, Republican Scott Rupp, Republican Bob Dixon, and Republican Rob Schaaf.<sup>236</sup> As the lone Democrat voting for the SB113, Callahan (who was the Senate Minority Leader as well) proclaimed that the bill still aligned with the voters’ original intent, and that a lack of “enforcement tools” was a large part of why Proposition B needed to be altered.<sup>237</sup> Schaaf explained that his district misunderstood the impacts of the initiative, saying: "I don't believe people in my district wanted to put every dog breeder out of business."<sup>238</sup>

In the House SB113 barely passed the 82-majority requirement needed, with it passing 85-71.<sup>239</sup> During the session, 13 members voted for SB113 even though their district approved Proposition B.<sup>240</sup> Republican Representative Paul Curtman claimed he had “a lot of heartache” overlooking the will of his voters, as he did so along with six other Republicans in the St. Louis area who approved it.<sup>241</sup> Republican Representative Kurt Bahr cited lack of funding mechanisms that would help enforce Proposition B.<sup>242</sup> Democratic Representative Jamilah Nasheed justified

her vote against her district (which voted 81% in favor of Proposition B) by stating “it's always good to find some type of common-ground compromise.”<sup>243</sup> Some speculated that the suburban Representatives that switched were enticed by promises by the Republican House leadership that included rural assistance on future bills such as charter schools.<sup>244</sup> Regardless, the lawmakers' statements did not cite that as a factor.

Before signing SB113 into law, Democratic Governor Jay Nixon proposed a compromise that he hoped would bridge the gap between the voters' wishes and the objections by the state legislature. This compromise was reached with major players on both sides, including Kathy Warnick of the Humane Society of Missouri, Karen Strange of the Missouri Federation of Animal Owners, Bob Baker of the Missouri Alliance for Animal Legislation, Barbara York of the Missouri Pet Breeders Association and Don Nikodim of Missouri Farmers Care.<sup>245</sup> In doing so, Nixon started the process of a new piece of legislation, SB161, being considered to modify SB113. SB161 strengthened some of the language in SB113 that was seen as vague by Proposition B proponents, especially surrounding space parameters, exercise, and guidelines veterinarians had to follow when performing checkups or making recommendations.<sup>246</sup> It also inserted more criminal codes to detail the crime of “canine cruelty” as a class C misdemeanor for first time offense, and a class A for a repeat offense. SB161 passed easily through the Missouri House (108-42) and Senate (24-10), and, unlike SB113, do so with an emergency clause.<sup>247</sup> The emergency clause implemented the law almost immediately, and prevented any future referendum on the statute.<sup>248</sup> Therefore, if proponents still had problems with the dog breeding process, another citizen initiative would have to be created.

Ultimately the proponents of Proposition B were able to pass reforms to the breeding system in Missouri. However, they were only able to do so because of the Governor Nixon's

actions that were focused on reaching a compromise. The state legislature made several clear attempts to alter Proposition B, and passed SB113, which many proponents of the initiative were dissatisfied with. So while Nixon effectively brought both sides to reluctantly agree on a revision, this did not end the debate over the initiative, and there were still Missouri residents that felt the titled “compromise” was rushed and demonstrated how the legislature was able to disregard the voters.<sup>249</sup> However, this process did prove that the voters’ wishes could not totally be ignored by a legislature that largely wanted to, and highlighted some of the tactics and reasoning that legislatures utilize to attempt to undermine initiated statutes.

### ***South Dakota Measure 22, 2016***

The most recent case study I examined is South Dakota’s Measure 22, in 2016. Plagued by two major ethics scandals in the two years prior, the voters of South Dakota decided to place an initiative on the ballot to deal with campaign finance reform.<sup>250</sup> To get an initiative on the ballot in South Dakota, the amount of signatures must be equal to five percent of the number of votes cast in the most recent gubernatorial election.<sup>251</sup> Since 277,248 people voted in the 2014 governor’s race, supporters needed to collect around 13,870 signatures by the deadline.<sup>252</sup> In the end, 25,216 signatures were collected, which submitted the initiated statute to the November ballot.<sup>253</sup>

Measure 22 was extremely detailed, reforming campaign finance and lobbying in several ways. The first was to alter the contribution limits. It lowered donation amounts to political action committees; political parties; and candidates for statewide, legislative, or county office.<sup>254</sup> PACs could not accept any contribution greater than \$2,000 during a calendar year from a single source (the limit before had been \$10,000). Political parties could not accept anything greater

than \$5,000 (down from \$10,000 as well).<sup>255</sup> Candidates for governor could not accept \$4,000 from an individual person or political committee, or \$40,000 from a political party, in a calendar year. For attorney general and lieutenant governor, those numbers were \$2,000 for individual and \$20,000 for a political party. For secretary of state, state auditor, state treasurer, commissioner of school and public lands, or public utilities commissioner, the limits were set at \$1,000 individually and \$10,000 for a political party. The numbers for candidates for legislative and county officers were \$750 individual and \$5,000 from a political party.<sup>256</sup> It also barred any candidate, PAC, or political party from accepting donations from any ballot question committee.<sup>257</sup> Section 31 of the initiative limited lobbyists from donating over \$100 in a calendar year, as well as banning being an intermediary for campaign gifts.<sup>258</sup> In addition, certain state officials and high-level employees were prohibited from lobbying until two years after leaving the state government.<sup>259</sup>

Other regulations in Measure 22 included disclosure and transparency details, as it required full disclosure of name and residence address to the recipient of the donation, no matter the entity donating.<sup>260</sup> It also limited individual donations to \$500 if the person did not disclose their occupation and current employer to the recipient, and inserted similar requirements for companies and committees that donate.<sup>261</sup> Section 22 of the measure increased the amount of disclosure statements that were required from committees, parties, or candidates.<sup>262</sup> Electronic standardization of disclosure was also accounted for in Sections 28-30.<sup>263</sup>

To go along with these changes, Measure 22 created an ethics commission entitled the South Dakota Ethics Commission. This ethics commission was to share responsibilities with the attorney general and secretary of state regarding enforcement of the new campaign finance regulations.<sup>264</sup> The commission was to have five members (who could not be state employees,

elected officials, or lobbyists) to serve single six-year terms. No more than two members could be from the same political party.<sup>265</sup> Their duties included the Democracy Credits Program implementation; issuing recommendations to minimize corruption and promote trust in the government; statement and record review; and investigative and enforcement duties.<sup>266</sup>

The final aspect of Measure 22 was the creation of a publicly funded campaign finance program, or a “democracy credit fund.”<sup>267</sup> The program would send each registered voter in the state two \$50 “democracy credits”, which voters could assign to the candidate(s) of their choosing. The democracy credits could only be assigned to candidates who had been certified as participating after the candidate filed with the ethics commission.<sup>268</sup> This certification process included a minimum number of “qualified contributions” ranging from \$25 to \$200 depending on the office, as well as a demonstration that no unqualified contributions were received.<sup>269</sup> Limits for the amount of democracy credit funds that candidates could receive were also put in place for each office. This included caps on all candidates for particular offices if the total amount redeemed by all candidates exceeded a certain number.<sup>270</sup> The ethics commission was to alter each of these numbers every other year based on the CPI of the Midwest Region.<sup>271</sup>

Measure 22 passed by a very slim margin of 3.26 percentage points, with 180,634 (51.63%) in approval, and 169,199 (48.37%) opposed.<sup>272</sup> There were two ballot question committees that supported Measure 22: South Dakotans for Ethics Reform, and South Dakotans for Integrity. In total, they received \$1,834,653 in contributions.<sup>273</sup> The top donor in support was a Massachusetts-based organization called Represent.Us, which seeks to pass anti-corruption initiatives at state and local levels of government.<sup>274</sup> Other notable supporters were OurRevolution, and Democratic members of the state legislature (who were facing a large Republican majority at the time).<sup>275</sup>

These supporters of Measure 22 saw it as a way to fix a broken election system in the state, holding politicians and lobbyists accountable, and limiting the influence of big money. In their argument, they cited a study that ranked South Dakota as the eighth most corrupt state, and claimed that the lack of oversight on lobbying gifts was a problem that Measure 22 would address.<sup>276</sup> They stated that lobbyists in opposition were only against the measure because they benefitted from the rigged system.<sup>277</sup> They saw Measure 22 as a step in the right direction toward fixing the broken political system in the country, and how South Dakota could lead the charge of election reform nationwide.<sup>278</sup>

Coinciding with the slim margin of victory was a large amount of opposition to Measure 22. Defeat22.com was the lone ballot question committee against Measure 22, and it raised over \$600,000 in its efforts.<sup>279</sup> The conservative group, Americans for Prosperity, was a top donor. Other notable opponents included the South Dakota Republican Party, South Dakota Chamber of Commerce & Industry, South Dakota Retailers, and South Dakota Farm Bureau.<sup>280</sup> They argued that the taxpayers would be forced into subsidizing political campaign activity that people might not necessarily support, and that those funds could be put toward other projects to help the state. They also took issue with the donation disclosure requirement that Measure 22 implemented, as they saw this as a privacy violation which would put South Dakota residents at risk for harassment and intimidation based on the disclosure.<sup>281</sup> Furthermore, the influence of outside groups like Represent.Us and OurRevolution was not received well because of their alleged unfamiliarity with the state and its people.<sup>282</sup>

The repeal effort occurred almost immediately after Measure 22 was approved by voters, as a lawsuit was filed by Republican state legislators two weeks after election day. In the court case, Sixth Judicial Circuit Court Judge Mark Barnett ruled to put a hold on much of the

statute.<sup>283</sup> While halting the implementation of the initiative, Barnett's ruling essentially passed the burden of repeal onto the legislature, which on January 20, 2017, introduced HB1069. The bill's sole purpose was to completely repeal Measure 22 and it passed through the House 54-13 and through the Senate 27-8.<sup>284</sup> No Democrat in either chamber voted in support of the bill, and only six Republican representatives combined voted against the bill. The bill also received the required two-third majority vote to pass with an "emergency" clause. This meant that HB1069 would be implemented as soon as it passed, and that a veto referendum was off the table for voters.<sup>285</sup>

Republican representatives supporting HB1069 made much of the same arguments as opponents had made during the campaign for the initiative, speaking out against outside influences in the state and privacy concerns. They claimed that the supporters of Measure 22 had been tricked into support by the external groups, and that a complete repeal was the best way to proceed. State Representative Larry Rhoden (R) cited the court's decision to support his argument to start from scratch, and said that the ethics in the state were "impeccable."<sup>286</sup> Another criticism against the initiative was that it was too long. Speaker of the House Mark Mickelson alluded to the 13,000 words and 35 pages as being problematic, and stated that he believed representatives would resign if Measure 22 was not repealed.<sup>287</sup>

Republican Governor Dennis Daugaard signed HB1069 into law on February 2, 2017. He stated that voters who supported Measure 22 were "hoodwinked by scam artists who grossly misrepresented these proposed measures."<sup>288</sup> However, he did sign other bills after passage through the state legislature that aimed at ethics reform. HB1073 limited lobbyist gifts and HB1076 established a government accountability board.<sup>289</sup> These bills showed slight resemblance to some of the provisions that were in the initiative. In addition, HB1053 coded



protections to government employees who reported violations of abuse of funds or authority.<sup>290</sup> The final bill signed by the Governor was HB1165, which required annual updates of financial interest statements for any elected statewide or local official.<sup>291</sup>

Many supporters of the original Measure 22 saw the repeal as a horrendous threat toward direct democracy in the state, and evidence that the legislature did not have the voters' interest in mind.<sup>292</sup> However, despite the repeal of the initiative, the legislature did take up the issue of campaign finance reform with the bills passed and signed by Governor Daugaard. While that is a silver lining in the midst of a defeat for direct democracy in the state, the repeal of Measure 22 proves that state legislatures are just as prepared as ever to go against the will of the voters when they do not agree with an initiated statute.

## **Analysis**

After examining each case study, I was able to identify some common trends that occurred. In this section, I will identify them, and explain their importance to the my overall research question. I organize my results in order from when they generally occur in repeal process.

### *Out-of-state Argument*

Many of the case studies I observed contained criticism of outside influence by national groups. During the debate over Idaho's Initiative 2, Montana's I-148, Missouri's 2010 Proposition B, and South Dakota's Measure 22, state legislators claimed that voters were influenced by various national groups, and that therefore the views of the voters were not represented properly. National groups in these case studies like U.S. Term Limits, the Humane

Society, and Represent.Us were accused by legislators of bringing the issue to the voters as opposed to having the voters create the conversation on their own. State representatives argued that outside influences were infiltrating the state, and that it was the legislature's duty to seek for repeal.

As the literature review demonstrated, the past decade has seen an increase in both state and national interest group involvement in the initiative process. There is a legitimate case to be made that the original reasoning for adopting initiatives in state constitutions has been eroded. More money from large national interest groups makes it harder for smaller groups to make an impact, and it is understandable why some people see heavy outside influence as damaging to an initiative's legitimacy. That being said, eliminating out-of-state influence does not necessarily decrease the lobbying efforts or money that these campaigns garner, as the interest groups within the state hold power and influence as well. This creates situations where the out-of-state influence can be exaggerated and misused to fulfill other objectives.

The legislature's use of the out-of-state argument does not always have to be grounded in truth. Just because interest group involvement is higher these days, does not mean that every case is severely impacted by it. Furthermore, as proven in the literature review, some of this influence can benefit the voters by making them more aware of the issues. By employing this line of reasoning, state legislators effectively can frame majority voter opinions as minority opinions. Despite the majority of voters approving a certain initiative, the legislators will say that it is only the case because of poor voter education on the issue. This is very similar to the original distrust of the initiative process when states were first writing the process into their constitutions. Lawmakers then and now cite a lack of deliberation and refinement in the initiative process, claiming that it goes against the Founders' vision for lawmaking. This fear that minority groups

could abuse the direct democracy system has taken a new identity with the out-of-state argument. The lawmakers are able to present themselves as defending the state from being bought by organizations that do not represent the voters. By distancing support for the issue to those outside the state, they minimize the issue at hand. This seems to rationalize total or partial repeal for them, making the process easier to begin.

The out-of-state argument paints the issue being debated as one that is not as important to the constituents as voters were led to believe. Regardless of the extent of the outside involvement, this expands on the trend of lawmakers questioning voter competence in regards to approving ballot initiatives they don't support. In addition to the claims examined in the literature review such as difficult ballot language, lack of media coverage, lack of spending, and voter fatigue, lawmakers identify the influence of national groups as swaying voters in one direction or another. According to these representatives, instead of the voters raising the issue themselves and having educated opinions on it, the organizations are in control.

The hypocrisy is evident, as legislators are being elected by those same voters. So when they try to discredit the voters by saying that "a small fraction voted" or that "the voters were bought", they are applying a different standard than they apply to their own elections. Regardless, the representatives make it clear on numerous occasions that they believe they know the will of the voters better than the actual voters.

In addition to minimizing the issue and raising questions of voter competence, this argument gives the legislature someone else to blame for an initiative they do not like beyond their constituents. This draws attention away from the fact that they are ignoring the will of the voters, and downplays a concern in their state. It allows the legislators to say that they are just defending their state's integrity, and is clearly an effective tactic. Three out of four of the cases

(Idaho Initiative 2, Missouri's 2010 Proposition B, and South Dakota's Measure 22) in which this argument was employed saw voter opinion shift away from support. This demonstrates the out-of-state argument's power and why it is very likely to be used if an approved ballot initiative attracts national attention, no matter the validity of the claims.

### *Role of the Judiciary*

In the selections of the cases, I came across many ballot initiatives that were ultimately ruled unconstitutional by courts either before being placed on the ballot, or after passage. Since the role of the judiciary and ballot measures could be an entire research paper in itself and outside the scope of my research, I did not examine those cases. However, I think it is important to talk about how the judiciary was used in half of the cases that I ended up selecting, and how that impacts the initiative. The case studies demonstrate more tactics that state legislatures use to control the fate of ballot initiatives. These examples of legislatures claiming that approved initiatives are unconstitutional, and how sometimes legislators themselves can attempt illegal practices to stop initiatives, can be key components of a state legislature's attempt to repeal.

Just like how the legislature tries to blame outside groups for leading the voters astray, they can utilize other sources to try to repeal a ballot initiative before it gets to the State House or Senate. In two of my case studies, the state legislatures filed lawsuits claiming that the initiatives were unconstitutional. Both measures that were under question dealt with direct checks on the power of the state legislature (Idaho's Initiative 2 and South Dakota's Measure 22). This prompts a suggestion for future research about the relationship between checks on legislative power and the likelihood of judicial involvement.

Both of these lawsuits were filed early after the initiative's passage, and were successful in delaying components of each piece of legislation. One takeaway from this is that it demonstrates the speed that the representatives want to begin repeal. When there is an issue that they want to repeal, the most immediate form of cancelling it from state law is to put it to the courts. Regarding Idaho's Proposition 2, *Rudeen v. Cenarrusa* was initially a successful challenge; and the lawsuit against South Dakota's Measure 22 resulted in a blockage. These validated the efforts of the legislature. While Idaho's case was appealed to the Idaho Supreme Court and was ultimately ruled constitutional, it still allowed the legislature to slow the movement down and generate distrust within the public. With an increased likelihood that the court will side with the legislature or at least provide mixed results, representatives could be more inclined to turn toward the judicial system to fulfill initiative repeal. It can be quicker than the lawmaking process, and it provides a cover for the legislature to hide behind. While the burden of repeal fell to the state legislatures in both cases, the willingness to go to the courts unveils this tactic utilized by representatives in the repeal process.

Another interesting aspect of the courts' relationship with ballot alteration is that both sides can benefit from it, as it also can be utilized by proponents of the initiative. As stated above, the legislature often wants to accomplish repeal in a swift and silent manner, which leads them to claim unconstitutionality so the judicial system does the work for them. But as shown in the case of Missouri's 2008 Proposition C, legislative repeal efforts can occur before the statute is voted on. The court was utilized in this situation to aid the initiative supporters, and protected the direct democracy process. While this was a win for the pro-initiative group, symbolizing that the court can favor both sides of the debate, it still allowed a path for the state congress to repeal the initiative later with legislation. Therefore, it seems the courts can seldom hurt the anti-

initiative legislature, only providing a chance to succeed or move on to the next method of repeal. Future research should be done on the relationship between the legislature and the judiciary when repealing an initiative is an option. This would give greater insight into how the legislature can be impacted from sending an initiative to court, and how the courts view direct democracy today.

*First option: total repeal*

When it came down to the actual repeal process, the beginning legislation from the state legislatures centered primarily around complete repeal of the initiative. Not all were successful, but for every case study I analyzed, among the early drafted legislation there was at least one proposed bill that called for total repeal. This similarity gives insight to how some representatives view the issues that they disagree with. Instead of initially opting for compromise legislation, the first option seems to be a binary debate between keeping all of the statute or none of it. The reasons behind this should be a focus of future study, as political posturing, apathy toward compromise, or other factors could contribute toward a representative's immediate suggestion of complete repeal of a voter-approved initiative. This trend seems to coincide with the increased partisanship that America has experienced during this 25 year time period. While these case studies and this issue is on a much smaller scale, it does not take away from the possibility that the nation's lessened ability to compromise could play a part in the zero-sum game that is observed with regards to some ballot initiatives.

This again relates to the lack of trust in voters. Now, as the literature review makes clear, there are many instances where the initiative process confuses or misrepresents voters, but factors like readability and oversaturation have an impact in many cases. Those factors do not

necessarily take away from voters caring about the issues that they vote on, or diminish their collective ruling on the issue. But instead of acknowledging that the issue at hand is one that voters care about and should be considered, some representatives do not give the voters' preference any credibility. This demonstrates a lack of faith in voter judgement, which again is hypocritical.

Beyond the questioning of voter knowledge and competency, the recommendation for complete repeal could demonstrate a doubt in the ability of voters to continue the support after the initiative. It takes a lot of effort and organization in many cases for initiatives to reach the ballot, so this could be seen as a good way to send initiative supporters back to square one. As the case studies showed, there are plenty of opportunities for the initiative process to be disrupted before the measure even reaches the ballot. And in most all of the cases, the issues are still being fought over to this day, with supporters of medical marijuana, or ethics reform in the states observed having problems getting their issues back on the ballots with similar support. Repeal puts initiative supporters on their heels, and therefore a complete repeal is not a bad place to start for some representatives.

#### *Rules of Repeal and Emergency Clause Usage*

A surprising takeaway concerning these cases is the lack of rules surrounding legislative repeal. As the literature review details, 11 states have no restrictions on the legislative repeal process. It seems that there is no coincidence that all the states used for the case studies are a part of that total. The absence of restrictions on legislative power might give representatives more confidence to take part in the repeal of a statute they didn't like compared to a representative in a state with some form of regulation. This is most demonstrated in the usage of emergency clauses.

Two of the five cases saw an emergency clause utilized to protect repeal legislation, and its impact potentially benefitted the legislature greatly. Not only does an emergency clause put a repeal resolution in effect, but in most cases does not allow for a referendum vote on the piece of legislation. This provides the legislature with an escape, and supporters of the initiative have to start a whole new campaign because the new legislation cannot be touched. In both cases where lawmakers used an emergency clause (Missouri's 2010 Proposition B and South Dakota's Measure 22), the debates over the initiatives were intense and involved a lot of negative political discourse. Both resolutions were seen by proponents of the initiatives as "gutting" the original statutes, and therefore were not universally supported by voters. The emergency clause prevented any action from being taken in either case, which provided the state legislatures safety from referendum on the controversial repeal legislation.

These two cases demonstrate how emergency clauses hinder the opposition's ability to respond in the way they would like, therefore making it harder to get the issue back to the voters' priorities. Neither issue has been successfully added back onto the ballots in the states which shielded the repeal with the emergency clause. Since another run at the ballot takes its time and is a very expensive endeavor to do, this can decrease support. It also allows the legislature and other opponents to form new opposition campaigns. The emergency clause is likely to hurt the chances of proponents being able to successfully bring up the issue again in a timely manner and restricts the ability of the public to provide that check that is written in their state constitution. The referendum is a safety valve for the initiative, and is the ultimate check on the legislature, and taking the option away makes the emergency clause a powerful weapon for the state legislature and governor to utilize to clear an issue off the table.



The prevalence of emergency clauses on controversial initiative repeal legislation is a big takeaway from my research. It brings into questions the legislature's ability to decide what an "emergency" is, since while the issues being discussed in these case studies were certainly important for the people of the states, they do not seem to qualify for the expected high standard it would take to pass a bill immediately without voter input. The use of it ignores compromise and bypasses direct democracy, all while demonstrating that legislatures will use the absence of rules to their advantage. The usage of emergency clauses should certainly be the subject of future research to determine how often abuse of this happens.

#### *Governor's role and Partisan Power*

The analysis of the case studies demonstrate the importance of the governor's role in the repeal process. Since the governor's signature is the last step in getting a complete or partial repeal passed, the actions of him or her can significantly impact the outcome. The governor is the party leader, and therefore gubernatorial decisions cannot be looked at without first examining the relationship with the legislature. In all of the case studies, the state legislatures were majority Republican— in many cases a heavy majority. Three cases included a Democratic governor, and two included a Republican. The governor responses were not common according to party, suggesting that it is a case-by-case decision when it comes to the governor's action regarding initiatives.

It seems the governor's personal thoughts on the issue take precedent over that of his or her party in the legislature, unlike the legislature themselves. Each case study saw state representatives in both chambers vote along party lines when it came to initiative repeal. Most of the time their district's voting outcomes did not matter, and instead party allegiance swayed their

vote. Similar to the initiative's beginnings when the Republican party did not support the concept, the Democrats in these case studies often utilized the hesitancy to score political points. However, since most of the states that have the initiative process are Republican majorities, I do not believe that party has an impact on whether or not repeal is taken up in the first place. Instead, I believe it is much more likely to associate the lack of restrictions on legislative alteration with whether or not repeal moves forward and is achieved. Therefore, while party does not necessarily determine whether repeal is considered, allegiance to party supersedes following voters' wishes when it comes to many state representatives.

Beyond the party and personal beliefs of the governor, the spotlight could also play a factor in the decision to sign off on repeal legislation or not. These situations become very public and polarized, as initiative supporters see repeal attempts as directly violating voter rights. With the increased attention, the governor could see this as an opportunity to win the voters' support by publicly defending their rights to direct democracy. In three of the five case studies, the governor either vetoed a repeal or advocated for compromise legislation. In these scenarios, the governor portrayed himself as an advocate of the will of the voters, and made public statements on their behalf.

The other two cases saw one non-committal governor, and one governor who was a stern advocate of repeal. The latter, South Dakota Governor Daugaard, cited the out-of-state argument as his reasoning for supporting repeal. However, he then signed other legislation that provided some of the reforms that supporters had been trying to address. Both could also be seen as a governor paying attention to the optics behind the decision to support or veto repeal. One governor did not want to formally take a stand on the issue, and the other publicly supported repeal but then made concessions under the radar. Therefore, it seems as though while the

relationship between governors and the repeal process is an extremely important one, it is heavily influenced by how the decision will politically impact public support for them.

## **Conclusion**

In my literature review and case study analysis, I demonstrate how the debate over ballot initiatives and direct democracy began and how it has carried to today. In my analysis of five case studies I examined the timeline of repeal attempts in each case, identified trends, and was able to reach the following conclusions:

When observing an approved ballot initiative, the prevalence of out-of-state interest group involvement on the issue is an area where the state legislature will often turn to make their case for repeal. The claim could be valid, as there is existing research to support that the initiative process has evolved to be used more by organizations, but could also be exaggerated by the legislature as rationale for repeal. In addition to the out-of-state argument, the state legislature will turn to the judiciary to make the first attempt at repeal. These early rationale can be seen as the representatives' way of shifting focus away from themselves (and shifting blame away from the voters) to use other entities for repeal. As the repeal process continues, it is very likely that one of the first bills introduced during the state session will be centered around a complete initiative repeal as opposed to a partial one. If total repeal is ultimately not achieved, the regulations of legislative action have a direct impact on how repeal is considered, especially when it comes to emergency clause usage. The emergency clause is an important option that state legislatures and the governor will utilize to quickly pass repeal legislation and end current discussion over the issue. The state governor plays a large role in the process, but often makes a decision based on optics or his personal opinion regarding the issue. This is in contrast to the

legislature who will very likely vote along party lines regardless of their district's support of the original initiative or not.

This research was not without limitations. To start, data (both qualitative and quantitative) on state ballot initiatives is not easy to find. Some media websites do not archive their stories and a lot of information is not stored on government websites. In addition, the repeal process does not happen often, in part because there is a lot of attention paid to the initiative when repeal is brought up and the backlash can be fierce. Although, in doing research for this paper, it does seem like examples of legislative alteration are increasing (or at least becoming more publicized). Finally, while many variables were controlled for, there are going to be special circumstances in every case that are going to have an impact on the outcome. However, the five cases I selected provide a good base for analysis because they represent several states and issues. They allowed me to examine the repeal processes and observe commonalities in state legislature arguments and tactics. These observations provide a blueprint for how this process works.

The initiative system is not perfect. Interest groups and increased spending have created systems where some people are seeing the process as inauthentic. Initiatives are also often not publicized well, leading to voter confusion and apathy on election day. Additionally, initiatives have a history of abusing minority groups, leading to some civil rights not being supported by direct democracy. Reforms of these issues are required for direct democracy to do what it is intended, and as the literature review demonstrated, there are many different opinions on how.

But states with no legislative repeal laws must make changes too, because instances of unchecked legislative authority against the voters is a dangerous precedent. There has to be regulations on legislative alteration of initiatives, whether that is supermajority requirements, time restrictions, putting the issue back to voters, or a new method. This is certainly the case for

the 11 states that currently have none of these rules, as all of my case studies were part of the 11. One recommendation would be to cap out-of-state monetary donations to help ease concerns about how initiatives are being marketed and who the people feel is in charge. Another recommendation is mandatory judicial review of emergency clauses regarding initiative repeal. An emergency clause severely impacts initiative groups and is often not a valid emergency. There needs to be more oversight when legislatures vote or declare an emergency.

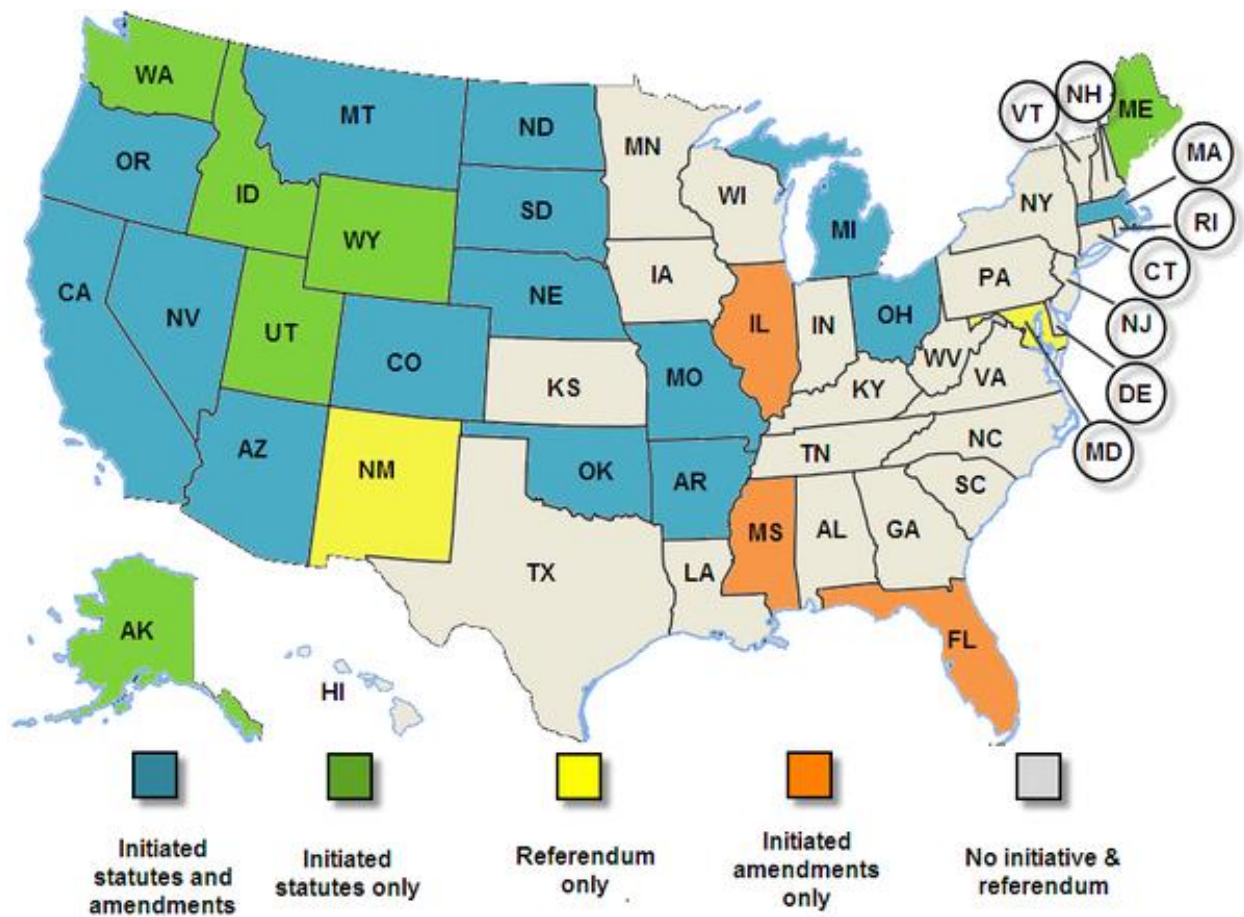
These findings would also benefit from future research into each observed trend. One could examine the relationship between out-of-state interest groups and the in-state voters to see if the groups are misrepresenting the people or convincing them to support something they do not understand. Examining the judiciary's role in the initiative process should also be explored further, specifically when it comes to initiatives that propose checks on legislative authority (such as Idaho's Proposition 2 and South Dakota's Measure 22). Future research should additionally center around emergency clauses and the rationale for their usage in initiative repeal settings, and how further oversight of that process, perhaps by the judiciary, would impact initiatives. With further in-depth analysis in these areas, the bridge between the two sides of the direct democracy debate could potentially come closer together.

Direct democracy is still a topic of debate in contemporary politics, and it is more relevant than ever. Each state varies, and the benefits versus drawbacks of initiatives are still weighed back and forth with many of the same arguments as the early 20<sup>th</sup> century. The process has changed since its inception in the late 19<sup>th</sup> century, leading to more interest group involvement, increased cost, and targeting of vulnerable minority groups. Because of these problems, the people should not have unlimited decision-making powers. However, while the check on the voters can come through judicial means, legislative repeal is an important

occurrence we must pay attention to. Initiatives are a written part of state constitutions, and therefore should be considered a right of the voters of the state. Legislative repeal brings up questions as to how valued the voters' opinion is, and how the legislatures' ability to undermine that opinion can be abused. The trends I observed throughout my research demonstrate how repeal occurs and the impact of rules on the process. It also provides a baseline for future research to analyze each trend in more detail.

As with many contemporary political issues, it is not easily solved, nor is it a binary solution. There needs to be a middle ground that allows voters to express themselves, while being confident that their representatives will respect that expression as long as it is constitutional. Despite the potential reforms that I have provided, I believe the one that matters the most is voter awareness. The initiative will only be as powerful as the voters' participation and awareness in the process. The legislature is going to introduce laws restricting initiatives. Just recently Idaho's state legislature passed initiative reform that would have made the state the most restrictive in the country (if the governor had not vetoed it).<sup>293</sup> In scenarios like that, the people in those states have to know the stakes and how to respond. Just as direct democracy was crafted to give voters power, the responsibility is on the general public to make the necessary changes. Without increased awareness of the process by the people, the ultimate check on authority stands in jeopardy when representatives can repeal measures with no restrictions.

## Appendix



This map shows status of direct democracy in each state. Due to the methods of my research, states with direct initiatives were the only ones I observed. Therefore, while all include examples of direct democracy, Florida, Illinois, Maryland, Mississippi, and New Mexico were not included.<sup>294</sup>





- <sup>21</sup> Ibid, 36.
- <sup>22</sup> Ibid, 42.
- <sup>23</sup> Ibid, 39; Piott, 8-9.
- <sup>24</sup> Goebel, 44.
- <sup>25</sup> Ibid.
- <sup>26</sup> Goebel, 44.
- <sup>27</sup> Ibid, 50.
- <sup>28</sup> Ibid, 51.
- <sup>29</sup> Ibid, 45-46; Schmidt, 7.
- <sup>30</sup> Schmidt, 7.
- <sup>31</sup> Goebel, 53.
- <sup>32</sup> Schmidt, 8.
- <sup>33</sup> Ballotpedia. "History of Initiative and Referendum in the U.S." Accessed March 15, 2019. [https://ballotpedia.org/History\\_of\\_initiative\\_and\\_referendum\\_in\\_the\\_U.S](https://ballotpedia.org/History_of_initiative_and_referendum_in_the_U.S).
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- <sup>43</sup> Nicholson, 403-410.
- <sup>44</sup> Ibid; Kesselman.
- <sup>45</sup> Nicholson, 403-410.
- <sup>46</sup> Ballotpedia. "Ballot Measure Readability Scores, 2017." 2017. Accessed October 10, 2018. [https://ballotpedia.org/Ballot\\_measure\\_readability\\_scores,\\_2017](https://ballotpedia.org/Ballot_measure_readability_scores,_2017); Reilly, Shauna, and Sean Richey. "Ballot Question Readability and Roll-off: The Impact of Language Complexity." *Political Research Quarterly* 64, 1. (2011): 59-67.
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- <sup>51</sup> Ibid.
- <sup>52</sup> Bowler & Donovan, xii-xiv.
- <sup>53</sup> Ibid, 45-46.
- <sup>54</sup> Piott, 31, 42,45,47; Goebel, 77-78.
- <sup>55</sup> Bruce E. Cain. & Kenneth P. Miller, "The Populist Legacy: Initiatives and the Undermining of Representative Government." in Larry Sabato, Bruce A. Larson, and Howard R. Ernst, eds. *Dangerous Democracy?: The Battle over Ballot Initiatives in America*. Lanham, MD: Rowman & Littlefield, 2001, 33; Broder, David S. *Democracy Derailed: Initiative Campaigns and the Power of Money*. San Diego: Harcourt, 2001, 15.
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