YOU SAY YES, I SAY NO: INSULATING THE INITIATIVE POWER AGAINST LEGISLATIVE TAMPERING IN VOTING AND ELECTORAL REFORMS

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I. INTRODUCTION

Elections are often hailed as reflecting "the will of the people," with legislators claiming broad mandates to implement their legislative agendas. But what happens when the electorate's legislative power comes into conflict with the legislature's legislative power? More specifically, what happens when the peoples' attempted reforms concern the electoral process itself, and the people's representatives fight back?

Consider, for instance, the plight of a Floridian who cast a ballot in support of Amendment 4 in 2018. Amendment 4 was a ballot initiative which, if approved, would amend the state constitution to restore voting rights to individuals convicted of a felony, excluding murderers and sex offenders, who have "complete[d] their sentence[s]."[1] The campaign for Amendment 4 succeeded, with 64.5% of Florida voters casting their ballots in favor of restoring the franchise to individuals with felony convictions.[2] Mere months later, however, the Republican-controlled Florida legislature passed a new law, S.B. 7066, which provided that an individual with a felony conviction would not be characterized as having "complet[ed] all terms of [a] sentence" until that person had repaid in

[*]J.D. Candidate, 2021, Seton Hall University School of Law; Executive Editor, Seton Hall Law Review; B.A., University of Vermont. I would like to thank Professors Lori Borgen and Michael Coenen for their invaluable insight into this paper, which grew dramatically from its inception over the course of unfolding events. I am grateful to the Seton Hall Law Review for their diligent work toward publishing this Comment and to Avi Muller for his superb stewardship of this institution through a tumultuous year. This Comment is dedicated to the individuals, in Florida and elsewhere, who are denied the right to vote based solely on their inability to pay legal fines and fees.

[1] FLA. STAT. § 98.0751(2)(a) (2020); FLA. DEPT. OF STATE DIVISION OF ELECTIONS, NOV. 6, 2018 GENERAL ELECTION OFFICIAL RESULTS, https://results.elections.myflorida.com/index.asp?electiondate=11/6/2018&datamode= (select "Const. Amendments" under the "Select Office" dropdown menu).

[2] *Id.*

full all legal fines and fees flowing from that sentence.[3] This statutory enactment effectively made voting rights restoration all but impossible for many, as the Florida Clerk of Courts association acknowledges that more than 80% of legal financial obligations have "minimal collections expectations."[4]

In the midst of a constitutional challenge to S.B. 7066, the Governor of Florida requested an Advisory Opinion from the Florida Supreme Court regarding Amendment 4, asking "whether the phrase 'all terms of sentence' encompasses . . . fines, restitution, costs, and fees [] ordered by the sentencing court."[5] The court answered in the affirmative, holding that "[t]he language at issue, read in context, has an unambiguous ordinary meaning that voters would most likely understand to encompass obligations including LFOs."[6] The court's decision arguably goes beyond its precedents to determine the intent of the legislation and mandates, rather than allows, repayment of legal financial obligations before becoming eligible for voting rights restoration. The effect of the legislature's interpretation of the amendment is clear, particularly in light of a recent federal court decision holding that Amendment 4, as interpreted by the Florida state legislature and Supreme Court, does not violate the federal Constitution.[7] The legislature could have clarified the "all terms of sentence" language to further the electorate's goal of restoring voting rights to thousands of individuals with a felony conviction. Instead, the legislature undermined the will of the electorate, as demonstrated through the constitutional initiative, was undermined by deciding to interpret the provision, not defined in the initiative itself, in such a strictly textualist manner.[8]

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[3] FLA. STAT. § 98.0751(2)(a) (2020).

[4] *See* Daniel Rivero, *Felons Might Have to Pay Hundreds of Millions Before Being Able to Vote in Florida*, WLRN PUB. RADIO & TELEVISION (Jan. 20, 2019, 7:38 PM), https://www.wlrn.org/post/felons-might-have-pay-hundreds-millions-being-able-vote-florida. Annual collection rates vary widely, "from 83 percent in 2015 down to as low as 43 percent in 2013." Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah Atchison, *The Steep Costs of Criminal Justice Fines and Fees*, BRENNAN CTR. FOR JUST. 45 (2019), https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf; *see also* Meghan Keneally, *"It's Not America: 11 Million Go Without a License Because of Unpaid Fines*, ABC NEWS (Oct. 25, 2019), https://abcnews.go.com/US/vicious-cycle-11-million-live-drivers-license-unpaid/story?id=66504966.

[5] Advisory Opinion to the Governor Re: Implementation of Amend. 4, The Voting Restoration Amend., 288 So. 3d 1070, 1072 (Fla. 2020).

[6] *Id.* at 1078 (internal quotations omitted).

[7] *See* Jones v. Governor of Fla., 975 F.3d 1016 (11th Cir. 2020).

[8] FLA. DEPT. OF STATE DIVISION OF ELECTIONS, *supra* note 1.

This dynamic has manifested itself several times with respect to voting and electoral laws passed by ballot initiative. In South Dakota, legislators repealed an initiated campaign finance statute.[9] In Idaho, despite voter approval of three initiatives on the issue of term limits for state and local officials over six years, legislators repealed the measures that would have prevented them from seeking reelection.[10] Florida, South Dakota, and Idaho all illustrate that when faced with new electoral or voting laws passed directly by the electorate, legislatures have chosen to amend, repeal, or effectively nullify those initiatives' results.

Certainly, there may be justifications for these responses to legislation-by-initiative; for example, an extensive body of literature documents the downsides of voter initiatives and the risks they pose for minority groups.[11] When given the unfettered opportunity to do so, majority groups have shaped (and likely will continue to shape) electoral laws to maximize their own powers.[12] But the lesser-known problem is that of majorities—and even supermajorities—of voters conferring new rights and more substantial access to the ballot box through ballot initiatives, only to see those reforms rolled back or altogether repealed by a majority of elected representatives. These dynamics create comparably significant barriers to vulnerable groups' abilities to exercise their political power. Just as scholars caution that states should safeguard minorities against tyranny of the majority at large,[13] states should equally protect minorities from a handful of powerful individuals who choose to defy the will of the people by rolling back expansions of the franchise, campaign finance reforms, term limits, and other laws which directly affect how legislators are chosen.

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[9] *See* discussion *infra* Section II.0.

[10] *See* discussion *infra* Section II.0.

[11] *See, e.g.*, Kristen Barnes, *Breaking the Cycle: Countering Voter Initiatives and the Underrepresentation of Racial Minorities in the Political* Process, 12 DUKE F. CONST. L. & PUB. POL'Y 123, 125 (2017); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 2 (1978); Todd Donovan, *Direct Democracy and Campaigns Against Minorities,* 97 MINN. L. REV. 1730, 1745 (2013); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1557–58 (1990); Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 738 (1988).

[12] For example, following the 2010 census, a number of state political parties took advantage of their controlling both the legislative and executive branches of government in their respective states to draw legislative and congressional district lines that helped to entrench their majorities for the coming decade and make it more difficult for the minority party to be competitive. Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, CTR FOR AM. PROGRESS (Oct. 1, 2019, 9:01 AM), https://www.americanprogress.org/issues/democracy/news/2019/10/01/475166/impact-partisan-gerrymandering.

[13] *See, e.g.*, Bell, *supra* note 11.

Initiatives have become a useful tool for voters to push back against unresponsive legislatures in an era of highly partisan politics, particularly in the realm of voting rights and electoral reforms. This Comment proposes that, because a higher degree of democratic participation facilitates a more inclusive and democratic society, legislatures must be limited in their ability to amend or repeal initiated statutes. In this way, initiatives can serve as a tool to expand the franchise and facilitate democratic accountability in an era where nearly unfettered campaign finance has reduced legislators' responsiveness to their respective constituents' will.

This Comment will examine how state legislatures across the United States have pushed back on—and in some cases, nullified—voting and electoral initiatives passed by large majorities of the voting population.[14] Unlike the federal Constitution,[15] many state constitutions create mechanisms for citizens to directly propose and force a popular vote on binding legislation or constitutional amendments; indeed, a majority of states allow citizens to initiate legislation themselves or veto legislation through a referendum.[16] The

[14] This Comment focuses on state legislatures, but it would be irresponsible not to point out the similar dynamics at play following the 2020 U.S. Presidential election. Though the Trump campaign's efforts to reverse the results of an election that he lost the popular vote by over six million votes ultimately proved unsuccessful, Presidential Election Results: Biden Wins, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html (last visited Dec. 16, 2020), the anti-democratic institutional consequences of the (now former) President's campaign to undermine the election results will surely endure, see Jim Rutenberg & Nick Corasaniti, *'An Indelible Stain': How the G.O.P Tried to Topple a Pillar of Democracy*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/2020/12/12/us/politics/trump-lawsuits-electoral-college.html. At the heart of these efforts was the same desire to override the popular will—the election of President Biden—through a concerted effort to lobby state legislators to elect a Republican slate of electors. *See* Clara Hendrickson, *Donald Trump Called Monica Palmer After Wayne County Board of Canvassers Meeting*, DETROIT FREE PRESS (Nov. 19, 2020, 7:35 PM), https://www.freep.com/story/news/local/michigan/detroit/2020/11/19/trump-monica-palmer-wayne-canvassers-certification-election/3776190001; Ed White et al., *Trump Summons Michigan GOP Leaders for Extraordinary Meeting*, ASSOCIATED PRESS (Nov. 19, 2020), https://apnews.com/article/trump-invites-michigan-gop-white-house-6ab95edd3373ecc9607381175d6f3328. As this Comment demonstrates, that state legislators and election officials chose to act according to the popular will in this instance more likely reflects the immense public pressure and publicity surrounding election certification in one of the most contentious election cycles in history than it does those officials' commitment to upholding basic democratic principles. Only time will tell what consequences this high-profile effort to reject the popular will might have on elections and ballot initiatives moving forward, but that issue is largely beyond the scope of this paper.

[15] Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1079–87 (1988).

[16] *Initiative and Referendum Processes*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 31, 2020), http://www.ncsl.org/research/elections-and-campaigns/initiative-and-

federal Constitution has left these states with significant leeway to allocate their legislative powers in different ways, and many states have chosen to vest some degree of power to propose and enact legislation directly in the electorate.[17] In Part II, this Comment looks first at three instances of legislative "nullification"—cases in which the legislature repealed or amended a piece of initiated legislation in a manner that changed its effects and achieved a result that was counter to the expressed will of the electorate. Part III examines why today's political climate necessitates state constitutional amendments that insulate the initiative power with respect to voting and electoral reforms while expanding judicial review. Part IV analyzes existing models for these types of constraints, looking particularly at constitutional restraints in Arizona and California on the legislature's ability to repeal or amend enacted initiatives. Finally, Part V proposes a remedial amendment to state constitutions and examines counterarguments to that proposal.

II. LEGISLATIVE RESISTANCE TO VOTING AND ELECTORAL REFORMS THROUGH BALLOT INITIATIVES

It is important to distinguish an initiative from a referendum at the outset; in common parlance, these phrases are often conflated. An initiative is "[a]n electoral process by which a percentage of voters can *propose* legislation and compel a vote on it . . ." by the electorate itself.[18] In contrast, a referendum is "[t]he process of referring a state legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote," or a vote taken pursuant to such a legislative referral.[19] This Comment focuses on what some scholars have called "substitute" direct democracy rather than "complementary" direct democracy.[20] Through "substitute" direct democracy, the people assume the power of legislators and circumvent the formal legislative and executive branches to propose, and potentially enact, their chosen policies.[21] In contrast, "complementary" direct democracy entails legislative referral of legislation to the electorate for approval.[22] This discussion excludes from consideration "indirect" initiatives, which submit the proposed legislation to

referendum-processes.aspx; *Laws Governing Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Laws_governing_ballot_measures (last visited Jan. 13, 2021).

17 *See* discussion *infra* Part 0.

18 *Initiative*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

19 *Referendum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

20 Eule, *supra* note 11, at 1510.

21 *See id.*

22 *Id.* at 1512.

legislators before being placed on the ballot for popular approval.[23] Because both indirect initiatives and referenda require legislative consideration prior to being put before the electorate, they are less relevant to this discussion. This Comment also considers constitutional amendments passed by way of initiative. Though different in terms of how they bind the legislature, the process by which these amendments are passed face similar dynamics, which have produced legislative responses akin to those of initiated statutes and thus warrant consideration.[24]

South Dakota, Idaho, and Florida present three cases where similar—yet procedurally distinct—dynamics resulted in the effective nullification of voter-approved ballot initiatives. These episodes demonstrate three approaches for legislatures to defy even the most broadly supported voter initiatives by choosing either to repeal the law or implement it based on legislators' own self-interest. There are other instances of these dynamics at work,[25] including instances outside the scope of this Comment, where legislatures have pushed back in a similar way against reforms unrelated to elections or voting laws. Ultimately, the three states discussed herein present a diverse array of issues and procedures that arise when the electorate's legislative power comes into conflict with the legislature's legislative power.

[23] *Id.* at 1511.

[24] For example, in Florida, which allows initiatives to amend the constitution but not to pass ordinary legislation, the initiative must be filed with the Secretary of State's office, a petition in favor of the initiative must be signed by voters in each congressional district equal to eight percent of the votes cast in the last preceding election, and the initiative must be approved by 60% of voters. FLA. CONST. art. XI, § 5(e). In comparison, South Dakota requires sponsors of an initiated statute to file a copy of the proposed statute with the Secretary of State prior to collecting signatures, S.D. CODIFIED LAWS § 2-1-1.2 (2020), and then requires signatures of five percent of the number of votes in the previous gubernatorial election, S.D. CONST. art. III, § 1. Ordinary initiatives in South Dakota require only a majority vote for approval. S.D. CODIFIED LAWS § 2-1-12 (2020).

[25] *See infra* Table 1.

A. *Ethics and Campaign Finance Reform in South Dakota*

In South Dakota, the people's power to initiate laws on any subject is coextensive with the legislature's authority to propose measures.[26] This power does not limit the legislature's ability to amend or repeal any law passed by initiative.[27] South Dakota voters chose to exercise their power in 2016 when they approved Measure 22, which was designed to lower maximum contribution amounts to Political Action Committees (PACs), political parties, and candidates; create a voluntary, publicly funded campaign finance program for statewide and legislative candidates; create an appointed ethics commission to administer the public financing system and enforce campaign finance laws; and prohibit certain state officials from lobbying after leaving government.[28] Voters approved Measure 22 by a three-point margin, voting 51.6% to 48.4% in favor.[29]

[26] Brendtro v. Nelson, 720 N.W.2d 670, 680 (S.D. 2006) (discussing the people's power to repeal or amend laws passed by the state legislature). The state constitution vests legislative power in the state legislature but reserves to the people "the right to propose measures, which shall be submitted to a vote of the electors of the state . . . except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions." S.D. CONST. art. III, § 1. For further discussion on South Dakota's initiative power, see Jessica A. Levinson, *Taking the Initiative: How to Save Direct Democracy*, 18 LEWIS & CLARK L. REV. 1019, 1023 (2014); Nicholas R. Theodore, Note, *We the People: A Needed Reform of State Initiative and Referendum Procedures*, 78 MO. L. REV. 1401, 1404 (2013); *State Initiative and Referendum*, INITIATIVE & REFERENDUM INST. (2014), http://www.iandrinstitute.org/states/state.cfm?id=24.

[27] *Brendtro*, 720 N.W.2d at 682 (quoting State *ex rel.* Richards v. Whisman, 154 N.W. 707, 709 (S.D. 1915)). Courts have further held that the lack of any explicit limitation on the legislature's ability to amend, veto, or nullify ballot initiatives indicates the legislature's power to do so. This is particularly true in light of the fact that the Executive power to veto is barred, demonstrating that the framers of the 1898 amendment gave consideration to which branches of the state government should be able to amend such initiatives. *Whisman*, 154 N.W. at 709–10 (comparing the South Dakota constitution to state constitutions which have expressly limited legislative power to repeal and/or amend initiated measures.). South Dakota is one of eleven states with no restrictions on the legislature's ability to amend or repeal initiatives. *Limiting the Legislature's Power to Amend and Repeal Initiated Statutes*, NAT'L CONF. STATES LEGISLATURES (June 28, 2011), http://www.ncsl.org/research/elections-and-campaigns/limits-on-legislative-power.aspx; *see also Legislative Alteration*, BALLOTPEDIA, https://ballotpedia.org/Legislative_alteration#States_with_no_restrictions (last visited Jan. 13, 2021).

[28] ATTORNEY GENERAL EXPLANATION, INITIATED MEASURE 22, 2016 STATEWIDE BALLOT MEASURES, S.D. SEC'Y OF ST., https://sdsos.gov/elections-voting/assets/2016FullTextoftheBallotQuestionProposals.pdf.

[29] *South Dakota Measure 22—Revise Campaign Finance and Lobbying Laws—Results: Approved*, N.Y. TIMES (Aug. 1, 2017, 11:26 AM), https://www.nytimes.com/elections/2016/results/south-dakota-ballot-measure-22-campaign-finance-overhaul. South Dakota requires a simple majority in order for initiatives to be enacted into law. S.D. CODIFIED LAWS § 2-1-12 (2020).

On February 2, 2017, the Governor of South Dakota signed into law H.B. 1069, which repealed key sections of Measure 22 and amended others to dramatically limit the effect that the initiative could have on campaign finance in South Dakota.[30] The text of H.B. 1069 provided that, because it was "necessary for the support of the state government and its existing institutions, an emergency [was] declared to exist."[31] Through the use of the "legislative emergency" clause, the South Dakota legislature made it impossible for the repeal bill to be called for a referendum.[32] The State Senate voted 27 to 8 in favor of repeal.[33] Supporters of the repeal effort argued that "Measure 22 was constitutionally murky and should be repealed and replaced with pieces that more clearly reflect the will of the voters."[34] But not everyone supported the bill. Sen. Billie Sutton (D-Burke) stated before the passage of the repeal bill that it would "send[] the message that we do not trust [the people] to make decisions on ballot measures. . . . The bottom line is will we ignore the will of the people?"[35]

Despite pledging to replace Measure 22 with new legislation that would resolve the alleged constitutional issues while still honoring "the will of the people," the South Dakota legislature largely failed to restore the policies promised by Measure 22. Through repeal, South Dakota lawmakers were effectively able to choose elements of the bill to implement and others to eliminate, in conflict with the expressed will of the voters through the election results. The legislature restored campaign finance contributions to substantially higher pre-Measure 22 levels, declined to enact the public financing system, and narrowly

30 H.B. 1069, 2017 Leg., 92nd Sess. (S.D. 2017) (codified as Campaign Finance Repeal and Revise, 2017 S.D. Sess. Laws ch. 72 §§ 1–2 185).

31 *Id.*

32 For a discussion of the lawful functions of the emergency clause under South Dakota law, see *Whisman*, 154 N.W. at 711–12 ("The only lawful function of the emergency clause is to cause an enactment to go into effect as soon as signed by the executive, instead of waiting until the first day of the next July. It must be observed that the initiative and referendum amendment to the Constitution provides that any laws which the Legislature may have enacted shall, upon a proper referendum petition being filed, be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the state government and its existing public institutions.").

33 Dana Ferguson, *S.D. Senate Strikes Voter-Approved Ethics Law*, ARGUS LEADER (Feb. 1, 2017, 7:59 PM), https://www.argusleader.com/story/news/politics/2017/02/01/sd-senate-strikes-voter-approved-ethics-law/97333962.

34 *Id.*

35 *Id.*

defined other portions of the remaining provisions to limit their application.[36]

In 2018, voters put an initiated constitutional amendment on the ballot that would have restored the proposed campaign finance and ethics reforms proposed in Measure 22 and created a voter approval requirement for any future legislatively-proposed amendments or repeal to take effect.[37] The amendment did not pass, garnering only slightly more than 45% of the vote.[38] This result highlights one potential issue with governing by initiative: consecutive or even simultaneous initiatives can receive inconsistent amounts of support, which only makes it more difficult to determine voters' actual intent. This becomes relevant, as demonstrated below, in the face of standards that constrain the legislature based on the core purposes of an initiative.[39]

B. *Term Limits in Idaho*

In Idaho, voters approved Initiative 2 in 1994 to impose term limits on U.S. Representatives and Senators, and on state and local elected officials.[40] Idaho voters overwhelmingly passed Initiative 2 with 59% of the vote.[41] In 1996, after the Idaho Supreme Court ruled that state-imposed term limits on U.S. Representatives and Senators were

[36] *Id.* While the legislature passed eight bills aimed at "creating lobbyist restrictions, allowing for investigation of wrongdoing in state government, and requiring more disclosure in campaign finance," it did not approve a public campaign finance system, lower campaign contribution limits, or ban certain gifts from lobbyists as proposed under Measure 22. Dana Ferguson, *After Promising to Replace, Did Lawmakers Deliver on IM22?*, ARGUS LEADER (Mar. 11, 2017), https://www.argusleader.com/story/news/politics/2017/03/11/after-promising-replace-did-lawmakers-deliver-im22/99014304.

[37] James Nord, *Ethics Measure Approved to be on South Dakota's 2018 Ballot*, PBS NEWSHOUR (Dec. 30, 2017), https://www.pbs.org/newshour/politics/ethics-measure-approved-to-be-on-south-dakotas-2018-ballot.

[38] *South Dakota Election Results*, N.Y. TIMES (May 15, 2019), https://www.nytimes.com/interactive/2018/11/06/us/elections/results-south-dakota-elections.html.

[39] *See* discussion *infra* Part IV.

[40] IDAHO CODE § 34-907 (1995). Though there were federal constitutional defects with respect to the law's applicability to federal elections that would ultimately be litigated, this Comment examines this and other Idaho initiatives solely for their effects on state and local officials. Initiative 2 "established that certain persons shall not be eligible to have his or her name placed upon the primary or general election ballot[,]" although it did not prohibit voters from writing that person's name on the ballot, nor did it prevent candidates from conducting write-in campaigns. Rudeen v. Cenarrusa, 38 P.3d 598, 601–02 (Idaho 2001) (internal quotation omitted). For an overview of Idaho's initiative process and the events surrounding the term limits repeal, see Scott W. Reed, *How and Why Idaho Terminated Term Limits*, 50 IDAHO L. REV. 1, 12 (2014).

[41] IDAHO SECRETARY OF STATE, ELECTION DIVISION, IDAHO INITIATIVE HISTORY (2019), https://sos.idaho.gov/elect/inits/inithist.htm.

unconstitutional, Idaho voters enacted a second initiative that required candidates for Congress and the state legislature to "pledge to support term limits."[42] Portions of this second initiative were struck down as unconstitutional under the Idaho state constitution, but the instruction that members of Congress and state legislators support term limits was upheld.[43] In 1998, Idaho voters again passed an initiative in favor of term limits, this time "allowing Congressional candidates to sign a term limits pledge."[44] This third initiative authorized the Secretary of State "to accept signed term limits pledge[s] from candidates" and required the Secretary to "place term limits pledge information on ballots" and in polling places.[45]

In 2000, local officials sued to have the term limits on state and local legislators thrown out for being unconstitutional.[46] Four state Republican leaders, who would soon be restricted from appearing on the ballot, intervened in the lawsuit.[47] In *Rudeen v. Cenarussa*, the Idaho Supreme Court examined the legality of the entirety of the 1994 initiative and found the term limits on state and local officials to be constitutional under both the state and federal constitutions.[48] The

[42] Simpson v. Cenarrusa (*In re* Writ of Prohibition & Declaratory Judgment), 944 P.2d 1372, 1373 (Idaho 1997). In 1995, the U.S. Supreme Court held in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) that states could not constitutionally impose term limits on candidates for the U.S House of Representatives or Senate. *Thornton* left open the question, however, of whether states could constitutionally impose term limits on candidates for state or local office. Bates v. Jones, 131 F.3d 843, 849 (9th Cir. 1997) (O'Scannlain, J., concurring) ("As an initial matter, *Thornton* does not speak at all to the question of whether limits on the terms of state officeholders raises a substantial federal question. *Thornton* is concerned exclusively with the constitutionality of state-imposed term limits on federal officeholders. The Supreme Court's decision was bottomed on the Qualifications Clause and the notion of a "national citizenship," neither of which, of course, has any relevance to this case."). In *Bates*, the Ninth Circuit held that California's term limits for elected state officials were constitutional under the first and fourteenth amendments. *Id.* at 847. Unlike in *Thornton*, where the Supreme Court scrutinized the law at issue under the Qualifications Clause, the Ninth Circuit analyzed the California law under the first and fourteenth amendments. *Id.* at 848–49 (O'Scannlain, J., concurring).

[43] *Simpson*, 944 P.2d at 1374–76.

[44] IDAHO OFFICE OF THE SEC'Y OF STATE, IDAHO VOTERS' PAMPHLET 3 (1998).

[45] *Id.* Under the initiative, candidates would agree that if they broke their pledge to voluntarily limit themselves to the term limits passed in previous initiatives, the words "Broke TERM LIMITS pledge" would appear next to their names on the ballot. *Id.* at 4. Although some portions of the initiative were struck down in court, the state could still publish information about candidates' position on the term limits pledge in voter education materials. Van Valkenburgh v. Citizens for Term Limits, 15 P.3d 1129, 1136–37 (Idaho 2000).

[46] Rudeen v. Cenarrusa, 38 P.3d 598, 602 (Idaho 2001).

[47] Reed, *supra* note 40, at 20.

[48] *Rudeen*, 38 P.3d at 609.

court held that the right to suffrage guaranteed under the state Constitution did not include the right to hold elected office.[49] In so constraining elected officials' right to hold office, the court viewed the 1994 initiative as a valid exercise of the electorate's constitutional initiative power.[50]

At the 2000 state Republican convention, a former state legislator and the sponsor of the term limit repeal effort said of voters' repeated support for term limits: "The people have spoken . . . they were wrong."[51] Idaho, like South Dakota, places no restrictions on legislators' abilities to alter or repeal enacted initiatives.[52] Legislative power lies in the hands of the legislature, though "[t]he people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature."[53] In February 2001, only two months after the 1994 term limits law was unanimously upheld in *Rudeen*, the state legislature declared a legislative emergency and overrode the Governor's veto to repeal the law, despite repeated public support over the course of three successive initiative campaigns.[54] Governor Kempthorne stated that his veto was "a question of process, and the will of the voters cannot be ignored and must be protected."[55] Before the repeal, "an estimated 60% of local officials were scheduled to be term-limited out of office in 2002 . . . . Local officials and their supporters . . . lobbied legislators (especially rural ones) to overturn the ban on terms."[56]

Bart Davis, who served as Senate Majority Caucus Chairman in 2002 during the repeal effort, penned a law review article explaining the legislature's rationale. Mr. Davis stated in his article that "the legislature repealed term limits because it could. Though brashly stated, the legislature substituted its judgment for the will of the people. Whether it should or not, is in the eye of the beholder."[57] Mr. Davis argued that the legislature "was in a unique position to see the effects of term limits

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[49] *Id.* at 604.

[50] *Id.*

[51] Bart M. Davis, *Idaho's Messy History with Term Limits: A Modest Response*, 52 IDAHO L. REV. 463, 466 (2016) (alterations and internal quotations omitted) (citing Mark Warbis, *Idaho Republicans Seek to End Term Limits*, SPOKESMAN-REV., June 25, 2000, at B3).

[52] *See* IDAHO CONST. art III, § 1; IDAHO CODE § 34-1801 (2019).

[53] IDAHO CONST. art. III, § 1.

[54] *In re* Writ of Mandamus And/Or for Writ of Prohibition, 92 P.3d 1063, 1064 (Idaho 2002); Michael Janofsky, *Idaho Legislature Repeals Term Limit Law, Undoing Voter-Approved Measure*, N.Y. TIMES, February 2, 2002, at A13.

[55] *Id.*

[56] Daniel A. Smith, *Overturning Term Limits: The Legislature's Own Private Idaho?*, 36 POL. SCI. & POL. 215, 216 (2003).

[57] Davis, *supra* note 51, at 485.

in other states, reasonably project those effects in Idaho, and understand the damage they would do at the local level."[58] Implicit in this argument is that the public could not—and did not—see and understand the effects that happened in other states. They could not, in his estimation, make a calculated decision about the long-term effects of term limits on political life in Idaho. Of legislators that voted to repeal, only eleven were defeated in the following election, although some were defeated as a result of redistricting.[59] This does not, however, prove that voters were not troubled by the legislative rebuke but instead suggests the significant incumbency advantages that term limits were designed to protect against.[60]

Idaho's saga with term limits further demonstrates the limited role of the judiciary in protecting the will of the people, as expressed in an initiative. Two citizens challenged the legislature's repeal of the 1994 Term Limits Act in court.[61] The court held not only that the legislature was not limited under the Idaho Constitution in terms of its ability to repeal enacted initiatives but also that the judiciary may not second-guess the legislature's decision to declare a legislative emergency to do so.[62] The court expressed a generalized skepticism toward engaging the "legislative process," arguing instead that its role is "the determination of the constitutionality of action of other branches of government but only when the time and circumstances are appropriate."[63] Inherent in this decision is a larger problem of how voters may be afforded a remedy in cases where their ability to choose their legislators is undermined through the legitimate legislative process. This issue is examined in greater depth below.[64]

58 *Id.* at 485.

59 *Id.* at 491.

60 *See* discussion *infra* Section III.A.

61 *In re* Writ of Mandamus And/Or for Writ of Prohibition, 92 P.3d 1063, 1065 (2002). While the Idaho Supreme Court did not address whether a citizen at large, who voted in favor of the repealed initiative, had standing to challenge the repeal, the case was allowed to proceed on the basis that another plaintiff was a potential candidate for an office held at that time by an incumbent who would be barred from seeking reelection, and thus had suffered injury. *Id.*

62 *Id.* at 1067 (citing Idaho State AFL-CIO v. Leroy, 718 P.2d 1129 (Idaho 1987)).

63 *In re Writ*, 92 P.3d at 1067–68.

64 *See infra* Part III.

C. *Voting Rights Restoration in Florida*

While initiated statutes are in most cases easily subject to legislative amendment or repeal, initiated constitutional amendments, at least theoretically, are more difficult for state legislatures to subvert. One potential solution to the dynamics at play in South Dakota and Idaho may be to enshrine the proposals enacted by initiative and legislatively repealed in a constitutional amendment. But as recent events in Florida demonstrate, this strategy is similarly susceptible to legislative influence in ways that subvert the initiative's core purposes. Florida is unique among the states examined here in that it does not allow initiated state statutes; the only permissible ballot initiatives are initiated constitutional amendments.[65] Lawmakers cannot directly alter the language of constitutional amendments as they would be able to amend an approved initiated statute but instead must submit proposed amendments to the voters, except where the proposed amendments limit the government's power to raise revenue.[66] Even so, lawmakers can interpret language in the initiated constitutional amendments in order to shape their meaning, as occurred following Amendment 4's ratification.

In 2018, Florida voters enacted Amendment 4, a constitutional amendment designed to automatically restore voting rights to individuals with felony convictions, excluding murderers and sex offenders, "upon completion of all terms of sentence including parole or probation."[67] Prior to Amendment 4, felony conviction resulted in permanent disenfranchisement unless the Governor chose to restore an individual's rights through clemency.[68] Florida's now-defunct felony disenfranchisement law dates back to an era before Reconstruction.[69] As of 2016, the law disenfranchised 21% of Florida's African American voting-age population.[70] The Amendment 4 campaign aimed to amend

65 FLA. CONST. art. XI, § 3.

66 FLA. CONST. art. XI, § 3.

67 FLA. CONST. art. VI, § 4(a).

68 Erika L. Wood, *Florida: An Outlier in Denying Voting Rights*, BRENNAN CTR. FOR JUST. 3 (Dec. 16, 2016), https://www.brennancenter.org/publication/florida-outlier-denying-voting-rights.

69 *Id.* Florida first enacted a felony disenfranchisement law in 1845, before African Americans were granted the right to vote. Johnson v. Governor of Fla., 405 F.3d 1214, 1218 (11th Cir. 2005) (discussing the history of felon disenfranchisement in Florida). Three years prior, the state enacted Black Codes, which corresponded with an increase in prosecution of and higher penalties for crimes the legislature believed were more likely to be committed by blacks. Wood, *supra* note 68, at 4.

70 CHRISTOPHER UGGEN, SARAH SHANNON & RYAN LARSON, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, THE SENTENCING PROJECT 16 (2016),

the state constitution to automatically restore the voting rights of individuals with felony convictions, excluding murderers and sex offenders.[71]

In November 2018, over 64% of Floridians voted to amend their state constitution and restore the voting rights to those affected by the felon disenfranchisement provision.[72] The Florida Constitution now requires that "any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation."[73] Although legislators are bound to respect the voting rights of felons who complete their sentences, the amendment itself does not define what completing one's sentence entails. The legislative response to Amendment 4 undermined its core purpose by redefining key terms from the initiative's language. On May 6, 2019, Governor DeSantis signed into law S.B. 7066, which defined the key phrase "completion of all terms of sentence" to encompass the payment of all fines and fees ordered by a court as part of the sentence or as a condition of supervision, including probation, community control, or parole.[74] Voting rights are not restored until all fees, fines, and restitution imposed as part of the sentence for a felony conviction are repaid, even those that a judge has converted into a civil lien.[75]

https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016.

[71] The actual text of the ballot initiative read:

> *No. 4 Constitutional Amendment Article VI, Section 4. Voting Restoration Amendment* This amendment restores the voting rights of Floridians with felony convictions after they complete all terms of their sentence including parole or probation. The amendment would not apply to those convicted of murder or sexual offenses, who would continue to be permanently barred from voting unless the Governor and Cabinet vote to restore their voting rights on a case by case basis.

Official Sample Ballot, General Election, Nov. 6, 2018, https://www.flaglerelections.com/Portals/Flagler/pdfs/2018-General-Sample-Ballot-Mailing.pdf.

[72] FLA. DEPT. OF STATE DIVISION OF ELECTIONS, *supra* note 1.

[73] FLA. CONST. art. VI, § 4(a).

[74] FLA. STAT. § 98.0751 (2019). These conditions are completed, under S.B. 7066, only through actual payment, termination of the obligation by the court upon the payee's approval through appearance in court or through notarized consent, or completion of all community service hours if the court converts the financial obligation to community service. *Id.*

[75] *Id. See also* Jones v. DeSantis, 410 F. Supp. 3d 1284, 1291 (N.D. Fla. 2019) ("Conversion to a civil lien, usually at the time of sentencing, is a longstanding Florida procedure that courts often use for obligations a criminal defendant cannot afford to pay.").

At first glance, S.B. 7066 seems to merely interpret the terms of Amendment 4, but the context in which its definition of sentence "completion" operates dramatically limits the amendment's practical effect relative to voters' reasonable expectations of voting rights restoration.[76] Between 1996 and 2012, Florida legislators created twenty new categories of legal financial obligations (LFOs), or fines and fees imposed by a court for various services, penalties, and mandatory surcharges, while simultaneously eliminating exceptions for those unable to pay.[77] The Florida Department of Corrections (FDOC) Chief of Admission admitted that FDOC has practically no way of knowing if an individual has not repaid financial obligations after their formal supervision has been completed.[78] The state does not maintain a database of LFOs,[79] and courts often order individuals to pay restitution directly to victims, for which there are no receipts of documentation.[80] The Florida Clerk of the Courts Association expects that 83% of LFOs will go unpaid.[81] Further, S.B. 7066 does not require courts to assess an individual's ability to pay.[82] Individuals who are unable to pay back

[76] *See Jones*, 410 F. Supp. 3d at 1295.

[77] *See* Rebekah Diller, *The Hidden Cost of Florida's Criminal Justice Fees*, BRENNAN CTR. FOR JUST. 5–7 (March 23, 2010), https://www.brennancenter.org/our-work/research-reports/hidden-costs-floridas-criminal-justice-fees.

[78] *Hearing on the Implementation of Amendment 4 Before Jnt. House Meeting of the Criminal J. Subcomm. & the Judiciary Comm.* (Fla. 2019), at 1:18, https://theflorida channel.org/videos/2-14-19-joint-house-meeting-of-the-criminal-justice-subcommittee-and-the-judiciary-committee.

[79] *Id.*

[80] *Id.* at 54:18.

[81] *See* Rivero, *supra* note 4.

[82] In a recent court decision, the U.S. District Court for the Northern District of Florida issued a narrow preliminary injunction on S.B. 7066 on the basis of inability to pay. *See* Jones v. DeSantis, 410 F. Supp. 3d 1284, 1309 (N.D. Fla. 2019), *rev'd*, 975 F.3d 1016 (11th Cir. 2020). The district court applied the injunction only with respect to the defendants bringing suit but not to the public at large, holding that "the State of Florida cannot deny an individual plaintiff the right to vote just because the plaintiff lacks the financial resources to pay." *Id. But see* Jones v. Governor of Fla., 975 F.3d 1016, 1056 (11th Cir. 2020) (Lagoa, J., concurring) (reasoning that felons in Florida "are not deprived of reenfranchisement solely based on inability to pay" because S.B. 7066 provides three alternative avenues for rights restoration: "termination of the obligation by the payee; conversion of LFOs to community service hours; and judicial modification of the original sentencing order."). The district court declined to address core issues about the purpose of Amendment 4 as understood by a reasonable voter, deferring to the Florida Supreme Court's Advisory Opinion. *Jones*, 410 F. Supp. 3d at 1291. The Eleventh Circuit ultimately stayed the injunction, reasoning that, despite its procedural defects, Amendment 4 and S.B. 7066 do not abridge rights guaranteed by the federal Equal Protection Clause, the Twenty-Fourth Amendment, or the Fourteenth Amendment Due Process Clause. *Governor of Fla.*, 975 F.3d at 1037, 1040, 1049, 1056. In doing so, the Court chose not to consider the reasons that voters may actually have chosen to enact the law, *see* text accompanying notes 91–95, and instead imputed other

their financial obligations will be disenfranchised as a result of their felony convictions. If over 80% of LFOs go unpaid, and Florida has no means to determine who has or has not paid those obligations that are actually fulfilled, the restorative effect of Amendment 4 will be dramatically limited, contrary to its core purpose.[83]

S.B. 7066 interprets Amendment 4 as creating a voting rights restoration scheme in which those felons who have the means to pay off their LFOs—and only those felons—may have their voting rights restored.[84] There are also procedural problems with S.B. 7066 that undermine the intent of Amendment 4.[85] The fees subject to repayment under the statute must be documented in the sentencing document

rational justifications for the law's restrictive interpretation consistent with its ruling, *Governor of Fla.*, 975 F.3d at 1035 ("Before extending the franchise to even more felons, Florida may have wished to test the waters by reenfranchising only those who complete their full sentences."); *id.* at 1037 ("[T]he face of the amendment makes clear that Florida voters do not share the dissenters' view that it is unjust to tell some criminals that they have incurred debts to society that will never be repaid. . . . Florida's voters intended only to reenfranchise felons who have been fully rehabilitated, and Senate Bill 7066 drew a rational line in pursuit of that goal."); *id.* at 1057–58 (Pryor, C.J., concurring) ("To argue that the purpose of Amendment 4 was to reenfranchise a particular percentage of felons that this Court deems acceptable is to ignore the words adopted by the people of Florida when they amended their constitution."). The Court employs the same textualist analysis as the Florida Supreme Court's Advisory Opinion, *see* text accompanying notes 88–95 *infra*, finding voters' motivations clear from the text of Amendment 4 itself rather than any of the publicity or campaign materials that reasonably shaped voters' expectations as to what they were actually voting for. The Eleventh Circuit's reasoning is thus abjectly divorced from the popular perceptions that motivated Amendment 4's enactment in the first place, and so only further erodes the will of the electorate by legitimating the legislature's interpretation of the sentence completion requirement.

[83] This is not the first time that the Florida legislature has employed this strategy to undermine voter-initiated constitutional amendments. In 2016, Florida voters approved Amendment 2, now codified as FLA. CONST. art. 10 § 29(d), which allowed distribution and use of medical marijuana. Fla. Dep't of Health v. People United for Med. Marijuana, 250 So. 3d 825, 827 (Fla. Dist. Ct. App. 2018). In 2017, lawmakers passed a bill that expressly excluded from the definition of medical use "possession, use, or administration of marijuana in a form for smoking." Fla. Stat. Ann. § 381.986(1)(j)(2). Though Governor DeSantis ultimately repealed the provision, legalizing the smoking of medical marijuana, the litigation faced substantial hurdles as the Florida Court of Appeals found that the challengers had not met their burden of showing that the statute was facially unconstitutional and vacated the lower court's stay. *Fla. Dep't of Health*, 250 So. 3d at 828.

[84] *See Jones*, 410 F. Supp. 3d at 1297 (arguing that voters likely did not interpret Amendment 4 to "condition the right to vote on the payment of fees for representation by a public defender.").

[85] Indeed, many of these problems are features of the implementing legislation, not bugs. *See Governor of Fla.*, 975 F.3d at 1110–11 (Jill Pryor, J., dissenting) (detailing the ways in which the legislature enacted S.B. 7066 with either knowledge or willful disregard for the bureaucratic deficiencies surrounding its effective implementation).

promulgated by the sentencing court.[86] Many counties in Florida, however, routinely fail to produce sentencing documents upon request, meaning that even if a person believes that they have repaid their LFOs, they may be unable to verify that belief and risk voting where they are barred from doing so.[87] Either in purpose or effect, or both, S.B. 7066 controverts the voters' reasonable interpretation of Amendment 4's intent to restore the franchise to individuals with felony convictions. These events demonstrate that even a substantive constitutional amendment does not insulate voters' will on electoral reforms from legislative revision. Here, legislators foresaw a sea change in voter registration that could have dramatically reshaped the political landscape in Florida and, despite Amendment 4's status as a constitutional amendment rather than an ordinary statute, took action to limit its political effect. Florida legislators' actions further demonstrate the proposition that there must be stronger protections in place for voters to expand the franchise through election and voting reforms without subjecting those reforms to legislators' perverse incentive structures.

This context makes the Florida Supreme Court's Advisory Opinion on Amendment 4's implementation even more problematic from a legislative nullification perspective. The court found the plain meaning of the Amendment's text to unambiguously include LFOs as a prerequisite to voting rights restoration.[88] At the outset of its opinion, the court explicitly rejected consideration of voter intent as a threshold matter for interpreting the provision, despite substantial precedent favoring such analysis.[89] The court cautioned against examining such

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[86] *See* FLA. STAT. § 98.0751(2)(a) (2019); Daniel Rivero, *Everything You Need to Know About Florida's Amendment 4 Lawsuit*, WLRN PUBLIC RADIO AND TELEVISION (Oct. 4, 2019), https://www.wlrn.org/post/everything-you-need-know-about-floridas-amendment-4-lawsuit.

[87] *Id.*

[88] Advisory Opinion to the Governor Re: Implementation of Amend. 4, The Voting Restoration Amend., 288 So. 3d 1070, 1072 (Fla. 2020).

[89] *In re* Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 599 (Fla. 2012) (applying the "approach that has been consistently undertaken when interpreting constitutional provisions"); Williams v. Smith, 360 So. 2d 417, 419 (Fla. 1978) ("In construing the Constitution, we first seek to ascertain the intent of the framers and voters, and to interpret the provision before us in the way that will best fulfill that intent."); Gray v. Bryant, 125 So.2d 846, 852 (Fla. 1960) ("The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfil the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied."). *But see* Edwards v. Thomas, 229 So. 3d 277, 283–84 (Fla. 2017) (pointing to the standard recited in *Gray* but proceeding to first examine the plain text of the provision at issue).

extrinsic evidence on the basis that it may "shift the focus of interpretation from the text and its context to extraneous considerations."[90] But the court's approach, particularly when applied to constitutional amendments enacted through popular initiative, is more likely to frustrate the original intent behind the law relative to ordinary statutory enactments passed through traditional legislative procedures.

The problem with Amendment 4 is that its language does not preclude the legislature from acting in this way, nor the court from so enshrining a restrictive interpretation of the Amendment's language into state constitutional law. While S.B. 7066 likely frustrates voters' reasonable understanding of the Amendment as they voted for it, the Amendment's language does not necessarily preclude such an interpretation of the "terms" of one's sentence.[91] But "voters are not professional lawmakers, so it is problematic to impute to the electorate the same knowledge about law, legal terminology, and legislative context that courts routinely ascribe . . . to legislators."[92] Taking such a strict textualist approach to interpreting ballot initiatives or initiated amendments is bound to produce anomalous results where the courts are holding voters to the same standards as seasoned legislators.[93] Courts "widely ignore media and advertising as sources of popular intent even though . . . research about voter behavior in ballot campaigns suggests that voters most regularly consult and seek guidance from these sources."[94] Indeed, the parties advocating for a broader interpretation of the Amendment point to precisely these types of materials to assert that the electorate understood Amendment 4 to exclude fines and fees from its requirements.[95] Though the Florida Supreme Court points to statements made by Amendment 4 sponsors in their legal briefs and oral arguments—which it is quick to emphasize played no role in their determination of the unambiguous meaning of

90 *Advisory Opinion*, 288 So. 3d at 1078.

91 *See* Initial Brief of the Florida House of Representatives at 9–10, Advisory Opinion to the Governor Re: Implementation of Amend. 4, The Voting Restoration Amend., 288 So. 3d 1070 (Fla. 2020) (No. Sc19-1341) ("[C]onsidered in isolation, the phrase 'terms of sentence' and its component words can take multiple meanings.").

92 Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 110 (1995).

93 *See* Glen Staszewski, *The Changing Landscape of Election Law: Essay: Contestatory Democracy and the Interpretation of Popular Initiatives*, 43 SETON HALL L. REV. 1165, 1167 (2013).

94 Schacter, *supra* note 92, at 111.

95 Reply Brief for the Am. Civ. Liberties Union of Fla. et al. at 14, Advisory Opinion to the Governor Re: Implementation of Amend. 4, The Voting Restoration Amend., 288 So. 3d 1070 (Fla. 2020) (No. Sc19-1341).

the Amendment's text[96]—it is plausible that these statements and intentions are divorced from *voters'* reasonable understanding of the Amendment as it was proposed and disseminated through mass media.

Alas, "we are all textualists now."[97] There is no denying that Amendment 4 could have been drafted more precisely and that its supporters could have avoided tactical errors in discussing the Amendment's scope, both have adversely impacted their success challenging S.B. 7066.[98] In Florida, as in Idaho, the court acted in a manner that did not account for the will of the people and their intent in passing the measure in question.

D. *Lessons Learned from Idaho, South Dakota, and Florida*

By limiting the franchise, legislators restrict who comprises the electorate, disproportionately impacting minorities who have been subject to disparities inherent in the criminal justice system.[99] While African Americans represent 13% of Florida's voting population, more than 44% of those registered to vote after the approval of Amendment 4 but before S.B. 7066 being passed were African American.[100] In South Dakota, by repealing the campaign finance measures, the legislature determined how its members can raise funds for their reelection campaigns. Whereas voters desired to lower the permissible contribution limits and establish a system of public financing, lawmakers chose a different course that would directly impact how they may seek reelection. In Idaho, voters, again and again, expressed their desire to limit the amount of time one powerful person can spend in political office. Legislators said no. When courts go one step further and decline to inquire into voters' reasonable intent as to initiated statutes and amendments, the intent of those reforms is further undermined. These choices directly affect voters' power to freely choose their representatives, in the same ways that redistricting threatens to

96 *Advisory Opinion*, 288 So. 3d at 1078.

97 Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

98 *See* Advisory Opinion to the Governor Re: Implementation of Amend. 4, The Voting Restoration Amend., 288 So. 3d 1070, 1085–87 (Fla. 2020) (Labarga, J., dissenting in part) (concluding that, even after consideration of extrinsic evidence, including statements made by Amendment 4's sponsors in support of the inclusion of restitution and fines and fees, Amendment 4 encompasses such considerations within the meaning of "all terms of sentence").

99 Kevin Morris, *Thwarting Amendment 4*, BRENNAN CTR. FOR JUST., (May 9, 2019), https://www.brennancenter.org/sites/default/files/analysis/2019_05_FloridaAmendment_FINAL-3.pdf.

100 *Id.* at 1.

entrench lawmakers in office against voters' wishes. The next Part examines current political and legal circumstances that limit voters' ability to push back against legislative nullification without altering the balance of legislative power in their favor.

III. STATES SHOULD ADOPT CONSTITUTIONAL AMENDMENTS LIMITING LEGISLATURES' ABILITIES TO NULLIFY VOTING AND ELECTORAL INITIATIVE RESULTS

Regardless of the formal weight given to the electorate's legislative authority vis a vis its state legislature, when it comes to rights and processes that substantially affect the legislature's responsiveness to the electorate's political will, those rights and procedures "must nonetheless be protected, strenuously so, because they are critical to the functioning of an open and effective democratic process."[101] With a few important exceptions, American democracy generally relies on the prospect that the person who gets the most votes in an election will go on to represent the constituency that elected her. But what one sees with initiatives is quite different; legislatures have assumed a power of review over voters' decisions that is akin to expelling a duly elected member of the legislature through majority vote based solely on what others think of that person's policy preferences. In South Dakota, where the legislature essentially declared of its own volition the popular campaign finance initiative to be constitutionally suspect, legislators began to blur the line between lawmaking and judicial review.[102] Likewise, in Idaho, legislators overruled the repeated affirmations of the electorate in support of term limits on state and local officials.

This Part contends first that the current political environment has created conditions and incentive structures that make establishing proper guardrails to prevent legislative misbehavior all the more important. Second, this Part asserts that legislative nullification creates a generalized public injury with no means of redress. By repealing electoral and voting initiatives, legislatures have at their disposal a means of pretextually declaring initiated legislation unconstitutional in order to second-guess the judgments of a co-equal legislative body. Even where an initiative is of questionable constitutionality, legislatures thus take decisions about legality and redress away from the courts and prevent their constituents from accessing any substantial remedies in

101 JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105 (1980).

102 *Cf.* INS v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring) ("When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers.").

light of the existing political dynamics and in favor of pretextual ends. To combat these dynamics, states should adopt constitutional amendments which procedurally and substantively constrain legislators' freedom to amend or repeal initiated statutes.

A. *Problematic Politics Necessitate Structural Constitutional Changes*

Contrary to traditional assumptions that legislators act in accordance with the views of a majority of their constituents, and indeed are incentivized to do so based on their desire to be reelected, the initiatives examined above lend credence to a second hypothesis: incumbency advantages and political structures may, at this moment, be so substantial as to alter legislators' incentives such that they are now able to balance the will of their constituencies against a reduced risk of being voted out of office given institutional advantages that facilitate incumbent reelection.[103] The California Constitution expressly acknowledges these incentives:

> The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative. . . . [U]nfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.[104]

California explicitly restricts terms, retirement benefits, and state-financed incumbent staff and support services on this basis.[105] Incumbency in and of itself creates immense advantages for state legislators seeking reelection. In 2015 and 2016, state legislators running as incumbents in contested elections, but who lacked a

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[103] For example, in 2018, only 14% of incumbent state legislators nationwide who faced a primary challenge ultimately lost their seats. *Incumbents Defeated in 2018's State Legislative Elections*, BALLOTPEDIA, https://ballotpedia.org/Incumbents_defeated_in_2018%27s_state_legislative_elections; *see also* Ciara O'Neill, *Money and Incumbency in State Legislative Races, 2015 and 2016*, NAT'L INST. ON MONEY IN POLITICS (Nov. 1, 2017), https://www.followthemoney.org/research/institute-reports/money-incumbency-in-2015-and-2016-state-legislative-races (finding that 92% of incumbent legislators kept their seats in 2015–16 elections).

[104] CAL. CONST. art IV, § 1.5.

[105] *Id.*

monetary advantage over their opponent, won their elections in 92% of cases.[106] This figure does not include the 40% of incumbent legislators who ran for their seats unopposed.[107] Of sixty-four incumbent South Dakota legislators who ran for reelection in 2016, the same election in which the public approved a campaign finance and ethics overhaul via initiative, sixty, or 94%, were reelected to another term.[108]

Other scholars have advanced alternative explanations for legislative nullification of majoritarian initiatives, namely that, due to a growing urban-rural divide, legislators vote in accordance with the views of their constituency while undermining the will of the electorate as a whole.[109] Daniel A. Smith points to this dynamic to explain Idaho's term limits repeal, in particular, arguing that voters in rural counties were "significantly less likely than residents of urban counties to support the term limits measure."[110]

It is reasonable that South Dakota voters, in this context, would be interested in passing campaign finance and ethics reforms to curb legislators' ability to seek or achieve reelection. Voters have a cognizable interest in limiting lawmakers' power to "entrench themselves in office as against voters' preferences."[111] Career legislators have clear incentives to reject systemic changes that might affect their ability to remain in office. Term limits are the most direct example. As the events in Idaho demonstrate, if given the opportunity to obstruct term limits and remain in office, legislators will jump at that chance.[112] As John H. Ely has argued, "[c]ourts must police . . . political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out."[113] These interests have been on display in recent, high-profile redistricting litigation.[114] Legislators

106 O'Neill, *supra* note 103.

107 *Id.*

108 *Id.*

109 Daniel A. Smith, *Representation and the Spatial Bias of Direct Democracy*, 78 U. COLO. L. REV. 1395, 1420 (2007).

110 *Id.* at 1426.

111 Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting).

112 *See* Jerry D. Spangler & Bob Bernick Jr., *Utah Senators Vote to Repeal Term-Limits Law,* DESERET NEWS (Feb. 25, 2003), https://www.deseret.com/2003/2/25/19706340/utah-senators-vote-to-repeal-term-limits-law (discussing the Utah legislature's repeal of a term limits law that was enacted in order to preempt a ballot initiative on the same subject). Only fifteen states have currently enacted term limits for state legislators, though four states had their legislative term limits thrown out by their state supreme courts. *The Term-Limited States*, NAT'L CONF. OF ST. LEGISLATURES (last updated Nov. 12, 2020), http://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx.

113 ELY, *supra* note 101, at 106.

114 *See Rucho*, 139 S. Ct. at 2509.

have notoriously taken steps across the country to stack the redistricting process in favor of the party in power to the point of infringing upon citizens' right to vote.[115]

Though relatively weaker than incumbency advantages, candidates who possessed a monetary advantage, but not an incumbency advantage, still won 80% of seats.[116] Particularly in Republican-controlled states, the post-*Citizens United* campaign finance landscape features a significant electoral advantage for state house candidates.[117] One study showed not only that *Citizens United* increased the odds of victory for Republicans in state house races, but was also correlated with a 5% increase in the likelihood that a Republican incumbent seeks reelection in those contests.[118] The same study found a statistically significant correlation between *Citizens United* and a roughly 10% decrease in Democratic candidates entering state house races.[119] Incumbency and monetary advantages create dynamics where even when legislators behave in a manner that a majority of voters dislike, such as substantially altering recently enacted initiatives, there are still significant barriers to removing those people from office and reshaping the state legislature in the image of the electorate. Incumbent support for an initiative that has statewide majority support may even benefit the candidate in their own district come time for reelection.[120] The next Section discusses why, given these dynamics, legislatures are emboldened to amend, repeal, or redefine initiatives enacted with broad support from the electorate.

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115 *See id.* at 2493 (discussing instances of alleged partisan gerrymandering in Maryland and North Carolina); League of Women Voters v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018); *see also* Maggie Astor & K.K. Rebecca Li, *What's Stronger than a Blue Wave? Gerrymandered Districts*, N.Y. TIMES (Nov. 29, 2018), https://www.nytimes.com/interactive/2018/11/29/us/politics/north-carolina-gerrymandering.html; *cf.* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2661 (2015) (discussing the constitutionality of Arizona's independent redistricting commission, established by initiative to end gerrymandering and improve "voter and candidate participation in elections").

116 O'Neill, *supra* note 103.

117 Tilman Klumpp, Hugo M. Mailon & Michael Williams, *The Business of American Democracy:* Citizens United*, Independent Spending, and Elections*, 59 J. LAW & ECON. 1, 3 (2016) (finding that *Citizens United* was associated with a 4% increase in the likelihood that a Republican is elected in state house races).

118 *Id.*

119 *Id.*

120 Smith, *supra* note 109, at 1427.

B. *Preserving Judicial Review*

In most states, legislators have the power to create new laws and amend existing ones.[121] But, as demonstrated above,[122] legislatures have occasionally taken it upon themselves to assess the constitutionality of ballot initiatives before the courts have had an opportunity to speak on the issues. Even absent constitutional concerns, legislatures are generally free to repeal laws that they dislike and replace them with laws they think are better. In the exercise of unified legislative power, this means a legislature merely revisiting issues that it has spoken on in the past. In the context of initiatives, however, where legislative power is bifurcated and voters have incentives to legislate in areas that their elected representatives find too politically charged or where they cannot find consensus, the potential for legislative clash is substantial.

Unlike traditional conflicts between voters and the government, where citizens may file suit against the body vested with the power to execute a given law, conflicts arising in the context of repeal or amendment offer limited remedies for voters whose preferences, as expressed through the ballot box, have been undermined through the legislative process. The post-repeal litigation surrounding Idaho's 1994 Term Limits Act is an excellent demonstration of how the judiciary offers a limited avenue for redress. Unlike South Dakota, which grants voters merely the right to "propose" measures subject to a vote by the electorate,[123] the Idaho Constitution reserves to the people "the power to propose laws, and enact the same at the polls independent of the legislature."[124] This independent power is undermined where state law vests the legislature with the power to repeal measures passed by initiative.[125] Proponents of this legislative right argue that the people, in response, may merely re-enact the same initiative, or instead elect a majority of legislators who support the initiative in question.[126] But where a legislator's career is on the line, and the body has already shown itself disposed to repealing the measure in question, what reason is there to expect a different outcome if a measure were merely re-enacted? Further, because voting and electoral reforms are specifically examined here, status quo incumbency advantages without voter-

121 *See* discussion *infra* Part IV (discussing how states have limited legislatures' abilities to amend laws enacted through initiative).

122 *See* discussion *supra* Part II.

123 S.D. CONST. art. III, § 1.

124 IDAHO CONST. art. III, § 1.

125 Luker v. Curtis, 136 P.2d 978, 984 (Idaho 1943) (Holden, C.J., dissenting).

126 *See id.* at 980.

approved changes may preclude the election of a more sympathetic legislature. Given the range of issues that voters consider when casting their vote, such as who will raise their taxes, who has a better plan for their community's schools, and other issues that directly impact community wellbeing, voters may be hesitant to cast their ballot based merely on a legislator's recalcitrance concerning an initiative that a given voter may have supported in the past. Even if some voters may be so put off by legislative nullification as to try to unseat offending legislators, they face a collective action problem alongside their fellow voters in mustering enough support around that single issue to incite a response sufficient to overcome incumbency advantages and change the makeup of the state legislature.[127]

Under these circumstances, voters' only remaining remedy is the courts. There are numerous problems with relying on the courts in the case of legislative nullification. Repeal, even more than amendment, presents a problem without significant means for redress. First, in states like South Dakota that grant voters the power merely to "propose" laws,[128] there are no constitutional constraints on the legislature's ability to repeal enacted initiatives.[129] Voters, presumably, would have no cause of action under which to state a claim for relief in this scenario. Even in states like Idaho, which grant initiative power "independent of the legislature," courts have not interpreted that phraseology to limit legislative power to repeal enacted initiatives.[130]

Second, state standing laws that closely track federal law may bar injured voters from seeking relief.[131] Though some states, such as South Dakota and Florida, allow their supreme courts to issue advisory opinions on issues of executive power,[132] most states do not allow for

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127 *See* Anthony Fowler & Andrew B. Hall, *Disentangling the Personal and Partisan Incumbency Advantages: Evidence from Close Elections and Term Limits*, 9 Q.J. POL. SCI. 501, 528 (2014) (concluding that incumbency advantages flow specifically to individual state legislators rather than their parties at large); Sean Luechtefeld & Adam S. Richards, *The Interaction of Issue and Image Frames on Political Candidate Assessment*, 67 COMMUNICATION STUDIES 20, 22 (2016) (discussing how "character-focused" messages in the media affect voter perceptions of a candidate compared with "issue-framed messages).

128 S.D. CONST. art. III, § 1.

129 Brendtro v. Nelson, 720 N.W.2d 670, 682 (S.D. 2006) (quoting State *ex rel.* Richards v. Whisman, 154 N.W. 707, 709 (S.D. 1915)).

130 IDAHO CONST. art. III, § 1.

131 For an expansive survey of state-by-state standing requirements, see Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 349 (2015).

132 The South Dakota Supreme Court has defined executive power, for the purpose of advisory opinions, as "situations in which the exercise of the Governor's executive power will result in immediate consequences having an impact on the institutions of

such opinions devoid of any case or controversy.[133] Such standing requirements restrict voters, who may not have suffered a unique or particularized injury, from obtaining relief.[134] For example, though Idaho's state constitution does not contain any "case or controversy" requirement akin to that in the federal Constitution, Idaho courts have imposed such a requirement on themselves.[135] Though the Idaho Supreme Court, in *In re Writ*, found that at least one of the plaintiffs had standing, the court relied upon a sole plaintiff's status as a potential challenger to an incumbent who would otherwise have been term-limited. With respect to reforms that create only "generalized grievance[s] shared by . . . a large class of citizens," plaintiffs will struggle to demonstrate standing.[136] Even in cases similar to *In re Writ*, plaintiffs seeking political office suffer an injury, which is not necessarily particularized. In theory, any citizen who wishes to seek public office in a district with a would-be term-limited incumbent would suffer the same injury. Just because repeal would impact a given individual's campaign does not mean that it is sufficiently particularized.[137] Even granting the Idaho Supreme Court's conclusion that the plaintiff in *In re Writ* had standing, this dilemma puts courts in other states with standing requirements modeled after the federal regime in a position to

state government or on the welfare of the public and which involve questions that cannot be answered expeditiously through usual adversary proceedings." *In re* Opinion of the Supreme Court Relative to the Constitutionality of Chapter 239, Session Laws of 1977, 257 N.W.2d 442, 447 (S.D. 1977) (Wollman, J., concurring specially).

133 *See* Sassman, *supra* note 131; *see also* Scott L. Kafker & David A Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives After* Hollingsworth v. Perry, 71 WASH & LEE L. REV. 229, 261–63 (2014) (discussing challenges of satisfying Article III standing requirements in the ballot initiative context).

134 Generally speaking, initiative petitioners have a right to pre-election standing in state courts. *Id.* at 251–53. In contrast, post-passage standing has "not generally been included in the state laws governing initiatives." *Id.* at 261 (arguing that post-election standing rights should be afforded to initiative petitioners).

135 Emp'rs Res. Mgmt. Co. v. Ronk, 405 P.3d 33, 36 (Idaho 2017) (citing Coeur d'Alene Tribe v. Denney, 387 P.3d 761, 766 (Idaho 2015)). Idaho courts require a petitioner to allege injury in fact, *Emplrs Res. Mgmt. Co.*, 405 P.3d at 36, which requires that the injury "be 'concrete and particularized' and 'actual and imminent, not conjectural or hypothetical,'" Tucker v. State, 394 P.3d 54, 62 (Idaho 2017) (quoting State v. Philip Morris, Inc., 354 P.3d 187, 194 (Idaho 2015)). Petitioners must also show "a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury. *Miles*, 778 P.2d at 763. Standing requires a showing of a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct." Coal for Agric.'s Future v. Canyon Cnty., 369 P.3d 920, 924 (Idaho 2016).

136 Young v. City of Ketchum, 44 P.3d 1157, 1159–60 (Idaho 2002).

137 *But see In re* Writ of Mandamus And/Or for Writ of Prohibition, 92 P.3d 1063, 1065 (Idaho 2002) ("The legislature's repeal impacts her campaign, and she demonstrates a particularized and sufficient injury to establish standing.").

avert issues that they feel are legislative in nature easily, and so should not be determined by the judicial branch.

Even in cases where courts choose to grant standing, however, legislatures still have distinct advantages. Both the Term Limits Act in Idaho and Measure 22 in South Dakota were repealed through the use of declarations of legislative emergency, which allow legislatures to amend or repeal laws without those actions being subject to referendum. Legislatures vested with the power to declare such emergencies essentially have the power to place decisions to repeal or amend enacted initiatives beyond reproach from the voters.[138] While courts could step in to review declarations of legislative emergency more aggressively, they have generally hesitated to do so.[139] In Idaho, "the legislature's determination of an emergency . . . is a policy decision exclusively within the ambit of legislative authority, and the judiciary cannot second-guess that decision."[140] In South Dakota, legislators were able to avoid judicial review of the emergency clause. South Dakota courts defer to legislative determinations of emergencies so long as the declaration can, "by any fair inference,"[141] be "necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions."[142] H.B. 1069, the bill that repealed Measure 22, merely parrots this language and provides no supporting reasons why a declaration of emergency was necessary other than that it was "necessary for the support of the state government and its existing public institutions."[143]

The exception to these dynamics is Amendment 4 in Florida, which, by virtue of its status as a constitutional amendment, is not easily altered. The Florida legislature faces more significant barriers to undermining Amendment 4's purpose because it must either act within a reasonable interpretation of the provision such that the law would not be subject to constitutional attack or amend the constitution through traditional processes. But, as the Amendment 4 saga demonstrates, this

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138 *See* Idaho State AFL-CIO v. Leroy, 718 P.2d 1129, 1133 (declining to review the legislature's decision to declare an emergency based on "[t]he respect due to the co-equal and independent legislative branch of state government and the need for finality and certainty about the status of a duly enacted statute").

139 *In re Writ*, 92 P.3d at 1067–68; *see also* State *ex rel.* Richards v. Whisman, 154 N.W. 707, 711 (S.D. 1915).

140 *Leroy*, 718 P.2d at 1136.

141 *In re* Request for Advisory Op. Concerning Constr. of H.B. 1388 as Amended by H.B. 1389, 387 N.W.2d 239, 242 (S.D. 1986).

142 S.D. CONST. art. III, § 1.

143 H.B. 1069, 2017 Leg. Assemb., 92nd Sess. (S.D. 2017) (codified as Campaign Finance Repeal and Revise, 2017 S.D. Sess. Laws ch. 72 §§ 1–2 185).

does not necessarily leave newly restored voting rights untouchable by legislation that narrowly interprets its language, nor protected by the state supreme court. Even without repeal or amendment, S.B. 7066 had the effect of dramatically altering the potential composition of the electorate based solely on legislators' preferences. Lawmakers were no less able to engage in a weighted political calculus, balancing the risk of losing reelection versus potential benefits of shaping the electorate and increasing already substantial incumbency advantages.

Modern political dynamics and the limited redress available to voters through the courts make structural protections on enacted initiatives all the more important to protecting voter intent. Voters are less able—and often less willing—to vote their incumbent legislators out of office. Incumbency and monetary advantages create such profound electoral handicaps for legislators that the incentive to act in favor of the majority will is lessened. As Idaho's experience with term limit repeal demonstrates, even after legislators willfully flaunt the desires of a majority of voters, the consequences may be minimal for those who voted against their constituents' expressed desires.[144] Creating structural protections for voting and electoral reforms constrains legislators' abilities to act anti-democratically in their self-interest by limiting the franchise, lowering ethical standards, or relaxing campaign finance restrictions in the face of opposition from voters. The next Part examines different approaches that protect voter-enacted initiatives against legislative self-interest.

IV. EVALUATING APPROACHES FOR FAITHFUL IMPLEMENTATION OF VOTING AND ELECTORAL REFORMS

The political and legal dynamics outlined above emphasize the need not merely for state constitutional enshrinement of priorities set forth in nullified initiatives but also for systemic protections for voters' initiative power in states that feature a constitutional right to initiative. While initiated constitutional amendments seeking policy ends themselves have traditionally been used to sidestep self-interested legislators who perceive them as a threat to their political careers,[145] these substantive amendments are themselves susceptible to the same types of sabotage as Amendment 4 in Florida. By conferring the right itself, rather than protections against the legislature's ability to alter that right in the future, substantive amendments are susceptible to

144 *See* discussion *supra* Section II.B.

145 John Dinan, *Symposium: Law & Politics in the Age of Direct Democracy: State Constitutional Initiative Processes and Governance in the Twenty-First Century*, 19 CHAP. L. REV. 61, 76 (2016).

legislative tampering that rely on existing safeguards under the law. As South Dakota and Idaho demonstrate, these safeguards can fall short of protecting the will of the electorate. In contrast, what this Comment will call "means-oriented" amendments provide the electorate with a lower electoral bar to clear to enact policy change while creating potentially higher legislative barriers to amendment. Means-oriented amendments can include procedural protections as well as protective substantive standards that limit the legislature's ability to amend or repeal an initiated law. Particularly with respect to the 19 states that allow for initiated constitutional amendments, whether direct or indirect, means-oriented amendments in this vein may be the most promising avenue to ensure that future statutory initiatives remain intact.[146] While means-oriented initiatives may be subject to some of the same vulnerabilities as substantive amendments, they protect future substantive amendments from legislative attack. This Part outlines approaches that different states have taken concerning means-oriented amendments that limit legislative capacity to amend enacted initiatives.

Means-oriented amendments offer two key benefits for the people in successfully implementing reforms that counter legislators' perverse incentives. First, they offer direct protection against repeal and amendment that would threaten the core purposes of initiated voting and electoral reforms. Second, once in place, this type of amendment allows the electorate not only to vote their respective legislators out of office—a challenge that, given existing incumbent advantages, is difficult to surmount—but also to threaten implementation of electoral and voting reforms through a strengthened initiative process with a higher bar for legislative amendment or repeal. This threat, even if not carried out, provides voters with a powerful tool to pressure legislators to act in majoritarian ways.

Beyond the context of voting and electoral initiatives, states have implemented different procedural and substantive constraints on their legislature's ability to amend enacted initiatives generally. In terms of procedural constraints, some states have imposed supermajority requirements on legislatures attempting unilaterally to amend implemented initiatives.[147] Other states employ restrict how soon after

146 NATIONAL CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM STATES (Jan. 18, 2018), http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx.

147 ARIZ. CONST. art. IV, Pt. 1, § 1(6)(C) (three-fourths vote in each house); ARK. CONST. art. V, § 1 (two-thirds of each house); MICH. CONST. art. II, § 9 (three fourths vote in each house); NEB. CONST. art. III, § 2 (two-thirds of unicameral legislature); N.D. CONST. art. III, § 8 (two-thirds of each house); WASH. CONST. art. II, § 41 (two-thirds of each house for first two years after enactment).

passage the legislature may amend an initiative.[148] Only two states, California and Arizona, currently have voter approval requirements, which require amendments to approved initiatives to be approved via a second initiative.[149] Unlike California, which requires voter approval unless otherwise stipulated in the initiative itself, Arizona allows for unilateral legislative amendment so long as the amendment "furthers the purposes" of the measure and passes with a three-fourths supermajority in both houses of the legislature.[150] The Arizona legislature can also submit proposed amendments to enacted initiatives to the voters through legislatively referred ballot initiatives. What this Comment calls the "furthers the purpose" standard is a more substantive constraint that requires the legislature to consider the will of the voters when amending a statute enacted by initiative. These substantive and procedural constraints are often used in combination, as in Arizona, to set a substantially higher bar for amending initiated statutes. These constraints create a category of laws that require broad legislative support—a rare thing in today's hyperpartisan political climate—to alter.

In 1998, Arizona voters passed the Voter Protection Act (VPA), which amended their state constitution by way of initiative to limit how legislatures may amend successfully enacted initiatives. Prior to enactment, legislators could amend approved initiatives "by a majority vote . . . [unless] that ballot measure was approved by a majority of the people . . . registered to vote in [Arizona], rather than by a majority of the people who voted on the ballot measure."[151] The VPA amended the Arizona Constitution to restrict legislative changes to those that "further[] the purpose" of the initiative.[152] This provision prohibits the

148 ALASKA CONST. art. XI, § 6 (two years to repeal, can amend immediately); NEV. CONST. art. IXX, § 2 (three years before legislature can repeal, amend, annul, or suspend); N.D. CONST. art. III, § 8 (seven years before repeal or amendment, except with two-thirds vote of each house); WASH. CONST. art. II, § 41 (two-thirds of each house for first two years after enactment); WYO. CONST. art. III, § 52(f) (two years before repeal but may be amended immediately).

149 ARIZ. CONST. art. IV, pt. 1, § 1(1); CAL. CONST. art. II, § 10(c); *see also Legislative Alteration*, BALLOTPEDIA, https://ballotpedia.org/Legislative_alteration.

150 ARIZ. CONST. art. IV, pt. 1, § 1(6)(C); *see also* Lisa T. Hauser, *The Powers of Initiative and Referendum: Keeping the Arizona Constitution's Promise of Direct Democracy,* 44 ARIZ. ST. L.J. 567, 586 n.129 (2012).

151 Arizona Sec'y of State, 1998 General Election Ballot Measures, Proposition 105 Analysis by Legislative Council 47, https://apps.azsos.gov/election/1998/Info/PubPamphlet/prop105.html.

152 ARIZ. CONST. art. IV, pt. 1, § 1(6)(C) ("The legislature shall not have the power to amend an initiative measure approved by a majority of the votes cast thereon, or to amend a referendum measure decided by a majority of the votes cast thereon, unless the amending legislation furthers the purposes of such measure and at least three-

legislature from repealing the approved initiative,[153] prevents the Governor from vetoing approved initiatives,[154] and creates a new amendment process that binds legislators in terms of the degree to which they may amend the initiative without voter approval.[155] To amend any initiative, even where the amendment would further its purpose, a three-fourths vote by the state legislature is required.[156] Substantive changes must be submitted to voters through legislatively referred state statute, while changes that are in line with the initiative's purpose can be approved without voter approval, albeit with the substantial three-fourths majority.[157] A three-fourths majority is also required to appropriate or transfer funds that were designated by the initiative in question; any appropriation of funds must further the purposes of the initiative.[158] Unlike an alternative proposal, the VPA did not prohibit the state legislature from using emergency legislation to enact changes to an approved initiative.[159]

California, notorious for its use of initiatives and referenda, affords its legislators even less power to amend enacted initiatives.[160] The legislature may only repeal or amend initiatives with the electorate's approval if the initiative in question expressly stipulates an alternate means by which the statute might be amended.[161] California courts

fourths of the members of each house of the legislature, by a roll call of ayes and nays, vote to amend such measure."); *see also* Arizona Sec'y of State, 1998 General Election Ballot Measures, Proposition 105 Analysis by legislative Council 47, https://apps.azsos.gov/election/1998/Info/PubPamphlet/prop105.html.

153 ARIZ. CONST. art. IV, pt. 1, § 1(6)(B); Arizona Sec'y of State, 1998 General Election Ballot Measures, Proposition 105 Analysis by legislative Council 47, https://apps.azsos.gov/election/1998/Info/PubPamphlet/prop105.html.

154 ARIZ. CONST. art. IV, pt. 1, § 1(6)(A).

155 *Id.* at § 1(6)(C); *see also* Hauser, *supra* note 150, at 586 n.129.

156 ARIZ. CONST. art. IV, pt. 1, § 1(6)(C).

157 *Id.* at § 1(6)(D).

158 *Id.*

159 Arizona Sec'y of State, 1998 General Election Ballot Measures, Proposition 104 Analysis by Legislative Council 37, https://apps.azsos.gov/election/1998/Info/Pub Pamphlet/prop104.html. In Arizona, emergency legislation, which includes "laws immediately necessary for the preservation of the public peace, health, or safety, or for the support and maintenance of the departments of the state government and state institutions," requires a two-thirds vote in each house of the state legislature as well as the Governor's signature and is not subject to referendum, where voters could otherwise directly overturn the legislation by popular vote. ARIZ. CONST. art. IV, pt. 1, § 1(3).

160 In California, "[a]ll political power is inherent in the people." CAL. CONST. art. II, § 1. Legislative power is vested in the state legislature, "but the people reserve to themselves the powers of initiative and referendum." CAL. CONST. art. IV, § 1.

161 CAL. CONST. art. II, § 10(c) ("The Legislature may amend or repeal a referendum statute. The Legislature may amend or repeal an initiative statute by another statute

liberally construe the people's power of initiative,[162] assuming a duty to "jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise."[163] In California, courts presume that the legislature acted lawfully and within its authority and uphold legislative acts that amend an enacted initiative "if, by any reasonable construction, it can be said that the statute furthers the purposes of [the initiative.]"[164] "This power is absolute and includes the power to enable legislative amendment subject to conditions attached by the voters."[165] On its own, the state legislature lacks the power to amend initiatives.[166] Californians have regularly used this process to sidestep traditional legislative processes and pass (sometimes contradictory)[167] initiatives that may not be amended without the people's consent.[168]

Unlike South Dakota and Idaho, where the legislatures acted reasonably quickly to repeal laws that they found undesirable, California tried—and failed—in 2016 to amend a law passed by initiative nearly thirty years earlier. 1988 Proposition 73 (Prop. 73) amended the Political Reform Act of 1974 to prohibit public funding of political campaigns.[169] Prop. 73 limited gifts to elected officials,[170]

that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval.").

[162] Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1283 (Cal. 1978).

[163] Legislature v. Eu, 816 P.2d 1309, 1313 (Cal. 1991) (internal citations omitted).

[164] Amwest Sur. Ins. Co. v. Wilson, 906 P.2d 1112, 1120 (Cal. 1995).

[165] California Common Cause v. Fair Political Practices Com., 269 Cal. Rptr. 873, 876 (Ct. App. 1990) (emphasis omitted).

[166] People v. Kelly, 222 P.3d 186, 211 (Cal. 2010).

[167] 1988 California Primary Election Ballot. Ballot Pamphlet, Primary Elec. (June 7, 1988), p. 14, 34 [hereinafter 1988 Cal. Primary Voter Information Guide]. Both Proposition 73 and Proposition 68 though contradictory in nature, were simultaneously approved by California voters. In *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n.*, 799 P.2d 1220, 1221 (Cal. 1990), the California Supreme Court held that "when two or more measures are competing initiatives, either because they are expressly offered as 'all-or-nothing' alternatives or because each creates a comprehensive regulatory scheme related to the same subject, . . . only the provisions of the measure receiving the highest number of affirmative votes will be enforced."

[168] *See* CAL. CONST. art. II, § 10(c) ("The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval."); *Kelly*, 222 P.3d at 211 ("[T]he legislature is powerless to act *on its own* to amend an initiative statute."); *Amwest*, 906 P.2d at 1122 (rejecting argument that initiatives may be amended to say "what the voters thought it meant").

[169] Howard Jarvis Taxpayers Ass'n v. Newsom, 252 Cal. Rptr. 3d 106, 108 (Ct. App. 2019)

[170] *Id.* at 109 (citing Ballot Pamphlet, Primary Elec. (June 7, 1988), analysis of Prop. 73 by Legis. Analyst, p. 33).

"proposed establishing limits of campaign contributions for all candidates for state and local elective office, and prohibiting the use of public funds for campaign expenditures and newsletters and mass mailings."[171] "Most important of all" was the restriction of public financing of campaigns, which aimed to keep tax dollars out of politicians' hands.[172] Despite extensive litigation,[173] Prop. 73's restrictions on the use of public funds remained in effect through 2016 when legislators attempted to amend the provision to allow public campaign funding.[174] Unlike South Dakota and Idaho, this is an instance where the will of the voters withstood legislative efforts to undo the restrictions placed on California's electoral system by initiative because of the unique restraints that California places on legislative alteration of ballot initiatives, in contrast to the twenty-three other states that allow ballot initiatives.

Prop. 73 itself provides two methods in the text of the initiative for amendment or repeal. The law may be amended "by a statute to 'further its purposes' passed in each house by two-thirds vote . . . and signed by the Governor[,]"[175] or "by a statute that becomes effective only when approved by the electors."[176] In September 2016, Governor Jerry Brown signed Senate Bill 1107 (S.B. 1107), which repealed Prop. 73's prohibition on accepting public funds to seek office.[177] S.B. 1107 was challenged on the basis that it was an "improper legislative amendment of a voter initiative."[178] For the California legislature to amend Prop. 73 without voter approval, it must pass the amending bill with two-thirds of each house, and the amendment must reasonably "further[] the purposes of the Act."[179] In *Howard Jarvis Taxpayers Assn v. Newsom*, the California Supreme Court held that S.B. 1107 did not further the

171 1988 Cal. Primary Voter Information Guide, *supra* note 167, at 32.

172 *Id.* at 34.

173 *See* Service Emp. Int'l. v. Fair Political Practices Comm'n., 955 F.2d 1312 (9th Cir. 1992) (holding that Prop. 73's contribution limits, among other provisions, were unconstitutional); Gerken v. Fair Political Practices Comm'n., 863 P.2d 694, 700 (Cal. 1993) (holding that Prop. 73's ban on publicly funded mass mailings was severable from the measure's unconstitutional provisions, and thus still in effect).

174 CAL. GOV'T CODE § 85300(b) (2016).

175 *Howard Jarvis*, 252 Cal. Rptr. 3d at 109 (citing CAL. GOV. CODE § 81012(a)).

176 *Id.* (internal citations omitted).

177 *Id.* at 108

178 *Id.* at 108.

179 *Id.* at 113–14 (citing Amwest Surety Ins. Co. v. Wilson, 906 P.2d 1112, 1118 (Cal. 1995)). This standard is popular among California initiative amendment clauses. *See, e.g.,* Official Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 5, at 145. Other California initiatives have used different language, such as "expand the scope" of the initiative. *See* Cty. of San Diego v. Comm'n on State Mandates, 240 Cal. Rptr. 3d 52, 64 (Cal. 2018).

purposes of Prop. 73, but controverted the Proposition's purposes by eliminating the ban on public campaign financing that was at the core of the initiative.[180] Historical context, ballot arguments in favor of the initiative, and express statements of purpose in the act can each serve as evidence of an initiative's purpose, as can the initiative's plain text.[181] California courts have invalidated amendments for contravening a law's principal purpose where the amendments took substantially different policy approaches from the law being amended.[182] S.B. 1107 was invalid because it was not amended in one of the two ways that Prop. 73 expressly allows.[183] The bill took a "significantly different policy approach" to campaign reform than did the Political Reform Act, and so was invalid because it conflicted with a primary mandate of the law.[184]

This process of judicial review demonstrates one way in which states can safeguard the will of voters with respect to electoral reforms. Even thirty years later, voters' expressed desire that their tax dollars not go toward political campaigns constrained how the state legislature could govern. The mere fact that voters can reliably bring suit to challenge amendments made to laws passed by initiative demonstrates another key benefit to this type of check on legislative power. As Julian Eule has argued, courts must play a larger role in resolving questions that arise in the course of direct democracy, "not because direct democracy is unconstitutional, nor because it frequently produces legislation that we may find substantively displeasing or short-sighted, but because the judiciary stands alone in guarding against the evils incident to transient, impassioned majorities that the Constitution seeks to dissipate."[185]

[180] *Howard Jarvis*, 252 Cal. Rptr. 3d at 118.

[181] *Id.* at 114–15 (citing *Amwest*, 906 P.2d at 1120).

[182] Gardner v. Schwarzenegger, 101 Cal. Rptr. 3d 229, 239 (Ct. App. 2009). The court emphasized that the amendment must further the purposes of the Political Reform Act of 1973 as a whole, not merely the amendments made through Prop. 73. *Howard Jarvis*, 252 Cal. Rptr. 3d at 115.

[183] *Id.* at 117.

[184] *Id.* at 118.

[185] Eule, *supra* note 11, at 1525 (arguing that courts, as the de facto adjudicator of initiatives, should exercise a lesser degree of judicial restraint in so adjudicating).

V. IMPLEMENTING MEANS-ORIENTED AMENDMENTS TO PROTECT VOTING AND ELECTORAL REFORMS

Based on the above discussion, this Comment proposes that states, and specifically voters who reside in states with substantial initiative powers, should seek to amend their respective constitutions to institute procedural and substantive constraints on their legislatures' power to amend and repeal initiated statutes governing voting and electoral reforms. This Part first examines the benefits and drawbacks of allowing for a substantive component such as the "further the purpose" standard. This Part also addresses implementation challenges in states that have initiated constitutional amendment procedures and those that do not.

This Comment takes no position on precisely which combination of procedural constraints each state should adopt; voters should determine for themselves the level of protection they desire against legislative interference in electoral schemes. Differently constructed procedural schemes can have diverse benefits. Adopting, for example, time constraints alone would allow the electorate a set amount of time to elect new representatives under their proposed electoral regime before legislators could repeal or amend those new rules at will. This could serve as a trial period for new laws while still allowing voters substantially greater power to determine how they elect their respective legislators. In contrast, adopting supermajority requirements would (perhaps indefinitely) require broad consensus among legislators to reverse or alter changes made by the electorate directly, but would still grant elected representatives some degree of freedom to revisit those laws.

The question of voter approval presents notable benefits alongside troubling challenges. Voter approval requirements, with or without accompanying substantive qualifications on those requirements, strengthen voters' effective veto power over their representatives. These requirements serve as a direct check on legislators' own incentives to promote policies that facilitate their remaining in office.[186] At the same time, legislatures are less able to make incremental adjustments to electoral regimes in the face of changing circumstances. Voter approval requirements for voting and electoral laws would pose less proximate harm to good governance in the short- and medium-run than would imposing similar constraints in more rapidly changing areas of governance, such as taxation schemes, spending programs, and the like. Whereas governments may suddenly be faced with new areas that

186 *See* discussion *supra* Part IV.

require funding, the types of demographic shifts that necessitate electoral reform happen more slowly. Indeed, the federal Constitution requires a federal census for redistricting only every ten years.[187] Particularly where the threshold for voter approval is lower than for legislative amendment, such restrictions may also cause special interest groups to send repetitive, confusing, or contradictory initiatives to the public for a vote. California has struggled with this issue, with courts having to conclude that where contradictory initiatives are simultaneously approved, only the initiative receiving the highest number of votes goes into effect.[188] To limit the complications that come with strict voter approval, states may be best served by allowing legislatures some degree of freedom to amend legislation based on substantive criteria or where the body can meet a sufficiently high threshold of support.

Crucially, any proposed amendment in this vein should exempt electoral and voting initiatives from being subject to legislative emergency powers. Perceived unconstitutionality or policy disagreements should not be hidden under a veil of legislative emergency to exempt changes to state electoral systems from being maintained by voters as they exist. As Kristen L. Fraser has argued, "[n]otwithstanding criticism from advocates of referendum rights," no legal violation arises where a legislature justifies application of the emergency clause based on the vague criteria set forth in their state constitution.[189] Some states regularly employ such clauses to effectively abrogate the People's power of referendum, or their ability to vote on an act of the legislature.[190] South Dakota and Idaho both resorted to this tactic to undermine initiated laws and amendments that affected legislators' ability to maintain power.[191] South Dakota voters were unable to muster the votes to enshrine the repealed campaign finance and ethics provisions into its state constitution via initiative.[192] It was

187 U.S. CONST. art. I, § 2.

188 Taxpayers to Limit Campaign Spending v. Fair Pl. Practices Com., 799 P.2d 1220, 1221 (Cal. 1990).

189 Kristin L. Fraser, *Grasping for the "Elephant in the Courthouse": Developments in Washington's Law of Law-Making*, 44 GONZ. L. REV. 411, 490 (2008).

190 Richard B. Collins & Dale Oesterle, *Governing by Initiative: Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 65 n.76 (1995) (discussing how Colorado has used the emergency clause invoking the public safety exception to prevent any referendums by citizen petition).

191 H.B. 1069, 2017 Leg., 92nd Sess. (S.D. 2017) (codified as Campaign Finance Repeal and Revise, 2017 S.D. Sess. Laws ch. 72 §§ 1–2 185); *In re* Writ of Mandamus And/Or for Writ of Prohibition, 92 P.3d 1063, 1064 (Idaho 2002).

192 Trevor Mitchell & Shelly Conlon, *Voters Reject Tobacco Tax Hike, Support Limiting Out-of-State Money for Ballot Initiatives*, ARGUS LEADER (NOV. 7, 2018), https://www.argus

precisely these legislative emergency powers that kept Idaho voters from obtaining redress in state court.[193] While there should be some meaningful check on an insulated initiative power, legislatures have abused their emergency powers, and will continue to, in order to dispose of voter-made law that they dislike.[194] Constitutionally speaking, there is less harm done to voters if the laws are left on the books and challenged in the courts.

Including a substantive constraint like the "furthers the purpose" standard on the legislature allows for flexibility while promoting an active role for the courts in this context. Allowing legislatures to amend and revise such initiatives—with broad consensus—is one way to ensure that initiated electoral reforms are clear, concrete, and enforceable. Courts would provide voters recourse, estopping any attempt to undermine the initiated laws. To determine voters' reasonable interpretations of the core purpose of the initiative—rather than just the stated purpose of the initiatives' framers and court advocates[195]—California courts, for example, look at historical context, ballot arguments in favor of the initiative, express statements of purpose in the Act, and the initiative as a whole to determine voter intent.[196] California's ballot pamphlets and advertising materials are readily available online.[197] In considering the purpose of an initiative, Arizona courts similarly consider "statements of findings passed with the measure as well as other materials in the Secretary of State's publicity pamphlet available to all voters before a general election."[198] In both states, the materials that courts consider in determining voter intent are limited to those available to voters when they voted on the initiative. Courts should also be more open to evidence of mass media representations of an initiative's meaning, as the electorate is disproportionately influenced by these materials relative to the more traditional materials that California and Arizona courts take into account.[199]

leader.com/story/news/politics/2018/11/07/south-dakota-election-results-three-five-ballot-measures-fail/1891328002.

193 *See In re Writ*, 92 P.3d at 1068.

194 *See, e.g.,* Collins & Oesterle, *supra* note 190, at 65 n.76.

195 *See* Jones v. DeSantis, 410 F. Supp. 3d 1284, 1296 (N.D. Fla. 2019) (arguing that oral arguments made by the initiative's proponents in court as to its purposes were not dispositive).

196 Howard Jarvis Taxpayers Ass'n v. Newsom, 252 Cal. Rptr. 3d 106, 114 (Cal. Ct. App. 2019) (citing Amwest Surety Ins. Co. v. Wilson, 906 P.2d 1112, 1120 (Cal. 1995)).

197 *California Ballot Measures,* U.C. HASTINGS LAW LIBRARY, https://www.sos.ca.gov/elections/ballot-measures/resources-and-historical-information.

198 Ariz. Early Childhood Dev. & Health Bd. v. Brewer, 212 P.3d 805, 809 (Ariz. 2009).

199 *See* Schacter, *supra* note 92, at 111.

Finally, as the events in Florida demonstrate, means-seeking amendments should have language that constrains not only the legislature but also the courts in how they might interpret voting and electoral reforms. Means-seeking amendments should attempt to ensure that courts avoid unanticipated consequences of ballot initiatives that voters may not have reasonably intended. As Staszewski has argued:

> [C]ourts should . . . narrowly construe ambiguous ballot measures when the potential collateral consequences of a proposal were not readily apparent to voters, and the substantive merits of a particular course of action were therefore not subject to reasoned deliberation, particularly when the interests or perspectives of the individuals or groups who would be adversely affected by a proposed understanding of the law were not considered during the lawmaking process.[200]

By coupling the "furthers the purpose" standard with a broad presumption in favor of voter intent, courts would be less likely to interpret electoral initiatives in a way that results in unintended consequences, as occurred in Florida. This presumption should apply with extra force where the underlying intent of an initiative was to expand the franchise or constrain legislative behavior. Such an approach would prevent results analogous to the Florida Supreme Court's Advisory Opinion on Amendment 4, which narrowly construed an extremely broad term in the state constitution.[201]

In states that allow initiated constitutional amendments, the adoption process for this kind of constitutional amendment is straightforward. Voters may sidestep the legislature and directly amend their constitutions just as they would pass a normal initiative, albeit with a higher threshold for approval.[202] In states that allow initiated state statutes but not constitutional amendments—Idaho is one example—citizens face a heavier lift to convince their legislators to cede control over electoral and voting laws to the people. Perhaps a more effective strategy in these states would be to first advocate for the adoption of constitutional amendment by initiative, which would create

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200 Staszewski, *supra* note 93, at 1174.

201 Advisory Opinion to the Governor Re: Implementation of Amend. 4, The Voting Restoration Amend., 288 So. 3d 1070, 1078 (Fla. 2020).

202 Of the states that allow for initiated state statutes, only five do not allow initiated constitutional amendments: Idaho, Maine, Utah, Washington, and Wyoming. *Initiative and Referendum States*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx (last visited Nov. 2, 2019).

the process by which the people could enact these changes. Finally, in states that allow for constitutional amendment by initiative but not initiated statutes, voters need only grant themselves the power of legislation-by-initiative alongside the protections discussed here.[203]

One unavoidable critique of this proposal is the potential for abuse of this insulated initiative power to abuse minority rights and further disenfranchisement. While electoral and voting laws are, in most cases, subject to the whim of self-interested legislators, legislators can also serve as a safety valve against attempts by a majority of voters to limit minority rights. Poor and minority communities are already likely to be underrepresented in the legislature, but new and increasing barriers to accessing the ballot box create unique problems when it comes to governing through initiative.[204] Voter ID laws, partisan redistricting, felon disenfranchisement, and a systematic elimination of polling sites create barriers for entire communities to participate in the electoral process, including by facilitating underrepresentation in their respective state legislatures.[205] If those whose rights are being limited have less access to the ballot in the first place, initiatives will only further undermine their electoral standing. More easily than Florida voters amended their state constitution to restore felon voting rights, other states without felon disenfranchisement laws could enact statutes by initiative that effectively strip thousands, if not millions, of people of the right to vote. These risks should not be taken lightly. Subjecting legislative amendment or repeal of such laws to voter approval could facilitate a literal tyranny of the majority, denying voting rights to some portion of the electorate based solely on the desires of a voting majority.

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203 In some states, this may require two separate constitutional amendments because of Single Subject laws, which limit the focus of constitutional amendments by initiative to one subject. For a discussion on the Single Subject rule, *see* Rachel Downey, Michelle Hargrove & Vanessa Locklin, *Direct Democracy: A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004).

204 Eule, *supra* note 11, at 1515.

205 Feldman v. Reagan, 843 F.3d 366 (9th Cir. 2016) (Thomas, C.J., dissenting) ("Minority voters encountered significant burdens in exercising their right to vote. The reduced number of polling places meant that voters had to wait hours in line to cast ballots."); Anthony J. Gaughan, *Has the South Changed? Shelby County and the Expansion of the Voter ID Battlefield*, 19 TEX. J. ON C.L. & C.R. 109 (2013); *Voter Identification Requirements | Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Aug. 25, 2020), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx; Christopher Ingram, *Thousands of Polling Places were Closed Over the Past Decade. Here's Where.*, WASH. POST (Oct. 26, 2018), https://www.washingtonpost.com/business/2018/10/26/thousands-polling-places-were-closed-over-past-decade-heres-where.

Despite these risks, citizens rarely enact initiatives that expressly discriminate against protected minorities, but more frequently block government efforts to assist minorities.[206] In this vein, one study shows that initiatives have historically been used for "reform" purposes, 87% of which have been "inclusive" rather than "exclusive."[207] Another study comparing legislation passed through direct democracy as compared with representative democracy showed that while states with more robust direct democracy regimes did, in fact, enact anti-minority proposals at a higher rate than did state without direct democracy, the overall passage rate was relatively modest.[208]

Redistricting initiatives in the 20th century were sometimes used to establish more equally apportioned legislative districts than the legislators themselves had drawn.[209] In 2000, Arizona voters approved an initiative that created an independent legislative redistricting commission that takes legislative apportionment out of the hands of both voters and their legislators.[210] Because the independent commission is subject to the VPA, it has an additional level of independence that stems from the high threshold for amendments to its enabling. The legislature is required to make "necessary appropriations" for the independent commission's operation but may "submit nonbinding recommendations" for how districts should be drawn.[211] For any proposed legislation that seeks to undermine the independent commission's core purposes, the Arizona legislature must turn to the voters.

When the people act on their own to create electoral and voting reforms, the potential for misbehavior and trampling on minority rights is admittedly greater. The "furthers the purpose" standard does not offer much substantive protection against anti-minority policies and indeed may serve to insulate anti-majority policies against correction by elected representatives. But the "furthers the purpose" standard, in conjunction with a legislative override provision, would give well-meaning legislators the ability to check the electorate's anti-minority

206 KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 142–44 (2009).

207 RICHARD BRAUNSTEIN, INITIATIVE AND REFERENDUM VOTING: GOVERNING THROUGH DIRECT DEMOCRACY IN THE UNITED STATES 65–69 (2004)

208 Daniel C. Lewis, *Bypassing the Representational Filter? Minority Rights Policies Under Direct Democracy Democratic Institutions in the U.S. States*, 11 ST. POL. POL'Y Q. 198, 209 (2011). The study found that direct democracy states enacted 20% of anti-minority proposals, compared with 10% in representative democracy states. *Id.* at 204–05.

209 MILLER, *supra* note 206, at 151–52.

210 Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2661 (2015).

211 *Id.*

proposals. This problem is not, however, limited to or a result of the remedy proposed in this Comment. Instead, anti-minority proposals that garner sufficient support within the electorate may be sustained even in the face of the most aggressive legislative nullification.

In states that allow for both initiated statutes and constitutional amendments, a majority that feels as though its legislature has unreasonably undermined its anti-minority wishes can attempt to enshrine those same policies in the state constitution.[212] Indeed, this dynamic was on display as South Dakota voters voted on Constitutional Amendment W in response to the legislature's repeal of Measure 22.[213] Though Constitutional Amendment W was ultimately rejected,[214] its presence on the ballot illustrates the steps that voters will take to push back against nullifying legislators. Particularly on high-profile issues like voting rights, it may be that legislative nullification or alteration to protect minority rights, ultimately, undermines those rights by causing backlash and instigating a constitutional amendment to subvert those rights, as occurred in South Dakota. In this way, legislative nullification does not serve as an effective roadblock for anti-minority policies where voters are vested with the initiative power. This proposal does not solve the anti-minority problems that are inherent in direct democracy. Instead, it attempts to reshape direct democracy so that, while anti-minority concerns sustain, initiatives can be one tool for minority groups, alongside a coalition of sympathetic voters, to establish more robust protections for their political rights.

Legislative nullification is being used to roll back progressive reforms that expand the franchise, create stricter ethics and campaign finance laws, and otherwise reform states' voting and electoral systems. The ballot initiative, with proper protection, can be a powerful tool to wrest control over states' governance schemes and enshrine protections for underrepresented groups to ensure free and fair elections well into the future. While there is certainly potential for misuse of the initiative power, curtailing legislatures' abilities to amend or nullify popularly enacted legislation creates a path for citizens to push back against attempts to subvert the popular will. By amending

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212 For example, in 1996, California voters amended the state constitution through Proposition 209 to prohibit government affirmative action programs in public employment, education, and contracting, to the extent that the programs gave preferential treatment based on "race, sex, color, ethnicity, or national origin." CAL. CONST. art. I, § 31.

213 *See* discussion *supra* Section II.A.

214 *South Dakota Election Results*, N.Y. TIMES (May 15, 2019), https://www.nytimes.com/interactive/2018/11/06/us/elections/results-south-dakota-elections.html.

their constitutions to protect voting and electoral reforms enacted through initiative, voters can take back influence that relaxed campaign finance regulations and increasing partisan divides have appropriated from them.

VI. CONCLUSION

Today's political landscape has created numerous obstacles for voters to freely choose their elected officials. Legislative alteration or nullification of voter-approved initiatives that change how legislators are elected only serves to further erode the power of a person's vote. When legislators can further entrench themselves in power by undermining the intent of the electorate, faith in our representative democracy erodes. While empowering initiatives poses new and daunting challenges, this moment in history necessitates structural changes that offer a powerful check on political elites. When voters decide to expand the franchise, politicians should not be able to have the final say. When voters impose term limits, legislators should not merely be able to set them aside and remain in their jobs indefinitely. This Comment has proposed one remedy for this dilemma that, particularly in states with initiated constitutional amendments, requires only the will of the electorate to implement. States that allow the electorate to enact voting and electoral reforms through ballot initiatives to expand access to the franchise, strengthen ethics and campaign finance rules, and limit their legislators in other ways should protect those reforms by enacting procedural and substantive constraints on their legislature that prevent representatives from nullifying the express will of their constituents. Such structural reforms have the potential, even when posed as mere threats, to change legislative behavior to better accommodate the desires of the electorate. If only for that purpose, the proposal made here provides voters with a powerful tool in the toolbox to assert themselves in the face of legislative efforts to limit the franchise, lower the ethical bar, or otherwise misbehave.

APPENDIX

Table 1 - Electoral and Voting Reform Initiatives, 2000-2019[215]

Arizona	
2000	Establish appointed Redistricting Commission to redraw boundaries for legislative districts
2004	STATUTE: Prop 200: Would require proof of U.S. citizenship in order to vote
California	
2000	Prop 39: Authorizes local school bond issues for certain uses if approved by 55%
2008	STATUTE: Prop 11: Independent commission to draw legislative district boundaries
2012	Prop 28: Limit of 8 years (senate)/6 years (assembly) replaced with 12-year limit on combined service
2016	STATUTE Prop 73: Limits on Campaign donations
	Prop 54: Conditions under which legislative bills can be passed
Colorado	
2004	Initiative 27: Reduces contribution amount to candidates and various political organizations
2006	Initiative 41: Prohibits elected officials or their immediate family members from accepting gifts
2008	Initiative 54: Closes a remaining loophole in CO election law by banning the practice of "Pay to Play"
2016	STATUTE: Prop 107: Open presidential primary elections
	STATUTE: Prop 108: Unaffiliated electors voting in primaries
	Amendment 71: Distribution and supermajority requirements for initiatives
Florida	
2010	Amendment 5: Amends current practice of drawing legislative district boundaries
	Amendment 6: Amends current practice of drawing congressional district boundaries
2018	Amendment 4: Restores right to vote for most people with prior felony convictions upon completion of their sentences
Michigan	
2018	Proposal 2: Creates independent citizens redistricting commission
	Proposal 3: Voting Policies in State Constitution Initiative (Straight-ticket voting; automatic voter registration; same-day registration)
Missouri	
2016	Amendment 2: Regulations on campaign contributions
2018	Amendment 1: Addresses lobbying, campaign finance, and redistricting procedures

[215] The table below includes any initiatives enacted between 2000 and 2019 that addressed voting and electoral reform. I included in this definition any initiatives involving campaign finance, election procedures, expansion or contraction of the franchise, redistricting, term limits, and restrictions on legislators' conduct. These initiatives were compiled from Ballotpedia's database of state ballot initiatives, which are catalogued by state and then by year. This chart does not include all states that allow initiatives in some form, but merely the states that enacted initiatives that fit these categories. *See List of Ballot Measures by* State, BALLOTPEDIA, https://ballotpedia.org/List_of_ballot_measures_by_state.

Montana	
2006	STATUTE: I-153: Prevents state officials and their staff from becoming licensed lobbyists
2012	STATUTE: I-166: Set policy on prohibiting corporate contributions and expenditures in Montana elections
Nebraska	
2004	Measure 415: Limits legislators to no more than two consecutive terms
	Measure 418: Requires 2/3 majority of state legislature to modify initiatives approved by voters
North Dakota	
2018	Measure 1: Establishes an ethics commission, bans foreign political contributions, and enacts provisions related to lobbying and conflicts of interest
	Measure 2: Citizen Requirement for Voting Amendment Initiative
Oregon	
2006	STATUTE: Measure 47: Puts restrictions on campaign contributions
South Dakota	
2016	STATUTE: Measure 22: Revise campaign finance and lobbying laws
Washington	
2004	STATUTE Initiative 872: Establishes top-two primary for state elections