

2022

Changing the Rules for Direct Democracy in the Twenty-First Century in Response to Animal Welfare, Marijuana, Minimum Wage, Medicaid, Elections, and Gambling Initiatives

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John Dinan, *Changing the Rules for Direct Democracy in the Twenty-First Century in Response to Animal Welfare, Marijuana, Minimum Wage, Medicaid, Elections, and Gambling Initiatives*, 101 Neb. L. Rev. ()
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John Dinan*

Changing the Rules for Direct Democracy in the Twenty-First Century in Response to Animal Welfare, Marijuana, Minimum Wage, Medicaid, Elections, and Gambling Initiatives

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I. INTRODUCTION

In many of the twenty-four states that permit voters to initiate statutes, constitutional amendments, or both,¹ groups routinely rely on initiatives to enact policies unattainable through the legislature. In recent decades, initiatives have been a vehicle for both limiting and increasing taxes and spending, imposing legislative term limits, raising the minimum wage, limiting affirmative action, legalizing marijuana, expanding gambling operations, protecting animal welfare, and establishing redistricting commissions, among other measures that are often blocked by legislators but embraced by voters.²

This Article focuses on rules governing the initiative process. It explains the numerous wide-ranging efforts to change initiative process rules in the Twenty-First Century. Although some of these recent proposed changes have been rejected or are awaiting a final vote, many have been enacted, generally limiting the use of the initiative process but occasionally facilitating access.

Efforts to change initiative process rules generally emerge in response to disjunctions in the views of the public and elected officials, whereby legislators block policies supported by voters. When these disjunctions result in groups relying on initiative measures to bypass legislators on high-profile issues on a routine basis, the party that controls the state legislature will begin to consider ways of limiting initiatives. One option would be eliminating the initiative process, however, there is no indication that the public would endorse the drastic step of repealing the initiative process. The more viable approach is to restrict the use of the initiative process by changing the rules to make the process less accessible and limit the initiative measures that can be enacted.

This Article's primary purpose is to identify the policy issues that are chiefly responsible for prompting changes in initiative process

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1. Twenty-one states provide for initiated statutes. Eighteen states provide for initiated constitutional amendments (counting Mississippi, where the state supreme court ruled in May 2021 that the initiative process can no longer be used until the rules for the process were updated to take account of a change in the number of the state's congressional districts, as discussed in Jackie Mitchell, *Mississippi Supreme Court Overturns 2020 medical marijuana initiative, says the state's initiative process can't be used*, BALLOTPEDIA NEWS, <https://news.ballotpedia.org/2021/05/15/mississippi-supreme-court-overturms-2020-medical-marijuana-initiative-says-the-states-initiative-process-cant-be-used/> [https://perma.cc/75KR-D564]). In total, twenty-four states (counting Mississippi) provide for citizen-initiated measures in some fashion, whether the statutory initiative or constitutional initiative. These states are listed in INITIATIVE & REFERENDUM INST., *State-by-State List of Initiative and Referendum Provisions*, <http://www.iandrinstitute.org/states.cfm> [https://perma.cc/7MG7-JM5T].
 2. Reliance on the initiative process to enact these and other policies in recent years is discussed in John Dinan, *State Constitutional Initiative Processes and Governance in the Twenty-first Century*, 19 CHAPMAN L. REV. 61 (2016).

rules in the Twenty-First Century.³ Over the 120-year history of initiatives in the U.S., the initiative process has been relied on by both liberal and conservative groups to enact policies disfavored by elected officials. Progressive groups benefited especially from the initiative process in the early Twentieth Century. Conservative groups often benefited in the late Twentieth Century. During the first two decades of the Twenty-First Century, Democratic officials and liberal groups are, on balance, more likely to benefit from initiatives, and Republican officials and conservative groups are more likely to support restricting the process. During the recent period, a half-dozen policy issues have figured prominently in initiative campaigns and have, in turn, prompted legislators to change initiative process rules: protecting animal welfare, legalizing marijuana, increasing the minimum wage, expanding Medicaid, altering voting and elections policies, and expanding gambling.

In addition to identifying the main issues that have recently spurred calls for rule changes, this Article will take stock of the various changes in initiative-process rules that have been proposed and enacted.⁴ One approach has made it more difficult to qualify initiatives for the ballot. A second approach has made it more difficult for voters to ratify initiatives placed on the ballot. A third approach has been to limit the number and range of subjects targeted through the initiative process. A final approach focuses on whether and how the legislature can revise policies enacted through initiative statutes, with critics of the initiative process seeking to expand opportunities for legislative modification and supporters aiming to better insulate initiatives.

II. POLICIES PROMPTING CHANGES IN INITIATIVE PROCESS RULES IN THE TWENTY-FIRST CENTURY

Changes in initiative process rules generally arise from disjunctions between the policy goals of the public and elected officials, yet, groups' and officials' attitudes toward the process and efforts to alter it are also rooted in other considerations. Support for and opposition to the initiative process are also a product of theoretical views about: the value of direct representation; assessments of whether citizens have sufficient information to pass judgment on ballot measures; whether interest groups wield too much influence; and whether minority rights receive adequate protection during the process.

These theoretical views and assessments figured prominently in debates in the 1900s and 1910s, when many states adopted the initiative process, and in the 1960s and early 1970s, during a second wave

3. *See infra* Part III.

4. *See infra* Part IV.

of direct-democracy adoptions when several additional states adopted the initiative.⁵ During each period, the predominantly progressive supporters of establishing the initiative process stressed the deficiencies of representative institutions and the benefits of allowing citizens to bypass these institutions when necessary. In contrast, the primarily conservative opponents highlighted the pitfalls of placing measures directly before voters and the advantages of allowing policies to emerge from deliberation among elected officials.⁶

These theoretical arguments continue into the early Twenty-First Century. Today, the debate has largely moved away from whether to adopt or eliminate initiative processes and now focuses on how to structure the rules governing these processes. Only one state has adopted the initiative process in the last 50 years. Mississippi initially adopted the initiative in 1914, only to see it invalidated by the Mississippi Supreme Court nearly a decade later.⁷ It readopted the initiative in 1992, only to see the process rendered temporarily unusable by a Mississippi Supreme Court ruling issued nearly three decades later.⁸ The prospects are dim that any additional states will establish an initiative process; legislators have shown little enthusiasm for adopting it in states where it is not already in place.⁹ It is just as unlikely that

5. The timeline of state adoption of the initiative is provided in JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 313 n.132, 328 n.151 (2006).

6. Debates about the theoretical basis for supporting and opposing the initiative are summarized in *id.* at 84–94.

7. *Power v. Robertson*, 93 So. 769 (Miss. 1922).

8. *In re Initiative Measure No. 65 vs. Watson*, NO. 2020-IA-01199-SCT, 2021 Miss. LEXIS 123 (May 14, 2021).

9. To be sure, legislators in prior eras were willing to approve creation of initiative processes. In the early 1900s, during the first wave of adoptions, initiative processes were, in a few cases, introduced through the work of constitutional conventions. This happened in Oklahoma (1907), Michigan (1908), Arizona (1911), Ohio (1912), and Massachusetts (1918). John Dinan, *Framing a “People’s Government”: State Constitution-Making in the Progressive Era*, 30 *RUTGERS L. J.* 933, 973–74 (1999) (discussing adoption of the initiative in conventions in each of these states). But initiative processes were generally enacted through legislature-crafted amendments during this time. Legislatures were responsible for crafting amendments creating initiative processes during this period in South Dakota (1898), *South Dakota Direct Democracy*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Direct_Democracy_\(1898\)](https://ballotpedia.org/South_Dakota_Direct_Democracy_(1898)) [<https://perma.cc/ZY54-YUFZ>], Utah (1900), *History of Initiative & Referendum in Utah*, BALLOTPEDIA, https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Utah [<https://perma.cc/3WWV-R8RG>], Oregon (1902), *Oregon Right to Initiative and Referendum, Measure 1 (June 1902)*, BALLOTPEDIA, [https://ballotpedia.org/Oregon_Right_to_Initiative_and_Referendum,_Measure_1_\(June_1902\)](https://ballotpedia.org/Oregon_Right_to_Initiative_and_Referendum,_Measure_1_(June_1902)) [<https://perma.cc/VGK3-FYR4>], Montana (1906), *Montana Referendum and Initiative, Amendment 1 (1906)*, BALLOTPEDIA, [https://ballotpedia.org/Montana_Referendum_and_Initiative,_Amendment_1_\(1906\)](https://ballotpedia.org/Montana_Referendum_and_Initiative,_Amendment_1_(1906)) [<https://perma.cc/YC37-VJH8>], Maine (1908), *Maine Initiative and Referendum Amendment (1908)*, BALLOTPEDIA, [https://ballotpedia.org/Maine_Initiative_and_Referendum_Amendment_\(1908\)](https://ballotpedia.org/Maine_Initiative_and_Referendum_Amendment_(1908)) [<https://perma.cc/FY7F-EQQ5>], Missouri (1908), *History of Initiative & Referendum in*

Missouri, BALLOTPEDIA, https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Missouri [<https://perma.cc/XHX5-H2L6>], Arkansas (1910), *Arkansas Initiative and Referendum Amendment (1910)*, BALLOTPEDIA, [https://ballotpedia.org/Arkansas_Initiative_and_Referendum_Amendment_\(1910\)](https://ballotpedia.org/Arkansas_Initiative_and_Referendum_Amendment_(1910)) [<https://perma.cc/N4KR-932L>], Colorado (1910), *Colorado Initiative and Referendum Rights, Referendum 3 (1910)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Initiative_and_Referendum_Rights,_Referendum_3_\(1910\)](https://ballotpedia.org/Colorado_Initiative_and_Referendum_Rights,_Referendum_3_(1910)) [<https://perma.cc/VM4E-EAKS>], California (1911), *California Initiative and Referendum, Proposition 7 (October 1911)*, BALLOTPEDIA, [https://ballotpedia.org/California_Initiative_and_Referendum,_Proposition_7_\(October_1911\)](https://ballotpedia.org/California_Initiative_and_Referendum,_Proposition_7_(October_1911)) [<https://perma.cc/XKF3-2TH6>], Nebraska (1912), *Nebraska Initiative and Referendum, Amendment 1 (1912)*, BALLOTPEDIA, [https://ballotpedia.org/Nebraska_Initiative_and_Referendum,_Amendment_1_\(1912\)](https://ballotpedia.org/Nebraska_Initiative_and_Referendum,_Amendment_1_(1912)) [<https://perma.cc/X584-H828>], Washington (1912), *Washington Right to Initiative and Referendum, Amendment to Article II Sec. 1 (1912)*, BALLOTPEDIA, [https://ballotpedia.org/Washington_Right_to_Initiative_and_Referendum,_Amendment_to_Article_II_Sec._1_\(1912\)](https://ballotpedia.org/Washington_Right_to_Initiative_and_Referendum,_Amendment_to_Article_II_Sec._1_(1912)) [<https://perma.cc/F38B-7S24>], Nevada (1912), *History of Initiative & Referendum in Nevada*, BALLOTPEDIA, https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Nevada [<https://perma.cc/Z2G7-WWDW>], Idaho (1912), *Idaho*, INITIATIVE & REFERENDUM INSTITUTE, <http://www.iandrinstute.org/states/state.cfm?id=8> [<https://perma.cc/4WPJ-UNFD>], Mississippi (1914), *History of I&R in Mississippi*, BALLOTPEDIA, https://ballotpedia.org/History_of_I%26R_in_Mississippi [<https://perma.cc/QF5A-9X6X>], and North Dakota (1914), *North Dakota Initiative and Referendum as to Legislation Referendum (1914)*, BALLOTPEDIA, [https://ballotpedia.org/North_Dakota_Initiative_and_Referendum_as_to_Legislation_Referendum_\(1914\)](https://ballotpedia.org/North_Dakota_Initiative_and_Referendum_as_to_Legislation_Referendum_(1914)) [<https://perma.cc/2TTR-F75E>].

In a later wave of adoptions, which took place mostly in the 1960s and 1970s, convention-referred measures were usually the vehicle for introducing the initiative process, as in Alaska (1959), *History of Initiative & Referendum in Alaska*, BALLOTPEDIA, https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Alaska [<https://perma.cc/ECW9-W49Q>], and Illinois (1971), ANN M. LOUSIN, THE ILLINOIS STATE CONSTITUTION 30, 37 (2011), or expanding the initiative process to allow initiated amendments as well as statutes, as in Montana (1972), Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 MONT. L. REV. 325, 326 (2010). But occasionally legislature-referred amendments or revisions were the vehicle for introducing the initiative process, as in Florida (1968) (*History of Initiative & Referendum in Florida*, BALLOTPEDIA, https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Florida [<https://perma.cc/L4RG-RT7X>]), or expanding the initiative process by allowing initiated amendments as well as initiated statutes, as in South Dakota (1972), *History of Initiative & Referendum in South Dakota*, BALLOTPEDIA, https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_South_Dakota [<https://perma.cc/P4GT-B9BQ>]. Mississippi (1992), which is the most recent state to enact an initiative process, did so through a legislature-referred amendment adopted 30 years ago. *Mississippi*, INITIATIVE AND REFERENDUM INSTITUTE, <http://www.iandrinstute.org/states/state.cfm?id=13> [<https://perma.cc/KE44-6UXA>].

Putting aside Mississippi's adoption of the initiative process in 1992, it is necessary to go back to the late 1960s and early 1970s for instances where the initiative process was adopted through a legislature-referred amendment. It is true that, in 1980, the Minnesota legislature approved and submitted for voter approval a constitutional amendment that would have established the initiative and referendum. In fact, the amendment secured over 116,000 more yes votes than no votes. However, because Minnesota requires amendments to be approved by a majority of voters in the entire election, and not just by a majority of voters

any state will eliminate the initiative process. A large majority of the public routinely expresses support for the concept of direct democracy and decries efforts to eliminate the initiative process. Accordingly, this change has not taken place in any state.¹⁰ With little prospect of a change in the number of states allowing for the initiative process, attention in recent years has focused on the design of existing initiative processes.

Although debates about initiative process rules have been shaped in part by theoretical views and assessments, groups and officials are nevertheless concerned about, and their opinions on initiative process rules are heavily influenced by, the specific policies enacted via initiatives at any given time. In this regard, attitudes toward the initiative process resemble those toward other governing rules and institutions such as the electoral college, senate filibuster, judicial review, or presidential executive orders. Attitudes toward these other rules and institutions exhibit some stability over time but are also highly contingent on the outcomes they produce. Democratic Party officials are more apt to support these institutions when they produce results aligned with Democratic Party priorities, but their support declines and even shifts to opposition when these rules or institutions no longer have favorable outcomes. Similar transformations can be found in the attitudes of Republican officials in response to changing assessments of the policy outcomes generated by these institutions.¹¹

Similar shifts happened over time in attitudes toward the initiative process of Democratic and Republican officials and among conservative and liberal groups in response to the policies enacted via initiatives in different eras. In the first few decades of the Twentieth Century, the initiative process was, in nearly all cases, a vehicle for securing progressive policies and championed by progressives and opposed by conservatives.¹² Initiative measures in the early 1900s guaranteed protection for workers when legislators were seen as

on the question, thereby essentially treating abstentions on an amendment as no votes, and because there were a number of abstentions that year, the amendment failed to pass. RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 39–40 (2002).

10. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 4 (1999); DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 208 (2000); MATTHEW J. STREB, *RETHINKING AMERICAN ELECTORAL DEMOCRACY* 61–62 (3d ed. 2015).
11. These shifts in attitudes are analyzed in regard to federalism in particular in John Dinan & Jac Heckelman, *Stability and Contingency in Federalism Preferences*, 80 *PUB. ADMIN. REV.* 234 (2020), and are analyzed in the case of other institutions in CARLOS A. BALL, *PRINCIPLES MATTER: THE CONSTITUTION, PROGRESSIVES, AND THE TRUMP ERA* (2021).
12. The use of the initiative process to adopt the policies mentioned in this paragraph is discussed in DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 18–20 (1989).

insufficiently attuned to the public's interest in mandating an eight-hour day, setting a minimum wage, and establishing workers' compensation programs. Initiatives also eliminated some legal defenses that railroads and other corporations relied on to avoid liability for workplace injuries. Other initiatives during this period allowed greater regulation of railroads and railroad rates when legislators were seen as beholden to railroads and wary of acting against their interests even when public opinion supported greater regulation. Initiative measures were also a vehicle for enacting other progressive reforms, including woman suffrage, the direct primary, and the abolition of the death penalty, which were in many cases opposed by conservatives.

After intermittent use in the mid-Twentieth Century, its final quarter saw a surge in the number of initiative measures and a change in the groups benefiting from these measures. Beginning in the late 1970s, conservative groups and Republican officials were in many instances the primary beneficiaries and champions of the initiative process.¹³ California voters' passage of the Proposition 13 tax-limitation measure marked the start of a wave of tax-and-expenditure limitation measures from the late 1970s through the early 1990s, as conservatives found that their pleas for limits on taxes and spending went unheeded by legislators but were in many cases supported by voters.¹⁴ Social conservatives also turned to the initiative process to reinstate the death penalty, limit abortion, protect victims' rights, and make English the official language after finding that the public was more receptive than legislators to supporting each of these policies.¹⁵ Conservative groups also enjoyed significant success in securing passage of initiatives limiting state legislators' terms in the face of legislative opposition. To be sure, liberal groups continued to achieve success through the initiative process on various policy issues.¹⁶ However, the most high-profile initiatives, especially tax-and-expenditure limitation measures, were backed mainly by conservatives and opposed by liberals.¹⁷ Reliance on the initiative process to enact these

13. CRONIN, *supra* note 10 at 202; Robert Lindsey, *Rise of Voter-initiated referendums: The Right Hones a Tool for Liberals*, N.Y. TIMES, July 24, 1984, at A14, <https://www.nytimes.com/1984/07/24/us/rise-of-voter-initiated-referendums-the-right-hones-a-tool-of-liberals.html> [<https://perma.cc/Q4Z8-AL4W>].

14. David B. Magleby, *Ballot Initiatives and Intergovernmental Relations in the United States*, 28 PUBLIUS 147, 150, 157-59 (1998).

15. See PATRICK B. MCGUIGAN, *THE POLITICS OF DIRECT DEMOCRACY IN THE 1980S: CASE STUDIES IN POPULAR DECISION-MAKING* (1985).

16. Lindsey, *supra* note 13 (noting that in the 1980s, a number of initiative measures were "backed by environmentalists, consumers and others who usually have a liberal point of view, seeking such goals as banning the development of nuclear power plants, requiring deposits for beverage bottles and cans to reduce litter and seeking ways to curb campaign financing abuses.").

17. SCHMIDT, *supra* note 12, at 125-45.

policies soured some liberal groups and Democratic officials on the initiative process in the late Twentieth Century,¹⁸ but conservative groups and Republican officials grew more supportive.¹⁹

In the first two decades of the Twenty-First Century, the political dynamics shifted again. Although conservative groups continue to enjoy occasional success in passing tax-limitation initiatives, immigrant-restriction measures, and affirmative-action limits, liberal groups have been the more prominent beneficiaries of the initiative process. This disparity is partly because Republicans currently are the dominant party in two-thirds of the twenty-four states that allow for the initiative. As of 2021, Republicans are the majority party across state legislatures and have been the majority party for all or nearly all of the last decade in sixteen states: Alaska, Arizona, Arkansas, Florida, Idaho, Michigan, Mississippi, Missouri, Montana, Nebraska (a non-partisan legislature with Republican leanings), North Dakota, Ohio, Oklahoma, South Dakota, Utah, and Wyoming.²⁰ In all but one of these states, Michigan, Republicans hold the governor's office.²¹ California, Colorado, Illinois, Maine, Massachusetts, Nevada, Oregon, and Washington are the other eight states with the initiative process. Democrats currently control the legislature in each of these states and hold the governor's office in all but one of them: Massachusetts.²²

Given Republicans' current dominance of elected offices in states with the initiative process, liberal groups are at present more likely than conservative groups to find their policy goals blocked in the legislature and to view direct democracy as an attractive alternative means of enacting their favored policies. The initiative process in the Twenty-First Century is not solely a vehicle for liberal groups to pass policies that are popular with voters and blocked by Republican-controlled legislatures. Disjunctions between the preferences and priorities of the public and elected officials and a resulting resort to the initiative process have various origins and take different forms.²³ Oc-

18. CRONIN, *supra* note 10, at 204.

19. In New Jersey in the 1980s, Republican state officials pushed for adoption of an initiative process, whereas Democrats generally opposed adding such a process. SCHMIDT, *supra* note 12, at 252; CRONIN, *supra* note 10, at 4. In Texas in the 1980s, support for adopting an initiative process generally came from Republican officials. SCHMIDT, *supra* note 12, at 269. In Virginia in the 1990s, Republicans in the legislature pushed for adoption of the initiative and referendum, whereas Democrats generally opposed the measure. JOHN DINAN, *THE VIRGINIA STATE CONSTITUTION* 114 (2nd ed. 2014).

20. National Conference of State Legislatures, *2021 State & Legislature Partisan Composition*, https://www.ncsl.org/documents/elections/Legis_Control_2-2021.pdf [<https://perma.cc/ZLQ7-ZP9B>].

21. *Id.*

22. *Id.*

23. The various reasons why legislators are not responsive to public opinion are detailed in JOHN G. MATSUSAKA, *LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY*

asionally, liberal groups resort to the initiative process in Democratic-controlled states. The goal in these cases is to secure even more left-leaning outcomes or do so more quickly than Democratic elected officials are willing to support or prioritize.²⁴ Meanwhile, conservative groups continue to use the initiative process on some occasions in Democratic-controlled states to enact policies that are popular with the public but disfavored by Democratic elected officials.²⁵ In the current era, however, the disjunctions between the public's views and the agenda and preferences of elected officials are most prominent in Republican-controlled states. These states, therefore, offer the most opportunities for liberal groups to take their case to the initiative process.

Disjunctions between the public's views and elected officials' preferences are most evident in recent years on a half-dozen issues, which are analyzed in the following sections. The goal is to show the connection between the passage of initiatives in each policy area and efforts by Republican officials and allied groups to change initiative process rules to limit initiative use. Occasionally, Democratic officials and allied groups have responded to the passage of initiatives in these areas by altering the rules to protect the initiative process.

A. Animal Welfare

Efforts to change initiative process rules—especially in the early 2000s, but continuing to the present—have been motivated to a significant and largely unappreciated degree by the prevalence and success of animal welfare protection initiatives in the face of Republican legis-

CAN MEET THE POPULIST CHALLENGE 45–47 (2020). As Matsusaka writes, “the initiative process is the last resort for groups that feel shut out of the legislature, so liberal initiatives appear when the legislature is controlled by conservatives, and conservative initiatives appear when the legislature is controlled by liberals.” *Id.* at 76.

24. See, for instance, an initiated statute approved by Colorado voters in 2020 establishing a paid family and medical leave program, *Colorado Proposition 118, Paid Medical and Family Leave Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Proposition_118,_Paid_Medical_and_Family_Leave_Initiative_\(2020\)](https://ballotpedia.org/Colorado_Proposition_118,_Paid_Medical_and_Family_Leave_Initiative_(2020)) [<https://perma.cc/J43Z-9NDL>], as well as an initiated statute approved by Oregon voters in 2020 decriminalizing certain drugs, *Oregon Measure 110, Drug Decriminalization and Addiction Treatment Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Oregon_Measure_110,_Drug_Decriminalization_and_Addiction_Treatment_Initiative_\(2020\)](https://ballotpedia.org/Oregon_Measure_110,_Drug_Decriminalization_and_Addiction_Treatment_Initiative_(2020)) [<https://perma.cc/WDQ7-BKX6>].
25. See, for instance, an initiated amendment, one of several placed on the ballot in various states in recent years, that was approved by Colorado voters in 2020 making explicit that voting is reserved for citizens. *Colorado Amendment 76, Citizenship Requirement for Voting Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Amendment_76,_Citizenship_Requirement_for_Voting_Initiative_\(2020\)](https://ballotpedia.org/Colorado_Amendment_76,_Citizenship_Requirement_for_Voting_Initiative_(2020)) [<https://perma.cc/4C2D-UVBM>].

lators' and allied groups' opposition. Often backed by the Humane Society of the United States (HSUS) and the Fund for Animals (FFA), these initiatives have taken various forms.²⁶ Many of these initiatives ban certain forms of hunting, trapping, and fishing, for instance, by prohibiting cockfighting, bear-baiting, and the use of leghold traps. Other initiatives limit the confinement of pigs, calves, and hens. These animal welfare policies generate opposition from farm groups and have generally not advanced far in the legislative process, but they have proved popular with voters in many cases.²⁷

In the late 1990s and early 2000s, legislators in states where animal welfare initiatives appeared or threatened to appear on the ballot responded by proposing various changes to the initiative process rules. In several cases, rules changes explicitly targeted animal welfare initiatives. In 1998, Utah legislators approved and voters ratified a constitutional amendment stipulating that initiative measures allowing, limiting, or prohibiting the taking of wildlife would need to be ratified by a two-thirds vote, rather than the simple majority required to approve all other initiatives.²⁸ Legislators in other states also sought to change initiative process rules that applied solely to animal welfare initiatives. However, voters rejected each of these other legislature-proposed rules changes, including a 2000 Arizona amendment that would have required a two-thirds supermajority threshold for voters to approve wildlife measures, a 2000 Alaska amendment that would have prevented consideration of any initiatives regulating wildlife, and a 2002 Oklahoma amendment that would have nearly doubled the number of signatures required to place on the ballot statutory initiatives dealing with fishing, hunting, trapping, or regulating occupations or entertainment events focusing on animals.²⁹

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26. *Ballot Measure/Initiative/Referendum History – Animal Protection Issues*, Humane Society of the U.S., <https://www.humanesociety.org/sites/default/files/docs/ballot-initiatives-chart.pdf> [<https://perma.cc/TEP8-NKG2>].
27. Wayne Pacelle, *The Animal Protection Movement: A Modern-Day Model Use of the Initiative Process*, in *THE BATTLE OVER CITIZEN LAWMAKING* 112–13 (M. Dane Waters ed., 2001); Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 *TENN. L. REV.* 57, 82 (2009).
28. *Utah Supermajority for Hunting Initiatives, Proposition 5 (1998)*, BALLOTPEDIA, [https://ballotpedia.org/Utah_Supermajority_for_Hunting_Initiatives,_Proposition_5_\(1998\)](https://ballotpedia.org/Utah_Supermajority_for_Hunting_Initiatives,_Proposition_5_(1998)) [<https://perma.cc/AB2F-UL2C>]; Rich Landers, *Utah Voters Pass Wildlife Proposition: Flies in Face of Animal-Rights Activists*, *SPOKESMAN REV.*, Nov. 15, 1998.
29. *Arizona Wildlife Management, Proposition 102 (2000)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Wildlife_Management,_Proposition_102_\(2000\)](https://ballotpedia.org/Arizona_Wildlife_Management,_Proposition_102_(2000)) [<https://perma.cc/P6HQ-JXLH>]; *Alaska No Voter Initiatives About Wildlife, Measure 1 (2000)*, BALLOTPEDIA, [https://ballotpedia.org/Alaska_No_Voter_Initiatives_About_Wildlife,_Measure_1_\(2000\)](https://ballotpedia.org/Alaska_No_Voter_Initiatives_About_Wildlife,_Measure_1_(2000)) [<https://perma.cc/U7GX-VCUL>]; *Oklahoma Signature Requirements for Initiative, State Question 698 (2002)*, BALLOTPEDIA, <https://ballotpedia.org/>

In several cases, rules changes did not target animal welfare initiatives explicitly. Still, they were motivated by opposition to animal-protection measures, even though other policies also played a role in fueling these changes. In Wyoming in 1998, in a change motivated by various factors but undertaken with a consciousness of the effects on animal welfare initiatives, voters approved a legislature-referred amendment tightening the geographic distribution requirement for collecting signatures for initiatives.³⁰ Meanwhile, in Idaho, legislators and allied groups were seeking to limit animal welfare initiatives, among other initiatives, when, in 2013, the legislature enacted a statute introducing a geographic distribution requirement for initiatives and referenda.³¹ In 2006, the Florida legislature approved and voters ratified an amendment boosting the ratification threshold for future amendments to a three-fifths supermajority.³² This change applied to

Oklahoma Signature Requirements for Initiative, State Question 698 (2002) [https://perma.cc/2LCP-896C]. Additionally, in 2010 Arizona voters rejected a legislature-crafted amendment that would have protected hunting and fishing rights and that also included a provision vesting exclusive authority for regulating wildlife in the legislature; this provision did not explicitly prohibit all initiatives on the subject but was interpreted by many as having this effect. *Arizona Hunting Amendment, Proposition 109 (2010)*, BALLOTPEDIA, https://ballotpedia.org/Arizona_Hunting_Amendment,_Proposition_109_(2010) [https://perma.cc/UFJ8-TYE5].

30. *Wyoming Signature Distribution Requirements, Amendment B (1998)*, BALLOTPEDIA, https://ballotpedia.org/Wyoming_Signature_Distribution_Requirements,_Amendment_B_(1998) [https://perma.cc/8ANS-TPR3]. In place of the prior rule requiring initiative backers to secure at least one signature in each of two-thirds of the state's counties, the new rule adopted in 1998 requires initiative supporters to collect signatures from 15 percent of voters in each of two-thirds of the counties. The connection between animal welfare initiatives and passage of this rule change is made in Landers, *supra* note 28. It should be noted that legislative backers of this rule change also made specific mention of and expressed concern about recent legislative term-limits initiatives in arguing for the need to limit the initiative process. See Robert W. Black, *Voters Approve Tougher Initiative Rules' Workers' Comp Protections*, ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 4, 1998.
31. S.B. 1108, 62d Leg., 1st Reg. Sess. (Idaho 2013) (codified as amended at IDAHO CODE, § 34-1805). This particular geographic distribution rule requires a certain percentage of signatures to be collected in just over half of the state's legislative districts. This change was largely motivated by passage of a trio of 2012 referenda overturning recently enacted education statutes; but it was pushed by the Idaho Farm Bureau Federation, which argued that the rules change would preserve the voice of rural areas if animal-rights activists decided to run ballot-measure campaigns. Betsy Z. Russell, *Idaho Governor Signs Bill Tightening Initiative Rules*, SPOKESMAN REV., April 3, 2013, https://www.spokesman.com/stories/2013/apr/03/idaho-governor-signs-bill-tightening-initiative/ [https://perma.cc/CB93-8FJZ].
32. *Florida Amendment 3, Supermajority Required to Approve a Constitutional Amendment (2006)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_3,_Supermajority_Vote_Required_to_Approve_a_Constitutional_Amendment_(2006) [https://perma.cc/9QSH-LQ3R].

all amendments but was motivated by concerns about recent citizen-initiated amendments. Supporters of this change took issue with several recent amendments that they deemed problematic, including raising taxes and boosting the minimum wage. However, the campaign for this change focused heavily on the passage of a 2002 Florida citizen-initiated amendment preventing the confinement of pregnant pigs in crates.³³

B. Minimum Wage

Of the various policies placed on the ballot via the initiative process in the Twenty-First Century, none have been more successful with voters than minimum-wage increases. Voters have approved all nineteen minimum-wage increase initiatives appearing on state ballots since 2000.³⁴ During this time, voters approved minimum-wage increases in Alaska, Arizona, Arkansas, Colorado, Florida, Maine, Missouri, Montana, Nebraska, Nevada, Ohio, Oregon, South Dakota, and Washington, often doing so multiple times in the same state.³⁵ In many of these states, initial efforts to persuade the legislature to increase the minimum wage proved unavailing. However, when supporters of minimum-wage increases took their case directly to the voters, the resulting initiatives were in every case successful during the Twenty-First Century, often prevailing by significant margins.³⁶

Labor unions and allied groups' success in using the initiative process to pass minimum-wage increases has played a key role in prompting Republican legislators and business groups to push for initiative process rules changes. In some states, minimum-wage policy played a role, alongside a range of other policies enacted through the initiative, in motivating legislative efforts to limit the use of the initiative pro-

33. *Florida Animal Cruelty, Amendment 10 (2002)*, BALLOTPEdia, [https://ballotpedia.org/Florida_Animal_Cruelty,_Amendment_10_\(2002\)](https://ballotpedia.org/Florida_Animal_Cruelty,_Amendment_10_(2002)) [https://perma.cc/N6MW-LUWS]. See Jason Garcia, *Big Business Backs Limits to Florida's Constitution*, ORLANDO SENTINEL, Sept. 12, 2006, <https://www.orlandosentinel.com/news/os-xpm-2006-09-12-amend12-story.html> [https://perma.cc/Z8UL-4YCX] (noting that backers of the rule change “frequently invoke the infamous 2002 initiative that enshrined in the constitution a measure that stops people from keeping pregnant pigs in cages.”).

34. *Minimum Wage on the Ballot*, BALLOTPEdia, https://ballotpedia.org/Minimum_wage_on_the_ballot [https://perma.cc/8DLH-Q2HV].

35. Voter approval of initiated measures increasing the minimum wage in each of these states is noted in *id.* Reliance on the initiative process to “circumvent reluctant lawmakers” and secure passage of minimum-wage increases in a number of states is noted in Shanna Rose, *State Minimum Wage Laws as a Response to Federal Inaction*, 52 STATE & LOC. GOV. REV. 277, 284 (2020).

36. These initiated measures generally took the form of initiated statutes, though in some cases they took the form of initiated constitutional amendments. See John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. LAW REV. 1007, 1018–19 (2011).

cess. When the Michigan legislature enacted statutory changes to the initiative process in December 2018, including by introducing a later invalidated geographic distribution requirement for initiatives, legislators were reacting in part to a successful campaign that year to pass a minimum-wage initiative but were also responding to other initiative measures legalizing recreational marijuana and making election-law changes.³⁷

In other states, minimum-wage initiatives were primarily responsible for legislators' and allied groups' efforts to change initiative process rules. In Arizona, various rule changes were made in response to a 2016 initiated statute simultaneously increasing the minimum wage and requiring businesses to offer paid sick leave.³⁸ In their 2017 session, Arizona legislators enacted two laws making various changes to the initiative process. These included banning the practice of paying signature-gatherers per signature collected and changing the standard for scrutinizing initiative petitions in such a way as to increase the chances of signatures being deemed invalid.³⁹ Then, in 2021, the Arizona legislature approved an amendment to appear on the 2022 ballot in response to how the 2016 initiative combined an increase in the minimum wage and a requirement of paid sick leave that state courts upheld.⁴⁰ By a party-line vote, with all yes votes coming from Republicans and all no votes coming from Democrats, legislators

37. Michigan Election Law, MCL 168 (1954) *amended by* 2018 Mich. Pub. Acts 608 (2018). Michigan has an indirect initiative process whereby initiative measures that secure enough signatures are first presented to the legislature for possible passage. In this case, after supporters of a minimum-wage increase and another measure requiring employers to offer paid sick leave secured enough signatures to force consideration of the measure, the legislature approved the measures without their having to go on the ballot. On the role of the minimum-wage increase measure in prompting the legislature to change initiative process rules, see David Eggert, *Michigan GOP Advances Bill to Make Ballot Drives Harder*, ASSOCIATED PRESS, Dec. 13, 2018, <https://apnews.com/article/fe38a03832aa4a3e893e20bf62d10c17> [<https://perma.cc/YWZ3-FXVX>].

38. *Arizona Minimum Wage and Paid Time Off, Proposition 206 (2016)*, BALLOTEDIA, [https://ballotpedia.org/Arizona_Minimum_Wage_and_Paid_Time_Off,_Proposition_206_\(2016\)](https://ballotpedia.org/Arizona_Minimum_Wage_and_Paid_Time_Off,_Proposition_206_(2016)) [<https://perma.cc/YN2F-TV2U>].

39. These 2017 legislative changes to initiative process rules, and their direct connection to the 2016 minimum wage measure, are detailed in Mary Jo Pitzl, *How Arizona Legislators Sapped Citizen Initiatives: Bit by Bit*, ARIZONA REPUBLIC, April 17, 2017, <https://www.azcentral.com/story/news/politics/legislature/2017/04/16/arizona-citizen-initiatives-restrictions-came-after-years-long-effort/99719152/> [<https://perma.cc/W6CT-6LMX>].

40. After voters approved the 2016 initiative, opponents challenged it in state court, in part on the grounds that the measure was illegitimate because it addressed multiple subjects. In rejecting this and other challenges to the measure, Arizona courts, in 2017, ruled that the state constitution's existing single-subject rule does not apply to citizen-initiated measures. *Ariz. Chamber of Com. & Indus. v. Kiley*, 399 P.3d 80 (Ariz. 2017).

crafted an amendment awaiting voter approval in 2022 that would require all future initiatives to address only a single subject.⁴¹

C. Marijuana

Initiatives removing state criminal penalties for marijuana use have been approved regularly during the Twenty-First Century, to the point that marijuana legalization supporters have benefited more than any other group from the initiative process during this time. State legislators' support for marijuana legalization has lagged significantly behind public support, prompting legalization proponents to turn to the initiative process. When states in the 1990s began to allow medical use of marijuana, the initial policies were enacted solely through the initiative process and only gradually began to be approved by legislatures. California was the first state to legalize medical marijuana in 1996, followed by Alaska, Oregon, and Washington in 1998, and Maine in 1999. These policies were all enacted through the initiative process.⁴² In 2000, Hawaii became the first state to legalize medical marijuana through the legislative process.⁴³ Half of the states that have legalized medical marijuana enacted this policy through the initiative process.⁴⁴

A similar pattern unfolded in the 2010s when states took the further step of allowing recreational marijuana use. Most of the eighteen states that legalized recreational marijuana achieved this goal through the initiative process. Colorado and Washington were the first states to legalize recreational marijuana through initiatives in 2012, followed by Alaska and Oregon in 2014; California, Nevada, Massachusetts, and Maine in 2016; Michigan in 2018; and Arizona, Florida, and Montana in 2020. Voters have, on a few occasions, rejected marijuana legalization initiatives. However, marijuana legali-

41. The proposed amendment and the vote totals on the legislative vote to approve the amendment are discussed at *Arizona Single-Subject Requirement for Ballot Initiatives Amendment (2022)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Single-Subject_Requirement_for_Ballot_Initiatives_Amendment_\(2022\)](https://ballotpedia.org/Arizona_Single-Subject_Requirement_for_Ballot_Initiatives_Amendment_(2022)) [https://perma.cc/4PPR-XEPV]. The connection between the minimum-wage measure and the crafting of this amendment is stressed in Bob Christie, *Arizona Legislature Set to Send Initiative Changes to Ballot*, ASSOCIATED PRESS, June 28, 2021, <https://apnews.com/article/az-state-wire-arizona-legislature-government-and-politics-d7f6cfab476d6a22f3bc0569f03769fc> [https://perma.cc/J9T9-9GB5].

42. A. Lee Hannah & Daniel J. Mallinson, *Defiant Innovation: The Adoption of Medical Marijuana Laws in the American States*, 46 POL'Y STUD. J. 402, 410 (2018).

43. *Id.*

44. See *Legal Medical Marijuana States and D.C.*, PROCON.ORG, <https://medicalmarijuana.procon.org/legal-medical-marijuana-states-and-dc/> [https://perma.cc/K793-NT2D]. The importance of the initiative process for passing medical marijuana legalization policies is detailed in Daniel J. Mallinson & A. Lee Hannah, *Policy and Political Learning: The Development of Medical Marijuana Policies in the States*, 50 PUBLIUS 344, 353–54 (2020).

zation measures have prevailed far more often, generally winning approval by substantial margins.⁴⁵

The passage of marijuana legalization initiatives has prompted groups and officials to take various steps to change initiative process rules. Some of the energy for changing the rules has come from groups *supporting* marijuana legalization. Because of the significant differences in the views of the public often very supportive of legalization and elected officials generally opposed, public officials have sometimes responded to the passage of legalization measures by overturning or modifying these policies.⁴⁶ These efforts by legislative opponents of marijuana-legalization initiatives have, in turn, prompted legalization supporters to change initiative process rules to better protect initiative measures from legislative reversal.⁴⁷

In Arizona, voters approved a wide-ranging 1996 initiated statute that allowed physicians to prescribe marijuana to certain patients.⁴⁸ The Arizona legislature responded by overturning this policy via legis-

45. Enactment of each of these recreational marijuana initiatives is detailed in *History of Marijuana on the Ballot*, BALLOTPEdia, https://ballotpedia.org/History_of_marijuana_on_the_ballot [https://perma.cc/9MM2-58AF].

46. The general phenomenon of state legislatures reacting to passage of initiatives by modifying or evading them in the course of implementing them is discussed in ELISABETH R. GERBER, ARTHUR LUPIA, MATTHEW D. McCUBBINS, & D. RODERICK KIEWIET, *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* 4–5 (2000).

47. In focusing on states where marijuana legalization supporters are trying to change initiative process rules with an eye to insulating initiatives from *legislative* reversal, it is also worth noting another state, Nebraska, where supporters of marijuana legalization are currently trying to change initiative process rules with an eye to insulating initiatives from *judicial* invalidation. In Nebraska, during the last decade, the secretary of state and state supreme court have had multiple opportunities to interpret the state constitution's single-subject requirement and have interpreted the rule in ways that have occasionally led to removal of high-profile ballot measures from the ballot. Most recently, in 2020, the Nebraska supreme court ordered a medical-marijuana legalization initiative to be removed from the ballot for violating the single-subject rule. In response, legislators who are sympathetic to the marijuana legalization effort introduced, in the 2021 session, a constitutional amendment that would rewrite the single-subject rule to increase the chances that future initiatives could survive judicial scrutiny. Instead of the present rule that "Initiative measures shall contain only one subject," the proposed rewritten version, which has not advanced in the legislature to date, would stipulate that: "[i]nitiative measures shall contain only one general subject which may include provisions that have a connection to the general subject of the measure." Chris Dunker, *Nebraska Senator Wants Rules on Initiative Petitions Clarified After Court Ruling Torpedoed Medical Marijuana*, LINCOLN J. STAR, Jan. 18, 2021, https://journalstar.com/news/state-and-regional/govt-and-politics/nebraska-senator-wants-rules-on-initiative-petitions-clarified-after-court-ruling-torpedoed-medical-marijuana/article_8becd425-d3df-5b5d-8b44-ea07c20f0554.html [https://perma.cc/6WTN-2PB4].

48. *Arizona Use or Possession of Controlled Substances, Proposition 200 (1996)*, BALLOTPEdia, [https://ballotpedia.org/Arizona_Use_or_Possession_of_Controlled_Substances,_Proposition_200_\(1996\)](https://ballotpedia.org/Arizona_Use_or_Possession_of_Controlled_Substances,_Proposition_200_(1996)) [https://perma.cc/8TZJ-2CU7].

lative statute. Frustrated by the legislature's actions, supporters of this policy took several actions in response. As an initial step, supporters of medical marijuana legalization forced a popular referendum on the legislature's actions in the 1998 election, at which time voters restored the original voter-approved policy.⁴⁹ Groups critical of the legislature's actions also took the additional step of insulating all future initiative measures from legislative reversal by crafting and securing voter approval of a 1998 initiated amendment, the Voter Protection Act.⁵⁰ This amendment bars the legislature from overturning initiated measures and stipulates that the legislature can modify initiated measures only by a three-fourths supermajority vote and only to further the purposes of the initiated measure.⁵¹

In other states, marijuana legalization *opponents* have spearheaded efforts to change initiative process rules. In Ohio in 2015, legislative opponents of marijuana legalization sought to change the state's initiative process rules to prevent the passage of a marijuana legalization initiative on the ballot that year. Ohio legislators were concerned about initiative measures on a range of policies. They were concerned in part by the passage of an initiated amendment in 2009 that legalized casino gambling and, in provisions that seemed more fit for a statute than a constitutional provision, authorized casinos in four cities and designated the operators of each casino.⁵² Legislators' concerns about using the initiative process to enact policies that enriched particular companies and investors resurfaced a half-dozen years later. Supporters of marijuana legalization proposed an initiated amendment that qualified for the 2015 ballot legalizing recreational marijuana use and providing exclusive commercial rights for marijuana cultivation to ten pre-determined groups.⁵³ Intending to render this marijuana-legalization amendment illegitimate if voters approved it (voters ended up rejecting it anyways), the Ohio legislature crafted, and voters approved, a 2015 amendment limiting the

49. *Arizona Medical Use of Schedule 1 Drugs, Proposition 300 (1998)*, BALLOTPEdia, [https://ballotpedia.org/Arizona_Medical_Use_of_Schedule_1_Drugs,_Proposition_300_\(1998\)](https://ballotpedia.org/Arizona_Medical_Use_of_Schedule_1_Drugs,_Proposition_300_(1998)) [https://perma.cc/UV5R-54GF].

50. *Arizona Proposition 105, Voter Protection Act (1998)*, BALLOTPEdia, [https://ballotpedia.org/Arizona_Proposition_105,_Voter_Protection_Act_Amendment_\(1998\)](https://ballotpedia.org/Arizona_Proposition_105,_Voter_Protection_Act_Amendment_(1998)) [https://perma.cc/4FP4-QN6F].

51. The origins of this 1998 amendment are discussed in Christie, *supra* note 41.

52. *Ohio Casino Approval and Tax Distribution, Amendment 3 (2009)*, BALLOTPEdia, [https://ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution,_Amendment_3_\(2009\)](https://ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution,_Amendment_3_(2009)) [https://perma.cc/UDM3-75QM].

53. *Ohio Marijuana Legalization Initiative, Issue 3 (2015)*, BALLOTPEdia, [https://ballotpedia.org/Ohio_Marijuana_Legalization_Initiative,_Issue_3_\(2015\)](https://ballotpedia.org/Ohio_Marijuana_Legalization_Initiative,_Issue_3_(2015)) [https://perma.cc/ALC4-PU5U].

subject matter of initiated amendments by barring all initiatives that create monopolies.⁵⁴

D. Medicaid (and Other Expansions of Government Programs)

Initiatives that expand government programs or increase spending on these programs have appeared on state ballots throughout the Twenty-First Century. Some of these measures mandate spending additional funds on specified programs but do not provide any additional revenue for these programs.⁵⁵ Other measures boost funding for certain programs by redirecting revenue from existing revenue sources.⁵⁶ Still other initiated measures increase certain taxes, generally income taxes, cigarette taxes, or sales taxes, and earmark the additional revenue for designated programs, usually education, health, or conservation programs.⁵⁷

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54. *Ohio Initiated Monopolies Amendment, Issue 2 (2015)*, BALLOTPEDIA, [https://ballotpedia.org/Ohio_Initiated_Monopolies_Amendment,_Issue_2_\(2015\)](https://ballotpedia.org/Ohio_Initiated_Monopolies_Amendment,_Issue_2_(2015)) [<https://perma.cc/9273-ZCMP>]. The connection between this change in initiative rules and the pending marijuana amendment is supported by comments from the amendments' chief sponsors noted in Robert Higgs, *Lawmakers Propose Constitutional Amendment that Could Block Marijuana Legalization Effort*, CLEVELAND PLAIN DEALER, June 16, 2015, https://www.cleveland.com/open/2015/06/lawmakers_to_propose_constitut.html [<https://perma.cc/3P5K-HJC3>].
55. For instance, in 2000, voters in Colorado approved an initiated amendment simply mandating that funding for K–12 schools increase by a designated amount each year. *Colorado Funding for Public Schools, Initiative 23 (2000)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Funding_for_Public_Schools,_Initiative_23_\(2000\)](https://ballotpedia.org/Colorado_Funding_for_Public_Schools,_Initiative_23_(2000)) [<https://perma.cc/G32J-3PHH>].
56. An initiated amendment rejected by North Dakota voters in 2014 would have required a portion of revenue from the state's oil extraction tax to be used to boost funding for conservation programs. *North Dakota Clean Water, Wildlife and Parks Amendment, Measure 5 (2014)*, BALLOTPEDIA, [https://ballotpedia.org/North_Dakota_Clean_Water,_Wildlife_and_Parks_Amendment,_Measure_5_\(2014\)](https://ballotpedia.org/North_Dakota_Clean_Water,_Wildlife_and_Parks_Amendment,_Measure_5_(2014)) [<https://perma.cc/B2WJ-3D2K>]. In response to this measure's placement on the ballot, the legislature crafted an amendment that appeared on the ballot that year and was also rejected. It would have prohibited initiated amendments from mandating state spending for a specific purpose and required initiated statutes with a significant fiscal impact to appear on a higher-turnout general election ballot rather than on a lower-turnout primary election ballot. *North Dakota Referral and Initiative Reform Amendment, Measure 4 (2014)*, BALLOTPEDIA, [https://ballotpedia.org/North_Dakota_Referral_and_Initiative_Reform_Amendment,_Measure_4_\(2014\)](https://ballotpedia.org/North_Dakota_Referral_and_Initiative_Reform_Amendment,_Measure_4_(2014)) [<https://perma.cc/S8UL-R3P5>]. State senator David Hogue made an explicit connection between the initiated amendment and the motivation for the legislature-crafted amendment that sought to restrict future initiatives of this kind. See Mike Nowatzki, *Measure 4 Aims to Limit Initiated Ballot Measures*, JAMESTOWN SUN, Oct. 22, 2014, [<https://perma.cc/G5XP-UWC9>].
57. A number of initiatives have increased cigarette taxes and dedicated the additional funding for health care programs. See, for instance, a 2004 Montana measure, *Montana Tobacco Sales Tax, I-149 2004*, BALLOTPEDIA, https://ballotpedia.org/Montana_Tobacco_Sales_Tax,_I-149_2004.

Although voters have often rejected these various spending and taxation measures,⁵⁸ one type of initiative measure, expanding Medicaid, has proved quite popular with voters in recent years. Medicaid expansion initiatives originate from the Affordable Care Act of 2010 (ACA), which called for states to expand their Medicaid programs to cover more low-income persons. The federal government committed to paying most, but not all, of the associated costs of covering newly eligible Medicaid recipients. The ACA has always offered states a choice of whether to expand Medicaid. However, this choice for states became much more meaningful after the U.S. Supreme Court, in *NFIB v. Sebelius*, ruled that states could not be penalized if they opted against expanding Medicaid. Legislators in Democratic-controlled states were always prepared to sign on to Medicaid expansion quickly and enthusiastically, but expansion received mixed reactions in Republican-controlled states. Although some Republican-controlled state legislatures agreed to expand Medicaid, others resisted doing so.⁵⁹

When the number of states agreeing to expand Medicaid stalled in the mid-2010s, backers of Medicaid expansion turned to the initiative process, believing that Republican legislators' opposition to expansion was out of step with public support.⁶⁰ On six occasions between 2017

org/Montana_Tobacco_Sales_Tax_I-149_(2004) [https://perma.cc/FB4X-9DA4], a 2006 Arizona measure, *Arizona First Things First for Children, Proposition 203 (2006)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_First_Things_First_for_Children_Proposition_203_\(2006\)](https://ballotpedia.org/Arizona_First_Things_First_for_Children_Proposition_203_(2006)) [https://perma.cc/J6A7-UE3A], a 2020 Colorado measure, *Colorado Proposition EE, Tobacco and E-Cigarette Tax Increase for Health and Education Programs Measure (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Proposition_EE_Tobacco_and_E-Cigarette_Tax_Increase_for_Health_and_Education_Programs_Measure_\(2020\)](https://ballotpedia.org/Colorado_Proposition_EE_Tobacco_and_E-Cigarette_Tax_Increase_for_Health_and_Education_Programs_Measure_(2020)) [https://perma.cc/A3B7-CASS], and a 2020 Oregon measure, *Oregon Measure 108, Tobacco and E-Cigarette Tax Increase for Health Programs Measure (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Oregon_Measure_108_Tobacco_and_E-Cigarette_Tax_Increase_for_Health_Programs_Measure_\(2020\)](https://ballotpedia.org/Oregon_Measure_108_Tobacco_and_E-Cigarette_Tax_Increase_for_Health_Programs_Measure_(2020)) [https://perma.cc/DH49-6ZSP].

Several amendments have increased taxes on upper-income earners as a way of boosting spending on K–12 education. See, for instance, a 2016 Maine initiative, *Maine Tax on Incomes Exceeding \$200,000 for Public Education, Question 2 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Maine_Tax_on_Incomes_Exceeding_\\$200,000_for_Public_Education_Question_2_\(2016\)](https://ballotpedia.org/Maine_Tax_on_Incomes_Exceeding_$200,000_for_Public_Education_Question_2_(2016)) [https://perma.cc/9VYK-ZRY2], and a 2020 Arizona initiative, *Arizona Proposition 208, Tax on Incomes Exceeding \$250,000 for Teacher Salaries and Schools Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Proposition_208_Tax_on_Incomes_Exceeding_\\$250,000_for_Teacher_Salaries_and_Schools_Initiative_\(2020\)](https://ballotpedia.org/Arizona_Proposition_208_Tax_on_Incomes_Exceeding_$250,000_for_Teacher_Salaries_and_Schools_Initiative_(2020)) [https://perma.cc/D6R9-NNXA].

58. Dinan, *supra* note 2, at 68–69.

59. See John Dinan, *The Supreme Court and the Affordable Care Act: The Consequences of the NFIB v. Sebelius decision for Health Care Policy*, in *CONTROVERSIES IN AMERICAN FEDERALISM & PUBLIC POLICY 75* (Christopher P. Banks ed., 2018).

60. Lilliard E. Richardson Jr., *Medicaid Expansion during the Trump Presidency: The Role of Executive Waivers, State Ballot Measures, and Attorney General Lawsuits in Shaping Intergovernmental Relations*, 49 *PUBLIUS* 437 (2019); Jake

and 2020, voters considered initiated measures focused solely on Medicaid expansion.⁶¹ Voters approved all six of these initiatives: Maine in 2017; Idaho, Nebraska, and Utah in 2018; and, Oklahoma and Missouri in 2020.⁶² Emboldened by this success, expansion advocates turned their attention to additional hold-out states that allow initiated measures, including South Dakota and Florida, and are working to qualify expansion measures for the ballot in these states.

Legislators who oppose initiated measures expanding Medicaid or other government programs have responded by changing initiative process rules in various ways. One response has been to require initiatives that mandate spending increases to include a dedicated source of the additional revenue. Arizona legislatures crafted and voters approved a 2004 amendment to this effect, requiring that any initiatives proposing a mandatory expenditure of state revenue provide a revenue source sufficient to cover all future costs of the additional spending.⁶³ In making the case for the amendment's passage, Russell Pearce, Chairman of the Arizona House Appropriations Committee, argued that the state's recent budget crises are "the direct result of Arizona's initiative process, which allows ballot measures to mandate new state spending without requiring an accompanying funding source, forcing the state to fund ballot-approved measures at the expense of other programs."⁶⁴

Rule changes have also targeted Medicaid expansion initiatives in particular. Idaho legislators responded to the passage of a 2018 Medicaid expansion initiative by enacting statutory changes to the state's initiative process rules in their 2020 session and then again in their 2021 session, although the state supreme court overturned the legislature's effort to strengthen an existing geographic distribution requirement.⁶⁵ Meanwhile, the South Dakota legislature took a key step

Haselswerdt, *Advocating for Medicaid Expansion in Republican States: Overcoming 'Fractious Federalism' in the Statehouse and Ballot Box*, 51 *PUBLIUS* 459 (2021).

61. In another case, in Montana in 2018, voters considered and rejected a ballot measure that coupled a continuation of Medicaid expansion with an increase in the cigarette tax. *Montana I-185, Extend Medicaid Expansion and Increase Tobacco Taxes Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Montana_I-185_Extend_Medicaid_Expansion_and_Increase_Tobacco_Taxes_Initiative_\(2018\)](https://ballotpedia.org/Montana_I-185_Extend_Medicaid_Expansion_and_Increase_Tobacco_Taxes_Initiative_(2018)) [https://perma.cc/4AV3-YSUH].
62. *Healthcare on the Ballot*, BALLOTPEDIA, https://ballotpedia.org/Healthcare_on_the_ballot [https://perma.cc/TH5X-9UVZ].
63. *Arizona Initiative and Referendum Measures, Proposition 101 (2004)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Initiative_and_Referendum_Measures,_Proposition_101_\(2004\)](https://ballotpedia.org/Arizona_Initiative_and_Referendum_Measures,_Proposition_101_(2004)) [https://perma.cc/LVM7-6YH4].
64. *See Arizona 2004 Ballot Propositions*, ARIZONA SECRETARY OF STATE 14, <https://azmemory.azlibrary.gov/digital/collection/statepubs/id/35613> [https://perma.cc/C66J-NZHK].
65. The connection between passage of the 2018 Medicaid expansion initiative and recent changes to Idaho initiative process rules is detailed in Liz Crampton and

toward changing initiative process rules in its 2021 session to make it more difficult to enact a Medicaid expansion initiative that backers are working to qualify for the November 2022 ballot. In particular, South Dakota legislators crafted a constitutional amendment that would have increased the voter-ratification threshold to sixty percent for any ballot measure that increases taxes or that requires the legislature to appropriate more than \$10 million over five years. However, voters in June 2022 rejected this amendment.⁶⁶

E. Voting and Elections

Groups' success in enacting initiatives related to voting and elections has been responsible for generating several efforts to change initiative process rules. Initiatives have been a regular vehicle for reforming the redistricting process over legislators' objections.⁶⁷ Initiatives have also removed various restrictions on the franchise and have expanded mechanisms for voting.⁶⁸ The resulting efforts to change initiative process rules have sometimes come from legislators who oppose these measures but have also come from groups who support and intend to protect these initiatives.

Mona Zangh, *The Next Republican Target: Ballot Campaigns*, POLITICO, July 21, 2021, <https://www.politico.com/news/2021/07/21/republicans-ballot-campaigns-voting-rights-500347> [<https://perma.cc/BH33-3JU2>]. The Idaho Supreme Court ruling overturning the 2021 legislative change is *Reclaim Idaho v. Denney*, 497 P.3d 160 (Idaho 2021).

66. This connection is documented in Stephen Groves, *Senators Want 60% Threshold for Some Ballot Initiatives*, ASSOCIATED PRESS, March 2, 2021, <https://www.argusleader.com/story/news/2021/03/02/senate-wants-60-voter-threshold-some-ballot-initiatives/6897671002/> [<https://perma.cc/6ZJ7-QFHE>]; Reid J. Epstein and Nick Corasaniti, *Republicans Move to Limit a Grass-roots Tradition of Direct Democracy*, N.Y. TIMES, May 22, 2021, <https://www.nytimes.com/2021/05/22/us/politics/republican-ballot-initiatives-democrats.html> [<https://perma.cc/G64Q-C2R4>]. The defeat of this amendment is noted in *South Dakota Constitutional Amendment C, 60% Vote Requirement for Ballot Measures Increasing Taxes or Appropriating \$10 Million Measure (June 2022)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_C,_60%25_Vote_Requirement_for_Ballot_Measures_Increasing_Taxes_or_Appropriating_\\$10_Million_Measure_\(June_2022\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_C,_60%25_Vote_Requirement_for_Ballot_Measures_Increasing_Taxes_or_Appropriating_$10_Million_Measure_(June_2022)) [<http://perma.cc/3KKB-HMBS>].
67. Dinan, *supra* note 2 at 77–78; JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 66–67 (2018).
68. See, e.g., *Florida Amendment 4, Voting Rights Restoration for Felons Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Amendment_4,_Voting_Rights_Restoration_for_Felons_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_4,_Voting_Rights_Restoration_for_Felons_Initiative_(2018)) [<https://perma.cc/LR7G-G3A3>]; *Michigan Proposal 3, Voting Policies in State Constitution Initiative*, BALLOTPEDIA, [https://ballotpedia.org/Michigan_Proposal_3,_Voting_Policies_in_State_Constitution_Initiative_\(2018\)](https://ballotpedia.org/Michigan_Proposal_3,_Voting_Policies_in_State_Constitution_Initiative_(2018)) [<https://perma.cc/JC8W-EDG7>]; *Nevada Question 5, Automatic Voter Registration via DMV Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Nevada_Question_5,_Automatic_Voter_Registration_via_DMV_Initiative_\(2018\)](https://ballotpedia.org/Nevada_Question_5,_Automatic_Voter_Registration_via_DMV_Initiative_(2018)) [<https://perma.cc/JE8J-9VML>].

In some cases, as in Missouri and Florida, legislators have thwarted or attempted to thwart citizen-initiated *amendments* after voters have approved them. The key measures in these states were a wide-ranging 2018 Missouri amendment that included a provision vesting initial map-drawing responsibility in a state demographer⁶⁹ and a Florida amendment passed that same year that enfranchised persons with felony convictions.⁷⁰ In both cases, Republican elected officials took steps to frustrate the enforcement of the policy.⁷¹ In the case of Missouri, the Legislature proposed another amendment approved by voters in 2020, reversing part of the original measure.⁷² Motivated in part by opposition to these initiatives, legislators in both states have also given serious consideration to changing initiative process rules by making it more challenging to qualify future initiatives for the ballot by increasing the voter ratification threshold.⁷³ Additionally, in Michigan in 2018, the passage of a pair of election-related initiated amendments, including one amendment creating an independent redistricting commission, played a notable role in leading legislators later that year to erect additional barriers to accessing the initiative process.⁷⁴

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69. *Missouri Amendment 1, Lobbying, Campaign Finance, and Redistricting Initiative*, BALLOTPEDIA, [https://ballotpedia.org/Missouri_Amendment_1_Lobbying_Campaign_Finance_and_Redistricting_Initiative_\(2018\)](https://ballotpedia.org/Missouri_Amendment_1_Lobbying_Campaign_Finance_and_Redistricting_Initiative_(2018)) [https://perma.cc/NJ8W-T6A4].
70. *Florida Amendment 4, Voting Rights. Restoration for Felons Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_(2018)) [https://perma.cc/G66W-M5TD].
71. Patricia Mazzei & Michael Wines, *How Republicans Undermined Ex-felons' Voting Rights in Florida*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/17/us/florida-felons-voting.html> [https://perma.cc/C7GR-YPPX].
72. *Missouri Amendment 3, Redistricting Process and Criteria, Lobbying, and Campaign Finance Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Missouri_Amendment_3_Redistricting_Process_and_Criteria_Lobbying_and_Campaign_Finance_Amendment_\(2020\)](https://ballotpedia.org/Missouri_Amendment_3_Redistricting_Process_and_Criteria_Lobbying_and_Campaign_Finance_Amendment_(2020)) [https://perma.cc/NM79-XBEE].
73. See also Jason Rosenbaum, *Medicaid Fight Showcases Broader Missouri GOP Effort to Raise Ballot Initiative Bar*, ST. LOUIS PUBLIC RADIO (Apr. 30, 2021), <https://news.stlpublicradio.org/government-politics-issues/2021-04-30/medicaid-fight-showcases-broader-missouri-gop-effort-to-raise-ballot-initiative-bar> [https://perma.cc/JT6N-VR4T] (discussing the connection between the passage of the 2018 Missouri redistricting initiative and efforts in 2021 to enact limits on the ballot initiative process); Crampton & Zangh, *supra* note 65 (highlighting the connection in Florida between the 2018 felon enfranchisement initiative and recent efforts to change the ballot initiative process rules in the state).
74. Michigan Election Law, MCL 168 (1954) *amended by* 2018 Mich. Pub. Acts 608 (2018) See Eggert, *supra* note 37. (discussing the impetus for these legislative changes). The resulting statutory changes did not in all cases survive legal challenge. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 925 (2021). Among other legislative changes that were invalidated by the Michigan Supreme Court was the introduction of a geographic distribution requirement for initiated measures, holding that no more than 15 percent of the collected signatures can come from any one con-

In other cases, after voters adopted election-related policies via initiated *statutes*, legislators overturned them, thereby promoting both supporters of these policies and opponents to try to change initiative process rules. In South Dakota, voters in 2016 approved a wide-ranging initiated statute that revised campaign finance, ethics, and lobbying laws.⁷⁵ The legislature then passed a statute overturning these policies, as is permissible under South Dakota initiative process rules.⁷⁶ Supporters of the elections-policy changes responded in 2018 proposed an initiative that would have entrenched the original elections-policy changes in the constitution and changed initiative process rules by preventing the legislature from repealing or modifying any future initiative statutes.⁷⁷ Meanwhile, legislators who opposed the elections-policy changes and took issue with various other initiated measures that appeared on a particularly crowded 2016 ballot moved to place on the 2018 ballot two amendments seeking to limit the initiative process. One amendment would have increased the voter-ratification threshold to fifty-five percent for all amendments.⁷⁸ Another amendment sought to impose a single-subject rule on amendments.⁷⁹ Of the various changes appearing on South Dakota's 2018 ballot that would have affected initiative process rules, only the measure instituting a single-subject rule received approval from voters.⁸⁰

gressional district. *League of Women Voters of Michigan v. Secretary of State*, Nos. 163711, 163712, 163744, 163745, 163747, and 163748, 2022 WL 211736, at *6 (Mich. Jan. 24, 2022).

75. *South Dakota Revision of State Campaign Finance and Lobbying Laws, Initiated Measure 22 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws,_Initiated_Measure_22_\(2016\)](https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws,_Initiated_Measure_22_(2016)) [https://perma.cc/G66W-M5TD].

76. *Id.*

77. *South Dakota Constitutional Amendment W, State Campaign Finance and Lobbying Laws, Government Accountability Board, and Initiative Process Amendment (2018)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_W,_State_Campaign_Finance_and_Lobbying_Laws,_Government_Accountability_Board,_and_Initiative_Process_Amendment_\(2018\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_W,_State_Campaign_Finance_and_Lobbying_Laws,_Government_Accountability_Board,_and_Initiative_Process_Amendment_(2018)) [https://perma.cc/NB3X-CCH2].

78. *South Dakota Constitutional Amendment X, Constitutional Amendments Require a 55 Percent Supermajority (2018)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_X,_Constitutional_Amendments_Require_a_55_Percent_Supermajority_\(2018\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_X,_Constitutional_Amendments_Require_a_55_Percent_Supermajority_(2018)) [https://perma.cc/JYQ7-JWE9].

79. *South Dakota Constitutional Amendment Z, Single-Subject Rule for Constitutional Amendments (2018)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_Z,_Single-Subject_Rule_for_Constitutional_Amendments_\(2018\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_Z,_Single-Subject_Rule_for_Constitutional_Amendments_(2018)) [https://perma.cc/C2ZE-HLLA].

80. South Dakota voters in the 2018 election also considered—and approved—still another initiative process rule change, in the form of an initiated statute that restricted out-of-state contributions to ballot campaign committees, but this policy was later deemed unconstitutional by a federal district court judge. *SD Voice v. Noem*, 380 F.Supp. 3d 939 (D.S.D. 2019); *South Dakota Initiated Measure 24, Ban Out-of-State Contributions to Ballot Question Committees Initiative (2018)*,

F. Gambling

In several cases, groups supporting gambling have resorted to the initiative process to expand casinos and other forms of gambling, and in a way that has prompted rules changes of varying kinds.⁸¹ These gambling initiatives differ in a key respect from other initiatives discussed in this Article. Support for and opposition to gambling do not line up clearly along liberal and conservative lines as with other policies. Gambling initiatives nevertheless resemble other recent initiatives in prompting both supporters and opponents of these policies to try to change initiative process rules.

Some of the resulting rule changes have sought to increase the accessibility of the initiative process and the level of protection for policies enacted via initiatives. In Nebraska in 2004, gaming groups placed a package of gambling-related initiative measures on the ballot, but they were concerned about the possibility that legislators would overturn these pro-gambling initiatives if voters approved them. These groups, therefore, also placed on that year's ballot, and secured, voter approval for an initiated amendment requiring a two-thirds legislative vote to change policies enacted via initiatives.⁸²

In some other cases, opponents of gambling-expansion initiatives have pressed for limits on the initiative process. For instance, in Ohio in 2015, as discussed previously, opponents of gaming expansion reacted partly to the passage of a 2009 initiated amendment authorizing construction of casinos in four cities by designated groups when they secured passage of a 2015 amendment limiting monopoly-creating initiatives.⁸³

BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Initiated_Measure_24_Ban_Out-of-State_Contributions_to_Ballot_Question_Committees_Initiative_\(2018\)](https://ballotpedia.org/South_Dakota_Initiated_Measure_24_Ban_Out-of-State_Contributions_to_Ballot_Question_Committees_Initiative_(2018)) [<https://perma.cc/CR8H-V6BP>].

81. Dinan, *supra* note 2, at 71–72.

82. *Nebraska Legislative Majority to Modify Initiatives, Measure 418 (2004)*, BALLOTPEDIA, [https://ballotpedia.org/Nebraska_Legislative_Majority_to_Modify_Initiatives,_Measure_418_\(2004\)](https://ballotpedia.org/Nebraska_Legislative_Majority_to_Modify_Initiatives,_Measure_418_(2004)) [<https://perma.cc/H8UT-KZPE>]; Nancy Hicks, *Two proposals will face voters in November*, LINCOLN J. STAR (Oct. 17, 2004) (discussing the motivation for the advancement of the amendment and the related gambling measures on the ballot in the same year).

83. The amendment can be found at *Ohio Initiated Monopolies Amendment, Issue 2 (2015)*, *supra* note 54. See Tom Troy, *State auditor proposes new amendment*, THE BLADE, June 6, 2015, <https://www.toledoblade.com/State/2015/06/06/State-auditor-proposes-new-amendment.html> [<https://perma.cc/49Z4-GZ9E>] for the connection between the 2009 gambling initiative and passage of this 2015 anti-monopoly amendment per the comments of state auditor David Yost (*The Toledo Blade* formally dropped “Toledo” from its masthead in 1960. It is a newspaper of record for the city).

III. CHANGES TO INITIATIVE PROCESS RULES IN THE TWENTY-FIRST CENTURY

Recent rules changes that have been enacted or are awaiting enactment target various aspects of the initiative process. One set of changes focuses on the rules and process for qualifying initiative measures for the ballot. The second set of changes addresses the rules regarding voter approval of amendments. The third set of changes deals with the number and range of subjects includable in initiative measures. A final set of changes targets the rules regarding the insulation of initiative measures from post-enactment legislative modification.

In most cases, rules changes in recent decades have sought to increase the barriers to passing initiatives and have been driven by Republican-controlled legislatures that have enacted these limits generally by legislative statutes or via constitutional amendments that voters subsequently approved. However, in a few cases, rules changes have been enacted through the initiative process and aim to ease the passage of initiatives or protect them from legislative modification. In the following Sections, this Article provides illustrative examples of the changes mentioned above in initiative process rules in recent years.

A. Qualifying Initiatives for the Ballot

Recent rules changes have focused partly on adjusting regulations regarding the persons who collect signatures for petitions to qualify initiatives for the ballot. These rules are generally not embedded in state constitutions and are amendable by statute. In 2020 and 2021, legislators have been particularly active in this regard, with Idaho, Arkansas, Montana, and Utah enacting new signature-gathering regulations.⁸⁴ Some of these laws require signature-gatherers to register with the state and wear identifying badges. Several states have barred arrangements where signature collectors get paid per signature. Recent laws have also placed restrictions on who can serve as a signature-gatherer.

Other rules changes have added or strengthened geographic distribution requirements for signature-gathering. All states provide a formula for determining the total number of signatures that initiative backers must collect across the state. However, states vary in whether they take the additional step of requiring these signatures to be distributed in a certain fashion among various legislative or congress-

84. See, e.g., *Changes in 2021 to Laws Governing Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Changes_in_2021_to_laws_governing_ballot_measures [https://perma.cc/8CHA-LQ25]; *Changes in 2020 to Laws Governing Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Changes_in_2020_to_laws_governing_ballot_measures [https://perma.cc/R48H-FTM8].

sional districts. These geographic distribution requirements can impose significant burdens on signature-gatherers. Because these requirements are generally fixed in the state constitution, changes generally require passing a constitutional amendment; as in Colorado, where voters approved a 2016 initiated amendment that introduced a geographic distribution requirement for initiated amendments but declined to require it for initiated statutes.⁸⁵ In some other cases, geographic distribution requirements have been enacted via state statutes; but they are especially vulnerable to judicial invalidation. For instance, the Michigan legislature in 2018 passed a statute introducing a geographic distribution requirement for initiated measures; but the state supreme court invalidated this requirement.⁸⁶ Additionally, in 2021, the Idaho legislature passed a law that significantly tightened the state's statutory geographic distribution requirement; this change was also overturned by the state supreme court.⁸⁷

Changes to initiative rules have also focused on the signature-collection deadline. When a signature-collection deadline gets placed close to an election, groups backing the initiative have more time to collect the necessary signatures. By contrast, an early deadline limits the time available to collect signatures. On several occasions in the Twenty-First Century—Florida in 2004, Ohio in 2008, and North Dakota in 2014—states moved the deadlines earlier, increasing the burdens on signature collectors and initiative backers.⁸⁸

85. *Colorado Imposition of Distribution and Supermajority Requirements for Citizen-Initiated Constitutional Amendments, Amendment 71 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Imposition_of_Distribution_and_Supermajority_Requirements_for_Citizen-Initiated_Constitutional_Amendments,_Amendment_71_\(2016\)](https://ballotpedia.org/Colorado_Imposition_of_Distribution_and_Supermajority_Requirements_for_Citizen-Initiated_Constitutional_Amendments,_Amendment_71_(2016)) [https://perma.cc/573F-9QZ6].

86. Bulman-Pozen & Seifter, *supra* note 74 at 925. The statute is 2018 Mich. Pub. Acts 608 (2018). The Michigan Supreme Court ruling is *League of Women Voters of Michigan v. Sec'y of State*, Nos. 163711, 163712, 163744, 163745, 163747, and 163748, 2022 WL 211736, at *6 (Mich. Jan. 24, 2022).

87. S.B. 1108, 62d Leg., 1st Reg. Sess. (Idaho 2013) (codified as amended at IDAHO CODE, § 34-1805), *invalidated by Idaho v. Denney*, 497 P.3d 160 (Idaho 2021). See Keith Ridler, *Idaho Governor Signs Bill Making Ballot Measures Tougher*, ASSOCIATED PRESS, Apr. 17, 2021, <https://apnews.com/article/brad-little-medical-marijuana-legislation-referendums-marijuana-07b9ff1a14e886819176126fe3e43646> [https://perma.cc/YZ25-QNMQ] (discussing the law); Hayat Norimine, 'Tyranny of the Minority': Idaho Supreme Court Rules Voter Initiative Law Unconstitutional, IDAHO STATESMEN, Aug. 23, 2021, <https://www.idahostatesman.com/news/politics-government/state-politics/article253691918.html> [https://perma.cc/4BAN-SRS2] (discussing the state court decision).

88. John Dinan, *Twenty-first Century Debates and Developments Regarding the Design of State Constitutional Amendment Processes*, 69 ARK. L. REV. 283, 300–01 (2016).

B. Voter Approval of Initiatives

The accessibility of initiative processes is determined partly by the rules for qualifying initiatives and whether these procedures impose light or heavy burdens on groups trying to place initiatives on the ballot. However, the rules regarding voter approval of initiatives also significantly determine the accessibility of the initiative processes and influence the likelihood of ballot measures passing. In the Twenty-First Century, voters have enacted several changes to voter-approval rules, which are, in almost all cases, specified in state constitutional provisions and, therefore, can only be changed by a constitutional amendment. Other changes are awaiting voter approval in 2022. Voters have rejected some other proposed changes.

Voters in Florida and Colorado approved amendments increasing the voter-ratification threshold for initiated amendments. As a result of a 2006 amendment, nearly all amendments in Florida must now receive approval from three-fifths of voters.⁸⁹ A decade later, Colorado voters approved an initiated amendment requiring nearly all amendments to be approved by fifty-five percent of voters.⁹⁰ These changes apply to legislature-referred and citizen-initiated amendments but were motivated by concerns about initiated amendments.

Other measures to increase voter-approval requirements are either awaiting a popular vote or were recently defeated. In 2022, Arkansas voters will decide whether to approve an amendment that would impose a sixty percent voter-approval threshold for all initiated statutes and all constitutional amendments, whether referred by the legislature or initiated by citizens.⁹¹

Other recent proposed changes have been defeated by voters, including a 2018 South Dakota amendment to require a fifty-five per-

89. *Florida Amendment 3, Supermajority Vote Required to Approve a Constitutional Amendment (2006)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Amendment_3_Supermajority_Vote_Required_to_Approve_a_Constitutional_Amendment_\(2006\)](https://ballotpedia.org/Florida_Amendment_3_Supermajority_Vote_Required_to_Approve_a_Constitutional_Amendment_(2006)) [https://perma.cc/Y2TU-WFLD]. One other category of amendments, which would impose new taxes or fees not in effect as of 1994, remains subject to an even higher requirement that they be approved by two-thirds of voters participating in the entire election. *Florida Tax Limitation, Amendment 1(1996)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Tax_Limitation,_Amendment_1_\(1996\)](https://ballotpedia.org/Florida_Tax_Limitation,_Amendment_1_(1996)) [https://perma.cc/CUG6-M4XX]. This rule change was made via a 1996 amendment. *Id.*

90. *Colorado Imposition of Distribution and Supermajority Requirements for Citizen-Initiated Constitutional Amendments, Amendment 71 (2016)*, *supra* note 85. One category of amendments is exempt from this requirement; amendments repealing an existing constitutional provision need only secure approval of a majority of voters.

91. *Arkansas 60% Supermajority Vote Requirement for Constitutional Amendments and Ballot Initiatives Measure (2022)*, BALLOTPEDIA, [https://ballotpedia.org/Arkansas_60%25_Supermajority_Vote_Requirement_for_Constitutional_Amendments_and_Ballot_Initiatives_Measure_\(2022\)](https://ballotpedia.org/Arkansas_60%25_Supermajority_Vote_Requirement_for_Constitutional_Amendments_and_Ballot_Initiatives_Measure_(2022)) [https://perma.cc/N88W-H4M6].

cent threshold for approving all amendments,⁹² a 2020 Florida amendment to require all amendments be approved in two consecutive elections,⁹³ and a 2020 North Dakota amendment that would, in practice, have required initiated amendments to be approved in consecutive elections.⁹⁴

C. Subjects Addressed by Initiative Measures

Recent decades have brought several rules changes regarding the subjects addressable through initiative measures. One approach has been to designate certain subjects off-limits for initiative measures or adopt more rigorous requirements for initiatives addressing these particular subjects. Some states have maintained longstanding subject-matter limits of this kind. Several more states added such limits in the Twenty-First Century. A 2015 amendment in Ohio disallows initiatives that create monopolies.⁹⁵ A 2004 Arizona amendment disallows initiative measures requiring increased spending but failing to provide a dedicated funding source to cover the new spending.⁹⁶

Meanwhile, the Montana Constitution has, for some time, barred initiatives that make appropriations.⁹⁷ In 2021, the Montana legislature passed a law that defines “appropriations” under the constitutional provision in an expansive sense. The law interprets the provision as disallowing any measure having the effect of “directly or

92. *South Dakota Constitutional Amendment X, Constitutional Amendments Require a 55 Percent Supermajority (2018)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_X_Constitutional_Amendments_Require_a_55_Percent_Supermajority_\(2018\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_X_Constitutional_Amendments_Require_a_55_Percent_Supermajority_(2018)) [https://perma.cc/7D9U-CTLC].

93. *Florida Amendment 4, Require Constitutional Amendments to be Passed Twice Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Amendment_4_Require_Constitutional_Amendments_to_be_Passed_Twice_Initiative_\(2020\)](https://ballotpedia.org/Florida_Amendment_4_Require_Constitutional_Amendments_to_be_Passed_Twice_Initiative_(2020)) [https://perma.cc/WAZ2-VDL4].

94. *North Dakota Constitutional Measure 2, Require Initiated Constitutional Amendments to be Approved by the Legislature or Passed Twice Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/North_Dakota_Constitutional_Measure_2_Require_Initiated_Constitutional_Amendments_to_be_Approved_by_the_Legislature_or_Passed_Twice_Amendment_\(2020\)](https://ballotpedia.org/North_Dakota_Constitutional_Measure_2_Require_Initiated_Constitutional_Amendments_to_be_Approved_by_the_Legislature_or_Passed_Twice_Amendment_(2020)) [https://perma.cc/A3TY-YVBQ]. The North Dakota amendment would have required an initiated amendment to be approved by an initial vote of the people and then to be considered by the legislature, and if the legislature gave its approval by a majority vote, then the amendment would take effect. *Id.* In the event of the failure of the legislature to approve the amendment, then the amendment would have to be approved by a majority vote of the people in a second election before it could take effect. *Id.*

95. Ohio Initiated Monopolies Amendment, Issue 2 (2015), *supra* note 54.

96. *Arizona Initiative and Referendum Measures, Proposition 101 (2004)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Initiative_and_Referendum_Measures,_Proposition_101_\(2004\)](https://ballotpedia.org/Arizona_Initiative_and_Referendum_Measures,_Proposition_101_(2004)) [https://perma.cc/N5SH-GH4J].

97. MONT. CONST. art. III, § 4.

indirectly incurring a financial obligation” or “increasing or expanding eligibility to a governmental program.”⁹⁸

Another approach has been to mandate that initiatives addressing certain subjects meet more rigorous requirements than those imposed on other initiatives. A 1998 Utah amendment exemplifies this approach by requiring a two-thirds majority vote for initiatives dealing with wildlife protection rather than a simple majority vote required to approve other initiatives.⁹⁹ In June 2022, South Dakota voters rejected an amendment that would have established a sixty-percent threshold for voters to approve measures increasing taxes, fees, or certain appropriations.¹⁰⁰

A final set of rules changes in this area has focused on limiting the number of subjects per initiative. Most states that provide for an initiative process impose a single-subject rule so that each initiative can address only one subject. Meanwhile, some states impose a slightly different rule, a separate-vote rule, similar in spirit and roughly similar in operation to a single-subject rule. Several more states have imposed single-subject rules applying to initiatives in recent years. In 2018, South Dakota introduced a single-subject rule for initiated statutes and amendments by passing a legislative statute applying to initiated statutes followed by voter approval of a legislature-referred amendment, applying to initiated amendments.¹⁰¹ In 2020, Idaho joined the ranks of states imposing single-subject rules via a legislative statute.¹⁰² In 2022, Arizona voters will vote on a legislature-referred amendment to impose a single-subject rule on initiative measures.¹⁰³

D. Insulation of Initiatives from Legislative Modification

Recently, rules changes have targeted the rules regarding legislative modification of policies enacted via initiated statutes. Currently,

98. H.B. 651, 67th Leg., Reg. Sess. (Mont. 2021) (passed and went into effect on May 14, 2021. The statute has not been added to the Montana Annotated Code as of Feb. 23, 2022. The assigned session law chapter is 554).

99. *Utah Supermajority for Hunting Initiatives, Proposition 5 (1998)*, *supra* note 28.

100. *South Dakota Constitutional Amendment C, 60% Vote Requirement for Ballot Measures Increasing Taxes or Appropriating \$10 Million Measure (June 2022)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_C_60%25_Vote_Requirement_for_Ballot_Measures_Increasing_Taxes_or_Appropriating_\\$10_Million_Measure_\(June_2022\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_C_60%25_Vote_Requirement_for_Ballot_Measures_Increasing_Taxes_or_Appropriating_$10_Million_Measure_(June_2022)) [https://perma.cc/49NU-9UHR].

101. S.D. CODIFIED LAWS § 12-1, *amended by* 2018 S.D. Sess. Laws ch. 23 § 1; *South Dakota Constitutional Amendment Z, Single-Subject Rule for Constitutional Amendments (2018)*, *supra* note 79.

102. H.B. 548, 65th Leg., 2d Reg. Sess., (Idaho 2020), (codified as amended at IDAHO CODE, § 34-1801A).

103. *Arizona Single-Subject Requirement for Ballot Initiatives Amendment (2022)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Single-Subject_Requirement_for_Ballot_Initiatives_Amendment_\(2022\)](https://ballotpedia.org/Arizona_Single-Subject_Requirement_for_Ballot_Initiatives_Amendment_(2022)) [https://perma.cc/P3JA-RA4G].

ten of the twenty-one states that provide for initiated statutes impose restrictions on the legislature's ability to alter or repeal the enacted statutes.¹⁰⁴ California provides the strongest protection against legislative alteration of initiative statutes: the legislature cannot amend or modify an initiated statute without obtaining popular approval for the change. Arizona also provides strong protection. The Arizona legislature cannot repeal initiated statutes. It can only modify an initiated statute if the change furthers the initiative's purpose. Other state initiative regimes rely on a mix of legislative supermajority requirements, such as requiring a two-thirds or three-fourths vote to alter the policies passed via initiatives, or time-lapse requirements, such as allowing changes only after three years has elapsed.

Much of the energy for changing these rules in recent years has come from supporters of the initiative process, especially groups that have enjoyed success in passing initiatives and are trying to protect their policy gains. For instance, Arizona's stringent Voter Protection Act was adopted via an initiated amendment in 1998 and championed by marijuana legalization groups upset with the legislature's invalidation of a recent marijuana reform initiative.¹⁰⁵ Nebraska's current rule requires any legislative changes to initiative states to obtain the support of two-thirds of legislators. Nebraska voters adopted this requirement in 2004 through an initiated amendment spearheaded by gaming groups who took preemptive steps to protect gambling-expansion initiative measures on the ballot that year.¹⁰⁶

At other times, rule changes get championed by groups and officials who oppose recent initiative measures and seek to reduce the level of protection they enjoy by making it easier for legislators to change them. In Arizona in 2021, legislators voted, with all affirmative votes coming from Republicans, to place on the 2022 ballot an

104. . See *Legislative Alteration*, BALLOTPEDIA, https://ballotpedia.org/Legislative_alteration [<https://perma.cc/LE5X-PYNS>] (highlighting states and municipalities where lawmakers have amended or repealed citizen initiatives). For further discussion of certain state approaches to initiated statutes see Dinan, *supra* note 2, at 105–06 (discussing Arkansas, Nebraska, North Dakota, Michigan, Arizona, Nevada, and California).

105. Howard Fischer, *GOP-led effort seeks to dilute Arizona's Voter Protection Act*, ARIZ. DAILY STAR, Mar. 9, 2021 (updated Apr. 19, 2021), https://tucson.com/news/state-and-regional/gop-led-effort-seeks-to-dilute-arizonas-voter-protection-act/article_c485af67-8f9a-5ae6-b19a-3d2aa2a5cfad.html [<https://perma.cc/4LC4-LGED>] (noting that the 1998 Voter Protection Act was introduced in response to and based on dissatisfaction with the legislature's gutting of a 1996 medical marijuana initiative). For the 1998 amendment, see *Arizona Proposition 105, Voter Protection Act Amendment (1998)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Proposition_105,_Voter_Protection_Act_Amendment_\(1998\)](https://ballotpedia.org/Arizona_Proposition_105,_Voter_Protection_Act_Amendment_(1998)) [<https://perma.cc/D54Q-M47L>].

106. *Nebraska Legislative Majority to Modify Initiatives, Measure 418 (2004)*, *supra* note 82.

amendment changing that state's several-decade-old Voter Protection Act. The proposed amendment would allow the legislature to change any initiative found by the Arizona Supreme Court or U.S. Supreme Court to contain illegal or unconstitutional provisions.¹⁰⁷

IV. CONCLUSION

Although legal scholars generally focus on analyzing judicial interpretation of constitutional and statutory provisions, this Article stresses the importance of studying how these provisions get adjusted through legislation, initiated measures, and constitutional amendments. One purpose of this Article has been to highlight the extensive activity in recent years dedicated to changing the rules governing state initiative processes. Although initiative processes in the United States have undergone regular changes throughout their 120-year history, the Twenty-First Century has seen a surge of efforts to change the rules. A significant number of these efforts have been successful.

Another purpose of this Article has been to explain the recent proliferation of rules changes. Several insights emerge from this analysis. First, contemporary debates about the initiative process focus largely on changing initiative process rules because there are few prospects for increasing or reducing the number of states with the initiative process. Thus the debate between supporters and opponents of the initiative process now focuses on tailoring the rules of initiative processes in states already allowing for such processes.

Another insight to emerge from this analysis is that efforts to change initiative process rules are rooted in disjunctions between the views of the public and the preferences of elected officials. When the initiative process is used on a routine basis to bypass the dominant party and its allied groups, the majority party and its allies try to limit its use. As is evident from a brief review of the shifting political dynamics of the initiative process from the early Twentieth Century through the early Twenty-First Century, the initiative process can be and has been a vehicle for both liberal and conservative groups to secure policies blocked by legislators but supported by the public. In fact, from the late 1970s through the early 1990s, conservative groups benefited more than liberal groups from the initiative process, and Republican officials were more apt than Democratic officials to champion the accessibility of the initiative process. Therefore, the initiative process is not by its nature destined to benefit certain ideological groups.

107. *Arizona Legislative Changes to Ballot Initiatives with Invalid Provisions Amendment (2022)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Legislative_Changes_to_Ballot_Initiatives_with_Invalid_Provisions_Amendment_\(2022\)](https://ballotpedia.org/Arizona_Legislative_Changes_to_Ballot_Initiatives_with_Invalid_Provisions_Amendment_(2022)) [https://perma.cc/NU7R-U27V].

Nor is it inevitable that one of the political parties will perceive that its interests are best advanced by limiting initiative process rules.

At present, however, liberal groups are most likely to benefit from initiatives, and Republican officials are most likely to try to limit them. Republicans currently control the legislature in two-thirds of the states allowing for the initiative process, and are more likely than Democratic officials to be bypassed via initiatives. Moreover, liberal groups of various kinds have identified a range of policies where the preferences of Republican officials are out of step with the public's views, thereby generating numerous successful initiatives and prompting pushback in the form of initiative process rules changes.