

To: Constitutional Revision Committee

From: Steven H. Steinglass, Senior Policy Advisor
Ohio Constitutional Modernization Commission

Re: Strengthening Ohio's Statutory Initiative

Date: April 9, 2014

Members of the committee have been discussing whether the adoption by Ohio of a more robust statutory initiative could contribute to the decrease in the use of the state's direct constitutional initiative. This memorandum reviews the relationship between Ohio's indirect statutory initiative and its direct constitutional initiative. In addition, the memo looks at the 14 states that have both a direct constitutional initiative and a statutory initiative as well as at the states that have only a statutory initiative.

Background and Key Features of the Indirect Statutory and Constitutional Initiatives

In 1912, the Ohio voters approved the direct constitutional and the indirect statutory initiative, both of which were proposed by Ohio's Fourth Constitutional Convention, the Convention of 1912. As adopted, both initiatives require the gathering of signatures that are a percentage of votes in the last gubernatorial election (10% for constitutional initiatives and an initial 3% plus and an additional 3% in a supplementary petition for statutory initiatives) with 5% (for constitutional initiatives) and 1.5% (for initial and supplemental petitions for statutory initiatives) of the required signatures from 44 (which is half of Ohio's 88 counties).

Direct Constitutional Initiative

Ohio is one of 16 states with a direct constitutional initiative in which signatures are gathered and a proposed amendment is placed directly on the ballot. In Ohio and in 10 other states, a majority of votes on the proposed amendment is required. The other states have a variety of provisions some of which require a percentage of the total votes at the election.¹ Since 1912, 80 amendments to the Ohio Constitution have been proposed by initiative, and Ohio voters

¹ The other five states with direct constitutional initiatives have the following super-majority requirements:

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| Florida | three-fifths vote except a two-thirds vote on new taxes |
| Illinois | majority voting in the election or three-fifths voting on the amendment; subject-matter limitations to the use of the initiative |
| Nebraska | majority vote on the amendment, which must be at least 35% of total vote in the election |
| Nevada | majority vote on the amendment in two consecutive general elections |
| Oregon | majority vote on the amendment unless a supermajority is required in the proposed amendment |

approved 18 of them. During this same period, Ohio voters approved 102 of 150 amendments proposed by the General Assembly.

Indirect Statutory Initiative

Twenty-one (21) states including Ohio, have a statutory initiative, but six of those states do not permit the initiation of constitutional amendments.

States with Statutory and Constitutional Initiatives

Of the 15 states that have both a constitutional and a statutory initiative, 11 have a direct statutory initiative under which proponents may put proposed statutes directly on the ballot without first presenting the proposed statute to the legislature. The remaining four states--Ohio, Michigan, Massachusetts, and Nevada--have an indirect statutory initiative in which the issue's proponents must first submit their proposed statute to the state legislature. In these states, the proponents can take the matter to the ballot if the legislature fails to adopt the proposed statute. In Michigan and Nevada, the issue may go to the ballot after the legislature has failed to act without the collection of supplemental signatures. *See Mich. Const. Art. II, sec. 9; Nev. Const. Art. 19, sec. 3.* In Massachusetts, there is a modest additional signature requirement of .5% of the votes in the last gubernatorial (in addition to the 3% required initially). In Ohio, the proponents of the original statute must file a supplementary petition with 3% of the vote of the last gubernatorial election. Since Massachusetts has only an indirect constitutional initiative, Ohio is the **only** state with both a statutory initiative and a *direct* constitutional initiative) in which the proponents are required to collect additional signatures.

States with Statutory Initiatives but without Constitutional Initiatives

There are six states that have a statutory initiative but do not have either a direct or an indirect constitutional initiative.

In four of these states—Alaska, Idaho, Maine, and Wyoming—there is a **direct** statutory initiative, thus proponents may put proposed statutes directly on the ballot **without first presenting the proposed statute to the legislature**.

In Washington, there is both a direct and indirect statutory initiative, and they both require the same number of signatures. In Washington, the proponents may put a proposed statute on the ballot without first presenting it to the legislature. Alternatively, the proponents may first present the proposed statute to the legislature and, if the legislature fails to adopt the proposed statute, the matter is automatically put on the ballot without obtaining additional signature.

Likewise, Utah has both a direct and an indirect statutory initiative. The initial signature requirement for direct statutory initiatives in Utah is 10% of the votes for the office of President in the most recent presidential election. For the indirect statutory initiative, the proponents need only obtain signatures of 5% of the votes in the last presidential election, but they must get an additional 5% on a supplemental petition if the legislature does not adopt the proposed statute.

The Indirect Statutory Initiative in Ohio

In Ohio, 12 proposed statutes have gone to the voters after the General Assembly failed to adopt proposed initiated statutes; and the voters approved only three of these statutes.²

When the General Assembly adopts the legislation proposed by the indirect statutory initiative, there obviously is no need for the matter to go to the voters. Unfortunately, it is not clear how many proposed initiated statutes have been adopted by the General Assembly, thus obviating the need to take the issue to the voters. Nor is information readily available on how many times the General Assembly did not approve the proposed statute but the proponents—for whatever reason—did not take the issue to the voters.

Can the Ohio General Assembly Amend or Repeal Initiated Statutes? Can Legislatures in Other States?

In Ohio and six other states with both a direct constitutional initiative and a statutory initiative--Colorado, Missouri, Montana, Oklahoma, Oregon, and South Dakota--the state legislature has complete discretion to amend or repeal statutes that have been adopted by initiative.

In the seven other states with both a direct constitutional initiative and a statutory initiative, there are “anti-tampering” constitutional limitations on the power of the legislature to amend or repeal initiated statutes. These are limitations in time, limitations of a super-majority voting requirement, or combinations of the two. These limitations are summarized in the chart below (along with the limitations in those states with the statutory initiative but no constitutional initiative—Alaska, Washington, and Wyoming.)

In a 2002 report, the National Council of State Legislatures noted that providing an indirect initiative process that impedes legislative interference in some way would make the indirect initiative process more attractive to citizens seeking to get an initiative on the ballot.

The table below describes the “anti-tampering” provisions in states that have limited the power of the legislature to repeal or amend initiated statutes. This table includes both states that have a direct constitutional initiative and those that do not.

² The three statutes approved by Ohio voters after the General Assembly failed to adopt proposed initiated statute were provided aid to aged persons (1933), permitted the manufacture and sale of colored oleomargarine (1949), and restricted smoking in places of employment and most places open to the public (2006).

LIMITATIONS ON THE POWER OF THE LEGISLATURE TO AMEND OR REPEAL INITIATED STATUTES

| State | Measures Taken |
|--------------|---|
| Alaska* | No repeal within 2 years; amendment by majority vote any time |
| Arizona | 3/4 vote to amend; amending legislation must “further the purpose” of the measure; legislature may not repeal an initiative |
| Arkansas | 2/3 vote of the members of each house to amend or repeal |
| California | No amendment or repeal of an initiative statute by the Legislature unless the initiative specifically permits it |
| Michigan | 3/4 vote to amend or repeal |
| Nebraska | 2/3 vote required to amend or repeal |
| Nevada | No amendment or repeal within 3 years of enactment |
| North Dakota | 2/3 vote required to amend or repeal within 7 years of effective date |
| Washington* | 2/3 vote required to amend or repeal within 2 years of enactment |
| Wyoming* | No repeal within 2 years of effective date; amendment by majority vote anytime |

* no constitutional initiative

In three of the six states—Alaska, Washington, and Wyoming—with a statutory initiative but no direct constitutional initiative, there are also limitations on the power of the General Assembly to amend or repeal initiated statutes. In the other three states with a statutory initiative but no direct constitutional initiative—Idaho, Maine, and Utah—there are no limitations on the state legislature.

Comparison of Ohio to Other States

Ohio is unique in the country among the 14 states with both a direct constitutional and statutory initiative in terms of the preferred route of those taking issues to the voters. In Ohio, 85% of the initiated issues are for constitutional amendments. This means that of 80 attempts to initiate positive law (*i.e.*, either a statute or a constitutional amendment) proponents have elected to go the constitutional route in 68 instances. The next closest states hover around the high 60% level.

Why is Ohio an Outlier?

Some commentators have hypothesized that Ohio is an outlier in the “over-utilization” of the constitutional initiative as compared to its statutory initiative because: (a) Ohio does not limit the

power of the General Assembly to amend initiated statutes, and (b) the burden of collecting additional signatures in a supplemental petition.

Initial Conclusion, Correlation and Future Research

There is a strong correlation between Ohio's heavy use of the constitutional initiative and the unfettered ability of the General Assembly to amend or repeal initiated statutes and the requirement of a supplemental petition. But it is premature to conclude that these features of Ohio's statutory initiative explain the relatively infrequent use of the statutory initiative. What is necessary is a content-based review of all 68 proposed constitutional initiatives as well as the motivations of the proponents in order to determine which issues might have been pursued through the vehicle of a more robust statutory initiative. In addition, it would be useful to have a better grasp as to how the statutory initiative has actually worked in other states.

REVIEW OF PROPOSED INITIATED AMENDMENTS

[This memo should be expanded to include a content-based review of Ohio's 68 proposed constitutional amendments to determine, to the extent possible, whether a more robust statutory initiative might have provided a plausible alternative route for the proponents of the issue. In addition, there should be a review of the 12 statutory initiatives that the proponents took to the voters to determine why they selected the statutory as contrasted to the constitutional route. Finally, a full review of this issue should include a review of the use of the statutory initiative in other states.]

Conclusion

A conclusion about the likely impact of the creation of a more robust statutory initiative should wait the above-described content-based review of proposed constitutional amendments and statutory initiatives in Ohio as well as a review of the use of the statutory initiative in other states.