Testimony of M. Dane Waters, Founder and Chairman of the Initiative and Referendum Institute at the University of Southern California, to the Ohio Constitutional Modernization Commission on Thursday, June 8, 2017. The Initiative and Referendum Institute at the University of Southern California is a non-profit, non-partisan, educational and research organization. This testimony is provided for informational purposes only.

TESTIMONY

First let me thank the Ohio Constitutional Modernization Commission for giving me the opportunity to speak on a subject that I have spent the last three decades studying both in the United States and around the world – the initiative and referendum process. I am not here today as a supporter of the initiative and referendum process but to simply provide factual and historical information regarding regulations on the initiative and referendum process and more specifically on the constitutional initiative process.

I would like to begin with a quote from a speech that Teddy Roosevelt gave on February 21, 1912 here in Columbus to the Ohio Constitutional Convention.

"I believe that the initiative and referendum should be used, not as substitutes for representative government, but as methods of making such government really representative. Action by the initiative or referendum ought not to be the normal way of legislation; but the power to take it should be provided in the constitution, so that if the representatives fail truly to represent the people on some matter of sufficient importance to rouse popular interest, then the people shall have in their hands the facilities to make good the failure."

He went on to say, "[g]ive the legislature an entirely free hand; and then provide by the initiative and referendum that the people shall have power to reverse or supplement the work of the legislature should it ever become necessary."

Roosevelt acknowledged that the initiative and referendum should be used as the exception and not as the rule. But he also recognized that the people were the sovereign and that they were the ultimate authority and that they are the ultimate check and balance on all branches of government. In order for the people to fulfil the role that Roosevelt spoke of and truly have the power to be a check on representative government, initiative and referendum were added to the Ohio Constitution as an outcome of the 1912 constitutional convention.

However, since the initiative and referendum process was first adopted in South Dakota in 1898, and subsequently in 23 other states including Ohio, there has been an ever-growing friction between lawmakers and the initiative and referendum process. From this friction has grown an ever-increasing desire by lawmakers to place new regulations on the process. The motivation of lawmakers to take certain action is not for me to opine on, but the impact of those regulations on the people's ability to fulfill the check and balance that Roosevelt spoke of is what my research over the years has focused on.

The primary issue I want to address today, is the requirement being considered by this Commission to mandate that constitutional amendments proposed by the people using the initiative process must obtain a 55% yes vote before passage, but amendments proposed by the legislature would still require a simple majority.

The general requirement in every state for the passage of constitutional amendments is a simple majority vote. Exceptions do exist in several states. For example:

Nebraska, Massachusetts and Mississippi allow a majority vote for passage of amendments, provided the votes cast on the amendment equal a percentage of the total votes cast in the election (35% in Nebraska, 30% in Massachusetts, and 40% in Mississippi). Wyoming requires "an amount in excess of 50% of those voting in the general election." Constitutional amendments in Nevada must receive a majority vote in two successive general elections. Florida requires a 60% supermajority for any constitutional amendment to be adopted. Colorado also

has a supermajority requirement of 55% for any constitutional amendment except amendments that exclusively removes language from the constitution. For constitutional amendments, including its few initiatives, Illinois requires either (1) a majority of those voting in the election or (2) 60% of those voting on the amendment itself. Oregon has a unique provision demanding that any measure proposing a supermajority requirement must pass by that proposed supermajority requirement. For example, Florida's 60% supermajority requirement was passed by 57.78%; it would have failed in Oregon.

Though one can argue that any percentage for passage of an amendment greater than 50% is simply arbitrary, these regulations do exist. However, we must remember what Thomas Jefferson wrote to James Madison in 1787, "…the will of the majority should always prevail."

There is no debate that there should be reasonable regulations on how the initiative process is used when the citizens are exercising their legislative authority, just like there should be reasonable regulations on how the legislature operates when exercising the authority granted to them by the people. However, what is critical, fair and appropriate, is that the regulations regarding legislating by lawmakers should be consistent with the regulations regarding legislating by the people using the initiative process.

In all the examples listed above, in every case amendments proposed by the legislature MUST meet the same requirements as amendments proposed by the people before passage. Which is consistent with how our country, and by extension our states, were established – that the people vest authority in lawmakers to govern, but they don't cede that authority to them. Because of this, most constitutional scholars would argue that there should be greater restrictions on how amendments proposed by the legislature are adopted vs. those proposed by the people. But it can be argued that requiring regulatory parity on the people and the legislature as to how amendments are adopted is the best balance between the will of the people and the responsibility of lawmakers.

But putting that argument aside, there is no historical precedent for amendments proposed by the people needing to obtain a higher number of votes to pass than those proposed by the legislature. In fact, in no state and in no country where the citizens have the ability to propose constitutional changes, is there a greater requirement for the people's proposal to be adopted than one proposed by the legislature. So, in short, the requirement being proposed by the Constitutional Revision and Review Committee would make Ohio a lonely outlier both in this country and around the world.

Though many people are alarmed when the legislature pushes new regulations on the people's ability to propose and adopt new laws and amendments via the initiative process, rarely is the backlash as harsh if the legislature puts the same restrictions on their lawmaking abilities. In short, if lawmakers feel compelled to increase the regulations on the initiative process, it is imperative to the credibility of those efforts that they adopt the same regulations on their lawmaking abilities.

I will leave you with one final quote from William Jennings Bryan from his address to the Nebraska Constitutional Convention in 1920, "[w]e have the initiative and referendum in Nebraska; do not disturb them. If defects are discovered, correct them and perfect the machinery … make it possible for the people to have what they want … we are the world's teacher in democracy; … the world looks to us for an example. We cannot ask others to trust the people unless we ourselves are willing to trust them."

Thank you for your time.