

Ohio House Constitutional Resolutions Committee
Proponent Testimony on S.J.R. 2
Lee J. Strang
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Introduction

Chairman Plummer, Vice-Chair Hillyer, Ranking Member Mohamed, and members of the Ohio House Constitutional Resolutions Committee:

Thank you for the opportunity to testify on S.J.R. 2. My name is Lee Strang, and I am the John W. Stoepler Professor of Law & Values at the University of Toledo College of Law, where I have taught since 2008. Prior to teaching, I practiced law, clerked on the Sixth Circuit Court of Appeals for Judge Alice M. Batchelder, and I graduated from the University of Iowa College of Law and Harvard Law School. I teach a number of subjects including Ohio Constitutional Law. I have written extensively on constitutional law and constitutional interpretation. In my testimony today, I explain that S.J.R. 2's sixty-percent voter approval requirement for constitutional amendments is a reasonable response to changes that have occurred since Ohio adopted the initiative in 1912, one that will enhance the Constitution's ability to serve as our stable, fundamental law.

Stable, Fundamental Law

Stepping back for a moment, there is no uniquely correct answer for all times and places for how a constitution should be amended. In the United States, there were and continue to be a variety of different approaches to constitutional amendment. The United States Constitution famously requires supermajorities of both house of Congress and thirty-eight states to amend. This has the potential result of requiring up to 96% of Americans to approve a constitutional amendment. Massachusetts' state constitution, a model for the United States Constitution, was drafted by John Adams and was similarly difficult to amend. On the other end of the spectrum are constitutions that are easy to amend. These include the California Constitution, which adopted provisions during the Progressive Era allowing it to be amended by majority vote via initiative, and this resulted in over five-hundred amendments in less than a century and one of the longest constitutions in the United States, if not the world.

The goal of an amendment process is to hold two goods in healthy tension. On the one hand, a constitution is fundamental: it provides stability for a state's most important law. On the other hand, a constitution must be able to change to meet a state's evolving needs: it must have an amendment process. Therefore, an amendment process should be difficult enough to ensure stability, but not so difficult that it prevents valuable amendments. How a particular state achieves that balance is heavily dependent on context, and conditions may change over time that require a change to the amendment process *precisely in order to maintain the same balance*. This is what has occurred in Ohio.

Why Ohio Adopted the Current Approach

Our current 1851 Constitution originally provided for drafting constitutional amendments by either the General Assembly or a constitutional convention, and then required that all proposed

amendments would be subject to majority vote.¹ Like California, the Ohio Constitution was amended during the Progressive Era to add a third amendment proposal mechanism: the initiative,² which was also subject to majority vote.

Ohio adopted this initiative mechanism for a variety of reasons. The most common reason at the time was that the state legislature was not sufficiently responsive to average Ohioans, and that it was instead subject to control from large business interests, including nationwide trusts. A related reason was the belief that Ohioans should have a means to directly amend the Constitution because it is, after all, theirs.

The Sixty-Percent Passage Requirement Better Preserves Our Stable, Fundamental Law

Let me stress that I believe that the initiative is a valuable part of our constitutional amendment process because it allows Ohio citizens to circumvent existing law-making structures and speak directly to their fellow citizens, both at the signature-gathering stage and at the adoption stage. These reasons existed in 1912 and continue to exist today. It is typically a healthy aspect of a state's lawmaking process for citizens to participate in it, and the initiative is an especially robust form of that participation. For example, term limits were adopted by Ohioans for their elected representatives in 1992 using the initiative process.³

However, since 1912, the initiative process has become systematically subject to abuse because of its ease of passage by majority vote.⁴ These changes were unforeseen by the Constitution amenders over one-hundred years ago. These changes include: large businesses using the initiative process to enshrine their interests in the Constitution; out-of-state interests pouring money into Ohio constitutional amendment debates; political polarization of Ohioans; and geographic and socio-economic divisions among Ohioans.

For instance, well-financed out-of-state business interests have successfully championed marijuana legalization proposals in states like Michigan. They provided the resources and hired the personnel to get the issue on the ballot, and then persuaded the electorate through a short, well-healed, media campaign. Maybe marijuana legalization is a good idea or maybe it's not; my point is that "Big Weed" tipped the constitutional debates in these states.

The current majority requirement also means that controversial laws are enshrined into the Ohio Constitution by the slimmest of margins. This is especially harmful in a politically polarized society. One side of an issue can jam through a divisive law in a period of a few months without building widespread support among Ohioans. For example, the prohibition on the manufacture and sale of alcohol was passed by a paltry fifty-one percent. That experiment did not end well.

That the amendment process has been abused is beyond doubt. The most extreme but not the only example is the initiative that approved casino gambling in Ohio in 2009. This amendment shows many of the systemic failures of the majority-initiative process: it was a controversial issue; it was championed by out-of-state interests; it was championed by corporate interests; it was subject to a brief and well-financed media blitz; and it passed with just fifty-three percent of the vote.

¹ OHIO CONSTITUTION art. XVI (1851).

² See OHIO CONSTITUTION art. II, §1a (requiring signatures of ten percent of the voters to initiate a constitutional amendment vote).

³ *Id.* art. II, § 2.

⁴ I do not believe that the General Assembly and constitutional convention mechanisms to propose constitutional amendments present the same structural problems as initiative-proposed amendments because they each require an additional filtering step that avoids the pathologies of the fifty-percent initiative process.

This systemic abuse of Ohio's amendment process has harmed our Constitution and Ohioans. Our Constitution is already long, dense, complicated, and difficult for average Ohioans to understand. It is full of amendments that would not be part of the Constitution if it wasn't too easy to amend. I know this first-hand from teaching the Ohio Constitution to my law students: it was much more challenging than teaching the U.S. Constitution.

S.J.R. 2 preserve and strengthen the initiative process. The sixty-percent requirement in S.J.R. 2 will help ensure that there is a deep, broad, and stable consensus among Ohioans to amend our Constitution. If an amendment persuades sixty percent of Ohioans, that means it has support across political parties, religious groups, regions of the state, and socio-economic backgrounds. In a polarized world, that consensus itself is very healthy; and it also contributes to an amendment's stability because it won't be challenged in a year or two and reversed by fifty-one percent.

S.J.R. 2's sixty-percent requirement is also not too high. A review of [amendments voted on by Ohioans](#) shows that amendments of all sorts—those proposed by initiative, the General Assembly, and constitutional convention—regularly achieve broad-based support among Ohioans and meet the sixty-percent threshold, including fourteen of the last twenty-one constitutional amendments.

Conclusion

Our Constitution is nearly 175 years old. In a world where constitutions typically last less than twenty years, that is a real credit to the People of Ohio. The Constitution will be better able to serve its mission of being our stable, fundamental law for the next 175 years when amendments receive support from over sixty percent of Ohioans.