



The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy.

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## **From Taxes to Marijuana: November Voters to Decide 160-Plus Policy Issues | Sept. 13, 2018 | OAS Episode 43**

Welcome to “Our American States,” a podcast of meaningful conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them and the important work of democracy. For the National Conference of State Legislatures, I’m your host, Gene Rose.

Returning to our program is Patrick Potyondy, who is a legislative policy specialist and ACLS-Mellon public fellow in NCSL’s Elections and Redistricting program. Welcome back, Patrick.

Patrick: Thanks for having me, Gene, I'm really excited to be here.

Gene: So, as we all know, this November citizens will be going to the polls to choose their elected representatives at the federal, state and local level. In many states, they'll also be making decisions on new laws or state constitutional measures, and these are typically called initiatives and referendums, which of course is Patrick's area of expertise. So, Patrick, let's start with this. How do subjects get placed on ballots and is there a difference between an initiative and a referendum?

Patrick: Yeah, that's a great question here to start us off. So, there are kind of just a few main types and the first is that citizen initiative. And this is probably the one we hear most about. And this is where, you know, a group of folks get together and decide they want to place something on the ballot. And that can either be a constitutional amendment to amend their state constitution, or it can be a statute. And it kind of depends on the state which one you are allowed to do. And they place that on the ballot and then the entire voter group votes on that in the election and those are usually in November, that's when most are, but they can also happen at primary elections or special elections in some states as well. So that's usually what we think of when we say initiatives.

But there's also popular referendums, or popular vetoes. And so, this is when a legislature passes a law that a group of citizens has some question about, and they go out and collect signatures specifically to do a referendum on that law. And usually there's a small time frame involved in those, a smaller time frame I should say, something about 90 days or so, give or take depending on the state. And they'll go out and collect those signatures in that time frame and then place a referendum on that law on the next election so that voters can essentially vote up or down that law that was passed by the legislature.

And then the third main type are called legislative referrals or legislative referendums. And this is when a state legislature places a measure directly on the ballot. The legislature votes to place either a law, a statute or a constitutional amendment onto the ballot for voters to vote on at the next election.

Gene: So, I want to focus for a second on the citizen initiative. When I hear that phrase, Patrick, it brings to mind an image of concerned citizens working in a room valiantly to place an issue on the ballot. Is that an accurate portrayal of what is happening today?

Patrick: It can be and the answer to this is a little complicated. Staying with that first question here, building into the second, you know, 24 states allow those citizen initiatives. And they either allow citizens to do that constitutional amendment or a statute. And so it can be, you know, you and me, Gene, getting around our kitchen table and talking about those, you know, oft to discuss kitchen table issues and saying, you know, hey, you know we ought to do something, and we volunteer our time and you know maybe we get a couple friends and we go collect signatures. And so that can happen and that does happen, but it's also that a lot of big organizations, whether they're businesses or advocacy groups, and often times with big amounts of money, will get together and create these so-called citizen initiatives to get a statute or a constitutional amendment passed. They think it's a good idea for one reason or another and so it's just as likely that is the way that a citizen initiative makes its way to the ballot instead of that fabled, maybe volunteer, civic-minded direct democracy approach from kind of the ordinary citizens as they were.

Gene: So it seems like if you have the money, you could almost get anything placed on the ballot?

Patrick: It does seem that that can have some influence on how initiatives make it on the ballot. Some groups and some states I've kind of been tracking will use the initiative process as, you know, if a threat is too strong a word, as kind of a leverage point to get things done in the legislature that they would like done. So they will kind of go and say hey, you know, we'd really like such and such law to be passed and if you

legislature don't act, then you know, hey, we're gonna go and do it through the citizen initiative process and maybe do it in a way you don't have any control over or you don't like at all. And so then the legislatures are kind of forced to play ball through this kind of other means that often involves, right, those really big organizations and those big amounts of money.

Gene: So I assume when these initiatives get placed on the ballot, they don't really have legislative input, so does that cause legislatures to have to react to these proposals in some way if they're passed?

Patrick: Yeah, it can and of course, as with so many of the statutes we track here at NCSL, you know, it really varies by state. And so, in some states they actually have what's called an indirect initiative process whereby either through a lower signature threshold or some process written out in code, folks can collect signatures and give it to the legislature first to consider and the legislature can either act on that initiative and pass it without sending it to the people, or they can do nothing and it goes right to the ballot, or they can kind of propose an alternative measure so that both of those measures will appear on the ballot at the next election. They're kind of competing measures then. But once a measure does pass, the states can vary quite widely in what they're allowed to do once they become approved by the voters, right. So these also apply and, you know, I'm trying to spell this out fairly clearly, these apply to statutes, or kind of what we think of as regular laws that are passed and approved by voters. It won't apply to constitutional amendments. In 49 states, all except one state, legislatures have to refer to the voters changes in the constitution, the state constitution. If the legislature wants to do an amendment, they have to pass it and then they have to have the voters also approve that. So, if an amendment passes through the initiative process in the states that allow that, the legislature can of course try to repeal it as it were, but they have to essentially propose a new constitutional amendment.

In a case of a statute that's passed by the initiative, the states vary quite widely in what they allow their legislatures to do. So for example, Arizona, the legislature cannot repeal a statute passed by a ballot measure, but they may amend it with a three-quarters vote, but only to amend it to "further the purpose" of the measure. But in Arkansas, the legislature can amend or even repeal it with a two-thirds majority. And in California, the legislature may amend or repeal the measure once it becomes effective, but then to repeal or change it they have to have those voters approve those changes once again. So essentially, if the voters pass a statute there in California, it sort of has the power of a constitutional amendment law instead of a statute law, in that the legislature can go ahead and try to change it, but they have to kind of do the full referral to the people process like a constitutional amendment.

Gene: OK, let's talk about what the public will be voting on this November 2018. Tell us how many statewide measures will appear on ballots and if voters in every state will be considering a measure to vote on.

Patrick: So it won't happen in every state. So far, I've been tracking about a little over 160 total measures, total ballot measures, across 37 states. But every state could potentially each election have ballot measures since the legislature can refer measures to the ballot even though every state doesn't have that citizen initiative.

And so if I was to pick a few of the more essential topics for this election, it would be hard, but you know, first I'd start off with elections and redistricting issues actually. There's a high amount of elections related topics on this year's ballot in several states. These include the re-enfranchisement of folks with felony convictions in Florida through a citizen initiative. In Florida, almost about a quarter of otherwise eligible African-American voters are not able to vote because they have a felony conviction there. So that could be a big change in that state. Ranked-choice voting passed earlier this year in Maine through a popular referendum. And it was the first state to approve ranked-choice voting. Voter photographic ID is on the ballot in Arkansas and North Carolina. Automatic voter registration in Nevada, which automatic voter registration being a little bit of a trend in the election administration world. And five states will decide on ethics and kind of lobbying related measures in those states, sometimes touching upon other ones.

And so along with those elections issues, redistricting is also a really hot topic this year, with five states considering redistricting reforms. We have two measures in Colorado. We also have in Missouri and Utah and Michigan, and Ohio actually already voted and approved its redistricting reform measure earlier this year, possibly hinting at support for that issue. And that's one of those issues where support from outside the legislature is kind of pushing legislatures to become involved in this reform measure. The Colorado measures are legislative referred measures, but there was outside groups kind of pushing for those and were either going to take it to a citizen initiative or the legislature was gonna have to act on those.

And so, health care is another of those big topics I see in this round. Populations age and we get fuller policies covering folks with ability issues and various health conditions. States are kind of having to figure out how to cover those increased costs. And so part of this equation is Medicaid. So three states are going to consider expanding Medicaid this year as part of the ACA, the Affordable Care Act, or also called Obama Care. Seventeen states haven't expanded Medicaid so far. So far Nebraska, Idaho and Utah will consider Medicaid expansion this November. Earlier this year, Oregon passed a increased tax to support its Medicaid expansion as states,

as part of that program, states will have to pick up more of the cost of their Medicaid expansion as the program continues. And Montana will decide to essentially discontinue a planned repeal of Medicaid. They will essentially vote to either keep that repeal that would happen in 2019 and stop the Medicaid expansion, or they will vote to essentially keep Medicaid expansion in their state. And the states are kind of considering different ways to fund those portions of their coverage of the Medicaid expansion.

And third, I'm going to pick kind of, somewhat amorphous enlarged topic of tax revenue here. That I think there's various interesting things going on here. So again, kind of something for everybody in these ballot measures. So there's a trend of taxing higher incomes to pay for services like education and healthcare in a few states this year. California has a proposition that it would apply a one percent tax on incomes over a million dollars to fund homelessness prevention bonds. Colorado may do a graduated tax on higher incomes to fund public education. And Arizona had a very similar measure that was recently stricken from the ballot because of a legal challenge. And legal challenges being fairly common in the citizen initiative game. Maine will have a question to fund in-home healthcare through this sort of thing. And Hawaii could allow surcharges on investment properties, again to fund education for there.

And on the other side of this tax coin, we see this kind of similarly ongoing trend of efforts to limit the ability to raise revenues. So Florida and Oregon might start requiring super majorities to raise taxes. Arizona has a citizen initiative that would ban any future taxes or raises in existing taxes. North Carolina, in a fairly complicated measure, might lower the maximum cap that can be charged on income taxes and I think it's going from something like ten percent down to seven percent as the maximum that the legislature could charge on income taxes there. And California might require voter approval in the future to raise all gas taxes or fuel taxes.

And kind of one odd tax measure out here that I think is really interesting, in Nevada there may be a prohibition on what's called the pink tax or taxes on feminine hygiene products. And that's part of a larger legislative trend. So kind of a similar topic from that limiting revenue, but from a very different angle I think.

Gene: As I looked over your list, it looks like a few states will be looking at energy, environmental protection and transportation issues.

Patrick: Yeah. I think these are a couple other areas where some interesting things are going on. Both Arizona and Nevada have very similar measures on the ballot where voters will vote if they want to require that 50 percent of their electricity will come from

renewable sources by 2030. And Washington may initiate the country's first fee on carbon emissions.

And a lot of these energy and environmental protection measures are kind of wrapped together. And so Montana is considering requiring long-term protection plans for new types of mines. To essentially get a permit for a new mine you'd have to include in that a long-term protection plan to make sure that pollution down the road doesn't happen. Colorado is having an interesting pair of measures to deal with hydraulic fracturing, also known as fracking, a type of mining. And that's taken center-stage in this state. And so here we have one measure that would require a fairly far back setback, that is you could only have fracking taking place about 2,500 feet from schools or homes, occupied structures or other "vulnerable" lands as it's said in the measure. And so these are things like rivers or parks. And kind of in reaction to that, there's another measure that would seek to compensate private property owners for any decreased property value due to any government regulations. And so that's a fairly far-reaching constitutional amendment in Colorado that could cost the state quite a bit of money if the other fracking measure also passes. Florida might prohibit offshore drilling in one of its constitutional amendments. That issue was kind of recently raised by federal government choices on that issue.

And in the realm of transportation, California will consider repealing a 2017 gas tax increase, and as part of that same measure, would be essentially requiring that you get voter approval to do any future gas tax increases. And this measure is seen as kind of one of those measures that parties will often use to try to spur turnout of their side. And so here we're going to see if this helps increase the republican turnout in California, as there's a fair amount of money being put into that race. And Missouri will also consider a gas tax increase this year. As states kind of continuously work to see how they can kind of make sure they do good road upkeep and transportation upkeep.

Gene: Are there any ballot issues that address controversial issues?

Patrick: Aside from some of the ones that I've mentioned that can be fairly controversial, there's some other ones that I think are worth mentioning. There's abortion restriction measures in three states, in Alabama, Oregon and West Virginia, and I think it can be fairly speculative, but they may be connected to debates that are swirling around Supreme Court right now with abortion issues. There's also a gun control or gun safety measure as, however you want to phrase it, in Washington state. And there's a few others—Alabama is also going to consider allowing Ten Commandments on public property. That's an issue we've seen that state kind of debate and look at before. Colorado might regulate payday lenders further. This is

kind of an issue in lots of states that gets a little bit of a constant attention, but always something that's fairly controversial. Oregon is considering possibly repealing a law that's about 30 years old dealing with local law enforcement, so either state or local police, enforcing federal immigration laws. And that's a fairly hot topic now, as are most immigration issues. And a far-reaching proposal in Washington could make changes to the types of training police officers are required to get. And also the potential prosecution of police officers who use deadly force. And this one has been debated in indirect initiative going through the Washington legislature. And a compromise was almost reached and then through some kind of complicated issues arising from that, it eventually was required to go on the ballot so voters themselves will have to decide on that. And Arizona has a popular referendum on a school vouchers expansion that's gotten quite a bit of attention there. And for anyone who follows education reform, school vouchers can be a pretty contentious issue as it surrounds, you know, general public school funding and things like that.

Gene: So, I haven't kept perfect track, but it sounds like that there may be more issues on the ballots in the western part of the country than anywhere else. Which states have the most issues to consider?

Patrick: That's a really good point. I think, you know, that does tend to track with the states that allow citizen initiatives in the first place. You know, western states tend to allow those due to kind of historical realities and things like that. And so far in this year what we're looking at is that California will have the most issues; they'll have 16. They've actually already voted on five of those earlier; four of the five passed. Colorado itself though will have thirteen measures just on the November ballot. So they will have the most issues on a single ballot, I guess you could say. Florida will also have 10 measures, as the state with the next highest number. And the total comes out to about 166, although a few legal challenges and a few more legislative referrals could happen kind of tweaking that number here or there.

Gene: So, we've talked about a lot of subjects, Patrick, and you've been very good at explaining what's happening across the country. Is there anything else that legislatures and state legislature staff should know about?

Patrick: I would just make a couple final points to leave folks with. Having to pick the most important issues is always tricky, so you know, quickly I would just highlight criminal justice issues as one that if folks are interested in those realms to pay attention to. There's six states will consider what's called Marsy's Law or the Crime Victims Bill of Rights. That first started in California in 2008 and has kind of been making steady progress across the states. Marijuana legalization continues to kind of make its march across the states as well, with about five or six more states considering some type of marijuana legislation. Ohio has an interesting drug decriminalization and

treatment plan, as we kind of continue to struggle with the opioid epidemic and those sorts of things. They're going to try to use some of that decriminalization and what they hope will be savings essentially in the budget from not prosecuting so many drug crimes and use those funds instead for treatment. And Louisiana is one of only two states that doesn't require a unanimous jury to convict on a felony charge, along with Oregon. And that state, Louisiana, may change that in November.

And then two last final points I'd leave the listeners with in terms of if legislatures can or choose to act after a ballot measure has passed, I would just note that that can be fairly politically risky, right. If you're a lawmaker and you just saw that, you know, a majority of voters, or at least a majority of voters who participated, right, they just said they wanted this thing. So if you go and change that or alter it if your state allows you to do that, that can kind of possibly make the voters decide they may like you less than they like that ballot measure.

But on the other side there's some pros and cons to the citizen initiative process. Right, so some pros can be that voters can address issues that aren't being tackled by elected officials, right. You can have a more engaged citizenry. You can have increased voter turnout sometimes it seems like. It can be a check on government that holds officials accountable.

But there's a flip side to that, right? The United States is a representative democracy, right? So if you have direct democracy, you can sometimes end up with unaccountable policy making, right? If you and I, Gene, get together and pass a citizen initiative, there's really no holding us necessarily accountable. We're, you know, you can't vote us out of office later. Sometimes the policy ideas are unvetted by the kind of fairly stringent legislative process that goes on in our state legislatures. Spending is essentially unlimited and can be really hard to track. And voter information can be inadequate. You know, in our state legislatures it goes through this really intense committee process where a group of legislatures really dissect and pull apart policy and debate it with their staff and interested parties. And that doesn't necessarily always happen here with citizen initiatives.

And so those are some things to keep in mind as we move forward with considering, you know, well over 160 measures across the states this November.

Gene: That's great information, Patrick, and again with 160 issues on the ballot and our limited time, people may want more information on some of these subjects. Where can they go to learn more about these measures?

Patrick: Folks who want to kind of delve into some of the details here are always, feel free to reach out to us, and you can also find those on the NCSL webpage at [ncsl.org](http://ncsl.org) and if

you go and search for our ballot measures database, you can go and search by state and you can search by topic and you can search by election and even year, so you can go back well into the twentieth century and see how often some of these measures passed. Citizen initiatives generally, historically, the last decade or so, have seen about a 50 percent passage rate. Legislative referrals have a better passage rate at about 3 to 1 odds. But folks can go and delve in on the NCSL website there to find out more.

Gene: We've been talking with Patrick Potyondy, legislative policy specialist and ACLS-Mellon public fellow in NCSL's Elections and Redistricting program. Patrick, thank you for your time.

Patrick: Thanks, it was fun to be here.

Music and Gene VO:

And that concludes this edition of "Our American States." We invite you to subscribe to this podcast on iTunes and Google Play. Until our next episode, this is Gene Rose for the National Conference of State Legislatures. Thanks for listening.