Anti-Fracking Initiatives: Power to the People or More of the Same?

Rebecca W. Watson and Jennifer Cadena

Considering today's dysfunctional Congress—the failed 2011 grand bargain, the 2012 fiscal cliff, and the 2013 government shutdown—it does not take much of a cynic to question James Madison's faith in representative democracy rather than pure democracy. Madison argued that, "a pure democracy . . . can admit of no cure for the mischief of faction," but a republican government, by passing public views "through the medium of a chosen body of citizens" can refine "temporary or partial considerations." Federalist No. 10. Today, many see the citizen initiative as a much-needed corrective to our twenty-first century democracy—the voice of the people without a legislative filter. But is the citizen initiative an improvement or does it contribute to the break-down of political discourse?

In Colorado, Ohio, and Pennsylvania, municipalities have or are considering anti-hydraulic fracturing (fracking) initiatives to either outright ban or halt the use of the practice for several years. In the November 2013 election, Ohio voters defeated two out of three anti-fracking initiatives, while four Colorado cities voted against fracking. Statewide anti-fracking initiative campaigns in Michigan and Colorado are widely anticipated in 2014.

Our perspective on industry-focused initiatives was shaped during 1996–1998 when representing the Montana Mining Association in an ultimately losing battle against a citizen initiative to ban the use of cyanide heap leach mining. After the ban was enacted in 1998, Montana mining exploration permits dried up overnight, companies left the state, and the mining economy in this once-active mining state dwindled down to a few grandfathered mines. In sum, the people of Montana spoke and outlawed an industry. Montana is currently the only state with a statewide ban of cyanide heap leach mining. Can this happen to the oil and gas industries in states where fracking faces public opposition?

In the 2013 term, the U.S. Supreme Court struck down a California citizen initiative (Proposition 8) that outlawed same-sex marriage in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In the majority opinion, the Justices refused to "question California's sovereign right to maintain an initiative process" but found the initiative proponents lacked standing to defend the law in federal court when the state declined to do so. In a harshly worded dissent, Justice Kennedy argued that the majority failed to address

> [t]he essence of democracy [which] is that the right to make law rests in the people and flows to the government, not the other way around. . . . In California and the 26 other states that permit initiatives and popular referendums, the people have exercised their own inherent sovereign right to govern themselves. The Court today frustrates that choice . . ."

Hollingsworth, 133 S. Ct. at 2675.

Two hundred years after the ratification of the Constitution, the Supreme Court is still weighing in on the age-old question: should the right to make law rest in the people or government representatives?

In *Hollingsworth*, after the voters approved Proposition 8, same-sex couples challenged its constitutionality in federal district court, arguing that it deprived them of due process and equal protection under the Fourteenth Amendment. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010). The California attorney general conceded that Proposition 8 was unconstitutional, while the other government defendants refused to take a position on its constitutionality. Proposition 8 proponents intervened and defended the citizen initiative. The district court ultimately found Proposition 8 to be unconstitutional.

The Governor and Attorney General refused to appeal the decision, triggering the initiative proponents to file an appeal to the Ninth Circuit. *Perry v. Brown*, 671 F.3d 1052, 1070–71 (9th Cir. 2012). Unsure of whether the proponents had standing, the Ninth Circuit submitted a "certified question" to the California Supreme Court asking whether "the [initiative] proponents . . . possess either a particularized interest . . . or the authority to assert the State's interest in the initiative's validity" sufficient to defend the initiative upon adoption or on appeal. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011). The Ninth Circuit's concern was whether the governor, by refusing to appeal and defend Proposition 8, could "achieve through a refusal to litigate what he may not do directly: effectively veto the initiative by refusing to defend it or appeal a judgment invalidating it, if no one else—including the initiative's proponents—is qualified to do so." *Schwarzenegger*, 628 F.3d at 1197. After the California Supreme Court held that the initiative proponents "are authorized" to appear and assert the State's interest, 265 P.3d 1002 (Cal. 2011), the Ninth Circuit upheld the district court's finding and found Proposition 8 unconstitutional. *Brown*, 671 F.3d at 1095.

The initiative proponents appealed to the U.S. Supreme Court. The Supreme Court found that no matter what California law provided, without a demonstration by the initiative

Ms. Watson is a shareholder and Ms. Cadena is an associate at Welborn Sullivan Meck & Tooley, P.C. They may be reached at rwatson@wsmtlaw.com and jcadena@wsmtlaw.com.

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proponents of a "direct stake in the outcome" (i.e., a particularized injury), the proponents had only a "generalized grievance" insufficient to confer standing. *Hollingsworth*, 133 S. Ct. at 2662. The *Hollingsworth* dissent focused on California state law and was particularly troubled by a ruling that, in its opinion, would allow elected officials to thwart the will of the people in violation of the very purpose of a citizen initiative—as a release valve for the people when elected officials refuse to act. Justice Kennedy argued that "[g]iving the Governor and attorney general this *de facto* veto will erode one of the cornerstones of the State's governmental structure . . . And in light of the frequency with which initiatives' opponents resort to litigation, the impact of that veto could be substantial." *Id.* at 2670.

The reach of the *Hollingsworth* decision extends much further than marriage equality; it will have a significant impact on all future citizen-enacted laws, including anti-fracking initiatives, that may be challenged in federal court as unconstitutional or in violation of federal law. Although same-sex marriage and fracking appear to be completely unrelated, these subjects evoke intense, deep-seated emotions in individuals and concern subjects that elected officials do not want to address for either political or economic reasons. Consequently, proponents attempt to bypass government representatives and bring these issues directly to the people through a citizen initiative. The *Hollingsworth* holding regarding standing will circumscribe the initiative process.

A History of the Citizen Initiative Process

Direct democracy is the ability of the citizens to file a petition and propose a legislative measure (statutory initiative) or a constitutional amendment (constitutional initiative) and allow voters to vote "yes" or "no" on the measure. In the case of a referendum, the citizens can vote to reject legislatively enacted law. Initiatives and referendums allow voters direct lawmaking power.

The initiative process began in Europe. In the mid-1800s, several Swiss cantons adopted initiatives in response to perceived legislative corruption. In the United States in the late 1800s, the Progressives responded to concerns that state legislatures were corrupt and controlled by powerful economic interests—robber barons, land speculators, corporate trusts, and railroads—and argued for the Swiss "check" of the citizen initiative or referendum.

"The Swiss people are free from the corrupting extremes of wealth, largely because the referendum headed off the encroachments of boodlers, bribers, and monopolists, together with all kinds of special legislation by which so many American fortunes have been created . . ." Thomas E. Cronin, *Direct Democracy, The Politics of Initiative, Referendum, and Recall* (Harvard University Press 1989) at 13. The initiative process was intended to be used when government was unresponsive to the people. "[T]he initiative is in essence a legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end." Key & Couch, *The Initiative and the Referendum in California*, 485 (1939).

The strength of the Populist movement in the West and its support of direct democracy led to the West's early adoption of the initiative process. In 1889, South Dakota became the first state to establish direct legislation in the United States. In 1904, Oregon was the first state to pass a law using the initiative process. Nineteen states, mostly west of the Mississippi, adopted an initiative process between 1898 and 1918. In the period 1910–1919, use of the initiative process became popular, but waned during and after World War II. Today, twenty-four states provide for citizen initiatives at the state level and all but Delaware provide for some level of citizen-initiated direct voting. Attempts to provide for a national initiative in the United States have not met with success, although a majority of democratic nations provide for the initiative process and polling demonstrates its popularity with U.S. voters.

The modern use of the initiative process began in the 1970s with the passage of Proposition 13 (Peoples Initiative to Limit Property Taxation) in California. Since then, both sides of the aisle have begun to use the ballot initiative more frequently. The five most popular states for initiatives are Oregon, California, Colorado, North Dakota, and Arizona. The number of initiatives has increased dramatically, with a peak in the 1990s and the 2000s of around 370 initiatives. Typically, around 40 percent of initiatives are successful and become law.

Initiatives are most often drafted by special interest groups focused on a single issue. Some initiatives deal with everyday concerns, such as requiring used car dealers to provide more repair history in Massachusetts, while others address more significant issues such as medical marijuana in Colorado, limiting the power to tax in California and Colorado, renewable portfolio standards in Colorado, and abolishing the death penalty in California. Issues involving immigration and race often appear on initiatives. For example, in October 2013, the Supreme Court heard arguments in a challenge to a voter-approved measure to ban the use of race in college admissions. Oral Argument, *Schuette v. Coalition to Defend Affirmative Action* (2013) (No. 12-62).

The continued popularity of the initiative process results from several factors. First, there is public cynicism and distrust of elected officials, political parties, and big money interests. The citizen initiative offers a promise of power-to-the-people and corruption-free legislation. Second, the topics addressed in initiatives (tax cuts, marriage, race, and the environment) feed into special interest politics and attract significant media attention. Initiatives frequently offer a simple solution—ban x—for a complex problem. Third, both the left and the right have used initiatives to serve partisan ends, to bring their base voters to the polls. Fourth, politics is big business, and statewide initiative campaigns generate lots of money for political consultants and media outlets.

Common Components of Initiative Law

The procedures for direct legislation are not uniform throughout the states. Each state will have its own individual law that is often a maze of confusing, contradictory provisions resulting from attempts to improve or limit the process. Nonetheless, some common components of the initiative process can be highlighted.

Actors in the initiative process are several. Many states require the secretary of state, the attorney general, a state political practices agency, and county election officials to become actively involved in administering the initiative process. The legislature is, for the most part, kept out of the initiative process.

All states prescribe the format for initiative propositions and require executive branch review and approval of the ballot title or other summary statements (pro and con statements). The content of the ballot title is critical, since typically only the title appears on the ballot, not the initiative text. States provide for review of the petition form by the secretary of state and/or the legislative drafting staff and/or the attorney general and may also provide for executive branch involvement in drafting petition descriptions and ballot titles. Some states may provide for the involvement of petition proponents and opponents in the ballot title drafting process and for a preelection court challenge to the ballot title language.

The critical step for ballot initiative proponents is collecting enough signatures to qualify the initiative for the ballot. The signatures required are typically based on a percentage of the votes cast in the previous gubernatorial race. If a state permits constitutional amendments, the percentage required is frequently 25 to 50 percent higher. Only half the states require signatures to be distributed geographically to prevent large urban areas from skewing the process.

Almost all states require signatures from "qualified electors" or registered voters only. Typically, an analysis and comparison of the collected signatures with those of registered voters is conducted by county election officials to prevent fraud. This signature verification process can be challenged. In a dozen states, an additional expense for the state is the publishing and mailing, prior to the election, of a voter's information pamphlet describing each initiative. The initiative text is printed, and arguments for and against the initiative are prepared by proponents and opponents. These arguments are not checked for accuracy by any state official.

Most states provide for initiatives to be voted on at general elections. Some states permit initiatives on primary ballots or hold special initiative elections, but most do not. In most states, a simple majority of those voting on a *particular* initiative can enact citizen initiative proposals. A handful of states require some type of super majority or a majority of the total votes cast at that election or a previous election.

The subject matter of initiatives is restricted in most states. The majority of states also impose a single subject limitation on initiatives to prevent voter confusion.

Most states do not permit preelection challenge of the substance or legal sufficiency of an initiative, but do permit preelection judicial review of the initiative's procedural compliance. The official summary and ballot title are frequently challenged, as is the proposal's compliance with the procedural requirements for certification. Initiatives are frequently challenged on substantive state and federal constitutional grounds. In addition, eleven states allow the legislature to amend initiative-enacted law as it would any other statute. However, roughly half of the states either do not permit the legislature to amend initiative-enacted law or require a two to three year cooling-off period before the legislature can act. The political reality is that legislators are cautious in "second-guessing" the people's lawmaking.

Pros and Cons of the Initiative Process

Scholars who support the initiative process point to several benefits. Initiatives encourage individual participation in our democracy by encouraging the people to directly enact laws. Others argue that in "the dark reality of today's democracy" it is a mechanism for "civic maturation in these times of special interest politics." Alan Hirsch, "Direct Democracy and Civic Maturation," 29 Hastings Const. L. Q. 185, 215 (2001–02). In addition, initiatives are useful in areas of social experimentation (*see, e.g.*, medical marijuana, marriage equality, renewable portfolio standards) because initiatives "afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt." *Hollingsworth*, 133 S. Ct. at 2671.

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But do initiatives live up to their promise to improve the democratic process? There are several criticisms of the initiative process. First, citizen initiatives undermine the Framers' vision of a representative government with the capacity to deliberate over legislation. Elected officials, or at least their staff, have more time to research the effects of passing a statutory amendment. Legislatures also have a process of committees, hearings, and public testimony to discover and ameliorate unintended consequences before the bill goes to the full body for a vote. And the executive branch retains the power of the veto. The majority of voters, however, do not perform any type of research before voting on whether the citizen initiative is beneficial for the public as a whole. Indeed, research has shown that voters look for "cues" on how to vote: who is for it, who is against it and how do I generally feel about *them*? And, unlike a legislature, if unintended consequences are discovered during an initiative process, there is no opportunity to modify the language and the executive branch lacks veto authority over initiatives.

Second, initiatives may threaten minority rights through majoritarian rule. *Hollingsworth* is a twenty-first century example of an initiative attempting to deny marriage to gay Americans, but earlier initiatives focused on immigrants (Arizona and California), and *Schuette* is a challenge to an initiative limiting affirmative action. The proponents of the initiative process argue that legislatures are hardly immune from discriminatory legislation and, as with legislation, the courts can step in to correct any initiative abuses. "It is irrelevant that the voters rather than a legislative body enacted [this law] because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981).

Third, while legislators are supported by a variety of different, and sometimes competing, interest groups who can force some balancing of issue positions, the citizen initiative is typically financed by a particular special interest group or, increasingly, the very rich. Citizen initiatives cost

money—serious money. In this, they are no better than representative democracy. *See* Norimitsu Onishi, "California Ballot Initiatives, Born in Populism, Now Come from Billionaires," N.Y. Times, Oct. 16, 2012.

Fourth, it often seems that the only individuals who directly benefit from the citizen initiative are political and media consultants. Political consultants are retained to conduct focus groups to test the language used to support the initiative petition in campaign advertising. Consultants draft the initiatives and structure and implement the campaign. In many states, signature gatherers are paid on a per signature basis to gather the required support of voters. The opponents of the initiative retain their own political consultants to craft their message to oppose the initiative. Polling firms track the movement of the voters in response to the campaign. Although social media is increasingly critical in campaigns, traditional media—radio, TV, and newspapers—continue to benefit from initiative campaign ad dollars.

Fifth, and perhaps counterintuitive, initiatives largely are voted on by middle- and upper-class voters. Voter confusion with ballot initiatives is a continuing problem. Less educated, poorer, or younger voters often do not vote at all or skip voting on initiatives that are frequently difficult to understand.

Environmental/Natural Resource Initiatives

There is a long history of citizen initiatives in the natural resources context. In 1970, the year of the first Earth Day, the first environmental initiative (to ban dams) was introduced in Oregon. In the 1990s, Oregon timber interests spent $3 million to fight a clear-cut ban, and Montanans voted to phase out open pit, cyanide-leach mining. In the 2000s, the focus of the citizen initiatives became bonds and taxes to pay for environmental conservation and restoration. In that same decade, renewable energy standard initiatives began to appear. In 2012, initiatives in California and Michigan addressed labeling of genetically modified crops and stricter renewable energy standards, and both were defeated.

In the last several years, numerous anti-fracking initiatives have been proposed or are anticipated at the local or state level as opponents of fracking work to put "numbers on the board" to argue that widespread opposition to fracking should result in state and national fracking bans. Ohio, Michigan, Colorado, New York, and Pennsylvania have all experienced anti-fracking initiatives brought at the local level. *See* Food and Water Watch, Local Actions against Fracking. www.foodandwaterwatch.org. A number of the anti-fracking proposals are supported by Food and Water Watch and based on a template provided by the Community Environmental Legal Defense Fund, which organized the local anti-fracking campaigns in Ohio, Pennsylvania, New York, Maryland, and New Mexico.

Beginning in 2013, citizens in Michigan began gathering the signatures necessary to place an anti-fracking initiative on the statewide ballot in the November 2014 election. The Michigan anti-fracking initiative reads:

> to ensure the health, safety, and general welfare of the people and to protect plants, animals, air, land, and water, no person, corporation or other entity shall use, nor shall the department permit the use of, horizontal fracturing in the state, nor shall a person, corporation, or other entity store, dispose, or process in the state, wastes used or produced in horizontal hydraulic fracturing.

Committee to Ban Fracking in Michigan. http://letsbanfracking.org/index.php/2012-10-08-21-03-05.

In Colorado, municipalities are paving the way for a statewide ban by enacting citywide bans or lengthy "moratoriums" on hydraulic fracturing and horizontal drilling. Longmont was the first to pass an outright ban of hydraulic fracturing in 2012, a measure approved by nearly 60 percent of voters. The city was subsequently sued by the Colorado Oil & Gas Conservation Commission (COGCC), the Colorado regulatory authority, and the Colorado Oil & Gas Association, a trade association of oil and gas companies. They argue that state law preempts local law in oil and gas matters. *Voss v. Lundvall Bros., Inc.*, 830 P2d 1061, 1068 (Colo. 1992) (municipal bans are per se preempted.)

Other Colorado cities, rather than enact an outright ban, initially opted for brief emergency moratoriums to study the issue. These moratoria were followed by local citizen initiatives to either extend the moratoria or to ban fracking. Of the four Colorado cities with anti-fracking initiatives on the ballot, two passed overwhelmingly with over 60 percent of the vote. The race in one city was so close that it led to a recount but passed by a handful of votes.

"Protect Our Colorado," a statewide anti-fracking group that has been working with citizens to institute local bans, is aiming for a more inclusive statewide ban. "The official line is all options are on the table," said Sam Schabacker, the Mountain West organizer for Food and Water Watch. Curtis Wackerle, *Ballot Measure on Colo. Fracking Ban in the Works*, Aspen Daily News (Aug. 17, 2013). Schabacker claims that the citizens lack any other recourse because the state of Colorado could sue to prevent individual jurisdictions from enacting fracking bans based on the COGCC's preemption of the regulation of oil and gas.

In the early 1990s, the Colorado Supreme Court addressed state preemption in the oil and gas context when it held that state rules and laws preempt local regulations if there is an operational conflict but not if the local regulations "can be harmonized with [the] state interest." *Bd. of Cnty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1059 (Colo. 1992). In January 2014, Colorado anti-fracking opponents announced they would seek a constitutional amendment to provide greater regulatory authority on oil and gas to local governments.

And in December 2013, the Pennsylvania Supreme Court ruled a state law attempting to narrow the zoning authority of municipalities over oil and gas was unconstitutional under a unique environmental provision in the state's constitution. *Robinson Twp. v. Commonwealth*, __ A.3d ____, 2013 WL 6687290 (Pa. 2013). The language in the plurality opinion was surprisingly hostile to the oil and gas industry and argued that protection of the homeowners' interest in the quiet enjoyment of their homes was done best by local governments and not the state. Whether the Pennsylvania decision and the Colorado initiative will be successful in reversing the regulatory roles of state and local government in the oil and gas context is unclear.

In addition to lawsuits in state court, citizen initiatives

also face federal challenges. Citizen initiatives have been challenged in federal court for violating free speech, free association, substantive due process, and equal protection. The *Hollingsworth* opinion adds another challenge: will the government official, that individual who is typically tasked with defending a challenge to a citizen initiative, actually defend it in the lower court and appeal it if the initiative is struck down?

Lessons Learned from Past Natural Resource Citizen Initiatives

Most environmental initiatives start out with high approval ratings, over 60 percent. To turn those numbers around, the targeted industry must spend millions to coordinate a campaign in opposition. The challenge of defeating citizen initiatives on the environment is difficult, but there are steps that can be taken by initiative opponents to improve the odds.

Remember that voting yes on environmental issues makes voters feel good. Most environmental initiatives have upbeat slogans like "Clean Water, Clean Streams" or "Save Our Salmon" that make the initiative appealing to voters. For example, the Montana anti-mining initiative was titled "The Clean Water and Public Health Protection Act of 1996."

Also, initiatives offer a simple solution to replace a complex regulatory scheme. In Montana, the anti-mining initiative identified the need for special water treatment to remove iron, manganese, and toxins from mine discharges. Most voters have little knowledge of the existing set of water quality and mine permit regulations. Initiative opponents are placed on the defensive and are forced to explain these regulations to the public. The axiom of politics that "when you are explaining, you are losing" is particularly apt in the environmental initiative context.

Initiative campaigns are typically well-advised to achieve the desired end. In the 1996 Montana campaign, a Washington initiative campaign organizer was hired and advised the environmental proponents to focus on a narrow subject, focus-group and poll-test their message, and present a public "face" that was moderate, caring, and commonsensical. Industry targets need to hire their own campaign, focus-group, and polling consultants to counter the initiative campaign's tested message. What industry players may think works with voters often does not. Think "jobs" is the key message? We learned in Montana that people worry about *their* jobs, not the jobs in the targeted industry.

Initiatives are on a fast-track that favors the proponents. The proponents have already conducted focus groups and polling on the initiative by the time the signature-gatherers hit the streets. The targeted industry group is typically focused on their business and not on politics. It takes time for the industry to organize to counter an initiative campaign. Industry communication with the public should be ongoing and not just during a campaign. And in a twenty-first century campaign, industry needs to be where the voters (and their opponents) are: Twitter, Facebook, and YouTube. Pay attention to industry opponents, do your homework, and prepare a defense to the anticipated initiative *before* an initiative campaign hits. Define yourself as part of the community before the opponents demonize you as a profit-seeking, polluting outsider.

It is also important for initiative opponents to litigate early and often. Be knowledgeable about your state's initiative law, and be prepared to act within a very short time frame to challenge the ballot title, signature collection, single subject requirement, and the proponents' compliance with the campaign finance laws. Holding back will not make voters like you—they are not paying attention yet—and showing restraint won't earn their "love." In addition, always prepare for the worst: a challenge to the enacted initiative in court. Although the Court did not address the substantive due process and Equal Protection claims in *Hollingsworth*, in an anti-fracking initiative, a mineral owner might bring a Fifth Amendment takings claim or an operator may argue a violation of due process.

Be certain to line up the best campaign experts you can as early as you can. Retain a campaign director, political consultants, media advisors, campaign practices lawyers and accountants with campaign experience. Work with your industry associations and grassroots supporters.

Always remember to expect the unexpected. Anticipate an "October Surprise"—that last-minute "charge" or disclosure to throw your campaign off-step. In Montana, the mining industry raised $3 million and ran a successful campaign to defeat the 1996 initiative. But another initiative supported by Common Cause and the League of Women Voters was passed in 1996 that prohibited the corporate funding of ballot issue campaigns. In 1998, one environmental group filed an anti-mining initiative modeled on the failed 1996 initiative and spent $8,000 for signature collection, and by the time the federal district court had invalidated the prohibition of corporate funding of initiatives, it was too late. A 52 percent majority banned any new gold and silver mining in Montana.

The *Hollingsworth* decision underscores the importance of protecting those groups that, for whatever reason, may be currently disliked by the majority. The motto of "protecting one's children" in the same-sex marriage debate is similar to the motto of "protecting one's environment" in the anti-fracking debate. Both sides of the debate want to protect children and the environment, making these slogans a nonissue. Yet, these slogans evoke such strong emotional responses that citizen initiative proponents proclaim them with gusto. The real issue, the appropriate level of regulation to protect the environment and develop domestic resources, is complicated and requires more than a sound bite to understand.

Hydraulic fracturing has begun delivering on the promise of abundant, affordable domestic energy. Domestic oil and gas development is an integral part of President Obama's "all of the above" energy policy. The oil and gas industry, like other resource industries, is often portrayed as a bad actor because development presents risks to human health and the environment. Normally we handle these risks through improved technology and reasonable regulation. The anti-fracking initiative process prefers the blunt instrument of a complete ban on modern oil and gas technology. We cannot afford to say "yes" to that.