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ARTICLE

REGULATING DEMOCRACY THROUGH  
DEMOCRACY:  
THE USE OF DIRECT LEGISLATION IN  
ELECTION LAW REFORM

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Perhaps more than any other political phenomenon, incumbents' capture of political institutions through the manipulation of the rules of the electoral game has commanded the attention of scholars of the law of democracy in recent years.<sup>1</sup> Of course, the phenomenon is not new, nor is scholarly or judicial preoccupation with it.<sup>2</sup> However, whether the subject is gerrymandering,<sup>3</sup> campaign finance reform,<sup>4</sup> ballot notations,<sup>5</sup> primary

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1. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard H. Pildes, *Forward: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 25 (2004).

2. See, e.g., *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 139–40 (1981).

3. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 594 (2002); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

4. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 286 (2003) (Scalia, J., dissenting).

5. See, e.g., Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533 (1999).

election rules,<sup>6</sup> ballot access,<sup>7</sup> or any number of other exertions of state power to organize and sculpt the legal environment for elections, the question recently has been: How can we develop institutions and constitutional rules that prevent those in charge from using their power to insulate themselves from competition?

For many, this has led to an espousal, if not glorification, of the institutions of direct democracy (the initiative, referendum, and recall) as critical and important safeguards against incumbent entrenchment.<sup>8</sup> Under this view, direct democracy allows for an end-run around incumbents, allowing the median voter in a jurisdiction to enact institutional reforms seen as against the interests of political insiders who have clogged up the “channels of political change.”<sup>9</sup> By allowing voters to redesign electoral rules, the initiative process has the potential to rein in dominant parties seeking to hobble their opponents and to control cartel behavior of incumbents that disadvantages outsiders. Of course, as many have observed, the initiative process is hardly a tool used exclusively or principally by the dispossessed or powerless. Insiders, too, can use this alternative means of policymaking to achieve their goals.<sup>10</sup> Nevertheless, while recognizing that the more and less powerful might exploit the tools of direct democracy, at least such alternative means of policy change remain an option for out-groups in the initiative states. Therefore, it might follow that certain types of laws—that is, those types of laws likely to be favored by voters and disliked by incumbents—should be more prevalent in such states where the initiative is an option. This Article attempts to test this hypothesis.

In particular, we hope to explore whether certain types of election regulation appear more often in initiative states than noninitiative states. In so doing, we attempt to build on the work of Caroline Tolbert, whose initial

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6. See, e.g., Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001); Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181 (2001); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y. U. L. REV. 750 (2001) [hereinafter *Defense of Autonomy*].

7. See, e.g., Issacharoff & Pildes, *supra* note 1; Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775 (2000).

8. See, e.g., Elizabeth Garrett, *New Issues in the Law of Democracy: Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239 (2004); Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415 (2004).

9. ELY, *supra* note 2, at 103.

10. See Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99 (1996). See also ELISABETH GERBER, ARTHUR LUPIA, MATHEW D. MCCUBBINS & D. RODERICK KIEWIET, *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* (2001).

efforts to answer this question predicted and found evidence that initiative states are more likely to pass certain “governance policies”—specifically, “procedural reforms that constrain the autonomy of state legislatures, change the ‘rules’ that state and elected officials must follow, and restructure political institutions.”<sup>11</sup> Similar to others who have tried to study this problem, however, we run into the problem of defining the scope of our project—worrying that an overly narrow approach could be written off as preoccupied with the politics of a specific issue, or that an overly broad approach glosses over greater variation among the loosely defined category of laws we analyze. Figuring that more is better than less and that our goal at this stage is as much to promote further research as it is to present our own interpretation of the data, we have opted for the mile-wide-inch-deep approach since we suspect that different readers will be interested in different types of reforms. We therefore attempted the daunting task of gathering data on as many election law reforms as possible. The reforms analyzed in this Article include term limits for both governor and state legislators, commission-based redistricting, public funding of campaigns, campaign contribution limits, primary election structures for state legislative elections and presidential nominations, women’s suffrage, state legislative malapportionment prior to *Baker v. Carr*,<sup>12</sup> and the installation of the direct primary.

Because we canvass a broad array of laws in this area, we necessarily arrived at some complicated conclusions. In Part I we present the aggregated data for each reform. The first task we set for ourselves was to discover whether certain types of election laws are more prevalent in states with direct democracy. Indeed, we find that some types of reforms, such as term limits, are more prevalent in initiative states, while most others, such as certain types of campaign finance regulation, are not. In the aggregate, we were struck by how similar—in general and at this rough level—initiative and noninitiative states were. However, we recognize that not all initiative states are created equal and that coarsely grouping the states based on an on-off toggle for presence or absence of the initiative fails to capture important differences between initiative states. In some states, the barriers to placing a measure on the ballot are very low and political actors use the initiative process quite frequently, while in many other states the initiative option is available but rarely used. We therefore modified Caroline Tolbert’s distinctions about

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11. Caroline J. Tolbert, *Changing Rules for State Legislatures: Direct Democracy and Governance Policies*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 171 (Shaun Bowler et al. eds., 1998).

12. *Baker v. Carr*, 369 U.S. 186 (1961).

general initiative usage<sup>13</sup> to characterize initiative states further as “frequent users,” “moderate users,” and “infrequent users,” but were once again surprised to find few differences among the states and measures we analyzed.

Because a simple frequency distribution depicting the prevalence of a particular reform does not explain how the state passed the law, we also considered whether the initiative states passed each of these reforms through the initiative process<sup>14</sup> or through normal legislative means. Here we find considerable variation among the laws we analyze. For the most part, however, we find that initiative states in fact pass many of these reforms through normal legislative means, rather than through the mechanisms of direct democracy.

Having surveyed the lay of the land, we turn in Part II to a more in-depth explanation of why initiative states may have adopted certain contemporary election law reforms. In particular, we try to answer the question whether some legislatures pass election reforms out of fear of a voter initiative on a similar subject or simply because the legislators themselves favor such a reform. Of course, each new reform—however passed in a given state—usually arises from a unique impetus in the populace or the legislature, or both. Some legislatures pass a law because of the threat of an initiative, others because it is in the dominant party’s self interest or the result of a legislative bargain, and still others because legislators genuinely believe that the election reform, like any law, is justified as good public policy. We have therefore attempted to comb through the available legislative histories and contemporaneous sources to get a sense for whether and when legislatures have reacted to the initiative threat. When the data are available, we also do our best to examine failed election law initiatives in order to discuss why certain reformist dogs did not bark even when given the chance.

In Part III we examine the following older election law controversies: the extent and history of malapportionment in states before *Baker*, the adoption of the direct primary, and the enfranchisement of women. Adoption of the institutions of direct democracy sometimes coincided with the adoption of several of these structural reforms, and at other times preceded them.

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13. See Tolbert, *supra* note 11, at 180–81. We used the same principle—the average number of measures appearing on a ballot in a certain state divided by the number of years that the state has had the initiative process—and modified it to accommodate reforms isolated in certain decades. These include the usage measures for women’s suffrage and the direct primary measure usage through 1920. The measure for pre-*Baker v. Carr* apportionment calculates usage through 1960; calculations for all other reforms, as they are relatively contemporary or span a large period of time, reflect usage through 2000. See *infra* Part I.

14. Ballot initiatives in this study include only those sponsored by citizens or citizen groups; measures sponsored by legislatures or government organizations are excluded.

Together they constituted components of a Progressive vision of institutional change that sought to transfer power from captured legislatures and corrupt party machines to the people.

In Part IV we present our conclusions. Throughout this Article we explore the hypothesis that reforms disliked by legislators as a class are more likely to be passed in initiative states. The voters may go around their elected representatives to pass such anti-incumbent laws or legislators might attempt to take the wind out of the sails of an initiative effort by passing a similar law. We recognize, however, that not all election reforms threaten legislators equally and in some cases a seemingly anti-incumbent reform, when passed by the legislature or placed by a legislator on the ballot, takes a form that promotes, rather than threatens, incumbents' interests. Some readers therefore may find the anecdotal evidence that we present here to be more valuable than the aggregate findings, insofar as it conveys the general theme that the presence of the initiative process might make some reforms more likely.

We must be clear at the outset, however, that we do not develop a model to explain why states adopt certain election reforms. This Article merely notes correlations (or lack thereof) between the presence or use of the initiative and the passage of certain reforms. We are well aware that a host of political and institutional factors largely unexplored here play into the process of passing such reforms, whether through the legislature or at the ballot box. Moreover, we recognize that initiative states vary considerably with respect to the ease with which a voter can place something on the ballot and the likelihood that interest groups or individuals will want to use the initiative process to further their political goals. Similarly, each of the election law reforms we explore represents a rough grouping of laws that vary with respect to the severity of their intrusion on elections. Except for our discussions of campaign finance and pre-*Baker* redistricting, we identify here the presence or absence of a reform (such as term limits) without examining the nature of the reform (such as how severe the term limits restriction is) or the reasons the sponsors placed the measure on the ballot or even who those sponsors were. We also do not investigate, in any systematic way, instances in which courts strike down election reform initiatives or legislatures hijack initiatives by amending them after the fact.<sup>15</sup> These constitute serious drawbacks, which we hope subsequent research will remedy. That being said, we think much can be gained even from the rough cut of the data we present here—whether or not it proves or disproves any particular hypothesis—if for no other reason than that we have discovered trends in the data that we did not originally expect.

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15. See generally GERBER ET AL., *supra* note 10.

FIGURE A. Reform measures achieved by availability of initiative process

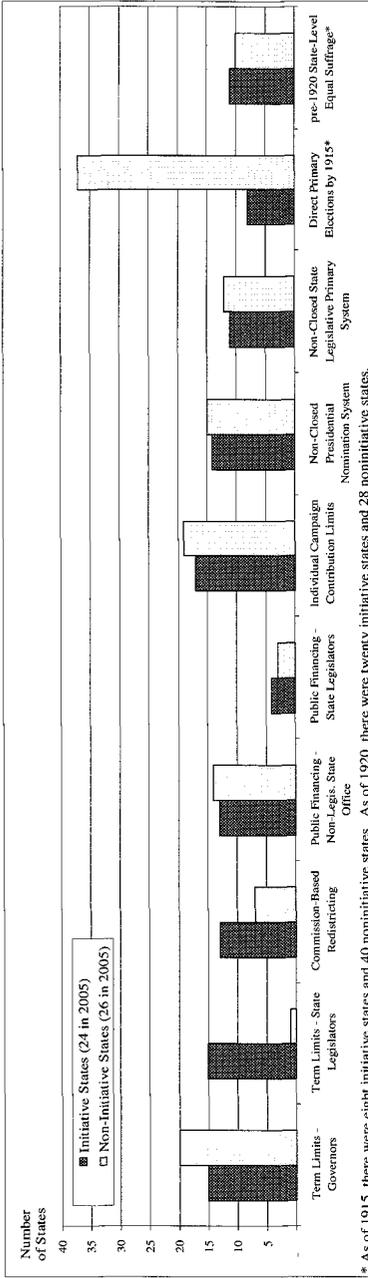


FIGURE B. Initiative states only: number of reform measures achieved by usage of the initiative process

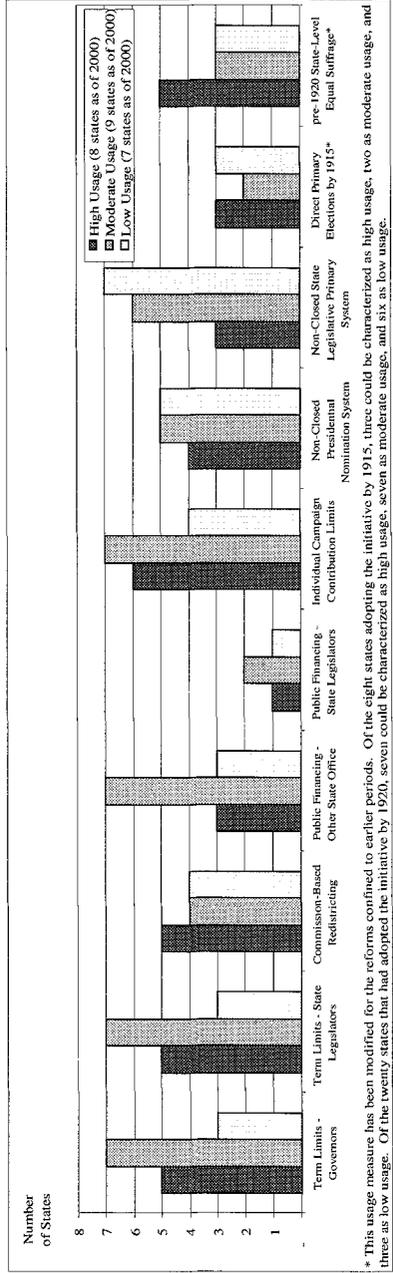


FIGURE C. Among states with the initiative process: mechanism used to achieve reform

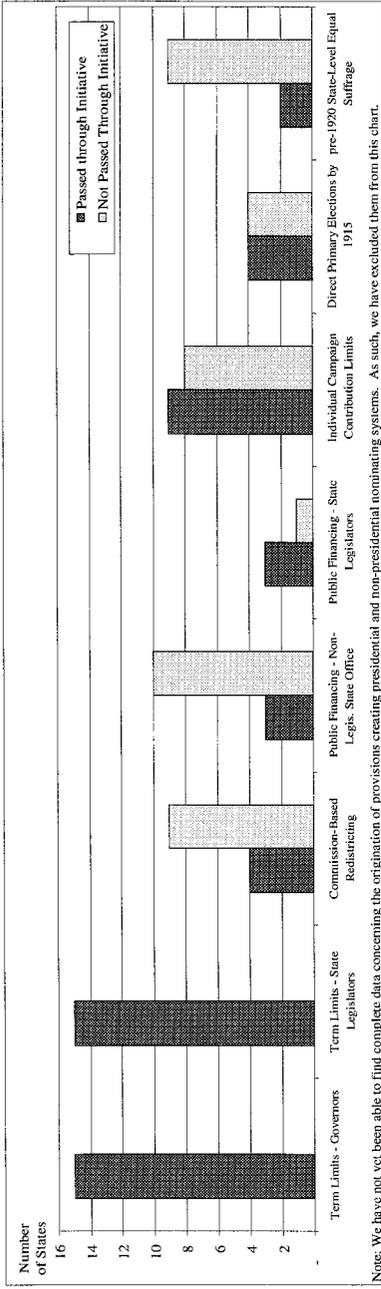
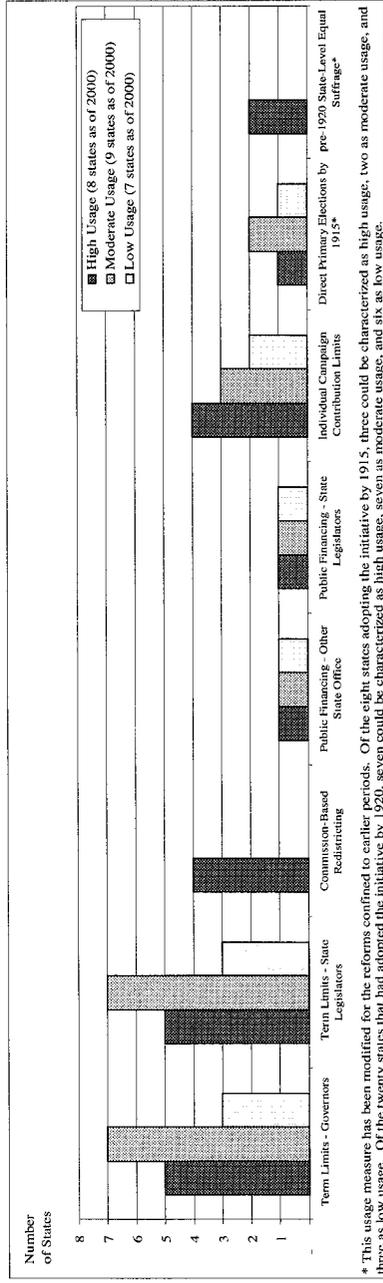


FIGURE D. Initiative states only: number of states using the initiative process for reform



## I. DO INITIATIVE STATES HAVE DIFFERENT ELECTION LAW REGIMES?

Figure A displays the frequency distribution for certain election laws in initiative and noninitiative states. As mentioned above, we examine the following election reforms: term limits affecting governors and state legislators, commission-based redistricting, public funding of campaigns, campaign contribution limits, primary election structures for state legislative elections and presidential nominations, pre-*Baker v. Carr* redistricting, and adoption of women's suffrage. There is considerable variation among the laws we cover in terms of whether differences exist between these categories of states. While there are a handful of policies that initiative states have adopted more often, most such reforms appear with relatively equal frequency in initiative and noninitiative states. Only legislative term limits and commission-based redistricting seem to be much more prevalent in initiative states than in noninitiative states. For most of the other reforms, there appear to be no significant differences with respect to the frequency of a certain law between the two categories of states, and for two reforms—nonlegislative term limits and pre-1920 women's suffrage—a greater share of noninitiative states appear to have adopted the given reform.

We make a further distinction among initiative states by the frequency of initiative use, as shown in Figure B. This distinction is important because the institutional parameters regulating the use of the initiative process in each state vary widely and can significantly affect the success of initiative campaigns. Thus, we might expect that, to the extent the initiative process is related to election law reform, states with higher initiative use, for whatever reason (such as a progressive culture or loose institutional parameters) might be more likely to adopt election law reforms. As the states are relatively evenly distributed among the three categories—high usage, moderate usage, and low usage<sup>16</sup>—the absolute numbers used above in Figure B are instructive. While in many cases, such as term limits, campaign contribution limits, and pre-1920 women's suffrage, higher initiative usage characterizes the states that have enacted reforms, we do not observe any strong systematic patterns.

In order to establish whether the presence of the initiative process affects the likelihood that a state will adopt a particular reform, it would be helpful (though not necessarily revealing) to know whether initiative states passed

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16. Of the twenty-four states that currently have the initiative process, Tolbert has identified eight as "high" users, nine as "moderate" users, and seven as "low" users. See Tolbert, *supra* note 11, at 180–81.

these election reforms through the initiative process or through legislative action. As presented in Figure C, here we find even greater variation among the laws in our study; some provisions more than others appear particularly likely to be passed by initiative. Initiative states have passed legislative term limits only through the initiative process, for example, whereas all public funding programs for nonlegislative elections and most efforts to establish equal suffrage for women and commission-based redistricting were passed through normal legislative means.

This tendency to pass election reform through the initiative process might not be uniform among initiative states, however. In other words, perhaps some initiative states, because of history, culture, or the strategies accepted and perfected by parties and interest groups, are more likely to use the initiative process for election reform. As Figure D indicates, we find limited support for that proposition. Those states with high or moderate usage of the initiative process were somewhat more likely than low usage states to use that process to pass election reforms, but the differences between the states are not dramatic.

## II. CONTEMPORARY CASE STUDIES

### A. TERM LIMITS

Of the laws that we analyze, legislative term limits represent the most severe intrusion on the interests of individual legislators.<sup>17</sup> We might expect initiative states to be more likely to pass such limits, given that legislators in noninitiative states would generally be unwilling to curtail their career options. In fact, as existing research has documented, with the exception of one state, state legislative term limits exist only in states whose voters have the initiative process available to them.<sup>18</sup> Moreover, in those states the initiative process has been the only successful avenue for reform.

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17. See *id.* at 177.

18. See U.S. Term Limits, *State Legislative Term Limits*, at [http://www.termlimits.org/Current\\_Info/State\\_TL/index.html](http://www.termlimits.org/Current_Info/State_TL/index.html) (last visited Apr. 28, 2005).

TABLE 1. States imposing term limits on state legislators

<u>Status of Initiative</u>	<u>Term Limits on Legislators</u>			<u>Among Initiative States, How Achieved?</u>			
	<u>Yes</u>	<u>No</u>	<u>Total</u>	<u>Initiative Process</u>	<u>Legislative Action</u>	<u>Existed in Constitution</u>	<u>% through Initiative</u>
<b>Initiative States</b>							
<i>Frequent Users</i>	5	3	8	5	-	-	100%
<i>Moderate Users</i>	7	2	9	7	-	-	100%
<i>Infrequent Users</i>	3	4	7	3	-	-	100%
<b>Total Initiative States</b>	<b>15</b>	<b>9</b>	<b>24</b>	<b>15</b>	<b>-</b>	<b>-</b>	<b>100%</b>
<b>Noninitiative States</b>							
	1	25	26	-	1	-	
<b>Total</b>	<b>16</b>	<b>34</b>	<b>50</b>				

In Louisiana, one of two states with a legislature that adopted such limits (as discussed shortly, Utah adopted and then repealed its limits), strong public agitation for the reform prompted state legislators in 1995 to approve a state constitutional amendment to limit its own terms.<sup>19</sup> Several legislators asserted that the public's support for the measure inspired the bill: "I think term limits are not the way to go, but I felt after due consideration that people in this state and in the country are looking for term limits and I should give them a chance to vote on it."<sup>20</sup> Later that year, voters approved the amendment in a referendum by a margin of greater than three to one.<sup>21</sup>

Although the legislature approved the constitutional amendment that it sent to the voters, it protected itself somewhat by declining to pass limits that would take effect in the ensuing few years. Ultimately, the provision in Louisiana, compared to all states with legislative limits, will have seen the most years pass before it takes effect in 2007. Apart from Louisiana's adoption of term limits through the legislative process, which was spurred by both the success of the national movement and state level public sentiment in favor of reform, the overwhelming message from the legislative term limits movement is that it was successful because of the availability and use of the direct initiative. Indeed, we should emphasize the uniqueness of the legislative term limits movement that swept through initiative states in the late 1980s and early 1990s. Although one might consider term limits to be the

19. See *Statewide Constitutional Amendments*, NEW ORLEANS TIMES-PICAYUNE, Oct. 23, 1995, at A4. See also Ed Anderson & Pamela Coyle, *Term Limits for Louisiana Now up to the Voters*, NEW ORLEANS TIMES-PICAYUNE, June 15, 1995, at A1; Marsha Shuler, *Term Limits Movement in the Louisiana Legislature*, BATON ROUGE ADVOC., Nov. 18, 1994, at 9B.

20. Anderson & Coyle, *supra* note 19 (quoting former state Senate President Samuel Nunez).

21. See La. Sec'y of State, *Results for Election Date 10/21/95*, at <http://www.sos.louisiana.gov:8090/cgibin/?rqstyp=elcms4&rqsdta=102195> (last visited Apr. 28, 2005).

paradigmatic case of a citizen-favored, legislator-opposed measure ripe for passage through the initiative process, the presence of a unique, well-funded, ideologically motivated movement, as well as a desire to use the initiative process, distinguish term limits from the other reforms we analyze.

As a point of comparison, we have also investigated the adoption of gubernatorial term limits laws. While many gubernatorial term limits provisions exist in state constitutions and date back to the 1800s, other states passed them during a less concentrated reform movement that spanned the second half of the twentieth century. As the table below shows, thirty-five states currently have laws restricting the number of terms their governors can serve. Of these, more than half (twenty) exist in states in which the initiative process is not available or was not available at the time term limits were adopted.<sup>22</sup> Among the states that have gubernatorial term limits that also have the initiative process, only one state (Utah) achieved them through the legislative process, but its legislature later repealed them. The remaining fifteen, or 94%, used the initiative to install term limits, as shown on the left side of Table 2.

TABLE 2. States imposing term limits on governors

<u>Status of Initiative</u>	<u>Term Limits on Governors</u>			<u>Among Initiative States, How Achieved?</u>			
	<u>Yes</u>	<u>No</u>	<u>Total</u>	<u>Initiative Process</u>	<u>Legislative Action</u>	<u>Existed in Constitution</u>	<u>% through Initiative</u>
<b>Initiative States</b>							
<i>Frequent Users</i>	5	3	8	5	-	-	100%
<i>Moderate Users</i>	7	2	9	7	-	-	100%
<i>Infrequent Users</i>	3	4	7	3	-	-	100%
<b>Total Initiative States</b>	<b>15</b>	<b>9</b>	<b>24</b>	<b>15</b>	<b>-</b>	<b>-</b>	<b>100%</b>
<b>Noninitiative States</b>	<b>20</b>	<b>6</b>	<b>26</b>	<b>-</b>	<b>11</b>	<b>9</b>	
<b>Total</b>	<b>35</b>	<b>15</b>	<b>50</b>				

Even in Utah, the legislature passed the statutory term limits measure, which applied to both legislators and governors, while a strong grassroots movement was underway. The sponsor noted that the measure was “absolutely ridiculous,” but then “conceded it was better than limitations imposed by grass-roots petitions now circulating among voters.”<sup>23</sup> The

22. Two states, Missouri and Mississippi, adopted gubernatorial term limits with their original constitutions and then subsequently adopted the initiative process. See U.S. Term Limits, *State Gubernatorial Term Limits*, at [http://www.termlimits.org/Current\\_Info/State\\_TL/gubernatorial.html](http://www.termlimits.org/Current_Info/State_TL/gubernatorial.html) (last visited Apr. 28, 2005).

23. Dan Harrie & Tony Semerad, *Ethics-Reform Bills Buried in Utah's Legislative Grave*, SALT LAKE TRIB., Mar. 3, 1994, at A1 (quoting state Senator Lane Beattie).

indirect pressure of the initiative process, then, was sufficient to spur the legislature to action. When it did, the grassroots movement died away, and a competing measure that appeared on the ballot later that year failed. The legislature had the last laugh the following year: in March of 2003, it repealed the law.

In contrast, legislatures in many states without the initiative, as shown at the bottom of Table 2, were the vehicle for gubernatorial term limits. Of the twenty states that have term limits on governors established without the availability of the initiative process, nine of them came with the adoption of the state constitution. In the remaining eleven states, gubernatorial term limits were enacted through constitutional amendments.<sup>24</sup>

The comparison of legislative and gubernatorial term limits laws highlights the central position of the legislature as the potential choke point for election reform legislation. Whereas several legislatures have been willing to limit the terms of the governor, only one has subjected its own members to term limits. Moreover, the term limits movement is unique in its exploitation of the initiative process. With only one exception, the initiative states that have term limits for either the governor or state legislature got them through the initiative process. The presence of the initiative process, by itself, however, is insufficient to *cause* a state to pass term limits. Although fifteen initiative states have adopted term limits, nine have not. As will become clear, though, term limits exist at the far end of the spectrum. For no other reform is the importance of the initiative and the recalcitrance of state legislators so clear.

#### B. COMMISSION-BASED REDISTRICTING FOR STATE LEGISLATURES

In an effort to promote competition and the election of moderate representatives, Governor Arnold Schwarzenegger has threatened to place an initiative on the California ballot that would transfer authority over the redistricting process from the legislature to a commission composed of retired judges.<sup>25</sup> This move, as well as the widespread frustration in many states (let alone among law professors<sup>26</sup>) concerning low levels of competition for Congress and state legislatures, has reinvigorated interest in creating institutions dedicated to removing incumbent protection and partisan greed as the principal motivations behind the redistricting process. Insofar as unchecked redistricting power allows dominant legislative parties or cartels of

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24. See U.S. Term Limits, *supra* note 22.

25. See David S. Broder, *Crossing Lines in California*, WASH. POST, Mar. 31, 2005, at A19.

26. See, e.g., Issacharoff, *supra* note 8; Issacharoff, *supra* note 3.

legislators to act in ways contrary to voters' perceived interests,<sup>27</sup> we might expect initiative states to be more likely to pass redistricting reform. We therefore examined which states have transferred power over the redistricting process from the legislature to a commission of some sort. Of course, we recognize that commissions come in many forms—some are the primary means of redistricting, others exist merely as a backup in case the legislature fails to pass a plan, and in still other states the commission's plan is merely advisory.<sup>28</sup> Moreover, we also recognize that in some states, depending on how the members of a redistricting commission are appointed, commissions might constitute mere proxies for the dominant party of a legislature or for a bipartisan cartel.<sup>29</sup>

With these caveats in mind, we still might expect initiative states to attempt to increase the distance between line-drawers and those whose careers their efforts would most likely affect. In other words, insofar as the normal process of legislation gives legislators the greatest potential control over the redistricting process (not an uncontested claim to be sure), we would expect greater variation with respect to the institutions in control of redistricting in initiative states. Indeed, as Table 3 indicates, we find a relationship suggesting just that.

Redistricting commissions, used in some capacity in twenty states, are almost twice as common in states that have either the constitutional or statutory initiative process than in those that do not. In particular, nine of the twelve states that use commissions as the primary institution for redistricting are initiative states. As Table 4 indicates, however, most laws transferring power over redistricting to commissions were not passed (or even pursued) through the initiative process among initiative states: legislatures in six of the nine initiative states that use commissions voted to cede their redistricting authority. With that said, all four states that have used the initiative process to institute commission-based redistricting are high-usage states.

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27. See Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 543 (1994) ("Any good politician knows the consequences of letting the opposition party draw the district boundaries . . . on average, redistricting favors the party that draws the lines more than if the other party were to draw the lines.").

28. Distinctions among categories of redistricting commissions have been difficult to make. Commissions in states such as Iowa, for example, can be overruled by the legislature, although the commission still retains control over the submission of subsequent plans. For the purposes of this section, we have used the distinctions adhered to by the National Council of State Legislatures.

29. See generally Persily, *supra* note 3, at 674–75.

TABLE 3. States using redistricting commissions for legislative redistricting

Status of Initiative	Use Commission?		Total	If Yes, Type of Commission?			
	Yes	None		Primary	Advisory	Backup	Total
<b>Initiative States</b>							
<i>Frequent Users</i>	5	3	8	4	-	1	5
<i>Moderate Users</i>	4	5	9	4	-	-	4
<i>Infrequent Users</i>	4	3	7	1	1	2	4
<b>Total Initiative States</b>	<b>13</b>	<b>11</b>	<b>24</b>	<b>9</b>	<b>1</b>	<b>3</b>	<b>13</b>
<b>Noninitiative States</b>							
	7	19	26	3	2	2	7
<b>Total</b>	<b>20</b>	<b>30</b>	<b>50</b>	<b>12</b>	<b>3</b>	<b>5</b>	<b>20</b>

TABLE 4. How states with the initiative process adopted redistricting commissions

Status of Initiative	Primary		Advisory/Backup		Total			
	Init.	Not Init.	Init.	Not Init.	Init.	Not Init.		
<b>Initiative States</b>								
<i>Frequent Users</i>		3	1	1	-	4	1	80%
<i>Moderate Users</i>		-	4	-	-	-	4	0%
<i>Infrequent Users</i>		-	1	-	3	-	4	0%
<b>Total Initiative States</b>		<b>3</b>	<b>6</b>	<b>1</b>	<b>3</b>	<b>4</b>	<b>9</b>	<b>31%</b>

Only four states, Arkansas in 1936, Oklahoma in 1962, Colorado in 1974, and Arizona in 2000, were successful in transferring control over redistricting to authorities through direct constitutional initiatives; three other states, Oklahoma in 1960, North Dakota in 1973, and California in 1990, attempted to install redistricting commissions through the initiative process and failed.<sup>30</sup> In the remaining seventeen states that use commissions, ten of which are initiative states, legislative action established them. Even though states with the initiative process are more likely to have commissions, in most cases they did not get them through the initiative process.

What prompted legislatures in states such as Missouri, Arkansas, Washington, and Ohio—all of which have the initiative process and also use commissions as the primary agent for redistricting—to cede control over the state legislative redistricting process? Washington's adoption of the independent commission, we suspect, was prompted by a combination of a tradition of progressivism and the threat offered by the initiative. In 1981, the

30. See Initiative and Referendum Inst., Univ. of S. Cal., *Statewide Initiatives Since 1904–2000*, at <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/State%20wide%20Initiatives%201904-2000.pdf> (last visited Apr. 28, 2005).

state legislature experienced considerable difficulty with the congressional reapportionment process as the governor vetoed the legislature's first plan and a federal court panel invalidated the second, spurring intense partisan bickering over the ensuing few years as the legislature struggled to create a new map. At the same time, while the state legislature approved its plan for its own districts with relative ease, minority Democrats' complaint of partisan gerrymandering coincided with a citizens' group's filing of an initiative to require an independent commission to redistrict state legislative boundaries.<sup>31</sup> The following year, a competing amendment emerged from the state legislature that transferred authority of all redistricting, congressional and legislative, to an independent commission. The voters approved the measure in the fall of 1983.<sup>32</sup> In Washington, at least, the legislators seemed willing to relinquish control over an onerous, knotty process, particularly when they could preempt a competing measure emerging from the public. For other states, the putative transfer of authority to a commission merely masked the fact that partisans could still dictate who would sit on such commissions and how they would behave once there.

### C. CAMPAIGN FINANCE REFORM

In the jurisprudence and scholarship concerning campaign finance reform, a healthy debate exists over whether certain types of reform favor incumbents. Because challengers to incumbents are often poorly funded and incumbents already enter a race with name recognition that only money could otherwise buy, reformers often seek measures with the intention of equalizing the electoral playing field. We examine here two types of campaign finance reform: public funding and contribution limits. Proponents of public funding (usually accompanied by spending limits) often see it as a way of closing the spending gap between incumbents and challengers, and advocates of contribution limits often hope that doing so will curtail the fundraising advantages of incumbents. On the other hand, opponents of such reforms also worry that any limits on campaign funding activity necessarily help incumbents because challengers need all the money they can get in order to compete with the natural advantages that all incumbents share.

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31. See Richard W. Larson, *Spellman Vetoes, Signs Parts of Redistricting Plan*, SEATTLE TIMES, May 18, 1981, available at [http://www.secstate.wa.gov/oralhistory/redistricting2/1980s/1981/1981-Spellman\\_vetoes\\_signs\\_parts\\_of\\_redistricting\\_plan-5a-4.pdf](http://www.secstate.wa.gov/oralhistory/redistricting2/1980s/1981/1981-Spellman_vetoes_signs_parts_of_redistricting_plan-5a-4.pdf).

32. See Wash. State Redistricting Comm'n, *Overview*, at <http://www.redistricting.wa.gov> (last visited Apr. 28, 2005). See also Wash. Sec'y of State, *The 1980s: 1982 Court Cases*, at [http://www.secstate.wa.gov/oralhistory/redistricting2/1980s/1982/1982\\_courtCases.aspx](http://www.secstate.wa.gov/oralhistory/redistricting2/1980s/1982/1982_courtCases.aspx) (last visited Apr. 28, 2005).

By analyzing the frequency of certain reforms in initiative and noninitiative states we had hoped to shed light on this controversy. Perhaps if only initiative states passed such reforms we might conclude that they were, by nature, anti-incumbent or procompetition. Given that these two groupings of states do not appear to differ in any systematic way with respect to campaign finance reform, we cannot add much to the underlying debate. Anecdotes from particular states suggest, however, that the presence of the initiative option often leads to the enactment of campaign finance reforms that incumbents specifically disfavor.

### 1. Public Financing

Laws that provide public financing to candidates for elected office exist in twenty-seven states<sup>33</sup> and vary considerably in form. Differences in the amount of money provided, the source of that money, how and when it is distributed, and how a candidate or party qualifies for it make any systematic evaluation of these laws somewhat challenging. When adopted, public financing laws were expected to facilitate quality challenges to entrenched incumbents by equalizing the availability of funds for challengers' campaigns. In retrospect, there is not much evidence that this has been the case; research suggests that public financing is irrelevant to the outcome of state legislative elections<sup>34</sup> except when the funds available are particularly high,<sup>35</sup> and some scholars even assert that the availability of public funds, while narrowing the spending gap, has neither increased the competitiveness of elections or the number of challengers that choose to run.<sup>36</sup>

Although the evidence concerning the effect of public funding on competition is, at best, mixed, legislators might not support such programs for several reasons even if they do not feel threatened by publicly funded challengers. Aside from the obvious possibility that they might be against such schemes in principle, they also simply might not want to change the campaign finance rules under which they have heretofore successfully run. Moreover, even if they do favor such schemes, they might sense some electoral fallout from advocating for them. In other words, legislators might

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33. See Benjamin Wyatt, *Origins of State Public Financing of Elections: A Comprehensive Database of State Public Financing Systems addendum 1* (2002) (unpublished B.A. thesis, Wesleyan University), at <http://www.octobernight.com/bwyatt/add1.htm> (last visited Apr. 29, 2005).

34. See generally HERBERT E. ALEXANDER, *REFORM AND REALITY: THE FINANCING OF STATE AND LOCAL CAMPAIGNS* (1991).

35. See Patrick D. Donnay & Graham P. Ramsden, *Public Financing of Legislative Elections: Lessons from Minnesota*, 20 LEGIS. STUD. Q. 351, 361 (1995).

36. Kenneth R. Mayer & John M. Wood, *The Impact of Public Financing on Electoral Competitiveness: Evidence from Wisconsin, 1964-1990*, 20 LEGIS. STUD. Q. 69, 69-88 (1995).

not want to be on record as advocating for the use of public money to subsidize their own campaigns. Public funding might be one of those potentially controversial issues where legislators see it as in their interest to pass the buck to voters to let them decide whether tax dollars should go to the candidates' campaigns.

As mentioned above and depicted in Table 5, public financing laws of some kind exist in twenty-seven states.<sup>37</sup> State-level public funding programs, for the purposes of this analysis, include both full public financing of candidate campaigns and also simple grants to political parties. Thirteen of those twenty-seven states have such simple grant programs, while seven have laws that specifically fund state legislative races. There is little difference between initiative and noninitiative states with respect to their propensity to pass public financing reforms in any form. However, initiative states tended to use the initiative process to pass state legislative public funding programs but not public funding programs for other offices. Three of the four initiative states that publicly fund state legislative campaigns passed such programs through the initiative, but all of the nine initiative states that use public funding for other offices passed such programs through the legislature.

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37. See Wyatt, *supra* note 33.

TABLE 5. Public funding provisions for statewide and legislative campaigns<sup>38</sup>

	Public Financing: All Programs*				
	Yes	No	Total	How Passed?	
				Initiative	Not Init.
<b>Initiative States</b>					
<i>Frequent Users</i>	3	5	8 38%	1	2
<i>Moderate Users</i>	7	2	9 78%	1	6
<i>Infrequent Users</i>	3	4	7 43%	1	2
<b>Total Initiative States</b>	<b>13</b>	<b>11</b>	<b>24 54%</b>	<b>3</b>	<b>10</b>
<b>Noninitiative States</b>	<b>14</b>	<b>12</b>	<b>26 54%</b>		
<b>Total</b>	<b>27</b>	<b>23</b>	<b>50 54%</b>		
	Public Financing Programs Affecting State Legislative Candidates				
	Yes	No	Total	How Passed?	
				Initiative	Not Init.
<b>Initiative States</b>					
<i>Frequent Users</i>	1	7	8 13%	1	-
<i>Moderate Users</i>	2	7	9 22%	1	1
<i>Infrequent Users</i>	1	6	7 14%	1	-
<b>Total Initiative States</b>	<b>4</b>	<b>20</b>	<b>24 17%</b>	<b>3</b>	<b>1</b>
<b>Noninitiative States</b>	<b>3</b>	<b>23</b>	<b>26 12%</b>		
<b>Total</b>	<b>7</b>	<b>43</b>	<b>50 14%</b>		

\* The top half of the table identifies all public funding programs, including those that apply to state legislative candidates. The bottom half isolates only those programs that apply to state legislative candidates.

Perhaps, for one or another reason noted above, legislators do not want to subsidize their own campaigns but are willing to vote for public funding of campaigns for other offices. Maybe legislators view the political risks—either from the standpoint of public opinion or from the perceived help it would give potential challengers—as too great when their own offices are at stake, but not too great when another's office is. Twenty-seven states have public funding programs, but only seven of them apply to state legislators. While legislators in twenty-three states (fourteen noninitiative states and nine initiative states) were willing to pass public financing for other offices, they seem, at least on the surface, to be less willing to do so for their own

38. The data in the table include "simple grant" public financing programs. Three of the six initiative states (Arizona, Maine, and Massachusetts) that have public financing provisions for state legislative candidates gained them by moving from a simple grant program to a full program through the initiative process in the decades after the program was initially passed.

campaigns. We should not make too much of this potentially spurious finding, however, especially since three legislatures in noninitiative states, indeed, were willing to pass schemes to fund their own campaigns. The most that can be said, we think, is that the data at this rough level do not indicate that the initiative process is either necessary or sufficient for the passage of public funding.

## 2. Contribution Limits

Contribution limits exist as probably the most popular form of campaign finance reform, as well as perhaps the easiest to understand. The potential forms of a contribution limit, however, are as varied as the tactics used to evade them. States may ban or place various types of limits on contributions from different entities, such as individuals, political action committees, political parties, corporations, unions, and out-of-state citizens. Like public financing laws, limits on campaign contributions vary extensively in type, amount, and parameters for enforcement. We concentrate here on the presence or absence of limits on individual contributions to candidate campaigns. For the purposes of this study, we were particularly interested in the propensity of legislatures or voters to adopt such limits and the relative severity of contribution limits for initiative and noninitiative states. As Table 6 demonstrates, limits on contributions to state legislative campaigns exist nearly equally in initiative states and noninitiative states. Moreover, among the states with contribution limits in which the initiative process exists, just over half were introduced using the initiative process.<sup>39</sup>

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39. The average limits recorded in this chart are derived from Federal Election Commission data and refer to limits on individual contributions to candidates for state legislative offices in a given year. To the extent that the state law distinguishes between general and primary elections, these limits apply to general elections. To the extent that the state law distinguishes between election years and nonelection years, these limits apply to election years. These data do not take into account further restrictions by election cycle on aggregate individual contribution limits. The entry for Rhode Island, which has less restrictive limits for candidates qualified to receive public funding, assumes the candidate has not qualified for public funding. The entry for New Hampshire, which has less restrictive limits for candidates who voluntarily limit their expenditures, assumes the candidate has not voluntarily agreed to limit expenditures. See EDWARD D. FEIGENBAUM & JAMES A. PALMER, *FEDERAL ELECTION COMM'N, CAMPAIGN FINANCE LAW 2002: A SUMMARY OF STATE CAMPAIGN FINANCE LAWS WITH QUICK REFERENCE CHARTS* chart 2-A (2002) (compiling state laws regulating campaign contributions), available at <http://www.fec.gov/pubrec/cfl/cfl02/cfl02chart2a.htm>.

TABLE 6. Limits on individual contributions to candidates for state legislative offices

	Limits Exist?			%
	Yes	No	Total	
<b>Initiative States</b>				
<i>Frequent Users</i>	6	2	8	75%
<i>Moderate Users</i>	7	1	8	88%
<i>Infrequent Users</i>	4	4	8	50%
<b>Total Initiative States</b>	<b>17</b>	<b>7</b>	<b>24</b>	<b>71%</b>
<b>Noninitiative States</b>	<b>19</b>	<b>7</b>	<b>26</b>	<b>73%</b>
<b>Total</b>	<b>36</b>	<b>14</b>	<b>50</b>	

	Contribution Limits: How Passed?			
	Initiative	Legis.	Total	% Init.
<b>Initiative States</b>				
<i>Frequent Users</i>	4	2	6	67%
<i>Moderate Users</i>	3	4	7	43%
<i>Infrequent Users</i>	2	2	4	50%
<b>Total Initiative States</b>	<b>9</b>	<b>8</b>	<b>17</b>	<b>53%</b>

	Average Limits, by Office			
	Assem.	Senate		
<b>Initiative States</b>				
<i>Frequent Users</i>	\$ 1,149	\$ 1,411		
<i>Moderate Users</i>	\$ 693	\$ 764		
<i>Infrequent Users</i>	\$ 2,450	\$ 2,450		
<b>Total Initiative States</b>	<b>\$ 1,333</b>	<b>\$ 1,448</b>		
<b>Noninitiative States</b>	<b>\$ 1,442</b>	<b>\$ 1,883</b>		
<b>Total</b>	<b>\$ 1,498</b>	<b>\$ 1,721</b>		
<i>Difference</i>	\$ (109)	-8%	\$ (435)	-23%

If we want to get a better grasp on the effect of the initiative process on the likelihood of passage of contribution limits in general, or low limits in particular, we need to know more about the types of limits passed and the political struggles (if any) that led to their passage. We do not engage in a

systematic analysis here, except to point out in Table 6 the data comparing the average severity of contribution limits for state legislators in the initiative and noninitiative states that have adopted contribution limits. On average, initiative states have set lower contribution limits than noninitiative states: about \$400 (23%) lower for contributions to races for a state's lower house and about \$100 (8%) lower for state senate races. Of course, this relationship might be spurious, or attributable to factors such as the size of a state's population or economy, and we cannot say that the presence of the initiative process itself *caused* these differences. Moreover, we have not yet found a dataset that explains which limits were passed by initiative, so we cannot test our strong intuition that the average initiative is probably more restrictive than the average piece of campaign finance reform legislation.

Beyond the summary statistics though, we are awash in anecdotal evidence suggesting that the presence of the initiative in particular states was essential to the passage of contribution limits. In some cases voters rallied behind and passed initiatives seeking to change the permissive limits the legislature established. In others, legislators bowed to pressure from a threatened initiative. In still others, the legislature voted to raise limits set by a previous initiative. Here are just a few examples:<sup>40</sup>

- Massachusetts: In 1990, the legislature enacted a \$500 contribution limit, but only after citizens had gathered signatures for a ballot question.
- Missouri: In 1994, citizens gathered signatures for a measure to set a \$100 contribution limit for legislative races. In an attempt to head off the initiative, the legislature passed a \$250 contribution limit. The initiative was placed on the ballot anyway and passed. The Eighth Circuit rejected those \$100 limits, so the legislative limits of \$250 went into effect, which adjusted for inflation amounted to \$275, but the court voided those limits too. The Supreme Court then reviewed the limits set by the initiative and reinstated them in *Nixon v. Shrink Missouri Government PAC*.<sup>41</sup>
- Oregon: In 1994, voters passed an initiative to set a \$100 limit on legislative races, which the Oregon courts later threw out under the state constitution. Citizens have filed (but not yet qualified) a constitutional amendment to allow for contribution limits for the 2006 ballot.

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40. We are indebted to Derek Cressman, Director of [www.therestofus.org](http://www.therestofus.org), for these examples.

41. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

- Montana: In 1994, citizens passed an initiative to set a \$100 limit for contributions to legislative candidates. Despite several attempts, the legislature has not successfully increased this limit.
- California: A 1996 initiative established a \$500 contribution limit for the state legislature and \$1000 limit for statewide office. A 2000 legislatively referred ballot measure repealed Proposition 208 and established much higher limits (\$3000 for the legislature, \$20,000 for governor).
- Colorado: A 1996 initiative set a contribution limit of \$100 for legislative races and \$500 for governor. The legislature then raised the limits to \$1000 per two-year cycle for the House, \$1500 for the Senate, and \$5000 for governor in 2000. In 2002, voters went back and by initiative passed a constitutional amendment setting a limit of \$200 per election for legislative races and \$500 per election for statewide races.
- Alaska: The legislature passed a law for a \$500 legislative contribution limit in 1996 only after citizens gathered 30,000 signatures and threatened to qualify an initiative that would have set lower limits. In 2003, the legislature doubled this contribution limit. In 2004, citizens submitted 36,000 signatures to qualify an initiative for the 2006 ballot to take them back down to \$500.
- Arkansas: In 1996, voters approved an initiative to lower the contribution limit from \$1000 to \$100 for legislative races, but the courts later struck the law down.
- Ohio: In late 2004, the Ohio legislature passed a law to increase its contribution limit from \$2500 to \$10,000. Citizens are threatening a referendum to repeal this law.

These examples illustrate the direct and indirect effects of the initiative process on campaign finance reform. Although the data may not suggest a robust effect at first glance, for certain states direct democracy has been an indispensable avenue of success for outside reformers blocked by recalcitrant legislatures. Moreover, once the legislative logjam breaks in initiative states (either because the voters act themselves or legislatures pass such reforms), they tend to adopt stricter limits than noninitiative states. At the same time, most legislatures in noninitiative states have also acted on their own to establish contribution limits, and the existence of contribution limits at the federal level demonstrates that direct democracy is hardly necessary for passage of such reforms.

## D. NOMINATION SYSTEMS

Since the Supreme Court's decision in *California Democratic Party v. Jones*, striking down California's "blanket primary" initiative,<sup>42</sup> law professors have spilled a lot of ink debating a party's First Amendment right of expressive association implicated by state regulation of primaries.<sup>43</sup> In *Jones*, the Court clarified that a state (which includes a majority of voters acting through the initiative process) violates a party's First Amendment rights when it forces the party to include nonmembers in its primary. Advocates of reforms, such as the blanket primary, see them as shifting power away from party leaders and the party faithful and toward the median voter in the electorate, perhaps also spurring competition in the process. Such advocates paint the picture of a largely moderate electorate held hostage by extremist partisans who oppose reform of the nomination process and who have no incentive to change the primary system that, for most districts, represents the dispositive election. Although the *Jones* decision blunts possible anti-party innovation by way of the initiative process, investigating whether systematic differences as to primary systems exist between initiative and noninitiative states can give us some idea as to whether incumbents may have historically held up more open nomination systems.

We examine here systems for nominating candidates for state legislature and for President. The principal difference between the two systems is that some states hold caucuses instead of primaries for President, and some states employ different rules for Democrats and Republicans for presidential elections. Although an infinite number of nomination systems potentially exist, we have divided systems into four general categories to understand the trends in the states we analyzed:

- Closed primary: Only party members can vote in a party's primary.
- Semi-open primary: Party members can only vote in their party's primary but independents can choose any party's primary ballot.
- Open primary: Anyone, regardless of party affiliation or nonaffiliation, can vote in any party's primary. This category includes states that do not keep track of or do not require party affiliation to vote in a primary, and states that have a blanket primary where voters can switch party primaries for each office.

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42. Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

43. See, e.g., Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95; Issacharoff, *supra* note 6; Persily, *Defense of Autonomy*, *supra* note 6; Pildes, *supra* note 1.

- **Caucus:** A gathering of voters in a town hall style meeting in order to nominate a candidate. Caucuses can also be open or closed. No state has a semi-open caucus.

We began an examination of the data presented in this section without a clear hypothesis to test. On the one hand, consistent with the drama surrounding California's experiment with the blanket primary, perhaps we should expect initiative states to be more likely to have open primaries because the median voter can act (or threaten) through the initiative process to ensure a greater degree of choice or openness in a primary election. If we assume that party stalwarts are more likely to want to close their primaries to nonmembers and that party organizations can more easily execute such restrictions through their alter egos in the legislature, then we should expect noninitiative states to have closed primaries. On the other hand, voters in initiative states may not necessarily want to open up their primaries, nor might party leaders in noninitiative states necessarily prefer closed systems. Perhaps the preferences of voters or legislators is more a function of state-based idiosyncrasies as to whether parties want their nominees to cater to a broader electorate at the primary stage.

TABLE 7. State-level nominations by availability of the initiative, as of 1990<sup>44</sup>

	Nomination Process			
	Closed	Semi-Open	Open	Total
<b>Status of Initiative Process</b>				
Initiative States				
<i>Frequent Users</i>	5	1	2	8
<i>Moderate Users</i>	2	2	4	8
<i>Infrequent Users</i>	1	0	7	8
<b>Total Initiative States</b>	<b>8</b>	<b>3</b>	<b>13</b>	<b>24</b>
Noninitiative States	8	4	14	26
<b>Total</b>	<b>16</b>	<b>7</b>	<b>27</b>	<b>50</b>

As Tables 7 and 8 indicate, we find almost no difference between initiative and noninitiative states with respect to the openness of their primary systems for either state legislative or presidential elections. Indeed, the two types of states appear almost identical.<sup>45</sup> The only differences worth noting

44. See Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 307 tbl.1 (1998).

45. The data for presidential nominating processes refer to the rules of the 2004 Democratic Party primary or caucus for each state, but the differences between the parties are not so substantial that they would change our conclusions. We have used older data for the state legislative primaries because we wanted to capture the state of the world before *California Democratic Party v. Jones* made forcing a

are a somewhat larger number of initiative states (six out of twenty-four as opposed to four out of twenty-six for noninitiative states) that employ caucuses for nominating presidential candidates, and the fact that frequent users of the initiative seem somewhat more likely to have closed primaries than infrequent users. We consider, however, the remarkable similarity between these states to be more significant than these small differences.

We were also surprised to discover how frequently legislators introduced bills concerning who can vote in a primary election. From 2001 to 2004, legislators from thirty states introduced eighty-seven bills that would have opened up their states' presidential primary to independent voters or to voters of the opposing party.<sup>46</sup> Only five such proposals, however, became law. Even fewer initiatives were proposed. By our count only California and Washington passed initiatives seeking to change their primary systems. California's experiment with the blanket primary ended with the *Jones* decision, as mentioned above, but the voters recently shot down a proposed initiative for a nonpartisan primary, in which the top two vote-getters of any party in the primary advanced to the general election. The voters approved such a measure in Washington, however, which for the previous sixty-seven years had employed a blanket primary.<sup>47</sup>

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blanket primary on parties unconstitutional. Nevertheless, updating the data to 2004 also would not change our conclusions.

46. Nat'l Conference of State Legislatures, *Database of Election Law Reform Legislation*, at <http://www.ncsl.org/programs/legman/elect/elections.cfm> (last visited Apr. 29, 2005).

47. See Chuck Taylor, *A Washington Primary Primer*, SEATTLE WKLY., Dec. 1–7, 2004, at [http://www.seattleweekly.com/features/0448/041201\\_news\\_primary\\_primer.php](http://www.seattleweekly.com/features/0448/041201_news_primary_primer.php). After *Jones*, the political parties in Washington successfully challenged the blanket primary. The Legislature then passed a law instituting a nonpartisan primary, which was vetoed by the governor. A back-up bill instituting an open primary for the 2004 elections received the governor's signature. However, the voters passed the nonpartisan primary initiative in the November general election. See *id.*; Wash. Sec'y of State, *History of the Blanket Primary in Washington*, at [http://www.secstate.wa.gov/elections/bp\\_history.aspx](http://www.secstate.wa.gov/elections/bp_history.aspx) (last visited Apr. 29, 2005).

TABLE 8. Distribution of presidential nominating systems by status of the initiative process, as of 2004

	Primary Election			Total
	Closed	Semi-Open	Open	
Initiative States				
<i>Frequent Users</i>	4	1	1	6
<i>Moderate Users</i>	3	1	4	8
<i>Infrequent Users</i>	0	1	3	4
<b>Total Initiative States</b>	<b>7</b>	<b>3</b>	<b>8</b>	<b>18</b>
<b>Noninitiative States</b>	<b>10</b>	<b>3</b>	<b>9</b>	<b>22</b>
<b>Total</b>	<b>17</b>	<b>6</b>	<b>17</b>	<b>40</b>

	Caucus			Total
	Closed	Semi-Open	Open	
Initiative States				
<i>Frequent Users</i>				
<i>Moderate Users</i>	0	-	2	2
<i>Infrequent Users</i>	1	-	0	1
<b>Total Initiative States</b>	<b>2</b>	<b>-</b>	<b>1</b>	<b>3</b>
<b>Noninitiative States</b>	<b>3</b>	<b>-</b>	<b>3</b>	<b>6</b>
<b>Total</b>	<b>1</b>	<b>-</b>	<b>3</b>	<b>4</b>
	<b>4</b>	<b>-</b>	<b>6</b>	<b>10</b>

	Total: All Systems			Total
	Closed	Semi-Open	Open	
Initiative States				
<i>Frequent Users</i>	4	1	3	8
<i>Moderate Users</i>	4	1	4	9
<i>Infrequent Users</i>	2	1	4	7
<b>Total Initiative States</b>	<b>10</b>	<b>3</b>	<b>11</b>	<b>24</b>
<b>Noninitiative States</b>	<b>11</b>	<b>3</b>	<b>12</b>	<b>26</b>
<b>Total</b>	<b>21</b>	<b>6</b>	<b>23</b>	<b>50</b>

### III. EARLY EXAMPLES OF ELECTORAL REFORM

In this section we analyze the potential role the initiative process played in instituting the direct primary, women's suffrage, and pre-*Baker v. Carr* redistricting. The first two measures, plus direct election of senators and

direct democracy itself,<sup>48</sup> represented a family of Progressive and Populist reforms that existed as a program for broadening political participation and moving power away from captured legislatures or party bosses.<sup>49</sup> We encounter a problem in analyzing the relationship of direct democracy to these other Progressive Era reforms because states instituted them in a relatively short time frame as part of a coherent package of reforms. Moreover, eventually *all* states instituted women's suffrage, the direct primary, and the direct election of senators, so we can only analyze whether those states with the initiative process were first to move on these issues and whether they used the initiative process to pass these reforms. In general, we find few differences between initiative and noninitiative states and find rare instances where voters used the initiative process to pass such reforms.

Pre-*Baker* redistricting is a bit more complicated. By comparing degrees of malapportionment and the last date of redistricting among initiative and noninitiative states, we had hoped to get some sense of whether the people tended to rise up against malapportioned legislatures when the law allowed it. We find some differences between initiative and noninitiative states but states rarely used the initiative process to force redistricting or to pass a plan. We offer some hypotheses as to why such differences might appear in the data.

#### A. THE DIRECT PRIMARY

Progressive electoral reform took different forms in different parts of the country at the turn of the century. In the West, where populism ruled, the targets of reformers' ire were legislatures captured by railroads and other trusts, while in the East reformers set their sights on corrupt, urban party machines.<sup>50</sup> Both strains of progressivism, however, pushed for adoption of the direct primary, which they saw as diminishing the power of party bosses as well as expanding popular participation in the political process. We might expect that politicians who owed their current position at least in part to the nomination mechanism that got them there would be reluctant to change it. Moreover, the party organization might exert power over incumbents to block a reform that would diminish the organization's power to select candidates. If so, we might expect noninitiative states to be less likely than initiative states to pass direct primary legislation. We do not find this to be the case. For the most part, initiative and noninitiative states were both very likely to pass such

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48. See *infra* note 59 (analyzing direct election of senators before the Seventeenth Amendment).

49. See Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y. REV. 11 (1997).

50. See *id.* at 13.

reforms, although half of the initiative states passed direct primary legislation through the initiative process.

Although states had barely begun to enact direct primary laws before 1900, all but three of the forty-eight states had done so by 1915.<sup>51</sup> As before, the following table identifies states' adoption of direct primary laws as of 1915 according to the presence or absence of the initiative process at the time the direct primary was adopted. The three states that had not provided for direct primary elections—Connecticut, New Mexico, and Rhode Island—all lacked initiative processes as well.<sup>52</sup> The presence of the initiative, was neither necessary nor sufficient, however, for the establishment of the direct primary, as demonstrated by the fact that 83% of the noninitiative states passed direct primary laws during this period. More revealing is the fact that the average year of adoption of the direct primary for noninitiative states (1907) was actually *earlier* than that for initiative states (1909). Initiative states, as a group, did not tend to adopt direct primaries earlier than noninitiative states.

Of those states that provided the initiative mechanism to voters, four passed direct primary laws through that process. Maine was the first state east of the Mississippi River to enact a process for the statewide initiative, and its very first initiative to qualify for the ballot was a requirement that the state and counties select candidates through popular vote at primary elections, rather than through party conventions.<sup>53</sup> It passed overwhelmingly in 1911, the only ballot measure to pass for the next twenty-five years.

The people of Montana succeeded immediately in adopting the direct primary; in 1912, the first time the voters used the initiative, the measure qualified and voters approved it.<sup>54</sup> Likewise, reformers in Oregon (1910) and South Dakota (1912) instituted the primary through the initiative process. In the case of South Dakota, sixty years passed before another statewide initiative was to pass.

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51. See ALAN WARE, *THE AMERICAN DIRECT PRIMARY* 119 (2002).

52. These three states did not fall slightly behind in their reform efforts. All three refused to create direct primaries for many more decades. *Id.*

53. See Initiative and Referendum Inst., Univ. of S. Cal., *Maine*, at <http://www.iandrinstitute.org/Maine.htm>. (last visited Apr. 29, 2005).

54. See Initiative and Referendum Inst., Univ. of S. Cal., *Montana*, at <http://www.iandrinstitute.org/Montana.htm> (last visited Apr. 29, 2005).

TABLE 9. States adopting the direct primary through 1915

	<u>As of 1915: Direct Primary</u>			<u>Avg. Date of Adopt.</u>
	<u>Yes</u>	<u>No</u>	<u>Total</u>	
<b>Initiative States</b>				
<i>Frequent Users</i>	3	-	3	1907
<i>Moderate Users</i>	2	-	2	1909
<i>Infrequent Users</i>	<u>3</u>	<u>-</u>	<u>3</u>	1910
<b>Total Initiative States</b>	<b>8</b>	<b>-</b>	<b>8</b>	<b>1909</b>
<b>Noninitiative States</b>	<u>37</u>	<u>3</u>	<u>40</u>	<b>1907</b>
<b>Total</b>	<b>45</b>	<b>3</b>	<b>48</b>	<b>1907</b>

	<u>How Passed: Initiative Used?</u>			<u>% Init.</u>
	<u>Yes</u>	<u>No</u>	<u>Total</u>	
<b>Initiative States</b>				
<i>Frequent Users</i>	1	2	3	33%
<i>Moderate Users</i>	2	-	2	100%
<i>Infrequent Users</i>	<u>1</u>	<u>2</u>	<u>3</u>	33%
<b>Total Initiative States</b>	<b>4</b>	<b>4</b>	<b>8</b>	<b>50%</b>

Although these states used the initiative process directly to effect reform, the presence of the initiative had indirect influences as well. In Illinois, for example, a nonbinding initiative mechanism prompted the legislature to pass a direct primary law. The Illinois state legislature chose to limit the state’s voters to a “Public Opinion” procedure in 1901, similar to an advisory or nonbinding initiative power.<sup>57</sup> The people used this qualified power to approve a variety of measures to limit incumbent and party machine control, including replacement of nominating conventions with direct primaries, restrictions on “corrupt political practices,” and simplification of complicated election ballots.<sup>58</sup> The legislature ignored all of these requests except the direct primary, which it passed in 1904.

Thus, although adoption of the direct primary appears, in retrospect, to have been almost inevitable nationwide, we should not overlook the important

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57. See Initiative and Referendum Inst., Univ. of S. Cal., *Illinois*, at <http://www.iandrinstute.org/Illinois.htm> (last visited Apr. 29, 2005).  
 58. *Id.*

role that the initiative process played in certain contexts to institute reforms that legislatures may not have been rushing to pass. As with the other reforms we analyze, we should emphasize that the absence of systematic differences between initiative and noninitiative states does not prove that the initiative process was irrelevant or even unnecessary for adoption of this particular reform. Unlike the other reforms in this Article, however, we were surprised to learn how quickly the direct primary became a fixture of the national electoral process. In under fifteen years, the country moved from a situation where no state held party primaries to one where almost all did.<sup>59</sup>

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59. We had hoped to include a small section analyzing direct election of U.S. senators prior to the enactment of the Seventeenth Amendment in 1913, but will relegate discussion of the issue merely to this footnote. Prior to enactment of that Amendment, several states began transferring the power to appoint U.S. senators from state legislatures to the people. Insofar as this transfer of power represents an unwelcome limitation on the legislature's power, it fits within the class of election reforms we analyze and we might assume that such an unwelcome transfer (if that is what it was) would be more prevalent in states where voters could go around the legislature through the initiative process. States varied considerably, however, in the means they employed to give voters some power to direct the legislature over its appointment of senators. See Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 166 (1997). By December of 1910, before state legislatures had convened to elect their senators, the *Boston Herald* announced, "Fourteen out of the thirty Senators who take the oath of office at the beginning of the next Congress, have already been designated by popular vote." GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 104 (1938) (quoting the *Boston Herald*, Dec. 26, 1910). Although elections helped select senators from many states, in most cases it was because voters had winnowed the possible field through a direct primary that the state had adopted. Thus, in a one-party state the voters effectively determined through the primary whom the legislature would "select" as senator; the legislature rubber stamped the voters' decisions, putting it in "pretty much the same position as the Electoral College." See John S. Lapinski, *Direct Election and the Emergence of the Modern Senate* 15 (Nov. 11, 2004) (unpublished manuscript), at <http://www.ssc.upenn.edu/polisci/programs/american/lapinskypaper.pdf>. According to John Lapinski's count, by 1912, thirty-five states had some form of popular control of the appointment of senators and thirteen did not. *Id.* at app. tbl. 1. The most Populist was Oregon, in which the voters through a general election chose the Democratic candidate, and the Republican legislature obeyed their wishes and appointed him.

We are unsure about the direct or indirect effect of the initiative process on the popular election of senators. Our uncertainty derives from sketchy data as to the effectiveness of each of these forms of popular constraint on legislatures, as well as the relative timing of the passage of the initiative, the direct primary, and then the election of senators. Of the ten initiative states that existed at the time of the Seventeenth Amendment, eight (80%) had some form of popular control over the selection of senators. Of the thirty-eight noninitiative states, twenty-seven (71%) utilized some form of popular control. However, only three states (to our knowledge) used the initiative process directly to bring about the popular election of U.S. senators—Oregon in 1908, and Montana and Oklahoma in 1912—and each of those states had already adopted direct primaries. See Initiative and Referendum Instit., *supra* note 30). Thus, both sets of states appear to have made the transition to popular elections at approximately the same rate and at the same time. Legislatures seemed as willing to give up their power to appoint senators as the people who were willing to take it.

## B. WOMEN'S SUFFRAGE

The women's suffrage movement that culminated in the adoption of the Nineteenth Amendment in 1920 was dotted with repeated attempts to introduce equivalent measures at the state level, both to state legislatures as statutory proposals and to voters through the initiative process in states that permitted it.<sup>60</sup> The many well-documented studies of equal suffrage have attributed the movement's success to many factors: the growing importance of women in the workforce, the recognition that equal voting rights at home suited the message of democratization abroad voiced during World War I, and the wave of populism and progressivism that drove the adoption of much social reform from the post-Civil War period into the early twentieth century. Amid these changes, of course, was the widespread adoption of the direct initiative. Here we explore whether the prolific introduction of direct democratic mechanisms into many states' policymaking processes in the 1910s was somehow related to the concurrent success of state-level women's suffrage measures during the same decade.

Women's suffrage is a characteristically different type of reform than the others we analyze because it did not explicitly challenge the authority of legislators. It would appear, however, that both voters and legislators had an "incentive" to resist the enfranchisement of women such that we should not expect direct democracy to be a useful tool for the achievement of suffrage. For legislators, giving women the vote might have introduced uncertainty into their electoral base. The political preferences of prospective women voters were uncertain, and a rational male legislator might resist a redefinition of the electorate from one that elected him to one that included new voters with unknown allegiances and preferences. On the other hand, male voters, acting through the initiative, hardly had an incentive to dilute their own influence by potentially doubling the size of the electorate. Insofar as a "political lockup" prevented passage of women's suffrage, both the legislature and the electorate were similarly locked up.

Existing research suggests that the presence of the initiative process was not important for the success of state-level equal suffrage measures. Lee Ann Banaszak's exhaustive study of the movement explains that the wave of direct democracy was far from complete when voters and legislators were considering state-level suffrage laws. In fact, prior to 1920, the initiative process existed in only fifteen states (four of which adopted equal suffrage

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60. See, e.g., LEE ANN BANASZAK, *WHY MOVEMENTS SUCCEED OR FAIL: OPPORTUNITY, CULTURE, AND THE STRUGGLE FOR WOMAN SUFFRAGE* 3 (1996).

before adopting direct legislation).<sup>61</sup> Of the twenty-six states that did extend the franchise to women prior to 1920, eleven, or 42%, had the initiative process available to them at the time. Although the women's suffrage movement appeared to be at least as successful in states that had not adopted the initiative as in those that did, it is important to note that many states that did extend the franchise to women also ultimately adopted the initiative process as well. Western states such as Wyoming, Colorado, Utah, and Idaho all provided equal suffrage before the turn of the twentieth century and then subsequently adopted the initiative process as part of the first wave of the direct democracy movement from 1908 to 1913.

Of the states that did have the initiative process available when they were considering equal suffrage measures, how many actually used it? Of the eleven states with the initiative process that did pass a women's suffrage measure, only two of them (Oregon and Arizona,<sup>62</sup> both in 1912) did so through the initiative process. Legislatures in other states—such as New York, Maine, and Rhode Island in the northeast, as well as Illinois, a state characterized at the turn of the century by strong machine politics—all adopted statutory provisions for equal suffrage during the same period without the presence or pressure of the initiative process. Moreover, at least one state similar to the northeastern states just mentioned—Massachusetts—and other Midwestern states—such as Arkansas and Nebraska—were all armed with the initiative process but failed to embrace equal suffrage prior to passage of the Nineteenth Amendment. In all, the availability of the initiative process to proponents of women's suffrage did not seem to enable reform with any more success than in those states without it.

In fact, in many states the legislature appeared to be more progressive than the voters. Eight of the states that enacted women's suffrage laws through the legislature<sup>63</sup> did so after the voters defeated constitutional amendments at the polls. For example, suffrage advocates in Oregon, one of

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61. See BANASZAK, *supra* note 60, at 180; ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 400–02 app. tbls.A-18 to A-20 (2000).

62. Arizona became a state in February of 1912 with a provision for the initiative process in its inaugural constitution. According to contemporary accounts, suffrage activists were unable to persuade the first state legislature to consider adopting a statutory equal suffrage measure, and thus immediately pursued an initiative campaign that resulted in a constitutional amendment in the state's first election that fall. See *Chapter II: Arizona*, in 6 *HISTORY OF WOMAN SUFFRAGE: 1900–1920* (Elizabeth Cady Stanton et al. eds., 1922); Claudette Simpson, *Frances Munds and Arizona's History of Suffrage*, *PRESCOTT DAILY COURIER*, Mar. 22, 1998, available at [http://www.sharlot.org/archives/history/dayspast/text/1998\\_03\\_22.shtml](http://www.sharlot.org/archives/history/dayspast/text/1998_03_22.shtml).

63. These states are North Dakota (1917), Nebraska (1917), Rhode Island (1917), Maine (1919), Missouri (1919), Iowa (1919), Ohio (1919), and Wisconsin (1919). Scholastic.com, *Chronology of Women's Suffrage Movement Events*, at <http://teacher.scholastic.com/researchtools/articlearchives/womhst/chrono.htm> (last visited Apr. 29, 2005).

the first adopters of direct legislation (1902), fought perhaps the most trying campaigns for the vote. Although Oregon was an early adopter of equal suffrage in 1912, it was only after five previous defeats in 1884, 1900, 1906, 1908, and 1910.<sup>64</sup> Oregon's experience demonstrates that the initiative process, either as a direct mechanism for change or as an indirect indication of progressivism, was not a strong benchmark for the success of women's suffrage.

Similarly, in Nebraska, one of the last states west of the Mississippi River to grant women the right to vote, the legislature on more than one occasion passed an equal suffrage amendment that the voters defeated.<sup>65</sup> An initiative campaign in 1914 met a similar fate; the proposition granting equal suffrage to women qualified for the ballot but the voters defeated it by about 10,000 votes.<sup>66</sup> Contemporary accounts attribute the failure to the strong German-Catholic population in the state that was guided by the Church to oppose the measure and the strong opposition across the state to the prohibition movement, a movement linked closely to the suffrage proponents.<sup>67</sup> Notwithstanding the defeat of the 1914 proposition, encouragement by the suffragists prompted the legislature to approve partial women's suffrage in 1917, permitting women to vote in municipal elections and for presidential electors. A referendum campaign by the anti-suffrage forces quickly formed to attempt to overturn the law, only to be thrown out in the courts in early 1919 due to the fraudulent collection of signatures.<sup>68</sup> By then, the legislature was considering the federal Amendment, which it ratified unanimously.

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64. *See id.* In the final three efforts, Oregon voters defeated at the ballot women's suffrage measures submitted as direct initiatives. *See Initiative and Referendum Inst., Univ. of S. Cal., Oregon*, at <http://www.iandrinstute.org/Oregon.htm> (last visited May 18, 2005).

65. Nebraska's legislature approved women's suffrage during the constitutional convention of 1871, but the voters defeated the measure. In 1882, the legislature again endorsed a constitutional amendment granting equal suffrage, which the voters rejected. For more information on the history of women's suffrage in Nebraska, see *Nebraskastudies.org, Votes for Women*, at [http://www.nebraskastudies.org/0700/stories/0701\\_0110.html](http://www.nebraskastudies.org/0700/stories/0701_0110.html) (last visited Apr. 29, 2005).

66. *See id.*

67. *See id.*

68. *See id.*

TABLE 10. States adopting equal suffrage for presidential elections by 1920<sup>69</sup>

	State-Level Equal Suffrage		
	Yes	No	Total
<b>Initiative States</b>			
<i>Frequent Users</i>	5	-	5 100%
<i>Moderate Users</i>	3	3	6 50%
<i>Infrequent Users</i>	3	1	4 75%
<b>Total Initiative States</b>	<b>11</b>	<b>4</b>	<b>15 73%</b>
<b>Concurrent Adopters</b>	<b>5</b>	<b>-</b>	<b>5</b>
<b>Noninitiative States</b>	<b>10</b>	<b>18</b>	<b>28 36%</b>
<b>Total</b>	<b>26</b>	<b>22</b>	<b>48 54%</b>

	How Passed: Initiative Used?		
	Yes	No	Total
<b>Initiative States</b>			
<i>Frequent Users</i>	2	3	5 40%
<i>Moderate Users</i>	-	3	3 0%
<i>Infrequent Users</i>	-	3	3 0%
<b>Total Initiative States</b>	<b>2</b>	<b>9</b>	<b>11 18%</b>

As a final example, in Massachusetts, which ratified the Nineteenth Amendment with unanimous support in both houses and which had the initiative by 1918, the defeat of the final push for women's suffrage came from the voters. After failing to pass suffrage laws in 1910 and 1911, the legislature approved a constitutional amendment in 1915 that the voters then defeated.<sup>70</sup> Ultimately, it was an unwilling electorate, and not an unresponsive legislature, that stymied reform.

### C. STATE LEGISLATIVE REDISTRICTING PRIOR TO *BAKER V. CARR*

As described in our discussion of redistricting commissions above, with the power to draw district lines comes an effective tool for entrenching one's preferred candidates and punishing their opponents. The judiciary established

69. "Concurrent Adopters" are states that adopted women's suffrage before gaining the initiative, but that did adopt the initiative process by 1920: California, Colorado, Idaho, Utah, and Washington. Ten states (Indiana, Iowa, Maine, Minnesota, Missouri, North Dakota, Ohio, Rhode Island, Tennessee, and Wisconsin) that adopted women's suffrage restricted the privilege to presidential elections; the remaining states' equal suffrage measures applied to all elections (Arizona, Kansas, Michigan, Montana, New York, Nevada, Oklahoma, Oregon, and South Dakota).

70. See *Bay State Defeats Suffrage by 124,000*, N.Y. TIMES, Nov. 3, 1915, at 2.

a constitutional check on the exercise of the political branches' redistricting power only with *Baker* and the redistricting cases of the 1960s. Prior to those decisions, which effectively required redistricting following each decennial census, states varied considerably in their propensity to redistrict, with some doing so regularly and others ignoring for generations state constitutional requirements that required the legislature to redistrict. States also varied with respect to the degree of malapportionment they tolerated or encouraged in their legislative institutions. Insofar as the availability of the initiative process may have restrained otherwise unfettered redistricting power, we might expect initiative states to have behaved differently with respect to pre-*Baker* redistricting. In noninitiative states the voters arguably had no means of forcing legislatures to update their districts as the population shifted. Conversely, perhaps in initiative states the "people" took advantage of the opportunity to circumvent their legislators so as to force them to redistrict more frequently or to tolerate a lesser degree of malapportionment.

Indeed, as Tables 11 and 12 suggest, we find that initiative states were somewhat less malapportioned and that they redistricted more recently before *Baker*. The "average vote to control" measure below indicates the percent of the population in a given region whose votes are needed in order to control a majority of the districts in 1962.<sup>71</sup> The lower the percentage, the more grossly malapportioned were the districts. On average, in initiative states, districts comprising 32.3% of the population could elect a majority in the lower house of the state legislature, while districts comprising 30.7% of the population could elect a majority in the upper house of the state legislature. In contrast, the average vote to control for initiative states was 35.5% for the lower house (a 3.2 point difference) and 31% for the upper house (a 0.3 point difference). (Similar differences exist for the median states, except that the greater difference occurs among the upper houses.)

Although the average degree of malapportionment in the two classes of states differed only slightly, the average date of their most recent redistricting preceding *Baker* differed considerably. Three-quarters of initiative states reapportioned their legislatures in the 1950s, while only half of noninitiative states reapportioned their lower houses and 41% reapportioned their upper houses during that period. The average initiative state redistricted in late 1948 and the median state redistricted in 1951. In contrast, and often despite state constitutions and statutes requiring periodic reapportionment, noninitiative states on average had redistricted their lower houses in 1934 and their upper

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71. See Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1324 (2002).

houses in late 1933: a fourteen- and fifteen-year difference. The median state, however, redistricted its lower house in 1950 and its upper house in 1943: a one- and eight-year difference respectively. The data illustrate that several outliers among noninitiative states "drag" down the group's average year of pre-*Baker* redistricting. For example, Vermont was the worst among noninitiative states: it had not reapportioned its legislature since 1793 when it ratified its constitution.<sup>72</sup>

TABLE 11. Malapportionment in state legislatures prior to *Baker v. Carr*

	<u>Average Vote to Control, 1962</u>		<u>Pre-1962 Last Apportionment</u>	
	<u>Lower House</u>	<u>Upper House</u>	<u>Lower House</u>	<u>Upper House</u>
<i>Initiative States</i>				
<i>Frequent Users</i>	35.2%	30.1%	1950.1	1950.1
<i>Moderate Users</i>	34.7%	34.2%	1947.7	1947.8
<i>Infrequent Users</i>	36.8%	28.7%	1947.9	1947.2
<b>Total Initiative States</b>	<b>35.5%</b>	<b>31.0%</b>	<b>1948.9</b>	<b>1948.8</b>
<b>Noninitiative States</b>	<b>32.3%</b>	<b>30.7%</b>	<b>1934.0</b>	<b>1933.7</b>
<i>Difference</i>	3.2%	0.3%	14.9	15.1

TABLE 12. Descriptive statistics of malapportionment measures in state legislatures prior to *Baker v. Carr*

	<u>Average Vote to Control Measure</u>				<u>Year of Last Apportionment</u>			
	<u>Lower House</u>		<u>Upper House</u>		<u>Lower House</u>		<u>Upper House</u>	
	<u>Init. States</u>	<u>Noninit.</u>	<u>Init. States</u>	<u>Noninit.</u>	<u>Init. States</u>	<u>Noninit.</u>	<u>Init. States</u>	<u>Noninit.</u>
Median	35.3%	34.5%	33.9%	30.3%	1951	1950	1951	1943
Standard Deviation	8.5%	10.7%	12.4%	10.2%	9.9	34.1	9.8	32.3
% Reapportioning in 1950s					76%	52%	76%	41%

Despite the fact that initiative states seemed to be slightly better apportioned in 1962 than noninitiative states and had reapportioned more recently, there is only scant evidence that the initiative process played a direct role in the reapportionment process. Until 1962, three of six attempts to introduce reapportionment requirements through the initiative process succeeded.<sup>73</sup> In addition, four of ten attempts to use the initiative process

72. See *id.* at 1319-20.

73. These states were Arizona (1918), California (1926), and Michigan (1952). Initiative and Referendum Instit., *supra* note 30.

actually to conduct a state legislative redistricting exercise succeeded: three were statutory initiative measures, one of which the legislature overturned in the following session.<sup>74</sup> It is ironic to note that the people of Colorado approved through referendum a malapportioned redistricting plan, which the Supreme Court nevertheless struck down in *Lucas v. Forty-Fourth General Assembly*,<sup>75</sup> a companion case to *Reynolds v. Sims*.<sup>76</sup>

Thus, although it is possible that the presence or threat of an initiative motivated some states to redistrict, other factors may provide a fuller explanation of the differences we observe in the data. Those factors might include the year of entry of a state into the Union, or, as in the reforms discussed above, a correlation between presence of the initiative and an institutional and political context conducive to good government reforms. Given that initiative states, in general, were relative latecomers to the Union, their first redistricting naturally took place later than other states and they were less likely to develop a tradition of acquiescence to static district lines, and perhaps their population shifts between censuses were not as large as states that joined the Union earlier. Also, maybe the political competitiveness of a state or the existence of divided government might determine the extent of a state's malapportionment or its propensity to redistrict. If one party dominates either a state's government or voting population, perhaps we should not expect much redistricting reform initiated either from secure politicians in noninitiative states or from voters in initiative states who do not view their representative institutions as particularly warped. With all that said, we do notice some differences between these two categories of states, so we should not rule out the possibility that the availability of the initiative had some effect.

#### IV. CONCLUSIONS

We have been careful in this Article not to overstate the significance of our findings. We do not think we have found systematic trends to suggest that election reform, in general, is more likely in initiative states. Certain types of laws such as term limits, however, seem unimaginable without the initiative as an open avenue for changing election laws, and we have dug up many other

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74. For example, the 1956 statutory initiative in Washington represented the culmination of a decade-long battle between the League of Women Voters and the legislature in that state, and, as a statutory measure, it did not pass through the legislature first. Once it did pass, the legislature modified it in the next session by creating new district boundaries in order to dilute the effect of the original initiative. See Wash. Sec'y of State, *Redistricting—The 1950s*, at <http://www.secstate.wa.gov/oralhistory/redistricting/1950.aspx> (last visited Apr. 29, 2005).

75. See *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964).

76. *Reynolds v. Sims*, 377 U.S. 533 (1964).

examples of particular reforms for which the initiative played an essential role. In some cases, the effect of the initiative is direct—meaning that voters pass election reform measures at the polls—but often it is indirect, with legislators acting under threat of an initiative. In most cases, however, even in initiative states, it is legislatures, not voters, who pass the various election reforms we analyze. We tried to disentangle whether such reforms arose from initiative threats or from other sources. All we can conclude at this stage is that the initiative can sometimes be a prerequisite for the passage of electoral reforms that recalcitrant incumbents oppose. Legislatures will often pass such measures on their own; however, they will pass them in forms less drastic than those the voters usually propose and pass.

We paint a mixed picture with respect to the effect of direct democracy on election reform. This mixed picture we think questions the strong claims that are often made about legislative capture inhibiting election reform. The initiative may provide an avenue of reform that under certain circumstances could allow reform-minded voters to get around the obstructionist, self-interested tactics of their legislators. In the end, however, we think much work remains to be done to identify properly the sources for the differences that distinguish each state's election law regimes.