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**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.¹ Of course, the phenomenon is not new, nor is scholarly or judicial preoccupation with it.² However, whether the subject is gerrymandering,³ campaign finance reform,⁴ ballot notations,⁵ primary election rules,⁶ ballot access⁷ 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 (initiative, referendum and recall) as critical and important safeguards against incumbent entrenchment.⁸ Under this view, direct democracy allows for an end-run around incumbents, allowing the median voter in a jurisdiction to enact institutional

¹ See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets*, 50 STAN. L. REV. 643 (1998); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 25 (2004).

² See *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1981).

³ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (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 *McConnell v. Federal Election Comm'n* 540 U.S. 93, ___ (2003) (Scalia, J., dissenting).

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

⁶ See 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*, 88 GEO. L.J. 2181 (2001); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750 (2001).

⁷ See 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 Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. (forthcoming 2004); Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239 (2004).

reform seen as against the interests of political insiders who have clogged up the “channels of political change.”⁹ 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 policy making to achieve their goals.¹⁰ 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 outgroups 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 paper attempts to test this hypothesis.

In particular, we hope to explore whether certain types of election regulation appear more often in initiative states than non-initiative states. In so doing, we attempt to build on the work of Caroline Tolbert, whose initial efforts to answer this question predicted and found evidence that initiative states are more likely to pass certain “governance policies” – that is, “procedural reforms that constrain the autonomy of state legislatures, change the ‘rules’ that state and elected officials must follow, and restructure political institutions.”¹¹ Like others who have tried to study this problem, however, we

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, 99-128 (1992).

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).

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 (e.g., redistricting) 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 paper include term limits (both for 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*¹² and the installation of the direct primary.

Because we canvass a broad array of laws in this area, we necessarily arrive 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 non-initiative states were; however, we recognize that not all initiative states are created equal and that

¹² *Baker v. Carr*, 369 U.S. 186.

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 barrier 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 general initiative usage¹³ 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, however, we also considered whether the initiative states passed each of these reforms through the initiative process¹⁴ 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 election law reforms. In particular, we try to answer the question whether some legislatures pass election reforms

¹³ Tolbert, *supra* note 11, at 180. 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 state has had the initiative process, and modified it to accommodate reforms isolated in certain decades. For example, 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.

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

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 and/or the legislature. Some legislatures pass a law because of the threat of an initiative, others because it is in the dominant party’s self interest, and still others because legislators genuinely believe 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 older election law controversies – specifically, the extent and history of malapportionment in states before *Baker v. Carr*, the adoption of women’s suffrage, and the adoption of the direct primary. Adoption of the institutions of direct democracy sometimes coincided with the adoption of several of these structural reforms, and at other times preceded them. Together they constituted components of a Progressive vision of institutional change that sought to transfer power from captured legislatures and corrupt party machines and toward the people.

In Part IV we present our conclusions. We arrive at a tentative conclusion that for certain reforms that legislators, as a class, are likely to disfavor 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. However, we recognize 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. Therefore, the anecdotal evidence we present here may 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.

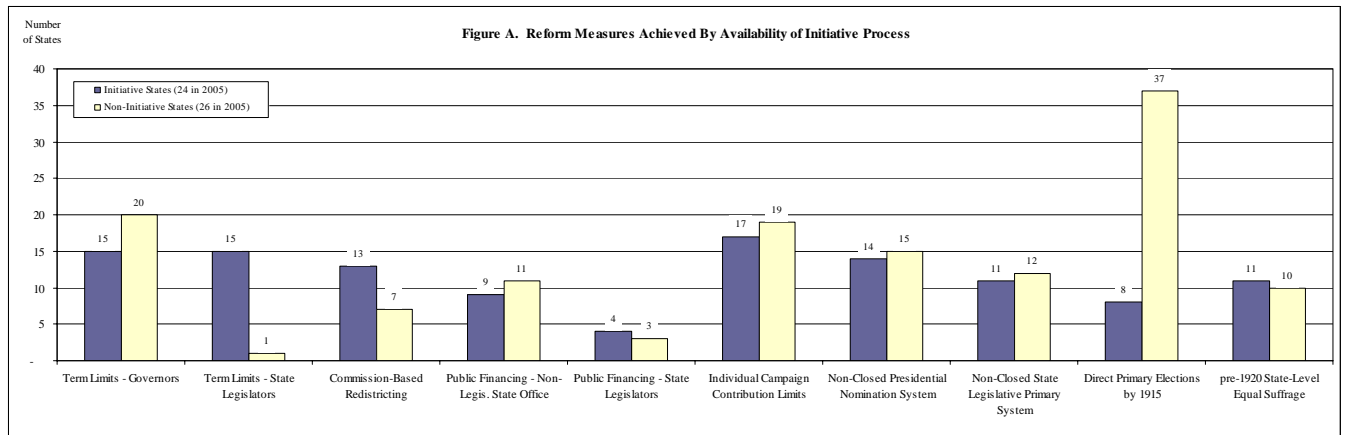
Embedded within that tentative conclusion are a large number of caveats. First, we recognize that not all initiative states are created equal, nor are specific types of reforms. In other words, state laws vary with respect to the ease with which a voter can place something on the ballot (such as the number of signatures required), and each of the election law reforms we explore represents a rough grouping of laws that can vary considerably with respect to the severity of their intrusion on elections. For the most part, we identify here the presence or absence of a reform (*e.g.*, term limits) without examining the nature of the reform (*e.g.*, how severe the term limits restriction is), 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.¹⁵ 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

¹⁵ See ELISABETH GERBER ET AL., STEALING THE INITIATIVE.

for no other reason than the fact that we discovered trends in the data that we did not originally expect.

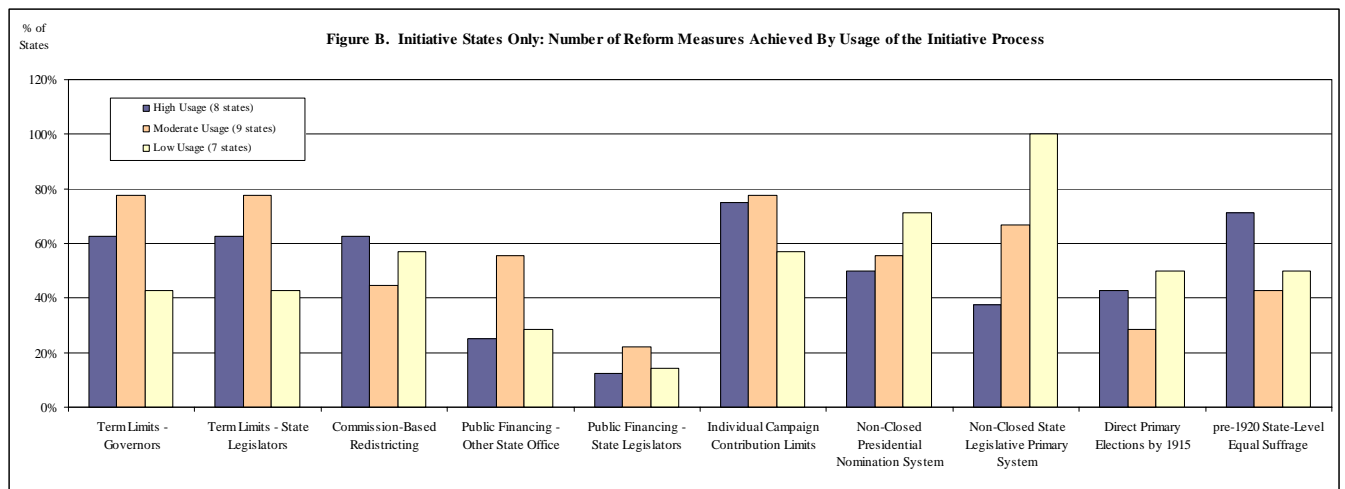
I. Do Initiative States Have Different Election Law Regimes?

Figure A displays the frequency distribution for certain election laws in initiative and non-initiative 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, and primary election structures for state legislative elections and presidential nominations. 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 non-initiative states. Only legislative term limits and commission based redistricting seem to be much more prevalent in initiative states than in non-initiative states. For most of the other reforms there appear not to be any significant differences with respect to the frequency of a certain law between the two categories of states, and for two – non-legislative term limits and pre-1920 women’s suffrage – a greater share of non-initiative states appear to have adopted the given reform.

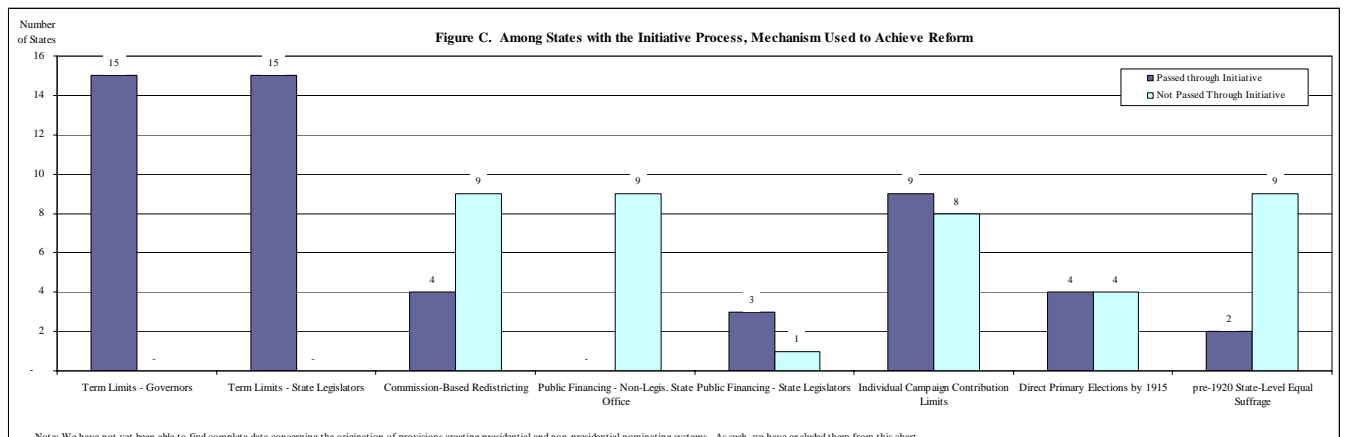


We make a further distinction among initiative states by the frequency of initiative use, as shown in Figure B. This distinction is important because the institutional parameters regulating the use of the initiative process in each state, as we mentioned, vary widely, and can significantly affect the 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 (a progressive culture, loose institutional parameters, etc.) 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,¹⁶ the absolute numbers used below 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.

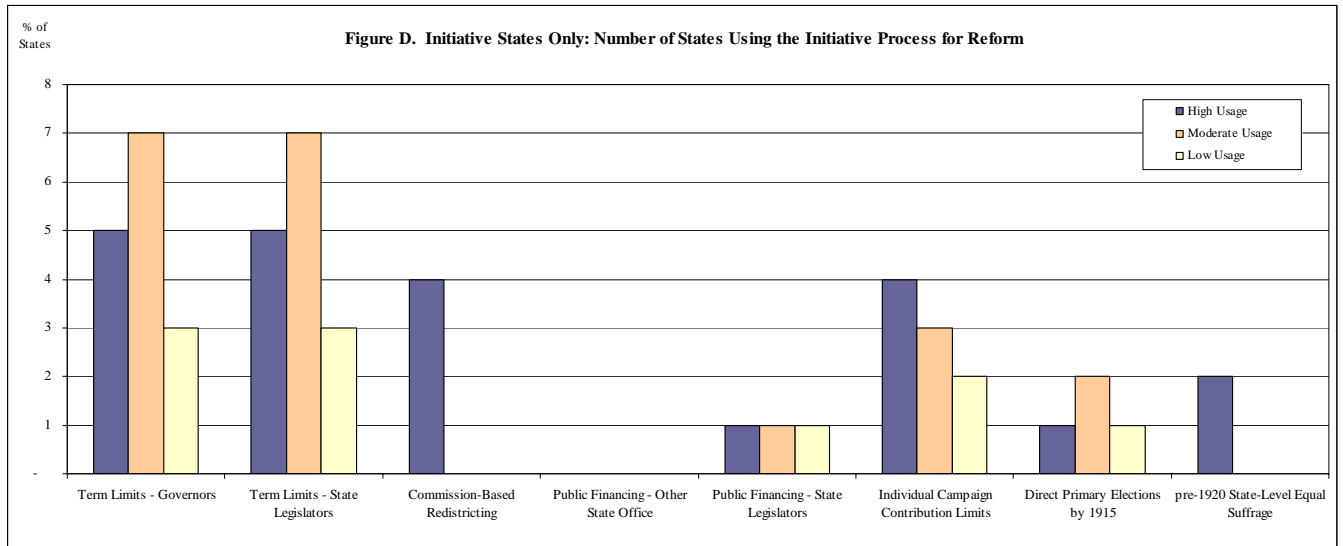
¹⁶ Of the 24 states that currently have the initiative process, Caroline Tolbert has identified eight as “high” users, nine as “moderate” users, and seven as “low” users. See *supra* note 11.



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 dispositive) to know whether initiative states passed 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 being passed by initiative. Initiative states have passed legislative term limits only through the initiative process, for example, whereas all public funding programs for non-legislative elections and most efforts to establish equal suffrage for women and commission-based redistricting were passed through normal legislative means.



The 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 we analyze, legislative term limits represent the most severe intrusion on the interests of individual legislators.¹⁷ We should therefore expect initiative states to be more likely to pass such limits, given that legislators in non-initiative 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.¹⁸ Moreover, in those states, the initiative process has been the only successful avenue for reform.

¹⁷ Tolbert, *supra* note 11.

¹⁸ U.S. Term Limits, *State Legislative Term Limits*, at http://www.termlimits.org/Current_Info/State_TL/index.html.

Table 1. States Imposing Term Limits on State Legislators

Status of Initiative	Term Limits on Legislators			Among Initiative States, How Achieved?			
	Yes	No	Total	Initiative Process	Legislative Action	Existed in Constitution	% through Initiative
Initiative States							
<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%
Total Initiative States	15	9	24	15	-	-	100%
Non-Initiative States	1	25	26	-	1	-	
Total	16	34	50				

In Louisiana, one of two states whose legislature adopted such limits (Utah’s limits, as discussed shortly, were adopted and then repealed), strong public agitation for the reform prompted state legislators in 1995 to approve a state constitutional amendment to limit its own terms.¹⁹ 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.”²⁰ The amendment was approved in a voter referendum later that year by a margin of 3:1.²¹

While the legislature did approve the constitutional amendment to be 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

¹⁹ *Statewide Constitutional Amendments*, NEW ORLEANS TIMES-PICAYUNE, Oct. 23, 1995, at A4; *Term Limits for Louisiana Now Up to the Voters*, NEW ORLEANS TIMES-PICAYUNE, June 15, 1995, at A1; *Term Limits Movement in the Louisiana Legislature*, BATON ROUGE ADVOCATE, Nov. 18, 1994, at 9B.

²⁰ *Term Limits for Louisiana Now Up to the Voters*, *supra* note 14, at A1 (quoting former Senate President Samuel Nunez).

²¹ Louisiana Secretary of State, *Results for Election Date 10/21/95*, at <http://www.sos.louisiana.gov:8090/cgibin/?rqstyp=elcms4&rqsda=102195>.

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, though, which was spurred by 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 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 limit 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 above shows, 36 states currently have laws restricting the number of terms its governor can serve. Of these, more than half, or twenty, exist in states in which the initiative process is not available.²² Among the sixteen states that have gubernatorial term limits that also have the initiative process, only one state (Utah) achieved them through the legislative process. The remaining fifteen, or 94%, used the initiative to install term limits, as shown on the left side of the following table:

²² U.S. Term Limits, *State Gubernatorial Term Limits*, at http://www.termlimits.org/Current_Info/State_TL/gubernatorial.html.

Table 2. States Imposing Term Limits on Governors

Status of Initiative	Term Limits on Governors			Among Initiative States, How Achieved?			
	Yes	No	Total	Initiative Process	Legislative Action	Existed in Constitution	% through Initiative
Initiative States							
<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%
Total Initiative States	15	9	24	15	-	-	100%
Non-Initiative States	20	6	26	-	11	9	
Total	35	15	50				

Even in Utah, the statutory term limits measure, which applied to both legislators and to governors, was passed by the legislature 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.”²³ The 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 was presented 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, though, many legislatures in the states without the initiative, shown at the bottom of the previous table, were the vehicle for gubernatorial term limits. Of the twenty states that have term limits on governors that were established without the

²³ *Ethics-Reform Bills Buried in Utah’s Legislative Grave*, SALT LAKE TRIB., Mar. 3, 1994, at A1.

availability of the initiative process, nine of them were cemented in place with the adoption of the state constitution. The remaining eleven were enacted through constitutional amendments that were approved through the legislative process.²⁴

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 governor or state legislature got them through the initiative process. As will become clear, however, 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. This move, as well as the widespread

²⁴ Based on information available at <http://www.termlimits.org>.

frustration in many states (let alone among law professors²⁵) 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.²⁶ Insofar as unchecked redistricting power allows dominant legislative parties or cartels of legislators to act in ways contrary to voters' perceived interests, 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.²⁷ 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.²⁸

With these caveats in mind, however, we still might expect initiative states to attempt to increase the distance between linedrawers 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

²⁵ See Issacharoff, *supra* note ____.

²⁶ See Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AMER. POLIT. SCI. 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.”).

²⁷ 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 by the National Council of State Legislatures. [confirm]

²⁸ See Persily, *In Defense of Foxes Guarding Henhouses*, *supra* note 3.

uncontestable claim to be sure), we would expect greater variation with respect to the institutions in control of redistricting in initiative states. Indeed, as the table below indicates, we find a relationship suggesting just that.

Table 3. States Using Redistricting Commissions for Legislative Redistricting

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

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. However, as the table below indicates, 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 three states that have used the initiative process to institute commission-based redistricting are high-usage states.

Table 4. How States with the Initiative Process Adopted Redistricting Commissions

Status of Initiative	How Commissions Were Adopted: By Type of Commission						Total	
	Primary		Advisory		Backup		Initiative	Not Init.
	Initiative	Not Init.	Initiative	Not Init.	Initiative	Not Init.		
Initiative States								
<i>Frequent Users</i>	3	1 75%	-	-	1	- 100%	4	1 80%
<i>Moderate Users</i>	-	4 0%	-	-	-	-	-	4 0%
<i>Infrequent Users</i>	-	1 0%	-	1 0%	-	2 0%	-	4 0%
Total Initiative States	3	6 33%	-	1 0%	1	2 33%	4	9 31%

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.²⁹ 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 available are more likely to have commissions, in most cases they did not get them through the initiative process.

Why is this the case? What prompted legislatures in states such as Missouri, Arkansas, Washington, and Ohio - all of which have the initiative process and also use independent commissions as the primary agent for redistricting – to cede control over the state legislative redistricting process? For example, Washington’s adoption of the independent commission, we suspect, was prompted by a combination of a tradition of

²⁹ Initiative and Referendum Institute, *Statewide Initiatives Since 1904-2000*, at <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/Statewide%20Initiatives%201904-2000.pdf> (Feb. 11 2004).

progressivism and the threat offered by the initiative. In 1981, the 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 legislative redistricting plan created by the legislature was approved 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.³⁰ The following year, a competing amendment emerged from the state legislature that transferred authority of all redistricting, congressional and legislative, to an independent commission, and was approved by the voters in the fall of 1983.³¹ In Washington, at least, the legislators seemed willing to relinquish control over an onerous, knotty process, particularly when they could pre-empt a competing measure emerging from the public.

C. Campaign Finance Reform

In the jurisprudence and scholarship concerning campaign finance reform, a healthy debate exists concerning 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

³⁰ *Spellman Vetoes, Signs Parts of Redistricting Plan*, THE SEATTLE TIMES, May 18, 1981, at ____.

³¹ See <http://www.redistricting.wa.gov/>; see also http://www.secstate.wa.gov/oralhistory/redistricting2/1980s/1982/1982_courtCases.aspx.

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 all incumbents share.

By analyzing the frequency of certain reforms in initiative and non-initiative 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 pro-competition. 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. However, anecdotes from particular states suggest that the presence of the initiative option often leads to the enactment of campaign finance reforms specifically disfavored by incumbents.

1. Public Financing

Laws that provide public financing to candidates for elected office exist in 27 states³² and vary considerably in form. Differences in the amount of money provided, the

³² Benjamin Wyatt, *Origins of State Public Financing of Elections: A Comprehensive Database of State Public Financing Systems* (2002) (B.A. thesis, Wesleyan University), *available at* <http://www.octobernight.com/bwyatt/add1.htm>.

source of that money, how and when it is distributed, and how a candidate qualifies for it make any systematic evaluation of these laws somewhat challenging. When they were 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 elections³³ except when the funds available are particularly high,³⁴ 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.³⁵

While public financing may not have a negative impact on incumbents, it is still possible that the perceived effects of the reform influence legislators' attitudes toward reform when they consider it. So long as legislators anticipate that the effects of public financing laws would be detrimental, we might expect the initiative process to be influential to the adoption of the reform. Alternatively, legislators in favor or indifferent to public financing regimes may nevertheless be reluctant to pass them out of fear that voters might consider incumbents as voting to subsidize their own campaigns. As with other types of reforms that legislators might consider electoral risks, making tax dollars

³³ ALEXANDER, HERBERT E. REFORM AND REALITY: THE FINANCING OF STATE AND LOCAL CAMPAIGNS. NEW YORK: TWENTIETH CENTURY FUND PRESS [DISTRIBUTED BY THE BROOKINGS INSTITUTION, WASHINGTON, D.C.], 1991.

³⁴ Patrick D. Donnan & Graham P. Ramsden, *Public Financing of Legislative Elections: Lessons from Minnesota*, 20 LEGIS. STUD. Q. 351, 351-364 (1995).

³⁵ Kenneth R. Mayer & John M. Wood, *The Impact of Public Financing on Electoral Competitiveness: Evidence from Wisconsin*, 20 LEGIS. STUD. Q. 69, 69-88 (1995).

available for candidate campaigns may be one of those issues over which legislators would prefer to pass the buck to the voters.

As depicted below, public financing laws for any number of state offices exist in 27 states, but public funding for state legislative campaigns exist in only seven states.³⁶ No differences appear between initiative and non-initiative states with respect to their propensity to pass public financing reforms for either legislative or some other office.

Status of Initiative	Laws Providing for Public Financing, by Office			Total
	State Legislators	Other State Office	No Public Financing	
Initiative States	4	9	11	24
<i>Frequent Users</i>	1	2	5	8
<i>Moderate Users</i>	2	5	2	9
<i>Infrequent Users</i>	1	2	4	7
Non-Initiative States	3	11	12	26
Total	7	20	23	50
% Initiative States	57%	45%	48%	48%

The initiative process does appear to be used more frequently for legislative public funding regimes than for other state offices. In the following table, note that, of the thirteen state-level public financing laws that exist in initiative states, only three were installed through the initiative process, and all three of them, evenly distributed among

³⁶ Wyatt, *supra* note 26.

usage categories, fund state legislative campaigns. In contrast, legislatures (not voters) passed all nine public funding programs for non-legislative offices in initiative states

Table 5. States with Public Funding Provisions for Statewide and Legislative Campaigns

Status of Initiative	Public Financing: Non-Legislators					Public Financing: State Legislators				
	Yes	No	Total	How Passed?		Yes	No	Total	How Passed?	
				Initiative	Not Init.				Initiative	Not Init.
Initiative States										
<i>Frequent Users</i>	2	6	8	-	2	1	7	8	1	-
<i>Moderate Users</i>	5	4	9	-	5	2	7	9	1	1
<i>Infrequent Users</i>	2	5	7	-	2	1	6	7	1	-
Total Initiative States	9	15	24	-	9	4	20	24	3	1
Non-Initiative States	11	15	26			3	23	26		
Total	20	30	50			7	43	50		

As noted above, legislators’ propensity to pass public funding regimes only for offices other than their own is consistent with several hypotheses, any of which may be true for the individual cases we list here. Perhaps legislators fear that public funding would help their potential opponents or they consider such reforms too controversial, such that they preferred to pass the buck to the initiative process. Or perhaps, as with any initiative, public funding may simply be one of those issues, which legislators do not view as a priority but which a concerted group of voters can successfully place on the ballot before a receptive public.

2. Contribution Limits

Contribution limits exist as probably the most popular form of campaign finance reform, as well as perhaps the easiest to understand. As discussed above, a considerable debate exists concerning such limits' oft described anti-incumbent or pro-competitive effects. Of course, the potential forms of a contribution limit 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. As the following table shows, limits on contributions to state legislative campaigns exist nearly equally among initiative states as in non-initiative states.

Contribution Limits *	Limits on Individuals	No Limits	Total	% with Limits
Initiative States	18	6	24	75%
<i>Frequent Users</i>	6	2	8	75%
<i>Moderate Users</i>	8	3	11	73%
<i>Infrequent Users</i>	4	1	5	80%
Non-Initiative States	19	7	26	73%
Total	37	13	50	

* All laws in this portion of our study apply to state legislators.

Moreover, among the states with contribution limits in which the initiative process exists, just over half were introduced using the initiative process, mostly concentrated among high and moderate initiative users:³⁷

Table 6. Limits on Contributions by Individuals to Candidates for State Legislative Offices

Initiative Status	Limits Exist?				Average Limits, by Office		Contribution Limits: How Passed?			
	Yes	No	Total	%	Assembly	Senate	Initiative	Legislation	Total	% Init.
Initiative States										
<i>Frequent Users</i>	6	2	8	75%	\$ 1,149	\$ 1,411	4	2	6	67%
<i>Moderate Users</i>	7	1	8	88%	\$ 693	\$ 764	3	4	7	43%
<i>Infrequent Users</i>	4	4	8	50%	\$ 2,450	\$ 2,450	2	2	4	50%
Total Initiative States	17	7	24	71%	\$ 1,333	\$ 1,448	9	8	17	53%
Non-Initiative States	19	7	26	73%	\$ 1,442	\$ 1,883				
Total	36	14	50		\$ 1,498	\$ 1,721				
					<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 the table below the data comparing the average severity of contribution limits for state

³⁷ 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 the state law distinguishes between general and primary elections, these limits apply to general elections. To the extent the state law distinguishes between election years and non-election 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 and James A. Palmer, Campaign Finance Law 2002: A Summary of State Campaign Finance Laws with Quick Reference Charts Chart 2-A (2002), available online at <http://www.fec.gov/pubrec/cfl/cfl02/cfl02chart2a.htm> (last visited Jan 31, 2005) (compiling state laws regulating campaign contributions).

legislators in the initiative and non-initiative states that have adopted contribution limits. On average, initiative states have set lower contribution limits than non-initiative states: about \$400 lower (23%) 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 due to other 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. 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 in particular states the presence of the initiative was essential to the passage of certain contribution limits. In some cases voters rallied behind and passed initiatives seeking to change the permissive limits established by the legislature. 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 examples³⁸:

- Missouri: In 1994, citizens gathered signatures for a measure to set \$100 contribution limits for legislative races. In an attempt to head-off the initiative, the legislature passed \$250 contribution limits. The initiative was placed on the ballot went to the ballot anyhow, winning. The Eighth Circuit rejected those \$100 limits, so the legislative limits of \$250 went into effect. They were then adjusted for inflation to become \$275, and then those limits too were voided by the courts. The Supreme Court then

³⁸ We are indebted to Derek Cressman, Director of www.therestofus.org, for these examples.

reviewed the limits and reinstated them in the *Nixon v. Shrink Missouri Government PAC*.³⁹

- California: A 1996 initiative established a \$500 contribution limit for state legislature and \$1000 for statewide office. A 2000 legislatively referred ballot measure repealed prop 208 and established much higher limits (\$3000 legislature, \$20,000 for governor).
- Colorado: A 1996 initiative set contribution limits of \$100 for legislative races and \$500 for governor. The legislature then raised the limits to \$1000 per 2 year cycle for House, \$1500 for Senate, and \$5000 for governor in 2000. In 2002, voters went back and by initiative passed a constitutional amendment setting limits of \$200 per election for legislative races and \$500 per election for statewide races.
- Alaska: The legislature passed a law for \$500 legislative contribution limits in 1996 only after threatened by citizens filing 30,000 signatures to qualify an initiative that would have set lower limits. In 2003, the legislature doubled these contribution limits. In 2004, citizens submitted 36,000 signatures to qualify an initiative for the 2006 ballot to take them back down to \$500.
- Oregon: In 1994, voters passed an initiative to set \$100 limits 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.
- Montana: In 1994 citizens passed an initiative to set \$100 limits for contributions to legislative candidates. Despite several attempts, the legislature has not successfully increased those limits.
- Arkansas: In 1996, voters approved an initiative to lower contribution limits from \$1000 to \$100 for legislative races, but the courts later struck it down.
- Massachusetts: In 1990, the legislature enacted \$500 contribution limits, but only after citizens had gathered signatures for a ballot question.
- Ohio: In late 2004, the Ohio legislature passed a law to radically increase their contribution limits from \$2500 to \$10000. Citizens are threatening a referendum to repeal this law.

³⁹ 528 U.S. 377 (2000).

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 non-initiative states. At the same time, most legislatures in non-initiative states, as is true for the federal government, have also acted on their own to establish contribution limits.

D. Nomination Systems

Since the Supreme Court's decision in *California Democratic Party v. Jones*,⁴⁰ striking down California's "blanket primary" initiative, law professors have spilled a lot of ink debating a party's First Amendment right of expressive association implicated by state regulation of primaries.⁴¹ 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. The picture such advocates paint is one of a

⁴⁰ 530 U.S. 567 (2000).

⁴¹ See Garrett, *Is The Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95; Issacharoff, *Private Parties With Public Purposes*, *supra* note 6; Persily, *Toward a Functional Defense of Political Party Autonomy*, *supra* note 6; Pildes, *The Constitutionalization of Democratic Politics*, *supra* note 1.

largely moderate electorate held hostage by extremist partisans who stand in the way of 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 non-initiative states can give us some idea as to whether incumbents may have historically held up more open nomination systems.

We examine here nomination systems for both state legislature and for nominating the President. The principal difference between the two systems is that some states hold caucuses, instead of primaries, for President, and in a few states, the rules are different for Democrats and Republicans. Although an infinite number of nomination systems potentially exist, we have divided systems into four general categories to get a sense of 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 non-affiliation, can vote in any party’s primary. This includes states that do not keep track of or do not require party affiliation, and states that have a blanket primary where voters can switch party primaries for each office.
- 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-closed 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 non-members and that party organizations can more easily execute such restrictions through their alter egos in the legislature, then we should expect non-initiative 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 non-initiative 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.

As the tables below indicate, we find almost no difference between initiative and non-initiative states with respect to the openness of their primary systems for either state legislative or presidential elections. Indeed, the two classes of state appear almost identical.⁴² The only differences worth noting is a somewhat larger number of initiative states (six out of twenty four as opposed to four out of twenty-six for non-initiative states) that employ caucuses for nominating presidential candidates, and the fact that

⁴² The data for Presidential nominating processes refers 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 blanket primary on parties unconstitutional. Nevertheless, updating the data to 2004 also would not change our conclusions.

frequent users of the initiative seem somewhat more likely to have closed primaries than infrequent users. However, we consider the remarkable similarity between these states to be more significant than these small differences.

Table 7. State-Level Nominations by Availability of the Initiative, as of 1990

Status of Initiative Process	Nomination Process			
	Closed	Semi-Open	Open	Total
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
Total Initiative States	8	3	13	24
Non-Initiative States				
Total	8	4	14	26
Total	16	7	27	50

Table 8. Distribution of Presidential Nominating Systems by Status of the Initiative Process, as of 2004

Status of Initiative Process	Primary Election				Caucus			Primary and Caucus Systems			
	Closed	Semi-Open	Open	Total	Closed	Open	Total	Closed	Semi-Open	Open	Total
Initiative States											
<i>Frequent Users</i>	4	1	1	6	0	2	2	4	1	3	8
<i>Moderate Users</i>	3	1	4	8	1	0	1	4	1	4	9
<i>Infrequent Users</i>	0	1	3	4	2	1	3	2	1	4	7
Total Initiative States	7	3	8	18	3	3	6	10	3	11	24
Non-Initiative States											
Total	10	3	9	22	1	3	4	11	3	12	26
Total	17	6	17	40	4	6	10	21	6	23	50

We were also surprised to discover how frequently legislators introduced bills concerning who can vote in a primary election. From 2001-2004 legislators from thirty states introduced 87 bills that would have opened up their states' presidential primary to independent voters or to voters of the opposing party.⁴³ However, only five such

⁴³ National Conference of State Legislatures, *Database of Election Reform Legislation*, *supra* note 38.

proposals became law. Even fewer initiatives were proposed. By our count only California and Washington have passed initiatives seeking to change their primary systems. California's experiment with the blanket primary ended with the *Jones* decision, as mentioned above, but just this past year the voters shot down a proposed initiative for a non-partisan primary, in which the top two vote-getters of any party in the primary move on to the general election. However, the voters approved such a measure in Washington, which for the previous sixty-seven years had employed a blanket primary.⁴⁴

III. Early Examples of Electoral Reform

In this Part we turn back the clock to look at early election reforms and the effect (if any) that the initiative process may have had on their enactment. In addition to highlighting the relationship of different Progressive Era reforms to each other, by taking this look back we hope to get some sense as to whether electoral reform initiatives (or threats of them) may have been more prevalent or effective in earlier years and whether initiative states as a group may have behaved differently at the time they instituted direct democracy. En route to examining those phenomena, we should admit a drawback to some of the analysis presented previously: issues such as term limits, campaign finance,

⁴⁴ See Chuck Taylor, *A Washington Primary Primer*, SEATTLE WKLY., Dec. 1-7, 2004, available at http://www.seattleweekly.com/features/0448/041201_news_primary_primer.php. After *Jones*, the parties in Washington successfully challenged the blanket primary. The Legislature then passed a law instituting a non-partisan 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.*; Washington Secretary of State, *History of the Blanket Primary in Washington*, at http://www.secstate.wa.gov/elections/bp_history.aspx.

and redistricting reform have only been “issues” for the past thirty years or so.

Legislative term limits, in particular, and the movement that used the initiative process so skillfully to have them instituted are creatures of the late 1980s and 1990s. Thus, preoccupation with these trendy reforms could skew conclusions as to the independent effect of the availability of the initiative process election reform generally.

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,⁴⁵ 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.⁴⁶ We run into 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 direct election of Senators so the most we can analyze is 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 non-initiative states and 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 last date of redistricting among initiative and non-initiative states

⁴⁵ In a footnote, we analyze direct election of Senators before the Seventeenth Amendment. See *infra* note _____.

⁴⁶ See generally Nathaniel Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL. REV. 11 (1997).

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 non-initiative 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.⁴⁷ 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 should expect non-initiative 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 non-initiative states were both very likely to pass such reforms, although in half of the initiative states direct primary legislation was passed through the initiative process.

⁴⁷ Id.

Although states had barely begun to enact direct primary laws before 1900, all but three of the forty-eight states had done so by 1915.⁴⁸ 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.⁴⁹ However, the presence of the initiative clearly was neither necessary nor sufficient for the establishment of the direct primary, as demonstrated by the fact that 83% of the non-initiative states passed direct primary laws during this period. More revealing is the fact that the average year of adoption of the direct primary for non-initiative states (1907) was actually *earlier* than that for initiative states (1909). We do not mean to make more of this than to say that initiative states as a group were certainly not early adopters, or at least not more so than noninitiative states.

⁴⁸ See ALAN WARE, *THE AMERICAN DIRECT PRIMARY* 19 (2002).

⁴⁹ These three states did not fall slightly behind in their reform efforts. All three refused to create direct primaries for many more decades. ALAN WARE, *THE AMERICAN DIRECT PRIMARY* 119 (2002).

Table 9. States Adopting the Direct Primary through 1915

	As of 1915: Direct Primary			Avg. Date of Adoption	How Passed: Initiative Used?			
	Yes	No	Total		Yes	No	Total	
Initiative States								
<i>Frequent Users</i>	3	-	3	1907	1	2	3	33%
<i>Moderate Users</i>	2	-	2	1909	2	-	2	100%
<i>Infrequent Users</i>	3	-	3	1910	1	2	3	33%
Total Initiative States	8	-	8	1909	4	4	8	50%
Non-Initiative States	37	3	40	1907				
Total	45	3	48	1907				

Of the 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 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 by party conventions.⁵⁰ It passed overwhelmingly in 1911, the only ballot measure to pass for the next twenty-five years.

The people of Montana were immediately successful in adopting the direct primary; in 1912, the first time the voters used the initiative, the measure qualified and voters approved it.⁵¹ Likewise, reformers in Oregon (1910) and South Dakota, which implemented the oft-copied “Richards primary election law” (1912), instituted the primary through the initiative process. In the case of South Dakota, sixty years passed before another statewide initiative was to pass.

⁵⁰ See DAVID SCHMIDT, *CITIZEN LAWMAKERS* (1989), summarized by the University of Southern California's Initiative and Referendum Institute, at <http://www.iandrinstute.org>.

⁵¹ See DAVID SCHMIDT, *CITIZEN LAWMAKERS* (1989), summarized by the University of Southern California's Initiative and Referendum Institute, at <http://www.iandrinstute.org>.

While these states were able to use the initiative process directly to effect reform, there is evidence that the presence of the initiative had indirect influences as well. In Illinois, for example, a non-binding initiative mechanism prompted the legislature to pass a direct primary law. The Illinois state legislature chose to limit its people to a “Public Opinion” procedure in 1901, which was basically an advisory or non-binding initiative power. 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 the complicated election ballots. The legislature ignored all of these requests except the direct primary, which it passed in 1904.⁵² Thus, in at least one case, the initiative process was used to signal to the legislature an issue of public importance, on which they were then compelled to act.⁵³

⁵² See *id.*

⁵³ 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 unwelcomed limitation on the legislature’s power, it fits within the class of election reforms we analyze and we might assume that such an unwelcomed 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, e.g., Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its Implications for Current Reform Proposals*, 45 CLEVE. ST. L. REV. 165, 166 (1997); U.S. CONST. art. I, §3, Cl.1 (amended 1913) (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”). 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). However, while the senators from many states effectively were selected through a popular vote, in most cases it was because voters had winnowed the possible field through a direct primary the state had adopted. Thus, in a one-party state the voters through the primary effectively determined who the legislature would “select” as Senator, rubber stamping the voters’ decisions, putting them in “pretty much the same position as the Electoral College.” See John S. Lapinski, *Direct Election and the Emergence of the Modern Senate*

Thus, although adoption of the direct primary appears, in retrospect, to have been almost inevitable nationwide, we should not overlook the important 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 non-initiative 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 paper, however, we were surprised to learn how quickly the direct primary became a fixture of the national electoral process. In under 15 years, the country moved from a situation where no state held party primaries to one where almost all did.

B. Women's Suffrage

15 (Nov. 11, 2004) (unpublished manuscript), *available at* <http://www.ssc.upenn.edu/polisci/programs/american/lapinskipaper.pdf>. According to Lapinski's count, by 1912 35 states had some form of popular control of the appointment of Senators and thirteen did not. *Id.* at App. Table 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 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 passage of the initiative, the direct primary and then the election of Senators. Of the 10 initiative states that existed at the time of the Seventeenth Amendment, 8 (80%) had some form of popular control of the process of selection of Senators. Of the 38 non-initiative states, 27 (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* University of California, Initiative and Referendum Institute, *Statewide Initiatives Since 1904 – 2000* (work in progress); *see also* DAVID SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* (1989), which is summarized in pertinent part by the University of Southern California's Initiative and Referendum Institute, at <http://www.iandrinstitute.org/>. Thus, both sets of states appear to have made the transition to popular election 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.

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. In fact, some date the earliest days of the reform movement to well before the Civil War.⁵⁴ 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 policy changes, of course, was the widespread adoption of the direct initiative. The prolific introduction of direct democratic mechanisms into many states' policymaking processes in the 1910s and the concurrent success of state-level women's suffrage measures during the same decade suggest that possible relationships between the two developments are worth exploring.

Insofar as equal suffrage directly threatened legislators' reelection prospects, it did so by introducing some uncertainty into the electoral base of individual legislators. The political preferences of prospective women voters were uncertain, and one might expect incumbents to resist a redefinition of the electorate from one that elected them to one that included new voters with unknown allegiances and preferences. Particularly since the adoption of equal suffrage may have spurred resistance among all-male

⁵⁴ LEE ANN BANASZAK, *WHY MOVEMENTS SUCCEED OR FAIL: OPPORTUNITY, CULTURE, AND THE STRUGGLE FOR WOMAN SUFFRAGE* (1996).

legislatures, thereby making statutory changes difficult, pre-1920 state level women’s suffrage is a reform that we might see as having been more successful in states in which the initiative process was available. For the purposes of this section, we conduct a descriptive analysis similar to those in the previous sections: were equal suffrage measures more common in states with the initiative process? If so, were they pursued through the initiative process or through legislative action?

Table 10. States Adopting Equal Suffrage for Presidential or All Elections by 1920

	State-Level Equal Suffrage			How Passed: Initiative Used?			
	Yes	No	Total	Yes	No	Total	
Initiative States							
<i>Frequent Users</i>	5	-	5	2	3	5	40%
<i>Moderate Users</i>	3	3	6	0	3	3	0%
<i>Infrequent Users</i>	3	1	4	0	3	3	0%
Total Initiative States	11	4	15	2	9	11	18%
Concurrent Adopters*	5		5				
Non-Initiative States	10	18	28				
Total	26	22	48				

* Refers to states that adopted women's suffrage before gaining the initiative, but that did adopt the initiative process by 1920: Includes CA, CO, ID, UT, and WA.

Existing research suggests that the presence of the initiative process was not critical to 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 before adopting direct legislation).⁵⁵ Of the 26 states that did extend the franchise to women prior to 1920, eleven, or 42%, had the initiative process available to them at the time. However, while the women's suffrage movement appears 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 did also ultimately adopt the initiative process as well, but later; 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 1908-1913. The perception that state legislatures in these states voluntarily adopted women's suffrage independent of the initiative process, then, is somewhat misleading.

Of the states that did have the initiative process available when they were considering equal suffrage measures, how many actually used it? Of the ten states with the initiative process that did pass a women's suffrage measure, only two of them (Oregon and Arizona⁵⁶, both in 1912) did so through the initiative process. Legislatures in other states, such as New York, Maine, and Rhode Island in the northeast, and in 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

⁵⁵ BANASZAK, *supra* note 51, at 180; ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, App. A-18, A-19, A-20 (2000).

⁵⁶ Arizona was granted statehood 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 immediately pursued an initiative campaign which resulted in a constitutional amendment in the state's first election that fall. *Chapter II: Arizona*, in *HISTORY OF WOMAN SUFFRAGE*, Vol. 6: 1900-1920 (1922); Claudette Simpson, *Frances Munds and Arizona's History of Suffrage*, produced by the Sharlot Hall Museum Archives department and published by the Prescott Daily Courier (Prescott, AZ) on Mar. 22, 1998.

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. 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 those that did not.

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 legislature⁵⁷ did so after constitutional amendments were defeated at the polls. For example, suffrage advocates in Oregon, one of the first adopters of direct legislation (1902), fought perhaps the most trying campaigns for the vote. While the adoption of equal suffrage in 1912 made that state one of the more progressive, it was only after five previous defeats in 1884, 1900, 1906, 1908, and 1910 that the victory was won.⁵⁸ 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 had considered an equal suffrage amendment that it approved but then was defeated by the voters.⁵⁹ An

⁵⁷ These states are North Dakota (1917), Nebraska (1917), Rhode Island (1917), Maine (1919), Missouri (1919), Iowa (1919), Ohio (1919), and Wisconsin (1919). *Chronology of Women's Suffrage Movement Events*, at <http://teacher.scholastic.com/researchtools/articlearchives/womhst/chrono.htm>.

⁵⁸ *Id.*

⁵⁹ Nebraska's legislature approved women's suffrage during the constitutional convention of 1871, but the proposal was defeated by the state's voters. In 1882, a constitutional amendment granting equal suffrage was again endorsed by the legislature, but subsequently was defeated at the polls. For more information on

initiative campaign in 1914 met a similar fate; the proposition granting equal suffrage to women qualified for the ballot but was defeated among the voters by about 10,000 votes.⁶⁰ 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 that was linked closely to the suffrage proponents.⁶¹ Notwithstanding the defeat of the 1914 proposition, encouragement by the suffragists prompted the legislature to approve partial women's suffrage, permitting women to vote for municipal election and for presidential electors, in a new bill in 1917. 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.⁶² By then, the legislature was considering the federal amendment, which it ratified unanimously.

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 was then defeated by the voters at the polls.⁶³ Ultimately, it was an unwilling electorate, and not an unresponsive legislature, that was able to stymie reform.

the history of women's suffrage in Nebraska, see:
http://www.nebraskastudies.org/0700/stories/0701_0110.html.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Bay State Defeats Suffrage by 124,000*, N.Y. TIMES, Nov. 3, 1915, at ____.

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 a constitutional check on the exercise of the political branches' redistricting power only with *Baker v. Carr* 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 non-initiative 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 the tables below 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 1962.⁶⁴ The lower the percent, the more grossly malapportioned the districts. On average, in initiative states, districts comprising 32.3 percent of the population could elect a majority in the lower house of the state legislature, while districts comprising 30.7 percent 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 percent for the lower house (a 3.2 point difference) and 31.0 percent 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 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 non-initiative states reapportioned their lower houses and 41 percent reapportioned their upper houses during that period. The average initiative state redistricted in late 1948 and the median state redistricted in 1951. In contrast, often despite state constitutions and statutes requiring periodic reapportionment, non-initiative states, on average, had redistricted their lower houses in 1934 and their upper houses in late 1933: a 14 and 15 year difference. However, the median state 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 non-initiative states “drag” down their average year of pre-*Baker* redistricting. For example, Vermont was the worst among

⁶⁴ Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299 (2002).

non-initiative states: it had not reapportioned its legislature since 1793 when it ratified its Constitution.⁶⁵

Table 11.

	Average Vote to Control, 1962		Pre-1962 Last Apportionment	
	Lower House	Upper House	Lower House	Upper House
Initiative States				
<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
Total Initiative States	35.5%	31.0%	1948.9	1948.8
Non-Initiative States	32.3%	30.7%	1934.0	1933.7
<i>Difference</i>	3.2%	0.3%	14.9	15.1

Table 12. Measures of Malapportionment in State Legislatures prior to *Baker v. Carr*

	Average Vote to Control Measure				Year of Last Apportionment			
	Lower House		Upper House		Lower House		Upper House	
	Init. States	Non-Init.	Init. States	Non-Init.	Init. States	Non-Init.	Init. States	Non-Init.
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 non-initiative 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, there were only six attempts to introduce reapportionment requirements through the initiative process; three succeeded.⁶⁶ In addition, there were ten attempts to

⁶⁵ Margaret Greenfield et al., *Legislative Reapportionment: California in National Perspective*, 1959 LEGIS. PROBS ____.

⁶⁶ These states were Arizona (1918), California (1926), and Michigan (1952). Initiative and Referendum Institute, *Statewide Initiatives Since 1904-2000*, at

use the initiative process actually to conduct a state legislative redistricting exercise; three of the four that succeeded were statutory initiative measures, one of which the legislature overturned in the following session.⁶⁷ Ironically, the people of Colorado specifically approved through a referendum a malapportioned redistricting plan, which the Supreme Court nevertheless struck down in a companion case to *Reynolds v. Sims*.⁶⁸

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 a political culture supportive of 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 did not have as large population shifts between censuses. 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

[http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/State wide%20Initiatives%201904-2000.pdf](http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/State%20wide%20Initiatives%201904-2000.pdf).

⁶⁷ 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, did not pass through the legislature first. Once it passed, the legislature modified the law in the next session by creating new district boundaries in order to dilute the effect of the original initiative. In this state, then, the absence of a direct legislation mechanism allowing for constitutional revision allowed the legislature to retain control over reapportionment despite statutory efforts to the contrary.

⁶⁸ 377 U.S. 533 (1964). See *Lucas v. Forty Fourth General Assembly*, **Error! Main Document Only**. 377 U.S. 713 (1964).

secure politicians in non-initiative 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. However, certain types of laws, such as term limits, seem unimaginable without the initiative as an open avenue for changing election laws, and we have dug up many other 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. However, in most cases, 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, cultural or otherwise. All we can conclude at this stage is that the initiative can sometimes be an absolute prerequisite for the passage of electoral reforms opposed by recalcitrant incumbents. However, legislatures will often pass such reforms on their own, even though in some cases such reforms may not be as reformist as they would be had the voters proposed them.

In the end, we paint a mixed picture with respect to the effect of direct democracy on election reform. However, 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 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.