

12

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*Direct Democracy and Election
and Ethics Laws*

State legislators are likely to alter institutions so as to keep power and win elections. As such, we should not expect lawmakers to adopt either election or ethics reforms that may diminish their chances of winning and holding office. In nearly half of the American states, though, citizens may circumvent their state legislatures and adopt statutes and constitutional amendments that alter the institutional design of state government, including election and ethics policy.¹ This chapter offers a comparative and historical examination of the popular adoption and policy impact of a variety of election and ethics ballot initiatives in the American states. It also examines recent efforts by state legislatures to regulate and restrict the use of the initiative. It concludes by assessing the success and failures of initiated ethics and election reforms in the states.

History of Ethics and Election Initiated Reforms

Beginning with the passage of the first governance initiative in Oregon in 1904 (requiring the direct primary for the nomination of candidates) and continuing through 2006 with the defeat of the Arizona Voter Reward Act in

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Arizona (which would have awarded a \$1 million lottery prize to one lucky voter), citizens have approved 154 of 258 initiated ethics and election reforms appearing on the ballot.² Ethics and election reform initiatives have a much higher success rate (60 percent) than initiatives in general (40 percent).

This aggregate adoption rate, however, masks an important difference between the two types of reform. Over the past century, initiatives proposing ethics reform have been far more successful than initiatives proposing election reform. Voters have rejected just two of twenty-four ethics-related statewide initiatives on the ballot—a 1934 measure in Arizona that would have changed nepotism rules and a 1976 measure in Utah that would have given voters the right to recall their state officials. Every other ethics reform initiative has received a majority vote. Voters have passed initiatives requiring the disclosure of financial interests of legislators, limiting their outside business interests, and curtailing the gifts bestowed upon them, as well as initiatives clamping down on legislative salaries, creating independent ethics commissions, and regulating the activities of lobbyists, giving ethics reform initiatives a success rate of 92 percent.

In contrast, over the same period, voters have approved 132 of the 234 election reform initiatives on the ballot, a 56 percent approval rate. Within this category, only legislative term limits (76 percent), proxy term limit initiatives calling for self-limit pledges, informed voter notations, and none-of-the-above ballot options (69 percent), and campaign finance initiatives (60 percent) come remotely close to the success rate of initiated ethics reforms. The overall passage rate for election reforms is greatly inflated by the 59 legislative term limits initiatives (of which 45 passed) and the 46 campaign finance initiatives (of which 28 passed). The balance of initiated election reforms have been met in large part by voter skepticism.

When term limit initiatives are removed from consideration, slightly less than half (87) of the remaining 175 election reform initiatives have been approved by voters. Some of the big losers among election reforms have been initiatives promoting woman suffrage (7 of 9 initiatives were defeated in the early 1900s), calling for a unicameral legislature (Nebraska's 1934 initiative was successful, but 2 others were defeated), redistricting and reapportionment efforts (21 of 31 initiatives were defeated), approving independent redistricting commissions (6 of 10 initiatives have failed), changing the way candidates are nominated by their parties (only 4 of 10 initiatives calling for nonpartisan elections have passed: fusion, open primaries, blanket primaries, and the end of caucuses), and altering the method of voting (only 7 of 16 initiatives have been approved that call for voting by mail, election day registration,

and no-excuse absentee voting). In 2005 voters struck down 4 election reform initiatives in Ohio and a redistricting measure in California.³ The following year voters rejected election reform initiatives allowing voting by mail and giving a \$1 million reward to a lucky voter in Arizona, providing public financing to candidates in California, limiting the terms of judges in Colorado, allowing candidates in Massachusetts to cross-list with multiple parties, and term limiting state legislators and imposing campaign finance restrictions in Oregon. In 2006, 4 initiatives were successful at the polls: in Alaska a measure limiting campaign contribution and requiring greater lobbying disclosure passed, as did 1 limiting the state legislature to a ninety-day session, and voters approved ethics reform measures in both Colorado and Montana. Between 2001 and 2006 voters passed all 7 statewide ethics reform initiatives on the ballot, but they struck down 26 of 30 election reforms.

Support for Reform Initiatives

A closer examination of the history of ethics and election ballot initiatives suggests that they are shaped by two separate dynamics which may increase or undermine popular support at the polls. Mechanistically, of course, the initiative provides a majoritarian system of governance. As such, it is prone to both populist and factional tugs and pulls. Both dynamics in the plebiscitary process are powerful and at times can be synergistic. The populist dynamic taps an oppositional sentiment among the electorate, counterpoising citizens against their elected officials. As one observer notes, "Populism divides the political world into Us, the People, and Them, the professional politicians and bureaucrats who actually rule."⁴ This rhetorical trope exploits the sentiment that ordinary citizens can use the process "to challenge, if not outright repudiate, their elected officials and the institution of representative government."⁵

Governance policies like tax and expenditure limits and other antitax measures, election reforms such as term limits and campaign finance limits, and many ethics reforms are classic examples of this populist dynamic at play. Whether the goal of reformers is to crack down on corruption of public officials or malfeasance within government by creating an independent ethics commission, to rein in legislative salaries or restrict the outside financial interests of state legislators, to restrict lobbying or make it more transparent, or to limit the gubernatorial appointment power of U.S. Senators, we can rest assured that supporters will rely on the populist cry of Us versus Them when

rallying the masses. If it is not possible to throw the bums out, reformers can at least place on the ballot laws regulating the public actions of elected officials and those seeking to influence them.

In contrast, other election and ethics reforms are driven predominantly by a factional dynamic. These factional reforms do not alter the relationship between citizens and their elected officials or attempt to regulate the conduct of elected officials. Rather, factional governance policies might be best characterized as a struggle of Us versus Us, since the aim of the reforms is to disrupt the status quo of who is permitted to participate in the electoral process, the manner in which citizens nominate and elect candidates, and the way in which elections are conducted. Initiatives advanced by good government groups such as Common Cause and the League of Women Voters typically aim to enhance electoral participation (especially among apathetic or marginalized segments of the electorate), alter the nomination process of political parties, grant electoral rights to the disenfranchised, or expand the voting rights of members of minority groups. From giving women the right to vote to establishing the direct primary and eliminating the appointment of U.S. Senators to rectifying malapportioned state legislative or congressional districts to allowing election day voting to permitting fusion candidates to cross-list their parties affiliation to allowing crossover voting in blanket primaries, the explicit normative goal of these good government policies is to enlarge or enhance the electoral opportunities of certain citizens.

The initiative, then, is conducive to the adoption of some, but not all, election reforms. Not every citizen wants to change the electoral system; many may prefer, and may even benefit from, maintaining the status quo. As a result, there is the potential for the electorate to become factionalized over these governance initiatives, and it is reasonable to expect that many of these reforms will be rejected at the polls. "As a majoritarian institution, direct democracy requires majorities of voters to support a particular policy and, by definition, minority groups are disadvantaged."⁶ Good governance election reforms intended to level the playing field and expand political access and opportunities for minorities or marginalized groups have at times provoked a factional rift that stems from an electoral majority sensing it is being pushed aside by those gaining political power at their expense.⁷ Election-related initiatives motivated by a factional divide within the electorate, while not as extensive, include efforts in the 1960s across many states to overturn reapportionment plans by state legislatures and, more recently, to require stricter identification requirements in Arizona for citizens to register and vote.

Direct Democracy and Election Reforms

In theory, even if many election reform initiatives go down to defeat, the initiative process can still promote the adoption of election reforms by stimulating action in state legislatures. In the words of Woodrow Wilson, the option of an initiative may serve as a “gun behind the door,” compelling legislators to act in accordance to the will of the people.⁸ However, when it comes to election reforms, the evidence on the efficacy of this instrument is mixed. Looking over time at ten election reforms, one study finds that states with and without the initiative do not seem to have very different election laws,⁹ and another, which controls for some demographic and ideological factors, finds (with the exception of term limits) that the presence of the initiative historically does not have much impact on the adoption of fifteen election-related laws.¹⁰ In contrast, an earlier study finds that “citizen usage of the initiative is a powerful explanation for the adoption of legislative term limits and constraints on governmental taxation and spending.”¹¹ A follow-up study that controls for a number of socioeconomic variables, legislative professionalization, and state political ideology, the same scholar concludes that states with frequent use of the initiative were “more likely to adopt the nine contemporary political reforms” by 1996 than lower frequency initiative users and those without the process.¹² Between 1984 and 1998, states with a higher historical average use of the initiative were similarly found to be more likely than other states to adopt stricter restrictions on individual contributors and on contributions from parties and political action committees.¹³

There may be good reason to be somewhat circumspect about the effect of the initiative on the adoption of election reforms.¹⁴ When trying to extrapolate the historical impact of the initiative on governance reforms more broadly, it is possible that the adoption of some reforms may be historically bounded. In particular, the overwhelming success of legislative term limits across initiative states during the 1990s has come and gone.¹⁵ It is also possible that when governance reforms are combined into a single index, a few policies (specifically, term limits and tax and expenditure limits) may be driving the results.¹⁶ Finally, it may be the case that governance reforms were initially stronger in noninitiative states and that initiative states were simply trying to catch up during the period studied.¹⁷ As such, it may be an overreach to conclude that “a state history of active citizen participation using the process is necessary to explain the adoption of governance policies.”¹⁸

Table 12-1 provides bivariate correlations of two measures of the initiative (the presence or absence of the initiative and the average number of statewide

Table 12-1. *Statewide Initiative and Election Reform Correlations*

<i>Reform^a</i>	<i>Initiative permitted</i>	<i>Average number of initiatives on the ballot, 1980–2004</i>
State legislative term limits	.594**	0.605**
Multimember senate districts	.127	0.094
Multimember house districts	.027	.048
Felon voter restoration in prison	-.008	-.004
Felon voter restoration on parole	-.157	-.134
Felon voter restoration during probation	-.196	-.241
Index of campaign finance regulations	.046	.071
Campaign finance disclosure	.330*	.340*
Public financing of campaigns	-.147	-.166
Campaign finance contribution limits	-.088	-.010
Redistricting commission for state legislative seats	.402**	.382**
Redistricting commission for congressional seats ^b	.043	.076
Index of principles governing congressional redistricting ^c	-.061	.018
Index of state election administration reforms	.007	.032
No straight-party voting	.402**	.428**
Election day voter registration	-.053	-.100
No-excuse absentee voting	.412**	.448**

Source: National Conference of State Legislatures (2007).

a. $N = 50$, unless otherwise noted.

b. $N = 44$. Seven states (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming) have a single, at-large congressional district, but Montana has a redistricting commission for congressional districts (Barabas and Jerit 2004; McDonald 2004).

c. $N = 43$. Seven states have a single, at-large congressional district.

**significant at 0.01 level (two-tailed); *significant at 0.05 level (two-tailed)

initiatives on the ballot between 1980 and 2004) with seventeen measures of election reform in the American states.

The ordinal measures of recent election reforms include

—Legislative term limits and multimember Senate or House districts.¹⁹

—Allowing felons to vote (while in prison, on parole, or on probation).²⁰

—A composite stringency index of twenty-two state campaign finance regulations as well as disaggregated measures of state campaign finance disclosure, public financing of campaigns, and contribution limits.²¹

—A redistricting commission for either state legislative or congressional redistricting.²²

180 DANIEL A. SMITH

—A seven-point index of the principles governing congressional redistricting decisions.²³

—A composite index of twelve election administration reforms (new voting equipment, voting equipment standards and procedures, a ban on punch cards, a new or improved central registration database, improved registration list maintenance and purging procedures, voter intent, recount procedures, absentee voting procedures, provisional ballots, poll workers, polling place and voting machine accessibility for elderly and disabled voters, and improved voter education).²⁴

—Straight-party voting, election day voter registration, or no-excuse absentee voting by mail.²⁵

We should take the results presented in table 12-1 as suggestive, rather than definitive, as they do not use multivariate statistical controls for state economic, demographic, and political factors. Though other possible factors are not held constant, the adoption of five of the seventeen election reforms—term limits on state legislators, stringency of campaign finance disclosure, the use of a commission for state legislative redistricting, no straight-party voting, and no-excuse absentee voting by mail—are statistically related to the presence or use of the initiative. It comes as little surprise that the adoption of legislative term limits is positively related to both the presence of the initiative and actual initiative use.²⁶ States with the initiative (and those using the process more frequently) are also less likely to allow party-line voting, which again should be expected, as one of the major Progressive Era reforms was to weaken party machines. The adoption of campaign finance disclosure, redistricting commissions, and no-excuse absentee voting are all positively related to having (and using) the initiative.²⁷ However, the fact that over two-thirds of the election reforms are not tied to either the presence or the use of the initiative is somewhat eye-opening. Initiative states are not more likely to overturn felon disenfranchisement laws or use multimember legislative districts. There is also no statistically significant relationship between the presence (or use) of the initiative and a wide spectrum of campaign finance reforms (except for disclosure) or the index of state election administration reforms.

Direct Democracy and Ethics Reforms

Little scholarly work has been done on the impact of the initiative on the adoption of ethics reforms in the American states. A few studies use a dichotomous dummy variable indicating the presence or absence of the initiative to examine comparative levels of corruption in the states, but results are mixed.²⁸

Table 12-2. *Statewide Initiative and Ethics Reform Correlations Reform*

<i>Reform</i>	<i>Initiative permitted</i>	<i>Average number of initiatives on the ballot, 1980–2004</i>
Statehouse reporters' ranking of public corruption (<i>N</i> = 47)	-.198	-.298*
Ethics laws, jurisdiction to investigate index (<i>N</i> = 47)	-.061	-.033
Ethics laws, authority to investigate index (<i>N</i> = 44)	-.193	-.181
State legislative lobbying regulation, 1990–91 (<i>N</i> = 50)	-.088	.039
State legislative lobbying regulation, 2003 (<i>N</i> = 50)	.001	.093
State legislative lobbying regulation, 2003 (plus penalties) (<i>N</i> = 47)	-.073	.016

Source: National Conference of State Legislatures (2007); Council of State Governments (2006).

*significant at 0.05 level (two-tailed)

In a more rigorous treatment of the adoption of ethics laws in the states, one scholar also uses a dummy variable to capture the impact of the initiative on the adoption of various state ethics laws in the states over three time periods.²⁹ In 1954–72 and 1989–96, the study finds that the presence of the initiative does not have an impact on the likelihood of a state adopting legislative ethics codes or on explaining a state's overall change in its legislative ethics laws. During the post-Watergate period (1977–88), however, the presence of the initiative contributed to the overall strengthening of state legislative ethics laws. Citizens in four states used the initiative to authorize the adoption of independent legislative ethics commissions between 1970 and 1996 (California, 1974; Maine, 1975; Michigan, 1975; Arkansas, 1990), and the initiative process played an indirect role in the adoption of a commission in Massachusetts (1978) after Common Cause threatened to place a measure on the ballot. However, the study also finds that the initiative did not affect whether a state adopted an independent legislative ethics commission between 1973 and 1996.

Table 12-2 provides bivariate correlations among the alternative measures of the initiative and five measures of ethics reform in the American states, as well as a normalized ranking of perceived public corruption from a survey of State House reporters.³⁰ The ethics reforms include separate indexes measuring the jurisdiction and authority of state ethics committees to investigate on their own authority, and three measures of state legislative lobbying regulations.³¹ Correlations between the presence and average use of the initiative

over time and the five ethics reform measures suggest that states with or that frequently use the initiative are no more likely to adopt reforms giving ethics commissions more authority to investigate misconduct or to adopt stricter lobbying regulations. The increased use of initiative, however, appears to be weakly related to lower levels of perceived public corruption by the capitol beat press corps. As with the relationship between the initiative and various election reforms, the findings here are suggestive, not conclusive.

Legislative Backlash? Regulating the Initiative

It comes as no surprise that initiated efforts to regulate ethics and elections have not been well received by many state legislatures. Faced with a threat to their own livelihood, lawmakers have tried continually to rein in the process of direct democracy. Though legislative hostility toward the initiative is often driven by concerns over substantive outcomes resulting from ballot measures, legislators undoubtedly are also frustrated by the ethics and elections sanctions imposed by initiatives.

Legislative efforts to regulate and restrict the initiative process are not new. Before the ink had even dried on the constitutional amendments granting citizens newfound plebiscitary powers during the Progressive Era, state lawmakers tried to make it more difficult for groups to place measures on the ballot.³² In Oregon, the first state to have a statewide initiative on the ballot, the state legislature passed a law in 1907 requiring circulators to sign an affidavit when collecting signatures. In California, following the 1914 general election, which had forty-eight statewide measures on the ballot, the state legislature passed a law making it a criminal offense for signature gatherers to misstate the contents of a measure. Lawmakers in Washington passed a statute in 1915 that required registered voters to sign their names on petitions in the office of a county clerk from 6 p.m. to 9 p.m. over a ninety-day period. Perhaps appropriately, the law never went into effect, as it was immediately overturned by a popular referendum.³³ During the 1920s and 1930s state legislatures passed a series of laws pertaining to the financing of ballot measures. In 1933 Oregon lawmakers passed a statute requiring proponents and opponents of ballot measures to report their contributions and expenditures and, in the following legislative session, prohibited “any person to give, pay, or receive any money or other valuable consideration for securing the signatures of electors on direct legislation petitions.”³⁴ By the 1970s over half of the initiative states passed laws restricting campaign contributions and expenditures in ballot campaigns.³⁵ Over the years, state legislatures also

have passed laws placing geographic distribution requirements on the signature-gathering phase in qualifying ballot measures. Roughly a dozen states still require signatures to be collected from a minimum number of geographic units (usually congressional districts).³⁶ As a result of these regulations, there is considerable variation across states with regard to the ease and availability of the initiative process.³⁷

State lawmakers continue to place restrictions on the initiative process, with the unmistakable intention of making it more difficult for proponents to qualify their measures. Many legislative efforts to regulate the process focus on fraudulent gathering of signatures for petition drives. Some of these regulations include requiring signature gatherers to be residents of the state, requiring petitioners to sign affidavits or have the petitions they are circulating notarized, and shortening the time in which valid signatures may be gathered. Today, every state permitting the initiative has criminal penalties for both circulators and signatories if they falsify information on petitions, including fines upward of \$5,000 and up to two years of jail time.³⁸

Many of these restrictions on the initiative subsequently faced court challenges. In 1978 campaign finance restrictions that states had placed on ballot measure campaigns were overturned by the U.S. Supreme Court in its 1978 decision in *First National Bank of Boston v. Bellotti*. In reviewing a Massachusetts statute that prohibited contributions and expenditures by corporations in ballot campaigns unless the issue materially affected the corporation's business, the court found that expenditure limits in ballot campaigns were unconstitutional. Three years later, in *Citizens against Rent Control v. City of Berkeley*, the justices ruled that any limits on contributions to ballot issue committees were unconstitutional infringements on free speech.³⁹ In 1988 the U.S. Supreme Court invalidated a Colorado law banning paid signature gatherers in its decision *Meyer v. Grant*. Several other states, including Maine, Mississippi, North Dakota, Washington, and Wyoming, were required to take bans off the books.⁴⁰ In its 1999 decision *Buckley v. American Constitutional Law*, the high court struck down another Colorado law that required petition gatherers to be registered voters, to wear identification badges, and to report how much they were being paid, ruling that the restrictions were "undue hindrances to political conversations and the exchange of ideas." Recently, the high court has been quite dubious of state legislative efforts to restrict the initiative process.⁴¹

Despite judicial rulings striking down legislative efforts to regulate the process of direct democracy, the legislative effort to restrict the initiative process seems to have picked up steam. According to data compiled by the

National Conference of State Legislatures, between 2001 and 2006 over 400 bills dealing with the process of direct democracy were filed in the twenty-four states that permit the initiative, with more than 1 of 8 of these bills becoming law.⁴² In 2007 alone, legislators in the two-dozen initiative states filed more than 200 bills aimed at regulating the process. Some of the more popular legislature-sponsored regulations include requiring a financial impact statement for measures that qualify for the ballot, changing the format of petitions, tightening single-subject standards, placing additional restrictions on paid petition gatherers, and providing more disclosure of campaign finance activities. Certainly, the efforts of state lawmakers to rein in the process is not solely a reaction to ethics and election initiatives, but these initiatives likely contribute at the margins to the hostility shown by state legislatures toward the process of direct democracy.

Implications for Reform

The use of the initiative might not be the best institutional antidote for reformers interested in reforming the electoral process, although it may play an indirect role in setting the reform agenda across the states. Reformers who sponsor ethics and election initiatives that tap into a deep populist sentiment will likely continue to be rewarded at the polls.⁴³ But absent a populist dynamic, election reform efforts using the initiative will face the same uphill battle as other factionalized ballot initiatives. Furthermore, regardless of the success or failure of ethics and election reforms placed on the ballot via the initiative, it is certain that state lawmakers will continue to cast a skeptical eye on the process. The legislative backlash against the initiative arose during the origins of direct democracy, and regulations placed on the process are likely to persist. At its heart, though, the initiative remains a majoritarian system of governance; the voice of the people (or at least that of the electorate) will have the final say on whether altering the status quo is perceived to be beneficial.

Notes

1. Smith and Tolbert (2007).
2. Data are from the Ballot Initiative Strategy Center, National Conference of State Legislatures, and the Initiative and Referendum Institute and were coded by the author. Several initiatives contain both ethics and election reforms and are counted twice for the purposes of this analysis.
3. Tolbert, Smith, and Green (forthcoming).

4. Citrin (1996, p. 268).
5. Smith (1998, p. 28).
6. Donovan, Wenzel, and Bowler (2001, p. 173).
7. Cain (1992).
8. Quoted in Smith and Tolbert (2004, p. 2.).
9. Persily and Anderson (2005).
10. Matsusaka (2006).
11. Tolbert (1998, p. 184).
12. Tolbert (2003, p. 487).
13. Pippen, Bowler, and Donovan (2002).
14. See Persily and Anderson (2005); Matsusaka (2006).
15. Smith (2003); Tolbert (1998).
16. Tolbert (2003).
17. Pippen, Bowler, and Donovan (2002).
18. Tolbert (1998, p. 187).
19. Council of State Governments (2006).
20. Sentencing Project (2006).
21. Witko (2005).
22. McDonald (2004).
23. Barabas and Jerit (2004).
24. Palazzolo and Moscardelli (2006).
25. Kimball (2003); Council of State Governments (2006).
26. See Tolbert (1998); Persily and Anderson (2005); Matsusaka (2006).
27. Pippen, Bowler, and Donovan (2002).
28. Alt and Lassen (2003); Meier and Holbrook (1992).
29. Rosenson (2005).
30. Boylan and Long (2003).
31. Council of State Governments (2006); Newmark (2005).
32. Donovan and Smith (2008).
33. Lapalombara and Hagan (1951).
34. Lapalombara and Hagan (1951, p. 415).
35. Smith (2001).
36. Waters (2003).
37. Collins and Oesterle (1995); Bowler and Donovan (2004).
38. Donovan and Smith (2008); Council of State Governments (2006).
39. Smith (2001).
40. In 2002 voters in Oregon approved Measure 26, an initiated measure that requires signature gatherers to be paid by the hour and be classified as paid employees rather than independent contractors.
41. Smith (2001).
42. National Conference of State Legislatures (2007).
43. Citrin (1996); Smith (1998).