

Nicholas Stephanopoulos\*

## Reforming Redistricting: Why Popular Initiatives To Establish Redistricting Commissions Succeed or Fail

*Wordcount:* 27,615

*Abstract:* There are several ways in which redistricting reform could in theory be achieved. State legislatures could voluntarily cede control over district-drawing, courts could invalidate especially egregious gerrymanders, or popular initiatives could be launched to create redistricting commissions. However, thanks to the self-interest of legislators as well as the Supreme Court's unfortunate recent decisions in *Vieth v. Jubelirer* and *LULAC v. Perry*, the redistricting initiative is now the only realistic way to curb political gerrymandering.

This Article provides the first detailed empirical and normative examination of redistricting initiatives. The Article begins by making the case for the popular initiative in the redistricting context, and for the redistricting commission as a solution to the problem of gerrymandering. Relying on extensive archival research, it next analyzes all twelve redistricting initiatives that have taken place over the course of American history, positing explanations for why each measure succeeded or failed. Finally, the Article considers the twelve initiatives holistically in order to determine what factors best account for the measures' passage or rejection, and how proponents of redistricting reform can improve their odds of success in the future. The Article's main finding is that, contrary to the academic conventional wisdom, the most important reason for redistricting initiatives' frequent failure is the strident opposition of the majority party in the state legislature. Conversely, redistricting initiatives only succeed when some factor—e.g. favorable national developments, the enthusiastic support of the state's media establishment, dissension between the majority party's executive branch officials and its legislators—defuses majority party opposition.

\* J.D., 2006, Yale Law School; M.Phil, University of Cambridge, 2002; A.B., Harvard University, 2001. My thanks are due above all to Heather Gerken, who initially suggested this Article's subject and supported me throughout the writing and revision process. I am also grateful to Melissa Anderson, David Fontana, Owen Fiss, Nathaniel Persily, and Larry Solan for reading earlier drafts of this Article and offering many helpful suggestions.

Nicholas Stephanopoulos

## Reforming Redistricting: Why Popular Initiatives To Establish Redistricting Commissions Succeed or Fail

### TABLE OF CONTENTS

INTRODUCTION .....	3
I. THE CASE FOR THE REDISTRICTING INITIATIVE AND COMMISSION .....	6
A. <i>The Redistricting Initiative</i> .....	7
B. <i>The Redistricting Commission</i> .....	10
II. THE TWELVE REDISTRICTING INITIATIVES .....	17
A. <i>Variables</i> .....	18
B. <i>Cases</i> .....	20
1. Arkansas, 1936 (Succeeded).....	21
2. Oklahoma, 1960 (Failed) .....	23
3. Oklahoma, 1962 (Succeeded).....	26
4. North Dakota, 1973 (Failed).....	29
5. Colorado, 1974 (Succeeded).....	33
6. Ohio, 1981 (Failed).....	35
7. California, 1982 (Failed).....	38
8. California, 1984 (Failed).....	41
9. California, 1990 (Failed).....	45
10. Arizona, 2000 (Succeeded).....	48
11. California, 2005 (Failed).....	52
12. Ohio, 2005 (Failed).....	56
III. PATTERNS AND LESSONS.....	59
A. <i>Patterns in the Past</i> .....	59
B. <i>Lessons for the Future</i> .....	66
C. <i>Implications for the Academic Conventional Wisdom</i> .....	69
CONCLUSION.....	72
APPENDIX A: FEATURES OF THE TWELVE REDISTRICTING INITIATIVES .....	75
APPENDIX B: FACTORS IN REDISTRICTING INITIATIVES' SUCCESS OR FAILURE.....	76

## INTRODUCTION

Redistricting in America is rotten. Across the country, for elections of every level, district lines are drawn in such a way that fundamental democratic values are subverted. Sometimes districts take on bizarre shapes as legislators add and subtract people in order to assure a particular political profile. Sometimes distinct political communities—say, rural farmers or inner-city minorities—are split apart by district lines or merged with other very different communities. Sometimes districts are blatantly skewed toward one party even though the state as a whole is politically competitive. Sometimes, thanks to clever district-drawing, the distribution of seats in a state legislature or congressional delegation has little correlation to a state’s overall voting pattern. And, very often, all these sins are combined. When looking at a district map, it is not unusual to see oddly shaped districts that divide political communities, virtually guarantee reelection for incumbents, and enable one party to win a much higher proportion of legislative seats than popular votes.

There are several ways in which redistricting abuses could be combated, but unfortunately most are unlikely to transpire. Congress<sup>1</sup> and state legislatures<sup>2</sup> could pass laws

---

<sup>1</sup> The Constitution explicitly states that “Congress may at any time by law make or alter . . . regulations” relating to “[t]he times, places and manner of holding elections.” U.S. CONST. art. I, § 4. Congress has exercised this authority several times in the past. The Apportionment Act of 1842, 5 Stat. 491, required that House districts elect a single member and consist of contiguous territory. The Apportionment Act of 1862, 12 Stat. 572, reiterated these requirements, and the Apportionment Act of 1872, 17 Stat. 28, § 2, added the further condition that districts “contain[] as nearly as practicable an equal number of inhabitants.” In 1901, Congress also insisted on district compactness, Apportionment Act of 1901, 31 Stat. 733, and in 1911 it renewed these requirements of contiguity, compactness, and equipopulation, Apportionment Act of 1911, 37 Stat. 13. However, Congress did not extend the 1911 requirements when they expired, and has failed to pass any new redistricting legislation over the past ninety years. Today the only federal statutory limitation on redistricting is the requirement that all House districts elect a single member. 2 U.S.C. § 2c (2000).

<sup>2</sup> Several states have either adopted standards for redistricting, or decided by statute to allow bipartisan or nonpartisan commissions to draw district lines. *See, e.g.*, HAW. REV. STAT. § 25-2 (1993); IDAHO CODE ANN. § 72-1506 (1999); IOWA CODE § 42.4(5) (2003); ME. REV. STAT. ANN. tit. 21-A, § 1206 (2003); MONT. CODE ANN. § 5-1-

imposing certain requirements—e.g. contiguity, compactness, preservation of political communities—on the district-drawing process. But legislators are the primary beneficiaries of the redistricting status quo, and therefore have a strong incentive not to change the rules that allow them to be reelected time after time. Courts could also intervene by invalidating especially egregious gerrymanders. But the Supreme Court’s recent decisions in *Vieth v. Jubelirer*<sup>3</sup> and *League of United Latin American Citizens (LULAC) v. Perry*<sup>4</sup> all but foreclosed federal judicial relief, at least on equal protection grounds. A plurality of the Court held in *Vieth* (and affirmed in *LULAC*) that political gerrymandering is never justiciable under the Equal Protection Clause, and the remaining Justices splintered over what the constitutional standard should be (and whether it has yet been discovered).<sup>5</sup> As for state courts, Sam Hirsch has noted that it is “difficult to convince [them] not to follow lockstep the U.S. Supreme Court’s . . . jurisprudence,” and that the Elections Clause arguably “bars a state court from applying state constitutional law to invalidate a congressional map enacted by the state legislature.”<sup>6</sup>

Legislators’ self-interest and adverse court decisions leave critics of contemporary redistricting with only one promising avenue for reform: the popular initiative. The initiative, available in some form in twenty-four states,<sup>7</sup> enables the general public to place statutory and

---

115 (2003); WASH. REV. CODE § 44.05.090 (1994). But such states are in the minority, and their reforms typically do not apply to federal elections.

<sup>3</sup> 541 U.S. 267 (2004).

<sup>4</sup> 126 S. Ct. 2594 (2006).

<sup>5</sup> Justice Kennedy concurred in the Court’s judgment but wrote separately to express his view that simply because “no [justiciable] standard has emerged in this case should not be taken to prove that none will emerge in the future.” 541 U.S. at 311 (Kennedy, J., concurring in judgment); *see also LULAC*, 126 S. Ct. at 2607 (“A plurality of the Court in *Vieth v. Jubelirer* would have held such challenges to be nonjusticiable political questions, but a majority declined to do so.”). The *LULAC* Court rejected yet another proposed standard for detecting unconstitutional political gerrymandering, i.e. a presumption that mid-decade redistricting is conducted solely for partisan ends and therefore violates the Equal Protection Clause.

<sup>6</sup> Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 210-11 (2003).

<sup>7</sup> *See* Initiative & Referendum Institute, State I & R, [http://www.iandrinstitute.org/statewide\\_i%26r.htm](http://www.iandrinstitute.org/statewide_i%26r.htm) (last visited February 11, 2006). Forty-nine states (all but Delaware) require popular approval for constitutional amendments passed by the legislature. Initiative & Referendum Institute, States with Legislative Referendum for Statutes and

constitutional proposals directly on the ballot. After enough signatures are garnered, both legislatures and courts are circumvented, and the people themselves are able to decide if, for example, certain standards should be followed during redistricting or a commission should draw district lines instead of the legislature.

Redistricting initiatives—in the wake of *Vieth* and *LULAC* the only realistic way to curb political gerrymandering<sup>8</sup>—are the subject of this Article. Part I discusses the merits of the initiative in the redistricting context, and evaluates the bipartisan commission (the approach taken by almost every redistricting initiative) relative to other anti-gerrymandering mechanisms. The section argues that the popular initiative is particularly well-suited to combating gerrymandering because it allows voters to bypass the self-interested politicians who typically thwart efforts to make redistricting fairer. The section also contends, on the basis of political theory and empirical evidence, that the bipartisan commission is, on the whole, well-designed to prevent gerrymandering and improve redistricting.

Part II begins to confronts the biggest problem with redistricting initiatives: the fact that they generally fail. The section first presents a series of factors that have been identified by scholars and other observers as potential explanations for initiatives' success or failure. The section then examines in detail the twelve cases in which initiatives were launched to regulate redistricting. Each initiative's official language, political backdrop, principal supporters and opponents, campaign dynamics, and eventual outcome are described. In addition, tentative conclusions are reached about why each initiative passed or (more typically) was defeated.

---

Constitutional Amendments, <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Legislative%20Referendum%20States.pdf> (last visited February 12, 2006).

<sup>8</sup> Redistricting initiatives are clearly a second-best solution since they must be conducted separately in each state, and are unavailable entirely in twenty-six states. It would be better to regulate gerrymandering across the entire country in one swoop, either through congressional or federal judicial action. But, as argued above, national action is virtually impossible because of federal legislators' self-interest and unfavorable Supreme Court doctrine.

Finally, Part III takes a more holistic approach to the twelve redistricting initiatives. The section analyzes all the initiatives together in order to identify factors that were relevant to success or failure across a range of cases; offers recommendations that advocates of redistricting reform should follow in the future; and discusses the Article's implications for the academic conventional wisdom on why initiatives succeed or fail. The section's main finding is that redistricting initiatives always fail when they are strongly opposed by the majority party in the state legislature, and only succeed when some factor—e.g. favorable national developments, the enthusiastic support of the state's media establishment, dissension between the majority party's executive branch officials and its legislators—defuses majority party opposition. The upshot for reformers is that they should wait for auspicious political moments before launching redistricting initiatives, and try at all costs to stop the majority party from presenting a unified front of opposition to the measure. And the lesson for academics is that the traditional theory of initiative outcomes, which downplays the importance of political parties, is wrong as applied to redistricting initiatives. Not only do parties' positions and campaigning influence redistricting initiative outcomes, they hold more explanatory power than any other factor.

## **I. THE CASE FOR THE REDISTRICTING INITIATIVE AND COMMISSION**

Before delving into the details of the twelve redistricting initiatives, it is important to ask whether initiatives are a good idea in the redistricting context, and whether their typical approach—the creation of a redistricting commission—is an appropriate cure for the ills of gerrymandering. This Part argues that the answer to both of these questions is yes. Popular initiatives are especially well-suited to the redistricting context because it is an area where

legislators' self-interest often trumps the pursuit of the public good. And redistricting commissions, while not a perfect solution to rampant political gerrymandering, are theoretically and empirically superior to the status quo.

### A. *The Redistricting Initiative*

When the initiative and referendum<sup>9</sup> were first proposed at the turn of the twentieth century, their supporters tended to view them as a panacea to many of the afflictions of politics. Woodrow Wilson believed that they would remind politicians that “they are bound in duty . . . to represent the sovereign people . . . and not the private interests which creep into their counsels.”<sup>10</sup> Harvard professor Lewis Jerome Johnson argued that, “[s]upplemented by the initiative and referendum . . . the representative system will gradually but surely enter upon a period of honor and usefulness hitherto never surpassed and probably never equaled.”<sup>11</sup> And California Governor Hiram Johnson, a prominent Progressive, claimed that after his state adopted the initiative and referendum, “the prosperity of the State [would be] assured, exaction and extortion from the people will be at an end,” and “development and progress will follow as a matter of course.”<sup>12</sup>

But the century in which they have been in use has stripped some of the bloom off the initiative and referendum rose. According to critics, the expense of placing a proposition on the

---

<sup>9</sup> Initiatives are placed directly on the ballot after enough signatures are obtained. Referenda subject a legislative enactment to a popular vote.

<sup>10</sup> Woodrow Wilson, *The Issues of Reform*, in *THE INITIATIVE, REFERENDUM AND RECALL* 69, 87-88 (William Bennett Munro ed., 1912).

<sup>11</sup> Lewis Jerome Johnson, *Direct Legislation as an Ally of Representative Government*, in *THE INITIATIVE, REFERENDUM AND RECALL*, *supra* note 10, at 139, 147.

<sup>12</sup> Hiram Johnson, Inaugural Address (Jan. 3, 1911), *available at* [http://www.governor.ca.gov/govsite/govsgallery/h/documents/inaugural\\_23.html](http://www.governor.ca.gov/govsite/govsgallery/h/documents/inaugural_23.html).

ballot and then conducting an effective campaign for it makes it difficult for ordinary people to participate in the initiative and referendum process, and results in domination by well-heeled special interests.<sup>13</sup> In addition, precisely because they evade the normal checks and balances of the legislative process, initiatives and referenda can more easily be used to abridge individual rights. As Julian Eule writes, “direct democracy bypasses internal safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest.”<sup>14</sup> Furthermore, initiatives and referenda may result in an undesirable distortion of public policy. “The legislative process provides for debate over alternatives, compromise, and consensus or agreement,” while initiatives and referenda present voters with a single proposition that must be approved or rejected in its entirety.<sup>15</sup> Finally, the evidence that initiatives and referenda improve deliberation on important issues is slim. In fact, voter turnout is usually far lower in special elections for initiatives and referenda than in normal elections.

Fortunately, this critique of direct democracy has limited force in the redistricting context. Redistricting initiatives do not endanger individual rights since all they seek to do is change the process by which electoral district lines are drawn. They do not interfere with the complicated negotiating and favor-trading of the legislative process since they involve no serious spending and need not be balanced against other agenda items. Because of their diffuse impact and fiscally neutral posture, there is no special interest group that consistently benefits from the passage of redistricting initiatives. And, while not as simple and provocative as some cultural

---

<sup>13</sup> See, e.g., Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1853 (1999) (“As money becomes the only certain route to ballot access, the character of direct democracy is increasingly determined by those with financial resources.”); Jamin B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1 N.Y.U. J. LEGIS. & PUB. POL’Y 21, 22 (1997) (“[W]hether our laws emerge from legislative process or plebiscite, far too many of them are being shaped and determined by the expenditure and contribution of huge sums of money by interested corporate factions.”).

<sup>14</sup> Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1549 (1990).

<sup>15</sup> DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 29 (1984).

issues, the question of who should draw district lines—the legislature or a commission—is easily understandable by voters.

Most importantly, redistricting initiatives are attractive because, to use John Hart Ely’s phrase, they promise to “unblock[] stoppages in the democratic process.”<sup>16</sup> Redistricting is a context in which legislators’ incentives and the public interest are almost diametrically opposed. Legislators want to win reelection handily and to have their party obtain as many seats as possible. Under almost any theory of democracy, on the other hand, the public is more interested in elections whose outcome is not a foregone conclusion, districts that respect preexisting political communities, and legislatures whose partisan composition roughly reflects actual vote totals. Redistricting initiatives enable the public to rescue their interests from legislative hijacking. Substantive standards (e.g. contiguity, compactness, competitiveness, preservation of political communities) can be imposed on redistricting, or a more neutral district-drawing process instituted, without legislators—whose rejection of such proposals is a virtual certainty—having anything to say about the matter. As a recent *Harvard Law Review* Note observes, direct democracy, when it addresses flaws in the electoral and legislative process,

is playing precisely the role that it should: it checks dysfunctional government. . . . [D]irect democracy is most effective when partisan politics or special-interest influence has so distorted the proper operation of political markets that democratic government ceases to be responsive to voters’ concerns. Just as scholars have advocated an enhanced judicial role when “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out,” so too can direct democracy promote more responsive and representative government in such situations.<sup>17</sup>

Redistricting initiatives are by no means without their blemishes. As Part II discusses in detail, voters are not always very informed or excited about them, their accompanying media

---

<sup>16</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 117 (1980).

<sup>17</sup> Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2764-65 (2005) (internal citations omitted).

campaigns are often extremely misleading, and sinister motives are sometimes alleged to lurk behind the proposals' technical details. Moreover, the intrinsic state-by-state nature of direct democracy means that redistricting reform by initiative must unfold slowly and incrementally, rather than in a single national legislative or judicial thunderclap. Still, on balance, the case for redistricting initiatives is strong. Unlike many other initiatives, they do not supplicate to special interests, upset delicate budgetary balances, or harm minority groups. And, as long as legislative and judicial paths to reform remain blocked, they represent the only realistic way for the evils of gerrymandering to be redressed.

### *B. The Redistricting Commission*

Redistricting initiatives *could* in principle operate in several ways. They could allow the legislature to continue drawing districts, but require that certain rules about districts' shape and composition be followed. They could abolish single-member districts entirely and replace them with a proportional representation or other electoral system.<sup>18</sup> They could create a nonpartisan or bipartisan commission and grant it complete freedom to devise the district map it thinks is best. Or they could create a commission and limit its discretion by imposing various requirements on the districts that it draws.

In practice, every one of the twelve redistricting initiatives has taken the last of these approaches: establishing a commission by constitutional amendment, and then providing the commission with various rules to follow as it goes about drawing district lines. The main contrasts among the initiatives have involved the bodies to be reapportioned (state legislature

---

<sup>18</sup> This would only be possible for state elections. Federal law requires that all Representatives be elected through single-member districts. 2 U.S.C. § 2c (2000).

and/or congressional delegation), the standards to be used by the commissions, and the size, composition, and selection of the commissions. Appendix A, *infra*, summarizes the main features of the twelve redistricting initiatives.

Because the initiatives have been so similar, it is worth examining how compelling their solution to political gerrymandering—a commission with prescribed standards—is. In my view, the commission is quite a good solution.<sup>19</sup> First, and most critically, the members of redistricting commissions are not self-interested legislators. Who exactly the members are varies from initiative to initiative,<sup>20</sup> but in no case are the very politicians who will soon be running for reelection allowed to draw the district lines themselves. This feature of commissions encourages values other than the legislators' self-interest to be pursued, for example, district competitiveness, the preservation of political communities, and the achievement of electoral results that broadly mirror the public's political preferences.<sup>21</sup> Of course, commission members are not politically agnostic saints; under the terms of several of the twelve initiatives, in fact, they may be executive branch officials or staunch partisans appointed by state party leaders. But the fact that commission members' *own* careers will not be directly affected by the district maps that they draw frees them to focus on the public good (or, at least, to consider it more seriously than

---

<sup>19</sup> Redistricting commissions enjoy wide support in the scholarly literature. *See, e.g.*, DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 173-75 (2002); Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J. L. & PUB. POL'Y 115 (2004); Robinson O. Everett, *Lessons from North Carolina's Redistricting Litigation*, 6 TEX. REV. L. & POL. 205, 221 (2001); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1647, 1691-98 (1993); Gene R. Nichol, *The Practice of Redistricting*, 72 U. COLO. L. REV. 1029, 1030 (2001); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997).

<sup>20</sup> *See infra* Appendix A. The three principal formulas for commission composition are 1) for certain state officials (e.g. the governor, the secretary of state) to be on the commission ex officio; 2) for designated state officials (e.g. the governor, legislature majority and minority leaders, state party leaders) to appoint the commission members; and 3) for retired judges to staff the commission.

<sup>21</sup> *See* Nichol, *supra* note 19, at 1030 ("I am inclined to believe that independent redistricting commissions are less political than their legislative counterparts."); Kubin, *supra* note 19, at 858 ("The legislative independence of . . . commissioners also affords them greater flexibility to adhere to a state's constitutionally mandated redistricting criteria.").

legislators do). The bipartisan nature of many commissions, with an equal number of each major party's backers as well as, typically, a neutral chairperson elected by the political appointees,<sup>22</sup> also prevents commission members from blatantly flouting democratic values. Any redistricting proposal that promises to result in disproportionate electoral success for one party inevitably provokes fierce opposition from the other party's supporters and the chairperson.<sup>23</sup>

Second, redistricting that is conducted by a commission enjoys greater public legitimacy than redistricting carried out by the state legislature. As Jeffrey Kubin notes, the latter method “fosters disillusionment with the democratic process because it more deeply ingrains upon the American psyche the image of politicians as self-interested actors feathering their own nests.”<sup>24</sup> Oddly shaped districts, very high reelection rates, seat counts that do not correspond to vote counts—all these ills may be blamed on self-serving politicians when the legislature draws the district lines, with the result that the public's faith in government declines and its cynicism swells. In contrast, when elections conducted pursuant to a commission's district map fall short of perfection, people at least know that the rules of the game were drafted by someone other than the game's actual contestants.<sup>25</sup>

Third, entrusting redistricting to a commission allows the legislature to devote more attention to issues of greater concern to the public. It is true that redistricting (typically) takes place only once per decade, but it is a very time-consuming process that generates a great deal of animosity among legislators battling for personal and partisan advantage. A governor's veto or a

---

<sup>22</sup> A variation of this formula was proposed in North Dakota (1973), Arizona (2000), and Ohio (2005). Many states that have adopted redistricting commissions through legislative action (as opposed to an initiative) also have bipartisan commissions.

<sup>23</sup> See Kubin, *supra* note 19, at 856 (“Fundamentally, tie-breaking commissions provide for a fair fight because the majority party cannot run roughshod over the minority party as it would be able to in an unevenly split legislature.”).

<sup>24</sup> *Id.* at 860.

<sup>25</sup> See Confer, *supra* note 19, at 126 (“Bipartisan or nonpartisan legislative redistricting commissions increase the legitimacy of the entire redistricting process by removing the most self-interested group, the political parties, from control over the process.”).

court's invalidation of the legislature's plan, both quite common in the redistricting context, can further protract the process and intensify legislators' antagonism. But when a commission draws district lines, both the time-drain and the poisonous side effects of legislative redistricting are averted.<sup>26</sup>

Empirical evidence confirms that elections in states with commissions are superior in several respects to elections in states without commissions.<sup>27</sup> Andrew Gelman and Gary King conducted a study of all lower house elections in thirty states over a twenty-year period. They found that when a single party controls redistricting, it wins on average three percent more seats than it would have obtained if a commission handled redistricting or if control over the legislature was split.<sup>28</sup> That is, a party that would have won 100 seats under a bipartisan commission's plan will typically win 103 seats if it is able to draw the district lines itself. At the federal level, I compared 2004 election results in the four states that employ redistricting commissions and have more than two congressional seats—Arizona, Iowa, New Jersey, and Washington—to results in the forty-three states that do not use commissions to redistrict their congressional delegations.<sup>29</sup> I found that candidates' average margin of victory was smaller in the commission states than the non-commission states (30.0% versus 36.6%), election turnout

---

<sup>26</sup> See *id.* at 128 (“The primary advantage gained by allowing redistricting to be done by nonpolitical or bipartisan redistricting commissions is that the legislature can take the time previously spent on redistricting and spend it in pursuit of its primary responsibility - being about the people's business.”).

<sup>27</sup> See also Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1388 (2005) (noting that redistricting commissions have been “singularly effective”); *id.* at 1390 (“Many districting commissions that purport to be nonpartisan have acquired a reputation (among informed local observers) for fulfilling their mission with integrity.”).

<sup>28</sup> Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 553 (1994).

<sup>29</sup> I did not consider the three states that use commissions but have only one or two congressional seats (i.e. Hawaii, Idaho, and Montana) because it is impossible to draw any conclusions about elections in such a small number of districts. It should also be noted that Iowa's commission is technically advisory only, but its proposals have almost always been followed by the Iowa legislature.

was higher (59.9% versus 57.7%), and the divergence between a major party's proportion of votes and its proportion of congressional seats was smaller (10.5% versus 16.2%).<sup>30</sup>

Redistricting plans drafted by commissions are also less likely to be challenged in court, and more likely to be upheld when they are challenged. Christopher Confer analyzed lawsuits involving the district maps of the seven states—Arkansas, Colorado, Michigan, Missouri, New Jersey, Ohio, and Pennsylvania—that use commissions for state legislature redistricting but not for congressional redistricting. He found that, after the 1980 census, five of the seven congressional plans were invalidated but none of the state plans were struck down (and only two were even litigated).<sup>31</sup> After the 1990 census, similarly, two of the seven congressional plans were declared invalid while only one state plan was (and that state plan, for the Arkansas state legislature, was the product of a commission composed solely of executive branch officials).<sup>32</sup> As for the four states that employ commissions for both state and federal redistricting, the 1980 and 1990 cycles together saw only one state plan and one federal plan invalidated.<sup>33</sup> Elections carried out after redistricting by a commission, then, appear to result in less litigation, a tighter correlation between a party's vote and seat totals, and, at least at the federal level, more voter participation and more competitive races.

Like redistricting initiatives, redistricting commissions are far from flawless. If party representation on a commission is unbalanced, as is the case in several states, the commission may be just as dominated by partisan self-interest as the state legislature. Even if the commission

---

<sup>30</sup> For 2004 election data, see Fairvote, Voting and Democracy Research, Dubious Democracy 2005 Data, <http://www.fairvote.org/?page=722> (last visited February 16, 2006). Because of the small number of commission states, none of the differences between commission and non-commission states are significant at the 95% confidence level. The probability that the differences did not arise due to chance are 88% for the average margin of victory, 35% for turnout, 85% for Democrat seat-to-vote divergence, and 73% for Republican seat-to-vote divergence.

<sup>31</sup> Confer, *supra* note 19, at 132. If anything, one would expect state legislature redistricting maps to be *more* likely to be invalidated because of the far greater number of seats involved.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 131.

has an equal number of supporters of each major party, the outcome of the redistricting process may be a “sweetheart gerrymander,” where parties’ seats correspond to their support among voters but districts are drawn in such a way that incumbents coast effortlessly to victory. Furthermore, the near impossibility after *Vieth* and *LULAC* of challenging redistricting plans on partisan gerrymandering grounds means that there is no effective judicial check on commissions’ actions.<sup>34</sup> If they disregard the specified redistricting criteria, or create a district map as flawed as that of any legislature, there is very little that the courts can do.<sup>35</sup> Finally, some critics argue that even if commissions “work”—by making elections more competitive and legislative power more proportional to voter support—this is not necessarily a good thing.<sup>36</sup> More competition may undermine party cohesion by weakening party leaders’ hold on their seats and prompting candidates in close races to deviate from the party line. And more proportional representation may hamper the state majority party’s ability to pass legislation, and, at the congressional level, hurt the national party that would otherwise have enjoyed a disproportionate majority of the state’s seats.<sup>37</sup>

I do not find these arguments against redistricting commissions persuasive. The potential negative consequences of unbalanced and bipartisan commissions are belied by the empirical evidence cited above; even if such commissions in theory might produce gerrymanders of

---

<sup>34</sup> Challenges to redistricting plans on *racial* gerrymandering grounds—both under the Equal Protection Clause and the Voting Rights Act—remain available even after *Vieth* and *LULAC*.

<sup>35</sup> For a rare example of a court striking down a commission plan for failure to follow all of the specified redistricting criteria, see *In re Apportionment of the Colorado General Assembly*, 828 Pd. 185, 194-96 (Colo, 1992) (upholding most of the Colorado commission’s 1990 legislative redistricting plan but invalidating the split of two counties, which violated the requirement that counties not be unnecessarily divided).

<sup>36</sup> See Confer, *supra* note 19, at 133-38.

<sup>37</sup> For example, if California were to start redistricting by commission, its congressional delegation, currently made up of 33 Democrats and 20 Republicans, would likely become more evenly split. This might be a “fairer” result, but it would substantially harm the national Democratic Party. For a state to begin redistricting its congressional delegation by commission in a context where most states do not, then, arguably amounts to unilateral disarmament. See Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 450 n.118 (2004) (“If [redistricting reforms] were successful in only a few states (or if there were a consistent partisan alignment among the states most likely to enact such reforms by initiative), the use of commissions might exacerbate certain harms.”).

various sorts, in practice they have not tended to do so. Moreover, even if accurate, the critique of unbalanced and bipartisan commissions proves only that commissions with a particular composition do not function well—not that *all* commissions are intrinsically flawed. In particular, a commission made up of nonpartisan experts, like the one used by Iowa, should result in neither a one-party nor a bipartisan gerrymander.

As for the argument that rigorous judicial review of commissions' actions is unavailable, it merely suggests that there *should* be such judicial review. And in the absence of any way to regulate partisan gerrymandering in the courts, it is even more important that an independent party, not the self-interested legislators, draw the district lines. Samuel Issacharoff goes so far as to contend that courts should not even try to “police redistricting outcomes *ex post*,” and instead “should forbid *ex ante* the participation of self-interested insiders in the redistricting process.”<sup>38</sup> Finally, it is true that greater electoral competition and more proportional representation are not unalloyed goods; in the complex realm of elections, no goal can ever be achieved without some compromise. The key point, though, is that competition and some rough measure of proportional representation are far more fundamental to the democratic process than party cohesion and legislative efficiency. Democracy is in part about unified parties and effective lawmaking—but its essence is the translation of the popular will into public policy, and this deeper mission is advanced by redistricting commissions and undermined by the status quo.

---

<sup>38</sup> Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 643 (2002).

## II. THE TWELVE REDISTRICTING INITIATIVES

Redistricting commissions promise to improve American democracy, and the popular initiative is an attractive way to establish commissions in states where the legislature refuses to act. The great puzzle, then, is why most redistricting initiatives fail and why a select few succeed.<sup>39</sup> Solving this puzzle is critically important for proponents of redistricting reform, who need to know when and where to launch initiatives, and under what circumstances to hold their fire. The frequent failure and occasional success of redistricting initiatives are also perplexing to legal scholars and political scientists, most of whom would expect such initiatives—in the interests of the general public, and opposed mainly by self-interested legislators—generally to prevail.<sup>40</sup>

This Part begins the effort to get to the bottom of the mystery. It first outlines a series of factors that might explain redistricting initiatives' success or failure. Some of these variables have been identified by political scientists as significant in the initiative context, while others emerged as important over the course of my research. The Part next describes the salient features of the twelve redistricting initiatives that have taken place over the course of American history, and offers some tentative explanations for why each initiative succeeded or failed.

---

<sup>39</sup> Studies of why initiatives of a specific sort succeed or fail are rare. There are no studies of which I am aware attempting to explain why redistricting initiatives succeed or fail.

<sup>40</sup> *Cf.* RICH BRAUNSTEIN, INITIATIVE AND REFERENDUM VOTING: GOVERNING THROUGH DIRECT DEMOCRACY IN THE UNITED STATES 110 (2004) (presenting data that government and political process initiatives succeed at a higher rate than any other type of initiative).

## A. Variables

What are the variables that might explain the electoral success or failure of redistricting initiatives? Several political scientists, first, have identified campaign spending as a critical factor. According to Elizabeth Garrett, studies “have uniformly concluded that money plays a large role in [initiative] campaigns, particularly when it is spent to defeat ballot questions.”<sup>41</sup> Deep pockets allow politicians and interest groups to obtain access to the ballot—typically a difficult task because of the large number of signatures required—and more effectively to broadcast their message to the public. As a result, 78 percent of initiative campaigns are won by the side that spends more money, and opponents of a measure who outspend its backers win 90 percent of the time.<sup>42</sup> Second, some (more optimistic) scholars argue that initiatives’ outcomes depend on voters’ appraisal of the proposals’ pros and cons. Rich Braunstein’s data indicates that “inclusive” measures succeed at a higher rate than “exclusive” measures that primarily benefit a particular interest group (65.5 percent versus 43.5 percent), and that measures that increase citizens’ decision-making power succeed 73 percent of the time.<sup>43</sup> Similarly, Andrew Skalaban’s analysis of two California term limits initiatives suggests that voters have the “ability to make a sophisticated choice between competing initiatives by voting for the one closest to their ideal and against the other.”<sup>44</sup>

---

<sup>41</sup> Garrett, *supra* note 13, at 1847.

<sup>42</sup> BRAUNSTEIN, *supra* note 40, at 75-77; *see also* PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS, AND COMPARISONS 182-86 (1998) (46% of California initiatives with one-sided spending in favor succeeded, and 90% of California initiatives with one-sided spending in opposition failed). *Contra* MAGLEBY, *supra* note 13, at 147 (“By spending considerably more than the opposition, can a group pass an initiative into law? . . . . The best available evidence indicates that this is typically *not* the case.”); John R. Owens & Larry L. Wade, *Campaign Spending on California Ballot Propositions, 1924-1984: Trends and Voting Effects*, 39 W. POL. Q. 675, 688 (1986) (“Money has simply been overemphasized as a determinant of voting on direct legislation.”)

<sup>43</sup> BRAUNSTEIN, *supra* note 40, at 55, 67.

<sup>44</sup> Andrew Skalaban, *The Mostly Sovereign People: Sophisticated Voting and Public Opinion About Term Limits in California*, 20 POL. BEHAVIOR 35, 47 (1998).

Third, the positions taken by elites—major newspapers, interest groups, prominent politicians, etc.—arguably affect the likelihood that an initiative will pass. Jeffrey Karp’s study of a 1991 Washington term limits initiative showed that voters who were favorably disposed toward House Speaker Tom Foley and who knew that he opposed the measure were far more likely to oppose the measure themselves.<sup>45</sup> James Gregg found that the electorate follows newspapers’ endorsements more than 80 percent of the time,<sup>46</sup> and David Magleby determined that the positions of groups such as environmentalists and unions have a great deal of influence on voters’ behavior (greater, in fact, than politicians’ stances).<sup>47</sup> Finally, some scholars contend that the framing of an initiative is critically important. David McCuan et al. interviewed political consultants and found that, in the consultants’ view, the most important element of initiative campaigns was the “drafting of messages designed to gain support or test likely objections for a ballot measure.”<sup>48</sup> Magleby, similarly, analyzed several California initiatives and concluded that “[t]he battle over defining the proposition is one of the most important aspects of initiative politics . . . [T]he side that defines the issue will win the election.”<sup>49</sup>

In addition to these factors, two variables that are not emphasized in the secondary literature should be cited. First, the positions adopted by the major parties, and the intensity and

---

<sup>45</sup> Jeffrey A. Karp, *The Influence of Elite Endorsements in Initiative Campaigns*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 149, 162 (Shaun Bowler et al. eds., 1998) [hereinafter *CITIZENS AS LEGISLATORS*].

<sup>46</sup> MAGLEBY, *supra* note 15, at 151 (citing the Gregg study); *see also* EDWARD C. BANFIELD & JAMES Q. WILSON, *CITY POLITICS* 324 (1963) (“[W]hen voters must . . . pass on a multitude of referenda issues, the newspaper acquires added influence.”). *Contra* John E. Mueller, *Voting on the Propositions: Ballot Patterns and Historical Trends in California*, 63 *AM. POL. SCI. REV.* 1197, 1211 (1969) (“This analysis of ballots has found little evidence to support the view that newspaper recommendations strongly affect the vote on the propositions.”).

<sup>47</sup> MAGLEBY, *supra* note 15, at 158-59; *see also* Thomas A. Henderson & Walter A. Rosenbaum, *Prospects for Consolidating Local Government: The Role of Elites in Electoral Outcomes*, 17 *Am. J. Pol. Sci.* 695, 717 (1973) (“The differing referendum outcomes [in two Florida referendums on local government consolidation] were associated with contrasting elite attitudes and behaviors in the campaigns.”).

<sup>48</sup> David McCuan et al., *California’s Political Warriors: Campaign Professionals and the Initiative Process*, in *CITIZENS AS LEGISLATORS*, *supra* note 45, at 68.

<sup>49</sup> MAGLEBY, *supra* note 15, at 168-69; *see also* Mueller, *supra* note 46, at 1211 (“[C]ampaigning . . . does seem to structure opinion on those few propositions on which it is conducted . . .”).

consistency with which they are promoted, may have an impact on an initiative's odds of passing.<sup>50</sup> Parties have significant resources, they can easily convey their message through the politicians who belong to the party, and voters tend to respond to partisan cues. When a party strongly supports or opposes a measure, then, its stance should be expected to have some effect on the initiative's fate. Second, major state and national developments may make a redistricting initiative more or less likely to pass. A recent egregious gerrymander or a nationwide tide in favor of electoral reform, for instance, may create a favorable climate for a redistricting initiative. On the other hand, when voters are relatively satisfied with the political status quo, they may be reluctant to try to fix what does not seem to be broken.

### B. Cases

The factors that one might expect, on the basis of the secondary literature and common sense, to influence a redistricting initiative's likelihood of passing are therefore the following: campaign spending; the initiative's actual content and voters' evaluation of its benefits and costs; the positions taken by newspapers, politicians, interest groups, and political parties; the framing of the initiative over the course of the campaign; and the presence or absence of important state

---

<sup>50</sup> The typical view in the secondary literature is that parties do not often get involved in initiative campaigns, and have little influence when they do get involved. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 67 (1989) ("The absence of party labels [in initiative elections] . . . denies a majority of voters of a familiar cue."); MAGLEBY, *supra* note 15, at 174 ("There are good reasons for political parties to avoid stands on ballot measures."); Elisabeth Gerber & Arthur Lupia, *Campaign Competition and Policy Responsiveness in Direct Political Behavior*, 17 *POL. BEHAVIOR* 287, 290 (1995) ("[P]artisan cues are usually absent in direct legislation elections."); Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 *COLUM. L. REV.* 731, 731 (2000) ("The conventional wisdom is that the initiative process weakens the intermediary role of political parties.").

or national developments. This Section takes these factors into account while describing the twelve<sup>51</sup> redistricting initiatives and evaluating why they each succeeded or failed.

### 1. Arkansas, 1936 (Succeeded)

The first ever redistricting initiative took place in Arkansas in 1936. The state legislature had long been badly misapportioned, with Assembly and Senate districts varying widely in population,<sup>52</sup> and no reapportionment having taken place since 1890.<sup>53</sup> In response, Amendment No. 23 was placed on the 1936 general election ballot. The initiative sought to create a three-member Board of Apportionment to conduct redistricting, composed of the governor, the secretary of state, and the attorney general. The Board would have no power to change Assembly district lines, which were required to correspond to county boundaries, but would be able to vary the number of representatives that each county received in accordance with its population.<sup>54</sup> The Board would actually have the authority to draw the thirty-five Senate districts, with the caveats

---

<sup>51</sup> This Article does not consider the large number of initiatives that solely addressed misapportionment, for instance by requiring all electoral districts to have approximately the same population. The Article only considers initiatives that sought to create redistricting commissions and thereby combat political gerrymandering. This choice as to scope was made because 1) the campaign over an initiative is quite different when the measure seeks to create equally sized districts as opposed to when it tries to take redistricting out of legislators' hands; and 2) more importantly, *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny have wholly mooted the debate over whether equally sized districts and one-person, one-vote are desirable. Pre-*Baker* initiatives are therefore examined only if they tried to fight political gerrymandering in addition to legislative misapportionment.

<sup>52</sup> See *A Fair Deal for Every County*, ARKANSAS GAZETTE, Oct. 22, 1936, at 1 [hereinafter *A Fair Deal*] (“While a certain county with 44,740 population has one representative, two counties with a combined population of 43,262 have two representatives each, giving them together four times as many votes in the House of Representatives.”); *Inequality and Injustice*, ARKANSAS GAZETTE, Oct. 23, 1936, at 1 (“The most glaring inequality of all is that imposed on one three-county district with 126,918 population and one senator, as compared with another three-county district whose population is 33,225.”).

<sup>53</sup> See *In Tuesday's Election*, ARKANSAS GAZETTE, Nov. 1, 1936, at 1.

<sup>54</sup> All of Arkansas's seventy-five counties are entitled to at least one Assembly representative. Since the Assembly has one hundred seats, the Board has only twenty-five seats to distribute on the basis of county population.

that counties could not be divided for any reason, non-contiguous counties could not be combined, and all districts were required to have “as nearly as practicable” the same population.

The campaign over Amendment No. 23 was quite subdued, as the 1936 presidential race and other ballot initiatives absorbed most of the attention of Arkansas’s politicians and media. Democrat Governor Junius Futrell made no public statements about the reapportionment initiative, nor did the state’s legislators hold rallies or raise money for or against the measure. Newspaper coverage was also scant but largely supportive, with both the *Arkansas Gazette*<sup>55</sup> and the *Arkansas Democrat*<sup>56</sup> strongly endorsing the measure. In one typical editorial, the *Gazette* declared that “[a]pportionment is not a matter of one county or senatorial district or section against another, but a matter of fairness and justice for every resident of Arkansas wherever he lives.”<sup>57</sup>

On November 3, 1936, Amendment No. 23 passed by a vote of 66 percent for versus 34 percent against. The main reason for the measure’s success appears to have been a desire by the electorate—sharpened by favorable newspaper editorials—to undo the legislature’s longstanding misapportionment. In the absence of organized opposition, the policy arguments against imbalances in legislative representation prevailed. Decisions by Arkansas courts after the initiative’s passage confirm this assessment of why Amendment No. 23 succeeded. In the 1941 case of *Bailey v. Abington*, the Arkansas Supreme Court opined that “by the adoption of Amendment No. 23, the people intended to correct certain evils that then existed,” namely the situation where “some counties with a small population [had] more representatives than others

---

<sup>55</sup> See *A Fair Deal*, *supra* note 52 (“Every county should of course have as many members as its population entitles it to have . . . . Vote “For” Amendment No. [23].”)

<sup>56</sup> See *Amendment No. 25—Apportionment*, ARKANSAS DEMOCRAT, Oct. 30, 1936, at 10 (“In the spirit of everyday fairness to each other the voters should support Amendment No. [23].”).

<sup>57</sup> See *Fairness and Justice for All*, ARKANSAS GAZETTE, Oct. 28., 1936, at 1.

with a larger population.”<sup>58</sup> In *Stevens v. Faubus*, similarly, the Court stated that “[i]t was because the allocation [of legislators] had not been changed for many years and had become inequitable that the voters declared in Amendment 23 that the apportionment must be adjusted every ten years.”<sup>59</sup> Importantly, partisan politics do not appear to have played a role in the initiative campaign. Arkansas’s Democratic Party retained firm control of the state legislature both before and after Amendment No. 23 passed, and no one could have expected the initiative to challenge the party’s predominance in a state that since Reconstruction has been one of the country’s least hospitable terrains for Republicans.

## 2. Oklahoma, 1960 (Failed)

Prior to 1960, the Oklahoma state legislature was one of the most misapportioned in the country. An observer in the *Western Political Quarterly* noted that “[d]espite a continuing urbanization, the Oklahoma legislature remains ridiculously overpopulated with rural representatives,” with 27 percent of voters controlling a majority of the lower chamber’s seats and 25 percent controlling a majority of the state senate.<sup>60</sup> The state senator from Marshall and Love Counties represented only 15,879 persons while the senator from Tulsa County represented 248,000.<sup>61</sup> Moreover, this misapportionment existed in direct violation of the Oklahoma state constitution, which required districts of roughly equal population and reapportionment after each

---

<sup>58</sup> *Bailey v. Abington*, 148 S.W.2d 176, 180 (Ark. 1941).

<sup>59</sup> *Stevens v. Faubus*, 354 S.W.2d 707, 710 (Ark. 1962); *see also* *Butler v. Democrat State Committee*, 160 S.W.2d 494, 496 (Ark. 1942) (“The purpose of the amendment was, of course, to secure equal and fair representation in the General Assembly upon the basis of proportionate population.”).

<sup>60</sup> Walter F. Scheffer, *Problems in Municipal Finance*, 15 W. POL. Q. 522, 525 (1962); *see also* George B. Merry, *Gerrymandering Lingers Across U.S.*, CHRISTIAN SCI. MONITOR, Jun. 13, 1959, at 10 (noting that, in the 1958 congressional election, the Oklahoma Republican Party won just one of six seats despite receiving 31 percent of the vote).

<sup>61</sup> Jim Young, *Reapportionment Poses One of State’s Stormiest Problems*, DAILY OKLAHOMAN, Apr. 3, 1960, at 83.

census.<sup>62</sup> The Oklahoma house of representatives had last been reapportioned in 1920, and the Oklahoma senate had never been reapportioned in the state's entire history.<sup>63</sup>

In 1960, both the state's young Democratic governor, J. Howard Edmondson, and the League of Women Voters, a national good government group, supported an initiative that would have entrusted reapportionment to a three-member Legislative Apportionment Commission. The commission, composed of the attorney general, the secretary of state, and the treasurer, would have drawn state electoral districts of about the same population every ten years (with the caveat that every county, no matter how small, would have been entitled to at least one representative in the lower chamber).<sup>64</sup> Governor Edmondson backed the measure out of frustration with the rurally dominated legislature, which had refused to enact several policies that he favored. He campaigned hard for redistricting reform, organizing a fifty-two member committee to rally public opinion around the state,<sup>65</sup> and delivering frequent speeches about the merits of the proposal and the danger that federal courts would intervene if Oklahomans did not address their legislature's misapportionment.<sup>66</sup> He was joined in support of the measure by major newspapers,

---

<sup>62</sup> See OKLA. CONST. art. 5, § 10 (repealed) (distributing House seats to counties based in part on their population and requiring reapportionment every ten years); *id.* art. 5, § 9 (repealed) (same for Senate); see also James E. Clayton, *State Apportionment Pressure Mounts*, WASH. POST, TIMES HERALD, Apr. 27, 1962, at A1 (“Under Oklahoma’s constitution, its two largest counties are entitled to 15 of the 44 State Senators. They have three.”).

<sup>63</sup> See Jim Young, *Edmondson Reapportionment Plan Lifts Ceiling*, DAILY OKLAHOMAN, Sept. 11, 1960, at 68.

<sup>64</sup> See *id.* The League of Women Voters, while supportive of the initiative, would have preferred a plan that strictly observed the principle of one-person, one-vote. See *Apportionment Decision Looming*, DAILY OKLAHOMAN, Mar. 21, 1959, at 3 (“[S]ome of the league members thought [the governor’s] proposal was watered-down . . . .”); *Women Voters Keep Their Plan on Shelf*, DAILY OKLAHOMAN, Apr. 3, 1960, at 27 (“League leaders objected to the governor’s plan to assure every county in the state at least one house member.”).

<sup>65</sup> See Jim Reid, *Forces Massing in Petition Fight*, DAILY OKLAHOMAN, Aug. 5, 1960, at 5; see also *Fate of Reform Issue Depends on Voting Size*, DAILY OKLAHOMAN, Sept. 18, 1960, at 1 (“[T]he Edmondson forces are putting on a drive for personal contact with voters to get them to the polls.”).

<sup>66</sup> See *Federal Act Eyed in Apportionment*, DAILY OKLAHOMAN, Sept. 11, 1960, at 68 (quoting Gov. Edmondson) (“[I]f we don’t take this action it is a grave probability that the federal government will do it for us . . . . It is a fair assumption that unless we act and exercise our own rights we might well forfeit them.”); Young, *supra* note 63 (“Edmondson contends his petitions will simply give ‘fair representation to all of the people no matter what county they live in.’”).

city governments,<sup>67</sup> civic groups such as the League of Women Voters, the Junior Chamber of Commerce, and the Tulsa Jaycees,<sup>68</sup> and the Oklahoma Republican Party, which was one of the main victims of misapportionment.<sup>69</sup>

Ironically, opposition came almost entirely from within the governor's own party. Oklahoma Democrats, recognizing that redistricting reform would weaken their grip on the state legislature, launched a furious campaign against the initiative. They formed a new organization, Oklahomans for Local Government, to oppose the reapportionment measure as well as two other ballot proposals that threatened rural interests.<sup>70</sup> They argued that the state should retain its existing constitutional reapportionment formula, rather than amend it so that there would be no cap on the number of seats a county could have.<sup>71</sup> They claimed that the initiative would allow a small number of urban counties to dominate the state legislature and pass whatever laws they wished.<sup>72</sup> Most importantly, they systematically rallied rural voters through vigorous rhetoric, frequent campaign events,<sup>73</sup> and an organization extending all the way to the precinct level.<sup>74</sup>

In the end, the reapportionment initiative was defeated handily, by a vote of 35 percent in favor versus 65 percent against. Only three of Oklahoma's seventy-seven counties supported the

---

<sup>67</sup> See *Council Backs Reapportionment*, DAILY OKLAHOMAN, Sept. 14, 1960, at 4 (reporting that the Oklahoma City Council passed a resolution in support of the reapportionment initiative, but only by a 5-3 vote).

<sup>68</sup> See Otis Sullivant, *Unity Is Sought on Legislative Apportionment Plan*, DAILY OKLAHOMAN, Sept. 4, 1959, at 1.

<sup>69</sup> See *Harris Urges GOP Support for Petitions*, DAILY OKLAHOMAN, Sept. 13, 1960, at 17.

<sup>70</sup> See *Democrat Chiefs Fight Measures*, DAILY OKLAHOMAN, Sept. 8, 1960, at 11. Other groups opposing the initiative—e.g. the Rural Electrification Commission, the Farmers Union and Farm Bureau, the Cattlemen's Association, and the County Officers Association—were also affiliated with the state Democratic Party and rural interests.

<sup>71</sup> The irony of Oklahoma Democrats defending the constitutional formula after failing to apply it for forty years in the lower chamber's case and *ever* in the senate's case was pointed out by *Daily Oklahoman* editorials. See *All the People All the Time*, DAILY OKLAHOMAN, July 3, 1960, at 10; *What the Constitution Says*, DAILY OKLAHOMAN, Sept. 7, 1960, at 8 ("Actually the politicians who are hollering about the virtues of the constitutional formula have no desire whatever to see it or any other reapportionment proposal applied. What they really favor is the undisturbed status quo . . .").

<sup>72</sup> See *Anything But the Facts, Ma'am*, DAILY OKLAHOMAN, Sept. 8, 1960, at 14 ("The voters are being told that 'three or four heavily populated counties' will have enough legislative strength to pass any laws they please if reapportionment passes September 20.").

<sup>73</sup> See Ray Parr, *Governor Assailed at Petitions Rally*, DAILY OKLAHOMAN, Sept. 13, 1960, at 1 (describing a rally at Tishomingo where former governor Raymond Gary denounced the reapportionment initiative).

<sup>74</sup> See Reid, *supra* note 65.

measure, while “[t]he one-sided majorities” in many rural counties “were the most lop-sided ever given in the state on major issues.”<sup>75</sup> The most important factor in the initiative’s defeat was the intensity of opposition among the state Democratic Party and its rural backers, who rightly feared that their political clout would be diminished if the initiative passed. Turnout was extremely high—and voter sentiment almost uniformly negative—in rural counties, while city dwellers turned out in smaller numbers and supported the initiative by less impressive majorities.<sup>76</sup> As the *Daily Oklahoman* remarked, “[r]ural voters were fanatically determined to protect what they considered their interests,” while “[u]rban voters were only indifferently responsive to theirs.”<sup>77</sup> Oklahoma Democrats also seem to have framed the issues in the election more effectively than Governor Edmondson. While the governor spoke about fairness in political representation, a relatively abstract concern, state Democrats told rural voters that their power would be undercut if the initiative passed, that the state constitution would be amended in a manner contrary to the intentions of the document’s framers, and that state politics would come to be dominated by big city interests.

### 3. Oklahoma, 1962 (Succeeded)

Two years later, Oklahoma’s reformers tried again. The initiative they proposed this time differed subtly from the measure that failed in 1960, in that the 1962 initiative did not seek to

---

<sup>75</sup> Otis Sullivant, *State Votes No, No, No*, DAILY OKLAHOMAN, Sept. 21, 1960, at 1; *see also Rural Vote Emphatically No*, DAILY OKLAHOMAN, Sept. 21, 1960, at 27 (“Never before in the history of elections [have] such one-sided majorities been rolled up in the rural areas. In Cimarron County, in the far end of the Panhandle,” the vote was “1,240 votes against to a mere 5 for reapportionment.”).

<sup>76</sup> *See Rift in Oklahoma Hurts Democrats*, N.Y. TIMES, Sept. 25, 1960, at 55 (“Rural voters turned out in record numbers to swamp the proposals. They were favored in the larger cities, but the majorities there were not so large as expected and the vote was much lighter than in the rural areas.”).

<sup>77</sup> *Where There Is Light*, DAILY OKLAHOMAN, Sept. 22, 1960, at 18.

change the constitutional reapportionment formula, only to enforce it by means of a commission.<sup>78</sup> Counties would thus not be entitled to at least one representative in the lower chamber, nor would the cap on country representation in the lower chamber (seven) be eliminated, if the initiative passed.<sup>79</sup> As in 1960, Governor Edmondson backed the measure, as did the state Republican Party<sup>80</sup> and Oklahoma's leading newspaper.<sup>81</sup> In addition, both parties' candidates for governor expressed their support for the initiative,<sup>82</sup> and a new group called Citizens for Constitutional Reapportionment spearheaded the signature-gathering process.<sup>83</sup>

More importantly, the judicial landscape had shifted between 1960 and 1962. In March 1962, the Supreme Court held in *Baker v. Carr*<sup>84</sup> that legislative apportionment presented a justiciable question and that electoral districts were required to have approximately the same population. That decision sparked widespread litigation and legislation, and galvanized supporters of redistricting reform across the country.<sup>85</sup> In Oklahoma, a federal district court applied *Baker* to the apportionment of the state's legislature, and concluded that the entire

---

<sup>78</sup> The proposed Constitutional Apportionment Commission would also have been composed of the attorney general, the secretary of state, and the treasurer.

<sup>79</sup> See *In re Initiative Petition No. 271*, State Question No. 408, 373 P.2d 1017 (Okla. 1962) (holding that the 1962 initiative is "substantially different" from the 1960 initiative, and therefore not barred from the ballot by a constitutional provision prohibiting the resubmission of an initiative within three years of its initial defeat).

<sup>80</sup> See *Apportion Drive To Get GOP Aid*, DAILY OKLAHOMAN, Oct. 6, 1961, at 10.

<sup>81</sup> See *At Long Last*, DAILY OKLAHOMAN, Nov. 5, 1962, at 28 (endorsing the reapportionment initiative).

<sup>82</sup> See *Governor Foes To Let Voters Decide Issue*, DAILY OKLAHOMAN, Sept. 29, 1962, at 3 [hereinafter *Governor Foes*] ("Both candidates early in the campaign had declared for constitutional apportionment as a general proposition, and each said he would call a special election on the measure if he became governor . . ."). Governor Edmondson was unable to run for reelection because of term limits.

<sup>83</sup> See William Beecher, *Political Upheaval? Cities To Gain Power if High Court's Ruling Spurs Reapportionment*, WALL ST. J., Mar. 27, 1962, at 1; see also *Apportion Backers Plan Intensive Drive*, DAILY OKLAHOMAN, Oct. 7, 1962, at 11 ("Citizens for Constitutional Reapportionment announced Saturday an intensive and active campaign to insure success in the November 6 election.").

<sup>84</sup> 369 U.S. 186 (1962).

<sup>85</sup> See Alan L. Otten, *Rural Lawmakers: Rapid Reapportionment Threatens Their Hold on State Legislatures*, WALL ST. J., Aug. 9, 1962, at 1 ("With a speed and scope defying all forecasts, the Supreme Court's landmark reapportionment decision is revolutionizing the makeup of state legislatures."); Laymond Robinson, *22 States Battle on Redistricting: Fight Spurred by High Court Ruling Is Spreading Fast*, N.Y. TIMES, Aug. 6, 1962, at 23 ("The politically potent issue of legislative apportionment is burning like a prairie fire across the nation. Only a small flame in a few states some months ago, the issue has blazed to new prominence following a landmark decision by the United States Supreme Court . . .").

arrangement was unconstitutional.<sup>86</sup> The court gave the Oklahoma legislature until March 8, 1963 to come up with an electoral regime that did not violate the Constitution, and threatened to reapportion the legislature itself if the deadline was not met.<sup>87</sup> The 1962 initiative campaign, therefore, was conducted under the looming cloud of federal judicial intervention.

Because of this cloud, the tone of the campaign on both sides was muted by comparison to the feisty 1960 confrontation. Both parties' nominees for governor rarely discussed reapportionment and said they would defer to the voters' judgment.<sup>88</sup> Oklahomans for Local Government, the group that led the opposition to the 1960 initiative, did not organize against the 1962 measure.<sup>89</sup> And the initiative generally was "not an issue that worked up the people as the contesting forces did on Gov. Edmondson's reform program, which included reapportionment, in 1960."<sup>90</sup>

In the wake of this subdued campaign, the initiative passed by a margin of 55 percent for to 45 percent against.<sup>91</sup> The Supreme Court's decision in *Baker* and the Oklahoma district court's ultimatum to the state legislature were unquestionably the most important factors explaining the initiative's victory. In 1960, Oklahoma's rural voters had believed that they could prevent reapportionment, and so had turned out in large numbers to preserve their political influence. By

---

<sup>86</sup> See *Moss v. Burkhart*, 207 F. Supp. 885 (D. Okla. 1962).

<sup>87</sup> *Id.*; see also *Court Accepts Oklahoma Promise*, CHRISTIAN SCI. MONITOR, Aug. 4, 1962, at 11.

<sup>88</sup> See *Governor Foes*, *supra* note 82 ("The nominees for governor are willing to let the voters make their own decision on the initiative measure for constitutional reapportionment of the legislature.").

<sup>89</sup> See Otis Sullivant, *Reapportionment Issue Fails To Stir up Election Interest*, DAILY OKLAHOMAN, Nov. 2, 1962, at 5.

<sup>90</sup> *Id.*; see also Otis Sullivant, *Apportion Issue To Increase Vote*, DAILY OKLAHOMAN, Sept. 26, 1962, at 3 ("[T]he initiative measure, if it gets on the ballot, will not be as hot an issue as it was two years ago . . . . The rural areas will not be as excited because of the federal court decision . . . .").

<sup>91</sup> But this was not the end of the initiative's story. In *Allen v. Burkhart*, 377 P.2d 821 (Okla. 1963), the Oklahoma Supreme Court ruled that the initiative had actually *failed* because "the aggregate number of affirmative votes fell short of a majority of the total number of ballots cast throughout the State in the general election." *Id.* at 825. Later in 1963, after further legislative inaction, a federal district court reapportioned the Oklahoma state legislature. See *Moss v. Burkhart*, 220 F. Supp. 149 (D. Okla. 1963). In a nice twist, the federal district court imposed the same reapportionment plan that the commission created by the initiative had adopted before it was dissolved by the state supreme court in *Allen*. See *id.* at 156.

1962, it was clear that, one way or another, reapportionment was going to take place. Either the legislature would act on its own, or a popular initiative would pass, or a federal court would intercede on behalf of the principle of one-person, one-vote. The incentive to fight reapportionment tooth and nail no longer existed, and the 1962 initiative accordingly skulked its way to victory.<sup>92</sup>

#### 4. North Dakota, 1973 (Failed)

North Dakota's 1973 redistricting initiative, like the Oklahoma measure eleven years earlier, arose in the context of litigation involving the one-person, one-vote principle. In the 1960s, courts thrice invalidated reapportionment plans drawn by the North Dakota state legislature.<sup>93</sup> The North Dakota district court eventually imposed its own plan in 1965, which was notable for the multimember senate districts it created as well as the relatively large inter-district population discrepancies that it authorized.<sup>94</sup> After the 1970 census, the state legislature failed to reapportion itself, and the district court struck down the existing district map—ironically, the same one that it had fashioned itself seven years earlier—and imposed yet another plan for the 1972 election only.<sup>95</sup> This plan also included multimember districts and substantial inter-district population variance.

---

<sup>92</sup> Also in the 1962 initiative's favor (though much less important than the judicial developments) was that it defused the criticisms of supporters of the constitutional reapportionment formula. As noted above, the 1960 initiative had proposed various changes to the constitutional reapportionment formula, while the 1962 initiative left it undisturbed.

<sup>93</sup> See *Paulson v. Meier*, 232 F. Supp. 183 (D.N.D. 1964) [*Paulson I*]; *Paulson v. Meier*, 246 F. Supp. 36 (D.N.D. 1965) [*Paulson II*]; *State ex rel. Lien v. Sathre*, 113 N.W.2d 679 (N.D. 1962).

<sup>94</sup> See *Paulson II*. The plan created five multimember senate districts, and managed to have only twenty-five of thirty-nine districts within five percent of the average district population. NORTH DAKOTA LEGISLATIVE COUNCIL, LEGISLATIVE REDISTRICTING – BACKGROUND MEMORANDUM 4 (2000), available at <http://www.legis.nd.gov/assembly/56-1999/interim-info/docs/19043.pdf>.

<sup>95</sup> See *Chapman v. Meier*, 372 F. Supp. 363 (D.N.D. 1972) [*Chapman I*].

In 1973, the Republican-dominated North Dakota state legislature finally passed a reapportionment plan calling for five multimember senate districts and an inter-district population variance of 6.8 percent.<sup>96</sup> The governor, Democrat Arthur A. Link, vetoed the plan but had his veto overridden by a vote of 72-30 in the House and 37-14 in the Senate.<sup>97</sup> Supporters of the governor then filed a referendum petition subjecting the legislature's plan to a statewide vote, and also launched an initiative to take redistricting out of the legislature's hands altogether. The initiative would have required all of North Dakota's legislative districts, for both the House and Senate, to elect only one representative, and created a bipartisan nine-member commission to draw the district lines.<sup>98</sup>

Not surprisingly, the chief backers of the initiative were Governor Link, the state Democratic Party, and traditional Democrat allies such as organized labor and farm organizations.<sup>99</sup> Democrats objected to both the boundaries of many districts, which they contended were unduly favorable to Republican candidates, and the multimember nature of some Senate and all House districts. According to Democrats, the latter feature allowed Republicans, who were the majority party in most of the multimember districts, to win far more seats than they deserved given their popular support. As the *Bismarck Tribune* observed, “[i]n a state which elected a Democratic governor and lieutenant governor as well as a state treasurer and tax commissioner, voters only elected 10 Democrats to the 51-member Senate and 22 Democrats to

---

<sup>96</sup> NORTH DAKOTA LEGISLATIVE COUNCIL, *supra* note 94, at 5.

<sup>97</sup> See *Chapman v. Meier*, 372 F. Supp. 371, 387 (D.N.D. 1974) [*Chapman II*].

<sup>98</sup> The House and Senate minority and majority leaders would each have appointed two commission members, and those eight members would then have elected the ninth member, who would have doubled as the commission's chairperson.

<sup>99</sup> See *Average Voter Little Concerned with Special Election Issues*, FARGO FORUM, Oct. 28, 1973, at C4 [hereinafter *Average Voter*] (“The constitutional amendment is a virtual creation of Democratic Gov. Arthur A. Link and the referred measure is [subjected] to a vote of the people largely through the efforts and with the support of the Democratic party.”); Bill Tillotson, *N.D. Voters May Decide Remap Issue*, BISMARCK TRIB., Nov. 23, 1973, at 1.

the 102-member House.”<sup>100</sup> The other important argument of the initiative’s supporters was that single-member districts would improve representatives’ accountability to their constituents. In Lieutenant Governor Wayne Sanstead’s words, “[s]ingle-member districts would create lines that would make candidates for public office come from one particular area. They would be voted on by a smaller number of people, thus making government more responsive to the needs of that area.”<sup>101</sup>

Opposition to the initiative was concentrated in North Dakota’s Republican Party, which stood to lose influence if the measure passed. Republicans attacked the initiative on multiple grounds. The state party’s chairman, Allan C. Young, declared repeatedly that the redistricting commission would amount to “yet another bureaucracy that would be completely unresponsive to the people of North Dakota.”<sup>102</sup> Other prominent Republicans claimed that the creation of single-member House and Senate districts would disrupt existing political communities and dilute rural influence in the state legislature.<sup>103</sup> Also leveled at the initiative were charges that it was merely an effort by frustrated Democrats to seize a greater share of the political spoils,<sup>104</sup>

---

<sup>100</sup> Bill Tillottson, *Amendment Backers Seek 1-Solon Units*, BISMARCK TRIB., Nov. 26, 1973, at 32.

<sup>101</sup> *Remap Plan Gets Support of Sanstead*, BISMARCK TRIB., Nov. 9, 1973, at 5; see also Tillottson, *supra* note 100 (paraphrasing Alton Schuette, chairman of the pro-initiative Committee for Equal Apportionment) (“If those multi-districts could be broken up . . . with legislators more closely representing their constituents and with each voter having to concentrate on electing only one senator and one representative on what would be a neighborhood basis, equality would be achieved.”).

<sup>102</sup> Phil Matthews, *Constitutional Amendment Draws Election Spotlight*, FARGO FORUM, Oct. 29, 1973, at 3; see also *Spokesmen Trade Views on Reapportionment Vote*, BISMARCK TRIB., Nov. 16, 1973, at 7 (also quoting Young) (“I believe the people of North Dakota will reject the creation of yet another bureaucracy . . . with unlimited spending power and with responsibility to neither the executive, legislative or judicial branch of government or to the people.”).

<sup>103</sup> See *Litten Calls Remap Vote ‘Gerrymandering’ Plan*, BISMARCK TRIB., Nov. 19, 1973, at 3 (quoting State Senator C. Warner Litten) (“When you start trying to break up the cities of Frago, Grand Forks and Minot into single Senate and single House districts, you will have a real gerrymandering hodge-podge.”); Bill Tillottson, *Voter Confusion Problem for Amendment’s Foes*, BISMARCK TRIB., Nov. 27, 1973, at 20 (State Senator David E. Nething “argues that the proposal, which also creates House subdistricts would break up rural voting patterns with a net result in weakening rural influence in the legislature.”).

<sup>104</sup> See *Average Voter*, *supra* note 99 (“Of course, if the Democrats had the majority, we could well imagine there would be little support from them for the proposed amendment.”); Tillottson, *supra* note 103 (“Democrats have been unable to get into the legislature in greater numbers, [State Senator Myron H.] Atkinson said, so they have tried to change the procedures for electing lawmakers.”).

that a new state census would be required if the measure passed,<sup>105</sup> that the initiative “assumes that there will never be more than two parties or two factions in the legislative arena,”<sup>106</sup> and that decennial redistricting might be too inflexible for a state as dynamic as North Dakota.<sup>107</sup> Many of these charges were echoed by the state’s two most important newspapers, the *Bismarck Tribune* and the *Fargo Forum*, both of which opposed the initiative.<sup>108</sup>

On December 4, 1973, the initiative went down to defeat with 45 percent of the vote in favor compared to 55 percent against. (The referendum on the legislature’s reapportionment plan also failed by a 53 percent to 47 percent margin.) The unified opposition of North Dakota’s majority party and media establishment was a key factor in the measure’s loss at the polls. The initiative’s critics also made more (though not necessarily better) arguments than its supporters, and received more attentive press coverage.<sup>109</sup> Furthermore, Governor Link, the most important Democrat in the state, barely involved himself in the campaign.<sup>110</sup> Finally, voter turnout in the election—in which the only items on the ballot were the redistricting initiative and the reapportionment referendum—was exceptionally light, a situation that typically favors the proponents of the status quo.<sup>111</sup>

---

<sup>105</sup> See ‘Amendment OK Means Census’, BISMARCK TRIB., Nov. 24, 1973, at 3.

<sup>106</sup> *Average Voter*, *supra* note 99.

<sup>107</sup> See *Should We Lock Ourselves in?*, BISMARCK TRIB., Nov. 28, 1973, at 4.

<sup>108</sup> See *Average Voter*, *supra* note 99 (expressing the *Fargo Forum*’s opposition to the initiative); *Cure Worse Than the Ill*, BISMARCK TRIB., Dec. 1, 1973, at 4 (same for the *Bismarck Tribune*).

<sup>109</sup> These claims are based on my reading all initiative-related pieces in the *Fargo Forum* and *Bismarck Tribune*.

<sup>110</sup> I found only one newspaper article quoting Governor Link about the initiative. See *No New Census Needed for Remap, Link Says*, BISMARCK TRIB., Nov. 30, 1973, at 3.

<sup>111</sup> See Bill Tillottson, *Light Voter Turnout Seen*, BISMARCK TRIB., Dec. 3, 1973, at 1; *id.* (quoting State Senator Nothing) (“I think all the publicity has confused voters more than helped them make up their minds . . . . Confusion usually leads to a ‘No’ vote.”).

## 5. Colorado, 1974 (Succeeded)

Reapportionment consumed much of the Colorado state legislature’s calendar in 1972. Legislators took months to come up with their initial plan,<sup>112</sup> only to see it struck down by the Colorado Supreme Court for violating the state constitution’s district compactness requirement.<sup>113</sup> The legislature’s next map was upheld in litigation,<sup>114</sup> but attracted attention because of the oddly shaped districts that it created. One district, according to Representative Jerry Kopel, “looked like an equatorial line on a world globe dividing the city, with portions of the boundaries through city parks just several yards wide.”<sup>115</sup> That district was nicknamed the “Bettymander” because it was designed to weaken Representative Betty Benevidez’s hold on her seat.<sup>116</sup>

In the wake of this controversial redistricting exercise, Colorado’s League of Women Voters proposed an initiative that would delegate district-drawing responsibilities to an eleven-member commission. The commission would include the majority and minority leaders of both state legislative chambers, three members appointed by the governor, and four members

---

<sup>112</sup> See *Amendment No. 9: Yes*, DENVER POST, Oct. 22, 1974, at 22 [hereinafter *Yes on 9*] (“Anyone who recalls the 1972 legislative session can affirm that legislative leaders—as well as their rank-and-file ‘troops’—were tied up for many weeks trying to redistrict the state . . . .”); Bob Ewegen, *Reapportionment Plan on Ballot*, DENVER POST, Oct. 14, 1974, at 3 (“The Colorado Legislature . . . was snarled for months in 1972 as it tried to reapportion itself . . . .”).

<sup>113</sup> See *Acker v. Love*, 496 P.2d 75 (Colo. 1972).

<sup>114</sup> See *In re Interrogatories by the General Assembly as Propounded by House Resolution No. 1020*, 497 P.2d 1024 (Colo. 1972).

<sup>115</sup> Jerry Kopel – Reapportionment, <http://www.jerrykopel.com/b/Reapportionment-2001.htm> (last visited Jan. 19, 2006).

<sup>116</sup> *Id.*

appointed by the chief justice of the Colorado Supreme Court.<sup>117</sup> It would redistrict the state legislature every ten years, and craft districts that were compact, that preserved communities of interest, and that deviated less than 5 percent in their population.<sup>118</sup>

The debate over the Colorado initiative was placid by comparison to the firestorms that enveloped similar measures in other states, both before and after 1974. Good government groups such as the League of Women Voters and Common Cause supported the initiative, but their main argument on behalf of the measure was just that it would allow the state legislature to focus on more important issues.<sup>119</sup> They did not denounce the Republican Party for its 1972 gerrymander or emphasize the inherent unseemliness of legislative redistricting. Colorado's main newspapers also devoted relatively little coverage to the initiative and expressed their (conflicting) editorial positions in moderate language.<sup>120</sup> Most surprisingly, the state's parties and prominent politicians were almost entirely silent about the initiative. No new organizations were formed to fight for or against the measure, and I did not find a single newspaper article quoting the governor or any major legislative figure about the initiative. In fact, the only reference to politicians' views on the initiative that I was able to find came two days before the election, and merely cited unnamed

---

<sup>117</sup> In addition, no more than six of the eleven commissioners could come from the same political party, each Colorado congressional district had to have at least one commission member, and one member had to live west of the Continental Divide.

<sup>118</sup> See Ewegen, *supra* note 112.

<sup>119</sup> See *Proposal 9 Backed by Common Cause*, DENVER POST, Oct. 21, 1974, at 2 (“In urging a ‘yes’ vote on the amendment, Common Cause pointed to what it called the ‘long, haggling sessions’ by legislators ‘struggling to retain their own seats.’ The result is to waylay critical issues ‘no matter which party is in the majority.’”).

<sup>120</sup> See *Vote No on Amendment Nine*, ROCKY MOUNTAIN NEWS, Oct. 25, 1974, at 68 [hereinafter *No on 9*] (“[W]e don’t believe this constitutional duty should be taken away from the Legislature.”); *Yes on 9*, *supra* note 112 (“[T]his newspaper believes that the reapportionment commission can be a forward step.”). The *Rocky Mountain News*’s main arguments against the initiative were that it “dislike[d] the trend in government of appointing people to various boards, commissions and government positions,” and that it would be difficult for the Colorado Supreme Court to evaluate fairly a map produced by a commission four members of which were appointed by the court’s chief justice. See *No on 9*, *supra*.

legislators who had “come out in opposition to Amendment 9, insisting that redistricting is a job done best by lawmakers, using the give-and-take of the legislative process.”<sup>121</sup>

The explanation for the campaign’s strange calm—and for the initiative’s resounding 60 percent to 40 percent victory on election day—is that 1974 was not a normal year in the annals of American politics. It was, rather, the year of Watergate and of President Nixon’s resignation, and one of the best years ever for Democrats across the country. In Colorado, Democrats defeated an incumbent Republican governor, U.S. senator, state attorney general, and state treasurer, while also winning control of the General Assembly.<sup>122</sup> The election’s dramatic pro-Democrat tilt reduced both parties’ incentives to talk much about the initiative. Republicans, sensing imminent electoral catastrophe, were reluctant to criticize a measure that was leading in the polls,<sup>123</sup> and unable to make the argument that the initiative was an effort by sore loser Democrats to seize more political power. Democrats, on the other hand, did not need to lobby hard for a measure that was already almost sure to pass, and were more focused on the many contested candidate elections in 1974 than the initiative campaign. In the end, Amendment 9 cruised easily to victory atop the year’s pro-Democrat and pro-reform tidal wave, escaping almost unscathed from the attacks that typically befall redistricting initiatives.

## 6. Ohio, 1981 (Failed)

---

<sup>121</sup> Suzanne Weiss, *10 Constitutional Amendments and Referred Laws on Ballot*, ROCKY MOUNTAIN NEWS, Nov. 3, 1974, at Trend 3;

<sup>122</sup> See Leroy F. Aarons, *Colorado Tide Not One of Liberalism*, WASH. POST, Dec. 15, 1974, at A1 (“There is a strange wind blowing in the Colorado Rockies. . . . [It] achieved hurricane force last November and turned into a disaster for Colorado Republicans.”).

<sup>123</sup> See Bob Ewegen, *9 Proposals Firm*, DENVER POST, Nov. 3, 1974, at 15 (noting that the redistricting initiative enjoyed a thirteen-point lead in October 1974, virtually unchanged from its eighteen-point lead the previous month).

Ohio already had a redistricting commission in place in 1981. Fourteen years earlier, the state legislature had passed (and Ohio's voters had ratified) a constitutional amendment transferring redistricting authority for state elections to a five-member Apportionment Board.<sup>124</sup> However, Republicans in the early 1980s were dissatisfied with the Board because Democrats enjoyed a three-to-two advantage on it, and had twice used that advantage to enact pro-Democrat redistricting plans.<sup>125</sup> Accordingly, the Ohio Republican Party proposed a measure that would have replaced the existing Board with a bipartisan commission made up of two Democrats, two Republicans, and a fifth member chosen by the four partisan appointees. The new commission would not actually have drafted district maps itself, but rather would have adopted the state and federal plans submitted to it in which districts were most compact, as measured by the ratio of districts' area to their perimeter.<sup>126</sup>

Ohio Republicans and good government groups were the initiative's main backers. Republican Party state chairman Earl Barnes declared that "[r]egardless of whether it's Republican or Democratic, I think the people are getting damned tired of gerrymandering."<sup>127</sup> John Evans, the coordinator of the pro-initiative campaign, termed the proposal "innovative" and stated that "[b]etter government through fair and impartial redistricting is our goal."<sup>128</sup> Republicans were joined in support of the measure by the League of Women Voters, Common

---

<sup>124</sup> See Common Cause – Independent Redistricting, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=998747> (last visited March 2, 2006). The Board is made up of the governor, the auditor, the secretary of state, and two members appointed by legislative leaders. The Board draws House and Senate districts on the basis of equal population, compactness, contiguity, and respect for existing political boundaries.

<sup>125</sup> See Adam Clymer, *Ohio G.O.P. Asks Redistricting Aided by Computer*, N.Y. TIMES, Feb. 27, 1981, at A13 (quoting Ohio Republican Party chairman Earl Barnes) ("I'm not saying that if we had control of the Apportionment Board, we'd be pushing [the initiative] at this time."); *id.* ("As they did after the 1970 census, the Democrats now hold a three-to-two majority on the Apportionment Board . . ."). However, neither the 1970 nor the 1980 reapportionments in Ohio were especially flawed.

<sup>126</sup> See *id.* Districts would also have had to vary by no more than 3 percent from the average district population.

<sup>127</sup> *Id.*

<sup>128</sup> See George B. Merry, *Redistricting by Computer: Some Politicians Worry They'll Lose Control*, CHRISTIAN SCI. MONITOR, Apr. 27, 1981, at 10.

Cause, and the Ohio Council of Churches.<sup>129</sup> Together, they created a new organization, the Committee for Fair and Impartial Redistricting, and spent around \$750,000 collecting signatures<sup>130</sup> and \$600,000 “on a media campaign aimed at discrediting the political methods currently used for apportioning districts.”<sup>131</sup>

In opposition, Ohio Democrats accused the initiative’s backers of attempting to seize political influence that they had been unable to win at the ballot box. James Leahy, executive director of the state Democratic Party, scoffed that “[i]f they don’t like the game, they try to change the rules.”<sup>132</sup> Another Democrat official, noting that Ohio had adopted its present Apportionment Board just fourteen years before and that Republicans had also tried and failed to place a similar initiative on the 1980 ballot, commented that “I’m not sure how many times you can build the ark, especially if it don’t flood.”<sup>133</sup> Democrats also cited the likely consequences of the initiative as evidence that it was nothing but a Republican power grab; “the plan could insure that both of Ohio’s lost Representatives [after the 1980 census] would be Democrats. If the initiative fails and the politically divided Legislature does the job, each party would lose one safe seat.”<sup>134</sup> Finally, Democrats attacked the initiative’s supporters for raising most of their funds from large corporations, and threatened those corporations with a reduction in their political influence if they continued their contributions.<sup>135</sup>

---

<sup>129</sup> See Clymer, *supra* note 125.

<sup>130</sup> See *id.*

<sup>131</sup> See United Press International Release, Nov. 4, 1981.

<sup>132</sup> See Clymer, *supra* note 125; see also William Carlson, *Issue 2 Is Significant for Many Ohioans*, PLAIN DEALER, Oct. 12, 1981, at 20-A (“Democrats charge that the incumbent Republican or any subsequent governor would provide a political edge in all but the most isolated counties” because of a provision authorizing the governor to divide municipalities with a population greater than 5,000 into subunits for the purpose of district-drawing.); Joseph D. Rice, *Rep. Stokes Leads Big Fight Against Remap Issue*, PLAIN DEALER, Oct. 31, 1981, at 4-A (quoting black Ohio congressman Louis Stokes) (“It would wipe out my congressional district. There is just no way I could survive.”).

<sup>133</sup> See Clymer, *supra* note 125.

<sup>134</sup> See Adam Clymer, *States Lag on Redistricting for Congress*, N.Y. TIMES, Nov. 3, 1981, at B13.

<sup>135</sup> See William Carlson, *Corporate Ethics on Issue 2 Criticized*, PLAIN DEALER, Oct. 27, 1981, at 13-A; Joseph D. Rice & William Carlson, *Dems Get Revenge on Issue 2 Backers*, PLAIN DEALER, Oct. 25, 1981, at 1-A.

On election day, Issue 2 lost with 42 percent of the vote for versus 58 percent against—a somewhat surprising result given that Republicans controlled the state’s governorship as well as one of the two legislative chambers. The main explanation for the initiative’s defeat was probably the relatively tepid support that it received from the state Republican Party, compared to Democrats’ energetic opposition.<sup>136</sup> Governor James Rhodes was almost entirely silent on the subject of the initiative.<sup>137</sup> More importantly, Ohio’s Republican legislators were quite uneasy about Issue 2, which would have required the redistricting commission automatically to adopt the state and federal plans with the most compact districts. Compactness may be a virtue when all else is equal, but its elevation above all other redistricting considerations—e.g. respect for communities of interest and political boundaries, district continuity from one election to another—posed a serious threat to *all* incumbent legislators, Democrat and Republican.<sup>138</sup>

## 7. California, 1982 (Failed)

The first of four California redistricting initiatives took place in 1982. During the previous year’s legislative session, Democrats had pushed through a reapportionment plan that promised to strengthen substantially their party’s hold on both the state legislature and California’s congressional delegation.<sup>139</sup> Republicans, furious at what they considered to be a

---

<sup>136</sup> See United Press International Release, Nov. 4, 1981 (“An elated C. Paul Tipps, chairman of the Ohio Democratic Party, said he believed a strong turnout across the state helped seal the defeat of Issue 2.”).

<sup>137</sup> See Joseph D. Rice, *Rhodes Likely To Say He’s for State Issue 2*, PLAIN DEALER, Oct. 28, 1981, at 11-A (noting, a week before the election, that the governor had not yet announced his position on the redistricting initiative, and that he had “publicly steered clear of the issue”).

<sup>138</sup> Cf. *No on State Issue 2*, PLAIN DEALER, Oct. 23, 1981, at 12-B (“We have difficulty accepting the idea that compactness . . . is the sole relevant criterion for forming districts . . .”).

<sup>139</sup> See Jerry Gillam & Claudia Luther, *2 Redistricting Bills Advance*, L.A. TIMES, Sept. 12, 1981, at 1 (“Democrats in the Legislature bulldozed down angry Republican opposition Friday night and approved reapportionment plans aimed at strengthening Democratic domination of the state senate and Californian seats in Congress for the next

blatant partisan gerrymander, initiated two direct democracy campaigns to undo the legislature's handiwork. First, they obtained enough petitions to subject the three reapportionment plans (for the Assembly, the Senate, and the congressional delegation) to a statewide referendum. The referendum occurred in June 1982, and resulted in all three plans being rejected by a 63 percent to 37 percent margin.<sup>140</sup>

Second, state Republicans joined forces with Common Cause to draft and promote a redistricting initiative. The initiative would have created a ten-member redistricting commission with four members appointed by the Assembly and Senate party caucuses, two members appointed by the major parties' chairmen, and four members appointed by senior state appellate judges. The commission would have been required to draw state and federal districts that were compact, respectful of political subdivisions, and divergent by no more than 2 percent from the average district population. Any reapportionment plan would have needed the approval of seven commission members, including at least three of the court-appointed commissioners and one of each party's appointees. If the commission deadlocked, the California Supreme Court would have appointed special masters to carry out the redistricting.<sup>141</sup>

California Republicans were the 1982 initiative's most important backers. They spent about \$350,000 gathering signatures for the measure and another \$250,000 campaigning for it,<sup>142</sup> and also provided most of the \$200,000 budget for a pro-initiative group called Citizens for Fair Representation.<sup>143</sup> Joining the Republicans in support of the initiative were an array of interest

---

decade."); Claudia Luther & Jerry Gillam, *3 Plans for State Redistricting OKd*, L.A. TIMES, Sept. 16, 1981, at B1 ("One Republican assemblyman likened the Democrats' treatment of the GOP to the Holocaust of World War II while another accused Assembly Speaker William L. Brown Jr. . . . of killing off his political foes as does Iran's Ayatollah Ruhollah Khomeini.").

<sup>140</sup> See Bill Billiter & Ronald L. Soble, *Voters Strongly Reject Canal, Back Prop. 8*, L.A. TIMES, June 9, 1982, at 1.

<sup>141</sup> See Claudia Luther, *New Redistricting Initiative Submitted*, L.A. TIMES, Dec. 17, 1981, at B3.

<sup>142</sup> See Claudia Luther, *Initiative To Create Redistricting Commission Qualifies for Ballot*, L.A. TIMES, June 22, 1982, at B3.

<sup>143</sup> See Bill Billiter, *Prop. 14: Election Reform or a Trojan Horse?*, L.A. TIMES, Oct. 14, 1982, at E1.

groups (e.g. Common Cause, the League of California Cities, the California Chamber of Commerce, the American Association of University Women, the California Church Council, the National Association of Retired Persons, and the National Association of Retired Teachers), as well as President Reagan and former President Ford.<sup>144</sup> The main arguments of the initiative’s supporters were that a redistricting commission was the only way to prevent the Democrats from repeating their 1981 power grab,<sup>145</sup> and that legislators are intrinsically unable to separate their personal interest from the public good during redistricting.<sup>146</sup>

California’s Democratic Party and Democratic Governor Jerry Brown—the architects of the 1981 reapportionment—were the initiative’s principal opponents.<sup>147</sup> Interestingly, few interest groups joined the Democrats in opposition,<sup>148</sup> though the *Los Angeles Times* did come out against the initiative.<sup>149</sup> Democrats spent about \$250,000 campaigning against redistricting reform,<sup>150</sup> and made a wide assortment of claims about the initiative. Assembly Speaker Willie Brown asserted that a redistricting commission would be just as roiled by partisan strife as the state legislature,<sup>151</sup> and that commissions generally work no better than legislative redistricting.<sup>152</sup> Assembly Democratic Caucus Leader Douglas Bosco predicted that the

---

<sup>144</sup> *Id.*; see also *Citizen Reagan Signs Petition on Remapping*, L.A. TIMES, Sept. 22, 1981, at A2.

<sup>145</sup> See Claudia Luther, *GOP To Aid Remapping Reform Bid*, L.A. TIMES, Dec. 6, 1981, at A3 (“[E]ven if the referendums succeed, Democrats—who hold majorities in both houses—have the power to enact similar reapportionment plans again. The most the referendums could accomplish is to keep intact the current districts . . .”).

<sup>146</sup> See Michael Asimow & Walter Zeiman, *Prop. 14: Is It Real ‘Reform’?*, L.A. TIMES, Oct. 10, 1982, at E3 (“When it comes to drawing district lines and determining their own political fate, even the most noble legislators place personal and public interests over the public interest. . .”).

<sup>147</sup> See Billiter, *supra* note 143 (“By contrast, there is no coalition or separate campaign organization for the opponents of Proposition 14. Almost all of the organized opposition comes from the state Democratic Party . . .”).

<sup>148</sup> I found only one newspaper article that described interest group opposition to redistricting reform. See Claudia Luther, *Remapping Challenge May Be Just Warm-Up*, L.A. TIMES, May 10, 1982, at B3 (claiming that organized labor would help run the campaign against the June referenda).

<sup>149</sup> See *Reapportionment: No on 14*, L.A. TIMES, Oct. 17, 1982, at E4 [hereinafter *No on 14*].

<sup>150</sup> See Luther, *supra* note 142.

<sup>151</sup> See Bill Billiter, *Democrats Opposed to Remapping Plan Chided by Speaker*, L.A. TIMES, Feb. 25, 1982, at B22. Governor Brown echoed this criticism. See Luther, *supra* note 141 (quoting Governor Brown) (“[Y]ou can’t really come up with a non-political or apolitical answer to a political problem—it just isn’t conceivable. Nobody is pure.”).

<sup>152</sup> See Luther, *supra* note 145.

commission would be composed of “a bunch of old, white, upper-middle-class men,” thus failing to reflect California’s diversity.<sup>153</sup> And other Democrats argued that the commission would lack accountability to the public,<sup>154</sup> and that it would be prone to deadlock because of its peculiar requirements for passing a reapportionment plan.<sup>155</sup>

On November 2, 1982, the initiative was defeated by a vote of 45 percent for versus 55 percent against. The measure’s backers actually spent more money and received more support from third-party groups than the initiative’s opponents, meaning that the loud and persistent criticism by the Democratic Party and Governor Brown was probably crucial to the measure’s loss at the polls. As was also the case in other initiatives, the measure’s opponents seem to have been more mobilized and more creative in their arguments than proponents of redistricting reform, enabling them to prevail in the end despite their initially inauspicious position.<sup>156</sup>

## 8. California, 1984 (Failed)

After the November 1982 redistricting initiative failed, the California state legislature passed a new reapportionment plan similar to (and just as pro-Democrat as) the one that had been rejected by the state’s voters in the June 1982 referendum. Angry Republicans responded by

---

<sup>153</sup> See Billiter, *supra* note 143; see also Luther, *supra* note 142 (paraphrasing California Democratic Party Chairwoman Nancy Pelosi) (“[T]he commission proposed in the initiative is structured so that it is unlikely that minorities and women will be appointed to participate . . .”).

<sup>154</sup> See Claudia Luther & Richard Bergholz, *Campaign Launched for Remap Initiative*, L.A. TIMES, Feb. 3, 1982, at B3; see also *No on 14*, *supra* note 149 (“A far more serious flaw in the initiative is that the public could not hold an independent commission accountable for its work . . .”).

<sup>155</sup> See Bruce Cain, *No: What Is ‘Fair’ to Some Would Not Be to Others*, L.A. TIMES, Oct. 10, 1982, at E3 (“Each party delegation will have the power to veto any final decision.”); see also Billiter, *supra* note 143 (“Critics of Proposition 14 contend that the state Supreme Court will wind up reapportioning the state in virtually every case because at least one of the three members appointed by each major party must give a vote before any plan can be approved.”).

<sup>156</sup> See Billiter, *supra* note 143 (citing a late August poll that showed a six-point lead for Proposition 14).

launching another initiative, this one prescribing the actual district lines for state and federal elections.<sup>157</sup> The initiative was scheduled for a December 1983 vote, and both parties began preparing for what one Democrat described as “the political fight of a generation.”<sup>158</sup> However, the preparations were cut short by the California Supreme Court, which ruled in September that the initiative violated the state constitution because it would have authorized an impermissible second redistricting during a single decade.<sup>159</sup>

Unfazed by the court’s decision, California Republicans drafted yet another redistricting initiative for the 1984 election. This initiative would have created a redistricting commission made up of eight retired state appellate judges, four appointed by Republican governors and four by Democrats.<sup>160</sup> The commission would have formulated district maps on the basis of competitiveness, compactness, contiguity, and equipopulation, and then submitted the maps to the electorate for approval in a statewide referendum. If the commission found itself deadlocked, one member would have been eliminated at random to break the logjam.<sup>161</sup>

The 1984 battle lines closely resembled those from two years earlier, except that Governor Jerry Brown, a Democrat, had been replaced by George Deukmejian, a Republican. Governor Deukmejian led the Republican effort in support of the initiative. According to one observer, he “devoted virtually his full-time efforts for weeks and more than \$1 million in his

---

<sup>157</sup> See Richard Bergholz, *GOP Assemblyman Announces Petition Drive To Get Redistricting Plan on Ballot*, L.A. TIMES, Apr. 6, 1983, at 22.

<sup>158</sup> See Kevin Roderick, *‘Political Fight of Generation’ Slated*, L.A. TIMES, Aug. 5, 1983, at B3 (quoting California Democratic Party Chairman Peter Kelly); see also John Balzarl & Douglas Shuit, *Governor Orders Remapping Vote*, L.A. TIMES, July 19, 1983, at OC1 (reporting that Republicans were prepared to spend \$3-5 million supporting the initiative, and Democrats up to \$5 million to oppose it); Jerry Gillam & Carl Ingram, *Democrats Push Hard for ‘Survival’ Money*, L.A. TIMES, July 31, 1983, at A3 (quoting Speaker Brown) (“This is the Super Bowl. [Republicans are] trying to take my seat in the Assembly as well as my job as Speaker.”).

<sup>159</sup> See *Legislature of the State of California v. Deukmejian*, 669 P.2d 17 (Cal. 1983).

<sup>160</sup> The eight commission members would have been chosen by lot by the president of the University of California.

<sup>161</sup> See Douglas Shuit, *Deukmejian’s Remap Plan Hits Legal Snag*, L.A. TIMES, Nov. 10, 1983, at OC3.

personal election funds to the campaign,”<sup>162</sup> and repeated his campaign theme, “fairness, not politics,” at rally after rally.<sup>163</sup> Republicans spent \$1.3 million to qualify the initiative for the ballot, and about \$2 million more on advertisements on behalf of redistricting reform.<sup>164</sup> As in 1982, President Reagan and numerous pro-business groups (e.g. the California Manufacturers Association, the California Chamber of Commerce, the Western Growers Association) joined the state Republican Party in support of the initiative.<sup>165</sup>

Democrats, not surprisingly, responded to the initiative by commencing “all-out warfare” against it.<sup>166</sup> They blasted the proposed commission for “relying on a small pool of elderly, predominantly Republican retired appellate court judges”<sup>167</sup> who might be influenced by conflicts of interest,<sup>168</sup> for creating nominally competitive districts that would actually favor the Republican Party,<sup>169</sup> and for reducing public input into the redistricting process.<sup>170</sup> They raised more than \$4 million to fight the initiative,<sup>171</sup> and won the support of the *Los Angeles Times*<sup>172</sup> as well as several groups that had largely sat out the 1982 election, such as the California AFL-CIO,

---

<sup>162</sup> See John Balzar, *Deukmejian, Unfazed by Prop. 39 Loss, Vows To ‘Reform’ State Remapping Laws*, L.A. TIMES, Nov. 8, 1984, at B3.

<sup>163</sup> See William Endicott, *Prop. 39 Ads Point Up Politicians’ Bad Image*, L.A. TIMES, Oct. 30, 1984, at B3 (describing an ad in which Governor Deukmejian said that “Proposition 39 will simply remove legislators from the process of drawing their own district lines. Proposition 39 will assure fairness.”); Keith Love, *Governor Blasts Anti-Prop. 39 Ads*, L.A. TIMES, Oct. 10, 1984, at B18 (quoting Governor Deukmejian) (“Why should you be concerned about reapportionment? Because (now) it is virtually impossible to unseat incumbents and it is hard to recruit good people to run for office. You are denied the best candidates possible.”).

<sup>164</sup> See John Balzar, *Prop. 39—The Battle That Could Determine the Game*, L.A. TIMES, Sept. 19, 1984, at A3.

<sup>165</sup> Unlike in 1982, Common Cause was relatively inactive in the 1984 initiative campaign.

<sup>166</sup> William Endicott, *Deukmejian Launches His Remap Drive*, L.A. TIMES, Jan. 21, 1984, at OC\_A9.

<sup>167</sup> See John Balzar, *GOP Remap Plan Trounced in Assembly*, L.A. TIMES, May 2, 1984, at B3; see also Tom Hayden, *The GOP Takes the Initiative*, L.A. TIMES, Aug. 19, 1984, at E3 (“Of the 37 retired judges available to serve, 34 are white, two are black, one is Asian and none is Latino. Only one is a woman. Twenty are Republicans, 11 are Democrats and the registration of the other six is unknown. The youngest is 58 years old and the oldest 94; their average age will be 75 in 1986.”).

<sup>168</sup> See John Balzar, *Remapping Plan Causes Turmoil on Wide Front*, L.A. TIMES, Oct. 16, 1984, at B3 (“Many retired judges have taken up new vocations that could pose political conflicts with reapportionment.”).

<sup>169</sup> See Hayden, *supra* note 167 (“[A]ny district composed of an equal number of Democrats and Republicans works to the advantage of the latter” because of Republicans’ higher turnout and greater support from special interest groups.).

<sup>170</sup> See Balzar, *supra* note 164 (“Democrats [argue] that it would not permit public participation and therefore not earn public confidence . . .”).

<sup>171</sup> See Mark Gladstone, *\$4 Million To Battle Remap Plan Sought*, L.A. TIMES, July 18, 1984, at B3.

<sup>172</sup> See *Reapportionment: No on 39*, L.A. TIMES, Oct. 31, 1984, at C4.

the California Trial Lawyers Association, the Mexican American Political Association, and the NAACP. They also mounted an extremely effective ad campaign that attacked the initiative for involving judges in redistricting,<sup>173</sup> and featured actor Jack Lemmon making statements like “Proposition 39, it would make a great movie—money, power, back room deals with judges. Ohhh. But it would make one lousy law.”<sup>174</sup>

On election day, 45 percent of the electorate supported Proposition 39 and 55 percent voted against it. Republicans benefited relative to 1982 from the energetic support of a popular governor. But, unlike in 1982, they were outspent by the initiative’s opponents and did not enjoy the same unified backing from third-party groups. More importantly, Democrats appear to have been exceptionally successful at framing the issues in the initiative campaign. Powerful anti-initiative ads swamped Governor Deukmejian’s message about fair representation, and convinced voters that judges could not be trusted to conduct redistricting. The governor admitted the effectiveness of the commercials a month before the election,<sup>175</sup> and observers afterwards concluded that “television commercials [had] a lot to do with” the initiative’s loss at the polls because “they play[ed] not only upon people’s rational understanding of these issues but also their emotions.”<sup>176</sup>

---

<sup>173</sup> See John Balzar, *Brown Labels Anti-Prop. 39 Ads ‘Con Jobs’*, L.A. TIMES, Nov. 22, 1984, at A3 (“[T]he anti-39 commercials focused tightly on the fact that retired judges, not legislators, would do the reapportionment. This would lead to backroom judicial deals and politicization of the courts, the commercials argued.”); Douglas Shuit, *Deukmejian Remap Effort Gets Boost in Washington*, L.A. TIMES, Oct. 4, 1984, at 3 (quoting one Democrat ad) (“Judges would be dragged into the political back room—like Chicago and other places with political machines. Only political cronies would ever be appointed judge.”)

<sup>174</sup> William Endicott, *Prop. 39 Ads Point Up Politicians’ Bad Image*, L.A. TIMES, Oct. 30, 1984, at B3.

<sup>175</sup> See Love, *supra* note 163 (quoting Governor Deukmejian) (The Democrats’ ads “are considered effective by some people I’ve talked to.”)

<sup>176</sup> See William Endicott, *State’s Voters Continue Pattern of Inconsistency*, L.A. TIMES, Nov. 8, 1984, at A8. Speaker Brown, a prominent California Democrat, ironically referred to the anti-initiative commercials as “the most extensive collection of con jobs I’ve ever seen.” Balzar, *supra* note 173.

## 9. California, 1990 (Failed)

California's next campaign over redistricting initiatives unfolded in 1990, when two separate reapportionment-related measures were on the ballot. The first, sponsored by Republican businessman Gary Flynn, would have allowed the state legislature to continue drawing district lines, but would have required a two-thirds vote by the Assembly and Senate as well as voter approval before a redistricting plan could become law.<sup>177</sup> The second, of more interest here, would have created a twelve-member commission to conduct redistricting. The commission members would have been selected by a panel of three retired state appellate judges, and would have included five Democrats, five Republicans, and two independents. The commission would not actually have drafted district maps itself, but would have chosen among plans submitted to it on the basis of compactness, equal population, preservation of communities of interest, fair representation for minorities, and competitiveness.<sup>178</sup>

The initiative's supporters were a motley crew. The measure was announced by Paul Gann, best known as a co-sponsor of the notorious property tax-cutting Proposition 13, Alan Post, for three decades the state legislature's nonpartisan budget adviser, and Ellen Elliott, a leader of the League of Women Voters.<sup>179</sup> Also prominent in their support for the initiative were Leroy Heslop, former executive director of the California Republican Party,<sup>180</sup> former President Reagan,<sup>181</sup> major corporations such as Chevron and Hewlett Packard,<sup>182</sup> and a handful of

---

<sup>177</sup> See Tim Schreiner, *Broad Redistricting Plan on June Ballot*, SAN FRANCISCO CHRON., Jan. 19, 1990, at A3. The measure would have also imposed new ethics requirements on California state legislators.

<sup>178</sup> See *Getting Politics Out of Politics?*, L.A. TIMES, May 29, 1989, at B4 (describing the initiative).

<sup>179</sup> See *id.* (referring to the "curious coalition" in support of the initiative); Carl Ingram, *Reapportionment Plan Calls for Bipartisan Commission*, L.A. TIMES, May 24, 1989, at B3.

<sup>180</sup> See Daniel M. Weintraub & Jerry Gillam, *Remap Process No Longer a Narrow Political Concern*, L.A. TIMES, Mar. 11, 1990, at A1.

<sup>181</sup> See Joe Scott, *GOP Redistrict Plan Gets a Reagan Boost*, L.A. TIMES, May 13, 1990, at M8.

Democrats not holding elected office.<sup>183</sup> Unlike in 1984, however, Governor Deukmejian was not very active in the campaign,<sup>184</sup> and many Republican state legislators actually opposed the initiative because they were afraid that its competitiveness requirement would imperil their seats in addition to those of their Democratic opponents.<sup>185</sup> Supporters of the measure spent \$700,000 gathering signatures<sup>186</sup> and close to \$1 million on campaign commercials,<sup>187</sup> some of which featured actor Charlton Heston accusing Democrats of “conn[ing]” the public.<sup>188</sup> The most common arguments made on behalf of the initiative were that it would make California’s elections more competitive,<sup>189</sup> and eliminate districts that “look like pieces in an intricate jigsaw puzzle.”<sup>190</sup>

California Democrats mounted a unified—and very well-funded—campaign against the initiative. Assembly Speaker Willie Brown led the opposition (and even promised to make legislative redistricting fairer if the initiative failed),<sup>191</sup> while State Senator Bill Lockyer, civil

---

<sup>182</sup> See Daniel M. Weintraub, *Fraud Charges Traded on Redistricting Propositions*, L.A. TIMES, May 17, 1990, at A3.

<sup>183</sup> See Daniel M. Weintraub, *Voters Could Radically Alter Redistricting*, L.A. TIMES, May 27, 1990, at A3.

<sup>184</sup> See John Balzar, *Stunned State GOP Looks to Voters for Rescue on Redistricting in '90*, L.A. TIMES, Jan. 18, 1989, at 21 (quoting Governor Deukmejian) (“I would be happy to talk about it to individuals who are interested in [the initiative], but I think it’s a very difficult subject we learned from . . . a few years ago. It’s a very difficult topic to be able to get the average voter to relate to.”). I did not find any quotes about the initiative from Governor Deukmejian until the eve of the election. See Vlae Kershner, *Crucial Effect of Reapportionment Vote*, SAN FRANCISCO CHRON., June 4, 1990, at A12.

<sup>185</sup> See Tim Schreiner, *Defeat of Redistricting Plans Casts Pall on GOP Session*, SAN FRANCISCO CHRON., July 20, 1990, at A11 (“[A]most all GOP legislators, afraid of losing their own seats in a commission-drawn redistricting, opposed [the initiative].”). In my view, this overstates the extent of Republican opposition to Proposition 119. But it is true that most elected Republican politicians preferred Proposition 118, which would have left the redistricting power with the legislature, to Proposition 119.

<sup>186</sup> See Ingram, *supra* note 179.

<sup>187</sup> See Daniel M. Weintraub, *Redistricting Measures Costliest on Ballot*, L.A. TIMES, June 2, 1990, at A29.

<sup>188</sup> See *California Elections: The Ad Campaigns*, L.A. TIMES, May 26, 1990, at A34.

<sup>189</sup> See Weintraub, *supra* note 183 (quoting League of Women Voters leader Ellen Elliott) (“We have legislators who are less responsive to voters and less focused on resolving major issues, because they know they have a very good chance of being reelected, regardless of how ineffective they may be.”); Weintraub & Gillam, *supra* note 180 (“Since 1984, incumbents in the state Senate, Assembly and California’s congressional delegation have won 393 races and lost only 7.”).

<sup>190</sup> Weintraub & Gillam, *supra* note 180.

<sup>191</sup> See Greg Lucas, *Speaker Brown’s Promise on Redistricting*, SAN FRANCISCO CHRON., May 9, 1990, at A16.

rights leader Jesse Jackson,<sup>192</sup> and Senate President Pro Tem David Roberti also loudly criticized the measure. As in 1982 and 1984, Democrats accused Republicans of trying to “gain control by line-drawing rather than by political competition,”<sup>193</sup> and of proposing a commission that would be dominated by special interests and “mostly old, white men.”<sup>194</sup> The Democrats were joined in opposition to the measure by the National Organization for Women, various Hispanic groups, the Sierra Club, the *Los Angeles Times*’s editorial page,<sup>195</sup> and, most surprisingly, Common Cause, a prominent good government group that initially backed the initiative but later changed its mind.<sup>196</sup> Democrats and their allies also massively outspent the measure’s supporters, with estimates of their expenditures ranging from \$5-8 million.<sup>197</sup> This enormous war chest was used to fund a series of devastatingly effective commercials starring actors James Garner, Bea Arthur, and, in a reprise appearance, Jack Lemmon.<sup>198</sup>

Both redistricting initiatives on the ballot were trounced at the polls, with Proposition 119 (which would have created the commission) winning just 36 percent of the vote. As in 1984, Democrats’ speeches and ads convinced much of the public that the measure would have enabled sinister special interests to seize control of the state’s redistricting process. Bob Marks, campaign manager for the Yes-on-119 campaign, said that he knew his side was in trouble “when my mother called me up after she saw the Jim Garner ad and said ‘Are you sure I should vote for

---

<sup>192</sup> See Greg Lucas, *Jackson in Redistricting Fight*, SAN FRANCISCO CHRON., May 22, 1990, at A7 (“Propositions 118 and 119, Jackson said in his trademark rhyming style, represent a ‘scheme of dilution, a scheme of exclusion.’”).

<sup>193</sup> See Weintraub & Gillam, *supra* note 180 (quoting Speaker Brown).

<sup>194</sup> See Joe Scott, *Old Allies Go to War over Remap*, L.A. TIMES, Apr. 1, 1990, at M5.

<sup>195</sup> See *An Unreliable Way To Realign Voters*, L.A. TIMES, May 23, 1990, at B6. However, the *San Francisco Chronicle* endorsed the initiative. See *Yes on 118 and 119*, SAN FRANCISCO CHRON., May 20, 1990, at 1.

<sup>196</sup> See Daniel M. Weintraub, *Common Cause Opposes Plan for Redistricting Commission*, L.A. TIMES, May 2, 1990, at A3; Weintraub, *supra* note 182; Weintraub, *supra* note 183.

<sup>197</sup> See Schreiner, *supra* note 185; Weintraub, *supra* note 187.

<sup>198</sup> See Vlae Kershner, *Stars’ Role in Redistricting Vote*, SAN FRANCISCO CHRON., June 11, 1990, at A2 (“The Democrats’ television commercials . . . were so effective in crushing Propositions 118 and 119 by 2-to-1 ratios that Republicans hardly knew whether to complain or nominate them for awards.”).

this?”<sup>199</sup> Compared to 1984, the Democrats also enjoyed a much greater spending advantage, more backing from third-party groups, and, critically, a fractured opposition. As noted above, Governor Deukmejian was lukewarm in his support for Proposition 119 and many Republicans criticized the measure. At an acrimonious party conference a month after the initiative was defeated, conservative rebels actually submitted a resolution criticizing the “ineffectual, incompetent, and wasteful” campaign on behalf of the measure, and asked for an audit to “determine where the party’s money was spent and why it fumbled the campaign[].”<sup>200</sup>

## 10. Arizona, 2000 (Succeeded)

During the 1990s, Arizona’s state and federal elections were strikingly uncompetitive,<sup>201</sup> and complaints were raised about the strange shapes of some electoral districts.<sup>202</sup> In 2000, a coalition of good government groups, the Arizona Democratic Party (long the minority in the state legislature), and wealthy real estate developer Jim Pedersen sought to enact redistricting reform. The initiative they drafted would create a five-member redistricting commission; state appellate judges would select a pool of twenty-five candidates, the House and Senate majority and minority leaders would each appoint one commission member from this pool, and the four partisan appointees would choose a fifth individual to be the commission’s chairperson. The

---

<sup>199</sup> *Id.* Poll data reveals the impact of the Democrats’ ad blitz, which was unleashed in the final two weeks of the campaign. A month before the election, Proposition 119 led by eight points. *See* Weintraub, *supra* note 183. It ended up losing by twenty-eight.

<sup>200</sup> *See* Schreiner, *supra* note 185.

<sup>201</sup> *See* Chris Moeser, *House Supports Redistricting Plan*, ARIZONA REPUBLIC, Mar. 5, 1999, at 23A (noting that seventeen state senators and twenty-two state representatives had no opponent in the last election); *Put the Crayons Back in the Box!*, ARIZONA REPUBLIC, June 27, 1999, at 6B [hereinafter *Crayons in Box*] (“Arizona legislators seeking re-election have won 96 percent of their races since 1992 . . .”).

<sup>202</sup> *See* Pat Flannery, *Keeping Politics in Line*, ARIZONA REPUBLIC, Aug. 23, 2000, at 1 (describing Congressional District 7 as “a beast gobbling up disparate communities from the Cashion neighborhood in the West Valley to Guadalupe in the East Valley and from the Fort McDowell Indian Community near Scottsdale to Casa Grande”).

commission would then draft state and federal district maps on the basis of equal population, compactness, contiguity, respect for communities of interest, preservation of political boundaries, and competitiveness.<sup>203</sup>

The redistricting initiative, Proposition 106, was supported by an unusual mix of actors. Arizona Democrats, not surprisingly, strongly backed the measure in hope that it would weaken Republicans' grip on the state legislature and congressional delegation.<sup>204</sup> Good government groups such as Common Cause and the League of Women Voters also endorsed the measure, seeing it as an "antidote to Arizona's checkered redistricting history."<sup>205</sup> These predictable supporters were joined by a number of prominent Republicans: former Governor Rose Mofford, Superintendent of Public Instruction Lisa Keegan, former Attorney General Grant Woods, Phoenix Mayor Skip Rimsza, State Representative Sue Gerard, etc.<sup>206</sup> Almost every executive branch official in Arizona also supported the initiative,<sup>207</sup> and the governor, Republican Jane Dee Hull, kept her views on redistricting reform to herself.<sup>208</sup> Finally, Arizona's most important newspaper, the *Arizona Republic*, maintained a steady drumbeat of support for Proposition 106.<sup>209</sup> From February 1999 through election day, the *Republic* published a series of editorials

---

<sup>203</sup> See David K. Pauole, Comment, *Race, Politics & (In)equality: Proposition 106 Alters the Face and Rules of Redistricting in Arizona*, 33 ARIZ. ST. L.J. 1219, 1222-26 (2001).

<sup>204</sup> See, e.g., Andy Nichols, *Let Commission, Not Legislature, Redistrict State*, ARIZONA REPUBLIC, Jan. 3, 1999, at 6B (column in support of redistricting commission by Democrat State Representative Andy Nichols); Robbie Sherwood, *Nov. Ballot May Carry 17 Questions*, ARIZONA REPUBLIC, July 7, 2000, at 1A (quoting Democrat Attorney General Janet Napolitano) ("This will create more competitive districts where you have strong candidates fighting each other over ideas. Will it work or be perfect? Who knows? But it's a good start."); *Voters Deserve Fair Redistricting*, ARIZONA REPUBLIC, Feb. 5, 1999, at 6B [hereinafter *Voters Deserve*] (quoting failed Democrat congressional candidate Sam Coppersmith) ("Republicans like competition in everything except their own seats.").

<sup>205</sup> Pat Flannery, *Keeping Politics in Line*, ARIZONA REPUBLIC, Aug. 23, 2000, at 1.

<sup>206</sup> See Pauole, *supra* note 203, at 1220; Chris Moeser, *Redistricting Change Sought*, ARIZONA REPUBLIC, Sept. 14, 1999, at 1B (quoting Woods) ("I don't believe our Legislature has reflected the will of Arizonans on the most important issues very often in the '90s."); *Voters Deserve*, *supra* note 204.

<sup>207</sup> *Nonpartisan Panel is Vital*, ARIZONA REPUBLIC, Jan. 30, 2000, at 6B ("Phoenix Mayor Skip Rimsza and Scottsdale Mayor Sam Campana and every other mayor who has so far seen a presentation of the [initiative] plan" have supported it.).

<sup>208</sup> I was unable to find a single newspaper story describing Governor Hull's position on Proposition 106.

<sup>209</sup> The *Republic* is no bleeding-heart liberal newspaper. It endorsed George W. Bush for President in 2000. See *In Election 2000 . . . We Recommend*, ARIZONA REPUBLIC, Nov. 5, 2000, at 9B.

with titles such as *Put the Crayons Back in the Box!*<sup>210</sup> and *Stop the Music on Redistricting*,<sup>211</sup> and at one point issued a weekly “redistricting countdown” tracking the progress of the initiative’s backers in gathering signatures.<sup>212</sup> Proposition 106’s supporters stressed the enormous advantage enjoyed by Arizona incumbents during the 1990s<sup>213</sup> as well as the unseemliness of legislators custom-designing their own districts.<sup>214</sup>

Opposition to the initiative stemmed almost entirely from Republican legislators and a handful of pro-business interest groups. Arizona’s five Republican congressmen criticized the measure because they believed it would “lack accountability to voters” and “prove less representative of the state as a whole.”<sup>215</sup> State Senate Majority Leader Rusty Bowers attacked the initiative because, in his view, a redistricting commission would be just as political as the legislature but less savvy and knowledgeable about the state.<sup>216</sup> And Arizona Republican Party chairman Nathan Sproul denounced Jim Pedersen, the largest contributor to the pro-initiative side, and described the Proposition 106 campaign as “just a small group of special interest individuals trying to hijack the process.”<sup>217</sup> As mentioned above, Arizona Republicans’ opposition to Proposition 106 was less than unanimous, with several important party members

---

<sup>210</sup> *Crayons in Box*, *supra* note 201.

<sup>211</sup> *Stop the Music on Redistricting*, ARIZONA REPUBLIC, Nov. 7, 1999, at 8B.

<sup>212</sup> *See, e.g., Redistricting Countdown*, ARIZONA REPUBLIC, Apr. 17, 2000, at 6B.

<sup>213</sup> *See* Hal Mattern, *Redistricting Process Targeted*, ARIZONA REPUBLIC, Oct. 8, 2000, at 1A (quoting Arizona Common Cause Executive Director Dennis Burke) (“This proposition would enliven Arizona politics in a good way. We wouldn’t have all of these unopposed elections . . .”).

<sup>214</sup> *See* Pauole, *supra* note 203, at 1239 (“The most frequently cited argument in favor of Proposition 106 concerned the prevalent role of political self-interest in the drawing of district boundaries.”); *Redistricting Districts Is a Right of Citizens*, ARIZONA REPUBLIC, Nov. 2, 2000, at 8B [hereinafter *Right of Citizens*] (arguing that the initiative’s opponents “have the existing system greased for their own self gain”).

<sup>215</sup> *See* Pauole, *supra* note 203, at 1221.

<sup>216</sup> *See* Mattern, *supra* note 213 (quoting Bowers) (“If you think [the members of the commission] are going to have an increased amount of intelligence and less political interest, you are wrong.”).

<sup>217</sup> Robbie Sherwood, *66% in Poll Back Prop. 106*, ARIZONA REPUBLIC, Aug. 29, 2000, at 5B; *see also* David Leibowitz, *What Do You Know About Prop. 106*, ARIZONA REPUBLIC, Sept. 27, 2000 (“One man, wealthy shopping mall developer Jim Pederson, has bankrolled Prop. 106. . . . Who is he? What’s his political background? What’s in it for him?”).

either supporting or remaining silent about the measure.<sup>218</sup> In addition, the initiative's foes were forced to raise funds from outside the state in the waning days of the campaign as they found themselves behind in the polls and short on cash.<sup>219</sup>

In the end, Proposition 106 prevailed by a vote of 56 percent for to 44 percent against. The most significant explanation for the initiative's success was probably the dissension within the Arizona Republican Party. With Governor Hull uncharacteristically taciturn and many Republicans voicing their support for the measure, the party was unable to mount a unified campaign in opposition. Why Arizona Republicans were so fractured, though, is a more vexing question; legislative majorities in other states have not had nearly as much difficulty maintaining a common front when challenged by redistricting initiatives. The answer appears to be threefold. First, the *Arizona Republic's* extraordinary campaign on behalf of redistricting reform made the commission a major issue from early 1999 onward, and generated negative attention for all Republicans that tried to thwart it—but praise for politicians that bucked their party on the issue. Second, Republicans in the state legislature made the tactical mistake in 1999 of themselves proposing a redistricting commission, albeit one that would have been staffed by six Republicans and three Democrats.<sup>220</sup> Because of this decision, party members found it difficult down the road to argue that commissions were intrinsically unrepresentative and susceptible to special interest domination. Third, it was primarily Republicans who were not legislators (e.g. mayors, state cabinet members) that supported the initiative. These politicians had much less to lose if the measure passed, and were also less susceptible to pressure from the party apparatus.

---

<sup>218</sup> See *Right of Citizens*, *supra* note 214 (“[Opponents to Proposition 106] don’t represent the party as a whole, because many prominent Republicans . . . all support redistricting reform in the name of basic fairness.”).

<sup>219</sup> See *id.* (“No wonder the opposition to Proposition 106 has had to appeal to the Nevada Republican Party for a substantial part of its funding.”).

<sup>220</sup> See Ruben Navarette Jr., *Groscost Moves Toward Gluttony on Redistricting*, ARIZONA REPUBLIC, Feb. 24, 1999, at 2B.

## 11. California, 2005 (Failed)

The highest-profile redistricting initiative ever—thanks to the enthusiastic support of Republican Governor Arnold Schwarzenegger—recently took place in California. In the 2004 general election, not a single incumbent in the Assembly, Senate, or California congressional delegation had been beaten, and not a single seat had changed parties.<sup>221</sup> Governor Schwarzenegger therefore made redistricting by nonpartisan commission a central pillar of the reform package that he pushed in 2005. He first tried to convince the Democrat-dominated state legislature to enact his proposal.<sup>222</sup> When this effort (rather predictably) failed, he ordered a special election in which redistricting reform and several other measures would be put to a statewide vote.<sup>223</sup>

Proposition 77 would have created a three-member commission to carry out California's state and federal redistricting. The state's Judicial Council would have chosen at random a pool of twenty-four retired judges, the Assembly and Senate majority and minority leaders would each have selected three judges from the opposing party, the four legislators would then each have vetoed one of the remaining twelve judges, and finally the three commission members would have been picked randomly from the eight judges still on the list. The commission would have drawn districts on the basis of equal population, compactness, contiguity, and respect for

---

<sup>221</sup> See John Wildermuth, *Some Suspect Governor's Plan To Redraw District Lines*, SAN FRANCISCO CHRON., Jan. 2, 2005, at A17.

<sup>222</sup> See John M. Hubbell, *Plan Puts Redistricting in Judges' Hands*, SAN FRANCISCO CHRON., Jan. 15, 2005, at B3 (describing the constitutional amendment proposed by Republicans in the state legislature).

<sup>223</sup> See Jordan Rau, *Governor Puts Agenda on Ballot*, L.A. TIMES, June 14, 2005, at A1.

political boundaries, and would have been barred from considering the potential effects of redistricting on incumbents or political parties.<sup>224</sup>

Governor Schwarzenegger was by far the most important proponent of Proposition 77. He made redistricting reform a major issue in 2005, personally involved himself in the initiative's drafting, raised large amounts of money for the pro-initiative side, and campaigned vigorously on behalf of the measure. According to Schwarzenegger, Proposition 77 would have made California's elections more competitive,<sup>225</sup> helped more moderate politicians at the expense of extremists on both ends of the political spectrum,<sup>226</sup> and returned California to the widely respected judge-drawn districts that the state enjoyed in the 1990s.<sup>227</sup> Several important organizations joined Schwarzenegger in support of the initiative, including Citizens To Save California,<sup>228</sup> the Rose Institute,<sup>229</sup> Common Cause,<sup>230</sup> and various business interests. Both the *Los Angeles Times*<sup>231</sup> and the *San Francisco Chronicle*<sup>232</sup> also endorsed Proposition 77. Together, Schwarzenegger and his allies spent approximately \$5 million on advertising and other campaign activities.<sup>233</sup>

---

<sup>224</sup> See John Wildermuth, *Redistricting Initiative Would Set State Apart*, SAN FRANCISCO CHRON., Oct. 7, 2005, at B3.

<sup>225</sup> See Wildermuth, *supra* note 221 (“I think we have to do a redistricting’ to make the elections more competitive, Schwarzenegger said. ‘I think this is a very, very important thing that we have to make part of our reforms.’”).

<sup>226</sup> See *id.* (“[T]he governor is trying to put more moderate Republicans in office at the expense of conservatives . . .”).

<sup>227</sup> See Nancy Vogel, *Looking To Design a Fairer Map*, L.A. TIMES, Feb. 13, 2005, at B1 (referring to the “rosy rearview glow of California’s judge-drawn lines in the 1990s”); *id.* (quoting a Rose Institute official) (“We had 10 years of really good districts, and people saw that it was possible for an unbiased source to draw [them].”).

<sup>228</sup> See Peter Nicholas, *Group To Aid Gov.’s Push for Reforms*, L.A. TIMES, Jan. 12, 2005, at B1. Citizens To Save California was an umbrella organization dedicated to promoting all of Governor Schwarzenegger’s 2005 initiatives.

<sup>229</sup> See Vogel, *supra* note 227.

<sup>230</sup> See Carla Marinucci & John Wildermuth, *Prop. 77 Splits Common Cause in State*, SAN FRANCISCO CHRON., Oct. 18, 2005, at B2. However, several board members of the California chapter of Common Cause opposed the national organization’s decision to endorse Proposition 77. See *id.*

<sup>231</sup> See *A New Political Landscape*, L.A. TIMES, Oct. 23, 2005, at M4.

<sup>232</sup> See *The Chronicle Recommends: Prop. 77*, SAN FRANCISCO CHRON., Oct. 12, 2005, at B8.

<sup>233</sup> See Dan Morain, *Redistricting Drama Adds a Producer*, L.A. TIMES, Oct. 8, 2005, at B4.

A coalition of California Democrats, traditionally pro-Democrat groups, and skeptical Republicans opposed Proposition 77. Some of the most vocal Democrat critics were U.S. House Representatives Nancy Pelosi<sup>234</sup> and Howard Berman,<sup>235</sup> both of whom raised significant sums to defeat the measure. Groups that came out against the initiative included the Alliance for a Better California,<sup>236</sup> the Mexican American Legal Defense and Education Fund,<sup>237</sup> the California Teachers Association, the California State Council of Service Employees, and other major unions.<sup>238</sup> Most notably, a number of prominent California Republicans publicly broke with Governor Schwarzenegger over Proposition 77. U.S. House Representative John Doolittle declared that “[a]s a conservative Republican, it makes me very nervous when I hear people say that their overt objective is to remove the conservatives.”<sup>239</sup> The national Republican Party also opposed the initiative, and by some counts sixteen of California’s twenty Republicans in Congress disagreed with Schwarzenegger about redistricting reform.<sup>240</sup> The opponents of Proposition 77 dramatically outspent the measure’s supporters.<sup>241</sup> Their arguments focused on the impossibility of removing politics from the redistricting process,<sup>242</sup> the impropriety of

---

<sup>234</sup> See Christian Berthelsen, *Group Backing Remap Initiative Caught up in Donations Dispute*, SAN FRANCISCO CHRON., Oct. 7, 2005, at B3 (quoting Pelosi) (“I am very committed to defeating Proposition 77, and I am raising money to defeat it.”); Hubbell, *supra* note 222.

<sup>235</sup> See John Wildermuth, *Incumbents Team up To Oppose Schwarzenegger on Prop. 77*, SAN FRANCISCO CHRON., Aug. 26, 2005, at B1.

<sup>236</sup> See Dan Morain, *Coffers Bulging for Special Election*, L.A. TIMES, May 3, 2005, at B1. Alliance for a Better California, dedicated to defeating all of Schwarzenegger’s 2005 initiatives, was the Democrat counterpart to Citizens To Save California.

<sup>237</sup> See John Wildermuth, *Debate on Prop. 77 over Retired Judges*, SAN FRANCISCO CHRON., Oct. 17, 2005, at B1.

<sup>238</sup> See John Wildermuth, *Business, Labor Ante up in Play for Power*, SAN FRANCISCO CHRON., Sept. 26, 2005, at A1 (“California public employee unions, fighting for their political lives, are betting more than \$60 million that they can defeat Gov. Arnold Schwarzenegger’s package of initiatives Nov. 8.”).

<sup>239</sup> See Peter Nicholas, *GOP Fears a Redistricting Backfire*, L.A. TIMES, Feb. 8, 2005, at A1.

<sup>240</sup> See *id.*; see also Wildermuth, *supra* note 235 (“Gov. Arnold Schwarzenegger also faces a revolt from GOP congress members worried that the initiative could cost them their seats.”).

<sup>241</sup> See Morain, *supra* note 233; Wildermuth, *supra* note 238.

<sup>242</sup> See Peter Nicholas, *Gov. To Call for Special Session*, L.A. TIMES, Jan. 1, 2005, at A1 (quoting Assembly Speaker Fabian Nunez) (“You’ll never be able to rid [redistricting] of politics.”).

conducting a second, mid-decade redistricting,<sup>243</sup> the sense that the initiative was nothing more than a “power grab by the party that’s not in power,”<sup>244</sup> the difficulty of implementing the initiative’s proposals in time for the 2006 election,<sup>245</sup> and the fear that the national Democratic Party would be hurt if the measure passed and California Democrats lost seats in Congress as a result.<sup>246</sup>

Proposition 77 lost by a wide margin on election day, with 40 percent of the vote in favor compared to 60 percent against. As in previous California initiative campaigns, the unified and forceful opposition of the state Democratic Party framed the debate as a partisan struggle rather than a question of good government. The measure’s prospects were also damaged by the dissension within the California Republican Party. While almost every major Democrat loudly criticized the initiative, many Republicans remained silent or joined the disparaging Democratic chorus. Governor Schwarzenegger did enthusiastically back Proposition 77, but previous California campaigns show that gubernatorial support alone does not ensure a measure’s passage. Moreover, Schwarzenegger’s once sky-high approval ratings had plummeted by November 2005, thus further reducing his influence over the electorate. As one observer commented just before the election, “[t]here’s a negative drag created by Arnold that spans

---

<sup>243</sup> See Hubbell, *supra* note 222 (quoting Representative Pelosi) (“[I]t’s up to the public to ask why the governor would want to do this in mid-decade. That is a question fraught with meaning.”).

<sup>244</sup> See Vogel, *supra* note 227 (quoting Speaker Nunez); see also John Wildermuth, ‘Nonpartisan’ Measure Draws Partisan Debate, SAN FRANCISCO CHRON., Sept. 27, 2005, at B2 (quoting State Senator Gloria Romero) (“One party is trying to get more control, and another party is trying to defend against it.”).

<sup>245</sup> See Wildermuth, *supra* note 244 (quoting election expert Karin MacDonald) (“It would be incredibly difficult, if not impossible, to get this done before Dec. 30.”).

<sup>246</sup> See Ethan Rarick, *Learning To Love Gerrymandering*, L.A. TIMES, Oct. 2, 2005, at M5 (“I will support a nonpartisan redistricting of Democrat-dominated California on the same day I can be assured of similar fairness in Republican states.”).

across all of the propositions that he's supporting, and it doesn't leave a lot of room for him to move."<sup>247</sup>

## 12. Ohio, 2005 (Failed)

The last of the twelve redistricting initiatives took place in Ohio in 2005. In the previous year's election, Ohio Democrats had won 49 percent of the congressional vote but just 33 percent of the seats, 48 percent of the state House vote but just 42 percent of the seats, and 37 percent of the state Senate vote but just 19 percent of the seats.<sup>248</sup> Moreover, the average margin of victory in Ohio's state and federal races was 35 percentage points.<sup>249</sup> In response to these perceived electoral flaws, a group called Reform Ohio Now proposed an initiative that would have created a new five-member redistricting commission for Ohio. Senior state court judges of different party affiliations would have chosen the first two commission members, and those two commissioners would have selected the remaining three members (one Democrat, one Republican, and one independent). The commission would have adopted the state and federal district maps that created the most competitive districts, except that plans that sacrificed some competitiveness for greater compactness and community preservation could be chosen.<sup>250</sup>

Reform Ohio Now, the main backer of the redistricting initiative (Issue 4) as well as three other propositions on the 2005 ballot, was a "nonprofit coalition of mostly moderate and liberal-

---

<sup>247</sup> See Philip Matier & Andrew Ross, *Governor Losing His Star Power in Special Election*, SAN FRANCISCO CHRON., Oct. 31, 2005, at B1.

<sup>248</sup> See Joe Hallett, *Ohio Ballot Issue 4: Redistricting Comes Under Scrutiny*, COLUMBUS DISPATCH, Oct. 27, 2005, at 01A.

<sup>249</sup> See *There Is a Better Way*, COLUMBUS DISPATCH, Aug. 7, 2005, at 04B.

<sup>250</sup> See Hallett, *supra* note 248 ("The commission could accept a plan that scores two points lower on the competitiveness scale for congressional districts and four points lower for legislative districts if the plan does a better job of making the districts compact and keeps communities intact."); Joe Hallett, *Reform Would Wrest Pen of Power from State's Political Line-Drawers*, COLUMBUS DISPATCH, June 26, 2005, at 01C.

leaning interests.”<sup>251</sup> It was funded primarily by foundations and individual donors (many of them from outside Ohio),<sup>252</sup> and endorsed by groups such as Common Cause, the AFL-CIO and other unions, the NAACP, and the Sierra Club.<sup>253</sup> Ohio’s Democratic legislators were also nominally in favor of Issue 4,<sup>254</sup> but were not especially vocal in their support, probably because more competitive districts would have put their own seats in play in addition to those of their Republican opponents.<sup>255</sup> The initiative’s backers highlighted Ohio’s history of uncompetitive races and argued that the ethical scandals surrounding Republican Governor Robert Taft were evidence of the need for redistricting reform.<sup>256</sup> A typical commercial intoned that “[t]here’s a culture of corruption in our government” and claimed that Issue 4 would “help get rid of the special interest money, hold the politicians accountable and clean up the corruption once and for all.”<sup>257</sup>

Ohio’s Republicans furiously opposed Issue 4, forming a new organization, Ohio First, to direct the effort against the measure. Because of his poor poll numbers, Governor Taft kept a relatively low profile during the campaign, but prominent legislators such as House Speaker Jon Husted, State Senator Kevin Coughlin, and State Representative Kevin DeWine loudly

---

<sup>251</sup> Jim Siegel, *Group Pushing Election Reform Inches Closer to Ballot*, COLUMBUS DISPATCH, July 22, 2005, at 03B.

<sup>252</sup> *See id.* (“The group has raised money from a variety of sources including: Alida Messenger, of New York, a major donor to liberal causes and daughter of oil magnate John D. Rockefeller III; the Ohio Federation of Teachers; the Rockefeller Family Fund; the Ohio Public Interest Research Group Citizen Lobby; the Public Interest Projects Inc., of New York; and therestofus.org . . .”).

<sup>253</sup> *See* About Reform Ohio Now, [http://www.reformohionow.org/content.jsp?content\\_KEY=577&t=about](http://www.reformohionow.org/content.jsp?content_KEY=577&t=about) (last visited March 6, 2006).

<sup>254</sup> *See There Is a Better Way*, *supra* note 249 (“Naturally, Ohio Democrats favor reform.”).

<sup>255</sup> *See* Jim Siegel, *Redistricting Amendment: Proposal Could Mean Fewer Black Legislators*, COLUMBUS DISPATCH, Sept. 25, 2005, at 01A (noting that one prominent Ohio Democrat “still ha[d] some questions” about a month before the election, and that the Ohio black caucus had not yet decided to endorse Issue 4).

<sup>256</sup> *See* Hallett, *supra* note 250 (quoting Erin Bowser, director of the Ohio Public Interest Research Group) (“All of the various scandals happening now . . . reinforce how regular citizens are being shut out of the process and how difficult it is to hold elected officials accountable when they’re in safe districts and they can’t get beat.”).

<sup>257</sup> *Bureaucrats Bad; So Are Politicians*, CINCINNATI ENQUIRER, Nov. 3, 2005, at 9C.

denounced the initiative.<sup>258</sup> Thanks to intense fundraising and support from pro-business groups such as the Ohio Chamber of Commerce,<sup>259</sup> opponents of Issue 4 substantially outspent the measure's backers.<sup>260</sup> They used their war chest to assemble a large team of consultants (including the producers of the anti-John Kerry Swift Boat ads) and bombard the Ohio airwaves with critical commercials.<sup>261</sup> The main themes sounded by the ads were that Issue 4 was put on the ballot by "wealthy, out-of-state liberals trying to hijack Ohio's elections,"<sup>262</sup> and that the initiative would transfer control of redistricting to faceless bureaucrats.<sup>263</sup> Opponents of Issue 4 also argued that it was a mistake to privilege competitiveness above other redistricting criteria, proving their point by producing a sample district map with "districts shaped like string beans" that the new commission would be required to adopt because of its high competitiveness score.<sup>264</sup> Most of Ohio's newspapers joined Republicans in calling for a 'No' vote on Issue 4.<sup>265</sup>

On November 8, 2005, Issue 4 lost with just 30 percent of the vote for compared to 70 percent against—the worst defeat of any of the twelve redistricting initiatives. Following a sort of political Murphy's Law, almost everything that could go wrong did go wrong for the measure.

---

<sup>258</sup> See Hallett, *supra* note 250; Siegel, *supra* note 251. Coughlin even "admitted telling another lobbyist that he killed" a bill favored by Democrat Paul Tipps "to get back at Tipps for co-writing" the redistricting initiative. See Joe Hallett, *Legislator Put Preserving a Safe District over Saving Cities' Money*, COLUMBUS DISPATCH, July 3, 2005, at 05D.

<sup>259</sup> See Siegel, *supra* note 251 ("The Ohio Chamber of Commerce, a major player in state elections, is concerned that the provisions create an uneven playing field that favors unions over businesses.").

<sup>260</sup> See Mark Niquette & Jim Siegel, *Election-System Proposals: Initiatives' Friends, Foes Search for Easy Labels*, COLUMBUS DISPATCH, Sept. 25, 2005, at 01B.

<sup>261</sup> See Sandy Theis, *Election Issue Foes Fear Voices of Ohio Voters Would Be Stifled*, PLAIN DEALER, Oct. 18, 2005, at B2.

<sup>262</sup> See Niquette & Siegel, *supra* note 260; see also Sandy Theis, *Two Ballot Issues Unclear, Poll Finds*, PLAIN DEALER, Oct. 27, 2005, at B3 ("A new ad that appears in Christian newspapers even tags [Reform Ohio Now] supporters as those who 'took prayer out of our public schools.'").

<sup>263</sup> See *Bureaucrats Bad; So Are Politicians*, *supra* note 257 (quoting an anti-Issue 4 ad) ("[T]he costly election amendments would create new state bureaucracies filled with political appointees who have no minimum qualifications. . . . With all the scandals in Columbus, do we really want bureaucrats to have more control?").

<sup>264</sup> See Hallett, *supra* note 248; see also Joe Hallett, Jim Siegel & Mark Niquette, *Ohio's Issue 4 Aims To Inject Competition into Legislative Races*, COLUMBUS DISPATCH, Oct. 16, 2005, at 01A (quoting Ohio First spokesman Jim Tilling) ("In order to get competitiveness, you have to distort everything else.").

<sup>265</sup> See *Mixed Bag of Reforms*, PLAIN DEALER, Oct. 23, 2005, at H2; *Vote Today—There's Lots at Stake*, CINCINNATI ENQUIRER, Nov. 8, 2005, at 12B. But see *There Is a Better Way*, *supra* note 249 (expressing support for the principle of redistricting reform).

Issue 4's natural supporters, Ohio Democrats, were lukewarm in their advocacy because of concern about how their own reelection chances might be affected if the initiative passed. Reform Ohio Now was easily dismissed as a collection of out-of-state liberals. The initiative's critics were well-organized and well-funded, and their media barrage was considered to have been particularly effective. And turnout on election day was low, particularly in Ohio's cities, as voters confused by the complicated initiatives and reluctant to participate in a special election stayed home.<sup>266</sup>

### III. PATTERNS AND LESSONS

In seventy years of effort, four redistricting initiatives have succeeded and eight have failed. Part II described in detail all twelve initiatives, and posited some explanations for why each one passed or was defeated. This section considers the measures collectively rather than individually, and attempts to reach some broader conclusions about why redistricting initiatives succeed or fail, what reformers can do to make success more likely in the future, and how accurately the academic literature explains the initiatives' outcomes.

#### *A. Patterns in the Past*

Redistricting initiatives' odds of passage are actually worse than they seem. In total, four out of twelve have prevailed at the polls, but two of those successes—Arkansas (1936) and

---

<sup>266</sup> See Sandy Theis & Reginald Fields, *Scandals Get Little Reaction on Issues*, PLAIN DEALER, Nov. 9, 2005, at B1 (“[L]ow turnout in the cities indicated that Democrats failed to get their supporters to the polls. Others blamed voter confusion and said [Reform Ohio Now] made a mistake by pitching four complex issues at once.”).

Oklahoma (1962)—took place before or around the time of *Baker v. Carr*.<sup>267</sup> Those measures’ supporters, unlike backers of redistricting reform in the forty years since *Baker*, were able to point out the obvious unfairness of electoral districts that vary widely in population. They did not have to resort to the second-order argument that even when the one-person, one-vote principle is respected, democratic values can still be subverted by clever district-drawing. In the post-*Baker* era, only two out of nine redistricting initiatives have succeeded, compared to two out of three in the period before the Supreme Court entered the political thicket.

As a group, the campaigns over the failed redistricting initiatives were quite different from the campaigns over the successful measures. As Appendix B, *infra*, indicates, the initiatives’ proponents were outspent in four of the seven failed campaigns for which I have information, but had greater resources than their adversaries in the one successful campaign for which an assessment is possible.<sup>268</sup> The state governor twice opposed the initiative in failed campaigns but never fought against a successful initiative. The majority party in the state legislature strongly opposed all eight failed initiatives, but never vigorously resisted a successful initiative. (In the three successful campaigns for which I have information, the legislative majority party was split once and weakly opposed to the initiative twice.)<sup>269</sup> The minority party in the state legislature was split twice and weakly in favor thrice in the failed campaigns, but supported all three of the successful measures for which I have information.<sup>270</sup> In failed campaigns, major newspapers supported the initiative twice, opposed it four times, and were split twice, while in successful campaigns they endorsed the measure thrice and were split once.<sup>271</sup>

---

<sup>267</sup> 369 U.S. 186 (1962).

<sup>268</sup> See *infra* Appendix B.

<sup>269</sup> See *id.*

<sup>270</sup> See *id.* However, the intensity of support from the state legislative minority party varied in the successful initiative campaigns.

<sup>271</sup> See *id.*

Interest groups were split six times and supportive of the measure twice in failed campaigns, but were split just once and supportive twice in successful campaigns.<sup>272</sup> All of the successful campaigns unfolded in the wake of a recent egregious gerrymander, and twice they took place in the shadow of important relevant national developments; on the other hand, one of the failed campaigns was not provoked by an especially awful gerrymander, and none of them were accompanied by major national events.<sup>273</sup> Finally, opponents of redistricting reform were more effective at framing the debate in seven of the failed campaigns but none of the successful campaigns.<sup>274</sup>

The (rather intuitive) upshot is that redistricting initiatives are more likely to succeed when their supporters outspend and outframe the opposition, the legislative majority party is split or weakly opposed, the governor and the legislative minority party are strongly supportive, newspapers and interest groups endorse the measure, a blatant gerrymander has recently occurred, and favorable developments are transpiring on the national stage. But it is possible to advance this analysis further. First, state governors are basically powerless to get a redistricting initiative to pass (though they may be able to accomplish the reverse, that is, to ensure a measure's defeat through their energetic opposition). In three cases—Oklahoma (1960), California (1984), and California (2005)—governors made the passage of a redistricting measure their top campaign priority, only to see those initiatives lose by an average of twenty points. Moreover, none of the four successful initiatives enjoyed strong gubernatorial support; only once, in Oklahoma (1962), was the governor's favorable position clear from newspaper coverage, and even in that campaign Governor Edmondson was a lame duck and devoted little effort to passing the initiative.

---

<sup>272</sup> *See id.*

<sup>273</sup> *See id.*

<sup>274</sup> *See id.*

Second, the minority party in the state legislature is similarly incapable of propelling a redistricting initiative to success at the polls. The minority party strongly supported a redistricting measure four times<sup>275</sup> and weakly supported such a measure five more times,<sup>276</sup> yet only three of those initiatives succeeded. And in the three successful cases, the minority party's support for the initiative was weak twice—Oklahoma (1962) and Colorado (1974)—and strong only in Arizona (2000), a campaign in which the Republicans' internal strife was probably more important than the Democrats' unified advocacy. However, actual splits in (as opposed to lukewarm support from) the minority party correlate perfectly with defeat on election day. California Republicans divided over the 1990 and 2005 redistricting initiatives, and those measures lost by twenty-eight and twenty points, respectively.

Third, the actual content of a redistricting initiative also has little impact on the measure's fate at the polls; the eight failed proposals do not look appreciably different from the four that passed. Oklahoma's successful 1962 initiative, for example, was almost identical to the measure that the state's voters rejected in 1960. Similarly, the successful initiatives in Colorado (1974) and Arizona (2000)—both of which created commissions that draw districts on the basis of a set of familiar redistricting criteria—strongly resemble the failed initiatives in California (1982), California (1984), California (1990), and California (2005). The only conclusion that can be drawn about initiatives' content is that relatively unorthodox proposals are certain to fail. Ohio's 1981 initiative, which would have required the commission to adopt the plans with the greatest district compactness, and Ohio's 2005 initiative, which would have privileged competitiveness above all other redistricting criteria, were defeated by an average of twenty-eight points.

---

<sup>275</sup> These cases were North Dakota (1973), California (1982), California (1984), and Arizona (2000).

<sup>276</sup> These cases were Oklahoma (1960), Oklahoma (1962), Colorado (1974), Ohio (1981), and Ohio (2005).

Two more factors that seem relatively unimportant in explaining initiative success or failure are interest group positions and recent egregious gerrymanders. In most campaigns—seven of the eleven that I was able to assess—important interests lined up on both sides of the measure, making their overall influence a wash. In the four campaigns in which most interests backed one side (always the pro-initiative side), the measures passed twice and were defeated twice. And those two successes—Colorado (1974) and Arizona (2000)—were almost certainly not attributable to interest groups’ endorsements or mobilization, which by all accounts played a small role in both campaigns. As for glaring gerrymanders, they are unfortunately so prevalent that they provide no meaningful distinction between successful and unsuccessful redistricting initiatives. Seven of the eight failed initiatives took place shortly after an especially offensive redistricting exercise, as did all four of the initiatives that prevailed.

So what factors *do* account for why some initiatives succeed and some fail? The most important single variable appears to be the intensity of the legislative majority party’s opposition to the measure. In the eight cases where the majority party strongly opposed an initiative, the initiative failed every time. But in the four cases where the majority party’s position was unclear or split or only weakly opposed, the initiative succeeded every time. This finding makes a good deal of sense. Legislators from the majority party in a state are the main targets of redistricting initiatives (as well as the primary beneficiaries of the gerrymandered status quo). They are also members of the party that most of the electorate supports, at least in legislative elections.<sup>277</sup> So it is not surprising that the majority party in the state legislature vehemently opposes most redistricting initiatives, or that those initiatives fail as a result of its strident opposition.

---

<sup>277</sup> This assumes that the existing gerrymandering is not so egregious that the majority party in the state legislature only enjoys the support of a minority of the electorate. In none of the twelve cases does such minority entrenchment appear to have occurred.

But it is not just the fact of intense majority party resistance that dooms initiatives, but also the kind of campaign that the resistance engenders. In case after case, majority party legislators responded to a threatening redistricting measure by raising large sums of money, campaigning furiously against the measure, and striving to frame the debate in the most advantageous possible terms. As Appendix B shows, when the majority party strongly opposed a redistricting initiative, it outspent the measure's supporters four times and was outspent thrice, and was more effective at framing the debate six times, while never allowing the other side clearly to seize the rhetorical advantage.<sup>278</sup> This means that strong majority party opposition produces a political environment in which proponents of redistricting reform face almost insurmountable obstacles. They are confronted not only by the official hostility of the largest partisan entity in the state, but also by an anti-initiative effort that is better-funded, able to call on more prominent politicians as spokesmen, and made up of legislators desperately fighting for their political lives.

The deeper mystery, then, is why redistricting initiatives ever win—or, which is to say the same thing, why the state majority party does not always strongly oppose such measures. The answer is that while the majority party would always *like* to fight forcefully against redistricting reform, forces beyond its control sometimes prevent it from doing so. In Oklahoma (1962) and Colorado (1974), it was important national developments that interceded. The Supreme Court's decision in *Baker v. Carr* made it clear to Oklahoma Democrats that reapportionment could no longer be resisted. Even if they thwarted both the 1962 initiative and similar proposals in the state legislature, reapportionment would still take place, just by court decree instead of democratic decision-making. Accordingly, the Oklahoma Democratic Party barely even tried to fight the 1962 initiative even though two years earlier it had ferociously opposed an almost

---

<sup>278</sup> See *infra* Appendix B.

identical measure. Similarly, Colorado Republicans in 1974 recognized the threat that the redistricting initiative posed to their dominance in the state legislature. But they also realized that the 1974 elections, taking place shortly after the Watergate scandal, would be exceptionally favorable to Democrats and self-proclaimed reformers. They therefore muted their opposition—which would have been futile anyway—to the initiative, and focused on holding onto their seats.

There were no comparably important national developments in 2000, but the Arizona Republican Party still failed strongly to oppose the redistricting initiative on the ballot.<sup>279</sup> There is no single explanation for the party's halfhearted resistance; it appears, rather, to have stemmed from an unusual confluence of factors. First, Arizona Republicans themselves had earlier proposed a redistricting commission, making it difficult for them to argue convincingly against the initiative. Second, a number of prominent Republican executive branch officials declared their support for the measure, thus hampering legislators' effort to present a vigorous and unified opposition front. Third, and perhaps most importantly, the *Arizona Republic* tirelessly editorialized in favor of the initiative and criticized the measure's opponents. Newspapers in other states also endorsed redistricting initiatives, but the persistence and high profile of the *Republic's* campaign were unique among the twelve cases that I examined.<sup>280</sup>

It is now possible to answer this Article's motivating question: Why do redistricting initiatives succeed and why do they fail? In short, redistricting initiatives generally fail because they provoke fierce opposition from the majority party in the state legislature, which feels threatened by the possibility of fairer district lines. The majority party typically raises more

---

<sup>279</sup> The Arizona case is the most inexplicable of the twelve, as an initiative that benefited Democrats passed despite Republican control of the governorship and both chambers of the state legislature. I should note that I do not find my explanation for weak Republican opposition completely convincing. Majority parties in other cases faced political environments just as challenging but were able to mount energetic—and effective—campaigns against redistricting initiatives.

<sup>280</sup> In no other case did newspaper support for a measure play nearly as large a role as Arizona (2000). However, newspaper opposition helped doom initiatives in North Dakota (1973), California (1982), California (1984), and Ohio (2005).

money than the initiative's supporters, argues more creatively and vociferously for its position, and manages to cast the debate in a light more favorable to it. On the other hand, redistricting initiatives succeed when for some reason the legislative majority party is unable to mobilize in opposition. Sometimes national developments such as Supreme Court decisions or political groundswells account for this inability; sometimes local factors such as media coverage or poor tactical decisions by the majority party are responsible. The default, unfortunately, is that redistricting initiatives fail, and something out of the ordinary must transpire for them to prevail at the polls.

### *B. Lessons for the Future*

The above analysis of the twelve redistricting initiatives suggests that the situation for would-be reformers is dire. In general, any measure that they draft—no matter how well-written, no matter how admirable in its policy implications—will be defeated. The majority party in the state legislature will rally against the initiative, and reformers will be outspent, outframed, outcampaigned, and, ultimately, outvoted. It matters little whether the governor supports the measure, whether newspapers and interest groups are in favor, or whether the existing electoral districts undermine everything that democracy stands for. The outcome of the campaign will still be the same: failure.

But there are a few glimmers of hope for proponents of redistricting reform. First, and most importantly, history shows that redistricting initiatives do succeed when they are launched at the same time that favorable national developments are taking place. The challenge, then, is to identify propitious moments for reform in the future. Unfortunately, such moments are more

apparent with the benefit of hindsight, but it does seem like we may currently be on the verge of one. Thanks to the California and Ohio initiatives in 2005, the uproar over Texas's mid-decade redistricting, and the Supreme Court's recent decisions in *Vieth v. Jubelirer*<sup>281</sup> and *LULAC v. Perry*,<sup>282</sup> redistricting is in the news more than ever before. Moreover, though it is still too early to tell for sure, the 2006 elections look like they will be very favorable for Democrats<sup>283</sup>—who, outside of California, have been the main supporters of redistricting reform in the modern era. The combination of greater public awareness of redistricting abuses and a pro-Democrat political environment may produce an unusually auspicious setting for redistricting initiatives. If current trends hold, reformers should be sure not to let the opportunity slip away.

What happens if, as will usually be the case, there are no favorable national developments but a redistricting initiative is nevertheless on a state's ballot? In such a situation, reformers should learn as much as possible from the 2000 Arizona campaign, the one modern case in which a redistricting initiative prevailed despite the absence of any dramatic national events. One lesson from Arizona is that reformers should try not only to win major newspapers' endorsements, but also to garner their committed and vocal support. An unrelenting editorial campaign on behalf of an initiative, like that mounted by the *Arizona Republic* in 2000, has the capacity to focus the public's attention on redistricting and embarrass opponents of the measure. Media backing is especially important for proponents of redistricting reform since they are typically at a disadvantage when it comes to conventional campaigning and television advertising.

---

<sup>281</sup> 541 U.S. 267 (2004).

<sup>282</sup> 126 S. Ct. 2594 (2006).

<sup>283</sup> See Dan Balz, *Issues That Will Shape the 2006 Elections*, Wash. Post, July 24, 2006, at A01 ("Less than four months before the mid-term elections, there is one question that is preoccupying candidates around the country: How big will the Republican losses be in November? History suggests, and operatives in both parties agree, that Republicans are virtually certain to lose ground.").

A second lesson from Arizona is that it is vitally important for an initiative's supporters to create rifts in the legislative majority party. State legislators from the majority party are, of course, the politicians least likely to back a redistricting measure, but they may be convinced to do so if they hold seats that would be safe under virtually any electoral arrangement, or if they are unusually reform-minded. Several Republican members of the Arizona state legislature, for instance, came out in support of Proposition 106 in 2000.<sup>284</sup> A more promising way for reformers to sow dissension in the majority party's ranks, though, is to target the party's current and former executive branch officials. Such officials have much less to lose than state legislators if redistricting is entrusted to a neutral commission, and they are also more likely to buck the party establishment, especially if they no longer hold elected office. The most important Republican supporters of Proposition 106 in 2000 were all past and present executive branch officials.

A final bit of advice for reformers, derived from the failed campaigns of Ohio (1981), California (1990), California (2005), and Ohio (2005), is that they must at all costs maintain unity in the legislative minority party. In those four races, whatever hopes the initiatives' backers had were dashed by tepid support from, or outright splits in, the minority party.<sup>285</sup> Unfortunately, the best way to prevent minority party defection is for reformers to propose measures that are unthreatening to minority party politicians—and hence less likely to produce genuinely fair district maps. The common theme in the four cases above is that each measure would have imperiled the seats not only of majority party legislators, but also of many minority party politicians. The 1981 Ohio initiative would have made district compactness the sole redistricting

---

<sup>284</sup> See *Right of Citizens*, *supra* note 214 (noting that Republican State Senator Sue Grace and State Representative Susan Gerard supported the Arizona redistricting initiative).

<sup>285</sup> It is true that legislative minority party support for redistricting reform was also weak in Oklahoma (1962) and Colorado (1974), but the initiatives nevertheless passed. However, this is almost certainly because the major national developments in each case made the intensity of local party support almost irrelevant. In more typical campaigns, the absence of minority party mobilization does indeed always prove fatal to an initiative's chances.

criterion; the 1990 California initiative would have required the commission to consider district competitiveness when choosing among plans; the 2005 California initiative would have barred the commission from examining the party affiliations or voting histories of the electorate; and the 2005 Ohio initiative would have made competitiveness the most important factor in redistricting. Reformers, then, should avoid proposing schemes that promise to change most districts' shapes (as the 1981 Ohio initiative would have), or to make reelection more difficult for minority party legislators (as the other three measures would have). The proposals that are left may seem watered-down, but they would still dramatically improve the status quo—and, crucially, have a prayer of passing.

In sum, the playbook for advocates of redistricting reform should read as follows: Wait for favorable national developments to take place, and launch redistricting initiatives in their wake. If a measure is not buoyed by important national events, try to win the enthusiastic support of major newspapers, to peel off some members of the legislative majority party in the state, and to avoid proposals that are overly threatening to minority party legislators' job security. Even if all these goals are met, of course, the initiative may fail. But at least reformers will have learned the right lessons from the few successful initiative campaigns, and avoided repeating all the mistakes of the eight failed campaigns—not one of which featured a unified minority party, a divided majority party, and support for the measure from the state's media establishment.

### *C. Implications for the Academic Conventional Wisdom*

Section II.A, *supra*, presented the variables that, according to political scientists, best explain the outcomes of popular initiatives. These variables include campaign spending,

especially when deployed against a measure; voters' appraisal of a measure's merits; the positions taken by elites, in particular interest groups and the media; and the framing of a measure by its supporters and detractors. On the other hand, political scientists tend to downplay the importance of political parties, arguing that parties rarely take positions on initiatives and that voters in initiative elections are deprived of the partisan cues that assist their decision-making in candidate elections.<sup>286</sup> How accurate is the academic conventional wisdom on initiative outcomes (at least in the redistricting context)?

Not very. First, several of the factors identified as significant by political scientists are unhelpful in explaining why redistricting initiatives succeed or fail. For instance, initiative supporters outspent opponents in at least four campaigns but prevailed in only one of those cases.<sup>287</sup> (Though, as scholars would expect, every time that a redistricting measure's opponents were better-funded, the measure was defeated.) Initiatives' merits also could not have played too large a causal role since all twelve of the measures were relatively similar—seeking to combat gerrymandering by creating redistricting commissions that would draw district lines on the basis of specified criteria—but their fates at the polls diverged widely. As noted above, the Oklahoma (1960) and Oklahoma (1962) initiatives were almost identical, but the former passed while the latter was defeated; and the successful initiatives in Colorado (1974) and Arizona (2000) closely resembled the four failed California initiatives. Interest group and media positions seem

---

<sup>286</sup> See *supra* note 50. The scholarly consensus on political parties is not absolute, though. Regina Branton, for example, analyzed initiative outcomes across a range of states and issues, and found that there is a “more general relationship between partisanship and voting behavior in ballot elections than previously hypothesized,” and that “although [initiative] elections lack traditional partisan labels, voters rely on cues to formulate a decision on ballot initiatives.” Regina P. Branton, *Examining Individual-Level Voting Behavior on State Ballot Propositions*, 56 POL. RESEARCH Q. 367, 368, 372 (2003); see also Hasen, *supra* note 50, at 734 (“[P]arties no longer are passive observers of the initiative process. . . . Though it would be premature to consider parties as ‘major players’ in the process, the data show that parties are highly adaptable organizations, making selective use of initiative campaigns as part of their set of political tools.”).

<sup>287</sup> See *infra* Appendix B. In the one campaign where a redistricting initiative's supporters clearly outspent its opponents, Oklahoma (1962), the extra funding was almost certainly not decisive. As discussed above, see *supra* Part II.B.3, the Supreme Court's one-person, one-vote decision earlier that year was the most important reason why that measure passed.

relatively unimportant as well, since initiatives usually fail even when strongly backed by major groups and newspapers. Arizona (2000) is the only case where media support for a measure was an important reason for success at the polls, and it must be weighed against Oklahoma (1960), Ohio (1981), California (1982), and California (2005), all cases where initiatives were defeated despite strong interest group and newspaper backing.

Not only are the variables identified by political scientists unable to explain the outcomes of redistricting initiative elections, but the most important causal factor—the position of the legislative majority party, and the intensity with which it is held—is one that the academic literature typically neglects. This Article’s analysis of the twelve redistricting initiatives shows that the measures universally failed when they were strongly opposed by the majority party in the state, and universally succeeded when the majority party was split or only weakly opposed. This finding would come as a complete surprise to observers such as Cronin, Magleby, Gerber, and Lupia, all of whom argue that the absence of obvious partisan cues in initiative elections deprives parties of their usual electoral clout.<sup>288</sup> These scholars (along with most of the political science establishment) believe that parties do not matter in initiative elections, but not only do parties matter in the redistricting context, they matter more than any other variable.

There are three reasons why the academic conventional wisdom is so wrong about redistricting initiatives. First, and most importantly, redistricting initiatives are fundamentally different from other exercises in direct democracy because they are designed to upset the political balance of power. Political scientists may be right that parties do not get too exercised over fiscal or environmental or legal initiatives, but it stands to reason that they will be far more involved in campaigns over measures that could sharply enhance or undercut their political prospects. Other interest groups also have less at stake in redistricting initiative elections,

---

<sup>288</sup> See *supra* note 50.

meaning that it is easier for parties to assume the lead role in the debate. Second, political scientists are inclined to minimize the relevance of political parties across *all* initiative contexts. If this perspective is flawed and parties are generally more influential than was previously thought to be the case, as some recent evidence suggests,<sup>289</sup> the error will be especially severe in the arena where parties have the most to gain and lose. Third, no political scientist has ever conducted a detailed analysis of all the redistricting initiatives that have taken place over the course of American history. (Nor, to be fair, has anybody else.) But without such an analysis it is impossible to assess accurately the importance of political parties in redistricting initiative elections—especially since party positions and the manner in which they influence campaigns are not very susceptible to quantification and statistical study. This Article’s methodology, and the unexpected results it produced, thus suggest a need for more case study-style investigations of popular initiatives (and other political science phenomena as well). Case studies tend to be more laborious to generate than multiple regressions, but they can also reveal insights that are otherwise lost in the statistical fog.

## CONCLUSION

This Article has sought to answer two questions about redistricting initiatives, which after *Vieth* and *LULAC* represent the only realistic way to curb political gerrymandering. First, are redistricting initiatives (and the redistricting commissions they invariably seek to create) a good idea? Second, and more importantly, why do redistricting initiatives generally fail, and what can reformers do to improve such measures’ odds of success in the future? Part I made the case for

---

<sup>289</sup> See *supra* note 286.

redistricting initiatives and redistricting commissions. Redistricting initiatives unblock stoppages in the democratic process, thereby allowing the public to enact electoral reform over the opposition of self-interested legislators. And redistricting commissions are in theory better suited to district-drawing than state legislatures, and empirically have produced more competitive elections and more representative results.

Part II, the heart of the Article, first discussed a series of variables that might be expected to influence initiative outcomes. The section then examined in detail the twelve redistricting initiatives that have taken place over the course of American history. For each initiative campaign, the measure's supporters and opponents (as well as their principal arguments) were described, and tentative explanations for the measure's eventual success or failure were proposed. Part III, finally, considered the twelve redistricting initiatives holistically in search of broader explanations for their outcomes and lessons applicable to future campaigns. The section's main finding was that, contrary to the academic conventional wisdom, redistricting initiatives always fail when they are strongly opposed by the majority party in the state legislature. If reformers are to have any hope of success, they need to find some way—e.g. capitalizing on favorable national developments, winning the enthusiastic support of a state's media establishment, sowing dissension between the majority party's executive branch officials and its legislators—to defuse majority party opposition.

This finding is especially ironic because it undermines one of the central premises of direct democracy: that it enables the people to bypass the legislature and enact desired policies despite the politicians' resistance. If redistricting initiatives fail when they are strongly opposed by most legislators, and succeed when they are not, then they seem to be no different from conventional legislation. There are, however, two characteristics of redistricting initiatives that

distinguish them from regular bills and make them (slightly) more likely to become law. First, they may be (and usually are) placed on the ballot by groups other than state legislators. This means that redistricting reform may become a major political issue even when there is nothing that elected officials would rather talk about less.

Second, redistricting campaigns have a way of unfolding unpredictably. Polls gyrate up and down, media barrages shift public opinion back and forth, party fissures are revealed and then healed, national developments intercede, etc. The outcome in the end may usually be defeat for the pro-initiative side, but there is at least more volatility, and hence more hope, in initiative campaigns than in state legislative chambers. Proponents of redistricting reform, then, should not yet conclude that the direct democracy game is not worth the candle. The odds of success for redistricting initiatives are low—but they are not zero, and they are higher than the probability of meaningful legislative or judicial action.

**APPENDIX A: FEATURES OF THE TWELVE REDISTRICTING INITIATIVES**

<b>State</b>	<b>Year</b>	<b>Outcome</b>	<b>Level</b>	<b>Redistricting Criteria</b>	<b>Commission Composition</b>
Arkansas	1936	Yes	State	Commission draws districts with equal population that are contiguous and do not divide counties.	Three members: governor, secretary of state, and attorney general.
Oklahoma	1960	No	State	Commission enforces standards already in Oklahoma constitution; each county guaranteed one House member; ceiling on House members per county eliminated.	Three members: attorney general, treasurer, and secretary of state.
Oklahoma	1962	Yes	State	Commission enforces standards already in Oklahoma constitution; constitutional formula is unchanged.	Three members: attorney general, treasurer, and secretary of state.
North Dakota	1973	No	State	Commission draws single-member districts with equal population.	Nine members: two each picked by Senate majority and minority leaders, and House majority and minority leaders; the eight then pick the ninth, who is the chairman.
Colorado	1974	Yes	State	Commission draws districts while considering equal population, compactness, contiguity, and preservation of political boundaries and communities of interest.	Eleven members: four picked by legislature, three by governor, and four by judiciary.
Ohio	1981	No	State and federal	Commission chooses among submitted plans, on basis of district compactness.	Five members: two Democrats, two Republicans, and a fifth member chosen by the first four.
California	1982	No	State and federal	Commission draws districts while considering equal population, compactness, and respect for political boundaries.	Ten members: four selected by appellate judges, four selected by Senate and Assembly party caucuses, four selected by party chairmen.
California	1984	No	State and federal	Commission draws districts while considering competitiveness, compactness, respect for political boundaries, and equal population.	Eight members: all retired judges selected by lottery, four from each major party.
California	1990	No	State and federal	Commission chooses among submitted plans, on basis of equal population, minority group power, respect for county boundaries, compactness, contiguity, respect for political boundaries, and competitiveness.	Twelve members: ten from major parties and two independents, picked by judges.
Arizona	2000	Yes	State and federal	Commission draws districts while considering equal population, compactness, contiguity, preservation of political boundaries and communities of interest, and competitiveness.	Five members: appellate court picks twenty-five candidates; state legislature leaders pick four commissioners; those four pick chair.
California	2005	No	State and federal	Commission draws districts while considering equal population and minimization of county and city splitting, and ignoring party affiliations of voters.	Three members: retired judges chosen by legislature leaders through complicated formula.
Ohio	2005	No	State and federal	Commission chooses among submitted plans, on basis of competitiveness.	Five members. two chosen by sitting judges; those two then pick remainder.

**APPENDIX B: FACTORS IN REDISTRICTING INITIATIVES' SUCCESS OR FAILURE**

State	Year	Outcome	Vote	Side spending more	Governor position	Strength of governor's position	Legislature majority party position	Strength of legislature majority party position	Legislature minority party position	Strength of legislature minority party position
Arkansas	1936	Yes	66-34	Unclear	Unclear	Weak	Unclear	Weak	Unclear	Weak
Oklahoma	1960	No	35-65	Unclear	For	Strong	Against	Strong	For	Weak
Oklahoma	1962	Yes	55-45	For	For	Weak	Against	Weak	For	Weak
North Dakota	1973	No	45-55	For	For	Weak	Against	Strong	For	Strong
Colorado	1974	Yes	60-40	Unclear	Unclear	Weak	Against	Weak	For	Weak
Ohio	1981	No	42-58	For	For	Weak	Against*	Strong	For*	Weak
California	1982	No	45-55	For	Against	Strong	Against	Strong	For	Strong
California	1984	No	45-55	Against	For	Strong	Against	Strong	For	Strong
California	1990	No	36-64	Against	For	Weak	Against	Strong	Split	Weak
Arizona	2000	Yes	56-44	Unclear	Unclear	Weak	Split	Weak	For	Strong
California	2005	No	40-60	Against	For	Strong	Against	Strong	Split	Weak
Ohio	2005	No	30-70	Against	Against	Weak	Against	Strong	For	Weak

State	Year	Outcome	Vote	Editorial position of most newspapers	Interest group positions	Recent egregious gerrymander	Major relevant national developments	More effective framing
Arkansas	1936	Yes	66-34	For	Unclear	Yes	No	For
Oklahoma	1960	No	35-65	For	Split	Yes	No	Against
Oklahoma	1962	Yes	55-45	For	Split	Yes	Yes	Unclear
North Dakota	1973	No	45-55	Against	Split	Yes	No	Against
Colorado	1974	Yes	60-40	Split	For	Yes	Yes	Unclear
Ohio	1981	No	42-58	Split	For	No	No	Against
California	1982	No	45-55	Against	For	Yes	No	Against
California	1984	No	45-55	Against	Split	Yes	No	Against
California	1990	No	36-64	Split	Split	Yes	No	Against
Arizona	2000	Yes	56-44	For	For	Yes	No	For
California	2005	No	40-60	For	Split	Yes	No	Unclear
Ohio	2005	No	30-70	Against	Split	Yes	No	Against

\* Control over the Ohio state legislature was split in 1981, with Democratic control of the House and Republican control of the Senate.