

The Red and Blue Golden State: Why California's Proposition 11 Will Not Produce More Competitive Elections

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INTRODUCTION

In November 2008, Californians approved a redistricting reform measure, Proposition 11, which, despite the promises of its supporters, will have little effect on the competitiveness of the state's elections.¹ The initiative shifted responsibility for the redrawing of state legislative lines from the Legislature to an appointed commission.² Supporters promised that by taking the process from self-interested legislators, the resulting districts would be more competitive. However, an analysis of the state's demographics and the experience of other states suggests that a significant increase in the competitiveness of California's legislative districts remains unlikely and may even be undesirable. Indeed, because of the give-and-take nature of the redistricting process, California would be served best by keeping the initial responsibility for redrawing legislative lines with the Legislature. A redistricting commission would be most helpful if it focused on reviewing and revising plans developed by the Legislature, rather than actually drawing the initial plan itself.

This article first reviews the legal standards applicable to redistricting in California. It then discusses the most recent redistrictings and the five failed attempts that have been made to alter the redistricting process through ballot initiatives. Section II addresses Proposition 11, the campaign, and the 2008 general election. Section III explores the benefits and detriments resulting from more competitive district elections, the much-touted benefit of Proposition 11. Section IV analyzes the decline

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¹ The full text of Proposition 11, as it appeared on the 2008 ballot, is available at <http://www.voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop11> (last visited Nov. 2, 2010).

² See *infra* Part II.

in competitive elections in California and the non-redistricting causes of this decline. Section V looks to the experiences of other states that have employed commissions and imposed competitiveness standards on the drawing of their legislative districts. Finally, the last two sections discuss the likelihood that Proposition 11's redistricting commission will be able to draw more competitive districts and present an alternative approach that would provide redistricting roles for both an independent commission and the Legislature.

I. REDISTRICTING, "CALIFORNIA" STYLE

Proposition 11 is the first successful salvo in the ongoing redistricting battle in California.³ To best appreciate the measure's significance, a review of the state's redistricting history is helpful. But, first, this article will look at the legal constraints impacting redistricting prior to the passage of the measure. Then, it will review the decline in competitiveness in California's district elections which has prompted most of the concern over redistricting reform. Moreover, the article will examine the battles over the state's past redistrictings, both in the courts and on the ballot.

A. Legal Constraints on Redistricting in California

Redistricting is the process of revising the geographic boundaries of congressional or state legislative districts to account for population shifts between decennial censuses.⁴ The U.S. Constitution requires the federal government to conduct a census every ten years for the purpose of apportioning congressional seats among the states.⁵ The states typically

³ Two years later, California voters approved Proposition 20, which extends the reach of Proposition 11 to encompass the redrawing of congressional districts. See *Proposition 20: Voter Information Guide*, CALIFORNIA SECRETARY OF STATE, <http://www.voterguide.sos.ca.gov/propositions/20/> (last visited Dec. 28, 2010). In the November 2010 election, California's voters also rejected Proposition 27, which would have repealed Proposition 11. See *Proposition 27: Voter Information Guide*, CALIFORNIA SECRETARY OF STATE, <http://www.voterguide.sos.ca.gov/propositions/27/> (last visited Dec. 28, 2010).

⁴ *What You Should Know About the Apportionment Counts*, U.S. CENSUS BUREAU (2000), <http://www.census.gov/dmd/www/pdf/pio00-ac.pdf>. Redistricting is distinct from apportionment, which is the process of determining the number of seats to which each state is entitled in the U.S. House of Representatives. *Id.*

⁵ U.S. CONST. art. I, § 2, cl. 3. Article I provides that the first census shall occur within three years of the first meeting of congress; it further requires that the federal government conduct future censuses within ten-year terms thereafter. *Id.* Now, "Census Day" is the first day of April in years ending in zero. *Key Dates—2010 Census*, 2010 CENSUS, <http://2010.census.gov/2010census/how/key-dates.php> (last visited Oct. 22, 2010). Within one week of the commencement of the Congress following the census, the President must transmit to Congress a statement of the persons counted in each state and its allocation of Representatives. 2 U.S.C. § 2a(a) (2006).

redistrict their own state legislatures in conjunction with this process. The California State Constitution, for instance, requires that the state redistrict its election lines once every decade in the year following the national census.⁶ Historically, the California Assembly has shouldered responsibility for redrawing state legislative and congressional district lines.⁷

Certain federal and state standards apply to the drawing of election districts. First, the Supreme Court has determined that congressional districts must have approximately equal population. In *Reynolds v. Sims*,⁸ the Court held that political equality under the Constitution “can mean only one thing—one person, one vote.”⁹ This means that district populations should be as nearly equal as possible.¹⁰ Courts have applied this standard rigorously in congressional redistrictings.¹¹ In the context of state legislative plans, the Supreme Court has allowed state legislatures greater latitude.¹² Indeed, the Court has indicated that deviations of at least sixteen percent are acceptable.¹³

The other federal law that controls redistricting is the Voting Rights Act of 1965 (Act), as amended and codified in Title 42 of the United States Code.¹⁴ Depending upon the state involved, two provisions of the Act may have implications for redistricting. Section 2 of the Act applies to all states.¹⁵ Where certain preconditions exist,¹⁶ section 2 prohibits dilution of minority

⁶ CAL. CONST. art. XXI, §§ 1–2.

⁷ § 1 (amended 1980).

⁸ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁹ *Id.* at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1962)).

¹⁰ To calculate the ideal district population, divide the state’s total population by the number of districts in the legislative body. THOMAS L. BRUNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA 54 (2008). The variance of a given district is the total population of a district divided by the ideal district size. The overall or total deviation of a plan is the population difference between the largest and smallest districts divided by the ideal district population. *Chapter 3—Equal Protection*, MINN. SENATE, <http://www.senate.leg.state.mn.us/departments/scr/redist/Red2000/Ch2Equal.htm> (last visited Oct. 22, 2010).

¹¹ See *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969) (“[T]he ‘as nearly as practicable’ standard requires that the State make a good-faith effort to achieve precise mathematical equality.”).

¹² See *Mahan v. Howell*, 410 U.S. 315, 326 (1973).

¹³ *Voinovich v. Quilter*, 507 U.S. 146, 161–62 (1993) (stating that *Mahan* upheld a sixteen percent deviation because it was justified by a rational objective).

¹⁴ 42 U.S.C. §§ 1971–1974 (2006).

¹⁵ 42 U.S.C. § 1973 (2006).

¹⁶ The Supreme Court has identified three preconditions that must be present to establish a violation of section 2. First, the minority group must be sufficiently large and geographically compact so as to constitute a majority in a district. Second, it must be politically cohesive. Third, the white majority must vote sufficiently as a bloc to enable it to defeat the minority’s preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

voting strength.¹⁷ Line drawers typically use one or more of the following techniques to dilute minority voting strength through redistricting: “packing,” “cracking,” or “stacking.” “Packing” involves concentrating as many minorities as possible into as few districts as possible, thereby creating larger minority populations than necessary to elect their candidates of choice and minimizing the impact of minority votes.¹⁸ “Cracking” consists of splitting concentrations of a minority population and dispersing them among other districts to increase the number of districts containing white-voting majorities.¹⁹ Finally, “stacking” refers to combining concentrations of a minority population with larger concentrations of a white population to ensure that the districts contain white voting majorities.²⁰

Section 5 of the Voting Rights Act requires that changes involving voting (such as the passage of a redistricting plan) must be approved (“precleared”) by either the U.S. Attorney General or the U.S. District Court for the District of Columbia.²¹ Section 5 prohibits “retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”²² Section 5 extends only to nine states in their entirety, and to portions of seven others.²³ Four counties in California fall under section 5.²⁴ Section 5 applies when a covered jurisdiction adopts a redistricting plan.²⁵ Because four counties in California are covered, the effects of any statewide redistricting plan (congressional or legislative) on those four counties fall within the preclearance requirement of section 5.²⁶

¹⁷ Upon satisfaction of the three *Gingles* preconditions, courts must examine other factors in the totality of circumstances. *Johnson v. De Grandy*, 512 U.S. 997, 1011–12 (1994). Those factors include: a history of official discrimination touching the right to vote; racially polarized voting; the use of election procedures that may enhance the opportunity for discrimination; the use of a candidate slating process; the extent to which members of the minority group bear the effects of nonvoting discrimination which hinder their ability to participate in the political process; the use of racial appeals in political campaigns; the election of minority group members to public office; a lack of responsiveness by elected officials to the needs of the minority group; the tenuousness of policies underlying voting procedures; and proportionality, defined as the relationship between the number of majority-minority voting districts and minority members’ share of the relevant population. *Johnson v. Hamrick*, 196 F.3d 1216, 1220 (11th Cir. 1999).

¹⁸ Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in *MINORITY VOTE DILUTION* 85, 96 (Chandler Davidson ed., 1989).

¹⁹ *Id.* at 89.

²⁰ *Id.* at 92.

²¹ 42 U.S.C. § 1973(c) (2006).

²² *Beer v. United States*, 425 U.S. 130, 141 (1976).

²³ 28 C.F.R. § 51 app. (2009).

²⁴ The counties are Kings, Merced, Monterey, and Yuba. *Id.*

²⁵ 28 CFR § 51.13(e) (2009); *Beer*, 425 U.S. at 133.

²⁶ *Wilson v. Eu*, 823 P.2d 545, 550 (Cal. 1992).

California law also imposes certain requirements upon the redistricting process. The California Constitution sets forth several basic constraints. It reiterates the federal requirement that the districts shall have reasonably equal population²⁷ and also requires that they be contiguous.²⁸ In addition, the California Constitution provides that the geographical integrity of cities and counties be respected to the extent possible, without violating other requirements.²⁹

In addition, California recently passed its own state voting rights act.³⁰ While the California act is similar to the federal statute, the state law explicitly removes geographic concentration of the minority group as a requirement for finding a violation.³¹ Of course, some level of geographic compactness is necessary to establish an interest in redistricting. For these reasons, California's voting rights act does not appear to create any new constraints on its redistricting process.

B. Recent Trends in California District Elections

Despite the tradition in California (and elsewhere) of legislative control of the redistricting process, the placement of this responsibility in the hands of the Legislature has long been a target of criticism.³² In general, critics have charged that legislators are inherently self-interested in the outcome of redistricting.³³ Legislators have a number of incentives to exploit the process for political gain, including protection of individual incumbents, expanding partisan statewide majorities, and punishing those with differences from the line drawers, regardless of their party affiliation.³⁴ Critics complain that "politicians get to choose their voters, rather than the

²⁷ CAL. CONST. art. XXI, § 1(b).

²⁸ CAL. CONST. art. XXI, § 2(d)(3).

²⁹ CAL. CONST. art. XXI, § 2(d)(4).

³⁰ CAL. ELEC. CODE §§ 14025–32 (West 2009).

³¹ CAL. ELEC. CODE § 14028(c) (West 2009).

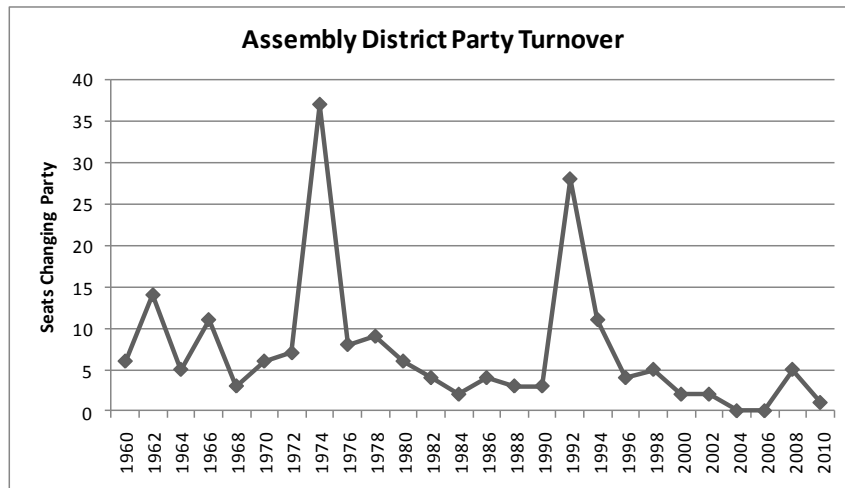
³² See Nicholas Stephanopoulos, *A Fighting Chance for Redistricting*, L.A. TIMES, Sep. 27, 2008, at A21 [hereinafter Stephanopoulos, *A Fighting Chance for Redistricting*], available at <http://articles.latimes.com/2008/sep/27/opinion/oe-stephanopoulos27>.

³³ *Id.*

³⁴ George Passantino, *Redistricting in California: Competitive Elections and the Effects of Proposition 11*, REASON FOUNDATION 13 (Oct. 2008), <http://reason.org/files/79d00eb443669b026c8c37c483f0bdb0.pdf>. While these are recognized incentives for political gain through redistricting, they do not all lead to the same ultimate configuration. For instance, the incentive of protecting individual incumbents encourages increasing a party's concentration in a particular district. Expanding a party's statewide share of districts, however, often requires drawing slimmer margins in each individual district, as the plan spreads that party's voters around to more districts. David Lublin & Michael P. McDonald, *Is It Time to Draw the Line? The Impact of Redistricting on Competition in State House Elections*, 5 ELECTION L.J. 144, 145 (2006).

reverse . . .”³⁵ Or, as North Carolina State Senator Mark McDaniel rather candidly admitted about the redistricting process, “We are in the business of rigging elections.”³⁶

While these arguments have tremendous emotional appeal, of greater interest is whether proof of such practices can be found in California. Critics of legislative redistricting identify several indicia of these practices. First, one trend pointed out by proponents of Proposition 11 during the 2008 campaign was the decline in changes of party control of California’s Assembly districts.³⁷ Figure 1 tracks the number of seats in the Assembly that have changed parties between 1960 and 2010:

FIGURE 1³⁸

³⁵ Editorial, *Redistricting Defeats*, WASH. POST, Nov. 14, 2005, at A20.

³⁶ John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1.

³⁷ See Passantino, *supra* note 34, at 13.

³⁸ See *Elected Offices*, JOINCALIFORNIA, <http://www.joincalifornia.com/page/9> (last visited Jan. 4, 2011). Although data was available only through 2006 when Proposition 11 appeared on the ballot, this Article will include data through the November 2010 general election.

The first striking fact about this chart is the two spikes in the trendline. These spikes represent a high exchange of seats between the parties in 1974 and 1992. Both of these occurred in the first elections after the implementation of new redistricting plans.³⁹ Of course, these are not the only elections held after the passage of new plans. California conducted elections pursuant to new plans in 1962, 1982, and 2002. Why were 1974 and 1992 the only years to have such extraordinarily high changes of seats between the major parties? Possibly because the authors of those plans were judges and not the Legislature.⁴⁰

The other trend that Figure 1 highlights is the overall decline of party turnover during the period analyzed. In the 1960s, the yearly exchange of seats averaged eight per election. By the 2000s, the average turnover was down to less than two per election. As was frequently noted during the Proposition 11 campaign,⁴¹ in the two elections prior to the 2008 election, no Assembly seats changed party hands.⁴²

Another possible indicator of legislative misuse of the redistricting process is the decline in competitive elections. Scholars have noted the decline of marginal districts over the past thirty years.⁴³ California's elections have followed this pattern; the number of competitive assembly seats has steadily decreased. For instance, Passantino tracked the number of

³⁹ In the 1970s, because of an impasse between the legislature and Governor Reagan over the proposed redistricting plan, the California Supreme Court ordered that the state use a temporary plan for the 1972 elections. The first election conducted under the permanent plan was in 1974. *Legislature v. Reinecke*, 492 P.2d 385, 390–91 (Cal. 1972); *Legislature v. Reinecke*, 516 P.2d 6, 9 (Cal. 1973).

⁴⁰ See *infra* notes 51–53, 64–67 and accompanying text.

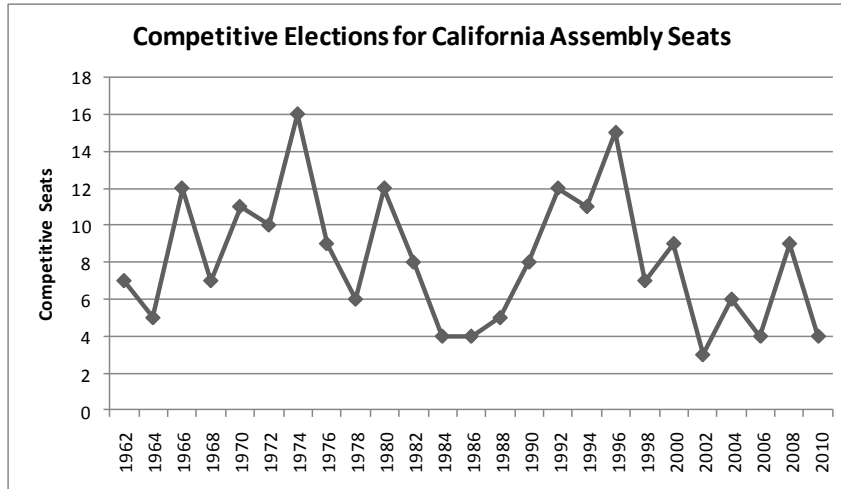
⁴¹ Stephanopoulos, *A Fighting Chance for Redistricting*, *supra* note 32.

⁴² See *supra* Figure 1. Ironically, this trend took a brief respite in the same election in which the voters approved Proposition 11. Five assembly seats changed party hands in November 2008. By 2010, however, the pattern returned, as the parties swapped only one seat. See Figure 1.

⁴³ Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1124–25 (2007) (showing a decline over the past sixty years in congressional elections decided by ten percent and five percent margins between the top two candidates).

assembly seats where the winner won no more than fifty-three percent of the vote.⁴⁴ Figure 2 presents the results:

FIGURE 2⁴⁵



In many respects, Figure 2 presents a picture quite similar to that of Figure 1. In both Figures 1 and 2, the highest peak occurs in 1974, which is immediately subsequent to the adoption of that year's plans. However, the second peak in Figure 1 occurs in 1992, but in Figure 2 it does not arise until 1996. In other words, in the 1990s, the highest number of districts changed party hands in the year immediately after the redistricting, while the number of competitive contests continued to increase. This discrepancy may suggest that factors other than redistricting affect competitiveness. Although Figure 2 also suggests that the number of competitive districts had been in decline since the 1992 redistricting, as with Figure 1, it illustrates a significant, though short-lived, rebound in the 2008 general election.⁴⁶

⁴⁴ Passantino, *supra* note 34 at 11–12.

⁴⁵ See *Elections by Decade*, JOINCALIFORNIA, <http://www.joincalifornia.com/page/10> (last visited Jan. 4, 2011).

⁴⁶ The fact that eight of the nine competitive districts in 2008 had Republican incumbents suggests that the rise in close contests may not reflect a general increase in competitiveness, but rather the national trend supporting Democratic candidates in that election. See generally Gary C. Jacobson, *The 2008 Presidential and Congressional Elections: Anti-Bush Referendum and Prospects for the Democratic Majority*, 124 POL. SCI. Q., no.1 (2009).

This decline in competitive districts during the past two decades coincided, not surprisingly, with the rise in sophisticated tools for the line drawers. Indeed, the most significant change occurred between the 1981 and 1991 redistricting cycles. For instance, the architect of California's 1981 redistricting, Congressman Philip Burton, "used teams of individuals to analyze massive hard-copy reports of voter registration data, election results, census data, and precinct maps using simple calculators and colored markers."⁴⁷ One decade later, the available technology had changed dramatically. The Supreme Court described the capabilities of the software REDAPPL, which the Texas redistricters used in 1991:

REDAPPL permitted redistricters to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed. At each change in configuration of the district lines being drafted, REDAPPL displayed updated racial composition statistics for the district as drawn. REDAPPL contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts (which approximate election precincts). The availability and use of block-by-block racial data was unprecedented; before the 1990 census, data were not broken down beyond the census tract level.⁴⁸

Thus, redistricters who sought to minimize competitiveness suddenly found themselves armed with new, high-tech tools with which to accomplish this objective.

C. California's Redistrictings and Redistricting Ballot Initiatives

In the past forty years, redistricting has been especially contentious in California. Both the process and the resulting plans have been the targets of litigation and of ballot measures. These experiences helped to shape Proposition 11 and its successful campaign.

⁴⁷ Micah Altman, Karin Mac Donald, & Michael McDonald, *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 SOC. SCI. COMPUTER REV. 334, 336 (2005). Because of the difficulty in using this data, Burton often relied upon his own knowledge of the state's demography and voting patterns to assess proposed districts. Nevertheless, Burton was so knowledgeable that he was able to create a district plan that swung five congressional seats to the Democrats. *Id.*

⁴⁸ *Bush v. Vera*, 517 U.S. 952, 961 (1996).

Three of California's past four redistrictings were the subjects of litigation. In 1971, the Democratic-controlled Legislature and Republican Governor Ronald Reagan failed to agree to a redistricting plan.⁴⁹ Accordingly, the California Supreme Court adopted temporary redistricting plans for the 1972 election.⁵⁰ When the Legislature did not enact redistricting plans in 1972, the California Supreme Court appointed special masters to develop the plans,⁵¹ which it eventually adopted.⁵²

In 1981, the Democrat-controlled Legislature passed redistricting plans that Democratic Governor Jerry Brown signed.⁵³ Republicans, outraged over what they thought was blatant partisan gerrymandering, commenced two separate attacks to overturn these plans.⁵⁴ First, they placed three referenda on the June 1982 ballot; each proposition sought to replace one of the redistricting plans (assembly, senate, and congressional).⁵⁵ Republicans hoped that new plans could take effect immediately, but the California Supreme Court ordered the state to use the 1981 plans for the 1982 congressional and legislative elections.⁵⁶ The three plans used for the 1982 elections each lost the referenda vote by an average margin of sixty-three percent to thirty-seven percent.⁵⁷ Moreover, in

49 Passantino, *supra* note 34, at 3.

50 Legislature v. Reinecke, 492 P.2d 385, 390–91 (Cal. 1972).

51 Legislature v. Reinecke, 507 P.2d 626, 627–28 (Cal. 1973).

52 Legislature v. Reinecke, 516 P.2d 6, 9 (Cal. 1973).

53 Assembly v. Deukmejian, 639 P.2d 939, 942 (Cal. 1982).

54 Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J. L. & POL. 331, 360 (2007) [hereinafter Stephanopoulos, *Reforming Redistricting*]. Critics of the plans used colorful language to voice their objections: "One Republican denounced the Burton plan as an 'outrageous, blatant, partisan carving up of the people,' another likened it to the Jewish Holocaust, while a third, adding one more insensitive religious metaphor, compared Speaker Brown to the contemporary Iranian theocrat, the Ayatollah Khomeini." J. Morgan Kousser, *Reapportionment Wars: Party, Race, and Redistricting in California, 1971–1992*, in RACE AND REDISTRICTING IN THE 1990S, at 134, 153 (Bernard Grofman ed., 1998). For his part, Representative Burton, the architect of the plan, described a district that spanned the San Francisco Bay and four counties as "my contribution to modern art." Daniel Borenstein, *The California Experience: Why Most of the Media Ignored Redistricting*, 1 ELECTION L.J. 141, 142 (2002).

55 Kousser, *supra* note 54. Proposition 10 challenged the congressional plan; Proposition 11 sought to replace the state senate redistricting; and Proposition 12 challenged the assembly remap. *California 1982 Ballot Propositions*, BALLOTPEdia, http://ballotpedia.org/wiki/index.php/California_1982_ballot_propositions (last visited Oct. 23, 2010).

56 Assembly v. Deukmejian, 639 P.2d 939, 963.

57 Specifically, Proposition 10 lost 35.4% to 64.6%; Proposition 11 lost 37.8% to 62.2%; and Proposition 12 lost 37.9% to 62.1%. See CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE: JUNE 8, 1982, GENERAL ELECTION (1982). The wording of the propositions provided that a "yes" vote approves, a "no" vote rejects" the redistricting statutes involved. Thus, a majority of "no" votes for a measure overturned the particular redistricting statute in question. *Id.*

November 1982, a Republican was elected to replace Governor Brown.⁵⁸ Accordingly, the lame duck Democratic governor called a special session of the Legislature to commence in December 1982, one month before Governor Brown was to step down, to develop new plans.⁵⁹ The Democrats drew plans that offered sufficient protections to Republicans and garnered the necessary two-thirds vote to receive “urgency” status,⁶⁰ which caused the plans to be sent to Governor Brown before the end of his term.⁶¹ The new plans remained in effect through 1990.⁶² As a second means to overturn the Democrat’s plans, the Republicans placed onto the November 1982 ballot Proposition 14.⁶³

In 1991, Governor Pete Wilson vetoed the redistricting plans approved by the Legislature.⁶⁴ Since the Legislature did not have sufficient votes to override the veto,⁶⁵ the governor initiated mandate proceedings in the California Supreme Court.⁶⁶ The court exercised its original jurisdiction and appointed three special masters, whom they instructed to develop the redistricting plans after conducting public hearings.⁶⁷ The California court accepted and adopted the Special Masters’ recommendations with minor modifications.⁶⁸

Finally, in 2001, the Golden State avoided major litigation over its redistricting plan when Democratic and Republican leaders found common ground: preservation of incumbents.⁶⁹ As

⁵⁸ *Badham v. Eu*, 694 F. Supp. 664, 666 (N.D. Cal. 1988).

⁵⁹ *Id.*

⁶⁰ Pursuant to the California Constitution, “urgency statutes” must be “necessary for immediate preservation of the public peace, health, or safety,” and passed by two thirds of each house. CAL. CONST. art. IV, § 8(d). Moreover, as an urgency statute, the statute redistricting the state legislature was not subject to a referendum. *Legislature v. Deukmejian*, 669 P.2d 17, 22 (Cal. 1983). The statute establishing the state’s new congressional lines would have been subject to a referendum, but no one challenged it. *Id.*

⁶¹ *Kousser*, *supra* note 54, at 156.

⁶² *Passantino*, *supra* note 34, at 6.

⁶³ *See infra* notes 76–84 and accompanying text.

⁶⁴ *Wilson v. Eu*, 816 P.2d 1306, 1306 (Cal. 1991).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1307.

⁶⁸ *Wilson v. Eu*, 823 P.2d 545, 559 (Cal. 1992).

⁶⁹ Later, the state’s Republicans revealed that they reached this accommodation after playing a “bluff” in 2001. Because of the strong Democratic majorities in the legislature (twenty-six to fourteen in the Senate and fifty to thirty in the Assembly) and a Democrat, Gray Davis, occupying the governor’s mansion, Democrats could pass redistricting legislation without a single Republican vote. Republicans threatened to submit the redistricting to a statewide referendum. Actually, however, the state party had “absolutely no money for a referendum,” admitted then-Assembly Republican Jim Brulte. Jim Sanders, *Precursor to Prop. 77 ‘Orchestrated Well’: Both Parties Got What They Wanted in 2001, at Least in the Short Term*, SACRAMENTO BEE, Oct. 19, 2005, at A3. Despite their ability to pass redistricting legislation and the likelihood that a referendum would not overturn the redistricting plans, Democrats accepted the deal. Considerations for the Democrats included the ability to shore up several congressional seats won in

the *Los Angeles Times* characterized the plan: “Most legislative districts are so safe that the real battles are in the primary elections.”⁷⁰ The Legislature drew both congressional and legislative lines “in a transparent effort to create ‘safe seats’ for virtually all state and federal legislators”⁷¹ Accordingly, the Democratic-controlled Legislature passed redistricting plans—with no significant Republican opposition—that Democratic Governor Gray Davis signed.⁷² Critics have described those plans as “bipartisan gerrymanders”⁷³ and “incumbent protection gerrymanders.”⁷⁴

2000, certainty over future district lines, and the concern that the Bush Administration might use the Voting Rights Act to challenge the plan. *Id.*

⁷⁰ Editorial, *Serving the Pols, Not the People*, L.A. TIMES, Nov. 10, 2004, at B10. An analysis of the plans demonstrates the successfulness of their agreement. The following table presents the number of assembly and state senate districts before and after the redistricting that had registered voter differentials between Republicans and Democrats of five percentage points or less:

TABLE 1
DISTRICTS WITH 5% REGISTRATION DIFFERENCES
BETWEEN REPUBLICANS AND DEMOCRATS
1992 AND 2002 REDISTRICTING PLANS

| | Pre-Redistricting | Post-Redistricting |
|--------------|-------------------|--------------------|
| Assembly | 14 | 3 |
| State Senate | 7 | 1 |

Sanders, *supra* note 69. Table 1 shows the significant drop in the number of competitive districts in both the Assembly and Senate after the redistricting.

⁷¹ Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2515 (2003).

⁷² Carl Ingram, *Davis OKs Redistricting that Keeps Status Quo*, L.A. TIMES, Sep. 28, 2001, at B12.

⁷³ Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL’Y 443, 464 (2005).

⁷⁴ Lublin & McDonald, *supra* note 34, at 146. Ironically, the ultimate consequence of the Democrats agreeing to the “bipartisan gerrymander” is that it prevented the heavily-Democratic state from sharing in the Democratic electoral wave in 2006 and 2008. See Dan Morain, *Donors Give Millions, Hide Their Motives*, SACRAMENTO BEE, Apr. 18, 2010, at E1.

Just as California's redistricting plans have been hotly contested, so has its redistricting process; redistricting has been the subject of five California propositions since the 1980s.⁷⁵ The first four failed by significant margins. The fifth finally succeeded, but by less than two percentage points.

Proposition 14 appeared on the November 1982 ballot.⁷⁶ It sought to create a redistricting commission whose members would be selected by judges, the major parties, and by any other party representing at least ten percent of the Legislature.⁷⁷ California Republicans were the primary financial supporters of the proposition, and several interest groups also backed it.⁷⁸ The Democratic Party and its leaders, especially Governor Jerry Brown and Assembly Speaker Willie Brown, were its primary opponents.⁷⁹ The proposition lost by a vote of 44.5% to 54.5%.⁸⁰

After the defeat of Proposition 14 and the subsequent blocking of the Sebastiani Plan, the Republicans, under the stewardship of Governor Deukmejian, developed a new proposal which became Proposition 39 on the November 1984 ballot.⁸¹ This measure proposed to establish a redistricting commission with eight of its ten members consisting of retired state court judges.⁸² Both parties spent approximately \$4 million on the

⁷⁵ The California Supreme Court blocked two additional proposals from being submitted to the voters. Assemblyman Don Sebastiani (heir to the wine fortune) and several Republican campaign consultants (still angry from the loss of potential fees that would have resulted from another round of competitive elections under new redistricting plans) prepared another referendum for a December 1983 special election. The proposed statutes would redraw the congressional and state legislative districts. Kousser, *supra* note 54, at 156. Collectively, they were dubbed the "Sebastiani Plan." Alan Heslop, REDISTRICTING REFORM IN CALIFORNIA 2 (2004), http://www.claremontmckenna.edu/rose/publications/pdf/conf_redistricting_paper.pdf. The state legislature and several Democratic officeholders petitioned the California Supreme Court to prevent the holding of the special election. *Legislature v. Deukmejian*, 669 P.2d 17, 18 (1982). The court ruled that the state could only be redistricted once per decade. *Id.* at 22. The court also said that the holding of the special election was prevented. *Id.* at 31. Two decades later, Proposition 24, a proposal intended for the March 2000 ballot, would have transferred responsibility for drafting redistricting plans from the state legislature to the California Supreme Court, which would then appoint a panel of special masters to conduct hearings and prepare the actual plans. *Senate v. Jones*, 988 P.2d 1089, 1092–93 (Cal. 1999). Because the measure violated a requirement that propositions must involve only a single subject (it also included provisions relating to the compensation of state legislators and other officers), the state's highest court blocked the proposal from appearing on the ballot. *Id.* at 1105.

⁷⁶ See *supra* note 63 and accompanying text.

⁷⁷ Heslop, *supra* note 75, at 1.

⁷⁸ Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 361.

⁷⁹ *Id.* at 361–62.

⁸⁰ Passantino, *supra* note 34, at 6.

⁸¹ Kousser, *supra* note 54, at 157–58.

⁸² Heslop, *supra* note 75, at 2.

campaign.⁸³ Nevertheless, Proposition 39 lost by a similar margin to that of Proposition 14, 44.8% in favor versus 55.2% against.⁸⁴

Having failed in the court of public opinion, the Republicans shifted their efforts to actual courts. However, they had no greater success.⁸⁵ Thus, in anticipation of the post-1990 Census redistricting, Republicans placed two propositions onto the June 1990 ballot.⁸⁶ The first, Proposition 118, would have retained initial authority over redistricting in the Legislature, but for such plans to become law it would have required that the redistricting plans receive two-thirds of the votes in each chamber, the signature of the governor, and approval by the voters in a referendum.⁸⁷ Proposition 119, submitted by a second group of Republicans, would have replaced the Legislature with a bipartisan commission whose members were nominated by non-profit, non-partisan organizations and selected by a panel of retired judges.⁸⁸ Supporters again contributed millions to the campaigns.⁸⁹ Proposition 118 failed by approximately 33% to 67%, while Proposition 119 lost by a vote of approximately 36% to 64%.⁹⁰

Finally, in 2005, after becoming frustrated by working with the Democratic-controlled state Legislature, Republican Governor Arnold Schwarzenegger made redistricting reform one of his primary goals.⁹¹ He ordered a special election in 2005.⁹² Included on the ballot was Proposition 77, which would have created a three-member commission to conduct the redistricting.⁹³ Proposition 77, along with the eight other

⁸³ Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 363–64.

⁸⁴ Heslop, *supra* note 75, at 3.

⁸⁵ See *Badham v. Eu*, 694 F. Supp. 664, 666 (N.D. Cal. 1988). In *Badham*, Republican Congressional representatives and voters challenged the redistricting bill signed by Governor Brown in 1983 as an “intentional, invidious and effective gerrymander” in violation of the Fourteenth Amendment. *Id.* at 667. The three judge panel granted defendants’ motion to dismiss, holding that plaintiffs could not amend their complaint to state a claim under *Davis v. Bandemer*. *Id.* at 673 (referring to *Davis v. Bandemer*, 478 U.S. 109 (1986)).

⁸⁶ Kousser, *supra* note 54, at 165.

⁸⁷ Heslop, *supra* note 75, at 3.

⁸⁸ Kousser, *supra* note 54, at 166; Heslop, *supra* note 75, at 4. If both propositions passed, the measure that received the largest majority would prevail. Kousser, *supra* note 54, at 166.

⁸⁹ One estimate calculated that the campaigns for and against the measure received a combined total of \$6 million. Kousser, *supra* note 54, at 166.

⁹⁰ Heslop, *supra* note 75, at 5.

⁹¹ Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 372.

⁹² Proclamation, *Governor Schwarzenegger Proclaims Special Election for November 8, 2005*, OFF. OF THE GOVERNOR (June 13, 2005), <http://gov.ca.gov/proclamation/2064/>.

⁹³ Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 372. Proposition 77 was just one part of a reform agenda for which the governor sought approval from the

propositions on the ballot, lost; Proposition 77 failing by a vote of 40.5% in favor to 59.5% against.⁹⁴

Thus, the five propositions after *Baker v. Carr* that were submitted to California voters lost. Table 2 summarizes these results:

TABLE 2
REDISTRICTING PROPOSITIONS
1982–2005

| Year | Measure | For | Against | Difference |
|------|-----------------|------|---------|------------|
| 1982 | Proposition 14 | 44.5 | 54.5 | -10.0 |
| 1984 | Proposition 39 | 44.8 | 55.2 | -10.4 |
| 1990 | Proposition 118 | 33.0 | 67.0 | -34.0 |
| 1990 | Proposition 119 | 36.2 | 63.8 | -27.6 |
| 2005 | Proposition 77 | 40.5 | 59.5 | -19.0 |

Support for these propositions never reached 45%. Consequently, each proposition lost by a double-digit margin, with an average differential of 20.2%.

With this as the background leading up to the 2008 election, Proposition 11 qualified for the November 2008 ballot.

II. PROPOSITION 11: IF AT FIRST YOU DON'T SUCCEED . . .

In many ways, the passage of Proposition 11 in 2008 was aberrational. Most things about the contest were unusual, including its inception, fundraising, and support. Nevertheless, despite the benefit of all of these factors, it still nearly did not pass.⁹⁵

voters. He also included on the ballot propositions that would delay teachers from gaining tenure (Proposition 74), require employee consent to use union dues for political contributions (Proposition 75), and limit increases in state spending (Proposition 76). Jordan Rau, *Governor Puts Agenda on Ballot*, L.A. TIMES, June 14, 2005, at A1; *California Special Election, 2005*, WIKIPEDIA, http://en.wikipedia.org/wiki/California_special_election_2005 (last visited Oct. 5, 2010).

⁹⁴ Peter Nicholas & Jordan Rau, *Results Unsettle Gov.'s Supporters*, L.A. TIMES, Nov. 10, 2005, at A1. All of Governor Schwarzenegger's measures lost despite his raising and spending \$56 million on them. The total spent for all of the propositions in that election reached \$300 million. Richard L. Hasen, *Assessing California's Hybrid Democracy*, 97 CAL. L. REV. 1501, 1502 (2009).

⁹⁵ CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008) [hereinafter STATEMENT OF VOTE 2008], available at http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

During the post mortem of the 2005 special election, one critique found that Governor Schwarzenegger “took on too much. He took on everybody in sight.”⁹⁶ Accordingly, in 2008 he narrowed his focus to one target: redistricting.

Perhaps more importantly, as in any good sequel, several new actors joined Schwarzenegger. One factor that set Proposition 11 apart from its predecessors was the breadth of its conception and subsequent support. The proposal arose not from one of the political parties or the governor, but from the efforts of “good government” non-profit organizations—the drafters of the measure included the California branches of AARP, Common Cause, and the League of Women Voters.⁹⁷ The authors of the ballot arguments were the presidents of the California Taxpayers Association and the California offices of the League of Women Voters and AARP.⁹⁸ In addition to these organizations, proponents of the measure included the Los Angeles Chamber of Commerce, the California Chamber of Commerce, the California NAACP, the California Police Chiefs Association, and the ACLU of Southern California.⁹⁹ The proposition also received endorsements from a broad range of editorial boards.¹⁰⁰

Politically, the supporters of Proposition 11 were similarly diverse. Despite its non-profit roots, the measure became identified with Republican Governor Schwarzenegger.¹⁰¹ This occurred for good reason since he was an active campaigner and

⁹⁶ Nicholas & Rau, *supra* note 94.

⁹⁷ Kathay Feng, Executive Director, Common Cause, Gov. Schwarzenegger Touts Redistricting Reform, Highlights Continued Fight for Reform in California (Dec. 17, 2008), <http://gov38.ca.gov/index.php?speech/11278/>.

⁹⁸ *California Online Voter Guide—2008 General Election*, CAL. VOTER FOUND., <http://www.calvoter.org/voter/elections/2008/general/props/prop11.html> (last visited Oct. 23, 2010).

⁹⁹ *California Passes Proposition 11 on Redistricting Reform*, AMERICANS FOR REDISTRICTING REFORM, <http://www.americansforredistrictingreform.org/documents/Proposition11.pdf> (last visited Oct. 23, 2010). Organizations with a particular focus on the interests of California’s minority populations, however, largely opposed Proposition 11. Opponents included the National Association of Latino Elected and Appointed Officials, the Mexican American Legal Defense and Education Fund, the NAACP Legal Defense Fund, and the Asian Pacific American Legal Center. *Id.*

¹⁰⁰ Included among the papers to endorse the measure were the *Los Angeles Times*, *San Francisco Chronicle*, *San Jose Mercury News*, *Fresno Bee*, *Torrance Daily Breeze*, *San Diego Union Tribune*, *Pasadena Now*, *L.A. Daily News*, *North County Times*, *Stockton Record*, *San Gabriel Valley Tribune*, *Santa Cruz Sentinel*, *Lompoc Record*, and *Redding Searchlight*. *California Proposition 11 (2008)*, BALLOTPEdia, [http://www.ballotpedia.org/wiki/index.php/California_Proposition_11_\(2008\)](http://www.ballotpedia.org/wiki/index.php/California_Proposition_11_(2008)) (last visited Jan. 5, 2011). The same source does not identify any editorial boards opposed to Proposition 11.

¹⁰¹ See, e.g., Nancy Vogel, *Prop. 11 Aims to Redo Remap*, L.A. TIMES, Oct. 14, 2008, at B1 [hereinafter Vogel, *Prop 11 Aims*].

fundraiser for the proposal.¹⁰² Despite its close connection to the Republican governor, the proposition nevertheless received significant support from high-profile Democrats. For instance, Gray Davis, the chief executive who Schwarzenegger replaced through the 2003 recall election, supported Proposition 11.¹⁰³ Other prominent Democratic supporters included Treasurer Bill Lockyer, former Assembly Speaker Robert Hertzberg, and former Controller Steve Westly.¹⁰⁴ California Forward, a recently-created reform group, also supported the measure.¹⁰⁵ The organization's co-chair was Leon Panetta, former eight-term Democratic congressman and chief of staff for President Clinton.¹⁰⁶

While Proposition 11's support was broad-based, its funding was anything but. Of the \$14 million contributed to the campaign, traditional Democratic supporters gave less than \$1 million.¹⁰⁷ Governor Schwarzenegger, in addition to campaigning for the measure, also supported it financially. His campaign contributions approached \$3 million.¹⁰⁸ Not only did contributions skew Republican, significant amounts came from Republicans outside of California. Non-California Republican contributors included New York City Mayor Michael Bloomberg, T. Boone Pickens,¹⁰⁹ and a group of Florida Republicans who donated large sums of money after a personal visit from Schwarzenegger.¹¹⁰

¹⁰² Michael Rothfeld, *Governor Talks, and Funds Flow*, L.A. TIMES, Dec. 14, 2008, at B1.

¹⁰³ Vogel, *Prop 11 Aims*, *supra* note 101.

¹⁰⁴ *Id.*; George Skelton, *Prop. 11 Beats the Alternative*, L.A. TIMES, Oct. 30, 2008, at B1.

¹⁰⁵ George Skelton, *Obama Takes the State's Best Bet*, L.A. TIMES, Jan. 8, 2009, at B1.

¹⁰⁶ *Id.*

¹⁰⁷ John Howard, *Redistricting: Ultimate Political Battle Looms in California*, CAPITOL WKLY., June 18, 2009, at A7; Nancy Vogel, *California Elections: Key Prop. 11 Donors Have GOP Ties*, L.A. TIMES, Oct. 24, 2008, at B1 [hereinafter Vogel, *California Elections*].

¹⁰⁸ George Skelton, *Prop. 11 Lead Signals Voters' Reform Mood*, L.A. TIMES, Nov. 13, 2008, at B1.

¹⁰⁹ Vogel, *Prop 11 Aims*, *supra* note 101.

¹¹⁰ Vogel, *California Elections*, *supra* note 107. This may overstate their contribution, since bankruptcy attorneys are seeking the return of \$250,000 contributed from Florida attorney Scott Rothstein, who pleaded guilty in January 2010 to running a billion-dollar Ponzi scheme. Anthony York, *Refund Sought for Disgraced Florida Lawyer's Donation to California's Prop. 11 Campaign*, L.A. TIMES POLITICAL BLOG (May 5, 2010, 3:50 PM), <http://latimesblogs.latimes.com/california-politics/2010/05/florida-lawyers-want-refund-for-california-political-contribution.html>.

Not only did Democrats not contribute to the campaign for Proposition 11, they did not contribute much to the opposition campaign either. In contrast to the \$14 million contributed in support of Proposition 11, the “No on 11” campaign received only \$1 million.¹¹¹

Also, in contrast to previous redistricting measures, Proposition 11 took a different approach to reform. Earlier propositions provided significant roles for either the major parties or for retired state court judges. For instance, Proposition 14 (1982) and Proposition 39 (1984) would have allowed the major parties to nominate the redistricting commission members.¹¹² Two of the propositions, 39 (1984) and 77 (2002), would have required that retired judges serve as commission members.¹¹³ Finally, two measures would have had judges either nominate (Proposition 14) or appoint (Proposition 119) the commissioners.¹¹⁴

Proposition 11, on the other hand, minimized the role of the parties and eliminated any role for retired judges.¹¹⁵ Instead, it proposed to establish a “Citizens Redistricting Committee” (CRC).¹¹⁶ The CRC would draw new district lines for the State Senate, Assembly, and Board of Equalization; under the proposition, the Legislature retained the authority to redraw congressional districts.¹¹⁷

¹¹¹ Howard, *supra* note 107.

¹¹² Heslop, *supra* note 75, at 1–2.

¹¹³ *Id.* at 2; Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 372.

¹¹⁴ Heslop, *supra* note 75, at 1, 4.

¹¹⁵ Retired judges were lightning rods for opponents’ attacks in earlier campaigns. Steven F. Huefner, *Don’t Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. CONST. L. & PUB. POL’Y 37, 41 (2010). Presumably for this reason, the drafters of Proposition 11 eliminated any role for them.

¹¹⁶ CAL. CONST. art. XXI, § 1(d), *amended by* Prop. 11, § 3.2.

¹¹⁷ CAL. CONST. art. XXI, § 2(a), *amended by* Prop. 11, § 3.3; CAL. CONST. art. XXI, § 1(b), *amended by* Prop. 11, § 3.2. The drafters decided to exclude congressional districts from the reach of Proposition 11 to reduce the likelihood that Speaker of the House Nancy Pelosi would aggressively oppose the measure. Vogel, *Prop 11 Aims*, *supra* note 101. Pelosi had vowed to finance the opposition effort heavily if Congress was included. John Howard, *New Redistricting Initiative Targets Congressional Seats*, CAPITOL WKLY. (Sept. 3, 2009, 12:00 AM), www.capitolweekly.net/article.php?xid=y859w0qbbs932v. Although Pelosi and Senator Barbara Boxer did support the opposition, the \$1 million raised by opponents fell far short of the \$14 million contributed in favor of the proposition. Howard, *supra* note 107. By contrast, when congressional lines were implicated in 2005’s Proposition 77, Pelosi spearheaded the effort to defeat the motion. In fact, after the 2005 election, the opposition campaign had more money in the bank (\$4 million) than the “No on 11” campaign raised during the entire campaign (\$1 million). Anthony York, *Redistricting Fight—from Riches to Rags*, CAPITOL WKLY., Oct. 9, 2008, at A1.

The CRC would consist of fourteen members: five Democrats, five Republicans, and four persons not registered with either party.¹¹⁸ Unlike prior proposals, neither the parties, retired judges, nor organizations would nominate prospective members; instead, they would submit applications.¹¹⁹ The State Auditor would establish a panel of three State Auditors to screen the applicants.¹²⁰ This panel would strike applications of persons who did not meet a series of requirements identified in the proposition.¹²¹ Then, this pool of qualified applicants would be reduced as follows:

- (1) The state auditors would narrow each of the three groups to twenty members;¹²²
- (2) The majority and minority leaders of the Assembly and Senate could each strike up to two applicants;¹²³ and
- (3) The State Auditor would randomly draw three Democrats, three Republicans, and two persons not registered with either party, and these persons would serve on the Citizens Redistricting Committee.¹²⁴

¹¹⁸ CAL. CONST. art. XXI, § 2(c)(2), *amended by Prop. 11, § 3.3.*

¹¹⁹ CAL. GOV'T CODE § 8252(a)(1) (West Supp. 2010), *added by Prop. 11, § 4.1.*

¹²⁰ CAL. GOV'T CODE § 8252(b) (West Supp. 2010), *added by Prop. 11, § 4.1.*

¹²¹ Proposition 11 contains the following minimum criteria for CRC members: (1) Be continuously registered in California and have not changed parties for at least five years, see CAL. CONST. art. XXI, § 2(c)(3), *added by Prop. 11, § 3.3*; (2) Have voted in two of the last three statewide general elections, see CAL. CONST. art. XXI, § 2(c)(3), *added by Prop. 11, § 3.3*; (3) Within ten years of application, neither the applicant nor an immediate family member had: served as a candidate for federal or state office, served as an officer, employee, or consultant of a political party, served as a member of a political party central committee, been a registered lobbyist, served as paid congressional, legislative or Board of Equalization staff, contributed \$2,000 or more to any candidate for elective office in any year, see CAL. GOV'T CODE § 8252(a)(2)(A) (West Supp. 2010), *added by Prop. 11, § 4.1.* While presumably well intended, these limitations would have the effect of filtering out many of the most qualified applicants. Consequently, as Arturo Vargas, the Executive Director of the National Association of Latino Elected and Appointed Officials noted, "We have to identify those folks who are not engaged . . . and convince them to serve." Shane Goldmacher, *Drawing Lines, Erasing Biases*, L.A. TIMES, Feb. 3, 2010, at AA1.

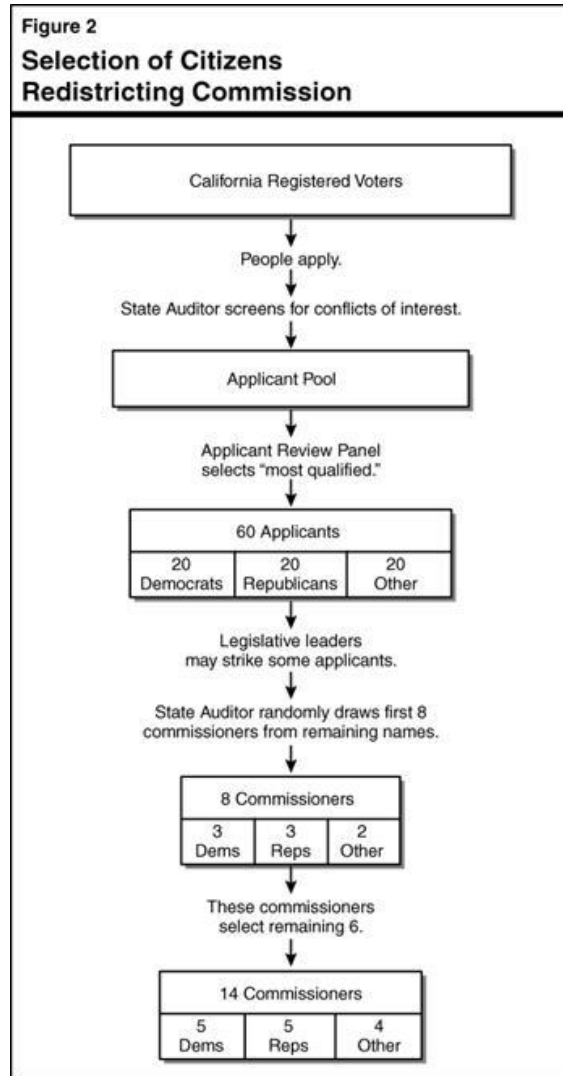
¹²² CAL. GOV'T CODE § 8252(d) (West Supp. 2010), *added by Prop. 11, § 4.1.*

¹²³ CAL. GOV'T CODE § 8252(e) (West Supp. 2010), *added by Prop. 11, § 4.1.*

¹²⁴ CAL. GOV'T CODE § 8252(f) (West Supp. 2010), *added by Prop. 11, § 4.1.*

Finally, these eight members would then select two additional members from each of the three sub-pools.¹²⁵ Figure 3, prepared by the California Legislative Analyst’s Office, presents this selection process graphically:

FIGURE 3¹²⁶



¹²⁵ CAL. GOV'T CODE § 8252(g) (West Supp. 2010), added by Prop. 11, § 4.1.

¹²⁶ Proposition 11, CAL. LEGIS. ANALYST'S OFF. (July 17, 2008), http://www.lao.ca.gov/ballot/2008/11_11_2008.aspx (internal figure number omitted).

Proponents and opponents alike recognized the unusual nature of these procedures. Bob Stern, the president of the Center for Governmental Studies, helped draft Proposition 11.¹²⁷ Stern acknowledged that the measure is “complicated It does take a lot of understanding to vote yes on this.”¹²⁸ George Skelton, a political commentator with the *Los Angeles Times* and Proposition 11 advocate, described its process as “convoluted.”¹²⁹ Other words used to characterize these procedures included “complex,” “confusing and unfair,” and “byzantine.”¹³⁰ Probably the most colorful description, however, was the following: “The mechanisms for selecting the panel seem about as convoluted as the weaning out process of a reality TV series.”¹³¹

Proposition 11 provides criteria that the CRC must follow in drawing new districts. First, it must comply with the federal requirements of equal population and the Voting Rights Act. Second, districts shall be contiguous. Third, districts must respect the geographic integrity of sub-jurisdictions to the extent possible. Fourth, to the extent possible, districts should be geographically compact. Finally, Assembly districts should be nested within Senate districts—two Assembly districts wholly within each Senate district.¹³²

¹²⁷ CENTER FOR GOVERNMENTAL STUDIES, REDISTRICTING REFORM IN CALIFORNIA: PROPOSITION 11 ON THE NOVEMBER 2008 CALIFORNIA BALLOT 5 n.2 (2008), http://www.cgs.org/images/publications/redist_memo_rpt_102408_fin.pdf.

¹²⁸ Debra J. Saunders, *Return to Redistricting Sanity*, RASMUSSEN REPORTS (Oct. 5, 2008), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_debra_j_saunders/return_to_redistricting_sanity.

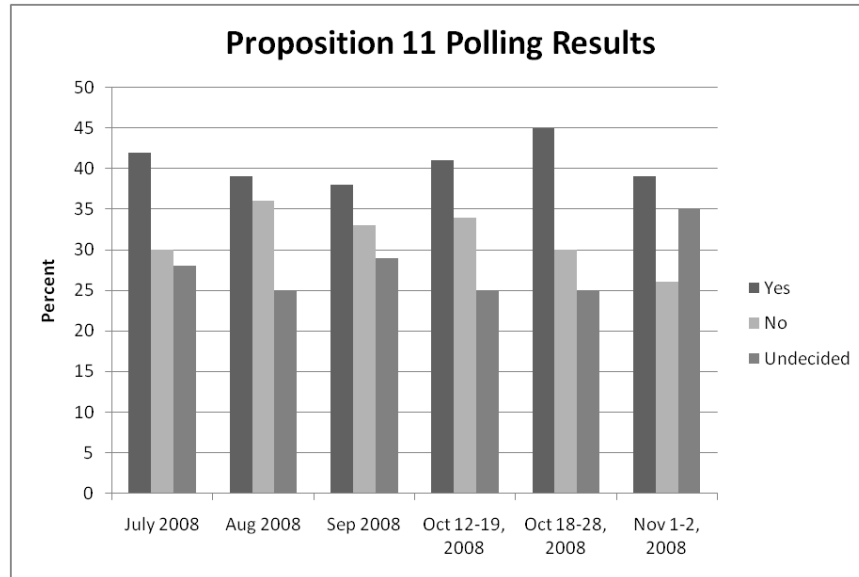
¹²⁹ George Skelton, *Reform Takes a Tough Road*, L.A. TIMES, Jan. 18, 2010, at A2.

¹³⁰ Howard, *supra* note 107; Matthew Yi, *Prop. 11 Leading in Early Returns*, S.F. CHRON. (Nov. 5, 2008), http://articles.sfgate.com/2008-11-05/news/17127045_1_redrawing-district-district-lines-independent-citizen. Recently, Professor John N. Friedman of Harvard’s Kennedy School of Government called the selection process “a foray into uncharted territory” that could produce a highly positive outcome or “it could really be a disaster.” John Mecklin, *Redrawn and Quartered: Will the Extraordinary California Experiment in Redistricting Spread to Other States?*, MILLER-MCCUNE, Mar./Apr. 2010, at 8, 10.

¹³¹ Saunders, *supra* note 128.

¹³² CAL. CONST. art. XXI, § 2(d), *amended by Prop. 11*, § 3.3.

Despite its vast fundraising and endorsement advantages, Proposition 11 had a difficult time attracting the attention of voters.¹³³ As Figure 4 indicates, in every poll taken in the five months preceding the election, support for the measure never exceeded forty-five percent:

FIGURE 4¹³⁴

For most propositions, political consultants expect support to fall during the campaign. Thus, experts anticipated a difficult road ahead for Proposition 11.¹³⁵ Furthermore, at least twenty-five percent of voters remained undecided about the proposition, though this number rose to thirty-five percent on the eve of the election.¹³⁶

Thus, prior to the election, the factors relating to Proposition 11 were mixed. It had overwhelming advantages in fundraising and endorsements. On the other hand, four previous redistricting initiatives in California had lost by an average

¹³³ Nationally, this election involved the historic candidacy of Barack Obama. In California, the ballot also included Proposition 8, which would have restricted the definition of marriage to opposite-sex couples, thereby overturning the California Supreme Court's ruling of the *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), that same-sex couples have a constitutional right to marry.

¹³⁴ *California Proposition 11 (2008)*, *supra* note 100.

¹³⁵ A low percentage of "Yes" voters "is always kind of ominous. Usually initiatives have to start out with a big lead to withstand the No campaign against it," said Mark DiCamillo, Field Poll director. York, *supra* note 117.

¹³⁶ *California Proposition 11 (2008)*, *supra* note 134.

margin of twenty percentage points.¹³⁷ Furthermore, voter support for Proposition 11 appeared at best to be tepid.¹³⁸

In fact, Proposition 11 did succeed, but barely. In the closest proposition contest on the ballot, the measure prevailed by a margin of 50.9% to 49.1%.¹³⁹

Although it passed, this result may not reflect enthusiastic support, but instead that its supporters were less likely to ignore the proposition than were its opponents. Table 3 provides a recap of the initiatives that were on the November 4, 2008 ballot:

TABLE 3¹⁴⁰
COMPARING SUPPORT FOR PROPOSITIONS
NOVEMBER 2008

| Proposition Number and Description | Total "Yes" and "No" Votes | % of Votes Cast for Prop 11 |
|--|----------------------------|-----------------------------|
| 1A High-Speed Train Bond | 12,696,429 | 105.9 |
| 2 Farm Animals Confinement | 12,935,507 | 107.9 |
| 3 Children's Hospital Bond | 12,638,905 | 105.4 |
| 4 Parental Notification | 12,948,951 | 108.0 |
| 5 Nonviolent Drug Offenses Sentencing | 12,721,989 | 106.1 |
| 6 Police and Law Enforcement Funding | 12,384,019 | 103.3 |
| 7 Renewable Energy Generation | 12,657,416 | 105.5 |
| 8 Eliminates Same-Sex Couples Marriage | 13,402,566 | 111.8 |
| 9 Criminal Justice System Victims' Rights | 12,411,433 | 103.5 |
| 10 Alternative Fuel and Renewable Energy Bonds | 12,562,820 | 104.8 |
| 11 Redistricting | 11,992,688 | 100.0 |
| 12 Veterans' Bond Act | 12,288,826 | 102.5 |

Table 3 presents the twelve propositions on the November 2008 ballot and the total votes in the contest. The last column represents the ratio of votes cast for each proposition compared to the total votes cast for Proposition 11. It shows that fewer voters cast a vote—either “Yes” or “No”—for Proposition 11 than for any other proposition. Between 2.5% more votes (290,000)

¹³⁷ See *supra* Table 2.

¹³⁸ See *supra* Figure 4.

¹³⁹ CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008) [hereinafter STATEMENT OF VOTE 2008], available at http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

¹⁴⁰ *Id.* at 7.

and 11.8% more votes (1.4 million) were cast for propositions other than for Proposition 11. One consideration is voter roll-off, which tends to be greater the lower an issue physically appears on the ballot.¹⁴¹ Since Proposition 11 was the second to last measure in the election, roll-off could explain this disparity. Studies, however, have found that voter roll-off in lower visibility contests can be double that of higher visibility contests.¹⁴² The reverse seems to have occurred in California in 2008, where a higher visibility contest, Proposition 11, had a higher roll-off than did lower visibility measures.¹⁴³

Despite the effort expended in support of the measure, both the opposition and the electorate in general displayed ambivalence toward Proposition 11. Certainly, most Democratic leaders opposed the motion. The “No on 11” campaign listed both Speaker Pelosi and Senator Boxer as members.¹⁴⁴ Furthermore, with significant majorities in both state houses, Democrats seemed to be the party with the most to lose.¹⁴⁵ Nevertheless, the measure’s drafters specifically excluded congressional re-districting from its reach to avoid a major fundraising effort by Pelosi.¹⁴⁶ This strategy worked. In 2005, Pelosi spearheaded the fundraising effort, but she also received significant assistance from California Senate President Pro Tem Don Perata and then-Assembly Speaker Fabian Nunez.¹⁴⁷ Furthermore, two powerful unions in California, the California Teachers Association and the Service Employees International Union, staunchly opposed the governor’s special election slate in 2005.¹⁴⁸ In 2008, both unions were neutral on Proposition 11.¹⁴⁹ As a result of these differences, in 2005 the opposition to Proposition 77 spent \$13

¹⁴¹ Roll-off is “[t]he difference between how many people go to the polls and how many people actually vote on a specific [contest].” David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115, 127–28 (2008). In legal and academic literature, “roll-off,” “falloff,” “dropoff,” and “ballot fatigue” refer to the same concept. *Id.* at 128. In the November general election, the total votes cast were 13.74 million. STATEMENT OF VOTE 2008, *supra* note 139, at 3. Thus, even Proposition 8, the measure with the highest votes cast, experienced some roll-off (340,000 votes). *Id.* at 62.

¹⁴² James Sample, Caperton: *Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 301 n.34 (2010).

¹⁴³ For instance, despite Governor Schwarzenegger’s campaigning and national fundraising efforts, Proposition 11 received fewer votes than did two bond initiatives, Propositions 10 and 12. *See supra* Table 3.

¹⁴⁴ Howard, *supra* note 107.

¹⁴⁵ Vogel, *California Elections*, *supra* note 107.

¹⁴⁶ Vogel, *Prop 11 Aims*, *supra* note 101.

¹⁴⁷ York, *supra* note 117.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

million¹⁵⁰ (which does not include \$4 million in unexpended funds);¹⁵¹ in 2008, the opposition to Proposition 11 spent only \$1 million.¹⁵²

Apparently, the Democrats' reserved approach to the measure stemmed from more than just Proposition 11's failure to apply to congressional redistricting. Possibly because of the weak performance of previous redistricting initiatives, the Democrats did not expect Proposition 11 to succeed.¹⁵³

Voters also lacked enthusiasm for the redistricting measure. As Figure 4 demonstrates, throughout the campaign, polling indicated that at least twenty-five percent of voters were undecided regarding Proposition 11, peaking at thirty-five percent on the eve of the election.¹⁵⁴ For their part, prospective voters indicated that the measure was low on their list of priorities for the election.¹⁵⁵ Besides the presidential election, among the eleven other initiatives on the ballot was Proposition 8, regarding same-sex marriage.¹⁵⁶ In contrast to the combined \$15 million raised in support and opposition of Proposition 11, Proposition 8 raised a combined total of \$83.2 million from both sides.¹⁵⁷ The high roll-off for Proposition 11 likely resulted from the mixture of many factors: confusion, uncertainty, placement on the ballot, ballot fatigue,¹⁵⁸ and attention focused on other choices on the ballot.

¹⁵⁰ LEAGUE OF WOMEN VOTERS ET AL., BUILDING A NATIONAL REDISTRICTING REFORM MOVEMENT: REDISTRICTING CONFERENCE REPORT 11, *available at* http://www.americansforredistrictingreform.org/html/documents/SLCRedistrictingReport_FINAL.pdf.

¹⁵¹ York, *supra* note 117.

¹⁵² Howard, *supra* note 107.

¹⁵³ Editorial, *A Political Triple Whammy*, L.A. TIMES, Feb. 16, 2010, at A12.

¹⁵⁴ Likely some of this uncertainty resulted from the complexity of the proposition itself. *See supra* text accompanying notes 127–131.

¹⁵⁵ As one voter who admitted that she abstained from voting on the proposition stated: "Redistricting. We need to do more immediate things." Tamara Audi et al., *California Votes for Prop 8*, WALL ST. J. (Nov. 5, 2008, 10:59 PM), http://online.wsj.com/article/NA_WSJ_PUB:SB122586056759900673.html.

¹⁵⁶ *See supra* Table 3.

¹⁵⁷ Lisa Leff, *Donors Pumped \$83M into Prop. 8 Race*, KSL.COM (Feb. 2, 2009, 8:05 PM), <http://www.ksl.com/?nid=148&sid=5490691>. The measure's sponsors raised \$39.9 million and spent all but \$983,000; the opposition received \$43.3 million and had \$730,000 left after the election. *Id.* As another indicator of the interest in this measure, it received the highest vote total of any of the measures in the election. *See supra* Table 3. Another initiative, Proposition 2, which sought to impose standards for confinement of certain farm animals, also attracted significant contributions; supporters contributed \$10.6 million, and opponents donated \$8.9 million. *California Proposition 2 (2008)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/California_Proposition_2_\(2008\)](http://en.wikipedia.org/wiki/California_Proposition_2_(2008)) (last visited Oct. 23, 2010).

¹⁵⁸ While more ballot initiatives lead to higher turnout, too many policy questions may have a negative effect of decreasing turnout. *See* Caroline J. Tolbert, John A. Grummel & Daniel A. Smith, *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 29 AM. POL. RES. 625, 635 (2001). *See also* Kirk J. Stark, *The Right to*

Was the passage of Proposition 11 foreseeable despite the abysmal track record of California redistricting initiatives? Under the circumstances, yes. After reviewing redistricting initiatives nationwide, Nicholas Stephanopoulos developed a set of factors leading to the passage of such measures. He analyzed the campaigns of every redistricting initiative since 1936,¹⁵⁹ including the California predecessors of Proposition 11, and initiatives from Arkansas (1936), Oklahoma (1960 and 1962), North Dakota (1973), Colorado (1974), Ohio (1981 and 2005), and Arizona (2000).¹⁶⁰ Stephanopoulos concluded that the most important variable in determining a proposition's success was the legislative-majority party's opposition to the measure.¹⁶¹ He identified several characteristics of successful opposition campaigns run by the majority party including "raising large sums of money, campaigning furiously against the measure, and striving to frame the debate in the most advantageous possible terms."¹⁶²

A comparison between the campaigns of the two most recent California redistricting initiatives supports Stephanopoulos' conclusion. In 2005, the opposition to Proposition 77 raised \$14 million; in 2008, the "No on 11" campaign raised only \$1 million.¹⁶³ In 2005, Speaker Pelosi pledged: "I am very committed to defeating Proposition 77, and I am raising money to defeat it."¹⁶⁴ In 2008, she basically sat on the sidelines since the measure did not involve congressional districts. In 2005, the opposition successfully characterized the proposition as "a Republican power grab."¹⁶⁵ In 2008, the "Yes on 11" campaign succeeded by focusing on anti-incumbent sentiments.¹⁶⁶

Vote on Taxes, 96 NW. U. L. REV. 191, 248 (2001) (noting that voters feel a "ballot fatigue" when "faced with ever longer lists of issues to decide on election day").

¹⁵⁹ Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 346.

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 380. In reaching this conclusion, Stephanopoulos also identified several factors that were not dispositive. These included the governor's position on the proposition, the legislative minority's support, the actual proposal, interest group positions, and the extent of any recent gerrymanders. *Id.* at 379–80.

¹⁶² *Id.* at 381.

¹⁶³ *See supra* note 111 and accompanying text.

¹⁶⁴ Christian Berthelsen, *Group Backing Remap Initiative Caught up in Donations Dispute*, S.F. CHRON., Oct. 7, 2005, at B3. As part of this commitment, she asked all thirty-three California Democrats in Congress to contribute against the proposition. *Id.*

¹⁶⁵ Hubert Huang, *The Strange Journey of Proposition 77*, CARDINAL INQUIRER (Nov. 3, 2005), <http://www.stanford.edu/class/comm273/2005/hhboy77/strangejourney.html> ("In an attempt to dispel the notion that the proposition is a disguise for a Republican power grab, Schwarzenegger went to Ohio and show [sic] his support for its redistricting initiative, the Democrat-backed Issue 4.")

¹⁶⁶ John Wildermuth, *Prop. 11 Won By Not Talking About Redistricting*, S.F. GATE POLITICS BLOG (Dec. 1, 2008, 6:06 AM), http://www.sfgate.com/cgi-bin/blogs/nov05election/detail?blogid=14&entry_id=33086#ixzz0swyfQTzL.

Nicholas Mosich, on the other hand, argues that 2005's Proposition 77 actually lost because of three different factors. Specifically, he identified: "(1) California's history of resistance to redistricting reform initiatives, (2) fierce bipartisan opposition to Proposition 77, and (3) voters' perception of the special election as a referendum on Governor Schwarzenegger's leadership."¹⁶⁷

Looking solely at the 2005 election, Mosich's conclusions are appealing; they do not, however, explain the subsequent success of Proposition 11. First, Californians certainly have demonstrated a reluctance to adopt a new redistricting procedure.¹⁶⁸ Indeed, this reluctance may have manifested itself in the narrowness of Proposition 11's victory. Nevertheless, the measure did taste victory. Furthermore, even if this history were a factor, one would expect it to have a greater effect in 2008, only three years after the defeat of Proposition 77, rather than in 2005, fifteen years after the last failed proposition.¹⁶⁹ Second, Schwarzenegger's approval and disapproval ratings were almost identical shortly before each election. According to the Field Poll, his approval ratings rose from thirty-seven percent in October 2005 to thirty-eight percent in September 2008; and during the same period, his disapproval ratings fell from fifty-six percent to fifty-two percent.¹⁷⁰ Thus, two of the factors identified by Mosich do not help to explain Proposition 11's success. The second factor he identifies, fierce bipartisan opposition, may help to explain Proposition 77's failure. It does not, however, explain the failure of earlier propositions, which only one party opposed.

Thus, Stephanopoulos' theory—that the legislative-majority party's vigorous opposition to the measure is the most significant factor in the failure of a proposition—seems to explain best the failure of Proposition 11's predecessors. The lack of such opposition also best explains Proposition 11's subsequent success. This was the first redistricting proposition not to face concerted opposition from the majority party, and it was the first such proposition to succeed.

¹⁶⁷ Nicholas D. Mosich, Note, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. CAL. L. REV. 165, 198–99 (2005).

¹⁶⁸ *Id.* at 198.

¹⁶⁹ See *supra* Table 2.

¹⁷⁰ Mark DiCamillo & Mervin Field, *New Record Low Job Ratings for Both Schwarzenegger and the State Legislature*, FIELD POLL, Oct. 13, 2009, at 2, <http://www.field.com/fieldpollonline/subscribers/R1s2315.pdf>.

III. COMPETITIVENESS: IS IT DESIRABLE?

Supporters of Proposition 11 promised one result: competitive elections. But, are competitive elections desirable? Even if they are, are they attainable in California? These are the questions that the next two sections explore.

To sell Proposition 11 to the voters, its proponents maintained that it would increase electoral competitiveness.¹⁷¹ Governor Schwarzenegger, the proposition's top contributor and fundraiser and highest-profile proponent, charged that "the current redistricting system . . . insulates lawmakers from competitive general elections."¹⁷² Similarly, Democrat and former-Controller Steve Westly assured the public that the proposition would create more competitive election districts.¹⁷³ But the "competitiveness" drumbeat did not stop there. Others who touted the proposition's ability to increase competitiveness included redistricting experts,¹⁷⁴ a non-profit organization,¹⁷⁵ and several newspaper editorial boards.¹⁷⁶

Despite this focus on competitiveness in the 2008 campaign, no discussion arose concerning the merits of competitiveness. Several commentators have pushed for redistricting reform to enhance competition in general elections. They have raised three main benefits of greater competitiveness: increased electoral participation, election of moderate legislators, and greater responsiveness of those legislators to the needs of their constituents.

¹⁷¹ Interestingly, the initiative does not actually require that the redistricting commission draw competitive districts. Proposition 11 delineates multiple standards for redrawing maps, see *supra* text accompanying note 132, but it does not include competitiveness among these requirements.

¹⁷² Steven Harmon, *Governor Pivots to Campaign Mode*, STATEWIDE DATABASE (Sept. 24, 2008), http://swdb.berkeley.edu/resources/Redistricting_News/california/2008/September/Governor_pivots_to_09_24-08.htm.

¹⁷³ Bay City News Service, *Schwarzenegger Stumps for Prop. 11*, PALO ALTO ONLINE (Oct. 24, 2008, 8:41 AM), http://www.paloaltoonline.com/news/show_story.php?id=9783.

¹⁷⁴ Patrick McGreevy, *Democrats Fall Short in Bid for a Super Majority*, L.A. TIMES, Nov. 6, 2008, at B4 (quoting professor John J. Pitney of Claremont McKenna College as saying, "[Proposition 11] will make more seats competitive"); Stephanopoulos, *A Fighting Chance for Redistricting*, *supra* note 32 ("What's good about Proposition 11 is that it would make California's elections more competitive.").

¹⁷⁵ *ACLU/SC Supports the California Voters FIRST Initiative on the November Ballot*, ACLU OF S. CAL. (June 18, 2008), <http://www.aclu-sc.org/releases/view/102890>.

¹⁷⁶ See *supra* note 100 (citing references). See also Editorial, *Let Citizens Redraw the Map*, DAILY BREEZE, Mar. 17, 2008, at 10A ("New plan to create competitive legislative districts in California merits support."); Editorial, *California Voters Should Support Redistricting Ballot Measure*, FRESNO BEE, Mar. 25, 2008, at C4 ("More competitive races will make lawmakers more accountable."); Editorial, *An Essential Reform*, SAN DIEGO UNION-TRIBUNE, Mar. 10, 2008, at B6 ("This is why it's absolutely crucial to have as many competitive legislative districts as possible.").

First, supporters maintain that greater competitiveness can benefit the entire electoral process. Competitiveness increases voter turnout rates.¹⁷⁷ The political parties are sensitive to competition and focus their limited resources where elections are competitive.¹⁷⁸ They target television advertising and other mobilizing efforts mainly in competitive races,¹⁷⁹ and studies have found that persons contacted through mobilization efforts are more likely to vote.¹⁸⁰ Presumably, greater interest also leads to more media attention, higher campaign contributions, and a sense that one's vote matters.¹⁸¹ Accordingly, the closer the anticipated outcome of an election, the more voters become involved¹⁸² and the better informed they are likely to be.¹⁸³ Furthermore, competitive elections can affect participation even after the election. For instance, after the 2000 presidential election, voter registration drives surged.¹⁸⁴ In addition to their effect on voters, competitive elections are essential to other aspects of the democratic process. For instance, they encourage the appearance of strong challengers to majority-party candidates, which also stimulates party mobilization and campaign contributions.¹⁸⁵

Proponents also maintain that more competitive districts can yield more centrist candidates. Studies suggest that at the individual district level "more competitive seats lead to more moderate members and . . . 'cross-pressured' members are more likely to have more centrist voting scores."¹⁸⁶ When districts are not competitive, candidates know that voters in their districts are

¹⁷⁷ Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV 185, 192 (2009).

¹⁷⁸ Michael P. McDonald, *The Competitive Problem of Voter Turnout*, WASH. POST (Oct. 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/30/AR2006103000712.html>.

¹⁷⁹ *Id.*

¹⁸⁰ ROBERT HUCKFELDT ET AL., INFORMATION, ACTIVATION, AND ELECTORAL COMPETITION IN THE 2002 CONGRESSIONAL ELECTIONS 22, available at http://psfaculty.ucdavis.edu/huckfeldt/website_revise060106.pdf.

¹⁸¹ See generally *id.* (exploring the correlation between voter engagement with an issue and political competitiveness).

¹⁸² STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 180–81 (Bruce Nichols & Robert Miller eds., 1993).

¹⁸³ Peter J. Jenkins, Comment, *The Supreme Court's Confused Election Law Jurisprudence: Should Competitiveness Matter?*, 2007 BYU L. REV. 167, 171.

¹⁸⁴ LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD 18 (Mar. 5, 2007), available at <http://www.projectvote.org/component/content/article/254-Voter%20Fraud/561-the-politics-of-voter-fraud.html>.

¹⁸⁵ Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 260 (2006).

¹⁸⁶ Walter M. Frank, *Making Our Congressional Elections More Competitive: A Proposal for a Limited Number of Statewide At-Large Elections in Our More Populous States*, 39 J. MARSHALL L. REV. 1425, 1427 (2006).

unlikely to support challengers from the other party.¹⁸⁷ This enables candidates to be more attentive to those voters who cast ballots in primary elections, who tend to be more partisan and less moderate than voters in general elections. When they are focused on this sort of voter, candidates are more likely to take extreme positions instead of representing the political center.¹⁸⁸ Thus, noncompetitive districts undermine centrists, who can win competitive general elections but not primaries in heavily-partisan districts. Noncompetitive districts thus impact the partisanship, and possibly the effectiveness, of legislatures.¹⁸⁹ Of course, the hope of many supporters of competitive districts is that an increase in centrist legislators will reduce both partisanship and gridlock in legislatures.¹⁹⁰

Competitive districts may also increase the accountability of legislators to the voters.¹⁹¹ Districts that are competitive compel legislators to respect the interests of their constituents or face a realistic chance of defeat.¹⁹² Furthermore, districts with competitive elections prevent parties from becoming overwhelmingly dominant in geographic areas and lacking incentives to compete for voters.¹⁹³ Some commentators consider accountability to be the central purpose of elections.¹⁹⁴ Others consider it to have a constitutional basis or to function as part of the checks and balances fundamental to the Constitution.¹⁹⁵ Another aspect of accountability regards corruption of elected officials. One study found that in the 1980s, among candidates

¹⁸⁷ Jenkins, *supra* note 183, at 170–71.

¹⁸⁸ *Id.* at 171.

¹⁸⁹ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2380 (2006). See Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1, 13 (2008) (asserting that the replacement of centrist legislators with extremists produces polarized, factious, and inefficient legislatures).

¹⁹⁰ See Alexander & Prakash, *supra* note 189, at 2381.

¹⁹¹ Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 629 (2002). However, some results suggest that a lack of electoral competition actually increases the responsiveness of legislators. BENJAMIN G. BISHIN, COMPETITION AND THE CONGRESSIONAL REPRESENTATION: ARE THE BENEFITS OF COMPETITIVE ELECTIONS OVERSTATED? 27, available at <http://moya.bus.miami.edu/~bbishin/ccr.pdf>.

¹⁹² Timothy P. Brennan, Note, *Cleaning Out the Augean Stables: Pennsylvania's Most Recent Redistricting and a Call to Clean Up This Messy Process*, 13 WIDENER L.J. 235, 338 (2003).

¹⁹³ Pildes, *supra* note 185, at 260.

¹⁹⁴ Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL'Y 397, 411 (2005).

¹⁹⁵ See Pildes, *supra* note 185, at 265–66 (arguing that the Elections Clause prohibits the self-interested manipulation in the creation of overwhelmingly safe and noncompetitive districts that destroy electoral accountability); Brennan, *supra* note 192, at 337 (asserting that the Founders believed that legislators should be accountable to the people, which was the most essential Constitutional check on the government).

charged with corruption, only 3.8% percent lost in primaries, while their loss rate in the general election was 25%.¹⁹⁶

Defenders of noncompetitive districts, however, point to several valuable functions they provide. They argue that noncompetitive districts provide better representation for their voters and promote stability of the Legislature. They also maintain that competitive elections, rather than inspiring crossover appeals, actually lead to “getting out the base” efforts.

Critics point out that, by definition, competitive districts leave more voters unrepresented. A major drawback of single-member districts is that the votes for the losing candidate are “wasted.”¹⁹⁷ Closely-balanced districts therefore maximize the number of wasted votes.¹⁹⁸ A district that is less competitive in general elections forces candidates to take positions more akin to those of the typical voter of the district; thus legislators elected from homogenous districts will be more representative of more of the district’s voters.¹⁹⁹ Furthermore, from the perspective of voter satisfaction, competitive elections are less desirable. Unlike with sporting events, when it comes to elections voters prefer blowouts (large victory margins) to exciting finishes (competitive contests).²⁰⁰ Voters also prefer to have representatives with similar ideologies over having closely-contested general elections.²⁰¹ As an additional psychological benefit, voters give Congress higher approval ratings when like-minded persons represent their districts.²⁰² Thus, non-competitive districts may maximize voter satisfaction.²⁰³

Another advantage pointed to by commentators is that noncompetitive districts increase the stability of the Legislature as a whole. With more competitive districts, partisan control of the Legislature would change more frequently.²⁰⁴ Thus, slight

¹⁹⁶ Matthew G. Jarvis, Competition is Good: Side-Benefits of Competitive Districts 14–15 (Aug. 28–31, 2008) (unpublished manuscript, prepared for presentation at the 2008 Annual Meeting of the Midwest Political Science Association), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/2/7/9/2/7/pages279276/p279276-1.php.

¹⁹⁷ Brunell, *supra* note 10, at 46.

¹⁹⁸ *Id.*

¹⁹⁹ Thomas I. Brunell & Justin Buchler, *Ideological Representation and Competitive Congressional Elections*, 28 ELECTORAL STUD. 448, 449 (2009).

²⁰⁰ *Id.* at 455. On the other hand, the satisfaction of voters who supported losing candidates is not related to the margin of defeat. *Id.* at 456.

²⁰¹ *Id.*

²⁰² *Id.* at 454.

²⁰³ This may explain the finding that turnout rates are curvilinear—while the most competitive counties have the highest turnout rates, so too do the least competitive counties. DAVID E. CAMPBELL, WHY WE VOTE: HOW SCHOOLS AND COMMUNITIES SHAPE OUR CIVIC LIFE 34 (2006).

²⁰⁴ HUCKFELDT ET AL., *supra* note 180, at 22.

changes in voter preferences would shift control of the Legislature.²⁰⁵ At the extremes of competitiveness, a statewide vote of only fifty-one or fifty-two percent in favor of a party might shift control in the Legislature.²⁰⁶ Because of legal²⁰⁷ and geographic constraints,²⁰⁸ no districting plan for California will have all hyper-competitive districts. Nevertheless, the risk of shifts in partisan control remains.²⁰⁹

Opponents of competitiveness also argue that high levels of competition can adversely affect individual officeholders and candidates. Candidates would likely be less interested in running for office if they knew that slight changes in political sentiment would remove them from office. Thus, less competitive districts can be more appealing to prospective candidates because greater stability makes the possibility of a career in the Legislature more likely.²¹⁰ Conversely, competitive elections deter candidates because of the foreseeable burden of campaigning in future close elections.²¹¹ Incumbents who are concerned about upcoming competitive elections have greater incentives to steer pork barrel projects to their districts in attempts to “buy off” their constituents.²¹² Similarly, they are more likely to focus on parochial issues rather than on those of benefit to the larger whole, be it a region, state, or nation.²¹³

²⁰⁵ Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 668 (2002). See also *Vieth v. Jubelirer*, 541 U.S. 267, 359 (2004) (Breyer, J., dissenting) (describing the fact that in a large state with mere random redistricting, a shift from fifty-one percent Republican to forty-nine percent Republican could yield a “seismic shift” in the composition of the legislature from one hundred percent Republican to one hundred percent Democrat).

²⁰⁶ Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 39–40 (1985).

²⁰⁷ See *infra* text accompanying notes 219–232.

²⁰⁸ See *infra* text accompanying notes 233–256.

²⁰⁹ Possibly a more likely concern in California is that a large number of competitive districts could result in significantly disproportional representation. Non-proportional legislatures are likely where excessive numbers of districts are competitive. Brunell, *supra* note 10, at 75.

²¹⁰ See Sally Dworak-Fisher, Note, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131, 137 (1996). See also Thomas Brunell, *When Competition Is Bad for Voters and Democracy*, DALLAS MORNING NEWS (June 3, 2008, 9:07 AM), http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-brunell_03edi.ART.State.Edition1.45fe223.html (asserting that a district that is less competitive in general elections is more attractive to strong candidates of the majority party to run in the primary).

²¹¹ Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J. L. & Pol. 653, 683 (1988).

²¹² Recent Developments, *Independent Redistricting Commissions*, 43 HARV. J. ON LEGIS. 535, 543 (2006).

²¹³ Justin Buchler, *Competition, Representation and Redistricting: The Case Against Competitive Congressional Districts*, 17 J. THEORETICAL POL. 431, 461 (2005).

Critics also charge that competitive districts may rely upon a premise that is not always applicable. Proponents argue that competitive districts will force candidates to take less extreme positions.²¹⁴ Candidates, however, do not always follow this strategy. For instance, after the 2000 presidential election, in which George W. Bush lost the popular vote but won the electoral college vote by 271 to 266,²¹⁵ President Bush did not focus on winning swing voters. Instead of targeting moderate voters, his reelection campaign focused on mobilizing his own party's voters.²¹⁶ Since the majority of "independent" voters are not truly swing voters but actually favor one party,²¹⁷ the drawing of competitive districts may not force candidates to broaden their appeal. Instead, such districts may actually heighten partisan appeals.²¹⁸

While the virtues of competitiveness are more intuitive, a lack of competitiveness may be beneficial. This is reassuring, since Proposition 11 is unlikely to accomplish its goal of increasing competition.

²¹⁴ See *supra* notes 186–190 and accompanying text.

²¹⁵ David Leip, *2000 Presidential General Election Results*, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://www.uselectionatlas.org/RESULTS/national.php?year=2000&off=0&elect=0&f=0> (last visited Oct. 24, 2010).

²¹⁶ Ronald Brownstein, *The Race to the White House: Bush Aims to Solidify His Base*, L.A. TIMES, Aug. 22, 2004, at A1. This strategy did not begin with President Bush; parties have utilized it since the earliest days of the union. Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 426 (2004).

²¹⁷ Tom Jacobs, *'Independent' Voters Are Generally Not*, MILLER-MCCUNE (July 28, 2009), <http://www.miller-mccune.com/politics/independent-voters-are-generally-not-3560/>. According to Tom Jensen, communications director of Public Policy Polling, "two-thirds of independent voters are not swing voters." *Id.* Conventional political science wisdom holds that "independents" who acknowledge that they "lean" toward one party actually behave like closet partisans. They are politically active and interested and loyal to the party to which they lean. Eric McGhee & Daniel Krimm, *Party Registration and the Geography of Party Polarization*, 41 POLITY 345, 359 (2009).

²¹⁸ Furthermore, a study of Congressional polarization concluded that gerrymandering explains little if any of the polarization apparent in Congress. Nolan McCarty et al., *Does Gerrymandering Cause Polarization?* 5 (Oct. 23, 2006), *available at* <http://www.princeton.edu/~nmccarty/gerrymander11.pdf>. Indeed, the authors found that legislative polarization is consistent with the general geographic polarization of voters along ideological and partisan lines. *Id.* at 4. Masket, Winburn, and Wright found that representatives elected from legislatively-drawn districts are actually less polarized than members of Congress whose districts were drawn by a non-legislative body. Seth Masket et al., *The Limits of the Gerrymander: Examining the Impact of Redistricting on Electoral Competition and Legislative Polarization* 20 (Aug. 31–Sept. 3, 2006) (unpublished paper presented at annual meeting of American Political Science Association), *available at* <http://www.votelaw.com/blog/blogdocs/Limits%20of%20the%20gerrymander.pdf>. Another study found that, while redistricting was a factor in polarization, the U.S. Senate, which does not undergo redistricting, and the House had become polarized concurrently. Sean M. Theriault, *The Case of the Vanishing Moderates: Party Polarization in the Modern Congress* 19 (2004), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/8/3/2/6/pages83269/p83269-19.php.

IV. NON-COMPETITIVE ELECTIONS: MIGHT SOMETHING BESIDES REDISTRICTING CAUSE THEM?

Whether or not competitiveness is desirable, legislative elections in California have experienced a marked competitive decline,²¹⁹ and supporters of Proposition 11 have insisted that legislative redistricting is the cause. A more careful study of applicable legal requirements and geographic considerations, however, indicates that Proposition 11 is unlikely to increase competitiveness significantly.

As previously discussed, federal and state laws constrain the drawing of legislative districts. Line drawers must populate the districts equally,²²⁰ and they must not dilute minority voting strength.²²¹ California law also imposes additional mandatory (contiguity)²²² and nonmandatory (respect for jurisdictional boundaries)²²³ requirements. The combination of these constraints, however, limits the ability of redistricters to draw more competitive districts.

Bruce Cain, Karin Mac Donald, and Iris Hui examined the impact of legal criteria on the drawing of competitive districts.²²⁴ They noted a truism of redistricting: the imposition of multiple criteria will “highly constrain” the accomplishment of any single goal. In other words, mandating more than one criteria necessarily will require trade-offs among criteria.²²⁵ Compliance with the Voting Rights Act, for instance, necessitates avoiding both minority vote dilution and retrogression of minority voting

²¹⁹ See *supra* Figure 2. Although the competitiveness of California’s districts has declined, this is not solely a California phenomenon. Analysis of congressional elections reveals that victory margins for incumbents have been rising nationwide since the early 1990s (for open seats, election margins during the period have fluctuated). Legislative control of redistricting has not correlated to higher victory margins. Masket et al., *supra* note 218, at 14.

²²⁰ See *supra* notes 8–13, 27 and accompanying text.

²²¹ See *supra* notes 14–26 and accompanying text.

²²² See *supra* note 28.

²²³ See *supra* note 29.

²²⁴ See generally BRUCE E. CAIN, KARIN MAC DONALD & IRIS HUI, INSTITUTE FOR GOVERNMENTAL STUDIES, COMPETITION AND REDISTRICTING IN CALIFORNIA: LESSONS FOR REFORM (2006). Specifically, they instructed a team of mappers to draw demonstrative assembly district plans for California. As part of this experiment, they “switched on or off” particular redistricting constraints to determine their effects on the drawing of districts for California. These particular requirements were: (1) compliance with the Voting Rights Act; (2) minimizing the splitting of subjurisdictions; and (3) enhancing competitiveness. They began by drawing “random-box” plans (using only Census population data) to establish benchmarks from which the effect of adding a particular constraint could be measured. Then, they instructed the mappers to add one of the constraints in separate plans. Finally, they instructed them to draw maps incorporating all three criteria. *Id.* at 22.

²²⁵ *Id.* at 5.

strength.²²⁶ Since African Americans and Latinos are predominantly Democratic, the legally-mandated majority-minority districts are usually heavily-Democratic and intentionally noncompetitive in general elections (so the minority population can elect its candidate of choice).²²⁷ Conversely, since these districts require the inclusion of large concentrations of Democratic voters, they deplete the pool of Democratic voters for surrounding districts, thereby facilitating—or even necessitating—the drawing of safe Republican districts.²²⁸

Thus, the Voting Rights Act requirements have significant redistricting consequences. The Voting Rights Act reduces competitiveness not only by altering the configuration of districts, but also by reducing the pool of districts available for competition. In California, Cain et al. found that minority populations have been dispersing geographically.²²⁹ As a result, to satisfy the Voting Rights Act standards, map drawers need to extend districts to encompass pockets of ethnic communities.²³⁰ This constrains their options when populating surrounding districts. Moreover, states that must satisfy the section 5 non-retrogression requirement typically have fewer marginal districts and fewer districts with two major-party candidates.²³¹ Consequently, preserving minority voting strength often occurs at the direct expense of electoral competitiveness.²³²

Another factor that explains the decline in competitiveness is population redistribution. During the past two decades, our population has realigned itself geographically along political lines. Bill Bishop labels this phenomenon as “The Big Sort.”²³³ As a result, regions, states, and counties now are much more politically homogenous than they were just three decades ago.²³⁴

²²⁶ See *supra* notes 14–26 and accompanying text.

²²⁷ Lublin & McDonald, *supra* note 34, at 147.

²²⁸ Bruce I. Oppenheimer, *Deep Red and Blue Congressional Districts: The Causes and Consequences of Declining Party Competitiveness*, in CONGRESS RECONSIDERED 135, 152 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005).

²²⁹ See Lublin & McDonald, *supra* note 34, at 147.

²³⁰ CAIN ET AL., *supra* note 224, at 24.

²³¹ Lublin & McDonald, *supra* note 34, at 155.

²³² CAIN ET AL., *supra* note 224, at 24. Similarly, because of the unusual configurations of many city and county boundaries, respecting those lines also significantly constrains competitiveness. *Id.* at 26. While this is not a mandatory standard that redistricters must follow, the California Constitution nonetheless does require that the geographic integrity of cities and counties be respected to the greatest extent possible without violating other requirements. CAL. CONST. art. XXI, § 2(d)(3).

²³³ BILL BISHOP, *THE BIG SORT* 42 (2008).

²³⁴ *Id.*

This sorting is possible because we have a highly mobile population. For instance, in 2008, 11 million Americans moved to a different county.²³⁵ While the population of the United States has always exhibited a high rate of mobility, the nature of this movement has changed in recent decades.²³⁶ Beginning in the 1970s and 1980s, when people moved, they tended to relocate to areas where most residents held similar political perspectives.²³⁷ In general, when people select a locale in which to live, they choose where to live within that locale based upon factors that correlate with partisan preferences.²³⁸ These factors include immigration, education, income, and religion.²³⁹ Thus, Democrats began moving to Democrat-majority counties and Republicans to Republican counties. Similarly, as Democrats left Republican areas, Republicans were more likely to replace them, and vice versa.²⁴⁰ This trend differed markedly from the racial consequences of these movements. From 1980 to 2000, American counties became slightly less segregated, whereas during the same period, the segregation of Republicans and Democrats increased by almost twenty-six percent.²⁴¹

Within California, these shifts are readily apparent. The 1976 and 2004 presidential elections provide good points for comparison. Both races were very closely contested at the national level. In 1976, Jimmy Carter prevailed over Gerald Ford by a popular vote margin nationwide of 2.1% (50.1% to 48.0%); in 2004, George W. Bush defeated John Kerry by a similar margin of 2.4% (50.7% to 48.3%).²⁴² During the twenty-eight years between these elections, forty-seven of California's

²³⁵ U.S. CENSUS BUREAU, TABLE 1: GENERAL MOBILITY, BY RACE AND HISPANIC ORIGIN, REGION, SEX, AGE, RELATIONSHIP TO HOUSEHOLDER, EDUCATIONAL ATTAINMENT, MARITAL STATUS, NATIVITY, TENURE, AND POVERTY STATUS: 2008 TO 2009, <http://www.census.gov/population/www/socdemo/migrate/cps2009.html> (follow excel for United States Table 1). At the same time, another twenty-five million persons moved within the same county. *Id.* In addition to population mobility, population growth has been the other major cause of California's political redistribution. JAMES G. GIMPEL & JASON E. SCHUKNECHT, PATCHWORK NATION: SECTIONALISM AND POLITICAL CHANGE IN AMERICAN POLITICS 76 (2004).

²³⁶ Oppenheimer, *supra* note 228, at 152–53.

²³⁷ *Id.*

²³⁸ Oppenheimer, *supra* note 228, at 153.

²³⁹ Alan I. Abramowitz et al., *Don't Blame Redistricting for Uncompetitive Elections*, 39 PS: POL. SCI. & POL. 87, 88 (2006).

²⁴⁰ BISHOP, *supra* note 233, at 44.

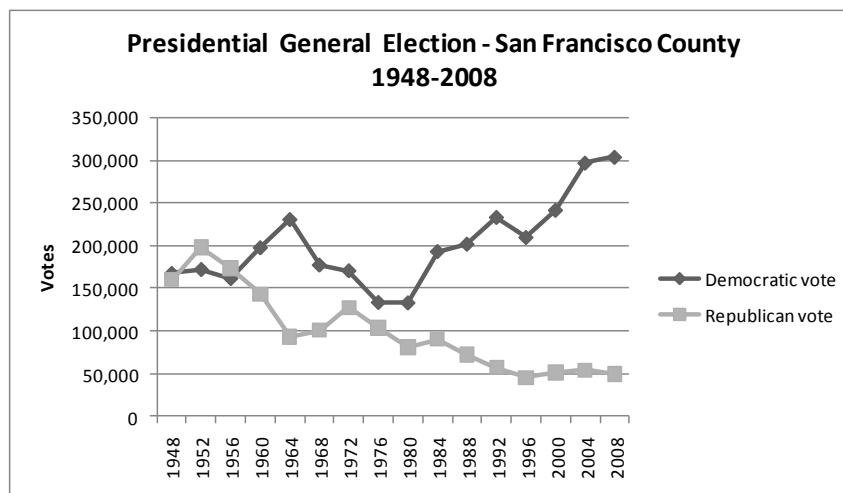
²⁴¹ *Id.* at 10.

²⁴² David Leip, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://www.uselectionatlas.org/RESULTS/national.php?year=2000&off=0&elect=0&f=0> (last visited Oct. 24, 2010).

fifty-eight counties (81%) became more partisan. Specifically, seventeen counties (29.3%) became more Democratic while thirty (51.7%) became more Republican.²⁴³ Only eleven (20.0%) became more closely contested.²⁴⁴

Three counties provide especially illuminating illustrations of this shift: San Francisco,²⁴⁵ Los Angeles, and Kern. San Francisco is an example of an area that became increasingly partisan during this period despite a stable overall population size. Figure 5 charts the Democratic and Republican votes in presidential general elections in San Francisco:

FIGURE 5²⁴⁶



For the first three elections, San Francisco leaned slightly toward the Republicans. However, starting in 1960, the Democratic candidate won the county, and Democrats have won every presidential general election since then. Starting in 1976, the Democratic margin of victory has increased from the previous elections, with the sole exception being in 1996. By 2008, the Republican candidate (McCain) garnered only 13.6% of San

²⁴³ BISHOP, *supra* note 233, at 44.

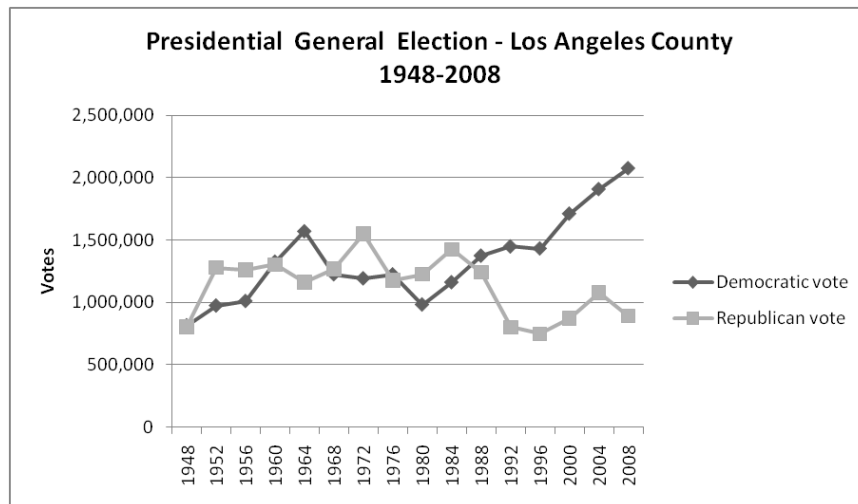
²⁴⁴ *Id.*

²⁴⁵ The California legislature consolidated the city and county of San Francisco in 1856. *Percy v. Long, Consolidated City and County Government of San Francisco*, 8 PROC. OF THE AM. POL. SCI. ASS'N 109, 109 (1912). It is the only consolidated city and county in California. *Id.* at 110.

²⁴⁶ CALIFORNIA SECRETARY OF STATE, *Statewide Election Results*, http://www.sos.ca.gov/elections/elections_elections.htm; Leip, *supra* note 242.

Francisco's vote.²⁴⁷ Those familiar with San Francisco's geography will know that this shift in partisanship did not result from population growth (there is nowhere to add population). In fact, between 1960 and 2000, the total population in San Francisco County increased by just 4.9%; during this period, the statewide population increased by 115.5%.²⁴⁸ Thus, this change must have resulted from geographic sorting; specifically, an influx of Democrats and outflow of Republicans.

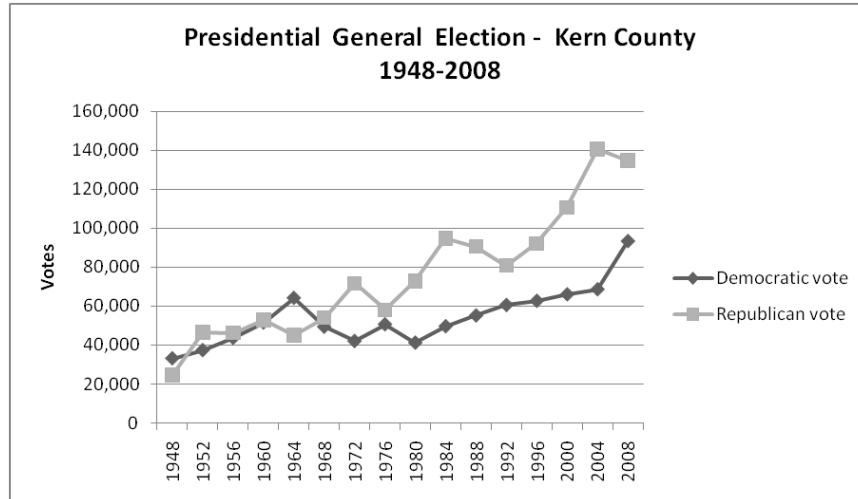
Neighboring counties Los Angeles and Kern provide striking examples of the divergence of growing populations, as one neighbor broke Democratic while the other Republican. Figures 6 and 7 chart these results:

FIGURE 6²⁴⁹

²⁴⁷ See Leip, *supra* note 242.

²⁴⁸ See *California Historic & Projected Growth 1790 to 2030*, NEGATIVE POPULATION GROWTH, <http://www.npg.org/states/ca.htm>; *San Francisco Population*, SFGENEALOGY.COM, <http://www.sfgenealogy.com/sf/history/hgpop.htm>.

²⁴⁹ CALIFORNIA SECRETARY OF STATE, *Statewide Election Results*, http://www.sos.ca.gov/elections/elections_elections.htm; Leip, *supra* note 242.

FIGURE 7²⁵⁰

From 1948 until 1984, Los Angeles County oscillated between supporting Republican and Democratic presidential candidates. Then, in 1988 it supported the Democratic nominee, and it has continued to do so since then by increasing margins. In Kern County, support for Democratic and Republican nominees stayed fairly close through 1976. Then, as in Los Angeles, the margin of support started to diverge, but in this instance in favor of Republicans. Moreover, unlike San Francisco, which had a relatively stable population from 1960 through 2000, both Los Angeles and Kern experienced significant growth. During this period, Los Angeles grew by 57.6%, while Kern grew by 126.6%.²⁵¹

This analysis focused on the trends evident in particular counties. The effects of this sorting are apparent, however, throughout the state. Beginning in 1948, sixteen general election contests (excluding propositions) had extremely close votes statewide; the final margins between the top two candidates were less than two percentage points.²⁵² These close statewide results, however, mask the sorting occurring at the local level. Figure 8

²⁵⁰ CALIFORNIA SECRETARY OF STATE, *Statewide Election Results*, http://www.sos.ca.gov/elections/elections_elections.htm; Leip, *supra* note 242.

²⁵¹ *Los Angeles County Population Growth*, CENSUSSCOPE, http://www.censusscope.org/us/s6/c37/chart_popl.html; *Kern County Population Growth*, CENSUSSCOPE, http://www.censusscope.org/us/s6/c29/chart_popl.html.

²⁵² The Appendix lists these specific elections and the distribution of votes by county by margin of victory.

presents the average percentage of votes cast by decade in landslide and “toss-up” counties in these narrowly-decided statewide elections:²⁵³

FIGURE 8²⁵⁴

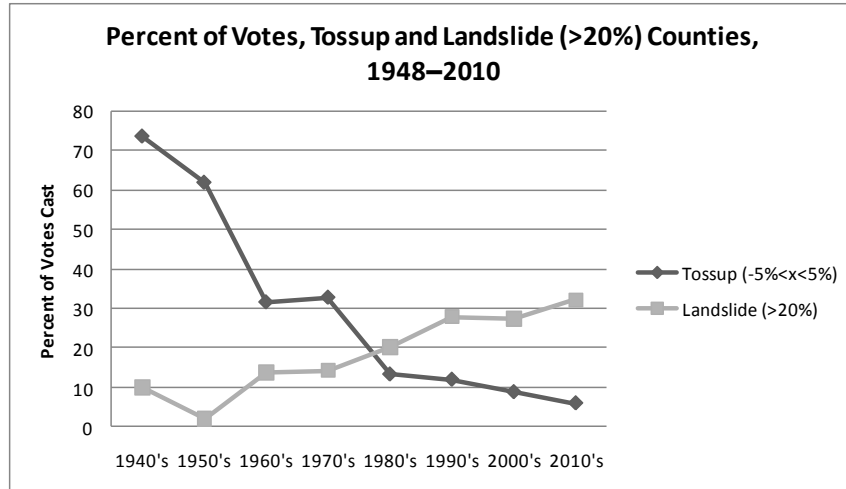


Figure 8 illustrates the diverging trends in California. In the 1940s, 73.5% of California’s votes were cast in counties in which the statewide vote differential between the top two candidates was less than two percentage points. Only 9.9% of the vote came from counties decided by landslide margins—at least twenty percentage points. Thus, three-quarters of Californians lived in counties with nearly equal populations of Democrats and Republicans. Starting in the 1980s, however, in these narrow statewide elections more Californians cast their votes in landslide counties than in toss-up counties. This trend has continued, so that in the 2000s less than ten percent of the votes came from toss-up counties, while more than one-quarter were cast in landslide counties.

Although the analysis of twenty percent landslide counties demonstrates the growth of politically extreme counties, political scientists recognize that a differential of ten percent or less defines marginal contests.²⁵⁵ Thus, we could use ten percent as

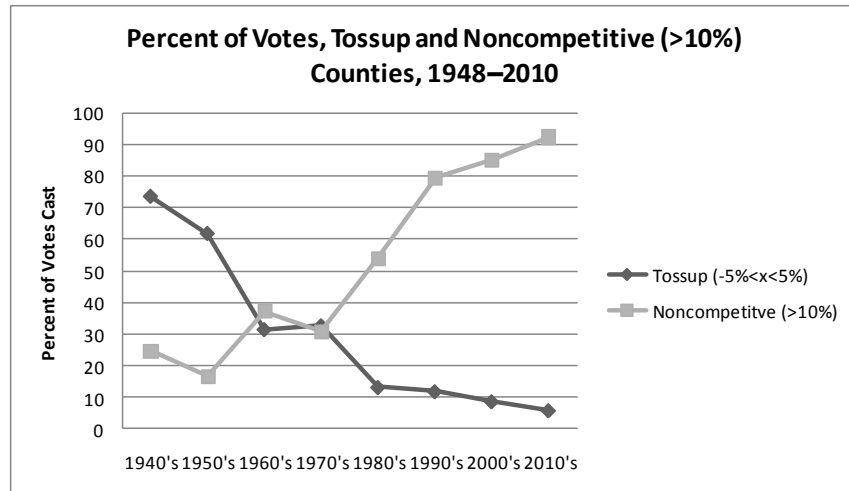
²⁵³ A “landslide” election refers to a contest in which the winner receives at least sixty percent of the vote. ALLAN J. LICHTMAN, *THE KEYS TO THE WHITE HOUSE: A SUREFIRE GUIDE TO PREDICTING THE NEXT PRESIDENT* 26 (2000). A “toss-up” election is an election in which the winning candidate prevails by less than five percent of the total vote.

²⁵⁴ See *infra* Appendix & note 353.

²⁵⁵ James E. Campbell, *The Stagnation of Congressional Elections*, in *LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS* 141, 142 (Michael J. Malbin ed., 2003).

the cutoff to examine noncompetitive counties. When we do so, we see some interesting changes:

FIGURE 9²⁵⁶



Not surprisingly, more voters live in ten percent noncompetitive counties than live in twenty percent landslide counties. Accordingly, the votes in noncompetitive counties basically draw even with the votes in toss-up counties by the 1960s and 1970s. The main difference, though, between Figures 8 and 9 is the magnitude in jump after the 1970s in the population in noncompetitive counties. By the 2000s, nearly ninety percent of votes in a statewide toss-up election were cast by voters who lived in counties decided by at least ten percent, or noncompetitive margins. Conversely, less than ten percent of the state's voters lived in marginally competitive counties, even when the election was a toss-up.

These changes probably did not result solely from population movement. It is more likely that group dynamics pushed group members to greater extremes as one group or another became dominant in a county.²⁵⁷ Sociologists have studied group dynamics and the effects of group homogeneity on behavior. They have found that heterogeneous groups tend to be more moderate; the differences within the group restrain group excesses.²⁵⁸ Groups of homogenous persons, conversely, tend to

²⁵⁶ See *infra* Appendix & note 353.

²⁵⁷ BISHOP, *supra* note 233, at 68.

²⁵⁸ *Id.*

move toward polarization.²⁵⁹ Group polarization occurs as homogenous groups discuss issues. Over time group members predictably move and coalesce, not toward a middle position, but toward a more extreme position than that held by the members initially.²⁶⁰ Continued dialog actually decreases variance among members and produces convergence on a relatively more extreme position.²⁶¹ This result occurs for two reasons. First, individuals seek acceptance, and so they adjust their position to conform to the dominant perspective of the group.²⁶² Second, with a relatively homogenous group, contrary positions are rarely considered, so the dominant perspective naturally becomes more convincing.²⁶³

Pervasive evidence demonstrates that group polarization theory extends to issues that bear directly on politics and political behavior.²⁶⁴ When applied to political dynamics, homogeneous groups similarly become self-reinforcing. For instance, in landslide counties, political minorities participate less throughout the political process, from volunteering to voting.²⁶⁵ As minorities retreat, the majority gains confidence in its positions and becomes more extreme.²⁶⁶

What are the implications of this population sorting for California's redistricting reform? Critics of legislative redistricting charge that the Legislature draws noncompetitive districts that favor one party over the other.²⁶⁷ This is a comforting hypothesis since it provides a readily-curable cause: legislators redrawing their own lines and thus choosing their voters, for an effect: the rise in noncompetitive districts. Even better, not only does it have a cause, it identifies the "bad guys" who perpetrated it, and what better bad guys could one suggest

²⁵⁹ "Polarization," in this context, occurs when the tendency of individual members of a group to lean toward a given position is enhanced after discussion or other exchanges. As a result, groups often make more extreme decisions than would the typical average individual in the group. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 85 (2000) [hereinafter Sunstein, *Deliberative Trouble?*].

²⁶⁰ Cass R. Sunstein, *The Law of Group Polarization* 9 (John M. Olin Law & Econ., Working Paper No. 91, 1999) [hereinafter Sunstein, *The Law*].

²⁶¹ Sunstein, *Deliberative Trouble?*, *supra* note 259, at 85–86.

²⁶² *Id.*

²⁶³ Sunstein, *The Law*, *supra* note 260, at 10.

²⁶⁴ Edward L. Glaeser & Cass R. Sunstein, *Extremism and Social Learning*, 1 J. LEGAL ANALYSIS 263, 269 (2009).

²⁶⁵ BISHOP, *supra* note 233, at 73.

²⁶⁶ *Id.* at 77. Not only do group dynamics relate to the decline in competitiveness in districts, they also help explain the rise in partisanship and the decline in moderation in legislatures. Studies at the national level have found that members of Congress from all regions have moved away from the center, and since the 1980s voters have become vastly more partisan. *Id.* at 246, 253.

²⁶⁷ *Id.* at 28–29.

than politicians?²⁶⁸ The hypothesis also has victims—besides the electorate generally, the centrists who otherwise would send moderate candidates to the Legislature.²⁶⁹ During the past two decades, however, county lines—which have not changed—have come to define highly-partisan enclaves. Although the line drawers decide the final district configurations, geographies underlying the districts have become more partisan anyway. Blaming legislators for the lack of competition may be appealing, but it ignores underlying realities.²⁷⁰

Other analyses confirm that the ability of line drawers to create competitive districts in California is limited. Cain et al. found that California's geography constrains the ability to draw competitive districts. When they instructed their map drawers to develop their random box plans (applying only equal population and compactness as constraints), fifty-three of the eighty assembly seats (66.3%) were unlikely to be even potentially competitive.²⁷¹ In other words, before taking into account any other criteria, which will necessarily reduce competition further, two-thirds of California's assembly districts will be noncompetitive.²⁷²

The Center for Governmental Studies (Center), which helped to draft Proposition 11 and which supported the measure, acknowledged that increasing competition in California would be difficult.²⁷³ In addition to the concentrations of urban Democrats, Republicans predominate in large regions of the state, notably the Central Valley and much of Orange and Riverside Counties.²⁷⁴ The Center noted that imposing competitiveness as a redistricting criterion would require stretching districts from areas dominated by one party to those controlled by the other party.²⁷⁵ Even if this were possible, such practices likely would violate other considerations, such as the compactness of districts

²⁶⁸ *Id.* at 29.

²⁶⁹ Levinson & Pildes, *supra* note 189, at 2380.

²⁷⁰ BISHOP, *supra* note 233, at 29.

²⁷¹ CAIN ET AL., *supra* note 224, at 16–17. For these plans, they instructed their map drawers to ignore all other federal and state criteria. The map drawers constructed four plans, and Cain et al. averaged the results of these plans. *Id.*

²⁷² The “random box” plans also illustrate another consequence of California's geography. Because of the large urban concentrations of Democrats in the San Francisco and Los Angeles metropolitan areas, anything other than a heavily-biased Republican gerrymander will result in a Democratic majority. *Id.* at 4. For instance, of the fifty-three safe assembly districts in the “random box” plans, forty (75.5%) were safe Democratic seats. *Id.* at 13. These safe-Democratic districts constitute half of the Assembly's eighty districts.

²⁷³ CENTER FOR GOVERNMENTAL STUDIES, *supra* note 127, at 27.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

and the preservation of subjurisdictions and communities of interest.²⁷⁶

Plotting results from the recent statewide election shows the problem that this sorting creates for drawing competitive districts in California. The 2010 contest for state controller was decided by less than one percentage point. Specifically, Harris, the Democratic candidate, defeated Cooley, the Republican candidate, by 0.6% of the vote. The results of this election, presented graphically in Figure 10, illustrate the geographic separation in California.



²⁷⁶ Cain et al. required their mappers to draw “fully balanced” plans which considered equal population, the Voting Rights Act, compactness, minimizing subjurisdictional splits, and maximizing the number of potentially competitive districts. This reduced the number of potentially competitive districts from an average of seventeen in their “random box” plans to fifteen in their “fully balanced” plans. CAIN ET AL., *supra* note 224, at 16–18. However, they define competitiveness as a thirteen-point range in voter registration, from a three percent Republican advantage to a ten percent Republican advantage. If the range is considered to be only three percent Republican or Democratic advantage, then the number of competitive districts falls to seven. *Id.* at 19. Even these numbers are not absolutes. Cain et al. acknowledged that these plans were not sufficiently legally polished to submit as actual proposals and that additional modifications might be necessary. *Id.* at 24–25.

²⁷⁷ CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE: 2002 CONTROLLER (2002) [hereinafter STATEMENT OF VOTE: CONTROLLER 2002], available at http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

Figure 10 illustrates that one continuous bloc of counties supported the Democratic candidate, while another bloc supported the Republican candidate. Of California's fifty-eight counties, only three (Alpine, Imperial, and Los Angeles) were not part of one of these two blocs. In the thirty-nine contiguous counties that supported Cooley, he won by a combined margin of 18.6% of the vote. In the sixteen contiguous counties that supported Harris, the Democrat won by a combined differential of 26.4%; in the three noncontiguous counties, her combined margin was 14.1%.²⁷⁸ Furthermore, only seven of the state's counties were marginally competitive (differential between the top two candidates of less than ten percent). These seven counties accounted for only 7.7% of the state's total votes.²⁷⁹

This analysis illustrates the difficulty that line drawers will have in crafting competitive districts. Because of the geographic sorting that has occurred, most areas in California are highly partisan. Redistricters can draw competitive districts only by crossing city and county lines to combine different types of communities.²⁸⁰ In areas of political segregation, no commission can draw competitive districts.²⁸¹ Furthermore, the requirements of the Voting Rights Act will further constrain the commission's ability to draw competitive districts. Thus, the commission can fulfill the promises of Proposition 11's supporters only by violating the only standards that the measure actually articulates.

V. NONCOMPETITIVENESS: CAN REDISTRICTERS PROVIDE THE CURE?

The competitiveness of districts has declined, but geographic patterns appear to play a major role in this development. Can a change in the persons redrawing the lines alter this outcome?

To determine whether commission-controlled redistricting enhances competitiveness, Jamie Carson and Michael H. Crespin analyzed the results from the four Congressional redistricting cycles occurring between 1972 and 2002.²⁸² Carson and Crespin concluded that legislative redistricting is more likely to lead to

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Recent Developments, *supra* note 212, at 542.

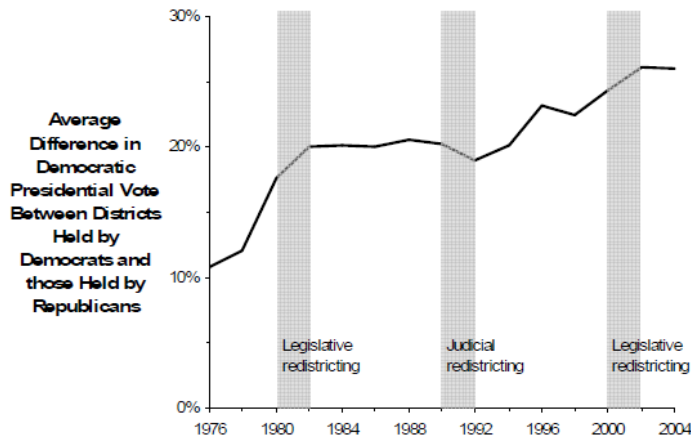
²⁸¹ Levinson & Pildes, *supra* note 189, at 2381.

²⁸² See generally Jamie Carson & Michael H. Crespin, Comparing the Effects of Legislative, Commission, and Judicial Redistricting Plans on U.S. House Elections, 1972–2002 (Mar. 11–13, 2004) (unpublished manuscript prepared for presentation at the Western Political Science Association Annual Meeting), available at <http://www.commoncause.org/atf/cf/%7BF3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/PaperRedistrictingPoliticalCompetition.pdf>.

the creation of noncompetitive districts than other procedures. Specifically, plans drawn by commissions, or the courts, tend to produce a greater level of competition than legislative-drawn plans.²⁸³ Seth Masket, Jonathan Winburn, and Gerald C. Wright looked at the competitiveness of state legislative districts. They found some evidence that legislative redistricting resulted in less competitive elections when compared to elections in districts drawn by neutral commissions, especially in contests involving incumbents.²⁸⁴

Although Masket et al. found that legislative redistricting created less competitive districts, another of their findings reinforces the geographic sorting hypothesis. They examined the difference in votes by assembly districts in presidential elections. Figure 11 presents the average difference in vote by districts from 1976 through 2004:

FIGURE 11²⁸⁵
**AVERAGE DIFFERENCE IN PRESIDENTIAL VOTE
 BY CALIFORNIA ASSEMBLY DISTRICT
 1976–2004**



²⁸³ *Id.* at 22. Carson and Crespin further found, however, that partisan redistricting strategies for Congressional seats depend upon the party's standing in Congress. A party not in control of Congress will tend to use more aggressive strategies in state redistrictings in an attempt to take away seats from the other party. Parties in control of Congress, however, are more likely to adopt conservative redistricting strategies to retain control. *Id.* at 22–23. But, sometimes if a party cuts its margins too thin, these strategies can backfire. For instance, in the 1980s, Indiana Republicans drew a plan that enabled their party to convert a 6-5 Democratic delegation to a 6-4 Republican advantage in 1982; by the end of the decade, the Democrats then reversed this to an 8-2 Democratic majority. More recently, a plan by Georgia Democrats intended to capture 7 of 13 seats resulted in securing only 5 seats. Lublin & McDonald, *supra* note 34, at 145.

²⁸⁴ Masket et al., *supra* note 218, at 17.

²⁸⁵ *Id.* at 38.

Figure 11 confirms that the vote differential increased after the legislative redistrictings of the 1980 and 2000 redistricting cycles. On average, the increase was by slightly less than three percent after the redistrictings. On the other hand, after the judicial redistricting in 1992, the differential declined by approximately one percent. The greatest change in differentials occurred, however, not after redistricting, but during the middle of the decades. In the 1970s, the differential increased by seven percent; in the 1990s, it rose by five percent (and was essentially flat during the 1980s).²⁸⁶ Alan I. Abramowitz, Brad Alexander, and Matthew Gunning similarly found that “[t]he most significant changes in competitiveness of [congressional contests] occurred between redistricting cycles.”²⁸⁷ Since the greatest decline in competitiveness occurred not after redistrictings, but between them, this suggests that the geographic sorting hypothesis better explains the decline.

Fortunately, two states, Arizona and Washington, already require that their redistricting commissions consider competitiveness in developing plans.²⁸⁸ If self-interested redistricting, rather than geographic sorting, better explains the decline in competitiveness, we should expect the districts in these states to exhibit significantly greater competitiveness than those in California—they do not.

²⁸⁶ *Id.*

²⁸⁷ Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. OF POL. 75, 79 (2006). Concerning the type of line drawer, they found “no evidence that redistricting by nonpartisan redistricting commissions or courts resulted in more competitive districts than redistricting by partisan state legislatures.” The primary exception was California, in which marginal congressional districts declined from fourteen to four. *Id.*

²⁸⁸ Two other states contemplated proposals to require competitive election districts. In Colorado, State Senator Ken Gordon introduced a bill to add competitiveness to the criteria that the legislature must use when it draws political boundaries. Eventually, however, these provisions were removed from the bill. *Redistricting*, COMMONCAUSE, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIWG&b=196481> (last visited Oct. 25, 2010). In November 2005, voters placed onto the Ohio ballot a proposition to reform its redistricting process. *State Issue 4: Amended Certified Ballot Language*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2005ElectionsResults/05-1108Issue4/State%20Issue%204%20Amended%20Certified%20Ballot%20Language.aspx> (last visited Oct. 25, 2010). This measure, Ballot Issue 4, would have substituted judicial appointment of members in place of appointment by elected officials. *Id.* More importantly, it would have required the commission to adopt the legislative and congressional plans—including any submitted by the public—that scored highest for competitiveness. *Id.* The measure lost, however, 30.3% to 69.7%. *State Issue 4: November 8, 2005*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2005ElectionsResults/05-1108Issue4.aspx> (last visited Oct. 25, 2010).

Washington State had originally required its Legislature to redraw the state's districts.²⁸⁹ Of the first ten redistrictings after statehood in 1889, however, the Legislature successfully redistricted only four times; the remaining times, the lines were redrawn by either the courts or voter initiatives.²⁹⁰ Therefore, in 1983, after the governor vetoed that decade's redistricting bill, the Washington Legislature proposed and the voters approved Constitutional Amendment 74 to shift responsibility for redrawing the lines to a bipartisan commission.²⁹¹ Pursuant to this amendment, the majority and minority leaders of the state Legislature each appoint one commissioner, and those four commissioners then appoint the remaining member.²⁹² The commission then submits its plans to the Legislature, which may alter the lines, but only after approval from two-thirds of the Legislature.²⁹³

As amended, Washington law delineates particular standards for the commission to follow in redrawing the lines. Washington law divides the state into forty-nine legislative districts. Each district elects one state senator and two members of the state house of representatives, who run for numbered posts.²⁹⁴ Legislative districts must have equal population.²⁹⁵ In addition, to the extent possible, districts should minimize splits of jurisdictions and be compact and contiguous.²⁹⁶ Finally, the commission must "encourage electoral competition."²⁹⁷

Much was made of the apparent success of the commission in bringing change to the state's congressional delegation. Indeed, prior to the 1992 redistricting, the delegation's members had

²⁸⁹ *Redistricting Facts*, WASH. STATE REDISTRICTING COMM'N, <http://www.redistricting.wa.gov/pages/facts.html> (last visited Oct. 25, 2010).

²⁹⁰ Herb Robinson, *Still Political, But Better Than Before*, SEATTLE TIMES, Nov. 19, 1990, at A8. The state had many colorful incidents in its history. Among labels applied to parts of plans were the "Kiskaddon Pimple," which described the addition of a single Snohomish County precinct—which included an incumbent's residence—into an otherwise all-King County district defined by a straight boundary with the exception of the precinct, and the "Rasmussen Stovepipe," a narrow corridor connecting Democratic incumbent senator Rasmussen's home to the Republican Lakewood area. Neil Modie, *Compromise Is the Key in Political Redistricting*, SEATTLE POST INTELLIGENCER, Mar. 19, 2001, at A7. Another plan submitted by activists, which would have placed eight incumbents into a single district was described as the "legislative equivalent of the Texas Chainsaw Massacre." Shelby Scates, *Trying to Slay the Gerrymander*, SEATTLE POST INTELLIGENCER, Dec. 22, 1991, at F2.

²⁹¹ David Ammons, *Citizen Panel Will Redraw State's Political Boundaries*, SEATTLE TIMES, Aug. 27, 1990, at D4.

²⁹² WASH. CONST. art. II, § 43, cl. 2.

²⁹³ WASH. REV. CODE ANN. § 44.05.100(1)–(2) (West 2007).

²⁹⁴ WASH. REV. CODE ANN. § 44.05.090(4) (West 2007).

²⁹⁵ WASH. REV. CODE ANN. § 44.05.090(1) (West 2007).

²⁹⁶ WASH. REV. CODE ANN. § 44.05.090(2) (West 2007).

²⁹⁷ WASH. REV. CODE ANN. § 44.05.090(5) (West 2007).

served an average of six terms in office. By 1994, the members averaged two terms.²⁹⁸ Table 4 tracks the changes in the party control of seats from the election, before the implementation of the commission's first plan to the present:

TABLE 4²⁹⁹
WASHINGTON CONGRESSIONAL DELEGATION
1990–2010

| | Democrats | Republicans |
|------|-----------|-------------|
| 1990 | 5 | 3 |
| 1992 | 8 | 1 |
| 1994 | 2 | 7 |
| 1996 | 3 | 6 |
| 1998 | 5 | 4 |
| 2000 | 6 | 3 |
| 2002 | 6 | 3 |
| 2004 | 6 | 3 |
| 2006 | 6 | 3 |
| 2008 | 6 | 3 |
| 2010 | 5 | 4 |

As Table 4 shows, in the first election under the 1992 plan, Democrats won three new seats, two from Republicans and one as a result of the state receiving an additional seat through reapportionment. Two years later, the Republicans took six seats from the Democrats. Over the next three elections, the Democrats won back four of those seats. Thus, during the five elections under this plan, incumbents lost seven elections and seats changed party hands twelve times.³⁰⁰ Elections under the

²⁹⁸ Louis Jacobson & Chris Cillizza, *Taking Redistricting out of Lawmakers' Hands*, NAT'L J., Mar. 10, 2001, at 728.

²⁹⁹ *United States Congressional Delegations from Washington*, WIKIPEDIA, http://en.wikipedia.org/wiki/United_States_congressional_delegations_from_Washington (last visited Oct. 29, 2010).

³⁰⁰ A closer analysis suggests that the turnover occurring in the 1992 plan may have resulted from national trends rather than any inherent competitiveness of the districts in the plan. Eight of the twelve seats that changed party hands under the 1992 plan did so in either the 1992 or 1994 elections. 1992 saw the defeat of Republican George H. W. Bush by Democrat Bill Clinton; the following election involved "the Republican tidal wave of 1994," in which Republicans won more than fifty congressional seats, including that of then-House Speaker Tom Foley of Washington. Rhodes Cook, *Hamstrung by Health Care? Two Ways to Lose a House Majority*, U. VA. CENTER FOR POL. (Mar. 25, 2010), <http://www.centerforpolitics.org/crystalball/articles/frc2010032501/>.

2002 redistricting plan, however, were a different matter. Only one seat changed parties under this plan.

Despite the use of a bipartisan commission that needed to comply with a specific competitiveness requirement, Washington's 2002 redistricting mirrored that of California. Much like the "incumbent protection gerrymander" passed by the California Legislature, the Washington bipartisan commission developed its own "status-quo plan."³⁰¹ As one of the members of the Redistricting Commission conceded, state legislative districts "tended to become slightly more Democratic if two or all three of their incumbent lawmakers were Democrats, and slightly more Republican if two or three incumbents were Republican."³⁰² In other words, the districts became less competitive.

An analysis of the Washington congressional and legislative districts reveals the dearth of competition under its 2002 status quo plan. Table 5 graphically presents the average margin of victory in the districts that the commission drew:

TABLE 5³⁰³
**AVERAGE MARGIN OF VICTORY, WASHINGTON
 CONGRESSIONAL, STATE SENATE, AND STATE
 REPRESENTATIVE DISTRICTS
 1992–2010**

| | U.S. Representative | State senator | State representative |
|---------|---------------------|---------------|----------------------|
| 1992 | 19.8 | 23.0 | 29.2 |
| 1994 | 16.8 | 34.7 | 34.8 |
| 1996 | 17.4 | 31.6 | 31.1 |
| 1998 | 28.1 | 47.2 | 43.0 |
| 2000 | 23.8 | 40.8 | 35.8 |
| 2002 | 26.0 | 54.6 | 42.2 |
| 2004 | 28.7 | 30.3 | 36.8 |
| 2006 | 29.1 | 44.3 | 48.2 |
| 2008 | 31.4 | 43.0 | 37.7 |
| 2010 | 20.2 | 40.8 | 35.7 |
| Average | 24.6 | 40.8 | 38.4 |

³⁰¹ David Ammons, *Citizen Commission Approves a New Map of Congressional Districts*, SEATTLE TIMES, Jan. 2, 2002, B1.

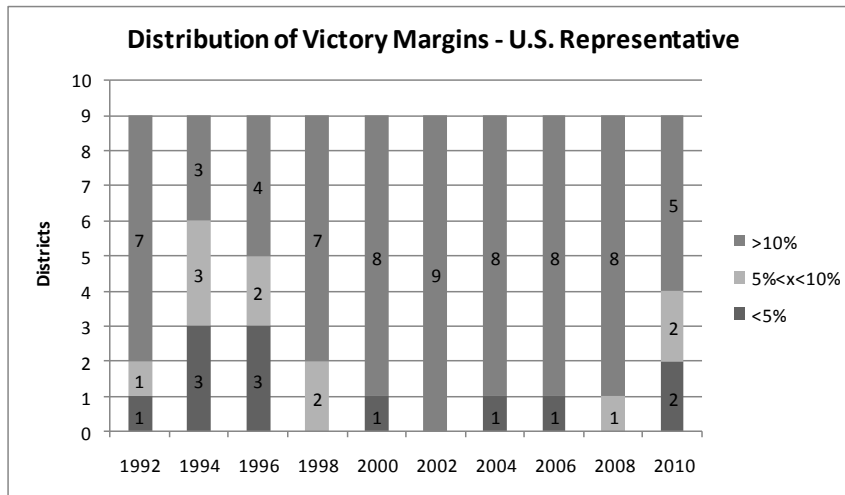
³⁰² Neil Modie, *Tale of 2 Legislators—and One District*, SEATTLE POST INTELLIGENCER, Jan. 22, 2002, at B6, available at http://www.seattlepi.com/local/55337_redistrict22.shtml.

³⁰³ See WASHINGTON SECRETARY OF STATE, *Previous Elections*, <http://wei.secstate.wa.gov/osos/en/PreviousElections/Pages/default.aspx> (last visited Jan. 7, 2011).

As Table 5 illustrates, from 1992 to 2008, the lowest average margin of victory in an election in districts drawn by the commission was almost 17%. In six of ten election cycles, the average margin of victory in general elections for state senate seats exceeded 40%. Overall, the average margins of victory under the commission's plans were 24.6% in congressional contests, 40.8% in state senate races, and 38.4% in state representative elections.

Because a large number of state senate and legislative districts were so uncompetitive that candidates ran uncontested, these contests skew the average victory margin upward. Therefore, the next three charts present the distribution of contests by range of margin of victory: less than five percent, between five and ten percent, greater than ten percent, and uncontested (no congressional races were uncontested):

FIGURE 12³⁰⁴



304 *Id.*

FIGURE 13³⁰⁵

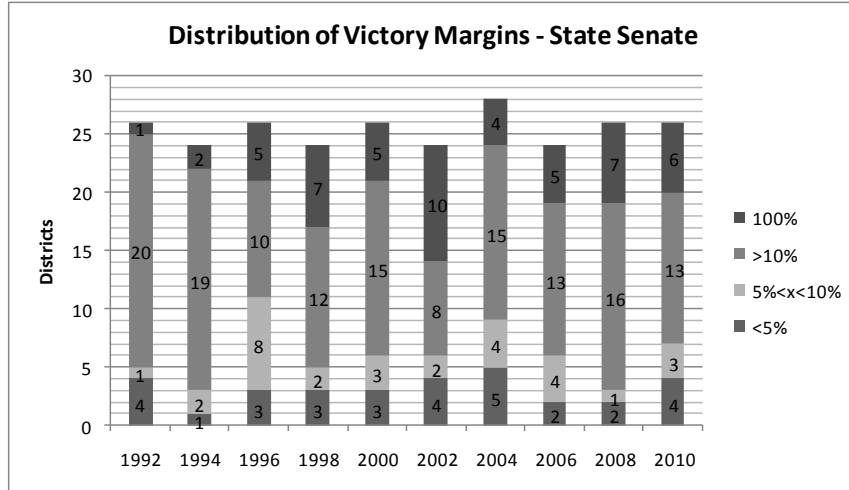
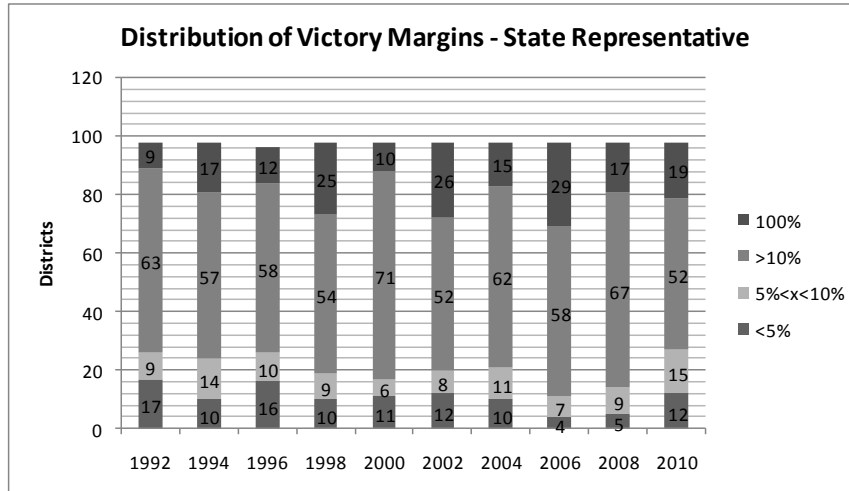


FIGURE 14³⁰⁶



These distributions also make apparent the increase in uncontested (presumably extremely safe) seats after the January 2002 “status quo” plan. Furthermore, despite the imposition of a competitiveness requirement, in seven of nine years for state senator and six of nine years for state representative, the number

305 *Id.*

306 *Id.*

of uncontested elections actually exceeded the number of toss-up elections.

Arizona provides a second example of a state that includes a competitiveness requirement. In 2000, Arizona voters approved an initiative that mandated consideration of competitiveness as a criterion for redistricting.³⁰⁷ The measure, Proposition 106, mandates creation of a five-member Independent Redistricting Commission (IRC) to perform the redistricting. Arizona's Commission on Appellate Court Appointments nominates candidates.³⁰⁸ The majority and minority leaders of the state senate and house each then appoint one commissioner.³⁰⁹ Next, the four commissioners appoint the fifth member, who serves as the chair.³¹⁰ No more than two members may be from the same political party.³¹¹ The Arizona Constitution requires this commission to redistrict the state's congressional and legislative districts.³¹²

As amended, the Arizona Constitution requires the commission to develop initial districts of equal population in a grid-like pattern. In the next phase, the commission makes adjustments as necessary to accommodate the six goals identified by Proposition 106 (equal population, Voting Rights Act compliance, compactness and contiguity, respect for communities of interest, geographic features and jurisdiction boundaries, and competitiveness).³¹³ In the remaining two constitutionally-mandated phases, the commission receives comments on its plan and makes final adjustments.³¹⁴

The commission's approval of a final plan in 2002 sparked litigation that did not conclude until a ruling by the Arizona Supreme Court seven years later. Concerning competitiveness, the Arizona Supreme Court concluded that the Arizona

³⁰⁷ Ronald J. Hansen, *2000 Redistricting Goal of Closer Elections Unmet*, ARIZ. REPUBLIC, Jul. 8, 2010, at A1.

³⁰⁸ ARIZ. CONST. art. 4, pt. 2, § 1(4)–(9).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ ARIZ. CONST. art. 4, pt. 2, § 1(3).

³¹² ARIZ. CONST. art. 4, pt. 2, § 1(14). Although Arizona also uses districts to elect the members of its state house, each district elects two representatives, the top two vote getters. ARIZ. CONST. art. 4, pt. 2, § 1(1). Accordingly, elections for the state house are not included in this analysis.

³¹³ ARIZ. CONST. art. 4, pt. 2, § 1(14).

³¹⁴ ARIZ. CONST. art. 4, pt. 2, § 1(14)–(16). Since Proposition 106 passed in 2000, the commission has been formed and drawn districts only in conjunction with the post-2000 Census round of redistricting. Despite the terms of the constitutional mandate, the commission did not actually adjust for competitiveness until after receiving comments. *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n*, 208 P.3d 676, 681 (Ariz. 2009).

Constitution, as amended by Proposition 106, required that the IRC create “more competitive districts to the extent practicable when doing so does not cause significant detriment to the other goals.”³¹⁵

Despite this goal of creating more competitive districts, the chair of the IRC conceded that most Arizonans would consider the commission’s work in this regard to be “an abject failure.”³¹⁶ He elaborated, “If your goal is competitive districts, I don’t think this helps you get down that road very far.”³¹⁷ In an analysis of the commission system, *The Arizona Republic* concluded that the commission “failed to meet a primary goal of making legislative elections more competitive.”³¹⁸

Analyses of the elections in the IRC’s districts support these conclusions and suggest again that geographic sorting cannot be overcome, even when governing law specifically instructs map drawers to do so. Despite the IRC’s charge to craft competitive districts, the resulting districts were anything but. Table 6 illustrates the average margin of victory in the districts that the commission drew:

TABLE 6³¹⁹
**AVERAGE MARGIN OF VICTORY,
 ARIZONA CONGRESSIONAL AND STATE SENATE
 DISTRICTS
 2002–2010**

| | U.S. representative | State senator |
|---------|---------------------|---------------|
| 2002 | 26.8 | 64.8 |
| 2004 | 40.1 | 62.3 |
| 2006 | 26.8 | 40.1 |
| 2008 | 22.7 | 44.2 |
| 2010 | 18.0 | 46.6 |
| Average | 26.9 | 51.6 |

Table 6 shows that the average margin of victory in districts drawn by the IRC approached thirty percent. Specifically, the average victory margin in general elections in congressional districts was 26.9%. For state senate contests, Table 6 shows

³¹⁵ *Arizona Minority Coalition*, 208 P.3d at 687.

³¹⁶ Hansen, *supra* note 307.

³¹⁷ Eli Rosenbaum, *Redistrict Reform’s Dead End*, WASH. POST, Oct. 29, 2005, at A23.

³¹⁸ Hansen, *supra* note 307.

³¹⁹ See *Previous Arizona Elections*, ARIZONA SECRETARY OF STATE, <http://www.azsos.gov/election/PreviousYears.htm> (last visited Jan. 8, 2011).

that the average margin of victory was 51.6%.

As with the Washington legislative elections, the large number of uncontested seats distorts these numbers. Therefore, Figures 15 and 16 reflect the ranges in which these contests fall:

FIGURE 15³²⁰

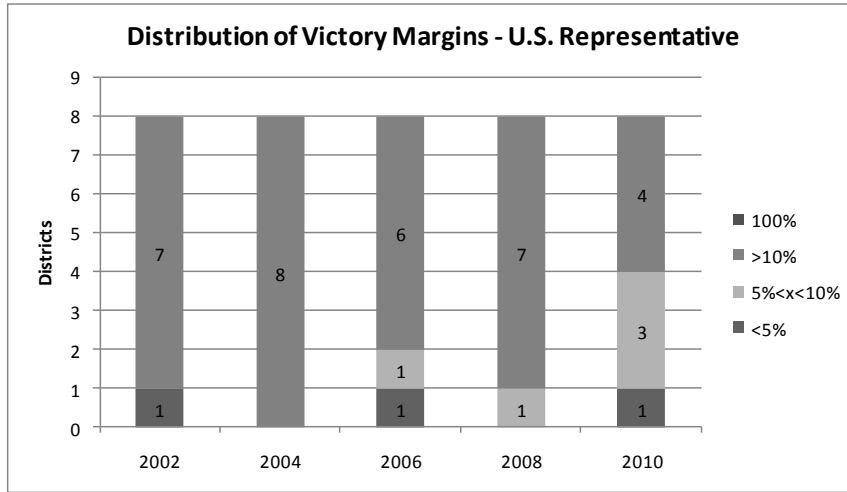
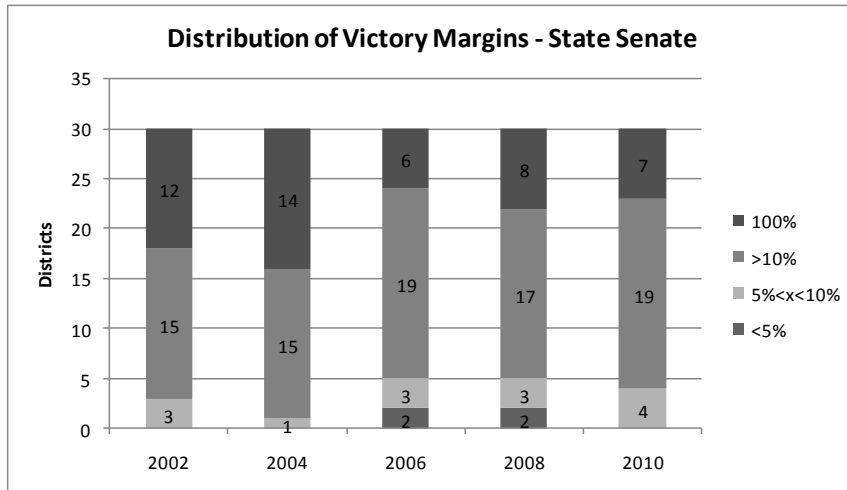


FIGURE 16³²¹



As with Washington's elections, the vast majority of

³²⁰ *Id.*

³²¹ *Id.*

Arizona's districts were decided by margins that exceeded ten percent. Of the 150 state senate contests over eight years in the "competitive" districts crafted by the IRC, only eighteen had margins below ten percent, and only four of those fell within five percent. Furthermore, in nearly one-third (forty-seven) of these contests, the winner did not face an opponent in the general election.

Why was the commission incapable of drawing competitive districts? Professor Michael McDonald, who worked as a consultant with the commission, noted that the state's redistricting requirements (similar to those of California except for the *addition* of competitiveness) prevented the creation of many competitive districts.³²² The commission's chair pointed to the Voting Rights Act's protection of minorities and their tendency to vote Democratic, and, echoing the findings of Cain et al., the IRC chair noted that the resulting concentration of Democrats in a small number of districts left few Democrats with which to make the remaining districts competitive.³²³

What do the experiences of Washington and Arizona suggest for California? Because of Arizona's sizeable minority population, redistricters' hands were tied when trying to draw competitive districts.³²⁴ California, however, has a much larger minority population than does the Grand Canyon State.³²⁵ To the extent demographics limited the competitiveness of Arizona's districts, California's redistricters will surely find their hands even more tightly bound by their own state's demographics.

Washington, however, had a proportionately smaller minority population than either Arizona or California had.³²⁶ Nevertheless, its commission did not craft significantly competitive districts. Instead, it chose to develop a "status quo" plan. More than anything else, this experience confirms that commissions, be they purportedly bipartisan or nonpartisan, are no more insulated from political considerations than is the Legislature.³²⁷ Washington's Redistricting Commission's five

³²² Hansen, *supra* note 307.

³²³ *Id.*

³²⁴ *Profile of General Demographic Characteristics*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/QTSubjectShowTablesServlet?_lang=en&_ts=313332516005 (select table "DP-1"; then click "Show Result") (last visited Jan. 16, 2011).

³²⁵ According to the 2000 Census, 63.8% of Arizona's population was non-Latino white, whereas only 46.7% of California's population was non-Latino white. *Id.*

³²⁶ The 2000 Census found that 78.9% of the Washington's population was non-Latino white. *Id.*

³²⁷ 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, 125 (2004).

members could not agree on redistricting plans. After missing the statutory deadline,³²⁸ the members eventually agreed to make only minimal changes to the previous plan to adjust for population shifts during the past decade. In the end, the only conclusion to which they could all agree was to sacrifice competitiveness.³²⁹

VI. IS PROPOSITION 11'S REDISTRICTING COMMISSION THE BEST MEANS TO REDRAW CALIFORNIA'S LINES?

Will Proposition 11's Citizens Redistricting Commission be able to draw more competitive districts? Arizona and Washington, states which have imposed competitiveness goals on their redistricting commissions, have had little success in achieving competitiveness. Since California has not statutorily included competitiveness among its requirements,³³⁰ the likelihood of California's commission achieving significant competitiveness in the state's districts is minimal. Demographics³³¹ and federal law³³² will work against the commission. Arizona and Washington, states with predominantly white populations, needed to concentrate few of their minority (and typically Democratic) voters into districts to comply with the Voting Rights Act. Nevertheless, few of those state's districts are competitive.³³³ California's majority-minority population, however, necessitates the drawing of numerous majority-minority, heavily-Democratic districts.³³⁴ This concentration of Democratic voters, along with the population's geographic sorting, will render the drawing of a significant number of competitive districts quite difficult.

If the commission will not be effective, might it actually be a step back? Some of the differences between independent commissions and the Legislature may make the CRC the less desirable body to redistrict the state.

³²⁸ The Washington legislature needed to pass a law retroactively changing the statutory deadline after the commission could not approve a congressional plan until more than two weeks after the required date. David Ammons, *Lawmakers to Rescue New Districts*, SEATTLE TIMES, Jan. 10, 2002, at B5.

³²⁹ This is an example of the problem of the "bipartisan gerrymander." A "bipartisan commission," with equal representation for both major parties, tends not to result in a nonpartisan result, but rather a bipartisan one. Desiring to avoid gridlock, commissioners draw a map that is acceptable to both sides. As with the 2002 California legislative redistricting and the 2002 commission redistrictings in Arizona and Washington, rather than draw competitive districts, such plans primarily strengthen the partisan district majorities already in place. Rosenbaum, *supra* note 317.

³³⁰ See *supra* note 171.

³³¹ See *supra* text accompanying notes 233–275.

³³² See *supra* text accompanying notes 220–232.

³³³ See *supra* text accompanying notes 302–305, 319–321.

³³⁴ See *supra* text accompanying notes 226–230.

One of the primary arguments for adopting a commission was to take redistricting away from the self-interested Legislature.³³⁵ The Legislature may have a vested interest in the outcome, but it also has more relevant knowledge and experience. Legislators are extremely familiar with their districts, their constituents, and their needs, and they usually have a better understanding of these concerns than do outsiders.³³⁶ Legislators are thus best able to tailor districts to represent constituent communities and their interests.³³⁷ Nathaniel Persily experienced this firsthand when he assisted courts in drawing redistricting plans for New York and Maryland. In one instance, he moved an uninhabited swamp from one district to another. Since this was uninhabited swampland, a person unfamiliar with the district, such as Persily, would justifiably have thought that such a move would have no redistricting consequences (since it had no population) and no political consequences (since the land had little value). A legislator informed Persily, however, that this shift would disrupt environmental projects that the legislator initiated and hoped to complete. Thus, a move that would have no apparent political effect had tangible policy consequences: persons unfamiliar with the district would not be able to incorporate this concern.³³⁸

Furthermore, the elected nature of legislators, rather than rendering them less qualified, actually makes legislators better suited to make the choices required by redistricting. The remap process inherently involves tradeoffs among numerous communities, constituent interests, and policies.³³⁹ Redistricting “involves give and take in resolving conflicts among the various standards and in considering the concerns, desires, and objections of numerous interested persons and groups.”³⁴⁰ Line drawers also make decisions about service relationships between representatives and constituents and their placement within larger policy programs or decisions.³⁴¹ Legislators routinely balance complicated policy choices and, as elected

³³⁵ See *supra* text accompanying notes 33–36.

³³⁶ Interview of Dr. Shauna Reilly, (Jan. 27, 2010), at 1:1-10 (on file with author).

³³⁷ Justin Levitt & Bethany Foster, *A Citizen's Guide to Redistricting*, BRENNAN CENTER FOR JUSTICE 23 (2008), http://brennan.3cdn.net/58180b7e66ce3d66bb_5sm6bvr97.pdf.

³³⁸ Persily, *supra* note 205, at 678 nn.94–95. Persily also found that line drawers who are unfamiliar with local communities are more likely to draw district boundaries coterminous to subjurisdiction boundaries even when the actual communities of interest extend beyond those lines. *Id.* at 678.

³³⁹ Brunell & Buchler, *supra* note 199, at 448–49.

³⁴⁰ *Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 100 (2006).

³⁴¹ Persily, *supra* note 205, at 679.

representatives, are particularly qualified to do so.³⁴² The Supreme Court has recognized that legislatures exercise political judgment in balancing competing interests,³⁴³ and that legislatures are the institutions “best situated to identify and then reconcile traditional state policies” within the redistricting framework.³⁴⁴ In contrast to legislatively-controlled redistricting, an appointed commission not only empowers less experienced persons to make these tradeoffs, but the commissioners also lack the accountability for their actions that legislators must confront with each election.³⁴⁵

Legislative redistricting does have significant advantages. Moreover, legal and demographic hurdles will prevent the CRC from achieving its objective of significantly increasing the competitiveness of California’s districts.

VII. KEEPING THE COMMISSION AND RETURNING REDISTRICTING TO THE LEGISLATURE—BUT WITH A TWIST

Because of the Legislature’s knowledge regarding factors that are relevant to the formulation of districts, as well as its experience in balancing interests, it is the appropriate body to draw the redistricting plan. An independent commission, however, could still serve a useful function in the redistricting process.

The commission could review the plan developed by the Legislature and propose changes. To add teeth to its recommendations, California law should give deference to the commission’s proposals.

An independent commission is better suited to review a redistricting plan, rather than to create it. Because of commission members’ lack of familiarity with the communities and the government’s relationship to them, they will benefit by having additional time to get up to speed and by observing the Legislature’s redistricting hearings and decisions. Once the

³⁴² Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 697 (2006).

³⁴³ *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

³⁴⁴ *Connor v. Finch*, 431 U.S. 407, 414–15 (1977).

³⁴⁵ Kang, *supra* note 342, at 690. Critics also question whether an appointed body can be representative of as diverse a population as that of California. This argument was particularly powerful in helping defeat Proposition 77 and its redistricting commission of three retired judges. Huefner, *supra* note 115, at 40–41. Although opponents of Proposition 11 raised this point, it obviously did not carry the day. Nevertheless, as of this writing, the application period for the Citizens Redistricting Commission has closed, and only 11,000 of the 30,000 applicants are from minority candidates. Malcolm Maclachlan, *Group Effort Pushed Minority Outreach for Redistricting Commission*, CAPITOL WKLY., Feb. 25, 2010, at A1.

Legislature has completed its plans, the commission could then review those lines. Their review could proceed at three levels:

(1) Overall architecture—this would look at the overall demographics of the plan. The commission would compare the share of registered voters in each major party and the racial and ethnic percentages of the statewide and regional population and compare them to the anticipated totals for the proposed plans. The objective of this review is to ensure that no groups are especially over- or under-represented at the statewide level. An example of a plan that would cause the commission concern would be the 2002 Ohio redistricting plans, in which Republicans controlled 61.6% of the seats even though they represented only 49.0% of the state's registered voters.³⁴⁶

(2) Review of specific districts—the commission would review the configuration of specific districts for irregularities. Concerns here would include unnecessary splitting of communities of interests and sub-jurisdictions, lack of compactness, irregular district shapes, combination of dissimilar communities, and other anomalies.

(3) A consideration of specific lines—this would focus on specific streets and geographic features that the plan uses to form districts. Practices that the commission addresses here might include the “Kiskaddon Pimple” and the “Rasmussen Stovepipe” from the Washington plans—situations where the overall district configuration is acceptable but a particular district's exclusion or inclusion of a few blocks lacks justification.³⁴⁷

To assist its review, the commission would consider public testimony provided to the Legislature and the complete record of its deliberations. It could also convene its own hearings to receive public comment about the Legislature's plans, which would help to direct the commission's attention. After concluding its review, the commission would submit to the Legislature written comments concerning the acceptability of its plan.

To encourage the Legislature to adopt the commission's recommendations, the deference that courts normally apply to the Legislature's plans should instead shift to the commission's

³⁴⁶ Joe Hallett, *Redistricting Comes Under Scrutiny*, COLUMBUS DISPATCH, Oct. 27, 2005, at A1. Not only did Ohio's plans create a disparity between party registration and electoral success, but its plans caused excessive noncompetitiveness in its districts. In the election immediately preceding Issue 4, the state's redistricting measure, the mean margin of victory in Ohio's 133 congressional and state legislative districts was forty-two percent. *Id.*

³⁴⁷ Modie, *supra* note 290.

work. As discussed previously, prior to the adoption of Proposition 11, California law mandated that the Legislature redistrict the state.³⁴⁸ Under that process, the courts held that California law entitled the Legislature's determinations to great deference as long as they constituted reasonable applications of controlling state and federal law. Courts extended such deference even when equally reasonable alternatives might be available.³⁴⁹ Courts deferred to the Legislature in the absence of a showing that it unmistakably violated a particular provision of the law.³⁵⁰ When considering a legislative redistricting, the court not only applied deference, but judicial restraint.³⁵¹ For constitutional challenges to legislative redistrictings, courts have presumed that the plans were constitutional and placed the burden of proving a violation upon the challenger.³⁵²

If the courts instead extend this deference to the conclusions of the reviewing commission, the Legislature would confront a choice. It could modify its plan to be consistent with the comments of the commission, or it could decline to alter its plan. However, in any subsequent challenge on grounds raised by the commission, courts would defer to the commission's recommendations as long as they were reasonable. Thus, to defend its unaltered plan, the Legislature would need to overcome the deference extended to the commission's recommendations.

Two examples show the effectiveness of this change. First, assume a commission had reviewed the Washington redistricting plan that contained the "Rasmussen Stovepipe." A reviewing commission might recommend that the narrow "Stovepipe" extension sliced through a community, combined dissimilar populations, and should be eliminated. In future litigation, the Legislature would need to argue that such a recommendation was not reasonable. In a second example, assume a commission had reviewed the Ohio redistricting plan and suggested that the Legislature modify it to balance more evenly the number of majority-Democratic and majority-Republican districts under the plan. Remember that Republicans controlled sixty percent of the districts even though they held only a forty-nine percent to forty-eight percent registration lead statewide. Again, in any future

³⁴⁸ See *supra* Part I.A.

³⁴⁹ *Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 100–01 (2006).

³⁵⁰ *Id.* at 98.

³⁵¹ *Assembly v. Deukmejian*, 639 P.2d 939, 958 (1982). See also *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (observing that caution is particularly appropriate where the legislature has "articulated a legitimate political explanation for its districting decision").

³⁵² *Nadler*, 41 Cal. Rptr. 3d at 98.

litigation, the Legislature would need to explain why drawing a more balanced plan was not reasonable. Conversely, if the commission recommends that a politically-balanced plan be tilted to favor one of the parties, the Legislature might be willing to contest in court the reasonableness of such a recommendation in a legal challenge to its plan.

The establishment of a reviewing commission thus has several advantages. First, it places upon the Legislature a tremendous burden to overcome if it decides not to adopt the commission's recommendations. Even if the Legislature believes its initial plan is justified, it must be able to establish that the commission's alternative is not even reasonable. Because of the high burden it must satisfy, counsel often will urge the Legislature to adopt the recommendations so as to retain control over the remap process. A second advantage is that the Legislature retains responsibility for the initial architecture of the plan in the Legislature, the body that is most familiar with the pertinent representational considerations, the best able to begin the process quickly, and most accountable to the voters. This system, however, would provide a significant check on the Legislature. Third, this system better utilizes the commission, allowing it more time to prepare and not demanding that it learn the minutiae of district representation, while providing a fuller record for its consideration. Fourth, it allows the Legislature to retain its plan if it believes the recommendations of the commission are not reasonable. Finally, it allows for public comment after the Legislature has developed its plan.

CONCLUSION

Proposition 11's redistricting commission is unlikely to provide a significant change in the competitiveness of the state's districts. A better approach would leave redistricting in the hands of the body most experienced in performing the policy trade-offs required by the redistricting process. A commission could be most helpful not in drawing lines, but in reviewing the maps developed by the Legislature.

APPENDIX³⁵³

| | | Statewide Differential | Counties Decided by: | | |
|------|---------------------|---------------------------|----------------------|------|------|
| | | | <5% | >10% | >20% |
| 1948 | President | 0.5 | 73.5 | 24.5 | 9.9 |
| 1958 | Lieutenant Governor | 1.8 | 63.7 | 20.2 | 2.0 |
| 1958 | Secretary of State | 0.9 | 61.0 | 14.6 | 2.8 |
| 1958 | Controller | 0.6 | 60.7 | 14.8 | 1.2 |
| 1960 | President | 0.5 | 51.4 | 30.3 | 5.1 |
| 1966 | Controller | 1.0 | 6.5 | 41.1 | 10.4 |
| 1970 | Attorney General | 1.4 | 7.4 | 45.4 | 18.8 |
| 1976 | President | 1.8 | 55.5 | 28.8 | 8.7 |
| 1982 | Governor | 1.2 | 9.8 | 32.4 | 19.6 |
| 1986 | Senator | 1.4 | 16.5 | 75.2 | 20.7 |
| 1990 | Attorney General | 0.4 | 32.7 | 57.6 | 23.1 |
| 1994 | Senator | 1.9 | 7.5 | 90.7 | 40.4 |
| 1994 | Secretary of State | 0.5 | 6.3 | 87.3 | 21.4 |
| 1998 | Secretary of State | 1.1 | 0.7 | 81.9 | 26.3 |
| 2002 | Controller | 0.3 | 8.7 | 85.1 | 27.4 |
| 2010 | Attorney General | 0.6 | 5.8 | 92.3 | 32.4 |

³⁵³ See DAVID LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/index.html> (last visited Jan. 9, 2011); *Statewide Election Results*, CALIFORNIA SECRETARY OF STATE, http://www.sos.ca.gov/elections/elections_elections.htm (last visited Jan. 9, 2011); *United States Presidential Election in California, 1948*, WIKIPEDIA, http://en.wikipedia.org/wiki/United_States_presidential_election_in_California,_1948 (last visited Jan. 9, 2011). The author's calculations, based on data obtained from the above sources, are on file with the author.

