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THE RED AND BLUE GOLDEN STATE: WHY CALIFORNIA’S PROPOSITION 11 WILL NOT PRODUCE MORE COMPETITIVE ELECTIONS

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I. 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. The initiative shifted responsibility for the redrawing of state legislative lines from the legislature to an appointed commission. Supporters promised that by taking the process from self-interested legislators, the resulting districts would be more competitive. An analysis of the state’s demographics and the experiences of other states, however, 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 by, rather than drawing the initial plan, reviewing and revising plans developed by the legislature.

This article first reviews the legal standards applicable to redistricting in California. Then, it discusses the most recent redistrictings and five failed attempts to alter the
redistricting process through ballot initiatives. Section III addresses Proposition 11, the campaign, and the 2008 general election. Section IV explores the benefits and detriments resulting from more competitive district elections, the much-touted benefit of Proposition 11. The fifth section analyzes the decline in competitive elections in California and causes other than redistricting for this decline. Section VI looks at the experience of other states that have employed commissions and imposed competitiveness standards on the drawing of their legislative districts. The last two sections discuss propositions on the November 2010 ballot that impact Proposition 11’s changes and an alternative approach that would provide redistricting roles for both an independent commission and the legislature.

II. REDISTRICTING, CALIFORNIA STYLE

Proposition 11 was actually the most recent salvo in ongoing redistricting battles in California. To best appreciate the measure’s significance, a review of the state’s redistricting history is helpful. First, though, 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. Then, 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.\(^1\) The United States Constitution requires the federal government to
conduct a census every ten years for the purpose of apportioning congressional seats
among the states.\(^2\) The states typically redistrict their own state legislatures in
conjunction with this process. The California Constitution, for instance, requires that the
state redistrict its election lines once every decade in the year following the national
census.\(^3\) Historically, the California Assembly has shouldered responsibility for redrawing
state legislative and congressional district lines.

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,\(^4\) the Court held that political
equality under the Constitution “can mean only one thing – one person, one vote.”\(^5\)
This means that district populations should be as nearly equal as possible.\(^6\) Courts have
applied this standard rigorously in congressional redistrictings.\(^7\) In the context of state

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\(^1\) Population Div., U.S. Census Bureau, What You Should Know About the Apportionment Counts 4
(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. \textit{Id.}

\(^2\) Article 1, Section 2, Constitution of the United States. Article 1 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. \textit{Id.} Now, “Census Day” is
the first day of April in years ending in zero. http://2010.census.gov/2010census/how/key-
dates.php. 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).

\(^3\) California Constitution, Article XXI, §§ 1-2.


\(^5\) \textit{Id.} at 558.

\(^6\) To calculate the ideal district population, divide the state’s total population by the number of
districts in the legislative body. Thomas I. Brunell, Redistricting and Representation: Why
Competitive Elections Are Bad for America S4 (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

\(^7\) 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”).
legislative plans, the Supreme Court has allowed state legislatures greater latitude.\textsuperscript{8} Indeed, the Court has indicated that deviations of at least 16 percent are acceptable.\textsuperscript{9}

The other federal law that controls redistricting is the Voting Rights Act of 1965, as amended.\textsuperscript{10} Depending upon the state involved, two provisions of the Act may have implications for redistricting. Section 2\textsuperscript{11} of the Act applies to all states. Where certain preconditions exist,\textsuperscript{12} Section 2 prohibits dilution of minority voting strength.\textsuperscript{13} 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 in as few districts as possible, thereby creating larger minority populations than necessary to elect their candidates of choice and minimizing the number of majority-minority districts.\textsuperscript{14} “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.\textsuperscript{15} Finally, “stacking”

\begin{itemize}
  \item \textsuperscript{8} Mahan v. Howell, 410 U.S. 315, 327 (1973).
  \item \textsuperscript{10} 42 U.S.C. § 1971, et seq.
  \item \textsuperscript{11} 42 U.S.C. § 1973.
  \item \textsuperscript{12} 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 usually to defeat the minority’s preferred candidate. Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).
  \item \textsuperscript{13} Upon satisfaction of the three Gingles preconditions, the court 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).
  \item \textsuperscript{14} Frank R. Parker, Racial Gerrymandering and Legislative Reapportionment, in Minority Vote Dilution 89, 96 (Chandler Davidson ed., 1989).
  \item \textsuperscript{15} \textit{Id.} at 89.
\end{itemize}
refers to combining concentrations of a minority population with larger concentrations of a white population to ensure that the districts contain white voting majorities.\textsuperscript{16}

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 United States Attorney General or the United States District Court for the District of Columbia.\textsuperscript{17} Section 5 prohibits "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."\textsuperscript{18} Section 5 extends only to 9 states in their entirety and to portions of 7 others.\textsuperscript{19} Four counties in California fall under Section 5.\textsuperscript{20} Section 5 applies when a covered jurisdiction adopts a redistricting plan.\textsuperscript{21} 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.\textsuperscript{22}

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 population\textsuperscript{23} and also requires that they be contiguous.\textsuperscript{24} In addition, the California Constitution provides that the geographical integrity of cities and counties be respected to the extent possible without violating other requirements.\textsuperscript{25}

\textsuperscript{16} \textit{Id}. at 92.
\textsuperscript{17} 42 U.S.C. § 1973(c).
\textsuperscript{18} \textit{Beer v. United States}, 425 U.S. 130, 141 (1976).
\textsuperscript{19} 28 CFR § 51 (Appendix).
\textsuperscript{20} \textit{Id}. The counties are Kings, Merced, Monterey, and Yuba.
\textsuperscript{21} 28 CFR § 51.13(e); \textit{Beer}, 425 U.S. at 133.
\textsuperscript{23} \textit{Id}. at (b).
\textsuperscript{24} \textit{Id}. at (c). Proposition 11 moved this provision to Article XXI, § 2(d)(3).
\textsuperscript{25} \textit{Id}. at (e). After Proposition 11, this provision appears at Article XXI, § 2(d)(4).
In addition, California recently passed its own state voting rights act.\(^{26}\) 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.\(^{27}\) 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 placing of responsibility in the hands of the legislature has long been a target of criticism. In general, critics have charged that legislators are inherently self-interested in the outcome of redistricting. 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.\(^{28}\) Critics complain that “politicians get to choose their voters, rather than the reverse.”\(^{29}\)

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\(^{27}\) Cal. Elec. Code § 14028(c).
\(^{28}\) George Passantino, Redistricting in California: Competitive Elections and the Effects of Proposition 11 (October 2008) at 13, http://reason.org/files/79d00eb443669b026c8c37c483f0b9b0.pdf; David Lublin & Michael P. McDonald, Is It Time to Draw the Line? The Impact of Redistricting on Competition in State House Elections, 5 Election Law Journal 144, 145 (2006). 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 the increasing of 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. Lublin & McDonald, *supra*, at 145.
Carolina State Senator Mark McDaniel rather candidly admitted about the redistricting process, “We are in the business of rigging elections.”

While these arguments have tremendous theoretical 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 to which proponents of Proposition 11 pointed during the 2008 campaign was the decline in changes of party control of California’s Assembly districts. Figure 1 tracks the number of seats in the Assembly that have changed parties between 1960 and 2008:

![Assembly District Party Turnover](http://www.joincalifornia.com/)

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

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31 http://www.joincalifornia.com/.
these occurred in the first elections after the implementation of new redistricting plans.\textsuperscript{32} 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 aberrationally high changes of seats between the major parties? Possibly because the drawers of those plans were judges and not the legislature.\textsuperscript{33}

The other trend which Figure 1 highlights the overall decline of party turnover during the period analyzed. In the 1960’s, the yearly exchange of seats averaged eight per election. By the 2000’s, the average turnover was down to less than one per election. As was frequently noted during the Proposition 11 campaign,\textsuperscript{34} in the two elections prior to the 2008 election, no Assembly seats changed party hands.\textsuperscript{35}

Another possible indicator of legislative misuse of the redistricting process is the decline in competitive elections. Generally scholars have noted the decline over the past thirty years of marginal districts.\textsuperscript{36} California’s elections have followed this pattern; the number of competitive assembly seats has steadily decreased. For instance, Passantino tracked the number of assembly seats where the winner won no more than 53 percent of the vote.\textsuperscript{37} Figure 2 presents the results:

\textsuperscript{32} In the 1970’s, 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. 1974 was the first election conducted under the permanent plan. See infra notes 45-46, 58-60 and accompanying text.

\textsuperscript{33} Id.


\textsuperscript{35} See supra Figure 1. Ironically, this trend ended in the same election in which the voters approved Proposition 11. Five assembly seats changed party hands in November 2008.

\textsuperscript{36} Samuel Issacharoff & Jonathan Nagler, Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections, 68 Ohio State Law Journal 1121, 1124-25 (2007) (showing a decline over the past 60 years in congressional elections decided by ten percent and five percent margins between the top two candidates).

\textsuperscript{37} Passantino, supra note 28 at 12.
In many respects, Figure 2 presents a picture quite similar to that of Figure 1. In both Figure 1 and Figure 2, the highest peak occurs in 1974, which is immediately subsequent to the adoption of that year’s plans. The second peak in Figure 1, however, occurs in 1992, but in Figure 2 it does not arise until 1996. In other words, in the 1990’s, 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 effect competitiveness. Although Figure 2 also suggests that the number of competitive districts had been in decline since the

\[\text{http://www.joincalifornia.com/page/10.}\]
1992 redistricting, as with Figure 1, it illustrates a significant rebound in the 2008 general election.\(^{39}\)

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.”\(^{40}\) One decade later, the available technology had changed dramatically. The United States Supreme Court described the capabilities of one such 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.\(^{41}\)

\(^{39}\) 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 instead the national trend supporting Democratic candidates in that election. Gary C. Jacobson, The 2008 Presidential and Congressional Elections: Anti-Bush Referendum and Prospects for the Democratic Majority, Political Science Quarterly Volume 124 Number 1, 1-30, 1 (2009).

\(^{40}\) Micah Altman, Karin Mac Donald, and Michael McDonald, From Crayons to Computers: The Evolution of Computer Use in Redistricting, Social Science Computer Review, Vol. 23 No. 3, Fall 2005 at 336. 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, so knowledgeable was Burton that he was able to create a district plan that swung five congressional seats to the Democrats. Id.

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.

Three of California’s past four redistrictings were subjects of litigation.\(^4^2\) In 1971, the Democratic-controlled legislature and Republican Governor Ronald Reagan failed to agree to a redistricting plan.\(^4^3\) Accordingly, the California Supreme Court adopted temporary redistricting plans for the 1972 election.\(^4^4\) When the legislature did not enact redistricting plans in 1972, the Supreme Court appointed special masters to develop the plans,\(^4^5\) which it eventually adopted.\(^4^6\)

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\(^4^2\) See infra this section. Despite the recurring partisan conflict over California’s redistrictings during the past half-century, earlier redistricting disputes revolved around very different issues. After statehood, the California Constitution required that the senate and assembly districts be equally populated. Stephen Ansolabehere, James M. Snyder, Jr., & Jonathan Woon, Why Did a Majority of Californians Vote to Limit Their Own Power? (1999) at 5, http://dspace.mit.edu/bitstream/handle/1721.1/18096/apsa_99_v2.pdf?sequence=1. However, in the 1920’s, Los Angeles’s burgeoning population necessitated the addition of three districts in Southern California, and the legislature could not agree which areas should lose their districts. The voters resolved this impasse by passing Proposition 28. Named the “Federal Plan,” the measure, like the federal system, required apportionment of the assembly by population and allocated one state senator to each county. In the same election, California voters for the first time rejected establishing a redistricting commission by voting down Proposition 20. Id. In 1928, 1948, 1960, and 1962, Californians rejected propositions to revert the apportionment of the senate from “one-county, one-vote” to apportionment by population. Id. at 6.

\(^4^3\) Passantino, supra note 28 at 3.

\(^4^4\) Legislature v. Reinecke, 6 Cal.3d 595, 603-04 (1972).

\(^4^5\) Legislature v. Reinecke, 9 Cal.3d 166, 167 (1973).

\(^4^6\) Legislature v. Reinecke, 10 Cal.3d 396, 401 (1973).
In 1981, the Democratic-controlled legislature passed redistricting plans that Democratic Governor Jerry Brown signed. Republicans, furious over what they considered to be blatant partisan gerrymanders, commenced two separate attacks to overturn these plans. First, they placed three referenda on the June 1982 ballot, each proposition seeking to replace one of the redistricting (assembly, senate, and congressional) plans. Republicans had hoped that new plans could take effect immediately, but the California Supreme Court ordered that the state use the 1981 plans for the 1982 congressional and legislative elections. The three plans used for the 1982 elections each lost the referenda vote by an average margin of 63 percent to 37 percent. Moreover, in November 1982 a Republican won election to replace Governor Brown. 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. The Democrats drew plans that offered sufficient protections to Republicans to garner a two-thirds vote to receive

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48 Nicholas Stephanopoulos, Reforming Redistricting: Why Popular Initiatives To Establish Redistricting Commissions Succeed or Fail, 23 Journal of Law and Politics 331, 360 (2007). 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.” Race and Redistricting in the 1990’s (ed. Bernard Grofman 1998) at 153. 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).
49 Id. Proposition 10 challenged the congressional plan; Proposition 11 sought to replace the state senate redistricting; and Proposition 12 challenged the assembly remap. http://ballotpedia.org/wiki/index.php/California_1982_ballot_propositions.
50 Assembly of State of Cal., 30 Cal.3d at 677.
51 Specifically, Proposition 10 lost 35.4 percent to 64.6 percent; Proposition 11 lost 37.8 percent to 62.2 percent; and Proposition 12 lost 37.9 percent to 62.1 percent. Statement of Votes, California Secretary of State, 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.
“urgency” status\textsuperscript{53} and be sent to Governor Brown before the end of his term.\textsuperscript{54} The new plans remained in effect through 1990.\textsuperscript{55} As a second means to overturn the Democrat’s plans, the Republicans placed onto the November 1982 ballot Proposition 14, which is discussed infra.

In 1991, Governor Pete Wilson vetoed the redistricting plans approved by the legislature.\textsuperscript{56} Since the legislature did not have sufficient votes to override the veto,\textsuperscript{57} the governor initiated mandate proceedings in the California Supreme Court.\textsuperscript{58} The Court exercised its original jurisdiction and appointed three special masters, who they instructed, after conducting public hearings, to develop the redistricting plans.\textsuperscript{59} The Supreme Court accepted and adopted the Special Masters’ recommendations with minor modifications.\textsuperscript{60}

Finally, in 2001, the Golden State avoided major litigation over its redistricting plan when Democratic and Republican leaders found common ground: preservation of incumbents.\textsuperscript{61} As the Los Angeles Times characterized the plan, “Most legislative

\textsuperscript{53} 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. California Constitution, Article IV, § 8(d). Moreover, as an urgency statute, the statute redistricting the state legislature was not subject to a referendum. Legislature of the State of Cal. v. Deukmejian, 34 Cal.3d 658, 668 (1983). The statute establishing the state’s new congressional lines would have been subject to a referendum, but no one challenged it. \textit{id}.

\textsuperscript{54} Grofman, supra note 48 at 156.

\textsuperscript{55} Passantino, supra note 28 at 6.


\textsuperscript{57} \textit{id}.

\textsuperscript{58} \textit{id} at 471.

\textsuperscript{59} \textit{id} at 473.

\textsuperscript{60} Wilson, 1 Cal.4th at 729.

\textsuperscript{61} 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 (26-14 in the Senate and 50-30 in the Assembly) and a Democrat, Gray Davis, occupying the governor’s mansion, Democrats could pass redistricting litigation 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
districts are so safe that the real battles are in the primary election.” The legislature drew both congressional and legislative lines “in a transparent effort to create ‘safe seats’ for virtually all state and federal legislators.” Accordingly, the Democratic-controlled legislature passed redistricting plans – with no significant Republican opposition – that Democratic Governor Gray Davis signed. Critics have described those plans as “bipartisan gerrymanders” and “incumbent protection gerrymanders.”

Just as California’s redistricting plans have been hotly contested, so has its redistricting process. Indeed, redistricting had been the subject of five California

What They Wanted in 2001, at Least in the Short Term, *The Sacramento Bee*, October 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 2000, certainty over future district lines, and the concern that the Bush Administration might use the Voting Rights Act to challenge the plan. *Id.*

“Serving the Pols, Not the People (Editorial),” L.A. Times, November 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>
<thead>
<tr>
<th>TABLE 1</th>
<th>DISTRICTS WITH 5-PERCENT REGISTRATION DIFFERENCES BETWEEN REPUBLICANS AND DEMOCRATS 1992 AND 2002 REDISTRICTING PLANS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Pre-redistricting</td>
</tr>
<tr>
<td>Assembly</td>
<td>14</td>
</tr>
<tr>
<td>State Senate</td>
<td>7</td>
</tr>
</tbody>
</table>

Sanders, *supra* note 61. Table 1 shows the significant drop in the number of competitive districts in both the Assembly and Senate after the redistricting.


propositions since the 1980’s. The first four failed by significant margins; finally, the fifth succeeded by less than two percentage points.

Proposition 14, referenced briefly supra at, appeared on the November 1982 ballot. 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 10% of the legislature. California Republicans were the primary financial supporters of the proposition, and several interest groups also backed it. The Democratic Party and its leaders, especially Governor Jerry Brown and Assembly Speaker Willie Brown, were its primary opponents. The proposition lost by a vote of 44.5 percent to 54.5 percent.

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. This measure proposed to establish a redistricting commission with eight of its ten members

66 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. Grofman, supra note 48 at 156. Collectively, they were dubbed the “Sebastiani Plan.” Alan Heslop, Redistricting Reform in California at 2, http://www.claremontmckenna.edu/rose/publications/pdf/conf_redistricting_paper.pdf (last visited Aug. 8, 2010). The state legislature and several Democratic officeholders petitioned the California Supreme Court to prevent the holding of the special election. Legislature of the State of Cal., 34 Cal.3d at 663-64. The Court ruled that the state could only be redistricted once per decade, id. at 668, and it prevented the holding of the special election. Id. at 681. 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 of State of Cal. v. Jones, 21 Cal.4th 1142, 1148-49 (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 1167.

67 Heslop, supra note 66 at 1.
68 Stephanopoulos, supra note 48 at 360.
69 Id. at 361-62.
70 Passantino, supra note 28 at 6.
71 Grofman, supra note 48 at 157-58.
consisting of retired state court judges.\textsuperscript{72} Both parties spent approximately $4 million on
the campaign.\textsuperscript{73} Nevertheless, Proposition 39 lost by a similar margin to that of
Proposition 14, 44.8 percent in favor versus 55.2 percent against.\textsuperscript{74}

Having failed in the court of public opinion, the Republicans shifted their efforts
to actual courts. However, they met with no greater success.\textsuperscript{75} Thus, in anticipation of
the post-1990 Census redistricting, Republicans placed two propositions onto the June
1990 ballot.\textsuperscript{76} The first, Proposition 118, would retain initial authority over redistricting in
the legislature, but for such plans to become law it would require 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.\textsuperscript{77} 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.\textsuperscript{78} Supporters again contributed millions to
the campaigns.\textsuperscript{79} Proposition 118 failed, 33.0 percent to 67.0 percent, while Proposition
119 lost by a vote of 36.2 percent to 63.8 percent.\textsuperscript{80}

\textsuperscript{72} Heslop, supra note 66 at 2.
\textsuperscript{73} Stephanopoulos, supra note 48 at 363-64.
\textsuperscript{74} Heslop, supra note 66 at 3.
\textsuperscript{75} Badham, 694 F.Supp. at 666. 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 to the United
States Constitution. \emph{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.
\textsuperscript{76} Grofman, supra note 48 at 165.
\textsuperscript{77} Heslop, supra note 66 at 3.
\textsuperscript{78} Grofman, supra note 48 at 165; Heslop, supra note 66 at 4. If both propositions passed, the
measure that received the largest majority would prevail. Grofman, supra note 48 at 166.
\textsuperscript{79} One estimate calculated that the campaigns for and against the measure received a
combined total of $6 million. \emph{Id.}
\textsuperscript{80} Heslop, supra note 66 at 5.
Finally, in 2005, after being frustrated from working with the Democratic-controlled state legislature, Republican Governor Arnold Schwarzenegger made redistricting reform one of his primary goals. He ordered a special election in 2005. Included on the ballot was Proposition 77, which would have created a three-member commission to conduct the redistricting. Proposition 77, along with the eight other propositions on the ballot, lost. Proposition 77 lost by a vote of 40.5 percent in favor to 59.5 percent against.

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

<table>
<thead>
<tr>
<th>Year</th>
<th>Measure</th>
<th>For</th>
<th>Against</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>1982</td>
<td>Proposition 14</td>
<td>44.5</td>
<td>54.5</td>
<td>-10.0</td>
</tr>
<tr>
<td>1984</td>
<td>Proposition 39</td>
<td>44.8</td>
<td>55.2</td>
<td>-10.4</td>
</tr>
<tr>
<td>1990</td>
<td>Proposition 118</td>
<td>33.0</td>
<td>67.0</td>
<td>-34.0</td>
</tr>
<tr>
<td>1990</td>
<td>Proposition 119</td>
<td>36.2</td>
<td>63.8</td>
<td>-27.6</td>
</tr>
<tr>
<td>2005</td>
<td>Proposition 77</td>
<td>40.5</td>
<td>59.5</td>
<td>-19.0</td>
</tr>
</tbody>
</table>

Support for these propositions never reached 45.0 percent. Consequently, each proposition lost by a double-digit margin, with an average differential of 20.2 percent.

With this as background, Proposition 11 qualified for the November 2008 ballot.

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81 Stephanopoulos, *supra* note 48 at 372. Proposition 77 was just one part of a reform agenda for which the governor sought approval from the 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; http://en.wikipedia.org/wiki/California_special_election,_2005.

III. 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.

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

Maybe 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. The authors of the ballot arguments were the presidents of the California Taxpayers Association and of the California offices of the League of Women Voters and AARP. 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. The proposition also received endorsements from a broad range of editorial boards.

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83 Nicholas and Rau, supra note 82.
86 http://www.americansforredistrictingreform.org/documents/Proposition11.pdf. 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
Politically, the supporters of Proposition 11 were similarly diverse. Despite its non-profit roots, the measure became identified with Republican Governor Schwarzenegger. This occurred for good reason, since he was an active campaigner and fundraiser for the proposal. 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. Other prominent Democratic supporters included Treasurer Bill Lockyer, former Assembly Speaker Robert Hertzberg, and former Controller Steve Westly. California Forward, a recently-created reform group, also supported the measure. The organization’s co-chair was Leon Panetta, former eight-term Democratic congressman and chief of staff for President Clinton.

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. Governor Schwarzenegger, on the other hand, besides

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Appointed Officials, the Mexican American Legal Defense and Education Fund, the NAACP Legal Defense Fund, and the Asian Pacific American Legal Center. Id.


campaigning for the measure, supported it financially, too. His campaign contributions approached $3 million. Not only did contributions skew Republican, significant amounts came from Republicans outside of California. Non-Californian Republican contributors included New York Mayor Michael Bloomberg, T. Boone Pickens, and a group of Florida Republicans who donated $500,000 after a personal visit from Schwarzenegger.

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.

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 39 (1984) would have allowed the major parties to nominate the redistricting commission members. Two of the propositions, 39 (1984) and 77 (2002), would have required that retired judges serve as commission members. Finally, two measures would have had

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94 Vogel, supra note 89.

95 Vogel, supra note 92. 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. Refund Sought for Disgraced Florida Lawyer’s Donation to California’s Prop. 11 Campaign, L.A. Times, May 5, 2010, http://latimesblogs.latimes.com/california-politics/2010/05/florida-lawyers-want-refund-for-california-political-contribution.html.

96 Howard, supra note 92.

97 Heslop, supra note 66 at 1-2.

98 Id. at 2; Stephanopoulos, supra note 48 at 372.
judges either nominate (Proposition 14) or appoint (Proposition 119) the commissioners.99

Proposition 11, on the other hand, minimized the role of the parties and eliminated any role for retired judges.100 Instead, it proposed to establish a “Citizens Redistricting Committee” (CRC).101 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.102

The CRC would consist of 14 members: five Democrats, five Republicans, and four persons not registered with either party.103 Unlike prior proposals, neither the parties, retired judges, nor organizations would nominate prospective members; instead, they would submit applications.104 The State Auditor would establish a panel of three State

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99 Heslop, supra note 66 at 1, 4.
100 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, Duke 5 Journal of Constitutional Law & Public Policy 37, 41 (2010). Presumably, for this reason the drafters of Proposition 11 eliminated any role for them.
101 Proposition 11, Section 3.2 (amended California Constitution Art. XXI, Sec. 1(d)).
102 Id., at Section 3.3 (amended California Constitution Art. XXI, Sec. 2(a)); id., Section 3.2 (amended California Constitution Art. XXI, Sec. 1(b)). 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, supra note _ at _. (Redo Remap) Pelosi had vowed to finance the opposition effort heavily if Congress was included. John Howard, New Redistricting Initiative Targets Congressional Seats, Capitol Weekly, September 3, 2009, www.capitolweekly.net/article.php?xid=y859w0qbbs932v (last visited August 15, 2010). 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. Josh Howard, Redistricting: Ultimate Political Battle Looms in California, Capitol Weekly, June 18, 2009, http://www.capitolweekly.net/article.php?_c=y25stx46p1t4c1&xid=y25sj17d9qh384&done=.y25st x46p2e4c1. 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 - $1 million – during the entire campaign. Anthony York, Redistricting Fight – from Riches to Rags, Capitol Weekly, October 9, 2008, http://www.capitolweekly.net/article.php?_c=y25stx46p1t4c1&xid=xgqquf9nsq9w1m&done=.yy 9y8lzzcfxrcw.
103 Id., at Section 3.3 (amended California Constitution Art. XXI, Sec. 2(c)(2)).
104 Id. at Section 4 (amended California Government Code § 8252(a)(1)).
Auditors to screen the applicants. This panel would strike applications of persons who did not meet a series of requirements identified in the proposition. Then, this pool of qualified applicants would be reduced as follows:

- the state auditors would narrow each of the three groups to 20 members;
- the majority and minority leaders of the Assembly and Senate could each strike up to two applicants;
- 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.

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

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105 Id. at Section 4 (amended California Government Code § 8252(b)).
106 Proposition 11 contains the following minimum criteria for CRC members:
- Be continuously registered in California and had not changed parties for at least five years, id. at Section 3.3 (amended California Constitution Art. XXI, Sec. 2(c)(3));
- Had voted in two of the last three statewide general elections, id.;
- Within 10 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.

107 Id. at Section 4 (amended California Government Code § 8252(d)).
108 Id. at Section 4 (amended California Government Code § 8252(e)).
109 Id. at Section 4 (amended California Government Code § 8252(f)).
110 Id. at Section 4 (amended California Government Code § 8252(g)).
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.\textsuperscript{112} About the measure Stern acknowledged, “It’s complicated. . . It does take a lot of understanding to vote yes on this.”\textsuperscript{113} George Skelton, a political commentator with the Los Angeles Times and Proposition 11 advocate, described its process as “convoluted.”\textsuperscript{114} Other words used to characterize these procedures included “complex,” “confusing and unfair,” and “byzantine.”\textsuperscript{115} 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.”\textsuperscript{116}

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 subjurisdictions 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).\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{112} Center for Governmental Studies, Redistricting Reform in California: Proposition 11 on the November 2008 California Ballot, 5 n.1 (2008).
\item \textsuperscript{114} George Skelton, Capitol Journal: Reform takes a tough road, L.A. Times, January 18, 2010, available at 2010 WLNR 1055017.
\item \textsuperscript{116} Saunders, supra note 113.
\item \textsuperscript{117} Id., at Section 3.3 (amended California Constitution Art. XXI, Sec. 2(d)).
\end{itemize}
Despite its vast fundraising and endorsement advantages, Proposition 11 had a difficult time attracting the attention of voters.\textsuperscript{118} As Figure 4 indicates, in every poll taken in the five months preceding the election, support for the measure never exceeded 45 percent:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{proposition_11_polling_results}
\caption{Proposition 11 Polling Results}
\end{figure}

For most propositions, political consultants expect support to fall during the campaign. Thus, experts anticipated a difficult road ahead for Proposition 11.\textsuperscript{120} Furthermore, at

\begin{itemize}
\item\textsuperscript{118} Nationally, this election involved the historic candidacy of Barack Obama. In California, the ballot also included Proposition 8, which would restrict the definition of marriage to opposite-sex couples, thereby overturning the California Supreme Court’s ruling of In re Marriage Cases, 43 Cal.4th 757 (2008), that same-sex couples have a constitutional right to marry.
\item\textsuperscript{119} http://www.ballotpedia.org/wiki/index.php/California_Proposition_11_(2008).
\item\textsuperscript{120} 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 102.
\end{itemize}
least 25 percent of voters remained undecided about the proposition, though this number rose to 35 percent on the eve of the election.

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 margin of 20 percentage points. Furthermore, voter support for Proposition 11 appeared at best to be tepid.

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 percent to 49.1 percent.

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:

\[
\begin{array}{|l|}
\hline
\text{TABLE 3}^{124} \\
\hline
\text{COMPARING SUPPORT FOR PROPOSITIONS} \\
\text{NOVEMBER 2008} \\
\hline
\end{array}
\]

\[
\text{---}\]

\[121\text{ See supra Table 2.}\]
\[122\text{ See supra Figure 4.}\]
\[124\text{ Id.}\]
Table 2 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 percent more votes (290,000) and 11.8 percent more votes (1,400,000) 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.¹²⁵ 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

<table>
<thead>
<tr>
<th>Proposition Number and Description</th>
<th>Total &quot;Yes&quot; and &quot;No&quot; Votes</th>
<th>% of Votes Cast for Prop 11</th>
</tr>
</thead>
<tbody>
<tr>
<td>1A High-Speed Train Bond</td>
<td>12,696,429</td>
<td>105.9</td>
</tr>
<tr>
<td>2 Farm Animals Confinement</td>
<td>12,935,507</td>
<td>107.9</td>
</tr>
<tr>
<td>3 Children’s Hospital Bond</td>
<td>12,638,905</td>
<td>105.4</td>
</tr>
<tr>
<td>4 Parental Notification</td>
<td>12,948,961</td>
<td>108.0</td>
</tr>
<tr>
<td>5 Nonviolent Drug Offenses Sentencing</td>
<td>12,721,989</td>
<td>106.1</td>
</tr>
<tr>
<td>6 Police and Law Enforcement Funding</td>
<td>12,384,019</td>
<td>103.3</td>
</tr>
<tr>
<td>7 Renewable Energy Generation</td>
<td>12,657,416</td>
<td>105.5</td>
</tr>
<tr>
<td>8 Eliminates Same-Sex Couples Marriage</td>
<td>13,402,566</td>
<td>111.8</td>
</tr>
<tr>
<td>9 Criminal Justice System Victims’ Rights</td>
<td>12,411,433</td>
<td>103.5</td>
</tr>
<tr>
<td>10 Alternative Fuel and Renewable Energy Bonds</td>
<td>12,562,820</td>
<td>104.8</td>
</tr>
<tr>
<td>11 Redistricting</td>
<td>11,992,688</td>
<td>100.0</td>
</tr>
<tr>
<td>12 Veterans’ Bond Act</td>
<td>12,288,826</td>
<td>102.5</td>
</tr>
</tbody>
</table>

¹²⁵ 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 Denver University Law Review 115, 128 (2008). In the legal and academic literature, “roll-off,” “falloff,” “dropoff,” and “ballot fatigue” refer to the same concept. Id. at 127. In the November general election, the total votes cast were 13.74 million. Official Declaration of the Vote Results, supra note 123 at 65. Thus, even Proposition 8, the measure with the highest votes cast, experienced some roll-off (340,000 votes).
visibility contests can be double that of higher visibility contests. 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.

Despite the effort expended in support of the measure, both the opposition and the electorate in general displayed ambivalence to Proposition 11. Certainly, most Democratic leaders opposed the motion. The No on 11 campaign listed both Speaker Pelosi and Senator Boxer as members. Furthermore, with significant majorities in both state houses, Democrats seemed to be the party with the most to lose. Nevertheless, the measure’s drafters specifically excluded congressional redistricting from its reach to avoid a major fundraising effort by Pelosi. 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. 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. In 2008, both were neutral on Proposition 11. As a result of these differences, in 2005 the opposition to Proposition 77 spent $13 million (which does not include $4 million in unexpended funds); in 2008, the opposition to Proposition 11 spent only $1 million.

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126 James Sample, Caperton: Correct Today, Compelling Tomorrow, 60 Syracuse Law Review 293, 300 n.34 (2010).
127 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.
128 Howard, supra note 102.
129 Vogel, supra note 92.
130 Vogel, supra note 89.
131 York, supra note 92.
132 Id.
133 Building a National Redistricting Reform Movement: Redistricting Conference Report, League of Women Voters, The Campaign Legal Center, and The Council for Excellence in Government,
Apparently, the Democrats’ reserved approach to the measure stemmed from more than just its 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.\(^{136}\)

Voters also lacked enthusiasm for the redistricting measure. As Figure 4 demonstrates, throughout the campaign polling showed that at least 25 percent of voters were undecided regarding Proposition 11, peaking at 35 percent on the eve of the election.\(^{137}\) For their part, prospective voters indicated that the measure was low on their list of priorities for the election.\(^{138}\) Besides the presidential election, among the eleven other initiatives on the ballot was Proposition 8, regarding same-sex marriage. In contrast to the combined $15 million raised in support or opposition of Proposition 11, the two sides on Proposition 8 raised a combined $83.2 million.\(^{139}\) The high roll-off for Proposition 11 likely resulted from the combination of many factors – confusion,
uncertainty, placement on the ballot, ballot fatigue, and attention focused on other choices on the ballot.

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

A comparison between the campaigns of the two most recent California redistricting initiatives supports Stephanopoulos’s conclusion. In 2005, the opposition to Proposition 77 raised $14 million; in 2008, the No on 11 campaign raised only $1 million.

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141 Stephanopoulos, supra note 48 at 346-77.

142 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

143 Id. at 381.

144 See supra note 96 and accompanying text.
In 2005, Speaker Pelosi pledged that “I am very committed to defeating Proposition 77, and I am raising money to defeat it.” 145 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.” 146 In 2008, the Yes on 11 campaign succeeded by focusing on anti-incumbent sentiments. 147

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.” 148

After the 2005 election, Mosich’s conclusions had appeal, but they do not explain the subsequent success of Proposition 11. First, Californians certainly have demonstrated a reluctance to adopt a new redistricting procedure. 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, which appeared on the ballot 15 years after the failed initiative.

145 Christian Berthelsen, Group Backing Remap Initiative Caught up in Donations Dispute, S.F. Chronicle, October 7, 2005, at B3. As part of this commitment, she asked all 33 California Democrats in Congress to contribute against the proposition.
147 John Wildermuth, Prop. 11 won by not talking about redistricting, PoliticsBlog, S.F. Chronicle, December 1, 2008, http://www.sfgate.com/cgi-bin/blogs/nov05election/detail?blogid=14&entry_id=33086#ixzz0swyfQfqL.
after the last failed proposition. Second, Schwarzenegger’s approval and
disapproval ratings were almost identical shortly before each election. According to
the Field Poll, his approval ratings rose from 37 percent in October 2005 to 38 percent in
September 2008; during the same period, his disapproval ratings fell from 56 percent to
52 percent. 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’s theory – the legislative-majority party’s vigorous
opposition to the measure – seems best to explain 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.

IV. 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. Governor Schwarzenegger, the proposition’s top
contributor and fundraiser and highest-profile proponent, charged that “the current

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149 See supra Table 2.
151 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 117, but it does not include competitiveness among these
requirements.
redistricting system insulates lawmakers from competitive general elections.” 152 Similarly, Democrat and former-Controller Steve Westly assured that the proposition will create more competitive election districts. 153 But the “competitiveness” drumbeat did not stop there. Others who touted the proposition’s ability to increase competitiveness included redistricting experts, 154 a nonprofit organization, 155 and several newspaper editorial boards. 156

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.

155 ACLU/SC Supports the California Voters FIRST Initiative on the November Ballot, June 18, 2008, press release http://www.aclu-sc.org/releases/view/102890 (Proposition 11 will make legislators “more likely to effectively address issues important to voters by creating fair legislative districts and competitive elections”).
First, supporters maintain that greater competitiveness can benefit the entire electoral process. Competitiveness increases voter turnout rates.\textsuperscript{157} The political parties are sensitive to competition and focus their limited resources where elections are competitive. They target television advertising and other mobilizing efforts mainly in competitive races,\textsuperscript{158} and studies have found that persons contacted through mobilizing efforts are more likely to vote.\textsuperscript{159} Greater interest also leads to more media attention, higher campaign contributions, and a sense that one’s vote matters. Accordingly, the closer the anticipated outcome of an election, the more voters become involved\textsuperscript{160} and the better informed they are likely to be.\textsuperscript{161} Furthermore, competitive elections can effect participation even after the election. For instance, after the 2000 presidential election, voter registration drives surged.\textsuperscript{162} Besides 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.\textsuperscript{163}

\textsuperscript{160} Steven J. Rosenstone & John Mark Hansen, Mobilization, Participation, and Democracy in America at 180-81 (1993).
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 that ‘cross-pressured’ members are more likely to have more centrist voting scores.”164 When districts are not competitive, candidates know that voters in their districts are unlikely to support challengers from the other party.165 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. By focusing on the most partisan voters, candidates are more likely to favor extreme positions and to be less representative of the political center.166 Thus, noncompetitive districts undermine centrists, who could win competitive general elections but not primaries in heavily-partisan districts. Noncompetitive districts thus impact the partisanship – and possibly effectiveness – of legislatures.167 Of course, the hope of many supporters of competitive districts is that an increase in centrist legislators would reduce both partisanship and gridlock in legislatures.

Competitive districts may also increase the accountability of legislators to the voters.168 Districts that are competitive compel legislators to respect the interests of their

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165 Jenkins, supra note 161 at 170-71.
166 Id. at 171.
constituents or face a realistic chance of defeat.\textsuperscript{169} Furthermore, districts with competitive elections prevent parties from becoming overwhelmingly dominant in geographic areas and lacking incentives to compete for voters.\textsuperscript{170} Some commentators consider accountability to be the central purpose of elections.\textsuperscript{171} Others consider it to have a constitutional basis or to function as part of the checks and balances fundamental to the Constitution.\textsuperscript{172} Another aspect of accountability regards corruption of elected officials. One study found that in the 1980’s, among candidates charged with corruption, only 3.8 percent lost in primaries, while their loss rate in the general election was 25 percent.\textsuperscript{173}

Defenders of noncompetitive districts, however, point to several valuable functions they provide. They argue that noncompetitive districts provide better representation for their voters, and they promote stability of the legislature. They also maintain that competitive elections, rather than inspire cross-over 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.” Closely-balanced districts, therefore, maximize the

\begin{flushleft}
\textsuperscript{170} Pildes, supra note 163 at 260.
\textsuperscript{172} See Pildes, supra note 163 at 266 (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 169 at 337 (the Founders believed that legislators should be accountable to the people, which was the most essential Constitutional check on the government).
\end{flushleft}
number of wasted votes.\textsuperscript{174} 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.\textsuperscript{175} 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).\textsuperscript{176} Voters also prefer to have representatives with similar ideologies over having closely-contested general elections.\textsuperscript{177} As an added psychological benefit, voters give Congress higher approval ratings when like-minded persons represent their districts.\textsuperscript{178} Thus, noncompetitive districts may maximize voter satisfaction.\textsuperscript{179}

Another advantage to which commentators point 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.\textsuperscript{180} Thus, slight changes in voter preferences would shift control of the legislature.\textsuperscript{181} At the extremes of competitiveness, a statewide vote of only 51 or 52 percent in favor of a party might shift

\textsuperscript{174} Brunell, supra note 6 at 46.
\textsuperscript{175} Thomas I. Brunell and Justin Buchler, Ideological Representation and Competitive Congressional Elections, Electoral Studies 28 (2008) 448, 449.
\textsuperscript{176} 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.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 454.
\textsuperscript{179} 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, 2006. Why We Vote: How Schools and Communities Shape Our Civic Life (2006) at 33-34.
\textsuperscript{180} Huckfeldt, Carmines, Mondak, & Zeemering, supra note _ at 22.
\textsuperscript{181} Nathaniel Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 Harvard Law Review 649, 668 (2002). See also Vieth v. Jubelirer, 541 U.S. 267, 359 (2004) (Breyer, J., dissenting) (in a large state with mere random redistricting, a shift from 51 percent Republican to 49 percent Republican could yield a ”seismic shift” in the composition of the legislature from 100 percent Republican to 100 percent Democrat.
control in the legislature.182 Because of legal183 and geographic constraints,184 no districting plan for California will have all hyper-competitive districts. Nevertheless, the risk of shifts in partisan control remains.185

Opponents of competitiveness also argue that high levels of competition can also adversely affect individual officeholders and candidates. Candidates will be less interested in running for office if they know that slight changes in political sentiment will remove them from office. Thus, less competitive districts can be more appealing to prospective candidates because their greater stability makes the possibility of a career in the legislature more likely.186 Conversely, competitive elections deter candidates because of the foreseeable burden of campaigning in future close elections.187 Incumbents concerned about upcoming competitive elections have greater incentives to steer pork barrel projects to their districts in attempts to “buy off” their constituents.188 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.189

183 See infra text accompanying notes 196-207.
184 See infra text accompanying notes 208-46.
185 Possibly a more likely concern in California is that a large number of competitive districts could result in significantly disproportional representation. Nonproportional legislatures are likely where excessive numbers of districts are competitive. Brunell, supra note 6 at 75.
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.\(^\text{190}\) 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 votes to 266,\(^\text{191}\) 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.\(^\text{192}\) Since the majority of “independent” voters are not truly swing voters but actually favor one party,\(^\text{193}\) the drawing of competitive districts may not force candidates to broaden their appeal. Instead, such districts may actually heighten partisan appeals.\(^\text{194}\)

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\(^\text{190}\) See supra text accompanying note 164.
\(^\text{191}\) http://www.uselectionatlas.org/RESULTS/national.php?year=2000&off=0&elect=0&f=0.

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, Polity, Volume 41, Number 3 (2009) at 359.

\(^\text{194}\) Furthermore, a study of Congressional polarization concluded that gerrymandering explains little if any of the polarization apparent in Congress. Nolan McCarty, Keith T. Poole, and Howard Rosenthal, Does Gerrymandering Cause Polarization?, 5 (2006), 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, Jonathan Winburn & Gerald C. Wright, The Limits of the Gerrymander: Examining the Impact of Redistricting on Electoral Competition and Legislative Polarization (paper presented at annual meeting of American Political Science Association, Aug. 31-Sept. 3, 2006), at 20.

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).
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.
V. NONCOMPETITIVE ELECTIONS: MIGHT SOMETHING BESIDES REDISTRICTING CAUSE THEM?

Whether competitiveness is desirable, legislative elections in California have experienced a marked decline in it. Supporters of Proposition 11 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, and they must not dilute minority voting strength. California law also imposes additional mandatory (contiguity) and nonmandatory (respect for jurisdictional boundaries) requirements. The combination of these constraints, however, limits the ability of redistricters to draw more competitive districts.

Cain, Mac Donald, and Hui examined the impact of legal criteria on the drawing of competitive districts. They noted a truism of redistricting: the imposition of

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195 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 1990’s (for open seats, election margins during the period have fluctuated). Legislative control of redistricting did not correlate to higher victory margins. Masket, Winburn, & Wright, supra note 194 at 14.
196 Supra notes 4-9, 23.
197 Supra notes 10-22.
198 Supra note 24.
199 Supra note 25.
200 Bruce E. Cain, Karin Mac Donald, & Iris Hui, Competition and Redistricting in California: Lessons for Reform, Institute for Governmental Studies (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
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.\footnote{Id. at 5.} Compliance with the Voting Rights Act, for instance, necessitates avoiding both minority vote dilution and retrogression of minority voting strength.\footnote{Supra notes 10-22.} 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).\footnote{Lublin & McDonald, supra note 28 at 147.} 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.\footnote{Bruce I. Oppenheimer, Deep Red and Blue Congressional Districts: The Causes and Consequences of Declining Party Competitiveness, in Congress Reconsidered 152 (ed. Lawrence C. Dodd 2005).}

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 to be made competitive. In California, Cain et al. found that minority populations have been dispersing geographically. As a result, to satisfy the Voting Rights Act standards, map drawers need to extend districts to encompass pockets of ethnic communities.\footnote{Cain, Mac Donald, & Hui, supra note 200 at 24.} This constrains their options when populating surrounding districts. Moreover, states that must satisfy the Section 5 nonretrogression requirement typically have fewer marginal

\begin{footnotesize}
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\item 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. \textit{Id.} at 22.
\item Id. at 5.
\item Id. at 22.
\item Supra notes 10-22.
\item Lublin & McDonald, supra note 28 at 147.
\item Bruce I. Oppenheimer, Deep Red and Blue Congressional Districts: The Causes and Consequences of Declining Party Competitiveness, in Congress Reconsidered 152 (ed. Lawrence C. Dodd 2005).
\item Cain, Mac Donald, & Hui, supra note 200 at 24.
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districts and fewer districts with two major-party candidates. Consequently, preserving minority voting strength often occurs at the direct expense of electoral competitiveness.

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. Bishop labels this phenomenon The Big Sort. As a result, regions, states, and counties now are much more politically homogenous than they were just three decades ago.

Because we have a highly mobile population, this sorting has been possible. During a single year, 2008, 11 million persons nationwide moved to a different county. 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. Beginning in the 1970’s and 1980’s, when people moved, they tended to relocate to areas where most people held similar political perspectives. In general, when people select a general locale in which to live, they make choices upon where to live within that locale upon factors that correlate with partisan preference. These factors include immigration, education, 

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206 Lublin & McDonald, supra note 28 at 155.
207 Cain, Mac Donald, & Hui, supra note 200 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 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 extent possible without violating other requirements. Supra note 25.
209 This amounted to 3.7 percent of the total population. 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. At the same time, another 25 million persons (8.4 percent) moved within the same county. Id.
210 Oppenheimer, supra note 204 at 153.
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. This trend differed markedly from the racial consequences of these movements. From 1980 to 2000, American counties became slightly less segregated. During the same period, the segregation of Republicans and Democrats increased by almost 26 percent.

Within California, these shifts are readily apparent. The 1976 and 2004 presidential elections provide good points for comparison. Both contests 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 percent (50.1 percent to 48.0 percent); in 2004, George W. Bush defeated John Kerry by a similar margin of 2.4 percent (50.7 percent to 48.3 percent). During the 28 years between these elections, 47 of California’s 58 counties (81 percent) became more partisan. Specifically, 17 counties (29.3 percent) became more Democratic while 30 (51.7 percent) became more Republican. Only 11 (20.0 percent) became more closely contested.

Three counties provide especially illuminating illustrations of this shift: San Francisco, 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.

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212 Bishop, supra note 208 at 44.
213 Id. at 10.
215 Id. at 44.
Figure 5 charts the Democratic and Republican votes in presidential general elections in San Francisco:

For the first three elections, San Francisco leaned slightly Republican. 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 increased from the previous election’s with the sole exception of 1996. By 2008, the Republican candidate (McCain) garnered only 13.6 percent of San Francisco’s vote. Those familiar with San Francisco’s geography will know that this shift in partisanship did not result from population growth (there’s nowhere to add population). In fact, between 1960 and 2000, the total population in San Francisco County increased by just 4.9 percent; during this period the statewide population increased by 115.5

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percent. Thus, this change had to result from geographic sorting resulting from the 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:

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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, and 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 percent, while Kern grew by 126.6 percent.\textsuperscript{222}

This analysis focused on the trends evident in particular counties. The effects of this sorting are apparent, however, throughout the state. Beginning in 1948, 16 general election contests (excluding propositions) had extremely close votes – statewide the

final margins between the top two candidates were less than two percentage points. These close statewide results, however, mask the sorting occurring at the local level. Figure 8 presents the average percent of votes cast by decade in landslide and tossup counties in these narrowly-decided statewide elections.

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

224 A “landslide” election refers to a contest in which the winner receives at least 60 percent of the vote. Allan J. Lichtman, The Keys to the White House: A Surefire Guide to Predicting the Next President 26 (2005). A “tossup” election will refer here to an election in which the winning candidate prevails by less than 5 percent of the total vote.
Figure 8 illustrates the diverging trends in California. In the 1940’s, 73.5 percent of California’s votes were cast in counties in which the statewide vote differential between the top two candidates was less than 2 percentage points. Only 9.9 percent of the vote came from counties decided by landslide margins – at least 20 percentage points. Thus, three-quarters Californians lived in counties with nearly equal populations of Democrats and Republicans. Starting in the 1980’s, however, in these narrow statewide elections more Californians cast their votes in landslide counties than in tossup counties. This trend has continued, so that in the 2000’s less than 10 percent of the votes came from tossup counties, while more than one quarter was cast in landslide counties.

Although the analysis of 20-percent landslide counties demonstrates the growth of politically extreme counties, political scientists recognize that a differential of 10 percent or less defines marginal contests. Thus, we could use 10 percent as the cutoff to examine noncompetitive counties. When we do so, we see some interesting changes:

Not surprisingly, more voters live in 10 percent noncompetitive counties than live in 20 percent landslide counties. Accordingly, the votes in noncompetitive counties basically draw even with the votes in tossup counties by the 1960’s and 1970’s. The main difference, though, between Figures 8 and 9 is the magnitude in jump after the 1970’s in the population in noncompetitive counties. By the 2000’s, nearly 90 percent of votes in

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a tossup election statewide were cast by voters who lived in counties decided by at least 10 percent, or noncompetitive margins. Conversely, less than 15 percent of the state’s voters lived in marginally competitive counties, even when the election was a tossup.

Did these changes result solely from population movement? Probably not. As one group or another became dominant in a county, group dynamics pushed group members to greater extremes. Sociologists have studied group dynamics and the effects of group homogeneity on behavior. Heterogeneous groups tend to be more moderate; the differences within the group restrain group excesses. Groups of homogenous persons, conversely, tend toward polarization. Group polarization occurs as homogenous groups discuss issues and, 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. The effects of continued dialog are both to decrease variance among members and to produce convergence on a relatively more extreme position. 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. Second, with a relatively homogenous group,

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228 Bishop, supra note 208 at 68.
229 “Polarization” in this context occurs when a tendency of individual members of a group 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 Law Journal 71, 85 (2000).
231 Sunstein, supra note 229 at 85-86.
contrary positions are rarely considered, so the dominant perspective naturally becomes more convincing. 232

Pervasive evidence demonstrates that group polarization theory extends to issues that bear directly on politics and political behavior. 233 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. 234 As minorities retreat, the majority gains confidence in its positions and becomes more extreme. 235

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. This is a comforting hypothesis, since it provides a readily-curable cause – legislators redrawing their own lines ("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 than politicians? 236 The hypothesis also has victims – besides the electorate generally, the centrists who otherwise would send moderate candidates to the legislature. 237 During the past two decades, however, county lines – which have not changed – have come to define highly-partisan

232 Sunstein, supra note 230 at 179.
234 Bishop, supra note 208 at 73.
235 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, id. at 246, and since the 1980’s voters have become vastly more partisan. Id. at 253.
236 Id. at 29.
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.\(^\text{238}\)

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), 53 of the 80 assembly seats (66.3 percent) were unlikely to be even potentially competitive.\(^\text{239}\) 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.\(^\text{240}\)

The Center for Governmental Studies, which helped to draft Proposition 11 and which supported the measure,\(^\text{241}\) acknowledged that increasing competition in California would be difficult. Besides the concentrations of urban Democrats, Republicans predominate in large regions of the state, notably the Central Valley and much of Orange and Riverside Counties.\(^\text{242}\) The Center noted that imposing competitiveness as a redistricting criterion would require stretching districts from areas

\(^{238}\) Bishop, supra note 208 at 29.

\(^{239}\) Cain, Mac Donald & Hui, supra note 200 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. ld.

\(^{240}\) 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. ld. at 4. For instance, of the 53 safe assembly districts in the “random box” plans, 40 (75.5 percent) were safe Democratic seats. ld. at 13. These safe-Democratic districts constitute half of the Assembly’s 80 districts.

\(^{241}\) Center for Governmental Studies, supra note 112.

\(^{242}\) ld. at 27.
dominated by one party to those controlled by the other party. Even if this were possible, such practices likely would violate other considerations, such as the compactness of districts and preservation of subjurisdictions and communities of interest.\footnote{Id. 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 17 in their “random box” plans to 15 in their “fully balanced” plans. Cain, Mac Donald & Hui, supra note 200 at 16-18. However, they define competitiveness as a 13-point range in voter registration, from a 3 percent Republican advantage to a 10 percent Republican advantage. If the range is considered to be only 3 percent Republican or Democratic advantage, then the number of competitive districts falls to 7. 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.}

Plotting the results of a recent statewide election shows the problem that this sorting creates for drawing competitive districts in California. The 2002 contest for state controller is the most recent election for statewide office decided by less than 2 percentage points. Specifically, Westly, the Democratic candidate, defeated McClintock, the Republican candidate, by 0.3 percent. The results of this election, presented graphically in Figure 10, illustrate the geographic separation in California.
Figure 10 illustrates that one continuous block of counties supported the Democratic candidate, while another block supported the Republican candidate. Of California’s 58 counties, only two (Imperial and Los Angeles) were not part of one of these two blocks. In the 41 contiguous counties that supported McClintock, he won by a

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combined margin of 17.6 percent of the vote. In the 15 contiguous counties that supported Westly, the Democrat won by a combined differential of 18.5 percent; in the two noncontiguous counties, his combined margin was 17.9 percent. Furthermore, only 14 of the state’s counties were marginally competitive (differential between the top two candidates of less than 10 percent). These 14 counties accounted for only 14.9 percent of the state’s total votes.

This analysis illustrates the difficulty that line drawers will have in crafting competitive districts. Because of the geographic sorting which 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. In areas of political segregation, no commission can draw competitive districts. 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.

VI. 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?

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246 Id.
247 Lesowitz, supra note 188 at 542.
248 Levinson & Pildes, supra note 167 at 2381.
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. Carson and Crespin concluded that legislative redistricting is more likely to lead to 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. Masket et al. 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.

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:

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250 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. Sometimes, however, if a party cuts its margins too thinly, these strategies can backfire. For instance, in the 1980’s, 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, however, Democrats 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 28 at 145.
251 Masket, Winburn, & Wright, supra note 194 at 17.
Figure 11 does confirm that the vote differential increased after the legislative redistrictings of the 1980 and 2000 redistricting cycles. On average it increased by slightly less than 3 percent after these redistrictings. On the other hand, after the judicial redistricting in 1992, this differential declined by approximately 1 percent. The greatest change in differentials occurred, however, not after redistricting but during the middle of decades. In the 1970’s, the differential increased by 7 percent; in the 1990’s, it rose by 5 percent (and was essentially flat during the 1980’s). Abramowitz et al. similarly found that the most significant changes in competitiveness of congressional contests

252 Masket, Winburn, & Wright, supra note 194 at 37.
253 Id. at 18.
occurred between redistricting cycles.\textsuperscript{254} Since the greatest decline in competitiveness occurred not after redistrictings but between them, this suggests that the geographic sorting hypothesis better explains that decline.

Fortunately, two states, Arizona and Washington, already require that their redistricting commissions consider competitiveness in developing plans.\textsuperscript{255} 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.

Washington State had originally required its legislature to redraw the state’s districts. Of the first ten redistrictings after statehood in 1889, however, the legislature successfully redistricted only four times; the remaining times either the courts or voter initiatives redrew the lines.\textsuperscript{256} Therefore, in 1983 (after the governor vetoed that

\textsuperscript{254} Alan I. Abramowitz, Brad Alexander, & Matthew Gunning, Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections, The Journal of Politics, Vol. 68, No. 1 (2006) at 79. 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 14 to 4. \textit{Id}.

\textsuperscript{255} 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. http://www.commoncause.org/site/pp.asp?c=dkLNk1MQlwG&b=196481. In November 2005, voters placed onto the Ohio ballot a proposition to reform its redistricting process. This measure, Ballot Issue 4, would have substituted judicial appointment of members in place of appointment by elected officials. State Issue 4: Amended Certified Ballot Language, http://www.sos.state.oh.us/SOS/elections/electResultsMain/2005ElectionsResults/05-1108Issue4/State%20issue%20%20Amended%20Certified%20Ballot%20Language.aspx. 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. \textit{Id}. The measure lost, however, 30.3 percent to 69.7 percent. http://www.sos.state.oh.us/SOS/elections/electResultsMain/2005ElectionsResults/05-1108Issue4.aspx.

\textsuperscript{256} Herb Robinson, Still Political, But Better Than Before, \textit{The Seattle Times}, November 19, 1990, http://community.seattletimes.nwsource.com/archive/?date=19901119&slug=1105037. 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 –
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.\footnote{David Ammons, Citizen Panel Will Redraw State’s Political Boundaries – Commission’s Goal: End a Nasty Tradition of Redistricting Hassles, The Seattle Times, August 27, 1990, http://community.seattletimes.nwsource.com/archive/?date=19900827&slug=1090030.} Pursuant to this amendment, the majority and minority leaders of the state legislature each appoint one commissioner. Those four commissioners then appoint the remaining member.\footnote{Wash. Rev. Code § 44.05.100(1)-(2)(2007).} The commission then submits its plans to the legislature, which may alter the lines, but only after approval from two-thirds of the legislature.\footnote{Washington Constitution, Art. II, § 43 (2).}

As amended, Washington law delineates particular standards for the commission to follow in redrawing the lines. Washington law divides the state into 49 legislative districts. Each district elects one state senator and two members of the state house of representatives, who run for numbered posts.\footnote{Wash. Rev. Code § 44.05.090(4)(2007).} Legislative districts must have equal population.\footnote{Id. at (1).} In addition, to the extent possible, districts should minimize splits of subjurisdictions and be compact and contiguous.\footnote{Id. at (2).} Finally, the commission must “encourage electoral competition.”\footnote{Id. at (5).}

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, March 19, 2001, at http://www.seattlepi.com/local/census19.shtml. Another plan submitted by activists that 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, December 22, 1991, http://www.seattlepi.com/archives/1991/9112220002.asp.

\footnote{David Ammons, Citizen Panel Will Redraw State’s Political Boundaries – Commission’s Goal: End a Nasty Tradition of Redistricting Hassles, The Seattle Times, August 27, 1990, http://community.seattletimes.nwsource.com/archive/?date=19900827&slug=1090030.} \footnote{Wash. Rev. Code § 44.05.100(1)-(2)(2007).} \footnote{Wash. Rev. Code § 44.05.090(4)(2007).} \footnote{Id. at (1).} \footnote{Id. at (2).} \footnote{Id. at (5).}
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 served an average of six terms in office. By 1994 the members averaged two terms.\textsuperscript{264} Table 4 tracks the changes in party control of seats from the election before the implementation of the commission’s first plan to the present:

\textsuperscript{264}Taking Redistricting out of Lawmakers’ Hands, National Journal, March 10, 2001.
TABLE 4

WASHINGTON CONGRESSIONAL DELEGATION, 1990-2008

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<thead>
<tr>
<th></th>
<th>Democrats</th>
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<td>2008</td>
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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. Elections under the 2002 redistricting plan, however, were a different matter. No seats have 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

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266 Id. 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 election. 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 50 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, March 25, 2010, http://www.centerforpolitics.org/crystalball/articles/frc2010032501/.

64
California. Much like the “incumbent protection gerrymander” passed by the California legislature, the Washington bipartisan commission developed its own “status-quo plan.”\textsuperscript{267} As one of the members of the Redistricting Commission conceded, 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.”\textsuperscript{268} 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:

\begin{table}[h]
\begin{center}
\begin{tabular}{|c|c|c|}
\hline
 & U.S. Representative & State senator & State representative \\
\hline
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 \\
Average & 24.6 & 38.8 & 37.6 \\
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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 percent. In five of nine

\textsuperscript{267} David Ammons, Citizen Commission Approves a New Map of Congressional Districts, \textit{The Seattle Times}, January 2, 2002, http://community.seattletimes.nwsource.com/archive/?date=20020102&slug=redistricting02m.  
\textsuperscript{269} http://wei.secstate.wa.gov/osos/en/PreviousElections/Pages/default.aspx.
election cycles, the average margin of victory in general elections for state senate seats exceeded 40 percent. Overall, the average margins of victory under the commission’s plans were 31.4 percent in congressional contests, 38.8 percent in state senate races, and 37.6 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 5 percent, between 5 and 10 percent, greater than 10 percent, and uncontested (no congressional races were uncontested):

FIGURE 12

Distribution of Victory Margins - U.S. Representative

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270 Id.
FIGURE 13

Distribution of Victory Margins - State Senate

- 100%
- >10%
- 5%<x<10%
- <5%

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FIGURE 13

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271 Id.
272 Id.
Particularly interesting, during a period of significant upheaval at the national level in 2006 and 2008, the number of elections decided by less than 5 percentage points dropped markedly for all three offices. 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 7 of 9 years for state senator and 6 of 9 years for state representative, the number of uncontested elections actually exceeded the number of tossup 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. The measure, Proposition 106, mandates creation of a five-member Independent Redistricting

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Commission (IRC) to perform the redistricting. Arizona’s Commission on Appellate Court Appointments nominates candidates. The majority and minority leaders of the state senate and house each then appoints one commissioner. Next, the four commissioners appoint the fifth member, who serves as the chair.\textsuperscript{274} No more than two members may be from the same political party.\textsuperscript{275} The Arizona Constitution requires this commission to redistrict the state’s congressional and legislative districts.\textsuperscript{276}

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). In the remaining two constitutionally-mandated phases, the commission receives comments on its plan and makes final adjustments.\textsuperscript{277}

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 Constitution, as amended by Proposition 106, required that the IRC create more competitive districts

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{274} Ariz. Constn. art. 4, pt. 2, § 1(4)-(9).
\item \textsuperscript{275} Id. at § 1(3).
\item \textsuperscript{276} Id. at § 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. Id. at § 1(1). Accordingly, they are not included in the analysis infra.
\item \textsuperscript{277} Id. at § 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 Coalition v. Redistricting Com’n, 208 P.3d 676, 681 (Ariz. 2009).
\end{itemize}
\end{footnotesize}
to the extent practicable when doing so does not cause significant detriment to the other goals.\textsuperscript{278}

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.”\textsuperscript{279} He elaborated, “If your goal is competitive districts, I don’t think this helps you get down that road very far.”\textsuperscript{280} In an analysis of the commission system, \textit{The Arizona Republic} concluded that the commission “failed to meet a primary goal of making legislative elections more competitive.”\textsuperscript{281}

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:

\textsuperscript{278} Id. at 687.
\textsuperscript{279} Hansen, supra note 273.
\textsuperscript{281} Hansen, supra note 273.
Table 6 shows that the average margin of victory in districts drawn by the IRC approached 30 percent. Specifically, the average victory margin in general elections in congressional districts was 29.1 percent. For state senate contests, Table 6 shows that the average margin of victory was 52.9 percent.

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 fell:

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282 http://www.azsos.gov/election/PreviousYears.htm.
Figure 15

Distribution of Victory Margins - U.S. Representative

FIGURE 16
As with Washington’s elections, the vast majority of Arizona’s districts were decided by margins that exceeded 10 percent. Of the 120 state senate contests over eight years in the “competitive” districts crafted by the IRC, only 14 had margins below 10 percent, and only 4 of those fell within 5 percent. Furthermore, in one-third (40) of these contests, the winner did not face an opponent in the general election.

Why was the commission so 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 in California except for the addition of competitiveness) prevented the creation of many competitive districts.\textsuperscript{285} The commission’s chair pointed to the Voting Rights Act’s protection of minorities and their tendency to vote Democratic. Echoing the findings of Cain et al. the IRC chair

\textsuperscript{285} Hansen, supra note 273.
noted that the resulting concentration of Democrats in a small number of districts left a few Democrats with which to make the remaining districts competitive.\textsuperscript{286}

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. California, however, has a much larger minority population than does the Grand Canyon State.\textsuperscript{287} 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.\textsuperscript{288} 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.\textsuperscript{289} Washington’s Redistricting Commission’s five members could not agree to redistricting plans. After missing the statutory deadline,\textsuperscript{290}

\textsuperscript{286} \textit{Id.}

\textsuperscript{287} According to the 2000 Census, 63.8 percent of Arizona’s population was non-Latino white, whereas only 46.7 percent of California’s population was non-Latino white. http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US04&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U&redoLog=false; http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_SF1_U_DP1&-geo_id=04000US06&-ds_name=DEC_2000_SF1_U&redoLog=false.

\textsuperscript{288} The 2000 Census found that 78.9 percent of the Washington’s population was non-Latino white. http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_SF1_U_DP1&-geo_id=04000US53&-ds_name=DEC_2000_SF1_U&redoLog=false.

\textsuperscript{289} Christopher C. Confer, \textit{To Be About the People’s Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions}, 13 Kansas Journal of Law and Public Policy 115, 125 (2004).

\textsuperscript{290} 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, \textit{The Seattle Times}, January 10, 2002. http://community.seattletimes.nwsource.com/archive/?date=20020110&slug=redistricting10m.
the members eventually agreed to make only minimal changes to the previous plan to ajust for population shifts during the past decade. In the end, the only conclusion to which they could all agree was to sacrifice competitiveness.  

VII. IS PROPOSITION 11 WORTH KEEPING?

The experience of other states suggests that Proposition 11 is unlikely to achieve the objectives touted by its promoters. Should Californians retain its procedures?

This is a topical question because, in the first general election since the voters approved Proposition 11, the November 2010 ballot will contain two measures relating to it. The first is Proposition 20, the “Voters FIRST Act for Congress.” Proposition 20 would amend the California Constitution primarily to expand the jurisdiction of the Citizens Redistricting Commission to include the redistricting of congressional lines. As of the date that the measure qualified for the ballot, its sole funder was Charles T. Munger, Jr., who previously contributed $1.25 million to Proposition 11. Prior to Proposition 20’s qualifying for the ballot, Munger has already contributed $3.1 million to its campaign.

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291 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 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 280.

292 Letter from Charles T. Munger to Edmund G. Brown, Jr., September 1, 2009, THE VOTERS FIRST ACT FOR CONGRESS (attached) at 1, http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm. Proposition 20 also would define and provide examples of a “community of interest,” id. at 3, and enable a registered voter to bring suit against a referendum that seeks to stay the implementation of a redistricting plan. Id. at 4.

293 Morain, supra note 65.

294 Kevin Yamamura, Schwarzenegger Fights to Protect His Climate-change and Redistricting Legacy, The Sacramento Bee, 1A, April 26, 2010.

Another measure scheduled for the 2010 general election is Proposition 27, the “Financial Accountability in Redistricting Act.” This measure would amend the California Constitution and Government Code to return all responsibility for redistricting to the state legislature. Unlike the No on 11 campaign, the Proposition 27 campaign promises to be much better funded. Prior to qualifying for the ballot, the campaign received $140,000 from House Speaker Pelosi, 13 other House Democrats, and California Assembly Speaker Bass. In addition, Haim Saban, a billionaire in the entertainment industry, loaned the campaign $2 million so that even prior to qualifying for the ballot, the campaign had already amassed $2.5 million.

Why has Proposition 27 received more funding six months before the election than the No on 11 campaign received – $1 million during the entire 2008 election cycle? Speculation is that the main concern of California Democrats is not Proposition 11’s redistricting procedures for the state’s legislative districts but Proposition 20’s focus on the state’s congressional districts. Democratic strategists maintain that the best way

d. Munger, a physicist who works at the Stanford Linear Accelerator Center, is the son of Charles Munger, the long-time partner of Warren Buffett and co-founder with Buffett of Berkshire Hathaway. Morain, supra note 65.


299 Morain, supra note 65. Interestingly, Saban had supported Proposition 11, contributing $200,000 to it. Id.


301 Supra at 102.
to defeat Proposition 20 is to confuse voters by placing a second redistricting measure on the same ballot.\textsuperscript{302}

With the battle to preserve or extend Proposition 11 joined, an evaluation of its likely success is timely. 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,\textsuperscript{303} the likelihood of California’s commission achieving significant competitiveness in the state’s districts is minimal. Demographics\textsuperscript{304} and federal law\textsuperscript{305} will work against the commission. Arizona and Washington, states with predominantly white populations, had to concentrate few of their minority/Democratic voters into districts to comply with the Voting Rights Act. Nevertheless, few of those state’s districts are competitive.\textsuperscript{306} California’s majority-minority population, however, necessitates the drawing of numerous majority-minority –

\textsuperscript{302} PolitiCal, supra note 298. The Democratic Party is all but assured to retain large majorities in the legislature and in the congressional delegation. Cain et al., supra note 200. Besides a geographic edge, it also has a significant registration advantage. For the June 2010 primary, California’s voter registration was 44.5 percent Democratic, 30.8 percent Republican, and 20.2 percent Independent. 15-Day Report of Registration, May 24, 2010, California Secretary of State, http://www.sos.ca.gov/elections/rorror-pages15day-prim-10/hist-reg-stats.pdf. Individual members, however, are less secure. Howard Berman, one of the senior members of the delegation, has long worried that redistricting could leave him vulnerable to a Latino challenger. Morain, supra note 65. After the 2002 redistricting, his district had a Latino voting-age population plurality of 49.2 percent, while the adjoining district had a Latino voting age plurality of 49.0 percent. The principal architect of this redistricting was Michael Berman, brother of the congressman. Cano v. Davis, 211 F.Supp.2d 1208, 1212 (C.D. Cal. 2002). Latino plaintiffs challenged this configuration as violative of both the U.S. Constitution and the Voting Rights Act. A three-judge panel, however, granted defendants’ summary judgment motion against plaintiffs’ claims. Id. at 1251. Thus, having come close to seeing his district become predominantly Latino in 2002, Berman may not want the voters in his district’s new configuration to be determined by persons unaffiliated with him.

\textsuperscript{303} Supra note 151.

\textsuperscript{304} See supra text accompanying notes 208-46.

\textsuperscript{305} See supra text accompanying notes 196-207.

\textsuperscript{306} See supra text accompanying notes 269-72, 282-84.
and heavily-Democratic districts. 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 California Citizens Redistricting Commission is unlikely to increase significantly the competitiveness of the state’s legislative and congressional districts, should voters retain it? Stated differently, 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.

One of the primary arguments for adopting a commission was to take redistricting from the self-interested legislature. 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. Legislators are thus best able to tailor districts to represent constituent communities and their interests. Persily experienced this first hand 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 (no population) and no political consequences (little value to the land). A legislator informed Persily, however, that this shift would disrupt environmental projects that the legislator initiated.

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307 See supra text accompanying notes 202-205.
308 Supra notes 29-30.
309 Interview of Dr. Shauna Reilly, January 27, 2010, at 1:1-10.
and hoped to complete. Thus, a move that would have no apparent political effect had tangible policy consequences, and persons unfamiliar with the district would not be able to incorporate this concern.\textsuperscript{311}

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.\textsuperscript{312} Redistricting “involves a give and take, in resolving conflicts among the various standards and in considering the concerns, desires, and objections of numerous interested persons and groups.”\textsuperscript{313} Line drawers also make decisions about service relationships between representatives and constituents and their placement within larger policy programs or decisions.\textsuperscript{314} Legislators routinely balance complicated policy choices and, as elected representatives, are particularly qualified to do so.\textsuperscript{315} The Supreme Court has recognized that legislatures exercise political judgment in balancing competing interests,\textsuperscript{316} and that legislatures are the institutions best situated to identify and then reconcile the traditional state policies within the redistricting framework.\textsuperscript{317} In contrast to legislatively-controlled redistricting, the appointed nature of a commission not only

\textsuperscript{311} Persily, supra note _ 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. \textit{Id.} at 678.
\textsuperscript{312} Brunell & Buchler, supra note 175 at 448-49.
\textsuperscript{314} Persily, supra note 181 at 679.
empowers less experienced persons to make these tradeoffs, they also lack the accountability of the legislature for their actions.\textsuperscript{318}

Legislative redistricting does have significant advantages. Moreover, legal and demographic hurdles will prevent the CRC from improving significantly the competitiveness of California’s districts. Thus, Californians should return redistricting to the legislature.

\textsuperscript{318} Kang, \textit{supra} note 315 at 690. Critics also question whether an appointed body can be representative of as diverse a population as California has. This argument was particularly powerful in helping defeat Proposition 77 and its redistricting commission of three retired judges. Steven F. Huefner, Don’t Just Make Redistricters More Accountable to the People, Make Them the People, 5 Duke Journal of Constitutional Law & Public Policy 37, 41 (2010). 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, \textit{Capitol Weekly}, February 25, 2010, http://www.capitolweekly.net/article.php?xid=ynlknd841ztmav.
VIII. KEEPING THE COMMISSION AND RETURNING REDISTRICTING TO THE LEGISLATURE – BUT WITH A TWIST

Because of the legislature’s knowledge about factors relevant to the formulation of districts and its experience in balancing interests, it is the appropriate body to draw the redistricting plan. An independent commission, however, could 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 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 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 underrepresented 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 percent of the seats even though they represented only 49.0 percent of the state’s registered voters.\footnote{Joe Hallett, Redistricting Comes under Scrutiny, The Columbus Dispatch, October 27, 2005 available at \url{http://www.ohiocitizen.org/money/redistrict/1.pdf}. Not only did Ohio’s plans create a disparity between party registration and electoral success, excessive noncompetitiveness characterizes 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 42 percent. \textit{Id}.}

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 subjurisdictions, 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.\footnote{Supra note 256.}

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 will 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 work. As discussed previously, prior to the adoption of Proposition 11, California law mandated that the legislature redistrict the state.\textsuperscript{321} 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.\textsuperscript{322} Courts deferred to the legislature in the absence of a showing that it unmistakably violated a particular provision of the law.\textsuperscript{323} When considering a legislative redistricting, the court not only applied deference but judicial restraint, too.\textsuperscript{324} For constitutional challenges to legislative redistrictings, courts presumed that the plans were constitutional, placing the burden upon the challenger to prove a violation.\textsuperscript{325}

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 consistent with the comments of the commission. Alternatively, it could decline to alter its plan. However, in any subsequent challenge on the 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.

Three examples show the effectiveness of this change. First, assume a commission had reviewed the Washington redistricting plan that contained the

\textsuperscript{321} California Constitution, Article XXI, § 1.
\textsuperscript{322} Nadler, 137 Cal.App.4th at 1340.
\textsuperscript{323} Id. at 1337.
\textsuperscript{324} Assembly of State of Cal., 30 Cal.3d at 669. See also Easley v. Cromartie, 532 U.S. 234, 242 (2001) (caution is especially appropriate where the legislature has articulated a legitimate political explanation for its districting decision).
\textsuperscript{325} Nadler, 137 Cal.App.4th at 1337.
“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. As 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 60 percent of the districts even though they held only a 49 percent to 48 percent registration lead statewide. Again, in any future 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 most familiar with the pertinent representational considerations, best able to begin the process quickly, and 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, 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. Fifth, it allows public comment after the legislature has developed its plan.

CONCLUSION

California has a long tradition of rejecting redistricting reform proposals. Proposition 11 appears to have succeeded less because of its own merits but more because the controlling party only half-heartedly opposed the measure. Based upon demographic factors in California and the experience in other states, Proposition 11’s redistricting commission is unlikely to provide a significant change in the final outcome, or it could produce even worse results. A better solution would leave redistricting in the hands of the body most experienced in performing the policy trade-offs required by the process. A commission could be most helpful in reviewing the resulting maps.

APPENDIX\textsuperscript{326}

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