Close Elections, Cross-Party Voting, and the Constitution

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INTRODUCTION

Electoral competition is the bedrock of democracy. Much like prices signal the consumption preferences in a private market, democratic elections help signal the political preferences of the population and make governments responsive to these preferences.\(^1\) Competition is not important, however, just for the sake of competition. Competition channels egoism into public gain. Indeed, it is not from the generosity of governors or the sympathy of senators that we can expect liberty, but from their regard to their own interests…harnessed by the features of electoral competition.

Constitutions define the rules of the electoral process. For example, the U.S. Constitution established the Electoral College with a detailed description of the selection process,\(^2\) defined the election for President as a plurality, winner-take-all system,\(^3\) created term lengths for both houses of Congress,\(^4\) and explicitly granted election administration rights to the States.\(^5\) Of the seventeen amendments adopted since the Bill of Rights, more than half concern election-related issues: (1) revised election procedures for the Vice President;\(^6\) (2) voting rights protections against racial discrimination;\(^7\) (3) popular elections for the United States Senate;\(^8\) (4) female suffrage;\(^9\) (5) succession procedures for members of Congress upon death;\(^10\) (6) presidential term limits;\(^11\) (7) a presidential elector for the District of Columbia;\(^12\) (8) the abolition of poll taxes;\(^13\) and (9) lowering

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3. Id.
4. Id. at art. II, §§2-3.
5. Id. at art. I, §4.
6. Id. at amend. XII.
7. Id. at amend. XV.
8. Id. at amend. XVII.
9. Id. at amend. XIX.
10. Id. at amend. XX.
11. Id. at amend. XXII.
12. Id. at amend. XXIII.
the voting age from twenty-one to eighteen. At the state level, constitutions govern everything from redistricting and electoral structures, to voting technology and campaign finance. Whereas political parties are absent from the U.S. Constitution, party structure, membership, voting rules, and access to the ballot are sometimes regulated by state constitutions.

Why do constitutions deal with these issues? What are the risks of relying on statutes and the common law? Election law creates the rules by which political actors are chosen. As the highest law of the land, constitutions are difficult to revise or amend, and they bind future lawmaking. Thus, constitutionally entrenched electoral rules are immune to changes by temporary political coalitions and instead may be changed only with the support of a very broad movement that involves the general citizenry. Statutory law, on the other hand, is subject to the political preferences of a majority of elected representatives—from as few as 32 people in Alaska to 214 people in New Hampshire—who cannot bind future lawmakers. The common law is subject to the preferences of even fewer people, sometimes even a single judge. Because democracy is predicated on fair elections, and because fair elections require that no person or group of people systematically benefit from the rules of the game, these rules are best situated in constitutions that are less the product of political vagaries and more an expression of political philosophy and democratic theory. At the root of these democratic theories is the notion that competition is the cure for the systematic public defects stemming from self-interested human nature.

This paper looks closely at the nature and importance of competitive elections and discusses how constitutions play a crucial role in shaping the optimal electoral structures.

13. Id. at amend XXIV.
14. Id. at amend. XXVI.
15. See, for example, ILLINOIS CONST. art IV, §2(a) and TEXAS CONST. art. III, §28.
16. See, for example, OREGON CONST. art. II, §16 (establishing plurality rule and providing for the possibility of proportional representation), and N.H. CONST. art. XLVIII (establishing plurality rule for gubernatorial elections).
17. See, for example, UTAH CONST. art. IV, §8 (providing for the use of electronic voting machines, called “mechanical contrivances”).
18. See, for example, HAWAI’I CONST. art. II, §5 (establishing state campaign fund to be used for partial public financing of state public offices.)
19. The Alaska state House is comprised of 40 members, and the state Senate 20, for a minimum winning coalition of 32 lawmakers. The New Hampshire state House is comprised of 400 members, and the state Senate 24, for a minimum winning coalition of 214. The minimum coalition in the U.S. Congress is \((435/2 + 1) + (100/2 + 1) = 269\) people.
20. Some state constitutions may be amended with a majority vote of citizens. Though this puts the constitution on the same level as laws that are effectuated via the ballot initiative process, the amendment process is still more difficult than passing ordinary legislation in the state legislature. Thus, even though some state constitutions may not be difficult to amend in absolute terms, they remain the hardest law to overturn in relative terms. See infra Part IV.
The paper proceeds in four parts. Part I distinguishes competitive elections from close elections and reviews the political theory of close elections. Specifically, the median voter theorem predicts that as the number of voters increases, the preferred political platform will converge towards the median voter’s preference and lead to closely contested elections. In 2008 and 2010 California voters amended their constitution with laws aimed at increasing competition in state elections. Both of the laws—one regarding redistricting and one eliminating the party primary—are based on the median voter theorem that competitive elections will yield more moderate and cooperative legislators. In Part II, I present data from the California Assembly that tests these underlying assumptions of the median voter theorem and the motivation for the two recently passed constitutional amendments and find little evidence to support the claims of election reform proponents. In Part III, I explore the implications of these data and findings for California’s constitutional law. Though election law is best situated in constitutions, the paradox of constitutional lawmaking exposes the risks of constitutionalizing ill-conceived election law. Constitutional amendments are often conceptualized as high risk, high reward for their proponents, but the risks and rewards extend to the general electorate as well. Part IV concludes by challenging election reformers to better understand the reality of legislative behavior and to rethink their assumptions when the structural changes they promote do not have their intended effect.

PART I

COMPETITIVE VS. CLOSE ELECTIONS

In general, the definition of competition in the election literature is taken for granted. However, researchers and commentators often use one singular term, “competitive election,” to refer to one of two distinct phenomena, defined as:

First-order definition: An election that pits two or more candidates against each other for one office;

Second-order definition: An election between two or more people in which the winning margin is close, but not equal, to zero.

Conflating these two phenomena can lead to a mistaken understanding of the root causes, or the appropriate responses to non-competitive elections. In fact, a precise definition of competition is necessary for diagnosing deficiencies in the system. For example, in the fifteen years between 1992-2006 in California, 97.7% of state Assembly elections were contested by two or more candidates, suggesting a very high level of competition as understood by the first-order definition above. In only 3.6% of these races, however, did the winner garner less than 51% of the vote. These numbers suggest that the bigger threat to competition in the California Assembly relates to margins of victory and not to ballot access. This threat of the “vanishing marginals” was first articulated by
David Mayhew in 1974 regarding federal Congressional elections and has also been observed in several other state legislative bodies as well.\footnote{21} Throughout the paper I use the term “competitive election” to refer to the first-order definition and the term “close election” to refer to the second-order definition. For the reasons described above, my main focus is on close elections, though the theory and implications for competitive elections are similar.

\subsection*{A. Median Voter Theorem}

The median voter theorem is based on contested assumptions, yet its basic tenets remain the most widely-accepted predictive theory about voting. The median voter theorem assumes that political platforms, or preferences, can be aligned on a left-right scale and mapped onto a two-dimensional space.\footnote{22} Based on the spatial model of voting formalized by Downs in the 1950s, the median voter theorem predicts that as the number of voters increases, the preferred political platform will converge towards the median voter and lead to closely contested elections.\footnote{23} See Figure 1.

Consider an election with two candidates who compete for the Republican nomination to a particular office. In states with closed primaries, these two candidates compete for the votes of registered Republicans. The median voter theorem predicts that these candidates will converge on the platform of the median Republican voter, marked $m_r$ in Figure 1, as doing so will maximize the number of votes each candidate can earn. The same logic applies to the Democratic primary, which will yield a candidate who endorses the platform $m_d$. By extension, when the Republican and the Democrat meet in the general election, the median voter theorem predicts that both candidates will converge toward the platform endorsed by the median voter of the general electorate ($m$) in order to maximize their chances of winning the election. The rationale of the median voter theorem predicts that shifts toward the (relative) political center will yield more voter support, thus incentivizing candidates to adopt the median platform, or else risk losing voter support to their opponent.


\footnotetext{22.}{Voting on multiple issues might increase the space-dimensions. However, because multiple issues often involve highly correlated matters, mapping these platforms and preferences is still possible in low-dimensional space where the application of the median voter theorem is strongest. See Kevin M. Quinn and Andrew D. Martin, \textit{An Integrated Computational Model of Multiparty Electoral Competition}, 17 STAT. SCI. 405 (2002).}

\footnotetext{23.}{Anthony Downs, \textit{AN ECONOMIC THEORY OF DEMOCRACY} (1957) (formalizing the Hotelling principle of minimum differentiation as it relates to voting). See also Harold Hotelling, \textit{Stability in Competition}, 39 ECON. J. 41 (1929).}
The median voter theorem is a predictive model of a political candidate’s position, though several benefits have been identified from the outcome predicted by the model. For example, the median voter theorem predicts that elections will be decided by very close margins, thus making it easier for voters to hold elected officials accountable by “voting the bums out.” In addition, politicians who represent the median voter are, by definition, less extreme at the margins. This is important inasmuch as a legislature full of moderate candidates is theoretically more likely to enact bipartisan laws and cooperate with each other.

Who, exactly, is the median voter in this theorem? This question is best answered by describing who the median voter is not. First, the median voter theorem is not the mean voter. In other words, the model does not account for the intensity of preferences among voters. For example, if Democrats strongly support gun control laws and Republicans are generally indifferent but lean slightly against the law, the median voter...

24. The median voter theorem also applies when a candidate becomes the voter, e.g., when a candidate is elected and must choose from among a set of policies. See Kenneth A. Shepsle, Institutional Arrangements and Equilibrium in Multidimensional Voting Models, 23 AM. J. POL. SCI. 27 (1979).

Theorem does not weigh Democratic votes more heavily than Republican votes. To understand why we look to the one person, one vote rule in America that precludes people with extraordinarily strong preferences from casting more than one ballot.\footnote{The one person, one vote was first articulated by the Supreme Court in \textit{Gray v. Sanders}, 372 U.S. 368 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote”). \textit{See also Reynolds v. Sims}, 377 U.S. 533 (1964) (citing Gray).} Thus, the median voter is defined as the person whose preferences represent the 50th percentile or for whom the number of people who disagree are the same as the number who agree.\footnote{The median voter theorem assumes symmetry among preferences. Voter preferences may vary greatly in their intensity, but the theorem predicts that the variation at both ends of the left-right scale is equal, and thus offsetting. \textit{See} ROBERT D. COOTER, \textsc{Strategic Constitution} 34 (1999).} This means that the median voter can also be thought of as the decisive voter. This does not mean, however, that the median voter is a \textit{moderate} or that her preferences more closely align to independent or undecided voters than to loyal partisan voters. The median position can be manipulated. Most notably, legislative districts are redrawn every ten years and the resulting balance of political preferences is often skewed in one direction or the other. See Figure 1. Redistricting does not undermine the median voter theorem—no matter the distribution of voters, there will always be a 50th percentile. Where this (relative) median falls on the left-right political spectrum, however, is determined by the makeup of an election jurisdiction, over which redistricting bodies have great power. And no matter the distribution or the median position, the median voter theorem predicts a convergence of preferences to the center of that distribution.

The median voter theorem can help explain two recent constitutional amendments in California. Believing that too many legislative districts were drawn to protect incumbents, California voters approved a constitutional amendment to create an independent, bipartisan redistricting commission in 2008. Believing that close elections yield more cooperative lawmakers, California voters approved a constitutional amendment that eliminated party primaries in favor a top-two system aimed at shrinking the margins of victory in general elections.

This paper focuses on the second constitutional amendment—Proposition 14 passed in 2010—and evaluates whether shrinking margins of victories correlate with high levels of cooperation in the California Assembly.

\textbf{B. California’s Proposition 14}

In 2009, the California State Legislature was deadlocked on the state budget. With just one more vote necessary to reach the two-thirds super majority threshold, California state Senator Abel Maldonado wielded great power as one of a handful of holdouts who was willing to bargain. Maldonado, a ten year veteran of Sacramento—six as an Assembly representative from San Luis Obispo County, and four as a state senator—agreed to vote for the pending budget resolution in exchange for a political favor. The
buying price? Legislative support for Maldonado’s ballot initiative to amend the state constitution in favor of open primaries where the top two vote getters, drawn from one list regardless of party, advance to a run-off in the general election. Maldonado believed that open primaries would lead to close general elections, where more moderate candidates would emerge and prevent future budget stalemates because of their willingness to cooperate and compromise. In the end, Maldonado struck his bargain. The budget passed and on June 8, 2010 the open primary amendment appeared on the ballot as Proposition 14.

In the lead up to the election, there was a serious, statewide dialogue about the effects of Proposition 14. The Los Angeles Times endorsed the measure as “a modest step toward eliminating some of the incentives that encourage our representatives to dig in and resist sensible compromise.”28 The Monterey County Herald (one of Maldonado’s home newspapers) opined that Proposition 14 would “move candidates toward the middle” because “rather than appealing only to their party’s core…the candidates would try to seek votes from everyone.”29 Most of the opposition to Proposition 14 centered on the measure’s possible effect on campaign spending and on minority party candidates who some believed would be harmed by the open primary system. There was some opposition, however, that questioned the benefits predicted by the median voter theorem. The Orange County Register publicly opposed Proposition 14 on the basis that “…encouraging moderate, middle-of-the-road candidates, essentially amounts to elections between candidates with few policy differences where personality trumps substance.”30

Proposition 14 ultimately passed with 53.8% of the vote and will go into effect in 2012. In the meantime, Maldonado’s efforts had drawn the attention of Governor Schwarzenegger. When Lieutenant Governor John Garamendi won a special election to serve in the United States Congress before the end of his term, Schwarzenegger nominated Maldonado to serve out the term and the state legislature consented.31

Proposition 14 is a real-world instantiation of the median voter theorem, though in reverse. Whereas the median voter theorem predicts centrist candidates will garner a slim majority of votes, the Proposition 14 is based on the idea that close elections will produce centrist candidates who are more likely to cooperate with each other. Whether either of these theories explains California politics is an empirical question.


31. In November 2010, just five months after Californians endorsed his open primary initiative, Maldonado lost his bid for a full term as Lieutenant Governor by 11 points to San Francisco Mayor Gavin Newsom.
PART II
AN EMPIRICAL ANALYSIS OF THE CALIFORNIA ASSEMBLY

The median voter theorem suggests that as the number of voters increases, the preferred platform of the winning candidate will reflect the preferences of the median voter in that jurisdiction. By pandering to the median voter, a political candidate is able to attract as many votes as possible—at minimum 50% plus one vote. The median voter theorem thus suggests that no matter how electoral districts are drawn (i.e., no matter where the median voter’s preferences are along a left-right dimension), electoral outcomes should hover, on average, near 50%. The solid line in Figure 2 represents the average margin of victory for all Assembly seats between 1898 and 2002 and illustrates that outcomes in California are not, on average, close to 50%. In fact, elections for the California Assembly are rarely closely contested.

FIGURE 2. California Assembly Election Returns 1898-2002

1992-2004 election data is based on published reports by the CA Secretary of State.\textsuperscript{32} 1898-1992 election data based on data compiled by Seth Masket (from the California Blue Book and the California Assembly Roster).\textsuperscript{33} Polarization score calculated by Masket using DW-NOMINATE software.\textsuperscript{34}

\textsuperscript{32} “Statewide Election Results,” California Secretary of State’s website available at http://www.sos.ca.gov/elections/elections_elections.htm.


A. Close Elections

The average margin of victory between 1992-2004 was 33.7% meaning that a winning candidate for the Assembly earned, on average, 66.85% of the vote.\footnote{As a rough control, I looked at California state senate election returns. The California Secretary of State only provides election return data for the state Senate for the years 1990-2008. During this period, the average margin of victory for Senate seats was 32.8% (compared to 33.7% in the Assembly). By comparison, ballot propositions (both initiatives and referenda) over the same span were more competitive with an average margin of 24.3%.
} Despite the lack of widespread close elections in this period, they are some of the most competitive, and closely contested in the past 100 years. At the same time, the Assembly has become more polarized than any other time in the state’s history. The dotted line in Figure 2 represents the polarization score of the California Assembly.\footnote{Supra note 33.} These data are not strong evidence in favor of the median voter theorem, though perhaps they are the product of aggressively partisan redistricting. If the median voters in Republican districts and Democratic districts move further and further apart, we would expect to see an increase in polarization, we might see both high polarization and close elections. However, elections were not that close. As it relates to Proposition 14, these data illustrate that in 2009 the Assembly was highly polarized and Assembly elections were not generally close. While these two facts are true on aggregate and on average, these data are not very favorable to the proponents of Proposition 14 as it does not appear that polarization is correlated with election returns. However, averages can be misleading and this relationship is worth exploring in more detail. Although the average margin of victory between 1992-2004 was 33.7%, there were a handful of elections that were decided by close margins. See Table 1.

\begin{table}[h]
\centering
\caption{Number of elections decided by narrow margins in the California Assembly.}
\begin{tabular}{|c|c|c|c|c|}
\hline
Year & < 50.01\% & < 50.5 & < 51\% & < 52.5\% \\
\hline
1992 & 0 & 2 & 4 & 6 \\
1994 & 0 & 2 & 4 & 7 \\
1996 & 3 & 4 & 7 & 9 \\
1998 & 0 & 1 & 2 & 3 \\
2000 & 0 & 0 & 0 & 3 \\
2002 & 0 & 1 & 2 & 3 \\
2004 & 0 & 0 & 1 & 2 \\
\hline
\textbf{TOTAL} & \textbf{3} & \textbf{10} & \textbf{20} & \textbf{31} \\
\hline
\end{tabular}
\end{table}

\footnote{Election data is based on published reports by the CA Secretary of State. The total number of elections between 1992-2004 is 560.}
To test the marginal effect of close elections, I recorded every election for the Assembly between 1992-2004 and compared it to individual roll call votes over the same time period. During this time, the California Assembly voted on 13,740 bills (or an average of 1,963 bills per legislative session). I coded individual votes for every sixth bill (ordered numerically for each session) as recorded by the Legislative Counsel of California (n=2,320). Each vote was coded “1” when the legislator voted with the majority and “0” otherwise. The Legislative Counsel also notes when a legislator does not vote, whether by abstention or because he or she was absent. From this information I calculated the rate at which each member of the Assembly voted with the majority, and the rate at which they did not vote. I then plotted these rates on the electoral margin of victory for each corresponding member of the Assembly. See Figure 3. Every dot in Figure 3 represents one member of the California Assembly. In the top set of graphs, the rate at which each legislator voted with the majority is measured on the y-axis in percentages. In the bottom set of graphs, the rate at which each legislator failed to vote, for whatever reason, is measured on the y-axis in percentages. Electoral margins of victory are measured on the x-axis in both sets of graphs. Finally, blue dots represent Democratic legislators and red dots represent Republican legislators.

B. Legislative Cooperation

I use a legislator’s rate of voting with the majority as a measure of their cooperativeness. This is an admittedly imperfect measure, though I think it captures the deficiency that Abel Maldonado and proponents of Proposition 14 seek to remedy: an unwillingness to cooperate, which I define as voting with one’s opponents. There are various ways to define cooperation (e.g., co-sponsoring a bill with somebody from a different party, introducing an amendment that garners bipartisan support, refraining from invoking procedural hurdles, etc.), but I prefer the rate of voting with the majority because it involves the commodity of greatest interest—a legislator’s vote—and, unlike other measures, it includes things that are not initiated by the legislator and are out of their control. Legislators can co-sponsor all sorts of bipartisan bills that have no chance of reaching a vote or of passing, but if legislative stalemate is the concern, then voting matters, and voting with the majority party when one is in the minority is a defensible measure of cooperation. One limitation to this approach is that the California Assembly has been a Democratic stronghold for the past 15 years. With an exception for the 1995-96 legislative session (highlighted with a red square in Figure 3), Democrats have consistently held a majority of Assembly seats. This means that much of the analysis in this paper focuses on Republican lawmakers (195 to 39) who were in the minority party. I have no reason to believe that Republicans operate in a systematically different way than Democrats when they are in the minority of the Assembly, but the one-sidedness of the data is one important caveat that limits the external validity of this research.


38. Note that my measure is different than the polarization measure in Figure 2, which measures the average distance between Republican and Democratic preferences in the Assembly.
FIGURE 3: Rate of cooperation and non-voting on electoral margins of victory.

Sources: California Secretary of State’s website and http://www.leginfo.ca.gov/billinfo.html.
Figure 3 illustrates a linear relationship between electoral margins of victory and legislative cooperation, though the relationship is not statistically significantly positive. See Table 2. If close elections lead to higher levels of cooperation, then we would expect the best fit lines on the plots to slope downward. In other words, we would expect to see higher rates of cooperation where the margin of victory was closer to zero and lower rates of cooperation where the margin of victory was closer to one. This is not the case. The relationship is unstable. As a continuous measure, the margin of victory is negatively correlated to cooperation, though that relationship is not statistically significant. Testing for various victory thresholds reveals no pattern, though all of the coefficients are positive. However, because the number of elections is small, the standard errors are very large and so the data are essentially inconclusive. See Table 2. While these data offer little evidence in support of the argument that close elections will produce more cooperative legislators, it is difficult to draw any strong conclusions about the possible effects of an intervention like Proposition 14 from observational data. The recent history of California elections suggests, however, that the median voter theorem may not have the predictive magnitude accorded it by election reformers.

Figure 3 does reveal strong party discipline. Republicans are more likely to vote like Republicans, no matter their margin of victory, and Democrats likewise. This party discipline is robust across all years in the sample and suggests that party identification is a very good predictor of how a legislator will vote.

<table>
<thead>
<tr>
<th>Margin of Victory</th>
<th>(1)</th>
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<th>(3)</th>
<th>(4)</th>
<th>(5)</th>
<th>(6)</th>
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<tr>
<td>&lt; .005</td>
<td>.113</td>
<td>.113</td>
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<tr>
<td>&lt; .01</td>
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<tr>
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<td>.051*</td>
<td>.051*</td>
<td>.051*</td>
<td>.051*</td>
<td>.051*</td>
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<td>Cons</td>
<td>.808**</td>
<td>.789**</td>
<td>.789**</td>
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<td>.789**</td>
</tr>
<tr>
<td>R²</td>
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<td>.009</td>
<td>.007</td>
<td>.006</td>
<td>.003</td>
<td>.024</td>
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<tr>
<td>N</td>
<td>560</td>
<td>560</td>
<td>560</td>
<td>560</td>
<td>560</td>
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</tbody>
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* = p ≤ .05; ** = p ≤ .01. Standard errors reported in parentheses.
Neither electoral margin of victory nor party discipline is strongly correlated with the rate of not voting. Non-voting rates were generally low with only two legislators failing to vote more than one-third of the time. Though non-voting has not been raised as a problem, there are reasons to believe that the margin of victory might be a good predictor of how often a legislator votes. On the one hand, winning in a landslide may induce a legislator to take their job less seriously, and to abstain without fear of repercussion. On the other hand, winning a very close election may also induce a legislator to abstain, though for different reasons. Fearful of losing the next election, a legislator elected by a slim margin may abstain from voting on controversial bills to avoid being on record for or against issues that might be used against them. The data offer no evidence to support or to reject either of these hypotheses. Given that the median non-voting rate was 3%, and that this 3% was equally distributed between parties and across victory margins, non-voting does not appear to be a significant problem worthy of more attention.

C. Legislative Updating

Given the lack of a strong relationship between legislative cooperation and electoral margin of victory, I turn my attention to the legislators themselves. Perhaps singular elections are an unreliable measure because, in a winner-take-all system, just winning an Assembly seat is all that matters. Once there, past elections are forgotten and legislators pursue similar strategies regardless of their chances for reelection. In other words, if a close election does not produce a candidate more willing to compromise, perhaps candidates change their strategy after voters judge their behavior as opposed to judging their promises. To test this I plotted the cooperative rate of each legislator over time, focusing on whether changing margins of victory affect their behavior. See Figure 4. The x-axis measures the cooperative rate of each legislator in the legislative session after his or her initial election. The y-axis measures the cooperative rate of each legislator in the legislative session after his or her reelection. The plot is then conditioned on 16 combinations of electoral returns for both elections. I broke down each election into four equally sized categories of election returns (with 5% overlap) and scatterplots are reported for each combination of these categories. For example, in the bottom left corner legislators won both their first election and their reelection by less than 18% and 24% respectively. The panel in the bottom right corner reports the cooperative rates for legislators elected by less than 18% and reelected by more than 46% of the vote.

<table>
<thead>
<tr>
<th>n(elect)</th>
<th>Election Groups</th>
<th>Reelection Groups</th>
<th>n(reelect)</th>
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<tbody>
<tr>
<td>250</td>
<td>0% to 18.35%</td>
<td>0% to 24.05%</td>
<td>250</td>
</tr>
<tr>
<td>251</td>
<td>17.85% to 28.45%</td>
<td>23.25% to 33.65%</td>
<td>249</td>
</tr>
<tr>
<td>250</td>
<td>28.15% to 43.25%</td>
<td>33.55% to 47.05%</td>
<td>249</td>
</tr>
<tr>
<td>249</td>
<td>42.45% to 100%</td>
<td>46.35% to 100%</td>
<td>249</td>
</tr>
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</table>
The idea is that legislators may view their reelection as a referendum on their behavior and change their political strategy accordingly. What we see, in fact, is that most legislators fall on, or very near, the 45-degree line in a majority of panels. Note: the lines in each panel represent the ordinary least squares approximation for each subset. This suggests that the margin of victory is not as strong of a predictor of one’s cooperativeness as the previous level of a legislator’s cooperativeness. On the 45-degree line, the cooperative rate is identical in the legislative session before and after reelection; whatever the cooperative rate in the legislative session after an election, the legislator is likely to cooperate at the same rate in the legislative session following his or her reelection. There are three exceptions to this. First, in the left, uppermost corner, where the first election was a blowout (> 42%) and the second election was more closely decided (< 24%) there...
is only one data point. This is perhaps the most important plot as it artificially replicates the effect of instituting a close election where it did not exist before. Perhaps this legislator acted in a way that lost him a lot of votes between his election and reelection. This is the plot whose relationship is most relevant for evaluating the hypothesis that artificially instituting close elections will lead to higher rates of cooperation. Unfortunately there is only one data point so it is impossible to note any pattern among legislators. It is worth noting, however, that this one legislator’s cooperative point falls on the 45-degree line, suggesting that despite his narrow reelection, he did not change his strategy regarding cooperation. The second exception, in the right uppermost corner, is a flat trend line where most of the data points are clustered near the upper right. In this plot, where legislators were both elected and reelected by a landslide, their cooperative rates were quite high, and consistently so. This panel suggests a relationship that is completely contrary to the hypothesis: those who won by blowouts were more likely to cooperate, and more likely to become more cooperative. The final exception to the 45-degree pattern is found in the two plots with the steepest trend lines (near the upper left corner). These plots suggest that a narrower reelection victory was correlated with a lower cooperative rate. In both plots, the reelection victory margin was lower than the initial election margin, yet the cooperation rate was lower (in some cases much lower) during the legislators’ second term. This appears to contradict the median voter theorem and the hypothesis of Proposition 14. This trend is an exception, however, to the 45-degree pattern that generally holds across the entire distribution.

Ultimately, this trellis graph suggests that the closeness of an election victory is not as strong of a predictor of one’s cooperativeness as their previous rate of cooperation. In other words, perhaps there are some people who are just more likely to be cooperative by nature, regardless of electoral structures. Exactly who are these cooperators?

D. Personal Characteristics of the Cooperators

Of the four most cooperative legislators in the past 15 years, their electoral margins of victory range from 1.8% to 22.1%. Two are female and two are male, both males served in the military, and three of the four had previous elected experience in local politics. Of the four least cooperative legislators in the past 15 years, their electoral margins of victory range from 7.6% to 33.4%. All were male, one served in the military and only one had been elected to local office previously. Do any of these personal characteristics, on average, have a predictive effect on a legislator’s rate of cooperation? To test this I coded every member of the California Assembly between 1992-2006 with information from the California Legislature Handbook. The personal characteristics listed for each member include sex, educational institution, prior elected experience, military service, and a short personal biography with other information (e.g., children, membership in a civic club, political philosophy, etc.). I coded each member of the Assembly on three dimensions, with dummy variables for whether the legislator had previously served as a mayor or on a city council, whether the legislator was female, and whether the legislator had served in the military. See Figure 5. None of these three personal characteristics was predictive of higher rates of cooperation in the sample. Not only were the means for each dummy substantively equal but the distribution of each variable had nearly the same variance.
What does this mean? It means that we do not have a very clear idea about how to predict the cooperative rate of legislators, much less how to induce cooperation. All of the data are inconclusive, though they do point at some unknown personal trait that inclines legislators to be cooperative, regardless of electoral margins of victory.

**PART IV**

**IMPLICATIONS FOR CALIFORNIA CONSTITUTIONAL LAW**

As the highest law of the land, constitutions are difficult to revise and amend, and they bind future lawmaking. Thus, constitutionally entrenched election law is immune to changes by temporary political coalitions, which is important inasmuch as election law creates the rules by which political actors are chosen. Because fair elections require that no person or group or people systematically benefit from the rules of the game, these rules are best situated in constitutions that are less the product of political vagaries, and more the result of a broad movement that involves the general citizenry. At the very least, some state constitutions like California’s may be amended with a bare majority vote of citizens. Though this puts constitutional amendments on par with popular laws effectuated via the ballot initiative process, the amendment process is still more difficult than passing ordinary legislation in the state legislature, and often has a higher signature gathering threshold to gain access to the ballot. In other words, constitutional

39. For example, in California, the number of signatures required to place an initiative on the ballot is 5% of the total votes for Governor in the last gubernatorial election whereas the number of signatures required to place a constitutional amendment on the ballot is 8% of the total votes for Governor in the last gubernatorial election.
amendments will never be easier to pass than ordinary legislation and more often than not are much harder to pass. Thus, even though some state constitutions may not be difficult to amend in absolute terms, they remain the hardest law to overturn in relative terms.

As a general directive, the rules of a game should be arbitrated at the highest possible level, and not by the players themselves. But this directive comes at a cost. Players are in a better position to bargain efficiently, and “final word” decisionmaking bodies are hyper-centralized and risk being too narrow-minded. Applying this to the world of elections, we generally adopt the theory that electoral rules should be entrenched at the highest, constitutional level. But constitutional adjudication prevents parties from efficiently bargaining with each other, it precludes judicial checks and balances, and it increases the risks associated with making bad laws.

A. Getting the Right Answer

Statutory law and the common law may both be manipulated at the hands of small groups of people. This is a deficiency when inferior laws are passed, but is a good thing when trying to overturn inferior laws. Constitutional law, on the other hand, is very difficult to revise and amend and, therefore, an ideal habitat for election law, provided the law is congruent with the will of We, the People. Philosophical questions regarding the general will aside, constitutions are powerful because they transcend ordinary politics and raise the stakes of lawmaking, thus increasing the importance of getting it right. By “getting it right” I mean that a proposed amendment has its predicted effect. As an example, Californians disapprove of the job the state legislature is doing at a rate of 8-to-1. It comes as no surprise, then, that California residents favor interventions meant to shake up the political process in Sacramento, such as Proposition 14. But what if these interventions do not have their intended effect? What if voters amend the constitution only to discover that the problem they sought to remedy still exists? Because constitutions are so difficult to amend, the electorate bears the risk of any miscalculations about the effect of a law. Where constitutional amendments fail to live up to their promise, voters may be stuck with a new law that they do not prefer, but cannot overturn. This leads to the paradox of constitutional lawmaking: because constitutions are hard to amend, it is important that proposed amendments perform as promised. However, because constitutions are hard to amend, there is an increased tolerance for a margin of error in predicting the effect of an amendment.

B. The Constitutional Lawmaking Paradox

Most laws are passed with some expectation of a particular effect. There is a margin for error but voters rely on a particular expectation when voting for a law. When laws are implemented, voters tolerate deviations from their expectations to a degree.

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40. Record low assessment of the legislature. Huge majority thinks state is seriously off on wrong track, CALIFORNIA FIELD POLL, Sept. 28, 2010 (Release #2357). 80% disapprove of the job the state legislature is doing compared to 10% who approve, with 10% no opinion. “This is lowest assessment of the legislature’s job performance by The Field Poll during the past twenty-seven years.”
But to what degree? In Figure 6, I model how the constitutional amendment process leads to a paradox. When precision is needed most, flexibility is liberally afforded; the same features of the constitutional amendment process that demand getting the law right, tolerate a high degree of getting it wrong. The spatial models in Figure 6 compare the decision calculus of passing a constitutional amendment versus enacting an ordinary law. For the sake of clarity, Figure 6 models a decision about how much money to spend on a particular policy though the model can be used to describe other non-monetary policy choices with ordinal policy options (e.g. level of political competition). Points near the left of the spatial model represent low levels of spending and points near the right of the model represent high levels of spending. The top line represents the constitutional amendment process and the bottom line represents the legislative process. DV stands for decisive voter—DV^A for amendments and DV^S for statutes—and is located at the most preferred point of the decisive voter. For the sake of comparison, I assume that DV^A and DV^S share the exact same spending preference for this particular policy. I also assume that there are transactions costs associated with passing a constitutional amendment and with passing a statute. I model these costs by noting where the decisive voter’s dissatisfaction with a particular proposal equals the transactions costs of passing a new

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41. The decisive voter for a constitutional amendment may be the median voter of the general electorate, or the voter at the threshold of some supermajority. The decisive voter for a statute is likely the median legislator (presuming an up-or-down vote on a singular issue without bargaining). It is not unrealistic to assume that the preferences of these decisive voters might overlap, though it is more likely that they do not.
CONSTITUTIONS AND CLOSE ELECTIONS

Moreover, \( DV^A_{\text{low}} \) and \( DV^S_{\text{low}} \) indicate the lower values, \( DV^A_{\text{high}} \) and \( DV^S_{\text{high}} \) denote the upper values. Because constitutions are more difficult/costly to amend than statutes, the set [\( DV^A_{\text{low}}, DV^A_{\text{high}} \)] will almost always be larger, and will never be smaller than the set [\( DV^S_{\text{low}}, DV^S_{\text{high}} \)]. Any point inside the set [\( DV^A_{\text{low}}, DV^A_{\text{high}} \)] will not trigger a new amendment and any point inside the set [\( DV^S_{\text{low}}, DV^S_{\text{high}} \)] will not trigger a new statute. This is the case because it would cost more to overturn a law in the set demarcating transactions costs than to just bear the costs of the inefficiency of the law. Thus, those wishing to make a new law have discretion to set the spending limit anywhere within the set demarcating the transactions costs. These discretionary zones are marked in Figure 6.

Now for a specific example. Suppose the status quo (marked SQ) is so unsatisfactory that a new law could be passed either via constitutional amendment or by the legislature (i.e., it is outside both of the discretionary zones). Suppose further that law \( X^* \) is proposed. This proposed law is not the most preferred point for either the constitution amenders or the legislature. However, both groups prefer it to the status quo so let us compare the consequences of passing the law as a statute versus as an amendment to the constitution. First note that voters expect the proposed law to have effect \( X^* \), though the law is based on a set of untested hypotheses and there is likely to be some margin of error in the final effect of the law. This margin of error is denoted by the set [\( X_L, X_H \)] in Figure 6. Given the expectation that the law will have effect \( X^* \), the law is likely to pass whether it is taken up by the legislature, or whether it is promoted as an amendment to the constitution. This fact is noted by the green dashed arrows in Figure 6.

Now suppose that the actual effect of the new law is \( X_H \). This situation is marked by red dashed arrows in Figure 6. Because \( X_H \) is further from the decisive voters’ most preferred point, it is inferior to \( X^* \). Yet note that when the original law is passed as a constitutional amendment, the real-world effect (\( X_H \)) does not trigger an overriding amendment. On the other hand, \( X_H \) does trigger action by the legislature; it is cheaper to engage in statutory lawmaking to override \( X_H \) than to tolerate it. And herein lies the paradox. The transactions costs of statutory lawmaking are low, and overturning bad laws is easy. Thus, the risk of passing bad laws is not very high. However, because the override costs are so low, sponsors of new statutes must take extra care to minimize the margin of error that might trigger an override. Conversely, the transactions costs of amending the constitution are relatively higher, and overturning bad laws is relatively more difficult. Thus, it is important to minimize bad laws, or to more accurately predict the effects of an amendment, in order to prevent getting stuck with suboptimal laws. However, because the override costs are so high, proponents of constitutional amendments can get away with proposals with high margins of error that are unlikely to be overturned in the future.\(^{42}\)

\(^{42}\) Note that only one time in the history of the United States Constitution has an amendment been repealed by another amendment. See U.S. CONST. amend. XXI, repealing amend. XVIII.
C. Constitutional Election Law

Despite this paradox and the inherent risks it illustrates, there are important reasons to embed election law in the constitution. As a result, we might expect to see imprecise or inefficient election laws in California that do not deliver as promised. Time will tell whether Proposition 14 qualifies as one of these laws. The evidence presented in this paper does not inspire much confidence and, in light of the constitutional lawmakers' paradox, proponents for a more cooperative state legislature might conduct more careful research on the topic. Indeed, there is a dearth of empirical research on election law. Given the difficulty in overturning election laws that ultimately make their way into the constitution, it is important to have a better understanding of how electoral structures affect politics and policymaking. In the past 15 years, there have been several laws aimed at increasing electoral competitiveness in California. In 1996 the blanket primary, in 2008 an independent redistricting commission, and in 2010 the open, top-two primary. While these laws are predicated on strong political theories, it is not clear what effect these laws will have in the future. It is not clear that any of these reforms will lead to closer elections. And even if they do, it is not clear that close elections yield moderate candidates who are more willing to compromise and cooperate. What is clear is that these new laws will remain a part of the California constitution for many, many years to come. Responsible reformers should more carefully examine the effects of future laws before passing more risky constitutional amendments that may or may not ultimately accord with the will of the people. When close elections do not have the remedial quality ascribed to them, are we not then merely maximizing the number of people who are dissatisfied with the results of every election?

PART IV
CONCLUSION

In California, elections are not decided by close margins and legislators are not particularly cooperative. Whether these two facts are related is unclear, although California voters assumed a strong relationship when they amended the state constitution to promote close elections in 2010. The recent history of California politics suggests that the relationship between close elections and legislative cooperation is weak, if a relationship even exists. At present, we do not have a very clear idea about how to forecast whether a legislator will be cooperative and electoral margins of victory appear to be a particularly weak predictor. Nevertheless, election reformers continue to pursue constitutional amendments aimed at narrowing election margins. We need more

43. One of the problems with election law research is a lack of good data. Many scholars have lamented this deficiency and made calls for increasing efforts at tracking the effects of various election laws. See Heather Gerken, THE DEMOCRACY INDEX (2009) (noting that we do not even know how many votes were cast in the 2008 election) and Data for Democracy: Improving Elections through Metrics and Measurement, PEW CENTER ON THE STATES (2008).
empirical work on these issues before we risk embedding these laws in the California constitution.

Though election law is best situated in constitutions, the paradox of constitutional lawmaking exposes the risks of constitutionalizing election law. Constitutional amendments are often conceptualized as high risk, high reward for their proponents, but the risks and rewards extend to the general electorate as well. And just because election reformers can get away with passing laws that have large margins of error does not mean that they should. What the paradox of constitutional lawmaking teaches us is that a more careful understanding of the effects of proposed reforms is necessary. When structural changes do not have their intended effect, voters ultimately bear the risk of the miscalculations that may lead to negative consequences. Those who seek to amend the constitution must better understand the reality of legislative behavior if they genuinely intend to have an effect on politics in California. For example, the California legislature is highly polarized, the parties are highly disciplined, and the Assembly almost never rejects bills that come up for a vote.44 Like market imperfections that undermine the assumption of perfect competition, these features of California politics undermine some assumptions of the median voter theorem. Thus, election reforms that chiefly rely on the median voter theorem (e.g., Proposition 14) risk having an unpredictable effect. Though the constitutional amendment process may tolerate this unpredictability, it is socially inefficient and possibly detrimental for long-term progress.

44. Between 2000 and 2006 the Assembly only rejected 27 bills of the 7,402 that came before the body for a vote.