

# Election Evidence: The Promises and Realities of California's Citizen Commission

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## ELECTION EVIDENCE: THE PROMISES AND REALITIES OF CALIFORNIA'S CITIZENS COMMISSION

Brett Piersma\*

[W]henever the people shall choose their representatives upon just and undeniably equal measures, . . . it cannot be doubted to be the will and act of the society . . . .

—John Locke<sup>1</sup>

The character of our democracy is at stake in how we elect our representatives as much as in which representatives we elect and what laws they enact.

—Dennis Thompson<sup>2</sup>

### INTRODUCTION

That California political and electoral pathologies are some of the worst in the nation has become axiomatic. The state is known for its crisis in governance,<sup>3</sup> a notoriously tardy budget,<sup>4</sup> and bizarre congressional districts.<sup>5</sup> This reputation, indeed much of California history, is a double-edged sword. Along with these pathologies and

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<sup>1</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 175 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>2</sup> DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES, at vii (2002).

<sup>3</sup> Raphael J. Sonenshein, *Can a Citizens' Commission Help Repair California Government? Lessons from Local Charter Reform*, 44 LOY. L.A. L. REV. 637, 657–58 (2011) (describing the belief that California has major structural problems as “widespread”).

<sup>4</sup> See Karl Manheim et al., *Rebooting California—Initiatives, Conventions and Government Reform: Symposium Introduction*, 44 LOY. L.A. L. REV. 393, 400–01 (2011) (assigning blame for California's dysfunction in part to citizens' overuse of the initiative, referendum, and recall processes); Joe Mathews, Op-Ed., *The California Fix: Making Amends*, L.A. TIMES, Oct. 19, 2009, at A17 (quoting California Supreme Court Chief Justice Ronald George: “Frequent amendments—coupled with the implicit threat of more in the future—have rendered our state government dysfunctional.”); *The Ungovernable State*, ECONOMIST, May 16, 2009, at 33 (describing California's budget dysfunction and attributing it to a “combination of features” of the state's political and structural dynamics).

<sup>5</sup> Patrick McGreevy, *Redistricting Panel Will Draw a Line*, L.A. TIMES, Dec. 20, 2010, at AA1 (describing the 23rd district as the “ribbon of shame” because it narrows to a small strip of land that stretches 200 miles along the California coast “disappear[ing] at high tide”).

systemic breakdowns come success stories in reform.<sup>6</sup> In a nation of states as incubators for policy experimentation, California is a teeming Petri dish.<sup>7</sup> The state has developed a reputation for setting national trends in social<sup>8</sup> and political reform, often decades before other states.<sup>9</sup> For example, California is one of only twenty-two states to adopt the initiative,<sup>10</sup> referendum,<sup>11</sup> or both during the Progressive Era of the early twentieth century.<sup>12</sup> Of these states, California is one of only ten to adopt the initiative for both statutes and state constitutional amendments.<sup>13</sup> While more than a third of the states have provisions allowing citizens to recall elected officials,<sup>14</sup> the procedure had only been used once in the United States to recall a governor before the recall of California Governor Gray Davis in 2003.<sup>15</sup> Yet California is not just experimental and progressive. Steeped in populism, its measures consistently undermine the political power of elected representatives by turning power back to voters “making public policy at the ballot box.”<sup>16</sup> It is no surprise then that California’s most recent effort to reform the process of redistricting is also among the most progressive and antipolitical in the nation: the adoption of an independent citizens redistricting commission.<sup>17</sup>

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<sup>6</sup> See STATE POLITICS AND REDISTRICTING, PART I 141 (Lynda McNeil ed., 1982) (describing California’s progressive political and electoral history, particularly its roots back to Upton Sinclair and the impact of immigration).

<sup>7</sup> Justice Louis Brandeis’s dictum in his dissent in *New State Ice Co. v. Liebmann* is perhaps the best-known expression of this concept: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” 285 U.S. 262, 311 (1932). While it has since become common wisdom among political scientists, its constitutional home is the Tenth Amendment, which reserves powers not delegated to the United States to the states or to the people. U.S. CONST. amend. X.

<sup>8</sup> See, e.g., JONATHAN BELL, CALIFORNIA CRUCIBLE: THE FORGING OF MODERN AMERICAN LIBERALISM 3 (2012) (“California had by the 1970s become a trailblazer for national debates over taxation, sexual and gender rights, racial discrimination, and the welfare state . . .”).

<sup>9</sup> See STATE POLITICS AND REDISTRICTING, *supra* note 6, at 141.

<sup>10</sup> Initiative is “a petition process that allows voters to place one or more propositions on the referendum ballot” and has roots in “the Athenian *ecclesia* of the fifth century B.C.” JOSEPH F. ZIMMERMAN, THE INITIATIVE: CITIZEN LAW-MAKING 1 (1999).

<sup>11</sup> Referendum is “the submission of laws, whether in the form of statute or constitution, to the voting citizens for their ratification or rejection,” and has been employed in the United States in some form since the Revolution. ELLIS PAXSON OBERHOLTZER, THE REFERENDUM IN AMERICA 2 (Guant, Inc. 1997) (1893).

<sup>12</sup> Initiative & Referendum Inst., Univ. Of S. Cal., *State I&R*, [http://www.iandrinstute.org/statewide\\_i%26r.htm](http://www.iandrinstute.org/statewide_i%26r.htm) (last visited Oct. 21, 2013).

<sup>13</sup> *Id.*

<sup>14</sup> MARK BALDASSARE & CHERYL KATZ, THE COMING AGE OF DIRECT DEMOCRACY: CALIFORNIA’S RECALL AND BEYOND 11 (2008).

<sup>15</sup> *Id.* at 4–5, 11 (describing the removal of North Dakota Governor Lynn Frazier in 1921). Recall has been used throughout the states to recall other state and local officials. See *id.* at 11.

<sup>16</sup> *Id.* at vii.

<sup>17</sup> Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1812 (2012) (describing both Arizona and California’s redistricting commissions as “the boldest

The independent commission ostensibly depoliticizes the process of drawing state senate, assembly, and congressional district lines by removing politicians almost entirely from the process. While controversial, these commissions address the inherent conflict of interest of partisan gerrymandering. Yet advocates have also touted the citizens commission's potential to increase district competitiveness, reduce partisanship in government, and create more centrist legislatures.<sup>18</sup> If true, commissions may untie the Gordian Knot of dysfunctional government and reduce much of the gridlock plaguing California government.<sup>19</sup>

This Note's main finding is that these possibilities are overstated, especially in view of the results of the 2012 election in California. Even if greater competitiveness is desirable and offers these potential outcomes, the constraints on legislative redistricting also constrain citizens commissions. These constraints stem from federal statutes, court decisions, and state guiding principles. As a result, redistricting commissions cannot create as many truly competitive districts as hoped and offer little of the promises made by their proponents. On the other hand, the California citizens commission did achieve its most obvious and primary goal: to remove self-interested legislators from the process and make it "open so it cannot be controlled by the party in power."<sup>20</sup>

This Note concludes that the primary impact of the citizens commission's work in California has been to increase the *appearance* that the system is less beholden to politicians and to weaken the power of legislators to use redistricting in political horse trading. The new maps also forced several legislators to retire rather than face opponents they could not defeat or more popular fellow party members.<sup>21</sup>

This Note proceeds in four parts: Part I outlines the constraints that Congress, the Supreme Court, and state legislatures place on redistricting. Part II discusses the democratic impetus for redistricting reform and evaluates the merits of citizens commissions against other redistricting mechanisms. It also briefly outlines the history of redistricting in California. Part III discusses the passage of Propositions 11 and 20 and assesses the legal challenges to both. Part IV embarks on case studies of three California districts and examines the impact of the commission's work on the 2012 congressional elections.

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departures from the traditional legislative redistricting model"). Part II describes other, less progressive options available to reformers such as advisory commissions or commissions which ratify district lines drawn by legislatures.

<sup>18</sup> See *infra* Part II.

<sup>19</sup> The text of California Proposition 11 did not purport to increase competitiveness. It did, however, identify the "serious conflict of interest" involved in having legislators draw their own districts and explained that this is "why 99 percent of incumbent politicians were reelected." Text of Proposed Laws: Proposition 11 § 2(a) 137, available at [http://www.wedrawthelines.ca.gov/downloads/voters\\_first\\_act.pdf](http://www.wedrawthelines.ca.gov/downloads/voters_first_act.pdf). Instead, increased competitiveness and decreased polarization were held out by major proponents as benefits of the proposition. See *infra* Part III.

<sup>20</sup> Text of Proposed Laws: Proposition 11 § 2(c) 137, available at [http://www.wedrawthelines.ca.gov/downloads/voters\\_first\\_act.pdf](http://www.wedrawthelines.ca.gov/downloads/voters_first_act.pdf).

<sup>21</sup> See *infra* Part IV.

## I. CONSTRAINTS AND COMPETITIVENESS

A democracy may be measured by the vibrancy of its elections.<sup>22</sup> Only when candidates actively compete for their seats in contested elections can voters hold politicians accountable for their decisions.<sup>23</sup> Indeed, the “competitive struggle for the people’s vote” is a necessary condition to the democratic process.<sup>24</sup> For an election to be vibrant and competitive, the votes cast must have real meaning and must not count as a mere rubber stamp on decisions made beyond their reach.<sup>25</sup> Yet Congress has become the least competitive of all representative institutions in recent years, largely due to the re-districting process practiced in most states.<sup>26</sup> As the process is currently conducted in most states, redistricting presents at least two concerns central to the democratic process and to this Note’s thesis.

First is the concern about who will control the redistricting process. When representatives redraw their own district lines, they have a clear “personal interest distinct from that of their Constituents,” as James Madison warned at the Constitutional Convention.<sup>27</sup> The American system of state-designed redistricting is particularly vulnerable to this problem of self interest as legislators control the process by which their constituents are carved out.<sup>28</sup> This often results in “gerrymanders”—oddly shaped districts legislators draw to “pack,” “stack,” or “crack” voters in pursuit of legislators’ electoral goals.<sup>29</sup> Incumbents of opposite parties often collude in bipartisan gerrymanders

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<sup>22</sup> JONATHAN WINBURN, *THE REALITIES OF REDISTRICTING: FOLLOWING THE RULES AND LIMITING GERRYMANDERING IN STATE LEGISLATIVE REDISTRICTING 2* (2008).

<sup>23</sup> THOMAS E. MANN & BRUCE E. CAIN, *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 1* (2005).

<sup>24</sup> JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (1950) (“[T]he democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”).

<sup>25</sup> WINBURN, *supra* note 22, at 3 (stating that voters vote not only so their candidate will win, but so that their vote will “count,” suggesting an almost ethereal aspect to the process).

<sup>26</sup> MANN & CAIN, *supra* note 23, at 1.

<sup>27</sup> 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 249–50 (Max Farrand ed., Yale Univ. Press 1937).

<sup>28</sup> WINBURN, *supra* note 22, at 3.

<sup>29</sup> See, e.g., Anthony E. Chavez, *The Red and Blue Golden State: Why California’s Proposition 11 Will Not Produce More Competitive Elections*, 14 *CHAP. L. REV.* 311, 314 (2011) (“[S]tacking refers to combining concentrations of a minority population with larger concentrations of a white population to ensure that the districts contain white voting majorities.”); Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 *U. PA. L. REV.* 1379, 1416 (2012) (discussing the “pack” and “stack” concepts in the context of limiting minority groups’ representation by cramming them into one single district or dividing them so thinly so as to deny representation altogether). For a visual example of how this technique functions, see Mike Sayer, Southern Coalition for Social Justice: Training on Political Redistricting, (July 26–31, 2010), [http://latinojustice.org/redistricting/ny/Voting\\_Dilution\\_Techniques\\_Mike\\_Sayer.pdf](http://latinojustice.org/redistricting/ny/Voting_Dilution_Techniques_Mike_Sayer.pdf).

to secure reelection of each party's incumbents, resulting in non-competitive maps.<sup>30</sup> Thus, while incumbents are interested in securing reelection with as little competition as possible, their constituents desire the exact opposite: vibrant elections in which candidates propose distinct and substantive solutions to complex problems in a competitive fight where voters suss out the best ideas and select their candidates accordingly. When representatives control redistricting and have the chance to "select voters" rather than vice versa, something fundamental to democracy is sacrificed.<sup>31</sup>

A second concern is that the process of redistricting will result in unequal representation, whereby "one person's vote counts only a fraction . . . of another's" vote.<sup>32</sup> While the Constitution does not mandate a particular redistricting process or even that representatives be selected by districts rather than at large,<sup>33</sup> Congress, the Supreme Court, and state legislatures have imposed many constraints on the process.<sup>34</sup> Many of these constraints are related to racial gerrymandering and voter dilution.<sup>35</sup>

If redistricting as legislatures currently practice it results in noncompetitive districts, which themselves result in a host of governance-related pathologies, redistricting reform may be the most promising path toward improving how government functions.<sup>36</sup> The U.S. Supreme Court has weighed in on gerrymandering, paying particular attention to race and majority-minority districts,<sup>37</sup> while addressing the issue of the political gerrymander differently.<sup>38</sup> All of these rules represent constraints that bind legislatures and will also bind any group tasked with redrawing district lines.

#### *A. Gerrymandering and Constraints on Redistricting*

The Court has been more lucid in setting forth a standard with regard to race than to political line drawing. The Court has held that efforts to separate districts solely on

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<sup>30</sup> Bruce E. Cain et al., *From Equality to Fairness: The Path of Political Reform since Baker v. Carr*, in *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING* 6, 23 (Thomas E. Mann & Bruce E. Cain eds., 2005).

<sup>31</sup> SCHUMPETER, *supra* note 24; *see infra* Part I.B.

<sup>32</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 120 (1980).

<sup>33</sup> *See* THOMAS L. BRUNELL, *REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA* 51 (2008) (explaining that the Constitution does not mandate the use of single-member districts and "many states did elect representatives from at-large, multi-member districts for many years"). This changed with the Apportionment Act of 1842. *Id.*

<sup>34</sup> *See infra* Part I.A.

<sup>35</sup> *See infra* Part I.A.

<sup>36</sup> Cain et al., *supra* note 30, at 17 (explaining why redistricting reform at the state level has emerged as a way to increase competitive elections).

<sup>37</sup> The history of voting rights legislation and jurisprudence is beyond the scope of this Note except insofar as they mandate redistricting processes as discussed below.

<sup>38</sup> *See* Stephanopoulos, *supra* note 29, at 1382–84 (characterizing the Supreme Court's jurisprudence on political gerrymandering as leaving unresolved whether "a standard for identifying unlawful gerrymanders might exist").



the basis of race can be challenged under the Equal Protection Clause.<sup>39</sup> The Court has struck down racial gerrymanders in Georgia, North Carolina, and Texas, citing race as the legislatures' improper "predominant purpose."<sup>40</sup> In effect the Court has said that states may use race as *a* factor, but it may not be *the* factor.<sup>41</sup> Further, under the Voting Rights Act's (VRA) "preclearance" provision, specified states and counties must get federal approval prior to changing their voting practices.<sup>42</sup> The Court thus views race as a suspect classification. As a result, states will face strict scrutiny when they draw majority-minority districts using race, requiring the state to show the plan is narrowly tailored to serve a compelling government interest.<sup>43</sup>

This creates an uneasy tension. Under the VRA, the Justice Department may mandate states to draw majority-minority districts, but those districts could be challenged under the Equal Protection Clause.<sup>44</sup> Further, because states will necessarily rely on race in order to draw such districts, it will be easier for challengers to prove that the states utilized race as the dominant factor.<sup>45</sup> State legislators and redistricting commissions must trace a careful path when redistricting voters from one district to another.

Those redrawing district lines are also not permitted to "weight the vote of one county or one district more heavily than . . . another."<sup>46</sup> The Court has applied this "one person, one vote" standard to elections to both the U.S. House of Representatives and state legislatures.<sup>47</sup> These reapportionment cases have had a dramatic effect on the

<sup>39</sup> See Mark E. Rush, *Representation in Theory and Practice*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 1, 7 (Mark E. Rush ed., 1998).

<sup>40</sup> Daniel H. Lowenstein, *Race and Representation in the Supreme Court*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 49, 69–74 (Mark E. Rush ed., 1998) (summarizing the racial gerrymandering cases as "mov[ing] sharply away from the Court's tradition . . . of respecting the fundamentally political nature of redistricting").

<sup>41</sup> See *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

<sup>42</sup> Preclearance is mandated in Section 5 of the Voting Rights Act. See Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 121 (Mark E. Rush, ed. 1998).

<sup>43</sup> CHARLES S. BULLOCK, III, *REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA* 66 (2010).

<sup>44</sup> Rush, *supra* note 39, at 7.

<sup>45</sup> BULLOCK, *supra* note 43, at 66.

<sup>46</sup> *Baker v. Carr*, 369 U.S. 186, 244 (1962). Until *Baker*, the Court held questions of distribution of citizens to be a political question—a constitutional issue that courts should abstain from resolving because they are better left to the other departments of government. The Court announced the "one person, one vote" standard in *Gray v. Sanders*. 372 U.S. 368, 381 (1963). See Jesse H. Choper, *Introduction to THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 1 (Nada Mourrada-Sabbah & Bruce E. Cain eds., 2007); Richard L. Hasen, *Leaving the Empty Vessel of "Republicanism" Unfulfilled*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 75 (Nada Mourrada-Sabbah & Bruce E. Cain eds., 2007) (explaining that the Supreme Court's 1962 *Baker v. Carr* decision was "the beginning of the end of the political question doctrine").

<sup>47</sup> See *Reynolds v. Sims*, 377 U.S. 533 (1964) (ruling unconstitutional under the Equal Protection Clause legislative plans for the apportionment of seats in the Alabama legislature);

process of redistricting, yet have also caused significant controversy. A case can be made that the voter dilution cases themselves led to the race-conscious districting plans the Court was preoccupied with under the VRA in the 1990s.<sup>48</sup> The reapportionment cases laid the foundation for the transformation of the right to vote, an individual right, into the right to effective representation, an “interest-based or group right.”<sup>49</sup> This has introduced a conflict into equal protection law between individual and group rights. Justice Clarence Thomas lamented this irreconcilable conflict in *Holder v. Hall*,<sup>50</sup> “reject[ing] the assumption . . . [that] the Voting Rights Act can be construed to cover potentially dilutive electoral mechanisms.”<sup>51</sup> Neither the Supreme Court nor Congress has provided clear guidance on how states might implement the VRA’s mandate to remedy situations of vote dilution and abide by the ruling that race is a suspect classification, subject to strict scrutiny.<sup>52</sup> A citizens commission entering the redistricting farrago may find it nearly impossible to satisfy every rule, regulation, and restriction while making any significant improvement to competitiveness.

### B. Political Gerrymandering

Despite Madison’s fear of politicians controlling the process, partisan gerrymandering—drawing district lines to protect incumbents or target opponents—has received the Court’s imprimatur and is not unconstitutional.<sup>53</sup> In *Bush v. Vera*,<sup>54</sup> Justice O’Connor explained: “[W]e have recognized incumbency protection, at least in the

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Wesberry v. Sanders, 376 U.S. 1 (1964) (ruling that apportionment of congressional district seats in Georgia so that one congressman represented two to three times as many as another violated the Constitution).

<sup>48</sup> Anthony A. Peacock, *Equal Representation or Guardian Democracy? The Supreme Court’s Foray into the Politics of Reapportionment and Its Legacy*, in VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 23, 43 (Mark E. Rush ed., 1998).

<sup>49</sup> *Id.*

<sup>50</sup> *Holder v. Hall*, 512 U.S. 874 (1994).

<sup>51</sup> *Id.* at 945.

<sup>52</sup> Bruce E. Cain & Kenneth P. Miller, *Voting Rights Mismatch: The Challenge of Applying the Voting Rights Act to “Other Minorities,”* in VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 141, 142 (Mark E. Rush ed., 1998).

<sup>53</sup> Unless, of course, unlawfully based on race. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993) (finding that a North Carolina redistricting map raised a sufficient question of racial gerrymandering to suggest an equal protection violation); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994) (ruling that three Texas districts were unconstitutionally racially gerrymandered). *But see* James U. Blacksher, *Dred Scott’s Unwon Freedom: The Redistricting Cases as Badges of Slavery*, S. CHANGES, Fall 1998, at 28, reprinted in 3 RACE, VOTING, REDISTRICTING AND THE CONSTITUTION 336 (Marsha J. Tyson Darling ed., 2001) (characterizing *Shaw* and its progeny as promoting an unworkable color-blind paradigm); Jamin B. Raskin, *Supreme Court’s Double Standard*, THE NATION, Feb. 6, 1995, at 167–68 (criticizing the Supreme Court’s rulings as a double standard meant to protect “white incumbents” in the U.S. House of Representatives but not African-American or Latino majorities).

<sup>54</sup> *Bush v. Vera*, 517 U.S. 952 (1996).



limited form of ‘avoiding contests between incumbent[s],’ as a legitimate state goal.”<sup>55</sup> In *Davis v. Bandemer*,<sup>56</sup> the Court seemed to narrow this by recognizing a cause of action for political gerrymandering, but found the Indiana map in question did not surmount the “threshold requirement” for showing “discriminatory vote dilution.”<sup>57</sup> The standard the plurality announced—that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole”—proved unworkable.<sup>58</sup>

The Court did no better in *Vieth v. Jubelirer*,<sup>59</sup> where it refused to overturn a Pennsylvania plan challenged by Democratic voters.<sup>60</sup> Facing the opportunity to give teeth to the *Bandemer* standard, the Court instead summarily ruled the issue of partisan gerrymandering “non-justiciable” because “no judicially discernible and manageable standards for adjudicating such claims exist.”<sup>61</sup> A set of four justices stated that plaintiffs had proved sufficient evidence to win, but relied on different standards to come to their conclusion.<sup>62</sup> Plaintiffs in every case since *Bandemer* have faced similar outcomes as the Court has refused to find sufficient disadvantage to warrant overturning a state’s partisan redistricting.<sup>63</sup>

While the Court has severely circumscribed the potential for future political gerrymanders to be ruled unconstitutional, California has enunciated a clear rule on political gerrymanders: “Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.”<sup>64</sup> So reads the California Constitution since voters approved Proposition 11 in 2008, exemplifying the “laboratories of democracy” vision of American federalism.<sup>65</sup> More importantly, this simple clause frees up the citizens commission to pursue other goals such as competitiveness rather than incumbency protection.<sup>66</sup>

The Supreme Court has required that the districts be adjusted every ten years after the census and that such districts be as nearly equal as possible.<sup>67</sup> Apart from concerns

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<sup>55</sup> *Id.* at 964.

<sup>56</sup> 478 U.S. 109 (1986).

<sup>57</sup> *Id.* at 110.

<sup>58</sup> *Id.*; see Stephanopoulos, *supra* note 29, at 1381–82 (arguing that in the area of political gerrymandering, “the case law is in chaos . . . [and] [t]here is thus an urgent doctrinal and academic need for new ideas”).

<sup>59</sup> 541 U.S. 267 (2003).

<sup>60</sup> *Id.* at 267.

<sup>61</sup> *Id.*

<sup>62</sup> BULLOCK, *supra* note 43, at 130.

<sup>63</sup> *Id.*

<sup>64</sup> CAL. CONST. art. XXI, § 2.

<sup>65</sup> *California Online Voting Guide: Proposition 11*, CAL. VOTER FOUND., <http://www.calvoter.org/voter/elections/2008/general/props/prop11.html> (last updated Dec. 21, 2008).

<sup>66</sup> See *infra* Part I.C.

<sup>67</sup> *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (“The conception of political equality . . . can mean only one thing—one person, one vote.” (citing *Gray v. Sanders*, 372 U.S. 368, 381

about racial gerrymandering and the weight of each vote, the Court has left the matter to the states. As a result, most states allow legislatures to either directly draw electoral maps or play an integral role in the process.<sup>68</sup> This very discretion at the state level has made possible a variety of proposals to change the process, each bearing the marks of the state's unique history, culture, and experience with corruption.

### *C. Principles and Competitiveness*

Any group tasked with redrawing district lines, be it the legislature or an independent commission, will be constrained not only by federal law and court-imposed restrictions, which themselves vary by location, but also by traditional redistricting principles.<sup>69</sup> For example, in California, only four counties are subject to the Section 5 pre-clearance procedures of the Federal Voting Rights Act (VRA) while all of Alabama, Mississippi, and Virginia are.<sup>70</sup> All states, however, must abide by Section 2 of the Act which prohibits any practice that denies or abridges anyone's right to vote based on race, color, or minority language status.<sup>71</sup> But many states have gone beyond federal law by writing into their constitutions several "principles" to guide redistricting.<sup>72</sup>

Geographic contiguity, where all parts of a district are connected to each other, is "one of the most common rules for drawing district lines"<sup>73</sup> and is specifically enumerated in the California Constitution.<sup>74</sup> Compactness, when a district has a "regular shape, with constituents all living relatively near to each other" is also a "traditional" principle<sup>75</sup> and, according to the California Constitution, should be followed "[t]o the extent practicable."<sup>76</sup> The geographical integrity of political subdivisions such as cities, counties, and communities of interest must also be "respected in a manner that minimizes their division to the extent possible."<sup>77</sup>

Noticeably absent from this list is "competitiveness," which is not specifically enumerated in the California Constitution and has not been identified as a "traditional

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(1963))). The California Constitution also requires districts in that state to be reasonably equal in population. CAL. CONST. art. XXI, § 1.

<sup>68</sup> Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines in California?*, 53 J.L. & ECON. 545, 545–46 (2010).

<sup>69</sup> Although the Supreme Court has not expressly required them to, many states apply the following redistricting principles: compactness, geographic contiguity, retaining political subdivisions, and maintaining communities of interest. See Laughlin McDonald, *The Looming 2010 Census*, 46 HARV. J. ON LEGIS. 243, 244–45 (2009).

<sup>70</sup> See *infra* Part III.A.

<sup>71</sup> 42 U.S.C. § 1973 (2006).

<sup>72</sup> JUSTIN LEVITT, A CITIZEN'S GUIDE TO REDISTRICTING 50 (2010).

<sup>73</sup> *Id.*

<sup>74</sup> CAL. CONST. art. XXI, § 2.

<sup>75</sup> LEVITT, *supra* note 72, at 51.

<sup>76</sup> CAL. CONST. art. XXI, § 2.

<sup>77</sup> *Id.*

race-neutral districting principle[ ]” by the Supreme Court.<sup>78</sup> But increased competitiveness has been cited as a benefit concomitant with the creation of citizens redistricting commissions.<sup>79</sup> Should citizens commissions intentionally attempt to draw more competitive districts? If so, to what extent can they succeed when they are otherwise constrained by so many other rules, regulations, and principles?

## II. THE IMPULSE TO REFORM REDISTRICTING

Before evaluating Propositions 11 and 20 in California, the work of its redistricting commission, or the outcome of the 2012 election, it is important to discuss the constitutional and democratic implications of such efforts. This Part discusses legislative redistricting and asks why citizens redistricting commissions emerge and whether they offer substantial hope to ameliorate the ills of traditional redistricting processes.

### A. Redistricting by Legislature

Under the U.S. Constitution, the method of drawing electoral maps is left to the discretion of the states.<sup>80</sup> Yet from the nation’s inception, the dangers of allowing politicians to choose their own voters has been apparent.<sup>81</sup> Elbridge Gerry’s original “Gerry-mander” snaked through Massachusetts and ensured the election of a fellow Republican.<sup>82</sup> Since then, the term has been a synonym for opportunism of the party in power.<sup>83</sup> Evidence shows a long history of political manipulation of district lines at the state level. Nearly every decadal redistricting from 1789 to 1913 contained at least one district where contiguity was questionable.<sup>84</sup> Recent evidence suggests that even

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<sup>78</sup> See *Miller v. Johnson*, 515 U.S. 900, 901 (1995) (including such principles as “compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, [and] racial considerations”).

<sup>79</sup> See *infra* Part II.C.

<sup>80</sup> U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the legislature thereof.”); Tim Storey, *An Overview of Redistricting*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST 1, 1–2 (Gary F. Moncrief ed., 2011).

<sup>81</sup> See Peter F. Galderisi & Bruce Cain, *Introduction: Redistricting Past, Present, and Future*, in REDISTRICTING IN THE NEW MILLENNIUM 3 (Peter F. Galderisi ed., 2005) (explaining that the practice of gerrymandering actually preceded Governor Elbridge Gerry’s famous 1812 plan “as the shifting of district boundaries for political advantage occurred with some regularity in states and in the British colonies”).

<sup>82</sup> BULLOCK, *supra* note 43, at 107.

<sup>83</sup> See Storey, *supra* note 80, at 2.

<sup>84</sup> Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 SOC. SCI. HIST. 159, 179 (1998). A “contiguous district” is “one in which it is possible to travel from any point in the district to any other point in the district without crossing the district boundary . . . .” Justin Levitt, *Redistricting in the West: The Legal Context*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST 15, 24 (Gary F. Moncrief ed., 2011). Today, many states require legislative districts to be contiguous. *Id.*

after the reforms of the 1960s, modern districts are more often discontinuous than they historically were.<sup>85</sup>

Until the twentieth century, the basic unit of representation at the state level was the town or county,<sup>86</sup> and the evidence shows state legislatures did not often divide counties or towns in their redistricting.<sup>87</sup> However, as the population grew into the early twentieth century, the apportioning of seats did not keep pace with population shifts, both intentionally and by neglect.<sup>88</sup> Just prior to the Supreme Court's landmark population and redistricting rulings in the 1960s, one Southern California district had 422 times as many people as the smallest district, and Tennessee had failed to reapportion representatives for sixty years.<sup>89</sup>

Legislative redistricting therefore presents a host of dangers. As previously discussed, conflicts of interest are inherent in the process. Representatives may protect their own and their party's electoral prospects while seeking to dilute the votes of the minority party.<sup>90</sup> Without external pressure, either from citizens groups, federal law, or state law, legislators write electoral rules with substantial discretion, inclined to protect partisan gains and scuttle electoral reform proposals.<sup>91</sup> With the power to change the process of redrawing district lines vested in the very body that benefits from the status quo, it is not surprising that this system persists. While some states have adopted some form of citizens commission, most states continue to allow redistricting by the state legislature.<sup>92</sup>

### *B. Redistricting Reform as Remonstrance*

Redistricting reform has become the siren song to the politically dispossessed, offering perhaps the last best hope to restore democratic representation and responsive government to statehouses.<sup>93</sup> The hope attached to redistricting reform in California parallels the enthusiasm that surrounded the passage of the initiative and referendum in 1911 when Progressive Governor Hiram Johnson touted the promises of extending the initiative to the people as “perhaps the greatest service that could be rendered our

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<sup>85</sup> Altman, *supra* note 84, at 180.

<sup>86</sup> Levitt, *supra* note 84, at 15.

<sup>87</sup> Altman, *supra* note 84, at 180.

<sup>88</sup> Levitt, *supra* note 84, at 15–16.

<sup>89</sup> *Id.* at 16.

<sup>90</sup> Todd Donovan, *Direct Democracy and Redistricting*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST 111 (Gary F. Moncrief ed., 2011).

<sup>91</sup> *Id.* at 112.

<sup>92</sup> Levitt, *supra* note 84, at 17.

<sup>93</sup> For a brief summary explaining why the former redistricting process resulted in more ideological representatives in the California legislature, an increase in registered-independent voters, and greater polarization, see George Skelton, *A Polarized, Paralyzed State*, L.A. TIMES, Aug. 10, 2009, at A2.

State,” bringing an end to “exaction and extortion from the people.”<sup>94</sup> The irony that many of the pathologies facing California today may be unintended consequences of the initiative system itself cannot be lost on present day reformers.<sup>95</sup> The greater irony is using the initiative process to fix a state arguably made ungovernable by that very process.<sup>96</sup>

When voters in states with the initiative process become convinced the political system is broken beyond what legislators can manage to repair, they often turn to changing the way legislators are selected.<sup>97</sup> Research has shown that states with the initiative are far more likely to adopt reforms weakening party control over redistricting.<sup>98</sup> For example, in 1974 Colorado voters, frustrated with legislators’ proposed district map and the impact it would have on communities bifurcating them indiscriminately, passed an initiative delegating district drawing to a commission.<sup>99</sup> A similar campaign in Oklahoma, which then-Governor Edmondson supported out of frustration with the “rurally dominated legislature,” failed in 1960 after opposition developed within the governor’s own party.<sup>100</sup> The path to a commission in Arizona was fraught with legal

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<sup>94</sup> Hiram Johnson, Governor, Inaugural Address (Jan. 3, 1911), available at <http://governors.library.ca.gov/addresses/23-hjohnson01.html>.

<sup>95</sup> See Skelton, *supra* note 93 (identifying two “voter-injected poisons—term limits and the two-thirds vote requirement” as a cause of legislative gridlock); Editorial, *Prop. 25 Changes Everything*, L.A. TIMES, Nov. 4, 2010, at A24 (questioning the wisdom of California voters who simultaneously passed Proposition 25, which removed the two-thirds vote requirement for adopting a budget, and Proposition 26, which created a two-thirds vote requirement for raising fees).

<sup>96</sup> For more recent examples of how the initiative process has affected how Sacramento operates, see George Skelton, *Californians Split Their Vote*, L.A. TIMES, Nov. 4, 2010, at A2 (characterizing the results of the 2010 election as “plac[ing] more shackles on the governor and Legislature” and quoting governor-elect Jerry Brown as saying, “[t]he taxpayers gave and they also took away”). Skelton also decries Californians’ rejection of Proposition 21 (which would have “saved the state’s deteriorating parks”), passage of Proposition 22 (a “shackle on Sacramento . . . [that] will cost the state billions by eliminating its ability to tap local transportation and redevelopment funds”), and rejection of Proposition 24 (voters “defended big business” by rejecting the repeal of corporate tax breaks). *Id.*

<sup>97</sup> See Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 345 (2007) (comparing factors contributing to redistricting initiatives such as “[a] recent egregious gerrymander or a nationwide tide in favor of electoral reform . . .” with instances in which voters are “relatively satisfied with the political status quo, [such that] they may be reluctant to try to fix what does not seem to be broken.”); see also Cain, *supra* note 17, at 1813 (describing the “evolutionary pattern” of the creation of these commissions in reaction to elected officials’ actions).

<sup>98</sup> Donovan, *supra* note 90, at 130.

<sup>99</sup> Stephanopoulos, *supra* note 94, at 355–56. Today, the Colorado General Assembly draws district lines for congressional seats while the Reapportionment Commission draws State Senate and State House of Representative district lines. See *Redistricting in Colorado*, COLORADO: THE OFFICIAL STATE WEB PORTAL, [http://www.colorado.gov/cs/Satellite/CGA-ReDistrict/CBON/1251581558103#How\\_is\\_Redistricting\\_accomplished\\_in\\_Colorado\\_](http://www.colorado.gov/cs/Satellite/CGA-ReDistrict/CBON/1251581558103#How_is_Redistricting_accomplished_in_Colorado_) (last visited Oct. 21, 2013).

<sup>100</sup> Stephanopoulos, *supra* note 94, at 348. A slightly modified version passed just two years later, although notably after the Supreme Court’s decision in *Baker v. Carr*.

hurdles for nearly thirty years.<sup>101</sup> Voters finally passed Proposition 106 in 2000 granting authority to redistrict to a five-person commission drawn from a pool of citizens reviewed by the state's Commission on Appellate Court Appointments.<sup>102</sup> This is just a sampling of the push factors that result in citizens redistricting commissions.

There are many ways a state might approach redistricting, utilizing any combination of citizens, state bureaucrats, legislators, and judges. Bruce Cain, Professor of Political Science at Stanford University, has evaluated these different combinations using two key factors: independence and autonomy.<sup>103</sup> Using these two as yardsticks to measure the composition and the power of redistricting commissions will provide us with a view of just where true authority over the redistricting process lies.<sup>104</sup>

First, independence means freedom from control by legislators.<sup>105</sup> By measuring the independence of those individuals drawing the lines, we can evaluate the degree to which a commission has an implicit conflict of interest.<sup>106</sup> Independence can be viewed as lying on a spectrum between complete dependence and complete independence.<sup>107</sup> Many systems, described more fully below, allow legislators themselves to draw the lines and are arguably the least independent.<sup>108</sup> Other systems allow legislators to be involved in the selection of commission members, creating either a moderate degree of independence in the case of designees or no independence when composed of elected

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<sup>101</sup> The state's district plans were overturned by a district court in 1971, rejected by a federal court in 1981, and rejected by the Justice Department for failing to produce enough "majority minority" districts in the early 1990s. Cain, *supra* note 17, at 1831. In 2009, the Arizona Supreme Court ruled on the commission's 2002 plan, finding that Proposition 106 requires the commission to create "more competitive districts to the extent practicable when doing so does not cause significant detriment to the other goals." *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 687 (Ariz. 2009).

<sup>102</sup> Cain, *supra* note 17, at 1831–32.

<sup>103</sup> *Id.* at 1818–19. Jonathan Winburn discusses largely the same two factors, which he labels, respectively, "membership" and "capacity." Jonathan Winburn, *Does it Matter if Legislatures or Commissions Draw the Lines?*, in *REAPPORTIONMENT AND REDISTRICTING IN THE WEST* 137, 141 (Gary F. Moncrief ed., 2011).

<sup>104</sup> See Cain, *supra* note 17, at 1812 (summarizing independent redistricting commissions' performance and offering observations regarding their independence and autonomy).

<sup>105</sup> *Id.* at 1814. Cain instantiates "independence" by describing a commission of members who cannot hold political office. *Id.* at 1818.

<sup>106</sup> *Id.* at 1812; see also BULLOCK, *supra* note 43, at 133 (describing the Iowa approach as highly revered because of the "limited influence of party politics" even though the plan does not come from a commission).

<sup>107</sup> Cain utilizes a "continuum" of independence and places New York's "advisory commission" only slightly apart from pure legislative districting because both elected officials and nonlegislators serve on it. Cain, *supra* note 17, at 1814.

<sup>108</sup> THOMPSON, *supra* note 2, at 133 (discussing Madison's warning about "the dangers of letting representatives decide their own privileges"). Thompson argues that we should be "concerned that [legislators] favor rules that protect incumbents and discourage challengers." *Id.*



officials.<sup>109</sup> Finally, in some systems there is little or no nexus between the commissioners and the legislators whose districts they are mapping.<sup>110</sup>

Second, autonomy means the ability to enact and place into effect the product of the commission's work.<sup>111</sup> In some systems, a commission may be fully independent, yet its work is merely advisory.<sup>112</sup> This is the case in three states where the commission serves only to advise either the legislature or the governor.<sup>113</sup> Other systems are structured such that the commission's work only takes effect if the legislature fails to adopt a new map.<sup>114</sup>

This framework suggests several questions about redistricting. First, is it even possible within the American system to design any redistricting procedure, be it utilizing elected, appointed, or randomly drawn individuals, that would be genuinely free from self-interest? Is it inevitable that politics and partisanship will seep into the process? Second, is placing the redistricting process in the hands of unelected citizens more or less democratic than allowing elected representatives to do so? After all, removing incumbents who have been duly elected by "jiggling the lines is, in a sense, undemocratic."<sup>115</sup> Third, under what circumstances might a commission, operating dispassionately and following specified rules of neutrality, nonetheless run afoul of equal protection guarantees or create political gerrymanders? Finally, applying this framework and these inquiries, how did California fare in its first foray into citizens drawing district lines in the 2012 election?

### C. Citizens Commissions

Of the arguments in favor of removing from state legislatures the task of redistricting and delegating it to a citizens commission, one has become particularly salient: to reduce the "safety" of electoral districts<sup>116</sup> thereby increasing competitiveness. Safe districts, it is thought, result in less engaged, more partisan politicians and more polarization in legislatures.<sup>117</sup> The argument may be broken down as follows.

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<sup>109</sup> Cain, *supra* note 17, at 1816.

<sup>110</sup> *Id.* at 1817.

<sup>111</sup> *Id.* at 1814 (describing "autonomous power" as the ability to "enact a redistricting plan without legislative approval").

<sup>112</sup> WINBURN, *supra* note 22, at 141.

<sup>113</sup> *Id.* at 141–42. Maine, Maryland, and Vermont utilize this system. Several other states have implemented temporary advisory commissions. *Id.*

<sup>114</sup> *Id.* at 141.

<sup>115</sup> BRUNELL, *supra* note 33, at 69.

<sup>116</sup> A "safe district" is defined as one in which an elected representative is all but certain to win reelection, thus requiring little or no campaigning on the part of the representative. Some political scientists consider a district safe when the candidate wins greater than fifty-five percent of the vote. JAMES Q. WILSON & JOHN J. DI IULIO, JR., *AMERICAN GOVERNMENT* 327 (Charles Hartford et al. eds., 10th ed. 2006).

<sup>117</sup> Chavez, *supra* note 29, at 338 (outlining supporters' arguments for competitive districts including the proposition that they lead to greater responsiveness among legislators).

First, citizens commissions operate under neutral or bipartisan impulses, considering population change and other nonpolitical principles, as opposed to partisan factors such as incumbent protection.<sup>118</sup> This is so because these commissions are specifically designed to be independent with rigorous and thorough vetting processes to ensure the members are not beholden to politicians.<sup>119</sup> While there is reason to question this premise, this doubt may in fact reflect distrust in the design of the commission rather than lack of faith in the commissioners.<sup>120</sup>

A second premise is that a commission operating under such neutral impulses will create more competitive districts.<sup>121</sup> This is thought to result naturally rather than by the design of commissioners as they focus on nonpolitical goals.<sup>122</sup> In fact, Proposition 11 does not require the commission to use competitiveness as a factor.<sup>123</sup> This outcome, increased competitiveness, is thought to result *indirectly* and naturally when citizens commissions adhere to neutral criteria such as compactness, geographic and political boundaries, and respect for communities.<sup>124</sup>

Finally, competitive districts force candidates to move closer to the political center and to respond more attentively to constituents by attenuating their positions.<sup>125</sup>

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<sup>118</sup> See WINBURN, *supra* note 22, at 17 (explaining that district lines should be drawn based on “factors that either apply to both parties (or incumbents) equally or, most likely, do not even consider partisanship (or incumbent standing)”).

<sup>119</sup> Justin Levitt, *Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 533–36 (2011). Levitt describes the reason for these commissioners’ independence: “[C]itizens whose job security is not affected by the outcome of a redistricting process will feel far less compulsion to distort otherwise coherent districts . . .” *Id.* at 538.

<sup>120</sup> *Id.* at 540–41 (describing people’s tendencies to “default[ ] on difficult political judgments, prioritizing certain criteria for the wrong reasons”).

<sup>121</sup> Jean Merl & Michael J. Mishak, *Panel’s Final Redistricting Maps Drawn*, L.A. TIMES, July 30, 2011, at A1. Other changes to the redistricting process may also result in more competitive districts. See, e.g., Chavez, *supra* note 29, at 369–70 (proposing a hybrid approach in which “[t]he commission could review the plan developed by the Legislature and propose changes”).

<sup>122</sup> This theory has been debated for decades among political scientists. Recently, in view of California’s experiment with redistricting, it has gained more attention. See generally Chavez, *supra* note 29. For a list of criteria for district boundaries the commission must follow, in order of priority, see *Redistricting Reform in California: Proposition 11 on the November 2008 California Ballot*, CENTER FOR GOVERNMENTAL STUDIES 21 [hereinafter *Redistricting Reform in California*], available at <http://policyarchive.org/handle/10207/bitstreams/95928.pdf>.

<sup>123</sup> *Redistricting Reform in California*, *supra* note 122, at 27 (summarizing two possible reasons why the authors left competitiveness out: the Arizona experience where competitive districts were challenged in the courts for seven years and the difficulty of creating competitive districts in California due to population concentration and compactness requirements).

<sup>124</sup> See Cain, *supra* note 17, at 1823 (explaining that creating more competitive districts was an implicit motive of redistricting reform in California despite ballot measures lacking competition as explicitly enumerated criteria).

<sup>125</sup> BULLOCK, *supra* note 43, at 113. The concomitant inference is that responsiveness to constituents is an element of good democracy. But see BRUNELL, *supra* note 33, at 75–89 (2008) (arguing that noncompetitive districts and districts with little ideological diversity, maximize the

Politicians in competitive districts face a more centrist median voter, necessitating more frequent interactions with voters to gauge public opinion.<sup>126</sup> It would not be so easy to assume the views of a politician's constituency's position.<sup>127</sup> Furthermore, under the California law, this moderating effect would be felt in Sacramento as well as in Washington, D.C. because the process applies to both state district lines as well as congressional ones.<sup>128</sup>

An incumbent who has typically won reelection in his district for several elections who then faces a new, more evenly divided constituency due to redistricting, faces a difficult set of options: retire, acknowledging that victory in this new district is more than an uphill battle; hold to his political values and be prepared to lose with his head held high; or adjust his positions toward the middle voters in the new district.<sup>129</sup> Alternatively, he could elect to run in a nearby district with more like-minded voters and face a difficult primary battle against a fellow partisan.<sup>130</sup>

Competitive districts are also thought to increase electoral participation<sup>131</sup> and reduce party polarization in the legislature.<sup>132</sup> The conclusion aptly drawn from these premises is that any state interested in structural reforms to encourage moderate political platforms and politicians who are more responsive to the electorate should consider implementing the citizens commission model. If this is true, citizens commissions may hold great potential to ameliorate gridlock in state capitals and in Congress.

While these goals may be desirable, independent citizens commissions do not come easily or emerge overnight. They are the result of a long process of development subject to historical forces and the political culture of a population.<sup>133</sup> Some states confront

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number of winning voters, improve voters' attitudes toward Congress, and enhance representation by increasing the number of constituents accurately represented by their congressman).

<sup>126</sup> As with many of the arguments surrounding citizens commissions, there is some debate as to whether politicians in competitive districts court the median voter more effectively. *See, e.g.*, Chavez, *supra* note 29, at 338–39.

<sup>127</sup> *Id.* at 341–42 (summarizing two key criticisms of this point: “[B]y definition, competitive districts leave more voters unrepresented,” and “[c]andidates would likely be less interested in running for office if they knew that slight changes in political sentiment would remove them from office.”).

<sup>128</sup> CAL. CONST. art. XXI, § 1.

<sup>129</sup> BULLOCK, *supra* note 43, at 100–02.

<sup>130</sup> *See, e.g.*, BRUNELL, *supra* note 33, at 69 (describing Republican redistricting in Pennsylvania that resulted in a 2002 primary battle between two popular Democrats, John Murtha and Frank Mascara, a fight that became “at times quite nasty”).

<sup>131</sup> Chavez, *supra* note 29, at 338.

<sup>132</sup> Grainger, *supra* note 68, at 547 (finding a relationship between legislative redistricting and polarization). *But see* NOLAN MCCARTY et al., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 1 (2006) (finding polarization is not attributable to redistricting but is instead the result of income inequality).

<sup>133</sup> The adoption of a somewhat unusual redistricting process in Iowa, for example, reflects decades of wrangling between the U.S. Supreme Court, state supreme court, legislators, and citizens. *See* Peverill Squire, *Iowa and the Political Consequences of Playing Redistricting Straight*, in REDISTRICTING IN THE NEW MILLENIUM 261–63 (Peter F. Galderisi ed., 2005).

abuses of redistricting authority with great leaps forward, while others experiment in smaller steps.<sup>134</sup> For example, citizens commissions may start as advisory in nature only, whereby an independent or quasi-independent commission drafts a redistricting plan subject to approval by the legislature.<sup>135</sup> This form of commission exists in various iterations in several states such as Iowa and New York.<sup>136</sup> Other states have experimented with a “backup commission” approach such that stalemated negotiations in the legislature throw the issue to the commission.<sup>137</sup> This system incentivizes bargaining strategies and other benefits.<sup>138</sup> Another option for reform involves “politician commissions” composed of elected officials who do not have to obtain legislative approval for their work.<sup>139</sup> The benefit of this system is that it recognizes the political nature of the task and encourages bargaining and compromise.<sup>140</sup> In the twenty-one states in which panels draw district lines, only thirteen employ commissions with *primary* responsibility for drawing the plan, two states utilize advisory commissions, and five utilize backup commissions.<sup>141</sup>

Yet none of these systems reaches the level of independence and autonomy the independent citizens commission does.<sup>142</sup> This model solves the two great polemics of independence and autonomy described above. First, because allowing legislators to “choose their voters” creates conflict of interest concerns, the greater the separation between legislators who stand to be elected by these districts and the actual district line drawing, the lesser the conflict.<sup>143</sup> The citizens commission system reaches the ultimate degree of separation as legislators’ sole involvement in the process is the right to strike names from a pool of potential commission members.<sup>144</sup> Second, when commissions possess mere advisory or backup authority, their effect is only to encourage legislators

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<sup>134</sup> See Stephanopoulos, *supra* note 94, at 346–77. Stephanopoulos outlines the history of redistricting initiatives in several states, with Oklahoma standing out for its rather extreme swing. “Prior to 1960, the Oklahoma state legislature was one of the most misapportioned in the country.” *Id.* at 347. The initiative, to enforce the state’s constitutional reapportionment formula by commission, passed largely because of the Supreme Court’s decision in *Baker v. Carr*, the state supreme court’s “ultimatum to the state legislature,” and progressive state politicians. *Id.* at 352.

<sup>135</sup> Cain, *supra* note 17, at 1813.

<sup>136</sup> *Id.* at 1813–14.

<sup>137</sup> *Id.* at 1815.

<sup>138</sup> *Id.* (describing how the existence of a backup commission, which would place the line drawing into a bipartisan process, may boost the majority party’s ability to keep its members from insisting on their own individual demands).

<sup>139</sup> *Id.* at 1816.

<sup>140</sup> *Id.*

<sup>141</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, *Redistricting Commissions: Legislative Plans*, <http://www.ncsl.org/legislatures-elections/redist/2009-redistricting-commissions-table.aspx> (last visited Oct. 21, 2013).

<sup>142</sup> Cain, *supra* note 17, at 1818.

<sup>143</sup> WINBURN, *supra* note 22, at 2.

<sup>144</sup> *Application and Selection Process*, WEDRAWTHELINES.CA.GOV, <http://wedrawthelines.ca.gov/selection.html> (last visited Oct. 21, 2013).

to conduct the process efficiently as legislators retain the power to adopt or reject these commissions' lines.<sup>145</sup> In other words, no matter the degree of commission independence, its role is passive barring failure of the legislature to complete its task. Commissions vested with full authority, subject only to judicial review, may be viewed as the most autonomous.

California's new citizens commission possesses not only separation, but also full enactment power. The legislature retains no authority to approve either commission members or the results of its work.<sup>146</sup> It is possible that these factors are what scare politicians and those with entrenched interests in the system. A commission operating in too neutral a manner may disrupt much of what lobbyists and donors have worked to build, especially if the outcome is a crop of fresh, independent representatives.

#### *D. Redistricting in California*

The history of redistricting in California is as varied as its landscape and population. Four of the past five redistrictings, including the most recent, have been subject to litigation.<sup>147</sup> In the 1970s and 1990s, independent judges drew district lines, while in the 1960s, 1980s, and 2000s, the legislature did.<sup>148</sup> The decade-long shadow of each district redrawing, coming immediately after and as a consequence of the U.S. Census, provides case studies from which to draw conclusions. Indeed, the 1973, 1981, and 1991 redistricting experiences illuminate trends in the process as well as the roots of reform that would culminate in the passage of Proposition 11 and 20.<sup>149</sup>

In the 1970s, the Democrats controlled the legislature but answered to a Republican governor, Ronald Reagan.<sup>150</sup> This led to a showdown in 1971 as the Governor refused to enact a district map that gerrymandered benefits for the Democrats.<sup>151</sup> As a result, a panel of special masters, California State Supreme Court appointed judges, drew the lines which were accepted in 1973 and in place for the 1974 election.<sup>152</sup> In the 1980s, however, the Democrat-controlled legislature, with the support of a Democratic governor, manipulated the process to add five seats for the Democrats while drawing several oddly shaped districts.<sup>153</sup> With striking parallels to the 2012 election, Republicans,

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<sup>145</sup> Cain, *supra* note 17, at 1814.

<sup>146</sup> CAL. CONST. art. XXI, § 2(c)(1).

<sup>147</sup> Chavez, *supra* note 29, at 320. Chavez addresses the past four redistrictings. For analysis of the most recent redistricting, see *infra* Part III.

<sup>148</sup> Grainger, *supra* note 68, at 546. See generally GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* (2002).

<sup>149</sup> Cain, *supra* note 17, at 1822–23.

<sup>150</sup> Grainger, *supra* note 68, at 548–49.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 548.

<sup>153</sup> Bruce E. Cain, *Assessing the Partisan Effects of Redistricting*, 79 AM. POL. SCI. REV. 320, 331 (1985).

viewing the plan as extreme partisan gerrymandering, immediately challenged the map with a three-pronged assault.<sup>154</sup> First, they used the referendum system to put on the ballot three propositions to replace each of the three legislative maps (assembly, senate, and congressional).<sup>155</sup> Second, they sought to have the plans take effect immediately, before the propositions were voted on, for the 1982 election rather than the legislature's plans.<sup>156</sup> Third, they placed Proposition 14 on the 1982 ballot, a proposal to create a citizens commission to draw district lines instead of the legislature.<sup>157</sup> In the end, the California Supreme Court rejected the Republicans' redistricting plans and ordered the legislature's plans to be used for the 1982 election.<sup>158</sup> Proposition 14 failed at the ballot box, but the other three referenda were successful, overturning the Democrats' maps only after they were used for the 1982 election.<sup>159</sup> Thereafter, the two parties hammered out a deal that provided sufficient benefits to Republicans to ensure passage and avoid defaulting to the special masters.<sup>160</sup>

The 1980s redistricting imbroglio left a legacy of bitterness between the parties and illuminates the impetus for subsequent redistricting attempts.<sup>161</sup> Lawsuits and calls for reform marked the 1980s, culminating in 1991 with another impasse in the political process in which special masters once again took over.<sup>162</sup> This time, the special masters' plan secured gains for Democrats, which they were keen to lock in through bipartisanship during the next go-around in 2001.<sup>163</sup>

This makes sense politically: when a majority party is viewed as abusing its line-drawing power, the opposition will resort to available tactics to upset that hegemony. In a state like California, where a minority party has recourse to referenda, initiative, and the court's special masters, the party in power will operate strategically to maximize and lock in gains. In a state without such procedures, a majority party would find less incentive to work with the minority to draw mutually favorable districts. When the parties work together, horse trading for districts and engaging in give-and-take electoral exchanges, critics voice the concern that the cost of bipartisanship is competitive elections, centrist politicians, and moderate legislatures.<sup>164</sup> Partisan districting increases a party's registration in districts that lean for that party.<sup>165</sup>

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<sup>154</sup> Chavez, *supra* note 29, at 320.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 321.

<sup>158</sup> *Id.*

<sup>159</sup> Cain, *supra* note 17, at 1822.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* It is interesting to note spikes in exchange of seats between the parties in both 1974 and 1992, both times when district maps were drawn by special masters.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1823.

<sup>165</sup> Cain, *supra* note 153, at 329.



The 2001 redistricting saw just such a result; lines were drawn in a bipartisan manner, preserving both parties' seats, and in the election that followed not one seat changed party hands.<sup>166</sup> In a sort of political "live and let live" compact, it seems the parties were able to find common ground in the preservation of incumbent seats.<sup>167</sup> This deal would prove ironic as the law of unintended consequences took effect in the subsequent years. The 2002 election, in which long-time politicians Howard Berman, Brad Sherman, Lois Capps, Elton Gallegly, and David Dreier<sup>168</sup> all benefitted with safe seat victories, stood as an "argument against the redistricting system in California" and a poster child for partisan gerrymandering gone too far.<sup>169</sup>

### III. PROPOSITION 11

As a consequence of these experiences, California reformers continued to view any redistricting linked to the very political branches being elected with suspicion and distrust.<sup>170</sup> This distrust led to efforts by various groups to change the redistricting process. Proposition 14, which would have created a commission with members selected by judges and the parties, failed in 1982, as did similarly styled Proposition 39 in 1984.<sup>171</sup> In 1990, voters also struck down Proposition 118, which would have required redistricting plans to receive two-thirds of the vote in the legislature, the governor's signature, and voter approval, and Proposition 119, which would have created a bipartisan commission to draw maps.<sup>172</sup> Finally, in 2005, Proposition 77, which would have created a commission to conduct redistricting, also failed to receive voter approval.<sup>173</sup>

Proposition 11 would be different. This time, proponents would be more focused, support more widespread, and endorsements more ringing.<sup>174</sup> An initiative placed on the ballot by voters, Proposition 11 would amend the California constitution by establishing a "Citizens Redistricting Commission . . . [to] draw new district lines . . . for State Senate, Assembly, and Board of Equalization districts."<sup>175</sup> Then-Governor Arnold Schwarzenegger campaigned for the measure stating, "[w]e need a system of truly competitive legislative districts so when lawmakers go home, they can be held accountable."<sup>176</sup> The measure even proclaimed under its "Findings and Purpose"

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<sup>166</sup> Grainger, *supra* note 68, at 549.

<sup>167</sup> Chavez, *supra* note 29, at 321.

<sup>168</sup> See *infra* Part IV for discussions about these politicians and how the citizens commission affected their electoral futures.

<sup>169</sup> Grainger, *supra* note 68, at 549.

<sup>170</sup> Cain, *supra* note 17, at 1822.

<sup>171</sup> Chavez, *supra* note 29, at 323.

<sup>172</sup> *Id.* at 324.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 326.

<sup>175</sup> Text of Proposed Laws: Proposition 11, § 2(a) 137, available at [http://wedrawthelines.ca.gov/downloads/voters\\_first\\_act.pdf](http://wedrawthelines.ca.gov/downloads/voters_first_act.pdf).

<sup>176</sup> George Skelton, *Logjam Sends Coalitions down the Initiate Trail*, L.A. TIMES (Dec. 10, 2007), <http://articles.latimes.com/2007/dec/10/local/me-cap10>.

section that “[a]llowing politicians to draw their own districts is a serious conflict of interest that harms voters.”<sup>177</sup> With strong popular support for the bill, well-funded backing, and the governor campaigning for it, Proposition 11 had better chances than any prior attempt to change redistricting in California.

In politics, promises are easy and facts are difficult. Supporters of Proposition 11 all but promised that more competitive elections would result from the passage of the bill. Steve Westly, former State Controller, touted Proposition 11 as a common sense measure that would create more competitive districts and “bring democracy back to California again.”<sup>178</sup> Westly cited “ideological extrem[ism]” as holding publicly funded institutions, such as schools and hospitals, hostage during the recent budget fight in Sacramento.<sup>179</sup> A coalition of good-government groups such as California Forward, California Taxpayers Association, and the League of Women Voters, sponsored the bill and it was endorsed widely by politicians.<sup>180</sup> The measure was even supported by former Governor Gray Davis whom Schwarzenegger replaced in a 2003 recall election.<sup>181</sup> Governor Schwarzenegger sharpened his language as the vote drew near stating, “This is a fixed system, . . . a system that rewards legislators for rigid partisanship . . . .”<sup>182</sup>

Proposition 11 differed in substantial ways from prior measures to reform the district-line-drawing process. First, the proposition gave the task entirely to a citizens commission, constrained only by the provision that the maps must conform with the U.S. Constitution and the VRA.<sup>183</sup> Second, the measure provided a minimal role for the legislature.<sup>184</sup> Third, there was no role for retired judges as in the prior measures.<sup>185</sup> Finally, as initially proposed, Proposition 11 left in the hands of the legislature the task of drawing congressional lines, giving the citizens commission the authority to draw state Assembly, Senate, and Board of Equalization lines.<sup>186</sup>

A striking feature of the Proposition is its reference to three cities with “oddly shaped districts to protect incumbent legislators.”<sup>187</sup> The proposition avers that voters

<sup>177</sup> Text of Proposed Laws: Proposition 11, § 2(a) 137, available at [http://www.wedrawthelines.ca.gov/downloads/voters\\_first\\_act.pdf](http://www.wedrawthelines.ca.gov/downloads/voters_first_act.pdf).

<sup>178</sup> *Schwarzenegger Stumps for Prop. 11*, PALO ALTO ONLINE (Oct. 24, 2008, 8:41 AM), [http://www.paloaltoonline.com/news/show\\_story.php?id=9783](http://www.paloaltoonline.com/news/show_story.php?id=9783).

<sup>179</sup> *Id.*

<sup>180</sup> Cain, *supra* note 17, at 1823.

<sup>181</sup> Nancy Vogel, *Prop. 11 Aims to Redo Remap*, L.A. TIMES, Oct. 14, 2008, at B1, B7.

<sup>182</sup> *Id.* at B7.

<sup>183</sup> Text of Proposed Laws: Proposition 11, § 3.3 137, available at [http://www.wedrawthelines.ca.gov/downloads/voters\\_first\\_act.pdf](http://www.wedrawthelines.ca.gov/downloads/voters_first_act.pdf). The proposed law contains other guidelines such as requiring districts to be drawn “[t]o the extent practicable . . . to encourage geographical compactness.” *Id.*

<sup>184</sup> For example, the Legislature must “provide adequate funding to defend any action regarding a certified map” but may not amend Chapter 11 of the California Constitution without first meeting a strict set of conditions. *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* § 3.2(1) (“[T]he Legislature shall adjust the boundary lines of the ~~Senatorial, Assembly, Congressional, and Board of Equalization~~ congressional districts . . . .” (strikeout in original)).

<sup>187</sup> *Id.* § 2(b).

in these and other communities have “no political voice because they have been split into as many as four different districts.”<sup>188</sup> Even more striking are the proposition’s promises, from making the redistricting process “open” and ensuring “full participation of independent voters” to putting “voters back in charge.”<sup>189</sup>

#### *A. Passage of Proposition 11*

California voters agreed, and in 2008 took the job of district line drawing from the state legislature and placed it in the hands of a citizens commission by a vote of 50.9% in favor, 49.1% opposed.<sup>190</sup> As initially passed, the proposition did not include U.S. congressional districts. That provision was passed two years later in Proposition 20, passed by a vote of 61.3% in favor, 38.7% opposed.<sup>191</sup>

Proposition 11 added Section 2 to Article XXI of the California Constitution and declared: “[T]he Citizens Redistricting Commission . . . shall adjust the boundary lines,” summarily removing the task from the legislature.<sup>192</sup> Consisting of fourteen members, the new commission was to be composed of five members registered with each of the two largest parties and four not registered with either.<sup>193</sup> Creation of such a commission would immediately raise VRA concerns. Since the early 1970s, several counties in California have qualified for coverage under Section 5 due to their Latino populations.<sup>194</sup> While the Latino population in the West has grown in recent years, Latino electoral weight has not grown equivalently.<sup>195</sup> Such underrepresentation is not necessarily the result of gerrymandering and voter suppression as it is for other ethnic and minority groups with different histories.<sup>196</sup> However, statistics show the Latino population in California grew from thirty-two percent in 2000 to thirty-eight percent in 2010, but decreased in the California legislature from twenty-two percent in 2000

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* § 2(a), (e).

<sup>190</sup> Jean Merl, *Panel Expected to OK its Redistricting Plan*, L.A. TIMES, Aug. 13, 2011, at AA3; Debra Bowen, California Secretary of State, *Statement of Vote: November 4, 2008, General Election*, available at <http://www.sos.ca.gov/elections/sov/2008-general/>.

<sup>191</sup> Debra Bowen, California Secretary of State, *Statement of Vote: November 2, 2010, General Election*, available at <http://www.sos.ca.gov/elections/sov/2010-general/complete-sov.pdf>.

<sup>192</sup> CAL. CONST. art. XXI, § 2.

<sup>193</sup> *Id.*

<sup>194</sup> *Preclearance Submission of the 2011 Redistricting Plan for the Counties of Kings, Merced, Monterey and Yuba by the State of California under 42 U.S.C. § 1973c*, n.3, available at [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_112011/handouts\\_20111116\\_gdc\\_sec5sub.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_112011/handouts_20111116_gdc_sec5sub.pdf). While the only states in the West fully covered by Section 5 of the VRA are Arizona and Texas, Kings, Merced, Monterey, and Yuba Counties in California are also covered. See Jason P. Casellas, *Redistricting and Latino Representation in the West*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST 95, 96–97 (Gary F. Moncrief ed., 2011).

<sup>195</sup> Casellas, *supra* note 194, at 95.

<sup>196</sup> *Id.* at 95–96.

to eighteen percent in 2011.<sup>197</sup> In fact, the increase in Latino population accounts for fully ninety percent of California's overall population growth.<sup>198</sup> The new commission would have to draw new district lines in conformity with the VRA provisions, Supreme Court decisions, and the principles enunciated in the California Constitution.<sup>199</sup>

Many districts with significant Latino populations were heavily Democratic in the prior map, yet held by Anglo- or African-American incumbents.<sup>200</sup> The commission's new map changed this dynamic in several places. Some incumbent Democrats faced challenges from Latino Democrats in their primary.<sup>201</sup> Add to this California's new "jungle primary" in which the top two vote getters in a primary face off in the general election, regardless of party.<sup>202</sup> This scheme offered the chance that a district could see a Latino and an African-American or Anglo Democrat compete in the runoff election.<sup>203</sup> Indeed, this was the result in several districts in 2012,<sup>204</sup> yet how Proposition 11 will impact Latino descriptive representation remains unclear and may not be evident for years.<sup>205</sup>

### B. Challenges to the Plan

Hardly had Secretary of State Debra Bowen certified the Commission's work before challenges were filed with the State Supreme Court, per the statute's provisions.<sup>206</sup> One such challenge, *Radanovich v. Bowen*, alleged that race was used improperly as a factor in creating voting districts.<sup>207</sup> The plaintiffs alleged California's 37th, 43rd, and 44th Congressional Districts violated the Equal Protection Clause of the Fourteenth Amendment and the VRA, and requested the Court appoint special masters to redraw the lines.<sup>208</sup> On October 26, 2011, the California Supreme Court denied the Petition.<sup>209</sup>

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<sup>197</sup> *Id.* at 101.

<sup>198</sup> *Id.*

<sup>199</sup> Text of Proposed Laws: Proposition 11, § 3.3(d) 137, available at [http://www.wedrawthelines.ca.gov/downloads/voters\\_first\\_act.pdf](http://www.wedrawthelines.ca.gov/downloads/voters_first_act.pdf).

<sup>200</sup> Casellas, *supra* note 194, at 102.

<sup>201</sup> *Id.*

<sup>202</sup> Alex Isenstadt, *California Incumbents Safe No More?*, POLITICO (Apr. 12, 2011), <http://www.politico.com/news/stories/0411/52970.html>.

<sup>203</sup> See Casellas, *supra* note 194, at 102.

<sup>204</sup> See *infra* Part IV.

<sup>205</sup> See Casellas, *supra* note 194, at 102.

<sup>206</sup> The amendment includes the provision that "[t]he California Supreme Court has original and exclusive jurisdiction in all proceedings in which a certified final map is challenged or is claimed not to have taken timely effect." CAL. CONST. art. XXI, § 3 (b)(1).

<sup>207</sup> Verified Petition for Extraordinary Relief in the Form of Mandamus or Prohibition, *Radanovich v. Bowen*, No. S196852 (Cal. Sept. 29, 2011).

<sup>208</sup> *Id.*

<sup>209</sup> *Radanovich v. Bowen*, No. S196852 (Cal. Oct. 26, 2011) (en banc) (denying motion to strike, petition for writ of mandate, and request for emergency stay), available at [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_102011/handouts\\_20111026\\_csc.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_102011/handouts_20111026_csc.pdf).

Plaintiffs then filed a complaint in U.S. District Court,<sup>210</sup> to which the Citizens Commission timely filed a motion to dismiss.<sup>211</sup> The court dismissed the case on res judicata grounds finding: (1) the California Supreme Court had reached a final judgment on the merits; (2) the issues in the prior dispute were the same as in the federal claim; and (3) the same parties were involved in both actions.<sup>212</sup> Therefore, under California law, the prior rejection of the case was a final judgment.<sup>213</sup>

In another petition to the California Supreme Court, Julie Vandermost<sup>214</sup> filed a *Petition for Extraordinary Relief in the Form of Mandamus or Prohibition Emergency Stay Requested* in September 2011.<sup>215</sup> The petition specifically challenged the certified maps for the California Senate<sup>216</sup> and requested that the court prohibit the Secretary of State from enforcing them.<sup>217</sup> Petitioner argued the maps were unconstitutional, unlawful, and unenforceable.<sup>218</sup> Petitioner sought to stay the use of the maps and offered three alternatives plans, one involving using a “nesting plan” or by reverting to the 2001 odd-numbered Senate districts.<sup>219</sup>

Meanwhile, a citizens group began to circulate petitions for a referendum staying the implementation of the redistricting commission.<sup>220</sup> In light of the fact that the petition had received over 700,000 signatures, Vandermost’s petition requested the Court to clarify which district map for the State Senate would be used in the election in the event the challenge successfully qualified for the ballot.<sup>221</sup> Vandermost also filed three possible alternate maps to be used in that event, rather than using the commission’s certified maps.<sup>222</sup>

Concurrent with these events, the citizens commission submitted its certified maps to the U.S. Attorney General for consideration under the VRA in November 2011.<sup>223</sup>

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<sup>210</sup> Radanovich v. Bowen, No. 2:11-cv-09786-SVW-PJW (C.D. Cal. Feb. 9, 2012), available at <http://redistricting.lls.edu/files/CA%20radanovich%2020120209%20order.pdf>.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Julie Vandermost, an Orange County businesswoman, has been a consistent player in the fight over redistricting. As chairwoman of Fairness and Accountability in Redistricting, she helped place Proposition 40, a ballot referendum challenging the California Senate map drawn by the commission. See Jim Sanders, *GOP Ends Effort to Kill California Senate Districts, Won't Push Prop. 40*, THE SACRAMENTO BEE (July 13, 2012), <http://archive.is/LHFCx>.

<sup>215</sup> Verified Petition for Extraordinary Relief in the Form of Mandamus or Prohibition at 15, Vandermost v. Bowen, 269 P.3d 446 (Cal. 2012), available at [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_122011/handouts\\_20111213\\_vandermost\\_refpetition.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_122011/handouts_20111213_vandermost_refpetition.pdf).

<sup>216</sup> *Id.* at 1.

<sup>217</sup> *Id.* at 15.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 33.

<sup>220</sup> *Id.* at 22.

<sup>221</sup> *See id.* at 28–37.

<sup>222</sup> *See id.* at 28–33 (suggesting three remedies that may be easily implemented: (1) the simple nesting plan; (2) the existing 2001 Senate districts; or (3) Quinn’s Model Constitutional Plan).

<sup>223</sup> Letter from Thomas E. Perez, Assistant Attorney Gen., to Kamala D. Harris, Cal. State

The U.S. Department of Justice reviewed the maps and did not “interpose any objection to the specified changes” the maps made.<sup>224</sup> Upon these grounds, the citizens commission’s work could go forward without federal challenges to its legitimacy, notwithstanding the pending state court claims.

In January 2012, while the primary election was beginning to warm up, the California Supreme Court ruled on Vandermost’s inquiry regarding the challenge to the commission and which maps would be used.<sup>225</sup> The court ruled that Vandermost’s petition for writ of mandate was ripe, but found that there was no showing that the challenged referendum was likely to qualify for the ballot.<sup>226</sup> The court agreed with the Secretary of State’s argument that even if the commission’s map is eventually stayed by the challenge, it should nonetheless be used during the primary election for the sake of continuity and smoothness of elections.<sup>227</sup> Specifically, in order to “avoid disruption of the election planning process,” confusion, and the concomitant ills it would bring, the commission’s map would be most appropriate.<sup>228</sup> The court cited *Assembly v. Deukmejian*<sup>229</sup> for the proposition that the court must determine which map is “reasonably and practically available” and the “pros and cons of each.”<sup>230</sup> It then evaluated four maps available: the commission’s certified map and three maps submitted by Vandermost.<sup>231</sup> It is not surprising that the court concluded that the commission’s map was the “most appropriate,” citing its conformity with the “constitutionally mandated criteria embodied in the federal and state Constitutions.”<sup>232</sup> The court went on to describe the process by which the commission had done its work, from the proposition that put it on the ballot to the selection method used for its members.<sup>233</sup>

With the commission’s maps firmly in place for the 2012 election, what remained was to observe their impact on the matchups, discourse, fundraising, and ultimately whether they would diminish the partisanship of the legislative bodies they would produce.

#### IV. THE 2012 ELECTION

The 2012 election was bound to be a shake-up to some degree. Pundits and analysts, not to mention political stakeholders, held their collective breath throughout the

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Attorney Gen. (Jan. 17, 2012), *available at* [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_012012/handouts\\_20120119\\_mofocasupdoj.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_012012/handouts_20120119_mofocasupdoj.pdf).

<sup>224</sup> *Id.*

<sup>225</sup> *Vandermost v. Bowen*, 269 P.3d 446, 451 (Cal. 2012).

<sup>226</sup> *Id.* at 446, 451.

<sup>227</sup> *Id.* at 451.

<sup>228</sup> *Id.*

<sup>229</sup> 639 P.2d 939 (Cal. 1982).

<sup>230</sup> *Vandermost*, 269 P.3d at 451 (citing *Assembly v. Deukmejian*, 639 P.2d 939 (Cal. 1982)).

<sup>231</sup> *Id.* at 474–75.

<sup>232</sup> *Id.* at 451, 466.

<sup>233</sup> *Id.* at 455–58, 484 (emphasizing the transparency and openness of the commission’s procedures).



process, witnessing long-time incumbents retire, Democrat pitted against Democrat, and voters reading ballots with two unfamiliar names under the major parties' banner. The 2012 election was variously referred to as a "perfect storm,"<sup>234</sup> "slugfest,"<sup>235</sup> and even an "omen" for the Republican party and its future electoral losses.<sup>236</sup> Through the white noise of derision and praise for the commission's work several key races and outcomes emerged, which suggest conclusions about the consequences of California's electoral experiment.

This study analyzes three California districts comparing the new commission maps with those that existed prior to Proposition 11. It will analyze the significant electoral consequences of the commission's work and assess whether competitiveness or the other goals were realized. A necessary constraint in this analysis is that the process of redistricting does not neatly arrange voters from former districts into new ones. For example, the 26th district largely became the 27th on the new map.<sup>237</sup> Comparing the old 26th to the new 26th would be comparing entirely different constituencies, an analysis with distinct merits and possibilities, yet not the focus of this study. This study aims to compare outcomes where former and new districts largely overlap.

#### *A. From Safe to Safe: The 27th District*

California's 26th District once covered from La Canada Flintridge all the way to Rancho Cucamonga and north to San Gabriel and San Bernardino.<sup>238</sup> The work of the redistricting commission, however, changed the composition of the district, now numbered the 27th, adding eighteen percent more Asians and decreasing the white population to twenty-nine percent.<sup>239</sup> Registered Democrats increased from thirty-five percent to forty-two percent.<sup>240</sup> David Dreier, an influential and long-serving Republican, now faced a new constituency and the prospects of an uphill battle for reelection.<sup>241</sup> Dreier

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<sup>234</sup> Isenstadt, *supra* note 202.

<sup>235</sup> Bob Morris, *California Open Primary Leads to Democratic Slugfest*, IVN (July 19, 2012), <http://ivn.us/2012/07/19/california-open-primary-leads-to-democratic-slugfest/>.

<sup>236</sup> Jens Erik Gould, *Is California's Democratic Supermajority an Omen for the Rest of the U.S.?*, TIME (Nov. 20, 2012), <http://nation.time.com/2012/11/20/is-californias-democratic-super-majority-an-omen-for-the-rest-of-the-u-s/>.

<sup>237</sup> See *California's Citizen Commission Final District Maps*, L.A. TIMES, <http://www.latimes.com/la-redistricting-map-july-2011,0,5339409.htmlstory#37.42166,-119.27199999999999,6,usCongress,,,current> (last visited Oct. 21, 2013) [hereinafter *Interactive Maps*]. The user can select regions throughout the state and compare, side-by-side, the prior map with the current including geography, party registration, and race and ethnicity.

<sup>238</sup> *Id.*

<sup>239</sup> See *Demographics of the New Congressional Districts*, L.A. TIMES (July 29, 2011), <http://spreadsheets.latimes.com/usCongress-2011-0729/?force=True&sortOrder=1&sortColumn=3> [hereinafter *Demographics Spreadsheet*].

<sup>240</sup> *Id.*

<sup>241</sup> Richard Simon, *Rep. David Dreier Decides Against Seeking Reelection*, L.A. TIMES (Feb. 29, 2012), <http://latimesblogs.latimes.com/california-politics/2012/02/rep-david-dreier-decides-against-seeking-reelection.html>.

decided not to run, citing Congress's "low approval rating" and Americans' desire for "change in Congress."<sup>242</sup>

Dreier's decision could not have been a difficult calculation. After three decades in Congress, Dreier had amassed considerable clout and influence, chairing the House Rules Committee and establishing a solid conservative record.<sup>243</sup> But these credentials would do him no good in the new arrangements. His San Dimas home, in the prior 26th District, was now placed in the 32nd District with its sixty-two percent Latino and forty-seven percent registered Democrat to twenty-eight percent Republican.<sup>244</sup> Dreier's other option was to run in the new 27th, a less unlikely prospect with forty-two percent Democrat and thirty percent Republican.<sup>245</sup> If he did, Dreier would face an uphill battle necessitating huge influxes of cash to compete in a Democratic district against Judy Chu, a popular Democrat whose former 32nd District had been incorporated into the new 27th District.<sup>246</sup> If the commission's goal was to convert safe districts into competitive ones, it utterly failed in the 26th/27th by instead creating a safe Democratic district. Dreier opted for retirement and Ms. Chu won with an astounding sixty-four percent of the vote against newcomer Jack Orswell.<sup>247</sup>

In this District, the promise of a newly competitive race with fresh candidates and new ideas did not result. While one long-time representative's choice of retirement over a bitter fight may be exactly what some proponents envisioned, a well-connected politician winning with a supermajority clearly was not. It seems instead the work of the commission created an environment where well-respected and popular representatives simply could not win, but the new district that forced his retirement was still noncompetitive.

### *B. Berman v. Sherman: The Slugfest*

As previously discussed, competitiveness is supposed to force candidates to broaden their appeal, move closer to the center politically, and attenuate their positions.<sup>248</sup>

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<sup>242</sup> *Id.*

<sup>243</sup> See Catalina Camia, *GOP Rep. Dreier of Calif. Announces Retirement*, USA TODAY (Feb. 29, 2012), <http://content.usatoday.com/communities/onpolitics/post/2012/02/david-dreier-retire-house-rules-committee-1#.Uk1qFnf8KKI>; *David T. Dreier's Voting Records*, PROJECT VOTE SMART, <http://votesmart.org/candidate/key-votes/26765/david-dreier> (last visited Oct. 21, 2013). *But see Brownley in the 26th District*, L.A. TIMES, Oct. 5, 2012, at A18 [hereinafter *Brownley*], available at <http://www.latimes.com/news/opinion/endorsements/la-ed-end-brownley-strickland-20121005,0,6634076.story> (explaining that "even though they may not yet appreciate the fact . . . David Dreier [is a] moderate[ ] . . . who [has] focused on sound policy more often than ideology").

<sup>244</sup> See *Demographics Spreadsheet*, *supra* note 235.

<sup>245</sup> *Id.*

<sup>246</sup> See *Interactive Maps*, *supra* note 233.

<sup>247</sup> *Candidate Details: Judy Chu*, OURCAMPAIGNS.COM, <http://www.ourcampaigns.com/CandidateDetail.html?CandidateID=5474> (last visited Oct. 21, 2013).

<sup>248</sup> See Chavez, *supra* note 29, at 338–43.

After the maps were redrawn for the 2012 election, California's new 30th District incorporated territory once divided between Democrat Howard Berman's 28th District, Democrat Brad Sherman's 27th District, and the prior 30th District.<sup>249</sup> Both candidates had won reelection with greater than sixty percent in their largely Democratic respective districts for more than a decade.<sup>250</sup> However, combined with California's Proposition 14 allowing the top two vote getters to compete in a runoff election regardless of party affiliation, the new 30th District was headed for a bruising battle between two well-funded and entrenched Democrats.<sup>251</sup>

Redistricting favored Brad Sherman. The new 30th District was made up of sixty percent of the voters from his prior district compared with twenty percent from Howard Berman's.<sup>252</sup> Politically, the new 30th District was a shoo-in for any Democrat: forty-nine percent of registered voters were Democrats compared with twenty-five percent Republican.<sup>253</sup> Indeed, the primary election resulted in both Democrats winning, Berman garnering thirty-two percent of the vote to Sherman's forty-two percent.<sup>254</sup> Voters would have their choice between two Democratic Jewish lawyers with rhyming last names, both educated at the University of California, Los Angeles, and with largely the same political views.<sup>255</sup> The differences between their positions came down to minor nuances and the merits of their background experiences rather than deep divides over policy.<sup>256</sup> For example, while both supported it, Berman was seen as a "more enthusiastic supporter of free trade."<sup>257</sup> Both supported immigration reform, but Berman had a longer history of advocating for farm workers.<sup>258</sup>

Depending on your political views, this scenario either represents the most competitive election imaginable or the most disenfranchising. Two candidates very close in political opinion may have been what reformers had in mind, but not necessarily two candidates both on the political left. On the other hand, while Democrats might be glad

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<sup>249</sup> See Jennifer Steinhauer, *Lines Redrawn, Longtime Allies Fight for a Seat*, N.Y. TIMES (Dec. 8, 2011), <http://www.nytimes.com/2011/12/09/us/politics/lines-redrawn-longtime-allies-fight-for-a-seat.html>.

<sup>250</sup> *Candidate Details: Brad Sherman*, OURCAMPAIGNS.COM, <http://www.ourcampaigns.com/CandidateDetail.html?CandidateID=746> (last visited Oct. 21, 2013); *Candidate Details: Howard L. Berman*, OURCAMPAIGNS.COM, <http://www.ourcampaigns.com/CandidateDetail.html?CandidateID=754> (last visited Oct. 21, 2013).

<sup>251</sup> Steinhauer, *supra* note 245 (quoting Eric Bauman, chairman of the Los Angeles County Democratic Party, as saying, "This is going to be the battle royal . . . Both of these guys will be extremely well funded with top-flight campaign teams.").

<sup>252</sup> Molly Ball, *Clone Wars*, THE ATLANTIC (May 21, 2012, 2:18 PM) <http://www.theatlantic.com/magazine/archive/2012/06/clone-wars/308983/>.

<sup>253</sup> See *Demographic Spreadsheet*, *supra* note 234.

<sup>254</sup> Morris, *supra* note 231.

<sup>255</sup> See Ball, *supra* note 248 (listing similarities between the two candidates).

<sup>256</sup> See generally Op-Ed., *Howard Berman in the 30th*, L.A. TIMES, Sept. 23, 2012, at A25.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

to be assured one of these two Democrats would be elected, they would also be assured that both could not simultaneously be elected to the House of Representatives. One would have to go home.

The consequence of the independent citizens commission's work, then, would be to force two well-respected Democrats with proven track records in their districts to spend millions of dollars lambasting each other in search of the narrowest political high ground.<sup>259</sup> Herein lies one key shortcoming in the independent citizens commission, especially the California iteration. Legally mandated majority-minority districts, along with California demographics, will usually be strongly Democratic because these populations are usually predominantly Democratic.<sup>260</sup> As a result, these districts will usually be highly noncompetitive. Further, placing so many Democrats into a district may even *necessitate* the drawing of safe Republican districts.<sup>261</sup> To proponents of progressive reforms, this poses a moral dilemma: preserve minority voting strength while sacrificing electoral competitiveness.<sup>262</sup> Compactness might also be jeopardized in search of competitive districts by stretching districts between areas dominated by different parties.<sup>263</sup>

Competitive districts of the sort envisaged by proponents of Proposition 11 may not only be difficult given these conflicting objectives and legal and demographic constraints, they may not even be desirable. Group sorting<sup>264</sup> and cultural polarization<sup>265</sup> are facts of American existence. Depending on which prestigious publication one consults, partisan politics either causes polarization among Americans or is the result of it.<sup>266</sup> In either case, Americans are becoming more deeply divided politically. Redistricting may offer very little to ameliorate this trend.

Further, ignoring the reality of a divided America may be problematic in other ways. As previously discussed, competitive elections tend to draw greater fundraising

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<sup>259</sup> See Ball, *supra* note 248 (quoting Representative Henry Waxman as saying, "I'm angry that two Democrats are running against each other, spending millions of dollars, when we could have used that money to elect other Democrats.").

<sup>260</sup> Chavez, *supra* note 29, at 345.

<sup>261</sup> *Id.* (explaining that the dispersing of minorities throughout the state has forced map drawers to encompass pockets of ethnic communities, thus constraining their options in populating the surrounding districts).

<sup>262</sup> *Id.* (citing California's constitutional provision to respect the "geographical integrity of cities and counties" as another force constraining the creation of competitive districts).

<sup>263</sup> *Id.* at 353.

<sup>264</sup> See generally BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008) (discussing America's homogeneity within communities and political subdivisions, partially the result of our highly mobile population).

<sup>265</sup> See generally Steven Strauss, *Six Reasons American Political Polarization Will Only Get Worse*, PROJECT SYNDICATE (Oct. 16, 2012), <http://www.project-syndicate.org/blog/six-reasons-american-political-polarization-will-only-get-worse>.

<sup>266</sup> For example, Strauss's study cites "Ideologically Safe Congressional Seats" as a factor contributing to political polarization making compromise a "dirty word." *Id.* Chavez, on the other hand, turns this around, explaining that "Democrats . . . mov[e] to Democrat-majority counties and Republicans to Republican counties." Chavez, *supra* note 29, at 346.

by interest groups and raise tensions in the debate.<sup>267</sup> On the other hand, safe districts create little political noise as candidates are almost certain of victory.<sup>268</sup> It may be that with the former, more Americans on the farther political edges will be unrepresented as more moderate candidates succeed in more evenly divided districts. Finally, with safe districts, the acrimony and tension that would otherwise play out during the election are instead released in the legislature, with the citizens observers to the drama rather than players in it.

### C. *The Ribbon of Shame*

The California 23rd is another district that experienced dramatic changes as a direct result of the commission's work. Known as the "ribbon of shame," the former California 23rd District once snaked along the California coast for hundreds of miles between bucolic Cambria and busy Oxnard.<sup>269</sup> Literally no thicker than a few blocks in some portions, the district has long been the object of scorn for its gerrymandered shape, but its representative, Lois Capps, has benefited from this linking of distant bastions of Democrats.<sup>270</sup> She has easily won reelection in each election since the District was drawn after the 2000 census.<sup>271</sup> However, much has changed since the commission conducted its work.<sup>272</sup> The new District covering most of this territory—the 24th—will retain a Democratic majority, but by a much narrower margin. This district is composed of 39.2% registered Democrats and 35.4% registered Republicans.<sup>273</sup>

In the 2012 election, Ms. Capps faced Republican Abel Maldonado in the 24th District.<sup>274</sup> This District was one of the few Republicans hoped to wrest from Democrats as the demographics tended to infer a chance at a competitive election.<sup>275</sup> But Ms. Capps's popularity, decades of service, and name recognition gave her the edge.<sup>276</sup>

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<sup>267</sup> See Chavez, *supra* note 29, at 339 (suggesting that greater competitiveness in elections leads to higher campaign contributions).

<sup>268</sup> See Strauss, *supra* note 261 (discussing the prevalence of ideologically safe congressional seats).

<sup>269</sup> McGreevy, *supra* note 5, at AA4.

<sup>270</sup> *Candidate Details: Lois Capps*, OURCAMPAIGNS.COM, <http://www.ourcampaigns.com/CandidateDetail.html?CandidateID=736> (last visited Oct. 21, 2013).

<sup>271</sup> McGreevy, *supra* note 5, at AA4. The previous district composition was 44.3% Democratic, 32.9% Republican.

<sup>272</sup> See Rep. Lois Capps Will Run for Re-election in New 24th District, CAL COAST NEWS (Aug. 2, 2011), <http://calcoastnews.com/2011/08/rep-lois-capps-will-run-for-re-election-in-new-24th-district/> (explaining that the new district "promises to be a more challenging race for Capps").

<sup>273</sup> See *Demographics Spreadsheet*, *supra* note 233.

<sup>274</sup> *Capps Wins in 24th Congressional District*, L.A. TIMES (Nov. 7, 2012), <http://latimesblogs.latimes.com/california-politics/2012/11/24th-congressional-district-lois-capps-abel-maldonado.html>.

<sup>275</sup> See *Demographics Spreadsheet*, *supra* note 235.

<sup>276</sup> Ms. Capps' husband, Walter Capps, also served in the House of Representatives until his

What became clear is that longtime representative Elton Gallegly found himself re-districted not into a district of overwhelming Democrats, but one of Republicans, with another popular and powerful Republican congressman, Buck McKeon.<sup>277</sup> Under the new configuration, most of the 23rd District territory was incorporated into a new 24th District, and the new 23rd District moved far inland taking bits from several other districts.<sup>278</sup> These changes dramatically altered voting populations. The new 24th District became narrowly Democratic, but assumed a more balanced composition of voters than previous.<sup>279</sup> The iconic Morro Rock and surrounding sleepy bed-and-breakfasts became part of the same district as larger inland cities like Santa Maria and small rural towns like Santa Ynez.<sup>280</sup> In order to win a closely divided district such as this, a candidate would presumably have to attenuate her views to gain voters at the margins.

For Elton Gallegly, the decision was probably not too difficult. He decided not to seek reelection due to the redistricting.<sup>281</sup> Gallegly may have foreseen the type of intra-party fight exemplified by the Berman v. Sherman contest and chose retirement instead. Perhaps he saw the difficulty of running a race in a more moderate district as a candidate with a strongly conservative record. In any event, citizens in the much more narrowly divided district, forty-one percent Democratic and thirty-six percent Republican, are now represented by a long-time Democrat with as liberal a record as Gallegly's was conservative.<sup>282</sup> Whether this was the vision of the proponents of Proposition 11 is difficult to tell. More difficult to tell is what future elections will hold and to what extent any new competitive districts will simply revert back to safe ones.

#### CONCLUSION

This Note concludes that the Berman v. Sherman conflagration and other examples demonstrate why competitiveness generally is a fool's gold of electoral reform. The fight for the 30th District was arguably one of the ugliest and costliest in recent California history, nearly coming to blows during a debate.<sup>283</sup> Howard Berman's defeat after nearly \$15 million spent by the candidates and outside groups ultimately does not benefit voters of either party.<sup>284</sup> The retirement of key representatives like Elton

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sudden death in 1997. *See Walter Capps*, L.A. TIMES (Nov. 4, 1997), <http://articles.latimes.com/1997/nov/04/local/me-50174>.

<sup>277</sup> *Brownley*, *supra* note 239.

<sup>278</sup> *See Interactive Maps*, *supra* note 233.

<sup>279</sup> *See Demographics Spreadsheet*, *supra* note 235.

<sup>280</sup> *See Interactive Maps*, *supra* note 233.

<sup>281</sup> *Brownley*, *supra* note 239.

<sup>282</sup> *See Demographics Spreadsheet*, *supra* note 235.

<sup>283</sup> *See Sean Sullivan*, *Berman-Sherman Debate Turns Nasty, In a House Race that Is Already Heated*, WASH. POST (Oct. 12, 2012), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/10/12/berman-sherman-debate-turns-nasty-in-a-house-race-that-is-already-heated/> (“During an exchange, Sherman put his arm around Berman, and asked: ‘Do you want to get into this[?]’”).

<sup>284</sup> Michelle Quinn, *Brad Sherman Defeats Howard Berman After Bitter Fight*, POLITICO (Nov. 7, 2012, 6:25 AM), <http://www.politico.com/news/stories/1112/83477.html> (citing the \$15 million figure for expenditures).



Gallegly also may not improve representation measurably or increase voter satisfaction in candidate selection. Finally, and most important to this inquiry, the citizens commission in California did not create the hoped-for competitive elections, and therefore has little chance at measurably reducing polarization in Sacramento or Congress. Instead, the changes it wrought simply paved the way for other well-connected politicians to win safely in those districts and create a new generation of safe districts.

The greatest advantage to the implementation of the citizens commission has likely been the appearance of transparency and the diminished sense of an inherent conflict of interest in Sacramento.<sup>285</sup> Californians clearly felt the impulse to remove from legislators the power over district line drawing and probably voted in favor of it, cognizant of the state's history with partisan gerrymanders. Beyond the senses and impressions that the system is now more transparent, little seems to have been gained from handing the task of redistricting to a citizens commission in California. Given the present evidence, there is simply insufficient evidence to draw causal links from the establishment of a citizens commission to increased competitiveness and ultimately to less polarization.<sup>286</sup>

Finally, for good or for bad, politicians in Sacramento have one less arrow in their quiver when it comes to political bargaining. This may be one of the bigger losses, as leaving redistricting in the hands of those most experienced in performing grand bargains has distinct policy benefits of its own.<sup>287</sup> While conclusive statements about the citizens commission are premature after only one election, it is safe to suggest that studies should continue to assess California elections with a critical eye on the causal link between the citizens commission's work and legislative polarization. One such study should evaluate future elections in light of what may have resulted from a redistricting process that retained the citizens commission, but returned the redistricting to the legislature and required the two bodies to work collaboratively.

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<sup>285</sup> Reducing the “appearance of influence or access” may itself justify the establishment of citizens commissions notwithstanding the Supreme Court’s finding of fact to the contrary. *See Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) (finding that the electorate will not “lose faith in our democracy” merely because of the appearance of improper influence). *But see* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1305–12 (2012) (criticizing the type of “in-house fact finding” demonstrated in *Citizens United* and proposing two solutions to the problem: “confin[e] the evaluation of legislative fact to sources presented by the adversary system[,]” and the opposite extreme, “open[ ] up the adversary system so that information flows more freely and openly”).

<sup>286</sup> *See* discussion *supra* Parts II.B, II.C (identifying this as a primary rationale for implementing citizens commissions); *see also* Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666, 678 (2009) (recognizing a similar breakdown in causation despite “a compelling circumstantial case” that partisanship causes an increase in polarization).

<sup>287</sup> Chavez, *supra* note 29, at 372.