Collateral Damage: The Endangered Center in American Politics

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COLLATERAL DAMAGE: THE ENDANGERED CENTER IN AMERICAN POLITICS

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Arnold Schwarzenegger's election as governor of California is a crowning achievement of the plebiscitary movement in American politics. A celebrity with built-in appeal, no political experience, no connection to the political machines, no clear fiscal policy,¹ and no readily discernible programmatic mandate, he nonetheless swept through a field of over 100 candidates,² received about half of all votes cast, and easily dislodged a recently elected incumbent.³ How could this be? For Gray Davis and the activist core of the Democratic Party, this was another manifestation of a massive right wing conspiracy,⁴ a refusal to let the electoral will of the people prevail, and the continuation of a political trajectory that ran


through the impeachment of Bill Clinton and the Florida recount fiasco. For the Republicans, the election seemed more hopeful. Perhaps the party could restore its appeal from the days before Pete Wilson launched a presidential campaign based on hostility to immigration and affirmative action.\(^5\) Perhaps the charge of tax-and-spend had finally taken hold and the Republican message would again prevail.\(^6\)

In this Essay, I will suggest that both the Democrats and Republicans miss the mark. Schwarzenegger’s election was neither the product of a vast conspiracy nor the realization of the Republican agenda for California. More precisely, there may have been a conspiracy and there may have been those suddenly absorbed by the Republican platform, but neither appears to have been the animating force behind the rather stunning electoral victory. Rather, it was the rebellion of the median voter, the center of American politics, against the perceived closing-off of the political process to competitive pressures. In setting out this claim, I will touch on three broad themes. The first is the troubling and complicated role of the plebiscite in a representative democracy. Here my argument will be that whatever the difficulties associated with bypassing the structured political process, the referendum/initiative process has emerged unexpectedly as a last ditch safety valve for the electorate at large to claim some accountability from the governing political class. The second is that the move toward plebiscitary democracy is tied into the increased non-responsiveness of the political process. The added step here is to argue that there has been a marked drop in competitiveness of legislative elections and that this has prompted repeated efforts to breakup the results of gerrymanders and other mechanisms that function to lock up the political process. The third is the role that constitutional law has played in furthering the decrease in competition in the political process and the consequences from this reduction in competitive-

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5. See Mark Z. Barabak & Cathleen Decker, Initiative Sparks Debate at GOP Convention, L.A. TIMES, Sept. 28, 1997, at A3 (describing California Republican support for propositions perceived as being against bilingual education as potentially driving Hispanic voters away from the California Republican party).

ness. I will conclude by looking at the issues presented in the California recall as reflective of the historic tension in democratic governance between the need to reward majoritarian preferences and the protection of minority interests.

I. PLEBISCITES AND THE HISTORIC COMMITMENT TO REpublicanism

Plebiscites, as well as most forms of direct democratic rule, in many ways form the vulnerable underside of democracy. Majorities swept along by passion or factional interest can command the instrumentalities of power to reward the useless unduly or immunize themselves from electoral accountability. As John Ely once summarized one of our Nation's founding concerns, "an untrammeled majority is indeed a dangerous thing...." In constructing the Constitution, the founding generation sought to constrain the power of local majorities to oppress minority interests. As a result of this tension between majority and minority interests, the Constitution guarantees republican government in each state by interposing numerous institutional barriers between the direct preferences of voters and levers of power. In composing the federal government, the Constitution expresses distaste for direct democracy with differing degrees of separation between popular voting and the election of officials. Under the unamended Constitution, the electoral college and state legislators served as barriers between state populations and the election of presidents and senators. All of these procedures and guarantees expressed a general dislike of the Founding era for the processes of direct democracy. The use of representative democracy naturally complemented the balance of

power structural barriers in place against the immediate exercise of the political will of the majority.\textsuperscript{12}

In spite of this initial disfavor, plebiscites and other forms of direct democracy persist, in the form of initiatives, referendums, and now, famously, recalls. Particularly in the states west of the Mississippi—those whose foundings reflected the political impulses of populism—some variant of referendum or initiative is a common part of the political landscape.\textsuperscript{13} A century ago, in \textit{Pacific States Telephone & Telegraph Co. v. Oregon},\textsuperscript{14} the Supreme Court confronted head on the constitutionality of the referendum in the context of a special tax levied against a utility.\textsuperscript{15} In many ways, this case presented the Madisonian nightmare: a mobilized majority, swept along by its passions, using direct elections to seize the wealth of a disfavored minority. The Court avoided the deep constitutional question by declaring the entire matter non-justiciable and delivering the Republican Guarantee Clause to the constitutional purgatory known as the political question doctrine\textsuperscript{16}—a state of limbo from which that clause has yet to emerge. Through a rather tortured logical chain, the Court found that if the presence of an initiative meant that the government of a given state was not republican, then the entire state government would be illegitimate and in need of replacement—a matter for which the Court was institutionally not competent.\textsuperscript{17}

Even beyond its role as a form of plebiscitary democracy, the recall suffers another infirmity in the eyes of the Framers. The Madisonian concern for majorities succumbing to passion also manifested itself in the Framers designing constitutional


\textsuperscript{13} For an account of the populist origins of the California recall process in the early 20th century as part of an effort to remove corrupt officials beholden to the railroads, see Garrett, supra note 2 (manuscript at 2; Joshua Spivak, \textit{Why Did California Adopt the Recall?}, (Sept. 15, 2003), available at http://hnn.us/articles/1682.html.

\textsuperscript{14} 223 U.S. 118 (1912).

\textsuperscript{15} Id. at 133-37.

\textsuperscript{16} See id. at 147 (declaring that questions over whether a state's governing processes are sufficiently republican are for resolution by processes of state government and congressional standards of admission of senators and representatives from the states are beyond the capacity of judicial tribunals).

\textsuperscript{17} Id. at 140-42.
protections for governors against immediate accountability to the preferences of the electorate. Thus, Alexander Hamilton wrote that an executive without the sinecure of a fixed term of office "might lay [his office] down, unless continued by a new choice; and if he should be desirous of being continued, his wishes conspiring with his fears would tend still more powerfully to corrupt his integrity, or debase his fortitude." According to Hamilton, the republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.19

Madison tied the length of office to a belief that sensible government requires the occasional adoption of "well connected measures, which have a gradual ... operation."20 Since these operations will not bear immediate public fruit, though they may incur immediate costs, officials must be guaranteed a stay in office long enough to ensure the public cannot overreact to costs without witnessing the benefits.21 According to Madison, "it is evident, that an assembly elected for so short a term as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result."22 The need to plan over extended time horizons while

19. Id. at 393. See also Garrett, supra note 2 (manuscript at 37-40). Garrett argues that a similar harm to legislation may result from the specter of recall processes hanging over legislators. In jurisdictions allowing immediate recall of elected officials, office-holders may have to fear for the opinion of those who would potentially recall them. These voters may be different (likely more extreme) than the median voter. The result is, even if a recall is not conducted, the possibility of recall proceedings leads to compression of the time horizons of politicians.
21. For a more complete exposition of the political theory underlying fixed, extended terms in office, see William R. Keech, Thinking about the Length and Renewability of Electoral Terms, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 104-10 (Bernard Grofman & Arend Lijphart eds., 1986), which discusses and expands on different theories supporting prolonged terms in office.
preserving accountability is a perpetual tension in governance, as much in the public domain as in the private corporation.\textsuperscript{23}

Yet plebiscitary mechanisms persist. Leaving aside its questionable constitutional pedigree, two major arguments have been advanced as to why we should, at the very least, be willing to give direct democracy some credence. First, direct democracy may counter problems of legislative entrenchment. My colleague Richard Briffault, for example, points to the repeated invocation of initiatives and referenda, in states that have them, to compel unwilling and self-interested legislatures to submit to term limits, campaign finance regulations, and the like.\textsuperscript{24} I confess to being sympathetic to destabilizing mechanisms that can thwart the tendency of incumbents to lock in their political positions by constricting competitive challenges.\textsuperscript{25} My former colleague Lynn Baker advances another position, arguing that direct democracy mechanisms allow well-developed and controversial issues to be decided as first-order matters not subject to legislative log-rolling.\textsuperscript{26} In her view, legislative politics may be freed to consider more clearly the public good if not forced to play out issues, such as gun control or abortion, that are both divisive and subject to intense special interest factionalism. Leaving aside the constitutionality of specific state regulations on such controversial matters, there is a strong argument that democracy functions best when certain issues are off the table. Thus, one "enabling" function of constitutionalism is precisely to set

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\item \textsuperscript{23} The converse of this problem is also true. In allowing direct democratic processes, populations can bind the government to costly projects, without anyone being accountable for the long-term sensibility of those projects. \textit{See} Garrett, \textit{supra} note 2 (manuscript at 34) (reporting that, by some estimates, California initiatives have left thirty to seventy percent of state budget constitutionally bound to fulfilling wishes expressed in initiatives).
\item \textsuperscript{24} \textit{See} Richard Briffault, \textit{Distrust of Democracy}, 63 TEX. L. REV. 1347, 1367-73 (1985). Under this view, the existence of direct democracy provisions further serve as indirect checks on legislative policy, even when initiatives are not directly used to make law. For an analysis of the prospect that legislatures may be forced to bargain in the shadow of initiatives, see Elisabeth R. Gerber, \textit{Legislative Response to the Threat of Popular Initiatives}, 40 AM. J. POL. SCI. 99, 99-106, 107-12, 124-25 (1996).
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the ground rules and allow democratic politics to play out without everything being up for grabs.\textsuperscript{27}

I will now add one further consideration that ties direct democracy back to the Schwarzenegger election. Direct democracy may serve to restore competitiveness to the political process and thus ensure that legislative politics not be hijacked too far from the preferences of the median voter.

II. REGRESSION TO THE POLITICAL MEAN

At first blush, to speak of the preferences of the median voter not being honored, or as in the title of this Essay, to speak of an endangered center in American politics, appears bizarre. It is well accepted in political theory that winner-take-all elections from single-member districts will tend to produce two, and only two, parties and that, over time, both parties will drift ideologically toward proximate centrist positions. In the world of political theory, this phenomenon is referred to as Duverger's Law.\textsuperscript{28} The concept can be expressed, based on the work of Harold Hotelling in economics and Anthony Downs in political science,\textsuperscript{29} by relying on a spatial model of political distributions.


\textsuperscript{28} See MAURICE DUVERGER, POLITICAL PARTIES 216–28 (Barbara North & Robert North trans., John Wiley & Sons, Inc. 2d ed. 1962) (1951); see also GARY W. COX, MAKING VOTES COUNT 13–33 (1997) (offering an extended discussion of Duverger's Law); Samuel Issacharoff, Supreme Court Destabilization of Single-Member Districts, 1995 U. CHI. LEGAL F. 205, 236 n.153 (1995). By comparing proportional representation systems with territorially-based electoral systems, Duverger focused on the fact that in territorial districts, the winner in any given district gets the seat and the losers get nothing. This electoral form, often termed “first past the post,” has the effect of “wasting” all votes not gained by a winner, unlike proportional systems in which all votes may contribute to the proportionate distribution of seats. The final step in the “law” is to show that parties and the electorate respond to the risk of wasting votes on non-winning candidates by gravitating toward large party structures that hew sufficiently to the center to attract the critical median voters. See DUVERGER, supra.

\textsuperscript{29} See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-41 (1957); Harold Hotelling, Stability in Competition, 39 ECON. J. 41 (1929).
The model, as originally envisioned by Hotelling, runs as follows. Imagine a town that runs along a one-mile main street, with its population spread evenly along that distance. Further imagine that there are two gas stations in town. The optimal arrangement in terms of minimizing driving distance to a gas station would be for each to be half way between the town boundary and the midpoint. The problem is that if one sets up at the quarter-mile marker, the other one will set up just the other side so as to be able to be the closest station for three quarters of the town’s population. In the bizarre world of zero transaction costs known only to economists, the two competitors would then leapfrog each other until they arrived at a stable equilibrium. As anyone who has ever driven into a small town with two filling stations knows, that equilibrium is in the center of town, where each filling station is located right across the street from the other.

Downs generalized this spatial model to the political process. In a two party system, each party seeks an ideological position wherein it will attract more voters than the alternative party. If party A were to stake positions more liberal than those held by seventy percent of the population, another party could choose one of two ideologies. It could be slightly more liberal, and therefore be more appealing to the thirty percent of voters to the political left of A. Or, more successfully, the second party could stake an ideological position slightly to the right of A, thereby appealing to seventy percent of the voting public. Not to be outdone, of course, in a two party system, political theory forecasts that parties will continue this game of maneuvering ideologies to capture voter interest until both parties represent positions around those of the median voter. Where one party is marginally more liberal than the median voter and the other party is marginally more conservative, each party’s policies appeal to fifty percent of the electorate. At this point, an equilibrium is reached and no more maneuvering can be successful in attracting a greater share of the electorate. Where parties have not hewn back toward the center, as with the failed candidacies of Barry Goldwater in 1964 and George McGovern in 1972, the result has been an electoral fiasco.30

30. See Godfrey Sperling, Dole Must Appeal to Conservative and Moderate Republicans, CHRISTIAN SCI. MONITOR, Aug. 13, 1996, at 19 (suggesting that to have any chance of success,
While American elections are decided by the first past the post method, the paradox is that the two major American parties have become decidedly less centrist over the past fifty years. Viewed from a comparative international perspective, the two major parties still appear quite centrist. There is a stronger ideological gulf between them, however, which requires some explanation. Despite the fact that the population as a whole has not changed its levels of partisanship, Congressional Republicans and Democrats have ideologically shifted to the right and left, respectively.

The first step in solving this apparent paradox is to recognize that American elections are a two-step process. To run successfully in the general election, a candidate must first capture the nomination of one of the two major parties. If we crudely characterize the Democrats as the party of the left and the Republicans as the party of the right, then the same Hotelling-Downs equilibrium will play out in the primary process, yielding candidates who are likely to be significantly to the left and right of the center. In prior writings, I have described this two-step process as providing necessary competitive grist to American politics. The result is the familiar practice, at least historically, of Democratic candidates running left in the primary and rediscovering the center in the general election, while Republican candidates look decidedly more conservative in the primaries and more compassionate in the general election. As the political scientist John Aldrich has explained, it is the need to prevail in the primaries and to maintain the aroused support of the party faithful that keeps the American parties from collapsing entirely into the center, as Duverger and Downs might have predicted.

Even if we push the equilibrium model to a remove from the center, there remains the paradox that American politics since at least the 1960s has shown greater divergence from the median in candidate opinions, yielding a significantly greater ideological

presidential candidates must develop a moderate compromise between the liberal and conservative extremes).


33. See, e.g., Morris P. Fiorina, Culture War?: The Myth of a Polarized America 78
divide among elected representatives. In Congress, for example, Republican positions are now twice as far away from Democratic positions as they were before the 1960s. At the same time, however, the strength of partisan identification by the citizenry has diminished: individuals are less likely to identify with partisan positions today than they were in the 1950s. Additionally, while low voter turnout has increasingly left national elections in the hands of partisans, the change in turnout over the years is not sufficient to explain the growth in the extremism of elected officials.

Before turning to the causal factors, let me give a thumbnail sketch of the evidence. Although there are different explanations for the increase in polarization, the consensus of political science observation is as follows. The parties in both Congress and the state legislatures are more polarized and more homogeneous than they have been at almost any time in the 20th century. The distribution of power in the legislative caucuses is bimodal, with relatively high peaks away from the center. In other words, there are few center-oriented Democrats or Republicans. Both are drawn

(2004) ("For as long as we have had data, political scientists have known that political elites are more polarized than the mass of ordinary Americans.").

34. Id. at 25-28.

35. See id. at 98-100. Fiorina shows that while strong partisans are more likely to vote than independents and weak partisans, their voting rate has been consistent over the past forty years.


37. See id. at 305 (citing increase in the frequency of party votes and increase in difference between median ideological scores for Congressmen since 1970).


40. See Roberts & Smith, supra note 36, at 311-12. Roberts and Smith discuss how the median point for each party has gradually moved towards that party's extreme, leaving more political distance between the median points of the two parties. This necessarily implies a bimodal distribution, as a single mode could only occur if the medians for both parties were in the political center.
well toward the poles. At the same time, we see no such bimodal distribution of preferences in the populace as a whole.\textsuperscript{41} Instead, there is a typical bell-shaped distribution with a relatively pronounced peak as most Americans gravitate toward the center on a distribution of positions.\textsuperscript{42} As a result, the elected representatives are increasingly removed from the population’s preferences and are unaccountable to changes in the desires or views of the electorate. This is especially problematic in the House of Representatives, as the body that the Founders crafted to be intimately in touch with the movements in political sentiments of the populous as a whole.\textsuperscript{43}

I now turn to the causal factors for what Dan Ortiz has termed the high agency costs\textsuperscript{44} in representation and to the consequences for our political system.

III. THE DECLINE OF THE CENTER

Why are elected officials more polarized while the population as a whole is not? I suggest three causal factors, two of them having to do with the distortive effects that districts have on political preferences. First, the equipopulation requirement following each decennial census itself has an impact. In California, for example, the fact that all districts are drawn with equal \textit{population} as opposed to equal \textit{numbers of voters} tends to magnify Hispanic political power and leads to relatively fewer votes being cast in heavily Latino districts than in other districts.\textsuperscript{45} To the extent that Latinos have distinctive political preferences, the districting system overweights them relative to what would be the case in a direct

\textsuperscript{41} See John H. Evans, \textit{Have Americans’ Attitudes Become More Polarized? An Update}, 84 SOC. SCI. Q. 71, 76-78 (2003) (finding no change in polarization of electorate over the last thirty years).

\textsuperscript{42} See id. at 76-78, 86. Upon studying attitudes across a variety of issues, Evans concludes that there has been no increase in bimodality across the American population. In fact, over several issues studied, Evans points to a decrease in polarization, with the population’s ideologies drifting more towards the center.

\textsuperscript{43} See Ortiz, \textit{Got Theory}, supra note 39 (manuscript at 18-23) (discussing the Framers’ conceptions of the role of the House of Representatives).

\textsuperscript{44} Daniel R. Ortiz, \textit{Federalism, Reapportionment and Incumbency: Leading the Legislature to Police Itself}, 4 J.L. & POL. 653, 672-81 (1988).

\textsuperscript{45} See Garza v. County of Los Angeles, 918 F.2d 763, 773-76 (9th Cir. 1990) (voting rights challenge addressing whether the baseline for population equality should be voters or people).
plebiscite where only voters could participate. There is some evidence that there are further distortive effects from population shifts during the ten-year cycle from urban and rural areas to suburban growth spots.

A second factor playing into polarization results from changes in strategy by American political parties. The prevailing wisdom had always been that the outcome of an election is determined by which party won the median voter. In an electorate where about half the potential voters actually vote, the parties have learned that they may gain many votes by altering the mix of who votes rather than assuming the median positions of the likely electorate. The need to mobilize the base to get participation is a lesson drawn from the earliest days of political parties in the nascent Republic. Indeed, despite the Framers' well documented antipathy toward any type of organized factions, the founding generation turned to the incipient forms of political parties as early as 1796, and certainly by the dramatic election of 1800, to combat the perceived apathy of masses of voters and to provide an organizational form through which to encourage participation.

48. See e.g., Debra J. Saunders, Citizenship Troopers, S.F. CHRON., Jan. 25, 2004, at D4 (describing decline in presidential election voter turnout from more than 60% in 1960 to 51.3% in 2000). These numbers both overstate and understated turnout, in that turnout will generally be highest for presidential elections; see, e.g., Joe Andrew, Everyone Loses If We Play This Game, WASH. POST, Dec. 19, 1999, at B3 (describing how turnout in off-term elections is even lower than for presidential elections, with only 36% of eligible voters turning out to vote in the 1998 elections); Kathleen Conti, Off-Year Election Called Poor Redistricting Test, BOSTON GLOBE, Sept. 21, 2003, at 1 (explaining that off-year elections always produce lower turnout than presidential elections, while at the same time not accounting for the rise of ineligible voters among the voting age population as a result of recent immigration and felon disenfranchisement).
49. See ALDRICH, supra note 32, at 45-50, 97-106 (explaining how, since the founding days of the Republic, successful politicians needed not only broad electoral support but also the passionate support of partisans able to mobilize voters); Issacharoff, Private Parties, supra note 31, at 301 (observing that "current Republicans and Democrats find [that] their party activists propel candidates decidedly more to the right and left, respectively, than the potentially victorious electoral base of the parties").
50. For an excellent account of the role of mobilizing voter turnout in prompting early party organization, see ALDRICH, supra note 32, at 97-125.
The parties have fastened upon that in the modern era, with the assistance of targeted communications such as radio, e-mail and websites, with increasing election-day emphasis on rousing the intensely partisan base of the party rather than focusing candidate appeals on the political center. Particularly in low profile elections, or whenever turnout is low, this strategy is especially effective since fewer votes will be necessary in the low turnout race to produce a victorious election. This strategy has great allure because politics has increasingly become the domain of the activist wings of the parties. As Robert Putnam explains:

Americans at the political poles are more engaged in civic life, whereas moderates have tended to drop out.... Moreover, this correlation between ideological “extremism” and participation strengthened over the last quarter of the twentieth century, as people who characterize themselves as being “middle of the road” ideologically have disproportionately disappeared from public meetings, local organizations, political parties, rallies, and the like.

To the extent that activists are a more likely source of campaign funds, our financing system may also unwittingly contribute to the polarization of politics.

While strategies and the distribution of power among districts may compound partisan distortions, my primary attention is on the effects of the elimination of effective competition within gerrymandered districts. My argument is simply that these districts have the effect of eliminating the second-stage election that pulls partisan impulses back toward the electoral center. If individual districts are configured so that they are accountable to only one party’s voters,

51. See Jeffrey Toobin, Ashcroft’s Ascent, THE NEW YORKER, Apr. 15, 2002, at 50, 63 (recounting Karl Rove’s statement that past Republican failures are largely based on a failure to have maximized the number of religious conservatives coming to the polls).

52. Hirsch, supra note 47, at 193-94.


candidates and parties in those districts will have no incentive to chase the median voter from the district as a whole.\textsuperscript{55}

That gerrymandering produces partisan distortions is not difficult to document. For example, in those states where Democrats controlled the last redistricting process, Al Gore won 51.5\% of the vote, while Democrats won 57.1\% of the Congressional seats.\textsuperscript{56} Assuming that a vote for Al Gore is a good proxy for Democratic ideology, one should anticipate, with districts that reflect the political diversity of the state as a whole, that Democrats should win approximately the same proportion of districts as they did of the presidential vote. The difference between the two percentages indicates that districts are intentionally constructed to be non-competitive, removing the power of centrist voters. The Republican side presents the case even more strongly. There, in states where Republicans controlled redistricting, George Bush won 53.1\% of the vote, while Republicans won congressional elections in 66.7\% of districts. Intentional gerrymandering aimed at moving the median ideology point in individual districts is the cause of this difference.

The cost, however, is not so much in the partisan consequences but in the utter lack of competitive accountability of incumbent officeholders to voters. In 2002, in the wake of the post-Census redistricting, there were at most forty-four congressional elections that were considered by the political parties and the media to be competitive elections where either a Republican or Democrat could conceivably win, while informed commentary put the number at around seventeen.\textsuperscript{57} The problem is not with the total number, but with the denominator. In 2002, all 435 House seats were up for reelection, compared with only 36 governorships and 34 Senate seats.

\textsuperscript{55} See, e.g., Fiorina, supra note 33, at 78-89. Fiorina explains that if districts are not ideologically identical to one another, the game theory model is still predictive, but will not result in successful candidates who are as centrist as the national population. Rather, candidates and parties will drift to the center of each district.

\textsuperscript{56} Hirsch, supra note 47, at 200.

\textsuperscript{57} See, e.g., Gary Martin, Races Now in Homestretch, SAN ANTONIO EXPRESS-NEWS, Nov. 3, 2002, at 1A (commenting, based on research from Zogby polling, that only seventeen U.S. House races seemed very competitive); see David Postman, Why So Many Races Lack One Thing: Competition, SEATTLE TIMES, Oct. 13, 2002, at A1. According to this article, only thirty-nine congressional races were truly competitive in 2002.
Even these numbers hide the real extent of the lack of competition borne out of redistricting. One of the congressional races considered competitive was in South Dakota, a state with only one congressional district and no capacity for gerrymandering.58 Four competitive races were in Iowa, where redistricting is done by computer without control by incumbent political forces.59 In some other cases, competitiveness only arose when a state’s congressional delegation shrank in the wake of the 2000 Census, forcing one incumbent to run against another.60 Finally, there were the exceptional districts that managed to vote out incumbents either in jail (Jim Traficant)61 or plagued by scandal (Gary Condit).62

The aggregate picture shows the real lack of competition. In 2000, 98.5% of incumbents won their elections,63 with over 75% of the winners defeating their challengers by at least twenty percentage points.64 This statistic which shows that the normal incumbent wins by a landslide actually obscures the extreme victories experienced by some incumbents. For example, in Massachusetts, incumbents won by far more than twenty percentage points—beating their competition by an average of 71.9%.65 The 2002 elections continued the same trend, with only four congressional incumbents losing to their challengers, and only forty-three incumbents receiving less

58. See Jake Thompson & C. David Kotok, Nebraska Monitoring Contests on its Borders, Several Midwest Races May Determine the Balance of Power in Governorships and in Congress, OMAHA WORLD-HERALD, Nov. 3, 2003, at A1 (identifying South Dakota as one of several competitive races).


60. See, e.g., Francine Kiefer, Early Census Snapshot: A Boost for Republicans, CHRISTIAN SCI. MONITOR, Apr. 14, 2000, at 1 (discussing how in states whose congressional delegations shrink as result of the census, incumbents will have to battle one another).


65. See id. (statistics on margin of victory in Massachusetts' ten districts).
than sixty percent of the vote. 66 Competition was so absent in some states that over one-third of state congressional delegations experienced no change during the 2002 election, with about twenty percent of seats totally uncontested. 67 To capture the impact of the gerrymander, consider the traditional definition of a landslide in American politics: a victory by greater than a 60-40 margin. Now consider California, where voters rebelled en masse to displace an elected governor and vote in Schwarzenegger. In the 2002 elections, not a single challenger in the general elections for Congress in California districts received over forty percent of the vote. 68 In other words, every single incumbent in California won by landslide margins.

It is, of course, possible that high rates of incumbent reelection reflect nothing more than voter satisfaction with their representatives, an odd claim for California given the immediate and uncereimonious turning out of the governor. Even this would ill explain the increase in the rate of incumbent reelection immediately before and after a redistricting cycle. Elections in 2002—the election year immediately following redistricting—were less competitive than the previous election year, as seventy more congressional races went unchallenged in 2002 than in the previous election year, repeating and accentuating a pattern that began with the post-1980 redistricting. 69 The consequences are not just incumbent sinecure but nonresponsive and increasingly dysfunctional governance. As Dan Ortiz aptly explains:

A national swing of five percent in voter opinion—a sea change in most elections—will change very few seats in the current

68. Hirsch, supra note 47, at 182.
69. See Daley, supra note 59, at 5 (describing decreasing level of competition since 1992); Ortiz, Got Theory, supra note 39 (manuscript at 20-23).
House of Representatives. Gerrymandering thus creates a kind of inertia arresting the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion and thus frustrates change and creates undemocratic slippage between the people and their government.\footnote{Ortiz, \textit{Got Theory}, supra note 39 (manuscript at 31).}

The distancing of elected representatives from the median voters was not the express aim of gerrymandering. Rather it was the consequence of providing ideologically safe districts that succored the reelection hopes of incumbents. The political preferences of the polity were not the direct target; they were simply collateral damage in the fight for incumbent sinecure.

\section*{IV. THE JUDICIAL CONTRIBUTION TO POLITICAL NON-COMPETITION}

Unfortunately, the decline in competition through gerrymandering is an insider's game, normally immune from public concern. Of late, however, gerrymandering has caught the public eye through bizarre antics in Colorado and Texas, and—at last—from some attention to the stunning lack of electoral competition in congressional and state legislative elections.\footnote{See, e.g., Daley, \textit{supra} note 59 (blaming redistricting, among other things, for lack of competition); \textit{The Partisan Fix}, \textsc{Wash. Post}, Sept. 14, 2003, at B6 ("The principal reason so few challenges are being mounted is that they would stand little chance of winning. And a major reason for that is redistricting ...."); \textit{Voting Without a Choice}, \textsc{Wash. Post}, Nov. 7, 2003, at A30 ("Until the corrupt redistricting process is reformed, competition will continue to be the loser.").} That self-interest should prevail when incumbent political powers are given control over redistricting is perhaps not surprising. It is worth pausing, however, to examine the acquiescence of the judiciary, which presumptively should be expected to rise to restrain the self-serving ambitions of the political branches.\footnote{See \textsc{The Federalist No. 51}, at 252 (James Madison) (Terence Ball ed., 2003) (proposing checks and balances to counteract desire for aggrandizement of power, under recognition that "[a]mbition must be made to counteract ambition").}

I have previously addressed the role that judicial acquiescence has played in the increasingly brazen manipulation of the redistricting process.\footnote{See Samuel Issacharoff, \textit{Judging Politics: The Elusive Quest for Judicial Review of Political Fairness}, 71 \textsc{Tex. L. Rev.} 1643, 1669-75 (1993); see also Samuel Issacharoff,} The condensed version starts with the now familiar
observation that the Supreme Court's central opinion in this area set such a high barrier to any effective judicial review of political gerrymandering as to render the process worthless. In *Davis v. Bandemer*, the Supreme Court confronted Indiana Republicans' successful gerrymandering efforts. After redistricting, Indiana Democrats received more than a majority of the statewide vote, but won only around forty percent of state assembly seats. Although the Court acknowledged that party driven redistricting was constitutionally suspect, it only allowed a remedy 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." Some have challenged the usefulness of this standard, but that understates the problem. The failure in *Bandemer* was not the test actually employed, but the conceptualization of the problem. *Bandemer* sought to integrate the concept of partisan gerrymandering into the minority voting rights cases by essentially setting out a test for when a political party faced such "discrimination" that it too might be thought of as a "discrete and insular minorit[y]," the formulation of the famous *Carolene Products* footnote. Neither the systemic loss of competition nor the attendant diminution in accountability to the voters is effectively captured by the application of the discrimination model.

A useful illustration may be found in the flip-side of *Bandemer*—the less recognized but even more troubling case of *Gaffney v. Cummings*, in which the Court considered a challenge to a bipartisan carve-up of Connecticut to ensure a high level of reelection among incumbents. Viewed through a discrimination lens, the Court could detect no adverse effects from a redistricting that all participants proclaimed to have produced a "politically fair"

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75. Id. at 115.
76. Id. at 132.
80. Id. at 738-39.
result.\textsuperscript{81} So long as all political insiders signed off on the deal, the Court could identify no constitutional infirmity. The bipartisan, or sweetheart, gerrymander has now taken hold across the country, except where one party is in a position to try to do in the other, as in Texas or Colorado.

Underlying the Court's treatment of the partisan gerrymandering cases is a surprising and disturbing inattentiveness to the value of competition itself in the election process. A broad range of writers, from Joseph Schumpeter to Richard Posner, have examined the role of elections in ensuring democratic legitimacy and have concluded, as have I, that after-the-fact accountability is the key to democratic governance.\textsuperscript{82} As political scientist Bingham Powell observes,

\begin{quote}
Few contrasts between dictatorship and democracy are sharper than this one: in a democracy the citizens can vote the leaders out of office. The citizens' ability to throw the rascals out seems fundamental to modern representative democracy because it is the ultimate guarantee of a connection between citizens and policymakers. It enables the citizens to hold the policymakers accountable for their performance. Such accountability is a keystone of majoritarian democratic theory.\textsuperscript{83}
\end{quote}

Although the Supreme Court last term addressed the first major partisan gerrymandering case since \textit{Bandemer}, the Court's decision in \textit{Vieth v. Jubelirer}\textsuperscript{84} did little to stem the concern over the loss of competitive accountability in American politics. \textit{Vieth} was brought as a challenge by Pennsylvania Democrats to a Republican carve up of the state. In part, the lack of focus on loss of competition was a result of the question presented. The issue in \textit{Vieth}, as in \textit{Bandemer}, concerned a claim by one of the major parties that it received less than a proportionate share of the seats it deserved, as opposed to a claim that there was a systemic defect in the redistricting process. Even under this limited claim, the Court revealed itself to be at a loss over the problem of gerrymandering. Justice Scalia's plurality

\textsuperscript{81} Id. at 752-54.


\textsuperscript{83} G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY 47 (2000).

\textsuperscript{84} 124 S. Ct. 1769 (2004) (plurality opinion).
opinion would have taken the doctrinal quagmire as an opportunity to overrule Bandemer and simply declare political gerrymandering claims non-justiciable. Justice Kennedy was willing to condemn the Pennsylvania map for abandoning all “restraint,”
but also willing to dismiss the plaintiffs’ complaint on the grounds that he had yet to find a workable test for adjudicating political gerrymandering claims. The remaining Justices dissented, all convinced that there must be a claim stated in political gerrymandering claims, but disagreed on the nature of the proof required for such a claim.

The final holding in Vieth rested on the inability of the parties before the Court to overcome one of the standard criteria that forecloses any judicial result by rendering a claim a nonjusticiable political question—namely, “a lack of judicially discoverable and manageable standards for resolving it.” But if the harm is identified as the lack of competitiveness in the political process overall, it is difficult to see how the bulk of voters can properly mount and preserve a claim against the diminution of political competition in the case of the greater threat of a bipartisan gerrymander. The effect of gerrymandering is to give most voters the chance to vote for the candidate of choice in rigged districts—or at least to let them cast a vote for the victorious candidate. The harm is systemic rather than specific, raising practical barriers to gathering sufficient interest to actually press a challenge, as well as juridicial barriers such as standing. As a result, most challenges are brought not by voters facing a lack of competitive accountability in the system as a whole, but by one or another of the political parties claiming that they have been robbed. So it was with Vieth v. Jubelirer, in which the Democratic Party of Pennsylvania stood before the Court in the putative posture of a disfavored minority along the lines of southern blacks facing the vestiges of Jim Crow. One need look no further than the governorship of Pennsylvania or the mayoralty of Philadelphia and Pittsburgh to see that the

85. See Vieth, 124 S. Ct. at 1778.
86. Id. at 1792 (Kennedy, J., concurring in the judgment).
88. See Vieth, 124 S. Ct. at 1776 (plurality opinion) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).
Democratic Party would make an odd inheritor of the tradition of special judicial solicitude for those incapable of fending for themselves in the rough and tumble world of politics.

Elsewhere I have argued that the Court should intercede not to determine whether the right or wrong candidates are winning elections, as the petitioners in *Vieth* come perilously close to demanding, but instead should intervene surgically or prophylactically to remove from insiders control of the levers that rob the system of its competitive vitality. The cost of gerrymandering is unfortunately the polarization of representative bodies and the increased distance of elected representatives from the median preferences of the voting public.

**V. CALIFORNIA DREAMING**

My argument thus far has focused on the paradox that direct democracy threatens an excess of majoritarianism, yet emerges as a safeguard against an insufficiency of ultimate accountability to majority preferences. At some level of abstraction, this has been the central tension in American constitutional law governing the political process. Cases such as *Reynolds v. Sims*, for example, valorize the voting power of the majority and strike down malapportioned districts on the grounds that the majority is unable to exercise its ultimate right to prevail in electoral politics. At the same time, decades of constitutional and statutory law designed to prevent minority vote dilution attempt to limit what political

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89. *See* Issacharoff, *Gerrymandering*, supra note 73.
91. *Id.* at 561–68, 586–87. According to the Warren opinion:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system... [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.

*Id.* at 562.
theorists from Madison\textsuperscript{92} to Guinier\textsuperscript{93} identify as the potential for the tyranny of the majority. The risk in direct democracy is that the absence of mediating institutions will collapse all politics into the prevailing sentiment of even a small majority, without the measuring influence of factoring in intensity of preferences, legislative compromise, trade-offs, and other features of give-and-take politics.

Direct democracy appears in a different guise, however, when non-competitive elections have driven legislative power toward extremes in which compromise becomes rare, political grandstanding emerges as the norm, and effective governance ends up a casualty of fratricidal partisanship. Viewed in this light, California's experiment with direct democracy reveals both strains. There is ample evidence that when given choice without responsibility, Californians will repeatedly vote themselves benefits without burdens, mandating generous social benefits while eliminating the tax burden that should pay for them. Indeed, many have written of the devastating effect that this has had on the political and fiscal life of the state.\textsuperscript{94} At the same time, the initiative has become the weapon of choice in several moves to recapture the median voter's political strength.

First, through ballot initiative, Californians approved a blanket primary system. Under this system, primary voters could choose their favorite candidate for each office from any party, choosing members of different parties for different offices.\textsuperscript{95} Supporters of the

\textsuperscript{92} See The Federalist No. 10 (James Madison) (theorizing that purpose of Union is to prevent potential for factions to exercise destructive tyranny).

\textsuperscript{93} See Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy 1-20 (1994).

\textsuperscript{94} See, e.g., Peter Schrag, Take the Initiative, Please: Referendum Madness in California, 28 Am. Prospect 61, 63 (1996).

\textsuperscript{95} See David G. Savage, Justices Sound Dubious of 'Blanket Primary,' L.A. Times, Apr. 25, 2000, at A1. This system is different from the so-called “open primary” systems which exist in other states, in that during an open primary, a voter can choose in which party's primary she would like to participate on election day, but is bound to choosing candidates from that
blanket primary had specifically hoped it would restore power to moderate voters by allowing cross-over voting in the nomination process, particularly in districts lacking in bipartisan competition. This approach failed when the Supreme Court found blanket primaries to violate the freedom of association rights of political party loyalists to be free from outside interference in their primary processes.

Without the possibility of influencing the election by controlling the selection of candidates, moderate voters decided to do away with what may be thought of as regularly scheduled elections. In recalling Governor Davis and replacing him with Governor Schwarzenegger, California voters succeeded where they failed with the blanket primary process. In Schwarzenegger, moderates found a Republican who, although fiscally conservative, is far to the left of the normal California Republican establishment—one who is pro-choice, socially liberal, and a member of the Hollywood elite. In an ultimate distinction from his fellow Republicans, his election was met with the congratulations of such liberals as Senator Edward Kennedy, who is, coincidentally, Schwarzenegger’s wife’s uncle. Such a candidate could not have emerged in either the Republican or Democratic nominating processes. Yet, in a crowded field of over 130 candidates ranging from the serious to the deranged, the glamorous to the titillating, Schwarzenegger emerged with a stunning fifty percent of the vote.

So the median voter has warned that mechanisms of direct democracy may allow a check on self-interested politics that drive too far from the center. In her newly found voice, she may be heard to utter the campaign call to arms: “I’ll be back.”

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98. Garrett, supra note 2 (manuscript at 22-23).