

# REDISTRICTING OR RETHINKING? WHY PROPORTIONAL REPRESENTATION MAY BE A BETTER SOLUTION THAN CALIFORNIA'S INDEPENDENT REDISTRICTING COMMISSION

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## I. INTRODUCTION & THE PROBLEMS FACING CALIFORNIA'S LEGISLATURE

In 2008, California voters went to the polls and passed Proposition 11, which established the California Redistricting Commission. Former Governor Arnold Schwarzenegger strongly urged the passage of this ballot measure as a way to make elections more competitive.<sup>1</sup> The initiative's drafters sought to solve the legislature's political stalemate by attacking the legislative system at one of its earliest stages: the drawing of political districts. Taking the district line-drawing function away from legislators would seemingly eliminate the inherent conflict of interest in letting the political players create their own rules of the game.<sup>2</sup> While this may be a step toward increasing electoral competition and working to end the political gridlock in the California legislature,<sup>3</sup> as designed, the Commission may face potential pitfalls that could limit its effectiveness at accomplishing those goals.

California's uncompetitive legislative elections are a mess, as races are rarely, if ever, competitively contested,<sup>4</sup> seats change party hands

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<sup>1</sup> Nancy Vogel, *Prop 11 Aims to Redo Remap*, L.A. TIMES, Oct. 14, 2008, at B1.

<sup>2</sup> DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 175 (2002) ("In a public debate before the [Arizona] election, Susan Gerard, a Republican state representative, summarized the objection: 'Letting legislators draw the lines is the ultimate in conflict of interest.'").

<sup>3</sup> John Wildermuth, *Redrawing Districts—Governor Wins Big*, S.F. CHRON., Nov. 27, 2008, at A1.

<sup>4</sup> In 2008, just under 10 percent (seven races) of the eighty Assembly races were completely unopposed, forty-seven were won by a candidate receiving over 65 percent of the vote, and a mere six races were decided by five percentage points or less. See CAL. SEC'Y OF STATE DEBRA BOWEN, THE STATEMENT OF THE VOTE: STATE ASSEMBLY MEMBER BY DISTRICT (80 DISTRICTS) (Nov. 4, 2008),

infrequently,<sup>5</sup> and voters are left to wonder why they continue to go to the polls in an election where their vote seldom determines the result. Of the thirty-nine legislative seats with new occupants in the 2008 election (twenty-eight for the Assembly, eleven for the Senate), only five seats changed party hands—all in the Assembly.<sup>6</sup> Similarly, in the 2004 and 2006 elections, not a single seat changed party hands.<sup>7</sup> Most recently, the 2010 elections produced similar results: only three seats in the Assembly switched party control,<sup>8</sup> and no seats changed in the Senate.<sup>9</sup> Though several factors cause these results, one problem is the ability of legislators to draw district lines, which in effect assures them safe political districts. By being in districts where the electorate tends to disproportionately agree with their positions, politicians are able to take on more ideologically extreme positions, contribute to increased polarization of legislators,<sup>10</sup> lessen compromise, and increase gridlock. In January 2010, a mere 5 percent of California voters approved of the job that the California legislature was doing, and this was likely a consequence of voters' frustration with the uncompetitive process, which is resulting in low levels of representation for minority groups and causing polarization and gridlock in the legislature.<sup>11</sup> While the state is suffering from severe budget problems,<sup>12</sup> prison overcrowding,<sup>13</sup> and an education crisis,<sup>14</sup> having an ineffective and highly polarized legislature exacerbates these problems.<sup>15</sup>

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[http://www.sos.ca.gov/elections/sov/2008\\_general/40\\_56\\_state\\_assembly.pdf](http://www.sos.ca.gov/elections/sov/2008_general/40_56_state_assembly.pdf). Of the twenty Senate races, ten were won by a candidate receiving over 65 percent of the vote, and only one single race (in the 19th district) was decided by fewer than five percentage points. See CAL. SEC'Y OF STATE DEBRA BOWEN, THE STATEMENT OF THE VOTE: STATE SENATOR BY DISTRICT (ODD-NUMBERED DISTRICTS ONLY) (Nov. 4, 2008), [http://www.sos.ca.gov/elections/sov/2008\\_general/35\\_39\\_state\\_senators.pdf](http://www.sos.ca.gov/elections/sov/2008_general/35_39_state_senators.pdf).

<sup>5</sup> See THE CENTER FOR TOBACCO POLICY & ORGANIZING, NOVEMBER 2008 ELECTION: NEW MEMBERS OF THE CALIFORNIA LEGISLATURE (2008), [http://www.center4tobaccopolicy.org/\\_files/\\_files/New%20California%20Legislators%20November%202008%20Final.pdf](http://www.center4tobaccopolicy.org/_files/_files/New%20California%20Legislators%20November%202008%20Final.pdf) (summarizing that although there were thirty-nine new occupants in the legislature following the 2008 elections, many of which were a result of term limits, just five seats changed party hands).

<sup>6</sup> See *id.*

<sup>7</sup> Jennifer Steinhauer, *Plan on California Ballot for New Districting Panel*, N.Y. TIMES, Oct. 27, 2008, at A1.

<sup>8</sup> See *California State Assembly Elections, 2010*, BALLOTOPEDIA, [http://ballotpedia.org/wiki/index.php/California\\_State\\_Assembly\\_elections,\\_2010](http://ballotpedia.org/wiki/index.php/California_State_Assembly_elections,_2010) (last visited Mar. 2, 2011).

<sup>9</sup> See *California State Senate Elections, 2010*, BALLOTOPEDIA, [http://ballotpedia.org/wiki/index.php/California\\_State\\_Senate\\_elections,\\_2010](http://ballotpedia.org/wiki/index.php/California_State_Senate_elections,_2010) (last visited Mar. 2, 2011).

<sup>10</sup> Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines in California?*, 53 J.L. & ECON. 545, 546 (2010) ("These 'safe' districts allow legislators to shift to more extreme ideological positions in their roll call votes, which has led to increased polarization in Congress and state legislatures.").

<sup>11</sup> Jim Miller, *No Change in Voters' Dim View of Governor, Legislature*, THE PRESS-ENTERPRISE, Jan. 24, 2010, [http://www.pe.com/localnews/politics/stories/PE\\_News\\_Local\\_N\\_field24.4794cb1.html](http://www.pe.com/localnews/politics/stories/PE_News_Local_N_field24.4794cb1.html).

<sup>12</sup> The California Constitution requires that any funds appropriated from the general fund (except appropriations to public schools), must be passed by two-thirds of the legislature. See CAL. CONST. art. IV, § 12(d). Increased polarization has made this requirement even more difficult to attain.

<sup>13</sup> Severe overcrowding has resulted from mandatory prison sentences and high recidivism rates in the state's prisons, where antiquated infrastructures make the prospect of living in a California prison

These issues have led both citizens and legislators to push for reform, who are recommending drastic moves, such as hosting a convention to overhaul various state constitutional standards.<sup>16</sup> While Californians know that change is needed, many are unsure about specifically what reforms to pursue.<sup>17</sup> Thus, various reforms—such as Proposition 11—are continuing to be considered.<sup>18</sup> As such, today’s broken California is a ripe experimental ground for attempting to solve some of the state’s political and financial problems. Clearly, the goal should not be to oust all the incumbents; but rather, it should be to perpetuate a system where more voters’ voices count, or, as Dennis Thompson, a professor of political philosophy at Harvard University, explains, “[to] find the optimal level of competition, not to maximize it.”<sup>19</sup> If a particular reform is successful, voter confidence in the system could increase, resulting in higher levels of participation, increased political interest by citizens, and, ideally, a more effective and representative legislature that can attack the state’s problems.

This Note proposes an alternative solution to the lack of competition and inadequate representation in the California legislature. If California were to employ a completely new electoral scheme—one that takes advantage of proportional representation by using multimember districts and the single transferable vote—the state could move closer to meaningful solutions to the lack of competition in the current electoral system. Such a system, which would likely require a popular initiative to implement, would give voters a more determinative voice in elections, thereby increasing minority representation and electoral competitiveness. As Lani Guiner, a professor at Harvard Law School and one of the most well-known supporters of proportional representation systems, explains, “it is illegitimate for an advantaged majority to exercise disproportionate

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almost unimaginable. See, e.g., John Pomfret, *California’s Crisis in Prison Systems a Threat to Public*, WASH. POST, June 11, 2006, at A3.

<sup>14</sup> Due to budgetary constraints, former Governor Schwarzenegger cut spending in the areas of public education, leading to numerous teacher layoffs and tuition hikes at the state’s public universities. See, e.g., Carla Rivera, *Rallies to Focus on Cutbacks in Education*, L.A. TIMES, Mar. 4, 2010, <http://articles.latimes.com/2010/mar/04/local/la-me-protests4-2010mar04>.

<sup>15</sup> In 2009, a *Sacramento Bee* analysis suggested that California’s Republican legislators voted with their party or abstained 96 percent of the time, while California’s Democratic legislators voted with their party or abstained 99 percent of the time. Phillip Reese & Steve Wiegand, *California Lawmakers Rarely Defy Party Lines, Analysis Finds*, SACRAMENTO BEE, Oct. 31, 2009, at 20A.

<sup>16</sup> Eric Bailey, *Citizens Push for Overhaul of California Government*, L.A. TIMES, Feb. 25, 2009, at 7. However, in February 2010, this proposal “ran out of money,” forcing supporters to cancel plans to place their proposal for a constitutional convention on the ballot in November 2010. Evan Halper & Anthony York, *California Constitutional Convention Push Fizzles*, L.A. TIMES, Feb. 13, 2010, at 2.

<sup>17</sup> Dan Walters, *California Wants and Needs Fixing*, SACRAMENTO BEE, Feb. 28, 2009, at 3A (noting that 90 percent of Californians believe the state government needs an overhaul but no particular reform received an overwhelming amount of support).

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

<sup>19</sup> THOMPSON, *supra* note 2, at 176.

power.”<sup>20</sup> As British philosopher John Stuart Mill recognized, the single transferable vote allows more voices to be heard and avoids the problem of our current winner-take-all system: what Mill termed the “complete disfranchisement of minorities.”<sup>21</sup>

Part II of this Note analyzes the effects, benefits, and potential problems of the current California Redistricting Commission plan by examining how other states have employed similar commissions and discussing the effectiveness of California’s experiment. Part III introduces the method of the single transferable vote (“STV”) as an alternative to the redistricting commission, and discusses its history and effectiveness as used in other localities. Part IV explains the advantages of proportional representation, and specifically, an STV system. Finally, Part V proposes the use of an STV system in California and explains how multimember districts combined with STV in California legislative elections may be a better solution to the problems of competition and underrepresentation facing the legislature today.

## II. ANALYZING CALIFORNIA’S CITIZENS REDISTRICTING COMMISSION

In November 2008, California voters finally enacted reform at the ballot box and passed Proposition 11, albeit by a slim 50.9 percent margin.<sup>22</sup> Proposition 11 amended the California Constitution to establish the Citizens Redistricting Commission (“CRC”), which “shall draw new district lines . . . for State Senate, Assembly, and Board of Equalization districts.”<sup>23</sup> The CRC consists of fourteen members,<sup>24</sup> chosen from nearly 31,000 California applicants.<sup>25</sup> Five are registered with the largest political party in California, five are registered with the second largest political party in California, and four are not registered with either of the two largest political parties in the state.<sup>26</sup>

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<sup>20</sup> LANI GUINER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 79 (1994).

<sup>21</sup> JOHN STUART MILL, *ON REPRESENTATIVE GOVERNMENT* 130 (1861).

<sup>22</sup> CAL. SEC’y OF STATE DEBRA BOWEN, *SUPPLEMENT TO THE STATEMENT OF THE VOTE, STATEWIDE SUMMARY BY COUNTY FOR STATE BALLOT MEASURES (2008)*, at 16, [http://www.sos.ca.gov/elections/sov/2008\\_general/ssov/10-ballot-measures-statewide-summary-by-county.pdf](http://www.sos.ca.gov/elections/sov/2008_general/ssov/10-ballot-measures-statewide-summary-by-county.pdf).

<sup>23</sup> CAL. CONST. art. XXI, § 2(a).

<sup>24</sup> *Id.* § 2(c)(2).

<sup>25</sup> Jennifer Steinhauer, *Californians Compete for a Shot at Redistricting*, N.Y. TIMES, Mar. 4, 2010, at A18. For a more complete discussion of the selection process, see *infra* Part II.B.

<sup>26</sup> CAL.CONST. art. XXI, § 2(c)(2).

A. INDEPENDENT REDISTRICTING COMMISSIONS TEND NOT TO BE SO  
“INDEPENDENT”

California’s proposal to establish an independent redistricting commission is not completely novel. Several other states have recognized the need to change the way district lines are drawn, because, as one Texas state senator explained, “allowing state legislators to draw their own district boundary lines is a lot like letting children fill in their own report cards.”<sup>27</sup> Similarly, the U.S. Supreme Court suggested in 2004 that partisan gerrymandering claims are not likely to result in intervention,<sup>28</sup> further raising the stakes for redistricting by allowing state legislators to “crack” and “pack” districts easily to ensure incumbent re-election and create more safe seats.<sup>29</sup> Cracking refers to the division of a previously safe district to spread the majority party thinner across more than a single district.<sup>30</sup> Packing refers to the concentration of a particular minority group in a single district to ensure that the minority group has power only in a particular single-member district, but ultimately remains outnumbered in the legislature.<sup>31</sup> Both strategies tend to waste votes: with packing, votes often go to a candidate who would win by a large margin anyway; with cracking, votes go toward a candidate who lacks the majority support to win.<sup>32</sup> These strategies, along with partisan gerrymanders, have decreased electoral competition, and, consequently, lessened the accountability of elected officials now sitting in safe seats.<sup>33</sup> Fears about such strategic redistricting schemes have led other states to take line-drawing away from legislators.

Twelve states already have a system where an independent redistricting commission is the primary method for drawing lines for at least some elections.<sup>34</sup> Eight other states have commissions in place, but they do not serve as the primary redistricting body, instead serving as either advisory

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<sup>27</sup> John Mecklin, *Can California Redistricting Reform Change Congress?*, MILLER-MCCUNE MAG., Feb. 19, 2010, <http://www.miller-mccune.com/politics/can-california-redistricting-reform-change-congress-8568/> (quoting Texas state Senator Jeffrey Wentworth).

<sup>28</sup> Four justices determined that such claims were nonjusticiable. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004).

<sup>29</sup> See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 567 (2004) (explaining how “plaintiffs cannot get a plan struck down simply by showing that [a redistricting scheme] constitutes an excessively partisan gerrymander” after *Vieth*).

<sup>30</sup> *Vieth*, 541 U.S. at 287 n.7.

<sup>31</sup> *Id.*

<sup>32</sup> Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 767–68 (2004).

<sup>33</sup> Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 600–01 (2002). See also Poonam Kumar, *Ratification of Reapportionment Plans Drawn by Redistricting Commissions*, 40 U. MICH. J.L. REFORM 653, 654 (2007).

<sup>34</sup> The states are: Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington. Nat’l Conf. of State Legislatures, *2009 Redistricting Commissions Table*, <http://www.ncsl.org/?tabid=16617>.

committees or as backup commissions.<sup>35</sup> The commissions vary by state, ranging between three and eighteen members,<sup>36</sup> some explicitly including political actors,<sup>37</sup> while others strive to be more “independent.”<sup>38</sup> However, while these independent commissions often accomplish the stated goal of “tak[ing] redistricting out of the hands of incumbents,”<sup>39</sup> they are often more political than their designers originally had hoped. Legislators, themselves, often appoint members of the commissions.<sup>40</sup> Politicians even serve as commissioners in some states,<sup>41</sup> and, in many states, selection is based explicitly on partisan affiliation.<sup>42</sup> Thus, the “independence” of these commissions—defined here as being as free as possible from political biases, connections, and partisan influence—is speculative. While true and complete independence may be nearly impossible to achieve, accomplishing the goals of the commission may require further distancing the individual commissioners from the political process and partisan influences to avoid the conflict of interest that current legislators face when drawing lines.

Though each commission functions differently, it is not yet clear which commission structure works best.<sup>43</sup> Two states, Alaska and Arizona, have commissions that illustrate some of the problems, advantages, similarities, and differences between the various existing commissions and provide a good starting point to assess how the California commission may proceed. Alaska provides a good example of a politically appointed commission, which led to numerous litigation battles, while Arizona’s commission

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<sup>35</sup> *Id.* Maine and Vermont have “advisory commissions,” which draft and submit redistricting plans directly to their respective legislatures. *Id.* Connecticut, Illinois, Mississippi, Oklahoma, and Texas have “backup commissions,” which are assigned the role of redistricting in the event the legislature fails to meet a certain deadline. Iowa “conducts redistricting unlike any other state,” allowing “nonpartisan legislative staff” to develop maps without the use of any “political or election data.” *Id.* For a more complete discussion on redistricting in Iowa, see Thomas E. Mann, *Redistricting Reform: What is Desirable? Possible?*, in PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 92, 101–02 (Thomas E. Mann & Bruce E. Cain eds., 2005).

<sup>36</sup> For example, Arkansas has a three-member commission; one of Missouri’s two commissions consists of eighteen members. Nat’l Conf. of State Legislatures, *supra* note 34.

<sup>37</sup> For example, Arkansas’s commission consists only of the Governor, secretary of state, and attorney general. *Id.*

<sup>38</sup> For example, Alaska explicitly disqualifies “public employees or officials.” ALASKA CONST. art. VI, § 8(a).

<sup>39</sup> Janet Napolitano, *Arguments ‘for’ Proposition 106*, ARIZ. PROPOSITION 106 (2000), <http://www.azsos.gov/election/2000/info/PubPamphlet/english/prop106.htm>.

<sup>40</sup> This is the case in both Alaska and Arizona, discussed *infra* in Parts II.A.1 and II.A.2, and many other states, including: Colorado, Hawaii, Idaho, Montana, Ohio, Pennsylvania, and Washington. See Nat’l Conf. of State Legislatures, *supra* note 34.

<sup>41</sup> See *supra* text accompanying note 37.

<sup>42</sup> California’s proposal, for example, calls for five Republicans, five Democrats, and four independents. See CAL.CONST. art. XXI, § 2(a).

<sup>43</sup> Jeffrey C. Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 841–55 (1997) (describing the various types of commissions and the advantages and disadvantages of each but explicitly not advocating for a particular commission structure).

provides an example of an approach more similar to California's approach under Proposition 11.

### 1. *The Alaska Redistricting Board*

Alaska's experiment with redistricting began in 1998, with a legislative resolution later ratified by voters creating the five-member Alaska Redistricting Board.<sup>44</sup> From the beginning, the process was highly partisan in nature. Because the Alaska Constitution previously empowered the governor to redistrict,<sup>45</sup> Republicans favored the commission's creation because it would restrict the Democrats' ability to control redistricting after the 2000 census merely by reelecting the incumbent Democratic Governor, even despite Republican control of both houses of the legislature.<sup>46</sup> The resulting commission consisted of two members appointed by the governor, one member each appointed by the presiding officers of both the Alaska House and Senate, and one member appointed by the chief justice of the Alaska Supreme Court.<sup>47</sup> Allowing the partisan officials to make such appointments, unsurprisingly, led to a proportionately politically affiliated group; in 2000, the Democratic governor appointed two Democrats, the Republican legislature appointed two Republicans, and the fifth member, appointed by the chief justice, aligned herself with the Democrats.<sup>48</sup> One commentator notes "that one party will have at least a three-member majority on the [b]oard to give the nod to its side's proposal is virtually assured. . . . Thus, the appointment rules are not designed to produce a bipartisan Redistricting Board with a tie-breaking fifth member."<sup>49</sup>

The Alaska Redistricting Board's first redistricting plan was the board-amended product of a submission by Alaskans for Fair Redistricting, a mostly Democratic citizens' group.<sup>50</sup> Though this plan was deemed "final" by a 3-2 vote along party lines,<sup>51</sup> it was challenged, and the Alaska Supreme Court ordered the commission to redraw certain districts to comport with Alaskan constitutional standards of compactness.<sup>52</sup> After much deliberation and review of several submitted alternative plans, the board adopted its choice of a final amended plan, one which was drafted

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<sup>44</sup> Gordon S. Harrison, *The Aftermath of In Re 2001 Redistricting Cases: The Need for a New Constitutional Scheme for Legislative Redistricting in Alaska*, 23 ALASKA L. REV. 51, 61 (2006).

<sup>45</sup> ALASKA CONST. art. VI, § 3 (amended 1999).

<sup>46</sup> Harrison, *supra* note 44, at 61.

<sup>47</sup> ALASKA CONST. art. VI, § 8(b).

<sup>48</sup> Harrison, *supra* note 44, at 64.

<sup>49</sup> *Id.* at 70-71.

<sup>50</sup> *Id.* at 65-67.

<sup>51</sup> *Id.* at 66.

<sup>52</sup> *In re 2001 Redistricting Cases*, 44 P.3d 141, 143-47 (Alaska 2002). The opinion also suggested that the Board take a "hard look" at its effort at preserving areas of socio-economic integration, another of the Alaska Constitution's recommendations. *Id.* at 145. See also ALASKA CONST. art. VI, § 6.

and submitted for consideration by a single board member with the help of plaintiffs who challenged the first plan and various legislators.<sup>53</sup> While the board allowed for submissions and reviewed various alternatives, it ultimately selected a plan that was “negotiated privately by one board member and key stakeholders,” intimating a lack of transparency in the process and resulting in public confusion about the plan.<sup>54</sup> That plan was later adopted and upheld by the Supreme Court.<sup>55</sup> This strange set of events whereby a single member of the Board was able to wield such power has forced some in Alaska to advocate for a return of redistricting to the legislature.<sup>56</sup> This begs the question whether the redistricting process ought to be subject to the usual negotiations and compromises that legislators must make.<sup>57</sup> Alternatively, if Alaskan politics yields a situation where the governor and both houses of the legislature are from the same party, it would be feasible for four—or potentially all five—members of the commission to be from the same party. Then the question is whether the board (now dominated by a single party) would provide any greater benefit in terms of drawing lines more fairly than the a partisan legislature would.

## 2. *The Arizona Independent Redistricting Commission*

More recently, in 2000, Arizona established its own Independent Redistricting Commission when voters approved Proposition 106.<sup>58</sup> Like Alaska, Arizona’s commission consists of five members; unlike Alaska, Arizona ensures a bipartisan endeavor by limiting the group to no more than two members of the same political party.<sup>59</sup> Arizona further excludes individuals who in the last three years served as candidates for public office, officers for political parties, registered paid lobbyists, or a member of a candidate’s campaign committee.<sup>60</sup> However, Arizona again mirrors Alaska in terms of how its commission members are selected—by political actors. Four members are selected by the highest-ranking member of both the majority and largest minority party of each of the state House and Senate after the pool of candidates has been narrowed down by another body.<sup>61</sup> The four selected members then select the last member by majority

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<sup>53</sup> Harrison, *supra* note 44, at 69.

<sup>54</sup> *Id.* at 75.

<sup>55</sup> *In re* 2001 Redistricting Cases, 47 P.3d at 1090.

<sup>56</sup> See generally Harrison, *supra* note 44, at 72–79 (noting that the new system “is no improvement over the method of gubernatorial redistricting that it replaced”).

<sup>57</sup> *Id.* at 72–74 (“The best place for a legislative fight is in the legislature, and legislators are the best fighters because they know best their own personal and partisan interests.”).

<sup>58</sup> Kristina Betts, *Redistricting: Who Should Draw the Lines? The Arizona Independent Redistricting Commission as a Model for Change*, 48 ARIZ. L. REV. 171, 191 (2006).

<sup>59</sup> ARIZ. CONST. art. IV, pt. 2, § 1(3).

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

<sup>61</sup> *Id.* at § 1(4)–(6). The Commission on Appellate Court Appointments narrows down the body before the leaders make their selections. *Id.*

vote, who serves as chairperson of the committee and may not be a member of any political party.<sup>62</sup> There were early fears that the Arizona commission would be unaccountable because it was independent from the legislature.<sup>63</sup>

The commission was first assigned the goal of drawing districts in a grid-like pattern.<sup>64</sup> Then, the goal was to adjust equally-populated districts so that they were geographically compact and contiguous, respectful of communities of interest, and competitive, where possible, in light of the other goals.<sup>65</sup> However, Arizona quickly learned how difficult it was to accomplish these goals through redistricting; the state's growing population (specifically in terms of Hispanics) created a scenario where "communities of interest" became difficult to constrain by their geographic compactness, consequently diluting such communities across several districts and undermining the commission's intent.<sup>66</sup> While 2002 elections showed a "modest gain" in competitiveness, "the result fell well short of what many commission proponents and Democrats had hoped."<sup>67</sup> Another analysis of the 2002 election revealed that the new lines did not have any substantial effect on the levels of "fair representation in the Arizona legislature," where a net increase of only a single minority representative constituted a "poor showing for the time and expense that went into creating new, fair elections."<sup>68</sup> This appointment scheme, combined with lofty goals and failed judicial challenges to the commission's plan,<sup>69</sup> has left many Democrats—the minority in both houses of the Arizona legislature who spearheaded the creation of the commission—frustrated by a plan that might be "once again favoring Republicans."<sup>70</sup>

### 3. *Lessons Learned*

While both Arizona's and Alaska's commissions certainly cannot be described as booming successes, neither were total failures either: both

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<sup>62</sup> *Id.* at § 1(8). *See also* Betts, *supra* note 58, at 194 (noting that while "the Arizona Constitution requires that the chairperson be registered as an Independent, it does not restrict someone from a major political party from changing his or her voter registration to Independent to meet the requirement").

<sup>63</sup> THOMPSON, *supra* note 2, at 174.

<sup>64</sup> ARIZ. CONST. art. IV, pt. 2, § 1(14).

<sup>65</sup> *Id.*

<sup>66</sup> Mann, *supra* note 35, at 107.

<sup>67</sup> *Id.*

<sup>68</sup> Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation, and Regret*, 35 ARIZ. ST. L.J. 575, 594–96 (2003) (analyzing the five districts that were judicially contested and concluding that the "minority representation seems poor" in those districts).

<sup>69</sup> *See generally* Ariz. Minority Coal. For Fair Redist. v. Ariz. Indep. Redist. Comm'n, 121 P.3d 843 (Ariz. Ct. App. 2005) (per curiam) (overruling the district court's decision in favor of Hispanic Democrats who challenged the commission's proposed plan claiming districts were unconstitutionally uncompetitive).

<sup>70</sup> Jahna Berry & Chip Scutari, *Court Axes Democrats' Dreams of Redistricting*, ARIZ. REPUBLIC, Oct. 19, 2005, at 1A.

accomplished their stated goal of removing redistricting from the hands of the legislature. Of course, the independence of these commissions is far from certain when political actors can select the members, and it is questionable whether politics can truly be taken out of a scheme with stakes as high as gaining legislative seats based on how the lines are drawn.<sup>71</sup> Moreover, an effective redistricting plan certainly requires educated individuals with experience in the area; but, such candidates may often have political interests themselves, especially in an environment where the member is appointed by a political actor. In addition, both Arizona's and Alaska's commissions faced extensive litigation in the wake of their plans. In Alaska, such litigation led to a complete overhaul of the original plan, while in Arizona, the court's agreement with the commission left scores of Democrats unhappy. While neither result was a total disaster, perhaps there is a more efficient and appealing way of increasing competition and fair representation. Arizona further shows us that while such commissions tend to be favored by the minority party, in an attempt to level the playing field, the residual political bias may prevent the commission from effecting positive change for that minority. In any event, California has subsequently created its own commission, indicating that citizens still believe the result could not be any worse than when the legislators draw the lines themselves.

#### B. CALIFORNIA'S CITIZENS REDISTRICTING COMMISSION—CAN IT BE BETTER?

At the urging of former Governor Arnold Schwarzenegger,<sup>72</sup> Proposition 77, which proposed to put the power to draw California's legislative districts in the hands of independent retired judges, hit the ballot in 2005.<sup>73</sup> Proposition 77 was easily defeated,<sup>74</sup> but it stirred up further redistricting debate in California, and ultimately led to the passage of Proposition 11 in 2008. The Citizens Redistricting Commission, like other similar commissions, was established to take the ability to draw district lines out of the hands of the legislators in an effort to increase competition in elections and restore to citizens a meaningful, if not determinative, vote.

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<sup>71</sup> See Betts, *supra* note 58, at 194 (“[I]t may be impossible with any redistricting scheme to avoid favoring one political party over another.”).

<sup>72</sup> Schwarzenegger took his redistricting plan first to the legislature, threatening that if he was not satisfied with their response, “he [would] take his proposals directly to voters.” Peter Nicholas, *Gov. to Call for Special Session*, L.A. TIMES, Jan. 1, 2005, at A1. See also Elizabeth Garrett, *Law and Democracy: A Symposium on the Law Governing Our Democratic Process: Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1113–14 (2005) (explaining that the Governor used the threat of the initiative in California's Hybrid Democracy to accomplish his agenda).

<sup>73</sup> Sam Hirsch & Thomas E. Mann, Op-Ed., *For Election Reform, A Heartening Defeat*, N.Y. TIMES, Nov. 11, 2005, at A23.

<sup>74</sup> *Id.* On the same day, voters in Ohio rejected a similar proposal. *Id.*

The text of Proposition 11 provided that “voters in many communities have no political voice because they have been split into as many as four different districts to protect incumbent legislators.”<sup>75</sup> It also promises that independent voters’ voices will now be heard in the redistricting process, though they were “completely shut out of the [old] process.”<sup>76</sup>

Trying to avoid the perceived lack of independence that marred the Alaska commission and, to a lesser extent, the Arizona commission, the drafters of Proposition 11 devised a much stricter process for choosing members. Like Arizona—though much more stringent and more wide-reaching—the CRC contains a series of conflict of interest provisions. Individuals are immediately disqualified from serving on the commission if they participated in certain activities within the previous ten years, including being a candidate for federal or state political office (whether elected or not); serving as a paid staff member to either a political party, candidate, or campaign committee of a candidate for federal or state office; and even contributing \$2000 or more to any congressional, state, or local candidate for public office.<sup>77</sup> Various political and social groups applied to serve as a commissioner in the weeks before the deadline to encourage individuals to apply.<sup>78</sup> The California State Auditor even set up a Twitter account to provide updates and reach out to citizens.<sup>79</sup> While the general campaign was successful in attracting 30,725 applicants,<sup>80</sup> the first set of fears about the new regime quickly began to take shape. Despite the push for applications by groups of all types, many became concerned that the lack of diversity in the initial applicant pool—71 percent were white applicants, 66 percent were males, while just 10 percent were Latinos, and less than 5 percent were Asians—would yet again translate into an unrepresentative body drawing the lines.<sup>81</sup>

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<sup>75</sup> Preamble of the Ballot Initiative, Voters FIRST Act, §2(b), available at [http://wedrawthelines.ca.gov/downloads/voters\\_first\\_act.pdf](http://wedrawthelines.ca.gov/downloads/voters_first_act.pdf) [hereinafter Voters FIRST Act].

<sup>76</sup> *Id.* § 2(c).

<sup>77</sup> CAL. GOV. CODE § 8252(a)(2)(A) (West 2010). The code also restricts individuals who served as an elected or appointed member of a political party central committee or as a registered lobbyist.

<sup>78</sup> For example, the *San Francisco Bay View*, a “national black newspaper” ran a piece on February 11, 2010, stating that “[i]n order to reflect California’s diverse voter demographics, it is critical that at least one of the 14 Citizens Redistricting Commission members is African American.” Carol McGruder, *Become a Paid Redistricting Commissioner—Apply by Feb. 16*, S.F. BAY VIEW, Feb. 11, 2010, <http://www.sfbayview.com/2010/become-a-paid-redistricting-commissioner/>. The Sacramento Bee ran an editorial to a more general audience on Feb. 9, 2010, encouraging interested Californians to “step up and sign up.” Editorial, *Help Upend the Gerrymandering*, SACRAMENTO BEE, Feb. 9, 2010, at 12A.

<sup>79</sup> See *WeDrawTheLines*, TWITTER, <http://www.twitter.com/wedrawthelines> (last visited Mar. 2, 2011). One post, dated Feb. 10, 2010 at 1:32 P.M., read: “If not you then who? Fill out the application today! Five days left to apply!” then provided a link to the application. *Id.*

<sup>80</sup> Steinhauer, *supra* note 7.

<sup>81</sup> Steven Maviglio, Op-Ed., *Viewpoints: Redistricting Effort Misguided, Costly*, SACRAMENTO BEE, Mar. 2, 2010, at 13A. The author further explains that 36 percent of the state’s population is Latino, and 12 percent of the state’s population is Asian, thus leaving these groups highly underrepresented in the applicant pool.

Of these 30,725 applications, 24,915 were “eligible” to serve on the Commission, and 4547 completed the second stage of the application.<sup>82</sup> After the second stage, a three-member panel from the state auditor’s office, known as the Applicant Review Panel,<sup>83</sup> reviewed the more than 4500 completed applications and the letters of recommendation submitted by each applicant,<sup>84</sup> and it narrowed the field down to 622 finalists.<sup>85</sup> Interestingly, 14 percent of the 622 finalists were Asian Americans, the highest represented ethnic group at this stage.<sup>86</sup>

The state auditor’s office then conducted interviews of those individuals it considered to be the most qualified, and it somehow identified a mere sixty finalists: twenty Democrats, twenty Republicans, and twenty Independents (or members of minority parties).<sup>87</sup> The only guidance the panel received from the law in selecting candidates was to choose “on the basis of relevant analytical skills, ability to be impartial, and appreciation for California’s diverse demographics and geography.”<sup>88</sup> From such a large pool of applicants, this seems to equate to an almost random selection—a distinction from other commissions, which might ultimately yield less politically-affiliated commissioners than in other states. Interestingly, the random selection did not end there; after various legislative leaders were given the chance to “strike” names from each pool,<sup>89</sup> eight individuals were randomly selected as the first group of commissioners.<sup>90</sup> State Auditor Elaine Howle “used a spinning wire basket and ping pong-style lottery balls” to make the selection on November 18, 2010.<sup>91</sup> As required by the law, three Republicans, three Democrats, and two from neither party were selected.<sup>92</sup> The initial group consisted of three

<sup>82</sup> *Citizens Redistricting Commission Statistics*, WEDRAWTHELINES.CA.GOV, <https://application.wedrawthelines.ca.gov/statistics> (last visited Jan. 24, 2011).

<sup>83</sup> Question six of *Frequently Asked Questions*, WEDRAWTHELINES.CA.GOV, <http://wedrawthelines.ca.gov/faq.html> (last visited Jan. 24, 2011).

<sup>84</sup> *Citizens Redistricting Commission Applicant Review Panel Holds Public Meeting*, PRNEWSWIRE, June 14, 2010, <http://www.prnewswire.com/news-releases/citizens-redistricting-commission-applicant-review-panel-holds-public-meeting-96333519.html>.

<sup>85</sup> Douglas M. Johnson, *CA Narrows Pool of Redistricting Commission Applicants*, ROSE INST. OF ST. AND LOC. GOV’T, Blog Post (June 16, 2010, 4:52 PM), <http://rosereport.org/20100616/ca-narrows-pool-of-redistricting-commission-applicants/>.

<sup>86</sup> *Id.*

<sup>87</sup> See CAL. GOV. CODE § 8252(c) –(d) (West 2010). See also George Skelton, *Redistricting Reform Struggles*, L.A. TIMES, Jan. 18, 2010 (calling the process “convoluted”).

<sup>88</sup> CAL. GOV. CODE § 8252(d).

<sup>89</sup> *Id.* at § 8252(e) (“[T]he President pro Tempore of the Senate, the Minority Floor Leader of the Senate, the Speaker of the Assembly, and the Minority Floor Leader of the Assembly may each strike up to two applicants from each subpool of [twenty] for a total of eight possible strikes per subpool.”). See also *supra* note 83.

<sup>90</sup> CAL. GOV. CODE § 8252(f). Pursuant to the statute, of the eight selections, three were Republicans, three Democrats, and two Independents. Don Thompson, *Lottery Selects Group to Draw Calif. District Maps*, BAKERSFIELDNOW.COM, Nov. 18, 2010, <http://www.bakersfieldnow.com/news/local/109023474.html>.

<sup>91</sup> Thompson, *supra* note 90.

<sup>92</sup> *Id.*

men and five women; four were Asian, two were white, one was black, and the other Hispanic.<sup>93</sup>

Nearly one month later, on December 15, 2010, the eight commissioners selected the final six commissioners from the remaining sub-pools of applicants,<sup>94</sup> ultimately creating a commission composed of five Democrats, five Republicans, and four Independents.<sup>95</sup> Language in the statute provides that these final six commissioners “shall be chosen to ensure the commission reflects the state’s diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity. *However, it is not intended that formulas or specific ratios be applied for this purpose.*”<sup>96</sup> Thus, while the sentiment is to create a diverse commission, no mechanism is actually in place to ensure such a result—perhaps justifying the fears of those who contend that the lack of diversity in the initial applicant pool will continue to shut their voices out of the redistricting process. The final composition of the CRC consists of eight men and six women—four Asian Americans, three Caucasians, three Latinos, two African Americans, one Pacific Islander, and one American Indian.<sup>97</sup>

With its limits on the number of members from each party, the CRC functions more like Arizona’s commission than others. Just as many Arizona Democrats supported the creation of the Arizona commission to gain more competitive districts in a Republican-dominated legislature,<sup>98</sup> California Republicans hoped to accomplish the same since the California legislature typically is controlled by Democrats.<sup>99</sup> One commentator considered this a flaw in the California proposal, claiming that Democrats are at a disadvantage by “getting the same number of seats on the commission” despite a 14 percent Democratic registration advantage.<sup>100</sup> Likewise, despite making up over 20 percent of California’s voting-age population, less than 13 percent of the commission’s applicants were independent of a political party.<sup>101</sup> Because this group—combined with individuals from other minority parties—will gain four seats on the

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<sup>93</sup> *Id.*

<sup>94</sup> Jim Sanders, *Final Six Members Selected for State’s Redistricting Commission*, SACRAMENTO BEE CAPITOLALERT, Blog Post (Dec. 15, 2010, 12:38 PM), <http://blogs.sacbee.com/capitolalertlatest/2010/12/final-six-members-selected-for.html#storylink=misearch>.

<sup>95</sup> *Id.* See also CAL. GOV. CODE § 8252(g) (West 2010).

<sup>96</sup> *Id.* (emphasis added).

<sup>97</sup> Sanders, *supra* note 94; *Commissioner Biographies*, CALIFORNIA CITIZENS REDISTRICTING COMMISSION, <http://wedrawthelines.ca.gov/bios.html> (last visited Sept. 13, 2011).

<sup>98</sup> Berry & Scutari, *supra* note 70.

<sup>99</sup> See, e.g., Steven Harmon, *California Remap Proposal Worries Rights Groups*, CONTRA COSTA TIMES, July 8, 2008, available at <http://peaceandjustice.org/article.php?story=20080710095319102&query=agains> (explaining that Proposition 11 “is a Republican effort to overtake the Democratic majority”).

<sup>100</sup> Maviglio, *supra* note 81. The author further notes that Republicans and Democrats had “nearly the same number of applicants” to the commission, which further shows how unrepresentative the applicant pool is. *Id.*

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

commission and likely serve as mediators and tie-breakers, perhaps this is the group the “independent” commission should have been seeking out the most.

Like the Arizona commission, the CRC provides substantive guidelines that the commissioners must follow when drawing the districts. The districts must be drawn without respect to the residence of any incumbent, geographically contiguous, compact (to the extent practicable), and respecting the geographic integrity of cities, counties, and communities of interest.<sup>102</sup> Despite the law’s appeal to competitive elections in its “purpose” section,<sup>103</sup> the CRC does not suggest that the commissioners actively seek to draw the districts as competitively as possible, as Arizona’s commission guidelines provide. In any event, while some districts may become more competitive after being redrawn by the CRC, “competitive seats are harder to draw [actively] now because of changes in the state’s political geography.”<sup>104</sup> Even so, seeking to draw the district lines respecting communities of interest could “work directly against competitiveness.”<sup>105</sup> Thus, the purpose of the law, the execution of the law, and the possibility of achieving the purported goals of the law appear to be in conflict, perhaps raising questions about what end goal the drafters of the law were seeking and whether that goal can still be achieved.

### C. WILL THE EXPERIMENT WORK IN CALIFORNIA?

The Arizona and Alaska commissions raise two main problems. First, it is unclear whether the commissions are as independent of political biases as they seek to be. The independence of the commissions that have been created is certainly questionable where politicians are making the selections, and this is the case in Alaska and Arizona. While California has tried to abandon this method, the CRC’s independence is certainly still an issue. Under its current structure—equal members from each party, and an even number of independent commissioners—the CRC is hardly a nonpartisan body. Rather, it is a bipartisan body. As Mann explains, “a commission whose membership is evenly divided between the parties . . . is naturally drawn toward bipartisan compromise, which usually works to the advantage of incumbents and to the detriment of competition.”<sup>106</sup> In California, then, the question is whether the resulting commission will

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<sup>102</sup> CAL. CONST. art. XXI, § 2(d).

<sup>103</sup> Voters FIRST Act, *supra* note 75, §2(a) (“Allowing politicians to draw their own districts is a serious conflict of interest that harms voters. That is why 99 percent of incumbent politicians were reelected in the districts they had drawn for themselves in the recent elections.”).

<sup>104</sup> Eric McGhee, *Electoral Reforms Won’t Fix California Gridlock*, S.F. CHRON., Mar. 14, 2010, at E4.

<sup>105</sup> Mann, *supra* note 35, at 109.

<sup>106</sup> *Id.* at 108.

produce a scheme much different from 2000, when Democrats and Republicans engaged in a “bipartisan incumbent gerrymander” to ensure as many safe seats as they could for both parties.<sup>107</sup> If the bipartisan commission simply negotiates with the other party to ensure safe seats for all, the commission may not be acting independent of political biases and influences, and may actually hinder the creation of a more representative legislature. So while a bipartisan commission may ultimately yield a more fair result than if legislators drew the lines themselves, the potential for partiality certainly is greater under such a format. Similarly, though the CRC has a series of conflict of interest provisions, it is difficult for members to eliminate all biases, regardless of the safeguards installed, where “the act of redistricting is intrinsically political.”<sup>108</sup> Some scholars predicted that the members, especially those that are politically affiliated, would likely have their own political interests, possibly leading to partisan outcomes or making it easier for legislators to influence them.<sup>109</sup> This lack of independence is further exacerbated by the nature of the project. The application process was likely to attract the politically-interested, and the State Auditor’s Office’s job of selecting the “most qualified applicants” from that pool likely favored those with high levels of education and experience in the political industry—the same individuals who may be more likely to engage in partisan activities as commissioners.<sup>110</sup> As a result, despite its efforts, California’s CRC could easily suffer from the lack of independence that marred other similarly situated commissions. Of course, this begs the question whether the commission will really accomplish anything different from the legislature merely drawing lines itself.<sup>111</sup>

In fact, the CRC finalized the new districts on August 15, 2011, and unsurprisingly, not everyone was happy.<sup>112</sup> Some contend that the new districts “could give Democrats a tighter grip on the statehouse and

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<sup>107</sup> *Id.* at 100.

<sup>108</sup> Betts, *supra* note 58, at 198.

<sup>109</sup> *See id.*

<sup>110</sup> *See id.* at 198–99 (suggesting that Governor Schwarzenegger’s original Proposition 77 idea to allow retired judges to draw district lines may have been better at ensuring “independence”).

<sup>111</sup> Compare Note, *A Federal Administrative Approach to Redistricting Reform*, 121 HARV. L. REV. 1842, 1852–53 (2008) (“Even if partisanship may never be eliminated from the process, however, independent commissions still seem the most viable way to address both incumbent entrenchment and partisan bias. . . . [T]he bottom line is that independent commissions are less likely to distort the process than are partisan legislators.”), with Mann, *supra* note 35, at 111 (“Redistricting reform, therefore, is no panacea for the problems of polarization and lack of competitiveness . . . . [but] it is not an unreasonable place to start.”), and Barnes, *supra* note 68, at 596 (arguing that a net increase of one additional minority legislator being elected in Arizona in the 2002 election compared to the 2000 election is “a poor showing for the time and expense that went into creating new, fair elections”).

<sup>112</sup> Patrick McGreevy & Richard Simon, *Voting District Finalized and Face Immediate Challenges*, Los Angeles Times, Aug. 15, 2011, available at <http://www.latimes.com/news/local/la-me-redistricting-20110816,0,7874717.story>.

California's congressional delegation."<sup>113</sup> The citizens' group, Fairness and Accountability in Redistricting,<sup>114</sup> is gathering signatures to launch a referendum whereby voters would have to approve the CRC's newly drawn lines before their use in the November 2012 elections. Commissioner Michael Ward, who was the only commissioner to vote against the final redistricting plan, contends that the commission "simply traded the partisan, backroom gerrymandering by the Legislature for partisan, backroom gerrymandering by average citizens."<sup>115</sup> Commission Chairman Vincent Barabba, however, contends that there is "no basis" for saying the decisions were based on political considerations.<sup>116</sup>

The second problem with commissions is that they tend to trigger lengthy and expensive lawsuits, and other challenges to their plans. As observed in Alaska and Arizona, inevitably, some political, racial, or other groups will be upset by the lines drawn and ultimately look to the courts for a remedy.<sup>117</sup> In Arizona, angry Democrats took to the courts when they realized that the commission's plan was not as independent as originally intended.<sup>118</sup> Similarly, in Alaska, the commission's plan was challenged to the point that a single member of the commission ended up creating the ultimately successful plan.<sup>119</sup> Already in California the Mexican American Legal Defense and Educational Fund contends that in drawing the new districts, the commission violated the federal Voting Rights Act<sup>120</sup> and has threatened to sue the commission.<sup>121</sup>

University of California, Los Angeles law professor Daniel Lowenstein succeeded in putting Proposition 27 on the 2010 ballot—an initiative that if successful, would have abolished the redistricting commission altogether.<sup>122</sup> The initiative claimed that the commission would be too expensive<sup>123</sup> and warned against letting an unaccountable body draw district lines.<sup>124</sup> Then

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<sup>113</sup> *Id.*

<sup>114</sup> *Who We Are*, F.A.I.R. DISTRICTS, <http://fairdistricts2012.com/who-we-are> (last visited Sept. 13, 2011).

<sup>115</sup> McGreevy & Simon, *supra* note 112.

<sup>116</sup> *Id.*

<sup>117</sup> *See, e.g., In re 2001 Redistricting Cases*, 44 P.3d 141, 143–47 (Alaska 2002); *Ariz. Minority Coal. For Fair Redist. v. Ariz. Indep. Redist. Comm'n*, 121 P.3d 843 (Ariz. Ct. App. 2005).

<sup>118</sup> *See Ariz. Minority Coal. For Fair Redist.*, 121 P.3d at 843.

<sup>119</sup> Harrison, *supra* note 44, at 69.

<sup>120</sup> Voting Rights Act, 42 U.S.C. § 1973 (2010).

<sup>121</sup> McGreevy & Simon, *supra* note 112.

<sup>122</sup> Editorial, *State Redistricting Opponents Retrench*, ORANGE COUNTY REG., Dec. 31, 2009, [http://articles.ocregister.com/2009-12-31/opinion/24633740\\_1\\_ballot-argument-ballot-initiative-prop](http://articles.ocregister.com/2009-12-31/opinion/24633740_1_ballot-argument-ballot-initiative-prop).

<sup>123</sup> Lowenstein's proposal explains that the commissioners have the potential to make up to \$1 million annually, based on Proposition 11's ambiguous grant of \$300 per day to commissioners "for each day the member is engaged in commission business." CAL. GOV. CODE § 8253.5 (West 2010). *See* Financial Accountability in Redistricting (FAIR) Act, § 2(a), Proposition 27 (proposed Dec. 28, 2009), available at [http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i905\\_initiative\\_09-0107.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i905_initiative_09-0107.pdf).

<sup>124</sup> *Id.*

House Speaker Nancy Pelosi contributed to Lowenstein's measure; this was perhaps in response to another 2010 ballot initiative—Proposition 20—which proposed extending the CRC's power to draw district lines for congressional elections.<sup>125</sup> Because the CRC essentially puts Republicans and Democrats on equal footing with respect to the ability to draw district lines, something that is typically a Democratic prerogative due to frequent political majorities, this heavily Democratic-backed measure appeared to be a last-ditch effort to maintain the status quo of Democratic control.

In the 2010 elections, though, voters supported the CRC. Proposition 27, which would have abolished the CRC altogether, failed,<sup>126</sup> while Proposition 20, which greatly expands its power by allowing it to draw lines for federal elections as well, was approved.<sup>127</sup>

In any event, the fighting over the CRC demonstrates that just as in other states with commissions, redistricting commissions can become a battleground for simply determining the fair way to redistrict, rather than actually succeeding in redistricting in a fair way. Thus, citizens may begin to question the commission's value if, like in Arizona,<sup>128</sup> future elections fail to yield different results or similarly uncompetitive races.

Despite its flaws, the CRC's goals are an admirable attempt to create a fair redistricting process and to increase competitiveness in California's legislative elections. As one commentator explained when the commission was created, "if [fourteen] professional independent-minded people are named to the new commission and draw lines in ways that deal fairly with communities of interest, particularly minority groups, and create more districts in which Democrats and Republicans have approximately equal shots at winning," it could produce a "highly positive outcome."<sup>129</sup> On the other hand, "it could really be a disaster, if you have people with very little experience with the political process dealing with this complex task. They could wind up breaking up communities of interest in weird ways."<sup>130</sup> While the creation of the CRC appears to be a step in the right direction in giving more voters a voice and increasing competition, perhaps California

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<sup>125</sup> Shane Goldmacher, *Nancy Pelosi, Congressional Democrats Weigh in on Redistricting Measure*, L.A. TIMES, Political Blog (Feb. 12, 2010, 10:32 AM), <http://latimesblogs.latimes.com/california-politics/2010/02/nancy-pelosi-congressional-democrats-weigh-in-on-redistricting-measure.html>.

<sup>126</sup> *California Proposition 27, Elimination of Citizen Redistricting Commission*, BALLOTOPEDIA (2010), [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_27,\\_Elimination\\_of\\_Citizen\\_Redistricting\\_Commission\\_\(2010\)](http://ballotpedia.org/wiki/index.php/California_Proposition_27,_Elimination_of_Citizen_Redistricting_Commission_(2010)) (59.5 percent of voters voted against eliminating the commission).

<sup>127</sup> *California Proposition 20, Congressional Redistricting*, BALLOTOPEDIA (2010), [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_20,\\_Congressional\\_Redistricting\\_\(2010\)](http://ballotpedia.org/wiki/index.php/California_Proposition_20,_Congressional_Redistricting_(2010)) (61.3 percent of voters approved expanding the Commission's power to drawing the lines for federal elections).

<sup>128</sup> Barnes, *supra* note 68, at 596.

<sup>129</sup> Mecklin, *supra* note 27. Of course, keeping Mann's comment in mind, whether these districts will be more competitive is speculative if this criteria is followed. Mann, *supra* note 35, at 108.

<sup>130</sup> Mecklin, *supra* note 27 (quoting John N. Freidman).

is ready for a more radical experiment that would accomplish the same goals: using a proportional representation method to elect the legislature.

### III. AN ALTERNATIVE: PROPORTIONAL REPRESENTATION BY USE OF THE SINGLE-TRANSFERABLE VOTE

An alternative to the CRC is the adoption of an entirely new electoral scheme for California's legislators—one that would more readily achieve the goals of increased competitiveness, less voter apathy, and a more representative legislature. A system of proportional representation ("PR"), which employs nineteenth century British thinker Thomas Hare's proposal of a single-transferable vote ("STV"), might be a step in the right direction toward accomplishing these goals.

Historically, the United States has been dominated by single-member districts and "first-past-the-post" ("FPTP") elections, but California's broken system suggests that it may be time to consider alternatives. John Stuart Mill strongly supported Hare's electoral system, believing that a winner-take-all system is a "government of privilege," where the majority "alone possess[es] practically any voice" in the legislative body to the detriment of minorities.<sup>131</sup> Though minority groups still cast ballots under the current system, the end result is that those who voted for a losing candidate are rendered almost voiceless because they have no elected representative who will directly sympathize with their complaints and be attentive to their legislative requests. For example, in one Cincinnati city council election, before the adoption of PR for such elections in the early 1900s, Republicans won 55 percent of the vote, but won 97 percent of the seats on the council.<sup>132</sup> While the FPTP electoral scheme is advantageous in that it may provide stability in establishing a two-party regime, it effectively silences a large portion of the population and shakes its confidence in the system.<sup>133</sup> Such a disparity would be eradicated under PR—specifically, the STV system, which "allows voters to choose both between and within the parties and so reflects a diversity of opinions within society."<sup>134</sup>

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<sup>131</sup> MILL, *supra* note 21, at 53 (emphasis added).

<sup>132</sup> DOUGLAS AMY, REAL CHOICES/NEW VOICES: HOW PROPORTIONAL REPRESENTATION ELECTIONS COULD REVITALIZE AMERICAN DEMOCRACY 269 (2d ed. 2002).

<sup>133</sup> As Lani Guiner explains, "it is illegitimate for an advantaged majority to exercise disproportionate power." GUINER, *supra* note 20, at 79.

<sup>134</sup> Shaun Bowler & Bernard Grofman, *Introduction: STV as an Embedded Institution, in ELECTIONS IN AUSTRALIA, IRELAND, AND MALTA UNDER THE SINGLE TRANSFERABLE VOTE* 1, 6 (Shaun Bowler & Bernard Grofman eds., 2000).

Under the basic STV system, voters head to the polls armed with the ability to rank their choices of candidates.<sup>135</sup> Based on these rankings, candidates are elected once they receive a specific quota of votes—excess votes are then transferred to the next highest ranked candidate on those ballots. A detailed explanation of the mechanics of the system is discussed in Part B of this section. While the idea of an STV system is relatively unheard of today in the United States, it was used in the past throughout this country and is currently the method of choice for other western democracies.

#### A. HISTORY OF STV

Hare devised the STV system in 1861, and Mill later considered it to be the most appealing form of PR.<sup>136</sup> Mill not only believed that the winner-take-all system perpetuated majority rule by disfranchising the political minority, but also allowed a “majority of the majority,” the group of the most powerful elected officials, to do the actual legislating.<sup>137</sup> Today, commentators similarly opine that under the current system, “the majority that rules gains all the power and the minority that loses gets none.”<sup>138</sup> While “none” may be a bit of a stretch, Mill insisted that the results of winner-take-all elections are undemocratic, and he instead supported Hare’s system, suggesting that it would be “among the very greatest improvements yet made in the theory and practice of government.”<sup>139</sup> Particularly striking to Mill was the possibility that “every member of the [elected legislature] would be the representative of a unanimous constituency,”<sup>140</sup> because when voters rank more than one candidate on the ballot, the odds of electing a candidate whom a particular voter ranked (and therefore indicated support for) is very high.<sup>141</sup> Though Mill initially envisioned STV functioning with all of Great Britain as a single constituency,<sup>142</sup> the system has only been truly used and tested on a much smaller scale.

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<sup>135</sup> Voters may rank up to the number of candidates as there are seats to be filled—because this system will be one with multimember districts, the number of candidates a voter in California would be able to rank is discussed *infra* Part V.A.

<sup>136</sup> MILL, *supra* note 21, at 57.

<sup>137</sup> *Id.* at 54.

<sup>138</sup> GUINER, *supra* note 20, at 2.

<sup>139</sup> MILL, *supra* note 21, at 57.

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

<sup>141</sup> KATHLEEN L. BARBER, A RIGHT TO REPRESENTATION: PROPORTIONAL ELECTION SYSTEMS FOR THE TWENTY-FIRST CENTURY 76 (2000) (“Typically 80–90 percent of the ballots are effectively counted to elect a member of council, as opposed to 45–55 percent in a [single-member] plurality election.”).

<sup>142</sup> See MILL, *supra* note 21, at 57 (“Every member of the House would be the representative of an unanimous constituency.”). See also BARBER, *supra* note 141, at 12–13 (explaining that Mill was persuaded by Hare’s explanation that the voter would be liberated from a small district and “empowered to vote for candidates anywhere in the country”).

### 1. Experimentation with STV in the United States

During the first half of the twentieth century, nearly two dozen cities, including Cleveland, Cincinnati,<sup>143</sup> New York, and Sacramento, experimented with an STV system for their city council elections.<sup>144</sup> They were mostly the result of the Progressive movement's attempts to reduce the power of party bosses who were dominating the political scene.<sup>145</sup> Additionally, the late 1800s witnessed the growth in American "optimism about the potential for improving the human condition," and disgust towards "social, economic, and political inequities."<sup>146</sup> Increasing support for various forms of PR was mostly the result of a growing diverse population and the reality that winner-take-all elections tended to produce skewed results, leaving many groups underrepresented.<sup>147</sup> In Oregon, for example, fifty-nine Republicans were elected to a sixty-member state legislature; thus, despite receiving 32 percent of the votes, Democrats had achieved less than 2 percent of the representation.<sup>148</sup> While an effort was made to adopt STV in Oregon's state elections in 1908, it was ultimately unsuccessful.<sup>149</sup> Looming in the background, though, was the "insecurity" among the "native working-class and upper-middle-class professionals about their ability to maintain their way of life" in the face of this increased optimism by minority groups.<sup>150</sup> After more than two decades of advocacy without any state adopting the system, reformers looked to local elections to enact change, where several of their attempts ultimately succeeded. It is important to note that adoptions of STV came by local referenda, which left them "vulnerable to disestablishment in the same manner."<sup>151</sup>

<sup>143</sup> In 2008, voters in Cincinnati rejected Issue 8, which would have re-instituted STV in Cincinnati's City Council elections. See *Issue 8: Proportional Representation City of Cincinnati*, SMARTVOTER.ORG, <http://www.smartvoter.org/2008/11/04/oh/hm/issue/8/> (last visited Mar. 1, 2011). For an editorial urging voters to vote in favor of Issue 8, see Editorial, *Issue 8 Deserves Voters 'ok,'* BUS. COURIER OF CINCINNATI, Sept. 18, 2008, <http://cincinnati.bizjournals.com/cincinnati/stories/2008/09/22/editorial1.html>.

<sup>144</sup> The other cities were Boulder, Colorado; West Hartford, Connecticut; Lowell, Medford, Quincy, Revere, Saugus, and Worcester, Massachusetts; Kalamazoo, Michigan; Hopkins, Minnesota; Long Beach and Yonkers, New York; Ashtabula, Hamilton, and Toledo, Ohio; Coos Bay, Oregon; and Wheeling, West Virginia. Jeffrey C. O'Neill, *Everything that Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 Mich. St. L. Rev. 327, 337 n.62 (2006).

<sup>145</sup> AMY, *supra* note 132, at 267–68.

<sup>146</sup> BARBER, *supra* note 141, at 30 ("A transition was taking place in American life from the individualism of the framers . . . to more collective modes of political awareness.")

<sup>147</sup> See *id.* at 30–37. See also Leon Weaver, *The Rise, Decline, and Resurrection of Proportional Representation in Local Governments in the United States*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 139, 142 (Bernard Grofman & Arend Lijphart eds., 3d prtg. 2003).

<sup>148</sup> BARBER, *supra* note 141, at 35.

<sup>149</sup> *Id.* A ballot measure permitting but not requiring the use of STV passed, but four efforts to enact the reform failed. *Id.*

<sup>150</sup> *Id.* at 30.

<sup>151</sup> Weaver, *supra* note 147, at 142.

Today, Cambridge, Massachusetts, remains the only city in the country which still employs an STV system for its municipal elections,<sup>152</sup> and, beginning in 1971, the New York City School Board began conducting STV elections.<sup>153</sup> At first glance, the fact that most of the cities that experimented with the system ultimately rejected it suggests that it was unpopular and unsustainable over the long term. However, the reasons behind STV's rise and fall in U.S. cities may suggest otherwise.

Under any electoral scheme, politicians work intensely to get reelected. While elected officials usually oppose the creation of independent redistricting committees given their tendency to remove district line-drawing power and threaten "safe" seats, party leaders in the localities that adopted STV felt similarly threatened regarding the safety of their party's seats under this format and instituted a number of challenges to the system.<sup>154</sup> Party leaders were also agitated that STV caused their "loss of influence over nominations" of candidates.<sup>155</sup>

In the 1940s and 1950s, the ever-changing political climate became increasingly hostile toward reform and the search for equality. While many Americans grew fearful of electing racial, religious, and ethnic minority groups, women, and members of minority political parties, the STV system enhanced the chance that representatives of such minority groups would hold elected office.<sup>156</sup> As a scare tactic, politicians in Cincinnati urged voters to repeal the STV system, unless they wanted a "Negro mayor," after a vote conducted under STV resulted in the election of African Americans to city council for the first time in the city's history.<sup>157</sup> In New York City, fears of Communist influences in the city's government led to STV's repeal.<sup>158</sup> While eliminating Communism was New York City's goal, "as expected, the return to FPTP in 1947 not only succeeded in eliminating the Communist Party from the city council, but completely eradicated all minor-party representation."<sup>159</sup> Like a domino effect, other cities around the

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<sup>152</sup> *Choice Voting in Cambridge*, FAIRVOTE.ORG, <http://archive.fairvote.org/?page=241> (last visited Mar. 1, 2011). The system is also currently used by a number of non-governmental groups around the country, including the Motion Picture Academy in its selection of the Academy Award Winners. BARBER, *supra* note 141, at 168 n.7.

<sup>153</sup> Weaver, *supra* note 147, at 140.

<sup>154</sup> *Id.* at 142.

<sup>155</sup> *Id.* at 143.

<sup>156</sup> BARBER, *supra* note 141, at 59.

<sup>157</sup> AMY, *supra* note 132, at 273.

<sup>158</sup> In 1941, a single council-member was elected from the Communist Party, and in 1943, a second Communist council-member was elected. Thus, two members on the seventeen-member council were from the Communist Party. As one commentator notes, "[t]here is no doubt that the one issue above all others responsible for the repeal of P.R. in 1947 was Communism." Belle Zeller & Hugh A. Bone, *The Repeal of P.R. in New York City—Ten Years in Retrospect*, 42 AM. POL. SCI. REV. 1127, 1132–33 (1948).

<sup>159</sup> Gur Bligh, *Article: Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism*, 2008 B.Y.U. L. REV. 1367, 1397 (2008).

country ultimately abandoned STV after such well-publicized defeats in larger cities.<sup>160</sup>

One scholar argues that most of these cities ultimately rejected STV not because it failed to ensure political minorities' voices were heard, but rather because "it worked too well" at accomplishing this goal.<sup>161</sup> Another commentator explained that when observing the cities that abandoned STV and the reasons for it, "one is struck with how little attention was given in those campaigns to the *pros* and *cons* of proportional systems," but rather the real reason leading to its abandonment was "whether the various political actors perceived themselves to be advantaged or disadvantaged" by the system.<sup>162</sup>

One key exception, however, is in Cambridge, where STV has persisted despite its abandonment by other cities. Some have attributed this difference to "[p]rogressive influences still at work at state and local levels" there,<sup>163</sup> while others describes Cambridge as the "conspicuous exception" that was able to "recruit new [STV] enthusiasts to replace the ones who led the initial charge after they retired, died, or moved away."<sup>164</sup> Since the adoption of STV there in 1941, Cantabrigians have rejected ballot referenda initiated to repeal the system five different times.<sup>165</sup>

## 2. *The History (and Future?) of STV in California*

California was also affected by the wave of interest in STV around the country. In Los Angeles, voters in 1913 narrowly rejected an amendment to the city charter that would have instituted STV elections for city council, and the debate about the merits of the system raged on for almost a decade.<sup>166</sup> Sacramento adopted the system in 1921,<sup>167</sup> but it ultimately was repealed when the California Court of Appeals held that it violated the California Constitution.<sup>168</sup> In *People v. Elkus*, applying the same reasoning as the Michigan Supreme Court when it overturned the city of Kalamazoo's STV system two years earlier,<sup>169</sup> the California court found the system in

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<sup>160</sup> See AMY, *supra* note 132, at 273–74.

<sup>161</sup> *Id.* at 274. See also BARBER, *supra* note 141, at 59 (arguing that STV "did what it was supposed to do, that is, facilitate the representation of minorities of various sorts").

<sup>162</sup> Weaver, *supra* note 147, at 143.

<sup>163</sup> Barber explains that STV has persisted in Cambridge due to the "Progressive influence still at work at state and local levels among the forces of organized labor, urban Democrats and independents, independent Republicans, social workers, and champions of public power." BARBER, *supra* note 141, at 59.

<sup>164</sup> Weaver, *supra* note 147, at 143.

<sup>165</sup> The years are 1952, 1953, 1957, 1961, and 1965. *Adoption of Plan E*, CITY OF CAMBRIDGE: ELECTION COMMISSION, [http://www.cambridgema.gov/election/adoption\\_planE.cfm](http://www.cambridgema.gov/election/adoption_planE.cfm) (last visited Mar. 1, 2011).

<sup>166</sup> BARBER, *supra* note 141, at 54.

<sup>167</sup> *Id.* at 53.

<sup>168</sup> *People ex rel. Devine v. Elkus*, 211 P. 34, 39 (Cal. Ct. App. 1922).

<sup>169</sup> *Wattles ex rel. Johnson v. Upjohn*, 179 N.W. 335 (Mich. 1920).

violation of the state Constitution's guarantee of the right to vote "at all elections."<sup>170</sup> The court considered multi-candidate elections to be multiple elections, reasoning that a ballot counting toward only a single candidate restricted a voter's full voting rights in "all elections."<sup>171</sup> In contrast, the following year, the Ohio Supreme Court rejected a similar challenge, claiming that STV does entitle voters to vote at "every municipal election, even though that vote may be effective in the election of fewer than the full number of candidates."<sup>172</sup> The same system was again upheld by the New York Supreme Court in 1937.<sup>173</sup>

The decision in *Elkus* is yet to be overturned, leaving the legality of STV, at least at the local level, tenuous in the state. Because the California Supreme Court has not addressed the question, the decision's applicability to larger elections, such as those for the state legislature, remains unclear. One commentator argues that these decisions were highly political in Michigan and California, where "the judges had ties to their respective Republican Party organizations,"<sup>174</sup> though perhaps more plausibly the courts in California and Michigan simply ignored the practical effect of the use of STV compared to single-member districts. *Elkus* was decided on the premise that a now-repealed section of the California Constitution, allowing charter cities to provide the method by which they conducted their elections,<sup>175</sup> did not allow for a system that violated the constitutional guarantee that citizens could vote "at all elections."<sup>176</sup> However, voters still have (at least) a single representative whether elections take place under an STV or FPTP system. As the Ohio court noted, voters are able to vote at every election, and their votes will count towards the election of a single representative—no more or less than the vote they are allotted under the current system.<sup>177</sup>

Despite the California Court of Appeals's disdain for the STV system almost ninety years ago, today, Californians are beginning to realize the value of PR. In 2002, San Francisco adopted Instant Runoff Voting (IRV)<sup>178</sup>

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<sup>170</sup> *Elkus*, 211 P. at 35 ("The right to vote 'at all elections' includes the right to vote for a candidate for every office to be filled and on every proposition submitted.").

<sup>171</sup> *Id.* For a general discussion of the case, see Brian P. Marron, *Issue in Election Law: One Person, One Vote, Several Elections?: Instant Runoff Voting and the Constitution*, 28 VT. L. REV. 343, 368–69 (2004).

<sup>172</sup> *Reutener v. City of Cleveland*, 141 N.E. 27, 33 (Ohio 1923).

<sup>173</sup> *Johnson v. City of New York*, 9 N.E.2d 30, 38 (N.Y. 1937).

<sup>174</sup> BARBER, *supra* note 141, at 56.

<sup>175</sup> CAL. CONST. art. XI, § 8 1/2 (repealed 1970).

<sup>176</sup> CAL. CONST. art. II, § 1; *Elkus*, 211 P. at 38.

<sup>177</sup> *Reutener*, 141 N.E. at 33.

<sup>178</sup> "Instant Runoff Voting" is a procedure that can be put in place in a single-winner election in an attempt to more accurately capture the will of the people. Each voter ranks the candidates in order of preference on the ballot. If a candidate receives a majority of the first-place votes, that candidate is elected. If no candidate receives a majority, the candidate receiving the lowest number of votes is

for its various citywide offices.<sup>179</sup> While only applicable to single-winner elections, IRV is similar to STV in the use of ranking candidates and is designed to prevent the “third-party spoiler” effect and give voters more flexibility in electing a single representative.<sup>180</sup> Because IRV elections produce only a single winner, the *Elkus* decision has hardly any effect on its use or legality.<sup>181</sup> Studies conducted following the November 2004 election suggested that more voters had a say in the final choice of an elected official in San Francisco elections when compared to previous city elections under the old runoff system (which required a second trip to the polls).<sup>182</sup> While 74,698 (16.5 percent of the registered voters) in San Francisco showed up to the polls a second time to vote in a December 2001 runoff election for City Attorney, 189,314 votes were determinative in a 2005 instant runoff race for the Assessor-Recorder race—an increase of 168 percent of voters who were given decisive votes under this new system.<sup>183</sup> Similar results would be expected under STV, where the transfer of votes would result in a much higher percentage of determinative votes.

Additionally, some California state lawmakers have recognized the benefits of the IRV and STV systems. In 2009, AB 1121 was introduced in the California legislature; it was a bill that would have allowed a number of general law cities up and down the state to employ various PR techniques,<sup>184</sup> including IRV and “choice voting,” also known as STV. The entire California Assembly and two Senate committees<sup>185</sup> passed AB 1121

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eliminated and that candidate’s ballots are distributed to their second-choice candidate. This process is repeated until one candidate has attained a majority of the votes. O’Neill, *supra* note 144, at 334.

<sup>179</sup> Kimberly Edds, *For Voters, Choice Is as Easy as 1-2-3*, WASH. POST, Oct. 12, 2004, at A03.

<sup>180</sup> *Id.* See also Akhil Reed Amar & Vikram David Amar, *The Fatal Flaw in France’s—and America’s—Voting System, and How an ‘Instant Runoff’ System Might Remedy It*, FINDLAW.COM (May 3, 2002), <http://writ.news.findlaw.com/amar/20020503.html> (explaining how IRV could have led to the election of Al Gore over George W. Bush in the 2000 Presidential election by transferring Ralph Nader’s votes to Gore).

<sup>181</sup> The decision in *Elkus* rests on the fact that the STV system in Sacramento elected multiple candidates in a single race. *People ex rel. Devine v. Elkus*, 211 P. 34, 39 (Cal. Ct. App. 1922).

<sup>182</sup> See generally Christopher Jerdonek, *Ranked Choice Voting and Voter Turnout in San Francisco’s 2005 Election* (Feb. 4, 2006), <http://www.sfrcv.com/reports/turnout.pdf>.

<sup>183</sup> *Id.*

<sup>184</sup> See *CFER’s Ranked Voting Bill Moves to Senate Floor*, CALIFORNIANS FOR ELECTORAL REFORM, <http://cfer.org/legislation/ab1121.php> (last visited Mar. 1, 2011). The text of the proposed bill “establishes a pilot program” to allow up to ten cities ranging in population to implement an Instant Runoff Voting system for its single-winner elections and an STV system for its multiple-winner elections. The bill also provides a detailed example of how to count the ballots under an STV system. S. Comm. on Elections, Reapportionment & Constitutional Amendments, AB 1121 (Cal. 2009), available at [http://info.sen.ca.gov/pub/09-10/bill/asm/ab\\_1101-1150/ab\\_1121\\_cfa\\_20090706\\_123348\\_sen\\_comm.html](http://info.sen.ca.gov/pub/09-10/bill/asm/ab_1101-1150/ab_1121_cfa_20090706_123348_sen_comm.html).

<sup>185</sup> The bill passed the Committee on Elections, Reapportionment, and Constitutional Amendments before being referred to the Appropriations Committee. *Complete Bill History of A.B. No. 1121*, OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION, [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_1101-1150/ab\\_1121\\_bill\\_20090910\\_history.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1101-1150/ab_1121_bill_20090910_history.html) (last visited Mar. 1, 2011).

between June and August 2009. The bill ultimately failed in the Senate in September 2009 by a single vote.<sup>186</sup>

### 3. *STV in Other Western Democracies*

Beyond the United States, many nations have successfully employed STV in their elections. Ireland has used STV in all of its parliamentary elections since 1922.<sup>187</sup> Malta has conducted every parliamentary election under STV since 1921.<sup>188</sup> Malta maintains a two-party system, “one of the purest in the world,” in which no third party has won a parliamentary seat since 1964.<sup>189</sup> This suggests that a two-party system can in fact be maintained through the use of STV.

Australia is one of the world’s most experienced users of STV, currently employing the system in six jurisdictions, the two most notable of which are House of Assembly in the state of Tasmania since 1909, and the federal Senate since 1949.<sup>190</sup> In Tasmania, a stable two-party system has been maintained, mostly a result of the two major parties’ conscious attempt to provide candidates who may also appeal to potential third-parties.<sup>191</sup> At the federal level, frustrations grew as single-member district elections often produced skewed levels of representation, culminating in a 19-0 advantage in the Senate by one party in 1943.<sup>192</sup> Ironically, the leading party supporting the switch to STV in 1949 worried that “the pendulum would swing again” and they would lose those seats just as easily as they won them.<sup>193</sup>

## B. THE MECHANICS OF AN STV ELECTION

In an STV election, a single vote can be transferred to one of several candidates, depending on how many candidates the voter chooses to rank and how many votes the voter’s preferred candidates receive. Single-member districts are eliminated in favor of either a national constituency (as Mill favored)<sup>194</sup> or multimember districts (as this proposal favors),<sup>195</sup>

<sup>186</sup> *Current Bill Status of AB 1121*, OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION, [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_1101-1150/ab\\_1121\\_bill\\_20090922\\_status.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1101-1150/ab_1121_bill_20090922_status.html) (last visited Mar. 1, 2011). The vote was twenty to nineteen in favor of the bill, but to pass, a bill in California must attain twenty-one votes from the Senate.

<sup>187</sup> Michael Gallagher, *The (Relatively) Victorious Incumbent under PR-STV: Legislative Turnover in Ireland and Malta*, in ELECTIONS IN AUSTRALIA, IRELAND, AND MALTA UNDER THE SINGLE TRANSFERABLE VOTE 81, 87 (Shaun Bowler & Bernard Grofman eds., 2000).

<sup>188</sup> *Id.* at 88.

<sup>189</sup> *Id.* at 87.

<sup>190</sup> Colin Hughes, *STV in Australia*, in ELECTIONS IN AUSTRALIA, IRELAND, AND MALTA UNDER THE SINGLE TRANSFERABLE VOTE 155 (Shaun Bowler & Bernard Grofman eds., 2000).

<sup>191</sup> *Id.* at 159. Such a willingness to compromise in choice of candidates is another advantage brought about by the STV system.

<sup>192</sup> *Id.* at 162.

<sup>193</sup> *Id.* at 162.

<sup>194</sup> See BARBER, *supra* note 141 .

from which only a relatively small percentage of the vote is required for a candidate to be elected.<sup>196</sup> Districts still exist, but their size will be increased to account for the increased number of representatives from each district.<sup>197</sup> For example, if five members are elected from a district, one more than one-sixth of the votes cast will be enough to elect an individual member from that district.<sup>198</sup>

Upon entering the polling booth, the voter may rank as many candidates on the ballot as desired in order of preference.<sup>199</sup> Despite the ranking, each voter maintains a single vote—one which will only count toward a single candidate's tally.<sup>200</sup> Other than the ability to rank a voter's choices beyond simply voting for a preferred candidate, the voter's role does not become overly complicated.<sup>201</sup> That is, in order to vote, it is unnecessary to understand the formulas underlying the STV system,<sup>202</sup> just as many voters today vote in presidential elections despite confusion about the mechanics of the Electoral College.<sup>203</sup> In any event, a voter can certainly choose to understand the mechanics of the vote transfer if desired,<sup>204</sup> and as Thompson notes, "the possibility of voter confusion should not be invoked as a general objection to limiting choice."<sup>205</sup> Further, claims that the STV system is overly complex are generally unsupported in practice: in Cambridge, high turnout has been accompanied by a low level of soiled ballots (a level comparable to single member district voting systems in the United States).<sup>206</sup> In order to ensure that one's ballot is

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<sup>195</sup> See *infra* Part V.A.

<sup>196</sup> Richard Briffault, *Lani Guiner and The Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 435 (1995).

<sup>197</sup> See *infra* Part V.A for a discussion on how this will be accomplished in California.

<sup>198</sup> This takes into account the Droop quota, discussed *infra* Part III.B.

<sup>199</sup> Briffault, *supra* note 196, at 435.

<sup>200</sup> This is the "transferable" concept of STV. If one's first-choice candidate has no mathematical possibility of being elected, that vote transfers to the voter's second-choice candidate, and so on, until it helps a candidate become elected.

<sup>201</sup> As Akhil Reed Amar and Vikram David Amar explain regarding the complexity of the STV ballot: "When Americans go to the grocery store, they understand the second-choice concept: Get Ruffles, but if they are sold out, get Pringles. If Americans can handle this level of complexity as shoppers, why not as voters?" Amar & Amar, *supra* note 180.

<sup>202</sup> As Amy explains, voters "need only be able to accomplish such simple tasks as . . . ranking the candidates they prefer." AMY, *supra* note 132, at 189.

<sup>203</sup> In Presidential Elections using the Electoral College, voters are not directly voting for a candidate, but for an elector who will later elect the President. As one author notes, though, "[m]any states [ballots] even omit the wording about presidential electors altogether, so that the voters, unless they are well versed politically, have no way of knowing that they are actually voting for presidential electors rather than directly for president and vice president." GEORGE C. EDWARDS, III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 8 (2004).

<sup>204</sup> The specifics of the vote transfer are discussed *infra* in the next paragraph.

<sup>205</sup> THOMPSON, *supra* note 2, at 74. Though Thompson is referring to the debate regarding anti-fusion laws, the argument remains the same under STV, which will provide voters with more choices with a slight increase in risk of voter confusion. As Thompson notes, "if voters are provided with adequate information," which includes "clear instructions, a well-designed ballot, and reliable guidance from election officials," voters "should be responsible for making their own decisions." *Id.*

<sup>206</sup> AMY, *supra* note 132, at 189.

counted, it is in the voter's best interest to rank more than a single candidate.<sup>207</sup> This does not have any negative impact on a voter's higher ranked preference.<sup>208</sup>

While the voting process is relatively simple, the challenge begins at the vote-counting stage. But computers have made this process much easier and more efficient: officials in Cambridge used to complete the process over the course of a week,<sup>209</sup> but today, computers have allowed officials to complete the count and transfer "in a matter of seconds."<sup>210</sup> Similarly, this computer-based system allows for transparency—voters can see exactly how many votes were transferred to a particular candidate at each "count," bolstering voter confidence in the system. Of course, this system would require capable computer voting systems in all precincts conducting California's legislative elections. Before the counting begins, a quota must be established to determine the minimum number of first-choice (or later, transferred) votes a candidate must receive in order to be elected. While there are several ways that have been proposed to accomplish this,<sup>211</sup> Cambridge employs the "Droop quota,"<sup>212</sup> originally devised by H.R. Droop and later adopted by Hare.<sup>213</sup> The Droop quota ensures that the number of candidates who can attain the quota and be elected matches exactly the number of open offices. Under the Droop quota, the total number of valid ballots cast is divided by the number of seats available plus one; the result of this quotient plus one is the remaining quota.<sup>214</sup> For example, if 25,000 ballots are cast for nine seats the quota would be 2501; or 25,000 divided by ten (nine plus one), plus one.<sup>215</sup>

Once a quota has been determined, the process of counting (and later, transferring) votes can begin.<sup>216</sup> First, all votes must be sorted according to their first-choice preferences, and all candidates who reach the quota are deemed elected.<sup>217</sup> Undoubtedly, candidates that reach the quota will go above the quota, and thus begins the process of "transferring" votes. For example, if Candidate A receives 3000 first place votes in the above

<sup>207</sup> O'Neill, *supra* note 144, at 376.

<sup>208</sup> *Misunderstandings About Choice Voting*, FAIRVOTE.ORG,

<http://archive.fairvote.org/factsheets/choiceemndrstngs.htm> (last visited Mar. 1, 2011).

<sup>209</sup> *The Computerized Tabulation Process*, CITY OF CAMBRIDGE: ELECTION COMMISSION, [http://www.cambridgema.gov/election/computerized\\_tabulation.cfm](http://www.cambridgema.gov/election/computerized_tabulation.cfm) (last visited Mar. 1, 2011).

<sup>210</sup> *Id.*

<sup>211</sup> For a brief discussion of some of the methods available, see AMY, *supra* note 132, at 259–62.

<sup>212</sup> *Proportional Representation*, CITY OF CAMBRIDGE: ELECTION COMMISSION,

[http://www.cambridgema.gov/election/proportional\\_representation2.cfm](http://www.cambridgema.gov/election/proportional_representation2.cfm) (last visited Mar. 1, 2011).

<sup>213</sup> THOMAS HARE, *THE ELECTION OF REPRESENTATIVES, PARLIAMENTARY AND MUNICIPAL: A TREATISE* 305, (Longmans, Green, Reader, & Dyer, 4th ed., 1873).

<sup>214</sup> The formula is ((total number of votes cast)/(number of seats available +1)) + 1. See *Proportional Representation*, *supra* note 212.

<sup>215</sup> This example is derived from the Cambridge City Council Website's example. *Id.*

<sup>216</sup> See *supra* notes 209, 212.

<sup>217</sup> AMY, *supra* note 132, at 263.

scheme, then Candidate A will have 499 votes in excess of the quota. Thus, 499 votes from candidate A will be redistributed to the second-place choices on those ballots. While there are several methods to redistribute ballots, Cambridge employs the “Cincinnati Method”<sup>218</sup> to ensure a random sample of ballots from the surplus is transferred to their second-choice candidate. Amy proposes an alternative, more representative solution: transfer all the ballots “at a fraction of their value.”<sup>219</sup> Thus, if of the 3000 ballots that rank candidate A as first-choice, 2000 list Candidate B as second-choice and 1000 list Candidate C as second-choice, two-thirds of the surplus will go to candidate B and one-third to Candidate C (to the nearest whole number). Here, 333 of the surplus votes are transferred to Candidate B and 166 votes are transferred to Candidate C. The surplus votes that a candidate receives are added to their first-choice votes in a second attempt to reach the quota. If during this second count, no candidates receive the quota, the candidate who has received the lowest total of votes is eliminated, and that candidate’s votes are similarly transferred using the above method. This process repeats until all the seats are filled—when each candidate receives the quota or when the number of candidates remaining (or, have not been eliminated) is equal to the number of seats available.<sup>220</sup>

#### IV. WHY STV FOR CALIFORNIA?

Proportional Representation is a concept that is generally foreign to United States elections, but scholars have debated its advantages for several decades. Of course, there are several different types of PR and the merits of each are constantly being debated. The Party List method, among the most common PR systems used in the world today, allows voters to merely choose a party at the polls; depending on what percentage of the vote each party receives, a ranked-list (created by each party) is used to allocate seats

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<sup>218</sup> Under the Cincinnati method, each ballot indicating as its first choice the candidate who has the surplus is “numbered sequentially in the order in which they have been counted . . . and then every *n*th ballot is drawn and transferred to a continuing candidate.” *N* is the nearest whole number computed by the formula Total Number of votes received by the candidate divided by the surplus number of votes received. This is done to ensure that a random sample of ballots are transferred. *Cincinnati Method*, CITY OF CAMBRIDGE: ELECTION COMMISSION, [http://www.cambridgema.gov/election/cincinnati\\_method.cfm](http://www.cambridgema.gov/election/cincinnati_method.cfm) (last visited Mar. 1, 2011). This system, however, greatly increases the probability of error, compared to Amy’s method, discussed *infra*.

<sup>219</sup> AMY, *supra* note 132, at 263. See also David M. Farrell & Ian McAllister, *Through a Glass Darkly: Understanding the World of STV*, in ELECTIONS IN AUSTRALIA, IRELAND, AND MALTA UNDER THE SINGLE TRANSFERABLE VOTE, *supra* note 134, at 17, 25–26 (explaining that this method is called the “Gregory Procedure” and is employed in Tasmania, the Australian Senate, and other Australian legislative elections).

<sup>220</sup> AMY, *supra* note 132, at 265.

to the legislature.<sup>221</sup> The Mixed-Member PR system, which allows for half the candidates to be elected from single-member districts and half from party lists, has gained increasing recognition as a possible compromise between the two systems.<sup>222</sup> Guiner gained national attention when she proposed that legislative elections ought to be conducted under a system of cumulative voting, in which a voter is given as many votes as there are seats to be filled from a multimember district.<sup>223</sup> These and the various other PR methods<sup>224</sup> each have their advantages and disadvantages, but a complete discussion of them is outside the scope of this Note.

The advantage of the switch to a PR system will not only have a profound effect on the way elections are conducted, but also will affect the resulting representative body. Guiner explains that while the basic “majority rule” structure in place today is efficient, Democracy in general suffers “when it is not constrained by the need to bargain with minority interests.”<sup>225</sup> In other words, the minority is left without much ability to hold the majority accountable, often leading to a situation where minority interests are underrepresented and such groups are left without their fair share of governmental support and benefits. In the California legislature, for example, where districts rarely, if ever, change party hands, there is essentially a group of “permanent losers” in each district, who could potentially “lack incentive to respect laws passed by the majority over their opposition.”<sup>226</sup> Similarly, PR recognizes that in the single-member district system, even though a group has a small majority across a number of districts, that majority group could potentially win most or all seats in a particular jurisdiction.<sup>227</sup> PR is designed to make this result impossible by

<sup>221</sup> Of countries that employ PR, 80 percent use the party list system. *Id.* at 18–19, 225 Each party creates a list of candidates equal to the number of seats available in the multimember district (for example, where five candidates are to be elected from a particular jurisdiction, the Democrats will present a list of five Democrats in the order in which the party would like the seats to be allocated). *Id.* Voters do not choose a candidate but rather select a party, and the percentage of votes received by each party will equate to the number of seats that party is given, using the ranked list as a way of selecting which candidates are to be elected. *Id.*

<sup>222</sup> Germany employs mixed-member PR. Voters cast votes on a “double ballot,” first for a district representative, which would fill half the legislature, then voters indicate their choice for a party, from which the party would fill the remaining half of the legislature, so that the ultimate number of representatives is proportionate to the percentage of votes each party receives. For example, for a one hundred-member legislature, if Democrats received 45 percent of the vote, but twenty-two Democrats were elected from the districts, then the party list would be used to elect twenty-three more Democrats. *Id.* at 20.

<sup>223</sup> Briffault, *supra* note 196, at 418–20. With their multiple votes, voters then can choose whether to cast all of their votes for a single candidate, to give a single vote to several different candidates, or some combination in between. *Id.* at 432. *See generally* GUINER, *supra* note 20.

<sup>224</sup> For a more detailed summary of several of the various electoral systems, including those that do not involve PR, see O’Neill, *supra* note 144, at 332–37.

<sup>225</sup> GUINER, *supra* note 20, at 9.

<sup>226</sup> *Id.* at 10.

<sup>227</sup> Joseph F. Zimmerman, *Enhancing Representational Equity in Cities*, in UNITED STATES ELECTORAL SYSTEMS: THEIR IMPACT ON WOMEN AND MINORITIES 209, 215 (Wilma Rule & Joseph F. Zimmerman, eds., 1992). The author gives an example, explaining that after STV was abandoned in New York,

ensuring at least some level of representation to the minority.<sup>228</sup> Commentators suggest that voters must understand that the various forms of PR “are all vastly superior to single-member plurality elections” because they minimize wasted votes, give minor parties and minority groups fair representation, broaden political debate, increase voter participation, and ultimately render our government more responsive and democratic.<sup>229</sup> In short, PR allows more people to have their voices heard (and, hopefully, listened to) by their elected officials.

STV provides more competition than similar PR systems by focusing on the candidate instead of on the party. That is, where Party List and, to a lesser extent, Mixed-Member systems induce voters to vote merely for a party—allowing the party to pick the order by which candidates are elected from pre-made lists—STV allows voters to pick their favorite candidate individually. A voter’s options are not limited by the party of the candidate; STV leaves voters “free to choose a neighborhood representative *or* one who shares their political party, ethnicity, race, or gender.”<sup>230</sup> In other words, “STV allows voters to choose both between and within parties and so reflects a diversity of opinions within society,”<sup>231</sup> ultimately giving voters greater discretion than the party has over their selected candidate. However, some worry that this creates “incentives for candidates from the same party to try to do each other down in the interests of winning.”<sup>232</sup> The concern is that candidates will campaign against each other for votes. Such concerns, however, have not played out in the countries that have adopted STV.<sup>233</sup>

Under this system, the premise is that all interested voters deserve a determinative voice in the system, whereas in FPTP, the majority party tends to have the only voice through the election of its sole representative.<sup>234</sup> Another substantial advantage of STV is that most ballots, either by first-choice votes or by transfer, help to directly elect a candidate. In a single-member district, only those who voted for the single winning candidate contribute to electing the candidate (and this could be even less than 50 percent where a candidate is elected by a mere plurality), whereas an STV district provides many more voters with the opportunity to all have

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“Democrats won [twenty-four] of the [twenty-five] city council seats in 1949, although they polled only 52.6 percent of the votes cast. Had PR been in effect, the party division would have been [thirteen] Democrats, six Republicans, three Liberals, and three American Labor Party members.” *Id.*

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

<sup>229</sup> AMY, *supra* note 132, at 234.

<sup>230</sup> Barber, *supra* note 141, at xiii (emphasis added).

<sup>231</sup> Bowler & Grofman, *supra* note 134, at 6.

<sup>232</sup> *Id.* at 9.

<sup>233</sup> *Id.* at 10.

<sup>234</sup> BARBER, *supra* note 141, at 73.

their votes truly “count” in the election. Because voters know their vote will indeed make a difference, they have a greater incentive to participate in more elections.<sup>235</sup> Furthermore, when a voter’s first-choice candidate has already achieved enough votes to become elected (the quota), rather than “waste” that voter’s vote, STV transfers the vote to that voter’s second- or even third-choice to maximize a voter’s voice in the process.<sup>236</sup>

## V. APPLYING STV TO THE CALIFORNIA LEGISLATURE

### A. MULTIMEMBER DISTRICTS SHOULD REPLACE THE CURRENT SINGLE-MEMBER DISTRICT REGIME, AND THE CRC SHOULD DRAW THE LINES

Hare and Mill initially intended for STV to be applied at the national level without districts,<sup>237</sup> essentially creating one at-large election whereby any citizen can vote for any candidate running for the House of Representatives across the entire country. Mill, in his defense of Hare’s system, expressed confusion about “why the feelings and interests which arrange mankind according to localities, should be the only one thought worthy of being represented.”<sup>238</sup> Despite the merits of this sentiment, such a structure would lead to unmanageable elections that present voters with a ballot of thousands of candidates. A better solution is to continue to use “locality” as the baseline for elections in order to limit the number of candidates who would appear on any ballot, and also to increase the size of that locality so the voters’ options increase and are not merely tied to a single-member district.

One commentator suggests that Hare’s STV system was merely one that was “waiting for the Internet to be invented,”<sup>239</sup> because groups sharing common interests and supporting common candidates across larger jurisdictions can more easily mobilize than ever before. Some scholars argue that the location of district lines should matter less in the “age of the online,” as the Internet has decreased the importance of geographical proximity when it comes to individuals’ sense of community.<sup>240</sup>

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<sup>235</sup> A study concluded that Cambridge, Massachusetts, a city which employs STV in its municipal elections, had the “least decline” in its voter turnout rates amongst similarly situated Massachusetts cities over the course of three decades (1960s–1980s), a period where voter turnout decreased drastically across the country. George Pillsbury, *Preference Voting and Voter Turnout: The Case of Cambridge, MA*, FAIRVOTE.ORG, <http://archive.fairvote.org/?page=254> (last visited Mar. 1, 2011). The author concluded that its system of proportional representation was the main reason. *Id.*

<sup>236</sup> BARBER, *supra* note 141, at 73.

<sup>237</sup> See MILL, *supra* note 21.

<sup>238</sup> *Id.* at 62.

<sup>239</sup> Hughes, *supra* note 190, at 176.

<sup>240</sup> Eben Moglen & Pamela S. Karlan, *Symposium: The Soul of a New Political Machine: The Online, the Color Line, and Electronic Democracy*, 34 LOY. L.A. L. REV. 1089, 1099 (2001) (explaining that in

Accordingly, voters in a multimember district are given more choice and can align their votes with any number of preferences the voter considers valuable: stance on a particular set of issues, gender, ethnicity, political party, and many others.<sup>241</sup> However, because locality is still important for reasons of accessibility, convenience, and accountability to the people, this proposed system employs larger multimember districts where a more proportional group of legislators can be elected from each district, while still allowing for reasonable elections to be conducted.<sup>242</sup>

Some argue that multimember districts could be used to further discriminate against minorities (perhaps, by using the same gerrymandering techniques employed in single-member districts).<sup>243</sup> While the single-member district regime can be easily maneuvered to minority groups' disadvantage, STV, through multimember districts, allows for such minority groups to gain legislative seats even with a relatively small proportion of the vote. Thus, while the line-drawing function may still be subject to certain biases (such as ensuring that certain minority groups have fewer than the necessary quota of supporters in a particular multimember district), the biases are substantially less when compared to the single-member district line-drawing function. By lowering the thresholds required to elect a candidate and increasing the pool of potential voters, it simply becomes more difficult to employ gerrymandering techniques effectively. Just as some argue that district lines are less important in the Internet age,<sup>244</sup> "[m]ultimember districts would reduce the importance of boundaries and thereby the incentive for political actors to manipulate the line-drawing process to serve their own interests."<sup>245</sup>

Even so, this Note suggests that the Citizens Redistricting Commission should draw the lines for the multimember districts to eliminate whatever bias may be left in this system. Because an independent redistricting committee is less likely to draw lines in a self-interested way than legislators themselves, it makes sense to have allocated that task to the CRC. Because STV provides for a more competitive election due to increased voter choice and a higher proportion of voters with determinative votes, the CRC's stated goals of compactness (albeit, on a larger scale), geographic contiguity, and respect for geographic integrity of cities and

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today's society people "may become more skeptical of the idea that political representation ought to be organized invariably along geographical lines").

<sup>241</sup> See Zimmerman, *supra* note 227.

<sup>242</sup> See BARBER, *supra* note 141, at 13 (discussing the addition of the idea of multimember districts to STV elections).

<sup>243</sup> THOMPSON, *supra* note 2, at 146 (explaining opponents' arguments to the use of the multimember district).

<sup>244</sup> Moglen & Karlan, *supra* note 240, at 1099.

<sup>245</sup> Mann, *supra* note 35, at 95.

counties should remain intact. While a single-member redistricting scheme should probably care for communities of interest in an attempt to give these groups better representation, multimember districts will often create these communities of interest on their own, as voters in the larger district can align themselves with their candidate of choice based on such common interests. Thus, by increasing the number of voters in each district and decreasing the threshold required to elect a candidate, more communities of interest will be created and given a chance to elect a representative, and the district-drawing criteria need not set “respecting communities of interest” as a goal under this system. Therefore, the CRC, by following these very basic guidelines and drawing fair multimember districts, could be the first step toward implementing STV in California.

#### B. HOW AN STV ELECTION WOULD WORK IN CALIFORNIA

Under the current FPTP system, voters have a choice of which candidate to place an “X” next to on the ballot. After all the X’s are tallied, one candidate emerges victorious (either by achieving a majority or, at least, a plurality of votes) as the representative of a district of voters organized by where those voters reside. Under an STV system, voters would still be armed with a single vote; however, voters would have a larger body of candidates from which to choose, as well as a higher probability of electing the candidate of their choice due to a lower threshold requirement.

Past experience with STV suggests that in order to get a truly representative body, “district magnitude needs to be at least five members to ensure a proportional result.”<sup>246</sup> This proposal calls for the current California legislature to be divided into districts of five members each: the eighty districts of the Assembly will become sixteen five-member districts, and the forty districts of the Senate will become eight five-member districts. While districting (and thus, gerrymandering) will still exist, they will have less of an impact in a system that employs both the CRC and larger districts. This, along with the substantive criteria that the CRC used to draw the lines described above,<sup>247</sup> should result in something equivalent to combining five of the current geographically based districts into several larger districts, thus maintaining some of “locality” and contiguity aspects. This Note does not suggest a particular map, but instead argues that the districts be drawn as larger five-member districts roughly equal in population, as required by the Supreme Court.<sup>248</sup>

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<sup>246</sup> Farrell & McAllister, *supra* note 219, at 22.

<sup>247</sup> CAL. CONST. art. XXI, § 2(d).

<sup>248</sup> See *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

Consider a hypothetical California election under this STV system.<sup>249</sup> Sixteen five-member districts will elect the eighty Assembly members and eight five-member districts will elect the forty Senators. Just like FPTP elections, a voter in Assembly District 1 will face a ballot full of candidates for one of five slots in Assembly District 1, and a voter in Senate District 1 will face a ballot full of candidates for one of five slots in Senate District 1. That voter will likely be presented with a larger list of candidates than under the current scheme because the candidates running for five current districts would be consolidated onto a single multimember district's ballot.<sup>250</sup> Then, the voter will rank as many candidates as desired for each office. Based on the use of the Droop quota, a candidate is elected upon attaining one-sixth plus one of the total votes cast.<sup>251</sup> Of course, through the transfer of votes, a candidate need not receive this many first-choice votes—the quota must be achieved after the requisite number of votes have been transferred to that candidate.

### C. STV WOULD ACCOMPLISH THE GOALS OF AN INDEPENDENT REDISTRICTING COMMISSION BETTER THAN THE COMMISSION

The main purpose of creating the CRC was to eliminate the conflict of interest problem that legislators face when drawing district lines.<sup>252</sup> When politicians are no longer able to ensure themselves safe seats, voters can look forward to a more “independently” drawn district, which would ideally lead to less polarized districts and hence, more competitive elections. By increasing competition, more voters would believe that their voice matters, and ideally would go to the polls in higher numbers, providing a more meaningful vote. In reality, the lack of independence observed in similar commissions, coupled with the high cost and lengthy judicial battles over district lines suggest that these goals may not be accomplished as planned with the creation of the CRC. Additionally, it is unclear whether the creation of competitive seats was even the explicit goal of the CRC, and if it was, it is uncertain that such districts can be drawn in California's current political climate.<sup>253</sup> Thus, perhaps the problem is

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<sup>249</sup> For a sample chart showing how votes would be transferred in an STV election, see AMY, *supra* note 132, at 265. Keep in mind that while the transfer is a bit complicated, computers are equipped to complete the task “in a matter of minutes.” See source cited, *supra* note 209.

<sup>250</sup> Though there has been no strong evidence of voter confusion in Cambridge, it is conceded that a significantly longer list of names on the ballot could possibly confuse some voters. In San Francisco, initial use of IRV did cause some confusion. See *City's Voting System Tricky but Successful*, S.F. EXAMINER, Nov. 3, 2004.

<sup>251</sup> For example, if 600,000 votes are cast, the quota is calculated by dividing 600,000 by six (five plus one) plus one. The result is that 100,001 votes, or one more total vote than one-sixth of the total number, are needed to achieve the quota.

<sup>252</sup> See *supra* Part II.B.

<sup>253</sup> McGhee, *supra* note 104.

inherent in the single-member district regime. Although certainly a more drastic proposal, a switch to STV elections in the California legislature would address—and could accomplish—the same political goals the CRC is meant to achieve.

In an STV election for the California legislature, more candidates would be on the ballot because there would be more seats available. The diversity among the candidates<sup>254</sup> (both within parties and among the different parties)<sup>255</sup> would be highlighted, giving voters more of a choice: vote the party line, or vote according to some other common interest shared by a particular candidate. In a winner-take-all election, most equate these “common interest” candidates with “wasted votes” because they are not likely to achieve a majority, or even plurality, of votes. Knowing this, some voters are put in a tricky spot: use the ballot to vote for the candidate of choice despite knowing that candidate is a “sure loser,” thereby literally wasting the vote, or not vote for the candidate of choice, thereby not expressing one’s true preference. STV elections provide an alternative for these voters: they may rank their first-choice candidate first (and if lucky enough to gather the necessary quota, elect that candidate) and may rank the more popular candidate second. That is, even if a voter fully supports minor party Candidate A, who has a minimal chance of winning, that voter can rank as second-choice more popular Candidate B, who has a higher probability of winning. That voter’s vote will first be tallied toward Candidate A, and only when it is impossible for Candidate A to be elected will Candidate B receive that vote, thereby not wasting the vote. No matter which candidate is elected, the voter’s preferences are adequately expressed (via the first-choice vote), even if that vote eventually gets transferred to Candidate B. Past experience with the system suggests that almost all voters will likely have one of their votes count toward the election of one of their highly-ranked candidates.<sup>256</sup> Ideally, candidates representing several diverse interests will be elected to help diversify the legislature and increase the number of opinions presented there.

A voter’s representative is the highest ranked candidate on the voter’s ballot who is ultimately elected. This creates a situation where a legislator

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<sup>254</sup> For example, in the 1989 New York City school board elections conducted using STV, 54 percent of those elected were women and 47 percent of those elected were minorities. Leon Weaver & Judith Baum, *Proportional Representation on New York City Community School Boards*, in UNITED STATES ELECTORAL SYSTEMS: THEIR IMPACT ON WOMEN AND MINORITIES, *supra* note 227, at 197, 203.

<sup>255</sup> Bowler and Grofman, *supra* note 134.

<sup>256</sup> In Cambridge, a study conducted between 1991–2007 suggested that 90 percent of voters elected either their first- or second-choice, a number that will leave a significantly greater amount of people being “represented” by a candidate they voted for than in a winner-take-all system. *Voter Satisfaction in Cambridge: 1991–2007*, FAIRVOTE.ORG, <http://archive.fairvote.org/index.php?page=2488> (last visited Mar. 1, 2011).

becomes a representative to a constituency full of supporters, and, because more voters' voices count, a greater proportion of voters have an individual representative with whom they agree and to whom they can voice their concerns. That is, legislators will both represent a geographic district and, within that district, specifically look out for the interests of those supporters who were instrumental in electing the legislator to office. Though Candidate A may not be elected, the voter avoids having wasted a vote, is represented by second-choice Candidate B, and is encouraged to turnout in the next election.

Some have worried that the switch to PR could threaten the two-party system, which is stabilized by the current FPTP system and has become commonplace in the United States.<sup>257</sup> While the two-party FPTP system may perpetuate stability, it does so at the expense of minority perspectives. Nevertheless, FPTP has been valued highly by the courts,<sup>258</sup> suggesting that a system which may threaten it could be problematic for STV supporters. Undoubtedly, an STV system will elect its fair share of majority-perspective candidates, but it will also bring different perspectives to the legislature, especially at a time in the state's history when such perspectives are needed. Furthermore, it is possible that the STV system will not be as "destabilizing" as its detractors expect: as Guiner explains, "multiple, cross-cutting cleavages are more stabilizing than permanent, deep cleavages because the former better realize the majority rule assumption that shifting alliances are a check against the tyranny of the majority."<sup>259</sup>

Moreover, although some may fear that STV could allow extreme candidates to be elected, those extreme candidates who emerge victorious would make up a small minority in the legislature. Their opinion could then be heard, though not necessarily implemented. Rather, because those outlying interests are still represented in the legislature, whereas they were not before, this creates an incentive for such groups to work within the political process and begin to compromise: a more satisfactory result for a greater number of citizens. That is, such diverse representation "may improve the collective decision-making process by promoting open discussion among a diverse set of participants and by encouraging strategies of negotiation and coalition-building."<sup>260</sup> On the other hand, though, past experience with this, such as in New York City in the 1930s

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<sup>257</sup> See, e.g., Arend Lijphart & Bernard Grofman, *Choosing an Electoral System*, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 3, 5 (Arend Lijphart & Bernard Grofman eds., 1984).

<sup>258</sup> See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding as constitutional Minnesota's anti-fusion law disallowing minor parties to list major party candidates as their own candidate, thereby further burdening third parties in favor of a more stable two-party regime).

<sup>259</sup> GUINER, *supra* note 20, at 111.

<sup>260</sup> *Id.*

with the scare of Communist influences,<sup>261</sup> suggests that such extreme voices are not always welcome in the legislative body, and this may be a problem if STV is adopted.

With an increased number of choices, elections are more competitive for all parties involved—even minority racial, ethnic, gender, or interest groups—because with more slots available, each group only has to achieve a relatively low threshold to elect their choice candidate.<sup>262</sup> Additionally, these minority groups are encouraged to campaign more generally, because even a second- or third-choice ballot ranking could be beneficial. This might even lead to an increase in coalition building among the candidates during the election cycle; Candidate B can urge potential voters to “make me your second choice behind Candidate A,” because such votes could ultimately be beneficial to Candidate B. This may facilitate even further compromise, increased representation for minority viewpoints, and decreased legislative polarization, as Candidate B is willing to support a Candidate A policy to gain second-choice votes from Candidate A supporters.

Despite potential fears, it is unlikely that such a ranking system will confuse voters. For example, if the 2000 presidential election had been conducted under IRV,<sup>263</sup> former Vice President Al Gore could have asked Ralph Nader supporters to rank him second in exchange for supporting some policy they supported. When Nader was eliminated, his votes would have transferred to Gore, and Gore could have won the election. Finally, by reducing the effects of “safe districts” created by gerrymandering, more voters will be encouraged to express their opinions at the polls, and thus competition within each multimember district is further increased. Whereas numerous voters are “completely shut out” of the process in the FPTP system,<sup>264</sup> STV’s tendency to increase competition may lead to increased voter turnout.<sup>265</sup>

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<sup>261</sup> See *supra* note 158 and accompanying text.

<sup>262</sup> See AMY, *supra* note 132, at 159.

<sup>263</sup> This concept was discussed *supra* note 178.

<sup>264</sup> Voters FIRST Act, *supra* note 75, §2(c).

<sup>265</sup> For example, during the thirty-four years in which STV was employed in Cincinnati, turnout averaged 62.4 percent of registered voters. BARBER, *supra* note 141, at 104. In certain Canadian municipalities that experimented with STV in the early twentieth century, a “slight upward trend in voter turnout over the period appears . . . seem[ing] to give some credence to the claim that . . . [STV] makes electoral competitions more meaningful because votes cast for more marginal candidates are not perceived as wasted votes.” J. Paul Johnston & Miriam Koene, *Learning History’s Lessons Anew: The Use of STV in Canadian Municipal Elections*, in ELECTIONS IN AUSTRALIA, IRELAND, AND MALTA UNDER THE SINGLE TRANSFERABLE VOTE, *supra* note 134, at 205, 243. It should be noted, however, that numerous other variables are considered to affect voter turnout, including education levels, income levels, type of election, and several other unrelated factors. For a general discussion of these effects, see AMY, *supra* note 132, at 151–66.

#### D. POTENTIAL CALIFORNIA CONSTITUTIONAL HURDLES FOR STV TO BE IMPLEMENTED

Although this Note does not fully address the process that would be required to put STV into operation, a few potential hurdles to its implementation should be mentioned here. First, for legislative elections, the California Constitution calls for the use of single-member districts.<sup>266</sup> However, because the benefits of the multimember district system could increase levels of fair representation, the time may be ripe for Californians to amend this constitutional provision, likely by a ballot initiative.<sup>267</sup> Just as the creation of the independent redistricting committee was not supported by many legislators, the switch to STV likely will also lack support from legislators who fear losing their seats under such a system. Thus, it is more likely that the change would have to be effected by the people through a ballot initiative process like Proposition 11.

Even if an initiative instating STV is approved by voters, there is no guarantee that the courts would uphold the use of the system. As discussed, the California Court of Appeals held the use of STV for city council elections unconstitutional because it prohibited voters from voting “at all elections,” and that case remains good law.<sup>268</sup> But because STV would still allow for an individual to be represented by a single legislator, a court today would probably find that STV passes constitutional muster. Also, in both STV and FPTP elections, a vote still counts toward a single representative. Furthermore, because the *Elkus* decision concerned city council elections, its applicability to state legislative elections is questionable.

Other challenges, however, will likely be brought by the system’s opponents, including those who feel that their vote has been diluted by the switch from FPTP to STV. Such opponents may have the court’s sympathy: especially in the wake of the 2000 election, many courts have been reluctant to embrace unusual election arrangements, including those that promote minority representation<sup>269</sup> and potentially threaten the two-party system.<sup>270</sup> Further, as Elizabeth Garrett, professor of law, political science,

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<sup>266</sup> CAL. CONST. art IV, § 6.

<sup>267</sup> The California Constitution provides that the constitution can be amended by popular initiative. CAL. CONST. art. XVIII, §§ 3–4.

<sup>268</sup> *People ex rel. Devine v. Elkus*, 211 P. 34, 39 (Cal. Ct. App. 1922). This case was discussed *supra* Part III.A.2.

<sup>269</sup> *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding as constitutional Minnesota’s anti-fusion law disallowing minor parties to list major party candidates as their own candidate, thereby further burdening third parties in favor of a more stable two-party regime).

<sup>270</sup> See, e.g., Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 714–15 (2001) (arguing that the recent cases are often decided by judges based on their “cultural” views that Democracy requires “judicially-ensured order, stability, and certainty”).

and policy at the University of Southern California Gould School of Law, notes, justices' varying visions of how Democracy ought to function could hurt an experimental system's chances of being upheld by the courts.<sup>271</sup> Garrett suggests that in deciding such cases, "judges are very likely to rely on their own views of the best governance structures for a stable democracy." Justice Frankfurter once equated these decisions with the Court having to choose "among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government."<sup>272</sup> Without sufficient experience under STV, judges are likely to be skeptical of a scheme with such a view and the potential to disrupt the stability of the bipartisan American political system. Of course, the question that a judge would have to answer in a challenge to STV is whether adequate representation for minorities and increased electoral fairness outweighs such concerns.

## VI. CONCLUSION

California is facing some of the most serious problems in its history. A lack of competitive elections, which has increased polarization in the legislature, underrepresentation of minority groups, and voter disinterest and frustration have worsened the already pressing state problems. Voters recognized the need to effect change at the ground level and altered the electoral system through the passage of Proposition 11 in 2008 to create the California CRC, and expanded the commission's power with the passage of Proposition 20 in 2010. Though the idea of an independent commission to draw district lines is a step in the right direction toward combating uncompetitive elections, an analysis of other states' use of similar commissions suggests that they may not be as effective as California's reformers hoped. Lacking true independence and stirring lengthy and expensive litigation, commission-drawn lines typically leave numerous political and social groups upset with the result and tend to have little effect on minority group representation.

Due to the severity of California's problems, the state appears ripe for a more robust change. By switching to a proportional representation system which employs the single transferable vote to elect the state's legislators, the goal of competitive elections and ultimately a more representative

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<sup>271</sup> Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 131 (2002). Garrett continues: "This means that one contested view of the role of political parties in a democracy is constitutionalized, thereby eliminating the opportunity for states and the federal government to experiment over time with other democratic forms." *Id.*

<sup>272</sup> *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

legislature may more readily be achieved. Using multimember districts will allow for more votes to be determinative in legislative elections and decrease the importance of where district lines are drawn. Although it is possible that certain California constitutional hurdles must be overcome to proceed with such a system, there may be no better time for California to experiment with an alternative electoral scheme like STV, especially when the current system is broken.