



11-1-2008

Proposition 11: Redistricting. Initiative Constitutional Amendment and Statute.

Jeffery Grant

University of the Pacific, McGeorge School of Law

Luke Vanderwagen

University of the Pacific, McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/california-initiative-review>



Part of the [Legislation Commons](#)

Recommended Citation

Grant, Jeffery and Vanderwagen, Luke (2008) "Proposition 11: Redistricting. Initiative Constitutional Amendment and Statute.," *California Initiative Review (CIR)*: Vol. 2008 , Article 11.

Available at: <https://scholarlycommons.pacific.edu/california-initiative-review/vol2008/iss2/11>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in California Initiative Review (CIR) by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

California Initiative Review

Proposition 11: Redistricting. Initiative Constitutional Amendment and Statute.

Copyright © 2008 by University of the Pacific
McGeorge School of Law

By

Jeffrey Grant

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2009
B.A., Business Administration and History, Walla Walla University, 2006*

and

Luke Vanderwagen

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2009
B.S., Political Science, The University of San Diego, 2004*

Analysis of Proposition 11
Table of Contents

I. Executive Summary.....	1
II. The Law.....	1
A. California Redistricting Initiative History	1
B. Existing Law	4
1. Federal Law	4
a. United States Constitution.....	4
b. Federal Voting Rights Act	4
2. Current California Law	5
3. Current California Redistricting Procedure	6
C. Proposed Changes	6
1. Citizens Redistricting Commission.....	6
2. Proposition 11’s Requirements for Drawing Political Districts	7
III. Drafting Issues	8
IV. Constitutional Issues.....	9
A. Federal Constitutional Issues and Statutory Issues	9
B. State Constitutional Issues	10
V. Financial Support	11
VI. Public Policy Considerations.....	12
A. Proponents Arguments in Favor	12
B. Opponents Arguments Against	13
C. Public Policy Institute of California Report.....	15
VII. Conclusion.....	15

I. Executive Summary

Since 1982, California voters have rejected five redistricting initiatives. Four of these initiatives would have taken the task of redistricting out of the legislature and placed it with a redistricting commission. Proponents of redistricting reform have attempted to create redistricting commissions composed of retired state judges, citizens, or a mix of legislators and citizens. Proposition 11 is another redistricting initiative. It proposes to amend Article XXI of the California Constitution as well as portions of the California Government Code to create a multi-partisan redistricting commission composed of ordinary citizens.

Proposition 11, which is also referred to as the “Voters FIRST Act,” envisions a “Citizens Redistricting Commission” (“Commission”) responsible for State Senate, Assembly and Board of Equalization redistricting each year following the decennial national census. The proposed Commission would ultimately be composed of five members of the state’s largest political party, five members of the second largest political party, and four members not registered with either of the two largest political parties. Significantly, under the proposed plan the legislature would continue to draw congressional districts.

Proposition 11 also seeks to establish additional criteria that must be considered when redistricting. New criteria proposed under Proposition 11 include “community of interest” and “geographical compactness” requirements, as well as, a mandate that district maps not be purposefully drawn to favor candidates or parties. Under the proposed changes the legislature will also be required to account for “community of interest” and “geographical compactness” when adjusting congressional boundary lines.

II. The Law

A. California Redistricting Initiative History

Californians have voted on several redistricting initiatives. Since the 1980s, these initiatives have generally been driven by negative reactions to perceived flaws in legislative redistricting. In 1981, the Democratically controlled legislature successfully passed reapportionment statutes that were immediately met with opposition from Republicans. The Republicans viewed the statutes as a gerrymander intended to solidify Democratic control of the legislature. *See*, Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & Pol. 331, 360 (2007); Alan Heslop, *Claremont McKenna College, Rose Institute, Redistricting Reform in California 1*, http://rose.claremontmckenna.edu/publications/pdf/conf_redistricting_paper.pdf (last accessed September 12, 2008). In an attempt to invalidate the reapportionment statutes, the California Republican Party and a coalition of allies successfully qualified several referenda for the ballot. However, various members of the Assembly brought suit to fight the referenda. Ultimately, the California Supreme Court ruled that because the referenda would result in the usage of district lines drawn in 1972 thereby violating federal law, the candidates would have to run in the districts created by 1981 reapportionment statutes. *See, Assembly of State of Cal. v. Deukmejian*,

30 Cal.3d 638, 661-662 (Cal. 1982). The following year, Proposition 14 (1982) was placed before California voters in an attempt to permanently undo the 1981 reapportionment statutes. Stephanopoulos, 23 J.L. & Pol. at 360.

Proposition 14 (1982) called for a 10 member redistricting commission composed of legislators and citizens with 4 members appointed by Assembly and Senate party caucuses, 2 members appointed by the two major parties' chairpersons, and 4 members appointed by senior state appellate judges. *Id.* The commission's plans were to be put into effect on October 1, 1983. Heslop, *supra*, at 1-2. However, Proposition 14 failed, receiving only 45.5% "yes" votes. *Id.* Later in 1982, the legislature passed a reapportionment plan similar to the one that had led to the 1982 referendum and Proposition 14 (1982). Stephanopoulos, 23 J.L. & Pol. at 362. This led to another redistricting reform effort, the "Sebastiani Plan," which was to be placed on the ballot for a December 1983 vote. *Id.* at 362-363. The Sebastiani Plan would have placed redistricting maps before the voters, but was excluded from the ballot by the California Supreme Court. *California v. Deukmejian*, 34 Cal.3d 658, 664-665 (1983). The Court ruled that the Sebastiani Plan violated the California Constitution because it unlawfully attempted to redistrict more than once in a decennial period. *Id.*

Not to be deterred, opponents of Prop 14 qualified Proposition 39 for the 1984 ballot. Similar to Proposition 14 (1982), Proposition 39 (1984) would have also created a redistricting commission. In contrast though, this commission was to be composed of 8 retired state appellate judges responsible for drawing maps based on competitiveness, compactness, contiguity, and equipopulation. Stephanopoulos, 23 J.L. & Pol. at 363. Proposition 39 (1984) required that the maps then be submitted to voters in a statewide referendum. *Id.* Proposition 39 (1984) also failed to pass, garnering only 44.8% "yes" votes. Heslop, *supra*, at 3.

The 1990 federal census and consequent 1991 reapportionment plan brought renewed interest in redistricting. In 1990 two redistricting initiatives, Proposition 118 and Proposition 119, were placed on the ballot but rejected by voters. Proposition 118 (1990) was concerned with redistricting reform, but did not seek to divest the legislature of the task of drawing district boundaries. *See*, Stephanopoulos, 23 J.L. & Pol. at 365. Instead, Proposition 118 (1990) sought to restrict the legislature to detailed criteria such as requiring that both the Senate and Assembly adopt proposed plans by a two-thirds vote, and subjecting redistricting statutes to voter approval in the next statewide election. Heslop, *supra*, at 3. Californians rejected Proposition 118 (1990) with 67% of those voting on the initiative casting a "no" vote. *Id.* at 5.

Proposition 119 (1990) sought to create a redistricting commission selected by a panel of three retired appellate judges from a group nominated by non-partisan and non-profit state organizations. Elizabeth Garrett, *University of Southern California, Initiative & Referendum Institute, Redistricting: Another California Revolution?* 6, <http://www.iandrinstute.org/REPORT%202005-1%20Redistricting.pdf> (Feb. 2008). The commission would have consisted of five Democrats, five Republicans, and two independents. *Id.* The commission would not have drawn the maps, but would have chosen from plans submitted to it based on several criteria. Stephanopoulos, 23 J.L. & Pol. at 366. This initiative also failed to pass with 64% of the voters casting "no" votes. Garrett, *supra*, at 6.

In 1991, the Democratic legislature and Republican Governor failed to agree on a reapportionment plan, so the California Supreme Court appointed 3 Special Masters who drew up a plan that was adopted in time for the June 1992 elections. University of California Berkeley, *Institute of Governmental Studies, Proposition 77: Redistricting*, <http://igs.berkeley.edu/library/htRedistricting.html> (January 2006) (last accessed September 15, 2008). This plan remained in effect for all elections between 1991 and 2000. Douglas Johnson, *Claremont McKenna College, Rose Institute, Competitive Districts in California: A Case Study of California's Redistricting in the 1990s* 4, <http://ccdlib.claremont.edu/u/?/ric,75> (Feb. 21, 2005).

With the 1992 maps drawn by the special masters about to expire, and a 2001 reapportionment plan to be drawn up by the legislature on the horizon, Proposition 24 (2000) qualified for the ballot. This initiative would have amended the State Constitution and transferred reapportionment power from the legislature to the California Supreme Court. *Senate of the State of California v. Jones*, 21 Cal. 4th 1142, 1146 (1999). Proposition 24 (2000) also sought to create revisions “relating to the compensation of state legislators and other state officers.” *Id.* However, the California Supreme Court did not allow Proposition 24 (2004) to reach the voters, holding that its inclusion of reapportionment and compensation provisions on the same initiative violated the single-subject requirement of the California Constitution. *Id.*

With Proposition 24 (2000) out of the picture, the 2001 legislatively drawn reapportionment plan was passed and received Governor Gray Davis's approval on September 26, 2001. For the first time since the 1992 Special Masters' maps had taken effect the elections would be held pursuant to legislatively drawn maps. The subsequent 2004 election resulted in not one incumbent in the Assembly, Senate, or California congressional delegation being beaten, and not one seat in the legislature changing parties. Stephanopoulos, 23 J.L. & Pol. at 371. This result called into question the legislature's ability to serve the interests of voters and was the catalyst for Proposition 77, which was placed on a 2005 special election ballot. *Id.*

Proposition 77 (2005) called for removing the redistricting power from the legislature and placing it with “Special Masters,” a panel of three retired judges. James Lynch & Melissa Maradiegue, Student Authors, *University of the Pacific McGeorge School of Law, California Initiative Review, Proposition 77: Redistricting*, <http://www.mcgeorge.edu/x1435.xml> (November 2005) (last accessed September 12, 2008). Under the proposed plan, panel selection would begin with the state Judicial Council randomly choosing a pool of twenty-four retired judges. *Id.* Then, state legislature majority and minority leaders would narrow the pool down to eight. *Id.* The final three panel members, composed of at least one Republican and one Democrat, would be randomly selected from the remaining eight. *Id.* The panel was then required to draw maps that would be voted on in the 2006 primary. If voters rejected the proposed maps, a new panel would be created to draw new maps to be submitted to voters in the next election. If voters approved those maps, then the maps would go into effect and another panel would not be convened until after the 2010 census. *Id.* However, Proposition 77 failed by a wide margin, with 40% in favor and 60% against. Stephanopoulos, 23 J.L. & Pol. at 374.

B. Existing Law

The basic requirements for California's redistricting process are currently contained in the United States Constitution, the federal Voting Rights Act, and the California State Constitution.

1. Federal Law

a. United States Constitution

Article 1, section 2 of the United States Constitution provides in part that "The House of Representatives shall be composed of members chosen every second year by the people of the several states. ..." U.S. Const. art. I, § 2. The Supreme Court has interpreted this to mean that "as nearly as practicable" each person's vote in a congressional election must have equal weight. *Kirkpatrick v. Preisler*, 394 U.S. 526, 528-529 (1969). In order to satisfy the "nearly as practicable standard," a state must "make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Id.* at 530-531. However, a state has more leeway with population variance in drawing state districting maps than it does with congressional maps due to the state's interest in preserving "local subdivision political lines." M. Clarke & Robert Timothy Reagan, *Federal Judicial Center, Redistricting Litigation: An Overview of Legal, Statistical, and Case-Management Issues 2*, <http://purl.access.gpo.gov/GPO/LPS19488> (2002) (citing *Mahan v. Howell*, 410 U.S. 315, 323-325 (1973)).

Article 1, section 4 of the United States Constitution requires that states formulate their own political districts. U.S. Const. art I, § 4. During this process, a state must comply with the Equal Protection Clause of the Fourteenth Amendment. *Shaw v. Reno*, 509 U.S. 630 (1993). This means that district lines will be subject to strict scrutiny if a plaintiff can demonstrate that race was a predominant factor in forming those lines. Clarke & Reagan, *supra*, at 29.

b. Federal Voting Rights Act

Under the Supremacy Clause of the United States Constitution, California is subject to the requirements of the Voting Rights Act when conducting reapportionment. *Wilson v. Eu*, 1 Cal. 4th 707, 757 (1992); U.S. Const. art. VI, § 2. The Voting Rights Act was enacted to ensure that "the quantitatively equal votes of racial and language minorities, protected by the one person-one-vote requirement, are also qualitatively equal." Clarke & Reagan, *supra*, at 3. When a state like California is "covered" under the Voting Rights Act, it must first obtain clearance from the Department of Justice before its redistricting plan can go into effect. Bruce E. Cain, Karin Mac Donald & Iris Hui, *Institute of Governmental Studies, University of California, Berkeley, Competition and Redistricting in California: Lessons for Reform 6*, http://cdm266301.cdmhost.com/cdm4/item_viewer.php?CISOROOT=/p266301coll10&CISOPT R=0 (Feb. 2006). Section 5 requires that a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Clarke & Reagan, *supra*, at 4; quoting 42 U.S.C. § 1973c (incorporating *id.* § 1973b(f)(2)). Section 2

requires that, in racially polarized areas, minority groups in a district should be kept whole rather than split up when those minority groups constitute a majority in a district. Cain, Mac Donald & Hui, *supra*, at 6.

2. Current California Law

At the state level, California's reapportionment process for Senatorial, Assembly, Congressional, and Board of Equalization districts is governed by California Constitution article XXI. It provides that the legislature shall adjust these districts every ten years in the year following the decennial national census. Cal. Const., art. XXI, § 1. Article XXI also provides that the districts must be drawn in conformance with the following standards:

- (a) Each member of the Senate, Assembly, Congress, and the Board of Equalization shall be elected from a single-member district.
- (b) The population of all districts of a particular type shall be reasonably equal.
- (c) Every district shall be contiguous.
- (d) Districts of each type shall be numbered consecutively commencing at the northern boundary of the state and ending at the southern boundary.
- (e) The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section.

Cal. Const. art. XXI.

Several court decisions provide additional insight into article XXI's standards. While decided before article XXI was adopted in 1980, *Legislature of California v. Reinecke*, 10 Cal. 3d 396, 411 (Cal. 1973), provides information on how to satisfy subsection (b)'s "reasonably equal" requirement. The *Reinecke* court first reiterated that federal standards require strict numerical equality in congressional districts, and reasonable equality with state legislative districts. *Id.* The court then went on to explain what this standard called for under California law, stating "The population of senate and assembly districts should be within 1 percent of the ideal except in unusual circumstances, and in no event should a deviation greater than 2 percent be permitted." *Id.* The Court recognized that the United States Supreme Court had permitted a greater variance in other state reapportionment plans, but explained that districts in California are so large that even a small variance will affect a large number of people. *Id.*

Wilson v. Eu, 1 Cal. 4th 707, 761 (Cal. 1992), sheds light on the "contiguous" and "geographical integrity" requirements contained in subsections (c) and (e). *Wilson* did not isolate these requirements, but looked at four complimentary factors: contiguity, geographic integrity, community of interest, and compactness. *Id.* *Wilson* explained that these factors all work towards creating districts that are effective for the represented and the representative, stating, "From this we conclude that districts should be contained, insofar as possible, wholly within one of the major geographic regions of the state." *Id.* at 762. While *Wilson* does state that districts should be confined to major geographic regions, *Nadler v. Schwarzenegger*, 137 Cal. App. 4th 1327, 1339 (3d Dist. 2006), clarifies that the "respect for geographical integrity" requirement in subsection (e) is the most flexible reapportionment standard. According to the

court, political boundaries need to be respected, but subsection (e) does not prohibit a city from being divided into different districts. *Id.*

3. Current California Redistricting Procedure

Currently, the legislature passes reapportionment plans in the same manner that it passes other legislation. The redistricting legislation is “introduced, moved through the hearing process, passed out of the Legislature and sent to the Governor much like any other bill.” California State Senate, *Elections and Reapportionment Committee: California’s Redistricting Process*, http://sinet2.sen.ca.gov/ftp/SEN/COMMITTEE/STANDING/EL/_home/Reapportionment/process.htm (last accessed September 14, 2008). The houses draw their own districts and collaborate on the congressional plan. The governor has veto power over the legislative and congressional plans. Fair Vote, Voting and Democracy Research Center, *California Redistricting 2000*, <http://www.fairvote.org/?page=294> (last accessed September 14, 2008). Additionally, voters may reject a redistricting plan through the referendum process such as the Republican led rejection of the 1981 reapportionment plan. Heslop, *supra*, at 1.

C. Proposed Changes

Proposition 11 involves Constitutional amendment and changes to the Government Code. Specifically, Proposition 11 proposes to amend Article XXI of the California Constitution and to add Chapter 3.2 to Division 1 of Title 2 of the California Government Code in order to create an independent “Citizens Redistricting Commission” that will be responsible for the redistricting process for Senate, Assembly, and Board of Equalization districts. The Legislature will continue to draw congressional districts, but the measure imposes additional criteria the Legislature must consider when drawing those lines. Legislative Analyst’s Office, *Proposition 11: Redistricting. Constitutional Amendment and Statute.*, http://www.lao.ca.gov/ballot/2008/11_11_2008.pdf (July 2, 2008) (last accessed September 15, 2008).

1. Citizens Redistricting Commission

Proposition 11’s most dramatic proposed change to existing law is its proposed Citizens Redistricting Commission (“Commission”), which would be responsible for drawing new district lines for State Senate, Assembly, and Board of Equalization Districts. Prop. 11, § 3. Proposition 11 calls for a new Commission to form after each decennial national census. Prop. 11, § 3. Additionally, under Proposition 11, the maps produced by the Commissions are subject to voter review by referendum. Prop. 11, § 3. If voters reject a map or the Commission itself cannot approve a map by the required number of votes, under Proposition 11, the California Supreme Court will appoint Special Masters to draw boundary lines in accordance with the criteria enumerated in Proposition 11. *Id.*

Proposition 11 provides for a Commission composed of fourteen members. The method for selecting the Commissioners is slightly complex, but the basic process, explained in detail in proposed Government Code § 8252, is as follows:

1. All registered voters may apply for a position on the Commission.

2. The State Auditor removes applicants with conflicts of interest described in proposed Government Code § 8252.
3. The State Auditor randomly selects three qualified independent auditors (one Democrat, one Republican, and one non-affiliated) who will serve on the Application Review Panel.
4. The Application Review Panel selects 60 of the most qualified applicants. This pool must consist of 20 members of the largest political party, 20 of the second largest political party, and 20 not affiliated with the two largest parties.
5. Four legislative leaders may each strike 2 applicants per sub-pool, for a possible total of 8 removed from each affiliation.
6. The State Auditor then randomly draws eight names from the remaining applicants. These 8 shall consist of 3 members of the state's largest party, 3 members of the second largest party, and 2 members not affiliated with the two largest parties.
7. These eight initial commissioners then select the remaining 6 commissioners.
8. The final Citizens Redistricting Commission is to consist of 5 members of the state's largest political party, 5 from the second largest political party, and 4 not affiliated with either of the two largest parties.

Proposition 11, § 4.

Final maps must be approved by at least 9 affirmative votes, which must include three votes of members from each of California's two largest parties and three votes from members who are not registered with the two largest parties. Prop. 11, § 3.

Proposition 11 attempts to construct a transparent redistricting process. In addition to prohibiting ex parte communications concerning redistricting matters, Proposition 11 requires public hearings and input before the Commission draws any maps. Prop. 11, § 4. The Commission is also required to display the maps, hold hearings, and accept comments regarding the proposed maps. *Id.* These requirements accord with the stated purpose that Proposition 11 "guarantees redistricting will be debated in the open with public meetings, and all minutes will be posted publicly on the Internet. Every aspect of this process will be open to scrutiny by the public and the press." Prop. 11, § 2(d).

The Commission will not construct district lines without outside assistance. Proposed Government Code section 8253 provides that, "The commission shall hire commission staff, legal counsel, and consultants as needed." Prop. 11, § 4. In addition to the expense for consultants, Proposition 11 allots \$300 dollars to each commissioner "for each day the member is engaged in business." Members are also entitled to reimbursement for expenses incurred while performing their duties. *Id.* To meet these and other expenses, Proposition 11 calls for an appropriation in the state budget of at least \$3,000,000 to carry out the redistricting scheme it requires. *Id.* This redistricting scheme could cause redistricting costs to rise because, under Proposition 11, the Legislature would still draw new lines for congressional districts. Prop. 11, § 3. Thus, Proposition 11 requires the state to fund two redistricting entities, instead of the current one. This may turn out to be a non-issue. The Legislative Analyst's Office has predicted that, "Any increase in such redistricting costs would probably not be significant." Legislative Analyst's Office, http://www.lao.ca.gov/ballot/2008/11_11_2008.pdf.

2. Proposition 11's Requirements for Drawing Political Districts

Proposition 11 contains specific criteria the Commission must follow when redrawing Senate, Assembly and Board of Equalization districts. Many of the criteria are similar to current standards. Proposition 11 directs the Commission to establish single-member districts, comply with the “reasonably equal” federal standard for legislative districts, comply with the Voting Rights Act, and draw geographically contiguous districts. Prop. 11 § 3. These standards do not differ from the current law established by California Constitution article XXI and California case law.

Proposition 11 provides roughly four additions to the current criteria. The first two address a district's geographical aspects, requiring that the Commission respect the geographic integrity of any “community of interest,” and draw lines that encourage “geographical compactness.” Prop. 11 § 3. Proposition 11 does not define “community of interest” except to say, “Communities of interest shall not include relationships with political parties, incumbents or political candidates.” Prop. 11, § 3. With regard to the “geographical compactness” requirement, Proposition 11 states that lines should be drawn such that “nearby areas of population are not bypassed for more distant population.” Prop. 11, § 3. While these requirements are not currently contained in California Constitution article XXI, the California Supreme Court addressed them in *Wilson v. Eu*, 1 Cal. 4th 707, 761 (Cal. 1992). The *Wilson* court noted that contiguity, geographic integrity, community of interest and compactness are all addressed to the same goal. *Id* at 761. Additionally, “community of interest” has been described as being “roughly synonymous with recognition and maintenance of patterns of geography, social interaction, trade, political ties, and common interests.” Bernard Grofman, *Criteria For Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 87 (1985). Grofman goes on to say that “community of interest” provisions are “hard to enforce because they are hard to interpret.” *Id*. A “compactness” requirement likely refers to districts that have the minimum distance between all of their sides. Nicholas D. Mosich, Student Author, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. Cal. L. Rev. 165, 180 n. 89 (2005).

The third addition requires Senate districts to be comprised of two adjacent Assembly districts, and Board of Equalization districts to be drawn from ten adjacent Senate districts. Prop. 11, § 3. Finally, Proposition 11 explicitly requires that “The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.” Prop. 11, § 3.

Under Proposition 11, the state legislature continues to draw congressional districts, but must consider two new key requirements. Like the Commission, the legislature must maintain “communities of interest” and develop geographically “compact” congressional districts. Prop. 11, § 3. Unlike the Commission, however, the legislature is not explicitly directed to avoid favoring or discriminating against political incumbents, candidates, or parties. Prop. 11, § 3. Proposition 11 also requires that the legislature comply with the open hearing requirements laid out in proposed Government Code section 8253. Prop. 11, § 3.

III. Drafting Issues

The California Supreme Court's prohibition of Proposition 24 (2000) from the ballot demonstrates that redistricting initiatives will likely be challenged as impermissible constitutional revisions. While the California Supreme Court found that Proposition 24 (2000) violated the single-subject rule and did not have to reach the revision issue, the initiative measure was none-the-less challenged under the theory that the movement of the redistricting power from the legislature to another body was an illicit "revision." *Jones*, 21 Cal. 4th at 1150-52. As discussed more fully in section IV.B. of this analysis, the people of the State of California have the power to amend the California Constitution through the initiative process, but a revision requires additional procedural steps. Cal. Const. art. XVIII, §§ 1, 2. The opponents of Proposition 24 (2000) asserted that this power transfer fundamentally altered the government's structure, and was thus "beyond the power of a simple amendment to the Constitution and clearly requires use of the revision process." *Id.* at 1151. Proposition 11 may be challenged on these same grounds.

Section 2, subsection (a) of the proposed amendment to article XXI of the California Constitution gives the Commission the power to draw new district lines for State Senate, Assembly and Board of Equalization districts. Prop. 11 at § 3. This provision, as *Jones* illustrates, may be attacked as being an impermissible constitutional revision. Proposition 11 would probably fail if this provision was found invalid, even if a court attempted to save the remaining provisions through the measure's severability clause.

Proposition 11's severability clause provides, "The provisions of this Act are severable. If any provision of this Act or its application is held to be invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application." Prop. 11 at § 6.

A court is not bound by a severability clause, but will usually uphold the valid parts as long as they meet the three-part test laid out by the California Supreme Court in *Gerken v. FPCC*, 6 Cal. 4th 707, 714 (1993). To be severable, the invalid provision must be grammatically, functionally, and volitionally separable. *Id.* The grammatical test is satisfied if the valid and invalid provisions can be mechanically separated in a way that grammatically makes sense. *People's Advocate, Inc. v. Superior Court*, 181 Cal. App. 3d 316, 330 (3d Dist. 1986). A provision is functionally severable if it can be applied on its own, unaided by the invalid provisions. *Id.* at 332. Finally, a provision is volitionally separable if "it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions." *Gerken*, 6 Cal. 4th at 714-715. A measure will not be completely invalidated as long as a substantial portion of the measure remains severable. *Id.* at 717.

The grammatical test would be met if the provision granting the Commission redistricting power was invalid, but the remaining portions would probably not satisfy the functional or volitional tests. The functional test would not be met because the legislature is only given authority to draw congressional districts leaving no entity to draw Senate, Assembly or Board of Equalization districts. The volitional test would also not be met given that a primary purpose of

the measure is to have the Commission draw new district lines. It is not likely that the electorate would adopt the measure if the Commission could not draw those lines. Therefore the provision could not be severed and the entire measure would be held invalid.

IV. Constitutional Issues

A. Federal Constitutional Issues and Statutory Issues

Similar to prior California redistricting ballot measures, if passed, Proposition 11 may face challenges under federal constitutional and statutory law. Redistricting legislation necessarily involves voters' rights and as described above, is covered by federal legislation such as the Voting Rights Act of 1965 ("VRA") and federal case law interpreting voting rights under the Constitution. Although at the time of this writing no lawsuits have been filed, if Proposition 11 passes its opponents may challenge it under federal law. Prior constitutional challenges to redistricting have focused on procedural shortcomings and irregularities, the legality of the text itself, and the legality of the effects of the redistricting plan on protected groups such as African-American and Latino voters.

In recent years, redistricting plans in California and several other states have been challenged, illustrating potential litigation scenarios that could arise creating obstacles for the proponents of Proposition 11. In 2005, Proposition 77, which would have established a panel of ex-judges responsible for redistricting, was challenged in federal court prior to the statewide vote. *See*, James Lynch and Melissa Maradiegue, *Proposition 77 (2005): Redistricting*, Cal. Init. Rev., (November 2005). In that case the Mexican American Legal and Educational Defense Fund argued that the procedural irregularities involved with the placement of Proposition 77 on the ballot violated a provision of the VRA requiring pre-clearance for changes to voting law in "covered" jurisdictions. *Id.* California contains several counties that are considered covered under the VRA and any body responsible for redistricting will have to insure full compliance to avoid litigation.

A 2002 case in the Southern District of Florida involved litigation under a provision of section 2 of the VRA that prohibits the dilution of minority votes. *Martinez v. Bush*, 234 F.Supp.2d 1275 (S.D. Fla. 2002). While the District Court in *Martinez* did not find that the Florida redistricting plan violated the VRA, it does indicate that a redistricting plan that negatively impacts minority voters may be struck down. *Id.* at 1298. The *Martinez* court also set a relatively low burden for plaintiffs in VRA cases, holding that "a plaintiff need not show that a challenged state action was undertaken with discriminatory intent. It is sufficient if a challenged action has a prohibited effect, irrespective of the intent with which it was adopted." *Id.* While the redistricting plan that emerges from our legislature in 2011 may be challenged on these grounds regardless of whether Proposition 11 passes, it seems likely that a redistricting plan produced in accordance with Proposition 11 will be targeted under section 2 of the VRA. The opponents of Proposition 11 argue that one of its main shortcomings is its limited ability to represent minority voters in the redistricting process. If the opponents feel that their fears have become a reality under Proposition 11, they may utilize section 2 of the VRA to make their case.

B. State Constitutional Issues

The California Constitution only allows voters to make “amendments” to the constitutional text through the initiative process. Cal. Const., art. XVIII, § 3. Initiatives that produce a “revision” of the constitutional text are impermissible. *Raven v. Deukmejian*, 52 Cal.3d 336, 349 (1990) (citing Cal. Const., art. XVIII, §§ 1, 2). Constitutional revisions may only be had by calling a constitutional convention or by legislative submission of the revision to voters. *Id.* When an initiative such as Proposition 11 makes an extensive change to the constitution, it becomes a potential target for lawsuits under article XVIII of the California Constitution.

To determine whether an initiative has gone beyond amendment and reached the level of revision, California courts analyze “both the quantitative and qualitative effects of the measure on our constitutional scheme.” *Id.* at 350. *Raven* indicates that substantial changes in either area can tip the scales towards a revision resulting in an invalid provision. *Id.* In *Raven*, the court analyzed whether an initiative measure that added a provision to the California Constitution relating to the treatment of criminal defendants was an illicit revision. *Id.* at 341. The *Raven* court held that while the proposition at issue did not make a significant quantitative change to the state Constitution, its qualitative changes were significant enough to warrant invalidation. *Id.* at 351.

Quantitatively, Proposition 11 removes only 57 words and adds only two new sections of material to article XXI. This is not significantly different from the changes at issue in the *Raven* case. *Id.* at 335-336 (stating that the measure deletes no constitutional language and it affects only *one* constitutional article, article I.”). According to the *Raven* court this type of modification “does not seem so extensive ... as to change directly the ‘substantial entirety’ of the Constitution” and therefore does not amount to a quantitative revision. *Id.* at 335 (internal quotation marks omitted). It is likely that under *Raven* and other case law on this issue, Proposition 11 has not produced a quantitative revision.

On the other hand, opponents to Proposition 11 may argue that it amounts to a qualitative revision of the California Constitution. The *Raven* court found the proposition at issue in that case to be a constitutional revision because it shifted the constitutionally granted power to interpret individual rights away from the California judiciary and into the hands of the Supreme Court of the United States. *Id.* at 352. The *Raven* court reasoned that this change “would substantially alter the state Constitution as a document of independent force and effect.” *Id.* at 352. Opponents to Proposition 11 may argue that it is also a revision because similarly, it shifts power to redistrict from the legislature to a commission of voters resulting in a substantial alteration. To counter this argument, proponents may point to the inclusion of the legislature in the selection of the Commission and the legislature’s independent role in the Congressional redistricting process as set forth in Proposition 11. *See*, Proposition 11, §4 (2008).

V. Financial Support

The means by which financial support has been obtained by the proponents and opponents of Proposition 11 has proven to be one of the more controversial topics of this election cycle. Both the “yes” and the “no” camps have received negative press on this issue.

Additionally, the way in which financial support has been utilized has been examined and may be indicative of the political agendas represented in the redistricting battle.

The proponent camp has exponentially out-spent the opponent camp. Cal Access, a government transparency website operated by the California Secretary of State, indicates that the proponents of Proposition 11 have spent \$8 million thus far in their efforts to qualify Proposition 11 for the November ballot and to persuade voters to place a yes vote. *See*, Cal Access, <http://cal-access.ss.ca.gov/Campaign/Measures/Detail.aspx?id=1303165&session=2007>. In contrast, the opponents to Proposition 11 have only spent around \$675,000 fighting Proposition 11. *See*, Cal Access, *supra*. These numbers may be deceiving though. A large portion spent by the proponents may represent upfront expense associated with collecting signatures in the qualification phase as opposed to outright advertising for their cause after Proposition 11 was placed on the ballot.

It has been clear since Proposition 11's infancy that Governor Arnold Schwarzenegger has been a key supporter. However, the level of his financial involvement has not always been clear. The Governor, and the proponent camp generally, were heavily criticized for forming a "shadow committee" to qualify and fund Proposition 11. Documents filed with the California Secretary of State show that much of the financial support underlying Proposition 11 was received from contributions to three separate committees. *See*, Cal Access, *supra*. According to Proposition 11's opponents, multiple committees were setup as a "shell game" used to conceal the Governor's role in Proposition 11. *See*, No On Prop 11, <http://www.noonprop11.org/updates.html> (last visited September 14, 2008). Additionally, the Governor procured much of the financial support for Proposition 11 at private fundraising events both in California and elsewhere. *See*, *Calif. Governor coming to Austin for Fundraiser*, AP Texas News, available at <http://www.chron.com/disp/story.mpl/ap/tx/6056254.html>. Major contributions were received from Governor Schwarzenegger's California Dream Team. *See*, Cal Access, <http://cal-access.ss.ca.gov/Campaign/Measures/Detail.aspx?id=1303165&session=2007>.

While spending by opponents of Proposition 11 has not exceeded that of the proponents, opponent spending may increase sharply in the month leading up to the November vote. The opponents have been proactive in securing financial support for their cause and have been criticized for what some view as an overly aggressive approach to receiving support. *See*, Steve Harmon, *Complaint Filed Over Union's Contribution to Perata*, Contra Costa Times, August 28, 2008. A key Proposition 11 opponent, Senate Pro Tem Don Perata, was criticized for accepting campaign donations from the California Correctional Peace Officers Association. Critics contended that the campaign donations were a quid pro quo for Perata support within the legislature. *Id.*

Many followers of Sacramento politics report that Proposition 11 opponents have setup numerous accounts with funds slated to be spent in the run-up to the November vote. While these funds are not currently represented on the Cal Access website, which only reports actual spending and fund raising by political committees that have been identified, anecdotal reports of opponent fundraising indicate that opponents have been preparing for a costly pre-election media battle. Cal Access indicates that the California Correctional Peace Officers Association and the

Democratic State Committee of California have made major in state contributions. *See*, Cal Access, <http://calaccess.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1307984&session=2007&view=received>. Additionally, a contribution of \$400,000 was made by the American Federation of State, County and Municipal Employees, a national lobbying organization. *Id.*

VI. Public Policy Considerations

A. Proponents Arguments In Favor

The proponents of Proposition 11 argue that the redistricting reform embodied in the initiative will “help to stop the partisan gridlock that has paralyzed our state government.” Yes On Prop 11, http://yesprop11.org/getfacts/factsheet??_adctlid=v|writcy0txeobdd|xennhs6esqtt0n (last visited Sept. 13, 2008). According to the proponents of Proposition 11, state legislators are currently allowed to redraw their own district boundaries “resulting in a 99% reelection rate” and making elected officials unresponsive and unaccountable to voter needs. *Id.* The proponents believe that establishing a redistricting commission under Proposition 11 will increase accountability among elected officials and will “ensure that the redistricting process is open and transparent and will respect existing city and county boundaries and communities.” *Id.* As discussed more fully below, this claim has been largely refuted by a non-partisan study conducted by the Public Policy Institute of California.

The Los Angeles Times endorsement of Proposition 11 repeated a recurring theme offered by Proposition 11 supporters and is representative of the “vote yes” position. The LA Times explained that while not perfect, Proposition 11 helps to end the current system, which the Times contends gives the political parties power that is “destructive and inherently anti-democratic.” Editorial, *California Needs Redistricting Reform, Prop. 11 Isn’t Perfect, But It Would Take Some of the Politics Out of Drawing Legislative Districts*, L.A. Times, Sept. 12, 2008, at A20. Presumably, the increased democratization of California’s redistricting process will be triggered by Proposition 11’s mandate that a multi-partisan panel of voters conduct redistricting. Proposition 11 requires that the final commission be composed of fourteen members, “chosen to ensure the Commission reflects California’s diversity and analytical skills and ability to be impartial.” Yes On Prop 11, http://yesprop11.org/getfacts/factsheet??_adctlid=v|writcy0txeobdd|xennhs6esqtt0n (last visited Sept. 13, 2008).

The proponents of Proposition 11 attempt to further their goal of non-partisan redistricting by including a series of disqualification provisions within Proposition 11. These provisions are designed to weed out individuals who have partisan connections such as financial contributions exceeding \$2000, family members who have served in state political offices, or who have acted as lobbyists. These disqualification provisions combined with the multi-partisan make-up of the commission, the proponents contend, will further the goals of accountability, democratization, and transparency.

Finally, it is also important to note that while the proponents of Proposition 11 argue that it will put citizens first, the legislature is still very much involved with the redistricting process. Under the proposed scheme, the legislature still has an opportunity to strike applicants from the

final pool. Additionally, the legislature will still be wholly responsible for redistricting congressional districts.

B. Opponents Arguments Against

The opponents have three main arguments against Proposition 11. Opponents contend 1) that Proposition 11 is confusing and complicated, 2) that Proposition 11 is unfair, and 3) that there is a hidden agenda underlying it. *See*, No On Prop 11, <http://noonprop11.org> (last accessed Sept. 13, 2008).

In support of their contention that Proposition 11 is confusing and complicated, opponents point to the multi-step process necessary under Proposition 11 to select the final commission of six that will redraw districts. Under the Proposition 11 scheme there are at least five steps necessary to the final development of new district maps. Some critics contend that there are as many as twelve steps required under Proposition 11. *See*, Robert Balganorth, Prop. 11 is Sham Redistricting Reform- Vote No, SFGate.com (2008), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/09/11/EDM812SDOF.DTL>. Opponents of Proposition 11 take the position that these numerous steps will place legislators into the middle of the decision making process, giving them the opportunity to manipulate the outcome. *See*, No On Prop 11, <http://noonprop11.org> (last accessed Sept. 13, 2008).

In support of their position, opponents point out that the process requires the initial selection of candidates to be completed by the State Auditor who is selected by the governor from a list of potential auditors provided by the legislature. According to opponents, the State Auditor is ultimately accountable to the legislature. *See*, Linda Sutton, California Progress Report, Proposition 11: Fake Redistricting Reform Brought to You By Governor Schwarzenegger and His Wrong-Wing Republican Gang (2008), http://www.californiaprogressreport.com/2008/08/proposition_11.html. Additionally, the opponents highlight the provision of Proposition 11 that gives the legislature itself a chance to remove up to eight individuals from consideration for positions on the final redistricting commission. *Id.*

Additionally, Proposition 11's redistricting scheme could result in increased redistricting costs, because it would require two redistricting entities: a newly created commission in addition to the Legislature. Prop. 11, § 3. However, this may turn out to be a non-issue. The Legislative Analyst's Office has predicted that, "Any increase in such redistricting costs would probably not be significant." Legislative Analyst's Office, http://www.lao.ca.gov/ballot/2008/11_11_2008.pdf.

The opposition's second argument and a potential source of future litigation, is that Proposition 11 is unfair because the fourteen member Commission will produce an outcome that negatively impacts many California voters. The opponents argue that a commission of 14 members simply cannot adequately represent the interests of the citizens of a state as large and as diverse as California. *See*, No On Prop 11, <http://noonprop11.org> (last accessed Sept. 13, 2008). The opponents observe that under Proposition 11 the redistricting commission could conceivably be composed of individuals entirely from southern California, or even entirely from Orange County.

Finally, the opponents to Proposition 11 argue that there is a hidden agenda driven by special interests underlying this attempt at redistricting reform. *Id.* According to the opposition movement, Proposition 11 will give more power to oil companies, corporations, and political action committees. *See*, Robert Balganorth, Prop. 11 is Sham Redistricting Reform- Vote No, SFGate.com (2008), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/09/11/EDM812SDOF.DTL>. The opposition points to the large financial contributions made by these groups to the Yes on Prop. 11. *Id.* Additionally, opponents to Proposition have criticized Governor Schwarzenegger's establishment of a "shadow committee" to get Proposition 11 passed by voters. *See*, No On Prop 11, <http://noonprop11.org> (last accessed Sept. 13, 2008). The combination of these facts, according to the opposition, indicates that Proposition 11 will not serve the best interests of voters.

C. Public Policy Institute of California Report

In 2008 the non-partisan think tank, the Public Policy Institute of California, produced a report entitled Redistricting and Legislative Partisanship. The report discusses the connection between redistricting and partisan legislative gridlock. Specifically, the report finds that "the 2001 redistricting has had little effect on the way legislators vote on the bills that come before them in Sacramento. The link between partisan voting that seemed so obvious turns out to be largely absent." Eric McGhee, Redistricting and Legislative Partisanship v (2008). The report also concludes that even if more competitive districts were created, this "would not increase moderation in the Legislature so much as to shift the influence from one polarized party to the other." *Id.* at vii. Legislative gridlock is not caused by the way in which districts are drawn, but by partisanship that, according to the report, is unrelated to redistricting. *Id.* at 65. The report finally recommends that if the goal is legislative moderation, alternatives beyond redistricting reform may be required. *Id.* Increased polarization of voters, pressure on legislators from special interest groups, and pressure from party leaders are identified by the report as possible causes of partisan gridlock in the legislature. *Id.* at 65-69. The Public Policy Institute of California suggests that possible solutions to this legitimate problem may include open primaries, campaign finance reform, and mobilization of moderates. *Id.* at 69-71.

VII. Conclusion

Proposition 11 follows a long line of failed attempts to overhaul the California redistricting scheme through the initiative process. The proponents of Proposition 11 face an uphill battle which requires reversing historically low voter approval of redistricting reform and navigating a maze of state and federal laws and judicial opinions in the area of voters' rights.

If passed, Proposition 11 will create a multi-partisan Commission of ordinary citizens responsible for drawing new district lines for State, Senate, Assembly and Board of Equalization districts. Proponents contend that this will end partisan gridlock by creating more competitive districts and will enhance the democratic process. On the other hand, opponents contend that Proposition 11 is an attempt to make redistricting more susceptible to special interests and will be too slow and cumbersome to benefit voters.

In support of their position, proponents of Proposition 11 point to the nearly perfect reelection rate of incumbent legislators. According to proponents, this anomaly is due to districts drawn to favor incumbents. The proponents contend that by taking redistricting out of the hands of legislators and placing it with citizens, Proposition 11 would result in district maps that serve the interests of citizens as opposed to politicians. Yet, as discussed above, studies have concluded that competitiveness in the legislature is unrelated to the way in which districts are drawn. Further, the remaining role the legislature plays within the Proposition 11 scheme may not truly place citizens first.

Opponents believe Prop 11's multi-step process for establishing the redistricting commission will complicate an already complicated redistricting process. Additionally, they argue that Proposition 11 will make redistricting susceptible to special interests that will attempt to influence the redistricting process. But special interests are already highly influential in California politics. In fact, the opponents themselves were the subject of media scrutiny for the role that special interests played in their campaign against Proposition 11.

While various public policy considerations are always offered up in support of and in opposition to redistricting reform, the impetus of redistricting reform in California has been, and seemingly will continue to be, an ongoing power struggle between California's two major political parties. Like many years before, this November, California voters will again get to decide whether California is ready for redistricting reform. The essential question is whether Proposition 11 will be better or worse than the current redistricting scheme.