

A Textual Analysis on Redistricting Powers under the California Constitution

Current national events, including the U.S. Supreme Court and Congress' refusal to curtail extreme partisan gerrymandering, redistricting related racial discrimination by other states, and efforts to engage in mid-decade redistricting as a way to offset voting patterns, have prompted state lawmakers elsewhere to consider redistricting measures in their own states. Some state lawmakers have argued that a state-by-state national strategy is necessary to keep Congress representative of the nation as a whole.

Naturally, attention has turned to the nation's largest state, California, and the question is being debated, whatever the merits of redistricting for these reasons, as to whether the Legislature has the authority in California to respond to these events by enacting its own revised redistricting maps or whether such action, if desired, must occur in response to a constitutional amendment adopted by the People. Without regard to whether such an effort is advisable or politically possible, our inquiry is whether the plain text of the California Constitution authorizes the legislature to enact redistricting legislation at this time. There are credible textual arguments that the answer is yes.

While the California Citizens Redistricting Commission has the legal responsibility to draw districts once every 10 years following the Census, the California State Legislature has the legal constitutional authority to draw new districts today. In this memo, we present an independent legal analysis to assess what the text of the California Constitution prescribes about redistricting, and what the 2008 and 2010 amendments changed in the Constitutional provisions related to redistricting.

I. The text of the California Constitution, after amendment, maintained language pertaining to the Legislature holding power over redistricting.

Articles IV and XXI of the California Constitution both address redistricting. Article XXI creates an *obligation* for the Citizens Redistricting Commission to redraw boundaries after each decennial Census pursuant to certain enumerated requirements and subject to a once-a-decade limitation. Article IV, by contrast, reserves to the Legislature the *power* to redraw lines—and does expressly.

A. Article IV

Article IV Section 1 of the Constitution provides that “[t]he legislative power of this State is vested in the California Legislature.” Sections 8 and 10 retain for Legislature the power to adopt “a statute establishing or changing boundaries of any legislative, congressional, or other election district.” The mention of authority to enact congressional districts in Section 10 comes right after that section’s

commandment that “Each bill passed by the Legislature shall be presented to the Governor. It becomes a statute if it is signed by the Governor.” The Constitution thus expressly provides that the Legislature is empowered to establish or change district boundaries as part of its legislative authority and it sets when such laws may take effect.

B. Article XXI

Unlike most legislation, in which it is the prerogative of the Legislature whether or not to legislate on a subject, states are required to enact redistricting legislation after each Census to comply with federal one-person one-vote requirements. The California Constitution, like most states, does so by creating an affirmative obligation for redistricting to occur every ten years. Article XXI creates this obligation. Prior to 2008, Article XXI of the Constitution required the Legislature to adjust State Senate, Assembly, and Board of Equalization districts once a decade, “[i]n the year following the year in which the national census is taken.” The California Supreme Court interpreted this phrase to limit the Legislature to redistricting once a decade. Therefore, the California Supreme Court invalidated an effort by the People subsequently to redistrict by initiative, holding that the time-limitation applied to exercise of the legislative power of the State, as it applied specifically to the Legislature. *Legislature v. Deukmejian*, 34 Cal.3d 658, 669 P.2d 17 (Cal. 1983).

In 2008, voters adopted Prop. 11, which amended Article XXI of the Constitution to create a Citizens Redistricting Commission which was required to adjust State Senate, Assembly, and Board of Equalization boundaries “[i]n the year following the year in which the national census is taken.” Prop. 11 retained the requirement that the Legislature enact congressional district boundaries at that same time and subject to that same once-a-decade limitation but relieved the Legislature of the requirement to adjust boundaries for State Senate, Assembly, and Board of Equalization districts. Prop. 11 also created substantive standards to govern the Legislature’s redistricting of congressional districts.

In 2010, voters adopted Prop. 20, which amended Article XXI to remove the requirement that the Legislature adjust congressional district lines “[i]n the year following the year in which the national census is taken” and instead require the Citizen Redistricting Commission to do so. Prop. 20 also repealed the substantive standards that Prop. 11 had enacted that governed how the Legislature should redistrict congressional boundaries. The proposition left the express legislative power to redistrict set forth in Article IV unchanged and did not include clear constitutional text that banned the Legislature from engaging in redistricting or prohibited the Legislature from doing so at certain times.

Because of Props. 11 and 20, the Legislature is no longer required by constitutional text to adjust district boundaries in the year following the census and is no longer prohibited from doing so in years other than the year following the census, as Article XXI's requirements and limitations now apply only to the Citizen Redistricting Commission.

Article IV, Sections 8(c)(2) and 10(b)(1) of the Constitution expressly recognize the power of the Legislature to enact "a statute establishing or changing boundaries of any legislative, congressional, or other election district." Article XXI thus cannot be read as supplanting the Legislature's power to do so, as such a reading would render the language in Article IV, Sections 8(c)(2) and 10(b)(1) inoperative.

C. Harmonizing Article IV and Article XI

Together, Article XXI and Article IV mean that the Citizen Redistricting Commission is required to adjust district boundaries in the first year following the federal census, is bound by certain criteria in doing so, and may only do so once a decade. But the Legislature retains the power to establish or change boundaries of any legislative, congressional, or other election district as it deems appropriate and when it deems appropriate, as the People repealed (1) the substantive criteria that previously applied to congressional redistricting legislation enacted by the Legislature and (2) revised Article XXI's once-a-decade limitation to only apply to the Citizen Redistricting Commission, not the Legislature when invoking its legislative power to establish or change district boundaries.

Article I, Section 4, Clause 1 of the U.S. Constitution provides "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The power to enact Congressional districts granted to the Legislature by the state and federal constitution cannot be presumed to be withdrawn when in fact Propositions 11 and 20 merely layered the obligation of the Commission on top of the plenary authority of the Legislature and the latest proposition even strengthened the power of the Legislature in this area. The controlling state constitutional language empowers the Legislature: to enact "a statute establishing or changing boundaries of any legislative, congressional, or other election district." Moreover, the U.S. Supreme Court has held that provisions like Article XXI do not create an exclusive *power* in an identified body to redistrict, they merely create a *requirement* that the identified body engage in redistricting to ensure that a map is enacted. *Lawyer v. Dep't of Justice*, 521 U.S. 567, 577 n.4 (1997).

The counter argument to this textual analysis is that California courts could find the constitutional text ambiguous and therefore turn to political messaging during the enactment campaigns for Propositions 11 and 20. To be sure, Prop. 20 was

described at the time as “tak[ing] the responsibility to determine boundaries for California’s congressional districts away from the State Legislature.” See https://lao.ca.gov/ballot/2010/20_11_2010.aspx. The finding and purpose of the proposition were described as taking away the process from the Legislature, at least with respect to maps issued after a new census. See https://www.lalawlibrary.org/pdfs/PROP_1102_20.pdf.

When interpreting a provision of the state Constitution, the aim is “to determine and effectuate the intent of those who enacted the constitutional provision at issue.” *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 418, 9 Cal.Rptr.3d 121, 83 P.3d 518. When the voters enacted the provision, their intent governs. *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798, 268 Cal.Rptr. 753, 789 P.2d 934. To determine the voters' intent, “we begin by examining the constitutional text, giving the words their ordinary meanings.” *Richmond*, 32 Cal.4th at 418. Only if the court finds the text ambiguous, does it try to impute the intent from outside sources. Neither Props. 11 or 20 amended the constitution with plain text that commanded that the Legislature may never draw congressional redistricting plans, may not do so mid-decade or otherwise deleted the provisions in Article IV that talk about the Legislature’s powers including over congressional redistricting. One interpretation to the description published concerning Prop. 20 is that it took from the Legislature the “responsibility” to legislate after a new census but otherwise left language in the Constitution granting the Legislature such “power” should it chose to do so at a later time or for other extraordinary circumstances found by the Legislature. Although the California Supreme Court in *Deukmejian* held that under the then-existing language, the Legislature could only redistrict once a decade, the later proposition deleted that limitation as it applied to the Legislature. Of course, none of the non-textual evidence behind Prop. 20 tells us what the People would have supported under the current national circumstances.

This memo lays out the textual arguments based on the state constitutional language. A court wishing to construe whether a proposition's purpose will suffice to render inoperative language that the text of the amendment failed to change would also likely be met with legal arguments under federal law that this memo does not address.

What we lay out is a textual analysis demonstrating that the California Constitution does not include a textual prohibition on the Legislature drawing congressional districts at this point in the decade. We do not opine whether California should redraw its congressional map. Nor do we opine (should elected leaders desire to redraw) on whether a Constitutional Amendment may be politically expedient, it may be, but we conclude that there are reasonable arguments that California Constitution’s text permits the Legislature to undertake redistricting by statute in at least some circumstances.