

BRUCE E. CAIN

Redistricting Commissions: A Better Political Buffer?

ABSTRACT. The new institutionalism in election law aims to lessen the necessity of court intervention in politically sensitive election administration matters such as redistricting by harnessing politics to fix politics. Many hope that independent citizen commissions (ICCs) will improve the politics associated with drawing new district boundaries. As the recent round of redistricting comes to a close, I offer some observations about ICCs as effective court redistricting buffers. My basic points are as follows. Independent citizen commissions are the culmination of a reform effort focused heavily on limiting the conflict of interest implicit in legislative control over redistricting. While they have succeeded to a great degree in that goal, they have not eliminated the inevitable partisan suspicions associated with political line-drawing and the associated risk of commission deadlock. Additional political purity tests and more careful vetting of the citizen commissioners are not the solution. I argue that ICCs in the future should adopt a variation of New Jersey's informal arbitration system as a means of reducing partisan stakes and encouraging coalition building among stakeholders.

AUTHOR. Heller Professor of Political Science, University of California, Berkeley, and Executive Director, University of California Washington Center. I particularly want to thank Abigail Hinchliff, Daniel Hemel, Nick Walter, and Whitney Cloud. Above and beyond the usual duties of assisting with accuracy and footnotes, they provided unusually insightful substantive comments and useful suggestions for developing this Essay.



FEATURE CONTENTS

I. THE EVOLUTION OF COMMISSION STRUCTURE	1813
A. Advisory Commissions	1813
B. Backup Commissions	1815
C. Politician Commissions	1816
D. The Independent Citizen Commission	1817
E. The General Trend	1820
II. ON THE FRONTIER OF REFORM: THE CALIFORNIA REDISTRICTING COMMISSION EXAMINED	1821
A. The Legacy of Failed Reform	1822
B. Purging Legislative and Political Influence	1824
C. Reaction to the CRC's Redistricting Plans	1827
III. THE ARIZONA INDEPENDENT REDISTRICTING COMMISSION REDUX	1830
A. The Path to a Commission	1830
B. The 2011 AIRC Experience	1833
C. Lessons from the AIRC and CRC	1834
IV. LESSENING THE PARTISAN EDGE	1837
A. The Informal New Jersey Bargaining System	1838
B. Grafting the Bargaining System into the Independent Citizen Commission Structure	1839
V. THE PROMISE OF INDEPENDENT COMMISSIONS ASSESSED	1841

Since *Baker v. Carr*,¹ state and federal courts have played a more active role in redistricting at all levels, reviewing the statutory and constitutional compliance of districting plans and serving as the redistricting body of last resort when political processes fail. The Supreme Court has taken divergent paths with respect to political and racial gerrymandering cases, outlining empirical tests for determining racial violations² but essentially failing to settle on a workable standard for partisan fairness.³ Some legal scholars and political scientists continue to urge the courts to intervene more deeply into partisan and incumbent gerrymandering issues,⁴ putting forward new refinements of

-
1. 369 U.S. 186 (1962).
 2. To be precise, racial discrimination in redistricting can be determined in three ways. A constitutional standard protects against intentional racial discrimination as outlined in *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which determined that there must be a “racially discriminatory motivation” to show a Fourteenth or Fifteenth Amendment violation. There is a three-part racial discriminatory effects test under § 2 of the Voting Rights Act. See 42 U.S.C. 1973 (2006), amended by Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982). This test was developed in *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986), which established a three-prong test of sufficient size, cohesion, and racial polarization while concluding that “use of a multimember electoral structure . . . caused black voters . . . to have less opportunity than white voters to elect representatives of their choice.” *Id.* In *Grove v. Emison*, 507 U.S. 25, 40-41 (1993), the Court held that the three *Thornburg* prerequisites are also necessary to establish a vote fragmentation claim with respect to a single-member districts. For jurisdictions covered under § 5, there is a non-retrogression rule developed in *Beer v. United States*, 425 U.S. 130 (1976), which found that § 5 “has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Id.* More recently, *Georgia v. Ashcroft*, 539 U.S. 461, 497-80 (2003) reaffirmed that a § 2 vote dilution violation is not an independent reason to deny § 5 preclearance, and the Court allowed states the latitude to choose between preserving “a certain number of ‘safe’ districts” as opposed to a greater number of influence seats.
 3. While the Supreme Court held that partisan gerrymandering was justiciable in *Davis v. Bandemer*, 478 U.S. 109, 109 (1986), it has yet to find a manageable standard for determining excessive partisanship. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423 (2006) (plurality opinion) (finding that the appellants had not provided “a reliable standard for identifying unconstitutional political gerrymanders”); *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring in the judgment) (refusing to hold that all political gerrymandering cases are nonjusticiable but finding that “[t]he failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make . . . [the Court’s] intervention improper”).
 4. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 642-45 (2002) (putting forth a proposal for the Court’s future treatment of gerrymandering cases).

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

formal redistricting criteria⁵ or fairness formulas⁶ for consideration. But others think this unwise and seek to lessen the current burden on the courts.

In particular, a new generation of legal scholars is more skeptical of the Court's ability to act as neutral redistricting referee and seeks instead to buffer the courts from excessive involvement in line-drawing controversies by "harness[ing] politics to fix politics."⁷ The suggestions for improving redistricting politics are varied. For some, it means shaming politicians into more responsible choices through undesirable comparisons with "shadow" redistricting efforts.⁸ Others believe that redistricting can be improved by greater public participation. They advocate for improving the public's capacity to develop and submit redistricting plans,⁹ or for requiring that redistricting plans be approved by referenda or adopted by initiative.¹⁰ Most radically, there are those who want to take the task of approving new district lines away from elected officials and give it to independent redistricting commissions.¹¹ The goal behind all these ideas is to lessen court involvement by improving the political processes that must determine the inevitable value and interest tradeoffs implicit in redistricting.

Realizing the ideal of a re-engineered redistricting politics, however, is not guaranteed for many reasons. There are many unanswered empirical questions. Do unfair comparisons with good government plans really shame elected officials into adopting better plans when political survival is at stake? Do new efforts at transparency and public input influence the contours of final district plans in any measurable way, or are they politely ignored? Do citizens know or care enough about line-drawing to act competently as redistricting deciders?

-
5. See, e.g., Nicholas D. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. (forthcoming 2012).
 6. See, e.g., Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 ELECTION L.J. 1, 2 (2007).
 7. Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY* 86, 86 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011).
 8. See Heather K. Gerken, *Getting from Here to There in Redistricting Reform*, 5 DUKE J. CONST. L. & PUB. POL'Y 1, 7 (2010).
 9. For an attempt to create user-friendly open-source software in order to enhance public mapping input, see Micah Altman and Michael P. McDonald, *BARD: Better Automated Redistricting*, 42 J. STAT. SOFTWARE 1, 23 (2011).
 10. See Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 668 (2006).
 11. Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 849-50 (1997).

Do independent redistricting commissions produce better redistricting plans than state legislatures and other types of commissions?

The Arizona and California independent redistricting commissions are the boldest departures from the traditional legislative redistricting model. They are also the natural experiments we can learn the most from because collectively they embody elements of almost every redistricting reform idea ever proposed, including greater transparency, options for third-party map submissions, citizen approval through direct democracy, careful vetting for conflict of interest, partisan and racial balance, lottery selection, a supermajority voting rule, and a proclivity towards so-called neutral criteria such as compactness, respect for city and county lines, and preserving communities of interest. By design, the combined effect of such features should ideally lead to better, less controversial redistricting plans, lessening the need for court intervention. But other features—especially supermajority rules, expedited review, the ability to trump a commission’s product by exercising direct democracy options, the absence of clear criteria for staff selection, and questions about the impartiality of the so-called “independent” members—could just as easily lead to political stalemate, persistent venue shopping by losing interests, and greater public exposure to heated underlying political disagreements.

As the recent round of redistricting comes to a close, I assess the new independent redistricting commissions’ performance and offer some observations about their prospects as effective court buffers. My basic points are as follows. First, commissions generally vary in their separation from elected officials and their ability to enact district boundaries autonomously. The independent citizen commissions are the culmination of a reform effort to limit the conflict of interest implicit in legislative control over redistricting. Second, to the surprise of no one who has studied redistricting closely, independent citizen redistricting commissions have not eliminated political controversy and partisan suspicions. This means that, to date, independent citizen commissions have not lessened the odds of redistricting-related litigation or the sore-loser incentive to try to get a better plan out of the courts. Third, I suggest that too much effort has been focused on the legislative conflict of interest problem and not enough on the problem of partisan tensions. Purity tests and careful vetting will never allay partisan doubts. Political actors will judge proposals by effects, not by the perception of neutrality. If the trend toward greater partisan polarization continues, supermajority rules and bipartisan composition could ultimately lead independent citizen commissions to political deadlocks, particularly if dissatisfied groups and political parties think they can get a better deal from the courts or the initiative process. This will weaken the desired buffer for the courts. Fourth, I argue that independent citizen and politician redistricting

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

commissions should adopt a variation of the New Jersey’s informal arbitration system as a means of reducing partisan stakes and encouraging coalition building among stakeholders. In the end, independent citizen and well-designed politician commissions offer the courts the best opportunity to defer to “reasonably imperfect” redistricting plans and to avoid the intrinsically political task of drawing district boundaries.

I. THE EVOLUTION OF COMMISSION STRUCTURE

Redistricting commissions in various forms have existed for several decades. Viewed over time and across states, there is an apparent evolutionary pattern leading to the creation of independent citizen redistricting commissions in reaction to the redistricting efforts by elected officials and their surrogates. Commissions broadly fall into four main types: *purely advisory commissions* to either the Governor or the legislature; *backup* mechanisms that kick into action if the legislature fails to enact a plan in a timely fashion; *politician commissions*; and *independent citizen commissions*.¹²

A. Advisory Commissions

Eight states currently have advisory commissions for either their state legislative or congressional lines.¹³ They vary considerably in the degree of their independence from state legislators and other elected officials. Iowa’s system, for instance, is closest to the independent citizen commission model in the sense that the legislature delegates the line-drawing to a bipartisan advisory commission and a nonpartisan Legislative Services Agency (LSA).¹⁴ But critically, the Iowa model differs from the independent citizen commission because the legislature retains the power to approve or reject the plans produced by the LSA. For this reason, Iowa is really a “quasi-independent” commission model. It is independent in the sense that the members of the five-person advisory commission cannot hold a party position or partisan

12. See JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, A CITIZEN’S GUIDE TO REDISTRICTING 20–22 (2010); Justin Levitt, *All About Redistricting: Professor Justin Levitt’s Guide to Drawing the Electoral Lines*, LOYOLA LAW SCH., <http://redistricting.lls.edu/who.php> (last visited Jan. 22, 2012).

13. See Levitt, *supra* note 12 (Iowa, Maine, New York, Ohio, Rhode Island, Vermont, and Virginia); *2010 Redistricting: Governor’s Redistricting Advisory Committee and Public Hearings*, STATE OF MD., DEP’T OF PLANNING, <http://www.mdp.state.md.us/redistricting/2010/advisory.shtml> (last visited Feb. 24, 2012) (Maryland).

14. IOWA CODE §§ 42.5–42.6 (2011).

elected office, or be related to or work for members of the state legislature or Congress, and that the LSA consists of nonpartisan civil servants. It is not independent in the sense of having the power to enact a redistricting plan without legislative approval (i.e., autonomous power). Iowa's advisory commission is also bipartisan. Four commissioners are appointed by the majority and minority leaders from both houses of the legislature, and the fifth is elected to office by the other four. The bipartisan independent commission works with the nonpartisan LSA to develop congressional and legislative redistricting plans, which are then submitted to the legislature. The legislature can make suggestions for changes to the plans that it receives, but must reject the LSA's plans three times before it can substitute its own plan entirely.¹⁵ As in the past, that did not happen in 2011.¹⁶

New York's advisory commission, by contrast, is closer to the pure legislative redistricting model than Iowa's. New York's commission, called a legislative task force in the statute, consists of four legislators plus two nonlegislators appointed by the majority and party leaders in both houses. The legislature can adopt, amend or ignore the commission's recommendations as it chooses.¹⁷ In the traditional legislative redistricting model (used by thirty-seven states for their own legislatures and forty-two for Congress), new redistricting plans are developed by legislative leaders and members exclusively and are passed in the same manner as other laws. On a continuum of independence from elected officials, New York's advisory system is only different from a pure legislative redistricting method by the addition of a few nonlegislators: it is not independent in the sense of being separated from elected officials, nor does it possess the autonomous power to enact a redistricting plan.

The fatal flaw in the advisory redistricting commission model in the eyes of the reform community is that elected officials retain the power to adopt or reject the proposed new district lines. Nonetheless, some regard Iowa as a successful model because the legislature to date has largely deferred to the LSA's proposals and because the lines seem to comport well with neutral formal criteria such as compactness, respect for jurisdictional lines, and protecting communities of interest.¹⁸ However, there is no definitive way of

15. *Id.* § 42.3.

16. See Kay Henderson, *Iowa Legislature Approves Redistricting Plan*, REUTERS, Apr. 14 2011, <http://www.reuters.com/article/2011/04/14/us-iowa-redistricting-idUSTRE73D4GU20110414>.

17. N.Y. LEGIS. LAW § 83-m (Consol. 2011).

18. See Thomas E. Mann, *Redistricting Reform: What Is Desirable? Possible?*, in *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING* 101-02 (Thomas E. Mann & Bruce E. Cain eds., Brookings Inst. Press 2005).

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

determining whether Iowa's success is due to its unique quasi-independent process or other factors such as the absence of substantial voting rights issues, a congenial political culture, and minimal regional or geographic variation. To this day, Iowa's system is more widely admired than copied.

B. Backup Commissions

Backup commissions, like the advisory commissions, typically lack independence from the influence of elected officials but do have the autonomous power to enact district boundaries by default. Eight states have some form of backup commissions, either for their state legislatures only (six states),¹⁹ Congress (Indiana),²⁰ or both (Connecticut).²¹ While the exact composition of the commissions varies considerably, in all instances the members are either elected officials themselves (often statewide officers such as the Attorney General or the Secretary of State)²² or their designees.²³ Although the absence of initial line-drawing responsibility is a serious deficiency, the mere existence of a backup commission can be consequential nonetheless. Knowing that stalemated redistricting negotiations would throw the matter to a backup commission can alter the legislative bargaining strategies in certain circumstances. For instance, if a backup commission has a mandated bipartisan structure, as it does in Connecticut,²⁴ but the majority party controls both the legislature and Governor's office, then the specter of a bipartisan alternative can give the majority party leadership more leverage over individual majority party members (i.e., "hold this up by insisting on your selfish demands and we lose control of the process to the other party"). In states that designate the composition of their backup commissions by specific statewide offices, the partisan balance of the commissioners will depend on electoral fate (i.e., which parties win those offices).

19. They are Illinois (ILL. CONST. art. IV, § 3), Maryland (MD. CONST. art. III, § 5), Mississippi (MISS. CONST. art. XIII, § 254), Oklahoma (OKLA. CONST. art. V, § 11A), Oregon (OR. CONST. art. IV, § 6), and Texas (TEX. CONST. art. III, § 28).

20. IND. CODE ANN. § 3-3-2-2 (LexisNexis 2012).

21. CONN. CONST. art. III, § 6(b).

22. For instance, Mississippi's backup commission consists of the Chief Justice of the state supreme court, the Attorney General, the Secretary of State, and the majority leaders of the House and Senate. MISS. CONST. art. XIII, § 254.

23. The majority and minority leaders in both houses of the Connecticut legislature designate two backup commission members each, as well as a ninth member who must be an elector in the state. CONN. CONST. art. III, § 6(b).

24. *Id.*

C. *Politician Commissions*

“Politician commissions” are composed of elected officials or their designees. While they are not independent in the sense of being separated from the power and influence of elected officials, they are autonomous in the sense that they do not have to submit their plans to the legislature like advisory commissions or wait until there is a legislative breakdown like backup commissions. As the label suggests, the politician commission members are mostly elected officials or their designees. In three instances, the state courts also have a designee.²⁵ In five states, the politician commission draws the state legislative district lines only,²⁶ and in two states (New Jersey and Hawaii), their commissions draw congressional lines as well.²⁷ As with the backup commissions, there are two basic designs of partisan balance: allocation by office type with only the possibility of partisan balance if some of the designated offices are held by different political parties²⁸ and explicit party balance that mandates membership representing both the majority and minority parties. In addition, a few states (i.e., New Jersey and Colorado) require that their commissions reflect geographic balance or demographic diversity.²⁹

-
25. Those three states are Colorado (COLO. CONST. art. V, § 48), Hawaii (HAW. CONST. art. IV, § 2), and Pennsylvania (PA. CONST. art. II, § 17(b)). In the latter two instances, the court’s appointment power is only invoked when the legislature fails to appoint all positions within a certain time period or the commissioners cannot agree on the tiebreaking member.
 26. They are Arkansas (ARK. CONST. art. 8, § 1), Colorado (COLO. CONST. art. V, § 48), Ohio (OHIO CONST. art. XI, § 1), Pennsylvania (PA. CONST. art. II, § 17(h)), and Missouri with separate commissions for each legislative house (MO. CONST. art. III, §§ 2, 7).
 27. New Jersey (N.J. CONST. art. II, § 2, para. 1) and Hawaii (HAW. CONST. art. IV, § 2).
 28. One might wonder whether there is any valid justification for using designation by office type as opposed to explicit partisan balance. The problem with the latter is that unless it is designed to accurately reflect the existing balance between the two parties, the odds are high that one of the political parties will be overrepresented in proportion to its normal electoral strength. Combined with supermajority rules, this can mean that the minority party has a seemingly unfair advantage in the line-drawing exercise. Designation by office type could be defended as a more flexible approximation of party balance in the sense that state elected offices are more likely to be divided as the two parties become more competitive. But it is still a rough approximation rather than an accurate reflection of party strength, and it brings with it all the uncertainty about partisan fairness discussed above.
 29. In Colorado, no more than four members of the eleven-person politician commission that draws state legislative lines can live in the same congressional district. There must be at least one commissioner from each congressional district, including at least one commissioner living west of the continental divide. COLO. CONST. art. V, § 48. In the case of New Jersey’s state legislative commission, the commission members are appointed with “due consideration to geographic, ethnic and racial diversity.” N.J. CONST. art. II, § 2.

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

Sam Hirsch has argued for a decade that well-designed politician commissions are a valid reform alternative,³⁰ and I concur with him on this point. Whereas the premise of the independent citizen commission is that improvement will come from a more disinterested redistricting body utilizing neutral formal redistricting criteria, the premise of the politician commission is that redistricting is a political enterprise that ideally leads to a bargained compromise between stakeholders. The New Jersey commission, which will be discussed in some detail later, consists of equally sized contingents of Democratic and Republican appointees chaired by a tiebreaking member selected by the commissioners themselves or the by the state supreme court if the commissioners cannot agree. The advantage of the New Jersey bargaining model is that it incentivizes both parties to compete for the tiebreaking member's vote much in the manner that electoral incentives often lead to a median voter result. In theory, the adopted plan should exhibit more moderation and consensus. In practice, the New Jersey system depends heavily on the perceived impartiality of the tiebreaking member, a feature that can be problematic.³¹

D. The Independent Citizen Commission

The last commission type is the “independent citizen” model. Its distinguishing features are the separation of the commissioners from elected officials and the ability to put district lines in place without legislative approval. The independent citizen commission design is the culmination of a reform effort aimed at lessening legislators' ability to choose the district lines they run in (sometimes simplistically characterized as elected officials choosing voters rather than voters choosing their representatives).³² The term for this problem – i.e., legislators drawing district lines that they ultimately have to run in – is legislative conflict of interest (LCOI). The various commission types fall

30. See, e.g., Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 1 (2002).

31. For an example of the importance of the independent tiebreaker, see Mark J. Magyar, *Independent Tie-Breaker Promises Open Mind on Congressional Redistricting*, NJ SPOTLIGHT, Sept. 7, 2011, <http://www.njspotlight.com/stories/11/0907/0000>.

32. I say simplistic because I can attest from my own experience as a redistricting consultant that legislators are often pressured by their constituents and supporters to shape district lines in particular ways and that legislators are often loath to ignore their demands for fear of the electoral or fundraising consequences.

on a spectrum according to the degree of separation that the commissioners have with respect to legislative control and influence.³³

Commissions align in a theoretical continuum of increasing separation from a legislative conflict of interest, spanning from legislative redistricting at one end to independent citizen commissions at the other. This is displayed in Appendix A. The rows array the degrees of separation from LCOI, and the two columns distinguish between state legislative districting and congressional districting. The zero degree of separation is of course the pure legislative redistricting. We should note that more states allow the state legislature to draw congressional (42) than state legislative lines (37) because the legislature's conflict of interest is more direct when they are drawing their own lines than when they draw congressional lines.³⁴

The first degree of LCOI separation (*separation by dilution*) merely adds citizens or statewide elected officials to a commission mix that already includes legislators. The second degree (*separation by office*) excludes legislators from the commission entirely in favor of statewide elected officials. The third degree (*separation from office*) removes elected officials in favor of citizens appointed by legislative leaders. The fourth degree of separation (*separation by independent pool selection*) forces legislative leaders to make citizen appointments from a pool chosen by a politically balanced body (in Arizona, for instance, the Commission on Appellate Court Appointments).³⁵ And the fifth, and so far ultimate degree of LCOI separation, is the California Redistricting Commission (CRC) model in which legislators only get to strike some of the names from a pool chosen by the state auditor (*separation from legislative designation*), and the citizens themselves are carefully vetted to exclude many normal forms of political involvement.

LCOI separation is one meaning of independence. A second and equally important meaning of independence is the autonomous power to enact redistricting plans without the approval of the legislature or elected officials. On this second dimension, advisory commissions align at the low end, backup

33. For a different approach to classifying types of commissions by their degree of independence, see David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship*, 54 VILL. L. REV. 57, 68-80 (2009). This approach accords the highest independence to commissions that make binding, primary decisions based on the vote of a "non-political tiebreaker." *Id.* at 69. My scheme focuses primarily on the progression of LCOI separation but I recognize that independent citizen commissions uniquely combine LCOI separation and the autonomy to enact plans.

34. This distinction of course breaks down in the real world since more than a few state legislators typically set their sights on running for Congress, and the personal and political ties between state legislators and congressional members are often quite strong.

35. ARIZ. CONST. art. IV, pt. 2, § 1(3)-(8).

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

commissions in the middle, and independent citizen and politician commissions at the top. Understandably, politicians are uncomfortable with giving up the power to enact lines to commissions that are independent from them. Thus the correlation between LCOI independence and commission autonomy is usually an inverse one: the more LCOI-independent the commission membership, the less autonomous its power (e.g., the politician commission). Significantly, independent citizen commissions break the usual pattern between LCOI separation and enactment power.

As with the other commission types, there are shades of difference in the existing independent citizen commissions that reflect degree of separation gradations along the two dimensions of independency: LCOI separation and the autonomy to enact district plans. There are six states that authorize independent citizen commissions to draw both state legislative and congressional lines,³⁶ but two of them have only one congressional seat.³⁷ At the low end of a two dimensional index of commission independence is the State of Washington's system that gives legislative and party leaders the power to appoint commissioners subject to certain restrictions and allows the legislature a very limited ability to amend the commission's recommended districts.³⁸ Alaska, Idaho, and Montana are slightly higher in the index because they do not give their legislatures any opportunity to amend the commission's plans, but allow legislative leaders to make commission appointments subject to restrictions by elected officials, political party leaders, and lobbyists.³⁹ Arizona occupies the next position as it gives the state Commission on Appellate Court Appointments the job of creating a pool of potential citizen commissioners that the state legislature must choose from and gives its citizen commission autonomous power.⁴⁰ California also gives the legislature no say on plan approval but only allows legislative leaders the right to strike two nominees each from three subpools of twenty each chosen by the State Auditor.⁴¹

36. See ALASKA CONST. art. VI, § 8-10; ARIZ. CONST. art. IV, pt. 2, § 1(14); CAL. CONST. art. 21, § 2; IDAHO CONST. art. 3, § 2(a); MONT. CONST. art. V, § 14; WASH. CONST. art. II, § 43(1).

37. Alaska and Montana. See Table 1. *Apportionment Population and Number of Representatives, By State: 2010 Census*, U.S. CENSUS BUREAU, <http://www.census.gov/population/apportionment/data/files/Apportionment%20Population%202010.pdf> (last visited Feb. 3, 2012).

38. See WASH. CONST. art. II, § 43(7); WASH. REV. CODE ANN. § 44.05.100 (2012).

39. See ALASKA CONST. art. VI, § 8; MONT. CONST. art. V, § 14; IDAHO CODE § 72-1502 (2006).

40. ARIZ. CONST. art. IV, pt. 2, § 1(3)-(8).

41. See CAL. GOV'T CODE § 8252(b)-(g) (West 2006).

E. The General Trend

There are several points to make about the general progression of commissions over the years. First, it highlights how much the recent reform effort has focused on the LCOI problem even though redistricting controversy itself stems from many other problems such as partisan fairness, regional competition, racial underrepresentation, and the like. As we shall see shortly, those who designed the newest independent citizen commission, the California Redistricting Commission, went to extraordinary lengths to insulate it from elected state and federal officials. By comparison, there has been less innovation on the partisan tension front. Supermajority rules and balanced membership have long been the best protections against partisan bias, but those features tend to encourage bipartisan, incumbent protection plans and safe seats. While the evidence that bipartisan gerrymandering has significantly caused the country's rising partisanship is thin at best,⁴² the belief that it at least might have contributed to polarizing trends has diminished the luster of bipartisan redistricting plans.⁴³ The recent trend has been to add independent voters and/or decline-to-state voters (i.e., voters not registered with a political party) to the commissions, but as I will discuss later, that has not quieted partisan concerns and suspicions.

Second, there is absolutely no reason to believe that this progression will end at five degrees of separation. The search for LCOI separation can go further, eliminating legislative input of any kind and vetting ever more stringently the citizens and groups that testify before them for any previous political involvement that might taint their opinions.⁴⁴ In the end, a core

42. Two studies conclude that redistricting has had little impact on partisan polarization in the U.S. House of Representatives. See NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006); Stephen Ansolabehere, James M. Snyder, Jr., & Charles Stewart III, *Candidate Positioning in U.S. House Elections*, 45 AM. J. POL. SCI. 136 (2001). A third study of partisan polarization in the California legislature comes to a similar conclusion. See ERIC MCGHEE, *REDISTRICTING AND LEGISLATIVE PARTISANSHIP* (2008), available at http://web.ppic.org/content/pubs/report/R_908EMR.pdf.

43. There was a time when bipartisan fairness seemed a desirable reform goal and even received an ever so mild blessing from the Supreme Court. In *Gaffney v. Cummings*, 412 U.S. 735, 751-54 (1973), the Court held that a "political fairness principle" that achieves a rough approximation of the statewide political strengths of the two major parties does not violate the Equal Protection Clause.

44. The disclosure that the Democratic Party seemed to have organized a grassroots effort to persuade the CRC to draw lines that were more favorable for Democratic incumbents by organizing witnesses from the local community and flooding the CRC with testimony—some of which came from front groups or undisclosed paid lobbyists—created considerable

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

problem for U.S. redistricting reform is that the system of nonpartisan expertise is weaker (even, sadly, in electoral administration⁴⁵) than in the other Anglo-American democracies that also use single member district rules. Both the U.S. judiciary and executive branches have a much higher degree of political permeability than in the other countries, a trait that has increased over time both in the name of accountability⁴⁶ and as the unintended consequence of increasing partisanship. The reform community has turned to citizens as the answer but in so doing has traded one set of problems for another.

II. ON THE FRONTIER OF REFORM: THE CALIFORNIA REDISTRICTING COMMISSION EXAMINED

California's tradition is very much to take reform to the next level, frequently experimenting with policies and institutions that far exceed what other states regard as the frontier of reform.⁴⁷ There were many unsuccessful attempts at redistricting reform prior to the passage of Propositions 11⁴⁸ and 20,⁴⁹ the initiative measures that formed the Citizen Redistricting Commission and gave it responsibility for drawing state legislative and congressional district lines. California's experience with redistricting is long and troubled. Twice in the period since *Baker v. Carr*, the task of drawing new districts has reverted to a court-appointed panel of special masters, because, under circumstances of divided government, the Democratic legislature and Republican Governor could not come to agreement over a set of maps.

turmoil and may lead to future reforms aimed at further disclosure rules and a more careful vetting of testimony before the CRC in the next decade. See Olga Pierce & Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, PRO PUBLICA, Dec. 21, 2011, <http://www.propublica.org/article/how-democrats-fooled-Californias-redistricting-commission>.

45. RICHARD HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (forthcoming 2012).
46. See RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983) (describing how political appointees are used to put the administrative structure more in sync with the President's policies).
47. Bruce E. Cain, *Califòrmula for Dysfunction*, 6 AM. INT. 107, 107 (2011).
48. Proposition 11 (Cal. 2008) (codified at CAL. CONST. art. XXII), available at <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop11-title-sum.htm>.
49. Proposition 20 (Cal. 2010) (codified at CAL. CONST. art. XXI), available at <http://cdn.sos.ca.gov/vig2010/general/pdf/english/text-proposed-laws.pdf#prop20>.

A. *The Legacy of Failed Reform*

The Democrats controlled the process in 1981 and 2001, and in both cases outraged the reform community, although for different reasons. In 1981, the Democrats controlled the legislature, and then-Governor Jerry Brown passed a set of plans over strenuous objections by Republicans. The congressional plan, fashioned by the savvy and ambitious Democratic Congressman Phil Burton with the concurrence of the state legislature,⁵⁰ added five seats to the Democrats' share and contained numerous ostentatiously noncompact districts.⁵¹ After the plan was overturned by referendum in 1982, the two parties reached an agreement right before Governor Brown was due to leave office that satisfied the Republicans sufficiently to secure a referendum-proof two-thirds vote for a slightly modified set of lines.⁵² But this experience led to a decade of lingering bitterness, lawsuits, and ongoing attempts to change the system.⁵³

The 1980s redistricting experience was very much on the minds of the Democrats when they once again had complete control of the process in 2001. Aware that the direct democracy options posed the risk of expensive ballot fights over redistricting and that the Democratic candidates at both the state legislative and congressional level had done very well under the lines given to them by the 1991 special masters' plan, the Democrats opted for a bipartisan plan that would lock in their gains for another decade and appease the Republicans enough to keep redistricting off the ballot.⁵⁴ While this strategy enabled them to pass a timely redistricting plan and avoided an immediate

50. As with Tom DeLay's effort in Texas two decades later, Congressman Burton's outrageous disregard of traditional redistricting norms was motivated by the desire to enhance his power in Congress by adding new Democrats to the caucus ranks. Neither the 1982 California nor the 2002 Texas congressional redistricting are usual cases, but they both figure prominently in the motivations for both political and judicial reform of redistricting.

51. Bruce E. Cain, *Assessing the Partisan Effects of Redistricting*, 79 AM. POL. SCI. REV. 320, 331 (1985).

52. *The Long Reapportionment Trail: A Calendar of Confusion and Controversy*, CAL. J., March 1983; *Redistricting in California: Redistricting 1980*, U.C. BERKELEY INST. OF GOVERNMENTAL STUDIES, <http://igs.berkeley.edu/library/research/quickhelp/policy/redistricting/reapp80.html> (last visited Jan. 23, 2012).

53. See generally J. Morgan Kousser, *Redistricting: California 1971-2001*, in GOVERNING CALIFORNIA (Gerald C. Lubenow & Bruce E. Cain eds., 1997) (providing a narrative history of California's redistricting over three decades and the numerous attempts to reform the process).

54. Tony Quinn, *The Bipartisan Redistricting: How It Happened*, CAL-TAX DIGEST (Oct. 2001), <http://www.caltax.org/member/digest/oct2011/10.2001.Quinn-BipartisanRedistricting.o8.htm> (describing the rationale).

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

battle with the Republicans, it too became controversial. Against a backdrop of rising partisanship and legislative stalemate, critics began to complain that the price paid for bipartisan peace was too high, robbing the California political system of competitive seats and centrist legislators who could help bridge the gap between the distant party bases.⁵⁵ Governor Schwarzenegger, for these reasons, was a leading proponent of redistricting reform, and strongly backed a 2005 special election initiative measure that would have given the line-drawing process over to a panel of retired judges and mandated a re-redistricting in 2006.⁵⁶

While the 2005 measure failed, the cause of reforming California's redistricting system was taken up by a powerful and well-funded bipartisan reform coalition, California Forward. Learning from errors in past drafting (e.g., combining redistricting with other matters that violated the single subject rule) and political miscalculations (e.g., embedding redistricting reform in a package of Republican policy initiatives), California Forward was finally able to secure the passage of redistricting reform and create the California Redistricting Commission in two steps—Proposition 11, covering the state legislature, and Proposition 20, extending the scheme to Congress. Even though one of the implicit motivations behind these measures was creating more competitive districts in order to achieve more policy moderation, neither ballot measure included competition as one of its explicit criteria, as an unsuccessful Ohio measure had done.⁵⁷ The unstated assumption behind the

55. In fact, while the evidence regarding the effect of the 2001 plan on competitive seats is strong, the evidence for centrist legislators is not. See ERIC MCGHEE, PUB. POLICY INST. OF CAL., REDISTRICTING AND LEGISLATIVE PARTISANSHIP 1-4 (2008), available at http://www.ppic.org/content/pubs/report/R_908EMR.pdf.

56. Prop. 77 (rejected by Cal. Special Statewide Election, Nov. 8, 2005), available at http://library.uchastings.edu/ballot_pdf/2005s.pdf. On then-Governor Schwarzenegger's support for the redistricting reform initiative, see *Vote "Yes" on Props 74, 75, 76 & 77*, JOIN ARNOLD, http://digital.library.ucla.edu/websites/2005_997_008/www.joinarnold.com (last visited Feb. 6, 2012).

57. The Ohio measure defined competitiveness in a manner that only a political scientist could love. It required that the commission adopt a qualifying plan with the highest "competitiveness number," as defined "by a mathematical formula, that is the product of the number of balanced districts multiplied by two, plus the total number of other remaining competitive districts, minus the total number of unbalanced uncompetitive districts multiplied by two." Apparently, there were not enough political scientists in the state to tip the balance, as the measure lost with 30% in favor and 70% against. For the text of the measure, see *State Issue 4: Amended Certified Ballot Language*, OHIO SEC'Y OF STATE, <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2005ElectionsResults/05-1108Issue4/State%20Issue%204%20Amended%20Certified%20Ballot%20Language.aspx> (last visited Feb. 6, 2012). For the final vote tally, see *State Issue 4: November 8, 2005*, OHIO

California effort was that a bipartisan panel of citizens, unconnected to incumbent legislators and relying on neutral criteria, would create fair and competitive district boundaries without explicit instructions to do so and without using political data. In other words, partisan fairness and competition would be the indirect effect of the commission's composition and adherence to designated neutral formal criteria (e.g., compactness, respect for city and county boundaries, following communities of interest, etc.). This assumption turned out to be controversial in the end as Republican and Latino critics questioned the fairness of the CRC redistricting proposals for Congress and the state senate.⁵⁸

B. Purging Legislative and Political Influence

It is hard to imagine a more complete effort to squeeze every ounce of incumbent and legislative influence out of redistricting than the CRC design. It is probably best described as a ring of defensive tactics, employing multiple approaches to keep political and incumbent influences out. The first line of defense was a selection process for the fourteen-member commission that was explicitly "designed to be extraordinarily fair and impartial, and to lead to a group of commissioners who would meet the very high standards of independence and would reflect the population of [the state of California]."⁵⁹ To be eligible, a prospective commissioner had to be a registered California voter who had voted in two of the last three elections, and who had continuously registered with the same party, or as a nonpartisan, for the previous five years. Commissioners were prohibited from holding any elective office for ten years after service on the CRC, and from serving as paid staff for the legislature or a lobbyist, at any level, for the subsequent five years. Applicants were struck from the pool if within the previous ten years, they, or any member of their immediate family, had (1) been a candidate for, or appointed to, elected office; (2) been a paid employee or consultant for a candidate for state or federal elective office, or a consultant for a political party;

SEC'Y OF STATE, <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2005ElectionsResults/05-1108Issue4.aspx> (last visited Feb. 6, 2012).

58. See, for instance, Bryan Llenas, *California's New Election Map Draws Fire from GOP and Latino Groups*, FOX NEWS LATINO, Aug. 16, 2011, <http://latino.foxnews.com/latino/politics/2011/08/16/new-california-redistricting-passes-but-latino-opposition-remains>; and Jim Miller, *Redistricting: Commission Certifies Maps amid Criticism, Looming Challenge*, PRESS ENTERPRISE (Riverside, Cal.), Aug. 16, 2011, <http://www.pe.com/local-news-headlines/20110816-redistricting-commission-certificates-maps-amid-criticism-looming-challenges.ece>.
59. CAL. CITIZENS REDISTRICTING COMM'N, FINAL REPORT ON 2011 REDISTRICTING 2 (2011).

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

(3) served on a political party's central committee; (4) been a registered lobbyist; (5) served as paid staff for any of the bodies being redistricted; or (6) contributed \$2000 or more to a candidate for elected office at any level.⁶⁰ The implicit ideal was something analogous to an impartial jury, eliminating not only those with an insufficient degree of separation from elected officials, but also those whose involvement in politics might hinder their capacity to act impartially.

The selection process, conducted by the California Bureau of Audits, was elaborate and multistaged, featuring elements of a college admissions application, voir dire, lottery selection, and diversity balancing.⁶¹ After an extensive outreach effort that garnered more than 36,000 initial indications of interest, the State Auditor's Applicant Review Panel (ARP) screened the pool and invited those who were formally qualified to fill out an extensive supplemental application that required four essays of 500 words or less, plus information about education, employment history, campaign finance contributions over \$250, criminal history, and a listing of family members and related potential conflicts of interest. In addition, applicants had to supply three letters of recommendation. All of this was posted on the web for public comment.

Amazingly, 4547 individuals successfully completed these supplemental forms. This group was then reduced to 120 individuals (forty each from the pool of Democrats, Republicans, and independents) who were interviewed and then reduced again to sixty, evenly divided by party classification. At that stage, the majority and minority legislative leaders from both houses were each allowed to strike two persons from each of the three party pools, leaving thirty-six people per pool who moved on to the lottery phase of the competition. The eight who were chosen by lottery then chose the remaining six in a manner so as to reflect state diversity, "including, but not limited to, racial, ethnic, geographic, and gender diversity."⁶² In the end, on account of the analytic skill requirement, the CRC was diverse with respect to race, gender, and ethnicity, but not with respect to education and class.⁶³

60. CAL. GOV'T CODE § 8252(a)(2)(A) (West Supp. 2011).

61. Bonnie E. Glaser & Karin MacDonald, Implementation of Proposition 11, Step One: Setting the Rules, Soliciting Applications, and Forming a Commission (Sept. 2011) (unpublished manuscript) (on file with author).

62. See CAL. GOV'T. CODE § 8252(g).

63. All of the members had college degrees and many also had graduate degrees. The CRC's website *We Draw the Lines* featured the picture of a worker in a hard hat even though it is quite likely that none of the CRC had ever worked in one. CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov> (last visited Nov. 28, 2011).

The selection of seemingly impartial, diverse, and analytically qualified individuals was only the first line of defense. The second was an explicit ordering of neutral criteria as set out in section 2 of article XXI of the California Constitution. The order of priority was: (1) equal population; (2) Voting Rights Act compliance; (3) geographic contiguity; (4) respect for the “geographic integrity of any city, county, city and county, local neighborhood, or local community of interest”; (5) compactness; and (6) nesting (i.e., placing the boundaries of state assembly districts within state senate district boundaries).⁶⁴ There are three notable aspects to this approach. First, instead of regarding criteria as falling into tiered categories (a common way to think of redistricting criteria), the provision listed the priority exactly in order to limit tradeoffs between different values. Secondly, the geographic-community-of-interest criterion was given much more emphasis than in the past. It was defined as “a contiguous population which shares common social and economic interests,”⁶⁵ and the CRC relied heavily on public testimony to define the community of interest areas.⁶⁶ The criteria list is notable for what it excludes: first, the favoring or disfavoring of incumbents, candidates, or political parties, and, second, the residential location of any political candidate.⁶⁷

Transparency and extensive public input were the next line of defense. The extent of the CRC’s public outreach was staggering: thirty-four public meetings in thirty-two locations around the state, more than 2700 participants, and over 20,000 written comments.⁶⁸ Moreover, the hearings were carried live

64. CAL. CONST. art. XXI, § 2(d).

65. *Id.* § 2(d)(4).

66. The CRC actively solicited testimony to help define communities of interest. On its website, it asked the public for “[t]he economic and social interests that bind your community together,” “[w]hy your community should be kept together for fair and effective representation,” and “[w]here your community is located.” It maintained that “[w]ithout that information from you, the Commission won’t know which communities to keep together when drawing lines.” *California Citizens Redistricting Commission’s Guide to Redistricting and the Public Input Process*, CAL. CITIZENS REDISTRICTING COMM’N (Apr. 19, 2011), http://www.wedrawthelines.ca.gov/downloads/meeting_handouts_apr2011/learnmore_20110419_guidebook.pdf.

67. However, party registration data and results from past political races matched to the new districts were available through free public websites almost immediately after plans were released by the CRC. See for instance, REDISTRICTING PARTNERS, <http://redistrictingpartners.com> (last visited Jan. 23, 2012), for the Democrats; and MERIDIAN PACIFIC REDISTRICTING 2011, <http://www.mpimaps.com> (last visited Jan. 23, 2012), for the Republicans. The fact that the CRC was not sequestered like a jury meant that there was no guarantee that the Commission members were unaware of this data.

68. See CAL. CITIZEN REDISTRICTING COMM’N, *supra* note 59, at 1.

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

by Internet and hearing transcripts made available on the commission's webpage. The Irvine Foundation established outreach centers around the state that made software and some computer assistance available to those who wanted to draw their own maps. Bound by the state's open meeting laws to make decisions in public (including many legal and personnel discussions that often are held in executive session), there was little that the CRC could say or do that was not open for public inspection.⁶⁹ The first and all subsequent versions of the CRC's plans were posted on its web page.

The last line of defense was a supermajority voting rule that raised the threshold for agreement to a high level. A proposal could not be accepted unless it obtained the votes of three members of each pool.⁷⁰ As it was, the CRC's commission structure gave the Democrats, the majority party, less than half of the seats on the commission and Republicans and independents/decline-to-states a disproportionate amount of leverage.⁷¹

Taking all this into account, it is clear that by design and in implementation, California took extraordinary steps to ensure that the redistricting process would be fair and impartial. By various measures, the CRC drew maps that adhered fairly closely to the constitutional criteria, producing boundaries that were more compact⁷² and more competitive than the lines they replaced.⁷³ And yet, the reaction to their plans became progressively more heated as the process wore on.

C. Reaction to the CRC's Redistricting Plans

Taking stock of the CRC's achievements, we see that its districting plans made improvements over the 2001 districting plans in several ways, but the

69. The CRC operated under the state's Bagley-Keene Open Meeting Act. CAL. GOV'T CODE §§ 11120-11132 (West 2012). It also streamed its hearings live and made hearing transcripts available on its website. See *Background on the Commission*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/commission.html> (last visited Jan. 23, 2012).

70. CAL. CONST. art. XXI, § 2(c)(5).

71. In February 2011, 44% of California voters were registered as Democrats, 30.9% as Republicans, 20.4% as decline-to-state or independents, and 4.7% as other parties. See Mark Baldassarre, *California's Likely Voters*, PUB. POLICY INST. OF CAL. (Aug. 2011), http://www.ppic.org/main/publication_show.asp?i=255. The distribution on the fourteen-member CRC was five Democrats, five Republicans, and four independent/decline-to-state members. CAL. CONST., art. XXI, § 2(c)(2).

72. See Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans* 18 tbl.5 (Sept. 13, 2011) (unpublished manuscript), available at <http://polisci2.ucsd.edu/vkogan/research/redistricting.pdf>.

73. *Id.* at 23 tbl.7.

commissioners almost certainly could have done better in any one dimension had they chosen to emphasize it. In short, the commission produced “reasonably imperfect” plans. For instance, the CRC increased the number of majority Latino citizen voting age population (CVAP) seats at every level (by one seat in both the state senate and congressional plans, and by six in the assembly), but most of the gains occurred between the first draft and final plan following vigorous objections by the Mexican American Legal Defense and Educational Fund (MALDEF) and other Latino groups.⁷⁴ Although they achieved many changes, MALDEF was unhappy that its plan—which would have increased the number of Latino CVAP majority seats even more—was rejected, and that the CRC did not take other opportunities to create new Latino seats, especially at the state senate level.⁷⁵

With respect to neutral criteria, the CRC’s plans made only modest improvements except in terms of compactness. The number of census-designated place splits was reduced at all three levels but the gains in percentage terms were small largely because the legislature had done quite well in the previous redistricting cycle.⁷⁶ In the case of counties, there were seven fewer county splits in the assembly plan but five more in Congress and three more in the state senate plan than the legislature had in 2001.⁷⁷ Similarly, except for the congressional plans, which had been the most extreme of the 2001 bipartisan incumbent protection plans, there was very little improvement in the number of competitive⁷⁸ and nested⁷⁹ seats. The only area of obvious improvement was in the compactness of the seats,⁸⁰ which no doubt accounts for the generally favorable judgment of the press and public. In the end, appearance counts for a lot because the other values are harder for the public to assess.

74. *Id.* at 10–11 tbl.2. For the MALDEF reaction, see Nadra Kareem Nittle, *California Minority Groups Offer “Unity” Redistricting Map*, NEW AM. MEDIA (July 7, 2011), <http://newamericamedia.org/2011/07/unity-map-head-here.php>.

75. See Nadra Kareem Nittle, *Latest CA Redistricting Maps Satisfy Most Minorities—But Not Latinos*, NEW AM. MEDIA (Aug. 1, 2011), <http://newamericamedia.org/2011/08/latest-ca-redistricting-maps-satisfy-most-minoritiesbut-not-latinos.php>.

76. Kogan & McGhee, *supra* note 72, at 16 tbl.3.

77. *Id.* at 16 tbl.4.

78. *Id.* at 23 tbl.7.

79. *Id.* at 19 tbl.6.

80. *Id.* at 18 tbl.5 & fig.2.

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

Despite little objective evidence of serious bias,⁸¹ Republicans were disquieted from the start. Disappointed over the selection of staff⁸² and suspicious that the nonpartisans on the CRC were closet Democrats who would vote against Republican interests, the state Republicans expressed their concern throughout the process.⁸³ Believing that the CRC's final maps would give the Democrats supermajority control of the state legislatures and up to a five-seat gain in the House of Representatives, the Republicans launched referenda against the state senate and congressional plans, taking advantage of a provision in the constitution that stays the implementation of the lines and sends the matter for expedited review by the state supreme court as long as the referendum appears that it will qualify.⁸⁴ They also filed suit in the state supreme court, alleging violations of the state constitution's provisions for compactness, respect for geographic boundaries, and the integrity of local jurisdictional lines, but these claims were ultimately rejected.⁸⁵

In short, despite the extraordinary effort to scrub the process of LCOI and excessive partisanship, some groups and individuals judged the results to be unfair. The plan was certainly not perfect in this sense, but it was an improvement over the status quo and within the parameters of reasonably balanced efforts. The unresolved tension between neutral-procedural and outcome-fairness approaches could no longer be sublimated. The party that thought it got less than its fair share of districts took its cause to legal and direct-democracy venues.

-
81. The continued decline in Republican registration and the spread of Latino growth into Republican areas in the Inland Empire and the Central Valley posed problems for the Republicans from the start. Simulations of the likely Republican and Democratic seat shares under good and bad year scenarios do not show radical departures from the status quo. See *id.* at 26 tbl.8, 29 fig.3.
 82. See, e.g., Jim Sanders, *Redistricting Panel Chooses Mapmaker After Spirited Debate*, SACRAMENTO BEE: CAPITOL ALERT (Mar. 21, 2011, 9:43 AM), <http://blogs.sacbee.com/capitolalertlatest/2011/03/resolving-one-key-controversy.html>.
 83. See the various exchanges between Tony Quinn and Steven Maviglio on the Republican website Fox and Hounds. *Search Results*, FOX & HOUNDS, <http://www.foxandhoundsdaily.com/?s=redistricting> (last visited Jan. 23, 2012).
 84. CAL. CONST. art. XXI, §§ 2(j), 3(b).
 85. See Verified First Amended Petition for Extraordinary Relief in the Form of Mandamus or Prohibition, *Vandermost v. Bowen*, No. S196493 (Cal. Oct. 26, 2011); Verified Petition for Extraordinary Relief in the Form of Mandamus or Prohibition at 22-28, *Radanovich v. Bowen*, No. S196852 (Cal. Oct. 26, 2011). The California Supreme Court denied both petitions and the relief sought. *Vandermost*, No. S196493 (Cal. Oct. 26, 2011); *Radanovich*, No. S196852 (Cal. Oct. 26, 2011). The *Radanovich* plaintiffs have refiled their suit in federal court. Complaint for Injunctive and Declaratory Relief, *Radanovich v. Bowen*, No. 2:11-cv-09786-SVW-PJW (C.D. Cal. Nov. 23, 2011).

III. THE ARIZONA INDEPENDENT REDISTRICTING COMMISSION REDUX

In the 2001 redistricting round, the Arizona Independent Redistricting Commission⁸⁶ (AIRC) defined the cutting edge of redistricting reform, taking the effort at limiting LCOI to the fourth degree by restricting the pool of potential commissioners from which the majority and minority party legislative leaders could choose to twenty-five individuals selected by a judicial selection commission. The five AIRC members consisted of two each from the major political parties and one independent. No more than two could come from any one county. The 2000 initiative measure that created this system, Proposition 106,⁸⁷ also mandated that redistricting plans start from scratch, modifying an initial grid plan according to traditional criteria such as compactness, contiguity, and community of interest, and to the extent possible relying on visible geographic features and undivided census tracts. The commission could not consider incumbency considerations nor use political data in the construction of the initial grid but could use political data to test for VRA compliance and other goals.

A. *The Path to a Commission*

Prior to the passage of Proposition 106, Arizona, like California, had experienced a troubled redistricting history. The state's 1971 plan was overturned by a district court for splitting the Navajo tribe reservation into three separate state legislative districts and replaced by a court-drawn plan.⁸⁸ In 1981, the Republican-controlled legislature passed a redistricting plan that was vetoed by the Democratic Governor, Bruce Babbitt.⁸⁹ The Republicans were able to override the veto,⁹⁰ but their plan did not get Justice Department clearance and was rejected by a federal court for diluting the Native American vote and failing to achieve sufficiently equal population.⁹¹ Ten years later, the

86. I was able to observe the Arizona commission as the court-appointed Special Master in 2002.

87. *Proposition 106*, in ARIZ. SEC'Y OF STATE, 2000 BALLOT PROPOSITIONS 54 (2000), available at <http://www.azsos.gov/election/2000/info/pubpamphlet/english/prop106.pdf>.

88. Barbara Norrander & Jay Wendland, *Redistricting in Arizona*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST 177, 178 (Gary F. Moncrief ed., 2011).

89. *Id.* at 178-79.

90. *Goddard v. Babbitt*, 536 F. Supp. 538, 541 (D. Ariz. 1982).

91. Norrander & Wendland, *supra* note 88, at 178-79.

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

Democrats and Republicans each controlled one state legislative house and could not agree on a redistricting plan, forcing a federal court to impose one.⁹² However, Hispanics objected to the fact that the court's plan did not properly account for polarized voting and that it was not sent to the Justice Department for preclearance.⁹³ The legislature then drew up a new plan,⁹⁴ but it and a subsequent redraft were both rejected by the Justice Department for failing to produce enough majority minority districts.⁹⁵ Finally, a third plan was accepted for the 1994 elections.⁹⁶

Against this background of recurring redistricting turmoil, Proposition 106 went on the ballot in 2000 with the support of reform groups (namely, Common Cause and the League of Women Voters) and the Democratic Party, eventually winning by a margin of 56.1% to 43.9%.⁹⁷ Republicans were more supportive of redistricting reform in California (where they were in the minority) than in Arizona (where they were the majority party).⁹⁸ In redistricting matters, where one stands (on reform) depends on where one sits. Especially in states where the prospect of the minority party ever gaining legislative control are dim to nonexistent, the outside party is usually more willing to experiment with new processes.

The five-person Arizona Independent Redistricting Commission is selected by the four majority and minority party legislative leaders, but the citizen pool they choose from is initially reviewed and chosen by the state's Commission on Appellate Court Appointments.⁹⁹ The twenty-five finalists are divided into members of the two largest political parties in Arizona and persons not

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 179.

97. BETSEY BAYLESS, ARIZ. SEC'Y OF STATE, 2000 ANNUAL REPORT 44 (2000), available at http://www.azsos.gov/public_services/annual_report/2000/annual_report.pdf; David K. Pauole, *Race, Politics, and (In)Equality: Proposition 106 Alters the Face and Rules of Redistricting in Arizona*, 33 ARIZ. ST. L.J. 1219, 1221 (2001); Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation, and Regret*, 35 ARIZ. ST. L.J. 575, 577 (2003).

98. Arizona Republican legislators opposed Proposition 106, see Norrande & Wendland, *supra* note 88, at 180. In California, Proposition 20 was put on the ballot by Charles Munger, a Republican donor. See Gerry Shih, *Tackling Redistricting with Money and Zeal*, N.Y. TIMES, Oct 7, 2010, <http://www.nytimes.com/2010/10/08/us/o8bcredistrict.html>.

99. ARIZ. CONST. art. IV, pt. 2, § 1(3)-(8).

registered with either party.¹⁰⁰ Based simply on political science research about those who designate themselves as independents/decline-to-states, there was reason a priori to worry about whether that label would hold up under the intense pressure of partisan scrutiny. Most independent/decline-to-state voters are actually “partisan leaners,” meaning that they vote disproportionately for one party over the other. Only a minority of these voters swings to both parties with almost equal frequency.¹⁰¹ To the inner political world of party officials, elected representatives, consultants, and activists, this means that people who call themselves independents are more often than not closet partisans. This was not much of a problem for Arizona in 2001, but it became the center of controversy in 2011.¹⁰²

The initial experience with Arizona’s commission in 2001 was, on balance, positive enough to encourage the California reform community to adopt a similar, if more complex, model. The AIRC, however, was not able to forestall litigation. The commission’s first set of maps was challenged by the Justice Department for violating the section 5 retrogression standard by reducing the number of majority-Latino voting age population (VAP) districts by three.¹⁰³ The maps were then revised and precleared. However, the state maps were also challenged in state court for, among other things, failing to comply with the state constitutional requirement to draw competitive districts when “it was possible to do so.”¹⁰⁴ While the Arizona Supreme Court ultimately rejected this claim,¹⁰⁵ the underlying conundrum concerning competitiveness was never addressed.

If the AIRC was supposed to draw the initial grid lines without reference to incumbency or political data, to avoid retrogression by maintaining the same level of majority minority districts (which are inherently noncompetitive) and to adhere primarily to neutral formal criteria, how much room was there realistically for the constitutionally subordinate goal of creating new

100. *Id.*

101. BRUCE E. KEITH ET AL., *THE MYTH OF THE INDEPENDENT VOTER*, at xvi (1992).

102. One can only speculate as to why 2011 turned out to be more partisan. Partisanship generally rose in the United States in the intervening decade, but timing might have also had something to do with the outcome. The Arizona commission got a late start, and by then, the Republican complaints in California were mounting.

103. Letter from Ralph F. Boyd, Jr., Assistant Att’y Gen., U.S. Dep’t of Justice, to Lisa T. Hacker & Jose de Jesus de Rivera, AIRC (May 20, 2002), http://www.justice.gov/crt/about/vot/sec_5/az_obj2.php.

104. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 208 P.3d 676, 682 (Ariz. 2009).

105. *Id.* at 689.

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

competitive seats? This is a prime example of the central tension between neutral criteria versus desired reform outcomes such as creating more competitive seats. The implied reform assumption was that the former would lead to the latter, but that is only true sometimes. In California, the baseline 2001 districts (especially the congressional districts) were so skewed by the legislature's extreme bipartisan 2001 plan that the CRC could not help but increase the number of competitive seats even without looking at political data and by following neutral criteria. Even so, the gains in California were relatively modest.¹⁰⁶ Similarly, the AIRC in 2001 did little to increase competitiveness in Arizona.¹⁰⁷

B. The 2011 AIRC Experience

Entering the 2011 redistricting, there were two possibilities: (1) the AIRC would build on its reasonable success in 2001, or (2) with experience and knowledge of the process under their belt, the parties and political players would game the system more effectively. The answer, unfortunately, turned out to be the latter. As in California, partisan suspicion and disappointment over the likely political consequences of the new lines undermined the AIRC design. Both the CRC and AIRC were well insulated from incumbent self-interest, but less well protected from partisan expectations. In particular, two features proved to be problematic. First, because redistricting is a technical exercise, commissioners necessarily rely upon staff with geographic information system (GIS) skills (i.e., the ability to actually draw the lines), those with statistics training to do the Voting Right Act section 2 analysis, and legal counsel specializing in voting rights law. This sets up principal-agent problems based on asymmetries of information. In theory, the technical staff could steer commission decisions in a given direction by skewing the advice and options it gives to the commissioners. Even the suspicion that they might do so is poisonous. Second, in the AIRC bipartisan structure, the member registered as independent/decline-to-state acts as chair and the tiebreaker in the event that the partisan members cannot agree. If one party believes that an

106. The Kogan and McGhee study estimates that the predicted number of competitive seats rose between the baseline 2001 map to the 2011 final plan from 11% to 15% in the state senate, from 11% to 14% in the assembly, and from 5% to 18% in Congress. See Kogan & McGhee, *supra* note 73, at 23, tbl.7.

107. Norrander & Wendland, *supra* note 88, at 191 (finding little evidence that Arizona's election became more competitive after 2002, as measured by the number of unopposed seats, average margin of victory, wins by ten points or less, and bias between seats won and total votes).

independent/decline-to-state member is really a closet partisan, the legitimacy of the whole exercise falls apart.

In California, the CRC addressed the staff expertise problem by taking a more hands-on approach to drawing the lines rather than relying on staff to generate all the options.¹⁰⁸ The question of whether nominally nonpartisan commissioners were really closet partisans was problematic in California as well, but lessened somewhat by having four who claimed to be independent voters and rotating the chair responsibilities among all the commissioners.¹⁰⁹ The AIRC on the other hand was never able to overcome its staffing fight and had only one independent/decline-to-state voter as the deciding chair. The decision to hire a Democratic consulting firm, Strategic Telemetry, became a major controversy. Republicans alleged that the independent chair politicked on behalf of the Democratic firm in violation of the state's open meeting laws and destroyed relevant documents.¹¹⁰ The state Attorney General's office launched an investigation even as the AIRC proceeded with its hearings. After the congressional draft plan was released, appearing to make some Republican seats more competitive and potentially giving the Democrats gains, the Republican Governor and legislature became convinced that the fix was in, and summarily removed the chair on a party line vote.¹¹¹ The court subsequently restored the chair.¹¹²

C. Lessons from the AIRC and CRC

There are several common flaws in the Arizona and California independent citizen commission designs that are particularly problematic in an era of heightened partisanship. To begin with, neither design accounted for the staffing issue clearly. Both commissions were explicitly balanced in their membership, but there was no specific provision or guidelines about the

108. E-mail from Karin MacDonald, Mapping Consultant to Cal. Redistricting Comm'n, to author (Feb. 24, 2012, 5:43 PM) (on file with author).

109. The chairmanship was rotated on a regular schedule. See *Background on Commission*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/commission.html> (last visited Jan. 23, 2012).

110. Paul Davenport, *Arizona AG: Panel Member Said Documents Destroyed*, ASSOCIATED PRESS, Sept. 8, 2011, available at http://www.myfoxphoenix.com/dpp/news/politics/state_politics/arizona-ag-panel-member-said-documents-destroyed-apx-09082011.

111. Ginger Rough, *Arizona Redistricting Panel Won't Be Changed by Brewer*, ARIZ. REPUBLIC, Nov. 30, 2011, available at <http://www.azcentral.com/news/election/azelections/articles/2011/11/29/20111129arizona-redistricting-brewer-special-session.html>.

112. *Id.*

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

technical and legal staff they would employ. Most redistricting consultants have worked for one or the other party, which, given the political sensitivity of the task, is understandable.¹¹³ Similarly, most lawyers who specialize in voting rights cases or redistricting tend to align with one party or the other. If the commission is balanced by party affiliation, then should the staff be also? Would a bipartisan staff even be able to work together harmoniously?

Another problem is whether the seal on legislative interference and control is tight enough. In both California and Arizona, the independent commissions have to rely on the legislature for funding, not just before and during the redistricting cycle, but after as well. Since litigation and various cleanup matters can extend for years into the period after the commissions' redistricting plans have been disclosed to their state legislatures, it sets up a situation that at best is awkward and at worst compromises the commissions' independence and sets them up for potential retribution. The total budget for Arizona's 2001 Independent Redistricting Commission was \$9,544,100, 63% of which was spent after 2002.¹¹⁴ The California Redistricting Commission seems to be on a similar path of extended life and continued expenditure. It received an initial allocation of \$2,375,000 in FY 2010-2011 but then needed additional allocations amounting to \$3,470,000 through FY 2011-2012 for a total of \$5,845,000, with a projected shortfall of \$2,570,371.¹¹⁵ Litigation alone is likely to cost the CRC at least \$2,863,747.¹¹⁶ Given the unavoidable legal and political uncertainty that comes with line-drawing in the modern era, independent citizen commissions cannot be expected to disappear when they issue their lines. But depending financially on the legislature for funding could prove problematic if the legislature is not happy with the commission's product.

113. As an attempt to create a natural experiment in staffing bipartisanship, I agreed to be an affiliated consultant with a Republican team applying for the Arizona Independent Redistricting Commission staff mapping contract, thinking I could test the bipartisan staffing model personally. I was told by my Democratic friends that I had lost my mind and values. In the same redistricting cycle, I was demonized by California Republicans for my involvement in the 1981-1982 state redistricting (despite having established a noncontroversial, nonpartisan data center at Berkeley), and criticized by Democrats for my bipartisan gesture. This does not bode well for the bipartisan staffing model. I suspect that the Iowa Legislative Services Agency is a better model for staffing, leaving the politics to the commissioners.

114. JOINT LEGISLATURE BUDGET COMM., STATE OF ARIZ., FISCAL YEAR 2012 APPROPRIATIONS REPORT 136 (2011), www.azleg.gov/jlbc/12app/FY2012AppropRpt.pdf.

115. *Citizen Redistricting Commission Expenditure Summary: Estimates Through January 31, 2012*, CAL. REDISTRICTING COMM'N (Dec. 15, 2011), available at http://wedrawthelines.ca.gov/downloads/meeting_handouts_122011/handouts_20111215_crc_expenditure.pdf.

116. *Id.*

Even more problematic than lack of financial independence is the capacity of the legislature to interfere in a commission's operations. In Arizona, the Governor and legislature have the capacity to remove AIRC members for "gross misconduct,"¹¹⁷ which can apparently mean proposing boundaries that the majority party does not like. Displeased with the conduct of the AIRC's independent chair, the Governor of Arizona, Jan Brewer, attempted to remove her. In the end, the Governor was rebuffed by the Arizona Supreme Court,¹¹⁸ but the existence of this option certainly compromises the commission's independence and places the courts in the position of having to protect the commission. Tensions with the majority party in the legislature are a real threat. They did not manifest themselves in California because the majority party was reasonably content with the CRC lines. Tensions flared up in Arizona's case because the majority party was not happy with the commission's work. The prospect of a minority party winning the redistricting sweepstakes under a commission system reverses the time-honored political logic of "to the winner go the spoils" and tests the political majority's tolerance for outcomes it does not favor.

A third problem highlighted by the recent experiences in Arizona and California directly relates to the aspiration that independent citizen redistricting commissions can serve as better buffers for the courts. It should be taken as a given in any reform design that political players will game the system, looking for strategic advantage over their opponents and responding rationally to the new institutional incentives that they face. In particular, redistricting is bedeviled by the sore loser problem: because new district lines can determine the electoral fates of candidates, political parties, and interest groups, it is usually worth their time and effort to overturn a plan that they do not like for the uncertain prospect of something better. Court-drawn redistricting plans are not as easily predicted as legislatively enacted ones, but in my experience, political practitioners believe that judges favor the parties that nominated or elected them. There is also some empirical evidence for this.¹¹⁹ But even if this belief is mistaken, a redistricting sore loser might so

117. The Governor had to demonstrate "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office" under article 4, part 2, section 1(10) of the Arizona Constitution. See *Order, Mathis v. Brewer*, No. CV-11-0313-SA (Ariz. 2011), available at www.azcourts.gov/clerkofthecourt/SeparateOrders.aspx.

118. *Id.*

119. See Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413, 417 (1995) (showing that district court judges voted against redistricting plans presented by their own party at a lower rate than plans presented by the other party).

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

dislike a proposed redistricting plan that he or she would prefer any chance of a better plan from the courts to what a commission offers.

As a consequence, the pathways to legal review matter very much. The argument for expedited review is that it allows challenges to district lines to be resolved quickly so that election officials can move ahead with implementing the ballot and precinct changes necessary to conduct the upcoming election. Since the timetable is tight and the financial and administrative consequences of postponing elections are dire, it makes sense to resolve legal uncertainties quickly. But the incentive effect of expedited review is to encourage challenges, especially if the courts have the power to impose temporary lines while legal matters are sorted out in a lengthy trial process. California's law adds a special twist. Not only does it provide for expedited review by the state's supreme court, but it provides the option for the court to stay the implementation of new lines if there are enough signatures during the qualifying stage of a referendum campaign against a plan.¹²⁰ This is in fact the strategy that the California Republican Party pursued.¹²¹ Again, if the goal is to buffer the courts from being dragged into redistricting disputes, the threshold for legal intervention should be carefully evaluated in light of the various checks and bipartisan guarantees built into the independent citizen commission model.

IV. LESSENING THE PARTISAN EDGE

No doubt, there will be reform-led attempts to patch these problems in the coming years. But the question remains: absent an agreed-upon definition of fair outcomes and a continued trend of strong partisanship, can independent citizen or politician commission systems arrive at outcomes that will be regarded as sufficiently fair by the political parties to dampen disputes and keep the courts from having to take over the line-drawing process? Fair procedures are no guarantee that all parties will be happy. Degrees of separation only insulate from incumbent self-interest. A truly bipartisan structure risks the prospect of stalemate and an incumbent gerrymander, but using independent members to break partisan deadlock can feed the perception of hidden bias. If the belief in original sin with respect to those who claim to be politically independent cannot be eliminated, can it at least be minimized?

120. CAL. CONST. art. XXI, § 2(i)-(j).

121. See Martin Wisckol, *GOP's Redistricting Lawsuits Thrown Out*, ORANGE COUNTY REG., Oct. 26, 2011, <http://totalbuzz.ocregister.com/2011/10/26/gops-redistricting-lawsuits-thrown-out/71353>.

A. *The Informal New Jersey Bargaining System*

One possible solution might be incorporating the New Jersey bargaining system into the independent citizen commission system. As discussed previously, the formal New Jersey system is usually lumped with other “politician” commissions in scholarly classifications, based on its lower degree of separation from politician self-interest.¹²² The members of the commission for drawing congressional lines are appointed by the two majority and two minority party leaders plus the two chairs of the state Democratic and Republican parties, each of whom gets two selections. The thirteenth or tiebreaking member is chosen by the other twelve or by the state supreme court if they cannot agree. The thirteenth member is restricted from having held political office in New Jersey within the last five years. Similarly, the commission for the state’s legislative lines is chosen by the two state party chairs (with five appointments each) and the eleventh member by the other ten or the state supreme court in the event of a stalemate.¹²³ On the face, it is simply another first-degree separation-by-dilution commission.

However, the New Jersey model has some interesting “informal” features that separate it from other politician commissions and offer clues as to how the pervasive partisan paranoia, staff bias, and political original sin problems might be handled differently.¹²⁴ First, the two party delegations are invited to present competing plans in an iterative fashion. Second, they are given specific goals to compete over, such as creating competitive seats, minimizing party bias, and retaining voters in the same districts to the degree possible. The plans must of course meet the explicit federal constitutional criteria such as equal population, contiguity, and adherence to the VRA, but the winning plan is the one that scores best on the so-called subordinate or state criteria.

This system has several virtues. Most importantly, it induces competition between the party factions based on whatever desirable characteristics a state might want to emphasize. The New Jersey law leaves the criteria determination to the tiebreaking member. It would be better in my estimation to set these goals out formally in either an initiative measure where possible or a statute,

122. LEVITT, *supra* note 12, at 21.

123. N.J. CONST. art. II, § II, paras. 1-2.

124. The primary advocate for wider use of the New Jersey bargaining system is Sam Hirsch. See Sam Hirsch, Jenner & Block LLP, A Proposal for Redistricting Reform: A Model State Constitutional Amendment (conference paper presented at the Am. Mathematical Soc’y’s Special Session on “The Redistricting Problem,” Jan. 8, 2009), available at <http://www.americansforredistrictingreform.org/html/documents/HirschRedistrictingPaperforAmerMathSociety.pdf>.

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

preferably at least four years before the next round of redistricting to maintain some semblance of a “veil of ignorance” impartiality to the reasoning behind why some criteria are emphasized. The iterative bargaining process has a desirable median outcome effect that fits nicely with a “reasonably imperfect” normative framework. If we take as working premises that all redistricting is political, that any plan will likely be considered unfair by somebody, and that the best outcome is a redistricting plan that fits within the bounded set of “reasonably imperfect plans,” the iterative bargaining framework provides an incentivized path to the middle and away from extreme outcomes. If partisan bias is included and measured with multiple indicators including the distribution of partisan registration and normal votes, seats-votes curves,¹²⁵ and each party’s incumbent displacement count (i.e., the number of incumbents who are drawn out of their districts given their legal residence), the differences between party preferred plans might become less stark over the course of the bargaining, lowering the stakes of losing. The inevitable heat associated with redistricting cannot be turned off, but it can be reduced.

B. Grafting the Bargaining System into the Independent Citizen Commission Structure

That said, the New Jersey plan can be improved by grafting it to citizen commissions and changing the commissioners’ role from drawing lines themselves to judging the competition between all plans, or amending and adopting the best plan as their own. Many states have already taken steps to encourage online, public submissions of redistricting plans, but it is unclear whether any of these ideas and plans had much effect, even in the commission states. Several election law scholars¹²⁶ have initiated shadow redistricting efforts aimed at providing better examples of balanced plans, and while they received some press and possibly influenced the deliberations in a few

125. Seats-votes curves plot seat shares against vote shares and can be used to derive estimates of bias and responsiveness in redistricting plans. See Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 AM. J. POL. SCI. 514, 534-38 (1994).

126. Two examples are the Columbia University project, DrawCongress.org, run by Professor Nathaniel Persily and the Public Mapping Project run by Professors Michael McDonald and Micah Altman. See *DrawCongress.org*, COLUMBIA LAW SCH., <http://www.law.columbia.edu/redistricting> (last visited Nov. 28, 2011); Micah Altman & Michael McDonald, *Public Mapping Project*, PUB. MAPPING PROJECT, <http://www.publicmapping.org> (last visited Nov. 28, 2011).

instances,¹²⁷ their work would have been more influential if it had been entered in a “reasonably imperfect” competition. Placing commissioners in the position of judging the competition as opposed to drawing their own lines will in my experience lessen the political pressure upon them.¹²⁸ The state would save a great deal of money on consultants, because, like open source coding, a competition among submitted plans would push the time, expense, and effort onto those in the public who care enough to enter.¹²⁹ Opening the competition to the general public as well as political professionals lessens the dangers of collusive cooperation between the parties and potential staff bias. The neutrality of nonpartisans on state commissions might still be questioned, but having several (as in California) rather than one (as in Arizona) would lessen the focus on any given individual and the general suspicion about closet partisans to some degree.

Most importantly, however, the competition’s goals should be twofold. First, it should lessen the partisan differences over proposals by directing the iterative bargaining toward a median outcome. The intuition is this: the smaller the differences between the plans, the lower the stakes of losing, hopefully lowering the risks of expensive legal challenges and efforts to obstruct the implementation of the commission’s plan. In addition, the incentive to form coalitions in order to demonstrate support addresses a major problem with public input in redistricting. In my experience, too many individuals and groups simply use their opportunity to testify to reiterate parochial demands about preserving the integrity of their neighborhoods and political jurisdictions. They often reject what seem to me to be fair tradeoffs and compromises, such as allowing a community to be split at one level (e.g., Congress) in return for being kept whole at another (e.g., both houses of the state legislature). Much of the effort in redistricting reform to date has focused on elected officials, but legislators and statewide officials have never simply drawn lines in a political vacuum. Activists and interest groups have always

127. On June 7, 2011, two citizens testified before the CRC arguing in favor of a Columbia University plan developed by Professor Nathaniel Persily’s student group that kept a Tri-Cities portion of the Bay Area whole in redistricting. See *In the Matter of Full Commission Business Meeting (Volume I)* (Cal. Citizens Redistricting Comm’n, July 15, 2011), available at http://wedrawthelines.ca.gov/downloads/transcripts/201107/transcripts_20110715_sacto_vol1.pdf.

128. I ran the 1993 Oakland city redistricting in this manner and managed to keep the city council out of the line of political fire for the most part. Only at the end, when one city councilman decided to make a small change to the map, did it cause some controversy.

129. Aside from organized groups, there is an abundance of people with narrow enough definitions of fun to devote hours to the exercise. I am ashamed to say that I have never done it for free.

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

played a role. Other than empowering them with more opportunities to observe, testify, and submit, there has been little or no attention to the incentives or input quality of these interested individuals and groups.

The idea that disinterested citizens will come forward in great numbers and channel commissions of any type in the direction of some pure public interest is naïve.¹³⁰ The “iron law of oligarchy”¹³¹ applies in force to redistricting. In my opinion, it is better to accept the reality that the interested portion of the public will continue to provide most of the input, and reformers should work on improving the quality of their input. There is a roiling controversy in political science as to whether partisanship starts at the top (i.e., the elected officials themselves)¹³² or the bottom (i.e., public opinion),¹³³ but it is likely that the middle (i.e., the activists and interest groups) also plays a critical role. If we can take the edges off activists’ input and encourage more compromises at the middle level, then perhaps we can lessen the tension at the commission level as well.

V. THE PROMISE OF INDEPENDENT COMMISSIONS ASSESSED

If the goal is to buffer the courts from excessive involvement and to “harness politics to fix politics,”¹³⁴ what can we conclude about the promise of independent redistricting commissions? First, independent commissions cannot be expected to eliminate political controversies over line-drawing.

130. In research conducted under my supervision, Anthony Ramirez took a sample of seventeen CRC meetings and looked at who testified before them. In some cases, the testifiers identified their affiliations, but in many cases, he had to search the Internet to discover their connections. Of the one hundred and twenty-three separate testimonies, he was able to identify that ninety-nine were from individuals affiliated with interest groups ranging from the California Conservative Action group to California Forward, the group that pushed for the CRC redistricting reform and monitored its progress closely. In twelve instances, the individuals were local public officials. See Anthony Ramirez, *Where Are the Citizens? Not Here* (Oct. 26, 2011) (unpublished manuscript) (on file with author).

131. The concept and term originated in ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (Eden & Cedar Paul trans., 1915).

132. See, e.g., MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (3d ed. 2010) (arguing that partisan polarization is more evident in political elites than mass opinion).

133. See, e.g., Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 542 (2008) (finding that ideological divisions have increased among voters as well as elites, especially among the best informed, most interested, and active voters).

134. Gerken & Kang, *supra* note 7, at 86.

Redistricting scholars have long maintained that the placement of boundaries inevitably pleases some and not others.¹³⁵ Every plan affects incumbents, interest groups, and political party prospects differently. Some cities, counties, and neighborhoods inevitably do not get what they want and are either divided between districts or not placed with the neighboring areas they prefer. Good government groups want lines drawn according to neutral criteria, and voting rights groups want a fair share of representation based on expectations of likely outcomes. There are too many goals that need to be realized simultaneously to please everyone, particularly in large and diverse states. The upbeat optimism of the public testimony in the California hearings before the first release of the CRC's plans contrasted sharply with the angry denunciations in certain parts of the state and among some groups after the new lines were revealed.¹³⁶ Greater transparency and openness to public input might have the ironic effect of heightening the expectations and disappointment of those who do not get what they want from the reformed redistricting process.

The corollary to the first point is that at least in the short run, independent commissions might not diminish appeals to the court for redress. Arizona's commission was sued in 2001, and it had already been challenged in court even before it drew any lines in 2011.¹³⁷ California's commission was both in court and facing referenda almost immediately upon completion of its work.¹³⁸ As long as the courts offer a chance to appeal, we should expect groups that are unhappy with the results to pursue legal challenges. The temptation to sue is likely greater when challenges are granted expedited review and when referenda can prevent the implementation of a plan even before the electorate votes on it.¹³⁹ Politics is fought in the short run, and even a one-election-cycle advantage can be a strong motivation to act. Most importantly, even the most extraordinary efforts at constructing an impartial process in California did not allay partisan suspicions nor guarantee widespread satisfaction with results. Successful challenges this round will encourage more challenges in the future. To some degree, the courts control their own fate if they want independent commissions to be buffers. The courts might consider a higher level of

135. See, e.g., Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 73 (1985).

136. See, e.g., Olu Alemoru, *California Redistricting Maps Draw Angry Response*, L.A. WAVE, July 13, 2011, <http://www.wavenewspapers.com/news/local/west-edition/California-redistricting-maps-125543443.html>.

137. *Adams v. Comm'n on Appellate Court Appointments*, 254 P.3d 367, 369-70 (Ariz. 2011).

138. Wisckol, *supra* note 121.

139. CAL. CONST. art. XXI, § 3.

REDISTRICTING COMMISSIONS: A BETTER POLITICAL BUFFER?

deference to redistricting institutions such as independent citizen commissions that are more likely to adopt reasonably imperfect plans.

The most important feature of independent citizen commissions in the future may turn out to be not their degree of separation from incumbents or politics generally, but their capacity to negotiate to meet supermajority vote thresholds and agree on reasonably imperfect plans (i.e., good redistricting deliberation). There is no way to satisfy all redistricting constraints, but the need to compromise on these various goals in order to get enough votes to please a supermajority should reduce the odds of outlier plans that go to extremes to achieve partisan or incumbency goals.¹⁴⁰ While this may not satisfy the political groups that feel they got the short end of the stick in terms of district outcomes, it should be enough for the courts. In the end, the effectiveness of buffers will hinge to some degree on the respect that courts accord to them.

Given the goals of compromise and achieving reasonably imperfect plans, independent citizen commissions might not be the only candidates for buffering. Politician commissions that employ a political arbitration model, adopt transparency requirements, and encourage meaningful public participation might also serve as effective buffers.

In the end, political thickets can be pruned even if they cannot be removed entirely. The new election law institutionalism does not try to replace politics. It aspires to improve it enough to prevent substantial and widely perceived unfairness. The next round of improvements to independent citizen commissions or other commission structures should seek to increase the incentive to make compromises, including among those who testify and submit proposals to the commissions, rather than adding more degrees of separation in the search for greater political purity. The key is not whether line-drawers have prejudices, but whether they can set them aside enough to reach a bargain. As long as the process encourages individuals and groups to hold fast to their demands and expectations, the discontent that leads to legal recourse will breed vigorously. Better redistricting politics is not a judgment imposed by the politically pure upon the less pure; it is a “reasonably imperfect” outcome that a broad cross-section of citizens and groups can live with for a decade.

140. See Oedel, *supra* note 33, at 82-84.

Appendix A.

SEPARATION FROM LEGISLATIVE CONTROL¹⁴¹

DEGREE OF SEPARATION		STATE LEGISLATURE LINES	CONGRESSIONAL LINES	
0°	<i>Legislative Control</i>	37 States	42 States	Legislators Enact Lines
1°	<i>Separation by Dilution</i>	A: MD, ME, NY, OH, RI B: CT, IL, OH, P: CO, HI, MO, NJ, OH, PA	A: MD, ME, NY, RI, B: CT P: HI, NJ	Nonlegislators Added to Commission
2°	<i>Separation by Office</i>	B: OR P: ARK		Legislators Excluded from Commission
3°	<i>Separation from Office</i>	A: IA, VA, VT I: AK, ID, MT, WA	A: IA, VA, VT I: AK, ID, MT, WA	Elected Officials Excluded from Commission
4°	<i>Separation by Independent Pool</i>	I: AZ	I: AZ	Independent Pool of Legislative Designees
5°	<i>Separation from Legislative Designation</i>	I: CA	I: CA	Auditor/Random Selection of Commission

141. Notes: A = Advisory Commission, B = Backup Commission, P = Politician Commission, I = Independent Citizen Commission.

Ohio uses both politician and advisory commissions for its legislative lines.