

**CAN INDEPENDENT REDISTRICTING COMMISSIONS LEAD US OUT OF THE POLITICAL THICKET?**

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## INTRODUCTION

In *Arizona Legislature v. Arizona Independent Redistricting Commission*, the United States Supreme Court upheld five-four Arizona voters' taking redistricting authority away from their elected officials and vesting that authority in an independent redistricting commission ("IRC").<sup>1</sup> As a matter of constitutional law, this case turns on the meaning of "state legislature" and, according to the majority, Arizona's state legislature includes its citizens when they make laws through popular referendums.<sup>2</sup> While this decision may settle the constitutional issue,<sup>3</sup> the Court's decision raises a significant practical issue: Do IRCs actually work?

The problem of legislators' setting district boundaries to manipulate election results has bedeviled the Court for decades.<sup>4</sup> The justices offered sharply contrasting assessments of the Arizona IRC's work.<sup>5</sup> The majority assessed its work positively while the dissent, authored by Chief Justice Roberts, argued the Commission was plagued by partisan intrigue.<sup>6</sup> Whether IRCs can lead us out of the political thicket of partisan gerrymandering is an important question, but the Court's assessments are based on one state's experience in a single redistricting cycle.<sup>7</sup> In this article, we consider the legal and political implications of the Court's decision. We hope to expand the scope of the analysis to offer a better perspective on the practical advantages and disadvantages of IRCs.

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<sup>1</sup> *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2657–59, 2677 (2015).

<sup>2</sup> *Id.* at 2666–71, 2673; *see also id.* at 2679–80 (Roberts, J., dissenting) (discussing "[t]he unambiguous meaning of 'the Legislature' in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way."); *see also* Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 477–79 (The U. Chi. Legal F. Working Paper No. 520, Jan. 18, 2015).

<sup>3</sup> *Ariz. State Legis.*, 135 S. Ct. at 2666–71; Stephanopoulos, *supra* note 2, at 478.

<sup>4</sup> *See id.* at 2661–62, 2666–68 (discussing Arizona's history with the issue and multiple cases over the century dealing with redistricting).

<sup>5</sup> *Id.* at 2677–79, 2690–92.

<sup>6</sup> *Ariz. State Legis.*, 135 S. Ct. at 2677–79, 2690–92.

<sup>7</sup> *See Ariz. State Legis.*, 135 S. Ct. at 2677 (Arizona is the state being analyzed in this case); Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 4 ST. POL. & POL'Y Q., 455, 455–57, 459 (2004); Stephanopoulos, *supra* note 2, at 481.

In Section I, we discuss the problem of partisan gerrymanders. Courts have readily acknowledged that drawing districts to rig election outcomes is a constitutional problem, but have had an incredibly difficult time articulating a standard to judge partisan gerrymandering.<sup>8</sup> Some redistricting principles may precisely be formulated, such as population equality, but there appears to be no judicially-enforceable remedy to partisan gerrymandering.<sup>9</sup> As a result, redistricting litigation draws courts into protracted conflict with state legislatures.<sup>10</sup>

In Section II, we focus on Arizona's response to the problem of partisan gerrymandering which lead to the Court's decision in *Arizona Legislature v. Arizona Independent Redistricting Commission*. In Section III, we offer an overview of other states' redistricting practices. We classify redistricting commissions with respect to selection procedures and authority. In some states, commissioners are politically appointed; in other states, commissioners are elected.<sup>11</sup> In some states, commissions only issue recommendations to legislatures; in other states, their maps are binding.<sup>12</sup>

In Section IV, we review empirical political science on the impact of IRCs. The key issue is whether redistricting by IRCs leads to more competitive elections.<sup>13</sup> This section points legal scholars to a significant body of political science literature that is relevant to the debate over partisan gerrymandering. In Section V, we examine whether maps created by IRCs have withstood legal challenges in states other than Arizona.

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<sup>8</sup> See *Ariz. State Legis.*, 135 S. Ct. 2652 at 2690; *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004); Carson & Crespin, *supra* note 7, at 455, 458; Lois Beckett, *Is Partisan Gerrymandering Unconstitutional?*, PROPUBLICA (Nov. 11, 2011, 1:10 P.M.), <https://www.propublica.org/article/is-partisan-gerrymandering-unconstitutional>.

<sup>9</sup> See *infra* note 17 and accompanying text. See generally *Ariz. State Legis.*, 135 S. Ct. at 2690 (Roberts, J., dissenting) (discussing the difficulty in the judicial formulation of a standard); Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 782–83 (2004) (discussing the difficulty in establishing a manageable standard).

<sup>10</sup> See e.g., *Ariz. State Legis.*, 135 S. Ct. at 2658–59; see also Carson & Crespin, *supra* note 7, at 455.

<sup>11</sup> See *Ariz. State Legis.*, 135 S. Ct. at 2662; Carson & Crespin, *supra* note 7, at 455, 459; Stephanopoulos, *supra* note 2, at 478–79; *State-by-State Redistricting Procedures*, BALLOTPEDIA, [https://ballotpedia.org/State-by-state\\_redistricting\\_procedures](https://ballotpedia.org/State-by-state_redistricting_procedures) (last visited Mar. 1, 2016).

<sup>12</sup> See *Ariz. State Legis.*, 135 S. Ct. 2652 at 2662; *State-by-State Redistricting Procedures*, *supra* note 11.

<sup>13</sup> See Carson & Crespin, *supra* note 7, at 455–56, 459.

We conclude by offering some thoughts on the potential impact of the *Arizona Legislature* decision and identify states where citizens are best positioned to take advantage of the decision.

### I. THE PROBLEM OF PARTISAN GERRYMANDERING

The primary mandate for a redistricting agenda is to create districts with equal populations.<sup>14</sup> The Equal Protection Clause of the 14th Amendment requires that states make “an honest and good faith effort” to keep the number of citizens in each congressional district “as nearly of equal population as is practicable.”<sup>15</sup> Equal populations are also required in state legislative districts, but more leeway is afforded at the state level to accommodate traditional redistricting concerns like keeping counties whole.<sup>16</sup> The equal population requirement is enforceable because compliance can be judged with great precision.<sup>17</sup> After map makers satisfy the equal population requirement, they must try to balance a variety of potentially competing concerns. They must provide minority voters fair opportunities to elect their preferred candidates of choice; they should draw reasonably compact districts that avoid dividing counties and cities as much as possible.<sup>18</sup> Moreover, new maps must be politically attractive to a majority of incumbent legislators because, in most states

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<sup>14</sup> See generally *Baker v. Carr*, 369 U.S. 186, 206–08, 236 (1962) (holding that a person may seek judicial remedy for disproportionately drawn districts). In the event that the Court finds impropriety, the Court can require that districts be redrawn by the courts. See, e.g., *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 693–94 (D. Ariz. 1992) (where the state court did implement a plan). An interesting variation on counting the population that is equally divided among districts is found in Hawaii where only permanent residents (and not non-resident students and non-resident military) are counted for the purposes of apportionment. See HAW. CONST. art. IV, § 6; Justin Levitt, *All about Redistricting: Hawaii*, LOY. L.A. L. SCH., <http://redistricting.lls.edu/states-HI.php#institution> (last visited Apr. 4, 2016). Similarly, Washington excludes non-residents from its population count. See WASH. REV. CODE § 44.05.090 (2016).

<sup>15</sup> *Reynolds v. Sims*, 377 U.S. 533, 577 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 3, 7, 18 (1964).

<sup>16</sup> See *Gaffney v. Cummings*, 412 U.S. 735, 748–51 (1973); *Reynolds*, 377 U.S. at 577; *White v. Regester*, 412 U.S. 755, 765 (1973).

<sup>17</sup> See generally *Gaffney*, 412 U.S. at 736, 748–51 (describing statistical data that measures deviation to the hundredths of a percent).

<sup>18</sup> See generally *id.* at 736–37 (explaining that courts look favorably at plans which achieve political fairness between majority and minority parties, and cut fewer town lines).

legislators are responsible for the redistricting process.<sup>19</sup> The redistricting process has been described as a “political thicket” because it is difficult the competing concerns are difficult to untangle and may be better managed through political compromises.<sup>20</sup>

Partisan gerrymandering occurs when the majority party in the state legislature uses its authority to draw districts in its favor.<sup>21</sup> It is not a new practice; in fact, it is a venerated political tactic.<sup>22</sup> In excess, partisan gerrymandering has the potential to nullify the democratic process. It can be described as the “quintessential [case] of democratic breakdown.”<sup>23</sup> Those in power can retain power by suppressing competitive elections.<sup>24</sup> There is also the problem of bipartisan gerrymanders which occur when incumbent legislators in both parties devise districts to keep themselves in power.<sup>25</sup> Having legislators pick their constituents raises an inherent conflict of interest.<sup>26</sup> When elections results are engineered by manipulating districts, regular elections and representative government becomes a farce.<sup>27</sup> As a fundamental principle of democratic government, “voters should choose their representatives, not the other way around.”<sup>28</sup>

It is particularly problematic when state legislatures use election rules to frustrate the will of voters because voters are seen

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<sup>19</sup> Stephanopoulos, *supra* note 2, at 479; *State-by-State Redistricting Procedures*, *supra* note 11.

<sup>20</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *see also Gaffney*, 412 U.S. at 750 (warning courts that they may “become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing do.”).

<sup>21</sup> *See* Beckett, *supra* note 8; David W. Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in REAPPORTIONMENT IN THE 1970’S, 249, 274–77 (Nelson W. Polsby ed., 1971).

<sup>22</sup> *See Vieth*, 541 U.S. at 274–75; Mayhew *supra* note 21, at 274–77.

<sup>23</sup> Stephanopoulos, *supra* note 2, at 480.

<sup>24</sup> *See* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 55 (2004).

<sup>25</sup> *See Mayhew*, *supra* note 21, at 277–81. Bipartisan gerrymanders frequently result from divided government. *See id.*

<sup>26</sup> Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer*, 121 YALE L.J. 1808, 1817 (2012); Lillian V. Smith, *Recreating the “Ritual Carving”:* *Why Congress Should Fund Independent Redistricting Commissions and End Partisan Gerrymandering*, 80 BROOK. L. REV. 1641, 1641 (2015).

<sup>27</sup> *See, e.g.,* George Pyle, *Debate: Voters Choose Their Representatives, Not the Other Way Around* (June 30, 2015, 10:12 PM), <http://www.sltrib.com/home/2683225-155/debate-voters-choose-their-representatives-not>.

<sup>28</sup> Berman, *supra* note 9, at 781.

as the most effective solution to bad laws.<sup>29</sup> While this is a reasonable suggestion with respect to ordinary legislation, the polls offer no solution when legislatures rig elections.<sup>30</sup> The voters cannot resort the ballot box when unfair districting prevent them from changing legislators.<sup>31</sup>

Is partisan redistricting really a problem? Some argue that it makes electoral systems more responsive and less biased.<sup>32</sup> It also isn't entirely clear than partisan gerrymandering works. "Even the most egregious partisan gerrymanders do not 'lock-in' one party's control over the state[.]"<sup>33</sup> To win more than its "share" of seats, the majority party must expose its members to risk.<sup>34</sup> It must concede some districts to the opposition in order to compete in more districts.<sup>35</sup> This is difficult to achieve because majority party members would prefer safe districts.<sup>36</sup> In some instances, partisan gerrymanders backfire against the party that controlled the process.<sup>37</sup> The strategy hinges on narrowly winning many elections, but if conditions change, the party may find that it overextended itself and lose many seats.<sup>38</sup> The best laid plans of ambitious majorities sometimes fail miserably.<sup>39</sup> Technologies used to drawn maps have improved considerably and may make gerrymandering a more potent political weapon.<sup>40</sup>

The Supreme Court has recognized the problem of partisan gerrymandering.<sup>41</sup> The Supreme Court held in *Davis v. Bandemer*,

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<sup>29</sup> *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1995). "For protection against abuses by legislatures the people must resort to the polls, not to the courts." *Id.* (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

<sup>30</sup> See Carson & Crespin, *supra* note 7, at 458.

<sup>31</sup> See *id.*

<sup>32</sup> See Keith Smith, *On Gerrymandering and Its Effects*, UNIV. OF THE PACIFIC (Nov. 2, 2011), <https://pacificpoliticalscience.wordpress.com/2011/11/02/on-gerrymandering-and-its-effects/>.

<sup>33</sup> Bruce E Cain, *Simple vs. Complex Criteria for Partisan Gerrymandering: A Comment on Niemi and Grofman*, 33 UCLA L. REV. 213, 226 (1985).

<sup>34</sup> See *id.* at 321.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> CHARLES S. BULLOCK, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA 9–13 (2013); see Cain *supra* note 33, at 321.

<sup>40</sup> Munroe Eagles et al., *GIS and Redistricting: Emergent Technologies, Social Geography, and Political Sensibilities*, 17 SOC. SCI. COMPUTER REV. 5, 5 (1999); see also Jeffrey C Esparza, *The Personal Computer vs. The Voting Rights Act: How Modern Mapping Technology and Ethnically Polarized Voting Work Together to Segregate Voters*, 84 UMKC L. REV. 235, 235 (2015).

<sup>41</sup> *Davis v. Bandemer*, 478 U.S. 109, 113 (1986).

that intentional discrimination against a political party is a justiciable claim.<sup>42</sup> Although this case appeared to open the door to challenge partisan redistricting, the Court dismissed the Indiana Democrats' claim and no court has since invalidated a redistricting plan for excessive partisanship.<sup>43</sup>

Some degree of political discrimination is inherent in every redistricting plan passed by state legislators.<sup>44</sup> The question is one of degree. "[S]ome intent to gain political advantage is inescapable whenever political bodies devise a district plan[.]"<sup>45</sup> How much partisanship too much? When have legislatures gone too far?

According to Justice Kennedy: "[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . . . show a burden, as measured by a reliable standard, on the complaints' representational rights."<sup>46</sup> But Justice Kennedy's opinion in *LULAC v. Perry* articulates no reliable standard and the justices remained divided (the Court issued six separate opinions).<sup>47</sup> While a majority of justices appear to endorse the abstract proposition that courts should offer some remedy when lines are drawn to intentionally discriminate against a political party, nearly thirty years after the *Davis* decision, there is no consensus on how to provide this remedy.<sup>48</sup> Subsequent courts have been unable to identify clear, enforceable standards for judging real legislative districts.<sup>49</sup>

The best courts have been able to do is define the outer limits of partisan gerrymandering.<sup>50</sup> If a redistricting plan is so discriminatory that no legitimate government interest can be offered in its support, the plan goes too far and violates the Equal Protection Clause.<sup>51</sup> While unobjectionable, this is a toothless standard because some legitimate government interest can be

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<sup>42</sup> *Id.* at 113, 143.

<sup>43</sup> *Id.* at 113, 118–121, 131–32; see also Berman, *supra* note 9, at 782 (discussing *Vieth* in relation to *Davis*); NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 120, 126 (Washington, D.C: National Conference of State Legislatures, 2009) [hereinafter NATIONAL CONFERENCE].

<sup>44</sup> *Vieth*, 541 U.S. at 344 (Souter, J., dissenting).

<sup>45</sup> *Id.*

<sup>46</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 418 (2006).

<sup>47</sup> See *id.* at 408–09.

<sup>48</sup> Berman, *supra* note 9, at 782–83. In *Vieth*, four justices resigned to the conclusion that there are no standards for judging partisan redistricting. *Vieth*, 541 U.S. at 271, 281.

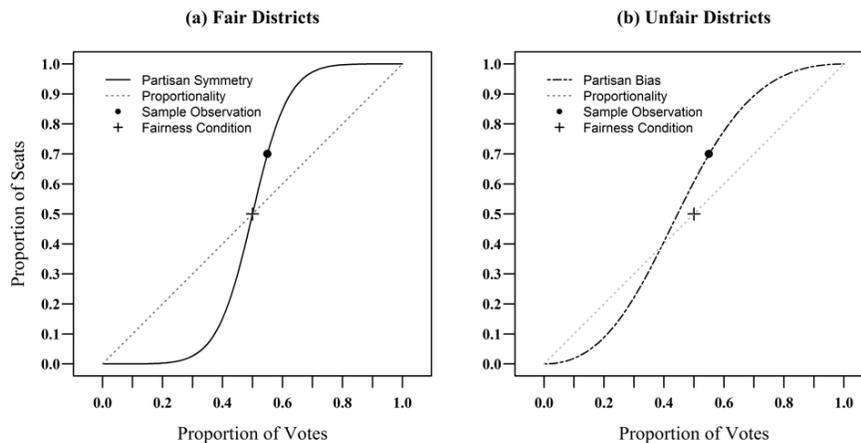
<sup>49</sup> NATIONAL CONFERENCE, *supra* note 43, at 120, 123, 126.

<sup>50</sup> See, e.g., *id.* at 123.

<sup>51</sup> See *id.* at 115.

articulated in just about every instance, particularly where map makers know they must be able to articulate some legitimate reason for the boundaries they draw.<sup>52</sup> In practice, it is difficult to distinguish partisan bias from majoritarianism.<sup>53</sup> Consider, for example, a state where a party that receives fifty-five percent of votes in an election wins seventy percent of seat in the legislature. Is this result unfair? This party may get “extra” seats because districts were drawn unfairly, but its legislative majority may also result from the winner-take-all nature of single member districts.<sup>54</sup> The figure below illustrates that this hypothetical case could result from either fair or unfair election rules. We may hypothesize about other potential election outcomes, but we observe one set of elections results at a time, not the full range of potential outcomes.

**Figure 1. Difficulty Distinguishing Fair and Unfair**



<sup>52</sup> See *id.* at 115, 120.

<sup>53</sup> See Burt L. Monroe, Bias and Responsiveness in Multiparty and Multigroup Representation, at 2 n.1 (July 23–26, 1998) (paper prepared for presentation to the Political Methodology Summer Meeting, San Diego, Cal.), <http://polmeth.wustl.edu/files/polmeth/monro98.pdf>.

<sup>54</sup> After all 50.1 percent of voters decide who wins a single district and, if all districts were the same, they'd win 100 percent of seats in the legislature. *Analysis: The Case for Voting Systems that Promote Full Representation and Majority Rule*, FAIRVOTE, <http://archive.fairvote.org/factshts/overview.htm> (last visited Feb. 23, 2016).

### Districts from Election Outcome<sup>55</sup>

In practice we really don't know what would have happened if the vote shares were reversed, we only observe one outcome at a time. In some cases, a pattern of election results may show that district maps "consistently degrade" one party's votes and political influence, satisfying a standard articulated in *Davis*.<sup>56</sup> However, by the time a clear pattern emerges from a series of elections, it's probably time for new maps. Courts generally are passive institutions; they wait for an injury to occur and do not decide cases until they are ripe for judicial resolution.<sup>57</sup> Except in narrow circumstances (i.e. injunctive relief), they do not prevent injuries.<sup>58</sup>

Some have argued that there is agreement on the proposition that fifty percent of votes should translate to fifty percent of the seats, so that the votes-to-seats curve is symmetric for both parties.<sup>59</sup> As King and Browning stated, an unbiased voting system "requires only one point at which the percentage of votes equals the percentage of seats: when each party receives [fifty percent] of the votes, the seats must be divided equally between them."<sup>60</sup> Subsequent works have adopted this view as the benchmark for measuring partisan bias.<sup>61</sup> A recent article suggests partisan

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<sup>55</sup> Figure 1 illustrates a hypothetical example discussed in the text which references the figure. See also Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251, 1254, 1263 (1987) (Figures 1 & 6).

<sup>56</sup> *Davis v. Bandemer*, 478 U.S. 109, 132 (1986). According to the Court: [A]n [E]qual [P]rotection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

*Davis*, 478 U.S. at 132–33.

<sup>57</sup> E.g., *Republican Party of Va. v. Wilder*, 774 F. Supp. 400, 404–06 (W.D.Va. 1991) (holding that plaintiffs showed discriminatory intent, but failed to demonstrate discriminatory effect because no election had taken place using the new district maps). Accord *Pope v. Blue*, 809 F. Supp. 392, 399 (W.D.N.C. 1992); *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662, 673–74 (N.D.N.Y. 1992).

<sup>58</sup> Whitney M. Eaton, *Where Do We Draw the Line? Partisan Gerrymandering and the State of Texas*, 40 U. RICH. L. REV. 1193, 1227–28 (2006).

<sup>59</sup> Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after *Lulac v. Perry**, 6 ELECT. L.J. 2, 32 (2007).

<sup>60</sup> King & Browning, *supra* note 55, at 1252.

<sup>61</sup> See, e.g., GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER*:

symmetry could be measured by the number of “wasted votes” for losing candidates.<sup>62</sup>

The one observation problem can be addressed by looking at district-level outcomes and calculating the share of seats in the legislature that would result from uniformly changing vote shares across all districts.<sup>63</sup> For example, if you took each district and assumed one party got one percent more votes in each district, how many seats would it gain? That’s a convenient assumption for estimation purposes but may not be suitable for litigation purposes. Justice Kennedy criticizes the approach in *LULAC*.<sup>64</sup> There may be factors other than partisan bias involved that prevent the party from translating its vote share into a legislative majority.

While partisan symmetry may be the best known alternative, it is not clearly the answer. One party could constitute the majority of voters in a majority of districts despite being in the minority statewide; the statewide majority may hold overwhelming majorities in some districts but find itself outpolled in competitive districts.<sup>65</sup> This may be the result of the statewide majority party being unfairly packed into certain districts, or the result of voters sorting themselves geographically.<sup>66</sup> Additionally, one party’s voters may turnout at higher rates, or nominate more skilled candidates. Redistricting may affect some groups of voters’ likelihood of turning out to vote.<sup>67</sup> Some districts have more

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THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 33–34 (Randall Calvert et al. eds., 2002); Andrew Gelman & Gary King, *Enhancing Democracy through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 542–43 (1994); Grofman & King, *supra* note 59, at 9; Simon Jackman, *Measuring Electoral Bias: Australia, 1949–93*, 24 BRIT. J. OF POL. SCI. 319, 323–24 (1994).

<sup>62</sup> Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 833–35, 850–852 (2015).

<sup>63</sup> A. C. Thomas et al., *Estimating Partisan Bias of the Electoral College Under Proposed Changes in Elector Apportionment*, in STATISTICS, POLITICS, AND POLICY 5–6 (2012), [https://gking.harvard.edu/files/gking/files/spp-2012-0001.aop\\_.pdf](https://gking.harvard.edu/files/gking/files/spp-2012-0001.aop_.pdf).

<sup>64</sup> *League of United Latin Am. Citizens*, 548 U.S. at 408, 418–20; see Danny Hayes & Seth C. McKee, *The Intersection of Redistricting, Race, and Participation*, 56 AM. J. OF POL. SCI. 115, 115 (2012).

<sup>65</sup> Hayes & McKee, *supra* note 64, at 121; Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. OF POL. SCI. 239, 241 (2013).

<sup>66</sup> *Id.* According to a recent study, Democratic voters are “inefficiently clustered in urban areas[ ]” such that Democrats win fewer seats than their statewide vote share would suggest. *Id.* at 262.

<sup>67</sup> Bernard L. Fraga, *Redistricting and the Causal Impact of Race on Voter Turnout*, 78 J. OF POL. 19, 19, 20, 31–32 (2015), <http://cas.uchicago.edu/workshops/americanpol/files/2015/11/Fraga.pdf>.

eligible voters than other do (and eligibility to vote is subject to change as well).<sup>68</sup> The perceived closeness of elections may influence voter turnout.<sup>69</sup> More voters participate in presidential-year elections than midterm elections and both types of elections occur after redistricting.<sup>70</sup> Whether eligible voters turn out to vote is a function of many factors, including education, income, age, and even the weather on Election Day.<sup>71</sup> This means you never get an accurate measure of how many votes are wasted in a particular election as a result of gerrymandering.

Courts can enforce the requirement that districts have equal sized population because it is a precise standard for judging maps.<sup>72</sup> It is hard to escape the conclusion that the only judicially-enforceable standard in partisan gerrymandering cases would be to insist on proportional representation.<sup>73</sup> If parties are entitled to seats in proportion to their vote shares, judges would have a clear, enforceable standard they could consistently apply over time and in different types of elections.<sup>74</sup> Proportional representation is not an absurd standard; many argue that proportional representation is fair and many countries use proportional representation systems to allocate seats in their legislatures.<sup>75</sup> However, proportional representation is not widely used in the United States and would require a revolutionary change in representation that courts may not impose.<sup>76</sup>

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<sup>68</sup> *Id.* at 20 n.1.

<sup>69</sup> Roger Gibbins, *Participation in Elections*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/topic/election-political-science/Participation-in-elections> (last visited Mar. 23, 2016).

<sup>70</sup> *What Affects Voter Turnout Rates*, FAIRVOTE, [http://www.fairvote.org/what\\_affects\\_voter\\_turnout\\_rates](http://www.fairvote.org/what_affects_voter_turnout_rates) (last visited Feb. 27, 2016).

<sup>71</sup> *Id.*; Brad T. Gomez, *The Republicans Should Pray for Rain: Weather, Turnout, and Voting in U.S. Presidential Elections*, 69 THE J. OF POL. 649, 649, 600–01 (2007).

<sup>72</sup> See *Reynolds*, 377 U.S. at 581–84.

<sup>73</sup> Peter Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solution*, in POLITICAL GERRYMANDERING AND THE COURTS at 240, 240, 241–43 (Bernard Grofman ed., 1990); Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 262–63, 277–81 (1985).

<sup>74</sup> See generally Levinson, *supra* note 73.

<sup>75</sup> See, e.g., AMY J. DOUGLAS, REAL CHOICES/NEW VOICES: HOW PROPORTIONAL REPRESENTATION ELECTIONS COULD REVITALIZE AMERICAN DEMOCRACY 29–31 (2d ed. 2002); Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 100 (2004); John R Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 183 (1984).

<sup>76</sup> *Proportional Representation*, FAIRVOTE,

Justice O'Connor's concurring opinion in *Davis* has been confirmed by subsequent case history: there is "a lack of judicially discoverable and manageable standards for resolving" claims that district maps discriminate against a political party.<sup>77</sup> Adjudicating claims of excessive partisanship requires judges make political decisions about representation.<sup>78</sup> There are potentially an infinite number of votes-to-seats curves (see examples in Figure 1), who is to say which one is the right electoral system? Judges are certainly capable of expressing their opinions on political matters, but their decisions would be inconsistent. Moreover, there is abundant evidence that judges' decisions are influenced by their own political preferences so evaluations of excessive partisanship are likely to depend on which party controlled the redistricting process.<sup>79</sup>

The Court's decision in *Vieth v. Jubelirer*, is instructive. In that case, a four justice plurality maintained that there are no discernable and manageable standards for judging partisan gerrymandering claims.<sup>80</sup> According to the plurality, *Davis* produced only "puzzlement and consternation" in lower courts and had been "virtually unenforceable."<sup>81</sup>

Justice Kennedy provided bare majority support for the justiciability of partisan gerrymandering claims, should a workable standard emerge: "That no such standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution."<sup>82</sup> While the door has not been shut, there is no glimmer

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[http://www.fairvote.org/proportional\\_representation#what\\_is\\_fair\\_voting](http://www.fairvote.org/proportional_representation#what_is_fair_voting) (last visited Feb. 27, 2016).

<sup>77</sup> *Davis v. Bandemer*, 478 U.S. 109, 148 (1986) (O'Connor, J., concurring) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>78</sup> *Id.* at 121–23; Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 668 (2006) (arguing that "[r]edistricting implicates central normative questions of governance and representation that govern how a democracy should operate."); King, *supra* note 55, at 1251.

<sup>79</sup> See COX & KATZ, *supra* note 61, at 82, 83; JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86–87, 110–14 (2002) (providing a general overview of the attitudinal model of judicial decision making); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3, 2008; Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413, 413 (1995).

<sup>80</sup> *Vieth*, 541 U.S. at 271, 289–90.

<sup>81</sup> *Id.* at 282–83.

<sup>82</sup> *Id.* at 301, 311 (Kennedy, J., concurring).

of light shining through. The *Vieth* case produced no less than three separate opinions as to the proper standard for judging such claims.<sup>83</sup> It seems unlikely that any one of these standards will command majority support on the Court any time soon.<sup>84</sup>

The challenge of articulating clear, enforceable standards is not confined to judging partisan gerrymanders, but also arises in judging racial gerrymanders.<sup>85</sup> To protect minority voters' equal opportunity to elect their preferred candidates, judges must articulate a standard of fairness.<sup>86</sup> It is easier (though certainly not easy) to formulate standards in this context because race is an inherently suspect classification.<sup>87</sup> If politics were color-blind, the racial/ethnic composition of legislatures would be proportional to that of the general population. Although the Voting Rights Act does not guarantee proportional representation, the implicit ideal of proportional representation features prominently in both our normative and legal understandings of fairness.<sup>88</sup> From this framework, we can establish redistricting standards that provide minority voters with fair opportunity to elect their preferred candidates of choice.<sup>89</sup> As discussed above, proportional

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<sup>83</sup> *Id.* at 292.

<sup>84</sup> Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after Vieth*, 3 ELECTION L.J., 626, 626–28 (2004).

<sup>85</sup> Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1025, 1052 (2005).

<sup>86</sup> *Thornburg v. Gingles*, 478 U.S. 30, 88 (1985) (White, J., concurring) (observing that “[I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it ‘should’ be for minority voters to elect their preferred candidates under an acceptable system.”).

<sup>87</sup> *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

<sup>88</sup> 52 U.S.C. § 10301(b) (2012) (stating that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”); see *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) (Souter, J.) (providing that “[o]ne may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast.”). *But see Holder v. Hall*, 512 U.S. 874, 903 (1994) (Thomas, J., concurring) (At the same time, Court opinions have implicitly or candidly adopted a rule of “roughly proportional representation.”).

<sup>89</sup> BARRY C EDWARDS, FORMULATING VOTING RIGHTS ACT REMEDIES TO ADDRESS CURRENT CONDITIONS 2–5, 22 (2013) (arguing that the Voting Rights Act should be applied to create districts where the probability that minority voters succeed in electing their preferred candidate equals their proportion of the district population. In some instances, this would mean that African American or Latino voters should constitute fifty percent of a district voting age population and have a fifty percent chance of electing their preferred candidate, but could also mean that a thirty percent African American district equalizes opportunity (or a seventy percent Latino district provides equal opportunity)).

representation is less appealing in the context of political parties.

The issue of racial and ethnic minority voters electing their preferred candidates of choice raises a fundamental problem for those who seek a partisan fairness standard: it is probably impossible to meet both standards at the same time.<sup>90</sup> To provide racial and ethnic minority voters equal opportunities to elect their preferred candidates of choice, it is typically necessary to create districts with Democratic majorities well in excess of fifty percent.<sup>91</sup> A lower percentage of Democratic voters may make white Democrats competitive, but there will likely be a trade-off between the goals of partisan fairness and racial/ethnic fairness.<sup>92</sup> Moreover, recent research suggests a trade-off between pursuing equal opportunities for African American voters and Latino voters as these groups are best served by very different redistricting standards.<sup>93</sup>

There are, of course, considerations beyond equitable population, partisan competition, and minority voting rights that map makers must take into account. Many state constitutions require that districts be drawn to avoid the division of cities, boroughs, towns, and wards.<sup>94</sup> Some commissions are also required

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<sup>90</sup> See, e.g., Greene, *supra* note 85, at 1022.

<sup>91</sup> Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 807–08 (1996); David Epstein & Sharyn O’Halloran, *A Social Science Approach to Race, Redistricting, and Representation*, 93 AM. POL. SCI. REV. 187, 187–88 (1999); David Lublin, *Racial Redistricting and African-American Representation: A Critique of “Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?”*, 93 AM. POL. SCI. REV. 183, 183–84 (1999).

<sup>92</sup> See EDWARDS, *supra* note 89, at 3.

<sup>93</sup> *Id.* at 3–4.

<sup>94</sup> The Arizona state constitution requires “visible geographic features” and “competitive districts” to be preserved to the “extent practicable.” ARIZ. CONST. art. IV, pt. 2, § 1 (14)(E–F). Alaska’s state constitution requires that House districts “be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area.” ALA. CONST. art. VI, § 6 (West 2015). Colorado’s constitution specifically requires that district maps should preserve “communities of interest including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district wherever possible.” COLO. CONST. art. V, § 47 (West 2014). Sometimes, as in the case of Maine, the “interests of local communities” are only protected by statute, which can be adjusted by the legislature at any time. ME. REV. STAT. tit. 21-A, ch. 15, § 1206-A (2015). Similarly, a Vermont statute suggests that the advisory commission to consider “patterns of geography, social interaction . . . and common interests[.]” VT. STAT. ANN. tit. 17, ch. 34 § 1903 (West 2015).

by state constitutions to avoid dividing communities of interest.<sup>95</sup> These additional considerations are often described as preserving districts that protect traditionally underrepresented communities like racial minorities and the poor.<sup>96</sup> These communities of interest “can be based on Indian reservations, urban interests, suburban interests, rural interests, neighborhoods . . . cultural and economic interests, or occupations and lifestyles.”<sup>97</sup>

The point of this brief discussion of minority voting rights and traditional redistricting principles is to emphasize that partisan competition is not only goal of redistricting and these goals compete with one another.<sup>98</sup> Even if we assume that someone rises to the challenge and articulates a reliable standard for judging partisan gerrymandering, meeting this hypothetical standard would likely require sacrificing on other fronts. There are multiple competing objectives in redistricting and no unique solution to optimize district maps on all relevant criteria.<sup>99</sup> The advancing technology used to make maps creates more opportunities to fine-tune district boundaries for desired effects, but the more maps are manipulated, the more the redistricting process erodes democratic engagement in elections.<sup>100</sup>

In the next section, we examine how the citizens of one state,

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<sup>95</sup> Justin Levitt, *All About Redistricting – Where are the lines drawn?*, LOY. L.A. L. SCH., <http://redistricting.lls.edu/where-state.php> (last visited Mar. 30, 2016).

<sup>96</sup> The Iowa Redistricting Commission takes into account a desire to keep counties whole within districts and to maintain districts that are contiguous, regular polygons representing as closely as possible square, rectangular, or hexagonal shapes. IOWA LEGISLATIVE SERV. AGENCY, FIRST REDISTRICTING PLAN 2–4 (Mar. 31, 2011), [https://www.legis.iowa.gov/docs/resources/redist/2011/2011-03-31/Plan1\\_Report.pdf](https://www.legis.iowa.gov/docs/resources/redist/2011/2011-03-31/Plan1_Report.pdf).

<sup>97</sup> MT. DISTRICTING & APPORTIONMENT COMM’N, CONGRESSIONAL AND LEGISLATIVE REDISTRICTING CRITERIA 2 (May 28, 2010), <http://leg.mt.gov/content/Committees/Interim/2011-2012/Districting/Other-Documents/1124RWFA-corrected-criteria-updated-2011.pdf>.

<sup>98</sup> Gelman, *supra* note 61, at 541–42.

<sup>99</sup> Kang, *supra* note 78, at 685–86 (explaining that there is an array of criteria for redistricting, “some of which contradict one another outright and all of which conflict at the margin.”).

<sup>100</sup> On advancing technology for redistricting: see Esparza, *supra* note 40, at 251; Eagles et al., *supra* note 40, at 8. The more district boundaries change from one election to the next, the less likely voters are to correctly identify their representatives in Congress and participating in congressional elections. See Stephen Ansolabehere et al., *Old Voters, New Voters, and the Personal Vote: Using Redistricting to Measure the Incumbency Advantage*, 44 AM. J. OF POL. SCI. 17, 24 (2000); Danny Hayes & Seth C. McKee, *The Participatory Effects of Redistricting*, 53 AM. J. OF POL. SCI. 1006, 1006 (2009); Seth C. McKee, *Redistricting and Familiarity with U.S. House Candidates*, 36 AM. POL. RES. 962, 962–63 (2008).

Arizona, responded to the problem of partisan gerrymandering.

## II. ARIZONA'S RESPONSE TO THE PROBLEM

By the year 2000, Arizona voters were understandably frustrated with how their legislators handled redistricting.<sup>101</sup> Elections in prior decades exhibited many signs of a dysfunctional redistricting process: legislative impasses, near-constant litigation, emergency deadlines, and court-drawn maps.<sup>102</sup> In 2000, Arizona voters approved an effort to end partisan gerrymandering in the state.<sup>103</sup> Proposition 106 amended Article IV of the Constitution of Arizona to create an “independent commission” tasked with overseeing “the mapping of fair and competitive congressional and legislative districts.”<sup>104</sup> The Arizona

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<sup>101</sup> RAPHAEL J. SONENSHEIN, LEAGUE OF WOMEN VOTERS OF CAL., WHEN THE PEOPLE DRAW THE LINES, AN EXAMINATION OF THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION 2, n.5 (Jan. 2011), <https://cavotes.org/sites/default/files/jobs/RedistrictingCommission%20Report6122013.pdf>.

In November 2000, Arizona voters passed Measure 106 to take the power to draw districts away from the legislature and vest it in a citizen commission. The Independent Redistricting Commission is composed of five members. The first four are nominated from a pool selected by the Commission on Appellate Court Appointments. From this pool of twenty-five, party leaders in the legislature each select one, so that there are two of each party. These four members then select a fifth person to be chairperson, choosing from among those in the pool who do not belong to either of the two major parties.

*Id.*

<sup>102</sup> See, e.g., *Goddard v. Babbitt*, 536 F. Supp. 538, 542–43 (D. Ariz. 1982) (adopting revisions to state and congressional maps); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 693–94 (D. Ariz. 1992) (drawing a map for 1992 congressional elections), *aff'd*, 507 U.S. 981 (1993); *Arizonans for Fair Representation, Inc. v. Symington*, 1993 WL 375329 (D. Ariz. Jun. 19, 1992) (ordering that the Senate map be used on interim, emergency basis for 1992 state legislative elections), *aff'd*, 506 U.S. 969 (1992). Further complicating its redistricting process, Arizona was a covered jurisdiction for purposes of Section 5 of the Voting Rights Act. *Arizonans for Fair Representation*, 828 F. Supp. at 687.

<sup>103</sup> SONENSHEIN, *supra* note 101, at 2.

<sup>104</sup> Ariz. Sec’y of State, *2000 Ballot Propositions: Proposition 106*, <http://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf> (last visited May 2, 2016) (for voter usage during the General Election Nov. 7, 2000). Groups supporting the Proposition argued that granting map-making responsibilities to an independent commission would result in independently-drawn maps free of partisan influence. Opposing the Proposition were the Arizona Chamber of Commerce and the state’s Republican congressional delegation, which argued that the members of the commission would be selected by “unelected, unaccountable lawyers” and that voters would have no check on the power of the commission. *Id.* Proposition 106 was approved by Arizona

Constitution calls for the commission to be created “[b]y February 28 of each year that ends in one”<sup>105</sup> consist of five members, no more than two of which may be members of the same political party, and none of whom may have been public officials for three years prior to their appointment.<sup>106</sup> Commissioners are selected through a multi-stage process that attempts to balance partisan interests and empower an independent deciding vote.<sup>107</sup> The Commission on Appellate Court Appointments<sup>108</sup> nominates twenty-five different candidates for the commission.<sup>109</sup> Of the twenty-five candidates, ten each must be registered with the state’s two largest political parties and five must either be registered with different parties, or not registered with a party at all.<sup>110</sup> After the twenty-five members have been nominated, four of them will be selected by leaders of the Arizona legislature.<sup>111</sup> First, “the highest ranking officer elected by the Arizona house of representatives,”<sup>112</sup> followed by the house minority leader, “the highest ranking officer elected by the Arizona senate,”<sup>113</sup> and then, the senate minority leader.<sup>114</sup> To select the fifth member, the four

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voters, 784,272 of whom voted in approval, representing 56.14% of the electorate. Ariz. Sec’y of State, *State of Arizona Official Canvass: 2000 General Election* (Nov. 27, 2000), <http://apps.azsos.gov/election/2000/General/Canvass2000GE.pdf> (providing the results of the vote on Arizona Proposition 106 during the Nov. 7, 2000 Arizona General Election).

<sup>105</sup> ARIZ. CONST. art. IV, pt. 2, § 1, cl. 3.

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

<sup>107</sup> *Id.* at cl. 3, cl. 4, cl. 5, cl. 6.

<sup>108</sup> *Id.* at cl. 4, cl. 5. Or, in the instance in which there is a “politically balanced commission,” with members “nominated by the commission on appellate court appointments and whose regular duties relate to the elective process,” that commission may be designated by the commission on appellate court appointments to nominate members to the IRC, as provided in Clause 4. *Id.* cl. 4.

<sup>109</sup> *Id.* at cl. 5.

<sup>110</sup> ARIZ. CONST. art. IV, pt. 2, § 1, cl. 5.

<sup>111</sup> *Id.* at cl. 6.

<sup>112</sup> *Id.* In this case, the Speaker of the Arizona House of Representatives. *House Leadership*, ARIZ. STATE LEGISLATURE, <http://azleg.gov/Leadership.asp?Body=H> (last visited, Mar. 1, 2016).

<sup>113</sup> ARIZ. CONST. art. IV, pt. 2, § 1, cl. 6. In this case, the President of the Arizona Senate. *Senate Leadership*, ARIZ. STATE LEGISLATURE, <http://azleg.gov/Leadership.asp?Body=S> (Mar. 1, 2016).

<sup>114</sup> ARIZ. CONST. art. IV, pt. 2, § 1, cl. 6. The Clause further specifies that, if one of the designated officers does not make their appointment within the prescribed seven-day period, they forfeit the ability to make an appointment. Additionally, in the case in which there are two or more minority parties in either house of the legislature, the Clause specifies that “the leader of the largest minority party by statewide party registration shall make the appointment.” *Id.* Clause 7 states that if there is a vacancy in any of the four appointments, “the

appointed members of the committee shall elect a candidate from the initial nomination poll, “who shall not be registered with any party already represented on the independent redistricting commission,” and this fifth member will serve as the chair.<sup>115</sup>

To provide the IRC with an objective set of criteria that governs the mapping process, Clause 14 of Article IV, Part II, Section I of the Arizona Constitution provides for the following:

- A. Districts shall comply with the United States Constitution and the United States voting rights act;
- B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;
- C. Districts shall be geographically compact and contiguous to the extent practicable;
- D. District boundaries shall respect communities of interest to the extent practicable;
- E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;
- F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.<sup>116</sup>

Elected officials retain some authority over IRC members.<sup>117</sup> The Constitution provides that the Governor of Arizona may, when accompanied by a two-thirds vote of the Arizona Senate, remove any member of the commission “for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of

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commission on appellate court appointments or its designee” shall select one of their initial nominees to fill the vacancy. *Id.* at cl. 7.

<sup>115</sup> *Id.* at cl. 8. The Clause further provides that the members of the commission shall have fifteen days in which they can select the fifth member. If, after fifteen days, a fifth member has not been selected, the commission on appellate court appointments or its designee shall make the selection themselves, drawing from the initial nomination pool. *Id.*

<sup>116</sup> ARIZ. CONST. art. IV, pt. 2, § 1, cl. 14.

<sup>117</sup> *Id.* at cl. 10.

office.”<sup>118</sup>

Despite the creation of an IRC, Arizona’s district maps remain the subject of intense litigation.<sup>119</sup> IRCs are not a panacea. The maps it produced for state legislative elections were only approved on an interim, emergency basis for the 2002 elections.<sup>120</sup> The IRC’s revised state legislative maps were initially deemed unconstitutional in 2004, by an Arizona Superior Court, because they did not create enough competitive districts, but these maps were eventually upheld by the Arizona Supreme Court.<sup>121</sup>

Redistricting in Arizona after the 2010 Census has also motivated a number of lawsuits.<sup>122</sup> One lawsuit tested the Governor’s authority to remove a member of the IRC.<sup>123</sup> On October 26, 2011, Governor Jan Brewer sent a letter to Colleen Mathis, the Chair of Arizona’s IRC, outlining the Chair’s alleged transgressions.<sup>124</sup> The Office of the Governor determined that Mathis “had committed substantial neglect of duty and gross misconduct in office”<sup>125</sup> and initiated her removal from the commission.<sup>126</sup> By a twenty-one to six margin, the Arizona Senate concurred with Governor Brewer’s removal of Mathis from the commission.<sup>127</sup> Mathis filed suit to keep her position and the Arizona Supreme Court heard the case as a part of its discretionary

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<sup>118</sup> *Id.*

<sup>119</sup> See Thomas E. Mann, *Arizona State Legislature v. Arizona Independent Redistricting Commission, et al.*, BROOKINGS INST. (June 29, 2015, 1:45 PM), <http://www.brookings.edu/blogs/fixgov/posts/2015/06/29-arizona-redistricting-commission-mann>.

<sup>120</sup> *Navajo Nation v. Ariz. Indep. Redistricting Comm’n*, 230 F. Supp. 2d 998, 1000–01 (D. Ariz. 2002).

<sup>121</sup> *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 208 P.3d 676, 682–83, 689 (Ariz. 2009).

<sup>122</sup> See Rebecca Beitsch, *Amid Court Fights, Some States Consider Redistricting Commissions*, THE PEW CHARITABLE TRUSTS (Sept. 23, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/09/23/amid-court-fights-some-states-consider-redistricting-commissions>.

<sup>123</sup> *Ariz. Indep. Redistricting Comm’n v. Brewer*, 275 P.3d 1267, 1269–70 (Ariz. 2012).

<sup>124</sup> *Id.* at 1269. Specifically, Governor Brewer alleged that the commission violated the Constitution in drafting maps; did not cooperate with the Office of the Arizona Attorney General in an investigation concerning the State’s open meetings law; violated the open meetings law; and manipulated the selection of vendors. *Id.* at n.1.

<sup>125</sup> *Id.* at 1269.

<sup>126</sup> *Id.*

<sup>127</sup> Marc Lacey, *Arizona Senate, at Governor’s Urging, Ousts Chief of Redistricting Panel*, N.Y. TIMES, Nov. 2, 2011, at A20.

special action jurisdiction.<sup>128</sup> The Court ruled that Governor Brewer's stated reasons for Mathis' removal were not constitutionally significant enough to warrant such a removal,<sup>129</sup> and reinstated her membership of the commission.<sup>130</sup>

In 2012, the Arizona State Legislature challenged the constitutionality of Proposition 106, arguing that it violated Article I, Section 4, Clause 1 of the U.S. Constitution, known as the Elections Clause.<sup>131</sup> The Clause, in part, states, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."<sup>132</sup> The legislature argued that, since the word "Legislature" meant the "State's representative assembly," Proposition 106 unconstitutionally deprived the legislature of the ability to draw congressional boundaries.<sup>133</sup> The U.S. District Court for the District of Arizona ruled against the legislature, and the legislature appealed the decision to the U.S. Supreme Court.<sup>134</sup>

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<sup>128</sup> *Ariz. Indep. Redistricting Comm'n*, 275 P.3d at 1270. Though Gov. Brewer challenged the special action jurisdiction of the Arizona Supreme Court in this case, the Court ruled that it would exercise special action jurisdiction, holding: "We exercised our discretion to accept special action jurisdiction because the legal issues raised required prompt resolution and are of first impression and statewide importance." *Id.* at 1270–71.

<sup>129</sup> *Id.* at 1278. The first claim, that Mathis and the commission violated the open meetings law, was ruled to be insufficient to justify Mathis' removal on the basis of "substantial neglect of duty" or "gross misconduct." *Id.* at 1277. The Court noted that, in order for such a requirement to be met, the commission would have had to have violated Article IV, Section II, Section I, Clause XII of the Arizona Constitution, which states that all meetings of the commission for which a quorum is present must be conducted publicly. *Id.* Governor Brewer did not allege that the commission met the violation of this specific constitutional requirement, and the Court noted that it was an open question as to whether the open meetings law even applied to the commission outside of the constitutional requirement. *Id.* The second claim, that Mathis and the commission did not accommodate the constitutional requirements in their mapmaking, was an impermissible justification for Mathis' removal. *Id.* The Court noted that the constitutional clause outlining the criteria for mapmaking, referenced earlier in this text, noted that the criteria were required "to the extent practicable." *Ariz. Indep. Redistricting Comm'n*, 275 P.3d at 1277. The Court also noted that, as the maps were still in the stage of being drafted, it was not possible for Governor Brewer to conclude that the criteria were altogether abandoned and not considered. *Id.*

<sup>130</sup> *Id.* at 1278.

<sup>131</sup> *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2654–55, 2678 (2015).

<sup>132</sup> U.S. CONST. art. I, § 4, cl. 1; *Ariz. State Legis.*, 135 S. Ct. at 2678 (Roberts, J., dissenting) (quoting U.S. CONST. art. I, § 4, cl. 1).

<sup>133</sup> *Ariz. State Legis.*, 135 S. Ct. at 2655, 2658–59.

<sup>134</sup> *Id.* at 2655–56.

The Supreme Court, in a five-four decision written by Justice Ruth Bader Ginsburg, ruled that, the delegation of redistricting power by public initiative to the independent redistricting commission was constitutionally permissible and did not violate the Elections Clause.<sup>135</sup> Justice Ginsburg outlines several cases decided by the Supreme Court in the last century with similar rationale, and notes, “[O]ur precedent teaches that redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking, which may include the referendum and the Governor’s veto.”<sup>136</sup>

Arizona’s IRC has not quieted the state’s ongoing partisan conflicts, but its record of redistricting in 2000 and 2010 is an improvement over legislators’ efforts in 1980 and 1990.<sup>137</sup> As discussed above, in the two decades preceding the creation of the IRC, legislators were often unable to produce maps in time for election, necessitating court-drawn emergency maps.<sup>138</sup>

In the 2002 elections, two of Arizona’s six congressional seats were competitive.<sup>139</sup> The Arizona IRC’s ability to draw competitive districts was due, in part, to the constraints of the Voting Rights Act and the need to draw majority Latino districts in Arizona.<sup>140</sup> In 2004, all eight congressional incumbents were returned to office and none of the State Senate seats were competitive in Arizona.<sup>141</sup> At times though, Arizona districts can be deemed competitive.<sup>142</sup>

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<sup>135</sup> *Id.* at 2657–58, 2676–77.

<sup>136</sup> *Id.* at 2667–68.

<sup>137</sup> *See Harris v. Ariz. Indep. Redistricting Comm’n*, 993 F. Supp. 2d 1042, 1046 (2014); *see also Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 693 (D. Ariz. 1992). The latest episode in the Arizona redistricting saga has yet to be written. *Harris*, 993 F. Supp. 2d at 1046. The U.S. Supreme Court granted certiorari in another case challenging maps produced by Arizona’s IRC. *Id.* In *Harris*, Plaintiffs alleged that the Arizona IRC deviated from equal populations in state legislative districts without justification. *Id.* at 1047. The Plaintiffs alleged that partisan advantage does not justify the deviation, nor does enhancing opportunities for minority voters to elect their preferred candidates to obtain preclearance under the Voting Rights Act. *Id.*

<sup>138</sup> *See, e.g., Arizonans for Fair Representation*, 828 F. Supp. at 693.

<sup>139</sup> Richard Forgette & Glenn Platt, *Redistricting Principles and Incumbency Protection in the U.S. Congress*, 24 POL. GEOGRAPHY 934, 942 (2005).

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

<sup>141</sup> Scott Lesowitz, *Recent Development: Independent Redistricting Commissions*, 43 HARV. J. ON LEGIS. 535, 541 (2006); Steven Hill, *Schwarzenegger vs. Gerrymander*, N.Y. TIMES (Feb. 19, 2005), <http://www.nytimes.com/2005/02/19/opinion/schwarzenegger-vs-gerrymander.html>.

<sup>142</sup> *See* Michael P. McDonald, *Drawing the Line on District Competition*, 39 POL. SCI. & POL., 91, 91–94 (2006); Michael P. McDonald, *Re-Drawing the Line on*

Given the limited number of seats in issue in these election cycles, it is useful to consider how other states have responded to the problem of partisan gerrymandering as assess how well those responses have worked.<sup>143</sup>

### III. OTHER STATES' RESPONSES

Thirty-seven states rely on their legislators to draw legislative district boundaries.<sup>144</sup> Of the thirteen states remaining, six, which include Alaska, Arizona, California, Idaho, Montana, and Washington, use *independent* commissions which means “no individual drawing the lines can be a legislator or public official[ ]” and seven use *political* commissions which allow elected officials to draw district boundaries.<sup>145</sup> Redistricting commissions' authority, goals, composition, and operating procedures vary from state to state.<sup>146</sup> Any given commission makes innumerable choices within these broad categories, and no two commissions look exactly alike. Figure 2 offers a general schema of redistricting commissions produced by ranking commissions in terms of their authority and political independence.

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*District Competition*, 39 POL. SCI. AND POL., 99, 99–101; Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, 4, ST. POL. & POL'Y. Q. 371, 384 (2004).

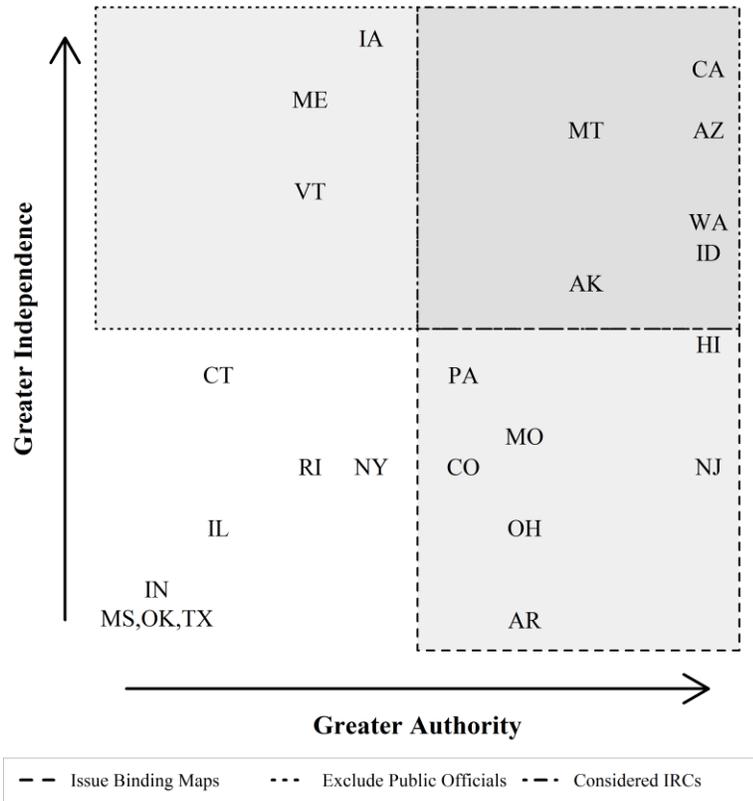
<sup>143</sup> McDonald, *A Comparative Analysis*, *supra* note 142, at 374.

<sup>144</sup> *National Overview of Redistricting: Who Draws the Lines?*, THE BRENNAN CTR. FOR JUSTICE, N.Y.U. SCH. OF L. (July 1, 2010), <https://www.brennancenter.org/analysis/national-overview-redistricting-who-draws-lines> [hereinafter *Who Draws the Lines?*].

<sup>145</sup> *Id.* (emphasis added).

<sup>146</sup> McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, *supra* note 142, at 377.

**Figure 2. Comparing Authority and Independence of Redistricting Commissions**<sup>147</sup>



In this section, we describe how states have organized redistricting commissions, emphasizing what makes some commissions more authoritative and independent than others.

*A. Authority of Commissions*

The first major decision that a state must make after forming a redistricting commission is how much authority to give the

<sup>147</sup> Figure 2 is based on our analysis of redistricting commissions used in different states. We ranked them in terms of their authority and their political independence and plotted the results in the figure. The comparisons on these dimensions are discussed in the text and hopefully that discussion makes clear how we ranked the states.

commission.<sup>148</sup> Redistricting commission maps may be binding, advisory, or produced only in the event that legislators fail to pass their own maps in a timely manner.<sup>149</sup>

Thirteen states utilize commissions whose district maps are binding.<sup>150</sup> These commissions derive their authority from state constitutions.<sup>151</sup> Some commissions have authority to draw maps for both congressional and state elections, such as the California Citizen's Redistricting Commission, while some are limited to drawing state legislative boundaries.<sup>152</sup> After they produce new maps for congressional and state elections, no further approval by another state entity is necessary.<sup>153</sup> Neither the governor nor the legislature may veto the commission's maps.<sup>154</sup> Only in the case that a decision cannot be reached does a state Supreme Court draw the districts, appoint another group to draw the districts, or appoint another member on to the commission to break a tie.<sup>155</sup>

For states with advisory commissions, the legislature is not required to utilize the commission's recommendations, or even consider them.<sup>156</sup> Advisory commissions generally derive authority

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<sup>148</sup> *Who Draws the Lines?*, *supra* note 144.

<sup>149</sup> *Id.* States with advisory commissions include Iowa, Maine, New York, Rhode Island, and Vermont. *Id.*

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

<sup>151</sup> *Id.* California's IRC was created through a ballot initiative, though it was later written explicitly in the California State Constitution. Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 CALIF. J. OF POL. & POL'Y VOL., 2012, at 2–3.

<sup>152</sup> *Id.* The California Citizens Redistricting Commission was initially created when the voters of California approved Proposition 11 in 2008, and was originally tasked with drawing district lines for the California Assembly, the California Senate, and the California Board of Equalization. *Id.* California voters adopted Proposition 20 in 2010, which amended Article XXI of the California Constitution, granting the California Citizens Redistricting Commission the ability to draw congressional boundaries. *Id.* Though Montana currently only has one member of Congress, and thus does not require a redistricting process for congressional districts, the Montana Constitution still contains provisions that create an independent commission to do so. *Who Draws the Lines?*, *supra* note 144.

<sup>153</sup> *Who Draws the Lines?*, *supra* note 144. Pennsylvania imposes a thirty-day public comment period on maps drawn by its redistricting commission. Justin Levitt, *All About Redistricting: Pennsylvania*, LOY. L.A. SCHOOL L. SCH., <http://redistricting.lls.edu/states-PA.php> (last visited Mar. 2, 2016).

<sup>154</sup> *Who Draws the Lines?*, *supra* note 144.

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

<sup>156</sup> *Id.* In Iowa, an interesting variation on the bright line between advisory and binding commissions exists. Justin Levitt, *All About Redistricting: Iowa*, LOY. L.A. L. SCH., <http://redistricting.lls.edu/states-IA.php#institution> (last visited Mar. 2, 2016). The Iowa Legislative Services Agency ("LSA"), in conjunction with a five-member commission chosen by the state legislative leaders, drafts a redistricting bill with a map for the Iowa legislature that may be

from state statutes, which allow the legislature to more easily change appointments to and the tasks of the commission legislature.<sup>157</sup> In states with advisory commissions and states with no redistricting commissions at all, district maps are passed by the legislature and can be vetoed by the governor.<sup>158</sup> Advisory commissions are comprised primarily of partisan members and current state legislators and other elected officials.<sup>159</sup>

There is a third category of redistricting commissions, which are created only when the legislature cannot make a decision by the time prescribed by state statute or Constitution.<sup>160</sup> Again, some of these advisory or back-up commissions are limited to working on state legislative boundaries.<sup>161</sup>

Most state Supreme Courts are given some power over the commission or over the redistricting plan.<sup>162</sup> In nearly every state, the state Supreme Court has original jurisdiction over cases challenging the lawfulness and propriety of a district map.<sup>163</sup> Someone claiming injury can challenge commission-drawn maps in court and below we will discuss a number of these cases. In Colorado, all redistricting plans are delivered directly to the state Supreme Court for review, eliminating the need for a suit to be filed.<sup>164</sup>

Some special cases of state Supreme Court review exist, for example, in New Jersey the state Supreme Court is required to choose between two plans in the event the commission cannot

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rejected, with feedback up to three times before the legislature may draft a plan without advice. *Id.*

<sup>157</sup> *Who Draws the Lines?*, *supra* note 144; Justin Levitt, *All About Redistricting: Who Draws the Lines*, LOY. L.A. L. SCH., <http://redistricting.lls.edu/who.php> (last visited Mar. 2, 2016) [hereinafter *All About Redistricting*].

<sup>158</sup> Levitt, *All About Redistricting*, *supra* note 157. The exception to the governor's veto are states that allow apportionment maps to be passed through a joint resolution. *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* States with these types of commissions include Connecticut, Illinois, Maryland, Mississippi, Oklahoma, Oregon, and Texas. *Id.* Indiana uses backup commissions only for congressional districts. *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See infra* notes 163–166 and accompanying text.

<sup>163</sup> *See, e.g.*, ALASKA CONST. art. VI, § 6.11; ARK. CONST. art. 8, § 5; CAL. CONST. art. 21, §3(b); COLO. CONST. art. V, § 48(e); HAW. CONST. art. IV, § 10; IDAHO CONST. art. III § 2(5); IOWA CONST. art. III § 36; ME. CONST. art. IV, pt. 1 § 3; N.J. CONST. art. II, § 2, ¶1 (d); N.Y. CONST. art. 3, § 5-b; OHIO CONST. art. XI, § 9(A); PA. CONST. art. II, § 17(d).

<sup>164</sup> COLO. CONST. art. V, § 48(e).

choose one.<sup>165</sup> In California and Missouri, if the commission cannot agree on a redistricting plan or the plan is deemed unlawful, the Supreme Court holds the power to appoint a new commission, appointed solely by the Court.<sup>166</sup>

### *B. Composition of Commissions*

The primary goal behind creating redistricting commissions is to establish a decision making body that is outside—if not completely independent from—the majority party in the state legislature.<sup>167</sup> Commissions vary greatly in composition, ranging from direct political appointments made by partisan legislative leaders or other elected officials, to purposefully bipartisan commission appointments, to random selection of commissioners based on a bipartisan or non-partisan pool of applicants.<sup>168</sup>

An independent commission, however, does not necessarily mean an apolitical or bipartisan commission. For example in Alaska, the selection process is such that members of the same party or political alignment can select all the commissioners.<sup>169</sup>

In California, the IRC is so large and the process so deliberate that it is nearly impossible for any one party to dominate the commission.<sup>170</sup> Per the State Constitution, California's Commission is made up of fourteen members, five of whom are registered with the state's largest political party by registration, five of whom are registered with the state's second largest political party by registration, and four of whom not registered with the largest or second largest parties.<sup>171</sup> Under the provisions of California state law, the California State Auditor convenes an Applicant Review Panel, which selects the sixty most qualified applicants to serve on the Commission, none of whom can be public officials.<sup>172</sup> The list of sixty applicants is then submitted to the

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<sup>165</sup> N.J. CONST. art. II § 2, ¶ 3.

<sup>166</sup> See CAL. CONST. art. 21, § 2(j); MO. CONST. art. III, § 7.

<sup>167</sup> Levitt, *All About Redistricting*, *supra* note 157.

<sup>168</sup> Justin Levitt, *Who Draws the Lines?: Party Control—State Legislative Lines*, ALL ABOUT REDISTRICTING (2016), <http://redistricting.lls.edu/who-partystate.php>.

<sup>169</sup> ALASKA CONST. art. VI §8(a), (b). However, none of the members of the commission, referred to as the “redistricting board,” may be public officials. ALASKA CONST. art. VI §8(c).

<sup>170</sup> Justin Levitt, *California*, ALL ABOUT REDISTRICTING (2016), <http://redistricting.lls.edu/states-CA.php>.

<sup>171</sup> CAL. CONST. art. 21, § 2(2).

<sup>172</sup> CAL. GOV'T CODE §8252 (West 2013). Of the sixty selected applicants, twenty must be registered members of the state's largest political party, twenty

state legislature, and the President Pro Tempore of the California Senate, the Minority Leader of the California Senate, the Speaker of the California Assembly, and the Minority Leader of the California Assembly are entitled to strike six applicants each.<sup>173</sup> After the strikes are removed from the applicant pool, the State Auditor randomly selects eight members to serve on the Commission,<sup>174</sup> and those eight members shall select an additional six.<sup>175</sup>

Most commissions include members chosen by the major parties or the party leaders in the state legislatures.<sup>176</sup> Bipartisanship is more common among states that use these commissions to draw congressional districts.<sup>177</sup> In bipartisan commissions, the appointments are often made by the state House and Senate majority and minority leaders, in turn.<sup>178</sup> The bipartisan composition of a commission is intended to avoid any overtly partisan bias in the redistricting map, so in these states each of the two largest parties are tasked with choosing members of the commission.<sup>179</sup> Rules vary from state to state whether the member

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must be registered members of the state's second-largest political party, and twenty must not be registered with the largest or the second-largest political parties. CAL. GOV'T CODE §8252.

<sup>173</sup> CAL. GOV'T CODE §8252. Of the six strikes per designated individual, no more than two of each may be registered members of the state's largest political party, registered members of the state's second-largest political party, and those not registered with the largest or second-largest political parties. CAL. GOV'T CODE §8252.

<sup>174</sup> CAL. GOV'T CODE §8252. Of the eight selected applicants, three shall be registered members of the state's largest political party, three shall be registered members of the second-largest political party, and two shall not be members of the largest or second-largest political parties. CAL. GOV'T CODE §8252.

<sup>175</sup> CAL. GOV'T CODE §8252 (West 2013). Of the six additional selected applicants, two shall be registered members of the state's largest political party, two shall be registered members of the second-largest political party, and two shall not be members of the largest or second-largest political parties. CAL. GOV'T CODE §8252. The Commission is required to consider a set of criteria in creating congressional districts, which include population equality; compliance with the Voting Rights Act; geographic contiguity; preservation of cities, counties, neighborhoods, and communities of interest; and, whenever it is practical to do so in a manner that does not violate any of the other standards, geographic compactness. CAL. CONST. art. 21, §1; *Cano v. Davis*, 211 F. Supp. 2d 1208, 1212 (C.D. Cal. 2002).

<sup>176</sup> NAT'L CONFERENCE OF STATE LEGISLATURES, *Redistricting Commissions: State Legislative Plans* (Dec. 2015), [www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx](http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> ARIZ. CONST. art. IV, pt. 2, § 1(3); ALASKA CONST. art. VI § 8(b); COLO. CONST. art. V, § 48(b); HAW. CONST. art. IV, § 2; IDAHO CONST. art. III § 2(2); MO.

is allowed be a current or former legislator or lobbyist.<sup>180</sup>

Idaho's six-member Commission for Reapportionment is a good example of a bipartisan commission.<sup>181</sup> The leaders of the two largest political parties in the state legislature and the chairperson for each of the two largest voting parties select a commission member.<sup>182</sup> In the event that any appointing official fails to make a timely appointment, the Supreme Court of Idaho makes the appointment in their place.<sup>183</sup> None of the appointees can be an elected or appointed official at the time of their designation or appointment.<sup>184</sup> Idaho's Commission is intended to be politically independent, but independence is sought by equalizing Republican and Democratic appointments.<sup>185</sup>

Frequently, redistricting commission appointees are charged with the task of choosing one or more additional members to complete the commission.<sup>186</sup> In some states, if the bipartisan commissioners cannot agree on the final commission members, the

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CONST. art. III, § 7; MONT. CONST. art. V, § 14(2); N.Y. CONST. art. 3, § 5-b; OHIO CONST. art. XI, § 1; PA. CONST. art. II, § 17(b); WASH. CONST. art. II, § 43(2); IOWA CODE § 42.5 (2016); 2011 R.I. Pub. Laws 11-106. States with commissions that are completely or partly comprised of bipartisan appointments include Arizona, Alaska, Colorado, Hawaii, Idaho, Iowa, Missouri, Montana, New York, Ohio, Pennsylvania, Rhode Island, and Washington. See ARIZ. CONST. art. IV, pt. 2, § 1(6); ALASKA CONST. art. VI § 6.8(b); COLO. CONST. art. V, § 48(b); HAW. CONST. art. IV, § 2; IDAHO CONST. art. III § 2(2); MO. CONST. art. III, § 7; MONT. CONST. art. V, § 14(2); N.Y. CONST. art. 3, § 5-b; OHIO CONST. art. XI, § 1; PA. CONST. art. II, § 17(b); WASH. CONST. art. II, § 43(2); IOWA CODE § 42.5; R.I. Laws ch. 106 § 1.

<sup>180</sup> ALASKA CONST. art. VI, § 8(a); ARIZ. CONST. art. IV, pt. 2, § 1(3); IDAHO CONST. art. III § 2(2); MO. CONST. art. III, § 7; N.J. CONST. art. II, § 2, ¶ 1(b); N.Y. CONST. art. 3, § 5-b; WASH. CONST. art. II, § 43(3); CAL. GOV'T CODE §8252. States that have a restriction on the appointment of commissioners that are currently or have previously held public office include Alaska, Arizona, California, Idaho, Missouri, New Jersey, New York, and Washington. See ALASKA CONST. art. VI, § 6.8(a); ARIZ. CONST. art. IV, pt. 2, § 1(3); IDAHO CONST. art. III § 2(2); MO. CONST. art. III, § 7; N.J. CONST. art. II, § 2 ¶ 1(b); N.Y. CONST. art. 3, § 5-b; WASH. CONST. art. II, § 43(3); CAL. GOV'T CODE §8252.

<sup>181</sup> See *infra* notes 182–185 and accompanying text.

<sup>182</sup> IDAHO CONST. art. III, § 2.

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

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> HAW. CONST. art. IV, § 2; IDAHO CONST. art. III § 2(2); MONT. CONST. art. V, § 14(2); N.Y. CONST. art. 3, § 5-b; PA. CONST. art. II, § 17(d); WASH. CONST. art. II, § 43(2); CAL. GOV'T CODE §8252; IOWA CODE § 42.5. The states that have the appointed commissioners appoint a number of remaining commissioners include California, Hawaii, Idaho, Iowa, Montana, New York, Pennsylvania, and Washington. See HAW. CONST. art. IV, § 2; IDAHO CONST. art. III § 2(2); MONT. CONST. art. V, § 14(2); N.Y. CONST. art. 3, § 5-b; PA. CONST. art. II, § 17(d); WASH. CONST. art. II, § 43(2); CAL. GOV'T CODE §8252; IOWA CODE § 42.5.

state Supreme Court chooses the final member.<sup>187</sup>

Under the Montana Constitution, the Majority and Minority Leaders in both the House and Senate “each designate one commissioner[ ]” to sit on the Montana Districting and Apportionment Commission, none of whom may be public officials.<sup>188</sup> The four designated commissioners then elect a fifth member, who serves as the Chairman of the commission.<sup>189</sup> If the members of the commission are unable to elect a fifth member, the Montana Supreme Court shall select, by majority vote, the fifth member.<sup>190</sup> Similarly, under the provisions of the Washington Constitution, the “legislative leader” of the two largest political parties in the Washington House of Representatives and the Washington Senate each select a member of the commission.<sup>191</sup> The four appointed members of the commission then, by majority vote, select a fifth member, who serves as the non-voting chair of the commission.<sup>192</sup>

The executive branch and the judicial branch often have direct influence over the composition of the redistricting commission through appointment power.<sup>193</sup> In these states the Governor, Secretary of State, or the state Supreme Court are responsible for appointing all or some of the redistricting commission.<sup>194</sup> The Colorado redistricting commission—responsible for state legislative districts only—requires the four leaders of the legislature to choose four members, the Governor to choose three, and the Chief Justice of the State Supreme Court to choose four.<sup>195</sup>

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<sup>187</sup> HAW. CONST. art. IV, §10.

<sup>188</sup> MONT. CONST. art. V, § 14.

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

<sup>190</sup> *Id.* Interestingly, in an archaic relic of a time in which the male gender was elevated above any other, the Montana Constitution specifically says that “a majority of the supreme court shall select *him*.” MONT. CONST. art. V, § 14. (emphasis added).

<sup>191</sup> WASH. CONST. art. II, § 43.

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

<sup>193</sup> ALASKA CONST. art. VI § 8(b); COLO. CONST. art. V, § 48(b); MO. CONST. art. III, § 7; N.J. CONST. art. II, § 1(b); 2011 R.I. Pub. Laws 11-106; VT. STAT. ANN. tit. 17, § 1904 (2009). States that require a public official from the executive branch to appoint one or more commission members include Alaska, Colorado, Missouri, New Jersey, Rhode Island, and Vermont. See ALASKA CONST. art. VI § 6.8(b); COLO. CONST. art. V, § 48(b); MO. CONST. art. III, §7; N.J. CONST. art. II, § 2, ¶ 1(b); 2011 R.I. Pub. Laws 11-106; VT. STAT. ANN. tit. 17, § 1904. States that require a public official from the judicial branch to appoint one or more commission members include Alaska, Colorado, and Vermont. See ALASKA CONST. art. VI § 6.8(b); COLO. CONST. art. V, § 48(b); VT. STAT. ANN. tit. 17, § 1904.

<sup>194</sup> See *supra* note 193 and accompanying text.

<sup>195</sup> COLO. CONST. art. V § 48(b).

In other states, elected and appointed officials in the executive branch are themselves the members of the redistricting commission.<sup>196</sup> Various states use different approaches to the amount of influence the executive and judicial branches have on the composition of the commission.<sup>197</sup> Arkansas' Board of Apportionment, which draws state legislative districts, is comprised only by the Governor as chairman, Secretary of State, and the Attorney General.<sup>198</sup> In a mix of the two approaches, Ohio's districts are drawn by the Governor, Auditor, Secretary of State, and two commissioners chosen by the legislative leaders,<sup>199</sup> aided by a six member advisory commission.<sup>200</sup> A Vermont statute reserves only one advisory commission seat appointment to the state Chief Justice.<sup>201</sup>

Although two other states—namely, Hawaii and New Jersey—draw congressional districts using commissions, the commissions are not “independent” in a traditional sense; they instead operate as “political commissions.”<sup>202</sup> The distinction lies in the fact that all of the previously mentioned states explicitly ban public officials from serving as redistricting commissioners.<sup>203</sup> Neither Hawaii<sup>204</sup> nor New Jersey<sup>205</sup> have explicit prohibitions against public officials serving as commissioners, however.

There are some special cases worth noting in which other, non-partisan entities have the power to appoint all or some members of a redistricting commission.<sup>206</sup> Iowa has one of these unique commission processes.<sup>207</sup> The Iowa Legislative Services Agency (“LSA”) is a non-partisan bureaucratic agency, established in 1980, which along with the five member advisory commission appointed by the legislative leaders, drafts a bill for consideration by the Iowa

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<sup>196</sup> ARK. CONST. art 8, § 1; OHIO CONST. art. XI, § 1. States that appoint public officials from the executive branch to a redistricting commission include Arkansas and Ohio. *See* ARK. CONST. art 8, § 1; OHIO CONST. art. XI, § 1.

<sup>197</sup> *See infra* notes 198–201 and accompanying text.

<sup>198</sup> ARK. CONST. art. 8 § 1.

<sup>199</sup> OHIO CONST. art. XI, § 1.

<sup>200</sup> OHIO REV. CODE § 103.51 (LexisNexis 1991).

<sup>201</sup> VT. STAT. ANN. tit. 17, § 1904.

<sup>202</sup> *Who Draws the Lines?*, *supra* note 144.

<sup>203</sup> *See supra* note 180 and accompanying text.

<sup>204</sup> HAWAII CONST. art. IV, § 2 (some limitations).

<sup>205</sup> N.J. CONST. art. II, § 2 ¶ 1(b).

<sup>206</sup> *See infra* notes 207–13 and accompanying text.

<sup>207</sup> *See infra* notes 208–09 and accompanying text.

legislature.<sup>208</sup> These bills must be rejected and sent back three times before the power of creating apportionment maps is taken from the LSA and the advisory commission.<sup>209</sup> Many states also require geographical considerations be taken into account when composing redistricting commissions.<sup>210</sup> These choices reflect a desire to maintain the geographic and demographic diversity with which the state identifies. For example, the Vermont advisory commission requires the Governor to appoint members “who are not all from the same county[.]”<sup>211</sup> In Arizona no more than two of the first four members may reside in the same county.<sup>212</sup> The New Jersey state Constitution also requires due regard for geographic, ethnic, and racial diversity.<sup>213</sup>

#### IV. EMPIRICAL RESEARCH ON INDEPENDENT COMMISSIONS

There has been a great deal of empirical research on how redistricting can influence election outcomes.<sup>214</sup> Prior scholars examining this issue have linked the decline in competitiveness to the growth in the incumbency advantage while others have focused on the partisan balance of seats in the House.<sup>215</sup> Some scholars blamed redistricting as a possible cause for the increase in the incumbency advantage.<sup>216</sup> Others reported a decline in competition in the first election after redistricting arguing that “a major element in the job security of incumbents is their ability to exert significant control over the drawing of district boundaries[.]”<sup>217</sup>

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<sup>208</sup> IOWA CODE § 42.3 (2016); ED COOK, LEGISLATIVE GUIDE TO REDISTRICTING IN IOWA 2 (2007).

<sup>209</sup> IOWA CODE § 42.3.

<sup>210</sup> See *infra* notes 210–13 and accompanying text (describing examples of states which require geographical considerations to be taken into account when composing redistricting commissions).

<sup>211</sup> VT. STAT. ANN. tit. 17, § 1904 (a).

<sup>212</sup> ARIZ. CONST. art. IV, pt. 2, § 1(3), (6).

<sup>213</sup> N.J. CONST. art. II, § 2(1)(a).

<sup>214</sup> See *infra* note 216–17 and accompanying text.

<sup>215</sup> See, e.g., Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Election*, 66 AM. POL. SCI. REV. 1234, 1240, 1241 n.10 (1972).

<sup>216</sup> See Mayhew, *supra* note 21, at 268–69. There is some disagreement on this topic. Compare Erikson, *supra* note 215, at 1241 n.10 (discussing that some believe that redistricting contributes to the advantage, but not attributing the advantage to redistricting), with John A. Ferejohn, *On the Decline of Competition in Congressional Elections*, 71 AM. POL. SCI. REV. 166, 167 (1977) (discussing the different explanations of the incumbency advantage and opining that the increase is based on a shift in the electorate’s behavior).

<sup>217</sup> Edward R. Tuft, *The Relationship between Seats and Votes in Two-Party*

Beyond the incumbency advantage, scholars have also focused on the aggregate effects of redistricting in terms of the partisan balance of seats in the House.<sup>218</sup> After the 1980s redistricting, the swing ratio (number of seats relative to proportion of the vote) was better for Democratic candidates in the states where the Democrats had complete control over the districting process.<sup>219</sup> There also was an initial partisan advantage for the political party that wielded control over the redistricting process for House elections in the 1970s.<sup>220</sup> In contrast, party control of state governments in the redistricting process yielded little partisan advantage in the 1992 elections.<sup>221</sup>

The effects of redistricting method on election outcomes is decidedly mixed with a great deal of the variation coming in how to define competition, what exactly constitutes a commission, and what are the correct “control” cases for comparison.<sup>222</sup> Some argue that pulling the redistricting process away from the standard legislative process should lead to an increase in overall levels of competition.<sup>223</sup> One of the authors of this article conducted an extensive analysis of congressional races in election cycles following redistricting.<sup>224</sup> In elections immediately after the 1990s and 2000s redistricting, courts and commission drawn plans were more competitive than those drawn by the legislature.<sup>225</sup> Using sixty percent of the two-party vote as a cutoff, roughly forty-four percent of districts drawn by commissions were competitive in 1992.<sup>226</sup> This number shrunk to thirty-one percent in 2002 but was still higher than the percentages for legislative drawn plans.<sup>227</sup> These differences remain significant in a statistical model that

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*Systems*, 67 AM. POL. SCI. REV. 540, 551 (1973).

<sup>218</sup> See *infra* notes 219–21 and accompanying text.

<sup>219</sup> Alan I. Abramowitz, *Partisan Redistricting and the 1982 Congressional Elections*, 45 J. POL. 767, 767, 768–70 (1983).

<sup>220</sup> See Richard G. Niemi & Laura R. Winsky, *The Persistence of Partisan Redistricting Effects in Congressional Elections in the 1970s and 1980s*, 54 J. POL. 565, 567–71 (1992); see also Richard Born, *Partisan Intentions and Election Day Realities in the Congressional Redistricting Process*, 79 AM. POL. SCI. REV. 305, 317 (1985).

<sup>221</sup> See Richard G. Niemi & Alan I. Abramowitz, *Partisan Redistricting and the 1992 Congressional Elections*, 56 J. POL. 811, 812–13 (1994).

<sup>222</sup> Carson & Crespín, *supra* note 7, at 459–61.

<sup>223</sup> *Id.* at 463; Jamie L. Carson et al., *Reevaluating the Effects of Redistricting on Electoral Competition, 1972-2012*, 14 ST. POL. & POL'Y Q. 165, 169 (2014).

<sup>224</sup> See Carson & Crespín, *supra* note 7, at 455, 456, 463.

<sup>225</sup> *Id.* at 462.

<sup>226</sup> *Id.* at 460.

<sup>227</sup> *Id.*

controls for the presence of quality challengers, spending, open seats, and the underlying partisan nature of the district.<sup>228</sup> Overall, IRC-drawn districts are four percent more likely to yield competitive elections compared to legislative plans.<sup>229</sup> This effect is about the same as when a quality challenger runs against an incumbent.<sup>230</sup> Although this is only one factor in the competitiveness of congressional elections, the data suggest that IRC have a significant, positive effect on electoral competition.<sup>231</sup>

When additional data from the 1972, 1982, and 2012 elections were added in a follow-up analysis, commission drawn plans were still more likely to be competitive.<sup>232</sup> This new analysis includes nearly all elections held immediately after a redistricting when most commissions were active.<sup>233</sup> Overall, 37.5 percent of commission drawn plans were in the competitive range, compared to only 28.3 percent for districts that were drawn using the normal legislative method.<sup>234</sup> Once again, the findings were robust to a series of additional independent control variables.<sup>235</sup> Statistical models indicate that commission-drawn districts are nearly ten percent more likely to be competitive compared to legislative drawn districts.<sup>236</sup> The method used to draw districts matters when it comes to partisan competition.

In a separate analysis, the authors compare the 1972 and 1982 elections with the 1992, 2002, and 2012 races in order to examine races before and after an increase in polarization and the introduction of computer based redistricting.<sup>237</sup> In the earlier races, a district drawn by a commission was no more likely to be competitive.<sup>238</sup> It was not until the 1992 elections when the effect

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<sup>228</sup> *Id.* at 464. This controlled statistical analysis is based on a multivariate probit model. *Id.* This is a special type of regression model used when the outcome or dependent variable (in this case, the result of congressional elections) is a discrete, rather than continuous variable. Carson & Crespin, *supra* note 7 at 464.

<sup>229</sup> *Id.* at 461–62.

<sup>230</sup> *Id.* at 462 (Table 2).

<sup>231</sup> *Id.*

<sup>232</sup> Carson, *supra* note 223, at 167, 173.

<sup>233</sup> *Id.* The analysis does not include mid-decade elections but few new plans are enacted during this time period. *Id.* at 167.

<sup>234</sup> *Id.* at 168.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 172, 176.

<sup>237</sup> Carson, *supra* note 223, at 171.

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

of commissions becomes more pronounced.<sup>239</sup>

Figure 1 provides a graphical depiction of competitiveness by districting plan. The y-axis gives the predicted probability of a race being competitive along with ninety-five percent confidence intervals.<sup>240</sup> As the figure makes evident, legislative drawn plans are the least likely to be competitive, followed by court plans.<sup>241</sup> The most competitive districts are from commission drawn plans, although the wide confidence intervals suggest there is quite a wide range of potential outcomes.<sup>242</sup>

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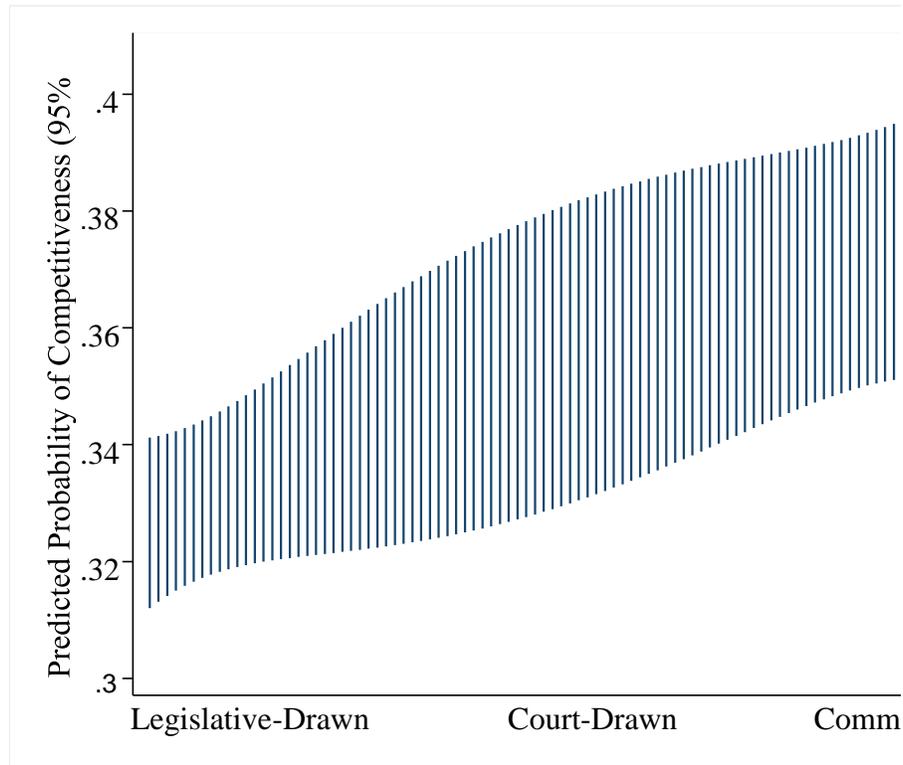
<sup>239</sup> *Id.* The authors suggest computerized GIS technology and increased polarization may be key players in the process. *Id.* at 171–72.

<sup>240</sup> *Id.* The predicted probabilities plotted in Figure 1 are based on results from a statistical model. The height of the bars reflect uncertainty associated with a finite sample size. *Id.* A ninety-five percent confidence interval is the range of values that contain the true value of a parameter in ninety-five percent of repeated samples. Carson, *supra* note 223, at 170.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

**Figure 3. Predicted Probability of a Competitive District by Map Type**



Source: Carson, *supra* note 223, at 173.

The results are echoed when elections beyond the ones immediately following a redistricting are studied.<sup>243</sup> During the first five post-2000 elections, the mean margin of victory was 40.1 percent in traditional legislative drawn districts.<sup>244</sup> This statistic varied from a high of 36.5 percent to a low of 22.3 percent in

<sup>243</sup> Eric Lindgren & Priscilla Southwell, *The Effect of Redistricting Commissions on Electoral Competitiveness in U.S. House Elections, 2002-2010*, 6 J. P. & L. 13, 14–15 (2013).

<sup>244</sup> *Id.*

commission districts depending on the type of commission.<sup>245</sup> Backup and independent commissions were the most competitive while advisory and partisan commissions were less likely to be competitive.<sup>246</sup>

Not all research finds commission drawn plans are more competitive.<sup>247</sup> In 2000, the last election before redistricting, twenty-five percent of commission districts were considered marginal while twenty-four percent were marginal in 2002, after redistricting.<sup>248</sup> The proportion of safe congressional districts increased from forty-four percent to fifty-one percent in the same races.<sup>249</sup> Meanwhile, competition at the state legislative level does not seem to change based on the method employed.<sup>250</sup>

Election results in individual states help illustrate the general patterns discussed above. In California, which implemented a new commission for the 2012 elections, the amount of competition depends heavily on if an incumbent is in the race.<sup>251</sup> Accounting for incumbents, the increase in competition is predicted to range between three points and thirteen points depending on the chamber and the plan.<sup>252</sup> If all incumbents were to retire and leave

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> See Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75, 79 (2006) [hereinafter Abramowitz et al., *Incumbency*]; Alan I. Abramowitz et al., *Don't Blame Redistricting for Uncompetitive Elections*, 39 POL. SCI. & POL. 87, 88 (2006) [hereinafter Abramowitz et al., *Don't Blame*].

<sup>248</sup> Abramowitz et al., *Incumbency*, *supra* note 247, at 79. A district is considered marginal if its two-party division of the presidential vote is close to (within five percent) of national presidential voting; a safe district is one in which one party's share in the presidential election is ten percent or more than the national average. *Id.* at 78. Political scientists measure the partisanship of a district using the presidential vote rather than congressional election results in order to evaluate how district partisanship affects congressional elections. See *id.*; see also Abramowitz et al., *Don't Blame*, *supra* note 247, at 87–88. *Contra* McDonald, *supra* note 142, at 92–93. Michael P. McDonald challenged these findings on methodological grounds and argues Abramowitz et al. overstate the number of true commission states. *Id.*

<sup>249</sup> Abramowitz et al., *Incumbency*, *supra* note 24, at 79.

<sup>250</sup> Richard Forgette et al., *Do Redistricting Principles and Practices Affect U.S. State Legislative Electoral Competition?*, 9 ST. POL. & POL'Y Q. 151, 165–69 (2009); see also Seth Masket et al., *The Gerrymanders are Coming! Legislative Redistricting Won't Affect Competition Much, No Matter Who Does It*, 45 POL. SCI. & POL. 39, 40–43 (2012).

<sup>251</sup> See Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 CAL. J. POL. & POL'Y 1, 1, 17 (2012).

<sup>252</sup> *Id.*

open seats many more seats would be competitive.

Many of the races in Iowa, New Jersey, and Washington failed to yield close contests in 2004.<sup>253</sup> The congressional races in Iowa in 2002 were more competitive compared to races elsewhere with four of five races deemed competitive.<sup>254</sup> This is likely due to the commission based system Iowa uses to draw both congressional and state legislative districts.<sup>255</sup> The races immediately following redistricting have not always been competitive as no incumbents from Iowa lost a reelection bid during the 1980s.<sup>256</sup> However, as incumbents retired during this time period, seventy-five percent of the seats turned over to the other party while the final race was decided by one percent of the vote.<sup>257</sup> During the 1990s, races were competitive and two incumbents lost.<sup>258</sup> The first was the result of two incumbents running against each other in 1992 and Democrat Neal Smith losing to a challenger, Republican Greg Ganske.<sup>259</sup> Two incumbents, Tom Latham and Leonard Boswell were forced to run against each other in 2012 as well.<sup>260</sup> Iowa's redistricting commission system does not allow mapmakers to know the home addresses of incumbents.<sup>261</sup> This means they are frequently drawn in to run against each other.<sup>262</sup>

Margin of victory is not the only way to judge election outcomes. No matter who draws the districts, a partisan process will result in a partisan outcome.<sup>263</sup> This is true if the method is by commission or by other means but a plan is more likely to be neutral if drawn by a bipartisan commission.<sup>264</sup> This was evident

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<sup>253</sup> See generally Thomas Mann, *Redistricting Reform: What is Desirable? Possible?*, in *PARTY LINES: COMPETITION, PARTISANSHIP AND CONGRESSIONAL REDISTRICTING* 92, 101–05 (Thomas Mann & Brue E. Cain eds., 2005) (discussing the redistricting schemes in those three states).

<sup>254</sup> See Forgette & Platt, *supra* note 139, at 942; see also Peverill Squire, *Iowa and the Political Consequences of Playing Redistricting Straight*, in *REDISTRICTING IN THE NEW MILLENNIUM* 261, 266–67 (Peter F. Galderisi ed., 2005)

<sup>255</sup> Squire, *supra* note 254, at 261.

<sup>256</sup> *Id.* at 266.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 267.

<sup>259</sup> *Id.*

<sup>260</sup> Jennifer Steinhauer, *As Two Iowa Incumbents Compete, the White House Reverberates*, *N.Y. TIMES*, Oct. 16, 2012 at A11.

<sup>261</sup> Tracy Jan, *Iowa Keeping Partisanship Off the Map*, *BOSTON GLOBE*, (Dec. 8, 2013), <https://www.bostonglobe.com/news/politics/2013/12/08/iowa-redistricting-takes-partisanship-out-mapmaking/efehCnJvNtLMIAFSQ8gp7l/story.html>.

<sup>262</sup> See, e.g., Steinhauer, *supra* note 260 (describing two incumbents from Iowa in competition, due to redistricting).

<sup>263</sup> McDonald, *supra* note 142, at 389–90.

<sup>264</sup> *Id.*

in states like Idaho and Washington with neutral maps drawn by bipartisan commissions.<sup>265</sup> In states like Idaho and Washington with bipartisan commissions for legislative districts, seats tend to show less evidence of gerrymandering.<sup>266</sup> However, a partisan commission in Texas produced a gerrymandered map that favored the Republicans.<sup>267</sup>

Miller and Grofman's analysis of redistricting commission in the Western U.S. suggests that IRCs produce maps more quickly than legislators do, but are not better at respectively local political boundaries or drawing compact districts.<sup>268</sup> It is also unlikely that independent commissions will decrease polarization at the state level.<sup>269</sup> In fact, states with non-partisan commissions saw an increase in polarization while polarization in states with partisan drawn maps declined slightly.<sup>270</sup> California's new redistricting commission has done little to reduce the amount of polarization in the state or improve on general levels of representation.<sup>271</sup> Still, some saw the maps as better than the 2001 plan on other measures, such as the number of split cities and compactness.<sup>272</sup> This means the districts are closer to circles with short regular boundaries.<sup>273</sup> They are also made up of more homogeneous populations including several that are more likely to elect a Hispanic or Asian representative.<sup>274</sup>

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<sup>265</sup> JONATHAN WINBURN, *THE REALITIES OF REDISTRICTING: FOLLOWING THE RULES AND LIMITING GERRYMANDERING IN STATE LEGISLATIVE REDISTRICTING* 190–92 (2008). This was likely a result of the constraining rules put in place for the commissions to follow. *See id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 161–62.

<sup>268</sup> Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 UC IRVINE L. REV. 637, 658–62 (2013) (on divisions and compactness).

<sup>269</sup> *See* Masket, *supra* note 250, at 42–43.

<sup>270</sup> *Id.* at 43.

<sup>271</sup> Thad Kousser et al., *Reform and Representation: A New Method Applied to Recent Electoral Changes* 28 (Aug. 19, 2015) (Working Paper), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2260083](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260083).

<sup>272</sup> Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 CAL. J. OF POL. & POL'Y. 1, 14 (2012).

<sup>273</sup> Nicholas Stephanopoulos, *An Auspicious Start*, HUFFINGTON POST (June 22, 2011, 4:20 PM), [http://www.huffingtonpost.com/nicholas-stephanopoulos/an-auspicious-start\\_b\\_880565.html](http://www.huffingtonpost.com/nicholas-stephanopoulos/an-auspicious-start_b_880565.html).

<sup>274</sup> *Id.*

## V. HOW IRC-DRAWN MAPS FARE IN COURT

Litigation over redistricting seems inevitable. Discontented groups will almost certainly file suit hoping to have the challenged maps struck down or, at the least, stayed. Additionally, a number of states, including some that created IRCs, have been subject to pre-clearance requirements of the Voting Rights Act, requiring them to seek approval for new maps from the courts or U.S. Department of Justice.<sup>275</sup> For these reasons, maps produced by IRC are not immune from legal challenges. In this section, we discuss the litigation record of IRC-created maps (other than Arizona's which is discussed in Section II) and observed that some IRC maps have been struck down by the courts, while others have been upheld. On one end of the spectrum are Idaho and Alaska with six maps struck down and sent back to their IRCs in just two cycles, while on the other end are California, Washington, and Montana with no maps struck down.<sup>276</sup> On the whole, we find that IRC maps are more likely to survive legal challenges than maps drawn by legislators.<sup>277</sup>

A. *Montana*

Montana has the oldest IRC in the nation.<sup>278</sup> Unlike other commissions, Montana's Districting and Apportionment Commission was written into its current constitution, ratified in 1972.<sup>279</sup> Litigation challenging the Commission's plans date back to the 1980 Census cycle.<sup>280</sup> Over the course of four redistricting cycles, maps produced by Montana's IRC have consistently withstood legal challenges.<sup>281</sup>

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<sup>275</sup> See discussion *infra* Section V., A–E; see also Miller & Grofman, *supra* note 268, at 641, 651 n.15, 652.

<sup>276</sup> See discussion *infra* Section V., A–E. It should be noted that Alaska and Montana each only have one congressional district, so their IRCs only draw state legislative maps. See *infra* Section V., A–E.

<sup>277</sup> Miller & Grofman, *supra* note 268, at 651. According to Miller and Grofman, no court has been forced to draw maps when an IRC is responsible for congressional maps. *Id.*

<sup>278</sup> See MONT. CONST. art. V, § 14(2) (West 1984); Caitlin B. Aarab & Jim Regnier, *Mapping the Treasure State: What States Can Learn from Redistricting in Montana*, 76 MONT. L. REV. 257, 260–62 (2015); Rachel Weiss, *Redistricting Before and After 'One Person, One Vote,'* THE INTERIM, Oct. 2010, at 10–13.

<sup>279</sup> See MONT. CONST. art. V, § 14(2); Weiss, *supra* note 278, at 10–13.

<sup>280</sup> See, e.g., *McBride v. Mahoney*, 573 F. Supp. 913, 913, 914 (D. Mont. 1983) (litigation challenging the commissions plans following the 1980 census cycle).

<sup>281</sup> See, e.g., *infra* notes 282–96 and accompanying text.

The first complaint against Commission's maps came in *McBride v. Mahoney*.<sup>282</sup> The issue involved the apportioning of state House districts.<sup>283</sup> Although the plan had a deviation above ten percent, making it presumptively unconstitutional, the District Court found that the Commission had legitimate reasons for its deviation and held the plan constitutional.<sup>284</sup>

After the 1990 Census, Native Americans challenged the Commission's state legislative maps alleging they diluted their voting strength in violation of the 1965 Voting Rights Act.<sup>285</sup> The lower court upheld the plans, but the Ninth Circuit instructed it to reevaluate the plans to make new findings of fact.<sup>286</sup> On remand, the lower court again upheld the plans finding that there was no diluting of the Native American vote and the Ninth Circuit agreed.<sup>287</sup>

After the 2000 Census, two cases emerged involving the Commission.<sup>288</sup> One pertained to its maps and the other involved assignments of holdover senators.<sup>289</sup> In the first case, the Secretary of State refused to accept the Commission's plans on the grounds that they violated a newly enacted state law.<sup>290</sup> Montana's First Judicial District Court declared the state law at issue to be unconstitutional, along with the Secretary's refusal to file the Commission's plans.<sup>291</sup> In the second case, holdover senators sought to enjoin the Commission's transition plan.<sup>292</sup> The lower court, however, held the law to be unconstitutional stating that the assignment of holdover senators is the responsibility of the Commission;<sup>293</sup> and the Montana Supreme Court affirmed.<sup>294</sup>

The only issue that gave rise to litigation concerning the

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<sup>282</sup> *McBride*, 573 F. Supp. at 913.

<sup>283</sup> *Id.* at 914.

<sup>284</sup> *Id.* at 915, 917.

<sup>285</sup> *Old Person v. Cooney*, 230 F.3d 1113, 1117 (9th Cir. 2000).

<sup>286</sup> *Id.* at 1117.

<sup>287</sup> *Earl Old Person v. Brown*, 312 F.3d 1036, 1037 (9th Cir. 2002).

<sup>288</sup> *See, e.g., infra* notes 289, 292 and accompanying text.

<sup>289</sup> *Wheat v. Brown*, 85 P.3d 765, 766 (Mont. 2004); *Brown v. Montana Districting and Apportionment Comm'n*, No. ADV 2003-72, 2003 ML 1896, ¶¶ 2–3 (Mont. Dist. Ct., 1st Jud. Dist. 2003) (order granting motion to dismiss), [http://leg.mt.gov/content/committees/interim/2003\\_2004/dist\\_apport/work\\_plan/BrownvMontanaDistricting.pdf](http://leg.mt.gov/content/committees/interim/2003_2004/dist_apport/work_plan/BrownvMontanaDistricting.pdf).

<sup>290</sup> *Brown*, 2003 ML 1896 at ¶¶ 2–3, 21, 30–31.

<sup>291</sup> *Id.* at ¶¶ 24, 30–31.

<sup>292</sup> *Wheat*, 85 P.3d at 766.

<sup>293</sup> *Id.* at 766, 771.

<sup>294</sup> *Id.* at 776, 772.

Commission after the 2010 Census cycle was “holdover senators.”<sup>295</sup> In *Willems v. Montana*, the appellate court upheld the lower court’s decision ruling that the Commission’s assignment of “holdover” districts, along with the process by which the districts were designated, was appropriate.<sup>296</sup>

### B. Idaho

In 1994, Idaho amended its state constitution to create an IRC.<sup>297</sup> Two years later, the legislature revised state law to provide additional guidance to the Commission on redistricting.<sup>298</sup> Both the state constitution and statutes require the IRC to avoid dividing political subdivisions and the number of counties divided by state legislative boundaries has been the focal point of litigation in Idaho.<sup>299</sup> The Idaho IRC’s litigation history is relatively complex and summarized in Table 1.

**Table 1. Summary of Legal Challenges to Idaho IRC’s Maps**

Case	Cycle	Result
<i>Smith et al. v. Idaho Comm’n on Redistricting</i> ,	2000	Plan struck down, returned to IRC

<sup>295</sup> *Willems v. Montana*, 325 P.3d 1204, 1206 (Mont. 2014).

A “holdover senator” is a senator elected under the old districting system who must be assigned to a redrawn district to serve the final two years of his or her term [lest s/he need be subject to re-election that same year.] A “holdover senator” is, therefore, not required to seek election at the general election held immediately following implementation of the districting plan.

*Id.*

<sup>296</sup> *Id.* at 1210.

<sup>297</sup> IDAHO CONST. art. III, § 2(2) (1994). Interestingly, Idaho’s state legislature was responsible for placing the amendment on the ballot—an amendment that would effectively remove its authority to redraw the lines for both state and congressional districts. *See generally* IDAHO CONST. art. III, § 2(2) (by creating the commission, the legislature no longer has the power to redraw lines).

<sup>298</sup> IDAHO CODE ANN. §§ 72-1501–1508 (giving further guidance to the commission regarding filling vacancies, criteria governing plans, and other issues).

<sup>299</sup> IDAHO CONST. art. III, § 5 (1986); IDAHO CODE ANN. § 72–1506(1) & (4) (2009).

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38 P.3d 121, 124 (Idaho 2001).		
<i>Bingham County et al v. Idaho Comm'n on Redistricting Comm'n</i> , 55 P.3d 863, 870–71 (Idaho 2002).	2000	Second plan struck down, returned to IRC
<i>Bonneville County v. Ysursa</i> , 129 P.3d 1213, 1223 (Idaho 2005).	2000	Third plan upheld
<i>Frasure v. Idaho Redistricting Comm'n</i> No. 39128-2011 (Idaho 2011) (unpublished order denying appeal).	2010	Appeal dismissed
<i>In re Constitutionality of Idaho Legislative Reapportionment Plan of 2002</i> No. 39127-2011 (Idaho 2011) (unpublished order declaring plan unconstitutional and void).	2010	2002 map cannot be used in 2012
<i>Twin Falls County v. Ysursa</i> , 271 P.3d 1202, 1207 (Idaho 2012).	2010	Plan struck down, returned to IRC

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Although a number of Idaho IRC maps have been struck down, the commission has been able to redraw its maps and satisfy the courts.<sup>300</sup> Additionally, notably absent from the Idaho redistricting cases are allegations that the Idaho IRC deviated from equally populated districts to advantage one party over the other; the litigation is primarily generated by “overpopulated” (and therefore

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<sup>300</sup> See e.g., *Twin Falls County v. Ysursa*, 271 P.3d 1207, 1207 (Idaho 2012); *In re Constitutionality of Idaho Legislative Reapportionment Plan of 2002*, No. 39127-2011 (Idaho 2011) (unpublished order declaring plan unconstitutional and void); *Frasure v. Idaho Redistricting Comm'n*, No. 39128-2011, ¶ 3 (Idaho 2011) [http://www.ncsl.org/documents/legismgt/2010Redist/Frasure\\_v\\_ID\\_Redistricting\\_Comm\\_Opinion.pdf](http://www.ncsl.org/documents/legismgt/2010Redist/Frasure_v_ID_Redistricting_Comm_Opinion.pdf), (unpublished order denying appeal); *Bonneville County v. Ysursa*, 129 P.3d 1213, 1223 (Idaho 2005); *Bingham County et al. v. Idaho Comm'n on Redistricting Comm'n*, 55 P.3d 863, 870–71 (Idaho 2002); *Smith et al. v. Idaho Comm'n on Redistricting*, 38 P.3d 121, 124 (Idaho 2001).

underrepresented) counties.<sup>301</sup> It is challenging to draw equally-populated districts for Idaho's thirty-five state Senators and seventy state Representatives because there are forty-four counties in the state and many of its northern counties are sparsely populated.<sup>302</sup>

Redistricting following the 2000 Census generated three opinions from the Idaho Supreme Court.<sup>303</sup> The Court struck down the Commission's first two legislative maps before the Court finally upheld the Commission's third plan.<sup>304</sup> Beginning in August 2001, the Commission adopted a two district congressional redistricting plan, C15, and a thirty-five district legislative redistricting plan, L66, both adopted by a four-two vote with the same four commissioners voting in favor of the plans.<sup>305</sup>

In *Smith et al. v. Idaho Commission on Redistricting*, the Idaho Supreme Court accepted the case on original jurisdiction and unanimously ruled against the Commission by striking down plan L66 because it deviated<sup>306</sup> by more than ten percent in population

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<sup>301</sup> See generally *supra* note 300 and accompanying text. The purpose for population deviations in these Idaho cases contrasts to the partisan motive for population deviations in a case like *Larios v. Cox*, where Georgia Democrats tried to deviate from equal populations as much as legally permissible to achieve partisan advantage in upcoming elections. *Larios*, 300 F.Supp.2d 1320, 1330–31 (N.D. Ga. 2004). See Richard Briffault, *Electoral Redistricting and the Supreme Court: Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL'Y 397, 416–17 (2005).

<sup>302</sup> See *House Membership*, IDAHO STATE LEGISLATURE (2014), <http://legislature.idaho.gov/house/membership.cfm>; *Senate Membership*, IDAHO STATE LEGISLATURE (2014), <http://legislature.idaho.gov/senate/membership.cfm>; *Idaho Counties by Population*, CUBIT (2016), [http://www.idaho-demographics.com/counties\\_by\\_population](http://www.idaho-demographics.com/counties_by_population). The task is much easier for Idaho's two congressional districts. See generally *Commission Wrestles With One Big Question In Drawing Congressional Districts: Split Ada or No?*, SPOKESMAN (July 15, 2011), <http://www.spokesman.com/blogs/boise/2011/jul/15/commission-wrestles-one-big-question-drawing-congressional-districts-split-ada-or-no/>. The IRC can achieve population equality by splitting only one county; the state is divided into eastern and western districts with Ada County (the largest county which contains Boise, Idaho's most populous city) divided to achieve population equality. See *id.*

<sup>303</sup> *Bonneville County*, 129 P.3d at 1223; *Bingham County*, 55 P.3d at 870–71; *Smith*, 136 P.3d at 123–24.

<sup>304</sup> *Bonneville County*, 129 P.3d at 1223; *Bingham County*, 55 P.3d at 870–71; *Smith*, 136 P.3d at 124.

<sup>305</sup> *Smith*, 38 P.3d at 123–24; IDAHO LEGISLATIVE SERVICES OFFICE, IDAHO'S FIRST COMM'N ON REDISTRICTING, 2001-2002 2 (2002), [http://www.legislature.idaho.gov/redistricting/archive/commission\\_chronology.pdf](http://www.legislature.idaho.gov/redistricting/archive/commission_chronology.pdf).

<sup>306</sup> *Smith*, 38 P.3d at 123–24. District population deviation is the sum of (1) the proportional difference between the state's ideal district size and the lowest

between districts without any rationally related state interest to do so.<sup>307</sup> The Court announced that pursuant to *Reynolds v. Sims*, legislative districts need to be “as nearly of equal population as is practicable[ ]”<sup>308</sup> and under *Brown v. Thomson*, population deviations greater than ten percent are presumptively invalid.<sup>309</sup> The Court ruled L66 unconstitutional on its face because it deviated by 10.69 percent without any legitimate reason for the disparity.<sup>310</sup> After the *Smith* ruling, the Commission reconvened pursuant to court order and passed another state legislative plan, L91, by a four-two vote, with the L66 “no” votes voting “yes” this time around.<sup>311</sup>

The Idaho Supreme Court heard challenges to plan L91 in *Bingham County et al. v. Idaho Commission on Redistricting et al.*<sup>312</sup> the population deviation in L91 was 11.79 percent (greater than the previously voided L66).<sup>313</sup> The Commission asserted, however, that the deviation this time was due to the advancement of legitimate interests to avoid unnecessary county splits while preserving the integrity of political subdivisions in accordance with Idaho’s Constitution and laws.<sup>314</sup> The Court accepted these reasons to be legitimate, but found them to not have been applied consistently.<sup>315</sup> The Court stated that while the Commission avoided splitting two particular counties, it did not extend the same principles when it split three other counties.<sup>316</sup> Additionally, the Court noted that the Commission rejected other plans with deviations under ten percent solely because it preferred to keep

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populated district and (2) the state’s ideal district size and the highest populated district. *See generally Equal Population*, NAT’L CONF. OF ST. LEGISLATURES (1996) <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/ch2equal.htm>. Ideal district size is determined by dividing the state’s population by the number of districts. *See generally id.*

<sup>307</sup> *Smith*, 38 P.3d at 123–24. The Court also ruled that a disputed Commissioner was eligible for appointment despite being associated with a lobby because he was a not a *registered* lobbyist as prohibited by the literal language of Idaho Code § 72–1502. *Id.* at 124 (emphasis added).

<sup>308</sup> *Id.* at 123 (quoting *Reynolds*, 377 U.S. at 577).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 124.

<sup>311</sup> IDAHO LEGISLATIVE SERVICES OFFICE, *supra* note 305.

<sup>312</sup> *Bingham County et al. v. Idaho Comm’n on Redistricting Comm’n*, 55 P.3d 863, 870–71 (Idaho 2002).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 866.

two particularly counties intact, while splitting others.<sup>317</sup> Hence, the Court struck down L91 holding that the justification for a deviation of 11.79 percent, although legitimate, was insufficient because it was based on a policy that was not applied consistently.<sup>318</sup> After the Court's decision in *Bingham*, the Commission was reconvened once more under court order and, by a five-one vote, passed another thirty-five district legislative plan, L97, with a population deviation of less than ten percent.<sup>319</sup>

After some unsuccessful challenges and special master hearings, the Idaho Supreme Court heard challenges to L97 (over two years after its adoption) in *Bonneville County v. Ysursa*.<sup>320</sup> The Court denied the initial challenges because L97 possessed deviations of only 9.71 percent (i.e. under ten percent) rendering it presumptively constitutional on its face.<sup>321</sup> Because there were some factual questions, however, the Court ordered a special master to conduct hearings and create a record for the Court to review.<sup>322</sup> The challenges in *Bonneville* relied on "regional deviation" rather population deviation between districts.<sup>323</sup> The argument posed was that the northern region of Idaho diluted the vote of the southwest and southeast regions of Idaho through the district apportionment relative to the northern region's population.<sup>324</sup> The Court rejected the argument pointing out that the alleged "regional deviations" could not overcome the presumption of constitutionality afforded to L97, especially when it could not be shown that the Commission's apportionment was unconstitutional or irrational.<sup>325</sup> The Court found L97 to be the result of the Commission's intent to comply with the one person/one vote requirement by keeping deviations below percent.<sup>326</sup> The plan L97 passed constitutional muster and remained in effect throughout the 2000 cycle.<sup>327</sup>

After the 2010 Census was delivered, the Idaho Secretary of State convened Idaho's IRC, but the Commission failed to submit

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<sup>317</sup> *Bingham County*, 55 P.3d at 866.

<sup>318</sup> *Id.* at 866, 870–871.

<sup>319</sup> IDAHO LEGISLATIVE SERVICES OFFICE, *supra* note 304, at 2.

<sup>320</sup> *Bonneville County*, 129 P.3d at 1215, 1216.

<sup>321</sup> *Id.* at 1215, 1216.

<sup>322</sup> *Id.* at 1216.

<sup>323</sup> *Id.* at 1217.

<sup>324</sup> *Id.* at 1217–18.

<sup>325</sup> *Id.* at 1219.

<sup>326</sup> *Bonneville County*, 129 P.3d at 1215, 1220.

<sup>327</sup> *Id.* at 1215.

plans within the ninety-day deadline.<sup>328</sup> A second 2011 Commission was convened effectively restarting the ninety-day period.<sup>329</sup> In the interim, the Idaho Supreme Court ruled that the 2002 plan, L97, could not be extended into the 2012 cycle; under the newly delivered 2010 Census, L97 contained unconstitutional population deviations.<sup>330</sup> The second 2011 Commission, eventually passed a congressional redistricting plan, C52, by a four-two vote and a legislative redistricting plan, L87, unanimously.<sup>331</sup>

The Idaho Supreme Court denied requests to have the Court adopt its own plan or extend the Commission's deadline to adopt its own plan and ruled that it did not have original jurisdiction to interpret state law.<sup>332</sup> Eventually, the Idaho Supreme Court heard challenges to L87 in *Twin Falls County v. Ysursa*.<sup>333</sup> The Court struck down L87 ruling that it split more counties than necessary to comply with the U.S. Constitution.<sup>334</sup> The Court explained that in creating a redistricting plan, the U.S. Constitution ranked first in the hierarchy of authority, then the Idaho Constitution, and finally Idaho law.<sup>335</sup> The Court acknowledged that to achieve deviations less than ten percent, the Commission might have to split counties contrary to the goals of Idaho's Constitution and laws.<sup>336</sup> In other words, if the county splits found in L87 were necessary to get the population deviation below ten percent, the plan would be upheld.<sup>337</sup> The Court further noted, however, that the Commission had actually considered and rejected other plans that divided fewer counties, but which would have been below ten

<sup>328</sup> See generally IDAHO CONST. art. III. § 2(4) (discussing the ninety-day deadline).

<sup>329</sup> See IDAHO CONST. art. III. § 2(4); *Commission Meetings & Public Hearings*, IDAHO LEGISLATURE, <https://www.legislature.idaho.gov/redistricting/meetings.htm> (last visited Apr. 3, 2016).

<sup>330</sup> In re Constitutionality of Idaho Legislative Reapportionment Plan of 2002, No. 39127-2011 (2011), [http://www.ncsl.org/documents/legismgt/2010Redist/In\\_Re\\_Constitutionality\\_of\\_Idaho\\_Reapportionment\\_Plan\\_of\\_2002\\_Opinion.pdf](http://www.ncsl.org/documents/legismgt/2010Redist/In_Re_Constitutionality_of_Idaho_Reapportionment_Plan_of_2002_Opinion.pdf).

<sup>331</sup> *News & Updates*, IDAHO LEGISLATURE, <https://www.legislature.idaho.gov/redistricting/news.htm> (last visited Mar. 8, 2016).

<sup>332</sup> *Frasure v. Idaho Redistricting Commission*, No. 39128-2011 (2011) [http://www.ncsl.org/documents/legismgt/2010Redist/Frasure\\_v\\_ID\\_Redistricting\\_Comm\\_Opinion.pdf](http://www.ncsl.org/documents/legismgt/2010Redist/Frasure_v_ID_Redistricting_Comm_Opinion.pdf).

<sup>333</sup> *Twin Falls County*, 271 P.3d at 1202, 1203.

<sup>334</sup> *Id.* at 1203.

<sup>335</sup> *Id.* at 1204.

<sup>336</sup> *Id.* at 1206.

<sup>337</sup> See *id.* at 1206.

percent population deviation.<sup>338</sup> Hence, because of the existence of the other plans, L87's county splits were more than necessary.<sup>339</sup> The Court did, however, reject the Petitioners' request to have the Court determine the legislative districts. Instead, the Court ordered plan L87 revised.<sup>340</sup> The Commission reconvened pursuant to the Court order and unanimously passed legislative redistricting plan, L93.<sup>341</sup> The Idaho Supreme did not hear any challenges to L93, which has remained in effect since 2012.<sup>342</sup>

### C. California

Shortly after the 2010 Census was released, California's first Citizen Redistricting Commission convened.<sup>343</sup> On August 15, 2011, it approved and certified its first set of maps.<sup>344</sup> Soon thereafter, challenges were brought against the state Senate and congressional maps, but the California Supreme Court rejected both without opinion.<sup>345</sup> A complaint was also filed alleging the Commission's selection procedures, which emphasize diversity, violate the State's constitutional guarantees against discrimination.<sup>346</sup>

## Table 2. Summary of Legal Challenges to California IRC's Maps<sup>347</sup>

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<sup>338</sup> *Id.* at 1206.

<sup>339</sup> *See Twin Falls County*, 271 P.3d at 1206–07.

<sup>340</sup> *Id.* at 1203.

<sup>341</sup> *Adopted Redistricting Plans*, IDAHO LEGISLATURE, [https://www.legislature.idaho.gov/redistricting/adopted\\_plans.htm](https://www.legislature.idaho.gov/redistricting/adopted_plans.htm) (last visited Mar. 8, 2016).

<sup>342</sup> *See id.*

<sup>343</sup> *Vandermost v. Bowen*, 269 P.3d 446, 452 (Cal. 2012).

<sup>344</sup> Letter from Vincent Barabba, Acting Chair, Cal. Citizens Redistricting Comm'n & Gabino Aguirre, Acting Vice Chair, Cal. Citizens Redistricting Comm'n, to Debra Bowen, Cal. Sec'y of State (Aug. 15, 2011).

<sup>345</sup> *Vandermost*, 269 P.3d at 452.

<sup>346</sup> *Id.* at 452, 452 at n.7.

<sup>347</sup> *Radanovich v. Bowen*, No. 2:11-cv-09786-SVW-PJW, at 1, 5 (C.D. Cal. 2012), <http://redistricting.lls.edu/files/CA%20radanovich%2020120209%20order.pdf>; *Vandermost*, 269 P.3d at 484; *Radanovich v. Bowen*, S196852, 2011 Cal. LEXIS

Cases	Cycle	Results
<i>Radanovich v. Bowen; Vandermost v. Bowen</i> , Cal. Supreme Court Nos. 196852, 196143 (Oct. 26, 2011) (unpublished).	2010	Plan upheld
<i>Radanovich v. Bowen</i> , Case No. 2:11-cv-09786-SVW-PJW (C.D. Cal. 2012) (unpublished).	2010	Plan upheld
<i>Vandermost v. Bowen II</i> , 269 P.3d 446, 484 (Cal. 2012).	2010	IRC maps approved as interim plan
<i>Connerly v. California</i> , 177 Cal. Rptr. 3d 304, 311 (Cal. 3d DCA 2014).	2010	Remanded for further finding of fact

The only court opinion published regarding the Commission's maps came from the California Supreme Court's decision in *Vandermost v. Bowen* ("Vandermost II").<sup>348</sup> The issue in *Vandermost II* questioned what Senate map would be used while the Commission's Senate map was pending a referendum vote.<sup>349</sup> California's Constitution allows voters to vote down through referendum maps passed by the Commission.<sup>350</sup> The Court reasoned that the proposed referendum had a likelihood of making it onto the ballot and, as such, created time sensitive issues that required the Court to determine ahead of time what Senate map would be used in the interim.<sup>351</sup> The Court rejected the argument the Commission's challenged Senate map could not be among those considered as an interim map.<sup>352</sup> In fact, the Court questioned the suggestion that it would actually be avoiding the "political thicket" if it were to conclude that a map produced by a nonpartisan Commission could not be used in contrast to a map proposed by the

10999, at \*1 (Cal. 2011); *Connerly v. State*, 177 Cal. Rptr. 304, 311 (Cal. Ct. App. 2014); Press Release, California Courts, Challenges to Redistricting Denied (Oct. 27, 2011), <http://www.courts.ca.gov/15762.htm>.

<sup>348</sup> *Vandermost*, 269 P.3d at 452.

<sup>349</sup> *Id.* at 484.

<sup>350</sup> CAL. CONST. art. XXI, § 3(2).

<sup>351</sup> *Vandermost*, 269 P.3d at 469–70.

<sup>352</sup> *Id.* at 473.

proponent of a political party sponsored referendum.<sup>353</sup> The Court evaluated the pros and cons of all the proposed maps, including the Commission's Senate map, and ruled the Commission's map to be the most appropriate interim map for the 2012 elections.<sup>354</sup> The referendum eventually went on the ballot as Proposition 40.<sup>355</sup> After the Court's ruling in *Vandermost II*, however, the sponsors abandoned their campaign and the voters overwhelmingly voted "yes" to keep the Commission's state Senate map.<sup>356</sup>

#### D. Washington

The State of Washington has the second oldest IRC in the United States, created in 1983.<sup>357</sup> Despite being in existence for three census cycles, Washington's Commission has experienced the least amount of legal challenges.<sup>358</sup> In fact, only one published case is recorded and that case did not come until the 2010 Census cycle.<sup>359</sup>

In the case of *In re: 2012 Washington State Redistricting Plan*, a *pro se* petition for declaratory judgment was filed with the Washington State Supreme Court challenging the Commission's legislative and congressional plans.<sup>360</sup> The plans were challenged on the grounds that they violated Washington State law for splitting more counties than necessary.<sup>361</sup> The Court ordered briefs to determine which plans would be used in the interim.<sup>362</sup> The Court eventually ruled the Commission's plans to be used as

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<sup>353</sup> *Id.* at 474.

<sup>354</sup> *Id.* at 484.

<sup>355</sup> Proposition 40, CALIFORNIA CHOICES.ORG, <http://www.californiachoices.org/proposition-40> (last visited Mar. 8, 2016).

<sup>356</sup> *Id.*; Patrick McGreevy, *Sponsors of California's Proposition 40 Drop Their Campaign*, LOS ANGELES TIMES (Oct. 6, 2012), <http://articles.latimes.com/2012/oct/06/local/la-me-prop40-20121006>.

<sup>357</sup> Based on our research, Washington's IRC is the second independent commission and the third oldest redistricting commission. Colorado created a political commission in 1974. See WASH. CONST. art. II, § 43; see *Historical Timeline*, WASH. STATE REDISTRICTING COMM'N, <http://www.redistricting.wa.gov/history.asp> (last visited Mar. 8, 2016).

<sup>358</sup> See *Washington, ALL ABOUT REDISTRICTING*, <http://redistricting.lls.edu/state-WA.php> (last visited Mar. 8, 2016).

<sup>359</sup> *Id.*

<sup>360</sup> Order Adopting Redistricting Plan, *In re 2012 Washington State Redistricting Plan*, No. 869766 (Wash. 2012); Petition for Declaratory Judgment at 1, 8, *In re 2012 Washington State Redistricting Plan*, No. 869766 (Wash. 2012).

<sup>361</sup> Petition for Declaratory Judgment at 1, 8, *In re 2012 Washington State Redistricting Plan*, No. 869766 (Wash. 2012).

<sup>362</sup> See Order Adopting Redistricting Plan, *In re 2012 Washington State Redistricting Plan*, No. 869766 (Wash. 2012).

interim maps for the 2012 elections.<sup>363</sup> Not long after that, upon request from the Petitioner, the Court dismissed the petition and the maps remained in effect.<sup>364</sup>

### *E. Alaska*

Alaska's IRC, known as the Redistricting Board ("the Board"), has been in place since 1999.<sup>365</sup> The Board's appointees are selected without regard for political affiliation.<sup>366</sup> However, because the four appointing officials may be from the same political alignment (i.e., the Governor, the majority leaders, and the Chief Justice of Alaska), the Board's composition may very well be partisan.<sup>367</sup> Both the 2000 and 2010 Census cycles brought about challenges to the Board's maps.<sup>368</sup> Alaska, like Montana, has only one congressional district leaving the Board with duty of only drawing state legislative maps.<sup>369</sup> Alaska was a covered jurisdiction, for purposes of Section 5 of the Voting Rights Act, requiring it to pre-clear changes to its state legislative districts.<sup>370</sup>

The first map ever drawn by a Board came after the 2000 Census, but it was struck down by the Alaska Supreme Court.<sup>371</sup> The Court found the maps to be in violation of compactness and equal population requirements.<sup>372</sup> The Board then drafted a subsequent plan, which was eventually upheld by the Alaska Supreme Court after, it too, was challenged.<sup>373</sup>

In Alaskan redistricting jurisprudence, the Supreme Court of Alaska established the *Hickel Process*, requiring redistricting plans to be drafted first by complying with the Alaska Constitution, and then adjusting to comply with the Voting Rights Act.<sup>374</sup> A redistricting plan may minimize the requirements of

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<sup>363</sup> *See id.*

<sup>364</sup> Order Dismissing Case, *In re* 2012 Washington State Redistricting Plan, No. 869766 (Wash. 2012).

<sup>365</sup> *See* ALASKA CONST. art. VI § 8(a).

<sup>366</sup> ALASKA CONST. art. VI § 8(a).

<sup>367</sup> ALASKA CONST. art. VI § 8(b).

<sup>368</sup> *Alaska*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/state-AK.php> (last visited Mar. 8, 2016).

<sup>369</sup> KRISTIN D. BURNETT, CONGRESSIONAL APPORTIONMENT: 2010 CENSUS BRIEFS 2 (Nov. 2011).

<sup>370</sup> *In re* 2011 Redistricting Cases, 294 P.3d 1032, 1033–34 (Alaska 2012).

<sup>371</sup> *In re* 2001 Redistricting Cases, 44 P.3d 141, 143 (Alaska 2002).

<sup>372</sup> *In re* 2001 Redistricting Cases, 44 P.3d at 143, 145–46.

<sup>373</sup> *In re* 2001 Redistricting Cases, 47 P.3d 1089, 1090 (Alaska 2002).

<sup>374</sup> *In re* 2001 Redistricting Cases, 294 P.3d at 1034; *Hickel v. Southeast Conference*, 846 P.2d 38, 44–45, 49–51 (Alaska 1992).

Alaska's Constitution only when such minimization is the only means available to comply with the Voting Rights Act.<sup>375</sup> The Board's first plan was challenged on the grounds that it minimized Alaska's constitutional requirements unnecessarily.<sup>376</sup> After a trial, the Supreme Court of Alaska accepted review and rejected the Board's plan with instructions for the Board to follow the *Hickel* process.<sup>377</sup> The Court subsequently approved the Board's plan, as an interim plan, for the 2012 elections.<sup>378</sup> Meanwhile, the Board promulgated another plan, which was rejected by the lower court as not complying with the *Hickel* process.<sup>379</sup> The Alaska Supreme Court affirmed the lower court and again rejected the Board's plan as being non-compliant with its previous mandate and the *Hickel* process.<sup>380</sup>

On July 2014, the Board adopted its third redistricting plan, known as the 2013 Proclamation Plan.<sup>381</sup> Challenges to the 2013 plan were consolidated and eventually rejected by the trial court.<sup>382</sup> The trial court's decision was appealed, but the Alaska Supreme Court dismissed the appeal, thereby, leaving the 2013 plan in effect for the 2014 cycle.<sup>383</sup>

#### CONCLUSION

In this article, we have examined whether independent redistricting commissions offer us a way out of the political thicket. State legislators may initiate the creation of IRCs and it may relieve some of them to have an independent commission handle this difficult and divisive task.<sup>384</sup> But the problem of partisan gerrymandering suggests state legislators may be part of the

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<sup>375</sup> *In re 2011 Redistricting Cases*, 294 P.3d. at 1034–35.

<sup>376</sup> *In re 2011 Redistricting Cases*, 294 P.3d. at 1033.

<sup>377</sup> *In re 2011 Redistricting Cases*, 274 P.3d 466, 467–68 (Alaska 2012).

<sup>378</sup> *In re 2011 Redistricting Cases*, 282 P.3d 306, 315 (Alaska 2012); *In re 2011 Redistricting Cases*, 274 P.3d at 468–69.

<sup>379</sup> *In re 2011 Redistricting Cases*, 294 P.3d. at 1033.

<sup>380</sup> *In re 2011 Redistricting Cases*, 294 P.3d. at 1033.

<sup>381</sup> *In re 2011 Redistricting Cases*, No. 4FA-11-2209CI, 2013 WL 6074059, at \*2–3 (Alaska Super. Ct. 2013).

<sup>382</sup> *In re 2011 Redistricting Cases*, No. 4FA-11-2209CI at \*35.

<sup>383</sup> *In re 2011 Redistricting Cases*, Case No. S15681 (Dec. 8, 2014) (unpublished); COURTVIEW: JUSTICE SOLUTIONS, courtrecords.alaska.gov (last visited Apr. 15, 2016) (documentation of docket via court database).

<sup>384</sup> See generally *State-by-State Redistricting Procedures*, *supra* note 11. This, in fact, happened in Alaska, Idaho, Montana, and Washington. *Id.* Generally the creation of an IRC requires a constitutional amendment because the legislators' authority over redistricting is outlined in state constitutions. See *id.*

problem rather than part of the solution. The recent Supreme Court decision in *Arizona Legislature* supports the authority of citizens to amend their state constitutions in order to delegate redistricting authority to independent commissions, rather than rely on state legislators.<sup>385</sup>

How might the Court's decision affect the political landscape? The *Arizona Legislature* decision suggests that frustrated citizens in states like Arizona and California may address the problem directly by initiating the creation of IRC in their states (to the extent their state constitutions allow citizen initiated constitutional amendments).<sup>386</sup> Citizens in other states may follow their lead. Sixteen states in addition to Arizona and California allow citizens to initiate amendments to their constitutions.<sup>387</sup> Six states that allow citizens to initiate constitutional amendments already have redistricting commissions with limited authority and/or independence: Arkansas, Colorado, Illinois, Missouri, Mississippi, and Oklahoma.<sup>388</sup> Voters in Arkansas, Colorado, and Missouri would appear best positioned to capitalize on the Court's recent ruling because their state constitutions allow them to initiate amendments and their state redistricting commissions already have binding authority over state legislative districts (although they lack authority over congressional districts).<sup>389</sup> Under Colorado's State Constitution, four legislators serve on the state's redistricting commission (along with three members appointed by the governor and four members appointed by the chief justice of the Colorado Supreme Court).<sup>390</sup> If these four legislators appointed commissioners, rather than served personally, the commission would be considered an IRC. Arkansas' three-member redistricting commission is composed entirely of elected officials: the governor, the secretary of state, and the attorney general.<sup>391</sup> If these officials appointed commissioners,

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<sup>385</sup> *Id.*

<sup>386</sup> *Id.*; *Initiated Constitutional Amendment*, BALLOTPEDIA, [https://ballotpedia.org/Initiated\\_constitutional\\_amendment](https://ballotpedia.org/Initiated_constitutional_amendment) (last visited Mar. 9, 2016).

<sup>387</sup> *Initiated Constitutional Amendment*, *supra* note 386.

<sup>388</sup> *State-by-State Redistricting Procedures*, *supra* note 11. Note that this process is almost impossible in Mississippi. *Initiated Constitutional Amendment*, *supra* note 386.

<sup>389</sup> *State-by-State Redistricting Procedures*, *supra* note 11; *Initiated Constitutional Amendment*, *supra* note 386.

<sup>390</sup> COLO. CONST. art. V, § 48, cl. (1)(a), (1)(b).

<sup>391</sup> Justin Levitt, *All About Redistricting: Arkansas*, LOY. L.A. LAW SCH., <http://redistricting.lls.edu/states-AR.php#institution> (last visited Mar. 9, 2016).

rather than served directly, the Arkansas commission would be considered independent.

The inability to formulate a workable standard for judging partisan redistricting claims has drawn the courts into the ongoing struggle between Democrats and Republicans for control of American politics. In *Vieth*, Justice Kennedy cautioned that partisan gerrymandering claims could compel the courts into an “unprecedented intervention in the American political process.”<sup>392</sup>

The courts may not have intended to play such a prominent role in the redistricting process, which the U.S. Constitution commits to state legislatures, but the frequent conflicts over redistricting have dragged the courts unwittingly into the political thicket. The courts repeated efforts to articulate standards for one aspect of redistricting appear to generate additional conflict over rival redistricting principles.<sup>393</sup> The system exhibits many signs of dysfunction: legislative gridlock, frequent clashes between courts and legislatures, emergency hearings, and interim maps.<sup>394</sup> Although the history of redistricting in Arizona, the empirical research on IRCs, and the litigation record of IRC-drawn maps paint a mixed picture, the results of IRC-drawn have been positive in terms of election competition and respecting basic constitutional principles.

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<sup>392</sup> *Vieth*, 124 S.Ct. at 1793.

<sup>393</sup> See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, U. PENN. L. REV. 153, 541, 543–44 (2004). “A first law of political thermodynamics guarantees that partisan challenges cannot be eliminated; at most, they can be channeled into different doctrinal pigeonholes.” *Id.* at 543.

<sup>394</sup> Gabrielle Levy, *Redistricting Reform Gains Steam*, US NEWS (Dec. 1, 2015), <http://www.usnews.com/news/articles/2015/12/01/redistricting-reform-gains-steam>; see also *2000s Redistricting Case Summaries*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/redistricting/2000s-redistricting-case-summaries.aspx> (last visited Apr. 4, 2016). Courts have frequently been compelled to draw maps when the legislative process breaks down. *2000s Redistricting Case Summaries*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/redistricting/2000s-redistricting-case-summaries.aspx> (last visited Apr. 4, 2016). After the 2000 Census, twelve states held election on court-drawn maps. See *id.*