

**ESTABLISHING A SOVEREIGN VOTE:  
UNSHACKLING THE ELECTORATE BY REDISTRICTING  
THROUGH INDEPENDENT COMMISSIONS**

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I. HISTORY OF DISTRICTING AND GERRYMANDERING

For much of our nation’s history, the power to draw congressional districts has rested exclusively with the states’ legislators,<sup>1</sup> and in a majority of states, the legislature retains that authority.<sup>2</sup> When dividing the state into congressional districts, map makers are bound by strict equal population requirements.<sup>3</sup> By federal law, these districts are redrawn following each decennial census to ensure that each state has the correctly apportioned number of congressional districts, and that each district is roughly equal in population.<sup>4</sup> Following the Supreme

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1. See 2 U.S.C.A. § 2c (West 2020). Article I, section IV of the U.S. Constitution grants to the state legislatures the authority to make and enforce laws governing the election of senators and representatives. U.S. CONST. art. I, § 4, cl. 1.

2. See *Who Draws the Maps? Legislative and Congressional Redistricting*, BRENNAN CTR. FOR JUSTICE (Jan. 30, 2019), <https://www.brennancenter.org/analysis/who-draws-maps-states-redrawing-congressional-and-state-district-lines>.

3. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

4. See U.S. CONST. art. I, § 2, cl. 3; see also *What is Redistricting?*, PUB. MAPPING PROJECT, <http://www.publicmapping.org/what-is-redistricting> (last visited Mar. 12, 2020).

Court's decisions in *Wesberry v. Sanders* and *Reynolds v. Sims*<sup>5</sup> in 1964, map-makers must be mindful of these population requirements—colloquially known as the *One-Person One-Vote* rule.<sup>6</sup>

Despite these restrictions, the process is still easily manipulated. Our national tradition of allowing incumbent legislatures to draw districts more or less as they see fit is too often taken as an invitation to entrench a partisan advantage.<sup>7</sup> Legislatures often perform feats of mind-boggling districting gymnastics in order to hone a political edge, while they comply with equal population and state law “compactness” requirements.<sup>8</sup>

This process is commonly known as gerrymandering.<sup>9</sup> Gerrymandering occurs where the party in power draws districts with the intention of suppressing the efficacy of an adversary's voter base—ensuring that the gerrymanderer comfortably collects the requisite votes needed to retain power.<sup>10</sup> The gerrymander often results in biased

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5. *Reynolds v. Sims*, 377 U.S. 533, 559–64 (1964) (extending the *Wesberry* equal population requirement for congressional districts to those drawn for use in state legislative races).

6. *Id.* at 558. The Court held that districting schemes that gave a voter in smaller districts a voting power multiple times that of a large-district resident violated the Equal Protection Clause. *Id.* at 562–66.

7. See Matthew Frankel, *U.S. Congress: Gerrymandering is the Problem*, BROOKINGS (June 15, 2010), <https://www.brookings.edu/blog/up-front/2010/06/15/u-s-congress-gerrymandering-is-the-problem/> (noting that the prevalence of modern gerrymandering may be contributing to radicalism on both ends of the political spectrum); see also Benjamin Brickner, *Reading Between the Lines: Congressional and State Legislative Redistricting their Reform in Iowa, Arizona and California and Ideas for Change in New Jersey*, EAGLETON INST. OF POLITICS 57 (May 2010), [https://eagleton.rutgers.edu/wp-content/uploads/2019/07/Brickner\\_ReadingbetweentheLines.pdf](https://eagleton.rutgers.edu/wp-content/uploads/2019/07/Brickner_ReadingbetweentheLines.pdf) (“In the modern era of legislative professionalism, which has resulted in significantly longer stints in office, the danger of losing an election is a powerful incentive. Where the prospects of reelection are artificially enhanced by engineering politically safe districts, long-term incumbents’ may become detached from their constituents.”).

8. See Justin Levitt, *Where are the lines drawn?*, LOY. L. SCH.: ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/index.php> (last updated June 29, 2019). Thirty-seven states have compactness requirements for legislative districts, while nineteen also have some form of compactness requirement for congressional districts. *Id.* Few, however, have defined what “compactness” means. *Id.*

9. *Gerrymander*, BLACK'S LAW DICTIONARY (4th ed. rev. 1968). Gerrymandering draws its name from Elbridge Gerry, former governor of Massachusetts. Brian Duignan, *Gerrymandering*, ENCYC. BRITANNICA: POLITICS, <https://www.britannica.com/topic/gerrymandering#ref25820> (last visited Mar. 12, 2020). In 1812, Gerry's administration redefined state districts to give Gerry's party an advantage. *Id.* A contemporary cartoonist likened one of the resulting ludicrously contorted districts to a salamander and dubbed it “The Gerry-mander,” cementing the term in the public lexicon. *Id.*

10. See Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 55–56 (2004); see also *Practical bug fixes for democracy: Wondering How the Tests Work?*, PRINCETON GERRYMANDERING PROJECT, <http://gerrymander.princeton.edu/info/> (last visited Mar. 12, 2020) (explaining the techniques used by gerrymanderers).

districts that are convoluted and misshapen, and which pay little heed to established community borders like city and county lines.<sup>11</sup> As discussion persists, legislatures continue to draw maps designed to circumvent efforts to curtail districting that unduly disadvantage political minorities.<sup>12</sup>

The debate on districting has reached a fever pitch in recent years, but the issue is by no means new; disproportionate districting has been a favorite strategy of the political machine in our country for hundreds of years.<sup>13</sup> Historically, a well-orchestrated gerrymander has always been a powerful political weapon, albeit not necessarily a sure way to secure an advantage.<sup>14</sup> In order to win more than its share of seats, the party constructing the gerrymander must spread its advantage thinner—which exposes itself to greater risk—in order to compete in more districts.<sup>15</sup> However, with the advent of computers and more advanced map-drawing technology, this once risky yet high-reward political strategy can consistently stamp out competitive elections.<sup>16</sup>

Modern elections frequently demonstrate the ruthless efficiency of present-day gerrymanders. By way of example, in North Carolina's 2018

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11. See David Wasserman, *Hating Gerrymandering Is Easy. Fixing It Is Harder.*, FIVETHIRTYEIGHT (Jan. 25, 2018), <https://fivethirtyeight.com/features/hating-gerrymandering-is-easy-fixing-it-is-harder/>; see also Nic Cavell, *Gerrymandering is Even More Infuriating When You Can Actually See It*, WIRED (Jan. 28, 2016, 9:00 AM), <https://www.wired.com/2016/01/gerrymandering-is-even-more-infuriating-when-you-can-actually-see-it/>.

12. Article I § II of the Constitution requires districts to come “as nearly as is practicable” to containing an equal number of people. *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). Deviations from the mean must be justified by state policy, and even then, are considered unconstitutional if they vary by more than a percent of the population. See Levitt, *supra* note 8.

13. See *Vieth v. Jubelirer*, 541 U.S. 267, 274–75 (2004) (Scalia, J.) (plurality opinion) (noting that examples of what would come to be known as gerrymandering can be found in the colonies as far back as the early 18th century); see also ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 26–29 (1901). Some evidence indicates a 1788 gerrymander in Virginia led to the election of James Madison to congress. See Robert Draper, *The League of Dangerous Mapmakers*, THE ATLANTIC (Oct. 2012), <https://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/>. Elbridge Gerry would serve as his second vice-president. *Id.*

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

15. The motivation is to create district maps that enable gerrymanderers to win as many close races as possible. If Party A needs only 51% of the vote in order to win a seat, any votes cast in favor of the party above 51% are “wasted.” See Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 6–8 (1985).

16. See Pildes, *supra* note 10, at 56; 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).

midterm elections—despite receiving 48.3% of the total votes cast for congressional house representatives—Democrats received just three (23%) of the seats, whereas the Republicans seized at least nine (69%) of the seats, while securing only 50.4% of the vote.<sup>17</sup> Several other states experienced similar scenarios during the 2018 midterm elections,<sup>18</sup> and throughout the redistricting cycle following the 2010 census.<sup>19</sup>

Given the resulting imbalance, it is unsurprising that public ire about gerrymandering continues to grow as we enter the 2020 redistricting cycle. Of course, while concern about gerrymandering is *en vogue*, imagining a redistricting scheme immune to becoming mired in political challenge proves problematic.<sup>20</sup> The approach of a few states, however, may offer a solution.

## II. THE EXTRA-LEGISLATIVE COMMISSION STRUCTURE

Coinciding with a rising national apprehension about political gerrymandering, a handful of states have adopted extra-legislative bodies that act as a check on the legislature's ability to draw state and congressional districts, or that replace the legislature altogether

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17. Maggie Astor & K.K. Rebecca Lai, *What's Stronger Than a Blue Wave? Gerrymandered Districts*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/interactive/2018/11/29/us/politics/north-carolina-gerrymandering.html>; see also Alan Blinder, *North Carolina Sets New Date for Redo Election in Congressional House Race*, N.Y. TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/us/north-carolina-special-election-house-ninth.html>; Alan Blinder, *Inside a Fly-by-Night Operation to Harvest Ballots in North Carolina*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/north-carolina-voter-fraud.html?module=inline>.

18. See Christopher Ingraham, *In at least three states, Republicans lost the popular vote but won the House*, WASH. POST (Nov. 13, 2018, 6:00 AM), [https://www.washingtonpost.com/business/2018/11/13/least-three-states-republicans-lost-popular-vote-won-house/?utm\\_term=.d1e4052aa494](https://www.washingtonpost.com/business/2018/11/13/least-three-states-republicans-lost-popular-vote-won-house/?utm_term=.d1e4052aa494).

19. Some challenges to the 2010 districting cycle lasted well into the decade. See Michael Li & Thomas Wolf, *5 Things to Know About the Wisconsin Gerrymandering Case*, BRENNAN CTR. FOR JUSTICE (June 19, 2017), <https://www.brennancenter.org/blog/5-things-know-about-wisconsin-partisan-gerrymandering-case> (discussing *Gill v. Whitford*); Christopher Ingraham, *How Maryland Democrats pulled off their aggressive gerrymander*, WASH. POST (Mar. 28, 2018, 1:23 PM), [https://www.washingtonpost.com/news/wonk/wp/2018/03/28/how-maryland-democrats-pulled-off-their-aggressive-gerrymander/?utm\\_term=.418f513fdade](https://www.washingtonpost.com/news/wonk/wp/2018/03/28/how-maryland-democrats-pulled-off-their-aggressive-gerrymander/?utm_term=.418f513fdade) (discussing a 2018 challenge to Democrats' gerrymandering in Maryland).

20. See *Davis v. Bandemer*, 478 U.S. 109, 158–59 (1986) (O'Connor, J., concurring). Justice O'Connor suggests a scenario in which a party, despite representing a majority of voters, is expected to consistently lose future elections under a districting plan. *Id.* It seems contrary to societal ideals of fairness that such a districting scheme should persist, but should a districting plan be held unconstitutional merely because of the projection future losses?

throughout the process.<sup>21</sup> States have created a variety of different entities to assist with or take charge of redistricting, each with varying degrees of autonomy from the state legislature.<sup>22</sup> A comparison of the most independent of these—the politician commission and the independent redistricting commission—is the subject of this commentary.

What defines these two commission structures is their degree of autonomy from the legislature. In states that employ politician commissions to draw districts, a panel comprised of selected state legislators, high-ranking members of the judiciary, or state executive officials typically holds responsibility for redistricting.<sup>23</sup> The politician commission is distinct from independent commissions in that elected officials (i.e., politicians) are appointed to serve on the commissions.<sup>24</sup> The politician commission is usually composed of a balanced number of representatives from each major political party.<sup>25</sup> In some states, elected officials hold pre-designated seats on the political commission, while others leave the power to appoint commissioners to the Governor, incumbent party leadership, or the state's highest court.<sup>26</sup> But the politician commission provides no guarantee that the districting process *remains* unencumbered by political influence. In late 2018, the legislature in New Jersey, a state employing a politician commission, attempted to roll back the “bi-partisan” aspect of its bi-partisan commission by making amendments to the state's constitution minimizing minority-party participation in the districting process.<sup>27</sup> Opposition to the bill came in full force from numerous political factions: Republicans, progressives—increasingly frustrated with gerrymandering on the other side—and even the Democratic governor of

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21. See generally Annie Lo, *Citizen and Legislative Efforts to Reform Redistricting in 2018*, BRENNAN CTR. FOR JUSTICE, (Nov. 7, 2018), <https://www.brennancenter.org/analysis/current-citizen-efforts-reform-redistricting>; BRENNAN CTR. FOR JUSTICE, *supra* note 2.

22. See Justin Levitt, *Who draws the lines?*, LOY. L. SCH.: ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/who.php> (last updated June 29, 2019); see also Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L. J. 1808, 1813 (2012).

23. See Justin Levitt, *A Citizen's Guide to Redistricting*, BRENNAN CTR. FOR JUSTICE, 21 (2010), <http://www.brennancenter.org/sites/default/files/legacy/CGR%20Reprint%20Single%20Page.pdf>; Levitt, *supra* note 23.

24. See Levitt, *supra* note 23.

25. *Id.*

26. *Id.*

27. See Assemb. Con. Res. 60, 218th Leg., 2018 Sess. (N.J. 2018). A provision of the bill would have required at least 25% of New Jersey's districts to be drawn within five points of the average statewide vote over the previous decade in an overwhelmingly Democrat-controlled state. *Id.*

New Jersey.<sup>28</sup> Although the proposal has been withdrawn for the moment,<sup>29</sup> the measure would have further entrenched the Democratic Party in what is a firmly Democrat-controlled state.<sup>30</sup>

How close New Jersey came to writing a partisan advantage into its constitution should serve as both an example, and a warning. A more reliable form of redistricting is necessary to ensure equity in the redistricting process.

### III. INDEPENDENT REDISTRICTING COMMISSIONS AND THE CITIZEN COMMISSION STRUCTURE

The independent redistricting commission is designed to ensure autonomy from the state legislature.<sup>31</sup> States that employ independent commissions have vested an entity that exists outside of legislative control with the authority to oversee and conduct state and/or congressional redistricting from beginning to end.<sup>32</sup> While commissions vary in structure, the core idea is to ensure fairness by eliminating parties' ability to redraw districts for selfish political benefit. The independence of these commissions stems from a common requirement that commissioners be neither legislators, nor public officials.<sup>33</sup> In addition, a person's service as a commissioner on an independent commission generally disqualifies that individual from running for public office for a period of time following the completion of the commission's work.<sup>34</sup> Some states go even further, disqualifying those with even tangential ties to the political process from service on a commission.<sup>35</sup>

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28. N.Y. Times Editorial Board, Editorial, *New Jersey Democrats Play Power Games Too*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/opinion/new-jersey-democrats-redistricting-gerrymander.html>.

29. Nick Corasiniti, *After Backlash, Democrats in New Jersey Rethink Redistricting Plans*, N.Y. TIMES (Dec. 16, 2018), <https://www.nytimes.com/2018/12/16/nyregion/redistricting-nj-democrats-republicans.html>.

30. See Matt Friedman, *Intense opposition kills New Jersey redistricting amendment*, POLITICO (Dec. 15, 2018, 7:35 PM), <https://www.politico.com/states/new-jersey/story/2018/12/15/intense-opposition-kills-redistricting-749296>.

31. See *Independent redistricting commissions*, BALLOTPEDIA, [https://ballotpedia.org/Independent\\_redistricting\\_commissions](https://ballotpedia.org/Independent_redistricting_commissions) (last visited Mar. 13, 2020).

32. *Id.*

33. Levitt, *supra* note 23.

34. *Id.*

35. California and Arizona, for example, bar legislative staff from being commissioners. Cain, *supra* note 22, at 1824. In addition, California, Idaho, and Washington all prohibit political lobbyists from performing work on a commission. Levitt, *supra* note 23.

Empowering an independent commission to draw districts ensures “no individual drawing the lines can be a legislator or public official,”<sup>36</sup> but there remains the potential for the legislature to have its say in the process.<sup>37</sup> Currently, ten states have adopted redistricting commissions with varying degrees of true independence from the state legislature, to ensure that the power to draw state and congressional districts does not rest with partisan state officials alone.<sup>38</sup> Of the independent commissions currently in use, each state’s model reflects different degrees of actual autonomy to approve redrawn districts. At one end of the spectrum is Washington State’s system, which provides both for the appointment of commissioners by elected officials and for the legislature to have a limited ability to amend the commission’s proposed districts.<sup>39</sup> The commissions empowered by Alaska, Idaho, and Montana each possess slightly more autonomy because they each allow the legislature to appoint commissioners, but do not allow the legislature an “opportunity to amend” the proposed districts.<sup>40</sup> Closer to full autonomy is Arizona’s independent commission, which requires the state Commission on Appellate Court Appointments to create a “pool of potential citizen commissioners that the state legislature must choose from” before ceding full districting autonomy to the finalized commission.<sup>41</sup> At the far end of the spectrum is California’s Citizen Commission, which, in addition to disallowing the participation of elected officials, gives the legislature no opportunity to amend the commission’s districts, and severely restricts legislative leaders’ ability to influence who is ultimately selected to serve on the final commission in charge of drawing California’s districts.<sup>42</sup>

This final approach, adopted by California in 2008 and more recently by Michigan in 2018,<sup>43</sup> is a working model for the independent citizen

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36. *National Overview of Redistricting: Who draws the lines?*, BRENNAN CTR. FOR JUSTICE, (July 1, 2010), <https://www.brennancenter.org/analysis/national-overview-redistricting-who-draws-lines>.

37. *Id.*

38. Starting with Montana in 1980, six states adopted independent commissions to handle the drawing of congressional districts. See Barry Edwards et al., *Can Independent Redistricting Commissions Lead Us Out of the Political Thicket?*, 9 ALB. GOV’T L. REV. 288 (2016). Four more approved reform during the 2018 Midterms. Miles Parks, *Voters Approve Major Changes To Redistricting And Other Voting Laws*, NPR (Nov. 7, 2018, 2:35 AM), <https://www.npr.org/2018/11/07/664993438/voters-approve-major-changes-to-redistricting-and-other-voting-laws>.

39. See WASH. CONST. art. II, § 43(7); WASH. REV. CODE ANN. § 44.05.100 (West 2020).

40. Cain, *supra* note 22, at 1819; see ALASKA CONST. art. VI, § 8; MONT. CONST. art. V, § 14; IDAHO CODE § 72–1502 (2020).

41. Cain, *supra* note 22, at 1819; see ARIZ. CONST. art. IV, pt. 2, § 1(3)–(8).

42. See CAL. GOV’T CODE § 8252(b)–(g) (West 2013).

43. *Michigan Proposal 2, Independent Redistricting Commission Initiative (2018)*, BALLOTPEdia,

commission structure that could be employed by other states. Like other independent redistricting commissions, the citizen commission prohibits officeholders, political candidates, family members of politicians, lobbyists, and employees of public officials from serving on a commission.<sup>44</sup> What makes the citizen commission unique is how those who *are* eligible to serve as commissioners are identified and selected.<sup>45</sup> Rather than allow state officials to select the non-politician commissioners, each citizen commission employs some mechanism to ensure that public officials do not have the final say on which individuals ultimately become commissioners.<sup>46</sup> The California commission, for example, relies on a certain degree of randomness.<sup>47</sup> First, registered voters apply to serve as commissioners.<sup>48</sup> From this applicant pool, state auditors narrow the field to sixty potential candidates; twenty each from the top two political parties in the state, and twenty unaffiliated with either party.<sup>49</sup> From there, the majority and minority legislative leaders from each house may each cut two candidates from each category, leaving thirty-six potential commissioners.<sup>50</sup> From this pool, eight commissioners are randomly selected (three Democrats, three Republicans, and two unaffiliated); these individuals then select five additional commissioners from each major party and four more unaffiliated from the pool.<sup>51</sup>

The main goals of the independent commission are twofold: to eliminate the conflict of interest inherent in the traditional redistricting-by-legislature approach, and to produce districts that result in more organically competitive races than a biased legislature-drawn map would.<sup>52</sup> The first is a simple task; however, accomplishing the second goal can be tricky because “competition” is a hard metric to define.<sup>53</sup> One

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[https://ballotpedia.org/Michigan\\_Proposal\\_2,\\_Independent\\_Redistricting\\_Commission\\_Initiative\\_\(2018\)](https://ballotpedia.org/Michigan_Proposal_2,_Independent_Redistricting_Commission_Initiative_(2018)) (last visited Mar. 13, 2020).

44. See MICH. CONST. art. IV, § 6(1)(b)(i)–(vii); CAL. GOV'T CODE § 8252(a)(2)(B) (West 2013).

45. See Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U.C. IRVINE L. REV. 637, 648–49 (2013).

46. See CAL. GOV'T CODE § 8252(b)–(g) (West 2013); MICH. CONST. art. IV, § 6(2)(f).

47. See CAL. GOV'T CODE § 8252(b), (f).

48. CAL. CITIZENS REDISTRICTING COMM'N, *Application and Selection Process*, WE DRAW THE LINES, <https://wedrawthelines.ca.gov/selection/> (last visited Mar. 13, 2019).

49. Brickner, *supra* note 7, at 2; see also Justin Levitt, *California*, LOY. L. SCH.: ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/states-CA.php#institution> (last updated June 29, 2019).

50. *Id.*

51. *Id.*

52. See Richard L. Hasen, *Foxes, Henhouses, and Commissions: Assessing the Nonpartisan Model in Election Administration, and Campaign Finance*, 3 U.C. IRVINE L. REV. 467, 472 (2013).

53. Edwards, *supra* note 38, at 319.



possible benchmark for evaluating how reliably a commission produces competitive districts is how the commission-drawn maps stand up to legal challenges compared to maps drawn prior to the adoption of the commission.<sup>54</sup> The basic premise behind this approach to evaluating commissions would be the assumption that if a commission is producing maps that succumb to legal challenge less often, the commission must be producing more competitive maps. Generally, non-partisan and bipartisan commission-drawn maps have been shown to create more competitive districts that are less vulnerable to legal challenge.<sup>55</sup> In addition, independent commissions have been shown to be more time-efficient than a legislature-driven process.<sup>56</sup> Compared to the traditional legislative process, which produces maps that are attractive to plaintiffs, independent commissions draw districts in far less time on average<sup>57</sup> and produce maps that are less susceptible to legal challenges.<sup>58</sup>

But perhaps a more intuitive metric by which to measure the value provided to the redistricting process by independent commissions could be to look at how “responsive” the districts drawn by a commission are, compared to the districts drawn under a legislative system.<sup>59</sup> An electoral system’s responsiveness reflects the “change expected in the partisan composition of a legislative body as a consequence of changes in the electorate’s voting behavior.”<sup>60</sup> In other words, where an electoral system is not very responsive, the electorate’s voting power has been either directly or indirectly diluted in some way.<sup>61</sup> Effective gerrymandering

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54. These challenges are primarily lodged under state-constitutional theories or the Voting Rights Act. See *Vandermost v. Bowen*, 269 P.3d 466 (Cal. 2012); *Connerly v. California*, 177 Cal. Rptr. 3d 304 (Cal. Ct. App. 2014).

55. Miller & Grofman, *supra* note 45, at 661, 663–64, 666.

56. See generally *id.* at 649–54.

57. See *id.* at 650–51.

58. See *id.* at 653–54.

59. “Responsiveness” measures a party’s ability to win more seats as it increases its share of the vote. See Laura Royden, Michael Li & Yuriy Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, BRENNAN CTR. FOR JUSTICE, 2 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Extreme\\_Gerrymandering\\_Midterm\\_2018.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Extreme_Gerrymandering_Midterm_2018.pdf).

When a map is perfectly responsive, the party will win a share of seats proportional to the share of the vote it wins. *Id.* at 2–3. When a plan is not responsive, any change in share of the statewide vote will result in a disproportional number of seats. *Id.* at 3.

60. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 295 (2001).

61. Political scientists have long shown that, in the absence of any shenanigans, American congressional maps possess a consistently high degree of responsiveness. Royden et. al, *supra* note 59, at 6; see generally Gary King & Robert X Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251 (1987).

makes districts less susceptible to unfavorable shifts in electorate voting behavior, therefore districts demonstrating a high level of responsiveness should be incompatible with a gerrymander, and vice versa.<sup>62</sup> Studies comparing heavily gerrymandered jurisdictions with legislature-drawn maps to the district maps of states employing independent commissions have shown that, on the whole, the latter are considerably more responsive.<sup>63</sup> Notably, greater responsiveness can be attributed to commission-drawn maps as compared to legislature-drawn maps, regardless of which party is responsible for drawing the maps.<sup>64</sup>

Detractors of independent redistricting models argue that because commissioners are not elected by the voters, like legislators are, the commissioners' decisions lack the transparency and accountability that comes with having districts drawn by elected legislators.<sup>65</sup> These concerns are not unwarranted, but they present only half of the story. Unlike legislators who potentially have much to gain from pulling off a gerrymander,<sup>66</sup> the commissioners generally have little to no vested interest in what may be protected by a lack of transparency.<sup>67</sup> Opponents of independent commissions argue that state legislators should be left in charge of district drawing because unlike commissioners, legislators can be held "accountable at the ballot box."<sup>68</sup> Other skeptics question the value such a model provides to American politics, and debate whether corrupt redistricting practices are actually the root of a decline in competitiveness, or whether such a decline is merely a symptom of a growing tendency for communities to "sort[] themselves" based upon

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62. Charles & Fuentes-Rohwer, *supra* note 60 at 296–97; *see also* Royden et. al, *supra* note 60, at 6–8.

63. Royden et. al, *supra* note 59, at 13–19.

64. *Id.* at 17.

65. *See* Sara N. Nordstrand, Note, *The "Unwelcome Obligation": Why Neither State nor Federal Courts Should Draw District Lines*, 86 FORDHAM L. REV. 1997, 2011 (2018) (arguing that "district judges who create voting districts operate outside of the democratic process."). When it has the opportunity, the judiciary has the power to redistrict without fear of political reprisal or judicial scrutiny. *Id.* at 2011 n.107.

66. *See id.* at 2002 (noting that "political parties may manipulate the shape of district lines for partisan advantage.").

67. California's redistricting commission website provides public access to a meeting agenda, transcripts, and video of the commission's meetings, and allows the public to submit their own suggested maps for the commission's consideration. CAL. CITIZENS REDISTRICTING COMM'N, *Notices and Agendas, WE DRAW THE LINES*, <https://wedrawthelines.ca.gov/hearings/> (last visited Mar. 13, 2020).

68. Susan Myrick, *'Nonpartisan' Redistricting Is Just a Fantasy*, CIVITAS INST. (Jan. 25, 2017), <https://www.nccivitas.org/2017/nonpartisan-redistricting-just-fantasy/>; *see also* Tony Daunt, *Opinion, Redistricting Proposal Is Confusing and Bad for Michigan*, BRIDGE MI (Oct. 10, 2018), <https://www.bridgemi.com/guest-commentary/opinion-redistricting-proposal-confusing-and-bad-michigan>.

identification with a political ideology.<sup>69</sup> However, there is growing concern that gerrymandering could play a large part in radicalizing both major parties in our political system by reducing the incentive for candidates to maintain a moderate platform.<sup>70</sup> The greater the extent to which districts may be drawn to provide a safe advantage to a candidate identifying with the benefitted party, the lesser any disincentive for candidates to run on radical platforms on either side of the aisle.<sup>71</sup>

Some critics express concern that the random nature of selecting commissioners results in commissions comprised of individuals who have no experience with the political process or redistricting.<sup>72</sup> However, in light of the ever-advancing technological component of the modern district drawing process, the selective application process for existing citizen commissions may very well result in commissioners that are *more* qualified than legislators.<sup>73</sup> While the incumbent legislature would no doubt have some benefit of experience in general conformance with federal guidelines, like the requirements of the Voting Rights Act for example, the application process almost guarantees that the pool of potential commissioners contains important statistical and technological experience. In short, commission participation both requires and attracts individuals with diverse experience.<sup>74</sup>

The pivotal questions concerning implementation of an Independent Citizen Commission model on a wider scale are: 1) how, and 2) what would the result look like? Unfortunately, there really is no simple answer to either question. Two of the more tested independent commissions—those in California and Arizona—were created through amendments to the states' constitutions via ballot initiative.<sup>75</sup> The ballot

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69. See Harry Enten, *Ending Gerrymandering Won't Fix What Ails America*, FIVETHIRTYEIGHT (Jan. 26, 2018), <https://fivethirtyeight.com/features/ending-gerrymandering-wont-fix-what-ails-america/>.

70. See Frankel, *supra* note 7; see also Brickner, *supra* note 7, at 57 (“[T]he rise of safe districts may exacerbate polarization and hyper-partisanship, as voters in politically homogeneous districts tend to elect more extreme candidates.”).

71. See Fred Dews, *A primer on gerrymandering and political polarization*, BROOKINGS (July 6, 2017), <https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/>.

72. See David Eggert, *Anti-Gerrymandering Group Defies Odds With 2018 Ballot Drive*, U. S. NEWS (Nov. 20, 2017), <https://www.usnews.com/news/best-states/michigan/articles/2017-11-20/anti-gerrymandering-group-defies-odds-with-2018-ballot-drive>.

73. See CAL. CITIZENS REDISTRICTING COMM'N, *supra* note 48.

74. See Miller & Grofman, *supra* note 45, at 667.

75. See generally MICH. S. FISCAL AGENCY, NOVEMBER 2018 BALLOT PROPOSAL 18-2: AN OVERVIEW (2018), <http://www.senate.michigan.gov/sfa/Publications/BallotProps/Proposal18-2.pdf>, (Michigan's ballot proposal); *Text of Proposition 20, the "Voters FIRST Act for Congress" (California 2010)*, BALLOTPEDIA, [https://ballotpedia.org/Text\\_of\\_Proposition\\_20](https://ballotpedia.org/Text_of_Proposition_20),

initiative (sometimes called the popular initiative or voter initiative), is a process employed by some states whereby individual citizens may petition for a change to their state's constitution or statutory scheme.<sup>76</sup> An attractive option, the ballot initiative runs into few impediments beyond garnering support for constitutional amendment.

There is some indication that the Supreme Court's 2015 decision in *Arizona Legislature v. Arizona Independent Redistricting Commission*, recognizing the constitutionality of the independent commission structure, is the nudge that states needed to follow California and Arizona's lead.<sup>77</sup> In this case, the Arizona legislature challenged the state independent commission's constitutional validity, asserting that the commission violated the Elections Clause of the U.S. Constitution.<sup>78</sup> Writing for a 5-4 majority, Justice Ginsburg penned an opinion interpreting the Elections Clause to permit voters in states with citizen initiative to provide for redistricting by commission.<sup>79</sup> The Court determined that the voting public in states with an initiative process fell within the meaning of the "legislature" as it relates to determining the "time, place, and manner" of choosing representatives.<sup>80</sup> Of the eighteen states that allow citizens to initiate constitutional amendments,<sup>81</sup> eight already employ some form of independent redistricting process.<sup>82</sup> In a few other states, the push toward implementation of independent commissions has already gained substantial support.<sup>83</sup>

However, the ballot initiative is an option only technically accessible in eighteen states, and feasible in even fewer.<sup>84</sup> A less certain approach would be to call on state legislatures themselves to adopt independent commissions to handle the redistricting process. That said, there is an

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the %22Voters\_FIRST\_Act\_for\_Congress%22\_(California\_2010) (last visited Mar. 13, 2019) (California's ballot proposal).

76. *Ballot Initiative*, BALLOTPEDIA, [https://ballotpedia.org/Ballot\\_initiative](https://ballotpedia.org/Ballot_initiative) (last visited Mar. 13, 2020).

77. 135 S. Ct. 2652 (2015).

78. *Id.* at 2670–71; *see also* U.S. CONST. art. I, § 4, cl. 1 (Elections Clause).

79. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2677.

80. *Id.* at 2660–61, 73 ("The legislature and electorate [of states like Arizona] share lawmaking power").

81. *Initiated constitutional amendment*, BALLOTPEDIA, [https://ballotpedia.org/Initiated\\_constitutional\\_amendment](https://ballotpedia.org/Initiated_constitutional_amendment) (last visited Mar. 13, 2020) (noting that in several of those states, including Illinois, Massachusetts, and Mississippi, the steps for proposing amendments are, realistically, impossible).

82. *Redistricting Commissions: Congressional Plans*, NAT'L CONF. ST. LEGISLATURES (Apr. 18, 2019), <http://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx>.

83. *See, e.g.*, Lo, *supra* note 21.

84. *Ballot Measure*, BALLOTPEDIA, [https://ballotpedia.org/Ballot\\_measure](https://ballotpedia.org/Ballot_measure) (last visited Mar. 13, 2020).

obvious mismatch between incentive and the power to act when it comes to legislative reform—such a route would require elected state lawmakers to voluntarily cede power.

Unsurprisingly, the most direct pathway to seeing widespread adoption of independent redistricting processes is the most drastic. Congress, exercising the authority granted to it under the Constitution, technically has the authority to mandate changes to the method of drawing congressional electoral maps in all states.<sup>85</sup> Article I of the Constitution delegates to the state legislatures the authority to choose the time, place, and manner of selecting congressional representatives.<sup>86</sup> The same clause, however, empowers Congress to enact laws “at any time” replacing or altering the states’ regulations and processes for selecting representatives.<sup>87</sup> In addition to being undoubtedly the most expedient option, a congressional approach leaves the opportunity to provide the states some sort of grace period in which to design a system that works for the state within congressional guidelines.<sup>88</sup>

#### IV. CONCLUSION

Partisan gerrymandering has existed as a thorn in the side of American politics for far longer than it should have, and the Supreme Court’s recent decision on justiciability leaves few avenues for relief. If the American people want to be rid of unnecessary political bias in our redistricting processes, we must look beyond our traditions. Of the various approaches taken by the states to address the procedural conflicts of traditional redistricting processes, the independent redistricting commission structure alone provides the benefit of effectively separating conflicted legislators from the redistricting process.

However, because amendment to state constitutions by way of ballot initiative is not available in every state, and redistricting reforms implemented by the state legislatures are neither predictable nor typically independent, anything short of congressional reform is at best a patchwork panacea for the larger problem. Comprehensive redistricting reform, in all likelihood, must come in the form of a Congressional mandate under Article I giving independent redistricting commissions authority to draw state and congressional district maps.

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85. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–34 (1995) (discussing the Framers’ intent that the Elections Clause reserves to Congress the right to dictate procedural requirements for elections).

86. U.S. CONST. art. I, § 4, cl. 1.

87. *Id.*

88. Some representatives have introduced bills to this effect. See, e.g., Redistricting Reform Act of 2017, H.R. 1102, 115th Cong. §§ 102, 201–204, 301–302 (2017).

Although heavy-handed, this method of redistricting reform can be implemented in such a way that states are permitted to design an independent commission model that best serves the interest of the state. A compulsory citizen commission structure should provide substantially similar representation of major parties and unaffiliated individuals.<sup>89</sup> A commission should also provide an opportunity for states to design the application process for selecting commissioners, so as to best tailor the process to the political realities of the individual states.<sup>90</sup> Moreover, a commission should provide an opportunity for the state legislature to make final adjustments to maps produced by the commission, allowing for only a small measure of adjustment, and requiring that any change made be publicly justified.<sup>91</sup> Constructed in such a manner, a citizen commission would provide freedom from the conflict of interest ingrained in contemporary redistricting, while maintaining state sovereignty and transparency throughout the process. Such an approach would divorce conflicted legislators from the temptation and opportunity to draw party-entrenching congressional districts.

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89. See, e.g., CAL. CONST. art. XXI, § 2(c)(2).

90. California's constitution makes no provision for the application process. See CAL. CONST. art. XXI, § 2; CAL. CITIZENS REDISTRICTING COMM'N, *supra* note 48. The process in Michigan allows voluntary applications. MICH. CONST. art. IV, § 6(2)(a)(i).

91. It may be beneficial to allow limited adjustments by legislators. Washington's Constitution allows for the legislature to make final adjustments to the maps drawn by its independent commission upon a successful "two-thirds vote of the legislators" in each house of the state legislature. WASH. CONST. art. II, § 43(7).