Independent Redistricting Commissions:
Hopes and Lessons Learned

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Abstract

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Gerrymandering, defined as the abuse of the redistricting power for partisan or personal gain, is widely denounced in current American political analysis. Through first-person experiences, review of existing studies, and case study research, this dissertation will analyze the hopes for, and limitations of, independent redistricting commissions as a solution for that problem. This dissertation will review the situations and decisions that resulted in the rare successes in forming redistricting commissions; the strengths and weaknesses of the various decisions regarding rules and structure that must be made by those proposing such commissions; and how the existing independent redistricting commissions in Arizona, California, and various local jurisdictions within California have succeeded or failed at achieving the goal of ending gerrymandering.

Preface

The relationship of this author with the material covered in this dissertation is unusual. As Senior Analyst and, later, President of National Demographics Corporation, and as a Fellow at the Rose Institute of State and Local Government at Claremont McKenna College, this author was a direct participant in many of the redistricting projects described herein. As the bibliography and extensive footnotes indicate, considerable additional research was undertaken to turn those experiences into this dissertation, but many of the conversations, decisions, and results described were personally witnessed by this author.

As Senior Analyst at National Demographics, this author was the lead technical consultant to Arizona's 2001 Independent Redistricting Commission. As described in the chapter devoted to Arizona, this body was the first state-level independent redistricting commission in the country. This author drew well over 100 redistricting plans for the commission; presented maps and analysis to the Commission and to the public at scores of public hearings; provided analysis and opinions on the many issues faced by that body, covering both issues specific to Arizona's geography and communities, and issues related to questions of competitiveness, voting rights, and other concerns of every redistricting effort nationwide. During the court challenge to the Commission's plans, this author also served as the testifying "person most knowledgeable" about the Commission's proceedings as defined by Federal Rules for Civil Procedures Rule 30(b)(6).

At the Rose Institute of State and Local Government at Claremont McKenna College, first as Student Manager in 1991 and later as a Fellow from 2001 through the present day, this author provided research, analysis, and commentary on California's 1991, 2001 and 2011 redistricting efforts. This author was an organizer and presenter at numerous Rose Institute conferences related to state and local redistricting, and an author of numerous Rose Institute reports on the topic. This author also

was an advisor to Kathay Feng and the coalition she organized as they drafted what became California's Proposition 11 in 2007 and 2008, and the author advised Governor Schwarzenegger and his team as they promoted the unsuccessful 2005 Proposition 77 redistricting reform effort. This author also was the project lead for the Institute's (unsuccessful) bid to serve as technical consultant to California's 2011 Citizens' Independent Redistricting Commission. This author continued to be involved in California's 2011 effort as a technical consultant to a number of local community groups who needed help drawing maps to present to the Commission, and as an analyst often quoted by numerous news outlets throughout the process.

As Senior Analyst before 2006 and, after 2006, as President of National Demographics Corporation, this author has served as redistricting and voting rights consultant to hundreds of cities, counties, school districts and other local jurisdictions across California, Arizona and Nevada. Among the jurisdictions covered in this dissertation, this author's work includes serving as consultant to Modesto's 2008 and 2011 independent redistricting commissions; serving as consultant to San Diego's 2011 independent redistricting commission; and consulting with the City (though not the independent redistricting commission) of Escondido. In addition, this author has been a featured speaker or panelist at numerous national redistricting conferences hosted by the National Conference of State Legislatures, the League of Women Voters, and other organizations.

As detailed in this dissertation, every redistricting authority grapples with numerous complicated issues. Some issues are specific to a given jurisdiction, while others are challenges facing every redistricting authority (at least in the United States). Much of the research, insights and conclusions contained in this dissertation is informed by this author's hands-on experience wrestling with these challenges while personally assisting these jurisdictions with their redistricting work.

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Introduction

Abuse of redistricting predates the first Congress of the United States, but the practice only acquired the label "gerrymandering" after the 1812 redistricting of the Massachusetts state legislature. In that redistricting, Governor Elbridge Gerry's Republican Party, which controlled the state's redistricting at the time, drew an oddly shaped district designed to minimize the number of opposition Federalists in the legislature. Governor Gerry, whose most significant legacy to the nation is as a signer of the Declaration of Independence, unfortunately is best known as the namesake of oddly-drawn, politically motivated, districts[1].

But for most of American history redistricting remained an obscure, little-understood aspect of American political life. Politicians knew its hidden power, but it rarely made an appearance in American court rooms. Scholars paid the issue little attention, it was not on reformers' agendas, and the public largely ignored the process.

Demographic change first brought redistricting to significant public notice. The first half of the Twentieth century saw very rapid urbanization. States failed to reflect this demographic shift in their districts, leaving their legislatures under the control of rural interests, to the disadvantage of the rapidly growing cities. At first, the U.S. Supreme Court refused to require reapportionment to reflect the new urban populations[2]. The Court asserted that such issues of representation were "political questions," reserved for the political branches of government, and Justice Frankfurter wrote his famous dismissal of redistricting legal challenges as a "political thicket" that he felt the judicial branch should avoid.

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[1] "Massachusetts Governor Elbridge Gerry," National Governors Association, http://bit.ly/ZlLK1O, viewed on April 12, 2013. Also, "Elbridge Gerry, 1744-1813," Colonial Hall, http://colonialhall.com/gerry/gerry.php, viewed April 12, 2013.

[2] *Colegrove v. Green, 328 U.S.549, 1946*

Only a few years after *Colegrove*, however, the Supreme Court retreated from its "political question" doctrine to begin what is often referred to as the "One Person, One Vote" series of rulings. In 1962, in *Baker v. Carr*, the Court concluded that "the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action…. The right asserted is within the reach of judicial protection under the Fourteenth Amendment." *Baker* was followed in 1963 by *Gray v. Sanders*, in which Justice Douglas wrote, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." In *Wesberry v. Sanders* in 1964, the Court held "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." This series of key cases concluded in 1964 with *Reynolds v. Sims*, when the Court affirmed its ruling in *Wesberry* that congressional representation must be based on equal numbers as nearly as is practicable, while suggesting that somewhat greater deviations might be permitted in redistricting state legislatures.

The Court's test of effective representation in these cases amounted to no more than a Census population count: Congressional districts must be as nearly equal in population as "practicable" and state legislative districts only a little less so. Unanticipated by the Court was the degree to which setting such an overriding standard would sweep away the use of county boundaries in redistricting and thereby open up new opportunities for gerrymandering. In fact, the Court's placing a simple population test above traditional redistricting rules opened the way for gerrymandering on an unprecedented scale, in part because of its timing. Almost simultaneous with the Court's sweeping away all non-population constraints on redistricting, another revolution – in computer technology – was under way. Computers and the "One Person, One Vote" rulings combined to give politicians (or, in most cases, their staff) the opportunity to fine-tune districts for maximum political gains.

Politicians and their staffs understood the opportunity far more quickly than most political scientists, some of whom[3] down-played redistricting's influence on election outcomes and policy well into the 1980s and 1990s. After the Supreme Court's "One Person, One Vote" rulings effectively ended the problems of mal-apportionment in redistricting, the federal Voting Rights Act of 1965 slowly brought the Court and the United States Department of Justice into disputes over the use of racial gerrymandering. In 1986, in *Thornburg v. Gingles* the Court identified three preconditions (compactness/numerousness, minority cohesion or bloc voting, and majority bloc voting)[4] to establish a Section 2 violation of the Voting Rights Act: the Act made illegal a redistricting plan that would impair the capacity of a minority group "to participate equally in the political process and to elect candidates of their choice." In 1993, in *Shaw v. Reno*, the Court held that, "[R]acial classifications of any sort pose the risk of lasting harm to our society….Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions….It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny."[5] With those two rulings, the Court brought under its jurisdiction both gerrymandering used to block the political influence of a racial or ethnic minority group, and gerrymandering where race is too "predominate" a factor in drawing lines even if that consideration is aimed at improving the political influence of a racial or ethnic minority group.

By the beginning of the Twenty-First century, there was no longer any doubt of the political significance of redistricting. Redistricting not only made headlines, but became the subject of scores of articles in political science journals and rose toward the top of reform agendas.

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[3] Cain, Bruce, "Assessing the Partisan Effects of Redistricting," American Political Science Review, Vol. 79, 1985.

[4] *Thornburg v. Gingles*, 478 U.S. 30, 1986

[5] *Shaw v. Reno*, 509 U.S. 630, 1993.

Court rulings in the 1980s and 1990s greatly reduced the preponderance of racial gerrymanders, but after 2000 courts were flooded with more and more redistricting cases. Increasingly, redistricting pitted judges against legislative line-drawers. Courts gradually stepped even further into the redistricting "thicket" with judge-drawn district lines and orders rejecting redistricting maps and requiring plans re-drawn in compliance with judicially declared criteria.

The media, following the lead of political scientists, was more and more interested in gerrymandering as the dark, hidden force of politics. Articles, commentary and even a movie began to appear blaming gerrymandering for Congressional gridlock, for partisan extremism, for the incompetence of politicians, and for public apathy. The bipartisan or "sweetheart" gerrymander is held responsible for the lack of competitive districts. The partisan gerrymander is blamed for the fact that one party or the other won more seats than its votes should permit. Even the rise of Barack Obama to the Presidency was traced to the gerrymandering of his State Senate district in Illinois.

Redistricting reform gradually became the battle cry of widely disparate groups. Republicans in Democratically-controlled California, Democrats in Republican-controlled Texas, five Justices of the Supreme Court, and both conservative and liberal reformers concerned by the dysfunction of representative institutions have joined the reform chorus.

The reform that has emerged as the apparent winner among many competing proposals is the independent redistricting commission. In Arizona, a five-member Independent Redistricting Commission came into being as the result of the passage of Proposition 106 in the 2000 General Election. In California, a 14-member Citizens Redistricting Commission was established following the passage of California Proposition 11, the Voters First Act, in November 2008. The California Commission was originally empowered to draw the boundaries of State Legislative and Board of Equalization districts, and control over Congressional redistricting was added through the 2010

passage of California Proposition 20, the Voters First Act for Congress. That the independent commission has become a kind of reform icon was suggested in November 2014 when the voters of New York approved Proposition 1 and the creation of such a commission: in fact, however, although the New York version is called "Independent," eight of its ten members are appointed by the majority and minority leaders of the State Legislature.

This study focuses on truly independent redistricting commissions. It aims to describe: the politics of redistricting reform and the creation of redistricting commissions; the recruitment of commissioners, their work, their staff and their technology; the involvement of the media, interest groups and the public; the districts that result from their deliberations; and court challenges to their maps.

Ultimately, this dissertation seeks to assess the effectiveness of independent commissions in curbing redistricting abuses through the review of commission redistricting in the states of Arizona and California and the cities of Escondido, Modesto and San Diego.

Redistricting reform, whether by commission or other means, must confront the inherently political nature of the line-drawing process: to change the shape and composition of a district is to change the political dynamic within it, to affect vote outcomes, and therefore to change the fate of candidates, the party balance of those elected, and ultimately the policy outcomes in the elected body. The struggle over redistricting reform proposals is always between legislators and their political allies, who reap considerable benefits from maintaining control over redistricting, and the hopes of reformers to rile up public opposition to gerrymandering abuse and to generate support for the commission reform proposal.

Politicians, Judges, Scholars and Reformers

In the 50 years since the Supreme Court's rulings in *Baker* and *Wesberry*, redistricting has emerged as

one of the most contentious of all political processes. Politicians have seized on the power of computerized line-drawing systems; the judicial mandate to draw districts of equal population has freed them to ignore county boundaries and other traditional criteria; and they have produced districts that make Gerry's salamander district, by comparison, a model of good government. In California and Texas, as well as in many other states, redistricting politics have made headlines not only in the decennial process but also with mid-decade gerrymandering for partisan advantage.

Redistricting has become a field of intense judicial activity. Many of the Congressional and legislative districts drawn after every decennial census are now subjected to judicial scrutiny. Judges sometimes strike down plans and impose criteria. Sometimes, judges even step into the line-drawing role themselves.

Scholars have responded to the high-profile political struggles and the high-stakes court cases by making redistricting a leading topic in political science journals. Academic research on redistricting and gerrymandering is one of the highest profile fields of political science research in America today. Few, if any, rulings of the United States Supreme Court embrace political science research and methodologies to the extent that the Court did in the *Gingles*, *Vieth v Jubelirer*[6], and *LULAC v Perry*[7] cases. In its ruling in the 2004 *Vieth* case, the Court essentially issued a 'call for papers' to the political science and statistical academic communities:

> Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights. . . .

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[6] *Vieth v Jubelirer*, 541 Us 267 (2004)
[7] *League of United Latin American Citizens (LULAC) v Perry*, 548 Us 399 (2006)

> That no such standard has emerged in this case should not be taken to prove that none will emerge in the future . . . in another case a standard might emerge that suitably demonstrates how an apportionment's de facto incorporation of partisan classifications burdens rights of fair and effective representation. (Justice Kennedy, concurring)[8]

Reformers, recognizing that the media have raised public understanding of redistricting abuses, have moved anti-gerrymandering efforts toward the top of reform agendas. Major national activist groups have endorsed a range of reform concepts. Twenty states that have already adopted redistricting reform initiatives of one kind or another,[9] and redistricting reformers remain active in every state.

The struggles and interactions among these major participants – politicians, judges, scholars and reformers – are the subject of this introduction. This dissertation will sketch the major themes and trends by way of setting the stage for our examination of commission-drawn districts.

When Politicians Draw Districts

Gerrymandering can take a number of forms. Politicians may draw districts for the benefit of their own political party: such partisan gerrymanders are quickly condemned by politicians of the other party and by reformers for whom fairness in representation is an important value. Partisan gerrymanders put majority party leaders to severe tests because they typically mean that some majority party incumbents must accept a more competitive seat in order make other districts safe for their party. Leaders must make skillful use of funding inducements, promises of future chairmanships, or other commitments to win over individual legislators more interested in safe seats for themselves than

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[8] *Vieth v. Jubelirer*, 541 U.S. 267, 2004.

[9] Johnson, Douglas, and Ian Johnson and David Meyer, Redistricting in America: A State by State Analysis. Rose Institute of State and Local Government, 2010.

in more seats overall for their (already majority) party.

Politicians may also draw lines for the benefit of incumbent legislators: such "sweetheart" or "bipartisan" gerrymanders are unpopular with opponents of the status quo in legislative politics and with reformers who value competition as one of the touchstones of representative democracy. When both parties unite in defending the map, however, opposition tends to be muted and ineffective. Modern computers and databases enable such plans to practically guarantee safe seats for everyone for the entire decade the plan is in effect.

Whether in partisan or bipartisan gerrymanders, individual legislators, especially those in positions of power, are often able to pursue narrow personal or political goals in redistricting. These may be as varied as retaining or adding important donors in the district; excluding groups that raise difficult issues; or splitting counties and cities to limit the risk that supervisors or mayors may run against incumbents. Such self-interested gerrymandering often goes unnoticed.

While gerrymandering is most often associated in the public mind with the advantage one major political party achieves at the expense of the other party, bipartisan incumbent protection gerrymanders are at least as frequent, if not more so. Arguably, too, they are more detrimental to America's system of representative government. A number of scholars take this view: "[T]his form of political market manipulation threatens a core tenet of democratic legitimacy: accountability to shifting voter preferences."[10] Often, too, politicians overreach in drawing a map for partisan advantage: in seeking to maximize the number of seats for the party, the partisan gerrymander may make the margin of advantage too small to defend against a wave election or against the natural demographic shifts in a state over the course of the decade. Thus, the bipartisan gerrymander is typically longer-lived, and

[10] Issacharoff, Samuel, "Gerrymandering and Political Cartels," 116 Harvard Law Review 593 (2002).

thus even more detrimental to concepts of representation and voter efficacy, than the partisan type.

Judges and Redistricting

Thanks to the Voting Rights Act of 1965 and its 1975 expansion to cover language minorities such as Latinos and Asian Americans, redistricting plans gerrymandered to discriminate against racial and ethnic minorities have changed from the rule to the exception. While particularly aggressive or naively drawn redistricting plans continue to be rejected for racial gerrymandering, after *Thornburg* and *Shaw* and their related Supreme Court rulings the Court's rules for how to draw plans to survive racial gerrymandering challenges are reasonably clear. Today, most redistricting-related Voting Rights Act litigation centers on challenges to at-large local government election systems, rather than challenges to racially gerrymandered districting plans.

The success of the Federal Voting Rights Act has led to increasing debate over its redistricting rules, with many respected academic and other voices on the left and the right beginning to look beyond the era of the current form of the current version of the Voting Rights Act[11].

In *Shelby County v. Holder*[12], the Supreme Court examined the constitutionality of two provisions of the Voting Rights Act: Section 5, requiring specified states and local governments to obtain federal preclearance for redistricting maps, and Section 4(b), spelling out the formula by which jurisdictions are to be subject to preclearance. The Court did not strike down Section 5, but held that Section 4(b) is unconstitutional because the coverage formula is based on data over 40 years old. Section 5 remains in place, but currently no jurisdiction is subject to its preclearance provisions.

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[11] Key examples include Thernstrom, 1987; Guinier, 1991 and 1993; Barone, 1996; Mansbridge, 1999 and 2003; Peacock, 2005 & 2008; Engstrom, 2006.

[12] *Shelby County v. Holder*, 570 U.S. ___, 2013.

As blatant racially discriminatory redistricting plans become rare, more attention has been paid to political gerrymandering. The United States Supreme Court, which actively worked to refine and implement the Voting Rights Act ban on racial gerrymandering, so far has been reluctant to intervene in political gerrymandering cases. In *Davis v Bandemere*[13] the Court nosed into this infamous "political thicket," but so far the Court has yet to invalidate any redistricting plan on the basis of it being a political gerrymander. In *Vieth* and in *LULAC*, four of the nine current Supreme Court justices said that political gerrymandering questions are not justiciable; four said the Court should intervene in such situations (though they disagree on how to identify such situations); and the ninth, Justice Kennedy, said such questions are justiciable in theory, but a functional system of identifying a partisan gerrymander does not yet exist.[14]

In the 2011 round of redistricting, judges have struck down congressional plans in Florida, Alabama and Virginia; refused to pre-clear federal and state maps in Texas, and rejected all or parts of state legislative plans in Alaska, Colorado, Florida, Hawaii, Idaho, Kentucky, Missouri, Pennsylvania and Wisconsin. Judges have even drawn their own maps and imposed them on Connecticut, Kansas, Minnesota, New Mexico, Nevada, New York, and Texas.

Scholars and Redistricting

Among scholars, gerrymandering is now almost universally acknowledged as a detriment to representative government in America. Only a few scholarly holdouts remain.[15] Yet the scholarly

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[13] *Davis v. Bandemere, 478 US 109, (1986)*

[14] *Vieth v. Jubelirer* , 541 U.S. 267, 2004; and Arrington, Theodore S., "Redistricting in the U.S.: A Review of Scholarship and Plan for Future Research," Berkeley Electronic Press, The Forum, Vol. 8, No. 2. 2010.

[15] Brunell, Tom, "Rethinking Redistricting: How Drawing Uncompetitive Districts Eliminates Gerrymanders, Enhances Representation, and Improves Attitudes toward Congress," PS: Political Science and Policy, January 2006; and Buchler, Justin, "The Statistical Properties of Competitive Districts: What the Central Limit Theorem Can Teach Us About Election Reform," Political Science, April, 2007.

community continues to hotly debate the significance of the problem, how to identify and measure the degree of the problem, the best cure for the problem, and how and by whom that cure should be implemented.

Political scientists have drawn attention to the deleterious effects of both partisan and bipartisan gerrymandering for Congressional representation. Vote studies show that both Democrats and Republicans are increasingly less likely to cross party lines. In the 113th Congress both Republicans and Democrats voted a strict party line. House Republicans voted with their caucus 92 percent of the time, breaking the previous record of 91 percent in 2011. The Democrats also broke records in party line voting. Between them, the Republican and Democrat members saw the Federal Government shut down and Congress pass fewer bills.[16] To many political scientists and reformers, such Congressional dysfunction traces directly to the proliferation of safe districts. Some safe districts are the result of one-party dominance of a large geographic area and that party's resulting control of the districts in that area. But other safe districts, and the ones that are the focus of study and concern since they are more easily remedied, are the result of gerrymandering that packed them with voters of only one party.

A glance at the results of the November 2014 midterm election confirms the problem: only 20 of the 435 Congressional seats changed hands between the parties, even in that 'wave' election that saw Republicans win their largest majority in the House since World War II. For a huge majority of Congressional districts, the general election no longer poses a threat to the incumbent, who must now only worry about the primary election, which is typically dominated by relatively extreme partisans. This shifts incumbent voting behavior toward the extreme wings of the party: Republicans tilt more

[16] Mann, Thomas, and Norm Ornstein, Vital Statistics on Congress, Brookings Institution, 2014.

and more to the right, Democrats to the left.

A concept that undergirds much scholarly writing on redistricting is that gerrymanders result in the "wasting" of votes. In technical terms, many scholars see gerrymanders as involving either "packing," that is the concentration of voters of one type in one or a few districts, or "cracking," that is dispersal of voters of a particular type among many districts. In both cases, votes of the targeted group are wasted. Because of relatively low turnout rates among the Federally protected Latino and African American populations, districts drawn to comply with the Federal Voting Rights Act necessarily "pack" Democratic votes when creating "majority-minority" districts.[17] With the exception of these 'voting rights' districts that are legally-mandated "gerrymanders" at least theoretically drawn to redress past discrimination in voting rights, most scholars believe that gerrymandering deprives voters of a fair and effective voice in their representation and reduce the responsiveness of the legislature to changes in the will and opinions of the electorate.[18] By reducing such responsiveness, some scholars believe that gerrymandering increases voters' alienation from the political process, reduces public support for the legislature in question, and undermines the legitimacy of our system of government. Legislators, of course, will often respond that, as the elected leader who frequently meets with community groups, they, not academics from an 'ivory tower,' are the true experts on community needs for representation.

The media, the courts, and the general public are quick to denounce redistricting plans as

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[17] Grofman, Bernard. "Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Districting, Race Isn't Everything, It's the Only Thing'?" Cardozo Law Review, 14 (1993), 1237-1276; and Kousser, J. Morgan, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction, University of North Carolina Press, 1999.

[18] Cain, Bruce. The Reapportionment Puzzle. University of California Press. 1984; and Rush, Mark, "The Variability of Partisanship and Turnout: Implications for Gerrymandering Analysis and Representation Theory," American Politics Quarterly, Vol. 20, No. 1, January 1992.

gerrymanders. While the idea of what constitutes a gerrymander is generally agreed upon, a consistent and measurable way of labeling a redistricting plan as good or bad remains elusive to scholars, and the term most often comes to mean 'any plan a given person dislikes.'

While some scholars consider compactness a deceptive or self-contradicting tool for reviewing redistricting plans,[19] others argue compactness measures can flag potential gerrymanders for additional analysis.[20] A non-compact congressional district in California may clearly indicate a desire to gerrymander for political gain at the expense of the communities drawn into or out of the district, but a very non-compact district in Arizona was drawn in 2001 precisely to enhance the representation of a local community, in this case a native American tribal reservation.[21] The simple requirement that districts be compact – a provision in several state constitutions – is easily evaded in practice by legislative line-drawers. To be fully effective as a constraint on line-drawing, a compactness criterion must be defined statistically and in language too complex for easy understanding by voters. Where the debate over partisan gerrymandering is characterized by the lack of an effective measure of partisan gerrymandering, the debate over compactness is characterized by an over-abundance of compactness measures that can contradict each other in their conclusions. As a result, only a few reform initiatives put primary emphasis on compactness.

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[19] Cain, Bruce. The Reapportionment Puzzle. University of California Press. 1984; and Butler, David, and Bruce Cain. Congressional Districting: Comparative and Theoretical Perspectives (Macmillan, 1992); and

[20] Taylor, Peter, "A New Shape Measure for Evaluating Electoral District Patterns," American Political Science Review, Vol. 67, 1973; Morrill, Richard L., Political Redistricting and Geographic Theory, Resource Publications in Geography, 1981; and Niemi, Richard, and John Wilkerson, "Compactness and the 1980s Districts in the Indiana State House: Evidence of Political Gerrymandering?" Political Gerrymandering and the Courts, Agathon Press, 1990; and Niemi, Richard, Bernard Grofman, Carl Carlucci, and Thomas Hofeller, "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering," The Journal of Politics, Vol. 52, No. 4, November 1990.

[21] Storey, Tim. "The 2010 census means redistricting is almost here, and changes in the process could make it even tougher this time around." National Conference of State Legislatures, "Ready, Set, Draw." State Legislatures. December 2009, pp 14-17.

Even when redistricting plans are acknowledged as political gerrymanders by all except their authors, the measurement, scope, effectiveness, and overall political impact of such plans remain hotly contested among scholars.[22]

Some scholars argue that the power and sophistication of computer software and voter behavior data effectively locked in abusive gerrymanders for an entire decade.[23] Others argue that the mobility and ever-changing political behaviors of Americans limit the impact of a gerrymandered plan, and especially limit the period of time that it may retain its influence on election outcomes.[24] Others argue that limitations on line drawing imposed by legislative politics and state and federal laws significantly limit the scope of the abuse which can occur.[25] And still others argue that redistricting is an inherently and unavoidably political act rightfully placed under the control of the legislative process.[26]

The challenges facing academic research into redistricting and gerrymandering remain significant.[27] The inherent research problems that result from the secret ballot, and the resulting reliance on precinct

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[22] For example, see Tufte, 1973; Grofman, 1983; Cain, 1985; Nieme and Fett, 1986; King and Browning, 1987; Ostidek, 1995; J.M. Kousser, 1996; Cox and Katz, 2002; Persily, T. Kousser and Egan, 2002; King, Rosen, Tanner and Alexander, 2004; Grofman and King, 2007; Winburn, 2008; Jacobson, 2009

[23] McDonald, Michael P., "Redistricting, Dealignment and the Political Homogenization of Congressional Districts," unpublished dissertation, University of California, San Diego, 1999; Altman, Micah, Karin MacDonald, and Michael McDonald, "Pushbutton Gerrymanders? How Computing Has Changed Redistricting" in Party Lines. Mann, Thomas, and Bruce Cain, editors. Brookings Institution Press. 2005; and Abramowitz, Alan, Brad Alexander, and Matthew Gunning, "Incumbency, Redistricting and the Decline of Competition in U.S. House Elections." The Journal of Politics, Vol. 68, No. 1, February 2006.

[24] Morrill, Richard L., Political Redistricting and Geographic Theory, Resource Publications in Geography, 1981; Cain, Bruce. The Reapportionment Puzzle. University of California Press. 1984; and Matket, Seth, Johnathan Winburn, and Gerald Wright, "The Limits of the Gerrymander: Examining the Impact of Redistricting on Electoral Competition and Legislative Polarization", delivered at 2006 American Political Science Association Conference, Philadelphia, though the latter piece is fundamentally flawed.

[25] Butler, David, and Bruce Cain. Congressional Districting: Comparative and Theoretical Perspectives (Macmillan, 1992); and Seabrook, Nicholas R., "The Limits of Partisan Gerrymandering: Looking Ahead to the 2010 Congressional Redistricting Cycle," Berkeley Electronic Press, The Forum, Vol. 8, No. 2.

[26] Lowenstein, Daniel, and Jonathan Steinberg, "The Quest for Legislative Districting in the Public Interest: Elusive or Illusory" UCLA Law Review, October, 1985; and Persily, Nathaniel, "In Defense of Foxes Guarding Henhouses: The Case For Judicial Acquiescence to Incumbent-Protecting Gerrymanders," Harvard Law Review, Vol. 166. 2002.

[27] Arrington, Theodore S., "Redistricting in the U.S.: A Review of Scholarship and Plan for Future Research," Berkeley Electronic Press, The Forum, Vol. 8, No. 2. 2010.

level grouped returns, limit the precision and reliability of academic statistical tools used in the analysis of districts because analysts cannot tie data on individual votes to data individual characteristics; and the usefulness of data-driven studies is also limited by the lack of a common measure or definition of "good" representation, as the Justice Kennedy's opinion noted in *Vieth*:

> "With no agreed upon substantive principles of fair districting, there is no basis on which to define clear, manageable, and politically neutral standards for measuring the burden a given partisan classification imposes on representational rights. Suitable standards for measuring this burden are critical to our intervention."

The multitude of factors at play in redistricting also complicates research in this field. While the simple view of gerrymandering is that one party uses the redistricting process to benefit itself and hurt the other party, the reality of redistricting is much more complicated.[28] Favored incumbents in the minority party may get beneficial treatment, just as disfavored members of the majority party may find themselves drawn into detrimental political situations. Incumbents of both parties often team up for mutual political safety, with the voters and the systemic responsiveness of government as the losers. Individual desires for community unification, the removal of potential political challengers, the accumulation of good sources of campaign fundraising in one's district, and other similarly local, and other political factors further complicate the study of redistricting.[29]

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[28] Ostdiek, Donald Henry, "Changing Representation: Predicting and detecting Congressional Gerrymanders," unpublished dissertation, University of North Carolina at Chapel Hill, 1995.

[29] Ayres, Q. Whitfield, and David Whiteman. 1984. "Congressional Reapportionment in the 1980s: Types and Determinants of Policy Outcomes." Political Science Quarterly 99 (2): 303–14; and Winburn, Jonathan, The Realities of Redistricting, Lexington Books, 2008.

Reformers and their Problems

Even among those scholars who agree that gerrymandering is a major problem, there is disagreement over how to measure it and what to prioritize when fixing it. Some reformers emphasize building state and federal districts from local jurisdiction boundaries, such as school district, city, and county boundaries.[30] Other reformers prefer to emphasize more nebulous factors generally grouped into the term "communities of interest"[31] though that term has been taken to the somewhat absurd extreme of saying the borders of previously existing districts represent such a community.[32]

Some academics and reformers have attempted to computerize or otherwise automate the redistricting process and entirely remove human discretion from the process.[33] Such attempts have universally failed, either during the development of the automated redistricting software,[34] or at the ballot box.[35] Persily flatly declared "Redistricting cannot be truly randomized or automated."[36] Michael McDonald's attempt to automate redistricting for the 2011 cycle concluded "Redistricting is a computationally complex partitioning problem not amenable to an exact optimization solution."[37]

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[30] Niemi, Richard, Lynda W. Powell and Patricia L. Bicknell, "The Effect of Community-Congressional District Congruity on Knowledge of Congressional Candidates," Legislative Studies Quarterly, 1986, 11:187-201; and Altman, Micah, Karin MacDonald, and Michael McDonald, "Pushbutton Gerrymanders? How Computing Has Changed Redistricting" in Party Lines. Mann, Thomas, and Bruce Cain, editors. Brookings Institution Press. 2005.

[31] Makse, Todd, "Defining Communities of Interest in Redistricting Through Initiative Voting," Election Law Journal, Vol. 11, No. 4, December 2012, pp. 503-517.

[32] Morrill, Richard L., Political Redistricting and Geographic Theory, Resource Publications in Geography, 1981.

[33] Taylor, Peter, "A New Shape Measure for Evaluating Electoral District Patterns," American Political Science Review, Vol. 67, 1973; McDonald, Michael, "BARD: Better Automated ReDistricting," Journal of Statistical Software, June 2011, Volume 42, Issue 4. http://www.jstatsoft.org/; and Hardy, Leroy, and Alan Heslop, Redistricting Reform: An Action Program, Rose Institute of State and Local Government, 1990.

[34] McDonald, Michael, "BARD: Better Automated ReDistricting," Journal of Statistical Software, June 2011, Volume 42, Issue 4. http://www.jstatsoft.org/.

[35] Gerken, Heather, "Getting From Here to There in Redistricting Reform," Duke Journal of Constitutional Law & Public Policy, Vol. 5, No. 1, 2010.

[36] Persily, Nathaniel, "In Defense of Foxes Guarding Henhouses: The Case For Judicial Acquiescence to Incumbent-Protecting Gerrymanders," Harvard Law Review, Vol. 166. 2002.

[37] McDonald, Michael, "BARD: Better Automated ReDistricting," Journal of Statistical Software, June 2011, Volume 42, Issue 4. http://www.jstatsoft.org/.

An alternative path to reform involves leaving the redistricting power in the hands of the state legislature, but imposing strict line drawing criteria and/or process transparency rules on the legislature in the exercise of this process. In 2010 voters in Florida approved such restrictions on that state's state and congressional redistricting, with limited success. A high-profile lawsuit challenging the legislature's congressional lines was heralded as a success, but resulted only in judicially-ordered substantive changes to only two districts.[38] And transparency requirements are the focus of a major push by the Brookings Institution. But similar restrictions adopted in California in June of 1980 (Proposition 6) failed miserably there.[39] The failure of Proposition 6 contributed to the creation of an independent redistricting commission in California 28 years later.

In general, reform advocates want to improve the representative nature of legislative bodies by eliminating the legislature's use of gerrymanders to insulate itself from changes in the voting preferences of the electorate. This often means that reform advocates talk about increasing competition in legislative elections; but it can also mean a focus on district lines drawn in close correspondence with physical and geographic features[40] along with local community borders, even if such lines do not result in politically competitive districts.[41]

Some reformers also emphasize process changes. These include required public hearings, required collection and consideration of redistricting plans drawn by the public, and/or mandatory waiting

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[38] *Romo v. Detzner*, No. 1D14–3953. 2014.

[39] *Andal v. Davis*, Superior Court of California, July 18, 2003.

[40] Morrill, Richard L., Political Redistricting and Geographic Theory, Resource Publications in Geography, 1981; and Morrill, Richard, "Ideal and Reality in Reapportionment," Annals of the Association of American Geographers, March 15, 2010.

[41] Dixon, Robert G. Democratic Representation and Reapportionment in Law and Politics (Oxford, 1968); Hardy, Leroy, and Alan Heslop, Redistricting Reform: An Action Program, Rose Institute of State and Local Government, 1990.; and Altman, Micah, Karin MacDonald, and Michael McDonald, "Pushbutton Gerrymanders? How Computing Has Changed Redistricting" in Party Lines. Mann, Thomas, and Bruce Cain, editors. Brookings Institution Press. 2005.

times between the release of a redistricting plan and its adoption.[42]

Although earlier reform efforts to "go for the gold" and "end" gerrymandering continue,[43] they are losing ground. Formal, legalistic limits are increasingly outnumbered by reform "baby steps" aimed at incremental improvements, or reducing gerrymandering through informal "shaming" of the legislature.

The biggest limitation on changes aimed at eliminating gerrymandering and restoring the representative nature of redistricting is the process of getting such reforms into law. Difficulties in this process take the form both of voter rejection of reform initiatives and legislative rejection of reform bills.[44]

Even when reforms are adopted, all reform measures show limitations. These result from the limited nature of the reforms adopted; from unanticipated problems in the redistricting process; and from the inability of reforms to eliminate the partisan interests and/or political incentives inevitably swirling around the redistricting process. Many have pointed out, but some reform advocates still do not believe, that redistricting will always have a political end result: "to the surprise of no one who has studied redistricting closely, independent citizen redistricting commissions have not eliminated political controversy and partisan suspicions."[45]

This dissertation will detail the challenges facing those who wish to limit gerrymandering to assure fair

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[42] Altman, Micah, Karin MacDonald, and Michael McDonald, "Pushbutton Gerrymanders? How Computing Has Changed Redistricting" in Party Lines, Mann, Thomas, and Bruce Cain, editors. Brookings Institution Press. 2005; and Gerken, Heather, "Getting From Here to There in Redistricting Reform," Duke Journal of Constitutional Law & Public Policy, Vol. 5, No. 1, 2010.

[43] Stephanopoulos, Nicholas, "Reforming Redistricting: Why Popular Initiatives To Establish Redistricting Commissions Succeed or Fail", American Constitution Society for Law and Policy, March 2007

[44] Stephanopoulos, Nicholas, "Reforming Redistricting: Why Popular Initiatives To Establish Redistricting Commissions Succeed or Fail", American Constitution Society for Law and Policy, March 2007

[45] Cain, Bruce, "Redistricting Commissions: A Better Political Buffer?" 121 The Yale Law Journal 1808, 2012"

and effective representation. Are there practical ways to free the redistricting process from political controls or an excessive focus on its political result? To what extent do independent redistricting commissions offer remedies to gerrymandering?

This author, like most of those who have been personally involved in line-drawing of districts, is convinced that it is impossible to eliminate political and group interests from redistricting. Just as the design of a ballot has a clear political result, but is not defined with that result as a focus, the ideal redistricting is an administrative process that, although it has a political impact, is free of decisions driven by desires to achieve a particular personal or partisan political goal. Perfect attainment of this goal is likely impossible, making the real challenge finding the system that gets the closest to real independence from politically-driven decision-making.

The next section introduces some general questions affecting redistricting reform. The chapters that follow focus on commission processes in California (Chapter 2), Arizona (Chapter 3), and at the municipal level, with a focus on the experiences of Escondido, Modesto, and San Diego (Chapter 4). The final chapter presents conclusions and suggestions for the best approach in setting up and operating independent redistricting commissions.

Chapter 1. Independent Commissions and "The Encroaching Spirit of Power"

"If men were angels," Madison observed in Federalist 51, "no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[46] It might be said that the need for independent redistricting commissions is a reflection on the (inevitable) fallen nature of legislators and of all human beings: most independent commissions have been developed to take control of the line drawing process in the wake of gerrymandering scandals in which legislators blatantly reached for personal and/or partisan advantage.

The "independence" of a redistricting commission, of course, is not assured simply by naming it independent. Legislators may express support for an "independent commission," while nevertheless retaining effective power over its work. For example, in 2014 New York's state legislators crafted the word "independent" into the constitutional language of Proposal 1, which would create a redistricting commission. But the commission will be composed of ten members, eight of whom will be appointed by the legislature's majority and minority leaders, and the plan it draws will be subject to rejection and amendment by the legislature. Such a body is a bipartisan, not an independent, commission.

To create a commission truly free from all political interference is an infinitely challenging task. Political power may trespass on its "independence" in multitudinous ways. In Madison's terms, the "parchment barriers"[47] of its founding document may offer little defense against "the encroaching spirit of power."[48] "Independent," then, is a relative term, not an absolute one.

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[46] Madison, James, "Federalist 51" in The Federalist Papers, New American Library, 1961.
[47] Madison, James, "Federalist 48" in The Federalist Papers, New American Library, 1961.
[48] ibid.

Any honest design of an independent redistricting commission aims to maximize the separation between the people serving on that commission and the people affected by the commission's work. The challenge is that many very influential people and powerful organizations are affected by the commission's work: as a result, they are highly motivated to find ways under, over, and through the rules designed to establish independence.

It is not only the legislators and candidates who must run in commission-created districts who will seek influence over its work. Political parties, neighborhood organizations, chambers of commerce, civil rights organizations, slow growth advocates, and every other person, group, and organization with an interest in the composition of the legislative body may try to influence the commission and, thereby, undermine its "independence."

To design a system that can resist such advances is both complex and, inevitably, imperfect. Ultimately, the independence of a commission relies on the independent spirit and individual willpower of each commissioner. There are two chief elements, then, that determine whether a commission is successfully independent. First are the institutional protections available to the commission. Second are the character and motivations of the commissioners themselves.

The first section of this chapter explores how the design of a commission can maximize its independence. The design questions will be examined both from the perspective of those creating the commission and writing the language to establish it, and also from the perspective of the commissioners as they organize and conduct their duties.

The next section addresses commission organization from the perspective of its day-to-day functioning – principally, the ability to get its work done. Later chapters will review how different commissions have succeeded or failed in meeting the goals and performing the tasks described in this chapter.

Selecting the Commission

The selection of commissioners and, equally important, the determination of those who will select the commission, are the first, crucial steps in establishing its independence.

A few redistricting reformers believe that it is possible to find a truly independent person or group to perform the task of redistricting. Although some countries, mostly members of the British Commonwealth,[49] seem (on the surface) to have succeeded with such an approach, it has had little success in the United States. Iowa is perhaps the closest American version, and it is often praised for its degree of independence and the number of competitive districts it produces. In fact, however, the work of Iowa's Legislative Services agency is subject to review by the Iowa Legislature, which has the power to change the plans it receives. The Agency's line-drawing independence is the result not of an institutional system, but rather of a hands-off tradition. If it were possible to establish such a voluntary hands-off culture or custom in other states, then the institution of an independent redistricting commission would be unnecessary and the job could be left to the independent staff. But most state and federal civil servants, and much of academia, in the United States lack the commitment to non-partisanship that characterizes the Iowa and Commonwealth systems – and elected officials have shown no inclination to respect the independence of such entities where it has been attempted. Some redistricting reform advocates pointed to California's highly regarded Legislative Analyst's office as an example of a nonpartisan, expert agency that could be given the task of redistricting legislative and congressional districts. But the stakes in redistricting are so high that the independence of the Analyst

[49] "The Commonwealth boundary commissions tend to include impartial (non-political) public officials with backgrounds in election administration, geography or topography, and statistics. In Australia, New Zealand, and the United Kingdom, for example, the Boundary Delimitation Standards Commissions incorporate electoral officers or registrar-generals, as well as the Director of Ordnance Survey (United Kingdom) and the Surveyor-General (Australia and New Zealand)." (Handley, 2007)

would certainly fall to the resulting partisan assault.[50] The awareness that informal agreements for independent redistricting are doomed has generated the movement for formally independent redistricting commissions (as noted by the ardent opposition of Common Cause to New York's 2014 not-so-"independent" redistricting commission proposal).

Redistricting affects the future careers of current legislators as well as of the candidates who seek to replace them; it shapes the overall power of political parties; and it can decide the fate of policy. Far too much power is at stake for reliance on any simple tradition of independence.

If the "independent" individual or agency does not exist, then reformers are left with the question of who should manage the commission selection process? The goal must be to find line-drawing decision-makers with the greatest possible legal and institutional protection from political influence. In turn, that requires that the decision-makers be selected by individuals whose personal careers and financial positions give them a degree of immunity from such improper influence.

Reformers seeking individuals or organizations with institutional and/or legal protections from undesirable influence have often turned to groups such as auditors or judicial agencies. The group writing California's redistricting reform initiative in 2007 and 2008 discovered that federal law requires each state to have an official state auditor. This agency is charged with auditing programs that receive federal dollars and, in order to ensure independent audits, is equipped with legal protections against many forms of legislative influence. Of course, such requirements do not technically apply to the

[50] This is especially the case in California's professionalized, highly-paid Legislature. In 2007, California's legendary legislative analyst Elizabeth Hill personally expressed to the coalition developing Proposition 11 (this author was at the meeting) the belief that the decades' long history of independent analysis her agency had enjoyed would come to an instant halt if her office were put in charge of redistricting. In her view, legislators who historically have had either no influence or only minimal influence over her office –i.e., on important questions of state finance, education, environment and other state issues – would then find it impossible to restrain themselves from exerting control over the agency.

selection of redistricting commissioners, but the reformers' goal was that, given its long history of immunity to legislative influence, the auditor's office would use its institutional traditions and skills to resist the inevitable efforts to influence the commission selection process. Obviously, the success of this approach is heavily dependent on the character and decision-making skills of the individual in charge of the state auditor's office.[51]

Other possibilities have been identified by reformers seeking institutionally or legally independent state bodies. The heads of state University systems are sometimes viewed as being somewhat independent in the execution of their duties from state legislatures. The fact, however, that their budgets are heavily reliant on year-to-year decisions of the state legislature tends to rule them out. Similarly, state boards of education and other semi-independent state bodies that rely on annual budget appropriations are far from ideal as supervisors of the selection process.

When most Americans think of government institutions that are independent of politics, they tend to look to the judiciary. But the judicial systems employing current judges are, however, reliant on the legislature for annual appropriations, and they are often reliant on the governor for future promotions to higher judicial offices. The legislature has too much influence over the budget of the judicial branch for most judges to be comfortable playing a major role in legislative redistricting. Although the governor, not the legislature, typically has the most influence over judicial appointments, the governor obviously has a significant interest in seeing that redistricting helps his allies and his party in the legislature. Such self-interest could lead the governor to use all available tools of influence over judges who play a role in redistricting.

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[51] Also obvious is that the approach is possible only at the state legislative and congressional redistricting level: state auditors have no role in local governments such as cities or school districts; and such entities rarely have their own government official in the position of independent auditor.

Every one of the fifty states is different, and in some states there may very well be state agencies or commissions that enjoy legal, institutional, and or traditional independence from the legislature. Such agencies, sufficiently protected, may be able to play an honestly independent role in redistricting. Nevertheless, the agency that is common to all 50 states, and that shows the most promise of true independence from legislative influence, is pretty clearly the state auditor. Even the state auditor, however, has far from perfect immunity to such influence, as the later chapter on California's 2011 redistricting commission will discuss.

Independent individuals

Are there individuals who are personally independent of potential legislative and political influence due to their own careers and financial situations? Academics who teach in tenured positions at the private colleges and universities in the state – distinguished from professors in public universities funded by legislatures – are occasionally identified for the role. Of course, such academics have their own political predispositions and may also be vulnerable to promises of research funding or outside employment from the legislature or from individuals interested in influencing redistricting. Such influence might be lessened, though likely not eliminated, by a requirement that the academics involved in the commission selection process must not receive any government funding for their research for a certain period of time after their service in the redistricting process. A bar on prior funding, perhaps for five years or so, would also be required: again, the stakes are so high that legislators, political activists and party leaders could attempt to pre-fund those academics likely to control the commission selection process.[52]

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[52] Another problem of this approach is the overwhelming partisan imbalance in academia in America today. Academics with Democratic leanings far outnumber academics with Republican leanings. Indeed, academics to the left of the Democratic Party, such as Green Party members and Peace and Freedom Party members, and ultraliberal

When choosing individuals to be personally independent of legislative and political influence, most redistricting reformers have turned to retired judges. In virtually every state, retired judges enjoy generous retirement plans. And most judges retire at relatively advanced ages and do not take on a new career, other than as substitute judges, or arbitrators and mediators. As a result, they are often considered relatively immune to legislative influence.

Yet even retired judges fall short of the ideal as selectors of commissioners. Most judges at the state level were either elected or appointed, and if appointed, they usually must run for re-election. If elected, they typically have political connections, they have run campaigns, they have probably been endorsed by well-known or influential political figures, and they may have accumulated obligations to contributors and supporters. If appointed, there is the issue that they owed their job to the politician who appointed them. In most cases, the judicial candidate would have been politically active for one party or the other in ways that led to the appointment.

Another concern with the use of retired judges is that state judiciaries fail to match the diversity of the state. In most states, ten years of legal practice are required of judicial appointees: that tenure clock begins only after law school and success on the bar examination. Such requirements lessen minority group representation on the bench; and what is true of serving judges is even truer of the demography of retired judges. Nevertheless, these weaknesses have not prevented many redistricting reformers from turning to retired judges as the selection panel to review applications for redistricting commissioner. The general consensus on the fairness, community orientation, and political competitiveness of most plans drawn by courts (especially the California 1973 and 1991 redistricting

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independents sometimes on their own outnumber Republicans in colleges and universities today. See Rothman, Lichter and Nevitte, "Politics and Professional Advancement Among College Faculty" The Forum, Berkeley Electronic Press, Vol. 3, Issue 1, 2005.

plans) provides significant support for the argument that drawing lines should be left to judges, or at least to retired judges in the role of independent redistricting commissioners.

Two Steps to Achieve Independence

Regardless of how a redistricting reform measure sets up the selection process, perhaps the most important provision for independence is the very existence of a two-step selection process. First, as described above, is the use of the most independent group available (such as the State Auditor) to perform the selection; but, second, is the screening of the commissioners. Creating a commission with a reasonable level of independence requires both steps.

As noted earlier, perfect independence cannot be achieved in the real world of redistricting politics. There is simply too much at stake. Yet, if the actual selection process involves a screen for evaluating the independence of commissioner candidates, and if the screening is conducted by as impartial a group as can be found, then there is hope of a reasonable degree of independence in the actual work of the commission.

Commissioner Applications and Screening

All states today provide access to data on voting history and political contributions. Yet, relatively little is known about any single individual's personal votes and political leanings. Unless someone has been an officer in a political party, a candidate for office, or a campaign donor, there is little available record or proof of an individual's political beliefs.

In recent years, American political parties and presidential campaigns have compiled enormous data bases on voters; but users of even the most sophisticated of these databases are primarily dependent on hints, guesses, and questionable correlations. The place and type of residence of the individual, the

voting behavior of the precinct in which the individual lives, the most commonly held political beliefs of people who subscribe to magazines read by the individual, the general political beliefs of members of the same community and social organizations – all these are the facts around which 'big data' attempts to assess the political leanings and policy beliefs of target voters. Such facts have given rise to political discourse about 'soccer moms' and other political segmentation. In fact, however, these segments are identified from large pools of aggregate data and, therefore, much less reliable when applied to a single individual.[53] Although campaigns can operate perfectly well in the large-scale, big data world, selection of only five, nine, or even 15 commissioners cannot depend on aggregate data to establish their individual political leanings. The commission selection process must work hard to identify individual political views in order to avoid an imbalance in some views over others. The idea of "ambition must be made to counterbalance ambition"[54] only works if the ambition (in this case, political loyalties) of the people in question can be accurately identified during the selection process.

Two elements of the selection process seem to contribute most to the independence and, therefore, to the actual and perceived fairness, of a redistricting commission. First, at the individual level, there should be an evaluation of the ability of each commissioner applicant to act independently – namely to resist efforts at improper influence. At the most blatant, the efforts may be by legislators advocating for a redistricting map or specific lines; less obvious, but almost equally insidious, are the efforts of parties or lobbying groups to achieve particular redistricting results.

Second, at the group level, there are the selection decisions that determine the composition of the commission. These decisions involve criteria such as a requirement for an equal number of

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[53] Obviously, many parents (and certainly not only moms), spend time driving their kids to soccer games; but they do not hold the same social economic status, and political beliefs as commentators often ascribe to "soccer moms."

[54] Madison, James, "Federalist 51" in The Federalist Papers, New American Library, 1961.

commission members from each of the two major political parties; seats on the commission for people from neither of those parties; requirements for geographical distribution of members; and requirements for ethnic / racial diversity.

Such requirements may even extend to membership slots for people with particular backgrounds, such as advocates for increased civic engagement or voter turnout, or for people with civil rights or voting rights involvement in their past. These requirements bring risks. Individuals who have been active in voting rights litigation, for example, may bring preconceived notions to the redistricting, perhaps favoring legislators with strong voting rights records. Even the requirement that the commission must have equal numbers of Democrats and Republicans has problems, for it makes the party registration of commission applicants a major consideration in an era when such registration is in steep decline. Moreover, balancing party registrations may undermine a principal aim of many redistricting reformers, namely that commissioners will act independently of their personal partisan registration. And, of course, in the 26 states that do not register voters by political party, an alternative method of ensuring a balance commission must be found, which means using whatever data on partisan leanings is available to achieve some sort of representative balance.

Some requirements for selection of commissioners may in fact make it more difficult to achieve the goal of avoiding partisan bias.[55] California's 2011 experience showed that registered Democrats are more likely to include in their resumes references to work as community organizers, local advocates, or leaders of community-based issue organizations. Redistricting reformers, when writing the rules for

[55] There has been some academic study of how compactness requirements in redistricting have a tendency to benefit the Republican Party. A similar syndrome, though with the opposite bias, may affect the use of 'background qualifications' for commissioners. Just as a focus on compactness can be taken to an extreme and result in Republican bias in a redistricting map, a focus on community keywords in applicant resumes can result in a Democratic bias on redistricting commissions

how applicants are to be considered, and the individuals actually screening the applicants must take care to ensure that a selection preference for experience as "community advocate" or "neighborhood organizer" does not upset the desired partisan or ideological balance on the commission.

In the case of individuals who have local political engagement in their background, their activist history may be more of an indication of how they will act as redistricting commissioners than their formal partisan registration. A commission applicant who is a registered Republican, but who has been deeply involved with activist Democratic groups, may be a "Republican" in name only. Perhaps, too, an applicant registered as a Democrat but active in Tea Party politics, may side with Republicans.[56] Thus, rules for applicant screening must not employ criteria that, however appealing in the abstract, have the practical effect of undercutting the internal balance of the commission.

Perhaps the most important point is to recognize that the goal of "partisan balance" on an independent redistricting commission is not simply an equal division between partisans. The requirement that equal numbers of Republicans and Democrats serve on the commission is not that Republicans will advocate for Republican interests in redistricting, while Democrats advocate for Democratic interests. Instead, the goal is to ensure that there are sufficient numbers of watchdogs for improper partisan influence on the commission. The Republicans should be expected to call out or investigate potential or perceived pro-Democratic biases in the testimony given to the commission, in the statements and beliefs of other commission members, and in the commission's organizational and line-drawing decisions. Democratic members of the commission should be expected to play a similar watchdog role on Republican influence over the commission.

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[56] For example, on California's 2011 commission, two registered Republican sided with the Democratic members of the commission from the very start of the commission's proceedings.

A significant tool for reformers is the partisan veto of potential commissioners. Where Arizona's Proposition 106 set up a significant screening system for commission applicants, it left legislative leaders in charge of the final selection of commissioners. California in 2011 took an alternative approach: each of the four legislative leaders was given the ability to strike two commission finalists from each applicant 'pool' approved by the State Auditor's team (there were three separate redistricting pools: Democrats, Republicans, and 'other' registrants), for a total of six strikes per legislative leader. The first eight Commissioners were then drawn randomly, and those eight then chose an additional six. Just as Madison envisioned, the authors of Proposition 11 used the motivation of each legislative leader to ensure the Commission was not biased against the leader's party to help ensure the overall independence of the Commission.

The most common aim of redistricting reform initiatives is to change the focus on line-drawing for incumbent and partisan advantage to a focus on boundaries that reflect "community of interest." The ideal goal is seen as securing appropriate representation for localities in their elected bodies. As noted above, this ultimate goal of community and neighborhood representation may result in the use of selection criteria that give a high value to applicants' records of neighborhood or community advocacy. Not only may such criteria produce the kind of partisan bias described above, they may also militate against use of the most important criterion of all: namely, the ability of the individual commissioner to withstand pressures from whatever source. The homemaker or the "soccer mom" or the retiree or the machinist may be more likely than the activist community organizer to be able to resist improper pressure.

Whether it is in the debate over ratifying the American Constitution or the redistricting of California in 2011, partisanship is inevitable and thus partisanship cannot be ignored in structuring a commission. Internal self-regulation was the key to Madison's theory of curbing the encroaching spirit of power.

In Federalist #51, he presented "the interior structure of the government" and the "mutual relations" of its constituent parts as "the means of keeping each other in their proper places." It will be a central theme of this dissertation's conclusions (see Chapter 5) that rules that aim toward the creation of an internally self-regulating, self-policing, and self-limiting commission are most likely to achieve the true independence of commissions from the encroaching spirit of power.

Structuring the Commission's Work

The selection of commission members will inevitably be the most important step toward achieving as independent a commission as possible. If an ideal group of non-partisan individuals dedicated to drawing fair and community-oriented district lines free of all personal and partisan external influences could be identified, the commission's process and organization would be largely irrelevant. Yet, as the section above illustrated, no such perfect angels exist, and commission selection is far from a perfect process. The commission's procedures and rules must therefore be structured to strengthen the push for community-oriented and fair lines and to provide defenses against alternative efforts to influence the Commission's decisions.

Commission Voting

Most existing redistricting commissions, like most American political institutions, operate on a simple majority vote basis. While simple and easily understood by the members of the public who participate in and observe the process, such a voting system adds little to the systematic defense of the commission's independence.

Just as the 60-vote cloture requirement in the United States Senate acts to ensure the minority party has a voice and a strong tool to block actions that it opposes (as long as the minority has at least 40 votes), super-majority vote systems can systematically defend independent redistricting commissions

from partisan- and incumbent-driven efforts to undermine the commission's independence. California is perhaps at an extreme in its voting system: of the 5 Democrats, 5 Republicans, and 4 "other" registered voters on the California Commission, selection of key staff members and eventual approval of a redistricting plan requires the affirmative vote of at least 3 Democrats, 3 Republicans, and 3 "other" commissioners. Such a requirement protects the Commission by raising the bar for undermining the desired balance and 'counteraction of ambition': instead of a single 'rogue' commissioner, partisan influences must swing multiple commissioners to their cause. This is also a significant but still imperfect defense, as the California experience in 2011 proved at least to some degree (see Chapter 2).

While super-majority requirements are advisable for final plan adoption, such a requirement for all actions can prove an impediment to making progress toward a final plan. This poses a difficult challenge for authors of reform measures, as super-majority requirements can impede progress yet simple-majority votes along the way can render the final vote little more than a formality. The California Commission experienced this challenge when a simple majority vote of the Commission was used to disqualify one of the two applicants for technical consultant. California's Proposition 11 required a super-majority vote to hire a technical consultant, but with only one remaining applicant that super-majority vote became only a formality. A similar dynamic occurs with plan development: unless the minority faction(s) have the ability to force consideration and/or development of multiple draft plans, the super-majority up or down vote on a single final plan can become a formality.

Ultimately, decisions on commission size and voting majorities come down to local factors. In California, nine was considered by the reform coalition to be the smallest possible number while still accommodating the relative proportions of California's various ethnic groups and geographic regions. In Arizona, five was the number selected, with a requirement that at least two reside outside of the

two most populous counties in the state. For New York, Connecticut or any other states contemplating a redistricting commission, or for local jurisdictions, the number of commissioners – and the resulting numbers needed for super-majority approval of any redistricting plan – would similarly need to be tailored to local geographic, ethnic, and other diversity factors.

Commission Staff

Scholars and legislators discussing redistricting often refer to its highly technical and complicated legal requirements.[57] In the British Commonwealth, the answer has been to assign the redistricting task to non-partisan experts in these fields. But, as noted earlier in this chapter, that has proven unsuccessful in the United States, and the clear preference has been for "everyday citizen" commissions, at least in theory.[58] Somehow, these commission members must be provided the legal and technical support they need to understand and complete their task, along with the administrative and event support staff needed to operate the commission while it is in existence.

There are, however, very few true experts in the legal and technical aspects of redistricting. And with so few independent redistricting commissions in existence, most experts have some partisan redistricting work in their background – and often they have partisan current employers as well. Clearly, there is a significant risk to the commission's independence in its hiring of legal and technical consultants.

The 2001 and 2011 Arizona Commissions, and the 2011 California Commission, all chose a single

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[57] Cain, Bruce. The Reapportionment Puzzle. University of California Press. 1984; Altman, Micah, Karin MacDonald, and Michael McDonald, "Pushbutton Gerrymanders? How Computing Has Changed Redistricting" in Party Lines. Mann, Thomas, and Bruce Cain, editors. Brookings Institution Press. 2005; and McDonald, Michael, "BARD: Better Automated ReDistricting," Journal of Statistical Software, June 2011, Volume 42, Issue 4. http://www.jstatsoft.org/.

[58] The practice often turns out differently than the idea: every member of California's "citizen" commission in 2011 held an advanced degree and were at least middle-class in income level.

technical consulting firm and a pair – one Democratic and one Republican – of legal advisors. Each of these three commissions repeatedly emphasized that the commission's own independent makeup and goals would ensure a close guard against any inappropriate partisan influence from any advisors. Yet each commission encountered charges that their advisors inappropriately influenced their decision-making. To some degree, such charges are inevitable: they can be simply a tool outside partisans are using to push the commission toward favoring the partisan's goals.

The commission's choice of event organizing staff is a relatively safe one. While competence at planning and managing large, public events that must be noticed and run according to the appropriate open-meeting laws is vital, there is little opportunity for undue partisanship to enter the commission's process through this group's decisions. Most administrative staff are similarly focused on keeping the books and paying the bills of the commission. At the local level, the existing City Clerk's team often fills both of these roles. But the administrative staff who manage the proposal and selection of the technical and legal consultants play a vital role, and both Arizona and California encountered controversies related to their selection of executive directors and procurement assistants. These staff, if given control or significant influence over the request for proposal and proposal evaluations, can eliminate prospective consultants or lock the commission into procurement rules that force the selection of one bidder or another. Commission members, and the reformers who pushed for the creation of the commission, must carefully guard against such undue influence by carefully evaluating the procurement advice received – and actively seeking second opinions. The consistent sign of trouble among existing commissions is the decision to make hiring and/or procurement decisions in private. Given the level of public interest required to make an independent redistricting commission a reality, it is nearly certain that all public information provided to, and public decisions made by, the commission will be subject to large-scale public review and comment. At the procurement and management level, the openness to such review and comment is a strong indication that the

"transparency" requirements of the redistricting reformers are working.

Given the amount of legal advice often given in private, and the huge influence legal guidance can have on the commission's decision-making, the commission's selection of legal advisors is one of the most important decisions the commission will make. The immense complexity of the legal rules for redistricting makes it very difficult for individual commissioners (even those with law degrees) to become expert enough in the field to effectively evaluate and potentially disagree with any legal guidance provided by the commission's "expert" consultants.

Every decade, there are numerous conferences, seminars and publications related to redistricting. The National Conference of State Legislatures, the California School Board Association, the California League of Cities, the Arizona League of Cities and Towns, and the Rose Institute of State and Local Government at Claremont McKenna College all offered multiple sessions and publications on redistricting in 2010 and 2011, and most of these sessions and publications included guidance on the legal requirements of redistricting. Familiarity with these events and materials will greatly enhance each commission member's ability to evaluate and respond to legal counsel's guidance.

Independent redistricting commissions can also arrange their own training. One obvious approach would be to require the hired legal and technical consultants to offer training to the commission. Such training would be valuable to the commission's ability to understand the task before it and the process and decisions the commission will experience during its work. But training by the commission's hired consultants offers no protection against potential bias and improper influence by said staff.

One option is to bring in other consultants to provide additional training. Given the lack of clarity in many redistricting rules, it would appear to be wise to gather multiple opinions whenever possible, especially in the early training and information-gathering stage. This is another time when bringing in obvious partisans would be useful: Democratic trainers would almost certainly include advice on how

to spot potential Republican efforts to unduly influence the Commission, and vice versa.

There is another option available to independent redistricting commissions: hiring competitive consultants. Since this route is expensive it likely is better suited to state commissions than to local government efforts. But the gains in a more effective commission, and thus potentially lower eventual legal costs over the near-inevitable legal challenge to every state redistricting plan, could easily justify the expense. The idea is to have multiple legal and/or technical consultants who, by design, would offer competing viewpoints on the issues and decisions before the commission.

The Arizona and California commissions attempted something similar with the hiring of Democratic and Republican legal counsel, but in each case they hired the counsel as a team and each team evolved into more of a partnership than a counterbalance. Each commission tended to receive 'consensus' advice from the team rather than competing viewpoints or options. Instead of 'ambition counterbalancing ambition,' desires for comity overwhelmed the commission independence enhancement hiring rival partisans should produce.

While some closed-door interaction with legal counsel is likely inevitable for every commission, that is not the case with technical consultants. Given the impact that moving a single census block or small neighborhood can have on the political balance of a district, every change should be exposed for (hopefully intense) public review. And given the multitude of ways in which district lines can be drawn, commissions should insist on seeing multiple options whenever possible for addressing their ideas and requests.

Perhaps the worst idea is for commissioners and technical consultants to work together in private to develop maps. Even if the "official" vote is in public, closed-door consulting between the Commission members and the technical staff can lead to closed-door decision-making and render the public debate and vote pro-forma. The public quickly picks up on this feeling, and controversy is inevitable no

matter how well-intentioned the commissioners and consultants.

At the other extreme, some local commissions have instructed their technical consultants not to draw lines behind closed doors and attempted to make all line-drawing decisions census block by census block in open meetings. While technically possible for smaller jurisdictions, this process can also be fatally flawed because of the amount of time required. After spending five or eight hours of public meeting time developing a map, there is rarely the political will to go back and revisit the initial decisions that limited the later decisions in the map. While it is an appealing thought that there is no closed-door work occurring, the reality is that any qualified technical consultant will have a much better understanding than the "citizen" commissioners of the jurisdiction's demographics and how those demographics relate to line-drawing decisions: thus, the consultant can largely control the commission's work simply by presenting the decisions to the commission in the right sequence. The commission must find a way to balance the desire for transparency with the need to allow the technical consultant to do the job of providing sufficient map options to the commission to fully illustrate the impact of those options to the commission's overall goals. As with the legal counsel, the commission would be wise to seek a second opinion, either through the hiring of a rival consultant or through embracing public review and comment on the technical consultant's input.

Another option, which no commission has yet undertaken, is to not draw lines directly. As line-drawing software becomes more common, and now that virtually every commission has the financial ability to make online line-drawing tools available, commissions can simply request maps from the public and review those maps. A technical team would still be required to set up the system, accept the plans, and to provide a technical review of the public plans for the commission. But, if there is a sufficient level of public engagement, it would be possible for the commission to simply review (and request public modifications to) plans submitted to it, rather than drawing any plans itself. As a

fallback, a commission could do this voluntarily with the option to step in and directly modify lines at the end of the process if needed, or redistricting reformers could put this requirement directly into the commission rules.

Commission Process

Redistricting reform advocates almost universally emphasize "transparency," "accountability," and "community engagement." So it is no surprise that most reform proposals place considerable emphasis on public outreach requirements for a commission. Virtually every reform proposal requires multiple public hearings. Most include public notice requirements for hearings, and extensive public review time for proposed plans. And reform proposals often require hearings be held at multiple locations across a jurisdiction to make it easier for members of the public to attend.

In both Arizona and California, however, such requirements have led to complications. For example, both require draft plans to be made public for a minimum number of days prior to final adoption. Since that time is clearly intended to ensure public review of and comment on the maps, it is surprising that neither measure designated whether the commission could then accept those comments and adopt a final plan, or whether making any changes to the draft plan triggered an additional public review time. Given the strict time requirements for completing all redistricting work at every level[59], it is unlikely that any commission would have time for two or potentially even more multi-week public review periods.

As noted above in the section on staff and consultants, there are multiple options for how a

[59] Plans must be in place in time for candidates to organize and run for the new districts. The legal and practical requirements vary from having plans done a minimum of 90 days prior to election day to a six to ten month required lead time.

commission can interact with its legal and technical staff. Each decision will impact how long public meetings go on, how often public meetings can be held, and how detailed the public will be able to get in its plan review and feedback to the commission.

At least at the state level and in larger local jurisdictions, commissions can expect thousands of public comments. The flow of public input can quickly become crippling if the commission has not planned how it will accept and process that input – and partisan players unhappy with the direction the commission is taking can intentionally flood the commission with input in an effort to shut down the process. Careful planning is key, and successful completion of a high-profile redistricting project virtually requires having staff or consultants experienced in such matters (even though, as noted above, experienced redistricting staff inevitably pose a risk to a commission's independence and the commission must address those risks).

In the modern age of communications, with traditional mail and public comment at hearings more and more replaced with email, Facebook messages, Twitter 'tweets,' text messages, DropBox file transfers, and even auto-deleting SnapChat messages, keeping track of public records is a growing challenge for every public entity, and redistricting commissions – with their emphasis on transparency and public engagement – are particularly challenged to manage all of these communications. Care must be taken to ensure that community members without access to the more high-tech communications (or lacking fluency in English) are not deprived of the opportunity for effective participation. And records must be maintained in full compliance with public records requirements and in anticipation of the discovery requirements of potential future litigation. In 2011, the California Independent Redistricting Commission in particular saw partisan efforts to intentionally overwhelm the commission with public records act requests. Every commission must have in place communications protocols that comply with the law and, almost as importantly, enable the

commissioners to focus on the task before them without the distraction and time demands that poorly designed public records management systems can generate.

A key tool for every redistricting commission is the public backing that created the commission. As entities created by the voters, every commission starts its work with some level of assumed public support and endorsement. While some controversy is perhaps inevitable in at all but the most local redistricting efforts,[60] the public's perception of its staffing decisions, votes and process are perhaps the most vital to maintaining that public support. These are difficult and imperfect decisions, which each commission must carefully make for every redistricting effort.

[60] This author often tells his clients that the most common definition of "gerrymander" is "any map a given speaker dislikes."

Chapter 2. California

The modern history of California has witnessed examples of blatant gerrymandering by both political parties as well as repeated instances of carefully crafted bi-partisan or "sweetheart" gerrymanders. As the birthplace of the nation's computer revolution, California was the leader in linking computers to line-drawing in the period 1969 to 1972. Congressman Phil Burton and the Berman-Waxman machine became notorious nationally for no-holds-barred redistricting.

No other state gives better proofs than California of the essentially political nature of the line-drawing process, and in no other state have reformers suffered so many defeats. Even the most recent stage of California's redistricting saga and its creation of an independent commission continues to give proofs that all line-drawers are distinctly non-angelic. To the dismay of many of its supporters, California's independent commission proved deeply vulnerable to the encroaching spirit of power.

This chapter reviews the background to California's Citizens Redistricting Commission in earlier reform efforts, describes the campaign that established the Commission, closely reviews the Commission's first actions, outlines the actual mapping process, and concludes with an assessment of the Commission-drawn districts.

California's Contentious Redistricting History

California's politics were once "non-partisan," the legacy of Hiram Johnson's progressive reforms. "Cross-filing," the system that allowed candidates to run in both party primaries, heavily favored incumbents, a majority of whom were Republicans. Thus, even when the influx of new population into the State in the 1940s gave the Democratic Party the edge in registration, Republicans continued to hold comfortable majorities in both houses of the Legislature.

By 1951, however, the Republicans found themselves trailing by ever wider margins in statewide

registration. To counter the threat, the Republican leadership launched California's first statewide partisan gerrymander. In the days before the U.S. Supreme Court's decisions on population equality, the California Constitution required congressional districts to contain whole Assembly districts in the urban counties and whole counties in the rural areas. The formula meant that Los Angeles County deserved twelve Congressional districts to be formed out of its 30 Assembly districts.[61]

Employing a classic gerrymandering technique of "packing" to waste votes, the Republican line-drawers aimed to put three Assembly districts in most Democratic Congressional districts, but only two Assembly districts in most Republican districts. The gerrymander produced its desired results in the 1954 elections: the Democrats won a majority of the two-party vote in Los Angeles County, but only four of the County's twelve Congressional districts. Statewide, Republicans won 50.5 percent of the vote in Assembly districts but 60 percent of the seats in the Assembly, and 48.5 percent of the vote in Congressional districts but 60 percent of California's seats in Congress.

The GOP map, however, involved the classic flaw of partisan gerrymanders: a greedy reach for too many districts left some incumbents with weak margins that made them vulnerable to an electoral shift. In 1958, the Republicans lost their legislative majorities and the door was opened for Democratic retribution in the redistricting of 1961.

Population growth in the 1950s meant in 1960 California gained eight new Congressional districts. In the 1962 election, the first election using the new district borders drawn in 1961, Democrats won seven of the eight new districts, and a total of 25 of the State's 38 Congressional districts. The effectiveness of the 1961 Democratic gerrymander of California was most dramatically proven in the

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[61] Unless otherwise noted, the history of California from 1951 to 1981 is a summary of T. Anthony Quinn's Carving Up California. The history of reform efforts from 1981 to 2005 is from Alan Heslop's "Redistricting Reform in California" (2004).

1962 elections for Assembly districts: with only 54 percent of the two-party vote in the Assembly districts, the Democrats won 52 of the 80 districts.

Again, however, the partisan gerrymander soon lost effectiveness. Reagan's gubernatorial leadership inspirited the State GOP, and Republicans managed a return to majority status in the Assembly in 1968 and in the State Senate in 1969. Although the Democrats regained their majorities in both houses in the election of 1970, they faced a determined partisan opponent in the Governor's Mansion.

It was a formula for prolonged partisan warfare. Democrats drew highly gerrymandered plans; Republicans, employing more advanced technology, critiqued the plans minutely and publicized their worst features. Republican staff and consultants advised selected Democrats on how to press for amendments to their district: the Majority leadership, needing to keep their caucus together, was forced to accommodate them. When the Democrats managed to push redistricting bills through the legislature, Governor Reagan vetoed them and condemned them in press conferences.

Finally, the California Supreme Court stepped into the picture, requiring that the State use existing Assembly and Senate districts for the 1972 elections. Since California had been apportioned five new seats in Congress, the Court –to the great indignation of Republicans – required the use of the Congressional plan passed by the Democrats and vetoed by Reagan.

The 1972 elections failed to give the Democrats a veto-proof majority, forcing the Court to step once again into the process, this time with the appointment of a special master to draw the districts. The Court-drawn plan created more competitive districts than the State had ever seen before, but with several districts drawn to ensure the election of candidates preferred by Latino, Asian-American and African-American voters. The Watergate scandal tipped the balance against Republicans in many of the competitive districts, and the decade of the 1970s ended with Democrats again in control of both houses and free from the threat of a veto: Democrat Jerry Brown was Governor.

In 1980, reform advocates including the Rose Institute of State and Local Government at Claremont McKenna College successfully convinced California voters to approve Proposition 6, which left control of redistricting in the legislature's hands but attempted to impose relatively strict control on the legislature's discretion in the process. The Proposition 6 criteria were the following, and they introduce wording that would re-appear in many of the later redistricting reform measures:

> [T]he Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts in conformance with the following standards:
>
> (a) Each member of the Senate, Assembly, Congress, and the Board of Equalization shall be elected from a single-member district.
>
> (b) The population of all districts of a particular type shall be reasonably equal.
>
> (c) Every district shall be contiguous.
>
> (d) Districts of each type shall be numbered consecutively commencing at the northern boundary of the state and ending at the southern boundary.
>
> (e) The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section.[62]

Those criteria were not as limiting as their authors had hoped. In 1981, the Democrats took full advantage of the situation with maps that, benefiting from the new computer technology, seemed likely to assure Democratic control of the Legislature for the ensuing decade. The plans were promptly

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[62] Proposition 6 and Redistricting: A Legal Perspective, Rose Institute of State and Local Government at Claremont McKenna College, 1980. http://ccdl.libraries.claremont.edu/cdm/ref/collection/ric/id/1529

condemned as blatant gerrymanders by Republicans. The California Roundtable, the State's premier business group, funded a project at the Rose Institute to analyze the maps and publicize their effects on cities and communities. A statewide media campaign – combined with events such as the statement of Gerrymanderer-In-Chief Phil Burton that the plans were "my contribution to modern art" – brought gerrymandering to the attention of large numbers of California voters.

GOP fury over the partisan gerrymander translated into the rapid qualification of referenda against the Assembly, Senate and Congressional plans. Although they passed with 60 percent of the vote, the referenda were undercut by the Supreme Court headed by Jerry Brown's appointee, Chief Justice Rose Bird. The Court held that candidates must run in the districts drawn in the 1981 plan. The result was a major sweep for the Democrats in the 1982 elections with a win of six additional Congressional districts.

The Court action against the referenda further inflamed Republicans and led directly to a series of GOP-supported reform initiatives in the following decade. For the first time in California, redistricting reform became a prominent public issue. The groundwork for reform had been laid by the long-running controversy over the 1981 plan, the Rose Institute program funded by the California Roundtable, and the contentious involvement of the Rose Bird Court in the referenda and 1982 election.

The language for a reform initiative was developed by representatives of the California Republican Party, the California Roundtable, Common Cause and the Rose Institute. Proposition 14, as the reform proposal became, would have established a commission composed of both citizens and legislators: of ten members, four were to be selected by a panel of justices from the Courts of Appeal, six by the two major parties (three each) two of whom could be legislators, and one by any other party with ten percent of the members of the Legislature. To go into law, plans had to be adopted by a two-

thirds vote of the commission, including at least three votes from members appointed by the panel of Justices and at least one vote from each group of major party appointees. Following the lead of the Court Special masters, the criteria that the Commission was obliged to use included the nesting of Board of Equalization, Senate and Assembly districts. Other criteria included a ban on crossing any common county boundary more than once, and minimization of the division of cities, counties and regions. Plans were to be subject to referenda by the electorate.

Proposition 14, qualified with Republican backing and money in the summer of 1982, drew endorsements from many newspapers and public interest groups, and was widely expected to pass. In the election of November 1982, however, the Proposition failed, winning only 45.5 percent of the vote. Many theories were advanced to explain its defeat: its placement on the ballot between unpopular initiatives, conservative opposition to new bureaucracy (it failed to win a majority of the vote in Orange County), and inadequate funding. Perhaps the most interesting theory is that the initiative suffered from a lack of controversy: the Democrats, convinced that it would pass, did nothing to oppose it; the Republicans, seeing the lack of Democratic opposition, failed to advertise it.

The unexpected defeat of Proposition 14 led immediately to an accommodation between Democratic legislators and the Republican incumbents who survived the 1982 election. A new plan, again developed using the latest computer technology, gave safe districts to incumbents of both parties and was promptly signed into law by Governor Jerry Brown mere minutes before he left office. The result was California's first computer-managed, data-driven bipartisan or "sweetheart" gerrymander, which locked in place the partisan split of the 1981 partisan gerrymander.

Republican activists, quick to denounce the treason of the incumbents of their party, joined with representatives of various public interest groups to decry the "death of competition" in California. One initial reaction to the situation took the form of an initiative map, the so-called Sebastiani Plan,

drawn to achieve a maximum number of competitive districts. Once again, however, the Rose Bird Court stepped in and refused a special election for the Plan.

The newly elected Republican Governor, George Deukmejian, responding to activists in his Party, but anxious also to trim the lopsided Democratic majority in the Legislature, committed to a new reform initiative that would redraw plans by July of 1985. The criteria of the Deukmejian initiative, which became Proposition 39, were similar in some respects to that of Proposition 14, although they added the "promotion of competition" for elective office and consecutive numbering, north to south, of districts.

Proposition 39's commission was very different from that of Proposition 14. There were to be ten members, of whom eight were to be voting members selected "by lot" from two lists of retired state Appellate Court justices: four of the judges had to have been appointed by governors of one major party, four by governors of the other major party. The sitting Governor was to appoint one non-voting member, while the chairman or statewide official of the other major parry was to appoint a second voting member. To be adopted, plans must receive the votes of at least eight voting members

Voters rejected Proposition 39 by a slightly wider margin than Proposition 14: only 44.8 percent voted for it. Some reform advocates attributed this failure to a change of heart by Deukmejian: they claimed that his need to work with the Democratic majority in the Legislature, and threats by the Democratic leadership to hold his legislation hostage, had caused him to hold back on funding for the campaign. At the same time, the Democrats launched a massive advertising campaign that cleverly played on Republican voters' hostility to liberal judges: media ads and bill boards screamed the warning that judges would be taking over from the people's representatives.

In the late 1980s, as reform advocates looked ahead, the1991 redistricting seemed likely to perpetuate California's gerrymanders. A mounting number of scandals, some involving senior legislators, had

begun to bring into question California's "Professionalized Legislature," the bipartisan Unruh-Monagan reform of the late 1960s, and there were stirrings of a movement to limit legislative terms.

A group of reformers attempted to build on the public's sense of ethical malaise in Sacramento with language that incorporated redistricting in a general scheme of ethical reform. Their initiative, which became Proposition 118, focusing in its title on "Legislature, Reapportionment, Ethics," provided for the creation of a Joint Legislative Ethics Committee to monitor and report on the redistricting process. Recognizing the new power of computer technology, the Legislature was required to give all its members access to computer systems and data and to make the same commercially available to the public. The Legislature was further required to adopt plans by a two-thirds vote, and the plans were to be "automatically" submitted to vote of the people in referenda.

In a step beyond the criteria of Propositions 14 and 39, Proposition 118 attempted to define compactness and contiguity: "populous adjacent territory shall not be by-passed to reach distant population areas" and districts shall "contain no less than 60 percent of the population contained in that polygon, bounded only by straight lines with the shortest possible perimeter drawn around that district;" and "the average of all these percentages for all districts of a type shall not be less than 75 percent." The use of whole cities and census tracts was also prescribed. Districts were to "minimize the division of cities" and no "city smaller than the size of a district shall contain subdivisions of more than two districts," and "no district may contain subdivisions of more than two cities." In addition, districts must "minimize the division of census tracts" so that "no district of a type may contain subdivisions of more than four census tracts except to conform to city or county lines." Although the requirement of submitting the plan to vote in referenda was the major check, Court review was allowed for the violation of criteria and, in the event of voter rejection of plans in the referenda, "any voter may commence a legal proceeding to establish districts that are in compliance."

Another group of reformers, doubting that the provisions of Proposition 118 would check gerrymandering, and believing that its criteria were too complex for voters to understand, developed language for a bipartisan commission of citizens nominated by non-profit, non- partisan organizations and selected by a panel of retired judges. What became Proposition 119 provided for a citizen commission and required the Legislature to transfer $3.5 million to an Independent Citizens Redistricting Fund every decade. The commission, which was to receive plans submitted by the public, was to be composed of twelve members (and alternates) appointed by a panel of three retired Appellate Court justices from a list of registered voters nominated by nonprofit, nonpartisan organizations; five members were to be from each of the major parties; and two must not be members of those parties. Each major party could disqualify two members, who were to be replaced by alternates chosen by the judicial panel. A majority vote of at least seven commissioners, with at least two votes coming from members of each of the two major parties, was required to adopt a plan. The criteria for plans incorporated a provision that "to the extent practicable and consistent with the achievement of the other standards," the proportion of registered voters of each major political party in a district must be within 2% of the statewide population of that party's vote."

The two reform concepts found themselves placed next to each other on the June ballot of 1990: Proposition 118 failed with only 33.9 percent of the vote, Proposition 119 with 36.19 percent. Their poor showing was ascribed to voter confusion over their provisions and the competition between them.

After the initiative failures of the 1980s, an antidote to a renewed gerrymander was found in the same place as in in 1973: the election of a Republican and a Democratic Legislature. Republican Pete Wilson was elected Governor in November of 1990, and in 1991 he vetoed the Democrats' redistricting plans, again throwing the process into the hands of the Court. With Rose Bird no longer on the Court, in

1991 the California Supreme Court followed its 1973 precedent and appointed a Special Master to draw Assembly, State Senate, Congressional, and Board of Equalization districts. And, as in 1973, the Court's Special Master drew a plan focused on communities rather than incumbents and, in the process, created a number of competitive districts.

The redistricting reform movement, previously fueled in large part by outrage over the lack of competition, lost much of its momentum in the 1990s. Many of those involved in previous redistricting reform efforts spent much of the decade on advocacy of term limits, which spread rapidly in the 1990s. For redistricting reformers in California at least, the politically competitive and community-based nature of the districts drawn by the Court Masters quieted reform efforts throughout the decade.

The redistricting of 2001 showed that a Court-drawn plan provided only one decade's relief from gerrymandering and reignited the redistricting reform movement. A Democratic Governor, Gray Davis, acceded to the majority party's plans. State legislative districts were finely tailored to eliminate competition: it was the most complete and effective bipartisan gerrymander in the nation. California's Congressional districts suffered the same fate. Karl Rove in the Bush White House, the Democratic leadership in the Legislature, and leading Republican and Democrats in the House Delegation joined together to employ Michael Berman, a Democratic consultant to draw lines to incumbent advantage. Incumbent members of Congress each contributed $20,000 for Michael Berman's favor in the line drawing process. As Representative Linda Sanchez summarized the incumbents' position:

> "Twenty thousand is nothing to keep your seat. I spend $2 million [campaigning] every year. If my colleagues are smart, they'll pay their $20,000, and Michael [Berman] will draw the district

they can win in. Those who have refused to pay? God help them."[63]

Although the coordination among incumbents was largely the work of the Berman-Waxman "machine," it was a bipartisan effort to perpetuate the status quo.

By way of reaction, redistricting reform plans of several different types emerged, among them two that would have provided for redistricting commissions. A proposal by Ted Costa would have established a panel of appointed Special Masters to propose redistricting plans. California's Judicial Council was required to identify candidates drawn from retired state and federal judges who had never held partisan political office, kept their party affiliation over the preceding five years, and who must disavow for the future any appointive or elected office. The Speaker of the Assembly, the Minority Leader of the Assembly, the President pro Tempore of the Senate and the Minority Leader of the Senate would each identify three qualified judges "who are not members of the same political party as the legislator making the nomination;" and from this pool, the Judicial Council would draw, by lot, three persons to serve as Special Masters and three alternates. The Special Masters must unanimously approve the plan and present it to the Legislature, which must either enact the statute within ten days or propose modifications to the Special Masters. The plan must then be submitted in the next general election as a referendum for approval or rejection by the voters.

In 2003, Governor Gray Davis was recalled. Although redistricting was not prominent in the recall campaign, many Republican activists were keen to revenge his role in the 2001 redistricting. In 2005, Congressman Bill Thomas entered the redistricting reform battle and threw support to the Costa plan. An ambitious and rising Republican star named Steve Poizner led the fundraising and campaigning

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[63] Orange County Register unsigned editorial, "Prop. 27 would strangle redistricting reform in the cradle," September 9, 2010.

for what became proposition 77 on the 2005 statewide special election ballot. Governor Arnold Schwarzenegger also backed the measure, though most of his efforts were focused on other measures he placed on that same November 2005 ballot.

California Common Cause had been wary of redistricting reform proposals in the 1990s and had even opposed some of them. An organization with strong ties to the Democratic Party there was undoubtedly fear of increasing Republican political power in the state. There was a heated internal debate over whether to endorse proposition 77. The national Common Cause board ultimately decided in favor of supporting the reform measure for it realized it could not logically support a redistricting reform measure in Republican-controlled Ohio while opposing a similar redistricting reform measure in Democratic-controlled California. The two campaigns, in California and Ohio, then attempted to link their efforts together to emphasize a bipartisan, good government theme. Governor Schwarzenegger went so far as to travel to Ohio to campaign for the measure opposed by Ohio's own Republican governor.

Proposition 77 would have provided for a mid-decade redistricting and Governor Schwarzenegger made the initiative a center-piece of a larger package of reform proposals. Daniel Lowenstein, a professor at UCLA and a former chairman of the California Fair Political Practices Commission, was chairman of the committee opposing it and Michael Berman, brother of Congressman Howard Berman, was its consultant.[64] The Governor's support was not without its costs, appearing to divide redistricting reformers, even pitting the League of Women Voters, who opposed Proposition 77, against California Common Cause who supported it.

The alliance of Common Cause, Governor Schwarzenegger and other Republican backers of

[64] The Lowenstein/Berman collaboration would reappear in the 2010 debate over Propositions 20 and 27.

redistricting reform met the same fate in November 2005 as they had throughout the 1980s: an overwhelming defeat of the measure by the voters powered largely by an overwhelming spending advantage for its opponents. The initiative failed with only 40 percent of the vote.

Nevertheless, the backers of proposition 77 achieved two very important successes compared with earlier redistricting reform efforts in California. The first was the endorsement of redistricting reform and Proposition 77 in particular by every significant daily newspaper in the state. This success seems to have been largely due to the publicity given to Republican dominance of redistricting nationally: the media had focused much attention on GOP gains in states across the country. The second success was that the Senate President, Democrat Perata and Democratic Speaker Fabian Nuñez, both deeply concerned that Proposition 77 might pass, jointly promised that if voters rejected it, the Legislature itself would put a "better" redistricting reform measure on the ballot and support it. Relying on this promise, the League of Women Voters, which surveys showed was influential with California voters on redistricting reform issues, opposed Proposition 77. In doing so, the League took a lot of criticism from newspaper editorials and the Proposition's supporters. Nevertheless, the League embraced the Senate President and Speaker's promise as proof that Proposition 77 was the wrong reform measure. Their advertised position was that, by voting No, voters would then get a better reform. The legislative leaders would come to regret making that promise.

After voters rejected proposition 77, both legislative leaders essentially ignored their joint promise. Assembly Speaker Nuñez rejected calls to fulfill his promise and brushed aside the resulting criticism. Senate President Perata endorsed a measure that would have created a commission, but one completely beholden to legislative leaders.[65]

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[65] This author was quoted in the press as saying this reform proposal "would have been worse than monkeys

Senate President Perata faced a problem that he could not solve with his toothless commission. In the bipartisan sweetheart gerrymander of 2001, one incumbent had been left out of the deal. The district of Congressman Stephen Horn, Republican of Long Beach, was carved into so many pieces that Horn was forced to retire. The locally popular Congressman, repeatedly reelected from a heavily Democratic district throughout the 1990s, protested, and a bipartisan storm of protest erupted in the Long Beach area. Unlike most such public complaints about partisan gerrymandering, this one persisted. In part riding that wave of protest, Democrat Sen. Alan S. Lowenthal of Long Beach was elected to the State Senate on a platform that included a strong redistricting reform plank. Once elected, Lowenthal appeared as a committed advocate for reform, eventually pushing so hard that Senate President Perata allowed a vote. Lowenthal's plan, using language heavily influenced by Arizona's Proposition 106, which passed in 2000, would have established a five-member citizen commission. A panel of ten retired Appeals Court justices was to bring into being a pool of twenty-five nominees, with ten from each major party, and five not registered to either major party. From this pool, the Speaker of the Assembly, the Minority Leader of the Assembly, the President pro Tempore of the Senate and Minority leader of the Senate were each to make one appointment. These four appointees would then "gather and select by majority vote the fifth member who is not registered with any party already represented on the Commission." The Commission was required to make public display of maps and provide for review and recommendations by members of the Legislature and by citizens. In a break with most other California redistricting reforms, and essentially repeating the language of Arizona's Proposition 106, the criteria were minimal: compliance with the U.S. Constitution and the Voting Rights Act; population equality "to the extent practicable;" compactness and contiguity; respect for communities of interest; boundaries using visible geographic features, city and county boundaries, and

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throwing darts at a dartboard."

undivided census tracts. But it added the goal of political competition: "To the extent practicable, competitive districts should be favored when to do so would create no significant detriment to the other goals listed…."

The Senator's proposal for a ballot measure to establish such a commission was approved by the State Senate. It was no secret in the Capitol, however, that many of the Democrats who voted for it did so knowing that there was no chance the Assembly would approve the bill.

Assembly Speaker Nuñez was in no mood to endorse redistricting reform. Angered that Perata was leaving him politically exposed, he shut down the Assembly for the weekend to prevent the formal delivery of the Senate-passed bill. As expected, Lowenthal's bill died in the Assembly without as much as a hearing.

Drafting a New Proposition

California's history of incumbent abuse of the redistricting process had brought together a motley collection of reform advocates: candidates of both parties, shut out of any hope of election in stacked districts; Republican activists, who felt that their Party had been relegated to perpetual minority status; Democratic activists who, by contrast, believed that only the bipartisan gerrymander of 2001 prevented their Party from achieving the super majority needed to overturn Proposition 13 and achieve other Democratic policy goals; moderates of both parties, worried by the polarization and growing extremism of politics; some minority groups who felt that white incumbents had security at the expense of minority candidates; scholars and theorists who believed that competition was vital to the representative process; Governor Schwarzenegger, angered by the defeat of his own reform package, and faced with a large and seemingly permanent Democratic majority in the Legislature; civic organizations, led by Common Cause, seeking a larger role for citizens and greater transparency in the

process; and a League of Women Voters embarrassed by the failure of the legislative leadership to perform on its promise for redistricting reform.

Representatives of this diverse array of reformist groups contributed in different ways to the development of a new initiative. Common to all was the aim to end, once and for all, incumbent control of redistricting. For many groups the ideal reform would even eliminate any trace of incumbent influence on the process. At most, they were prepared to accept a limited veto by legislative party leaders of a minimal number of citizen applicants for Commission membership.

If not incumbents, then who should draw the lines? Reforms that gave judges the power had all failed. Common Cause and, somewhat less consistently, the League of Women Voters had long favored different forms of citizen involvement in redistricting. The Rose Institute had experimented in several municipal jurisdictions, both in California and Arizona, with "citizen kits" and open community hearings on district boundaries. Arizona's Independent Redistricting Commission, established by Proposition 106, had adopted the citizen kit concept and used Rose Institute consultants to staff the process. In 2001-2 the Arizona Commission drew praise for citizen-drawn plans that included numbers of competitive districts. Lowenthal's legislation, based around Arizona's reform, had given further prominence to the idea that citizens were fully capable of drawing districts. Steve Lynn, the chairman of the Arizona Commission, spoke at Rose Institute conferences on its experiences and gave encouragement to California's development of a citizen process.

Questions remained, however. As to the appointment of citizen line-drawers: who should be responsible for their selection? Legislative leaders played a key role in the citizen selection process in Arizona, as they would also have done in Lowenthal's plan. To most of those involved in the development of the new initiative, however, the distrust of incumbents was so deep-seated that they were dismissive of any hybrid legislator-citizen process. If they had their way, it would be a process

wholly controlled by citizens from which all taint of incumbent politics would be removed.

Such a decision might have led to efforts to codify the qualifications of citizen commissioners. Instead, it proved easier, and more in line with the anti-incumbent sentiment of the reform groups, to codify a series of disqualifications. The new approach disqualified anyone who had prior involvement in legislative politics, whether as paid staff or consultants to legislators or to Party central committees, as candidates for office, or as lobbyists. The language also disqualified anyone with family relationships to legislators or relationships to family members of legislators. The energy given to framing disqualifying language of this kind reinforces the hard-learned belief that legislators would exploit any tiny opening to manipulate the commission for partisan gain.

The criteria that should govern the redistricting process also attracted considerable discussion. Several simple criteria were easy enough to accept. Obviously, constitutional requirements of population equality and Voting Rights Act protections must be observed. Incumbents had often played political games with district numbering, and a requirement of consecutive numbering from north to south was included to prevent that. Similarly, the "nesting" of districts, so that a senate district would be composed of two whole Assembly districts, would limit even the Commission's ability to manipulate lines for political ends, with the side benefit that nesting had been shown to increase the number of competitive elections. But Arizona's 2001 Commission experience had raised some troubling questions about criteria. One was the definition of "competition": should it be defined or merely stated as a general goal? And should the criteria be prioritized and, if so, in what order?

Arizona's experience also focused attention on the voting requirements that would apply to the Commission. Arizona's Proposition had provided for a "non-partisan tie breaker:" a "neutral" commissioner, with ties to no party, able to cast the deciding vote, was expected to hold the power

over commission deliberations.[66] In the eyes of the California reformers, this gave too much power to a single individual. As the reformers' interest in diversity on the Commission clearly required a much larger Commission than Arizona's, the reformers added a voting system for key votes that would require the participation of both partisan and non-partisan members: 9 of the 14 Commissioners must approve plans and key hiring decisions, and among those nine had to be a majority of the Democratic Commissioners, a majority of the Republican Commissioners and a majority of the "other" Commissioners.

Another general question was whether to include Congressional districts in the initiative. Democrats in the Legislature had repeatedly proved that they would oppose almost any reform, and in the case of a citizen commission would do so vigorously and openly. Many Republican state legislators would also oppose it, but not openly. The historic opposition to redistricting reform proposals came from California's members of Congress with their plentiful campaign bank accounts. Anything that would reawaken the bipartisan Congressional coalition of 2001 would assure the initiative's defeat.

Another hotly debated issue among the reformers was the extent of the citizen commissioners' responsibility for drawing district maps. There was concern that anyone with experience in the field would also have ties to partisan groups, yet there was understanding that the Commission could not draw plans without technical experts to assist them. While the Rose Institute had a long history of working with municipal citizen commissions whose function was primarily to receive and review maps drawn by members of the public using citizen kits, there was concern that the scale of California might limit the effectiveness of such an approach and might allow incumbents to re-enter the process by submitting plans. Again, the fierce animus toward incumbents decided the question: the citizen

[66] Though, as noted elsewhere, the tie-breaker in 2001 was not as important as anticipated, as the Legislative District plan passed 4 to 1 and the Congressional plan passed with a unanimous 5-0 vote.

commissioners themselves would be the line-drawers, and the super-majority voting requirements originally designed for adopting final plans would also apply to the selection of technical consultants and key staff members.

Perhaps the biggest challenge for reformers was the issue that reform opponents used to defeat Proposition 77 and prior initiatives: who would serve on the commission? Survey and focus group studies confirmed the unpopularity of politicians; even judges were not highly rated; but "independent auditors" drew overwhelmingly positive responses. Research showed that the Bureau of State Audits had good reputation, a professional staff, and federal legal limits on the authority of Legislative leaders and the Governor to influence their work. It seemed the best choice for overseeing a citizen application process. But, in a lesson learned from prior efforts to assign the selection process to the similarly highly respected Legislative Analyst office that were vehemently opposed by the Legislative Analyst (Elizabeth Hill) when she was asked if she was open to the role, the Auditor was not informed of the plans to assign the selection process to her office.

As work went on discussing and designing language for the initiative, a major issue loomed over funding for the upcoming campaign. Most of the civic organizations involved in redistricting reform had suffered defeats of initiatives, many of which were explained by their lack of campaign money. Common Cause, dependent on membership fees, could not fund the campaign. Schwarzenegger, although he presided over a cash-strapped party, would undoubtedly be the primary funding source through his "Dream Team" fund. He had experienced his own taste of failure in the humiliating defeat of his reform package and was ready to join Common Cause and other civic organizations in a new reform effort. Yet, for many Progressives, Schwarzenegger's support was an embarrassment. Another possible Republican contributor was Charles Munger.

A research associate with the SLAC National Accelerator Laboratory at Stanford University, Munger

had first become interested in redistricting when working as a volunteer for Steve Poizner's campaign in a gerrymandered Assembly district. As the son of Warren Buffet's partner in Berkshire Hathaway, Munger had the financial resources to be a financial angel for the initiative campaign. He worked closely with Kathy Feng, the President of California Common Cause, who was the major figure in the drafting process. Recalling her collaboration with Munger, Feng, called it an "excruciatingly long" process answering the detailed, methodical questions he had before agreeing to commit. She acknowledged the thoroughness of his approach saying that he eventually became an expert on redistricting law.

With around 400,000 members, California Common Cause (CCC) was well established as the State's major non-profit, non-partisan, grassroots advocacy organization. At the heart of its mission was the aim to "strengthen public participation in government" and to "ensure that public officials and public institutions are accountable and responsive to citizens" Claiming to be an "independent voice for positive change" and "a watchdog against corruption and abuse of power" CCC had previously joined with the Republican Party and the Rose Institute in failed efforts to reform redistricting, though in recent years Common Cause was considered closely allied the Democratic leaders of the Legislature on many issues.

Although it was clear that there would be an advantage to placing the initiative on the June ballot, when Republicans would constitute a larger share of the electorate, drafting and organizational delays meant that it would have to go onto the November ballot of 2008. There was never any doubt that the initiative must be a constitutional amendment, beyond the power of the Legislature to rescind, even though its qualification would require collecting a larger number of signatures. The number of signatures, therefore, must equal 8% of the votes cast in the 2006 gubernatorial election: for 2008, this was 694,354 signatures.

Initiative Language

The language of the initiative involved major changes in California's long and complex Constitution. It amended Article XXI added Section 2 to Article XX I and a new Section 3 to Article XXI. It enacted Title 2, Division 1, Chapter 3.2 of the Government Code.

The changes gave authority for establishing Assembly, Senate, and Board of Equalization district boundaries to a fourteen-member commission chosen as follows:

1. Government auditors select sixty registered voters from an applicant pool.
2. Legislative leaders are permitted to reduce the pool through a veto of 2 pool members by each of the 4 majority and minority legislative leaders.
3. Auditors then pick eight commission members by lottery, and those commissioners pick six additional members for a total of fourteen.

The commission must include five commissioners of the largest political party in California (then and since the Democratic party), five commissioners from the second largest party (the Republican party), and four independents registered with neither the Democratic nor Republican party. For approval, new district boundaries need votes from three commissioners of the largest party, three from the second largest, and three of the commissioners from neither party. The commission may hire lawyers and consultants to assist it in its work.

Criteria were spelled out in numbered order:

> (1) Districts shall comply with the United States Constitution. Senate, Assembly, and State Board of Equalization districts shall have reasonably equal population with other districts for the same office, except where deviation is required to comply with the federal Voting Rights Act or allowable by law.

(2) Districts shall comply with the federal Voting Rights Act (42 U.S.C.Sec. 1971 and following).

(3) Districts shall be geographically contiguous.

(4) The geographic integrity of any city, county, city and county, neighborhood, or community of interest shall be respected to the extent possible without violating the requirements of any of the preceding subdivisions. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

(5) To the extent practicable, and where this does not conflict with the criteria above, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant population.

(6) To the extent practicable, and where this does not conflict with the criteria above, each Senate district shall be comprised of two whole, complete, and adjacent Assembly districts, and each Board of Equalization district shall be comprised of 10 whole, complete, and adjacent Senate districts.

(e) The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.

(f) Districts for the Senate, Assembly, and State Board of Equalization shall be numbered consecutively commencing at the northern boundary of the State and ending at the southern boundary.

The official ballot summary for Proposition 11 read as follows:

- Changes authority for establishing Assembly, Senate, and Board of Equalization district boundaries from elected representatives to 14-member commission.
- Requires government auditors to select 60 registered voters from applicant pool. Permits legislative leaders to reduce pool, then the auditors pick eight commission members by lottery, and those commissioners pick six additional members for 14 total.
- Requires commission of five Democrats, five Republicans and four of neither party. Commission shall hire lawyers and consultants as needed.
- For approval, district boundaries need votes from three Democratic commissioners, three Republican commissioners and three commissioners from neither party.

In line with the focus on excluding incumbent influence, the language went into detail on the disqualifications that would attach to citizens with any links to the Legislature. The Initiative provided that by January 1, 2010, the State Auditor was to initiate "an application process, open to all registered California voters in a manner that promotes a diverse and qualified applicant pool." Disqualifying attributes of citizen applicants were listed as follows:

> (2) The State Auditor shall remove from the applicant pool individuals with conflicts of interest including:
>
> (A) Within the 10 years immediately preceding the date of application, neither the applicant, nor a member of his or her immediate family, may have done any of the following:
>
> (i) Been appointed to, elected to, or have been a candidate for federal or state office.
>
> (ii) Served as an officer, employee, or paid consultant of a political party or of the campaign committee of a candidate for elective federal or state office.
>
> (iii) Served as an elected or appointed member of a political party central committee.

(iv) Been a registered federal, state, or local lobbyist.

(v) Served as paid congressional, legislative, or Board of Equalization staff.

(vi) Contributed two thousand dollars ($2,000) or more to any congressional, state, or local candidate for elective public office in any year, which shall be adjusted every 10 years by the cumulative change in the California Consumer Price Index, or its successor.

(B) Staff and consultants to, persons under a contract with, and any person with an immediate family relationship with the Governor, a Member of the Legislature, a member of Congress, or a member of the State Board of Equalization, are not eligible to serve as commission members. As used in this subdivision, a member of a person's "immediate family" is one with whom the person has a bona fide relationship established through blood or legal relationships.

The Campaign for Proposition 11

For the members of California Common Cause who had reluctantly supported or even opposed Proposition 77 in 2005, and even more for the members of the League of Women Voters, the failure of President Pro Tem Perata and Speaker Nuñez to keep their promise on redistricting reform was a bitter memory. Many believed that the hypocrisy of that promise had been fully exposed by the games surrounding Senator Lowenthal's bill. Now, Common Cause strongly backed the efforts of its executive director Ms. Feng to organize a coalition in support of the new redistricting reform ballot measure. At the same time, League of Women Voters concerns about the optics of supporting a redistricting reform proposal in Republican-dominated Florida while opposing one in Democratic-dominated California finally pushed the League of Women Voters to support the California redistricting reform measure, despite the objections of the legislative leadership. Congressman Thomas and his Republican allies in the redistricting reform fight also made an important strategic

decision to tone down the partisan Republican profile of redistricting reform. Republican office holders agreed, some reluctantly, to take a quiet backseat in the Common Cause-led coalition. Common Cause also managed to include in discussions, though not in support of the measure, close allies of the legislative leadership such as MALDEF and the Carpenters' Union. The coalition also benefited from the interest of the leadership of the powerful AARP in getting its members more involved in legislative issues. AARP's national president made a trip out to California to investigate the opportunity to expand AARP's civic engagement in California beyond their traditional focus on issues affecting the elderly. He met with Common Cause and other coalition leaders[67] before approving AARP's strong support for the redistricting reform proposal.

With the traditionally liberal Common Cause and the League of Women Voters in the lead, and with Schwarzenegger providing financial backing, Proposition 11 made it onto the November 2008 ballot. Charles Munger met with California's Congressional Republicans and won their agreement to proceed with the development of an initiative restricted to the districts of the State Legislature and Board of Equalization – not covering Congress. Even more important, Kathay Feng and the other backers of redistricting reform also pulled off a small miracle by convincing Congresswoman Nancy Pelosi, Congressman Howard Berman, and other California congressional Democrats to refrain from the massive anti-reform, multimillion dollar 'No' campaigns that had clobbered previous reform efforts. The details of their negotiations remain confidential, but Republican dominance of redistricting nationally was one factor influencing House minority leader Pelosi: she likely hoped that independent redistricting commissions would be approved in Republican controlled states. Moreover, the agreement of the reform coalition to exclude Congressional districts and to limit the reform to

[67] And this author.

legislative redistricting was a clear result of this negotiated detente.

Even without any significant spending on the 'no' side, the 'Yes on Proposition 11' campaign faced a significant challenge. The task was to win over voters who had repeatedly voted against redistricting reform, as recently as against Proposition 77

The firm of Goddard Gunster Public Affairs was retained to manage the campaign. Strategically, the campaign aimed to exploit voter dissatisfaction with the Legislature. The Legislature's repeated failures to pass a budget, partisan gridlock, growing political extremism, and political scandals were all linked to the lack of competition in legislative districts.

The Goddard firm also emphasized grassroots campaigning and an effort to win group endorsements. Business groups supporting Proposition 11 included: the Los Angeles Chamber of Commerce; the California Small Business Association; the National Federation of Independent Business, California; Silicon Valley Leadership Group; the Small Business Action Committee. Civic organizations included: The League of Women Voters; ACLU - Southern California; Bay Area Council; Bay Area Leadership Council; Neighborhoods for Clean Elections, Santa Clara Cities Association. Republican Governor Arnold Schwarzenegger and former Democratic Governor Gray Davis were joined by the California Democratic Council and the California Republican Assembly in support of Proposition 11. Although the major ethnic minority groups either opposed the proposition or stayed neutral, some minority business groups gave their support, including the California Black Chamber of Commerce and Central California Hispanic Chamber of Commerce, as well as North San Diego County NAACP. Most Sacramento-oriented lobbying groups disassociated themselves from the campaign, but the AARP, the California Police Chiefs Association and the California Taxpayers' Association gave it support.

In 1981-2, under a grant from the California the Roundtable, the Rose Institute had made relatively unsuccessful presentations on the need for redistricting reform to the editorial boards of more than

70 California newspapers. But the 2001 bipartisan gerrymander set the stage for a series of editorial board discussions in 2005 with Proposition 77's Steve Poizner and, again, the Rose Institute[68] that led to the unanimous endorsement of Proposition 77 by every major daily newspaper in the state. In 2008, the Proposition 11 campaign built on that background to draw endorsements from a plurality of the major newspapers in the State including the *Los Angeles Times' the San Francisco Chronicle; San Jose Mercury News,* and *the Fresno Bee.*

Three campaign committees supporting Proposition 11 filed with the Secretary of State's office and some donors contributed to more than one of the committees. The biggest contributors were:

- Gov. Schwarzenegger's California Dream Team, $2,446,000.
- Charles Munger Jr., son of Berkshire Hathaway billionaire, Charles Munger, $1.3 million
- Michael Bloomberg (the mayor of New York City), $250,000.
- Howard Lester (of Williams-Sonoma), $250,000.
- Brian Harvey, president of Cypress Land Company, $250,000.
- Reed Hastings, founder of Netflix, $250,000
- New Majority California PAC, $237,500.
- Meg Whitman, CEO, eBay, $200,000.
- William Bloomfield, $150,000

Kimball Petition Management to collect signatures and those signatures were provided to election officials on May 6. On June 17, the California Secretary of State announced that Proposition 11 qualified for the ballot.

[68] The Rose Institute was represented by the author.

The Campaign Against Proposition 11

The official committee to oppose Proposition 11, titled "Citizens for Accountability; No on Proposition 11," had a little-known Democratic activist, Paul Hefner, as its spokesman. Top Democrats at the national level opposing it included U.S. Senator Barbara Boxer and House Speaker Nancy Pelosi (who gave her name but no active support or funding). Most of the major minority groups were also in opposition, including the Mexican American Legal Defense and Education Fund, the NAACP Defense Fund and the Asian-American Pacific Legal Center. Traditional Democratic allies, such as the Correctional Police Officers Association and the California Teachers Association, promised help with the campaign.

In June, the California Democratic Party declared its opposition and an effort began to mobilize Party activists to push against the initiative. CCC's Kathy Feng complained about Democratic lobbying of reform allies to turn them against the initiative. Yet, the Democratic leadership from the Legislature, Speaker Fabian Nunez and State Senate leader Don Perata failed to mount the kind of unified attack that had defeated earlier reform initiatives.

One cause of the failure to develop an all-out Democratic assault was the impact of term limits. Proposition 140 of 1990 had limited members of the Assembly to three two-year terms, and members of the State Senate to two four-year terms, with a lifetime ban against seeking the same office. The incentive to seek district security through redistricting was, therefore, much less. Moreover, Assembly incumbents, more likely now than in the past to seek election to the State Senate, had less interest in cooperating to assist the security of members of the upper house. The fact, also, that the terms of leaders were also limited was an important fact: Nunez had already indicated his intention to leave the Legislature at the end of 2008, and Perata was planning to leave the Legislature to run for mayor of Oakland. Neither, therefore, would continue in their positions. Proposition 140 meant the end of

Willie Brown-style leadership in redistricting.

Another reason for the muted Democratic opposition to Proposition 11 was that polls in June showed that it was attracting only around 40 percent of voters. There had been much higher levels of polling support for Proposition 14 in July of 1982.[69] They remembered, also, that Proposition 14 had suffered from a lack of controversy when the Democrats, convinced that it would pass, did nothing to oppose it. To the limited extent that there was a Democratic strategy for opposing the initiative it was merely to turn out their partisan faithful while also weakening Republican enthusiasm for reform. Part of the Democrats' problem was the challenge to frame an argument against citizen involvement and the open public process prescribed by the initiative.[70] One argument, developed in the hope of deterring Republicans from voting for the initiative, was an alleged "lack of accountability to Taxpayers" and the fact that commission members were "paid $300 a day, plus unlimited expenses in the form of staffing, offices, etc." The well-known hostility of Republicans to bureaucracy also inspired the argument that it allowed "selected bureaucrats to maintain a hold on redistricting as they wish." A dark prospect of conspiracy was also raised: the unknown commissioners might pursue hidden agendas.

Other arguments were directed to voters of color. Minority candidates had won in a number of seats opened by the term limits provisions of Proposition 140 and some had assumed senior leadership positions in the Legislature. Latinos and African Americans were reminded that they might lose incumbents in a competitive process. Opponents of Proposition 11 fanned suspicions of change, warning that the use of county and city lines might undermine attention to voting rights issues.

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[69] DiCamillo, Mark and Mervyn Field, "Low Awareness but Initial Voter Backing of Five Statewide Ballot Measures," July 22, 2008. http://field.com/fieldpollonline/subscribers/Rls2280.pdf

[70] Official Ballot arguments, Proposition 11 of 2008.

Opponents also questioned whether districts drawn under the new process would improve in any important sense on the current legislatively-drawn districts and whether safe or un-competitive districts were really the cause of budgetary deadlock in Sacramento:

> "For good and bad reasons, commissions tend to be more expensive. There are high costs associated with being more open and independent. . . . Commissions are also no less likely to end up in lawsuits or political controversies. Redistricting is inherently political, involving choices and trade-offs . . . the sins of legislative redistricting have been grossly exaggerated. Partisan redistricting is rare, and in states with term limits, redistricting is less important than it used to be. Studies show that effects of redistricting on competition and party polarization are marginal at best, casting doubt on the hyperventilated assertions of commission advocates. . . .So adopt a commission if you must, but expect no miracles. Just be prepared to pay the consultants' bills."[71]

The California Correctional Peace Officers Association contributed a total of $577,000 to the Leadership California Committee, Senate President Pro Tem Perata's PAC. The contribution, although immediately challenged by CCC as an indirect contribution to "No on 11," was upheld by the Fair Political Practices Commission.

In late July of 2008 the "No on 11" campaign had cheering news from the Field Poll: Proposition 11 had only 42% support from likely voters. A month later, survey results released by the Public Policy Institute of California (PPIC) suggested that support levels might even be declining: Prop. 11 had only 39% of voters in support. Then, in late September, another PPIC survey showed only 38 percent in

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[71] Jost, Kenneth, "Will new reforms limit gerrymandering," CQ Researcher, February 25, 2011, Volume 21, Number 8, pages 169-192.

support. The Democratic strategy of allowing the initiative to fail because of a lack of controversy seemed to be working. Moreover, since Barack Obama was on the November ballot, Democratic turnout was expected to surge, especially in minority communities where opposition to Proposition 11 was highest.

In fact, however, although most political analysts expected it to fail, Proposition 11 passed with 50.82 percent of the vote. Its margin of fewer than 200,000 votes meant that it won more narrowly, and drew fewer votes, than any of the other statewide propositions on the November 2008 ballot.

A careful reading of the Field Poll of October 31 would have revealed the potential for a narrow victory. A week before the election, Proposition 11 was attracting somewhat higher levels of support: 45 percent of likely voters favored it and only 30 percent opposed. At that late stage in the campaign, moreover, there were still 25 percent undecided: the poll suggested that there might be an opening for victory if the undecided followed the trend in support. The major key to victory, however, was the strong support among Republican voters: 53 percent were in support, only 20 percent in opposition. Almost as important was the split among Democratic registrants; 41 percent supported and only 34 percent opposed the Proposition.

In any event, the California Independent Redistricting Commission was now a reality, but only for legislative redistricting. Congressional redistricting remained under the legislature's control.

Battling Initiative Campaigns

No sooner had Proposition 11 received the assent of the voters in 2008 than its opponents began efforts to repeal it and Representative Thomas's group began efforts to expand it to include Congressional redistricting.

This was the origin of two initiatives for the November 2010 ballot: Proposition 27, titled the

"Financial Accountability in Redistricting Act" would repeal Proposition 11 and eliminate the Commission. Proposition 20, known by its supporters as the "Voters First Act" would expand the Commission process to include Congressional districts.

While the Common Cause-led coalition had pledged only to put legislative districts under the control the commission, almost no one was surprised when Congressman Thomas and his allies appeared in 2010 with a measure adding congressional redistricting to the Commission's portfolio. Given an overwhelming surge of local and national media endorsements of the 2008 reform, it was now difficult for the old coalition of Congresswoman Pelosi, Congressman Berman, and the League of Women Voters to block this latest reform proposal. Now that the Commission was in place, the 'No' campaign had lost its traditional focus of attack based on sowing confusion and questions about who might sit on a theoretical commission or how it might operate.

In their attempt to bring Congressional redistricting under the Commission's control, the reformers were raising the stakes. It would inevitably involve a major counter-attack by the Democrats led by the formidable Berman-Waxman machine. Notorious for their no-holds-barred brand of politics, Congressmen Waxman and Berman would have the assistance of Michael Berman, the Democrats' chief consultant on redistricting. They could also rely on the backing of Daniel Lowenstein, a professor at UCLA, a former chairman of the California Fair Political Practices Commission, and an intransigent opponent of redistricting reform.

The reform advocates knew that the Democrats could raise millions from supporters such as billionaire Haim Saban and that incumbents would dig deep into their campaign war chests to defend their safe seats. Even Schwarzenegger's "Dream Team" would be unable to match them. Much seemed to hinge, therefore, on the willingness of Charles Munger to fund the campaign for a Congressional reform proposal. He had been an important funding "angel" for Proposition 11. The

key element in moving forward with Proposition 20 was his agreement to fund it. Eventually he would personally contribute more than $11 million to the Proposition 20 campaign. At least in terms of funding, therefore, the competition would be on a reasonably equal level.

On the Democratic side, the focus was on Proposition 27. Commission opponents registered two campaign committees in opposition to Proposition 20, but neither received substantial funding. The money was concentrated their effort on a "Yes" campaign for Proposition 27, which included a "poison pill" provision that, if passed, would nullify Proposition 20. The reformers countered with a similar provision. So if both propositions received a majority vote, the proposition that received the higher vote would take effect.

The anti-reform coalition poured millions of dollars into the campaign committee endorsing a "Yes" vote on California Proposition 27, including contributions from 17 members of the California's Congressional delegation, Democratic members of the California State Legislature, and major Democratic donors. The American Federation of State, County and Municipal Employees contributed $1,250,000 and the American Federation of Teachers $1,000,000. Haim Saban's $2,000,000 contribution was the largest individual donation.

Proposition 27 supporters drew on their experience crushing the competing reform provisions on the 1990 ballot, Propositions 118 and 119. One part of the Proposition 27 strategy was that voter confusion between two initiatives might defeat both initiatives. Although such an outcome would leave the Commission process in place for legislative redistricting, it would shield Congressional redistricting from the process.

The qualification process for each proposition, requiring a minimum of 694,534 signatures, provided an early test of the competing initiatives. For Proposition 20, the process was conducted by National Petition Management: at a cost of $1,937, 380 NPM gathered 1,180,623 signatures, easily qualifying it.

By contrast Kimball Petition Management spent $3,031, 085 to secure many fewer signatures for Proposition 27; but both qualified for the ballot.

The debate between the two sides covered familiar territory. Lowenstein's arguments for Proposition 27 focused on the presumed antipathy of Republican voters to unaccountable bureaucrats and waste of taxpayer dollars:

> "Under current law, three randomly selected accountants decide who can be one of the fourteen unelected commissioners who head a bureaucracy that wields the power to decide who represents us. This reform will ensure that those who make the decisions are accountable to the voters and that all their decisions are subject to approval by the voters."
>
> – And –
>
> "A group of unelected commissioners, making up to $1 million a year in cumulative salary, preside over a budget that cannot be cut even when state revenues are shrinking."

A further argument even raised the specter of segregation:

> "Districts must be segregated by income level and …all districts be segregated according to 'similar living standards' and that districts include only people 'with similar work opportunities.'"

Activists in the campaign for Proposition 20, reacting in outrage to what they perceived as cynical misinformation, campaigned using ever stronger anti-incumbent themes. They expanded on Proposition 11's unlikely coalition of civic organizations, election-reform groups, civil rights nonprofits and former officials from both major parties. To a much greater degree than in Proposition 11, also, they managed to win endorsements from media. *The Los Angeles Times*, for example,

strengthened its support for redistricting reform in a hard-hitting editorial of September 24, condemning Proposition 27 as the tool of "Big Money" and incumbent interests:

> "Proponents of the proposition smugly titled it the Financial Accountability in Redistricting Act, and they argue that it will save money, that California cannot, in this hour of fiscal crisis, afford the 14-member commission and the staff required to carry out its duties. That's fraudulent, and they know it. California's crisis is real, but the citizens commission is an antidote, not a contributor."

In the end, even Congressman Berman (who had clearly organized and funded the 'No' campaign, and whose brother was its chief consultant) denied having any role in it:

> "With Election Day near, UCLA law professor Daniel Lowenstein is a lonely man. As spokesman for the widely pilloried Proposition 27, he hasn't got powerful California politicians Howard Berman or Nancy Pelosi, who both back it, to actually pitch the measure. Proposition 27's billionaire supporter Haim Saban — now said to be embarrassed that he funded it without grasping the fine print — doesn't talk with him."[72]

In the election of November 2, Proposition 20 was approved with 61.2 percent of the vote. Proposition 27 failed with 40.6 percent of the vote. The Citizen Commission now had a mandate to draw new lines for both Congress and the State Legislature. California's Independent Redistricting Commission was now firmly in place.

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[72] MacDonald, Patrick Range, "Prop. 27 Gerrymander Supporters Duck and Cover," LA Weekly. October 28, 2010.

The Process

The task of designing and opening the citizen applicant process fell to Elaine M. Howle, California's State Auditor.[73] The Bureau of State Audits (BSA), a quasi-independent body, is required to "provide accurate, unbiased, and timely assessments of financial and operation aspects of state and local government entities."[74] The BSA was required by the new law to follow seven prescribed steps:

1. By January 1, 2010 to initiate the application process.
2. Remove all applicants with "conflicts of interest" as defined in the law.
3. Form an Applicant Review Panel (ARP) staffed by three state-employed auditors
4. The ARP must select 60 qualified applicants, 20 of whom must be Democrats, 20 Republicans, and 20 registered with neither party.
5. The four party leaders in the Legislature may strike up to two applicants each
6. The BSA must randomly draw eight applicants by November 10, 2010
7. The eight applicants must then choose six applicants with a requirement to assure diversity including geographic, gender, racial and ethnic factors.

BSA lacked any experience in such a process. Its solution was to begin with the development of regulations to which it then sought public comments. Regulations limiting Commission membership by requiring competence in analytical and mapping skills drew immediate hostile comment from

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[73] Ms. Howle had more than 20 years of auditing, management, and leadership experience with the California State Auditor's Office and its predecessor office, the Office of the Auditor General. She began her career in state government in 1983, joining the Office of the Auditor General, the predecessor agency to the California State Auditor's Office, as an entry-level auditor conducting performance audits on a variety of state and local governments. She was promoted to a supervising auditor in 1987 and a principal auditor in 1994. She became deputy state auditor in 1999 before being appointed California's first female state auditor in 2000. See https://www.auditor.ca.gov/aboutus/state_auditor.

[74] From the "About Us" page of the Bureau's website, https://www.auditor.ca.gov/aboutus, accessed August 23, 2015.

several minority groups. They argued that such regulations entailed blanket disqualification of the great majority of the State's population. By way of response, the BSA relaxed the technical requirements to no more than a basic familiarity with maps. Draft regulations attempting to define compactness, community of interest, and other Proposition 11 terms were drafted but ultimately rejected.

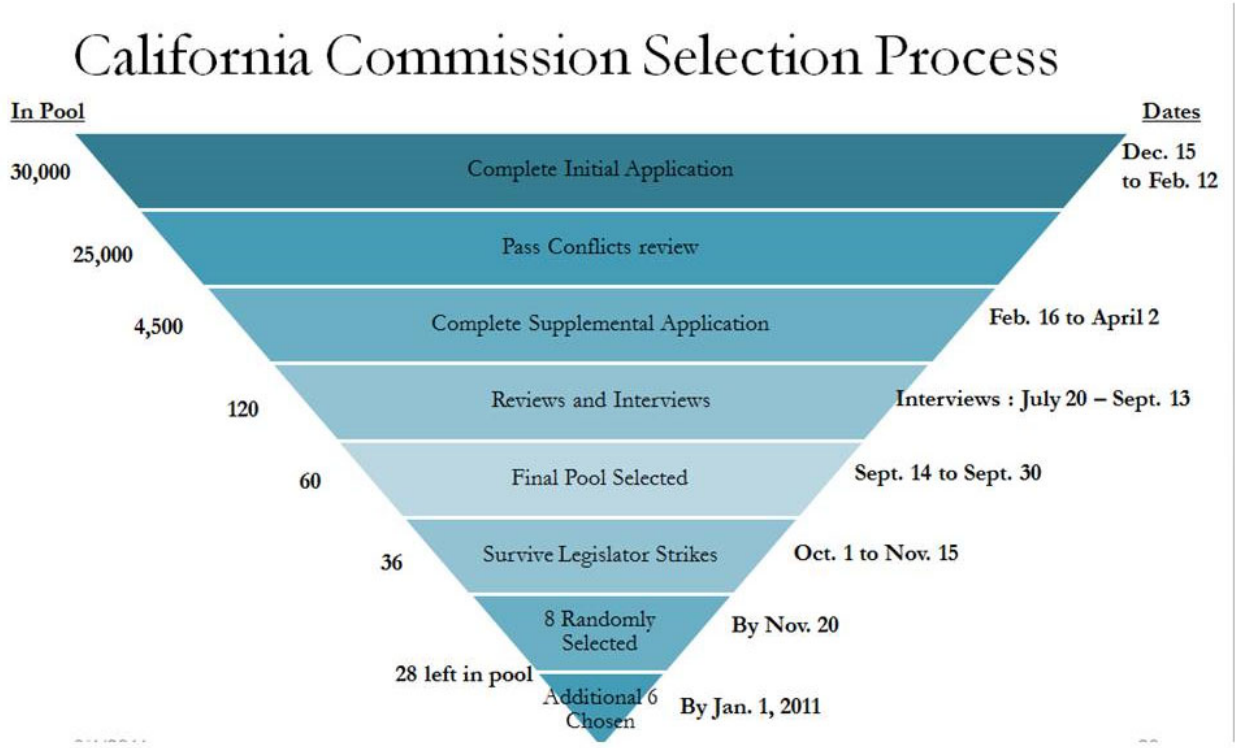
To monitor and assist the BSA, a number of civic and reform organizations formed a Working Group led by California Forward. This was an organization formed in 2006 by five major California foundations – The California Endowment; The Evelyn and Walter Haas, Jr. Fund; The William and Flora Hewlett Foundation; The James Irvine Foundation; and The David and Lucile Packard Foundation. They had charged California Forward with reshaping the future of the Golden State by "fundamentally changing the way government operates." Also involved in the Working Group were CCC, the League of Women Voters, the NAACP, AARP, MALDEF, NALEO, the Asian Pacific Legal Center and the Rose Institute. A cooperative relationship soon developed between the Working Group and the BSA. The James Irvine Foundation made a number of grants to several of the groups involved, including a $250,000 award to CCC and awards of $100,000 to NALEO, $50,000 award to the Urban League. In making the grants, the Irvine Foundation put special emphasis on assuring the diversity of the Commission and the transparency of its processes. CCC hosted conferences and provided training to individuals seeking involvement.

Although without experience in publicizing and organizing a contact program with citizens, the BSA began a grassroots effort to bring the application process to the attention of California voters. The Bureau generated an e-mail campaign to local governments, academic institutions, and civic organizations; inserted a notice of the application process in the Official Voter Guide for the May 19, 2009, special election; and retained the well-connected Ogilvy Public Relations firm with a $600,000 contract that included developing and placing advertisements in print and radio. The process attracted

more than 30,000 initial applications.

BSA held its first "Interested Persons" hearings in Sacramento, Los Angeles, San Diego and Fresno between January and March of 2009. A press release announcing final regulations was issued on October 19, 2009. Initial applications were accepted on-line between December 1, 2009 and February 16, 2010.

As the graphic below shows, there was massive interest in serving on the commission with more than 30,000 Californians filling out the initial application.



The first ARP meeting, combined with training of ARP members, was held on February 25, 2010, and seven further ARP meetings were held between April 19 and September 23. The ARP's task was to winnow down the 30,000-plus initial applications. The auditor had set up a two-stage application process which began with an initial set of questions screening commission applicants for the huge list of disqualifying conflict of interest provisions written into Proposition 11. Applicants passing this

initial screen were then invited to write a series of application essays and to collect and submit three letters of recommendation. A panel of three auditors from the State Auditor's office then reviewed the applications to select finalists for interviews by the audit panel. The panel then sent a list of finalists to legislative leaders each of whom had the power to veto two members of this final pool.

The first step reduced the pool to just short of 25,000 applicants. By the third meeting that number had been reduced to 4,562; by the fourth to 622; by the fifth to 314; and by the sixth to 120. At the seventh meeting, the ARP conducted interviews with 115 applicants and at the eighth meeting it arrived at the desired total of 60. By November 10, after the legislative leaders' "strike process," the pool was reduced to 36 applicants and a random public drawing on November 18 decided the final eight commissioners. On December 15 the eight finalists selected the slate of a further six commissioners. The 14 members of the Commission had been chosen. Their names and party and other qualifications were:

1. Dr. Gabino Aguirre, Democrat and Latino, from Santa Paula
2. Angelo Ancheta, Democrat and Asian-American, from San Francisco
3. Maria Blanco, Democrat and Latino, from Los Angeles
4. Cynthia Dai, Democrat and Asian-American, from San Francisco
5. Jeanne Raya, Democrat and Latina, from San Gabriel
6. Vincent P. Barabba, Republican and White, from Capitola
7. Jodie Filkins Webber, Republican and White, from Norco
8. Libert "Gil" R. Ontai, Republican and Asian-American, from San Diego
9. Dr. Michael Ward, Republican and White, from Anaheim
10. Peter Yao, Republican and Asian-American, from Claremont
11. Michelle R. DiGuilio, Independent and White, from Stockton

12. Stanley Forbes, Independent and White, from Esparto
13. Connie Malloy, Independent and African-American, from Oakland
14. M. Andre Parvenu, Independent and African-American, from Culver City

Problems of Organization

The Commission began to take shape even before the November 2010 vote on proposition 20. From the moment the first eight commissioners were selected, however, decisions began to be made that, in the eyes of many observers, cast doubt on whether the Commission could live up to hopes for the true independence that had been the primary aim of the reform coalition. The State Auditor refused to release contact information for the initially selected commissioners or for those in the remaining pool (who were eligible for the final six spots). The State Auditor even refused to forward information to that final pool from groups wishing to share information with them or invite them to attend redistricting conferences.[75]

A larger debate wracked the Commission as it attempted to select its 14th and final Commissioner. The choice came down to Ms. DiGuilio, who was favored by those concerned that no one from the Central Valley region was yet on the Commission, or Paul McKaskle, who lived in well-represented San Francisco but would have brought enormous experience to the Commission because he served with both groups of Special Masters appointed by the California Supreme Court to draw the state's redistricting lines in 1973 and 1991. Geography ultimately won over expertise, as Ms. DiGuilio was chosen and Mr. McKaskle's interaction with the Commission came to an end as, inexplicably, the Commission made no effort to engage Mr. McKaskle in a staff or consulting role.

[75] The author was part of the Rose Institute's team organizing a December 2010 conference on redistricting, and spoke personally with the State Auditor's staff to unsuccessfully request the contact information.

Once the full contingent of 14 commissioners was together, Proposition 11 had directed that the Secretary of State's office would then take over organizing and support responsibilities until the Commission hired its own staff. The Secretary of State began listing job descriptions and accepting applications even before all 14 members were selected. Raising even more significant concerns, the Secretary of State alone took charge of the selecting and inviting the only two individuals allowed to provide training to the Commission. Neither the technical nor the legal training providers had ever been involved in drawing state-level redistricting plans, but both worked for the UC Berkeley-based consulting firm ultimately selected by the Commission as its technical consultants. The Secretary of State also restricted input at these sparsely-attended early commission meetings by decreeing that allowing anyone interested in providing information to the Commission would have a maximum of three minutes to comment.

The Commission was also encouraged by the Secretary of State's staff to conduct its search for an executive director in secret closed sessions. The Commission accepted this advice, with the result that nothing is known about the selection of the executive director except the identity of the person actually selected.

The Executive Director played a central role in the Commission's first openly partisan battle. This involved a debate over the selection of the Commission's technical consultant. In its first meeting as a full Commission, Commissioner DiGuilio made a motion to hire Q2 Data and Research consulting firm as the Commission's technical consultant. At the time, no request for proposals had been issued and no bids had been received from Q2 (or from anyone else). This motion failed by a single vote. The Commission then went through a formal process of issuing a Request for Proposals for a technical consultant. The process generated eight weeks of controversy where the two bidders were alternately criticized as Republican loyalists or Democratic loyalists. In a sign of how the voting would go

throughout the process, three of the five Republicans on the commission joined with all of the Democrats and all of the Independents to hire Q2. The protests of Republican party leaders that Q2 was too closely aligned with the State legislative Democrats were rejected after the Rose Institute's bid was thrown out (on a simple majority vote) for the cited reason that the Institute's bid failed to comply with the Request for Proposal's requirement that the Institute's legal entity (Claremont McKenna College) provide the list of every donor for the previous 10 years and a listing of the political activities of each of those thousands of donors. A potential deadlock over the choice of consultant that might have arisen from the majority-vote disqualification of the Institute's bid and the requirement for a super-majority vote to ultimately select the technical consultant was averted when Republican Commissioner Peter Yao, who had opposed the disqualification of the Institute's bid, made the ultimately successful motion to hire the UC Berkeley-based Q2 Data and Research firm.

The Commission's Performance

The Commission fully met the hopes of the Proposition 11 reform coalition for a massive public outreach effort. The State Auditor had succeeded in generating the interest of tens of thousands of people in applying to serve on the Commission, and the Commission itself succeeded in encouraging thousands of people to attend and 2,700 people to testify at 34 public hearings and 70 "deliberation sessions." Another 22,000 written submissions were received. Meetings were held in every corner of the state between March and August 2011. The Commission's outreach was supplemented by the Irvine foundation which donated hundreds of thousands of dollars to fund redistricting offices. Six such offices were opened across the state with the goal of encouraging the public to come in and draft redistricting proposals for submission to the official commission. Nevertheless, no maps submitted to the Commission came from this six-figure investment.

Many of the usual players in state politics did submit statewide redistricting plans for commission

consideration, including MALDEF and the State Chamber of Commerce (but they did not use the Irvine Centers for their line-drawing). In addition, at various stages in the process many groups submitted local maps drawn either from scratch or to propose modifications to the Commission's current maps. This commitment to outreach, however, was undermined in a bizarre Commission decision: when the Legislature voted to provide extra funding to the Commission for setting up an online redistricting tool, the Commission declined the funding. The online capability would have allowed anyone to draw and submit a plan to the commission from their own home or office, without having to travel to one of the Irvine centers during working hours of those centers. The tool would, also, have allowed the public to do detailed checks and reviews of public and Commission plans. The Commission's only stated reason for rejecting this funding was a concern that it would overstretch their current staff and consultants.

In the end, the Commission's final plans were widely hailed by the media and by most members of the Proposition 11 redistricting coalition. Lawsuits filed against the assembly and congressional redistricting plans were defeated by the Commission with relative ease.

Most careful analysts agree that the Commission's maps are significantly more favorable to Democrats than to Republicans – although certainly not as favorable as lines that could have been drawn if control had remained with the Legislature. That the maps are a long way from being a partisan gerrymander is best suggested by Republican reactions to them. Republican leaders openly admit that they did not challenge the State Senate map in court because they considered it more favorable to Republican incumbent state senators than a court-drawn map was likely to be. Republican Congressman Kevin McCarthy actively opposed litigation challenging the assembly and congressional maps. Despite his expressed concerns with how the Commission had operated, McCarthy and his allies felt the plans were safer for Republican members of Congress than any court-drawn plan was likely to be.

To some observers, race seemed to have been the predominant factor in drawing a number of districts in the Commission's plans. Virtually all lines were drawn on top of a map showing the Latino voting strength in each census block in the area being discussed. In many cases, the lines were drawn to precisely follow those Latino voting strength thematic maps. Nevertheless, there was no legal challenge to the Commission's plans as racial gerrymanders. Writing in 2015, after the U.S. Supreme Court's 2013 ruling in *Shelby vs Holder*[76] that the coverage criteria (Section 4) of the Voting Rights Act was unconstitutional, and thus state and local jurisdictions were now relieved of the requirement to comply with Section 5 of the Voting Rights Act, Democratic redistricting consultant Paul Mitchell has written that "The functional impact of Section 5 [of the Federal Voting Rights Act] was to force the drawing of some districts first, and the other districts around them second, a method of advantaging some counties over others in a way that, under current rules [with Section 5 no longer applicable to California], could be seen as a violation of the Act."[77] Nor was there a challenge by Latino groups, despite the surprising failure to achieve a significant increase in Latino representation.

In the random draw of the first eight commission members Asian American groups proved astonishingly lucky: four of the initial eight were Asian-Americans. Later, after the quick resignation of one of the initial 14 commissioners, a fifth Asian American was added to the Commission. Given those numbers, it is no surprise that Asian American community groups found the Commission extremely receptive to their requests. The new legislative and congressional maps led to a significant jump in Asian-American representation, especially when contrasted with the relatively small gains for Latinos:[78]

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[76] *Shelby County v. Holder*, 570 US ____ (2013)

[77] Mitchell, Paul, "Redistricting: Are the 2011 lines still valid?" Capitol Weekly, June 15, 2015.

[78] 2014 is used for the post-redistricting comparison to allow for the four-year staggered terms of State Senators, where some post-redistricting Senate districts do not hold elections until 2014

	Assembly		State Senate		Congress		Total	
	2010	2014	2010	2014	2010	2014	2010	2014
African-Americans	6	9	2	2	4	3	12	14
Asian-Americans	7	9	2	4	3	6	12	19
Latinos	15	18	9	5	6	10	30	33
Total	28	36	13	11	13	19	54	66

The net gain of three new Latino state legislators and Members of Congress is just slightly more than the net gain of two African Americans, despite the significantly faster population and voter growth rate among Latinos. And both numbers stand in stark contrast to the Asian-American net gain of seven new legislative and congressional seats.[79]

Commission Problems

Virtually every state redistricting effort faces charges of partisanship and legal challenges. The stakes in redistricting are so high, both in terms of political power and in terms of the impact on individual elected officials' futures, that fierce legal and political battles are inevitable. Independent commissions do not change any of that calculus: they simply change the target of claims. As creations of the voters, however, independent commissions have a particularly high standard to meet in terms of avoiding perceptions of partisanship and potential bias.

California's commissioners – in some cases as individuals and in others as a group –made a number of missteps that tarnished the Commission's independent image. One Commissioner (Aguirre) stated on his application that he had not donated to any partisan candidate, but was discovered to have given significant donations to, and to be friends with, a Democratic assemblyman. But he was not disqualified because donated just after the disclosure date for the Commission application (but before

[79] As with any election, not all gains and losses are directly attributable to redistricting.

joining the Commission).

Another step by the Commission undermined an initial effort to achieve non-partisanship in the early stages of the process and deprived it of needed expertise. The Commission declined to hire the State's top redistricting legal firm for the position of Commission lawyer because of the alleged pro-Republican bias of that firm. Instead, the Commission hired two attorneys: one, Dan Kolke, had limited state redistricting experience, but was an expert on redistricting reform initiatives, having been the author of Proposition 20 and was an attorney for Governor Pete Wilson on the 1991 redistricting legal battles; the other's redistricting experience was limited to service on the board of the Lawyers Committee for Civil Rights (George Brown). In California that Committee had been active in local redistricting disputes but not in state redistricting in any significant way. Initially, this decision appeared to provide partisan balance, since the first attorney was a Republican and the second a Democrat. Relatively early in the commission process, however, the Commission let the Republican attorney know that they no longer wished to hear from him, but would take all legal guidance from the Democratic attorney, George Brown. This left the Commission with both an attorney and a technical consultant who had never worked on any statewide redistricting before, both of whom had significant Democratic ties.

Role of the Parties

The contrast between California's 2011 Commission and Arizona's 2001 Commission is particularly stark with respect to the role of political parties and their ability to assist the commission through a "watchdog" role. Both the Republican and Democratic parties in Arizona were active players in the redistricting process. In Arizona, both parties drew and submitted plans to the commission, and, more importantly, both Arizona parties carefully scoured lines and alerted the Commission to perceived partisan motivations in each plan before the commission. As would be hoped by the organizers of

independent redistricting missions, the Arizona commission in 2001 essentially ignored the maps drawn by either political party or its close allies; yet, the Commission greatly benefited from the warning flags raised by each party. Each party was quick to draw attention to the overt and covert partisanship of some comments and submissions to the commission, and in each case the Commissioners quickly rejected the comments and submissions in question.

In California in 2011 the Democratic Party played little or no overt role in the Commission process. But, as uncovered by the press after the Commission's work was done,[80] the Democratic Congressional delegation enjoyed considerable success in covertly getting the lines it wanted. The Democrats did so by submitting proposals through allied organizations. In one case, they used a completely fake "grassroots "organization consisting of only one member, who happened to be a Democratic political consultant. The California Republican party largely failed in its (much more limited) efforts to get lines it wanted and had very little influence on the Commission's maps. Republicans also failed to get the Commission to heed its claims of undue partisanship in various maps and proposals provided to the Commission. The most obvious problem for Republicans is that two of the five Republican commissioners, Gil Ontai and Vincent Barabba, immediately and completely aligned with the Democratic commissioners on every vote and in virtually every discussion. A third Republican Commissioner, Peter Yao, initially cast independent votes but quickly gave up that independence and later provided the key third Republican vote for the hiring of the technical consultant and the adoption of the final plans.[81]

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[80] Pierce, Olga, and Jeff Larson, "How Democrats Fooled California's Redistricting Commission," ProPublica, December 21, 2011.

[81] Yao later endorsed the Commission's congressional and assembly maps for the San Gabriel Valley that bizarrely attached his own hometown of Claremont to districts dominated by distant Pasadena. In an often criticized comment, Yao observed that, "I can show you lots of receipts from shopping in Pasadena," as justification for the bizarrely drawn lines that divide Claremont from most of the communities around it (and sharing the same issues as it

Another problem for the California Commission was the sheer magnitude of their task: they were required to draw 53 congressional districts, 80 assembly districts and 40 state Senate districts in just five months. One of the many compromises involved in Proposition 20 was to change the original timeline for the Commission's work, shortening it to an August 15 deadline. The initiative's authors did this to allow enough time for a referendum and, if such a referendum qualified for the ballot, to allow a court to intervene with a temporary plan for the 2012 election. The logic of this approach traced back to the 1981 redistricting battle where the referendum's qualification for the ballot was expected to lead to the suspension of the legislative-adopted plans and court drawing of a temporary plan (as happened in 1973). Instead, citing a lack of time, the California Supreme Court simply imposed the legislatively- adopted plan, despite the referendum qualification.[82]

Conclusion

The passage in 2008 and 2010 of the ballot initiatives creating the California Commission were but the latest chapter in a three decade-long effort to bring redistricting reform to California. Ironically the reform effort started with a success: in June 1980, California voters approved Proposition 6, which set out what were then thought to be strict rules on how the Legislature should draw state legislative and congressional district lines. In practice, however, the rules proved toothless: in 1981, Congressman Phil Burton drew congressional district lines that he accurately described as "my contribution to modern art." The failure of Proposition 6 is clear evidence of the futility of reliance only on criteria to prevent gerrymanders.

The redistricting reform movement experienced a second victory at the ballot box when California

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faces).

[82] Vandermost v. Bowen II, No. S198387

voters approved a referendum tossing out the 1981 legislatively-drawn lines as drawn by the Legislature. Although that 1982 referendum rejected the lines, the failure of Proposition 39 left the same legislative line-drawers with control over revising the rejected lines. Congressman Burton, Governor Jerry Brown, State Senate President David Roberti, and Assembly Speaker Willie Brown quickly drew a replacement plan, remarkably similar to its predecessor, and the new plan remained in place for the rest of the decade. California's redistricting history makes clear that legislative leaders preserve their leadership by maintaining control of redistricting for their caucus. The failure of Perata and Nunez to perform on their public commitment to redistricting reform was merely the most recent example of this fact.

The 1980s and 1990s, then, saw California voters reject four straight redistricting reform measures, each of which proposed to create some form of redistricting commission. The stalemate in 1991 between the Democratic-controlled legislature and the Republican governor led to a set of court-drawn plans for the 1990s: in retrospect, a longer-term achievement of those plans was to show California voters what fair, relatively competitive, and community-based legislative and congressional districts could look like.

In 2006, the Rose Institute, joining with Common Cause and the League of Women Voters, conducted a statewide survey: two-thirds of respondents said they favored redistricting reform. Why, then, had so many reforms failed to win the favor of California's electorate? One obvious answer to the question is that campaigns for redistricting reform initiatives (excepting only Proposition 14) were greatly outspent by opponents. Another obvious answer concerns the complexity of the subject and the arcane character of some reform concepts.

It was the bipartisan gerrymander of 2001 that changed the narrative by uniting a coalition of reform-minded groups. In that year, the Legislature, still controlled by Democrats, and a Democratic governor

teamed up with Congressional Democrats and Republicans to draw a "sweetheart "incumbent protection gerrymander. In doing so they inflamed the groups who would eventually succeed in creating and winning voter approval for an independent redistricting commission. The 2001 bipartisan gerrymander locked in partisan control of virtually every assembly, state Senate, and congressional district in the state for the entire decade. In the end only one congressional seat and four assembly seats changed partisan control throughout the decade; and, of these, the four assembly seats only changed control in the final election of the decade.

Incumbent and partisan protection also locked out California's rapidly growing Latino and Asian American communities from any significant gains in legislative and congressional representation for the entire decade. The Asian American community in particular felt misled and betrayed by legislative leaders they had considered allies in 2001. Kathy Feng's move from the Asian American Legal Caucus to Executive Director of California Common Cause proved a turning point in California redistricting politics, for she became the energetic leader of the reform coalition and its connection with Charlie Munger, whose funding proved critical.

Assessment of the success of Propositions 11 and 20 requires, first, acknowledgement that the Commission process involved a significant number of public meetings open to all interested citizens and groups. The commissioners themselves performed harmoniously in this outreach role, and there can be no doubt as to the open access that they provided to the public in their hearings in different parts of the State.

Nor is there serious doubt that the commissioners made sincere efforts to follow the criteria established by the Propositions. Certainly, their maps drew praise from the civic organizations involved in the Working Group. Their work also passed judicial muster when court challenges were beaten back.

Nevertheless, the Commission fell well short of performing in a non-partisan role or in a way that was equally fair to both major parties. It is no surprise, of course, that the Democratic Party worked very hard to influence the Commission's work. And the Republican Party was just as interested in influencing the Commission's work, though the Republican Party proved to be significantly less successful in doing so.

There is an important lesson for future commission creators and commissioners in the fact that the Democratic efforts succeeded to such an extent. The failure was not that the Democratic Party failed to 'respect the Commission's independence.' It is simply a fact of political life that a party's leaders and elected officials will go to great lengths to influence a process as vital to their power as redistricting. The focus of redistricting reformers and future commissioners should be on the failure to detect and reject those efforts. As noted in a different context over 200 years ago, "Ambition must be made to counteract ambition."[83] It would be far preferable to encourage each party to play an open role as a "watchdog" and invite them to alert the Commission to the efforts of the other party. In short the problem in California was not that the Democrats tried to influence the commission; it is that they got away with it. By focusing on eliminating all appearance of listening to either party, the Commission lost the benefits that Arizona's 2001 Commission enjoyed by having each party actively monitor and counteract the other party's less overt activities.

[83] Madison, James, "Federalist 51" in The Federalist Papers, New American Library, 1961.

Chapter 3. Arizona's Independent Redistricting Commission

This chapter provides a brief overview of Arizona's demography and politics, reviews Arizona's history of redistricting prior to the establishment of Arizona's Independent Redistricting Commission (AIRC) and describes the proposition that established the Commission. This dissertation now reviews the work of both the 2001 and 2011 Commissions, summarizing their first actions, outlining their mapping processes, and concluding with an assessment of the Commission-drawn districts and the overall work of the Commissions.

Arizona's Demography and Politics

In each decade after its admission to the Union in 1912, Arizona experienced extraordinary population growth. The Census of 1910 showed a population of 204,354, which grew at a pace of around 60 percent each decade to reach 1.77 million in 1970.[84] In the 1990s only Nevada grew faster than Arizona. By 2010, the State had a population of 6.4 million, with 3.8 million in the Phoenix/Maricopa County area and one million in the Tucson/Pima County area.[85]

From statehood up to 1950, the Democratic Party dominated Arizona politics and its presidential candidates typically carried the State. The election of 1952, however, when Eisenhower swept Arizona, began a period of Republican dominance in presidential elections.[86]

The power shift from the Democrats to the Republicans paralleled the growth of the suburbs in Maricopa and Pima Counties. In the rural areas of the State, also, conservative Democrats, sometimes

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[84] Forstall, Richard L., "Population of Counties by Decennial Census: 1900 to 1990: Arizona", Population Division, US Bureau of the Census, March 27, 1995.

[85] State and County Quick Facts, US Census Bureau, accessed 7/21/2015 for Pima County (AZ) and Maricopa County (AZ): http://quickfacts.census.gov/qfd/states/04/04019.html

[86] Historical background on Arizona redistricting prior to 1980 is from Hardy, Heslop and Anderson, The History of Redistricting in the 50 States.

called "Pinto Democrats," voted Republican in presidential elections; but then they voted Democratic in state legislative and gubernatorial elections. Thus, of the five most recent governors, two were Democrats.

The rivalry between Maricopa County and Pima County has marked Arizona politics for decades. Together, they account for around four-fifths of the votes cast in every election and, were they to combine, their representatives could dominate the State Legislature. In fact, however, their differences typically prevent any such combination. Maricopa is more Republican than Pima; Republicans in Pima are more moderate than the Republicans of Maricopa; Democrats in Maricopa tend to be significantly liberal than Democrats in Pima.

Two very different demographic groups have led much of Arizona's population growth in recent decades. White seniors, many from mid-Western states, flocked into Arizona the 1960s. It was a migration much assisted by the development of air conditioning and age-restricted retirement communities began to spring up to accommodate them. In Maricopa County, developer Del Web established Sun City. A similar community, Green Valley, initially designed for retired teachers, was set up in Tucson. Some seniors were only 'snow birds' escaping from cold winters elsewhere; but many more became permanent residents. In the same period, the state's Hispanic population grew rapidly. In 1980, the Census counted 16 percent of the state's population as Hispanic; but, by 2010, Hispanics made up 29 percent of the population.[87]

Native Americans are a significant part of Arizona's demography and more than one-quarter of

[87] CensusScope, "Analysis of US Decennial Census Data through 2010: Arizona," Brookings Institution and University of Michigan Social Science Data Analysis Network. Accessed July 21, 2015: http://censusscope.org/2010Census/states.php?state=AZ&name=Arizona

Arizona's land area is reservation land. The majority of the Navajo Nation, the largest Native American reservation in the US, and the entire Tohono O'Odham Nation, the second largest, are located in Arizona. There are 20 federally recognized tribes in the State and inter-tribal politics, most notably the long antagonism between the Navajo and the Hopi, sometimes spill into the general political arena.

Federal lands (Indian reservation trust land, military bases, national parks and other federal property) account for 74 percent of Arizona's land area. Land in State ownership makes up another 14 percent, leaving only 12 percent in private hands.

In 1912, Arizona applied a literacy test to voters and in the 1972 Presidential election, turnout fell below 50 percent of those eligible to vote. These facts subjected Arizona to Section 5 of the Federal Voting Rights Act, with its requirement that the U.S. Department of Justice preclear any laws and other decisions affecting elections, including redistricting.

History of Redistricting in Arizona

The Convention of 1910 that established Arizona's first constitution decided that the State's counties would be the basic unit for apportionment. Each county would have one senator, but the most populous counties –Maricopa, Pima, Cochise, Gila and Yavapai – would have two, making a total of 19 members of the State Senate. The lower chamber was to be composed of 35 members, with each of the State's counties given members on the basis of voter population. Redistricting was to occur on a quadrennial basis when the board of Supervisors of each county would tally the vote totals from the preceding gubernatorial election.

In 1918, Arizona voters approved an initiative modifying the House apportionment. Although no county's delegation to the House could be reduced, the initiative required the use of votes cast in the

preceding gubernatorial election to determine additional representation: for each 1,500 votes cast there would be one representative. A second initiative in 1932 raised the vote apportionment formula from 1,500 to 2,500 and, in contrast to the initiative of 1918, permitted reduction of the size of a county's delegation.

Neither the 1918 nor the 1932 initiatives were very contentious, for neither made any fundamental change in the political balance of power. In 1953, however, an initiative on the ballot proposed a radical departure. Framed by Governor Howard Pyle, the initiative sought to shelter the State's rural interests –the "three Cs" of cattle, cotton, and copper –from the growing power of urban and suburban interests. The initiative fixed the size of the House at 80 members, with at least one representative for every county; it required a quadrennial reapportionment of the House by the Secretary of State on a formula of one additional representative for each 3,620 votes cast in the preceding gubernatorial election. It was in its provisions for the upper chamber, however, that the rural areas gained the most: the 28-member senate was composed on the basis of two senators for each county.

In much of the rest of the nation in the 1950s and 1960s rural interests were advantaged by "silent gerrymanders" or the failure of mal-apportioned state legislatures to redraw districts to reflect rapid urbanization. Governor Pyle's initiative was a proactive malapportionment, seeking to secure rural power constitutionally and for the long term. To the limited extent to which numbers were reflected in Arizona's legislature under the plan, they were the numbers of voters who cast ballots, not equal population.

The *Baker v Carr* decision of 1962 and the *Wesberry v Saunders* decision of February 1964 elicited no response from Arizona's legislative or executive branches, but they captured the passionate interest of a young law student at the University of Arizona, Peter Klahr. In late April of 1964, Klahr filed suit

in the federal district court to reapportion the state's legislative districts prior to the November 1964 general election. In June, the U.S. Supreme Court issued its *Reynolds v Sims* ruling on state legislatures.

The three judge federal district court continued Klahr's suit to thirty days after the adjournment of the its 1965 session: the postponement, which had the effect of continuing the existing apportionment through the November 1964 election, was intended to give the State Legislature an opportunity to conform its districts to *Reynold*s.

The Governor stepped into the process in the summer of 1964 with the appointment of a 15-member panel of retired judges, academics, legislators and leading citizens. This "Blue Ribbon Citizens Committee," tasked with preparing recommendations to guide the Legislature, held plenary meetings in July, October, November and December of 1964, all of which were fully open to the public.

The Committee developed four main recommendations. The use of numbers of registered voters as the basis for apportionment, not total or adult population, was the first recommendation. Abandonment of county lines in the drawing of Congressional districts (but not legislative districts) was its second recommendation. The third was the formation of a lower house of 81 members and an upper house of 27. Finally, the Committee recommended assignment of the redistricting responsibility to a specially formed "State Board of Directors." The recommendations failed to achieve any response from the Legislature other than a resolution requesting Congress to call a constitutional convention to permit states to apportion one house on another basis than population.

The Governor called four special sessions of the State Legislature in 1965, each marked by conflict over redistricting. The Senate-House Redistricting and Reapportionment Study Committee deadlocked: members generally resisted any threat of being drawn out of their seats; most members stood by the integrity of county lines; rural members refused to participate in the elevation of urban interests; and there were, in addition, issues of partisan gain or loss.

The Legislature's failure to act brought Klahr's suit before a three judge federal district court in November of 1965. Although Klahr himself seemed to have no partisan bias, his suit attracted Republican support and he was represented by a leading Republican law firm. The State in opposition was represented by top Democratic lawyers.

The State's attorneys asked the court to recognize that the existing county- and voter-based apportionment formula was rationally designed to meet the State's special needs and characteristics; therefore, they reasoned, the judges should permit departure from strict application of the one-person-one-vote principle. Klahr's attorneys advocated a plan for three Congressional, 30 single-member Senate districts and 90 single-member House districts with substantial numerical equality.

The court surprised the parties by rejecting both proposals and taking upon itself the bulk of the redistricting task. The judges announced that they would impose a temporary plan that the Legislature should be free to replace following the next election. For their plan, the judges designed eight multi-member districts on a combined basis of population and voter registration. They then asked the parties to come into agreement on a proposal to subdivide two of the districts: District 7, Pima County, was given population sufficient to elect 6 senators, 12 representatives; District 8, Maricopa County, was to have 15 senators and 30 representatives. The task of the parties was to use voter registration figures as the basis for the subdivision of the two districts.

The court's request seemed certain to trigger a partisan struggle. The Democrats chose party activists to draw the subdivisions, as did the Republicans. In fact, however, the incompetence of the Democrats' line drawer for Maricopa County led to swift agreement between the parties: the Democrat agreed to a plan for the County that, reasoning from the voter registration figures, he thought would give eight of the fifteen districts to his Party. The GOP line drawers, recognizing that the voter registration figures concealed the pro-Republican voting behavior of Pinto Democrats, and

seeing that the plan would in fact give their Party eleven districts, quickly acceded to it.

In Pima County, District 7, however, agreement between the parties proved impossible and the court was forced to choose between two plans: the Democrats' plan was supported only by Democrats; the Republican plan had some conservative Democrat support and, apparently for that reason, the judges chose the Republican plan.

The 1966 elections proved that the redistricting had achieved important gains for the Republicans: they won two of the three Congressional districts and convincing majorities in both houses. For the first time in Arizona politics, party activists recognized the gains to be reaped from control over redistricting.

The court's plan and the subdivisions of its Districts 7 and 8, however, applied only to the elections of 1966. The Legislature took on the task of drawing plans for the rest of the decade in the summer of 1967. Both houses were under GOP control and the redistricting plans they passed were clearly designed to maintain and add to that Party's advantage. The Democrats refused to vote for the plans and circulated petitions to place them on the ballot for referendum.

The court ordered the 1968 elections to proceed under the 1966 court-ordered plan. The November elections confirmed Republican gains and, as a bonus, the voters affirmed the Republicans' 1967 plans in the referendum.

The GOP victory in the 1966-68 redistricting wars proved short lived. In the summer of 1969 the federal district court declared the 1967 plan unconstitutionally deviant from population equality. Throughout late 1969 and in a special session in January of 1970, partisan wrangling over redistricting consumed the Legislature. Republicans again effectively excluded Democrats from line drawing and final plans, again heavily favoring the GOP, passed on a party line vote.

In May 1970, the court, announcing that districts in the Republican plans were again improperly deviant from population equality, nevertheless ruled that the plan could be used for the 1970 elections. The court ordered that a new plan, based on the 1970 Census, must go into effect for elections in the rest of the decade.

In the fall of 1971, the Republican legislators devised a new plan, again precluding effective Democratic participation. The plan drew districts deviating from population equality by no more than one-half of one percent. It seemed that the court's test had been met while also achieving gains for the GOP. Population equality, line drawers had discovered, was no bar to achieving partisan advantage: with the lack of any other constraint, especially the removal of the requirement to follow county boundaries, the population equality rule opened up new creative opportunities for gerrymandering.

Once again, however, a challenge in federal court upset the best-laid GOP plans. Native Americans complained that the plans violated their Fifteenth Amendment rights and diluted their voting power. The court accepted the Republican plan for Arizona's Congressional districts but acceded to the Indian challenge of the State Legislative districts. The judges accepted the majority of the Republican legislative plan but amended it to place the Native Americans in one senatorial district, which required changes to only three northern districts. It was under this Republican-drawn but judge-amended plan that the 1972 elections were held.

In early 1972, however, the Republicans in the Legislature began an effort to better accommodate Indian concerns. The ancient antagonism between the Hopi and the Navajo led the former to protest inclusion in the same district. At the same time the White Mountain Apache demanded their own district. Although the lines for the amended plan were drawn, the legislature decided against submitting it for court approval, preferring to contest the 1974 elections under the existing plan.

In December of 1974, the district court accepted the Legislature's Native American – related changes. This amended plan governed elections for the rest of the decade.

In 1981, the Republican majority in the State Legislature targeted the seat of Democratic Congressman Morris Udall. But four Senate Democrats agreed to support an otherwise Republican-favoring redistricting plan in exchange for a seat that Representative Udall could win. Then Democratic Governor Bruce Babbitt vetoed the plan, agreeing with its critics that it was a partisan gerrymander that also improperly divided Tucson and diluted the vote of the Navajo Nation. Both the Department of Justice and a Federal court blocked the plan, finding that it was insufficiently population balanced and that it diluted the voting strength of Native Americans. At the same time, the U.S. Department of Justice refused preclearance for the plan. A compromise Congressional plan was approved on April 2, 1982, which Democratic leaders and the Department of Justice approved but that "On balance . . . was a net gain for the Republicans."[88] The 1981 legislative plan was an easier win for Republicans: with the support of those same four Senate Democrats, Republicans over-rode Governor Babbitt's veto and adopted the legislature's plan.

The decade of the 1990s began with control of the State Legislature split between the parties: Democrats controlling the Senate; Republicans controlling the House. It was a formula for a redistricting deadlock. A reluctant compromise was agreed between the parties on legislative districts, but the impasse proved unbreakable on Congressional districts. In February 1992, a group calling itself "Arizonans for Fair Representation" brought suit in federal court urging action on congressional redistricting. The court's ruling was that the chosen plan must meet three basic criteria: the Constitution, the Voting Rights Act, and "neutral principles of redistricting." These principles were

[88] Berman, David R. "Arizona" Chapter in Redistricting in the 1980's A 50-State Survey, Leroy Hardy, Alan Heslop, and George Blair, Editors, The Rose Institute of State and Local Government, 1993, pp 41-45.

said to be the preservation of communities of interest, compact and contiguous districts, and protection of incumbents (what it described in a later opinion as "the unnecessary or invidious outdistricting (sic) of incumbents").

On the basis of their three criteria, the judge rejected both the Senate and the House congressional maps. Instead, they turned to an "Indian Compromise Plan," submitted by intervening Indian tribes, as possessing the required features. The judges also found that the Senate had failed to present sufficient evidence to prove that polarized voting in Arizona warranted remedial action under the Voting Rights Act; and they further declared that a plan ordered into effect by a federal district court would not require preclearance by the Department of Justice. The 1992 election and subsequent Congressional elections through 2000 were held under the court-approved plan.

The State Senate, under Democratic control at the time, appealed the court decision in early 1993. One claim was that the court plan had failed to create two majority-minority districts in the five-district plan. There was one such district in the existing four-district plan: since the State had gained an additional district under the 1990 census, and since Hispanic population had increased substantially, the Senate claimed that the plan involved "a retrogression of minority voting strength." The Senate also countered the lower court's finding that there was insufficient evidence of polarized voting, contending that there were sufficient grounds to require remedial action under the Voting Rights Act. A final argument in the Senate's appeal was that the lower court in favoring "neutral" principles of redistricting was effectively violating the requirements of Sections 2 and 5 of the Voting Rights Act. What the federal appeals court would have done in the case will never be known because, prior to the appeals court action, Republicans regained their Senate majority and had the appeal dismissed.

In February 1992, at a time when the State Legislature was still deadlocked over the legislative plan, a group of former Republican legislators filed suit urging the federal district court to draw a new plan.

Almost immediately, however, the Legislature passed a legislative redistricting plan. The court stayed action while the plan was submitted to the Department of Justice for Section 5 preclearance under the Voting Rights Act. In June, the Department objected to the southeastern portion of the plan where a concentration of Hispanic voters was split into three districts. The Legislature quickly amended the plan in a way that was thought to remedy the objections. The court ordered that the plan be used for the 1992 elections. The Legislature's plan failed to gain the required preclearance from the U.S. Department of Justice. The Department insisted on an additional majority-minority district to represent Hispanic voters in southeastern Arizona. The Legislature passed a third state legislative plan in December 1993 that included the majority-minority district, and thus the plan was finally pre-cleared in February, 1994.

So the map of legislative districts used in 1992 was replaced in 1994 and then again replaced for 1996. And the final map was so crudely drawn that it was later found to include a non-contiguous district.

Proposition 106

It was against this backdrop of partisan struggle and continual change in district maps that Proposition 106 qualified for the November 2000 ballot. The Arizona Legislative Council, which summarizes ballot measures for the state's official voter guide stated:

> Proposition 106 would amend the Arizona Constitution to establish an appointed Redistricting Commission to redraw the boundaries for Arizona's legislative districts … and to redraw the boundaries for the Congressional Districts …. This proposition provides that the appointed Redistricting Commission shall first draw districts that are equal in population in a grid-like pattern across the state, with adjustments to meet the following goals:
>
> 1. Districts shall comply with the United States Constitution and the federal Voting Rights

Act.

2. Both legislative and congressional districts shall be equal in population, to the extent practicable. This establishes a new strict population equality standard for legislative districts.

3. Districts shall be geographically compact and contiguous, as much as practical.

4. District boundaries shall respect "communities of interest," as much as practical.

5. District lines shall follow visible geographic features, and city, town and county boundaries and undivided "census tracts" as much as practical.

6. Political party registration, voting history data and residences of incumbents and other candidates may not be used to create district maps.

7. "Competitive districts" are favored if competitive districts do not significantly harm the other goals listed.

Arizona's Independent Redistricting Commission was to consist of five members, no more than two of whom could be from the same political party or the same county. The Speaker of the Arizona House of Representatives, the Minority Party Leader of the Arizona House of Representatives, the President of the Arizona State Senate and the Minority Party Leader of the Arizona State Senate would each appoint one person. These four members of the Redistricting Commission would then meet and vote to appoint a fifth member to chair the commission. In this way, the Proposition designed a "tie breaker" commission.

There was heavy emphasis on public hearings. The commission was required to provide at least 30 days for the public to review the preliminary lines drawn by the commissioners, and then the commission would make the lines final, subject to approval by the United States Department of

Justice.

Jim Pedersen, a prominent Democratic Party activist who was campaigning for election as chairman of the Arizona State Party in 2001, heavily backed Proposition 106 with both his money and his time. Formerly administrative assistant to a mayor of Phoenix, Pederson was co-owner with his brother of the Pederson Group, which specialized in developing retail projects across Arizona. He brought into being and chaired the sponsoring organization for Proposition 106, "Fair Districts, and Fair Elections." He was joined in supporting the measure by the Arizona leadership of the League of Women Voters, Common Cause, and the Arizona School Boards Association.

In the ballot argument in favor of Proposition 106, Pederson argued that the "basic principles of democracy" required Arizonans to put aside partisan differences and "take action to protect the collective interests of citizen self-government." He emphasized the "ultimate conflict of interest" in incumbent-dominated redistricting:

"When legislators draw their own lines the result is predictable. Self-interest is served first and the public interest comes in a distant second. Incumbent legislators protect their seats for today and carve out new congressional opportunities for their political future."

He pointed to the uncompetitive character of the incumbent-drawn districts:

"The legislature has created a system that distorts representative democracy. There is only a four-percent difference between the number of registered Republicans and registered Democrats in this state - yet out of 30 legislative districts, there is only one where the difference in party registration is within 5 percent"

Individuals who supported the measure included Janet Napolitano, then Arizona's Attorney General, Terry Goddard the former mayor of Phoenix, as well as mayors or former mayors of Peoria, Tempe,

and Scottsdale.

Opponents of the proposition included five Congressmen (all Republicans) and the Arizona Chamber of Commerce. The argument against the measure, as articulated by Barry Aarons, a senior fellow with Americans for Tax Reform, appealed to Arizonans' hostility to federal interference in the State's affairs. He claimed that it would "reduce the input of the will of the people of Arizona and vest disproportionate influence in the hands of bureaucratic Washington D.C. lawyers of the federal Justice Department." The opponents' ballot measure argument urged:

> "Arizonans must not give up our right to determine the lines from which our officials should be elected. Do not let the bureaucratic Washington D.C. lawyers of the federal Justice Department gain disproportionate influence over our election process. Maintain the right to oversee the electoral process of redistricting and reapportionment here in Arizona with the elected representatives of the people not appointed inexperienced elite who will be the handmaidens of the government in Washington's lawyers."

Despite the Republican Party's official opposition, prominent Republicans supporting the measure included former Governor Rose Mofford, former Attorney General Grant Woods, Phoenix Mayor Skip Rimsza, and State Representative Sue Gerard.

In the November 2000 election Arizona's voters decisively approved the Proposition with 56.1 percent of the vote. It was a result that clearly reflected public impatience with the contentious partisan struggles of the preceding decades.

The 2001 AIRC: Initial Steps and Questions

Almost immediately after the passage of Proposition 106 in November 2000, the application process began for the commission. Proposition 106 assigned management of the application process to the

long-standing existence in Arizona of the Commission on Appellate Court Appointments. This commission already reviewed applications when Arizona had judicial vacancies and presented the governor with a list of three possible appointees for each judicial opening. Over the years the Commission developed a reputation of relative nonpartisan independence. The authors of Proposition 106 tasked this commission with a similar role in the screening of individuals interested in serving on the redistricting commission. Compared with what California would eventually adopt, Arizona had a relatively short list of disqualifying conflicts of interest for commissioners covering only the previous three years:

- a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party . . .
- not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, . . .
- not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

The Commission on Appellate Court Appointments was charged with reviewing the applications of potential commissioners and narrowing the list down to 25 finalists. Those 25 finalists, consisting of 10 Democrats, 10 Republicans, and five independents, were sent to the four legislative leaders in the state Senate and statehouse. Each of the legislative leaders then appointed one commissioner from the list, with the only requirement being that no more than two could be from any one party and no more than two could be from a single County. The latter requirement was designed to ensure that the commission would not be comprised entirely of residents of Maricopa County, since well over half of the State's population resides in Phoenix or other communities in that County.

As required by the Proposition, the Legislative Leaders appointed four members: the two Democrats were Andrea Minkoff, and Joshua M. Hall; the two Republicans were Daniel R. Elder and James R. Huntwork.[89] These four then picked the chairman, Steven W. Lynn, a governmental affairs executive from Tucson. Andrea Minkoff was chosen as vice-chair. The five served in a volunteer capacity, their only reimbursement being for expenses. A considerable sacrifice of income or time was involved since each commissioner spent hundreds of hours on their task.

From their first meeting, the Commissioners struggled with the questions of whom to hire as staff and consultants. The commission offered to hire both of the primary bidders for the post of consultant. But one bidder felt it was being allotted a secondary role and declined the offer. The commission also hired two attorneys, one Democrat and one Republican, each of whom was the preferred choice of the commissioners of the same party as the attorney. Although the Commission struggled with these initial decisions, it did manage to make them by unanimous vote. While there was a clear division between the Republican and Democratic commissioners, all four, in part because of pressure from the independently registered chairman, worked to find compromises and common ground at this early stage in the process. They seemed to share a sense that they were embarked on an unprecedented mission in the public interest: "In a very fundamental sense, the maps that this commission will draw for Arizona's new congressional and legislative districts will be based on citizen opinion."[90]

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[89] Ms. Minkoff is retired. Mr. Hall ran a real estate Title company. Mr. Elder is a landscape designer. Mr. Huntwork is an Attorney. And Steve Lynn is in charge of government affairs and public relations for a major energy company.

[90] Lynn, Steven, "Remapping Work Called a Success," Arizona Republic op-ed, August 14, 2001.

Drawing the 2001 lines

Proposition 106 prescribed process rules and criteria for AIRC. In practice, the process rules turned out to be vague and confusing. This became particularly important at two process points required by Proposition 106.

The first key process point resulted from the Proposition's language requiring that past election results not be considered in the drawing of draft plans: such data should be used by the commission only to review the draft plan after it was drawn:

Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals.

But is the "draft" plan different from the "Grid" plan? Proposition 106 did not answer that vital question. The 2001 Lynn Commission decided to take the more conservative route and exclude competitiveness data from use until after the adoption of the draft Legislative and Congressional maps.

Another key but vague process point was the requirement that the public have 30 days to review the "draft plan" before adoption of a final map. Obviously, providing time to review the draft plan is useless unless followed by the opportunity to comment on and prompt changes to the map. If the commission then made any changes based on that public input, the Proposition was unclear on whether the changed plan could be adopted as a final plan or whether it then became a new draft, triggering a new requirement for 30 days of public review.

Proposition 106 also contained what turned out to be an unfortunate lack of precision in the wording of the criteria. Most were fairly standard criteria, including equal population among the districts, compliance with the Federal Voting Rights Act, respect for communities of interest, keeping cities and counties united, and compact and contiguous districts. The proposition also specifically forbade

the consideration of incumbent locations, challenger locations, or the drawing of lines for the benefit or detriment of a political party. Most radically, Proposition 106 also required that the commission favor the drawing of competitive districts.[91] While campaign rhetoric supporting Proposition 106 had focused heavily on its supposed favoritism for competitive districts, the actual wording of the proposition was less definitive. Proposition 106 required AIRC to follow city and county lines, respect communities of interest, and create compact districts to "the extent practicable." Dictionary definitions of the term "practicable" suggest that it means "capable of being done, effected, or put into practice, with the available means; feasible." The competitiveness criterion, however, was worded very differently: the Proposition said that "To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals." As noted above, the language of Proposition 106 barred the use of election and registration data during the "initial phase" of map-drawing, which meant communities of interest would be the focus of the initial draft plans.

The wording of the Proposition could be read to suggest that competitiveness was the only criterion clearly subjugated to the other criteria; an alternative reading, however, would emphasize that it was the only criterion specifically called out to be "favored." This confusion in the Proposition's language became a source of considerable debate and controversy for the Arizona's first redistricting commission.

The commissioners, especially chairman Steven Lynn, expressed a strong desire to fulfill the public engagements and outreach requirements of the Proposition. Ultimately the Commission held 57 public hearings in every corner of the state.

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[91] Arizona was only the second state to write political competitiveness into the rules for redistricting, the first being in Washington state.

The Commission's public outreach also brought thousands of people to attend its public forums and hundreds of people to offer comments. In the first round, the comments focused on neighborhoods and communities of interest. They included, also, responses to a survey the commission distributed asking the public to name the criteria they wished to receive the most attention or be considered the highest priority. In the second round, the comments focused on the various maps being considered and requests for changes to those maps. An editorial in the Arizona Republic captured the challenge encountered by the Commission:

> The draft maps represent a monumental amount of work. Clearly, the commission is trying to draw districts based on the needs of Arizonans rather than its politicians. There are some disappointments, however. So much emphasis on drawing districts based on race and ethnicity is leaving precious little room for any partisan competition. . . . It's a given, legally and morally, that the districts must be fair to Arizona's minority populations. But surely there is a reasonable compromise that would allow for both fairness and some bona fide choices come November.[92]

In 2001, the cost of specialized redistricting software was prohibitive for most individuals and organizations. Yet, the Lynn commission requested and received scores of maps drawn by outside individuals and organizations. Ultimately, the commission publicly discussed over 150 different potential maps of Arizona's thirty legislative districts and eight congressional districts. Since Arizona was at the time covered by the Section 5 preclearance requirements of the federal Voting Rights Act, the Commission was required to submit for review to the Department of Justice every plan publicly discussed in its redistrict process. The sheer volume of plans thus submitted shocked Department of Justice officials: when the Commission submitted all 145 publicly considered legislative and

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[92] Arizona Republic unsigned editorial, "Fine Line Favors Minorities, But Leaves Few Choices," Arizona Republic, August 20, 2001.

congressional redistricting plans, the Department gave up trying to review all of them and asked the commission for guidance on the 5 to 10 'most relevant' plans on which they should focus on.

Of course, this process was not without considerable controversy and allegations of partisanship. But an interesting dynamic developed that showed that political parties, while no longer in charge of the state's redistricting, still played a surprisingly important and largely positive role in the 2001 redistricting: As each of the parties submitted redistricting plans, or requested changes to plans under consideration, the other party would quickly review the submissions or requests. They would present their findings in public meetings. While Proposition 106 forbade the Commission from considering the residency of incumbents and challengers, and therefore the Commission chose not to have such data, the commissioners could depend on one or other of the political parties to flag lines designed to serve individual or partisan interests. Proposals offered by one party to achieve a particular political aim might be cloaked in claims of respect for community. The other party would then appear before AIRC to uncloak and lay bare the true motives. Both parties in 2001 played this role, and the commission proved appreciative and willing to act to act: they repeatedly rejected plans or plan modifications when alerted to their political motivations.

The Arizona congressional map attracted much controversy. The most voluminous public record developed over the issue of whether the Navajo and Hopi tribal reservations should be united in one congressional district or separated into two separate districts. Other debates surrounded whether Pinal County should be placed in districts with Maricopa County or with the more rural rest of the state. A great deal of Commission time, also, was spent trying to carve a competitive congressional district out of the Tempe and Eastern Phoenix region that still followed the many community of interests in this area.

Another major debate involved the definition of competitiveness. As has already been noted,

Proposition 106 did not define the term. AIRC spent considerable time discussing alternatives: was the goal was to maximize the number of legislative and congressional districts that were perfectly balanced in terms of party registration (or some other measure of political competitiveness)? Or was it better to establish some range of registration or political balance and then to maximize the number of districts that fell into this range? One option was to draw as many districts as possible where the Republican advantage over the Democrats was less than 7%. Or, alternatively, to draw the maximum number of perfectly balanced districts. It was discovered that more districts could be drawn to meet the former than the latter goal. Moreover, there could be anti-competitive results from a focus on creating perfectly balanced competitive districts. Given the Republican advantage in party registration and statewide voting, the creation of one competitive seat was often only possible by packing as many Republicans as possible into an adjoining seat. Commissioner Jim Huntwork repeatedly reminded the public and his fellow Commissioners that in Arizona's recent history a number of seats where one party enjoyed even a 15 or 20% advantage had often elected someone from the other party. His argument, therefore, was that a focus on creating the maximum number of perfectly balanced districts could undermine the overall competitiveness of a map.[93] The creation of one perfectly balanced district would move surrounding districts from a 15% spread to a "bulletproof" 25% spread. Ultimately the Commission decided to define seats as competitive that had a political spread of 7% or less, and it used Harvard professor Gary King's "Judgeit' system as one measure and an average of five statewide elections (in 1998 and 2000) for Corporation Commissioner as a second measure. The seven percent range was arrived at somewhat randomly: it was based on the plus or minus 3.5% standard deviation in the JudgeIt calculations. Calculating a precise range to define "competitive" in Arizona is further

[93] Huntwork, James, "New approach to redistricting needed in Arizona," Arizona Republic op-ed, December 18, 2010.

complicated by the state's system of multi-member legislative districts: each of the 30 "legislative" districts is used to elect one State Senator and two State House members. Often the minority party in a given district succeeds at electing a State House member via single-shot voting, where the party runs only one candidate who succeeds based on majority-party members not uniformly supporting both of the majority party's candidates for that district.

Even with all of these challenges, and in the midst of all the partisan battling and general controversy that surrounds every statewide redistricting, the 2001 Lynn Commission approved a congressional plan with unanimous support of all five commissioners. But the legislative map encountered more strongly partisan conflicts. Democrats pushed hard for the addition of one more competitive legislative district in the Phoenix area and two more in Tucson: they viewed the thirty-seat plan as having only four competitive districts. The Commission decided – on a four-to-one vote, with both Republicans, the independent chair and one Democrat agreeing – that the changes necessary to draw the Democrats' requested additional competitive district in the "Moon Valley" region of Phoenix would result in "significant detriment" to the compactness and community of interest criteria. This particular controversy underscores that it is overly simplistic to view redistricting as a purely Democratic versus Republican issue. The Democratic commissioner who voted against the change (Hall) was the only commissioner not from Pima or Maricopa counties. His loyalties clearly involved balancing loyalty to both Democratic and rural concerns, and after the vote against the "Moon Valley" seat his fellow Democratic commissioner (Minkoff) accused him of trading his vote on the Moon Valley district to preserve the rural community's interest in an all-rural eastern legislative district (District 5 in the final plan).

Partisan controversy was not the only controversy that troubled the efforts Lynn Commission. Latino leaders and organizations were intensely involved in the 2001 process. There was considerable outrage

when none of the five commissioners proved to be Latino, a concern the Commission attempted to partially mitigate by hiring a Latino Executive Director.[94] At every step in the process, moreover, the commissioners emphasized outreach to the Latino community, eagerly greeted Latino speakers to its hearings, and welcomed plans submissions from Latino individuals and organizations. Some observers even believe that representation of Arizona's Latinos may actually have been benefited by the lack of a Latino on the Commission. A Latino commissioner might have rebutted definitions of community of interest advanced by individual Latino spokespersons, or disagreed with plan requests of Latino individuals or organizations. But with no Latino on the Commission, the Commissioners were hard-pressed to challenge Latino community members' claims and statements about the interests and borders of the "Latino" communities of interest. There is no proof for this theory, but the five non-Latino commissioners rarely disagreed with any Latino who spoke to them. And, ultimately, the Commission paid a significant price for adoption plan changes requested by the main Latino group, knowing those requested changes opened the door to a potential legal challenge against the plan.

Proper representation of the rapidly growing Latino community posed a dilemma to AIRC. Latino leaders were eager to see an increase in the number of Latinos elected to both Congress and the Legislature. In the congressional map, it was widely accepted from the beginning that one of Arizona's two new congressional districts would be drawn as a heavily Latino district (though there was considerable debate over exactly how heavily Latino that district should be). In the legislative map the challenge was more difficult. Because there was a set number of 30 legislative districts in the state, any new Latino-dominated district meant one less Republican- or Democratic- dominated non-Latino district. Also, because of lower turnout rates among Latinos than among the general population, to

[94] The Democratic attorney, Jose Rivera, was also Latino.

draw a Latino-dominated seat required packing Democrats into that seat with the result that there were fewer Democrats available to be used to make districts competitive.

The impact of the federal Voting Rights Act on the overall competitiveness of a plan varies depending on the political makeup of a state. In a majority-Democratic state like California, the need to pack Democratic voters into a single district (which is essentially inevitable when there is a need to draw a Latino- or African-American-dominated district) uses up the excess Democrats in the state. In such a state, the Voting Rights Act makes the rest of the map more competitive. But in a majority-Republican state, such as Arizona, that same packing of Democrats to create a Latino-dominated district increases the Republican advantage in the remainder of the state.

Public speakers often noted that Arizona Republicans had only a 6% registration advantage over Democrats. Therefore, according to these speakers, there should be a close division between the number of Democratic-controlled seats and Republican-controlled seats. But others, usually Republicans, would underline that once seats were drawn to ensure compliance with the federal Voting Rights Act, the GOP enjoyed a 16% registration advantage in the rest of the state.[95]

Democratic Commissioner Andy Minkoff, argued that the way to deal with this situation was to pack Republicans into a handful of districts, just as Democrats had been packed into the so-called "voting rights districts." By contrast, Republican Commissioner Jim Huntwork argued that competitiveness should be measured plan-wide and not just in a handful of almost perfectly balanced districts. He argued, also, that intentional partisan packing violated Proposition 106's requirement to favor competitive districts.

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[95] Huntwork, James, "New approach to redistricting needed in Arizona," Arizona Republic op-ed, December 18, 2010.

Latino leaders, who were overwhelmingly Democrats, openly wrestled with the trade-off between drawing additional Latino dominated districts and having more Democratic voters available for use in drawing competitive districts. The dilemma was further complicated by the section 5 Voting Rights Act requirement to avoid "retrogression:" that is to reduce in any way Latino ability to elect Latino candidates in any of the existing heavily Latino districts. In the end, the Commission voted to endorse the request of most Latino leaders to reduce the number of Latinos in the existing heavily Latino districts and to use the surplus Latinos to draw new Latino districts.

This decision meant that the Commission's legislative map had Latino districts that were less densely Latino than they had been in the 1990s plan. These reductions in Latino concentration endangered the Commission's claim to the Department of Justice that it had avoided any numerical retrogression. Yet, the Commission chose this risky approach in deference to the request from Latino leaders for more seats. The decision was based on testimony from those same leaders that the existing Latino seats remained sufficiently Latino to comply with section 5's requirement. The leaders of the Minority Redistricting Coalition thanked the Commission for the decision and acknowledged both the risk the Commission was taking and the need for the Latino community to back the Commission with the Department of Justice during preclearance review:

> MR. SOLAREZ: Thank you for paying attention to the needs of minorities, even though before you guys were on the Commission, we chastised you, and you guys performed up to par. Respect has to be shown to you. You respected the State of Arizona.
>
> MR. KIZER: Aaron Kizer, Citizens for Fair Redistricting. We wish to thank you very much. We wish we achieved a more compact district. We have nine districts. You lived up to your end of the bargain. We'll live up to our end.

At the Commission's penultimate meeting, the Minority Coalition for Fair Redistricting made a final

request for a change to lines drawn in the legislative plan in southeastern been Pinal County. The Commission did not act on that request and, although commissioners did not expressly state why they refused, the requested change would reduce the number of competitive districts in the plan by one.[96] That decision provided the leverage needed for Democrats unhappy with the plan to flip the Minority Commission's position, and the earlier thanks of the Latino leaders proved short-lived. Democratic Party officials met at least twice with Latino community leaders and successfully convinced at least some of them to reverse their support for the Commission's plans. When these Latino leaders rescinded their original endorsement of the Commission's legislative plans, the Commission's previous decision to support increasing the number of Latino districts even if that meant accepting small reductions in Latino percentages of existing Latino districts became a major liability. Without the Latino community leaders' endorsement, the U.S. Department of Justice rejected the plan during its preclearance review and sent the Commission with a list of proposed changes.

The Commission complied with the Department's requests by making changes to three legislative districts. The changes were small enough that they could be made without offsetting population changes to the surrounding districts. That pushed the plan's overall population deviation slightly above 9%, but the deviation remained just under the federal courts' 10% guideline for whether plans are presumed constitutional.

There was very little time remaining between receipt of the Department of Justice objections and the 2002 primary election. Moreover, Proposition 106 was unclear as to whether another 30-day public comment period was required prior to final adoption of a new plan. Thus, the Commission went to

[96] As counted using the 7% measure of competitiveness that the commission was using as its competitive range.

federal court with a request to implement the new map in time for the 2002 elections.

The Commission and the Latino leaders who had complained to the Department of Justice quickly agreed to use the Commission's modified plan as a one-time map for the upcoming election, and the federal panel signed off on this consensus approach. As the Department of Justice had pre-cleared the Commission's congressional map, the state was now ready for 2002.

The Commission then began drawing a 2004 plan, with the goal of reducing the relatively extreme population imbalances in the interim 2002 plan. The debate focused again between favoring competitive districts and what constituted a "significant detriment" to compactness and community of interest. This time, the Commission worked more quickly and in August 2002 adopted a new legislative map that was close both to its original plan and the interim 2002 plan.

Democrats and others immediately pushed for including more competitive districts in the plan. The Department of Justice, however, had ordered the Commission to make changes that forced a reduction in the number competitive seats in the plan. As noted earlier, these dilemmas highlight the very difficult challenge of balancing the Federal Voting Rights Act requirement with a goal of creating competitive districts in a state where Republicans outnumber Democrats.

The agreement on lines for 2002 was only an interim agreement, so the legal challenge from the Minority Coalition for Fair Redistricting proceeded in state court. After weeks of testimony, the Superior Court judge ordered the Commission to redraw its legislative lines to place more emphasis of competitiveness. The judge required the Commission to start first with the adoption of formal definitions and measures of criteria such as compactness. Then, under the judge's order, the Commission was required to give heavier emphasis to the goal of favoring competitive districts, wherever such districts could be drawn without crossing those defined measurements.

As has been extensively documented in the redistricting academic literature[97] concepts such as keeping communities of interest intact, compactness, and competitiveness are very difficult to define precisely, and even more difficult to measure effectively. Nevertheless, the Commission proceeded to review the academic writings on these topics and to adopt definitions, measurements, and values that it would consider "significant detriment." The judge's instructions were to start with the most competitive plan possible and then to modify that plan in areas where it was considered to have a significant detriment on one or more of the other criteria.[98] The Commission's consultants returned with two "most competitive" plans: one map was focused on drawing as many districts as possible that fell into the Commission's target spread of a 7% or less difference between Republican and Democratic voting strength; the other was aimed at drawing as many districts as possible where Republican and Democratic voting strength was essentially perfectly equal. Both maps went to extremes in favoring competitiveness, incorporating elements such as single census block wide "necks" linking Republican strongholds such as the City of Scottsdale with Democratic strongholds such as the Navajo Nation, even when those two strongholds were over one hundred miles apart. It was quickly evident that, since a large portion of Arizona's Democratic voters reside in heavily Latino or heavily Native American areas and drawing large numbers of competitive districts required dividing up those Democratic concentrations, both maps blatantly violated the federal Voting Rights Act. Upon receipt of these maps, as directed by the judge, the Commission's first step was to direct consultants to adjust the plans to ensure they complied with the federal Voting Rights Act. In doing so, the plans went from 23 competitive districts down to 10, even before addressing any "significant detriments" to

[97] See, for example, the works of Cain, Grofman, Stephanopoulos, Thompson.

[98] The Judge's order contradicted Proposition 106's requirement that "Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals."

communities of interest or compactness.[99] But both maps still clearly resulted in "significant detriment" to multiple Proposition 106 criteria including compactness and communities of interest. The Commission then turned to reviewing which districts in the revised plan still resulted in significant detriment to the Proposition 106 criteria. Ultimately, the commission adopted a plan and then filed it with the court. But before the plan could be implemented for the next election, the state Court of Appeals intervened, finally issuing its ruling in the ongoing redistricting lawsuit. The Appeals Court reversed both the Superior Court judge's ruling his findings of fact. The Appeals Court then sent the case back to the same Superior Court judge for reconsideration, and the Commission withdrew from the Department of Justice pre-clearance review the plan it had drawn under the Judge's original orders.

Superior Court Judge Fields then issued essentially the same ruling he had originally issued. The Appeals Court again overturned the Superior Court judge's ruling. And, ultimately, the Commission won a sweeping victory in the Arizona Supreme Court ruling in this case. The Supreme Court approved the Commission's legislative map for 2004 and the Commission's original congressional map, declaring:

> In reaching their decisions, the commissioners perform legislative tasks of the sort we make every effort not to pre-empt. The Commission adopts its final map only after engaging in several levels of discretionary decision-making. The constitutional requirement that the Commission accommodate specified goals "to the extent practicable" recognizes that accommodating the various goals requires the Commission to balance competing concerns. This balancing necessarily requires the commissioners to exercise discretion in choosing among potential adjustments to the grid map. The Commission's need to balance competing

[99] Johnson, Douglas, "Arizona Legislative Districts, March 1 Adopted Plan" report to the Arizona Independent Redistricting Commission, March 1, 2004.

> interests typifies the political process, in which each commissioner may well define differently the "best" balance of these goals. Deciding the extent to which various accommodations are "practicable" also requires the commissioners to make judgments that the voters have assigned to the Commission, not to the courts. . . . We conclude that the Commission fulfilled its responsibility to attempt to accommodate all the constitutional goals during its deliberative process.

The commission's Congressional map had also been challenged on two counts: (1) a lack of a sufficient number of competitive districts; and (2) a lack of contiguity in one Congressional district that followed only the Colorado River to separate the Hopi and Navajo reservations between two districts. Both claims were dismissed in Superior Court. Only the Navajo appealed, without success.

AIRC 2001 Results

The overwhelming public and media recollection of the Lynn Commission is that Republicans won the partisan battle over Arizona's 2001 redistricting. The unanimous 5-0 bipartisan vote for the Congressional plan is largely forgotten. Lost in this simplistic "Republicans won" conclusion are a number of facts: especially at the congressional level, the Lynn Commission's plan resulted in elected officials who reflected the ebbs and flows of Arizona voters' partisan preferences as the decade progressed.

In 2002, Republicans nationally reversed a nearly four-decade pattern of presidents losing congressional allies in their first midterm election and the GOP increased the number of House of Representatives seats it held nationwide. Arizona voters joined in this trend and Republicans won six of the State's eight congressional districts. When voter sentiment turned against Republicans in 2006 and even more strongly in 2008, Arizona voters also changed their preferences: Democrats won five

of Arizona's eight congressional districts. When the partisan pendulum mood swung back to Republicans in 2010, the breakdown of Arizona's delegation also changed: Republicans won five of the nine congressional seats.

At the congressional level the Commission plan, initially viewed as a win for Republicans, became the very picture of redistricting reformers' concept of competitiveness: a plan where control of the elected offices changes hands when the preferences of the electorate change.

The Lynn Commission's legislative plan was also widely viewed as a win for Republicans in 2002, and the perception changed little during the years that followed. In part this was because of a Democratic-funded legal challenge that lasted until 2008; and in part, also, it was because in both the 2002 and 2004 elections the Commission's plan resulted in two-thirds Republican majorities in both the state House and state Senate. But the new district lines were not the only reason for Republican dominance in legislative elections: high-profile debates over immigration, culminating with passage of Arizona's SB 1070 in 2010, drove Arizona voters strongly toward support for Republican candidates.

Latinos also benefited from the Lynn Commission's congressional plan, doubling their number from one seat to two of Arizona's eight congressional districts. And, virtually unnoticed, the Lynn Commission map increased the number of Latinos in the State Legislature by 25% in the first election held under the new lines in 2002, and Latinos picked up an additional new seat in 2004.

Arizona 2001 Commission Redistricting Results Table

		Congress	Senate	House
Latinos	2000	1	4	8
	2002	2	5	10
	2004	2	5	11
2000	Dem	1	15	24
	Rep	5	15	36
2002	Dem	2	13	21
	Rep	6	17	39
2004	Dem	2	12	22
	Rep	6	18	38

Review of 2001 Commission

Proposition 106 was born in reaction to partisan contests over multiple plans, multiple lawsuits overturning those plans, and final court-imposed imposed redistricting plans in 1996. Voter approval of Proposition 106 made Arizona the first state to give an independently-appointed and independently-operating redistricting commission control over congressional and legislative redistricting. While championed primarily by Democrats, the support of a significant number of Republicans, especially at the city and county level, was an important part of the successful passage of Proposition 106.

Other states already used commissions for redistricting, but none came close to the degree of independence given to the Arizona commission. In some states, such as Iowa, a relatively independent group drew lines but submitted those lines to the legislature for approval, rejection, or revision. In other states, such as Washington and New Jersey, commissions had the power to draw and implement redistricting plans without review by the legislature, but the commissions were directly appointed by legislative leaders or their appointment involved some combination of legislative and political party leaders. Arizona's commission was the first to be (essentially) independently created and to possess

independent control over the drawing of lines. Although legislative leaders did appoint the commissioners, the legislative leaders do so from an extremely limited and highly screened list of potential appointees.

Given its unprecedented character and the public relations background of its Chairman, it was surprising that the Lynn commission largely failed to tell its own story. At its hearings commissioners included extensive discussion of its outreach efforts and other steps to comply with the spirit and goals of Proposition 106, but the Commission did essentially no other public relations work. Commissioners would sometimes answer questions from the press; but there was no organized effort to pitch stories to the media or otherwise get out the word in support of its work. That failure resulted in a public perception that the Commission's work was dominated by Democratic versus Republican divisions. This narrative was further fueled by comments to the media by Republican and Democratic consultants and activists.

In fact, neighborhood oriented and community of interest debates overwhelmingly dominated the Commission's discussions. But reporters rarely mentioned such localized and nuanced concerns, with the exception of the easily-described Navajo versus Hopi dispute. As a result of these problems, the perception of the commission in the media and amongst most of the public was of that the Lynn commission heavily favored Republicans. To this day most Arizonans with any opinion of the 2001 redistricting are stunned when told the Commission's congressional map was adopted on a unanimous, five-to-zero vote, and that the legislative map was adopted on a bipartisan four-to-one vote.[100]

[100] Based on this author's review of newspaper and online commentary about the 2001 and 2011 redistricting results, and this author's admittedly small sample of discussions with reporters, legislative staff, and individual activists.

While the results of the Lynn commissions work were publicly controversial and perceived as favoring Republicans, the numbers tell a different story. AIRC 2001 must be counted a success in terms of the goals of the reform advocates who put Proposition 106 on the ballot. Community of interest concerns, rather than the interest of partisan elected officials, dominated most of the Commission's deliberations. Competitiveness was significantly increased as Arizona districts, in particular the Congressional districts, repeatedly shifted party control as voter sympathies changed over the course of the decade. And Latinos made significant gains in Congressional and Legislative seats held. Yet the perception of Republican domination of the 2001 redistricting process was to have major implications for the state's second round of independent redistricting in 2011.

The 2011 Mathis Commission

The passage of Proposition 106 in November 2000 left Democratic and Republican party leaders with very little time to prepare for the selection and formation of the 2001 independent redistricting commission. But by 2011 party leaders and elected officials had a full decade to analyze their experiences with the 2001 Commission and plan for the 2011 line-drawing. Undoubtedly, much thought was given by both parties to strategies for getting favorable lines adopted by the 2011 commission.

As in 2001, the process began with applications to, and reviews by, the Commission on Appellate Court Appointments. More than 300 people applied in 2001, but only 79 applied in 2011.[101] Perhaps one factor in that drop is that the 2001 commission was the historic first commission, and as such held particular interest for potential applicants. Almost certainly, also, the protracted, nine-year legal

[101] Gilman, Richard, "New Commission to Set Districts," Thinking Arizona blog, November 16, 2010. Accessed July 23, 2015: http://www.thinkingarizona.com/thinking_story/new-commissionto-set-districts/

battle dissuaded some potential applicants. Moreover, the first Commission's record of holding scores of hearings and meetings (far beyond the minimum required) may have deterred some potential applicants for the unpaid and highly controversial job. Few would want to match the enormous commitment of time and effort involved in so in any hearings and in taking such voluminous testimony. The perceived partisanship of the process and of the adopted plans also may have deterred redistricting reform supporters who were disillusioned in their hopes for the Commission. Another possibility is that the political parties in 2001, facing an unknown process, may have simply flooded the selection commission with as many applicants as possible. Under this theory, the parties in 2011, having learned from the 2001 experience, may have preferred to recruit a much smaller pool of highly reliable applicants. Whatever the reasons for the much smaller pool, it became the first step in heightened partisan controversy over selection.

When the Commission on Appellate Court Appointments began its work in 2010, it was composed of appointees made by Democrat former Governor Janet Napolitano and others made by Republican Governor Jan Brewer. The controversy to come with the upcoming Commission's work was foreshadowed by the controversy that enveloped the selection process.

The Commission on Appellate Court Appointments selection process generated multiple lawsuits. On the Commission's list of ten Republican, ten Democratic, and five Independent nominees, three were challenged as ineligible based on holding an elected public office. Proposition 106 contained the following provision barring elected officeholders from service on the commission:

Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

Paul Bender applied for the commission while holding office as Chief Justice of Supreme Court of the Fort McDowell Yavapai Nation. Although a registered independent, his liberal leanings were well known from his past political involvement and his academic writings. Republicans filed a lawsuit claiming he was ineligible to serve because Proposition 106 considered his elected post to be a disqualifying position. Two Republican applicants, who served on the boards of irrigation districts, were disqualified. The Arizona Supreme Court ruled that Mr. Bender was eligible to serve because tribal office did not count as "other public office" (but, in the end he was not selected as chair), and the Court disqualified the two irrigation board members from serving as those elected posts were termed "other public office." One side effect of the Commission's action and the Court's disqualifications was that, when combined with the Proposition 106 requirement that no more than two of the four Democratic and Republican Commissioners come from the same county, the Senate Republican Leader was left only one qualified nominee – essentially the Commission was dictating the Senate President's choice. But, at the Court's direction, the Commission named two replacement nominees, leaving Senate President Russell Pearce two eligible nominees to consider.[102]

Once the initial four commissioners, Democrats Linda McNulty and Jose Herrera, and Republicans Richard Stertz and Scott Freeman,[103] were named, the process took another bizarre twist. The Commission's interim lawyer, on loan from the Attorney General's office, advised the commission that the selection of a chairman was a personnel decision that must be done in a secret closed session. As a result, the initial four commissioners went into a back room, held secret discussions, and then simply announced the selection of Colleen Mathis as chair. Initial reports expressed a belief that Mathis

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[102] Norrander, Barbara and Jay Wendland, "Redistricting in Arizona" Chapter in Reapportionment and Redistricting in the West, Gary Moncrief, ed., Lexington Books, 2011.

[103] Ms. McNulty and Mr. Freeman are attorneys. Mr. Stertz runs a non-profit organization. Mr. Herrera is a Program Coordinator for Arizona State University. Chairwoman Mathis is a health care administrator.

might have a Republican leaning, since more than a decade earlier her husband had worked for a moderate Republican member of Congress. But Chair Mathis almost immediately began siding with the commission's Democrats on virtually every decision. It was later discovered that her husband had recently served as campaign treasurer for Democratic candidates. Under the language of Proposition 106 the post of campaign treasurer would bar applicants from service, but did not bar the spouse of a campaign treasurer from Commission service.

In depositions taken more than a year later it was revealed that Ms. Mathis coordinated with the two Democratic commissioners to engineer the selection of the technical consultant they wished to hire, but this was not known at the time because the commission made the decision to shred all of its notes and records from the deliberations surrounding the hiring of the technical consultant. Chair Mathis and Democratic commissioners succeeded in retaining their preferred firm, Strategic Telemetry. The firm's president managed the 2001 redistricting work of the Democratic National Committee, and the firm's current client list included Obama for America and the labor union coalition running efforts to recall Republican Governor Scott Walker in Wisconsin.

Chair Mathis sided with the two Democratic commissioners to hire their preferred Democratic attorney and to hire, as the "Republican attorney" a lawyer who only a few months earlier registered as a Republican and who was preferred by the two Democratic commissioners and the Chair, over the objections of the Republican commission members.

The 2011 Mathis Commission followed the 2001 Commission's example of extensive travel across the state to gather public input: the 2011 Commission held 43 forums and 58 business meetings across the state, including nine held on tribal reservations. According to the Commission's count, 5,364 people attended those 101 meetings, there were 2,350 requests to speak at those meetings, and another 1,800 people watched the meetings online. Another 7,403 written public comments were received by

mail, fax, and email. Individuals and groups submitted 224 proposed maps, and 45 people used online software to draw and submit plans for Commission consideration.

Instead of having consultants draw a variety of plans and then reviewing and discussing those plans in public forums, as the Lynn commission had done, the Mathis commissioners decided to personally draw the plans. One or two commissioners would present their work, and the subsequent discussion would focus on one or two such presentations at each meeting. The Mathis commission did not vote on options. Instead they simply held discussions, and then one or two commissioners would go off to work on implementing his or her understanding of that discussion. The resulting map would then be presented and discussed at the next meeting. No maps drawn or presented by either of the Republican commissioners were ever endorsed by a majority of commissioners or focused on for follow up work.

As a result of this personal line-drawing process, the Mathis Commission left much less of a public record to explain and support its decision process. Even more important from a legal perspective, there was a lack of evidence to show whether the commission had met the requirements of state Supreme Court's ruling of 2009. That ruling had emphasized the Commission's duty to trace all elements of its plan back to changes justified by the criteria of Proposition 106. This lack of documentation of the transition from grid to final map led to a legal challenge[104], which remains pending at the time of this writing.

Commission-related partisan fighting peaked with the Governor's decision, affirmed on a party-line two-thirds vote in the State Senate, to remove Ms. Mathis from her post as Chair. Proposition 106

[104] *Leach v Arizona Independent Redistricting Commission*

provides a removal authority:

After having been served written notice and provided with an opportunity for a response, a member of the independent redistricting commission may be removed by the governor, with the concurrence of two-thirds of the senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

On November 1, 2011, the 21 Republican Senators in the 30-member State Senate approved the Governor's move to remove the Chair Mathis, alleging violations of the state's Open Meetings law and a failure to follow the requirements of Proposition 106. But on November 18th the Arizona Supreme Court reinstated Chair Mathis, stating the following:

The Court concludes that the letter of November 1, 2011, from the Acting Governor to the intervenor Colleen Mathis does not demonstrate "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office" by the intervenor Mathis, as required under Article 4, Part 2, Section 1(10) of the Arizona Constitution.

Suspicions about what was going on when commissioners were drawing plans in their living rooms were confirmed when, years later, Commissioner McNulty admitted in a sworn deposition that she could not remember whether key changes in the legislative map were drawn by her as she sat with and received direction from Arizona Democratic Party Executive Director DJ Quindlen, or if Mr. Quindlen had just given her a portable flash computer drive with a pre-drawn plan that she then presented to the Commission as her own work. Some observers suggested that the only reason she could not recall is that she had made line changes in both ways at different times in the process: some changes were made at Quindlen's suggestion, but there were others that he had drawn for her on flash drive.

Some may argue that there is no outright prohibition in Proposition 106 on a Commission majority secretly or openly accepting and adopting a plan drawn in part by the Executive Director of a political party. Yet such view surely flies in the face of the Proposition's language that "The places of residence of incumbents or candidates shall not be identified or considered," as the Executive Director of a political party certainly knows, and considers, where the party's incumbents and candidates live.

Partisanship behind closed doors and bitter verbal battles characterized relationships among the 2011 commissioners. In stark contrast to the 2001 hearings, partisanship was the dominant topic of public testimony to the 2011 Commission.

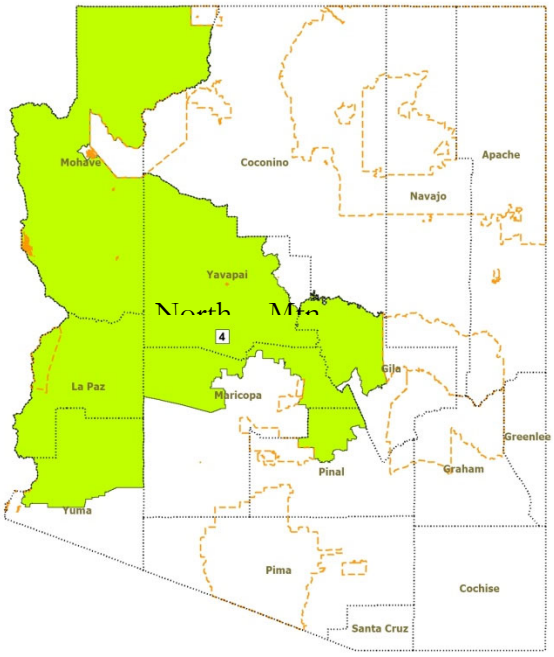
2011 AIRC in Review

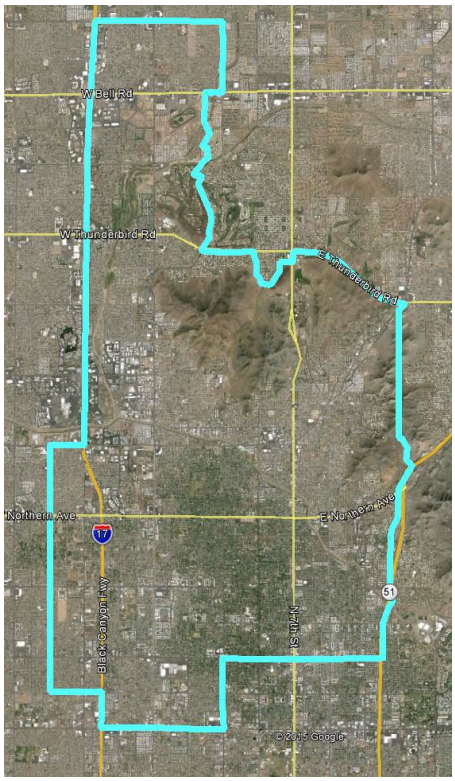
The great differences in the public's approach to the 2001 and 2011 commissions could simply be a reflection of the national political atmosphere of 2011, when the Tea Party movement was at the peak of its influence. The difference could also be a result of the two parties' decade-long preparation of their redistricting strategies. Or it may have been influenced by a sense of disillusionment among many reformers with the perceived partisan bias of the Lynn Commission's plans. Or, perhaps most likely, it may have been the initial highly partisan squabbles in the first stages of organizing and staffing the Mathis Commission that fatally poisoned the process. Perhaps the public were merely reflecting back the predominant partisanship of the commissioners themselves.

Whatever the cause, the Mathis Commission clearly did not live up to the hopes of the Proposition 106 reformers. The results of the Mathis Commission also illustrate another challenge facing those who hope that an "independent" redistricting process will lead to widespread or significantly greater electoral competition. Should the first priority be "competitive" districts or communities of interest, if those two conflict? The Mathis Commission clearly focused more on competitiveness, while the

Lynn Commission focused on communities of interest. Where the Lynn Commission went to one extreme when it rejected the so-called 'Moon Valley legislative district' as a significant detriment to communities of interest for linking the two unconnected sides of Phoenix's North Mountain Reserve, the Mathis Commission went to the other extreme when it adopted a Congressional district linking the western Colorado River region of the state with the Republican parts of Pinal County using two separate impassable regions, one over 10 miles wide and the other over 5 miles wide, in Yavapai and Maricopa Counties, respectively:

2011 Congressional District 4 2001 "Moon Valley" Legislative District





As in 2001, the 2011 commission's work went straight into Court. The Commission consistently defeated challenges to its work and plans until the U.S. Supreme Court accepted a case wherein the Arizona Legislature asserted that the Commission's control of Congressional redistricting violates Section 4 of Article I of the United States Constitution, namely:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof;

In February 2014, the U.S. District Court for Arizona, in a two-to-one decision, ruled that AIRC did not, in fact, violate the U.S. Constitution, holding that "Legislature" in Section 4 refers to the lawmaking process of the state and not legislators specifically. Nevertheless, in October, 2014, the United States Supreme Court placed *Arizona State Legislature v. Arizona Independent Redistricting Commission* on its calendar. Oral arguments in the case led many to believe the Court would rule in favor of the Legislature, but in the end the Court upheld the Commission's redistricting control in a 5 to 4 ruling with Justice Ginsburg writing the majority opinion joined by Justices Kennedy, Breyer, Sotomayor and Kagan:

> Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people. *McCulloch v. Maryland*, 4 Wheat. 316, 404– 405 (1819). So comprehended, the Clause doubly empowers the people. They may control the State's lawmaking processes in the first instance, as Arizona voters have done.

The Court's ruling did not end the legal challenges, however. Within days of issuing that ruling, the Court accepted a challenge to the Commission's Legislative map,[105] which it will hear in 2016. And, at the time of this writing, a challenge to the Commission's Congressional plan[106] remains active in state courts.

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[105] *Harris v Arizona Independent Redistricting Commission*
[106] *Leach v Arizona Independent Redistricting Commission*

Chapter 4. Municipal Independent Commissions

The pathologies of redistricting attract less attention in municipal jurisdictions than in states, but for those involved they are no less consequential. City redistricting also generates contests between advocates of the status quo and reformers. Municipalities, therefore, have seen the rise of independent commissions, sometimes as the result of voter-approved measures, sometimes as the result of litigation. At this level, too, redistricting reform has taken different paths in the attempt to constrain the encroaching spirit of power.

Five California cities use independent commissions to draw the boundaries of their council: San Diego, Modesto, Escondido, Chula Vista, and Anaheim.[107] San Diego created its commission by choice, Modesto formed its commission in the midst of a lawsuit, and the other three created redistricting commissions as part of legal settlements in lawsuits under the California Voting Rights Act.[108]

San Diego

City Profile

The City of San Diego, located at the southern end of California, is the second-most-populous city in the state. The city covers 325 square miles starting at the border with Mexico. The city has a diverse economy with tourism, a major U.S. Navy and Marine Corps presence, and bio-tech companies each

[107] Since Los Angeles and San Francisco have redistricting commissions that are not independent, they are not discussed here. In those two cities, commissioners are directly appointed by, and controlled by, the council members or other city elected officials

[108] Obviously, factors leading to the creation of the commissions are very different in San Diego and Modesto compared with Escondido, Chula Vista, and Anaheim. As this is being written, Anaheim's commission is being formed for the first time, so this author cannot yet review its operations. And the Chula Vista commission has organized and just begun its first work. The review that follows, therefore, covers the creation of those two commissions, but not their operation

providing major elements of the local economy

As of the 2010 census, San Diego had a population of 1,301,617, up 6.3 percent from 1,224,658 people in 2000. Of the 2010 population, 586,804 (45.1%) were Non-Hispanic White, 87,523 (6.7%) were African American, and 224,319 (17.2%) were Asian-American. In 2010, a total of 374,968 persons (28.8%) were Hispanic or Latino of any race, up from 311,488 (25.4%) in 2000.

According to the 2013 American Community Survey 5-Year estimate, the median income for a household in San Diego was $64,058. The per capita income for the city was $33,152. About 15.6% of the population were below the poverty line.

Creating the Commission: Measure C

In 1988, San Diego voters approved a change to a by-district election system from the city's previous mixed election system.[109] In 2001, San Diego was the first California city to use an independent redistricting commission to draw its council election districts. In 1991, controversy surrounded the drawing of council district lines: especially controversial was the "Filner Finger," a long narrow stretch along Seventh Avenue drawn to ensure Councilmember (and future Member of Congress and Mayor) Bob Filner did not have to move to have a favorable district in which he could run for re-election. Lines were also significantly altered to improve the re-election chances of first-term Councilwoman Linda Bernhardt, who had provided the decisive 5th vote on many controversial five to four votes on planning and other issues. The controversy failed to stop the creation of the "Filner Finger" district, but Mr. Filner never ran in the new district because he successfully ran for Congress in 1992.[110] But

[109] In a "by-district" system, candidates must live in a specific district and only the voters in that district vote on who will represent their district. In the City's previous election system, a primary was held in a given district and the top two finishers in that primary advanced to a citywide runoff election.

[110] Mr. Filner returned to City office with a successful run for Mayor in 2012, but was forced to resign in 2013 amidst a sexual harassment scandal.

the controversy did bring an end to Ms. Bernhardt's short council career, as she lost an April 9, 1991, recall vote and was removed from office by the voters from her original district before the new, more friendly, district lines took effect for the 1992 elections.

The controversy surrounding the 1991 redistricting led to Measure C appearing on the June 1992 ballot (and Measure A, imposing term limits on elected City officials, also appeared on that ballot). Measure C was sponsored by Deputy Mayor (and later County Supervisor) Ron Roberts, Common Cause, and the League of Women Voters. No statement in opposition was filed for the sample ballot materials, and Measure C passed with 68 percent of the vote (Measure A, the term limits measure also inspired by voter disgust with the 1991 redistricting shenanigans, passed with 75 percent of the vote).

Commission Member Selection

Measure C was a revision to the City Charter. It proposed a multi-layered approach to naming the redistricting commission:

> The Redistricting Commission shall be composed of seven (7) members who shall be appointed by the Presiding Judge of the Municipal Court, San Diego Judicial District. In the event that the Presiding Judge declines to make the appointments, they shall be made by a Municipal Court Judge selected by vote of the Judges of the Municipal Court, San Diego Judicial District. Should the Judges of the Municipal Court decline to so act, then the Redistricting Commission shall be appointed by a panel of three retired Superior Court Judges drawn at random by the City Manager in the fashion described in Penal Code sections 900(a) and 902. In the event that all of the preceding individuals decline to act, then the Redistricting Commission shall be appointed by a majority vote of the City Council.

In both 2001 and 2011, the Presiding Judge declined to participate in the naming of the Commission.

The Judges of the Municipal Court in 2001 and its successor agency, the Judges of the Superior Court, in 2011 also declined to participate. In both 2001 and 2011 a panel of three retired Superior Court Judges – one Democratic, one Republican, and one independent – was named to select the Commission.

The Charter language spells out the following qualifications for Commission members:

- "geographic, social and ethnic diversity"
- "a high degree of competency to carry out the responsibilities of the Commission"
- "a demonstrated capacity to serve with impartiality in a nonpartisan role"
- "registered to vote in The City of San Diego"

Appointed Commissioners are also required to "file a written declaration with the City Clerk stating that within five (5) years of the Commission's adoption of a final redistricting plan, they will not seek election to a San Diego City public office."

In 2001 the retired judges selected the commission with virtually no controversy. In 2011, however, the Republican retired Judge could not attend the appointing meeting, so the Democratic Judge and the Independent Judge named the Commission without him, and controversy over their nominations arose immediately. Many of the appointed Commission members had backgrounds as political activists, and local Republicans filed suit in an attempt to have a court disband the Commission. Almost immediately after that case was decided in the Commission's favor, it was revealed that one of the commission members had accepted a new job and moved to Los Angeles – but was continuing to travel south for Commission meetings. After an investigation, the County Registrar and District Attorney ruled that, because he had re-registered with a new address in San Diego after being discovered, he remained legitimately "registered to vote in The City of San Diego" and thus eligible

to serve on the Commission.

Drawing the Lines

Redistricting Criteria

Measure C, now enshrined as Article II, Section 5 of the City Charter, prescribed the following criteria for the drawing of Council districts:

- Populations "as equal as practicable"
- "Each redistricting plan shall provide fair and effective representation for all citizens of the City, including racial, ethnic, and language minorities, and be in conformance with the requirements of the United States Constitution and Federal statutes."
- "Preserve identifiable communities of interest;"
- "Geographically compact – populous contiguous territory shall not be bypassed to reach distant populous areas;"
- "Composed of whole census units as developed by the United States Bureau of the Census;"
- "Composed of contiguous territory with reasonable access between population centers in the district," and
- "Not be drawn for the purpose of advantaging or protecting incumbents."

The Charter also requires that 5 of the 7 Commission members must vote in the affirmative to approve three key actions: (1) naming the Commission Chair; (2) selecting a Chief of Staff; and (3) adopting the final redistricting map.

The Charter also requires extensive public outreach, stating "The Commission shall make every reasonable effort to afford maximum public access to its proceedings." The Charter requires at least

four public hearings before adopting a draft map and at least three additional hearings before adopting a final plan. Both the 2001 and 2011 Commissions held considerably more meetings than those minimum requirements.[111]

In 2001, more than 450 people provided public testimony; over 1800 pieces of correspondence were submitted to the Commission; and there were more than 65,000 views of pages on the redistricting commission website. Ten maps were submitted by members of the public.

The largest problem for the 2001 commission was time: the City Charter requires the adoption of a final plan within nine months of the release of the Census data. As a result, the Commission started its work in October 2000 believing it had until December 31, 2001, to complete its work. But in March, 2001, the County Registrar informed the Commission that the Registrar required the lines to be finalized by September 12, 2001, to be ready for the March, 2002, elections, and the Commission had to scramble to complete its work more than three months earlier than its schedule anticipated:

> "As a result, our educational materials were hastily prepared, public outreach for the first set of hearings was abbreviated, and Commission members remained frustrated throughout the process that we did not have sufficient time to compile, analyze and discuss all the information and data we wanted."[112]

Despite the compressed timeline, the 2001 commission's work passed with relatively little controversy. The main conflict surrounded the diverse and relatively low-income neighborhood of City Heights. Mainly Latino and African-American activists pushed for an alternative map that would unite City

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[111] The 2001 Commission held over 50 public hearings. The 2011 Commission held over 20 and its Chief of Staff made presentations to over 40 community organizations.

[112] San Diego 2001 Redistricting Commission, Behind Open Doors: Redistricting in Public, City of San Diego, December 2001. http://www.sandiego.gov/redistricting2000/pdf/doors.pdf

Heights, and they argued that dividing it three ways (as the official preliminary map did) would be a violation of the Federal Voting Rights Act. Most leaders from San Diego's very active and politically powerful gay community opposed the change in plans, arguing that the change in City Heights would result in dividing the heart of the city's gay community in Hillcrest, North Park, University Heights, Kensington and Talmadge.[113] The Commission ultimately divided City Heights. A secondary controversy in 2001 surrounded a push by the Asian-American community to unite heavily Asian-American neighborhoods in a single district. This push also was rejected by the Commission in favor of keeping neighborhoods more intact. Despite the risks taken by the Commission in rejecting requests by Latinos, African-Americans and Asian-Americans, no voting rights challenge was ever brought against the plan. But Latinos and Asian-Americans, in particular, remembered their unsuccessful struggles in 2001 and returned in force in 2011.

As chronicled below in the summary of Modesto's experience, typically the second redistricting by commission is significantly less controversial and involves less work than the historic first line-drawing by a commission. Whether in California, Arizona, or the City of San Diego, the voters clearly expect, and structure the commission to deliver, a first commission-drawn plan that is a wholesale overhaul of the lines drawn by the previous 'tainted' or incumbent-drawn plan. In contrast, if there is general public support and endorsement of the first map, the second commission has the much-simpler role of adjusting the first commission's work to accommodate population shifts over the decade. That is precisely what occurred in Modesto. But in San Diego, the voters approved a measure enlarging the City Council from eight members to nine starting in 2012. As a result, all of the districts were significantly over-populated; a new ninth district needed to be added to the map somewhere; and the

[113] Conlan, Mark Gabrish, "Queers, People of Color Clash Over San Diego City Council Redistricting," Zenger's Newsmagazine, July 17, 2001. http://la.indymedia.org/news/2001/07/8685.php

2011 Commission had no choice but to essentially start from a blank map.

In 2011, the partisan controversy surrounding the naming of the commission continued through the adoption of the commission's preliminary map. Sometimes the partisanship became almost comical, for example when a Democratic mapping consultant hired to draw and submit a plan on behalf of the very influential San Diego County Taxpayers Association later quit his contract and denounced the group as "a very conservative, Tea Party-like client."[114]

The 2011 commission encountered two separate significant grass-roots groups pushing for addressing in 2011 issues the groups felt were improperly rejected in 2001: the diverse "Community In Action" group pushed for the creation of a second heavily-Latino district and the unification of City Heights in a single Council district, while a large Asian-American coalition pushed for the creation of a district uniting the various Asian-American communities of northern San Diego. By 2011, however, the gay community that ten years earlier opposed uniting City Heights now was large and influential enough that it was less concerned about dividing its numbers between two council districts and thus did not significantly oppose the unification of City Heights. But the Asian-American efforts ran into hundreds of protestors (a significant number of whom were Asian-American), from neighborhood groups in north San Diego, mainly the Rancho Peñasquitos area, protesting the division of their neighborhoods.

The Results

San Diego's redistricting commissions seemed to have a relatively easy challenge in the eyes of the public: namely, to draw redistricting plans that are better than the "Filner Finger" plan. Both the 2001 and the 2011 commission drew plans that succeeded by that easy measure, and as shown by the lack

[114] Lamb, John, "Redistricting's Shadow War," San Diego City Beat, June 15, 2011.

of legal challenge to either plan.

Following the partisan controversy over the formation, residency, and early actions of the 2011 commission, the commission made significant changes to its preliminary plan (unlike in 2001).

Those changes, mainly driven by localized requests to unite neighborhoods, greatly reduced the partisan side of the controversy. In the end, the Commission endorsed the Community in Action goals (though in slightly modified district lines); the Commission turned down the lines requested by the Rancho Peñasquitos neighborhood Asian-Americans in favor of the lines proposed by Asian-Americans aligned with the Community in Action plan; and approved the final plan in a unanimous seven to zero vote. After the vote, the same conservative Republicans who originally sued to disband the Commission ultimately joined the ultra-liberal Community in Action group in praising the final map as fair and thanking the Commission for its work.

The 2012 elections brought a surprise to the Community in Action group: its goal of electing a second Latino to the Council failed when (non-Latino) Councilmember Marti Emerald ran for the new Council District 9. In the 2012 campaign, she massively outspent her challenger, a local Latino, and defeated him by a nearly three-to-one margin. But in 2014, in District 6, Chris Cate was elected in 2014, defeating another Asian-American in the November runoff. He became San Diego's first Asian-American Councilmember in nearly 50 years.[115]

[115] Zabala, Liberty, "First Asian-American in decades elected to SD Council," NBC7 San Diego. November 6, 2014. http://www.nbcsandiego.com/news/local/First-Asian-American-in-Decades-Elected-to-SD-Council-281718701.html

Modesto

City Profile

The City of Modesto, located in California's Central Valley, 90 miles north of Fresno and 92 miles east of San Francisco, is the largest city of Stanislaus County. The area is primarily agricultural and Modesto is home to E & J Gallo Winery, the largest winery in the world and the Gallo Glass Company, also the world's largest wine bottle manufacturing company.

As of the 2010 census, Modesto had a population of 201,165, up from 188,856 people in 2000. Of the 2010 population, 99,347 (49.4%) were Non-Hispanic White, 8,396 (4.2%) were African American, and 13,557 (6.7%) were Asian-American. In 2010, a total of 71,381 persons (35.5%) were Hispanic or Latino of any race, up from 46,629 (25.48 %) in 2000.

According to the 2011 American Community Survey 5-Year estimate, the median income for a household in Modesto was $49,852. The per capita income for the city was $22,886. About 18.5% of the population was below the poverty line.

Creating the Commission

In Modesto, there was a campaign in 2001 to change the city elections from at-large to by-district elections and to impose term limits on the Councilmembers. The campaign was launched by a group of residents disgruntled with a City government that they perceived as beholden to business and development interests. The faction was led by Mayor Carmen Sabatino.

Sabatino focused his supporters on a district elections measure. Although he succeeded in convincing the Council to put such a measure to the voters, only one other Councilmember signed the ballot argument in support of the Mayor's proposal. And, in what Sabatino later described as a deliberate

attempt to undermine support for the proposal, the final version of the proposed charter revision combined changing to by-district elections with changing the election date. Whether because city voters opposed the idea of district elections (as argued by other Councilmembers) or because the charter question was so muddled with the date-change issue (as argued by Sabatino), on November 6, 2001, the measure was defeated by a two-to-one margin, 34 percent yes to 66 percent no.

In 2003, after only one term in office, Sabatino was defeated for re-election to the Council. He then started a radio talk-show, in which he continued a drumbeat of complaints about city government and calls for wholesale change.

At about the same time, the San Francisco-based Lawyers Committee for Civil Rights sued the City on behalf of Latino residents, claiming that impoverished Latinos were being denied basic services, such as sewers and street lighting, in certain heavily Latino neighborhoods. While that lawsuit was ongoing, California passed the California Voting Rights Act of 2001, which greatly reduced the legal threshold needed for plaintiffs to force a city or other local jurisdiction in California to change from at-large to by-district elections.

The Lawyers Committee, and the plaintiffs associated with it, quickly filed a claim against Modesto under the California Voting Rights act. The City's initial response was a legal argument that the Act was unconstitutional; and, in Superior Court, the City prevailed. The plaintiffs, however, quickly appealed that ruling.

As Modesto's legal team worked on the case, and as legal costs piled up, Sabatino argued that the City was wasting its money fighting the case and, further, that districts would be better for the City and its citizens. After an extensive period of legal maneuvering by both sides, California's State Appeals Court overturned the Superior Court ruling and reinstated the constitutionality of the California Voting Rights Act.

The City Council, however, decided to continue the fight and appealed to California's Supreme Court. As each legal bill was paid, of course, more pressure built on the Council to simply concede and agree to district elections.

The California Supreme Court affirmed the ruling of the Appeals Court without comment.[116] The City appealed the case to the United States Supreme Court. By this point, however, the city's own legal bills had surpassed $1.5 million; and, if the City lost, it faced a requirement to pay the plaintiffs' attorneys legal bills.

Although the City had not yet been found guilty of a violation of the law, because the trial on the merits had not yet been held, many City leaders, on and off the Council, were growing weary of the legal battle. They were troubled, too, by allegations of racism and discrimination that surrounded the legal battle, and they were eager to see the entire dispute brought to an end so that the city could move on. The City Council decided to let the voters decide whether to move to a by-district election system. While awaiting the Supreme Court's decision whether to accept the case, the Council charged an existing Charter Revision Commission with developing charter provisions and by-district ballot questions to place before the city's voters.

The three most common forms of Council elections in California are at-large, by-district, and from-district: in the last of these, candidates are required to live in a given district, but the elections are held citywide. California supporters of at-large elections have discovered that a way to win votes on the question is to split the opposition. By putting all three options on the ballot, supporters of district elections split their votes between by-district and from-district systems, thereby improving the odds

[116] It is widely believed that the State Supreme Court, realizing that, whichever party lost would appeal the case to the United States Supreme Court, decided to take the most efficient step toward moving the case along to that venue.

that at-large will prevail.[117]

In California, binding ballot measures must be in the form of yes or no options. Ballot questions asking voters to choose between two different substantive options – as, for example, would you prefer Option A or Option B? – are not allowed. Ballot measures must take the form of do you support Option A? Yes or No. And do you support Option B? Yes or No. If the two options are conflicting, and both receive a majority of yes votes, then the measure receiving the most yes votes prevails.[118] Voters may prove to be either indecisive, or easily confused, when faced with such questions on the ballot.[119]

The Modesto committee avoided the potential confusion and division of district supporters by adopting a two-stage approach to the question, with initial questions on the November 2005 ballot and a final question on the City's February 2006 runoff election ballot. Voters were asked, in November, whether the voters prefer at-large elections or district-based elections for City Council. They were then asked, in a second question on that November ballot: "If the City uses a district elections system, would you prefer by-district or from-district elections?" If the majority vote was yes on the first question, the winning answer on the second question would go on the February 2006 ballot for final yes no vote. The city conducted an extensive educational campaign explaining the definitions and other elements of the various election systems to the voters prior to the November

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[117] As was done in Goleta in March, 2004 and Wildomar in November, 2009.

[118] The challenges of the system are perhaps best illustrated by the November 2010 vote in the city of Menifee over whether to have four Council districts and an at-large mayor; keep the five Council districts with the position of mayor rotating amongst the five Council members; or switch to an at-large system. Thanks to campaigns that focused on the benefits of the four-district and at-large measure, the majority of Menifee voters voted yes on both of the conflicting measures: the measure providing for four districts and an at-large mayor prevailed with 74% yes, compared with 71% yes for the at-large system (five districts would have stayed in place if both measures were defeated).

[119] California law does allow nonbinding advisory questions to offer multiple options rather than a yes no format.

vote.

Meanwhile, plaintiffs notified the US Supreme Court that the city had decided to put the question of district elections on the ballot, and the Court, surprising no one, quickly took notice of that action, decided that the request for hearing was now moot, and dismissed the City's request for hearing.

One sign of the business community's desire to move beyond the controversy was its shift to support Latino candidate David Perez's candidacy for Council in the 2007 election. Perez had run for Council twice before without success, and both times without significant financial backing for his campaign. In 2007, however, many city officials and campaign donors backed Perez's candidacy, and he was elected in his third try for City Council – in an at-large election.

In the November 2007 election, Modesto voters also endorsed a district-based Council election system over an at-large system by a 57 percent to 43 percent vote. On the second, also non-binding, ballot question, voters preferred the by-district system over a from-district system by a similar 57 percent to 43 percent margin. In February, 2008, the binding measure to implement by-district elections for Council with an at-large mayor was approved with the support of 73% of the City's voters.

The Charter Committee had not limited its work only to deciding how to place the question on the ballot. The Committee also spent considerable time reviewing options, examples, and ideas for how to put the power to draw districts in the hands of an independent commission. Since it proved too difficult to find another body to make the appointments, the Charter Committee eventually devised a commission made up of members appointed by the City Council, but with strict limitations on the Council's appointive power by a detailed description of the qualifications of appointees[120]:

[120] The full commission language of the Charter is included in the appendix.

(A) Strong consideration shall be given to composing the Commission of:

(i) a retired Stanislaus County judge as chairperson;

(ii) one (1) member from a bona fide local taxpayer's association with tax-exempt status under the relevant provisions of the Internal Revenue Code;

(iii) one (1) member from a bona fide local nonpartisan political organization, with tax-exempt status under Section 501(c)(3) of the Internal Revenue Code, dedicated to encouraging informed and active participation in government;

(iv) one (1) member from a bona fide local civil rights organization with tax-exempt status under Section 501(c)(3) of the Internal Revenue Code;

(v) one (1) member from a former Civil Grand Jury who has served in that role within the previous five (5) years;

(vi) additional members who have demonstrated civic involvement and a capacity to serve in an honest, independent, and impartial fashion, while upholding public confidence in the integrity of the redistricting process;

(B) The Commission shall reflect the demographic and geographic diversity of the City.

Drawing the Lines

Modesto, like San Diego, has now experienced two rounds of Commission redistricting. The first commission drew lines in 2008 and 2009, the second updated those lines in 2011 following the release of the 2010 Census data. Both commissions went through similar experiences, in part because the both commissions had the same chairman and same technical consultant. But the experiences differed in terms of the scope of change considered: where the first commission drew the City's first-ever

district lines, the 2011 commission merely adjusted those lines to accommodate population changes since the original lines were drawn.

The 2008 – 2009 commission conducted an extensive public outreach campaign, including the distribution of "public participation kits" that enabled interested members of the public to draw and submit their own redistricting plans for the city. There were over 3,600 visits to the commission's website, scores of people attended each of the commission's ten public hearings and mapping sessions (including a handful who attended nearly every meeting), and over 30 plans were submitted by members of the public using the "public participation kits."

The key question regarding where to draw the lines rapidly boiled down to the decision over in which district to place the city's airport and its surrounding heavily Latino and lower-income neighborhood. The area could be linked to the City's heavily Latino southwestern neighborhood only by a narrow connector running around downtown. Or the area could be linked to the closest district, despite that district's significantly higher income and less-diverse demographics. Public comments came in on both sides of the debate, but ultimately the commission was swayed by two factors: (1) public comments noted that the homelessness and crime issues of the airport area more directly impacted the neighboring district than the more distant southwestern district; and (2) the City's special legal counsel advised that, while both approaches could be defended in court, placing the airport neighborhood with the neighboring district was more easily defended because it would not be vulnerable to a charge of racially gerrymandering the lines.

The Results

Modesto's initial by-district results were highly disappointing to Latino voting advocates. After the City spent $5 million on the lawsuit and went through the process of creating the commission and drawing its initial lines, no serious Latino candidate ran for the "Latino" district in its first election

(2009). The only candidates were a young man recently home from a tour of duty in the Navy[121] and Anglo Republican, National Rifle Association member, and senior citizen David Geer. Mr. Geer won, 57 percent to 43 percent. But at least incumbent Latino David Perez managed to comfortably win re-election in his new district, maintaining the same one Latino member of the Council count that existed before the move to district elections.

In 2013, when Mr. Geer decided not to run for re-election due to health issues, all three candidates were Latino and Tony Madrigal joined David Perez on the Council, increasing the number of Latinos on the six-member Council from one to two.

Escondido

City Profile

Escondido is located in San Diego County, north of the city of San Diego and 30 miles (48 km) from downtown San Diego. Originally heavily dependent on agriculture (oranges were largely replaced by avocados a generation ago), housing developments have taken over most of its orchards and produce fields.

In the 2010 census, the city had a population of 143,916 (up from 133,955 in 2000) of which 40.4% were Non-Hispanic White, 2.5% African American, and 6.1% Asian American. In 2010, Hispanics of any race accounted for 48.9% of the population, up from 38.7% in 2000.

The 2010 median income for a household in Escondido was $42,567 and the per capita income for the city was $18,241. A total of 13.4% of the population had incomes below the poverty line.

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[121] Whose MySpace page reportedly combined his fan site for actress Sandra Bullock and his campaign materials.

The city divides into two demographically very different areas: in the hilly areas to the north, southeast, and southwest of the city are relatively affluent non-Hispanic neighborhoods; but the flat areas near downtown are heavily Hispanic.

Creating the Commission

In Escondido, the formation of the redistricting commission was the end of a long saga of conflict between the Latino and non-Latino segments of the city. For over a decade there had been various efforts in the city to enact measures against the City's illegal immigrant population. The most prominent of these battles was a proposal that landlords should be required to collect proof of citizenship from renters. That proposal was adopted, but later thrown out in a high profile court battle.

The city's mayor, himself an immigrant from Lebanon, was extremely active, along with most members of the City Council, in pushing such measures. Escondido had become a national hotspot for the debate over illegal immigration in the United States. By the mid-2000s, most of that controversy had died down, but the resentment and ethnic tension clearly persisted in Escondido.

The City Council proposed moving the city from general law status to a charter city, with the express goal of exempting the city from the State's prevailing wage rules. Unions, which rely heavily on those rules to ensure work for their higher wage members, challenged this effort. One tactic they employed was a lawsuit against the city under the California Voting Rights act. In a poorly considered move, the Carpenters Union acted as plaintiff in the voting rights lawsuit. Since unions do not vote in city council elections, the City quickly succeeded in having the Union removed from the case. By that point, however, the Union had recruited individual city voters to continue as legitimate plaintiffs in the case.

The case was also unusual because Escondido voters had elected a Latina councilmember who, it was clear, was politically and philosophically aligned with the activists who had brought the lawsuit. After

evaluating its past voting patterns, and considering the likely financial impact of fighting the voting rights lawsuit, the City agreed to settle with the plaintiffs and move to by-district elections. The settlement agreement included the establishment of an independent redistricting commission to draw the Council district lines.

The settlement in Escondido called for the selection of three judges to act as a redistricting commission selection panel. One judge was required to be a Republican, one a Democrat, and a third to be affiliated with neither of the two major political parties. The three judges were selected, but when the day came for them to review the applicants and select the commission, the Republican judge was absent. The Democratic and the Independent judge picked a diverse panel made up of individuals with a wide variety of work and community engagement backgrounds.

Drawing the Lines

From the Commission's first meeting it was clear that several of its members strongly resented the City Council for what they perceived to be its history of anti-Latino votes. They were also highly suspicious of City staff, because staff had advised and supported the Council in its actions over the previous decade.[122]

The Commission ultimately decided to conduct all line-drawing live in the commission meetings. This provided perhaps the ultimate in transparency possible for redistricting, but only for the 35 to 50 people that attended a given meeting. It provided only after-the-fact opportunities for anyone else to review or comment on draft plans prior to commission decisions.

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[122] City staff recommended this author's consulting firm, National Demographics, or NDC, to act as demographic consultant to the commission. The Commission's hostility to City staff was clearly on display in the selection process: although the commissioners found no fault with NDC, they explained their rejected of NDC as being simply because city staff had recommended the firm.

The Commission held six first-round hearings and then two additional meetings at which it developed and adopted a preliminary plan; and it then held three additional public hearings prior to adopting a final districting plan for the city on November 24, 2013. The Council then reviewed and approved the Commission's proposed plan.

The Results

In a classic example of the dangers of limited public review of plans and limiting line-drawing to only in public meetings, a single neighborhood in the "Latino" District 1 proved the downfall of the Latino candidate in the new district's first election. The Latino candidate's margin of victory in the rest of the district was overwhelmed by the incumbent Anglo's huge margin in that single northeast precinct, and the controversial Anglo incumbent[123] was re-elected by the "Latino" district.

Chula Vista

City Profile

Chula Vista is located in the South Bay region of the San Diego metropolitan area, less than ten miles from downtown San Diego and seven from the Mexican border. The city has shared in the rapid economic and cultural expansion of the San Diego area and is home to several popular recreational and tourist venues.

Chula Vista's population increased from 173,556 in 2000 to 243,916 in 2010, a 41 percent increase (dwarfing California's ten percent statewide growth). Despite such growth, the white, non-Hispanic share of the population declined by more than 5,000 in terms of actual numbers and its share of the

[123] Ironically, the winning incumbent in the "Latino" seat, Councilmember Ed Gallo, was the author and main proponent of many of the city's controversial earlier ordinances that were decried nationally as "anti-Latino."

population fell from 32% to 20% of total in the same period. In the decade, the Hispanic population share rose to 58%, up from 50% in 2000.

As of the 2010 census, Non-Hispanic Whites numbered 49,641 (20.4%); 9,972 (4.1%) were African American; 33,581 (13.8%) were Asian American; and Hispanics totaled 142,066 persons (58.2%).

Most of Chula Vista's orange groves and produce fields disappeared a generation ago and as service industries and businesses moved in. The city has quickly grown its own suburbs to its east in relatively wealthy neighborhood developments such as Otay Ranch and Rancho del Rey.

Creating the Commission

Chula Vista's move to by-district elections was much less contentious than in Modesto or Escondido. Aware of other challenges to at-large elections in other jurisdictions, the City Council spent a few months considering its options, largely in closed sessions, and then agreed to place a change to its election system on the ballot.

The Chula Vista City Council made a risky but ultimately successful move that defused the political tension that tends to surround such changes. In 2012, the Council agreed to implement by-district elections for its 2016 election, rather than for 2014. Such a delay might have provided grounds for a lawsuit, but no plaintiff came forward and the city held its 2014 election using its traditional at-large election system.

The proposed change was put on the City's November, 2012, ballot, and was approved 63 percent to 37 percent.

Chula Vista's charter provision implementing district elections included the creation of an independent redistricting commission. This commission was not as independent as that in Escondido,

because it was directly appointed by the City Council, but it was empowered to adopt a redistricting plan on its own.

Drawing the Lines and the Results

At the time of this writing, Chula Vista's redistricting commission, has just formed for the first time, so it remains to be seen how it will operate and whether or not it will succeed.

Chapter 5. Conclusions

Redistricting, whether done by an independent commission or by the elected body itself, is a political act of great consequence. Where the lines are drawn can determine the political makeup of the elected body, the political future of each individual currently serving in it, and the chances of potential challengers. Every districting and redistricting, therefore, raises concerns about manipulation for personal or partisan gain.

There is no perfect formula for creating, organizing, and operating an independent redistricting commission. Each choice at every step in the process may have both advantageous and disadvantageous repercussions. By their very nature, "independent" redistricting commissions must rely for their effectiveness on the personalities, motivations, and skills of the people appointed to them: by definition, their excesses or abuses are largely unchecked by other institutions, with only limited judicial oversight[124] and the difficult-to-use cudgel of voter referendums[125] overseeing the commission's work.

As noted above, structural elements can guide independent commissions either in useful ways, or seriously undermine their effectiveness. Again, each choice in the formation and operation of every commission is important.

The fact that of the 50 states only two (Arizona and California) have created independent redistricting commissions suggests the difficulty of forming them. Any review of newspaper articles and campaign literature – to say nothing of campaign donations – involved in the debate over the proposals for

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[124] Federal courts retain jurisdiction over equal population and federal Voting Rights Act issues, and state courts have jurisdiction as well, but both the Arizona and California State Supreme Courts have repeatedly deferred to the discretion of their respective commissions on key issues.

[125] Even in those states where voters have the ability to referend commission-adopted plans, referendums are difficult and expensive.

redistricting commissions in California, Arizona, Ohio, Illinois, Florida, and elsewhere highlights the difficulties involved. The political parties, the individuals in control of redistricting, and the interest groups that attach to the political status quo – all are deeply reluctant surrender their power. The few exceptions to that rule, where legislatures have acceded to some reform demands, have led to the creation of only questionably independent commissions. Legislatures in Hawaii, Idaho, New York and Washington handed over some part of redistricting power, but retained an important degree of ultimate control. They seem to have done so in exchange for freedom from the distraction and controversy with which each redistricting roils legislative agendas.[126] In 2015 he United States Supreme Court ruled against the Arizona legislature's effort to overturn the redistricting commissions created by initiative: such legislatively-created commissions may now become an even higher priority for reformers.[127]

Intense Scrutiny and Criticism Are Inevitable

Independent redistricting commissions are never immune to charges of bias or gerrymandering: in fact, they are especially vulnerable to them. Voters, the general public, and journalists expect self-interested gerrymandering from elected officials, but they apply much higher standards to independent commissions. They expect commissioners to act in the public interest. It is vital, therefore, that commissioners act in a way that will sustain public faith in their work.

Every map drawn by an independent redistricting commission will attract intense scrutiny; and, almost as a matter of course, charges of gerrymandering will ensue. Anyone disappointed with the lines in a draft plan may allege some nefarious purpose. If commission-drawn plans are to survive such

[126] Since they are not truly independent, these commissions are outside the scope of this study.
[127] *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 US ___ (2015)

rhetorical attacks, commissioners must anticipate and carefully plan their defenses against them. Rhetorical attacks all too easily escalate into legal challenges, or to referenda to overturn the commission plans, and even to challenges to the commission's very existence.

The Supreme Courts of both Arizona and California have ruled that independent redistricting commissions should be shown considerable deference if legally challenged. Yet, because legal challenges are nevertheless likely and will require significant expenditures of time and money, commissions must act in prudent anticipation of them. Nor can commissions ignore the threat of referenda. At the state level, in both Arizona and California, independent redistricting commissions were created through the initiative process. As such they must maintain the support of the voters. If voter support and public faith in the commission's independence are undermined, the risk escalates of a referendum to overturn adopted plans. Ultimately, of course, the initiative process remains available for voters to change the structure of the commission or to abolish it completely.

Drafting and Voter Approval of the Commission

One common theme in the formation of independent redistricting commissions is the importance of open communications and good working relationships between reformers and sympathetic incumbents. Those pushing for the creation of an independent commission need to court potentially sympathetic members of the group in control of redistricting. At the state level, the successes of reformers in Arizona and California proved the need for the out-of-power group – Democrats in Arizona and Republicans in California – to recruit and retain support from some members of the party in control of redistricting – Republicans in Arizona, Democrats in California. The failure of reform in Ohio proves the same point. Single party efforts at reform have yet to succeed in any jurisdiction.

The necessary cross-party support for redistricting reform in Arizona and California was fueled by political scandal. The excesses of highly partisan, one-sided gerrymanders, or bipartisan and incumbent-driven gerrymanders have led to revulsion even among beneficiaries of the process.

Revulsion is the source of significant support for independent redistricting commissions among incumbents of the party in control of redistricting. Sometimes such support among majority party members begins to avalanche after broken promises and repeated scandals, as it did in California. Sometimes it may simply arise from the feeling that partisanship and controversy have gone too far in disrupting policy goals, as happened in Arizona. The plain fact is that the only successes in establishing independent redistricting commissions at the state level have involved bipartisan efforts.

In California, as in most other states, extreme partisanship is much less common at the level of local government. Of course, many cities, especially larger cities, have clear Republican versus Democratic divisions. Localized issues, however, tend to be more common, particularly divisions over growth and concerns over land use. The circumstances and strategies that have led to the creation of independent redistricting commissions at the local level, therefore, differ markedly from those at the state level.

Generally, there is much less need to court support from members of the party in control of city councils: instead, the focus needs to be on winning over a number of key players. Rather than a two-way partisan division, most local governments and their local electorates divide among several factions and issue groupings.

In most local jurisdictions, there are a significant number of leaders – both elected and unelected – whose interests center on particular policy decisions. In Modesto, San Diego, and Chula Vista it was such issue-oriented leaders – local "policy wonks" – who were key to swinging the balance in favor of an independent redistricting commission.

A major difficulty is that such issue-oriented players in local politics are often part of the faction that already controls the drawing of election district lines. "Policy wonks" tend to gravitate toward the majority voting block on a city council or county board: after all, that is the only way to get their policy aims into effect.

Modesto and Chula Vista are examples of local jurisdictions in which controversies tilted issue groups toward support of an independent redistricting commission. In Modesto, a major controversy, precipitated by the law suit, was already swirling around the decision to move to district elections. In Chula Vista, it was clear that a similar controversy was inevitable. In both cities, it was clear that the redistricting litigation could have a major fiscal impact that would drain money away from policy related priorities. The seven-figure legal bills in Modesto gave much the same impulse toward reform as the perception in Chula Vista that to fight against districts would lead to sky-high legal costs.

Escondido is a very different case. The proponents of creating districts by an independent commission were pitted against the majority of the City Council: the reformers feuded with four of the five sitting members (and, therefore, with the voter organizations backing those councilmembers.)[128] The communication that existed was between a single sympathetic councilmember and the reformers.

Escondido suggests an alternative option for proponents of districting by independent commission. It was reformers' role in legal settlement talks, and their insistence in those talks on assigning the redistricting power to a commission, that proved effective.

Thanks to their backing from the Carpenters Union, together with an extensive network of support built over a decade of controversies in the city, the plaintiff group in Escondido was well placed to

[128] In fact, some showdowns between the two factions required riot police to keep the two sides apart

play a crucial role in the settlement. They possessed the financial and professional resources to convince their opponents on the City Council that the plaintiff suit was likely to succeed in court and that plaintiffs would receive a substantial fee from the city as a result of that success. The City's electoral history and current demographic and voting data – what is sometimes referred to as "facts on the ground" – gave credibility to their position.

Future reform groups, in similarly favorable situations, may be able to pursue an Escondido-style strategy. An important cautionary, however, is that they should be careful not to overplay their hand and tip the matter into court. Voting rights cases have not resulted in judges handing the redistricting power to an independent commission. Instead, judges have ordered the elected officials of the jurisdiction to draw and implement district elections, usually subject to the judge's continuing review. Judges do not create independent redistricting commissions; judicial settlements do.

The two warring sides in Escondido were able to settle their case because the limitations of each position were plain to both. The four-member council majority were forced to recognize the weakness of their legal position and the millions of dollars it would cost to attempt to defend that position; and the plaintiffs had to know that a trial and a judge's ruling would almost certainly leave the Council in charge of drawing the districts.

Selecting and Organizing the Commission

Two issues in structuring a commission appear to be the most important. As has been seen in the case of state commissions, the first is how the commissioners are chosen. The second is how key decisions of the commission, in particular the approval of the final plan, are made: is a simple majority vote or some super majority required to adopt the plan?

All our case studies have shown that structuring the makeup of an independent redistricting

commission involves many challenges. Modesto's commission was provided with clear guidance and strict rules over appointments; but the commission remains reliant on the final appointment of commissioners by the very City Council from which they are supposed to be independent. At the other end of the spectrum, Arizona's pre-existing commission on judicial appointments, with its decades-long history of independent, bipartisan decision-making, provided a nearly ideal independent selection authority. Yet, as any student of the history and importance of redistricting could have anticipated, the grant of the authority over selection led directly to significant partisan divisions and erosion of its traditional independence.[129] Since no ideal approach to selecting the members of an independent redistricting commission has yet been found, reformers must tailor their selection process to the resources available in their jurisdiction.[130] With a unanimous vote on its Congressional Plan, and a bipartisan 4-1 vote on its Legislative plan, Arizona's 2001 Commission clearly was the most successful of the three statewide commissions that have drawn lines so far, though the California 2011 Commission came close with 13-1 and 12-2 votes on its legislative and congressional plans, respectively. But the struggles of that state's 2011 Commission indicate that the 2001 success may be more due to personalities and commission choices than to structural advantages of the Proposition 106 model. The California model, with its larger commission and super-majority voting requirement, offers a commission more reflective of the state's diversity (geographic and ethnic) and with more protection against partisan, incumbent and other political influences. But future commissions (and those writing the initiatives to create them) would be wise to learn from California's voting experience and make all votes related to plan development and the hiring of key staff members require super-majority votes, not just the final vote.

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[129] Just as California legislative analyst Elizabeth Hill feared any involvement in the selection of a redistricting commission would undermine her agency's treasured independence.

[130] Such empiricism led California's redistricting reformers to use the state auditor as their selection authority.

California voters have twice rejected initiative proposals to empower a panel of retired judges to draw district lines for the state legislature and congressional delegation.[131] Campaigns involving tens of millions of dollars succeeded in convincing voters that placing retired judges in charge of drawing the lines at the state level was a bad idea. By contrast, employment of retired judges to serve as the selection panel for local governmental redistricting commissions has proven relatively noncontroversial. Such a proposal was endorsed by both sides in Escondido and, most recently, in Anaheim. Anaheim recently discovered, however, that there simply are not that many retired judges: even the 330,000 population city of Anaheim seems to be lacking the three retired judges it hoped to find, both to select the commission and to act as the commissioners

Where sufficient numbers of retired judges are available and willing to serve as selectors, they may provide the answer to the selection dilemma. Since only a few jurisdictions are likely to find a sufficiently large number of resident judicial retirees, alternative means of selection are needed. The answer in Escondido and, eventually, in Anaheim was to permit the judges to live outside the city.

Chula Vista and Modesto – both cities in which the "policy wonk" faction led the reform effort – abandoned the attempt to identify an independent selection authority. This meant leaving the appointment power in the hands of the Council. In Modesto's case, however, the Council's discretion was limited by a highly prescriptive list of qualifications for commissioners.

Lastly, in 2011 both California and Arizona unnecessarily stumbled into early hiring controversies that lingered even as the line-drawing progressed. California's selection of its executive director, and Arizona's selection of the Chairperson, were both done in private. Just because legal advisors say that a decision can be made in private does not mean a decision should be made in private. Clearly public

[131] Most recently Governor Schwarzenegger's 2005 initiative.

observation, participation, and review of those decisions would have created a more positive atmosphere from the beginning for both commissions, and future commissions would be wise to learn from those experiences.

All three state commissions suffered criticism regarding the hiring of technical consultants perceived as partisan. Much can be learned from those experiences as well, as discussed in the "Drawing the Plans" and "Line-Drawing by the Public" sections below.

Importance of Substantive Public Input

There are several steps that an independent redistricting commission may take to maintain public faith and trust in its work.[132]. The first is to provide extensive opportunities for public input in commission hearings. Obviously, the very fact of citizen engagement helps to prove that the commission's work is in the public interest. There is also, however, a substantive gain of equal importance: public input is the best and most legitimate means of identifying and defining neighborhoods as "communities of interest." At each point, while drawing the plan and when justifying its lines in court, a commission should be able to point to these as publicly validated building blocks for its plans.

Public input is substantively important, also, as a means of detecting any bias in a plan, whether intended or not. As the commission draws draft lines for individual districts, it should ask for public comment on the lines; more public comment should be sought when the draft maps themselves are published; and as the commission narrows down the options to a final map, the opportunities for public input should be further increased. The aim should be to involve the public – including the political parties – as a watchdog in vetting the lines: the greater the opportunities for public comment,

[132] These recommendations apply to both state-level and municipal commissions.

the more confident the commission can be that its plan is free of intentional or unintentional bias.

Independent redistricting commissions, even if they insulate themselves from all incumbent influence, even if they remain in complete ignorance of incumbents' addresses, will nevertheless find that they are charged either with advantaging or disadvantaging incumbents.[133] In any redistricting map, district lines will inevitably result in beneficial political effects for some, detrimental effects for others: it is, therefore, an easy step for critics to use specific lines to buttress charges of bias, partisanship and other malfeasance. The first line of defense against such charges must be the public record from commission hearings and the citizen testimony that led to the identification of specific communities of interest as district building blocks.[134]

As Chapter 3 described, the Arizona 2001 redistricting offers an important lesson in encouraging public involvement to guard against bias or partisanship. The Arizona Constitution, like most measures creating independent commissions, bars the commission from considering the effect of district lines on incumbents. Of course, that does not prevent the public or even representatives of

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[133] Members of independent redistricting commissions that are required to remain in ignorance of incumbents' addresses may wish to reflect on the experience of the Rose Institute of State and Local Governments in 1981. The Institute, located in California, brought in a distinguished professor of geography from the State of Washington to draw a model redistricting plan using topographical and demographic data to establish logical communities of interest as building blocks for districts. The professor lacked any awareness of legislators' home addresses, partisan interests or other facts of local political importance. Of course, the model map was primarily analyzed for its effects on incumbents. It was quickly discovered that the map drew the speaker of the California Assembly out of his district. The fact that the speaker's home was left just a block outside his district was used as proof of intentional political bias by critics. They claimed there was no way that such a line could have been the result of mere coincidence, but must have been a deliberate political maneuver.

[134] Commissioners, staff and consultants should also be aware that their past associations with incumbents will be scrutinized for any hint of impropriety and may become the basis for attacks Arizona's 2001 redistricting carries warnings of the inevitability of such attacks. The chairman of the commission had been friends for decades with a State Senator and declared that fact. The friendship did not benefit the State Senator, for she ended up with her residence across the street from the district she wished to represent. Another legislator, this time in the lower house, was a college friend of the Commission's lead technical consultant, who also declared the fact. Again, the incumbent did not benefit from the connection, for he found himself in a legislative district with six other incumbent state legislators and lost his bid for reelection. Such facts, however, did not prevent those who wanted changes in the lines from leveling accusations of favoritism and bias.

political parties, from reviewing lines and alerting the commission to real or perceived biases. This may be particularly important for plans submitted by citizens or citizen groups: other members of the public may be the best critics of such plans. At one point in the Arizona process, representatives of one party submitted a map to the commission. Their claim was that their map was closely based on the commission's current preferred draft, but that they had made very small, fine-tuning changes. The party representatives claimed that the changes would clean up small divisions of neighborhoods and achieve other improvements to bring the plan into closer correlation with the official redistricting criteria. Since the map was submitted in public it was available to all interested parties. While the commission was barred from evaluating the impacts on incumbents of the map's allegedly "small changes," the other political party was not barred from such review. That party's review alerted the commission to the fact that every incumbent of the proposing party had been safely located in separate districts, while the incumbents of their own party had been lumped in districts with multiple other incumbents. The commission, alerted in this way to the fact that the submitted plan clearly violated the criteria against favoring incumbents, quickly and unanimously removed the proposed changes from active consideration. In this way an independent commission created to remove the power of political partisans from redistricting nevertheless benefited from the participation of one of the political parties acting as a check on the other.

California's 2011 commission experience also offers a warning to future commissions; but it is a lesson learned from failures rather than successes. As noted earlier, a highly publicized report, the product of in-depth investigative journalism by the non-profit ProPublica organization, was issued after the commission's plans had been implemented. The report revealed the deep involvement of one party's congressional delegation in the commission process. Covertly applying extensive resources, that party's congressional delegation had successfully swayed the commission's work to achieve its incumbents' interests. Much of the reaction to the report was professed shock at the partisan

operatives' underhand efforts to influence the commission. That criticism was naïve: given the high-stakes of redistricting, especially the effects of congressional redistricting on national politics, such efforts are sure to be made. Commissions need to expect that incumbent office holders and their allies will attempt to influence the commission's line-drawing work. California's 2011 commission failed to understand and to anticipate this threat.

Ideally, the commission itself would detect and reject attempts to influence its work for partisan gain. It must be acknowledged, however, that the same criteria that aim to protect a commission's independence also limit the commission's ability to detect partisan bias. Given this reality, a wise commission must recognize that it needs help from watchful, informed and politically astute members of the public. Paradoxically, the most capable and attentive of such watchers may be the very members of the political parties from whom the commission must remain independent. Independent commissions need the parties to perform this strictly limited role of whistleblower carefully watching for the overt and covert machinations of the other party: thanks to their resources and their freedom from limitations imposed on independent commissions (such as a lack of awareness of the residences of incumbent officeholders) partisans are the best critics of the efforts by incumbents of the other party to influence a commission. The California 2011 commission thought it was asserting its independence by shunning all overt comments from either party, but in actuality it damaged its independence by rejecting the benefits it could have gained from allowing the parties to play a 'watchdog' role in the process. Nothing is more certain than the watchfulness of parties and politicians where their power is threatened.

Drawing the Plans

It is sometimes thought that an independent redistricting should ideally involve drawing all district

lines in public sessions: the belief seems to be that such a process achieves total transparency.[135] Line-drawing in public, although it appears laudable, involves significant risks and limits opportunities to test and review options. In public meetings, there is always pressure from those officially directing the line drawing to go from decision to decision with little time for reconsideration. Often lost in this process is careful consideration of alternatives: decisions made earlier are forgotten and significantly different alternatives are never considered. At a practical level, a decision to draw all district lines in public is tantamount to a decision to draw only one map.

When lines are drawn live in a meeting, a further problem is that only those there at the time – always a tiny subset of the total electorate in the jurisdiction – participate in the decision-making. Obviously, such plans cannot be circulated beforehand. The process may degenerate into a wholly unrepresentative "groupthink" syndrome: the results may please those members of the public present at the time, but ignore earlier testimony from others. Moreover, lines drawn live often prove to carry unintended consequences that deeper analysis would have identified.[136]

At a practical level, such entirely public drawing of district lines is impossible in large jurisdictions. State level redistricting maps for Arizona and California cover huge areas with an almost infinite number of permutations. Drafts must be prepared by staff and or commissioners working with staff and then brought to public meetings for official consideration: the function of the open meeting then becomes review, comment, and live revisions in front of the citizen audience.[137]

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[135] MacDonald, Karin, "Proposal to the Chula Vista Districting Commission," September 7, 2014. Page 69 of the November 10, 2014, Agenda Packet of the Chula Vista Districting Commission. http://bit.ly/1JdcH3d

[136] this was a significant factor in the Escondido commission's creation of its so-called Latino district: deeper analysis would have revealed the problem.

[137] There simply is not time to draw every census block of every district in open meetings in Arizona or California. Even when it is possible in local redistricting –as seen, for example in Escondido – the process has clear dangers.)

To draw all lines in public, even in small jurisdictions where it is feasible, carries a further liability: namely, the commission renders itself almost defenseless against any covert bias or hidden agenda of its demographic consultant. Because the line drawing is conducted in a linear fashion (that is, where each decision builds on the previous decision, one after the other), it is difficult for all but the most sophisticated observers to recognize the later consequences of each decision. To draw this line here, rather than there, may be to force decisions where other lines must be drawn several steps later in the process. Few members of the public and only unusually sophisticated commissioners will be able to anticipate the results. Yet any experienced redistricting demographic consultant will have a detailed sense of the consequences of each decision on future alternatives. Commissioners and members of the public need time to study and reflect on lines and to test alternatives before they make final decisions if they to be able to review, much less contest, the consultant's point of view.

It is true, however, that a decision to draw plans between meetings, and then to discuss and edit those plans in open, carries its own risks. The public is not present to watch as each census block is selected for inclusion or exclusion from each district. Moreover, commissioners must be alert to the threat that pre-meeting discussions and decisions, made out of public sight, may be improperly influenced.

The 2011 Arizona commission's adoption of a districting plan largely drawn by the executive director of the Arizona Democratic Party gave proof to extensive behind-the-scenes influence. On a smaller scale the California commission's delegation of the line drawing in Ventura County to a commissioner who was later discovered to be a campaign donor to the incumbent Democratic officeholder in that area resulted from a similar failure to police off-line influences.

If maps are drawn between sessions, it is crucial that multiple options be drawn, that all options are distributed prior to the meetings, that public comment is accepted on the benefits and disadvantages of each option, and that the commission makes clear that it remains open to large-scale revisions of

its maps and decisions.[138] As noted in Chapter 2, problems arise if Commissioners and staff are working together behind closed doors – the Commission's independence and dedication to public involvement and transparency suggest the public should see the maps and data at the same time as the Commission. As described in Chapter 3, the Arizona commission in 2001 provided for especially careful policing and vetting of its off-line process by both the public and the Commission. At each public meeting the commission would review multiple plans presented to it by its consultants; it would typically accept several plans drawn by members of the public; and it would give its consultants specific direction on options it wished to see, sometimes with detailed geographic changes as the goal and sometimes to improve overall demographics. The commission then required its consultants to highlight changes in materials released to the public for review prior to the next public meeting. In so doing, they ensured a full vetting of every change would be available from the perspective of every group and individual following the process. At the next meeting, the consultants were required to walk through the changes made to each map, census block by census block.

Perhaps the 2001 Arizona commission's most consequential decision was to ban its members from personally drawing lines. While Arizona's size and the timeline of the project required off-line work be done, this ban was an important reassurance to the attentive public. It meant that commission evaluations of the plan and implementation of its preferences on the plan took place only in public sessions. California's controversies with lines drawn by single members or subcommittees of Commission members behind closed doors also support the 2001 Arizona commission's methodology.

Another useful strategy of Arizona's 2001 commission was to take the time to consider as many

[138] In defense of the California commission, it followed most of these steps.

options and approaches as possible. About one-third of the way through drawing its legislative map the commission became bogged down in a series of choices, all of which were viewed as unacceptable. The commission then challenged its consultants to analyze the problems and to return with a wider set of options. The consultants responded with eight new and very different "big picture" approaches for drawing the state's legislative districts. The new options shifted the discussion and, as a result, the commission discovered a new "out-of-the-box" solution to its dilemma. Moreover, the collection of options significantly widened the scope and usefulness of the comments and suggestions made by members of the public. Obviously, the consultants needed time and flexibility to devise eight new options. Their work had to be done after the public meeting, but in full knowledge that there would be careful consideration of the new options at the next meeting with time and opportunities for public criticism and comment.

The drive to assure the total transparency of a line-drawing process that is strictly limited to public meetings may unduly constrain a commission's actions and adversely affect its plans. The California Commission in 2011 is an example. Although that commission considered alternative approaches within each region of the state, it failed to consider alternative statewide approaches. The commission began by dividing the state into nine regions; it then appointed small committees to draw districts in each region; and, finally, the committees presented their preferred option for each region to the full commission. The process was very public, but there was no "big picture," California-wide review, either for the commission itself or for the public.

One result was that the California commission failed to examine how decisions for one region affected other regions. Even more fundamentally, the commission failed to consider how the initial selection of the nine regions would limit and shape their later decisions. It is true that the public was free to present options without use of the nine-region structure; but there were very few such public

submissions from the public. Chapter 2 noted there that it takes a lot of time and computer power to draw a statewide map for the entire state of California. The commission's quick dismissal of nearly all such public submissions signaled that such efforts would not be fruitful. The result was an essentially linear approach to redistricting the state as a whole. As noted in Chapter 2, this approach seems almost entirely to blame for the bizarre lines of Congressional and state legislative districts in Orange County and in the Inland Empire.

There is undeniable public appeal to a process that takes place entirely in public meetings. Commissioners may pride themselves on being able to say that every line was drawn in an open meeting or that each decision was made with the public present. This review has illustrated crucial countervailing dangers of a process confined to public meetings. The quality of the plan may suffer from a failure to take the time to consider a wide range of options. Districts may fall short of full implementation of the assigned redistricting criteria. There is the hidden but omnipresent danger of consultant capture or excessive consultant influence on lines. Moreover, to confine the process to drawing lines at public meetings is effectively to limit public participation to those able to attend and willing to comment in person. If maps are drawn live, without time for in-depth review and analysis, they may suffer from some or all these problems. The members of the public unable to attend the meetings, and those who would prefer most time to analyze potential mapping decisions, are likely to quickly sour on the idea.

If these are the dangers of drawing all lines in public meetings, the question becomes how to limit the dangers of drawing lines between meetings or, as critics may say, "behind-the-scenes and out of sight." The major risk, of course, is that commissioners, whether or not aided by consultants, will draw lines to achieve improper objectives. As already noted, a practical protection against such activity is to block commissioners from drawing any lines themselves. Thus, the 2001 Arizona commission, by barring

its members from engaging in line drawing, narrowed their role to comment and judgment of lines drawn by others, whether by consultants or members of the public. Another reasonable protection is suggested by the practices of the California Coastal Commission, which also deals with the extremely controversial and politically charged topic of development in California's coastal zone. That commission enforces a rule that each of its members must publicly report every contact that he or she has on the topic of the commission's business outside of the open public meetings. Clearly, commissioners should be able to alert the public to the commission's work: indeed, discussions outside official meetings may stir further public input. The reporting requirement, therefore, is not a ban on outside contact, but rather an assurance that all contacts will be disclosed. By its very nature, such disclosure acts as a check on efforts to improperly influence commissioners and the commission's process.

Line-Drawing by Members of the Public

Likely the best means of preventing improper influence on independent redistricting commissions is to put the line-drawing process directly into the hands of the public.[139] The ideal is that a very independent redistricting commission that announces an intention not to draw lines itself but to rely on maps presented to it by any interested group or individual. The stakes of redistricting are so high that in all large and midsize jurisdictions, even in quite small jurisdictions, there is always eagerness to answer the commission's call for maps.[140] Often, a group will present a map at one meeting that brings

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[139] For a decade, this author has advocated this approach to redistricting reform in states and in large and mid-size jurisdictions; and he has participated as a consultant in jurisdictions that adopted it, including some quite small jurisdictions. At the state level and in the largest cities and counties, there is always sufficient public interest and available resources to permit the approach. It takes little encouragement from the commission for the public to draw, submit, and explain multiple proposals.

[140] See Chapter 3's discussion about the number of maps submitted for Arizona's 2001 redistricting and Chapter 4's discussion of San Diego's 2011 redistricting for evidence of this.

an opposing group forward with a rival map at the next meeting: the commission is then able to judge and compare the merits of different approaches.[141]

As the commission receives maps, commissioners and their consultants will review and ask questions about them. Commissioners will comment on them and single out the parts they like and dislike. Sometimes, commissioners will directly state the changes and/or variations that they would like to see made in a particular map. Then, after the meeting, all the maps are made available for public inspection on-line and in public libraries. At the next meeting, the commission will hear testimony and criticism of the maps: sometimes the commission will choose to follow lines for a district in one map, while adopting the approach of opposing maps in designing other districts.

In such an approach, the opportunities for extensive public participation serve to insulate the commission from charges of bias and improper influence. A kind of adversary process between advocates of different line-drawing concepts assures that all important concerns are aired and discussed. Commissions are able to arrive at a good map by interacting with members of the public who do the actual line drawing. Although commissions maintain their own technical team, in this approach the consultants' primary responsibilities are to support the public line-drawing process: the consultants provide plan drawing tools to the public, check demographic and other statistics, and evaluate submitted plans in terms of the assigned criteria. Because the consultants do not draw the plans themselves, there is little risk of their undue or improper influence.

The spread of online redistricting tools and their rapidly dropping prices means that almost any citizen with an interest is able to participate.[142] Thus, an iterative and interactive process allows all the

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[141] Sometimes, an individual without computer skills will need assistance from the commission's consultant to present them in digital form.

[142] Computer tools able to draw redistrict plans even for the largest jurisdictions are now widely available. Some

commission's evaluations, decisions and directions to be done in public and then provided online for inspection by citizens who are unable to attend.

The level of public interest and the number of groups involved mean that a wide variety of approaches and options will be considered before final lines are drawn: in itself, this carries an assurance of the fairness of the process. It is the watchdog role of the public, however, that is crucial: each group or individual who submits a plan becomes its advocate; and equally, they become critics of competing proposals from other members of the public. In large jurisdictions the resources the general public brings to this effort greatly exceed the resources any commission has available.

In smaller jurisdictions, including many cities, school districts and special districts, there may be too few organizations and individuals to engage in the kind of public-only line-drawing process described above. Commissions in such jurisdictions will need to follow a more traditional path: members or consultants will draw some initial options to generate comment and prompt alternatives. They may also need to employ their consultants to fine-tune the maps. Nevertheless, even in such cases, the public may be relied on to submit maps and concepts for districts. Even in the smallest jurisdictions, direct public involvement in line-drawing ensures that a variety of viewpoints and options will be considered prior to the adoption of a final plan.

But in the wake of the controversies and problems of the 2011 Arizona and California commissions, the line-drawing-by-the-public approach appears to be gaining attention and support.[143] Its spread will be aided by the use of online redistricting tools and the development of redistricting software expertise among the public. For those commissions unwilling to take this leap of faith, those same Arizona and

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commissions have permitted citizen access to their own map drawing programs

[143] Cain, Bruce, "Redistricting Commissions: A Better Political Buffer?" 121 The Yale Law Journal 1808, 2012.

California commission examples should weigh heavily in favor of the 'clashing consultant' model of hiring rival technical consultants and challenging them to provide both proposals to address public and commission concerns along with critiques of the other consultant's proposals.

It is a fact of contemporary politics that firms with extensive redistricting expertise are either staffed by political operatives of one political party or are perceived as predominantly linked to one party or the other. State redistricting commissions, which almost always become the focus of partisan and incumbent influence attempts, are wisest if they employ consultants viewed as tied to both political parties. To employ competing firms is a useful means of defending against partisan bias in one direction. In the process that this author believes ideal, all maps are submitted by the public and the consultants' task is limited to critique and commentary. The rival consultants' input, whether drawing plans as directed by the Commission or merely reviewing plans submitted by the public, reliably exposes political motivations that otherwise could go unrecognized by commissioners.

The "encroaching spirit of power," of which Madison spoke, is the greatest enemy of commission independence. Party and incumbent self-interest do not disappear with the creation of an independent commission; they are, instead, driven underground and, in a multitude of covert ways, continue to pursue their aims. Nor are they alone: many groups with a stake in legislation or the status quo will also attempt influence by concealed means.

There is a Madisonian solution to the problem: internal self-regulation and explicit self-limitation are the key means of combatting encroachment on commission independence. Commissioners should neither draw lines themselves nor have their consultants draw them. Instead they should open the process to the public and encourage every group or interested individual to submit maps or suggestions for lines. They should invite the competitors for power to make their case in public alongside all interested citizens. Commissioners are then free to choose – perhaps to "mix and match"

– among contesting proposals. They can accept, reject, or require modifications to maps or to district lines. In doing so, however, they will be aware that their choices are being made in the full light of day, which is a vital check on "the encroaching spirit of power."

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