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Redistricting Reform in Wisconsin to Curtail Gerrymandering: The Wisconsin Impartial Citizens Redistricting Commission

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REDISTRICTING REFORM IN WISCONSIN TO CURTAIL GERRYMANDERING: THE WISCONSIN IMPARTIAL CITIZENS REDISTRICTING COMMISSION

After an extremely partisan gerrymander in 2011, Wisconsin needs redistricting reform in order to eliminate partisan politics from the process. Now more than ever, momentum for change has reached its peak: the Wisconsin legislative maps as drawn in 2011 were ruled unconstitutional in Whitford v. Gill; the Supreme Court has recently ruled in favor of states implementing independent redistricting commissions; and nearly half of the states in the United States are beginning to use independent commissions for redistricting. This Comment proposes a unique approach for Wisconsin to adopt in order to curtail gerrymandering: the Wisconsin Impartial Citizens Redistricting Commission (WICRC). Under this scheme, Wisconsin would go further than other states and employ a commission comprised of nonvoting or seldom voting citizens who are selected by the Wisconsin Elections Commission in a process that parallels jury selection. The WICRC would be provided with population data and partisanship scores in order to reduce partisan bias while maximizing competition. While this approach may seem counter-intuitive, at the very least this Comment serves as a thought experiment in an effort to inspire redistricting reform in Wisconsin, and perhaps elsewhere in the United States.

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I. INTRODUCTION

Say what you want about newly elected President Donald Trump, but of all his controversial statements made while on the campaign trail, one was spot on: “[O]ur system is absolutely, totally rigged.”¹ This Comment does not focus on President Trump’s claims of a systematic rigging of elections, which were the crux of his “rigged” claims.² Rather, it focuses on another phenomenon that does rig our system and inhibits our democracy: gerrymandering. President Barack Obama recently recognized gerrymandering as a threat to our democracy in his Farewell Address, as he said, “Our democracy is threatened whenever we take it for granted. All of us . . . should be throwing ourselves into the task of rebuilding our democratic institutions. . . . [W]e should draw

1. Robert Farley, *Trump’s ‘Rigged’ Claim*, FACTCHECK.ORG (July 12, 2016), <https://www.factcheck.org/2016/07/trumps-rigged-claim/> [<https://perma.cc/N4KB-K6UJ>] (quoting President Trump at a rally on July 5, 2016, in Raleigh, North Carolina).

2. *See id.*

our congressional districts to encourage politicians to cater to common sense and not rigid extremes.”³

Every ten years, each state engages in a process of redrawing and reapportioning congressional and state legislative districts based upon data collected by the United States Census Bureau.⁴ At the hands of both political parties,⁵ gerrymandering—the partisan manipulation of political district boundaries to give a political party or incumbents an advantage in future elections⁶—plagues this process, giving many political districts very odd shapes.⁷ Gerrymandering has become a serious issue in the United States, as it has been a chief cause of the election of very partisan legislators and a gridlocked legislative process.⁸ The battleground state of Wisconsin serves as

3. Barack H. Obama, President of the United States, Farewell Address to the Nation from Chicago, Illinois (Jan. 10, 2017) [hereinafter President Obama, Farewell Address]. President Obama has also stated that one of his post-presidency projects will be combatting gerrymandering after the 2020 Census. Robert Barnes, *Supreme Court to Hear Potentially Landmark Case on Partisan Gerrymandering*, WASH. POST (June 19, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-to-hear-potentially-landmark-case-on-partisan-gerrymandering [<https://perma.cc/CQ75-AK9Q>] [hereinafter Barnes, *Supreme Court to Hear Potentially Landmark Case on Gerrymandering*] (insert URL into Google.com search engine; then follow “Supreme Court to hear potentially landmark case – The Washington Post” hyperlink).

4. Michael Wines, *Judges Find Wisconsin Redistricting Unfairly Favored Republicans*, N.Y. TIMES (Nov. 21, 2016), <http://nyti.ms/2f0oNEH> [<https://perma.cc/NHA9-R4V6>] [hereinafter Wines, *Wisconsin Redistricting Favored Republicans*].

5. Christopher Ingraham, *This is Actually What America Would Look like Without Gerrymandering*, WASH. POST (Jan. 13, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/01/13/this-is-actually-what-america-would-look-like-without-gerrymandering> [<https://perma.cc/F237-K757>]. Ingraham argues that determination of political districts should be a task for computers, and mentions how “[s]ome state legislatures are more brazen about the process than others. Maryland’s districts, drawn by Democrats, are one particularly egregious example. North Carolina’s, drawn by Republicans, are another.” *Id.*

6. Christopher Ingraham, *This is the Best Explanation of Gerrymandering You Will Ever See*, WASH. POST (Mar. 1, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see> [<https://perma.cc/95H9-WYSN>]; see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (defining partisan gerrymandering as “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power”).

7. Christopher Ingraham, *America’s Most Gerrymandered Congressional Districts*, WASH. POST (May 15, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/05/15/americas-most-gerrymandered-congressional-districts> [<https://perma.cc/GN92-G3D8>] (providing examples of irregularly shaped districts arising from 2011 redistricting and even giving some of them creative names, such as calling Pennsylvania’s 7th Congressional District “Goofy Kicking Donald Duck”).

8. See generally Nathan S. Catanese, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 323 (2014) [hereinafter Catanese, *Gerrymandered Gridlock*].

arguably the best example in the nation of how political districts have been altered for the sake of gaining partisan advantage.⁹

With the 2020 census only a few years away, swift action is needed in Wisconsin in order to institute a nonpartisan, impartial redistricting and reapportionment process. Momentum for reform is growing, especially because, in what was an unprecedented decision, the Western District of Wisconsin in *Whitford v. Gill* struck down part of Wisconsin's 2011 redistricting scheme because it "constitutes an unconstitutional political gerrymander."¹⁰ While the court did institute a short-term remedy by calling for the state legislature to craft new Assembly districts by November 1, 2017,¹¹ I ultimately see the holding of this case as a call to action for reform in Wisconsin. My suggestion is to scrap the current framework and implement an independent, impartial, and nonpartisan redistricting body called the Wisconsin Impartial Citizens Redistricting Commission.¹² Such a scheme would rely on Wisconsinites who do not vote or who rarely vote to construct political districts. While relying on laypersons for such an important task might seem counter-intuitive, this Comment should at least stimulate discussion to develop unique ideas aimed at curtailing partisan gerrymandering.

This Comment focuses on curtailing partisan gerrymandering in Wisconsin by introducing a unique framework by which Wisconsin should redraw and reapportion congressional and state legislative districts. Part II provides an overview of what gerrymandering is, the methods and consequences of gerrymandering, and where states derive their authority to draw political districts. Part II also discusses the current Wisconsin redistricting process and provides examples of gerrymandered Wisconsin districts that resulted from 2011 redistricting. Part II lastly examines the unconstitutionality of Wisconsin's gerrymandered districts by reviewing *Whitford v. Gill*, which held that the State Assembly maps are unconstitutional and also set forth a standard

9. See Craig Gilbert, *The Red & The Blue: Political Polarization Through the Prism of Metropolitan Milwaukee*, MARQ. LAW., Fall 2014, at 10 [hereinafter Gilbert, *Red & Blue*] (noting that, for instance, southeastern Wisconsin has become "the most polarized part of a polarized state in a polarized nation"); *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016).

10. *Whitford*, 218 F. Supp. 3d at 843.

11. On January 27, 2017, the court ordered the state legislature to enact a new redistricting map by November 1, 2017, in accordance with the determination of its decision and contingent upon the Supreme Court's affirmance of the court's judgment. Opinion and Order at 7, *Whitford*, 218 F. Supp. 3d 837 (No. 15-cv-421-bbc) (enjoining defendants from using the districting scheme of Act 43 and requiring that defendants craft a remedial redistricting plan for the November 2018 election). On June 19, 2017, the Supreme Court stayed the Western District's decision and granted certiorari to hear the case during its term beginning in October 2017. Barnes, *Supreme Court to Hear Potentially Landmark Case on Gerrymandering*, *supra* note 3.

12. See *infra* Part IV.

for reviewing the constitutionality of political boundaries. Part III gives examples of approaches that other states have taken to combat gerrymandering, such as implementing independent commissions of various kinds. Part III then critiques these approaches. Finally, Part IV proposes a new framework that Wisconsin should adopt to insulate its redistricting processes from partisan gerrymandering given its unique political makeup, activism, and demographics. The central feature of the framework proposed involves using citizens who seldom vote or who never vote to draw the new political boundaries. Given that this is a new approach to combating gerrymandering, Part IV also identifies affirmative arguments in favor of the idea and addresses potential counterarguments. Part V then concludes this Comment.

II. AN OVERVIEW OF GERRYMANDERING AND WISCONSIN'S CURRENT REDISTRICTING PROCESS

Gerrymandering is centuries old, and state legislators only continue to employ the practice when exercising their constitutional prerogative of redrawing political boundaries to achieve electoral advantages.¹³ Wisconsin's 2011 redistricting cycle serves as a prime example of how states craft districts in ways to favor the state's majority party.¹⁴

A. A History and Overview of Partisan Gerrymandering

Gerrymandering is a practice that has its genesis in the state of Massachusetts over 200 years ago and is named after a signer of the Declaration of Independence, Mr. Elbridge Gerry.¹⁵ In 1812, Mr. Gerry—the governor of Massachusetts at the time—signed into law a legislative map that had districts drawn to benefit his political party.¹⁶ *The Boston Gazette* recognized the irregular political districts, and in response famously published a cartoon shaping one of the districts to look like a salamander.¹⁷ These events gave rise to the term and practice of what we now dub as “gerrymandering.”¹⁸

There are several ways in which state legislators can alter political boundaries for partisan gain. One common technique is known as “cracking”—

13. Carl Hulse, *Seeking to End Gerrymandering's Enduring Legacy*, N.Y. TIMES (Jan. 25, 2016), <https://nyti.ms/1K7pupo> [<https://perma.cc/BG69-sWRN>] [hereinafter Hulse, *Gerrymandering's Legacy*].

14. Wines, *Wisconsin Redistricting Favored Republicans*, *supra* note 4.

15. Hulse, *Gerrymandering's Legacy*, *supra* note 13.

16. *Id.*

17. *Id.*

18. *Id.*

dividing a party's supporters among numerous districts so that the party cannot reach a majority in any district.¹⁹ Another popular technique is to “pack,” or concentrate, as much of the electorate of a political party into one or as few districts as possible.²⁰ By doing so, the party being concentrated controls as few districts as possible in the state, while the electorate of the other party is spread out to several districts so that it can control just about every other political district in the state; “packing” wastes the vote of certain electorate blocks because that party will achieve overwhelming majorities in only a few districts.²¹ In this way, state legislators of the majority party can concede only a few political districts by creating politically homogeneous districts that favor the opposing party, while in turn spreading out their voters amongst the other political districts within the state.²² Either way, whether cracking or packing, the result is wasted votes, as votes are cast either for a candidate that has no chance of winning because one party's voters constitute a small presence in the district, or for a victorious candidate but in an excess of what is needed to win.²³

There are several consequences of gerrymandering districts for partisan advantage. Deliberately created politically homogenous districts have the result of producing politically extreme legislators.²⁴ Very partisan legislators do not have an incentive to moderate their views because they are insulated from losing to opposite party challengers as they are a product of a politically lopsided electorate.²⁵ Therefore, the ultimate result of gerrymandering is gridlock and less policymaking because politically extreme legislators, knowing that they are guaranteed reelection, have no need to make bipartisan

19. *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016).

20. See Catanese, *Gerrymandered Gridlock*, *supra* note 8, at 329.

21. *Id.* (providing an example of how Pennsylvania clearly used a “packing” strategy to compact Democrats while spreading out Republican votes to more districts within the state—as a result, even though the votes cast for Democrats and Republicans in November 2012 were nearly equal, the Pennsylvania congressional delegation had thirteen Republicans and only five Democrats).

22. *Id.*

23. *Whitford*, 218 F. Supp. 3d. at 854.

24. See Catanese, *Gerrymandered Gridlock*, *supra* note 8, at 324.

25. See President Obama, Farewell Address, *supra* note 3 (“[W]e should draw our . . . districts to encourage politicians to cater to common sense and not rigid extremes.”); see also Catanese, *Gerrymandered Gridlock*, *supra* note 8, at 324 (“[S]tate lawmakers have tried to achieve hyperpartisan gain through the redistricting process. . . . This arrangement favors electing ideologically extreme candidates that have little to no interest in making political compromises, especially since it increases the likelihood of a primary election challenger.”).

deals or strive for common ground.²⁶ Another consequence is that debate within the majority party of a state can be reduced.²⁷ Incumbents representing politically extreme districts have a greater chance of losing to more ideologically extreme candidates in primary elections that would better cater to the desires of the politically extreme district.²⁸ The result is the election of legislators who are even more extreme, and thus gridlock only grows.²⁹ Also, in addition to feeling the need to represent only the dominant constituency, “a representative may feel more beholden to the cartographers who drew her district than to the constituents who live there.”³⁰ In this manner, legislators will give different weights and legislative responsiveness to different constituents.³¹ Another significant consequence of partisan gerrymandering is that one political party in a state could seize perpetual power, as it can retain a majority as it moves from one decennial period to the next so that it retains control over future redistricting processes.³² Overall, gerrymandering is not compatible with democratic principles of competition and fair representation,³³ as its ultimate result is dysfunctional governance.

B. State Authority to Draw and Apportion Political Boundaries

Today, many states take heed to the example of Governor Gerry and craft their state’s political districts to gain advantage for their party in federal and state elections.³⁴ The United States Constitution gives states the prerogative to regulate congressional and local elections, and the specific methods are further defined in the constitutions and statutes of each state.³⁵ Specifically, the Constitution states, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed *in each State by the*

26. See Catanese, *Gerrymandered Gridlock*, *supra* note 8, at 323–24 (“Gridlock not only increases the likelihood that the federal government will default on its debt obligations, but is also bad for public policy in general.”); see also *Whitford*, 218 F. Supp. 3d at 927.

27. See Catanese, *Gerrymandered Gridlock*, *supra* note 8, at 324, 339–40.

28. See *id.*

29. See *id.*

30. *Whitford*, 218 F. Supp. 3d at 879 (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 470 (2006)).

31. *Id.* at 887.

32. See *id.* at 895. See generally Catanese, *Gerrymandered Gridlock*, *supra* note 8.

33. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015).

34. See Hulse, *Gerrymandering’s Legacy*, *supra* note 13.

35. See *Whitford*, 218 F. Supp. 3d at 844 (first citing *Grove v. Emison*, 507 U.S. 25, 34 (1993); then citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (“Reapportionment of state legislative districts is a responsibility constitutionally vested in the state government.”)).

Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”³⁶ The authority to regulate elections includes drawing and reapportioning new boundaries for congressional and local districts based on the new census data gathered every ten years.³⁷ The Constitution requires that a census be taken every ten years,³⁸ and the exact procedures and deadlines for gathering and handling population and other census information are proscribed in 13 U.S.C. § 141.³⁹

C. Wisconsin’s Current Framework for District Drawing and Reapportionment

While some states give district drawing authority to neutral, independent bodies to try to avoid the issues of partisan gerrymandering,⁴⁰ in Wisconsin the bicameral state legislature has the responsibility of reapportioning congressional and state districts.⁴¹ According to the Wisconsin Constitution, “the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants.”⁴² In this way, Wisconsin treats redistricting like any other piece of legislation, in which the state legislature draws the legislative district boundaries.⁴³ Once the redistricting bill passes both houses of the state legislature, the bill is then “presented to the governor” for him or her to either sign into law or veto.⁴⁴

36. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

37. WIS. CONST. art. IV, § 3; *see also* Jason Stein & Patrick Marley, *GOP Redistricting Maps Make Dramatic Changes*, MILWAUKEE J. SENTINEL (July 8, 2011), <https://archive.jsonline.com/news/statepolitics/125225179.html> [<https://perma.cc/F22P-Y8JZ>] [hereinafter Stein & Marley, *GOP Maps Make Changes*].

38. U.S. CONST. art. I, § 2, cl. 3 (“The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”).

39. 13 U.S.C. § 141(a) (2012) (“The Secretary [of Commerce] shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year. . . . In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.”).

40. *See infra* Part III.

41. *Whitford v. Gill*, 218 F. Supp. 3d 837, 844 (W.D. Wis. 2016) (“[T]he people of Wisconsin have so far chosen to rely on its legislature to reapportion its districts after the decennial census.”).

42. WIS. CONST. art. IV, § 3.

43. *Whitford*, 218 F. Supp. 3d at 845 (discussing that the “[r]edistricting laws in Wisconsin are enacted . . . in the same manner as other legislation”). The court’s opinion provides an explanation of the legislative process from the perspective of Tad Ottman, aide to the Senate Majority Leader. *Id.*

44. WIS. CONST. art. V, § 10.

There are state and federal requirements imposed upon Wisconsin reapportionment legislation. First, federal law requires that the districts be approximately equal in population; each congressional district needs to have about the same population as other congressional districts, and state districts need to have approximately the same population as other state districts.⁴⁵ States must also comply with section 2 of the Voting Rights Act of 1965, which mandates that, in order to ensure that minority groups have an opportunity to elect candidates of their choice, states cannot dilute the voting power of ethnic or racial minority groups.⁴⁶ Next, requirements specific to Wisconsin districting are found in the Wisconsin Constitution.⁴⁷ In particular, State Assembly districts are “to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable.”⁴⁸ Also, “no assembly district shall be divided in the formation of a senate district.”⁴⁹ It has also been observed that “[a]lthough avoiding the division of counties is no longer an inviolable principle, respect for the prerogatives of the Wisconsin Constitution dictate that wards and municipalities be kept whole where possible.”⁵⁰

With a population growth of about 320,000, or 6%, between the 2000 census and 2010 census,⁵¹ the state legislature had to redraw both the congressional and state legislative districts to fulfill its constitutional duty and account for this population increase.⁵² In 2010, Republicans in Wisconsin swept the ticket as voters elected a Republican majority in the State Assembly,

45. *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that Article I, Section 2 of the Constitution requires that the congressional districts be proportionate to one another so that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”). For example, given that Wisconsin’s population based on the 2010 U.S. Census was about 5,686,986, the ideal population for each of Wisconsin’s eight congressional districts was about 710,873. WISCONSIN LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 2011–2012, at 17 (Lynn Lemanski et al. eds. 2011) [hereinafter BLUE BOOK 2011–2012].

46. 52 U.S.C. § 10301(a) (2012). See generally *Thornburg v. Gingles*, 478 U.S. 30 (1986).

47. WIS. CONST. art. IV, § 4.

48. *Id.*; see also *Whitford*, 218 F. Supp. 3d at 844.

49. WIS. CONST. art. IV, § 5; see also *Whitford*, 218 F. Supp. 3d at 844.

50. *Whitford*, 218 F. Supp. 3d at 844 (alteration in original) (quoting *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002)).

51. Paul Mackun & Steven Wilson, *Population Distribution and Change: 2000 to 2010* (U.S. Census Bureau, C2010BR-01, March 2011).

52. *Id.*

a Republican majority in the State Senate, and a Republican governor.⁵³ So, Republicans had complete control in laying the new political boundaries, and, thus, could redraw the state's eight congressional districts and 132 state legislative districts to the exclusion of any input from Democrats.⁵⁴ After

53. See *Fall 2010 General Election Results*, MILWAUKEE J. SENTINEL (Nov. 2, 2010), <http://archive.jsonline.com/news/statepolitics/105000829.html> [https://perma.cc/GNF5-D5A9]; *Whitford*, 218 F. Supp. 3d at 846 (“In 2010, for the first time in over forty years, the voters of Wisconsin elected a Republican majority in the Assembly, a Republican majority in the Senate, and a Republican Governor.”). After the 2010 election, the Wisconsin state legislature flipped from Democratic to Republican as Republicans became the majority party of the State Senate (19 Republicans to 14 Democrats) and the majority party in the State Assembly (60 Republicans to 38 Democrats). *2010 Fall General Election Results*, WIS. ELECTIONS COMM’N (Dec. 1, 2010), <http://elections.wi.gov/elections-voting/results/2010/fall-general> [https://perma.cc/3G9B-8BPA]. Wisconsin also elected Republican Governor Scott Walker as successor to Democratic Governor Jim Doyle. *Id.*

54. Several commentators describe how state Republican lawmakers retained law firms to help draw the new boundaries behind closed doors without any input from Democrats or the public. See Stein & Marley, *GOP Maps Make Changes*, *supra* note 37; see also David Michael Miller, *Slaying the Gerrymander: The Wisconsin Legislative Reference Bureau Maps Nonpartisan Redistricting*, ISTHMUS (Feb. 6, 2014), <http://isthmus.com/news/slaying-the-gerrymander> [https://perma.cc/87M3-N6EZ] [hereinafter Miller, *Slaying the Gerrymander*]; *Whitford*, 218 F. Supp. 3d at 846–47. In the facts of *Whitford*, the court describes the drafting of Act 43—the maps for the State Senate and Assembly districts. See *id.* at 846–53. Specifically, Judge Ripple discusses how Republican leadership in January 2011 retained various attorneys and law firms to assist and supervise the work of Tad Ottman, staff member to Senate Majority Leader Scott Fitzgerald, and Adam Foltz, staff member to Assembly Speaker Jeff Fitzgerald, in planning and drafting the new districts. *Id.* at 846–47. These individuals utilized redistricting software called autoBound, which provided demographic information for different areas of the map such as population, existing district boundaries, and different minority group populations. *Id.* at 847–48. Ottman and Foltz were also able to assess the partisan make-up and impact of the new districts they were drawing. *Id.* at 848. When they created a statewide map, they exported “district-by-district partisanship scores from autoBound.” *Id.* at 849. “The drafters used their composite score to evaluate the statewide maps that they had drawn based on the level of partisan advantage that they provided to Republicans.” *Id.* With each statewide map the drafters completed, the map “improved upon the anticipated pro-Republican advantage generated in the initial” draft plans, increasing the number of Republican safe seats and Republican leaning seats and decreasing the amount of swing seats. *Id.* at 850. The drafters then presented maps and partisan scores to the Republican leadership in the legislature. *Id.* at 851. Under the “Final Map,” the Republicans could expect to win 59 Assembly seats, with 38 safe Republican seats, 14 leaning Republican, 10 swing, 4 leaning Democratic, and 33 safe Democratic seats.” *Id.* (footnote omitted). Once the map was eventually finalized, the drafters “presented each Republican member of the Assembly with information on his or her new district” with a memorandum that “detailed what percentage of the population in the old and new districts voted for Republican candidates in representative statewide and national elections held since 2004.” *Id.* at 852. The drafters “engaged in a similar process with Republican members of the State Senate” and also gave a presentation to the Republican caucus. *Id.* at 852–53. In fact, Ottman’s notes from the meeting with the Republican caucus state: “The maps we pass will determine who’s here 10 years from now, and [w]e have an opportunity and an obligation to

months of secret drafting, the Republican leadership revealed the new district maps on July 11, 2011, as 2011 Senate Bills 148 and 149—concerning State Senate and Assembly districts and congressional districts, respectively.⁵⁵ These bills passed along strict party lines on July 19th and 20th, and were signed by Governor Walker on August 9, 2011.⁵⁶ These new maps were published in August 2011 and are codified in the Wisconsin statutes.⁵⁷

D. Examples of Gerrymandering in Wisconsin

One way in which Republican state lawmakers gerrymandered districts in their favor was by packing Democratic voters into a few districts to dilute their vote across the state.⁵⁸ For example, in addition to retaining Democratic strongholds like Eau Claire, Democratic Congressman Ron Kind's 3rd Congressional District was given an arm connecting it to counties in central Wisconsin, such as Portage County, that have given Democrats victories in the past.⁵⁹ This change is seen in comparing Figures 1 and 2, which are provided below. In another example, Democratic voters were packed into

draw these maps that Republicans haven't had in decades." *Id.* at 853 (alteration in original) (citation omitted).

55. S. 148, 2011 Leg., 100th Reg. Sess. (Wis. 2011); S. 149, 2011 Leg., 100th Reg. Sess. (Wis. 2011). See *Whitford*, 218 F. Supp. 3d at 853; see also Miller, *Slaying the Gerrymander*, *supra* note 54.

56. S. 148, 2011 Leg., 100th Reg. Sess. (Wis. 2011); S. 149, 2011 Leg., 100th Reg. Sess. (Wis. 2011). See *Whitford*, 218 F. Supp. 3d at 853; see also Miller, *Slaying the Gerrymander*, *supra* note 54.

57. Chapter 3 of the Wisconsin Statutes establishes the boundaries of the eight congressional districts, and Chapter 4 of the Wisconsin Statutes establishes the boundaries of the 33 State Senate districts and the 99 State Assembly districts. WIS. STAT. §§ 3.11–3.18 (2015–2016); *id.* §§ 4.009–4.99.

58. *Whitford*, 218 F. Supp. 3d at 854.

59. Craig Gilbert, *GOP Redistricting Plan Has Republican Cong. Sean Duffy's Re-election in Mind*, MILWAUKEE J. SENTINEL (June 13, 2011), <http://archive.jsonline.com/blogs/news/123782889.html> [<https://perma.cc/D4Y6-TPCJ>]. For an example of Rep. Kind's redrawn 3rd Congressional District, compare WISCONSIN LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 2009–2010, at 17 (Lynn Lemanski et al. eds. 2009) [hereinafter BLUE BOOK 2009–2010] (providing a visual of Chapter 3 of the 2007–2008 Wisconsin Statutes), with BLUE BOOK 2011–2012, *supra* note 45, at 17 (providing a visual of the new congressional districts enacted by 2011 Wisconsin Act 44, which shows that Rep. Kind's 3rd Congressional District added an arm extending into central Wisconsin to include Portage County). For examples of complete election results, see *Wisconsin Election Results*, WIS. ELECTIONS COMM'N, <http://elections.wi.gov/elections-voting/results> [<https://perma.cc/JSE9-HGJY>] (last visited Dec. 27, 2016) (from here you can navigate the website to find Wisconsin election results from previous elections—general and primaries; for instance, election results illustrate that in congressional and presidential elections since 2004, Eau Claire has voted in favor of Democrats, while Portage County, has been trending Democratic since 2004).

Congresswoman Gwen Moore's 4th Congressional District. Alongside keeping the entire city of Milwaukee and retaining the clear divide from the deeply-rooted conservative counties of Waukesha, Ozaukee, and Washington, the 4th Congressional District added several cities to the north that lean Democratic.⁶⁰ This change is also seen in comparing Figures 1 and 2.

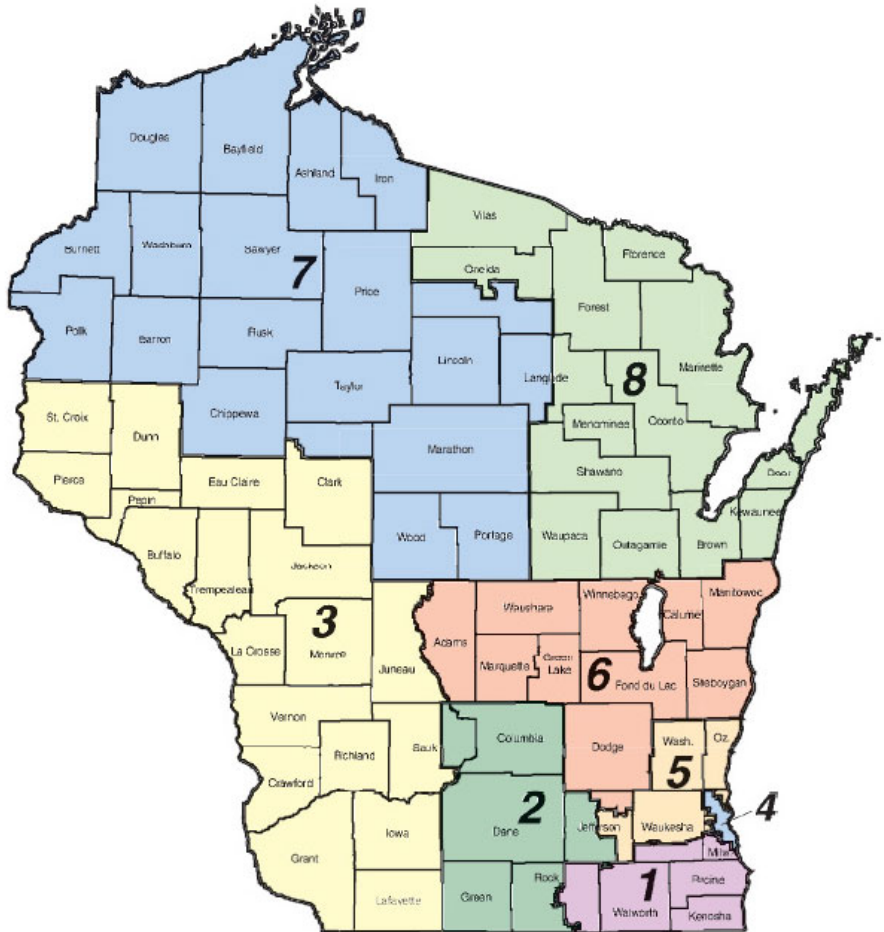
Another way that Wisconsin Republican lawmakers gerrymandered districts was by pulling conservative voting blocks into Republican districts to help Republican incumbents secure future elections. For instance, Republicans moved some growing conservative counties, such as St. Croix and Clark counties, out of Congressman Kind's district and into Republican Congressman Sean Duffy's 7th Congressional District to protect him from Democratic challengers.⁶¹ In another example, Republicans also cut out some Democratic areas of House Speaker Paul Ryan's 1st Congressional District and added some of Waukesha County's more conservative suburbs to his district.⁶² These changes are evident in comparing Figures 1 and 2.

60. See Gilbert, *Red & Blue*, *supra* note 9, at 17. For an example of Rep. Moore's redrawn 4th Congressional District, compare BLUE BOOK 2009–2010, *supra* note 59, at 17 (providing a visual of Chapter 3 of the 2007–2008 Wisconsin Statutes), with BLUE BOOK 2011–2012, *supra* note 45, at 17 (providing a visual of the new congressional districts enacted by 2011 Wisconsin Act 44, which shows that Rep. Moore's district expanded to the north of Milwaukee County). For examples of complete election results, see *Wisconsin Election Results*, *supra* note 59 (explaining, for instance, that Milwaukee has given Democrat candidates sizeable majorities, sometimes above 70%, such as in the 2014 gubernatorial election, or even touching 80%, such as in the 2012 presidential election; additionally, cities that were added to the district in 2011, such as Glendale, Shorewood, Whitefish Bay, and Fox Point, have voted Democrat in nearly every election in the past decade).

61. Miller, *Slaying the Gerrymander*, *supra* note 54. For an example of Rep. Duffy's redrawn 7th Congressional District, compare BLUE BOOK 2009–2010, *supra* note 59, at 17 (providing a visual of Chapter 3 of the 2007–2008 Wisconsin Statutes), with BLUE Book 2011–2012, *supra* note 45, at 17 (providing a visual of the new congressional districts enacted by 2011 Wisconsin Act 44, which shows that St. Croix and Clark counties were absorbed by the 7th Congressional District as they were taken out of the 3rd Congressional District). For examples of complete election results, see *2016 Fall General Election Results*, WIS. ELECTIONS COMM'N (Nov. 8, 2016), <http://elections.wi.gov/elections-voting/results/2016/fall-general> [<https://perma.cc/C4MJ-TNMX>] (explaining, for example, that St. Croix and Clark counties since 2010 have tipped in favor of Republican candidates—for instance, in the 2016 presidential election after the recount St. Croix County gave President Donald Trump about 55% of its vote and Clark County gave President Trump about 63% of its vote).

62. Miller, *Slaying the Gerrymander*, *supra* note 54. For an example of Speaker Ryan's redrawn 1st Congressional District, compare BLUE BOOK 2009–2010, *supra* note 59, at 17 (providing a visual of Chapter 3 of the 2007–2008 Wisconsin Statutes), with BLUE BOOK 2011–2012, *supra* note 45, at 17 (providing a visual of the new congressional districts enacted by 2011 Wisconsin Act 44, which shows that Speaker Ryan absorbed more of Waukesha County). See also Gilbert, *Red & Blue*, *supra* note 9, at 17 (mentioning that Waukesha County was one of the “three of the highest-performing Republican counties in America” in 2012). For examples of complete election results, see *2012 Fall General Election*, WIS. ELECTIONS COMM'N (Nov. 6, 2012), <http://elections.wi.gov/elections->

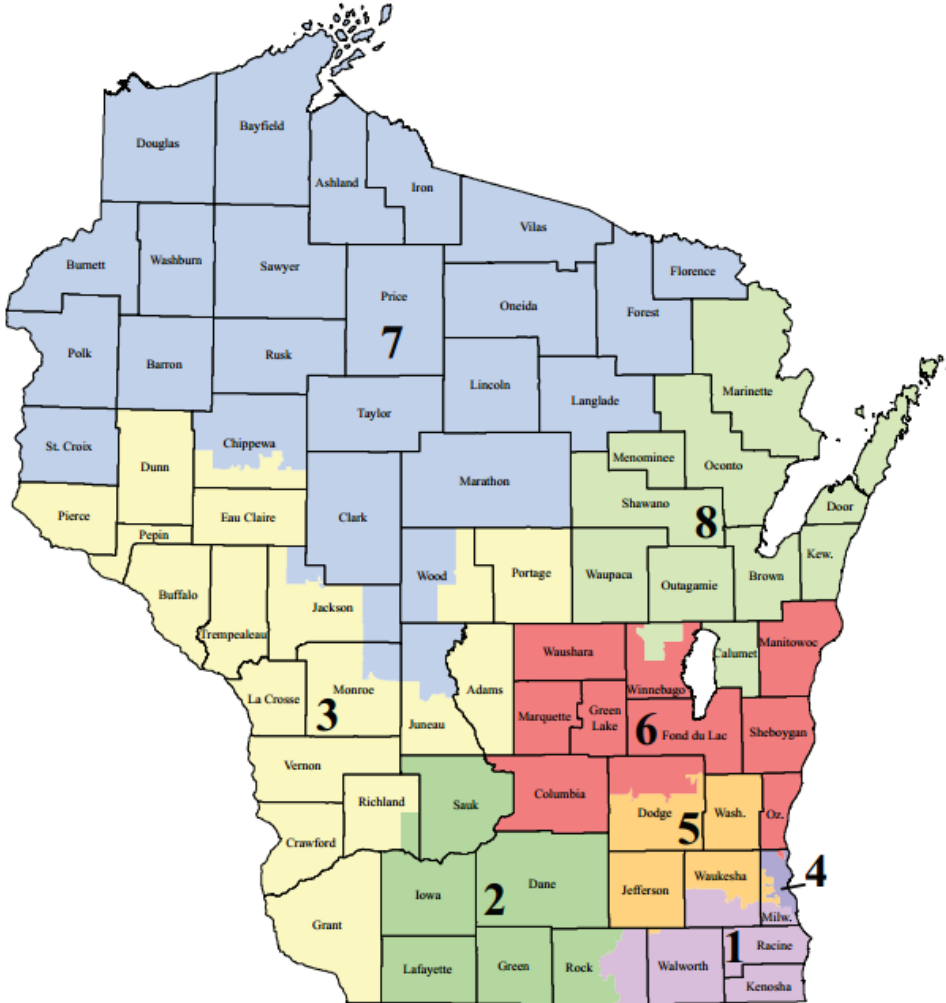
Figure 1: Wisconsin's Congressional Districts Before 2011 Redistricting⁶³



voting/results/2012/fall-general [https://perma.cc/NTA5-FEDE] and *2014 Fall General Election Results*, WIS. ELECTIONS COMM'N (Nov. 4, 2014), <http://elections.wi.gov/elections-voting/results/2014/fall-general> [https://perma.cc/TL3L-VXLP] (explaining, for example, since 2010, Waukesha County has given Republicans sizeable majorities in statewide races, such as giving Republican nominee Mitt Romney 67% of the vote in 2012 and Republican Governor Scott Walker 72% of the vote in 2014).

63. BLUE BOOK 2009–2010, *supra* note 59, at 17.

Figure 2: Wisconsin's Congressional Districts After 2011 Redistricting⁶⁴



There are also many examples of state legislative districts that were drawn to give Republican state legislators advantages. For example, in Republican

64. BLUE BOOK 2011–2012, *supra* note 45, at 17.

State Senator Alberta Darling's 8th District, not only were several areas of Democratic suburbs of northern Milwaukee like Shorewood taken away, but also State Senator Darling's district expanded north to include more parts of Ozaukee County like Mequon and Grafton and also expanded west to include more of Washington and Waukesha County, which all contain overwhelming Republican electorates.⁶⁵ In another example, Racine and Kenosha were packed into only a single State Senate district, which allowed these counties to be maneuvered to create a safe district for Republicans to the west and cut out Democratic State Senator Bob Wirth.⁶⁶ In a final example, in what illustrates long-term thinking on behalf of Republicans, brothers Senate Majority Leader Scott Fitzgerald and former Assembly Speaker Jeff Fitzgerald had a congressional district line drawn between their homes.⁶⁷ In this way, Republicans could ensure that they maintain a majority in the Wisconsin congressional delegation, because separating the brothers into different congressional districts prevents them from competing against one another for a congressional district.⁶⁸ The cut that Democrats took in state legislative districts as a result of gerrymandering is evident upon comparing Figures 3 and 4, which are provided below, as there are fewer blue districts after 2011 redistricting.⁶⁹

65. Compare BLUE BOOK 2009–2010, *supra* note 59, at 34, with WISCONSIN LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 2013–2014, at 34 (Julie Pohlman et al. eds. 2013) [hereinafter BLUE BOOK 2013–2014]. See also Gilbert, *Red & Blue*, *supra* note 9, at 17. In addition to providing a visual of how red Washington, Ozaukee, and Waukesha counties have become since the 1980s, Gilbert's article in a caption states, "In 2012, Washington, Ozaukee, and Waukesha were three of the highest-performing Republican counties in America, making metropolitan Milwaukee's urban-suburban voting gap among the biggest in the nation." *Id.*

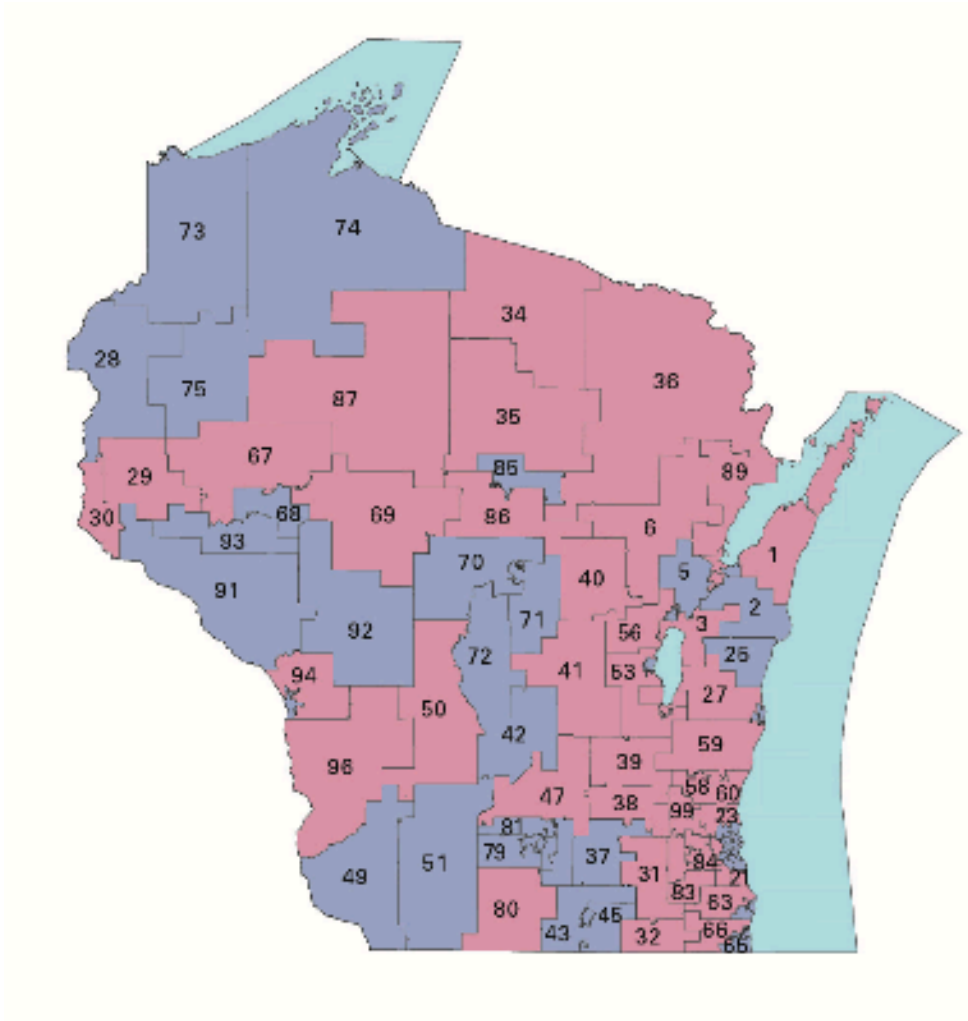
66. Miller, *Slaying the Gerrymander*, *supra* note 54.

67. *Id.*

68. *Id.*

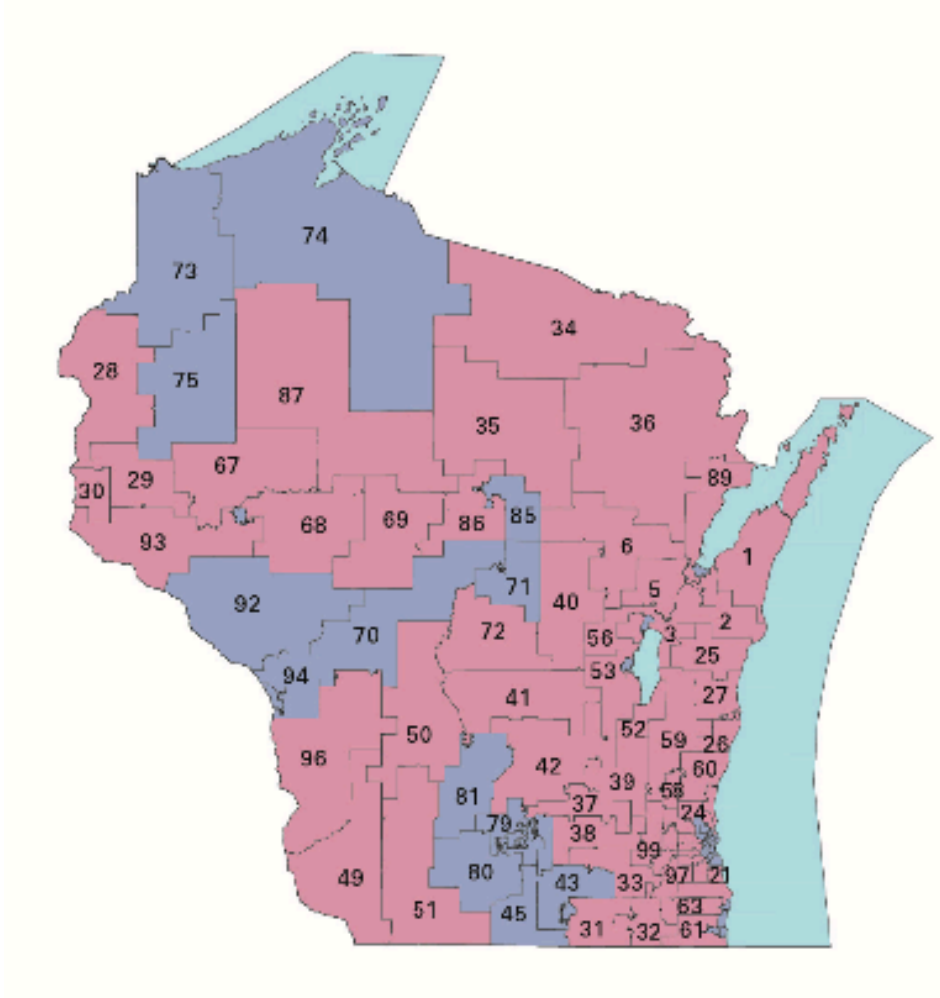
69. While it is certainly plausible that there are fewer blue districts because Democrats have simply lost elections, the facts demonstrate that despite receiving roughly equal amounts in elections, Democrats are awarded fewer seats. See *infra* notes 72–73.

Figure 3: Wisconsin's State Legislative Districts Before 2011 Redistricting with 2008 General Election Results⁷⁰



70. Complaint at Ex. 1, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (No. 15-cv-421-bbc) (illustrating how the 2011 plan deliberately allocated Democratic voters less efficiently than Republican voters across the state).

Figure 4: Wisconsin's State Legislative Districts After 2011 Redistricting with 2012 General Election Results⁷¹



Overall, the 2011 gerrymandering of Wisconsin's political districts has protected Republican lawmakers in Wisconsin and provided them election advantages over Democrats. David Michael Miller sums up the proof:

[T]he gambit paid off for the Republicans, cementing electoral

71. *Id.*

advantages that will last to 2021. They claimed five of eight congressional seats in 2012 despite winning less than half of the state's votes for Congress. They also won 55% of contested [S]tate Senate seats with only 45% of the vote, and 57% of Assembly races with 48% of the vote.⁷²

A visual example of such disproportionate results is seen when comparing Figures 3 and 4, as the Wisconsin State Assembly has become less blue and redder across the state largely due to gerrymandering. Additionally, even though Democrats received 51.4% of the statewide vote in 2012, they only claimed thirty-nine Assembly seats, while a roughly equal vote for Republicans in 2014 translated into sixty-three seats in the State Assembly.⁷³ Also, while the 2016 general election gave the Wisconsin delegation to Congress five Republicans and three Democrats, Democratic contenders won 1,379,996 votes to 1,270,279 earned by Republican candidates.⁷⁴

In sum, in the summer of 2011 Wisconsin Republican lawmakers engaged in a partisan gerrymandering that has and will influence Wisconsin elections and policymaking for at least the remainder of this decennial period.⁷⁵ Wisconsin's 2011 partisan redistricting could even shape the fundamentals of elections around the nation, as the state's 2011 redistricting cycle has rekindled the debate regarding the constitutionality of gerrymandering by stirring litigation that has resulted in a case before the U.S. Supreme Court in October 2017.⁷⁶

E. The Unconstitutionality of Wisconsin's Gerrymandered Political Districts

Over the course of history, the Supreme Court has placed the law governing political gerrymandering "in a state of considerable flux" by handing down inconsistent opinions and not articulating a clear governing rule on the matter.⁷⁷

72. Miller, *Slaying the Gerrymander*, *supra* note 54.

73. *Whitford v. Gill*, 218 F. Supp. 3d 837, 899, 901 (W.D. Wis. 2016).

74. John Nichols, *John Nichols: Resolved for 2017: End Gerrymandering of Wisconsin*, CAP TIMES (Jan. 3, 2017), http://host.madison.com/ct/opinion/column/john_nichols/john-nichols-resolved-for-end-gerrymandering-of-wisconsin/article_84e1bd45-7292-5a08-b33b-3664401e6530.html [<https://perma.cc/B6VA-R5VF>] [hereinafter Nichols, *End Gerrymandering of Wisconsin*].

75. Miller, *Slaying the Gerrymander*, *supra* note 54; *see Whitford*, 218 F. Supp. 3d at 864.

76. Barnes, *Supreme Court to Hear Potentially Landmark Case on Gerrymandering*, *supra* note 3.

77. *Whitford*, 218 F. Supp. 3d at 883. However, the *Whitford* court did acknowledge that "the Supreme Court recognized that the constitutionality of legislative apportionments is governed by the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 864; *see Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Furthermore, Judge Ripple's opinion did give an in-depth overview of the case law history governing legislative apportionments and political gerrymandering, which helps a reader

As a result, there has been a split amongst courts around the nation,⁷⁸ and the Court has really only left open the possibility that a workable standard could be identified in future litigation.⁷⁹ The Western District of Wisconsin in *Whitford v. Gill* set forth such a standard that the Supreme Court could adopt to finally hold that a gerrymander is unconstitutional for favoring one political party over another.⁸⁰

In a ruling that really was the first of its kind, a panel of three judges on November 21, 2016, held that Wisconsin's 2011 redrawing of State Assembly districts, as provided in Act 43, constituted an unconstitutional partisan gerrymander.⁸¹ In particular, in a 2-to-1 ruling, the United States District Court for the Western District of Wisconsin determined that the remapping of the state legislative districts violated the First Amendment and Equal Protection Clause

understand the constant flux of the law. *Whitford*, 218 F. Supp. 3d at 863–883. For instance, Judge Ripple describes how *Davis v. Bandemer*—the first case in which the Supreme Court directly addressed a claim that redistricting discriminated against members of a political party—provided meaningful guidance in three ways:

First, the Court's one-person, one-vote and vote-dilution cases provide the foundation for evaluating claims of political gerrymandering. Second, that a "claim is submitted by a political group rather than a racial group, does not distinguish it in terms of justiciability." And, third, a successful political gerrymandering claim must include a showing of both discriminatory intent and discriminatory effect.

Id. at 868, 871–72 (citations omitted) (quoting *Davis v. Bandemer*, 478 U.S. 109, 125 (1986)). However, Judge Ripple further discusses how in *Vieth v. Jubelirer* in 2004 "the members of the Court were unanimous only in their willingness to jettison the test set forth in *Bandemer*." *Id.* at 877. Therefore, the *Whitford* court concluded that the test articulated in *Bandemer* for gerrymandering "no longer is good law" and was unworkable. *Id.* at 877. Specifically, the court mentions that the *Vieth* plurality, in discussing the shortcomings of the *Bandemer* test, describes how "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking [such standards] . . . political gerrymandering claims are nonjusticiable and . . . *Bandemer* was wrongly decided." *Id.* at 872 (first and third alterations in original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004)). Judge Ripple notes how the decision of *Vieth* "has placed district courts in an even greater quandary." *Id.* at 877. One fact contributing to the lack of consistency is that many of the major cases that the Supreme Court has heard regarding political gerrymandering, including *Vieth*, 541 U.S. 267 (2004), were decided by a plurality. See Graham Deese, *District Court Evaluates New Standard for Gerrymandering*, WISCONSINWATCHDOG.ORG (July 20, 2016), <http://watchdog.org/270792/whitford-nichol-efficiency-gap> [<https://perma.cc/H67U-WVC2>] [hereinafter Deese, *Evaluates New Standard*].

78. Deese, *Evaluates New Standard*, *supra* note 77.

79. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (citing *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring in the judgment)).

80. *Whitford*, 218 F. Supp. 3d at 884.

81. *Id.* at 843; Wines, *Wisconsin Redistricting Favored Republicans*, *supra* note 4.

of the Fourteenth Amendment because it aimed to, and actually did, deprive Democratic voters of their right to be represented.⁸²

This decision is remarkable because a federal court had never before struck down political district boundaries on grounds that they unfairly advantage one political party over another.⁸³ In fact, many district courts even began to question the validity of the cause of action.⁸⁴ So, *Whitford* is so momentous because for the first time a court articulated the elements for a cause of action for unconstitutional political redistricting and also set forth a clear mathematical formula for measuring partisanship in a district.⁸⁵ As one commentator noted, “For years, everyone has waited for the Supreme Court to do something on this front. Now one of the lower courts has jump-started the

82. *Whitford*, 218 F. Supp. 3d at 838, 884.

83. Wines, *Wisconsin Redistricting Favored Republicans*, *supra* note 4.

84. *Whitford*, 218 F. Supp. 3d at 890; *see also* Deese, *Evaluates New Standard*, *supra* note 77 (asserting that because the Supreme Court “has yet to create a set of standards for lower courts to use when they evaluate partisan gerrymandering claims,” and has also delivered “inconclusive opinions,” lower courts have reached different conclusions as they are left to search for a workable standard that the Supreme Court might eventually adopt to rule that a redistricting scheme is unconstitutional).

85. Wines, *Wisconsin Redistricting Favored Republicans*, *supra* note 4; *see also* *Whitford*, 218 F. Supp. 3d at 883–910. The mathematical formula applied by the Western District was the efficiency gap—“the difference between the parties’ respective wasted votes, divided by the total number of votes cast in the election.” Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 851 (2015) [hereinafter Stephanopoulos & McGhee, *Efficiency Gap*]. After the wasted votes for each party are totaled, the difference between the wasted votes of each party, divided by the total number of votes cast in the election, makes the efficiency gap. *Id.* at 851–52. An efficiency gap of zero means that the parties wasted votes at a similar rate. *Whitford*, 218 F. Supp. 3d at 854. In *Whitford*, experts testified that based on actual election results, “Republicans scored an efficiency gap rating of 11.69 percent to 13 percent in the first election after the maps were redrawn,” illustrating that the maps achieved their intent to give Republicans a great advantage in elections. Wines, *Wisconsin Redistricting Favored Republicans*, *supra* note 4. Stephanopoulos and McGhee provide an example of how to calculate the efficiency gap in Figure 1. Stephanopoulos & McGhee, *Efficiency Gap*, *supra* at 852 (Calculation of the Efficiency Gap); *see also* *Whitford*, 218 F. Supp. 3d at 903–04 (“The [efficiency gap] calculation is relatively simple. First, it requires totaling, for each party, statewide, (1) the number of votes cast for the losing candidates in district races (as a measure of cracked voters), along with (2) the number of votes cast for the winning candidates in excess of the 50% plus one votes necessary to secure the candidate’s victory (as a measure of packed voters). The resulting figure is the total number of ‘wasted’ votes for each party. These wasted vote totals are not, of themselves, independently significant for EG purposes; rather, it is the comparative relationship of one party’s wasted votes to another’s that yields the EG measure.” (alterations in original) (footnotes omitted)); Wines, *Wisconsin Redistricting Favored Republicans*, *supra* note 4 (“The formula divides the difference between the two parties’ ‘wasted votes’—votes beyond those needed by a winning side, and votes cast by a losing side—by the total number of votes cast. When both parties waste the same number of votes, the result is zero—an ideal solution. But as a winning party wastes fewer and fewer votes than its opponent, its score rises.”).

debate.”⁸⁶ The *Whitford* court stated the elements for a cause of action for partisan gerrymandering as follows:

[T]he First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.⁸⁷

Ultimately, applying this standard, *Whitford* ruled that “Act 43 burdens the representational rights of Democratic voters in Wisconsin by” hindering their ability to turn votes into legislative seats for the life of Act 43.⁸⁸

Before Wisconsin Attorney General Brad Schimel filed an appeal to the U.S. Supreme Court on February 24, 2017,⁸⁹ the *Whitford* court on January 27, 2017, handed down a remedy to address the unconstitutional partisan gerrymander of Act 43: in accordance with the principles set forth in *Whitford* and contingent upon the Supreme Court’s affirmance of the decision, the state legislature had until November 1, 2017, to enact a new redistricting map.⁹⁰ However, on June 19, 2017, the Supreme Court granted certiorari to hear the appeal during its October 2017 term and voted to stay the Western District’s remedy.⁹¹

Now that *Whitford* is on the books, a workable standard has been established. This case can serve to halt the flux of the legal principles that has thus far guided, or actually misguided, partisan gerrymandering jurisprudence and finally provide the rationale that several justices have been looking for to strike down partisan gerrymanders.⁹² If the Supreme Court affirms the *Whitford* holding, it would be a landmark ruling in election law. This is because such a

86. Wines, *Wisconsin Redistricting Favored Republicans*, *supra* note 4 (quoting Heather Gerken, Yale Law School professor and expert on election law).

87. *Whitford*, 218 F. Supp. 3d at 884.

88. *Id.* at 910.

89. See Defendant’s Notice of Appeal, *Whitford*, 218 F. Supp. 3d 837 (No. 15-cv-421-bbc).

90. See Opinion and Order at 7, *Whitford*, 218 F. Supp. 3d 837 (No. 15-cv-00421-bbc) (enjoining defendants from using the districting scheme of Act 43 and requiring that defendants craft a remedial redistricting plan for the November 2018 election).

91. Barnes, *Supreme Court to Hear Potentially Landmark Case on Gerrymandering*, *supra* note 3.

92. *Whitford*, 218 F. Supp. 3d at 883; Wines, *Wisconsin Redistricting Favored Republicans*, *supra* note 4; Barnes, *Supreme Court to Hear Potentially Landmark Case on Gerrymandering*, *supra* note 3 (describing how Justice Kennedy has written that he has been waiting for “a manageable standard by which to measure the effect of the apportionment and so to conclude that the state did impose a burden or restriction on the rights of a party’s voters.”).

ruling would have a profound effect not only on Wisconsin redistricting, but also on altering the way in which district boundaries are crafted in all states across the nation. *Whitford* also serves as a great step in curtailing gerrymandering in Wisconsin by setting forth a standard to determine when partisan gerrymandering has become too much to unconstitutionally dilute the voice of voters.⁹³ If anything, *Whitford* stands for the proposition that ideological neutrality in redistricting is key because it is the baseline measure that can produce a robust democracy by drawing districts that stir competition rather than adhere to political extremes.⁹⁴ In this way, this decision can be used to argue that reforming Wisconsin's redistricting process is necessary to ensure that voters of each party have a fair chance at achieving reasonable representation in legislatures and prevent one party from potentially maintaining perpetual power within the state.

III. FRAMEWORKS ADOPTED BY OTHER STATES TO CURTAIL GERRYMANDERING: INDEPENDENT REDISTRICTING COMMISSIONS

While many states such as Wisconsin continue to rely on its legislature to reapportion political districts after each census, there has been a growing movement by other states to give redistricting power to an independent, neutral entity typically referred to as an independent commission.⁹⁵ In fact, according to the National Conference of State Legislatures, as of 2015, twenty-four states have implemented some form of a commission for drawing political districts⁹⁶ in which state legislators relinquish redistricting authority to nonpartisan or bipartisan commissions.⁹⁷

Recently, the Supreme Court acknowledged and affirmed a state's ability to enact independent, neutral bodies in order to prevent partisan gerrymandering. In 2015 in *Arizona State Legislature v. Arizona Independent*

93. *Whitford*, 218 F. Supp. 3d at 884.

94. *See generally* 218 F. Supp. 3d 837.

95. *Id.* at 844.

96. *Redistricting Commissions: State Legislative Plans*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 7, 2015), <http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx> [<https://perma.cc/4S4H-EQ9P>] [hereinafter *Redistricting Commissions*, NCSL]. This web page provides a chart of the various commissions that different states employ, and it states that “[t]hirteen states have a commission with primary responsibility for drawing a plan for state legislative districts. Five states have an advisory commission that may assist the legislature with drawing the district lines and five states have a backup commission that will make the decision if the legislature is unable to agree.” *Id.* Also, “Iowa’s redistricting plan . . . is distinct from the other categories.” *Id.*

97. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2662 (2015).

Redistricting Commission, the Court held that “the Elections Clause permits the people of Arizona to provide for redistricting by independent commission.”⁹⁸ This holding is significant because it demonstrates the Supreme Court’s acceptance of states using independent commissions to curtail partisan gerrymandering. So, in addition to *Whitford*, the fact that more states are adopting commissions along with the Court’s approval of such commissions are other indications that momentum is growing for Wisconsin to follow suit and reform its redistricting framework by adopting a commission of its own. The following is an examination of three examples of independent commissions or neutral redistricting bodies that other states already employ.

A. Iowa: The Legislative Services Agency and the Redistricting Advisory Commission

“Iowa conducts redistricting unlike any other state,”⁹⁹ and its framework for redistricting state legislative and congressional districts is codified in Chapter 42 of the Iowa Code.¹⁰⁰ Once population data from the Census Bureau is delivered to the state, the task of preparing congressional and state legislative political boundaries is the responsibility of the Legislative Services Agency (LSA).¹⁰¹ The LSA consists of “[n]onpartisan legislative staff” who “develop maps for the Iowa House and Senate as well as U.S. House districts without any political or election data including the addresses of incumbents.”¹⁰² Specifically, the LSA can consider only population data when redrawing political districts,¹⁰³ and it must draw the districts so that they “have a population as nearly equal as practicable to the ideal population for such

98. *Id.* at 2671. The Court reached this holding largely because it determined that under Arizona’s Constitution, the electorate shares lawmaking authority with the state legislature. *Id.*; see ARIZ. CONST. art. IV, pt. 1, § 1 (“The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature”); see also *id.* art. XXII, § 14 (“Any law which may be enacted by the Legislature . . . may be enacted by the people under the Initiative.”).

99. *Redistricting Commissions*, NCSL, *supra* note 96.

100. IOWA CODE § 42 (2017).

101. *Id.* § 42.2(3).

102. *Redistricting Commissions*, NCSL, *supra* note 96. Professor Justin Levitt states that the LSA is an advisory body comprised of “civil servants committed to nonpartisanship and otherwise charged with tasks like legal and fiscal analysis of state legislation and state government oversight.” Justin Levitt, *Iowa, ALL ABOUT REDISTRICTING*, <http://redistricting.ils.edu/states-IA.php> [https://perma.cc/6RS2-7DM5] (last visited Dec. 27, 2016).

103. See IOWA CODE § 42.4.

districts.”¹⁰⁴ There are also several geographical requirements that the LSA must abide by when constructing the boundaries, including: strict limits on dividing counties or cities among more than one district;¹⁰⁵ making districts that are of “contiguous territory”;¹⁰⁶ and the districts “shall be reasonably compact in form,” which means that the districts should be “square, rectangular, or hexagonal in shape, and not irregularly shaped.”¹⁰⁷ Iowa also mandates that districts cannot be drawn with any consideration of politics, such as to favor any political party or legislator.¹⁰⁸

Upon completion of the plan of the newly drawn state legislative and congressional districts, the LSA delivers its plan as a bill to the State Senate and Assembly, where the bill is brought to a vote to approve the plan “expeditiously” and “under a procedure or rule permitting no amendments except those of a purely corrective nature.”¹⁰⁹ In this way, while the LSA takes the pencil away from the state legislature to draw new district maps, the state legislature retains its authority to implement the district maps, as the LSA is simply a guide for the state legislature in the redistricting process.

Moreover, the LSA is assisted and guided by “a five member temporary redistricting advisory commission.”¹¹⁰ The majority and minority leaders of both the State Senate and Assembly select four members of the redistricting advisory commission,¹¹¹ and these first four commission members select the fifth member, who serves as the chairperson.¹¹² Members of the commission are reimbursed for the “necessary expenses incurred in performing their

104. *Id.* § 42.4(1)(a)–(b).

105. *Id.* § 42.4(2).

106. *Id.* § 42.4(3).

107. *Id.* § 42.4(4). Of course, this provision makes Governor Gerry’s salamander-shaped districts illegal in Iowa. See Hulse, *Gerrymandering’s Legacy*, *supra* note 13.

108. IOWA CODE § 42.4(5) (“No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group. In establishing districts, no use shall be made of any of the following data: (a) Addresses of incumbent legislators or members of Congress. (b) Political affiliations of registered voters. (c) Previous election results. (d) Demographic information, other than population head counts, except as required by the Constitution and the laws of the United States.”).

109. *Id.* § 42.3(1). Section 42.3(2) states that if the first bill fails, the LSA prepares another bill “embodying a second plan of legislative and congressional districting,” and this process continues until a redistricting bill is passed. See *id.* § 42.3(2)–(3).

110. *Id.* § 42.5(1). Section 42.6 describes the duties of the commission, such as holding public hearings. See *id.* § 42.6.

111. *Id.* § 42.5(1)(a); see *id.* § 42.1(4) (defining “Four selecting authorities”).

112. *Id.* § 42.5(1)(b).

duties,”¹¹³ and they cannot hold public office or be related to or employed by a legislator who is affected by the new district boundaries.¹¹⁴

Ultimately, between the LSA and the redistricting advisory commission, Iowa has a redistricting scheme that calls for two bodies to work together to play an auxiliary role and advise the state legislature on redistricting in a nonpartisan manner.¹¹⁵

B. Arizona: The Arizona Independent Redistricting Commission

Having experienced a “troubled redistricting history” since the 1970s, Proposition 106 was adopted by citizen initiative in Arizona in 2000 by a margin of 56.1% to 43.9%.¹¹⁶ Proposition 106 sought to end Arizona’s recurring reapportionment crisis by amending the state’s constitution to remove congressional and state legislative redistricting authority from the state legislature and convey such power to an entity called the Arizona Independent Redistricting Commission (AIRC).¹¹⁷

Convening after each census to establish new district boundaries, the AIRC consists of five individuals,¹¹⁸ of whom the first four are selected by the highest ranking elected officers in each chamber of the state legislature.¹¹⁹ There are certain requirements that each member must satisfy in order to be qualified to be a member of the AIRC, including: no more than two members of the AIRC shall be of the same political party; no more than two of the first four members shall reside in the same county; each member must be a registered Arizona voter; and each member cannot have served public office, be a registered paid lobbyist, or an officer of a political party within three years of appointment.¹²⁰ The state’s Commission on Appellate Court Appointments initially narrows the potential commission members as it chooses the pool that the chamber leadership must choose from.¹²¹ At a later meeting after the four original AIRC

113. *Id.* § 42.5(1)(d).

114. *Id.* § 42.5(2)(b)–(c).

115. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2662 (2015) (citing IOWA CODE §§ 42.1–42.6 (2013)).

116. Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1830–31 (2012) [hereinafter Cain, *Redistricting Commissions*].

117. *Ariz. State Legislature*, 135 S. Ct. at 2658.

118. ARIZ. CONST. art. IV, pt. 2, § 1(3).

119. *Id.* § 1(6).

120. *Id.* § 1(3).

121. *Id.* § 1(5) (“[T]he commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten

members are selected, these four members then select from the nomination pool a fifth member who is not registered with any party already represented in the AIRC.¹²²

As stated above, the AIRC is given the authority to establish congressional and legislative districts for each decennial period.¹²³ In making the maps, the AIRC is deprived of certain information in the initial phases of the process, such as party registration and voting history data.¹²⁴ The AIRC must begin by creating a “grid-like pattern” across the state, making adjustments only to accommodate certain constitutional goals, such as creating districts of roughly equal populations.¹²⁵ Once completed, the draft of the new map is made public for comment or even nonbinding recommendations by legislators; then, the AIRC must establish the final district boundaries.¹²⁶

C. California: The Citizens Redistricting Commission

In the later 2000s, an influential bipartisan reform coalition called California Forward took up the cause to reform California’s redistricting scheme.¹²⁷ Through a popular initiative, California Forward secured passage of Proposition 11 and Proposition 20, which covered redistricting for state legislative districts and congressional districts, respectively.¹²⁸ The goal of this reform effort was to develop a redistricting framework unlike that adopted by other states and to squeeze out every ounce of political influence by creating a

nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties . . .”).

122. *Id.* § 1(8).

123. *Id.* §§ 1(3), (6), (14).

124. *Id.* § 1(15).

125. *Id.* § 1(14) (“The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals set forth below: (A) Districts shall comply with the United States Constitution and the United States voting rights act; (B) Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable; (C) Districts shall be geographically compact and contiguous to the extent practicable; (D) District boundaries shall respect communities of interest to the extent practicable; (E) To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts; (F) To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.”).

126. *Id.* § 1(16).

127. Cain, *Redistricting Commissions*, *supra* note 116, at 1823.

128. *Id.*

scheme comprised of a bipartisan panel of citizens who were disconnected from legislators and political data.¹²⁹

The result of Propositions 11 and 20 was the Citizens Redistricting Commission (CRC).¹³⁰ Professor Bruce Cain describes the CRC as “a ring of defensive tactics, employing multiple approaches to keep political and incumbent influences out.”¹³¹ In this regard, selecting the fourteen members of the CRC involves a fairly elaborate selection process. First, all registered California voters¹³² are able to apply to serve on the CRC, but certain members are automatically removed if they present a particular conflict of interest.¹³³ In this manner, any degree of involvement in politics that may impede an individual’s impartiality and indifference is uprooted from the process.¹³⁴ Then, after the State Auditor selects an Applicant Review Panel made up of three qualified independent auditors who have the responsibility of screening the applicants to the CRC,¹³⁵ the panel, with consideration of impartiality and

129. *Id.* at 1823–24.

130. *See generally* CAL. GOV’T CODE §§ 8251–8253.6 (West 2017); CAL. CONST. art. XXI.

131. Cain, *Redistricting Commissions*, *supra* note 116, at 1824.

132. GOV’T § 8252(a). CAL. CONST. art. XXI, § 2(c)(3) actually requires that:

Each commission member shall be a voter who has been continuously registered in California with the same political party or unaffiliated with a political party and who has not changed political party affiliation for five or more years immediately preceding the date of his or her appointment. Each commission member shall have voted in two of the last three statewide general elections immediately preceding his or her application.

133. GOV’T § 8252(a)(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 State 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 relation, including parents, children, siblings, and in-laws.”).

134. Cain, *Redistricting Commissions*, *supra* note 116, at 1824.

135. GOV’T § 8252(b) (“The State Auditor shall randomly draw names from a pool consisting of all qualified independent auditors. The State Auditor shall draw until the names of three qualified independent auditors have been drawn, including one who is registered with the largest political party

diversity, selects sixty of the most qualified applicants.¹³⁶ This is evenly broken up between individuals who are registered with the largest political party in the state, individuals who are registered with the second largest party in California, and individuals who are not registered with either of the two largest parties in California.¹³⁷ Then, leadership from the State Senate and Assembly can each strike two applicants from each sub pool.¹³⁸ Next, eight names from the remaining pool are drawn at random so that three are from the largest party, three from the second largest party, and two are nonregistered individuals.¹³⁹ These eight individuals then appoint six other members to the commission from the remaining names, in accordance with keeping the proportionate balance between the parties.¹⁴⁰ Thus, ultimately, the CRC is made up of fourteen individuals from the California general public who are registered California voters rather than people who are selected by members of the state legislature.¹⁴¹ However, the CRC can hire staff and consultants as needed,¹⁴² the membership is compensated for their services,¹⁴³ and also the members cannot communicate with anyone outside of a public hearing other than the consultants that they retain.¹⁴⁴

The CRC is constitutionally responsible for drawing district boundaries in a manner that follows the requirements specified in the California Constitution.¹⁴⁵ For example, the constitution explicitly states that the districts cannot be drawn in a way that favors or dilutes a political party or an

in California based on party registration, one who is registered with the second largest political party in California based on party registration, and one who is not registered with either of the two largest political parties in California.”).

136. *Id.* § 8252(d).

137. *Id.*

138. *Id.* § 8252(e).

139. *Id.* § 8252(f).

140. *Id.* § 8252(g).

141. *Id.* § 8252(b), (d)–(g).

142. *Id.* § 8253(a)(5).

143. *Id.* § 8253.5 (“Members of the commission shall be compensated at the rate of three hundred dollars (\$300) for each day the member is engaged in commission business.”).

144. *Id.* § 8253(a)(3).

145. CAL. CONST. art. XXI, § 2(b), (d) (stating in section 2(d) that the single-member districts for the State Senate, Assembly, and Congress shall be of roughly equal population; must comply with the Voting Rights Act; must be contiguous; must minimize the division of cities and counties; and must be geographically compact).

incumbent.¹⁴⁶ Ultimately, after the CRC approves its final maps, the new maps become effective upon approval by a public referendum.¹⁴⁷

D. Critiquing Independent Commissions Already Employed by Other States

It is promising that nearly half of the states are beginning to implement and employ various types of independent bodies to curtail partisan gerrymandering by taking away such authority, or at least the bulk of it, from partisan state legislatures.¹⁴⁸ In fact, such commissions have been successful in many ways, as studies show that they draw their maps in a timely manner and create competitive boundaries.¹⁴⁹ Even California's experiment of relying on citizens to draw the maps had some success as the CRC, which was fairly diverse with respect to gender, age, and ethnicity, produced districts that were more compact and more competitive than the districts of the previous decennial period.¹⁵⁰

However, despite successes, the commissions currently employed exhibit several flaws, indicating that the new schemes are not totally fair, unbiased, or nonpartisan, and thus may even create maps that run afoul with the *Whitford* standard. For example, the primary cause for concern of many commissions is whether "the seal on legislative interference and control is tight enough."¹⁵¹ For instance, as seen in the examples of commissions provided above, leadership in the state legislatures of Iowa, Arizona, New Jersey, Alaska, Colorado, and many other states are involved in choosing at least a portion of the commission's members—typically the first of the commission's members are selected by the leadership of both houses of the bicameral state legislature.¹⁵²

146. *Id.* § 2(e).

147. *Id.* § 2(g)–(j); *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2662 (2015).

148. Ariz. State Legislature, 135 S. Ct. at 2662 ("Several other States, as a means to curtail partisan gerrymandering, have also provided for the participation of commissions in redistricting."); *Redistricting Commissions*, NCSL, *supra* note 96.

149. Ariz. State Legislature, 135 S. Ct. at 2662 (citing Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 UC IRVINE L. REV. 637, 661, 663–64, 666 (2013)).

150. Cain, *Redistricting Commissions*, *supra* note 116, at 1825, 1827.

151. *Id.* at 1835.

152. *See* IOWA CODE § 42.5(1)(a) (2017) ("Each of the four selecting authorities shall certify to the chief election officer the authority's appointment of a person to serve on the commission."); *id.* § 42.1(4) (including the majority and minority floor leaders of the State Senate and State House of Representatives as the "[f]our selecting authorities"); ARIZ. CONST. art. IV, pt. 2, § 1(6) ("Appointments to the independent redistricting commission shall be made in the order set forth below. . . . [T]he highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by

In addition, even though California's CRC tries to take politicians completely out of the process, the leaders of both parties in both houses of the state legislature are still involved as they are able to strike applicants from the pool.¹⁵³ Granting legislators the capacity to influence or even directly choose who can be a part of the bipartisan or neutral redistricting commission can actually infuse partisanship into the process, preventing the redistricting process from being insulated from political partisanship.¹⁵⁴ So, even though most commissions seek to have equal representation of both political parties and aim to prohibit the inner political world from serving, state legislators with authority to appoint members to the commission can politic and choose politically strong-willed or extremely partisan individuals who will fight for their party in the redistricting process, perhaps tipping the scale of partisanship of the commission in their favor.¹⁵⁵

Additionally, many commissions also mandate that the membership choose the commission's remaining members who ought to be independent or not registered with any major political party to keep the bipartisan makeup of the commission equal.¹⁵⁶ Here lies another opportunity for partisanship to enter the process. One party represented on the commission can try to tip the balance of power of the commission in their favor by seeking a member who, for instance,

one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate."); N.J. CONST. art. II, § 2, ¶ 1(b) ("There shall first be appointed 12 members as follows: (1) two members to be appointed by the President of the Senate; (2) two members to be appointed by the Speaker of the General Assembly; (3) two members to be appointed by the minority leader of the Senate; (4) two members to be appointed by the minority leader of the General Assembly; and (5) four members, two to be appointed by the chairman of the State committee of the political party whose candidate for the office of Governor received the largest number of votes at the most recent gubernatorial election and two to be appointed by the chairman of the State committee of the political party whose candidate for the office of Governor received the next largest number of votes in that election."). For other examples, see ALASKA CONST. art. VI, § 8(a)-(b); COLO. CONST. art. V, § 48; IDAHO CONST. art. III, § 2(2); ME. CONST. art. IV, pt. 3, § 1-A. Other states, such as Arkansas and Ohio, even have politicians serving on the commission, such as the governor and secretary of state. See ARK. CONST. art. 8, §§ 1, 4; OHIO CONST. art. XI, § 1; PA. CONST. art. II, § 17.

153. CAL. GOV'T CODE § 8252(e) (West 2017).

154. See Cain, *Redistricting Commissions*, *supra* note 116, at 1836.

155. See generally Cain, *supra* note 116.

156. See, e.g., ARIZ. CONST. art. IV, pt. 2, § 1(8) ("[T]he four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any party already represented on the independent redistricting commission and who shall serve as chair."); see also GOV'T § 8252(g) ("[T]he eight commissioners shall review the remaining names in the subpools of applicants and appoint six applicants to the commission.").

is secretly partisan.¹⁵⁷ For example, the fifth member of Arizona's AIRC, chosen by the first four members, is independent and acts as chair and the tiebreaker vote; if this person is secretly partisan, the legitimacy of the whole system unwinds.¹⁵⁸ In 2011, Arizona faced some of these fears as Republicans alleged that the independent chair politicked on behalf of Democrats and helped produce maps that made some Republican seats more competitive.¹⁵⁹

Another flaw in many redistricting commissions is that the legislature still retains some capacity to interfere in the commission's operations. For instance, most states employing redistricting commissions stipulate that a commission member can be removed based on certain conduct such as "neglect of duty," "inability to discharge the duties of office," or "gross misconduct in office."¹⁶⁰ While such provisions are valuable checks to prevent an abuse of power or unqualified individuals from serving on the commissions, their existence nevertheless leaves open the prospect of compromising the commission's independence from political influence.¹⁶¹ For example, Professor Cain describes how tensions can arise between the redistricting commission and the majority party when the majority party is not happy with how the lines are drawn.¹⁶² He provides an example of how Governor Jan Brewer of Arizona tried to remove the chairwoman of the AIRC—a registered independent named Colleen C. Mathis—along with the two Democrats on the panel, for gross misconduct when Ms. Mathis was alleged to have concealed her Democratic leaning and proposed lines that unfairly disadvantaged Republicans, who were the majority party at the time.¹⁶³ Moreover, in states such as California and Arizona, the commissions have to rely on the legislature for funding before, during, and after the redistricting process.¹⁶⁴ This becomes problematic because various aspects of the reapportionment process can extend for years even after the commission's work is complete, and tensions can arise if funding

157. Cain, *Redistricting Commissions*, *supra* note 116, at 1832–34.

158. *Id.* at 1833–34.

159. *Id.* at 1834.

160. See GOV'T § 8252.5(a); see also ARIZ. CONST. art. IV, pt. 2, § 1(10).

161. Cain, *Redistricting Commissions*, *supra* note 116, at 1836.

162. See generally *id.*

163. *Id.* at 1832, 1836; see also Marc Lacey, *Arizona Senate, at Governor's Urging, Ousts Chief of Redistricting Panel*, N.Y. TIMES (Nov. 2, 2011), <http://www.nytimes.com/2011/11/03/us/arizona-republicans-oust-colleen-mathis-head-of-redistricting-panel.html> [https://perma.cc/354P-D76U] ("Ms. Brewer accused Ms. Mathis, who is registered as an independent, of improperly conducting commission business out of public view and of skewing the redistricting process toward Democrats.")

164. Cain, *Redistricting Commissions*, *supra* note 116, at 1835.

is still required but a majority knows, and is not satisfied with, the newly drawn political boundaries.¹⁶⁵

Another flaw in many redistricting commissions is a lack of sufficient guidelines about the legal staff and consultants that the commission members can retain.¹⁶⁶ For instance, California gives the CRC members authority to appoint technical and legal staff to aide them in the process; however, other than providing the same limits on political insiders from getting involved, it provides no effective provisions or guideposts to limit or guide such a decision, such as placing limits on the party affiliation of staff.¹⁶⁷ Professor Cain describes this predicament:

Most redistricting consultants have worked for one or the other party, which, given the political sensitivity of the task, is understandable. Similarly, most lawyers who specialize in voting rights cases or redistricting tend to align with one party or the other. If the commission is balanced by party affiliation, then should the staff be also? Would a bipartisan staff even be able to work together harmoniously?¹⁶⁸

Considering this, similar to the themes of the previous paragraphs, placing no limits on the partisanship of staff employed by the commission is another illustration of how the lid on partisanship is not completely sealed on independent commissions.¹⁶⁹

Lastly, another concern worth mentioning is that some commissions simply consist of too many individuals. For instance, California's CRC consists of fourteen members,¹⁷⁰ New Jersey's commission consists of thirteen members,¹⁷¹ and Colorado's commission contains eleven individuals.¹⁷² While it can be valuable to get more insight into the redrawing process, this can make the group more exposed to the dangers of "groupthink"—"[d]ysfunctional collective decision making characterized by a strong sense of a group's moral righteousness, closed-mindedness, and pressures toward conformity."¹⁷³ In this

165. *Id.* at 1835 (providing an example of how 63% of the total budget of the 2001 AIRC was spent after 2002, and also how litigation alone cost the most recent CRC nearly \$3,000,000).

166. *Id.* at 1834–35.

167. CAL. GOV'T CODE § 8253(a)(5) (West 2017).

168. Cain, *Redistricting Commissions*, *supra* note 116, at 1835 (footnote omitted).

169. *See id.*

170. *See* GOV'T § 8252.

171. N.J. CONST. art. II, § 2, ¶ 1(a).

172. COLO. CONST. art. V, § 48.

173. STEVEN W. HOOK, U.S. FOREIGN POLICY: THE PARADOX OF WORLD POWER 97, 433 (4th ed. 2014).

way, generally, the larger the group is the more likely the dangers of groupthink will become apparent, as one person or a small group within the group can control the agenda of the commission, making others reluctant to give their input or question the decisions of the group.¹⁷⁴ This can be particularly dangerous should the individual or group dominating the group have partisan intentions, as this would infuse partisanship into the process.¹⁷⁵

Ultimately, while it is certainly promising that there is a growing movement in the United States towards redistricting reform in favor of independent, bipartisan redistricting commissions, the result thus far for many states has been an imperfect system leaving too many holes for partisanship to leak into the process.¹⁷⁶ Such holes and flaws are not only concerning for practical or political reasons, but are also concerning because they still leave the door open for unconstitutional gerrymandering under the *Whitford* framework. The only difference would be that an independent commission instead of the state legislature committed the constitutional violation. So, Wisconsin needs something further than what other states have done to tighten the lid on partisanship in order to effectively curtail gerrymandering.

IV. A UNIQUE REDISTRICTING FRAMEWORK FOR WISCONSIN: THE WISCONSIN IMPARTIAL CITIZENS REDISTRICTING COMMISSION

Wisconsin's redistricting process needs to be reformed. However, given the flaws of various commissions as discussed in the previous section as well as the unique political climate of Wisconsin, Wisconsin requires an approach that is unique in order to effectively curtail partisan gerrymandering. After 2011 redistricting, it is also evident that the state cannot rely on its partisan officials to run the process.¹⁷⁷ Therefore, Wisconsin should adopt something similar to California's CRC and rely on its citizenry.

However, in recent history, Wisconsin has grown to become a "hotbed of partisan division [and] a hotbed of political activism. . . . [T]wo phenomena [which] reinforce each other."¹⁷⁸ This phenomenon is apparent in numerous ways. For example, Wisconsin is a prime example of a battleground state, as, in statewide elections over the past decade, Wisconsin has flipped between electing candidates who are not only of opposing political parties, but also has flipped between candidates who have drastically different political ideologies

174. *See id.* at 97.

175. *See id.*

176. *See Cain, Redistricting Commission, supra* note 116, at 1812, 1841–42.

177. *See Wines, Wisconsin Redistricting Favored Republicans, supra* note 4.

178. Gilbert, *Red & Blue, supra* note 9, at 16.

and philosophies.¹⁷⁹ On top of these remarkable and varying statewide voting patterns, Wisconsinites have also become much more engaged in politics than the average American citizen.¹⁸⁰ This includes not only producing record-breaking voter turnouts in elections over the past decade, but also relatively high and increasing participation in a variety of political activities, such as making campaign contributions, attending political rallies, and displaying yard signs and bumper stickers.¹⁸¹ Considering these facts, Wisconsin continues to become one of the most active and polarized states in the nation.¹⁸² Given the significant and growing political participation and activism of Wisconsinites, Wisconsin voters are generally more politically biased as they have developed deep, fiery, and passionate views on politics and government, and perhaps are also generally more aware of the political makeup and climate of the state.¹⁸³ So, given the rather noteworthy partisan divide and active political climate of the voters of Wisconsin, a framework that would rely on registered voters to redraw political districts could still risk tainting the process with partisanship or political biases.

For the foregoing reasons, Wisconsin should call for an approach unlike what other states have already adopted to minimize the likelihood of gerrymandering: utilizing laypersons to the political process in a commission

179. Evidence of Wisconsin flipping in statewide elections is apparent based on recent election results. In November 2008, Democratic President Barack Obama defeated Republican presidential candidate John McCain 56.22% to 42.31%. *2008 Fall General Election Results*, WIS. ELECTIONS COMM'N (Nov. 4, 2008), <http://elections.wi.gov/elections-voting/results/2008/fall-general> [https://perma.cc/3KPR-RBNG]. Then in November 2010 Republican Governor Scott Walker defeated Democratic governor candidate Tom Barrett 52.25% to 46.48%, *2010 Fall General Election Results*, *supra* note 53; and also in 2010 Republican U.S. Senator Ron Johnson defeated three-time Democratic U.S. Senator Russ Feingold with 51.86% of the vote. *Id.* In 2012 Governor Scott Walker survived a recall challenge against Democratic challenger Tom Barrett with 53.08% of the vote, *2012 Recall Election for Governor, Lt. Governor and State Senator*, WIS. ELECTIONS COMM'N (June 5, 2012), <http://elections.wi.gov/elections-voting/results/2012/recall-election> [https://perma.cc/864R-XTLZ], but in the same year Democratic President Barack Obama defeated his Republican challenger Mitt Romney in Wisconsin with 52.83% of the vote, *2012 Fall General Election*, *supra* note 62, and Democratic U.S. Senator Tammy Baldwin defeated Republican candidate Tommy Thompson with 51.41% of the vote. *Id.* Since 2014, however, Wisconsin has remained red in statewide elections. In 2014, Republican Governor Scott Walker won with 52.26% against his Democratic challenger, *2014 Fall General Election Results*, *supra* note 62, and then in 2016 Republican U.S. Senator Ron Johnson defeated his Democratic challenger with 50.17% and President Donald Trump defeated Democratic presidential candidate Hillary Clinton in Wisconsin by a vote of 47.22% to 46.45%. *2016 Fall General Election Results*, *supra* note 61.

180. Gilbert, *Red & Blue*, *supra* note 9, at 18.

181. *Id.*

182. *Id.*

183. *Id.*

called the Wisconsin Impartial Citizens Redistricting Commissions (WICRC). These laypersons include citizens who do not vote or who seldom vote.

A. The Logic Behind the Wisconsin Impartial Citizens Redistricting Commission

As discussed above, Wisconsin is both unique and extreme in its political activism and partisanship; therefore, in order to adequately and effectively curtail gerrymandering, Wisconsin needs a creative solution that goes even further than California's CRC at squeezing out every hint of partisanship and political bias that is toxic to our democracy.¹⁸⁴ Wisconsin should amend its constitution to give district drawing power to a commission of ideologically dispassionate citizens who do not vote or who seldom vote.

1. Affirmative Arguments Justifying and Supporting the Wisconsin Impartial Citizens Redistricting Commission

The logic behind the membership of the WICRC is that voting history, or lack thereof, can be used as a good proxy for ideological neutrality. So, from this it follows that a nonvoter would be ideologically dispassionate as compared to someone who regularly votes. Relying on nonvoters to redraw political boundaries is unquestionably unique and perhaps even counter-intuitive; however, the Supreme Court has advanced the principle that states can implement novel policies to address different issues because they are laboratories for democracy:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.¹⁸⁵

Therefore, although it might be adopting something that appears out of the mainstream, states ought to take unique approaches to try to find adequate and effective ways to fix problems and address important issues that its citizens

184. See Cain, *Redistricting Commissions*, *supra* note 116, at 1824 (arguing that the goal of California's experiment was to develop a redistricting framework unlike that adopted by other states to squeeze out every ounce of political influence by creating a scheme comprised of a bipartisan panel of citizens who were disconnected from legislators and political data in order to maximize fairness, competition, and impartiality).

185. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

endure.¹⁸⁶ So, Wisconsin could serve as a laboratory to effectively curtail gerrymandering by relying on its nonvoting citizens to craft political districts.

Members of the population who do not vote or who seldom vote are quintessential individuals to serve on a body that is aimed at removing all traces of partisan politics from the process because a lack of a voting record can be used as a good proxy for ideological neutrality. This is because nonvoters are most likely impartial, indifferent, apolitical, or simply have no particular opinion on the subject, as they are probably disillusioned from the political process, are unaware of political climates, or frankly just do not care about politics. One commentator wrote:

But some people just don't care about politics, which can lead to voter *apathy*. And if a social group doesn't regard politics as very important, its members may not bother to vote In fact, . . . one might argue that in terms of any one citizen, "it makes no sense to vote." Only very rarely has a single vote changed the outcome of an election. And where that happened, it usually was only in very small, local elections.

Not only that, where elections occur often, people may experience voter burnout. "One of the things that makes the U.S. strange is that there's a lot of elections We ask voters to make a lot of decisions." Getting out to the polls can be a hassle. What's more, learning about every single issue takes time. If people are asked to vote too often, or choose a position on too many subjects, they might just opt out of the whole process. "We have a complicated system and . . . that produces fatigue."¹⁸⁷

Given that nonvoters or seldom voters are likely ideologically indifferent, they would be ideal individuals to serve on a commission tasked with drawing political boundaries without a political mindset or partisan endeavors.

Finding who has and who has not voted is not a difficult task. According to the Wisconsin Administrative Code, "The official registration list shall be open to public inspection,"¹⁸⁸ and so "[a]ny person may obtain, from the official

186. *Id.*

187. Bethany Brookshire, *4 Reasons Why Many People Don't Vote*, SCIENCE NEWS FOR STUDENTS (Nov. 7, 2016, 7:45 AM), <https://www.sciencenewsforstudents.org/article/4-reasons-why-many-people-dont-vote> [<https://perma.cc/DH85-LRC3>] (stating that the four main reasons why people do not vote include: registration is a hassle; people without a college degree are less likely to vote; people don't like the two-party system—if they don't like either candidate, they just don't vote; and apathy and burnout).

188. WIS. ADMIN. CODE EL § 3.50(2) (Feb. 2017).

registration list, voter registration data that is not protected information, upon payment of the applicable charges.”¹⁸⁹ There are also several programs and even phone apps that pull together publicly available data like voting history into one searchable database that allow candidates to target voting individuals.¹⁹⁰ While voter lists are sometimes expensive,¹⁹¹ a list to determine which individuals would qualify for WICRC membership is easily obtainable.¹⁹²

Furthermore, finding less than ten individuals to serve on this commission would also not be difficult. Voter turnout in Wisconsin indicates that there are about 1.5 million people out of Wisconsin’s approximately 4,500,000 voting-age individuals that could be targeted to serve on the WICRC.¹⁹³ Specifically, voter turnout in Wisconsin in the most recent presidential election was approximately 66% of the voting age population, meaning that about three million potential voters cast ballots; turnout was near 70% in the previous two presidential elections.¹⁹⁴ Thus, because anywhere between 30%–40% of eligible voters do not vote in presidential elections, this means that the potential

189. *Id.* § 3.50(3).

190. Michael D. Shear, *Obama Campaign Releases iPhone App for Canvassing*, N.Y. TIMES (July 31, 2012, 6:00 AM), <http://thecaucus.blogs.nytimes.com/2012/07/31/obama-campaign-releases-iphone-app-for-canvassing> [<https://perma.cc/MSD2-UCXC>].

191. See EL § 3.50(4) (“The charge for reports in electronic format is a \$25 base fee per report; plus \$5 for the first 1,000 voter registration data records, or up to 1,000 voter registration data records; plus \$5 for each additional 1,000 voter registration data records, rounded to the nearest thousand. The maximum charge for an electronic report is \$12,500.”); see also *Wis. Elections Commission Will Sell Some Voter Info to Presidential Commission*, FOX 6 MILWAUKEE (June 30, 2017, 1:22 PM), <http://fox6now.com/2017/06/30/wisconsin-elections-commission-will-sell-some-voter-information-to-presidential-commission/> [<https://perma.cc/N5BF-R6ZG>] (providing that the Wisconsin Elections Commission sold voter information (such as name, address, and history) to President Donald Trump’s Advisory Commission on Election Integrity for the maximum price of \$12,500).

192. See EL § 3.50(2)–(3); Shear, *supra* note 190.

193. *Compare Wisconsin Election Turnout near 20-year Low*, FOX 6 MILWAUKEE (Nov. 9, 2016, 8:16 AM), <http://fox6now.com/2016/11/09/wisconsin-election-turnout-near-20-year-low> [<https://perma.cc/N9ZZ-KJG7>] [hereinafter FOX 6 MILWAUKEE] (describing that about three million Wisconsinites voted in November 2016, representing a 66% turnout, which was lower than the 70% mark of the previous two presidential elections), with *Spring Primary Voter Turnout Estimated at 10 percent*, WIS. ELECTIONS COMM’N (Feb. 12, 2016), <http://elections.wi.gov/node/3873> [<https://perma.cc/85A3-969X>] [hereinafter *Spring Primary Turnout*] (asserting that, according to estimates of the U.S. Census Bureau, as of 2015 Wisconsin’s voting age population was 4,449,170). Thus, from these numbers, we can do the math to deduce that the population of non-voters or irregular voters in Wisconsin is roughly 1.5 million. *Id.*; FOX 6 MILWAUKEE, *supra*.

194. FOX 6 MILWAUKEE, *supra* note 193.

pool for WICRC membership is quite large—at least more than one million people—to fill a commission that would consist of less than ten people.¹⁹⁵

Again, many may find it counter-intuitive to trust random laypersons with a task as important as crafting political districts; however, American society trusts random laypeople with important tasks in several other instances. One example includes juries: as long as a juror is impartial, even if they are uneducated, untrained, or completely unfamiliar with the issue(s) at hand in a case, American society trusts random laypeople with determining whether an accused will be put behind bars or can walk free, or whether an individual or entity is liable for a large sum of money or nothing at all.¹⁹⁶ Wisconsin Statute section 756.06 aims to put together juries at random before they are further narrowed and vetted by the judge and attorneys during voir dire.¹⁹⁷ Specifically, Wisconsin gathers the list of potential jurors for the circuit court of each county primarily from the Department of Transportation list of individuals who are “licensed as a motor vehicle operator . . . or who ha[ve] received an identification card.”¹⁹⁸ So, while each county in Wisconsin can use additional lists, people who are selected for jury service are those who at least have a driver’s license or an identification card;¹⁹⁹ “[a] list of registered voters” is what is included in the list of *other* information that can be considered.²⁰⁰ Thus, when thinking about it, Wisconsin already relies upon many citizens who are non-voters or seldom voters to serve on juries, because having an identification card does not guarantee that you are a regular or registered voter.

Moreover, the membership of the WICRC and California’s CRC would not be that different. While I am proposing a scheme that advocates for the use of non-voters or infrequent voters, Wisconsin and California would both be utilizing everyday citizens to draw district maps.²⁰¹ Professor Cain notes how California’s experiment of using citizens had moderate success, as over 4,500

195. The pool is probably larger considering that voter turnout is usually much higher for presidential elections. For instance, in the spring 2016 primary, Wisconsin was predicted to have a voting turnout of about 10%—444,000 of its total voting-age population of about 4,500,000 individuals. See *Spring Primary Turnout*, *supra* note 193.

196. Nancy S. Marder & Valerie P. Hans, *Introduction to Juries and Lay Participation: American Perspectives and Global Trends*, 90 CHI.-KENT L. REV. 789, 798–99 (2015) (noting how American jury scholars are more inclined to put their trust in jurors instead of judges because there is a reluctance to fight “a single man” and juries put together a range of experiences and perspectives and represent “the commonsense judgment of the community”).

197. WIS. STAT. § 756.06(1) (2015–2016).

198. *Id.* § 756.04(2)(b).

199. *Id.* § 756.04(2)(b)–(c).

200. *Id.* § 756.04(2)(c).

201. See CAL. GOV’T CODE § 8252(a)(1) (West 2017).

people applied to be on the CRC and the CRC drew maps that adhered to constitutional criteria and produced districts that were more competitive and compact than before.²⁰² While there might be a stereotype that nonvoters are uneducated or inexperienced individuals,²⁰³ it is folly to think that nonvoter equates with unintelligent.²⁰⁴ There is no reason to think that the universe of nonvoters consists entirely of people who lack the skills necessary to supervise and direct the district drawing process—they merely need to be temporary experts in cartography for drawing political boundaries. There are many contributing members of society who are nonvoters or irregular voters that would be very well qualified to serve on a citizens redistricting commission. For instance, one example includes Jim Lehrer—the moderator for the first presidential debate between President Barack Obama and Republican nominee Mitt Romney in 2012—who has a reputation that is “unassailable. He reeks integrity”; however, Mr. Lehrer does not vote.²⁰⁵ In an example of an average citizen, Michael M. Lazerow describes a forty-nine year old citizen of Indiana named Nancy Koscher who does not vote, yet she remains involved in public affairs and is a contributing member of society by following local school board decisions, owns a carpet-installation business, and raises money for the Elkhart Red Cross chapter.²⁰⁶ There are thousands of people out there just like Nancy who are well-informed, contributing members of society who would be fit to serve on a citizens redistricting commission similar to the one that I am proposing.

202. Cain, *Redistricting Commissions*, *supra* note 116, at 1825, 1827.

203. See Michael M. Lazerow, *A Show of Apathy, Anger at Polls: Survey Shows Nonvoters Don't Fit a Single Stereotype*, NONVOTERS IN AMERICA (1996), <http://nonvotersinamerica.com/1996/08/a-show-of-apathy-anger-at-polls-survey-shows-nonvoters-dont-fit-a-single-stereotype> [<https://perma.cc/54TY-M9P9>] [hereinafter Lazerow, *Nonvoters in America*] (describing that the popular stereotype for nonvoters is that they are “younger, poorer, less educated and less informed than the likely voter”).

204. Winston Churchill once said, “The best argument against democracy is a five-minute conversation with the average voter.” Michael Deacon, *Why Winston Churchill Will Always be the Last Word in Political Wit*, TELEGRAPH (Nov. 22, 2012, 8:44 PM), <http://www.telegraph.co.uk/news/politics/9696402/Why-Winston-Churchill-will-always-be-the-last-word-in-political-wit.html> [<https://perma.cc/8S78-NFR5>].

205. Dylan Byers, *The Most Trusted Moderator in America*, POLITICO (Sept. 9, 2012, 12:22 PM), <http://www.politico.com/blogs/media/2012/09/the-most-trusted-moderator-in-america-137002> [<https://perma.cc/TS6C-WTZQ>].

206. Lazerow, *Nonvoters in America*, *supra* note 203.

2. Addressing Potential Counterarguments Against the Wisconsin Impartial Citizens Redistricting Commission

There are a few noteworthy concerns to address about implementing something like the WICRC. First, by trusting nonvoters or irregular voters with the important task of redrawing political districts, Wisconsin could be condoning, or perhaps rewarding, the act of not voting. The right to vote:

[I]s a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.²⁰⁷

While this is a valid concern, however, I do not see the WICRC as minimizing the importance of voting, but rather as doing something of the opposite. Specifically, “[p]ublic engagement enhances the Government’s effectiveness and improves the quality of its decisions. . . . Collaboration actively engages Americans in the work of their Government.”²⁰⁸ By empowering average citizens with such an important task, Wisconsinites overall could actually become even more engaged in the political process, which could even perhaps inspire nonvoters to vote.²⁰⁹ Something like the WICRC could actually inspire and reinvigorate an enthusiasm for attention to public affairs, which could ultimately enhance our democracy by making the government more responsive to the needs and desires of the people it represents.

Another legitimate concern about a system such as the WICRC is that the individuals who will be selected to serve on the commission will be held up for a long time. For example, in California, selection to the CRC takes about one year alone,²¹⁰ and then the actual redistricting process would begin the next

207. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

208. Memorandum from the Admin. of President Barack Obama on Transparency and Open Gov’t for the Heads of Exec. Dep’ts and Agencies No. 15, 74 Fed. Reg. 4685 (Jan. 21, 2009).

209. See generally Gilbert, *Red & Blue*, *supra* note 9, at 18 (describing in various ways how Wisconsinites are quick to become politically active). Therefore, a new scheme like the WICRC could stir political interest and activity in the state. See Tom Kertscher, *100,000 Pro-union Protesters Were Shipped into Wisconsin*, *Scott Walker Says*, POLITIFACT WISCONSIN (July 30, 2015, 1:54 PM), <http://www.politifact.com/wisconsin/statements/2015/jul/30/scott-walker/pro-union-protesters-were-shipped-wisconsin-scott-> [<https://perma.cc/YZ2Z-TY3Y>] (providing an example of how Wisconsinites have been politically active lately as thousands of protestors flocked to Madison in protest of the passage of Act 10 in 2011).

210. Compare CAL. GOV’T CODE § 8252(a)(1) (West 2017) (“By August 15 in each year ending in the number nine, the State Auditor shall initiate an application process, open to all registered California voters”), with *id.* § 8252(g) (“No later than August 15 in each year ending in the number

year, which would be the year following the census.²¹¹ California quashes the concern of holding this task over the commission's head for too long by requiring that potential members apply;²¹² applicants to the CRC essentially concede to this concern, as they know what they are getting themselves into. In order to suppress these concerns in Wisconsin, part of the screening process could be to ensure that potential members are able to make such a commitment, such as by excusing those who could not make such a commitment for medical or employment reasons.²¹³ Additionally, members to the WICRC could be compensated for their service on the commission, just like other states do for their commission members.²¹⁴ A compensation provision could perhaps incentivize participation in the WICRC.

Finally, one last concern to address is, similar to the discussion of Professor Cain's points above, the employment of staff to assist the WICRC could actually present a risk of manipulation of the WICRC members, as the staff would inevitably be more familiar with the process than laypersons.²¹⁵ However, such concerns about a partisan or devious staff are calmed by utilizing the nonpartisan staff already assisting the Wisconsin Elections Commission (WEC) and by also placing limits on what kind of advice the staff can provide to the WICRC, which is discussed below.

3. Available Checks on the Wisconsin Impartial Citizens Redistricting Commission

There can be several checks on the WICRC. For one thing, the vetting/screening process done by the WEC when selecting the members can ensure that members, although they are not regular voters, have at least a minimum competency and understanding of the great task that they are being

zero, the eight commissioners shall review the remaining names in the subpools of applicants and appoint six applicants to the commissions . . .”).

211. CAL. CONST. art. XXI, § 1 (“In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Citizens Redistricting Commission . . . shall adjust the boundary lines of the congressional, State Senatorial, Assembly . . . districts . . .”).

212. GOV'T § 8252(a)(1).

213. This would be similar to how a juror would be dismissed if they cannot fulfill their duties. See WIS. STAT. § 756.03 (2015–2016).

214. For examples, see GOV'T § 8253.5 (“Members of the commission shall be compensated at the rate of three hundred dollars (\$300) for each day the member is engaged in commission business.”), and IOWA CODE § 42.5(1)(d) (2017) (stating that commission members are reimbursed for “necessary expenses incurred in performing their duties”).

215. Cain, *Redistricting Commissions*, *supra* note 116, at 1835.

given responsibility of.²¹⁶ It is also important to note that a large part of this screening process would be to, as best as possible, quash any prospect of selecting someone to the WICRC who would be secretly partisan—such as someone who actually did not vote in a recent election thinking that their vote did not matter because they assumed that their candidate would win or lose.²¹⁷ Enlisting such individuals for WICRC membership could otherwise cause the whole system to crumble.²¹⁸ In addition, an inherent check on redrawing political districts is that the redrawn districts stand for ten years, as the Constitution requires a new census to be taken every ten years.²¹⁹ Finally, even though this provides a prospect of partisanship entering the process, another check could be to treat the WICRC redrawn maps as any other piece of legislation in Wisconsin, subjecting them to bicameral and gubernatorial approval. However, to block any attempts by legislators to alter the newly drawn political districts in their party's favor, there could be limits on the legislature's ability to amend the redrawn boundaries, similar to a requirement in Iowa limiting legislative amendments to ones that are simply corrective or provide nonbinding recommendations.²²⁰ Another way to combat potential political influence from legislators would be, whether in conjunction with or as a substitute of legislative approval, to put the newly drawn maps on the ballot.²²¹ In this manner, not only could legislators have a check on the WICRC, but also voting Wisconsinites could have a check on the members of the WICRC. In short, there are several checks on the WICRC that can ensure that the maps are constructed adequately, competently, and in as nonpartisan of a way as possible.

216. See *infra* Section IV.B.1.

217. This was actually a phenomenon that occurred in the 2016 presidential election, as many nonvoters who would have voted for Hillary Clinton did not vote because they thought that she surely would defeat Donald Trump. Sarah Marsh, “I Never Thought Trump Would Win”: Meet the Americans Who Chose Not to Vote, *GUARDIAN* (Nov. 18, 2016, 12:32 PM), <https://www.theguardian.com/commentisfree/2016/nov/18/donald-trump-win-americans-not-vote> [<https://perma.cc/AT7E-WTRW>].

218. See Cain, *Redistricting Commission*, *supra* note 116, at 1833–34.

219. U.S. CONST. art. I, § 2, cl. 3.

220. See IOWA CODE § 42.3(1)(a) (2017).

221. This would be similar to how California's maps as drawn by the CRC become effective only upon approval by a public referendum. CAL. CONST. art. XXI, § 2(g)–(j); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2662 (2015); *BLUE BOOK 2013–2014*, *supra* note 65, at 226 (“Statewide referendum questions are submitted to the electorate by the Wisconsin Legislature: 1) to ratify a law extending the right of suffrage (as required by the state constitution); 2) to ratify a law that has been passed contingent on voter approval; or 3) to seek voter opinion through an advisory referendum. Since 1848, the Wisconsin Legislature has presented 53 referendum questions to the Wisconsin electorate . . . [and] 39 were ratified.” (first alteration in original)).

In sum, the Wisconsin Impartial Citizens Redistricting Commission is a solution that aims to tightly seal the lid to prevent any partisanship from sneaking into the process, as it would consist of impartial citizens that are likely apolitical and who would be charged with minimizing partisanship and maximizing competition.

B. The Selection and Mechanics of the Wisconsin Impartial Citizens Redistricting Commission

The citizens serving on the Wisconsin Impartial Citizens Redistricting Commission would be selected in a process of randomness and screening to ensure that they are competent for the task and are as ideologically dispassionate as possible. The group would also be equipped and situated to ensure that the members operate in an impartial way to maximize competition when drawing the maps.

1. Selecting Members to the Wisconsin Impartial Citizens Redistricting Commission

The first part of producing an impartial WICRC involves determining how members to the commission are selected, and which individuals are even eligible. First, given the highly partisan redistricting process that Wisconsin experienced in 2011, the state legislature should be excluded from the redrawing process as much as possible, and this would include depriving the leadership within the state legislature the authority to appoint commission members in a new scheme.²²² So, the goals of impartial redistricting would be best served if Wisconsin took an approach similar to that of California by relying on citizens of the state to redraw the political boundaries. However, unlike California whose commission members must be a registered voter within the state,²²³ Wisconsin should scrap the requirement of limiting commission membership to only registered voters. Rather, the WICRC should consist of citizens who either have never voted or who have a very sparse voting record. This would be a very crucial first step in removing any hint of partisanship from the redistricting process because not only does it take the pencil out of the hands of the majority party of the state legislature, but it also does not call for the increasingly polarized voters of Wisconsin, who are likely just as partisan and biased, to draw district boundaries. Rather, it calls for assembling the most ideologically dispassionate group possible, which can be found in nonvoters.

222. This would be unlike the vast majority of states who utilize redistricting commissions. *See Redistricting Commissions*, NCSL, *supra* note 96 (providing examples of redistricting commissions wherein the members are selected by state legislators or actually are state legislators).

223. CAL. GOV'T CODE § 8252(a) (West 2017); CAL. CONST. art. XXI, § 2(c)(3).

The Wisconsin Elections Commission (WEC) and its staff would have the responsibility of running the selection process to select WICRC members. For the purposes of impartiality, this would be preferred over giving such authority to members of the state legislature. This is because state legislators are the ones who could directly benefit from redistricting, while the WEC, albeit having a partisan makeup with three Republican individuals and three Democratic individuals, comprises of appointed, nonelected members who are charged with enforcing the state's election laws and is served by a nonpartisan staff.²²⁴ Additionally, the WEC falls under the purview of Wisconsin Statute section 230.40, which mandates the following:

No person holding any position in the classified civil service may during the hours when on duty engage in any form of political activity calculated to favor or improve the chances of any political party or any person seeking or attempting to hold partisan political office Any violation of this section is adequate grounds for dismissal.²²⁵

So, the WEC would be the ideal entity to guide the selection process of WICRC members because, although the WEC does have a partisan build, the members face strict prohibitions to ensure that they are politically neutral when carrying out their duties.²²⁶

Keeping in mind the information described in the previous section regarding the easy access to voter history lists and availability of infrequent voters, similar to how each year “the office of the director of state courts . . . compile[s] a master list of potential jurors for use by the circuit courts of each county during the coming year” based upon a list submitted by the Department of Transportation of each person who has a driver's license or an

224. Governor Walker signed 2015 Wisconsin Act 118 on December 16, 2015, “which eliminate[d] the Government Accountability Board on June 30, 2016 and replace[d] it with two separate commissions to oversee the administration of elections and ethics.” See *Transition from G.A.B. to Elections and Ethics Commissions*, WIS. ELECTIONS COMM'N, <http://elections.wi.gov/transition> [<https://perma.cc/2U4P-BL8P>] (last visited Jan. 5, 2017). The Commission is comprised of six members: one is appointed by the Senate minority leader, one is appointed by the Senate majority leader, one is appointed by the Assembly Speaker, one is appointed by the Assembly Minority leader, and two are appointed by the governor—one from each political party. *Id.* The terms for these members expires in either May of 2019 or 2021. *Id.*; see also *About the Wisconsin Elections Commission*, WIS. ELECTIONS COMM'N, <http://elections.wi.gov/about> [<https://perma.cc/F837-NPSF>] (last visited Oct. 3, 2017) (stating that “[t]he Commission staff is non-partisan”).

225. WIS. STAT. § 230.40(1) (2015–2016).

226. *Id.*

identification card,²²⁷ a master list of potential WICRC members based on voting history information could be compiled by the WEC. Compiling this list of infrequent voters is step one to determining the membership of the WICRC.

The way in which WICRC members are selected can be modeled after how juries are selected in Wisconsin. After compiling the master list of potential WICRC members based upon voting records, the next step would be for the WEC to randomly strike potential members from this list. Under Wisconsin Statute section 756.06(1), when narrowing down prospective jurors, “the clerk of circuit court shall randomly select names from the prospective jury venire until the desired number is obtained to create the jury panel.”²²⁸ In a similar way, from the master list of potential WICRC members of Wisconsin citizens with at least sparse voting records, a desired number of individuals would be randomly selected from the pool by the WEC.²²⁹ Similar to how an individual in Wisconsin receives notification in the mail for him or her to report for jury duty,²³⁰ individuals at this stage would also receive a letter from the WEC to draft them to be a potential WICRC member.

The next step would be to engage in a screening process of prospective members to ensure that they are qualified to serve and are impartial in every way possible. First, because service on the WICRC would be a long commitment,²³¹ individuals at this stage could be excused if they present any of a variety of legitimate reasons, such as medical concerns or employment, which would prevent them from fulfilling such a responsibility. This would be similar to how, according to Wisconsin Statute section 756.03, a court can excuse an individual who was summoned for jury duty if that person cannot fulfill their role.²³²

227. *Id.* § 756.04(2)(a)–(c). The statute describes how other lists “may” be used in addition to the list provided by the Department of Transportation, such as “[a] list of registered voters from the elections commission.” *Id.*

228. *Id.* § 756.06(1) (“Whenever an issue is to be tried before a jury, the clerk of circuit court shall randomly select names from the jury venire until the desired number is obtained to create the jury panel. The random selection of names may include the provision that jurors reporting for service who have not been considered for assignment to a panel be considered before other jurors are considered for a second panel.”).

229. This would be similar to the selection of CRC members in California, as section 8252(b) states that “[t]he State Auditor shall randomly draw names from a pool consisting of all qualified independent auditors” who are then in charge of screening applicants. CAL. GOV’T CODE § 8252(b) (West 2017).

230. WIS. STAT. § 756.05 (“The summons may be served by 1st class mail or another method.”).

231. *See supra* notes 210–12 and accompanying text (providing an example of how California’s redistricting process takes over one year).

232. WIS. STAT. § 756.03.

Next, after such individuals have been excused and possibly replaced, the remaining potential members would undergo a screening process conducted by the WEC. In Wisconsin, after a jury panel is selected, judges examine each potential juror to determine if there is any sign of partiality that they would have in the decision-making process.²³³ This includes determining if

the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused.²³⁴

Similarly, potential WICRC members can be automatically struck by the WEC if they are identified to have any inkling of political bias. For instance, similar to the selection process of other states as discussed in Part III, individuals would be struck if they themselves or a relative is or was a public official, ran for public office, contributed to a campaign, served on a public official's staff, or in any other way has been involved in politics so that they might have a partisan leaning.

As a supplement for the court's general questions, attorneys are also permitted to ask the jury panel further individual questions in a process known as *voir dire*.²³⁵ In a similar way, the WEC could be charged with vetting and questioning prospective WICRC members. The main task of the WEC in this step would be to syphon out any partisanship leanings that any potential member may have. Question topics could include why they don't regularly vote; if an individual identifies with a political party even though they don't vote (for instance, if an individual indicated that they did not vote in the 2016 presidential election because they thought Hillary Clinton would win, this would disqualify them from participation in the WICRC because it shows a partisan lean),²³⁶ or perhaps even if an individual prefers to watch Fox News or CNN.²³⁷ In addition to consideration of competency, qualifications, and fitness

233. *Id.* § 805.08(1).

234. *Id.*

235. See generally *Filipiak v. Plombon*, 15 Wis. 2d 484, 113 N.W.2d 365 (1962); *Voir Dire*, BLACK'S LAW DICTIONARY 1805 (Bryan A. Garner et al. eds., 10th ed. 2014) (“[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury. Loosely, the term refers to the jury selection phase of a trial.”)

236. See Marsh, “*I Never Thought Trump Would Win*”, *supra* note 217 (describing how a popular reason for many Democrats not voting in the 2016 presidential election is because they thought Hillary Clinton was a lock to win).

237. See Jesse Holcomb, *5 facts about Fox News*, PEW RESEARCH CENTER (Jan. 14, 2014), <http://www.pewresearch.org/fact-tank/2014/01/14/five-facts-about-fox-news> [<https://perma.cc/7RC6-LCNK>] (“60% of Fox News viewers describe themselves as conservative By contrast, the ideological makeup of CNN viewers . . . and MSNBC viewers . . . is far more mixed.”)

to serve, when making its determinations, similar to the selection requirements of other redistricting commissions, the WEC should also choose a group of individuals that adequately and appropriately reflect the state's geographical and demographic makeup, such as requiring that members must be from different counties or regions of the state and that the membership reflect the overall gender and racial makeup of the state.²³⁸

Finally, the final membership—which would ideally consist of about six individuals—would be drawn randomly from a pool of a couple dozen individuals that the WEC has chosen through its screening process. This helps ensure that the WEC does not have final authority over who serves on the WICRC by directly selecting its membership.

2. Rules and Requirements Governing the Operation of the Wisconsin Impartial Citizens Redistricting Commission

Determining what information the members will have access to and what guidelines the members must follow when constructing the new districts is important to ensure that the WICRC remains impartial after its members are selected and assembled. Currently, because the Wisconsin state legislature has the constitutional responsibility to draw the district lines,²³⁹ the majority party at the time of redistricting can consider any information that they want, such as not only population data, but also information concerning racial demographics, voting patterns, partisanship, per capita incomes, education levels, and religious views.²⁴⁰ Considering how access to such information would make it very easy to craft districts in a way that conforms with partisan goals, an important feature of the WICRC would be to strictly provide the commission members with only

238. See N.J. CONST. art. II, § 2, ¶ 1(a) (“The members of the commission shall be appointed with due consideration to geographic, ethnic and racial diversity”); see also ARIZ. CONST. art. IV, pt. 2, § 1(3) (“Of the first four members appointed, no more than two shall reside in the same county.”). This is similar to the requirement in Wisconsin that if a jury panel does not adequately reflect a community's racial and ethnic makeup, a trial court may declare a mistrial and again randomly select prospective jurors that better represent the demographical makeup of a community. See *Oliver v. Heritage Mut. Ins. Co.*, 179 Wis. 2d 1, 11, 505 N.W.2d 452, 456 (Wis. Ct. App. 1993); see also *State v. Bond*, 41 Wis. 2d 219, 227, 163 N.W.2d 601, 604 (Wis. 1969) (“The jury selection system contemplates the intervention of chance and requires that chance must freely operate on a truly representative cross section of the community's population. [The defendant] is not entitled to a perfectly apportioned representation on his jury . . . but to only a fair jury from a panel selected without regard to race or other discriminatory factors.”).

239. WIS. CONST. art. IV, § 3; *id.* art. V, § 10.

240. Using information beyond population data was evidenced in 2011, as the drafters of Act 43 closely monitored voting patterns and partisanship levels of the districts they were constructing. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 848 (W.D. Wis. 2016).

the population of each county, city, and ward in Wisconsin during the initial drafting phases.²⁴¹ When drawing the districts, the WICRC members would be able to use computer software that would show them the county, city, and ward divides and populations and also let them know only the population of the districts they have drawn.²⁴² Also, the WICRC should have a few more

241. This is similar to what is mandated by chapter 42 of the Iowa Code. As the LSA redraws districts:

[N]o use shall be made of any of the following data:

(a) Addresses of incumbent legislators or members of Congress.

(b) Political affiliations of registered voters.

(c) Previous election results.

(d) Demographic information, other than population head counts, except as required by the Constitution and the laws of the United States.

IOWA CODE § 42.4(5) (2017).

242. See *Whitford*, 218 F. Supp. 3d at 847–48. Ottman described the redistricting software called autoBound that was used by the drafters in the 2011 redistricting process:

[Y]ou would open up a plan that you'd been working on or label a new plan and assign it the Assembly district that you wanted . . . that Assembly district to be. It's sort of like a color-by-number exercise. . . . You also determine what other layers that you want to look at on the screen. There were a number of different overlays that you have, anywhere from existing Senate and Assembly districts, . . . count[y] boundaries, municipal boundaries, ward boundaries all the way down to census block boundaries. As a practical matter what you tried to do is you would zoom in the region of your screen to the area that you're looking at to the smallest amount that you could see and then have kind of the fewest layers displayed that you would need. . . . And then what you would do is there were a couple different ways that you could add population to the district.

Id. (first, third, fourth, and fifth alterations in original).

In the case, Ottman further explained that in the more popular regions of the state he and the other drafters would look more at a ward level: “So you would have the wards displayed and you would literally draw a circle, click on it, and it would assign it to the map and fill it in. In other parts of the state . . . you might do that at the county level because it's so sparsely populated so you'd grab three or four counties at [a] time.” *Id.* at 848. (alterations in original) (footnote omitted). Moreover, Judge Ripple noted:

When the drafters would increase the area size of the districts that they were drawing, autoBound provided demographic information for the area that the drafter had included, such as the number of people in the district, the deviation from the ideal population, voting-age population, and *different minority group populations*. It also allowed the user to include “customized . . . demographic data.” One piece of “customized demographic data” employed by the drafters was a *composite partisan score*. From the time that Ottman, Foltz, and Handrick received the census data from the LTSB, they worked to develop a composite partisan score that accurately reflected the political make-up of the population units. Having this measure was necessary so that, when they aggregated those units into new districts, they could assess the partisan make-up of the new district they had drawn.

requirements in addition to federal guidelines and Wisconsin guidelines. For example, the districts should not be irregularly shaped and also no district should be drawn for the purpose of favoring one political endeavor over another.²⁴³

With the above requirements in place, in addition to having at least a sparse voting record and also having gone through an extensive vetting process to be deemed impartial, WICRC members are essentially going to operate with an untainted picture of Wisconsin with nonpartisan goals. However, in order for the WICRC to also maximize competition, the WICRC would inevitably need access to partisanship scores of the districts they craft so that they don't accidentally draw districts that heavily favor one party over the other. In this effort, after crafting the districts based only on population data, the WICRC would have strict limits on keeping the scores between the parties as close to 50%-50% as possible and maximizing the amount of swing districts within the state. In this way, the WICRC would be achieving the mandate that it cannot favor one political party over the other.

Many would argue that it is illogical to provide the WICRC with partisanship scores when the use of partisanship scores was largely how Republicans were able to craft the political boundaries in their favor in 2011.²⁴⁴ While this is a valid concern, however, partisanship scores would be necessary for the WICRC to enhance competition and advance democratic principles. Specifically, drawing political boundaries based only on population data, while preventing partisan considerations, does not guarantee that the districts will be more competitive. So, it would be important to provide the WICRC with information beyond only population data so that it can not only craft nonpartisan boundaries, but also draw lines that maximize competition amongst the districts of Wisconsin. In attempt to quash concerns of providing partisanship scores, the WICRC would face strict limits concerning the use of partisanship scores: partisanship scores would be provided only after consideration of population and the WICRC would have to stay within a certain percentage range to ensure that the parties have a fair chance in the districts.

Id. (alteration in original) (emphasis added) (footnotes omitted).

243. This is similar to the requirement in Iowa that “[d]istricts shall be reasonably compact in form In general, reasonably compact districts are those which are square, rectangular, or hexagonal in shape, and not irregularly shaped, to the extent permitted by natural or political boundaries.” IOWA CODE § 42.4(4) (2017). This is also similar to the provision in Iowa stating “No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group.” *Id.* § 42.4(5).

244. See *Whitford*, 218 F. Supp. 3d at 848.

Therefore, allowing the WICRC to access partisanship scores enhances the democratic principles and values of the competition of ideas²⁴⁵ by maximizing the number of swing districts within the state rather than continuing the practice of crafting districts that produce legislators who are only answerable to the dominant constituency. Thus, it is completely plausible to think that irregular voters can achieve relatively the same, or even greater, success as the CRC did for California at creating competitive districts.²⁴⁶

Another important part of ensuring complete impartiality and insulation from politics is to have the WICRC deliberate in secrecy. The importance of private deliberations to have frank discussion and avoid outside pressures was underscored in America's founding as the Founding Fathers crafted the Constitution in secret in Independence Hall,²⁴⁷ and this practice continues to be applied in present-day jury procedures. For instance, Wisconsin Statute section 756.08(2) requires that during deliberations on a verdict, jurors must be held in private and cannot communicate with others regarding the deliberations until a verdict has been reached.²⁴⁸ In a similar way, the WICRC members should be required to draw the new maps in seclusion from the public until the maps are released so that they are shielded from outside influences. However, the WICRC would be allowed to have the assistance from staff.²⁴⁹ Yet, unlike in California in which the staff serving the CRC technically has no limits on its partisanship,²⁵⁰ the WEC's nonpartisan staff would assist the WICRC.²⁵¹ In

245. See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (advocating for the dominant public policy of American free speech law to advance the idea of the marketplace of ideas).

246. Cain, *Redistricting Commissions*, *supra* note 116, at 1827.

247. EDWARD J. LARSON & MICHAEL P. WINSHIP, *THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON* 11 (1st ed., 2005) ("On Monday, May 28, the Convention worked out its rules, the most important of which was that all proceedings would be kept secret for the duration of the Convention.").

248. WIS. STAT. § 756.08(2) (2015–2016) ("When the issues have been submitted to the jury, a proper officer, subject to the direction of the court, shall swear or affirm that the officer will keep all jurors together in some private and convenient place until they have agreed on and rendered their verdict, are permitted to separate or are discharged by the court. While the jurors are under the supervision of the officer, he or she may not permit them to communicate with any person regarding their deliberations or the verdict that they have agreed upon, except as authorized by the court.").

249. This would be similar to how California allows its commission to "hire commission staff, legal counsel, and consultants as needed." CAL. GOV'T CODE, § 8253(a)(5) (West 2017).

250. *Id.*; Cain, *Redistricting Commissions*, *supra* note 116, at 1834–35.

251. *About the Wisconsin Elections Commission*, WIS. ELECTIONS COMM'N, <http://elections.wi.gov/about> [<https://perma.cc/R73A-PFM9>] (last visited Oct. 3, 2017) (stating that "[t]he Commission staff is non-partisan"); see also *Transition from G.A.B. to Elections and Ethics Commissions*, WIS. ELECTIONS COMM'N, <http://elections.wi.gov/transition> [<https://perma.cc/H47J-H7Z7>] (last visited Jan. 5, 2017).

helping the WICRC craft districts, the staff would be strictly limited to answering technical, objective questions, such as helping use the software, providing the population required for each district, and providing how many districts need to be crafted.

In sum, the mechanics of the WICRC would be set up so that the WICRC remains ideologically indifferent while crafting districts, yet also is provided with information to maximize competition in the state.

V. CONCLUSION

The purpose of this Comment has been to introduce a unique framework for Wisconsin to adopt to reform its redistricting process in order to curtail gerrymandering. In exercising their constitutional prerogative of regulating elections, many states continue to follow the example set by Governor Gerry in 1812 and craft political boundaries in order to give the majority party advantages in elections to solidify power.²⁵² This is exactly what happened in Wisconsin in 2011, as many state legislative and congressional districts were gerrymandered to give the majority party a better chance of winning elections in the decennial period.²⁵³

While many other states have instituted commissions to curtail gerrymandering, there are several pitfalls that such entities exhibit.²⁵⁴ Given such shortcomings and the fact that Wisconsin is an ever-growing politically active and polarized state, Wisconsin should adopt a unique framework to craft its political districts in a way that squeezes partisanship out of the process. As I have proposed, this would involve something that no other state has done: using citizens who seldom vote or who never vote to draw the districts.

While a solution like the Wisconsin Impartial Citizens Redistricting Commission is much needed in Wisconsin, regardless of who serves on the commission, at this time reform is unlikely given the current political climate in Wisconsin. Specifically, Wisconsin is presently under Republican control, with Republican majorities in both houses of the legislature and a Republican holding the governor's office.²⁵⁵ Thus, it is unlikely that Republicans would

252. See Hulse, *Gerrymandering's Legacy*, *supra* note 13.

253. See Wines, *Wisconsin Redistricting Favored Republicans*, *supra* note 4.

254. See *supra* Part III.

255. Shawn Johnson, *Wisconsin GOP Widens Margins in State Legislature*, WISCONSIN PUBLIC RADIO (Nov. 9, 2016, 6:15 AM), <http://www.wpr.org/wisconsin-gop-widens-margins-state-legislature> [<https://perma.cc/24VM-KCBS>] (emphasizing how Republicans grew their majorities in the State Senate and Assembly in the 2016 election). Shawn Johnson also states that “[t]he results will give

reform a scheme that benefits them, as this would essentially relinquish power to the minority party and “reverse[] the time-honored political logic of ‘to the winner go the spoils’”;²⁵⁶ Republicans stand to have control after the 2020 census and thus could ensure their control until even 2030 and beyond.²⁵⁷ Yet, such concerns did not stop some states from recently reforming their redistricting process.²⁵⁸ For example, despite having Republicans control both chambers of the state legislature and the governor’s office, Ohio in 2015 accumulated bipartisan support to pass a constitutional amendment to create a bipartisan redistricting commission for the drawing of state legislative districts.²⁵⁹

If the reader is to grasp anything from this Comment, it is this: the time for redistricting reform in Wisconsin is now. Momentum for change is ever growing, and perhaps has even reached its peak. Several reasons account for this: (1) more states are employing varying forms of redistricting bodies rather than continuing to rely on state legislatures;²⁶⁰ a federal court in *Whitford v. Gill* just laid down a momentous decision by ruling that the Wisconsin legislative redistricting in 2011 was unconstitutional because it burdened the representational rights of Democratic voters, and it articulated a clear standard that may calm the concerns of the Supreme Court to soon strike down a partisan gerrymander;²⁶¹ and the Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission* made it evident that the Court would look favorably upon bodies that are created to curtail partisan gerrymandering.²⁶² Momentum is growing in Wisconsin in many other ways, as several groups, such as Common Cause in Wisconsin, the League of Women

Republican Gov. Scott Walker his biggest GOP majorities yet when lawmakers return to Madison”
Id.

256. Cain, *Redistricting Commissions*, *supra* note 116, at 1836.

257. *Whitford v. Gill*, 218 F. Supp. 3d 837, 902 (W.D. Wis. 2016) (stating that Professor Mayer’s swing analysis shows that Democrats are not likely to regain control of the Assembly under the maps that were adopted in August 2011); *see Nichols, End Gerrymandering of Wisconsin*, *supra* note 74 (“The only barrier to competition is the unwillingness of the political careerists in the Legislature to embrace fair and open elections. Of course, that’s a big barrier.”).

258. Jackie Borchardt, *Gov. John Kasich to Include Congressional Redistricting Reform in Budget*, CLEVELAND.COM (Jan. 5, 2017, 1:07 PM), http://www.cleveland.com/politics/index.ssf/2017/01/ohio_congressional_redistricti.html [<https://perma.cc/N7QU-PHR7>].

259. *Id.* *See generally* OHIO CONST. art. XI.

260. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2662 (2015).

261. *Whitford*, 218 F. Supp. 3d at 843, 884; Barnes, *Supreme Court to Hear Potentially Landmark Case on Gerrymandering*, *supra* note 3.

262. *See Ariz. State Legislature*, 135 S. Ct. at 2677.

Voters, and the Wisconsin Democracy Campaign, are beginning to take up the cause and stir grass-roots efforts towards redistricting reform.²⁶³ The opportunity for reform in Wisconsin is ripe, and it must be seized.

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263. Nichols, *End Gerrymandering of Wisconsin*, *supra* note 74.

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