

Brooklyn Law Review

Volume 80 | Issue 4

Article 10

2015

Recreating the "Ritual Carving": Why Congress Should Fund Independent Redistricting Commissions and End Partisan Gerrymandering

Lillian V. Smith

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Lillian V. Smith, *Recreating the "Ritual Carving": Why Congress Should Fund Independent Redistricting Commissions and End Partisan Gerrymandering*, 80 Brook. L. Rev. (2015).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol80/iss4/10>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

Recreating the “Ritual Carving”¹

WHY CONGRESS SHOULD FUND INDEPENDENT REDISTRICTING COMMISSIONS AND END PARTISAN GERRYMANDERING

INTRODUCTION

Drawing election district lines to benefit incumbents and entrench partisan interests is an American political tradition as old as the nation itself. The “ritual carving and paring” of the United States into its 435 congressional districts, once imagined by the Founders as a way to equalize electoral influence, has evolved into a mechanism for protecting political power in the face of a changing demography.² A constitutionally mandated method of dividing up the population into equal congressional districts has thus become a tool of political opportunism, and in the process, it has undermined the very notion of the representative democracy that it was designed to protect.³

Today, in most states, the task of drawing election district lines is delegated to a state’s elected officials. Although these elected officials bring a variety of interests to office, a common thread across party lines and political positions is that incumbents want to remain in office. This creates a fundamental conflict of interest, whereby legislators are elected to represent and advocate for the best interests of their constituents while

¹ Robert Draper, *The League of Dangerous Mapmakers*, ATLANTIC (Sept. 19, 2012, 8:56 PM), <http://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/> (describing congressional redistricting as a “ritual carving and paring of the United States into 435 sovereign units.”). Draper goes on to say that what was once “intended by the Framers solely to keep democracy’s electoral scales balanced . . . has become the most insidious practice in American politics—a way . . . for our elected leaders to entrench themselves in 435 impregnable garrisons from which they can maintain political power while avoiding demographic realities.” *Id.*

² *Id.*

³ See THE FEDERALIST NO. 52 (James Madison) (American Bar Association ed., 2009); see also *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (stating that “[a]s long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”).

simultaneously seeking to ensure their own longevity.⁴ The notion of political accountability should, in theory, ameliorate this conflict, but the reality is that tactics such as gerrymandering have long been the mechanism by which legislators truly protect their incumbency. When legislatures redistrict, they necessarily influence election outcomes by “stacking,” “cracking,” and “packing” voting bloc power with carefully placed district lines.⁵ By carefully selecting who votes where, legislators are able to martial and regulate voting power to quell opposition and ensure victory. In the process, districts coil, meander, and splinter through neighborhoods and tend to look more like Rorschach-test inkblots than like cohesive voting communities.⁶

Consider North Carolina’s twelfth congressional district, one of the most gerrymandered in the nation.⁷ Known to many as the “I-85 district,” it winds narrowly for 160 miles from Greensboro to Charlotte and in some places is no wider than the highway’s right-of-way.⁸ It covers ten counties, five of which are split into three different districts, and it bifurcates several towns and communities in its path.⁹ One state legislator commented that “[i]f you drove down the interstate with both car doors open, you’d kill most of the people in the district.”¹⁰ Or take Maryland’s third

⁴ See Brief for Amici Curiae Thomas Mann and Norman Ornstein in Support of Appellees at 22, *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, No. 13-1314 (Jan. 23, 2015).

⁵ *Shaw v. Reno*, 509 U.S. 630, 670 (1993) (White, J., dissenting). “Cracking” is dividing a minority group among various districts so that it possesses a majority in no single district; “stacking” is placing a large minority population in the same district as a larger white population; and “packing” is creating concentrated districts of minorities, thus limiting the number of districts in which minority voting may have an effect.” Andrew J. Clarkowski, *Shaw v. Reno and Formal Districting Criteria: A Short History of a Jurisprudence that Failed in Wisconsin*, 1995 WIS. L. REV. 271, 284 n.96 (1995) (quoting *Shaw*, 509 U.S. at 670). Although these terms are traditionally used to describe methods of racial gerrymandering, partisan gerrymandering relies on similar tactics. See Sam Wang, *Gerrymandering Creates a Point of Weakness*, PRINCETON ELECTION CONSORTIUM (Oct. 9, 2013, 3:45 PM), <http://election.princeton.edu/2013/10/09/partisan-gerrymanderings-hidden-burden/>.

⁶ Griff Palmer & Michael Cooper, *How Maps Helped Republicans Keep an Edge in the House*, N.Y. TIMES (Dec. 14, 2012), http://www.nytimes.com/2012/12/15/us/politics/redistricting-helped-republicans-hold-onto-congress.html?pagewanted=all&_r=0.

⁷ Christopher Ingraham, *America’s Most Gerrymandered Congressional Districts*, WASH. POST (May 15, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/15/americas-most-gerrymandered-congressional-districts/>.

⁸ Redistricting Task Force for the Nat’l Conference of State Legislatures, *North Carolina Redistricting Cases: the 1990s*, MINN. SENATE (July 8, 2003), <http://www.senate.leg.state.mn.us/departments/scr/redist/redsum/ncsum.htm>.

⁹ *Shaw v. Reno*, 509 U.S. 630, 636 (1993).

¹⁰ *Id.* (citation omitted).

congressional district, dubbed "the praying mantis"¹¹ for the way in which its insect-like perch splits Montgomery County's majority-minority population into three separate districts.¹² And then there is Pennsylvania's "tortured-looking"¹³ seventh congressional district, which touches five counties and is as narrow as 800 feet across in some places.¹⁴

This type of gerrymandering occurs throughout the United States. By manipulating district lines, legislators are able to affect reelection rates and, in turn, the overall competitiveness of elections. It is especially illuminating that members of Congress continue to be reelected by overwhelming margins despite historically low approval ratings. Congress's approval ratings in 2012 hit a then all-time low of 10%.¹⁵ Yet in the 2012 congressional election, 90% of House members and 91% of Senators were reelected.¹⁶ Again, in 2013, Congress's approval ratings reached a new all-time low of 9%, with an average rating for the year of just 14%.¹⁷ But in the 2014 midterm elections, more than 94% of congressional incumbents who sought reelection held their seats.¹⁸ "It used to be that . . . once every two years voters elected their representatives, and now, instead, it's every ten years the representatives choose their constituents. . . . Congressmen are more likely to die or be indicted than they are to lose a seat."¹⁹

¹¹ Aaron Blake, *Name that District Contest Winner: 'The Praying Mantis'*, WASH. POST (Oct. 13, 2011, 4:30 PM), http://www.washingtonpost.com/blogs/the-fix/post/name-that-district-contest-winner-the-praying-mantis/2011/10/13/gIQAQ7w4hL_blog.html.

¹² Ben Pershing & Aaron C. Davis, *Donna Edwards, Montgomery Officials Line Up Against Redistricting Map*, WASH. POST (Oct. 11, 2011), http://www.washingtonpost.com/local/dc-politics/donna-edwards-montgomery-officials-line-up-against-redistricting-map/2011/10/11/gIQAljKhdL_story.html.

¹³ Aaron Blake, *Name that District Contest Winner: 'Goofy Kicking Donald Duck'*, WASH. POST (Dec. 29, 2011, 4:03 PM), http://www.washingtonpost.com/blogs/the-fix/post/name-that-district-contest-winner-goofy-kicking-donald-duck/2011/12/29/gIQa2Fa2OP_blog.html.

¹⁴ Doron Taussig, *Getting to Know the Ridiculous New 7th Congressional District*, PHILLY.COM (Dec. 15, 2011, 10:23 PM), <http://www.philly.com/philly/blogs/our-money/Getting-to-know-the-ridiculous-new-7th-congressional-district.html>.

¹⁵ Frank Newport, *Congress' Job Approval at New Low of 10%*, GALLUP (Feb. 8, 2012), <http://www.gallup.com/poll/152528/congress-job-approval-new-low.aspx>.

¹⁶ Charles Mahtesian, *2012 Reelection Rate: 90 percent*, POLITICO (Dec. 13, 2012, 12:12 PM), <http://www.politico.com/blogs/charlie-mahtesian/2012/12/reelection-rate-percent-151898.html>.

¹⁷ Frank Newport, *Congressional Approval Sinks to Record Low*, GALLUP (Nov. 12, 2013), <http://www.gallup.com/poll/165809/congressional-approval-sinks-record-low.aspx>.

¹⁸ *United States Congress Elections, 2014*, BALLOTPEdia, http://ballotpedia.org/United_States_Congress_elections,_2014 (last visited Jan. 22, 2015).

¹⁹ Jeffrey Toobin, *Drawing the Line: Will Tom DeLay's Redistricting in Texas Cost Him His Seat?* NEW YORKER (Mar. 6, 2006), <http://www.newyorker.com/magazine/2006/03/06/drawing-the-line-3> (quoting Pamela Karlan, professor at Stanford Law School).

With so little turnover in congressional representation, partisan interests run deep.

Although Congressional stagnation cannot be attributed to any one factor, partisan gerrymandering plays a significant role by reducing the competitiveness of elections, contributing to the systemic entrenchment of partisan interests, and perpetuating congressional deadlock, among other problems.²⁰ As long as congressional redistricting is delegated solely to the legislators themselves, this conflict of interest will be insurmountable. Although some states have begun to look more critically at the way their redistricting processes work, that is only a recent development, and 200 or more years of gerrymandering continues to eclipse the reform efforts of a few states. Furthermore, a wait-and-see approach to state-level reform leaves the nation without any consistent standards for independent redistricting.

As such, this note argues that Congress, under its Elections Clause power to “make or alter”²¹ state election administration, should begin to regulate states’ congressional redistricting practices by funding independent redistricting commissions and establishing guidelines for the organization and accountability of those commissions. Federal regulation of the process would create consistency across states through concrete, rule-based reform, rather than through the stipulation of certain outcomes. Furthermore, it would allow individual states to create redistricting commissions based on their own needs and expertise and would establish workable rules for ensuring the independence of those commissions.

Because of the political realities of congressional action on such regulation,²² this note further argues that rather than a federal mandate, Congress should first make funding available to the states to implement independent redistricting commissions, similar to the way the Help America Vote Act (HAVA) allocated federal funding for state election administration contingent upon compliance with baseline reform measures.²³ HAVA mandated certain nationwide election administration procedures, but

²⁰ Brief for Amici Curiae, *supra* note 4, at 3-4 (stating that “when the district-drawing process is controlled by elected officials, the result too often is a process dominated by self-interest and partisan manipulation. The consequences are twofold: diminished electoral competition, which insulates Representatives from their constituents; and an increasingly polarized Congress that takes cues from the most extreme and politically active partisans, with little incentive to compromise.”) *Id.*

²¹ U.S. CONST. art. I, § 4.

²² See Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL'Y REV. 109, 139 (2014).

²³ Help America Vote Act, 42 U.S.C. §§ 15301-15545 (2002).

otherwise, it required reform only when a state accepted HAVA funds.²⁴ This optional compliance, coupled with popular pressure to improve the administration of elections following the "hanging . . . chad" fiasco that precipitated HAVA's enactment, made it a particularly effective piece of election reform legislation.²⁵ A similarly gentle approach to federal regulation of redistricting would help to appease critics of federal forays into state sovereignty²⁶ while simultaneously establishing consistent standards for nationwide congressional redistricting practices. In addition to carving out a major role for state agency in the implementation of federal redistricting regulations, this proposed legislation would also establish a model for changing the way states conduct their own legislative redistricting.²⁷

Part I of this note discusses the process of redistricting, the development of partisan gerrymandering, and current regulations of redistricting and their inability to address partisan gerrymandering. Part II considers current state-level approaches to redistricting and the function and organization of several independent redistricting commissions currently in place at the state level. These case studies provide a helpful insight into both how a federal regulation might best be structured and why a federal regulation is better posited to bring independence to the redistricting process than state-by-state reform measures. Drawing on the state-level independent redistricting commission case studies, Part III proposes federal oversight of redistricting and discusses how federal funding might be used to incentivize, rather than mandate, reform. By funding such commissions, the federal government could bring a level of independence to redistricting that has thus far been unattainable in most states.

²⁴ *Id.*

²⁵ Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 424, 426 (2004).

²⁶ See Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, UTAH L. REV. 859, 859-64 (2010); see also Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1213 (2005).

²⁷ This note only addresses state-level redistricting of congressional election districts. Reforming the redistricting of state legislative districts is another analysis entirely, but reforming congressional redistricting may beneficially inform the way state legislative districts are drawn.

I. THE PARTISAN GERRYMANDER

A. *The Development of Gerrymandering for Political Gain*

To understand why redistricting is so amenable to the abuse of partisan gerrymandering and why federal oversight is the best strategy for ameliorating this abuse, a brief consideration of the process of redistricting and the development of the partisan gerrymander is helpful. Redistricting is the process by which legislative and congressional districts are created and recreated based on the results of each decennial census.²⁸ A state must redraw its district lines at least every ten years to account for changes in population and, at times, the number of congressional representatives allotted to it.²⁹ Federal law has fixed the number of House seats in Congress at 435 since 1913,³⁰ and thus, House seats are reapportioned every ten years based on states' proportion of the national population.³¹

In addition to the constitutional mandate that redistricting occur to account for shifts in population, the Elections Clause delegates the power to regulate the "Times, Places, and Manner of holding Elections" to the state legislatures but gives Congress the power to "make or alter" any state regulations.³² Hence, the process of drawing district lines for both state and federal elections occurs at the state level,³³ with Congress able to act as a check on the process through its constitutional power to affect state regulations,³⁴ which includes the power to limit gerrymandering practices.³⁵ Indeed, in describing the congressional regulatory

²⁸ L. PAIGE WHITAKER, CONG. RESEARCH SERV., R42482, CONGRESSIONAL REDISTRICTING AND THE VOTING RIGHTS ACT: A LEGAL OVERVIEW 1 (2014), available at <http://fas.org/sgp/crs/misc/R42482.pdf>.

²⁹ U.S. CONST. art. I, § 2; WHITAKER, *supra* note 28, at 1.

³⁰ U.S. CONST. art. I, § 2, cl. 3; 2 U.S.C. § 2a(a) (2012). The number of Representatives was set at 435 in 1911 (effective March 3, 1913). This number briefly increased to 437 when Hawaii and Alaska were admitted as states, but the total number of Representatives returned to 435 after the census in 1960. Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 345 (1958); Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 8 (1959); see also KAREN M. MILLS, U.S. CENSUS BUREAU, C2KBR/01-7, CONGRESSIONAL APPORTIONMENT CENSUS 2000 BRIEF (2011).

³¹ U.S. CONST. art. I, § 2.

³² *Id.* § 4; see also *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004).

³³ Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines in California?*, 53 J.L. & ECON. 545, 545 (2010).

³⁴ U.S. CONST. art. I, § 4.

³⁵ *Id.*; *Vieth*, 541 U.S. at 276; see also *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) (stating that "[t]he phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state

provision of the Elections Clause, Alexander Hamilton stated that "[i]ts propriety rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation*."³⁶ Recognizing the need for a federal check on the administration of elections, Hamilton further argued that "a discretionary power over elections ought to exist somewhere. . . . Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy."³⁷

However, despite Congress's ability to check state practices, redistricting has long been subject to abuse by legislators seeking to use the process to protect their own interests. Drawing district lines is intrinsically entangled with partisan and incumbent interests, and when elected officials are in charge of redistricting, there is an inherent conflict of interest. Indeed, the temptation to use the process to protect partisan and incumbent interests has been tantalizing from the very start, and states' misuse of their redistricting power pre-dates even the constitutional delegation of redistricting to the states. As James Madison observed, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed."³⁸ And in 1812, when Massachusetts Governor Elbridge Gerry manipulated the lines of an election district into the shape of what appeared to be a salamander in order to disadvantage his political opponents,³⁹ the practice of partisan-influenced redistricting got its name: the "gerrymander."⁴⁰

Despite the congressional check on redistricting provided by the Constitution, "[b]y 1840 the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. . . . [E]ach party would attempt to gain power which was not proportionate to

regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions.").

³⁶ THE FEDERALIST NO. 59 (Alexander Hamilton) (American Bar Association ed., 2009).

³⁷ *Id.*

³⁸ *Vieth*, 541 U.S. at 275 (quoting 2 Records of the Federal Convention of 1787, 240-41 (M. Farrand ed. 1911)).

³⁹ *Id.* at 274; see also Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1302-03 (2002).

⁴⁰ *Vieth*, 541 U.S. at 274.

its numerical strength.”⁴¹ Elected officials have always recognized that as long as populations and demographics continue to shift, incumbents must seek out other ways to ensure victory. This has led to the manipulation of district lines to influence particular outcomes.

One danger of redistricting, when conducted by elected officials, is that it allows the map-drawing party to create safe,⁴² uncompetitive districts and to allocate political power in a way that is beneficial to the party in power but that does not necessarily reflect voters’ actual preferences.⁴³ Because, in most states, redistricting is the purview of the legislature, the majority party has significant influence over the process. If the minority party were evenly distributed throughout the state, the manipulation of district lines would have less effect on voting bloc power.⁴⁴ However, the reality is that the minority and majority parties cluster in particular areas and communities of interest, making those regions prime targets for manipulation.⁴⁵ As one scholar notes, “[e]ven when the distribution of votes remains constant, the actual partitioning of voters along district lines can determine the outcomes of elections and thereby tempt those who control the redistricting process to manipulate the lines for their own ends.”⁴⁶ Redistricting is a tool with which elected officials can manipulate elections to serve their own interests; it gives “insiders” the ability to organize the electorate in such a way as to virtually predetermine the outcome of elections.⁴⁷

With election outcomes nearly guaranteed, the incentive for new, viable candidates to run for office is minimal. The competitiveness of elections is diminished when fewer candidates enter the field, and it becomes harder and harder to unseat incumbents. In turn, the political accountability of elected officials dwindles.⁴⁸ What creates and sustains the legitimacy of a

⁴¹ *Id.* at 274-75 (quoting E. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 123 (1974)).

⁴² “Safe districts are typically ones that contain enough voters of the same political party as a legislator but not so many that the votes are wasted.” Ancheta, *supra* note 22, at 111.

⁴³ Pamela S. Karlan, *The Partisan of Nonpartisanship: Justice Stevens and the Law of Democracy*, 74 *FORDHAM L. REV.* 2187, 2196 (2006).

⁴⁴ PETER S. WATSON, SENATE COUNSEL, STATE OF MINN., *HOW TO DRAW REDISTRICTING PLANS THAT WILL STAND UP IN COURT* 5 (2011), *available at* www.senate.leg.state.mn.us/departments/scr/REDIST/Draw/Draw.pdf.

⁴⁵ *Id.*

⁴⁶ Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *HARV. L. REV.* 593, 595 (2002).

⁴⁷ *Id.* at 595-96.

⁴⁸ *Id.* at 600.

democracy is the ability of the electorate to check their elected leaders through meaningful, competitive elections.⁴⁹ When elected officials, motivated by their own partisan interests, control the process so as to eliminate the competitive nature of elections and ensure their own longevity, they undermine this central tenet of democratic legitimacy.⁵⁰

This, in turn, contributes to a more polarized Congress in which centrist, moderate legislators are absent.⁵¹ "Gerrymandering thus creates a kind of inertia that arrests the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion, and thus frustrates change and creates undemocratic slippage between the people and their government."⁵² By perpetuating incumbent and partisan interests, gerrymandering pushes the voters' will to the margins, strips elected officials of their accountability, and limits voters' choices.⁵³ Furthermore, it leads to a deficit of effective, solution-oriented legislators and contributes to congressional deadlock.

B. Federal Constraints on Gerrymandering

Over two centuries of gerrymandering has led to the development of federal law regulating the process of redistricting. First, Congress enacted legislation that required congressional districts to be contiguous,⁵⁴ compact,⁵⁵ and equal in population.⁵⁶ Then, in *Baker v. Carr*, the Court held Equal Protection claims of malapportionment in redistricting to be justiciable after a long history of avoiding such cases under the political question doctrine.⁵⁷ The *Baker* Court established six factors that should

⁴⁹ See THE FEDERALIST NO. 52, *supra* note 3. In describing the importance of the House of Representatives to a functioning democracy, the Founders stated, "[a]s it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people." *Id.*; see also *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

⁵⁰ Issacharoff, *supra* note 46, at 623.

⁵¹ Karlan, *supra* note 43, at 2196.

⁵² Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 487 (2004).

⁵³ CITIZENS UNION, RESHAPING NEW YORK: ENDING THE RIGGED PROCESS OF PARTISAN GERRYMANDERING WITH AN IMPARTIAL AND INDEPENDENT REDISTRICTING PROCESS 1 (Nov. 2011), available at http://www.citizensunion.org/www/cu/site/hosting/Reports/CU_ReshapingNewYork_November2011.pdf.

⁵⁴ Apportionment Act of 1842, 5 Stat. 491 (1842).

⁵⁵ Apportionment Act of 1901, 31 Stat. 733 (1901).

⁵⁶ Apportionment Act of 1872, 17 Stat. 28, § 2 (1872).

⁵⁷ *Baker v. Carr*, 369 U.S. 186, 210-17 (1962). Prior to *Baker*, the Court had long held malapportionment claims to be nonjusticiable under the political question doctrine. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 370-71 (3d ed. 2000) (describing Supreme Court cases pre-*Baker*). "An issue is political not because it

be considered before a case is deemed a political question outside the purview of the Court⁵⁸ and determined that, according to those factors, apportionment was no longer a political question beyond the review of the Court and was justiciable under the Fourteenth Amendment.⁵⁹

Once Fourteenth Amendment claims of malapportionment in redistricting became justiciable under *Baker*, challenges to redistricting practices proliferated, and the Court's jurisprudence on racial gerrymandering quickly developed.⁶⁰ The Supreme Court went on to hold that congressional districts must be equal in population under the "one person, one vote" standard in order to protect political equality under the Equal Protection Clause of the Fourteenth Amendment.⁶¹ As one scholar notes, the Court's "one person, one vote" standard envisions a narrow but important conception of this equal influence:

It cannot mean . . . that each citizen has a right to equal influence over the political process or even that each voter has a right to an equal chance to have his or her preferred candidate elected. . . . [E]ach citizen ought to have the equal probability of casting a tie-breaking vote regardless of the location of his or her residence, all other things being equal. . . . [T]he chief evil of malapportioned districts is that some voters in some districts could have a greater chance of casting the dispositive vote in the election of their representative.⁶²

Hence, the danger the Court envisioned was that voting power might be diluted or enhanced based on the relative size of election districts.⁶³ In establishing the "one person, one vote" standard, the Court said that "[a]s long as ours is a representative form of government, and our legislatures are

is one of particular concern to the political branches of government but because the constitutional provisions which litigants would invoke as guides to resolution of the issue do not lend themselves to judicial application." *Id.* at 370; *see also* *South v. Peters*, 339 U.S. 276, 277 (1950); *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

⁵⁸ The six factors articulated by the *Baker* Court are: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217.

⁵⁹ *Id.* at 210-11, 237.

⁶⁰ Michael Weaver, *Uncertainty Maintained: The Split Decision over Partisan Gerrymanders in Vieth v. Jubelirer*, 36 LOY. U. CHI. L.J. 1273, 1290-91 (2005) (citing cases).

⁶¹ *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

⁶² Persily et al., *supra* note 39, at 1311-12 (citations omitted).

⁶³ *Reynolds*, 377 U.S. at 559.

those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”⁶⁴ Furthermore, in *Shaw v. Reno*, the Court created “new structural equal protection” by recognizing the influence of race in redistricting and carving out a role for the Court on adjudicating claims of racial gerrymandering.⁶⁵

Congress established another regulation on the states’ redistricting power with the Voting Rights Act (VRA), section 2 of which prohibits the dilution of minority votes through redistricting practices and creates a private right of action when certain preconditions exist.⁶⁶ And prior to *Shelby County v. Holder*, sections 4 and 5 of the VRA provided an added layer of regulation of redistricting practices in covered districts with a record of discriminatory voting practices.⁶⁷ Under the pre-*Shelby* VRA, all districts designated as covered were required to submit any changes to their voting procedures, including the apportionment of congressional districts, to the U.S. Attorney General for approval.⁶⁸ However, when the Supreme Court struck down the preclearance formula, it stripped Congress of its ability to regulate redistricting in covered districts through preclearance and left only *post facto* litigation brought under section 2 of the VRA.⁶⁹ Recourse under section 2 faces many obstacles, however, as the burden of proof is on the challenger and the litigation is necessarily complex, costly, and slow-moving. As Justice Ginsburg pointed out in her dissent in *Shelby County*, “[a]n illegal scheme might be in place for several election cycles before a § 2 plaintiff can gather sufficient

⁶⁴ *Id.* at 562.

⁶⁵ See Issacharoff, *supra* note 46, at 631. In *Shaw*, the Court held that the minority voters of North Carolina had stated a claim under the Equal Protection Clause of the Fourteenth Amendment by alleging that the state legislature had implemented a redistricting plan “so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.” *Shaw v. Reno*, 509 U.S. 630, 658 (1993).

⁶⁶ The Voting Rights Act of 1965, 42 U.S.C. § 1973 (2012); see also Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986) (holding that the preconditions to a private right of action under section 2 include that the minority group must be able to: (1) “demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) “show that it is politically cohesive”; and (3) “demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.” (citation omitted)).

⁶⁷ 42 U.S.C. § 1973c (2012).

⁶⁸ *Id.* at § 1973c(a); see also Branch v. Smith, 538 U.S. 254, 262 (2003) (stating that section 5 requires preclearance of redistricting schemes).

⁶⁹ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

evidence to challenge it.”⁷⁰ With the demise of preclearance, states are only bound to the U.S. Constitution, what remains of the VRA, and state laws regulating redistricting.

While claims of racial gerrymandering and dilution of minority votes brought under the Fourteenth Amendment and section 2 of the VRA remain justiciable by the Court,⁷¹ there is no such recourse for claims of *partisan* gerrymandering. The Court’s willingness to open its doors to claims of racial gerrymandering after *Baker* did not similarly extend to claims of partisan malapportionment.⁷² The Court constantly shied away from overriding states’ redistricting plans on claims of partisan gerrymandering, emphasizing that review of the process was best done by the legislature.⁷³ Then, in *Vieth v. Jubelirer*, a plurality of the Court held that “[n]either Art. I, § 2 nor the Equal Protection Clause . . . provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.”⁷⁴ Although Justice Kennedy’s controlling opinion did not totally eliminate the possibility that the Court might establish some judicial remedy for partisan gerrymandering, his concurrence with the plurality has left little recourse for such claims.⁷⁵

The *Vieth* decision has nearly foreclosed the possibility that the Court will ever find a claim of partisan malapportionment justiciable. And as one scholar noted, “[o]ne of the perverse consequences of the absence of any real constitutional vigilance over partisan gerrymandering is that litigants must squeeze all claims of improper manipulation of redistricting into the suffocating category of race.”⁷⁶ However, race and partisanship

⁷⁰ *Id.* at 2640 (Ginsburg, J., dissenting); see also McLean Crichton, Note, *A Fool’s Errand: Why Congress Should Amend the Voting Rights Act but Not Section 4’s Coverage Formula*, 80 BROOK. L. REV. 223, 235-36 (2014).

⁷¹ See Ala. Leg. Black Caucus v. Ala., Nos. 13–895, 13–1138, 2015 WL 1310746 at *4 (U.S. Mar. 25, 2015).

⁷² Although in *Davis v. Bandemer*, a plurality of the Court found that partisan gerrymandering could give rise to a claim under the Equal Protection Clause, the Court did not identify a clear standard by which to decide such claims. *Davis v. Bandemer*, 478 U.S. 109, 123-24 (1986). Furthermore, in the years that followed, nearly every claim of partisan gerrymandering failed to achieve judicial intervention under the *Bandemer* standard. *Vieth v. Jubelirer*, 541 U.S. 267, 279-80 (2004) (citing cases).

⁷³ *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978); see also *Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973); *Burns v. Richardson*, 384 U.S. 73, 84-85 (1966).

⁷⁴ *Vieth*, 541 U.S. at 305.

⁷⁵ *Id.* at 306; see also Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability After Vieth v. Jubelirer*, 73 GEO. WASH. L. REV. 1166, 1173-74 (2005).

⁷⁶ Issacharoff, *supra* note 46, at 630-31.

often overlap, particularly since the Civil Rights Movement of the 1960s realigned political parties and "created a reality in which today most African American voters are Democrats and most white conservative voters are Republicans."⁷⁷ To create a cause of action for only claims of racial gerrymandering is, as one scholar argues, "an artificial way of dividing up a world that has been dictated by American law and the Supreme Court. . . . [I]f 'partisan' factors predominate in the legislature then those challenging the proposed district lines lose, but if 'racial' factors predominate they win."⁷⁸ This distinction prevents legitimate claims of partisan gerrymandering from reaching the Court, and even worse, asks courts "to make decisions about what is in legislators' hearts" and "search for racist intent" in order to even hear malapportionment cases.⁷⁹ This oversimplifies how and why gerrymandering occurs and creates extreme obstacles for the justiciability of claims of gerrymandering. Ultimately, it points to the growing need for Congressional action to create meaningful regulation of redistricting practices in order to prevent the type of partisan gerrymandering that has little judicial oversight.

II. STATE APPROACHES TO REDISTRICTING REFORM

Perhaps in response to the limited federal constraints on partisan gerrymandering, states have begun to more strictly regulate their own redistricting processes by implementing oversight mechanisms for improving and monitoring the way district lines are drawn.⁸⁰ On the one hand, these state-by-state approaches to redistricting reform reveal the inconsistencies and ineffectuality of a piecemeal strategy for diminishing partisan influence. However, on the other hand, by drawing on the more successful aspects of each of these state-level approaches to redistricting reform, there emerges a useful framework for federal regulation of redistricting practices nationwide.

Because redistricting occurs at the state level, there is a wide disparity in how states approach and regulate the process.⁸¹

⁷⁷ Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (Jan. 7, 2014), available at <http://harvardlawreview.org/2014/01/race-or-party-how-courts-should-think-about-republican-efforts-to-make-it-harder-to-vote-in-north-carolina-and-elsewhere/>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Vieth*, 541 U.S. at 277 n.4; see also Grainger, *supra* note 33, at 545.

⁸¹ Nathan S. Catanese, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 343 (2014).

State-level strategies for congressional redistricting range from independent, citizen-informed redistricting commissions to traditional, direct legislative control of the line-drawing process.⁸² The wide variance across states means both that the implications of partisan gerrymandering are greater in some states than in others and that there is a startling lack of consistency in the way redistricting occurs in the United States. This disparity in approaches to redistricting means that the degree to which voters' preferences are actually reflected in their Congressional representatives varies depending on the state in which those voters happen to reside. This, in turn, contributes to a Congress where heavily gerrymandered states can coalesce partisan power on one side of the aisle, whereas states that employ independent redistricting commissions for more competitive elections may ultimately have less sway. Although state approaches to redistricting vary widely, what they all share is a deep power to influence the outcome of elections.

Any redistricting plan will have political effects; in that sense, there is no such thing as an objectively fair plan to alter district lines. No matter where the lines are drawn, there will be political consequences for the populations and the elected officials on either side.⁸³ What reform efforts aim to achieve is not an objectively fair redistricting plan, but rather, a process that puts greater emphasis on certain criteria over others.⁸⁴ Under the current scheme in the majority of states, the most heavily valued criteria for determining where district lines should be drawn is the degree to which it affects an incumbent's chances of being reelected.⁸⁵ Redistricting reform would have criteria such as the cohesiveness of the district and the degree to which it actually reflects voting bloc power take precedence over the likelihood of an incumbent's reelection.⁸⁶

Asking legislators to use these independent criteria in their redistricting plans is a tall order; it would require an elected official to put voters' rights before partisan interests. There is little incentive for any elected official to push for the reform of a process that safeguards that legislator's job. As such, in most

⁸² CAL. CONST. art. XXI, § 2; N.C. CONST. art. II, § 5.

⁸³ Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 838-39 n.6 (1997); see also Ancheta, *supra* note 22, at 135-36.

⁸⁴ Kubin, *supra* note 83, at 838-39 n.6. (quoting TERRY B. O'ROURKE, REAPPORTIONMENT: LAW, POLITICS, COMPUTERS 38 (1972)).

⁸⁵ See Kristen Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913, 913 (1996).

⁸⁶ See Kubin, *supra* note 83, at 838-39 n.6.

states, the legislature continues to control redistricting. However, there are a few states that have established redistricting processes that are more independent from the legislature. The way that the various states draw their congressional district lines, whether by the legislature or through some independent apparatus, illustrates both the problems of partisan gerrymandering and the ways in which redistricting could be more independent. Hence, it is useful to look closely at the states' role in redistricting, the possibility of reform at the state level, and the obstacles to widespread reform through a state-by-state approach that lacks federal oversight.

A. *The Traditional Approach to Redistricting: The Legislature Draws the Lines*

Despite the reform measures adopted by certain states, the majority of states take the traditional approach to redistricting whereby primarily the legislators are tasked with drawing their own district lines.⁸⁷ In the scheme utilized by New York prior to the recent passage of a constitutional amendment to reform redistricting,⁸⁸ the Legislative Task Force on Demographic Research and Reapportionment (LATFOR) assisted the state legislature in drawing the state and congressional district lines.⁸⁹ LATFOR's funding came from the same bill that allotted funding to the legislature, and the commission itself was made up of four legislators and two non-legislators.⁹⁰ There was ample opportunity for legislative input throughout the process, and although LATFOR conducted public hearings on its proposed redistricting plans, legislators indicated that in at least some redistricting cycles, LATFOR had already finished its map-drawing before staging any public hearings.⁹¹

LATFOR submitted its plan to the legislature as a bill, which was then ultimately approved or denied by the legislature that helped craft it.⁹² "Historically, this has amounted to

⁸⁷ Redistricting 101, *Redistricting Reform*, REDRAWING THE LINES, <http://www.redrawingthelines.org/redistrictingreform> (last visited Jan. 23, 2015); see also *Redistricting Commissions and Alternatives to the Legislature Conducting Redistricting*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/redistricting/redistricting-commissions.aspx> (last visited Jan. 23, 2015).

⁸⁸ *Proposed Ballot Propositions*, N.Y. STATE BOARD OF ELECTIONS (2014), <http://www.elections.ny.gov/ProposedConsAmendments2.html>.

⁸⁹ RESHAPING NEW YORK, *supra* note 53, at 29.

⁹⁰ *Id.* at 30.

⁹¹ *Id.*

⁹² *Id.* at 31; see also NEW YORK REDISTRICTING MEMO, BRENNAN CENTER FOR JUSTICE (2010), available at <http://www.brennancenter.org/analysis/new-york-redistricting-memo>.

something of a tacit agreement between the chambers, in which each chamber determines the lines for its own members independently.”⁹³ There were few rules that LATFOR was required to follow beyond what was established by federal law, and this absence of redistricting criteria meant that the process was used to protect partisan and incumbent interests.⁹⁴ In its seminal report on how gerrymandering undermines democracy, Citizens Union criticized LATFOR’s manipulation of district lines:

Past practices . . . have included: drawing a challenger’s home or political bases out of districts after having mounted a strong challenge against an incumbent; going to the margins of allowable district population size to advantage regions of the state over others; and the gerrymandering of districts and dividing of communities to split the vote of burgeoning ethnic communities.⁹⁵

Four out of six members of LATFOR were sitting legislators, and all six members were appointed by the legislature, with the majority party in each house getting two appointments.⁹⁶ Hence, the legislature had near total control and oversight of the redistricting process, with the majority party in each house able to exert significant influence over how redistricting would affect majority-party interests in ten years of elections.⁹⁷

This is just one example of how a state might approach redistricting and ensure that its incumbents are protected in the process. Again, because the criteria for how redistricting is conducted are largely left to the individual states, there is little consistency in the redistricting rules that each state has adopted. However, the majority of states delegate redistricting oversight to the legislature, staff redistricting commissions with elected officials, and in general, create a process whereby incumbents are well-positioned to ensure their own longevity.

B. The Rise of Independent Redistricting Commissions

An oft-touted reform measure implemented by states to prevent partisan manipulation of the redistricting process is the establishment of independent redistricting commissions on which legislators are not allowed to serve. These commissions vary in their organization and accountability to state legislatures

⁹³ NEW YORK REDISTRICTING MEMO, *supra* note 92.

⁹⁴ RESHAPING NEW YORK, *supra* note 53, at 31.

⁹⁵ *Id.* at 31-32.

⁹⁶ *Id.* at 7-8, 30.

⁹⁷ *Id.* at 7-8. In 2014, New York passed a constitutional amendment that created an independent redistricting commission to replace LATFOR. See *infra* Part II.C.3.

and the general public.⁹⁸ In its most common iteration, the redistricting commission has complete control of the line drawing process, although the degree of legislative oversight varies widely.⁹⁹ Other states employ a model in which the commission only steps in when the legislature fails to agree on a redistricting plan.¹⁰⁰ In at least one state, the commission advises the legislature on how to draw the district lines but has no binding authority over the process.¹⁰¹

In addition to the different roles these redistricting commissions play in the states that implement them, the commissions also vary in their structure and organization. The degree to which a redistricting commission is considered independent has as much to do with its membership as it does with its authority.¹⁰² In the bipartisan redistricting commission model, both major political parties get an equal number of appointments. The potential for the commission to deadlock is high, and each party has the incentive to protect its own interests and to compromise only to the extent that its incumbents' interests are protected.¹⁰³

Another model is one in which the commission is made up of high-ranking government officials, regardless of their political affiliation. For instance, the Texas Constitution appoints the lieutenant governor, the Speaker of the House, the attorney general, the state comptroller, and the land commissioner to a redistricting commission that is formed only in the event that the legislature cannot agree on the district lines.¹⁰⁴ The risk, under this model, is that the commission will be saturated with members of the party in power and will lead to even deeper partisan bias in the redistricting process.¹⁰⁵

A third, and perhaps less problematic model, is the "tie breaker commission."¹⁰⁶ It consists of members chosen by the minority and majority party leadership in the state legislature, with one or more additional members nominated by a majority of

⁹⁸ Christopher C. Confer, Note, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115, 119-23 (2003).

⁹⁹ Ryan P. Bates, Note, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333, 347 (2005).

¹⁰⁰ *Id.* at 347-48.

¹⁰¹ *Id.* at 348; VT. CONST. ch. II, § 73; *see also* CONN. CONST. art. III, § 6(a).

¹⁰² Bates, *supra* note 99, at 348.

¹⁰³ *See* Kubin, *supra* note 83, at 847 n.51.

¹⁰⁴ TEX. CONST. art. III, § 28.

¹⁰⁵ Bates, *supra* note 99, at 350.

¹⁰⁶ *Id.*

the commission.¹⁰⁷ Although the incentives to promote partisan interests still pervade the legislature's nominees,¹⁰⁸ each side will presumably have to concede to a plan that promotes competition in order to win the "neutral" tie-breaking member's vote.¹⁰⁹

C. *State Approaches to Redistricting Reform*

Although the majority of states follow the traditional approach to redistricting whereby the legislature draws the district lines, there are a few states that have begun to implement more reform-minded strategies for redistricting. Again, these approaches vary widely, and some make a better showing than others of actual reform. However, all three of the models discussed *infra* contribute to a best practices model for federal regulation of redistricting.

1. Arizona

Prior to the 2000 redistricting cycle, the Arizona legislature created its own maps of state and congressional election districts.¹¹⁰ In the 2000 election, voters passed Proposition 106, which amended the state's constitution and established an independent redistricting commission vested with the power to draw district lines.¹¹¹ The Arizona Constitution now provides that in every decennial redistricting cycle, an Independent Redistricting Commission (IRC) will conduct congressional and state redistricting, and it further provides the organization and appointment process for that commission.¹¹² Arizona's IRC has five members, no more than two of whom can be from the same political party.¹¹³ The amendment also regulates the residency of its

¹⁰⁷ *Id.* at 350 n.100 (citing state constitutions).

¹⁰⁸ See Brandon L. Boese, Note, *The Controversy of Redistricting in Minnesota*, 39 WM. MITCHELL L. REV. 1333, 1353 (2013) (stating that "[m]ost independent redistricting panels are still in their infancy and thus, it is hard to tell whether the maps they draw are any better than the legislature's maps. They do, however, seem to at least present an appearance of a fairer and more objective process of redistricting than redistricting through state legislatures, even amidst allegations that political parties are swaying these panels one way or another.").

¹⁰⁹ Bates, *supra* note 99, at 351; see also Kubin, *supra* note 83, at 848-49 & n.67.

¹¹⁰ Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret*, 35 ARIZ. ST. L.J. 575, 576 (2003).

¹¹¹ *Id.* at 577-78; see also Joseph Kanefield & Mary O'Grady, *Arizona Independent Redistricting Commission Legal Overview*, ARIZ. INDEP. REDISTRICTING COMMISSION 2 (July 8, 2011), <http://www.azredistricting.org/docs/Meeting-Info/AZ-Independent-Redistricting-Commission-Legal-Overview-070811.pdf>.

¹¹² ARIZ. CONST. art. IV, pt. 2, § 1.

¹¹³ *Id.*

members, such that no more than two of the first four members can be from the same county. The amendment further stipulates that:

Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.¹¹⁴

Hence, the amendment seeks to shield the commission from the influence of public office and vest the power of redistricting in the hands of people with less of a personal stake in the outcome of the elections their decisions will influence.¹¹⁵

Yet despite the amendment's goal of reform, the election districts created by Arizona's IRC were plagued by Department of Justice scrutiny, litigation, and criticism for their inability to improve the influence of minority voters.¹¹⁶ As one scholar notes, "[t]he only solution to these voting rights problems is to return to the drawing board for clearer guidelines for the I.R.C. or to push for changes to the federal laws and regulations that would make them more friendly to Arizona's . . . approach."¹¹⁷ And currently, Arizona's IRC and the maps it created in 2012 are being challenged as an unconstitutional delegation of the legislative authority to conduct redistricting to an unelected body.¹¹⁸ If the Supreme Court strikes down Proposition 106 and enjoins the IRC's district maps, that could portend the decline of state redistricting commissions that bar state legislature involvement in the redistricting process.

2. California

California has also turned to the independent redistricting commission model and has raised the bar for true independence

¹¹⁴ *Id.*

¹¹⁵ See Barnes, *supra* note 110, at 578; see also Boese, *supra* note 108, at 1361.

¹¹⁶ Barnes, *supra* note 110, at 597.

¹¹⁷ *Id.*

¹¹⁸ *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d. 1047, 1051-56 (D. Ariz. 2014), *appeal docketed*, No. 13-1314 (U.S. Oct. 2, 2014).

with the creation of its Citizens Redistricting Commission.¹¹⁹ California's model emphasizes citizen participation and government transparency and diminishes the legislature's role in the redistricting process.¹²⁰ Unlike Arizona, where the commission on appellate court appointments designates the commissioners,¹²¹ California has an Applicant Review Panel, which is made up of members of the state's independent auditing agency, the Bureau of State Audits.¹²² Legislative leaders get a certain number of vetoes from the pool of possible members, and the remaining nominees are chosen through a lottery.¹²³ This veto power is the only role for the California legislature in the redistricting process;¹²⁴ whether this would ameliorate the constitutional concerns in the *Arizona* case currently before the Court is unclear.

The California Constitution is clear on the aims of the Citizens Redistricting Commission and includes prohibitions on incumbent and partisan influence:

The commission shall . . . conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines. . . . The selection process is designed to produce a commission that is independent from legislative influence and reasonably representative of this State's diversity. . . . Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.¹²⁵

Of all the priorities listed in the California Constitution, there is no stated goal of increasing the competitiveness of elections.¹²⁶ Rather, the emphasis is on the process itself—that of preserving communities of interest and creating geographically contiguous districts.¹²⁷

Describing the effect of redistricting reform, one scholar and member of the California Citizens Redistricting Commission wrote:

California's post-2010 redistricting cycle . . . was independent of the legislature, far more process-driven, more expensive, and replete with unprecedented levels of citizen involvement. Did the Commission ultimately produce the "best maps"? Redistricting reflects a wide variety

¹¹⁹ CAL. CONST. art. XXI, § 2; Ancheta, *supra* note 22, at 138.

¹²⁰ Ancheta, *supra* note 22, at 127; *Frequently Asked Questions*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/faq.html> (last visited Jan. 23, 2015).

¹²¹ ARIZ. CONST. art IV, pt. 2, § 1(4).

¹²² Ancheta, *supra* note 22, at 118; *see also* *Frequently Asked Questions*, *supra* note 120.

¹²³ Ancheta, *supra* note 22, at 118; *see also* *Frequently Asked Questions*, *supra* note 120.

¹²⁴ Ancheta, *supra* note 22, at 118.

¹²⁵ CAL. CONST. art. XXI, § 2.

¹²⁶ Ancheta, *supra* note 22, at 125.

¹²⁷ *Id.* at 124-25.

of choices and judgments on how multiple districts might be drawn to fit together, and there is no one right answer. With more time and resources, the Commission might have obtained more data, explored more options, and refined the boundaries to keep more local communities together or to make the districts even more compact. But the overall process of constructing the maps complied with federal and state law and reflected the norms of transparency and participation Comparisons of the Commission's post-2010 maps and the legislature's post-2000 maps have shown that the Commission's districts were generally more compact, more competitive, better at advancing minority voting rights, and more successful in maintaining cities, counties, and communities of interest.¹²⁸

Commissioner Ancheta's commentary on the success of California's independent redistricting and the obstacles to the plan are illuminating. He states that an independent body to draw district lines works "if properly insulated from legislative influence," and that having clear criteria, including prohibitions on the consideration of factors such as incumbent protection, helps to limit the role of politicians' self-interest.¹²⁹ He further advocates for an expansive role for the public to participate in redistricting and for tailoring reform efforts to meet the needs of the jurisdictions they affect.¹³⁰

Redistricting reform in California is important to understanding how reform might occur at the federal level. Ultimately, Commissioner Ancheta deemed the plan a success that might inform other efforts at implementing a more independent redistricting process.¹³¹ He noted that the two major obstacles to the plan were time and resources, both of which would have contributed to an even fairer and more comprehensive redistricting plan.¹³²

3. New York

In a third but important example of one of the most recent redistricting reforms, in 2014, the voters of New York passed a constitutional amendment to revise the state's redistricting process.¹³³ The amendment establishes a redistricting commission made up of ten members. Each of the four legislative leaders appoints two members, and those eight appointees must agree on

¹²⁸ *Id.* at 135-36 (citations omitted).

¹²⁹ *Id.* at 136.

¹³⁰ *Id.*

¹³¹ *Id.* at 140.

¹³² *Id.* at 135.

¹³³ *Proposed Ballot Propositions*, *supra* note 88; *see also* N.Y. CONST. art. III, §§ 4-5.

the other two appointments.¹³⁴ Legislators are prohibited from serving on the commission, and the amendment establishes principles such as maintaining the core of existing districts and considering communities of interest.¹³⁵ There is also a strong emphasis on holding public hearings; the commission is required to hold at least twelve.¹³⁶

In many ways, the amendment establishes a commission that looks similar to the California Citizens Redistricting Commission. However, in New York, legislators appoint the commissioners, and the maps created by the redistricting commission are still subject to approval by the legislature.¹³⁷ Public interest groups have been quick to criticize the amendment for its failure to establish true independence from the legislature.¹³⁸ However, other groups have heralded the amendment as building an important foundation for reform,¹³⁹ especially considering the difficulty of obtaining legislative support for redistricting reform in a state where only the legislature can put a constitutional amendment on the ballot.¹⁴⁰

The debate in New York's public interest community surrounding the merits of the constitutional amendment highlights the political reality of enacting true reform and the difficulty of achieving actual independence in the redistricting process. Furthermore, what the debate in New York and this short survey of redistricting reform efforts make clear is the very dire need for clarity and consistency in implementing reform in every state so that voters' actual preferences for their congressional representation are reflected in every state, and not just those that have managed to introduce some independence to the redistricting process.

¹³⁴ *Proposed Ballot Propositions*, *supra* note 88.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Defeat the Referendum*, COMMON CAUSE, <http://www.commoncause.org/states/new-york/issues/redistricting/redistricting-referendum/> (last visited Jan. 23, 2015); *see also* NAACP Announces Opposition to Prop 1, READMEDIA (Oct. 14, 2014, 3:22 PM), <http://readme.readmedia.com/NAACP-Announces-Opposition-to-Prop-1/9820708>.

¹³⁹ *See* CITIZENS UNION, RIGGED TO MAINTAIN POWER: HOW NYS' 2012 REDISTRICTING PROTECTED INCUMBENTS AND CONTINUED MAJORITY PARTY CONTROL, (Oct. 2014), *available at* <http://www.voteyes4progress.org/wp-content/uploads/2014/10/CU-Report-Rigged-to-Maintain-Power1.pdf>.

¹⁴⁰ Unlike California, where citizens can propose ballot measures. Ancheta, *supra* note 22, at 113.

D. Why State Level Solutions are Not Enough to Reform Redistricting

The redistricting commissions that exist have been implemented by state legislatures and vary widely as far as their independence is concerned. Presently, only 12 states delegate redistricting to a group other than the legislature, and of those, only half utilize a redistricting commission.¹⁴¹ Furthermore, only some of the commissions cover congressional elections; in other states, independent commissions are implemented for state-level elections, but congressional district lines are left to the legislature.¹⁴² What is perhaps the most striking feature of the independent redistricting commissions that currently exist is how little they resemble one another. The number of commissioners ranges from five to fourteen; appointments are made by everyone from the Governor to the ranking legislative leaders to the judiciary; and the criteria for drawing districts, the legislature's ability to veto appointments, and the public's involvement all vary across the commissions.¹⁴³ The lack of uniformity is staggering, and each state utilizing an independent redistricting commission has faced unique challenges to its attempts to implement redistricting reform.

In Arizona, the first attempt at independent redistricting in 2001 faced years of litigation challenging its constitutionality.¹⁴⁴ Arizona's redistricting commission is self-executing and does not require any ratification of the final district maps.¹⁴⁵ Challenges to the commission's map, coupled with the preclearance requirements

¹⁴¹ *Redistricting Commissions and Alternatives to the Legislature Conducting Redistricting*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/redistricting/redistricting-commissions.aspx> (last visited Jan. 23, 2015).

¹⁴² For instance, in California, independent redistricting commissions cover both legislative and congressional redistricting, whereas in Colorado, a reapportionment commission conducts legislative redistricting, and the Colorado legislature conducts congressional redistricting. CAL. CONST. art. XXI, § 2; *see also Redistricting and Reapportionment*, COLORADO, <http://www.colorado.gov/cs/Satellite/CGA-ReDistrict/CBON/1251581558103> (last visited Jan. 23, 2015).

¹⁴³ *Appendix F, Redistricting Commissions: Congressional Plans*, REDISTRICTING AND ELECTIONS COMM. FOR THE NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 10, 2008), <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/apfcomco.htm>; *see also* CAL. CONST. art. XXI, § 2(b)(1) (which, unlike other states' constitutions, requires that the redistricting commission "conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines").

¹⁴⁴ Kristina Betts, Note, *Redistricting: Who Should Draw the Lines? The Arizona Independent Redistricting Commission as a Model for Change*, 48 ARIZ. L. REV. 171, 171-74 (2006) (discussing a lawsuit brought by the Arizona Minority Coalition for Fair Redistricting challenging the constitutionality of the maps, the delays in DOJ preclearance of the maps, and the uncertainty this created for the 2004 election).

¹⁴⁵ ARIZ. CONST. art. IV, pt. 2, § 1 (15-17).

imposed by the Department of Justice, caused serious delays to the finalization of the maps and forced the state to resort to temporary maps for its 2004 elections.¹⁴⁶ The first time the lines adopted by the commission were ruled constitutional was in 2004.¹⁴⁷ And now, the commission itself is being challenged as an unconstitutional delegation of the legislative authority to conduct redistricting to an unelected body.¹⁴⁸

Although California has not encountered the avalanche of litigation that plagued Arizona's redistricting commission, its Citizens Redistricting Commission faced its own set of challenges. First, delegating the complex task of drawing district lines to a wholly new and independent body required time and resources that were difficult for the commission to determine at the outset. Commissioners required training, mapmaking demanded intensive research, and citizen participation necessarily slowed the process.¹⁴⁹ Delays in training led to further delays in data collection, and the complex task of ensuring compliance with the Voting Rights Act further complicated the commission's work.¹⁵⁰ Moreover, the commission's careful attention to the testimony it received required the commission to change course several times.¹⁵¹ In addition to these delays, the commission also faced budget constraints based on the time and resource intensive nature of choosing truly independent commissioners and completing citizen-informed, nonpartisan election district maps.¹⁵² In short, while the independent redistricting process was largely successful, it faced resource constraints that must be streamlined if the process is to be sustainable.

¹⁴⁶ *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 284 F. Supp. 2d 1240, 1242 (D. Ariz. 2003); *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998, 1002 (D. Ariz. 2002); Poonam Kumar, *Ratification of Reapportionment Plans Drawn by Redistricting Commissions*, 40 U. MICH. J.L. REFORM 653, 666-67 (2007).

¹⁴⁷ *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 891 (D. Ariz. 2005); Kumar, *supra* note 146, at 666-67.

¹⁴⁸ *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014), *appeal docketed*, No. 13-1314 (U.S. Oct. 2, 2014).

¹⁴⁹ Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. DAVIS L. REV. 1041, 1075-80 (2013).

¹⁵⁰ *See id.* at 1078.

¹⁵¹ *Id.* at 1093 n.210 (citing CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF STOCKTON BUSINESS MEETING 210-11 (June 24, 2011)).

¹⁵² Ancheta, *supra* note 22, at 118-19 (stating that implementation of California Citizens Redistricting Commission was "complicated because of the high volume of applications and ongoing concerns over the diversity of the Commission—both of which contributed to a longer and more expensive process than expected. From beginning to end, selecting the commissioners took approximately two years to complete and cost a total of over \$4 million, including over \$1 million for consultant costs to conduct a statewide outreach campaign.").

Yet the challenges faced by newly installed independent redistricting commissions pale in comparison to the obstacles to implementing reform in the more than 35 states that still allow the legislature to control the redistricting process. Because legislators have little incentive to change a process that helps keep them in office, popular pressure for independent redistricting must motivate reform efforts. The California Citizens Redistricting Commission only exists because of Proposition 11, which was an initiative included on California's 2008 ballot based on citizens' petitions.¹⁵³ Currently, only 24 states possess a ballot initiative process in which citizens can petition to have a new law or constitutional amendment included on a ballot.¹⁵⁴ Of those 24 states, 18 permit ballot initiatives to propose constitutional amendments, and of those 18, 16 allow direct ballot initiatives, whereby the requisite number of citizen signatures gets an initiative on the ballot without legislative approval.¹⁵⁵ In the 34 states that do not allow direct ballot initiatives, the legislature is the final authority on any ballot measures, and citizens must put pressure directly on their elected representatives to reform redistricting.

States like Arizona and California provide useful insights into what does and does not work when a state implements an independent redistricting process. Arizona, plagued with litigation, needed a stronger mechanism for the ratification of its district maps.¹⁵⁶ California, which came closer to meaningful reform, battled the inherent difficulties of implementing a commission unlike anything else this country has seen. New York managed to establish an independent redistricting commission, but it had to compromise on the commission's independence in order to get the measure on the ballot at all. Each of these reform efforts provides a useful case study on both the pitfalls and the necessary components of an effective redistricting plan. Yet while these states and a handful of others attempt reform, the vast majority of states have seen little to no change to legislative control of

¹⁵³ *Prop 11 Redistricting Initiative Constitutional Amendment and Statute*, VOTER INFO. GUIDE (Nov. 4, 2008), <http://www.voterguide.sos.ca.gov/past/2008/general/title-sum/prop11-title-sum.htm>.

¹⁵⁴ *What are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST. AT THE U. S. CAL. (2014), <http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm>.

¹⁵⁵ *Id.*

¹⁵⁶ *See* *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014), *appeal docketed*, No. 13-1314 (U.S. Oct. 2, 2014); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 284 F. Supp. 2d 1240, 1242 (D. Ariz. 2003); *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998, 1016 (D. Ariz. 2002).

redistricting, and the legislators in those states stand in firm opposition to reform efforts.

In over two centuries of partisan gerrymandering, only a half-dozen states have managed any measure of reform. Quite simply, the state-by-state reform effort is untenable for truly systemic change. Where it exists, it is slow and often ineffectual, and where it doesn't exist, there is no impetus for the legislature to change the status quo and no possibility of direct ballot initiatives for the citizens of the 34 states that deny such ballot access. The possibility for state-level reform will be particularly diminished if the U.S. Supreme Court strikes down the legislation that created Arizona's independent redistricting commission in the case currently before the Court. If the Court finds that a state legislature's delegation of the redistricting process to an unelected, independent commission is not in fact a part of the legislative process under the Elections Clause, then any future state-level commissions will require significant legislative input, thus removing the very independence that they were designed to protect.¹⁵⁷ The Court has long left redistricting reform to the legislative branch, and it is imperative that Congress accept its duty and repair a practice that has undermined representative democracy for centuries and which, contrary to certain scholars' arguments,¹⁵⁸ has little recourse in state-level reform efforts.

III. REFORMING REDISTRICTING THROUGH FEDERAL OVERSIGHT

Other than the protections built into the U.S. Constitution and the VRA, there is minimal federal oversight of redistricting and certainly no uniform standard for how states conduct their redistricting and reapportionment. With such

¹⁵⁷ There does not seem to be any argument that a federally created commission would pose similar constitutional problems. At oral argument in the current case before the Court challenging Arizona's IRC, Paul Clement stated that:

If Congress wants to do it itself on the Federal level and set up some sort of Federal commission, I think that would be a very different issue because obviously Congress has power under the second subclause . . . Congress could say, we're going to actually take those commission districts and we're going to make them our own, and we're going to impose them.

Oral Argument at 5:07, *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n* (No. 13-1314), available at http://www.oyez.org/cases/2010-2019/2014/2014_13_1314.

¹⁵⁸ James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 887-89 (2006); J. Gerald Hebert & Marina K. Jenkins, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POL'Y REV. 543, 554-56 (2011); Noah Litton, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 OHIO ST. L.J. 839, 869 (2012).

variance among state practices, the greatest successes and the greatest failures of redistricting reform have all occurred through state-level plans. Depending on the particular scheme, states have become both the enemy and the savior of independent redistricting. However, now that Arizona, California, New York, and other states have attempted redistricting reform, the framework exists for a nationwide regulatory system that is better equipped to preempt the challenges faced at the state level and implement efficient, uniform standards for redistricting reform in every state. It is imperative that Congress exercise its constitutional power to "make or alter"¹⁵⁹ state redistricting practices by passing federal legislation to create funding for independent redistricting commissions in every state, thus making the framework a reality.

The virtues of federal legislation to regulate congressional redistricting are easy to imagine. Congress could establish a process for states to appoint truly independent commissioners and institute requirements for service on the commission. It could mandate that certain criteria take precedence over others when commissioners choose where to draw district lines, thereby diminishing the sway of partisan interests. It could ensure citizen participation and preserve communities of interest. With so many different redistricting plans at work across the United States, Congress has the information to craft successful, workable rules for independent redistricting commissions. And by mandating independence in the redistricting *process*, rather than by requiring any particular outcome, Congress could address the underlying problem of partisan bias and ensure that, in every state, redistricting occurs in a consistent, fair way without treading on the states' rights to perform congressional redistricting.

A. *Funding Reform: The Carrot or the Stick*

This note proposes that rather than a federal mandate of state-level reform, a more tenable approach to establishing a federal regulation is through a program in which funding is available to states to develop independent redistricting commissions according to federal guidelines. This solution is modeled on the Help America Vote Act (HAVA), wherein Congress, for the first time since 1933, made funding available for states to improve federal elections contingent on their

¹⁵⁹ U.S. CONST. art. I, § 4; *see also* *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004).

compliance with HAVA requirements.¹⁶⁰ The Act established certain baseline requirements for all states, but states were not required to comply with Titles I and II of the Act unless they accepted HAVA funding.¹⁶¹

A brief consideration of the structure and implementation of HAVA is useful in understanding how a federal program could be similarly devised to reform redistricting. Congress enacted HAVA in 2002 in response to the hanging chad debacle of the 2000 presidential election that left many voters skeptical of the election process.¹⁶² Among a number of concerns about how votes were being cast and counted in different states, research indicated that depending on the voting method, the implications for the final vote tally could vary widely.¹⁶³

Empowered to regulate elections¹⁶⁴ and impose requirements on states that accept federal funding in relation to the use of that funding,¹⁶⁵ Congress responded by enacting HAVA, which created an unprecedented source of funding for states to improve their elections.¹⁶⁶ It authorized \$3.86 billion for election improvements and created a new federal agency, the Election Assistance Commission, to provide guidance on HAVA's requirements and to distribute HAVA funds.¹⁶⁷ Although HAVA carved out a larger role for the federal government in an area formerly left to states and municipalities, that of election administration,¹⁶⁸ it mandated very little action from state and local governments.¹⁶⁹

What HAVA did mandate were certain minimum standards for voting equipment, which required many states to update their voting machinery.¹⁷⁰ It also required that states

¹⁶⁰ Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 TEX. REV. L. & POL. 277, 280 (2005).

¹⁶¹ 42 U.S.C. §§ 15301-15545 (2002); see also Brandon Fail, Comment, *HAVA's Unintended Consequences: A Lesson for Next Time*, 116 YALE L.J. 493, 493 (2006). However, "[u]nless a State is specifically excluded from one of HAVA's requirements, each State must comply with Sections 301, 302, and 303 of Title III of HAVA as of the effective dates in those sections." *Frequently Asked Questions*, U.S. DEPT OF JUST. CIV. RIGHTS DIVISION, <http://www.justice.gov/crt/about/vot/misc/faq/faq22> (last visited Jan. 22, 2015).

¹⁶² Shambon, *supra* note 25, at 424.

¹⁶³ See *id.* at 425.

¹⁶⁴ U.S. CONST. art. I, § 4; see also *Vieth*, 541 U.S. at 275 (2004).

¹⁶⁵ U.S. CONST. art. I, § 8, cl. 1; *S.D. v. Dole*, 483 U.S. 203, 206 (1987).

¹⁶⁶ Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 350 (2008); Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 ELECTION L.J. 203, 205 (2013).

¹⁶⁷ Tokaji, *supra* note 166, at 205.

¹⁶⁸ *Id.* at 203; Publius, *supra* note 160, at 286.

¹⁶⁹ Tokaji, *supra* note 166, at 205.

¹⁷⁰ *Id.*

make provisional voting available to anyone attempting to vote whose name was not on the registration list and create a statewide voter registration list with certain requirements for first-time voters.¹⁷¹ However, these mandates all came with funding, and states were free to develop their own plans for compliance. The Act had "the effect of moving from an environment of local control with loose state and limited federal oversight to an environment of strong state control and loose federal oversight."¹⁷² States were required to submit a plan for their intended use of the funds that showed compliance with HAVA's requirements.¹⁷³

By creating funding for election reform, developing baseline standards for that reform with federal oversight of compliance, and leaving the specific implementation of the federally-funded plan to the states, HAVA serves as a useful model for envisioning the federal regulation of states' redistricting practices. While it need not mirror the exact structure of HAVA, federal regulation of state redistricting practices could adopt the Act's basic principles of deference to state administration of elections, uniformity in election administration across states, and funding, rather than mandating, reform measures. Between the carrot or the stick, this gentler, "carrot" approach to a nationwide model for redistricting reform, in addition to being more tempered, would likely garner the popular support needed to create momentum for the regulation's success in Congress.

B. Proposed Legislation Adopting Principles from State Reform Practices

The states that have implemented independent redistricting commissions provide useful templates for creating a federal regulation. While no single state has a model approach, state constitutions contain language that could be similarly adopted in a federal regulation. For instance, California emphasizes citizen involvement,¹⁷⁴ New York underscores the need to preserve pre-existing political subdivisions, districts, and communities of interest,¹⁷⁵ and Arizona pushes for minimal legislative control over the process itself.¹⁷⁶ A federal regulation could draw from these states and others, adopting principles that

¹⁷¹ *Id.*

¹⁷² Shambon, *supra* note 25, at 431.

¹⁷³ 42 U.S.C. § 15403(b) (2002).

¹⁷⁴ CAL. CONST. art. XXI, § 2(b).

¹⁷⁵ *Proposed Ballot Propositions*, *supra* note 88.

¹⁷⁶ Kanefield & O'Grady, *supra* note 111, at 2.

have proven successful and eschewing those that are unworkable or ineffective. Furthermore, the regulation could mirror the structure and organization of HAVA by establishing certain minimum standards that preserve a state's power to develop its own plan for compliance. The regulation would focus on process, rather than outcomes, and it would provide funding for states to implement their own independent redistricting commissions. Finally, the regulation could create a small federal agency to approve states' plans, ensure compliance, and distribute funding.

This note does not aim to suggest the exact language of a federal regulation to create state-level independent redistricting commissions. However, there are certain principles that emerge from the states profiled in this note, as well as from the good government organizations that spearheaded many of the states' reform efforts, that are central to any meaningful, systemic reform of congressional redistricting. These principles fall into three general categories. First, the regulation must address how states make appointments to their independent redistricting commissions and who is to serve on the commissions. Second, the regulation must address the criteria to which the commission is to adhere, including proscribing certain factors. Finally, the regulation must address how maps are finalized, including who is able to provide input and feedback and the final mechanism for ratification. The following list draws from several state policies and provides a basic rubric for the parameters of the proposed federal regulation.

1. The Appointment Process

First and foremost, members of a state's legislature should neither make direct appointments nor serve on the commission. Drawing on the models in New York and California, the commission should remain as independent of legislative influence as possible and should reflect the state's diversity.¹⁷⁷ An applicant review panel made up of members of an independent state agency, such as a state auditing board, should make appointments to the commission.¹⁷⁸

The commission should consist of not less than some number of members, with an equal number of members from each of the largest and the second largest registered political parties in the state, and with some number of members who are not

¹⁷⁷ CAL. CONST. art. XXI, § 2(c)(1); N.Y. CONST. art. III, § 4-5.

¹⁷⁸ Ancheta, *supra* note 22, at 118; *see also* *Frequently Asked Questions*, *supra* note 120.

registered with either of the two largest political parties in the state.¹⁷⁹ The regulation would establish some minimum number of members and guide the partisan breakdown of the membership, but states would be free to establish the number of commissioners appropriate for that state's population. Members would have to be registered voters in the state.¹⁸⁰ Furthermore, a member could not be the spouse of any statewide elected official or member of Congress. Nor could a member have been within some preceding number of years a member of the state legislature, a member of Congress, a state officer or legislative employee, or a lobbyist or political party chairman.¹⁸¹ And a member would be ineligible to hold public office at any level for a period of ten years, starting at the date of appointment to the commission.¹⁸²

2. Redistricting Criteria

Establishing a set of criteria for independent redistricting commissions to both consider and exclude is essential to uprooting partisan influence. Furthermore, it contributes to the entrenchment of democratic values to replace the political opportunism that dominates redistricting practices at present. At the outset, congressional districts must comply with the U.S. Constitution and VRA.¹⁸³ Districts cannot have the purpose of, nor result in, the denial or abridgement of racial or language minority voting rights.¹⁸⁴ And under the Supreme Court's "one person, one vote" standard, districts must be as equal in population as practicable. Furthermore, the commission must address specifically and publicly any deviation from this standard.¹⁸⁵

At issue in so many gerrymandered districts is the mapmaker's utter disregard for cohesive, logical districts. As such, districts must be contiguous and as compact as practicable.¹⁸⁶ Maintaining pre-existing political subdivisions and communities of interest should take priority,¹⁸⁷ and geographical features such as city, town, and county boundaries should inform the placement of district lines.¹⁸⁸

¹⁷⁹ CAL. CONST. art. XXI, § 2(c)(2).

¹⁸⁰ Proposed Ballot Propositions, *supra* note 88.

¹⁸¹ CAL. CONST. art. XXI, § 2(c)(6).

¹⁸² *Id.*

¹⁸³ Kanefield & O'Grady, *supra* note 111, at 6.

¹⁸⁴ Proposed Ballot Propositions, *supra* note 88.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Kanefield & O'Grady, *supra* note 111, at 2.

An interesting development in states that have adopted independent redistricting commissions is the inclusion of criteria that those commissions are *not* to consider. This outright prohibition on certain influencing factors is an important step in acknowledging what has the potential to infect the process. Accordingly, districts should not be drawn to discourage political competition, nor for the purpose of creating or withholding favor for any candidate or incumbent.¹⁸⁹ Likewise, the location of the residence of any candidate or incumbent should not ever be considered.¹⁹⁰ And when it would not compromise any of the other principles, a competitive district should be preferred,¹⁹¹ although the emphasis should always be on the process itself, rather than any particular outcome.¹⁹²

3. Finalizing Congressional District Maps

Finally, the redistricting process should have a mechanism for public input and citizen participation, as well as a sound process for adopting and ratifying congressional district maps that have been subject to the full scrutiny of the commission and the public. The commission should maintain “an open and transparent process enabling full public consideration of and comment on the drawing of district lines” throughout the redistricting process.¹⁹³ There should be some minimum number of required public hearings to be established by individual states based on their size.¹⁹⁴

Furthermore, a major problem for Arizona’s first round of independent redistricting was that it lacked a mechanism for ratification, which made it vulnerable to several rounds of constitutional challenges, including the current case before the Court.¹⁹⁵ California has attempted to address this problem by including a constitutional requirement that finalized maps are subject to a referendum following their certification to the Secretary of State.¹⁹⁶ This requires the state’s voters to approve

¹⁸⁹ CAL. CONST. art. XXI, § 2(e).

¹⁹⁰ *Id.*

¹⁹¹ Kanefield & O’Grady, *supra* note 111, at 2.

¹⁹² See Ancheta, *supra* note 22, at 135-36.

¹⁹³ CAL. CONST. art. XXI, § 2(b)(1).

¹⁹⁴ For instance, New York requires 12 public hearings. *Proposed Ballot Propositions*, *supra* note 88.

¹⁹⁵ *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 284 F. Supp. 2d 1240, 1242 (D. Ariz. 2003); *Navajo Nation v. Ariz. Indep. Redistricting Comm’n*, 230 F. Supp. 2d 998, 1002 (D. Ariz. 2002); Kumar, *supra* note 146, at 666-67; *see also* *Ariz. State Leg.*, 997 F. Supp. 2d at 1047.

¹⁹⁶ CAL. CONST. art. XXI, § 2; CAL. CONST. art. II, § 9.

the final maps. Another option might be to allow the legislature to overturn the commission's final maps, but only by a super majority vote.¹⁹⁷ Requiring some degree of legislative approval of the final maps is likely the safest mechanism for protecting the constitutionality of an independent redistricting process and avoiding litigation such as the case currently before the Court.¹⁹⁸

4. Federal Agency Oversight

The animating principle of the proposed federal regulation is that it creates baseline standards for all states while safeguarding each state's right to take an active role in deciding how its redistricting occurs. However, in order to implement these standards and ensure accountability, there must be some organization at the federal level to act as a check on state participation and compliance, as well as to manage and distribute funding. It is beyond the scope of this discussion to establish the exact parameters of this federal body. However, HAVA again provides a helpful model with its creation of the Election Assistance Commission (EAC), which is a federal agency that ensures state compliance with HAVA's minimum requirements and distributes funding to those participating states.¹⁹⁹

The EAC is an independent, bipartisan commission, which guides states in meeting HAVA's requirements. As part of this charge, the EAC develops guidelines, provides information on election administration, accredits and certifies voting systems,

¹⁹⁷ At oral argument in the current case challenging Arizona's IRC, Justice Kennedy asked, "[S]uppose you had a...law that said that the reapportionment commission... must submit its proposal to the legislature, and the legislature has 30 days and can overturn it only by a three-quarters vote[?]" To which Paul Clement, arguing for the State of Arizona, replied, "I think, Justice Kennedy, that would be a harder case." Oral Argument at 6:04, *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n* (No. 13-1314), available at http://www.oyez.org/cases/2010-2019/2014/2014_13_1314. Another option might be to delegate redistricting to an independent commission but require legislative approval. As one report on implementing such a commission in New York noted,

[i]f Article I, § 4, is thought . . . to bar the State from vesting congressional redistricting authority in a commission, it would be appropriate to mandate the districting commission to recommend a congressional redistricting plan to the Legislature, perhaps with some restriction on the Legislature's discretion to amend the plan . . . in the event of a court order barring the establishment of congressional districts by the commission.

Comm. on Election Law, *A Proposed New York State Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders: Partisanship Channeled for Fair Line Drawing*, N.Y.C. BAR at 12 (Mar. 2007), available at http://www.nycbar.org/pdf/report/redistricting_report03071.pdf.

¹⁹⁸ Comm. on Election Law, *supra* note 197.

¹⁹⁹ 42 U.S.C. §§ 15321-22 (2002); Tokaji, *supra* note 166, at 205.

and audits the use of HAVA funds.²⁰⁰ Under HAVA, each state is eligible to receive federal funding after publishing a plan in the *Federal Register*, followed by a 45-day public comment period and the filing of a certification with the EAC.²⁰¹ The EAC distributes the funds accordingly, which states are then able to use to implement their individual, approved plans.²⁰² Similarly, federal regulation of redistricting would include the creation of a federal agency to guide states in implementing independent redistricting commissions, to review states' redistricting plans, and to fund those plans accordingly.

CONCLUSION

The notion that partisan interests have subverted the redistricting process is nothing new; the term "gerrymandering" has been in existence for some 200 years, and even the Founders spoke out against the practice.²⁰³ In this century, the *Washington Post* runs a contest for its readers to name the laughably shaped districts that emerged from the decennial redistricting in 2010.²⁰⁴ The corruption of the practice has become so deeply ingrained, and the conflict of interest runs so deep, that partisan gerrymandering has become accepted collateral damage for the machinations of the political process.

While a few states have managed to implement some measure of independent redistricting, the majority of the nation continues to allow its elected officials to determine who votes where. In those states, reform efforts languish. Waiting for each of these states to garner momentum and develop a framework for independent redistricting is simply untenable. If six states have managed to attempt reform in 200 years, the timeframe for state-by-state redistricting reform is impossibly long, and such an approach lacks the momentum for meaningful change. Furthermore, this wait-and-see tactic, in addition to its lack of efficacy, has led to several different strategies for independent redistricting, each with varying levels of success. The current national approach lacks consistency and stability, the implications of which are that voters are not equally situated across the states.

²⁰⁰ *About EAC*, U.S. ELECTION ASSISTANCE COMM'N, http://www.eac.gov/about_the_eac/ (last visited Apr. 12, 2015).

²⁰¹ KEVIN J. COLEMAN & ERIC A. FISCHER, CONG. RESEARCH SERV., RS20898, THE HELP AMERICA VOTE ACT AND ELECTIONS REFORM: OVERVIEW AND ISSUES 5 (2011), available at <http://fpc.state.gov/documents/organization/155625.pdf>.

²⁰² *Id.*

²⁰³ *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004).

²⁰⁴ Blake, *supra* note 11; Blake, *supra* note 13.

Hence, it is incumbent upon the federal government to implement independent redistricting commissions in every state. While the obstacles to this federal legislation are no different than those that challenge the individual states, the popular support needed to garner momentum for independent redistricting would have a much further reach when applied to a federal regulation, rather than a state-by-state effort. A federal scheme to create uniform standards for independent redistricting would certainly necessitate a great push from an informed, motivated citizenry. Yet such a movement is undoubtedly possible, as citizens in every state tire of partisan gerrymandering and seek to hold their elected representatives accountable for their failure to implement real change. As the founder of Common Cause, the "original citizens' lobby,"²⁰⁵ once said, "[t]he citizen can bring our political and governmental institutions back to life, make them responsive and accountable, and keep them honest. No one else can."²⁰⁶

Lillian V. Smith[†]

²⁰⁵ *About Us*, COMMON CAUSE, <http://www.commoncause.org/about/> (last visited Jan. 21, 2015).

²⁰⁶ Fred Wertheimer, *Tax Payer Checkoff Protects Against Corruption*, U.S. NEWS & WORLD REPORT (Apr. 11, 2011, 1:38 PM), <http://www.usnews.com/opinion/articles/2011/04/11/tax-payer-check-off-protects-against-corruption> (quoting John Gardner, the founder of Common Cause).

[†] J.D. Candidate, Brooklyn Law School, 2016; B.A., University of Virginia, 2008. Thank you to Michael Brodlieb, Lena Smith, Jon Myers, Molly Kammien, Michael Piacentini, and the entire staff of the *Brooklyn Law Review*. Special thanks are due to McLean Crichton for his thoughtful comments throughout the writing process. I would also like to thank Professor Joel Gora for his guidance and feedback, as well as Rachael Fauss and Alex Camarda for their mentorship and expertise.