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RATIFICATION OF REAPPORTIONMENT PLANS DRAWN BY REDISTRICTING COMMISSIONS

Poonam Kumar*

Partisan gerrymandering is a danger that threatens the foundations of the American democratic structure. This Note argues that partisan gerrymandering must be eliminated in order to foster political competition and ensure government accountability. Without a judicial solution, redistricting commissions present a viable option to help cure the ills of partisan gerrymandering. This Note argues that automatic and mandatory state supreme court judicial review must be the process by which the redistricting plans drawn by these commissions are ratified. Automatic judicial review permits redistricting to remain a legislative task while giving the judiciary a quintessential judicial task. In addition, this Note argues that automatic state supreme court review of the reapportionment plans provides a fairer and more efficient ratification mechanism that can greatly influence the effectiveness of redistricting commissions in combating partisan gerrymandering.

INTRODUCTION

During the Federal Convention of 1787, James Madison declared that “[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.”¹ Madison foresaw a controversy that continues to plague the American electoral system: partisan gerrymandering.² Although partisan gerrymandering has been a consistent source of debate over the past three centuries, the discussion has intensified in the twenty years since the Supreme Court held partisan gerrymandering to be a justiciable claim.³

Many solutions have been offered to resolve the challenge of partisan gerrymandering. One proposed resolution is creating redistricting commissions to draw state and federal congressional district lines to help diminish the presence of partisan influences.

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1. Vieth v. Jubelirer, 541 U.S. 267, 275 (2004) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 240–241 (Max Farrand ed., 1911)).

2. See *infra* Part I.

3. Davis v. Bandemer, 478 U.S. 109 (1986).

This Note argues that any redistricting commission must be ratified by automatic state supreme court review.⁴

Part I of this Note discusses recent judicial decisions regarding partisan gerrymandering and its attendant dangers to the political process, including a dramatic decrease in competition and government accountability. Part II describes the recent nationwide wave of legislation creating redistricting commissions. Part III argues that automatic judicial review by a state's supreme court is the only process by which to ratify a redistricting plan devised by a redistricting commission, and suggests that a ratification mechanism involving legislative or gubernatorial approval only increases the ability of partisan influences to pervade the reapportionment process. Furthermore, redistricting commissions without a ratification process subject the state to high financial costs and election delays. This Note argues that automatic judicial review by a state's supreme court provides the most efficient and fair mechanism for ratification because it respects the institutional competence of the judiciary and reduces partisan influences on the redistricting process, while ensuring timely elections pursuant to a constitutional and legal redistricting plan. Although automatic judicial review would not eliminate all partisan influences from the redistricting process, this procedure is an indispensable check on any redistricting commission.

I. THE DEFINITION AND POLITICAL DANGERS OF PARTISAN GERRYMANDERING

“Political gerrymanders are not new to the American scene. One scholar traces them back to the [c]olony of Pennsylvania at the beginning of the 18th century[.]”⁵ Political gerrymandering is defined as the majority party apportionment of electoral districts in order to “gain power which [is] not proportionate to its numerical strength.”⁶ Today, partisan gerrymandering continues to greatly

4. The phrase “ratification” will be used to refer to the process by which a redistricting plan becomes final. There are two principal categories of ratification processes, including executive and legislative veto and automatic state supreme court review. In addition, some redistricting commissions lack any ratification process.

5. *Vieth*, 541 U.S. at 274.

6. *Id.* at 274–75 (quoting ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 26–28 (1974)). The term gerrymander derives from a combination of the name of Massachusetts governor Elbridge Gerry, who in 1812 created an election district resembling a salamander, and the word “salamander.” *Id.* Black’s Law Dictionary defines gerrymandering as “[t]he practice of dividing a geographic area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.” BLACK’S LAW DICTIONARY 708 (8th ed. 2004).

influence decennial redistricting.⁷ By giving legislators the authority to create districts as they wish, political redistricting provides the legislators with almost exclusive control over the electoral process, thereby permitting them to virtually predetermine the results of elections.

A. *The Dangers of Partisan Gerrymandering*

By allowing a majority party to control the process of drawing election district boundaries, “the redistricting process skews the overall distribution of districts, producing nothing but relatively safe districts, with the map-drawing party capturing most of those districts while conceding a smaller number to the out-party.”⁸ As a result, the “allocation of political power is essentially frozen into place for a decade, regardless of shifts in voters’ preferences.”⁹ Robust political competition is a fundamental tenet of the United States constitutional structure.¹⁰ Partisan gerrymandering chips away at this constitutional foundation by eliminating nearly all competition for legislative seats in certain districts, thereby diminishing the accountability of elected officials.¹¹

The recent congressional elections are poignant examples of the way in which competition in American politics has been diminished. In the 2000 congressional elections, nearly ninety-nine percent of incumbent representatives resecured their seats in the U.S. House of Representatives, and close to eighty-three percent did so with more than twenty percent of the vote.¹² In the 2004 congressional elections, more than eighty-five percent of incumbents in the

7. Under Article I, Section 2 of the Constitution, congressional districts are to be apportioned every ten years according to census data. U.S. CONST. art. I, § 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . . . The actual Enumeration shall be made . . . within every subsequent Term of ten Years.”). This reapportionment is necessary in order to satisfy the one-person, one-vote requirement articulated by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962). It is worth noting that in 2006, the Supreme Court held that the Fourteenth Amendment does not *per se* prohibit mid-decade redistricting plans. *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006). Thus, redistricting can occur more often than every ten years. *See id.*

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

9. *Id.*

10. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2311, 2313 (2006).

11. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *HARV. L. REV.* 593, 600–01 (2002).

12. *Id.* at 623–25.

U.S. House of Representatives won by more than sixty percent.¹³ By virtually ensuring that politicians will resecure their seats, partisan gerrymandering makes voting a nearly futile exercise: “It used to be that the idea was, 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.”¹⁴ Our government was founded on the theory that the powers of government are derived from the “consent of the governed,”¹⁵ but without truly representative elections our representatives do not need to garner the voters’ “consent” in order to retain their power. In order for us to be a “government of the people by the people for the people,”¹⁶ the voters must be permitted to participate in fair elections and hold their representatives accountable.

B. *The Lack of Judicial Solutions to Partisan Gerrymandering*

Recognizing the dangers posed by partisan gerrymandering, voters continually initiate litigation alleging that partisan gerrymandering violates their constitutional rights. Although the Supreme Court has heard several of these cases, as explained below, over the past twenty years, the Court has stalled in articulating a judicial solution to the issue of partisan gerrymandering.

The Supreme Court first addressed partisan gerrymandering in 1986 in *Davis v. Bandemer*.¹⁷ In *Bandemer*, the plaintiffs claimed that Indiana’s legislative seats were reapportioned along partisan lines in 1981 to disadvantage Democrats.¹⁸ The Court held that the political question doctrine did not bar a political gerrymandering claim.¹⁹ The Court further held that such claims were justiciable under the Equal Protection Clause of the Fourteenth Amendment if the plaintiffs could prove both intentional discrimination against a political group and the resulting discriminatory effect.²⁰ Although the plaintiffs were able to establish intent, they were unable to

13. CommonCause.org, Redistricting, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=196481> (last visited Jan. 18, 2007).

14. Jeffrey Toobin, *Drawing the Line: Will Tom DeLay’s Redistricting in Texas Cost Him His Seat?*, NEW YORKER, Mar. 6, 2006, at 32, 35 (quoting Pamela Karlan, professor at Stanford Law School).

15. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

16. Abraham Lincoln, Gettysburg Address para. 3 (1863), available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=36&page=transcript>.

17. *Davis v. Bandemer*, 478 U.S. 109 (1986).

18. *Id.* at 115.

19. *Id.* at 122–24.

20. *Id.* at 126–27.

meet the threshold conditions for actual discriminatory effect.²¹ The Court had found the claims justiciable, but refused to be drawn into the gerrymandering controversy by overturning the 1981 Indiana redistricting plan.

The Court reexamined partisan gerrymandering in *Vieth v. Jubelirer*²² in 2004.²³ The plaintiffs in that case alleged that the reapportionment of Pennsylvania's districts by the General Assembly was a partisan gerrymander and thus violated the Equal Protection Clause of the Fourteenth Amendment.²⁴ The Court reviewed the lower court decisions over the years since *Bandemer* and observed that the courts had been unable to articulate any sustainable standard by which to judge whether such gerrymandering had occurred.²⁵ As a result, the plurality of the Court held that such claims were nonjusticiable given that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims [had] emerged."²⁶ Although the majority refused to overturn the holding of *Bandemer*, the Court still refused to intervene in the redistricting controversy. In *Vieth*, the Supreme Court continued to excise itself from constitutional review of partisan gerrymandering.

Most recently, in 2006, the Court considered claims resulting from redistricting in Texas.²⁷ In *League of United Latin American Citizens v. Perry*,²⁸ the plaintiffs contended that the mid-decade Texas redistricting by Tom Delay was an unconstitutional political gerrymander. The Court did not reexamine its justiciability

21. *Id.* at 127, 134.

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

23. *Id.* at 281 ("Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists.").

24. *Id.* at 272.

25. *Id.* at 279.

26. *Id.* at 281.

27. See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006). In 2003, Tom Delay and the Texas legislature redistricted mid-decade, allowing the Republicans to maintain their majority and even gain six additional congressional seats. Ryan P. Bates, *Congressional Authority to Require State Adoption of Independent Redistricting Commission*, 55 DUKE L.J. 333, 333 (2005) ("The saga of the Texas re-redistricting, though perhaps an outlier in its vituperative partisanship, its extraordinary drama, and its national media attention, was certainly not the only gerrymander of the 2000 redistricting cycle. But as a parable illustrating the many harms engendered by partisan gerrymandering, it is without peer. The political harms inflicted by the re-redistricting are plain: ruination of the bipartisan tradition in the Texas legislature; inaccurate representation of voters' aggregate preferences at both the statewide and national levels; months-long hijacking of the state legislative agenda, preventing consideration of programs crucial to many Texans; millions of dollars spent on three special legislative sessions; and violence to traditional notions of proper redistricting, such as district compactness and the decennial cycle itself.").

28. *League of United Latin Am. Citizens*, 126 S. Ct. 2594 (2006).

holding in *Bandemer*, but rather confined its review to the viability of the standard presented by the plaintiffs.²⁹ The Court rejected both the plaintiffs' theory that a mid-decade redistricting plan is *per se* proof of the intent to politically gerrymander,³⁰ as well as their theory that a mid-decade redistricting for political reasons violated the one-person, one-vote requirement.³¹ By rejecting the plaintiffs' proposed partisan gerrymandering standard, the Supreme Court continued to maintain considerable distance from upholding any such redistricting claim.

Many argue that the rigid application of federal constitutional principles to partisan gerrymandering claims would be the most effective reform mechanism.³² But because the Supreme Court has thus far refused to resolve the partisan gerrymandering controversy using constitutional principles, it is unlikely to do so in the future.³³ If the Supreme Court will not provide a solution to the dangers of partisan gerrymandering, then the solution must come from an alternative source.

II. REDISTRICTING COMMISSIONS AS A POTENTIAL CHECK ON PARTISAN GERRYMANDERING

Without judicial resolution of the partisan gerrymandering controversy, state legislatures have attempted to solve the problem themselves by creating redistricting commissions. This approach is not novel; “[a]lmost all democracies in the world that use single-member districts to elect legislators assign responsibility for drawing districts to independent commissions, including Australia, Canada, Germany, New Zealand, and the United Kingdom.”³⁴ Re-

29. *Id.* at 2607.

30. *Id.* at 2610 (“The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature’s decision to replace mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders.”).

31. *Id.* at 2611.

32. See Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 205 (2003) (“Perhaps the most obvious reform would be for courts to apply the federal constitutional limits on partisan gerrymandering much more aggressively. But there is little reason to think that will happen anytime soon. Although the Supreme Court’s 1986 decision in *Davis v. Bandemer* made partisan-gerrymandering claims under the Equal Protection Clause justiciable, these claims have almost never (in Professor Gary King’s phrase) been ‘justified.’ No districting plan for Congress or for either house of a state legislature has ever been invalidated under *Bandemer*.” (internal citation omitted)).

33. *Id.*

34. SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 36 (2006).

districting commissions are composed of political or nonpolitical actors who assume the responsibility for drawing district lines, a task that is normally assigned to state legislatures.³⁵ Advocacy groups across the country have begun to promote the creation of redistricting commissions to combat partisan gerrymandering.³⁶

Activists, legislators, and voters have launched a movement to enact redistricting reform legislation across the country.³⁷ Eleven states have already formed redistricting commissions that are wholly or partially comprised of non-elected officials.³⁸ This movement is aimed at reforming the redistricting process in the remaining thirty-nine states.

California and Ohio are examples of states that have attempted to implement redistricting commissions. In California, in conjunction with his "Year of Reform," Governor Arnold Schwarzenegger called for Californians to vote on four propositions in a special election on June 13, 2005.³⁹ One of these propositions, Proposition 77, was to set up an independent redistricting commission controlled by members of the state's Judicial Council.⁴⁰ Although this initiative was rejected by voters in November of 2005, Governor

35. Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1370–71 (2005) ("The celebrated 'intermediate institutions' formally remove certain questions from the legislature's domain. Like the paradigmatic constitutional court, the paradigmatic districting commission . . . is expected to operate as an external regulator of electoral processes."); Jeffrey C. Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 838 (1997).

36. See THE COUNCIL FOR EXCELLENCE IN GOV'T & THE CAMPAIGN LEGAL CTR., *THE SHAPE OF REPRESENTATIVE DEMOCRACY: REPORT OF THE REDISTRICTING REFORM CONFERENCE 9* (2005), available at <http://www.campaignlegalcenter.org/attachments/1460.pdf> (identifying the assignment of redistricting power to an independent commission as an indispensable principle of reapportionment); see also CommonCause.org, *supra* note 13 (arguing that redistricting commissions are necessary to establish competitive elections).

37. See Nicholas D. Mosich, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. CAL. L. REV. 165, 165–67 (2005) ("Spurred by progressively less competitive elections for the U.S. House of Representatives and state legislatures, and by the increasing success of partisan and bipartisan gerrymanders in manipulating the outcomes of those elections, calls for change have recently attracted national attention. Following the 2004 elections—the results of which revealed some of the least competitive races for state legislative and congressional seats in American history and exposed two of the most effective and egregious political gerrymanders ever accomplished—those calls rose to a fever pitch." (internal citations omitted)).

38. These states are Alaska, Arizona, Colorado, Hawaii, Idaho, Iowa, Missouri, Montana, New Jersey, Pennsylvania, and Washington. See The Campaign Legal Ctr., *Redistricting: Redistricting Commissions: Current State Commissions*, <http://www.campaignlegalcenter.org/redistricting-226.html> (last visited Jan. 8, 2007). Ohio and Arkansas have redistricting commissions wholly comprised of elected officials. *Id.*

39. Scott M. Lesowitz, *Recent Development: Independent Redistricting Commissions*, 43 HARV. J. ON LEGIS. 535, 536 (2006).

40. See Peter Nicholas, *Schwarzenegger to Offer Lawmakers a Deal*, L.A. TIMES, July 14, 2006, at Bus. Sec.

Schwarzenegger has already begun creating a new redistricting reform plan that may make California elections more competitive.⁴¹ Similarly, in 2005, Ohio proposed an amendment to the Ohio Constitution that would have “provide[d] for the creation of a state redistricting commission with responsibility for creating legislative districts.”⁴² On November 8, 2005, sixty-nine percent of the voters defeated the proposition.⁴³ Although it did not pass, the Ohio initiative garnered significant attention, and Ohio’s backlash movement against gerrymandering continues to search for a reform initiative.⁴⁴ In addition to the California and Ohio initiatives, Georgia, Indiana, Kansas, Massachusetts, New Hampshire, New York, North Carolina, Ohio, Oregon, Virginia, and Wisconsin have similar resolutions pending before their respective legislatures.⁴⁵

In addition to states’ efforts, the federal government has taken its own steps to mandate that states governments use redistricting commissions. On May 25, 2005, Representative John S. Tanner, a Democrat from Tennessee, introduced the Fairness and Independence in Redistricting Act of 2005, which would require states to use a bipartisan redistricting commission to complete congressional redistricting.⁴⁶ Congressman Tanner identified defeating partisan gerrymandering as the chief objective of the legislation.⁴⁷ Six months later, on October 20, 2005, Representative Zoe Lofgren, a Democrat from California, introduced the Redistricting Reform

41. *Id.*

42. State Issue 4—Amended Certified Ballot Language: Nov. 8, 2005 (on file with the University of Michigan Journal of Law Reform), <http://www.sos.state.oh.us/sos/ElectionsVoter/results2005.aspx?Section=1042> (last visited Jan. 9, 2007).

43. State Issue 4—Official Results: Nov. 8, 2005 (on file with the University of Michigan Journal of Law Reform), <http://www.sos.state.oh.us/sos/ElectionsVoter/results2005.aspx?Section=1168> (last visited Jan. 9, 2007).

44. The Ohio State Legislature is currently considering H.J.R. 13, which establishes new procedures for drawing election district boundaries. *Ohio Legislative Serv. Comm’n, H.J.R. 13 Resolution Analysis*, 123d G.A. (on file with the University of Michigan Journal of Law Reform), <http://www.lsc.state.oh.us/analyses/hjr13-i.pdf>.

45. The Council for Excellence in Gov’t & The Campaign Legal Ctr., *Redistricting: Redistricting Commissions: Pending State-by-State Proposals* (on file with the University of Michigan Journal of Law Reform), <http://www.campaignlegalcenter.org/redistricting-225.html> (last visited Jan. 18, 2007).

46. Fairness and Independence in Redistricting Act of 2005, H.R. 2642, 109th Cong. (2005).

47. John Tanner, *Legislation: Fairness and Independence in Redistricting Act* (HR 2642), http://www.house.gov/tanner/legislation_redistricting.htm (last visited Jan. 18, 2007) (“[B]ecause of political gerrymandering, only 5 percent of Congressional incumbents lost their seats in [the 2004] election, fewer turnovers than in the Soviet Politburo.”); Dan Gilgoff, *A Fake Democracy?*, U.S. NEWS & WORLD REPORT, May 15, 2006, at 35, 37 (quoting Tanner as stating “[our] system has produced gridlock in Washington because of lack of competition in the districts. Compromise is now considered a sign of weakness. . .”).

Act of 2005.⁴⁸ Both bills have been referred to the House Judiciary Committees where they await consideration.⁴⁹

Because the Supreme Court has refused to address the constitutionality of partisan redistricting, both state and federal legislatures have created or attempted to create redistricting commissions as an alternative solution. Three fundamental elements compose a redistricting commission: the commission's membership, the factors the commission considers in the districting process, and the ratification process. As this wave of potential reform persists, no one commission structure has emerged as superior to all others.⁵⁰ While no one particular combination of elements can guarantee nonpartisan elections, this Note argues that ratification through automatic state supreme is a necessary component of every redistricting commission.

A. The Models of Membership Structure for Redistricting Commissions

Membership in the redistricting commission is the threshold consideration in the formation process.⁵¹ The commission can be bipartisan (composed of officials from each political party), partisan (composed of political actors holding certain positions within government), or independent (composed of nonpartisan officials).⁵²

Commissions composed of sitting government officials guarantee no partisan balance and allow partisan influences to greatly influence the redistricting process.⁵³ Independent commissions are ideally composed of officials with no official party tie and selected in a politically neutral manner. However, "independent election officials will be only as good as the process of selecting them."⁵⁴ By

48. Redistricting Reform Act of 2005, H.R. 4094, 109th Cong. (2005).

49. LIBRARY OF CONG., ALL CONGRESSIONAL ACTIONS FOR H.R. 2642, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR02642:@@X>; LIBRARY OF CONGRESS, ALL CONGRESSIONAL ACTIONS FOR H.R. 4094, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04094:@@X>.

50. See Kubin, *supra* note 35, at 841–55 (describing the many different commission structures and the advantages and disadvantages of each).

51. For more information about membership structure, see generally Kubin, *supra* note 35; Mosich, *supra* note 37.

52. See Kubin, *supra* note 35, at 845–848.

53. *Id.* at 849.

54. OVERTON, *supra* note 34, at 36–38 ("Even a commission with strong procedural safeguards may not be completely free of prejudices—just as juries and judges are never completely immune. The test of independent redistricting, however, is not whether it completely eliminates bias but rather whether it reduces the personal and professional stake that decisionmakers have in the political outcome.").

contrast, bipartisan commissions can have an equal number of members from each political party, but this option presents the potential for deadlock and can also result in a bipartisan gerrymander, establishing protection for both parties' incumbents.⁵⁵ Bipartisan commissions can also take the form of tie-breaking commissions, which "pit equal numbers of party-political commissioners against one another with a tie-breaking chairman to monitor and referee the ensuing struggle."⁵⁶ Defenders of a bipartisan structure argue that these commissions "encourage[] moderation and compromise within the redistricting process."⁵⁷ However, these commissions also present the disadvantage of maintaining partisan control; the tie-breaking vote in such a commission potentially enables one party to control the districting process if consensus is abandoned.⁵⁸ If the membership structure does not eliminate partisan actors from the redistricting process it will continue to resemble the process as controlled by sitting legislators by allowing partisan influences to affect the results of the commission's work.

B. The Factors to Be Considered by the Redistricting Commission

The second element in the process of establishing a redistricting commission is determining the factors that the commission will consider when redistricting. Each existing statute that creates a redistricting commission mandates the use of distinct criteria. For example, the Fairness and Independence in Redistricting Act mandates that the commission adhere to all constitutional and statutory requirements, maintain geographic continuity of political

55. Bates, *supra* note 27, at 349; see also Gordon S. Harrison, *The Aftermath of In re 2001 Redistricting Cases: The Need for a New Constitutional Scheme for Legislative Redistricting in Alaska*, 23 ALASKA L. REV. 51, 75 (2006) ("[A]ny bipartisan plan will be a collusive agreement to protect the status quo—even those produced by a bipartisan commission that operates as designed to operate (that is, with a neutral, tie-breaking member who effectively forces the partisan members to compromise and cooperate in designing a plan)."); Kubin, *supra* note 35, at 860 ("The public policy danger of a tie-breaking commission's institutionalized system of checks and balances is that by encouraging moderation and compromise it will, in fact, promote a bipartisan gerrymander.").

56. Kubin, *supra* note 35, at 856.

57. *Id.* at 839 ("Recognizing that it is all but impossible to take politics and self-interest out of the redistricting process, a tie-breaking commission takes a Madisonian approach to reform by using the mechanics of the process to channel the motives of its participants. A tie-breaking commission is not an idealistic vision of redistricting reform. Rather, it is a realistic means of restoring an element of fairness and balance to a task that is and always will be a matter of survival for politicians and a struggle for legislative power for political parties." (internal citation omitted)).

58. *Id.* at 849.

subdivisions (including parishes, municipalities, and neighborhoods), and maintain compact and contiguous districts.⁵⁹ By contrast, the Arizona Independent Redistricting Commission is required to favor competitive districts to the extent practicable without detriment to the commission's other goals, such as ensuring equality of population, the compactness and contiguity of the districts, respect of communities of interest, and compliance with federal election law.⁶⁰ Many commissions are also required not to consider certain factors. For example, the Iowa Code provides that to the extent unnecessary for compliance with federal law, the addresses of incumbents, the political affiliation of registered voters, previous election results, and other demographic data, should not be considered in drawing district boundaries.⁶¹ A statutorily created redistricting commission is beholden to the statute that created it. If the statute does not dictate which factors a commission may or may not utilize, there is little guidance on how the commission will redistrict and no guarantee that the process will produce fairer and less partisan results. Furthermore, if the statute allows the commission to use partisan factors in redistricting, such as the political affiliation of registered voters, then there is a significant chance that such information will be used. As a result, it is imperative that legislators decide what factors the commission should and should not take into consideration in its districting when creating redistricting commissions because these factors can have a significant influence on the ability of a commission to reapportion in a fair and just manner.

C. The Process by Which a Redistricting Plan Is Ratified

The remaining element to be determined in the formation of a redistricting commission is the process by which the commissions' reapportionment plans are ratified. Redistricting commissions utilize different mechanisms to approve and implement a districting plan. Under Article IV of the Arizona Constitution, the plan as adopted by the Arizona Independent Redistricting Commission is

59. Fairness and Independence in Redistricting Act of 2005, H.R. 2642, 109th Cong. § 4(b)(1) (2005). Similar to the Fairness and Independence in Redistricting Act, Article VI of the Alaskan Constitution requires that the Alaskan Redistricting Board form contiguous and compact boundaries that consider local government boundaries. ALASKA CONST. art. VI, § 6.

60. ARIZ. CONST. art. IV, pt. 2, § 1.

61. IOWA CODE ANN. § 42.4(5) (West 1999); *see also* H.R. 2642 § 4(b)(2).

final after a thirty-day public comment period; no other steps are necessary to approve or enforce the plan.⁶² Similarly, in Alaska, the Redistricting Board's final approved plan is presumed binding; however, a suit initiated by a "qualified voter" within thirty days of the adoption of the final plan can halt its implementation.⁶³ In Iowa, the redistricting plan must be approved by the Iowa General Assembly, and because the districting plan is embodied in a bill, the governor has veto power.⁶⁴ In yet another ratification process, the Colorado Constitution requires mandatory judicial review by the Colorado Supreme Court.⁶⁵ However, in Colorado, neither the governor nor the legislature has any power to arrest the enforcement of the plan. Though ratification procedures can vary widely throughout the states, this Note argues that a properly formulated ratification process can greatly influence the effectiveness of a redistricting commission, and, if an ineffective process is used, partisan influences can continue to plague the course of redistricting.

III. PROCEDURAL OPTIONS FOR RATIFICATION OF REDISTRICTING COMMISSION'S REDISTRICTING PLANS

While it is possible for a redistricting plan to be adopted without any ratification process, there are several mechanisms by which a redistricting plan can be ratified: ratification by executive or legislative veto and by automatic state supreme court review. Using Arizona's redistricting procedure as an example, this Note argues that the lack of any ratification process for a districting plan can delay elections and cause significant monetary costs to accrue to the state.⁶⁶ This Note also uses the example of Iowa's procedure to show how legislative or executive veto of a redistricting plan permits partisan influences to penetrate the redistricting ratification process.⁶⁷ Lastly, this Note argues that mandatory and automatic judicial review by the state's supreme court, for example as mandated by the Colorado State Constitution, is the most politically neutral ratification procedure because it provides a fair and efficient oversight system that respects the institutional competence of

62. Unless of course, litigation challenging the plan is brought and a court invalidates the plan.

63. See ALASKA CONST. art. VI, § 11.

64. See IOWA CODE ANN. § 42.3.

65. See COLO. CONST. art. V, § 48(e).

66. See *infra* Part III.A.

67. See *infra* Part III.B.

the judiciary to review redistricting for compliance with the law. Although automatic judicial review does not of itself ensure competitive elections, this ratification procedure most advantageously furthers a redistricting commissions' purpose of furthering robust political competition for legislative seats.

*A. The Effect of an Absence of a Ratification Procedure
on Redistricting Commission's Plans*

Arizona does not have a formal ratification process because the commission's boundaries are self-executing unless the commission makes changes.⁶⁸ Under the Arizona State Constitution, the Arizona Independent Redistricting Commission (AIRC) must advertise the draft redistricting map to the public for comment for at least thirty days.⁶⁹ Additionally, either or both houses of the Arizona legislature may make recommendations regarding the redistricting plan during this time.⁷⁰ After this thirty-day period, the commission establishes the final boundaries.⁷¹ With no formal ratification process, the Arizona redistricting process is ineffectual in ensuring fair, constitutional, and timely elections.

The 2001 redistricting cycle in Arizona was protracted and left the state without a final plan for several years. According to the procedures outlined in the Arizona Constitution, the AIRC adopted a redistricting plan in October of 2001 and, after thirty days of comment, the AIRC certified the plan to the Secretary of State in November of 2001.⁷² On March 6, 2002, the Arizona Minority Coalition for Fair Redistricting (the "Coalition") and other plaintiffs challenged the redistricting plan for failure to create and preserve competitive districts as mandated by the Arizona Constitution.⁷³ Two additional actions were filed in federal court on May 1, 2002 alleging that the plan would diminish the voting strength of Native Americans in contravention of Section 2 of the Voting Rights Act.⁷⁴ The AIRC was also required to seek preclearance of

68. ARIZ. CONST. art. IV, pt. 2, § 1(15-16).

69. *Id.* at § 1(16).

70. *Id.*

71. *Id.*

72. *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998, 1002 (D. Ariz. 2002).

73. *Id.* at 1002.

74. *Id.* at 1003.

the redistricting plan from the Department of Justice.⁷⁵ The delays caused by litigation and the need for Justice Department approval created an election emergency in Arizona; candidates were unsure from what district they needed their petitions, signatures, and funds.⁷⁶ As a result, the parties to the litigation stipulated to a temporary plan for use in the 2002 elections.⁷⁷ Without any ratification process, the redistricting procedures in Arizona left the plan open to attack from several angles and consequently, left the elections in flux for several years.⁷⁸

Without a ratification process, the election emergency continued as further litigation ensued. In August of 2002, the AIRC adopted a new plan to be used for elections from 2004 through 2010.⁷⁹ The Coalition filed a new complaint challenging the amended plan and the federal district court remanded the case to state court in September of 2003 because the plaintiffs were only seeking relief under state law.⁸⁰ In November of 2003, a trial on the validity of the amended plan commenced.⁸¹ The Court held that the redistricting plan violated the state constitution, and the AIRC was forced to draft a new plan and commit that plan to a period of thirty day comment.⁸² A final plan was not adopted until April 12, 2004.⁸³ As the courts grappled with the validity of the redistricting plan, candidates for the Arizona legislature in the 2004 election were left uncertain about what map they were to use in determining which district they would be a candidate to represent.⁸⁴ Even though the AIRC had devised a redistricting plan, the AIRC and

75. Under Section 5 of the Voting Rights Act, Arizona, due to a history of discrimination, is required to submit any districting plans for review by the Department of Justice. U.S. Dep't of Justice Civil Rights Div., Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Jan. 18, 2007).

76. *Navajo Nation*, 230 F. Supp. 2d at 1005.

77. *Id.* at 1000–01.

78. Elvia Díaz, *Legislative Area Maps Rejected: Court Won't Allow New Districts*, ARIZ. REPUBLIC, May 29, 2004, <http://www.searchclub.com?page=news-article&id=559>.

79. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 284 F. Supp. 2d 1240, 1242 (D. Ariz. 2003).

80. *Id.* at 1249.

81. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 891 (D. Ariz. 2005).

82. *Id.*

83. *Id.* Further litigation ensued because of the lack of pre-clearance by the Department of Justice, but that litigation will not be discussed in this Note.

84. See Kristina Betts, *Redistricting: Who Should Draw the Lines? The Arizona Independent Redistricting Commission as a Model for Change*, 48 ARIZ. L. REV. 171, 172–73 (2006) (“[I]n the spring of 2004, potential candidates for the Arizona House of Representatives and Arizona Senate anxiously waited to hear which district they would be running in for the September primary and November general elections. The candidates’ uncertainty stemmed from a 2004 Arizona Superior Court decision holding the district lines used in the 2002 Arizona elections unconstitutional.” (internal citation omitted)).

the Arizona Secretary of State used the former boundaries for the 2004 election because there was insufficient time to prepare the ballots and other necessary materials.⁸⁵ The Arizona Secretary of State stated that the consistent litigation and uncertainty had “put a huge hiccup on [the] election process.”⁸⁶

Although the AIRC had drawn and adopted several redistricting plans since 2001, the Arizona elections were delayed and conducted pursuant to a temporary map.⁸⁷ This temporary map was outdated, and, because it was not drawn according to the procedure delineated by the Arizona Constitution,⁸⁸ could not have considered the goals set forth by the Arizona Constitution. Furthermore, Proposition 106, which amended the Arizona Constitution to include the AIRC, was designed to avoid the deadlock that had occurred in the Arizona legislature over the 1990 decennial redistricting.⁸⁹ However, the persistent litigation following the 2000 redistricting cycle repeatedly stalled the implementation of a final plan and the deadlock that Proposition 106 aspired to prevent ensued. As a result, the legislative purpose in creating the AIRC had been frustrated.

The AIRC revealed its first redistricting plan in November of 2001 and the first challenge was filed in March of 2002.⁹⁰ Each time a challenge to the plan was filed, it took several months for the court to render its decision striking down the plan.⁹¹ Then the AIRC would have to draw up a new map that would once again be challenged.⁹² As a result of this process, the AIRC did not draw constitutional boundaries until April of 2004.⁹³ Because this map was drawn too late in the election year, the map could only be used in the following election cycle.⁹⁴

The persistent litigation revealed that the AIRC’s redistricting plans had constitutional flaws. With only the AIRC itself as oversight to its redistricting, the AIRC had to await several court decisions in order to discover what constitutional errors the map

85. Díaz, *supra* note 78.

86. *Id.*

87. Navajo Nation v. Ariz. Indep. Redistricting Comm’n, 230 F. Supp. 2d 998, 1000–01 (D. Ariz. 2002).

88. ARIZ. CONST. art. IV, Pt. 2, § 1.

89. Betts, *supra* note 84, at 191.

90. Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n, 366 F. Supp. 2d 887, 890 (D. Ariz. 2005).

91. *Id.* at 890–91.

92. *Id.*

93. *Id.* at 891.

94. Díaz, *supra* note 78.

contained. With a proper ratification process, these flaws could have been discovered prior to the initiation of litigation and corrected. Instead, it took the AIRC three years to correct its errors, leaving Arizona without constitutionally sound election districts for four years.

B. Ratification by Executive and Legislative Veto

In contrast to Arizona's lack of a ratification procedure for plans devised by its redistricting commission, the Iowa redistricting process sets forth a mechanism of ratification through legislative and gubernatorial approval. Although Iowa's elections have been competitive, its process does permit partisan influences to permeate the redistricting process. Iowa's path towards the creation of a redistricting commission began in 1968, when the Iowa General Assembly, then in control of redistricting, adopted redistricting plans for the State Senate and the House.⁹⁵ This plan was challenged in state court, and in 1972 the Supreme Court of Iowa declared the plan to be an unconstitutional reapportionment because it did not attempt to achieve voter equality.⁹⁶ As a result, the General Assembly enacted House File 707, codified in Iowa Code Chapter 42, which transferred control over the redistricting process to a nonpartisan agency, the Legislative Services Bureau ("LSB").⁹⁷

Although Iowa, in contrast to Arizona, has codified a ratification mechanism in its redistricting process, its process is ineffectual in removing partisan influences. The Iowa Code sets forth a timetable for redistricting that the LSB and General Assembly must follow. The Code mandates that by April 1 of any redistricting year, the LSB must bring the bill reflecting the redistricting to a vote in either the House or Senate "expeditiously" and "not less than seven days after the report . . . is received."⁹⁸ If the plan does not garner majority approval of both, the LSB must submit a second amended plan by May 1 or twenty-one days after the vote that failed the bill.⁹⁹ The legislature is only permitted to make corrective amendments

95. IOWA GEN. ASSEMBLY—LEGISLATIVE SERVS. BUREAU, LEGISLATIVE GUIDE TO REDISTRICTING II (Dec. 2000) (on file with the University of Michigan Journal of Law Reform), <http://www.legis.state.ia.us/Central/LSB/Guides/redist.htm>.

96. *In re* Legislative Districting of Gen. Assembly, 193 N.W.2d 784 (Iowa 1972), *supplemented by* 196 N.W.2d 209 (Iowa 1972), *amended by* 199 N.W.2d 614 (Iowa 1972).

97. IOWA GEN. ASSEMBLY—LEGISLATIVE SERVS. BUREAU, *supra* note 95, at II.C.

98. IOWA CODE ANN. § 42.3(1) (West 1999).

99. IOWA CODE ANN. § 42.3(2).

to the first and second proposed redistricting plans.¹⁰⁰ If the second plan does not pass with a majority vote in either house, the LSB must submit a third plan, which is subject to any amendments by the legislature.¹⁰¹ Additionally, because the districting plans take the form of bills resembling the standard legislative practice, the governor has veto power over the plans.¹⁰² Although the Iowa structure has yielded quite competitive districts,¹⁰³ the ratification process following Iowa redistricting does not sufficiently eliminate partisan influences.

The latest redistricting cycle in Iowa demonstrates the potential for political powers to manipulate the districting process. At the time of the 2001 redistricting, the Republicans controlled the majority in the Iowa General Assembly, but the governor (the executive branch) was Tom Vilsack, a Democrat.¹⁰⁴ The first plan submitted by the LSB was rejected by the Iowa Senate in a twenty-seven to twenty-one vote in April 2001.¹⁰⁵ The vote split virtually down partisan lines, with all Republicans voting against the bill except for one.¹⁰⁶ The new map was disfavored by Republicans because the introduction of a large Western rural district would

100. IOWA GENERAL ASSEMBLY—LEGISLATIVE SERVICES BUREAU, *supra* note 95, at V.B.3.a.

101. *Id.*

102. IOWA CONST. art. III, § 16 (“Every bill which shall have passed the General Assembly, shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it with his objections, to the House in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such reconsideration, it again pass both Houses, by yeas and nays, by a majority of two-thirds of the members of each House, it shall become a law, notwithstanding the Governor’s objections.”).

103. Thomas Beaumont, *Political Hot Spot? It’s Iowa*, DES MOINES REG., Sept. 1, 2002, at A1 (“Few states outside Iowa have more than one or two closely contested congressional races—those in which polls show the major-party candidates within 10 percentage points of each other and one party’s registration total isn’t significantly larger than the other’s. ‘With realistically only 20 competitive House races in the country—20 out of more than 400—if you get a bunch of them in an area like this, it makes Iowa an interesting place,’ said Dan Thomas, political science professor at Wartburg College in Waverly.”); *see also* Brian O’Neill, *The Case for Federal Anti-Gerrymandering Legislation*, 38 U. MICH. J.L. REFORM 683, 711–12 (2005) (“Iowa accounted for ten percent of the nation’s competitive congressional elections in 2002, though it elects barely one percent of Congress.”).

104. *See generally* FAIR VOTE, VOTING & DEMOCRACY RESEARCH CTR., 2000 REDISTRICTING REPORT, IOWA (2000) (on file with the University of Michigan Journal of Law Reform), <http://www.fairvote.org/?page=305>.

105. Jennifer Dukes Lee, *Leaders Signal Bipartisan OK for Remap*, DES MOINES REG., June 5, 2001, at 1B; *Senate Rejects Districts; Iowa Legislative Maps: Democrats Accuse Republicans of Seeking Districts Favorable to the GOP*, TELEGRAPH HERALD, May 3, 2001, at A1.

106. Editorial, *Not Compact, Not Convenient; the Proposed Congressional Districts Are a Disaster for Iowans*, DES MOINES REG., June 10, 2001, at 16A.

have diminished their control over the legislature.¹⁰⁷ In particular, the first plan would have pitted two Republican incumbents, Congressmen Leach and Nussle, against each other in a new district.¹⁰⁸ Iowa House Speaker Brent Siegrist commented that the first plan was unfavorable because “[t]he big disappointment is having two congressmen tossed in together.”¹⁰⁹ The Republican Party’s intention was not to lose a legislative seat during the redistricting process.

Even though the second plan submitted by the LSB was approved by the legislature and signed into law by Governor Vilsack on June 22, 2001,¹¹⁰ the April 2001 ratification process demonstrates the continued presence of partisan forces. Although the approved plan still forced certain Republican incumbents to run in new districts, some analysts contend that because of Democratic Governor Vilsack, the Republican-controlled legislature was forced to accept one of the LSB plans.¹¹¹ If the second plan had been rejected, the legislature would have been allowed to make amendments, which likely would have led to a prolonged debate in the General Assembly. If agreement was not reached by September, then the Iowa Supreme Court would redistrict;¹¹² however, the Iowa legislature was likely hesitant to cede districting power to the judiciary, because judicial redistricting would not guarantee which party judicially-drawn redistricting would favor. Even if the Republican-controlled Iowa legislature was able to dominate the redistricting process during the debate over a third plan, the threat of a veto by Governor Vilsack likely motivated the Republicans to compromise on the second plan.¹¹³ Specifically, Senator Steve King, a Republican, stated that the second plan was “as good as we’re likely to see.”¹¹⁴ Notwithstanding this compromise, the Republicans

107. Chris Clayton, *Districts Sketched Again a Second Attempt to Redraw Iowa’s Political Landscape Holds Both Good and Bad Omens for Lawmakers in the West Proposed Iowa Congressional Districts by the Numbers*, OMAHA WORLD HERALD, June 2, 2001, at 1.

108. Joann Dann, *Safe But Sorry; The Way We Redistrict Destroys the Middle Ground*, WASH. POST, Dec. 2, 2001, at B1. Representatives Jim Leach and Jim Nussle were reelected in 2002 to separate districts. *U.S. House of Representatives*, CHI. TRIB., Nov. 7, 2002, at N18.

109. Chris Clayton, *New Political Map Keeps an Old Sticking Point Proposed Iowa Congressional Districts*, OMAHA WORLD HERALD, June 1, 2001, at 13.

110. Lynn Okamoto, *Vilsack Scores a Slew of Vetoes*, DES MOINES REG., June 20, 2001, at 1B.

111. See, e.g., FAIR VOTE, VOTING & DEMOCRACY RESEARCH CTR., *supra* note 104.

112. *Senate Rejects Districts; Iowa Legislative Maps: Democrats Accuse Republicans of Seeking Districts Favorable to the GOP*, *supra* note 105, at A1.

113. FAIR VOTE, VOTING & DEMOCRACY RESEARCH CTR., *supra* note 104.

114. Lynn Okamoto & Jennifer Dukes Lee, *Lawmakers OK New Map; The Revised Legislature and Congressional Districts are “As Good As We’re Likely to See,” One Republican Says*, DES MOINES REG., June 20, 2001, at 1B.

continued to control the legislature both before and after the 2001 redistricting, the first time one party had maintained control through a redistricting cycle before and since the transfer of districting power to the LSB.

By allowing the General Assembly to approve and the Governor to veto a redistricting plan, the Iowa redistricting process remains vulnerable to partisan influences. If the Governor were Republican, the resultant redistricting likely would have favored the Republicans even more, even though they retained power after the redistricting cycle. Furthermore, Iowa has consistently been a state without traditional Republican or Democratic leanings.¹¹⁵ If the same legislative mechanism were utilized in another state with partisan leanings, the results would most likely be equally partisan. With single-party control of both the Legislature and the Executive branches, the ratification process under the Iowa scheme is reduced to a mere rubber stamp of a partisan reapportionment map.

C. Automatic State Supreme Court Review

It is clear that no ratification procedure or a partisan ratification procedure can subvert the goals of redistricting commissions by permitting partisan influences to permeate the redistricting process, which should be nonpartisan to encourage strong political competition. A third potential ratification procedure, automatic state supreme court review, is the most desirable procedure because it is the most likely to yield nonpartisan state voting districts.

Colorado is an example of a state that utilizes the automatic state supreme court ratification mechanism. Article V of the Colorado Constitution requires that within “one hundred twenty-three

115. Iowa is traditionally regarded as a “swing” state in national elections. *See Down on the Farm; Swing States: Iowa*, *ECONOMIST*, Aug. 14, 2004, at 29, 29 (“Iowa is considered one of the most contested states in the nation. Mr. Bush lost to Al Gore in Iowa in 2000 by only 4,000 votes.”). The composition of the Iowa legislature also demonstrates that Iowans tend not to swing one way or another. For example, in 2006 the Iowa Senate was evenly split between the Democrats and Republicans and the Republicans only had a two-seat majority in the House. Press Release, Nat’l Conference of State Legislatures, Top 10 Election Battlegrounds: Much at Stake (Aug. 16, 2006) (on file with the University of Michigan Journal of Law Reform), <http://www.ncsl.org/programs/press/2006/pr060816election.htm>. Furthermore, the Des Moines Register reports that about thirty-eight percent of Iowans neither identify themselves as Democrat nor Republican, and thirty-one percent identify themselves as Democrats and thirty as Republicans. Thomas Beaumont, *Analysis: Nussle’s Declaration May Elevate Issue’s Prominence with Voters*, *DES MOINES REGISTER.COM*, Sept. 10, 2006 (on file with the University of Michigan Journal of Law Reform), <http://desmoinesregister.com/apps/pbcs.dll/article?AID=/20060910/NEWS09/60909016/1001>.

days prior to the date established in statute for precinct caucuses . . . or . . . no later than one hundred twenty-three days prior to the date established in statute for the event commencing the candidate selection process in such year,” the Colorado reapportionment commission shall submit a finalized plan to the Colorado Supreme Court for review for compliance with the state Constitution.¹¹⁶ The Constitution mandates that review of the plan must be the first priority over all other pending matters before the court and that the court must review the redistricting plan before hearing new cases or deciding pending cases.¹¹⁷ If the Court rejects the plan, the commission must revise and resubmit the plan to the court within a period of time as specified by the court.¹¹⁸ This form of review was applied by the Colorado Reapportionment Commission (“CRC”) and the Colorado Supreme Court in May of 2001. The CRC held fourteen meetings between May 11, 2001 and August 30, 2001 to draft a preliminary plan.¹¹⁹ Thereafter, the CRC convened twenty-two public hearings to receive comment on the preliminary plan. The CRC then finalized its plan on November 27, 2001.¹²⁰ On review, the Supreme Court held that the plan did “not comply with the substantive and procedural requirements of the Colorado Constitution.”¹²¹ The court held that the final plan of the CRC must more adequately conform to the constitutional priority of the maintenance of county boundaries, and the CRC must review and revise the plan for consistency with these criteria.¹²² The court ordered the CRC to submit an amended plan by February 15, 2002.¹²³ On February 22, 2002, the Colorado Supreme Court reviewed the revised plan submitted by the CRC and held that the “Commission

116. COLO. CONST. art. V, § 48. The Colorado Reapportionment Commission is only responsible for reapportioning state legislative boundaries. *See id.*

117. *Id.*

118. *Id.*

119. *In re* Reapportionment of Colo. Gen. Assembly, 45 P.3d 1237, 1246 (Colo. 2002).

120. *Id.*

121. *Id.* at 1254.

122. *Id.* at 1251–52 (“[T]he constitutional criteria [] contemplate the Commission taking an overview of Colorado’s population by county, then generating a map that respects the state’s legal preference for county integrity, then applying minimization of city divisions, compactness, contiguity, and community of interest criteria . . . when necessary. The Commission relies on a community of interest rationale to support denying whole county seats to counties that qualify for them, but this is the least weighty of the Section 46 and 47 criteria. The Commission’s reordering of the criteria offends the constitution. While the Commission has discretion to make necessary compromises, it cannot advance the lesser community of interest criteria over the greater requirement not to make county divisions unless necessary to meet equal population requirements.” (internal citations omitted)); Karen Abbott, *Plan to Redraw State Legislative Districts Rejected; Court Returns Plan to Commission, Order Fewer Counties Split*, ROCKY MOUNTAIN NEWS, Jan. 29, 2002, at 10A.

123. *In re Reapportionment of Colo. Gen. Assembly*, 45 P.3d at 1254–55.

ha[d] followed the procedures and applied the criteria of federal and Colorado law in adopting its 2002 Final Reapportionment Plan for Colorado General Assembly house and senate districts."¹²⁴ The redistricting and ratification process in the 2001 Colorado redistricting demonstrate the advantages of automatic judicial review by the state's supreme court; these advantages include ensuring that timely elections are held pursuant to a constitutionally valid redistricting plan, barring the judiciary from engaging in redistricting and not subjecting the state to high financial costs.

In particular, automatic judicial review enhances the goals of a redistricting commission by further restraining the effects of partisan gerrymandering. First, mandatory and automatic judicial review recognizes the institutional competence of the legislature. The U.S. Constitution states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."¹²⁵ This Clause can be interpreted to mean that congressional redistricting is the sole province of the state legislature.¹²⁶ In *Colegrove v. Green*,¹²⁷ the Supreme Court dismissed a challenge to a districting plan because the Court found the issue was "of a peculiarly political nature."¹²⁸ Justice Frankfurter, who wrote the majority opinion, stated that:

[c]ourts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not

124. *In re* Reapportionment of Colo. Gen. Assembly, 46 P.3d 1083, 1087 (Colo. 2002); *Justices OK State Legislative Remap*, DENVER POST, Feb. 24, 2002, at B5 ("The Colorado Supreme Court upheld on Friday the 10-year redrawing of new state House and Senate districts, allowing lawmakers and prospective candidates to begin preparing for the November election. . . . Friday's ruling came after the court rejected in late January a drawing of the state's 35 Senate districts that it said violated the state constitution by splitting several counties and denying four others a Senate seat.").

125. U.S. CONST. art I, § 4.

126. Hirsch, *supra* note 32, at 210-11 ("[E]choing Chief Justice Rehnquist's concurrence in *Bush v. Gore*, defendants will argue that the Elections Clause expressly delegates the power of congressional redistricting to 'each State . . . Legislature,' not to each State . . ."); Betts, *supra* note 84, at 177 ("Under the theory of separation of powers, redistricting falls within the power of the legislature, which creates yet another political issue.").

127. *Colegrove v. Green*, 328 U.S. 549 (1946).

128. *Id.* at 552.

enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.¹²⁹

The Supreme Court reinforced this sentiment forty years later in *Bandemer* when it observed that lowering the threshold for sustainable legal action against political gerrymandering “would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls.”¹³⁰ However, when a redistricting commission is formed, the legislature cedes its districting authority to the commission. If that mechanism fails, only then should redistricting be reviewed by the court. Drawing district lines must not be the province of the judiciary unless the legislative mechanism fails and the judiciary is forced to redistrict.

Automatic judicial review recognizes this potential separation of powers problem by giving state supreme courts a traditionally judicial task: constitutional review. An integral part of a court’s responsibility is to ensure that acts of the executive and legislature conform to the established law.¹³¹ With mandatory and automatic judicial review, state supreme courts assume this role by ensuring that the proposed redistricting plan is consistent with the applicable constitutional and statutory regulations. The Colorado Supreme Court affirmed this principle by explaining that its role in the districting process was “a narrow one: to measure the present reapportionment plan against the constitutional standards. The choice among alternative plans, each consistent with constitutional requirements, is for the Commission and not the Court.”¹³²

Automatic supreme court review not only respects the traditional scope of the judiciary’s competence, but it also eliminates the opportunity for the judiciary to draw the district lines itself. Automatic judicial review gives the inevitable challenge an auto-

129. *Id.* at 556.

130. *Davis v. Bandemer*, 478 U.S. 109, 133 (1986); *see also* *Wise v. Lipscomb*, 437 U.S. 535, 539–40 (1978) (holding that “redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt.”).

131. As Justice Marshall famously proclaimed, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

132. *In re* Reapportionment of Colo. Gen. Assembly, 647 P.2d 191, 194 (Colo. 1982); *see also In re* Reapportionment of Colo. Gen. Assembly, 45 P.3d 1237, 1247 (Colo. 2002) (“Our role in reviewing the Commission’s reapportionment action is narrow. We must determine whether the Commission followed the procedures and applied the criteria of federal and Colorado law in adopting its reapportionment plan for Colorado General Assembly house and senate districts. We do not redraw the reapportionment map for the Commission.” (internal citations omitted)).

matic audience with final state authority. With this expedited timeline, the redistricting commission has the opportunity to revise and reformulate the district lines consistent with the judiciary's standards and current law. The Supreme Court of Colorado stated in its latest review of the Commission's reapportionment plan that:

[the Court's] role does not include redrawing the statewide apportionment map to comply with the applicable constitutional criteria, this being the Commission's responsibility, and because the Commission may choose to make other alterations in district boundaries on remand in redrawing the apportionment map, we set aside the Commission's action and remand the Adopted Plan to the Commission for further consideration, modification, re-adoption, and re-submittal. . . .¹³³

Automatic review and the chance for commission revisions diminish the chance of a failure in the districting process, which is when courts generally engage in the exercise of districting.

Another reason why judicial review, not judicial redistricting, is preferable is that as opposed to the federal bench, state judges are often elected. In fact, some state judges are even nominated by political parties and may run on a partisan ballot.¹³⁴ Thus, when an elected judge draws voting district lines, it is difficult to say that the process is "politics-blind".¹³⁵ When judges step out of the spectrum of normal judicial activities and engage in redistricting, it increases the opportunity for extra-legal influences to permeate the process.¹³⁶ Although excising partisanship from elected judges may be difficult, the effect of political influences can be mitigated by confining judges to their elected *legal* duties.

Given the partisanship of elected state judges, one could argue that automatic review should be conducted by federal courts. However, the United States Supreme Court has held that the state court judiciary must receive priority when determining the

133. *In re Reapportionment of Colo. Gen. Assembly*, 45 P.3d at 1241.

134. Alabama, Illinois, Louisiana, Michigan, Ohio, Pennsylvania, Texas, and West Virginia use partisan elections at some point during the judicial selection process. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS 3 (2004), available at <http://www.ajs.org/js/JudicialSelectionCharts.pdf>.

135. Hirsch, *supra* note 32, at 213.

136. *Id.* at 211 ("[T]he court can either draw its own map or choose among those submitted by litigants. But in either event, the court will almost always have to choose among multiple maps, several of which are perfectly legal. Therefore, the court must make recourse to some 'extra-legal' criteria.").

constitutionality of districting plans.¹³⁷ In *Grove v. Emison*, the Supreme Court held that “[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.”¹³⁸ As a result, the partisanship of state court judges will always be an obstacle to tackle and in fact, must be the first to be confronted. This obstacle can be mitigated with automatic state supreme court review, because the judiciary is relegated to a quintessential judicial task.

A second advantage of automatic judicial review of commission redistricting plans is securing the timeliness of elections. As demonstrated by the Arizonan redistricting cycle in 2001,¹³⁹ protracted litigation can leave elections in flux and delay one of the fundamental components of American democracy. By foregoing the wait for trial and intermediate court review, automatic judicial review by the highest court of a state expedites the legal ratification of redistricting plans. Naturally, delays in the election timeline are inherent in the procedure of allowing for state supreme court review. For example, in the Colorado redistricting cycle in 2001, the court’s rejection of the first plan caused some scheduling problems. The Colorado Secretary of State stated that the court’s decision would “change a lot of dates” and could potentially change certain deadlines.¹⁴⁰ All that was required in such a situation was an emergency bill to be passed in the legislature to change the election deadlines.¹⁴¹ Nevertheless, the election proceeded on schedule.¹⁴² Automatic judicial review does not eliminate all delays, but it helps elections to occur in a timely fashion and with a presumptively legal and constitutional redistricting plan.

Although automatic judicial review can help achieve finality and efficiency in elections, in theory it may lead to a truncated review of a redistricting plan because of the considerable time pressures.¹⁴³ However, as exhibited by the Colorado Constitution, automatic judicial review does not require that there be a deadline for the court to finish its review, so the court need not be rushed into a

137. *Grove v. Emison*, 507 U.S. 25 (1993).

138. *Id.* at 33 (emphasis in original).

139. *See supra* Part III.A.

140. Abbott, *supra* note 122.

141. *Id.*

142. *See* Ryan Morgan, *At the Polls High Turnout Pleases Officials, But Some Problems Reported*, DENVER POST, Nov. 6, 2002, at E5.

143. Kubin, *supra* note 35, at 850–51.

decision.¹⁴⁴ For example, the Colorado Supreme Court rejected the first plan submitted by the CRC, but while this rejection caused time pressures, it did not cause the court to shirk from robust review. Furthermore, the Colorado Constitution mandates that review of the redistricting plan shall be the first priority on the court's docket.¹⁴⁵ With no unrealistic or pressing deadlines and a constitutional mandate to put redistricting plan review above all other matters, the court should be able to give a complete review of the redistricting plan.

The efficient process of judicial review not only increases the likelihood that elections will occur in a timely fashion, but also that elections will proceed according to a constitutional redistricting plan. The 2001 redistricting cycle in Arizona demonstrated that if litigation delays the ratification of a commission-drawn redistricting plan, a temporary, outdated plan may be used in place of a final plan drawn by the commission.¹⁴⁶ If an outdated plan is utilized, it can potentially represent a violation of the constitutional one-person, one-vote mandate.¹⁴⁷ Additionally, the use of a "temporary plan" (as in Arizona) or a judicially-created plan would signify that the intended redistricting process had failed. It also may signify that the partisan influences that the commission was designed to combat may seep back into the process. However, automatic review is more likely to yield a constitutional redistricting plan than protracted litigation.

Besides timeliness concerns, there are several efficiency-based advantages that arise from mandatory and automatic judicial review. For instance, automatic review will relieve some of the burden on the judiciary. "Litigation is now an expected appendage to the process. The adoption of a new set of districts is now often followed by the bloody combatants heading off to the courthouse to continue their battle."¹⁴⁸ Automatic review preempts this litigation by taking the plan straight to the institution with final approval. If state litigation regarding redistricting makes its way to the state's highest court, automatic review takes out the intervening appellate steps. Some may argue that such review removes the voter from a

144. The Colorado Constitution only mandates that "[i]f the plan is approved by the court, it shall be filed with the secretary of state for implementation no later than March 15 of the second year following the year in which the census was taken." COLO. CONST. art. V, § 48.

145. *Id.*

146. *See supra* Part III.A.

147. *See Baker v. Carr*, 369 U.S. 186 (1962).

148. Richard L. Engstrom, *The Post-2000 Round of Redistricting: An Entangled Thicket Within the Federal System*, *PUBLIUS*, Fall 2002, at, 51, 56 (internal quotation marks omitted).

process that implicates her fundamental rights. However, automatic review does not eliminate the opportunity for the voter to bring another challenge before the court, especially for a claim that the court has not yet considered. Additionally, the voter never loses the ability to bring a federal claim to federal district court and thus, protection by the federal judiciary endures.¹⁴⁹

Automatic review not only unclogs the judiciary's docket, but also saves a considerable amount of time and money. Persistent litigation costs the taxpayers, the plaintiffs, and the court time and money. Automatic review can relieve some of the costs of this process. Additionally, the costs of such litigation can be severely increased if the plan is invalidated by the court and the court orders the commission to pay the plaintiffs' attorney fees. In the 2001 Arizona redistricting cycle, a federal district court found for the plaintiffs and awarded attorneys' fees (that the AIRC and the Secretary of State of Arizona were equally responsible for paying).¹⁵⁰ Similarly, following the 2001 decennial redistricting in Alaska, the Alaska Redistricting Board was ordered to pay the plaintiffs' attorney fees.¹⁵¹ Alaska allocated \$2.8 million of the state capital budget to pay attorneys in the redistricting case.¹⁵² Taxpayers' money can be saved through the automatic review process. With the automatic review process, there is no award of attorneys' fees because there is no litigation.

Automatic judicial review by the state supreme court offers many advantages to the state, the voter, the judiciary, and the redistricting process. Redistricting is a legislative power¹⁵³ and with the creation of a redistricting commission, the legislature cedes its districting power to this commission. Automatic state supreme court review allows for the commission to complete this legislative task without allowing the judiciary to redistrict. Furthermore, such automatic review presents the state supreme court with a quintes-

149. Even if the state supreme court had held that federal law had been complied with, the federal courts would likely not hold that the claim is barred by the doctrine of *res judicata*, because the party did not have a "full and fair opportunity" to litigate the issue in the state courts. See *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980).

150. *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 286 F. Supp. 2d 1087, 1097 (D. Ariz. 2003). Although this decision was based on a federal statute, many states have similar statutes.

151. *Alaska Digest*, ANCHORAGE DAILY NEWS, Aug. 23, 2002, at B3.

152. *Id.*; see also *Alaska Ear; The Divine Appendage*, ANCHORAGE DAILY NEWS, May 19, 2002, at B2 ("So far legal bills filed by challengers of the new redistricting plan add up to \$2.5 million. They mostly won, so they get to collect from the loser, meaning the Alaska Redistricting Board, which is actually the state, which is actually you-know-who. This doesn't count the approximately \$500,000 in costs and fees for the board's attorneys. A judge gets to review and revise before payment is made.").

153. See *Wise*, *supra* note 130, at 539-40.

sential judicial task and restricts the judiciary from stepping beyond its institutional competence. Additionally, automatic state supreme court review allows the voter to exercise his right to vote in a timely election according to a constitutional redistricting map. Finally, mandatory state supreme court review partially relieves state courts of the litigation burden presented by the redistricting process and provides for an efficient redistricting process.

CONCLUSION

The Supreme Court has consistently “ground[ed] the legitimacy of the exercise of governmental power in the fairness and propriety of the electoral process itself.”¹⁵⁴ Partisan gerrymandering upends this democratic foundation by perverting the election process and allowing the elected to pick their electors. However, the courts continue to refuse to develop a judicial solution to partisan gerrymandering. As a result, opponents of partisan gerrymandering have looked for a solution elsewhere. One such solution is the establishment of redistricting commissions, by which the threat of partisan gerrymandering may be reduced. There are several elements to a redistricting commission, including the membership, the factors the commission must consider, and the ratification process. This Note has argued that automatic judicial review by the state supreme court is one of the necessary components of a redistricting commission that mitigates the evils of partisan gerrymandering.

Automatic judicial review by the state supreme court is a fairer, more efficient, and more judicially-appropriate ratification mechanism than ratification by state legislatures or no ratification at all. Automatic judicial review can help to eliminate the problems presented by other ratification mechanism, including election delays, high financial costs, and redistricting by the judiciary. However, the ratification process on its own will not necessarily provide a less partisan redistricting process or more competitive elections. Because judicial review must correspond to the statute creating the commission, if the other elements of the redistricting commission do not sufficiently eliminate partisan influences, then judicial review cannot cure those problems.

The dangers of partisan gerrymandering will continue unabated until a formidable solution can be crafted. Redistricting commissions

154. Issacharoff, *supra* note 11, at 605–06.

present such a solution, but the effectiveness of such a commission and the degree to which partisan influences are excised from the process depends on how the commission is constructed. Ratification by automatic state supreme court review is an essential component in the creation of a redistricting commission and an indispensable ingredient in the battle against partisan gerrymandering.