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Designing Redistricting Institutions

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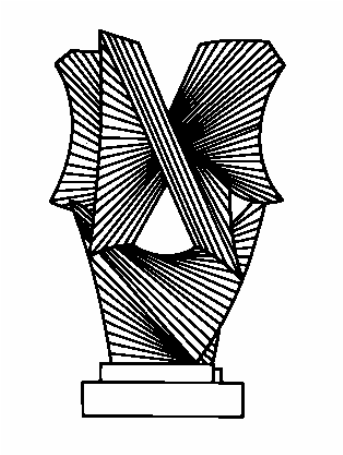

DESIGNING REDISTRICTING INSTITUTIONS

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Redistricting presents a powerful opportunity for political insiders to manipulate the structure of elections for partisan ends. In the United States, the problems of partisan manipulation are particularly acute. State legislative and congressional elections in the United States are generally conducted using single member districts, and this electoral structure provides greater gerrymandering opportunities than other systems of representation. Moreover, redistricting authority in the United States usually lies with state legislatures – institutions with decidedly partisan interests in redistricting outcomes. These features of American democracy produce a redistricting process that is widely seen as pathological.

In recent years, these pathologies have prompted extensive debate about reforming the redistricting process. The problem is that the debate is stuck in something of a rut. Recent reform discussions are too often focused myopically on the desirability of shifting redistricting authority from state legislatures to bipartisan or nonpartisan commissions.[1] But this framing of the reform debate focuses on a far too limited set of reform possibilities.

As a matter of institutional design, there are a number of ways that we might restructure the process of drawing electoral districts to curb the consequences of partisan gerrymandering. Current discussion focuses on one aspect of the design of the redistricting process: the question of what type of institution – a legislative institution or something else – should have initial authority to draw district lines. But as Part I explains, there are other aspects of redistricting's institutional structure that could be reformed. Part I briefly surveys two additional dimensions of possible reform. The first – the decision-rule dimension – focuses on the question of what constraints are placed on redistricting authorities' initial decisionmaking process. The second – the review dimension – focuses on what institutional structures of review are available to evaluate the initial redistricting decisions made by redistricting authorities.

After Part I introduces this broader suite of options, Part II expands on the discussion of decision rules. The Part introduces a novel constraint on the redistricting process – deferred redistricting implementation – that could ameliorate some of its partisan pathologies. Under deferred implementation, legislatures would retain authority to craft redistricting plans following the release of each census; but the implementation of those plans would be deferred for a few election cycles. As Part II explains, deferred implementation creates a partial temporal veil of ignorance that could curtail egregious partisan gerrymanders. In addition, it could improve the incentives of legislators in charge of

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[1] Recent reform efforts have followed a similar path. Arizona and a few other states have recently given their redistricting authority over to bipartisan commissions, but similar reform efforts in California and Ohio were soundly defeated in initiative elections in 2005. *See* ARIZ. CONST. art. IV, pt. 2, § 1 (adopted pursuant to popular initiative in 2000); Robin Toner, *Getting Pumped? Get Real*, N.Y. TIMES, Nov. 13, 2005, at sec. 4, p. 1 (describing the defeat this past fall of the redistricting reform initiatives in California and Ohio).

drawing district lines, making them less interested in using the redistricting process to pursue their political self interest.

I. THE DIMENSIONS OF REDISTRICTING REFORM

The focus on shifting redistricting authority from state legislatures to regulatory commissions has often obscured the breadth of redistricting reforms that are possible. There are a number of ways one might modify the structure of redistricting to curb some of the current system's partisan pathologies. First, one might shift initial authority to draw a state's district lines from that state's ordinary legislative process to some other institution. Second, one might place constraints on the state legislature's decisionmaking process in the redistricting context, rather than stripping the legislature of redistricting authority altogether. Third, one might leave initial authority to draw district lines with the state legislature, but provide for review of redistricting plans by some other institution.

Reform discussions today focus almost exclusively on the first option. But even with respect to this option, the discussion has until lately been limited by the near exclusive focus on redistricting commissions of either the bipartisan or nonpartisan variety. Bi-partisan and nonpartisan redistricting commissions are far from the only sorts of institutions that might be given redistricting authority. There are a variety of other institutional arrangements we might employ, depending on the goals we seek to accomplish through redistricting reform. Fortunately, this dimension of the reform discussion has expanded recently, as Heather Gerken and others have begun to discuss the possibility of employing institutional arrangements in the redistricting process that either generate new structures of participation or leverage the power of existing interest groups.[2]

Still, the other two dimensions of institutional reform are often overlooked. The decision rule dimension was a mainstay of early reform discussions but is talked about much less now. And the review dimension is generally only discussed in the context of evaluating the efforts of Article III courts to review redistricting plans for partisan manipulation. This Part briefly surveys these other two design dimensions to highlight the way in which they are under-explored. Part II then turns to a more detailed discussion of one potential reform of the decision rules that govern redistricting.

A. *Decision Rules*

One way to reform redistricting is to place decisionmaking constraints on the legislature when it engages in redistricting. There a number of mechanisms that one might use to constrain the legislature when it draws district lines – some which operate at the level of individual legislators, and some which capitalize on the fact that legislative decisionmaking is a collective enterprise.

Consider first constraints that operate at the level of individual legislators. There are three ways that we might improve the redistricting decisions of individual legislators: by

[2] *See* Heather K. Gerken, The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics (2005) (unpublished manuscript); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708 (2006).

limiting their opportunities, by changing their desires, or by altering their beliefs.[3] The first mechanism would limit the set of districts that the legislature could lawfully construct; the second would change what legislators *want* to do with respect to redistricting; and the third would change the information legislators have about the redistricting opportunities available to them.

Traditionally, redistricting doctrine and literature has focused on the first possibility – on mechanisms that limit the legislature's option set. The common requirement that redistricting plans be contiguous is just such a constraint. By prohibiting the legislature from drawing a district in which a person would have to leave the district at some point in order to visit all points in the district, this requirement reduces the legislature's options when it draws districts.

Option set constraints were a central part of the initial constitutional regulation of the redistricting process. When the Supreme Court held in 1962 that courts could review the constitutionality of legislative districts,[4] the first rule it established was the one person, one vote requirement.[5] As the Court eventually concluded, the principle of one person, one vote requires that districts be equipopulous. This rule constrains a legislature's options when it redistricts by prohibiting it from drawing districts with unequal populations.[6]

Despite the central role of option set constraints in the history of redistricting regulation, such rules are often dismissed today as either ineffective or partial. For example, both commentators and the Court generally agree today that the equipopulation requirement has not meaningfully curbed the ability of legislatures to engage in aggressive partisan gerrymanders. Ditto for the contiguity requirement. While these rules do constrain the legislature's option set, the effect of these constraints has unfortunately proven far too modest. There are a number of reasons for this, not the least of which is the increase since the 1960s round of redistricting in the sophistication of the tools that legislators use to design districts. Moreover, this increased redistricting precision has coincided in the last decade with an increase in the partisan identification of voters and the stability of the partisan alignment of voters. These changes in political demographics makes it easier for legislatures to predict voting patterns and fine tune districts in accordance with those predictions.

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[3] *See generally* JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 13-21 (1989). It is important to note, of course, that opportunities, desires, and beliefs can interact with and affect one another. I capitalize on this fact below.

[4] *See* Baker v. Carr, 369 U.S. 186 (1962).

[5] *See* Reynolds v. Sims, 377 U.S. 533 (1964).

[6] To be clear, the Court's one person, one vote doctrine actually constrains legislative decisionmaking in at least two ways. As explained above, the rule reduces the legislature's option set. But the equipopulation requirement is not the only meaningful part of the rule. The one person, one vote doctrine also (1) requires regular revision of district lines so that they comply with the equipopulation requirement and (2) authorizes judicial intervention if a state fails to revise its own district lines. (Prior to the cases that kicked off the redistricting revolution and established the one person, one vote requirement, the Supreme Court had suggested that such intervention was not available. *See* Colegrove v. Green, 328 U.S. 549 (1946)). As one might expect, members of a legislative assembly may bargain differently in the shadow of potential judicial intervention. In fact, there is evidence that the introduction of federal court review did constrain legislative decisionmaking in the 1960s. *See* GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION (2002).

Other potential options constraining rules are criticized as partial. There are rules available that could limit options more dramatically than the equipopulation or contiguity requirements – such as a requirement that districts be compact, with compactness defined in a mathematically determinate (if necessarily somewhat arbitrary) fashion.[7] But these rules are often criticized too, not on the ground that they would be as ineffective as the contiguity requirement, but on the ground that they would consistently work to the advantage of one political party. Commentators often condemn the compactness rule for being partial in this sense. They argue that, given the political geography of the United States, a compactness rule would systematically advantage the Republican Party because that party's voters are more efficiently distributed.[8] On grounds of either ineffectiveness or partiality, therefore, the general view is that option-constraining redistricting rules fare poorly.

There are a few reasons why we might criticize this general view.[9] My interest here, however, is not to rehabilitate rules that limit the option set from which legislatures pick redistricting plans. Instead, I want to highlight the fact that option-set constraints are far from the only decision rules available to reform the redistricting process. Rather than constrain the legislature's redistricting option set, we might try to change legislators' beliefs or desires with respect to redistricting.

One way to change legislators' beliefs about the available redistricting options would be to limit the information that the legislature has available to it when it selects a redistricting plan. Limiting the information available to legislatures when they redistrict can produce some of the beneficial effects associated with veil of ignorance rules.[10] Veil rules deprive decisionmakers of information that they need in order to maximize the extent to which a particular decision will best serve their self interest in the future.[11] In the redistricting context, the information that political actors need to advance their self-interest is information about the voting behavior of the electorate.[12] The better political actors are able

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[7] *See generally* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991).

[8] *See* Adam B. Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751 (2004) [hereinafter Cox, *Partisan Fairness*] (summarizing this argument).

[9] For instance, even if a compactness requirement would systematically benefit the Republican party, this fact is not necessarily a sufficient basis on which to reject the requirement. Whether one should be concerned about the systematic partisan bias that a compactness requirement might produce depends on a number of factors. First, it depends on the goals one seeks to further through redistricting reform (or, to put it differently, the harms one seeks to prevent). If one were interested only in ensuring a form of *procedural fairness* in the redistricting process (a plausible, though I think mistaken, normative position), then the fact that a given procedural rule produces partisan bias would be irrelevant. Even if one were concerned with the substantive electoral consequences of redistricting rules, such that the possibility of a rule producing systematic bias would make the rule suboptimal, the rule still might remain the best available rule given existing political and legal constraints. This general idea of second-best solutions, which is well-understood as a general matter, is often forgotten in discussions of redistricting reform.

[10] For a detailed discussion veil rules, see Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001).

[11] Veil rules can deprive a decisionmaker of information in two ways. First, in the classic Rawlsian sense, a veil rule can deprive a decisionmaker of information about the identities of those who benefit from a particular rule. *See* JOHN RAWLS, A THEORY OF JUSTICE 118-23 (rev. ed. 1990). Second, a veil rule can deprive a decisionmaker of information about the benefits for identified persons – that is, by blurring payoffs rather than identities. *See* Vermeule, *supra* note 10, at 399.

[12] I use the term self-interest here to capture a number of harmful – and even a few potentially beneficial – goals that redistricting authorities might seek to pursue through redistricting. The dominant goals of legislators, of course, are likely to be (1) the introduction of partisan bias that favors their political party, and (2) the

to predict this behavior, the more effectively they can manipulate the system in their own self-interest. Consider, for example, the limiting case in which political actors have perfect information about how voters will behave. In that case, the party in control of the legislature need not pad its expected margin of victory in any seats; it can spread its voters efficiently across districts without any worry about potential upsets, thereby maximizing the returns from redistricting.[13] In the absence of perfect information, however, there will inevitably be uncertainty in the predictions about how voters will behave. This uncertainty limits the degree to which political actors can manipulate the system – particularly if those actors are risk-averse. In Part II, I pursue this possibility further, discussing the mechanisms one might use to reduce the information available to redistricting authorities.

In addition to changing legislators' beliefs or information about redistricting, we might attempt to change their desires – that is, what they want out of redistricting. This possibility might seem the most improbable of the three. After all, if legislators are motivated to act in self-interested ways under the current redistricting system, it seems hard to imagine that they would ever desire to act otherwise. We might constrain them from doing what they really want, but how could we actually change what they wanted in the first place? I want to suggest that this intuition is partially misguided. Even if direct attempts at persuasion are bound to fail, it is still possible to change the motivations of legislators in charge of the redistricting process. One way to change legislators' desires is to change either their redistricting opportunities or their information about what opportunities are available. After all, constraints on self-interested action can dampen self-interested motives. I argue below that redistricting veil rules could have precisely this effect.

Putting aside rules that operate at the level of individual legislators, one might reform redistricting by capitalizing on the fact that legislatures are collective decisionmaking bodies. For example, one might improve redistricting dynamics by altering the mechanism by which the legislature picks among the available redistricting options. Redistricting plans are typically passed under the rules that govern ordinary lawmaking in each state.[14] Perhaps the simplest change we might make to this process is to amend the legislative voting rules. Employing a supermajority voting rule for redistricting would force more legislative consensus and improve the bargaining power of the minority party in the redistricting process. Of course, a supermajority rule would be far from a panacea. While such a rule would reduce the likelihood of partisan gerrymanders, it would likely increase the possibility of incumbent-protecting gerrymanders.

Other selection mechanisms, however, might be more effective constraining both types of gerrymanders rather than simply shifting redistricting outcomes away from one potentially

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reduction of competition for their particular seats. *See* COX & KATZ, *supra* note 6, at 31-43 (modeling the redistricting process as a game involving the pursuit of these twin goals).

[13] A party would want to spread its voters to create bare majorities because this strategy minimizes its number of "wasted" votes – that is, the number of votes that are neither necessary nor sufficient to a particular electoral victory – while maximizing the number of wasted votes for the competing party. *See* Cox, *Partisan Fairness*, *supra* note 8, at 767-69. It is important to note, of course, that this model of redistricting assumes that voters come in only two partisan "types." Where voters are arrayed on a partisan continuum, with partisan extremists, centrists, and all intermediate types, the optimal redistricting strategy will be somewhat different – though not in a way relevant to the present discussion. *See* Richard T. Holden & John N. Friedman, Towards a Theory of Optimal Partisan Gerrymandering (2005) (unpublished manuscript).

[14] There are a few exceptions. North Carolina, for example, cuts the governor out of the redistricting process by eliminating the governor's power to veto redistricting legislation. N.C. CONST. art. I, § 22, cl. 5.

bad redistricting outcome towards another. For example, one might restructure the legislative decisionmaking process by attempting to craft an "I cut, you choose" solution to the redistricting problem. The infinite number and heterogeneous nature of possible district combinations does make it difficult to devise a workable solution to the I cut, you choose problem in the redistricting context.[15] After all, the more heterogeneous the goods that are being divided by the "cut," the more likely it is that the party doing the dividing will be able to disadvantage the party doing the choosing. Still, the central point here is simply that there are a wide variety of potential collective-decisionmaking mechanisms available, very few of which have been explored in the redistricting context.

B. *Review-Structuring Rules*

Another way to reform the redistricting process is to change the structure of review that is available after district lines have initially been drawn. As with initial redistricting authority, there are several dimensions along which one can adjust redistricting review. One can change the institution given oversight authority, the standards of review that institution employs, and the rules regarding who can invoke the review process. In the partisan gerrymandering context, most discussions of redistricting review today focus exclusively on the desirability of judicial review. But judicial review is far from the only possible oversight mechanism available.

One alternative possibility, for example, would be to require that each state's congressional redistricting plan be approved (or not rejected) by a federal administrative institution. Federal administrative review of redistricting plans is far from unheard of. It is quite common under section five of the Voting Rights Act, where Justice Department review of redistricting plans was designed to protect minority voting rights in the face of what were perceived to be inadequate judicial safeguards. As far as I am aware, however, the possibility of centralized, federal administrative review has not been considered in the partisan gerrymandering context.

There are at least two important benefits that such review could provide. First, an administrative review institution would have more flexibility than do courts to develop workable strategies for identifying and policing partisan gerrymanders. Courts, operating within the framework of equal protection doctrine that is ill-suited to the task of dealing with political gerrymandering, have failed spectacularly in their efforts to police the partisan manipulation of district boundaries. But the limitations of existing doctrine would not hamstring an administrative review body. Consider, for example, the possibility of

[15] In a recent paper, Jeanne Fromer explored a potential redistricting mechanism that in some ways resembles an "I cut, you choose" solution. *See* Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547 (2005). Unfortunately, Fromer's solution does not appear to be particularly workable. To reduce the number of redistricting choices to a reasonable number for purposes of picking, she abstracts away from the picking of actual redistricting plans and focuses instead on choosing normative criteria. But this solution reintroduces many of the problems that plague attempts to impose option constraints on legislative decisionmaking in the first place: the normative criteria are often insufficiently precise to compel particular redistricting choices, and even when they are the criteria often come into conflict with another. For that reason, it is not possible to translate mechanically from the criteria picked to a determinate set of districts.

structuring review around something like the concept of partisan bias.[16] Courts are extremely unlikely to adopt the concept as a test for unconstitutional gerrymanders. This is not because partisan bias is normatively controversial: it is reasonably widely (though not universally) accepted as a minimal account of partisan fairness in redistricting. Rather, it is because measuring partisan bias requires sophisticated empirical instruments about which there is some methodological disagreement, and because there is no easy way to weave into the fabric of modern equal protection doctrine a constitutional commitment against partisan bias. But these facts would be much less significant stumbling blocks for an administrative body. Consequently, partisan bias might provide central reviewers with a reasonably neutral and administrable metric for identifying egregious gerrymanders.

A second advantage of centralized administrative review of redistricting plans is that such review could – particularly in the congressional districting context – overcome some problems with judicial review of redistricting that stem from the disaggregated nature of the federal judiciary. Article III courts are poorly situated to coordinate review of multiple states' redistricting plans. In part for that reason, judicial review today proceeds state by state. As I have argued elsewhere, however, state-by-state review of redistricting plans undermines the ability of courts to identify many of the representational harms that may flow from partisan gerrymandering.[17] National administrative review of redistricting plans would provide a mechanism for overcoming this coordination problem.

There are, of course, many questions one would need to answer before concluding that national administrative review of redistricting plans would be a good way of curbing partisan gerrymandering. In the racial gerrymandering context, where this sort of administrative review is widely discussed, there is deep disagreement about the desirability of continuing Justice Department review of redistricting plans under section five of the Voting Rights Act.[18] Obviously the benefits of centralized review come with costs. And central administrative review of redistricting plans for partisan bias would be no different. One potential cost would turn on the political consequences of choosing centralized versus decentralized review of redistricting decisions.[19] Some commentators seem to assume that more centralized control over congressional redistricting would exacerbate the partisan ills that currently plague the system. But this is far from clear. It is also possible that consolidating redistricting authority in Congress would lead to greater moderation or otherwise prompt reforms – by raising the salience of redistricting issues for voters, by altering the incentives of risk-averse legislators,[20] or through some other mechanism.[21]

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[16] For a description of the concept of partisan bias, see, for example, COX & KATZ, *supra* note 6; Gary King & Robert X Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251 (1987).

[17] *See* Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409.

[18] *See, e.g.*, Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004); Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 59 HOWARD L.J. (forthcoming 2006).

[19] The same is true with respect to initial redistricting authority. There is little systematic discussion of the virtues and vices of centralized control over the initial redistricting decisions.

[20] *Cf.* Matthew C. Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003) (arguing that political competitors that are risk averse and care about future payoffs may agree to external constraints on the power they can exercise while in control of the government – in the article's case, constraints imposed by an independent judiciary).

A second potential set of costs are the decision costs associated with adding a layer of review to the existing system.[22] These costs could be particularly important because the existing redistricting system still formally includes access to federal courts to complain about putative partisan gerrymanders. Our experience over the past several decades with the implementation of section five of the Voting Rights Act highlights some of these questions. At base, however, it seems quite plausible that the review of redistricting plans could be restructured in a way that actually *lowered* the decision costs associated with the process – at least as compared to the current regime, which consists of a hodge-podge of poorly coordinated judicial and administrative review mechanisms.

II. DEFERRED REDISTRICTING IMPLEMENTATION

As the previous Part explained, there are a number of strategies available to improve the redistricting process. This Part explores in a bit more detail a novel decisionmaking rule that would moderate some of the harmful consequences of the legislatively controlled line drawing – without requiring any radical revision of the institutional structure of redistricting. That mechanism is the deferred implementation of redistricting agreements.

A. *Temporal Veil Rules and Deferred Implementation*

Part I discussed the benefits of placing information constraints on a legislature when it redraws district lines. Veil rules, I explained, can make it more difficult for redistricting authorities to pursue their own self interest in the redistricting process.[23] One obvious way to create a veil rule is to prohibit legislators from consulting information about voters that would help them predict their voting behavior. But such a rule is fairly fanciful. It is hard to see how such a restriction could be enforced in the legislative context, given that returns from previous elections, party registration information, and demographic data on race, income levels, and so forth are all in the public domain. It is true that redistricting commissions and courts drawing redistricting plans sometimes decline to consider some of this information. But these are small (and potentially less self-interested) institutions. In a legislature, where dozens of self-interested legislators play a part in the development of a redistricting scheme, excluding highly salient political information about voters seems much less plausible. Moreover, a legislature often *must* consult quite a bit of information related to partisan voting patterns – such as data on the race of voters and the existence of racially polarized voting – in order to be sure that its redistricting plan does not violate the Voting Rights Act.

Even if it is not possible to keep current electoral and demographic data away from a legislature, however, it is still possible to place the legislature behind a partial veil of ignorance. Veil rules can take many forms, but one attractive candidate for political process regulation are temporal veil rules. Under a temporal veil rule, the legislature is forced to make redistricting decisions at time 1 – based on whatever information about voters is

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[21] We might speculate, for example, that the oft-touted redistricting reforms in Australia, Canada, and the United Kingdom came about in part because redistricting authority was more consolidated in those parliamentary democracies.

[22] I use the term "decision costs" here in a loose sense, to refer to all of the costs associated with the procedural structure of the redistricting system, including the costs of time, uncertainty, strategic behavior, and so on.

[23] *See supra* text accompanying notes 10-13.

available at time 1 to the legislature – about a redistricting plan that will govern elections at some future date. The time lag between the decision and the election creates uncertainty about how voters will behave when the election actually occurs. Current electoral and demographic data will obviously still be of some use. But based on these data a legislature will not be able to predict the behavior of voters several election cycles in the future nearly as well as it could predict the behavior of voters in the very next election.

There are two different ways that one could implement temporal veil rules for redistricting. The first would be to entrench redistricting decisions. This could be done by prohibiting the legislature from redrawing district lines more frequently than every x years. Elsewhere I have argued that prohibiting legislatures from redistricting more than once per decennial redistricting cycle can moderate the effects of partisan gerrymanders.[24] In part, such a rule does so by forcing the legislature to commit for an entire decade to a set of predictions about voting behavior that are made at the outset of the decade.[25] Because predictions about voting behavior several election cycles in the future are necessarily less accurate than predictions about the next election cycle, and because the predictions could not be updated to reflect growing inaccuracy over time, the rule against mid-decade redistricting constrains the extent to which a legislature can manipulate district lines for electoral advantage.

While a rule that entrenches redistricting decisions is one way to place information constraints on the redistricting process, it is not the only way. A rule that *defers implementation* of redistricting decisions provides another mechanism for generating a partial temporal veil in the redistricting process. Deferred implementation rules have never been discussed in the redistricting literature.[26] Under such a rule, the legislature would agree on the composition of its redistricting plan at time 1, but the redistricting plan would not be implemented until some later time 2. Like a prohibition on mid-decade redistricting, this rule capitalizes on the greater uncertainty about the future behavior of the electorate than its behavior in the next election cycle.[27] The uncertainty generated by the time lag between the redistricting decision and the plan's implementation would constrain the possibilities for gerrymandering.

While a deferred implementation rule would capitalize on uncertainty in the same fashion as a rule that entrenched redistricting decisions, it has an attribute that might make it a sturdier veil. The entrenching rule may be made somewhat less effective by incumbency effects. There is some evidence that, once elected, congressional representatives become

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[24] *See* Cox, *Partisan Fairness*, *supra* note 8.

[25] I say "in part" because a prohibition on mid-decade redistricting also regularizes the redistricting agenda in a way that reduces the likelihood of egregious partisan gerrymanders. *See* Cox, *Partisan Fairness*, *supra* note 8, at 776-82.

[26] For a general discussion of deferred implementation agreements in the legislative context, see Ariel Porat & Omri Yadlin, Promoting Consensus in Society Through Deferred-Implementation Agreements (2005) (unpublished manuscript).

[27] Like an entrenching rule, a deferred implementation rule has potentially beneficial agenda-setting properties as well. In a deferred implementation regime, a party that came into power in a state would be unable immediately to alter that state's redistricting scheme. If the party enacted a plan as soon as it gained power, it would have to wait through the deferral period for the plan to take effect. And if the opposition party returned to power a some point during the deferral period, it could repeal the other party's redistricting legislation. Thus, deferral can prevent a potentially destructive tit-for-tat equilibrium during politically volatile times. (Of course, it should be noted that during politically volatile periods this dynamic would likely also increase the role of courts in redistricting.)

much more difficult to defeat.[28] This incumbency advantage could reduce somewhat the uncertainty generated by the entrenching rule. After all, the elections in which uncertainty would otherwise be greatest – elections that take place several years after the districts are drawn – may include a number of incumbents who were elected for the first time in the election cycle immediately following redistricting. So if the legislature can manipulate district lines to secure the election of its favored new representatives in the first post-redistricting election cycle, the advantages those representatives will have in later election cycles can partially counteract changes in voting behavior that would otherwise occur. This does not mean that an entrenching rule would be ineffective: that would be true only if incumbency effects were absolute or extremely strong, and the evidence concerning incumbency effects does not suggest as much. Nonetheless, on the margin incumbency advantages can dampen the force with which an entrenching rule constrains the legislature's decisionmaking process.

A deferred implementation rule would not suffer from this potential shortcoming. Consider, for example, a hypothetical state in which the Democrats control the legislative process and hope to redraw the state's ten congressional districts in a way that eliminates three Republican representatives and adds three Democrats. If the legislature were constrained by an entrenching rule (say a rule prohibiting mid-decade redistricting), it could redraw district lines to maximize the possibility of electing three additional Democrats in the first post-redistricting election cycle. It could then hope that the advantages of incumbency would reduce the possibility that unanticipated changes in voter behavior would lead to the defeat of these three new Democratic representatives in later election cycles. If the legislature were constrained by a deferred implementation rule, however, it could not pursue this strategy. Again, it could redraw district lines to maximize the possibility of electing three additional Democrats in the first post-redistricting election cycle. But this election cycle would occur further in the future, which would make it more difficult for the legislature to predict accurately the behavior of voters in that election. Moreover, the legislature could not rely on the advantages of incumbency to offset this uncertainty, because the uncertainty would be present *in the first election cycle* in which the legislature was attempting to manipulate election outcomes, rather than some later election cycle that takes place after the legislature had already had a chance to "create" its own incumbents.

There is a related point. Incumbency effects aside, the *identity* of the potential candidates is obviously information that is helpful to have when one is trying to predict the behavior of the electorate. All else equal, legislators will likely better predict voter behavior in an election when the identity of one or more of the candidates is known. In ordinary redistricting contests, legislators often have a good sense of who the candidates (or at least one candidate) will be in the first few post-redistricting races for any particular seat. Under a deferred implementation scheme, however, the delay between selection and implementation would deprive legislators of some information about the identities of candidates in the first election run under the revised district plan. This would be especially true in situations where the legislators running in the districts are subject to fairly strict term limits. In that case, a large number of otherwise-likely candidates – existing incumbents – might be term-limited out of the picture during the deferral period.

In addition to changing legislators' information about the available redistricting option set, a deferred implementation rule may also have beneficial effects on legislators' motives

[28] For a more skeptical view of the evidence of incumbency advantage see, for example, COX & KATZ, *supra* note 6.

with respect to redistricting. As I noted in Part I, changing a person's beliefs about their opportunities can often change their desires. In the present case, the deferred implementation rule's direct information effect may lower the incentives of legislative members to manipulate district lines for political gain.

Legislators might be motivated to manipulate district lines for a number of reasons. But surely one central motivation is that it is in their political self-interest to do so. For a politically self-interested legislator, the desire to manipulate a redistricting plan will depend in part on how much the legislator can gain by manipulation. Deferred implementation can dampen this desire by introducing uncertainty that makes successful manipulation less likely. In addition, it can also dampen desire simply by moving the payoffs of manipulation further into the future. To the extent that a legislator has a moderately short time horizon over which she considers her political self-interest, she will be less interested in manipulating district lines that will not be implemented for several election cycles (as opposed to district lines that will go into effect immediately).[29] The legislator's time horizon will depend in part, of course, on what sort of political advantage she hopes to get from voting to gerrymander district lines – whether, for example, she hopes to run for office in one of the redrawn seats. It also depends on the extent to which political parties can provide legislators with political rewards today for votes that benefit the party farther in the future.[30] Still, delaying the implementation of redistricting plans may improve the motivations of legislators making redistricting decisions.

Typically, this motivational effect is both a benefit and a cost of veil rules. As Adrian Vermeule has explained, a veil rule that makes a decisionmaker less able to pursue a self-interested course of action will also make the decisionmaker less interested in pursuing any action at all. Veil rules may therefore be more trouble than they are worth in situations where it is imperative that political actors take action.[31] In the redistricting context, however, the motivational slack that veil rules can produce would likely be less of a problem. There is less concern that political actors will simply fail to undertake redistricting if they cannot as effectively pursue their self-interest through the process. This is because constitutional doctrine *requires* the political actors to redistrict regularly.[32] Accordingly, veil rules may be more effective in the redistricting arena than in other contexts.

The effect of a deferred implementation rule on legislators' information and incentives depends, of course, on the length of the deferral period. If the rule delayed implementation

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[29] This suggests an additional way in which deferred implementation may operate more powerfully in the presence of term limits. Term limits shorten the time horizons of legislators. Thus, term-limited state legislators drawing their own legislative districts in a deferred implementation regime will have less incentive to manipulate those lines in self-interested ways – because they may never have a chance to run in those districts. Of course, term limits may not have the same effect on state legislators' incentives when they revise federal congressional maps. To the extent that term-limited sate legislators have thoughts about later running for Congress, they may actually have a longer time horizon with respect to congressional redistricting than state legislative districting. In this way, deferred implementation may shift the object of legislators' self-interest in the redistricting process, as well as lowering the level of that self-interest.

[30] This statement assumes, of course, that political parties have longer time horizons than individual legislators.

[31] *See* Vermeule, *supra* note 10, at 429-32.

[32] *See* Reynolds v. Sims, 377 U.S. 533 (1964). It is true, of course, that legislators sometimes fail to comply with this constitutional mandate and deadlock without producing a redistricting plan. In such cases, courts would then devise a redistricting scheme. The point is just that the presence of a constitutional requirement helps offset the motivational slack generated by the veil rule.

for a very long period – say a decade or more – it would clearly have powerful effects on partisan manipulation. But a particularly long delay would come with substantial costs as well. As I explain in more detail below, deferring the implementation of a redistricting plan makes it harder to advance some normative goals associated with redistricting – such as ensuring that individual districts are equipopulous. At some point these costs would swamp the benefits of delay, making deferral beyond a certain point undesirable.

Identifying the ideal deferral period is well beyond my ambition here. Locating that point would require a complete theory about how to make trade-offs between the different normative commitments associated with redistricting.[33] It would also require a rich empirical understanding of the consequences of delayed implementation for each of these commitments. The effect of delay on these commitments generally and on legislators' information and incentives specifically would turn on a variety a factors, including the level of political and demographic stability, the presence or absence of term limits, and so on. My modest point here is only to suggest that even a relatively short period of deferral – perhaps a two- or three-election-cycle delay – could create beneficial veil effects without excessive cost.[34]

B. *Potential Objections to Deferred Implementation*

On several grounds, therefore, a deferred implementation rule might be an attractive mechanism for improving the existing process of redistricting. Nevertheless, one might object that deferring the implementation of redistricting plans would pose constitutional problems. The one-person, one-vote doctrine requires that states revise their legislative districts regularly in order to comport with the new census.[35] As a general matter, courts require that this line drawing take place prior to the first elections that follow the release of census data.[36] In fact, the Court has sometimes assumed that existing redistricting plans become immediately unconstitutional upon the release of new decennial census figures.[37] A rule that deferred the replacement of these redistricting plans for a few election cycles might run afoul of these restraints.

While a complete assessment of the constitutionality of deferred implementation is well beyond the scope of this Article, there are several reasons to doubt the quick conclusion that a deferred implementation regime would be constitutionally infeasible. First, it is important to note that *Reynolds v. Sims* – the case that created the doctrine of one person, one vote – did not require that states redistrict immediately following each census.[38] In fact, *Reynolds* did not even require states to redistrict decennially. Instead, it noted only that the failure to revise district lines *at least once each decade* would raise a presumption of unconstitutionality.[39] A deferred implementation rule for redistricting is perfectly compatible with this requirement

[33] These commitments might include maintaining equipopulous districts, reducing partisan bias, preserving electoral competition, curtailing representational polarization, and so on. *See* Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 418-38.

[34] As I suggested above, this might be particularly true where deferred implementation operates in conjunction with a term limits rule that shorten legislators' time horizons and deprives legislators of crucial information about the identities of candidates in the first post-redistricting election cycle.

[35] *See Reynolds*, 377 U.S. at 583.

[36] *See, e.g.*, Growe v. Emison, 507 U.S. 25, 35-37 (1993).

[37] *See* Georgia v. Ashcroft, 539 U.S. 461, 462 n.2 (2003).

[38] *See Reynolds*, 377 U.S. at 583-84.

[39] *See id.*

of decennial revision. Such a rule separates the selection and implementation dates for a redistricting plan, but does nothing to lengthen the time period during which that plan is in effect.[40]

Since *Reynolds*, it is true that courts have sometimes assumed that the Constitution requires new districts to be drawn immediately upon the release of the new decennial census (or, more precisely, prior to the first election cycle following the release of the census).[41] But this assumption has not been uniformly enforced. Maine's constitution, for example, requires that the state wait to redistrict until two years after the census is released.[42] While this provision conflicts with the assumption that U.S. Constitution requires immediate redistricting, Maine's constitutional requirement has not been invalidated.

More generally, the deferred implementation rule actually promotes the principles underlying the one person, one vote doctrine. The assumption that the Constitution requires redistricting immediately after the release of the census is probably best understood as a prophylactic mechanism for spurring the regular updating of district lines to equalize their populations, rather than as an implausible reading of the Constitution to entail a requirement of beginning-of-the-decade redistricting. Such a prophylactic rule prevents states from delaying redistricting (or refusing to redistrict altogether) for political reasons, as they often did in the half-century leading up to *Reynolds v. Sims*; and it prevents courts from having to make case-by-case determinations about when the Constitution compels redistricting. Like such a rule, a deferred implementation rule aims to curb the extent to which states can strategically manipulate the redistricting process for political reasons. Moreover, it can be integrated with the existing assumption about post-census redistricting so as not to eliminate the beneficial bright-line nature of the existing timing rules. Courts could continue to use the release of new decennial census data as the constitutional trigger for redistricting decisions. The only difference would be that district lines enacted by state legislatures following the release of the census would not be implemented for a few election cycles.

Still, one might still complain that deferred redistricting implementation would lead, on average, to greater population deviation across districts than we have in the current regime. Under the current system, the decennial census data underlying a redistricting plan is only a few years out of date when the plan is first used in an election during the '02 year of the decade. If the implementation of the districts were deferred for a few election cycles, however, these data would be more out-dated.

While it is true that deferring the implementation of redistricting plans does make it marginally more difficult to achieve perfect population equality, a deferred implementation rule can be structured to minimize this concern.[43] Most obviously, the legislature could work

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[40] The small caveat, of course, is that the transition from the current redistricting regime to a regime with deferred implementation could – though need not – lengthen the duration of the redistricting plan in effect during the transition.

[41] *See Georgia*, 539 U.S. at 462 n.2; Growe v. Emison, 507 U.S. 25, 35 (1993).

[42] *See* MAINE CONST. art. IV, pt. 1, § 2 ("The Legislature which convenes in 1983 and every 10th year thereafter shall cause the State to be divided into districts for the choice of one Representative for each district."); *id.* art. IV, pt. 2, § 2 ("The Legislature which shall convene in the year 1983 and every tenth year thereafter shall cause the State to be divided into districts for the choice of a Senator from each district, using the same method as provided in Article IV, Part First, Section 2 for apportionment of Representative Districts.").

[43] Moreover, it is important to note that our current system does not achieve anything like perfect population equality. While courts have interpreted the one person, one vote doctrine to require that states draw

with projected census data that estimated the population distribution as of the districting plan's implementation date, rather than relying on current (which actually means retrospective) census data. A related approach is already in use in Australia. When Australian redistricting authorities revise district lines every seven years, they base the district lines on the population that each district is projected to have at the mid-point of the districting plan's life, three and a half years in the future.[44] While the use of census projections raises some questions about the Supreme Court's requirement that states use the "the best census data available" when they undertake redistricting,[45] there is no strong reason for thinking that the Court would reject the use of census projections as unconstitutional.[46]

There is also a side-benefit to relying on projected population data: it reduces the chance that the deferred implementation rule would have partisan effects. One problem with the one person, one vote doctrine is that it runs the risk of systematically favoring one major political party over the other. Under current redistricting rules, district populations are equalized at the outset of each decade and then trend away from population equality as the decade progresses. In areas with declining population, districts become more and more under-populated as the decade progresses; in growth areas the opposite occurs. This favors areas of declining population, because those areas end up with a lower average population per representative. And if partisanship systematically lines up with demographic trends – for example, if growth areas tend to be predominantly Republican – then the current rules introduce some partisan bias.[47]

A deferred implementation rule that relied on projected population data would introduce no more partisan bias than the existing redistricting rules. By requiring that legislators draw lines based on estimates of the implementation-date population distribution, the rule would attempt to equalize populations at the outset of the districting plan's life – just like the current redistricting system. Moreover, one could always go further and require that district lines be drawn using population projections for the mid-point of the districting plan's life. This would help eliminate any partisan bias that the current redistricting rules may contain.

Still, it is true that, by reducing the amount (or, more accurately, the precision) of information available to redistricters, a deferred implementation rule limits the extent to which redistricters can pursue some potentially beneficial goals. For example, a rule against

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congressional districts (though not state legislative districts) with basically an identical number of people in each district, *see* Karcher v. Daggett, 462 U.S. 725 (1983); Vieth v. Pennsylvania, 195 F. Supp. 2d 672, 678 (M.D. Pa. 2002), these districts are based on decennial census data that are already out of date when the districts are completed. *See* The Census Act, 13 U.S.C. § 141(c) (2000). And over the course of the decade, population growth and shifts steadily increase the deviations that exist at the outset.

[44] *See* AUSTRALIAN POLITICS AND GOVERNMENT: THE COMMONWEALTH, THE STATES AND THE TERRITORIES (Jeremy Moon & Campbell Sharman eds. 2003).

[45] *Karcher*, 462 U.S. at 731.

[46] Moreover, even if a deferred implementation rule posed constitutional problems in the congressional districting context, where the Court has interpreted the one person, one vote doctrine to require precise population equality when districts are redrawn, it would still likely be safe from constitutional challenge in the state and redistricting context. The Court has permitted modest population deviations across state redistricting plans – generally rejecting one person, one vote challenges whenever the population deviations across districts are less than ten percent. This flexibility would make it easier to defer implementation of redistricting plans in the state legislative context.

[47] *See* DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: CASES AND MATERIALS (3d ed. 2004). *Cf.* Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. (forthcoming 2007).

mid-decade redistricting would prevent a state from revising district lines mid-decade in response to some large, unanticipated demographic change in the state that undermined some desirable attributes of the districting scheme. In practice, this particular cost may be more apparent than real.[48] Since the Supreme Court began to require decennial redistricting, no state has, as far as I am aware, voluntarily redrawn its districts mid-decade to correct for populations shifts. In fact, when states have revised their district lines in the middle of the decade, as Colorado, Texas, and Georgia all did in the past few years, they have continued to rely on census data from the beginning of the decade to construct those districts.[49] Nonetheless, the potential costs of reducing the information available to redistricters must be considered when evaluating information-constraining rules.

CONCLUSION

Redistricting reform efforts have recently garnered greater attention in the United States. For all the attention, however, discussions about the design of redistricting institutions have been too narrowly focused. The aim of this Article has been to expand that discussion, by suggesting mechanisms that can be used to reform the redistricting process even without stripping state legislatures of their initial authority to draw district lines. By introducing these ideas and highlighting the multiple possible dimensions of institutional reform, I hope to encourage broader thinking about how we might best design redistricting institutions from the ground up.

[48] Still, events like hurricane Katrina make clear that sudden demographic shocks are more than a hypothetical possibility.

[49] *See* Cox, *supra* note 8, at 785.

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