
NOTES

JUDGING THE THREE-JUDGE PANEL: AN EVALUATION OF CALIFORNIA'S PROPOSED REDISTRICTING COMMISSION

NICHOLAS D. MOSICH*

I. INTRODUCTION

A movement to reform the method of drawing state legislative and U.S. congressional districts has been slowly spreading across the country for decades.¹ The movement's goal: to revoke state legislatures' control over redistricting and cede it to independent redistricting commissions.²

* Class of 2006, University of Southern California Gould School of Law; B.S. 2002, University of Southern California. This Note is dedicated to Elizabeth Garrett for her guidance, insight, and encouragement during the writing process and throughout my law school career. I would like to thank my family, especially my grandparents, Nick and Barbara Mosich, for their continuous love and support. I would also like to thank Gina Gajdos for reading several early drafts. Lastly, I would like to express my appreciation to the Southern California Law Review, particularly Christopher Hodson, Michael Lee, Lauren Eber, and Maria de Cesare, for all their hard work.

1. The "act of redrawing the boundaries of a state's house, senate, and congressional [voting] districts following the decennial U.S. Census" is known as "redistricting." Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 840 (1997). See Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115, 129 (2004) ("After every decennial redistricting cycle the list of states that have bipartisan or nonpolitical legislative redistricting commissions gets longer by another two or three states."); Press Release, Common Cause, Statement of Chellie Pingree, President of Common Cause Endorsing Proposition 77: The Voter Empowerment Act (Oct. 5, 2005), available at <http://www.commoncause.org/site/apps/nl/content2.asp?c=dkLNK1MQIwG&b=194883&ct=1483493> ("Common Cause... has pushed for reform of the anti-democratic redistricting process for 30 years.").

2. Common Cause, Recent Updates, Common Cause, Gov. Schwarzenegger Team Up to Fix "Broken System" (Feb. 17, 2005), <http://www.commoncause.org/site/apps/nl/content3.asp?c=dkLNK1>

Spurred by progressively less competitive elections for the U.S. House of Representatives and state legislatures,³ and by the increasing success of partisan and bipartisan gerrymanders in manipulating the outcomes of those elections,⁴ calls for change have recently attracted national attention.⁵ Following the 2004 elections—the results of which revealed some of the least competitive races for state legislative and congressional seats in American history⁶ and exposed two of the most effective and egregious

MQIwG&b=395891&content_id={E890581E-F0A6-4CF8-877F-B77E034660B9}¬oc=1. For the purposes of this Note, an “independent redistricting commission” will refer to “a small group of . . . nonpolitical actors who craft new boundary lines outside of the legislative process according to specified redistricting criteria.” Kubin, *supra* note 1, at 838.

3. Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 184 (2003) (“If the usual pattern holds, and contests become even less competitive and more incumbent-friendly in the cycles immediately following a post-reapportionment election, then the 2004 and 2006 elections may soon supplant 1986, 1988, and 2002 in the record books.”); Patrick Basham, *Slaying the Gerrymander*, WORLD & I, Apr. 2004, at 4, 4 (“Of the roughly 6,000 legislative seats elected every two years nationwide, about forty percent feature a race in which only one party fields a candidate.”).

The precise extent to which the redistricting process affects legislative turnover and competition in elections is beyond the scope of this Note. Admittedly, there are many factors contributing to the lack of electoral competition, including the high popularity, name recognition, and larger campaign budgets that incumbent legislators enjoy. See GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY’S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 194–205 (2002). See also Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942–2000*, 1 ELECTION L.J. 315, 315–16 (2002) (observing that all political officials enjoy incumbency advantages).

4. Gerrymandering refers to state legislators intentionally manipulating district boundaries for individual or partisan gain. See COX & KATZ, *supra* note 3, at 1. A partisan gerrymander occurs when a majority party draws district lines in a manner that intentionally prevents the election and reelection of minority-party candidates, thereby giving an unfair advantage to one political party at the expense of the other. See BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 148 (1984). A bipartisan gerrymander occurs when the two major parties mutually agree to preserve or increase the safety of their representatives’ seats by creating safe-districts packed with commanding majorities of a single party. See DAVID BUTLER & BRUCE CAIN, *CONGRESSIONAL REDISTRICTING* 157 (1992).

5. For examples of past, and less recognized, calls for the establishment of independent redistricting commissions, see Steven B. Frates, Op-Ed., *For Our Next Governor, No Pain Means No Gain: The State Needs Decisive Action on Housing, Education, and Infrastructure*, L.A. TIMES, Nov. 16, 2003, at B16 (“[A]n independent redistricting commission empowered to redraw [California district] maps [is] needed to reengage the citizenry.”); Editorial, *A Plan for Leveling Political Playing Field*, ST. PAUL PIONEER PRESS, Aug. 2, 1992, at 18A (advocating for the reduction of “the politics of drawing legislative district boundaries . . . by asking voters to give the job to a bipartisan redistricting commission”); Editorial, *Putting the People First*, ST. PETERSBURG TIMES, Oct. 17, 1999, at 2D, available at 1999 WLNR 2660954 (“Voter initiatives for an independent redistricting commission and sensible standards for the drawing of districts deserve public support.”).

6. See *Incumbents Get Free Pass*, USA TODAY, Feb. 14, 2005, at 13A, available at 2005 WLNR 2080093 (noting the extremely uncompetitive races for seats in state legislatures and the U.S. House of Representatives).

political gerrymanders ever accomplished⁷—these calls rose to a fever pitch.⁸

In February 2005, California Governor Arnold Schwarzenegger responded to this outcry. He backed an initiative that, if passed, would have created an independent redistricting commission in California and he joined forces with nonpartisan organization Common Cause to advocate for the establishment of such commissions across the country.⁹ Commentators foresaw a “Redistricting Revolution.”¹⁰ The efforts of Governor Schwarzenegger and Common Cause met early success as campaigns to reform redistricting were launched in twelve states.¹¹ Additionally, initiatives to establish redistricting commissions in California and Ohio qualified for the ballots during those states’ next elections.¹² The calls for reform were echoed in Washington, D.C., as two bills were introduced in the House of Representatives that would require every state to use an independent redistricting commission for redrawing congressional districts.¹³

When Governor Schwarzenegger and Common Cause began their partnership, twelve states already employed redistricting commissions as their primary redistricting bodies.¹⁴ The existing commissions vary in degree of authority, compulsory district-drawing criteria, members’ political involvement, and structure.¹⁵ Many of the current reform efforts,

7. See *infra* Part II.A. In this Note, “political gerrymanders” refers to partisan and bipartisan gerrymanders, collectively.

8. See Adam Nagourney, *States See Growing Campaign for New Redistricting Laws*, N.Y. TIMES, Feb. 7, 2005, at A19, available at 2005 WLNR 1682088. See, e.g., Nicholas D. Kristof, Op-Ed., *No More Sham Elections*, N.Y. TIMES, Nov. 20, 2004, at A19, available at 2004 WLNR 11732868; Spencer Overton, Op-Ed., *Democracy Needs Fixing*, NEWSDAY, Nov. 8, 2004, at A41.

9. Common Cause, *supra* note 2.

10. See, e.g., ELIZABETH GARRETT, INITIATIVE & REFERENDUM INST., REDISTRICTING: ANOTHER CALIFORNIA REVOLUTION? 1 (2005), available at <http://www.iandrinstitute.org/REPORT%202005-1%20Redistricting.pdf>; John P. Avon, Op-Ed., *Redistricting Revolution*, N.Y. SUN, Mar. 1, 2005, at 8.

11. Common Cause, *supra* note 2.

12. See Dean E. Murphy, *Schwarzenegger Enters Debate over Redistricting in Ohio*, N.Y. TIMES, Oct. 18, 2005, at A22, available at 2005 WLNR 16843861.

13. Redistricting Reform Act, H.R. 4094, 109th Cong. (2005); Fairness and Independence in Redistricting Act, H.R. 2642, 109th Cong. (2005).

14. See GARRETT, *supra* note 10, at 3.

15. See *infra* Part III.A. As used in this Note, the term “structure” collectively refers to the distribution of members—whether in an equal or unequal representation of parties—on a redistricting commission, the presence or absence of a tie-breaking member, and the proportion of affirmative votes required to enact a districting plan (for example, simple majority, supermajority, or unanimous). Other commentators discuss these commission characteristics under such headings as “membership” or “appointment of members.” See, e.g., Confer, *supra* note 1, at 119; Kubin, *supra* note 1, at 845. This

however, focus on the same commission model—one composed of individuals from outside the government’s political branches (“nonpolitical membership”), and structured with an equal number of members from and appointed by each major political party and a neutral, tie-breaking chairman (“tie-breaking structure”).¹⁶ Nonpolitical membership is viewed as advantageous because nonpolitical actors are theoretically less likely to manipulate the redistricting process for partisan interests than are state legislators, whose personal and political interests are inextricably linked to the district lines they draw.¹⁷ Similarly, many redistricting proponents champion a tie-breaking structure because having an equal number of members selected by each of the major political parties prevents one party from imposing an unfair plan on the other, and the presence of one neutral member fosters moderation and compromise.¹⁸

In California, however, Governor Schwarzenegger attempted to lead his state into uncharted territory.¹⁹ The unique commission model supported by Governor Schwarzenegger via Proposition 77 consists of three members who must all be retired federal or state judges, and who

Note, however, declines to do so in order to distinguish structure—as defined above—from membership, which will hereinafter refer to the political or nonpolitical identity of these members, and the process by which they are appointed.

16. Five of the twelve states that give primary redistricting authority to redistricting commissions incorporate nonpolitical members and a tie-breaking structure. See *infra* Part III.A. Additionally, the redistricting commission set forth in Ohio’s Issue 4 had a nonpolitical membership and approximated a tie-breaking structure. See Reform Ohio Now, Initiative Petition, Amendment for an Independent Redistricting Process, http://www.reformohionow.org/downloads/ron_amendments.pdf (last visited Dec. 15, 2005) [hereinafter Issue 4 Petition] (providing the text of the constitutional amendment proposed in Ohio’s Issue 4). The two most recently enacted commissions, in Arizona and New Jersey, incorporate nonpolitical membership and a tie-breaking structure. See ARIZ. CONST. art. IV, pt. 2, § 1(3)–(8); N.J. CONST. art. II, § 2(1)(b)–(c). Moreover, the bills recently introduced in the U.S. House of Representatives to mandate independent redistricting commissions across the country both employ this type of model. See Redistricting Reform Act, H.R. 4094, 109th Cong. § 4(a) (2005); Fairness and Independence in Redistricting Act, H.R. 2642, 109th Cong. § 4(a) (2005). While there has been a significant focus on this type of redistricting commission recently, scholars have been advocating for redistricting commissions with nonpolitical members and a tie-breaking structure for years. See MARK MONMONIER, BUSHMANDERS AND BULLWINKLES 99–103 (2001); Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND REDISTRICTING ISSUES 7, 10–11 (Bernard Grofman et al. eds., 1982); Kubin, *supra* note 1, at 839. But see Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 124–26 (opposing the use of nonpartisan or bipartisan commissions).

17. See Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1661 (1993).

18. Kubin, *supra* note 1, at 845–46. For a further discussion of tie-breaking commissions, see *infra* Part III.A.

19. See *infra* Part IV.

must vote unanimously to pass each redistricting plan they draw.²⁰ Unlike the popular tie-breaking structure, the three-judge panel does not provide for equal representation between political parties or a tie-breaking vote.²¹ Despite these differences, the three-judge panel received support from several citizen watchdog groups,²² prominent California newspapers,²³ and notable political figures.²⁴

On November 8, 2005, in a special election called by Governor Schwarzenegger, California voters rejected Proposition 77.²⁵ Although at first glance it appears that in defeating the proposition, California voters were rejecting the concept of a three-judge panel, several factors unrelated to the substance of the redistricting proposal are more likely responsible for its demise.²⁶ Thus, the debate over the three-judge panel as a tool of the national redistricting reform movement should not die with Proposition 77. The question remains whether redistricting reformers should consider the three-judge panel as an alternative commission model potentially suitable for use in other states.

This Note proceeds to answer this question in three additional parts. Part II provides a background on the national redistricting reform movement by detailing the events that incited reform, the reformers' motivations to stop political gerrymandering, and the perceived problems with state legislators controlling the redistricting process. Part III details the general features of independent redistricting commissions and the advantages of commissions that employ a nonpolitical membership and the tie-breaking structure. Part IV analyzes the three-judge panel to determine

20. CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE, TEXT OF PROPOSED LAWS, PROPOSITION 77 § 1(a)–(b), at 64 (2005), available at http://www.ss.ca.gov/elections/bp_nov05/voter_info_pdf/text77.pdf [hereinafter PROPOSITION 77].

21. *Id.*

22. See Press Release, Common Cause, State and National Reform Groups Endorse Prop. 77 (Oct. 5, 2005), available at <http://www.commoncause.org/site/apps/nl/content2.asp?c=dkLNK1MQIwG&b=194883&ct=1484237>.

23. The *Sacramento Bee*, the *San Francisco Chronicle*, and the *Los Angeles Times* all endorsed Proposition 77. Editorial, *The Bee Recommends*, SACRAMENTO BEE, Oct. 28, 2005, at B6; Editorial, *The Chronicle Recommends: Prop. 77*, S.F. CHRON., Oct. 12, 2005, at B8; Editorial, *Times Endorsements*, L.A. TIMES, Nov. 6, 2005, at M4. For a complete list of newspapers that endorsed Proposition 77, see Fair Districts Now, Newspaper Endorsements for Proposition 77, <http://www.fairdistricts.com/Newspapers.htm> (last visited Dec. 16, 2005).

24. See Jim Sanders, *Prop. 77 Seeks Bipartisan Image*, SACRAMENTO BEE, Oct. 11, 2005, at A3, available at 2005 WLNR 16492418.

25. John Wildermuth, *Redistricting: Voters Reject Attempt to Take Boundary-drawing from the Hands of State Legislators*, S.F. CHRON., Nov. 9, 2005, at A14, available at 2005 WLNR 18087956. In addition, Ohio voters rejected Issue 4. Sandy Theis, *Job Issue OK'd; Reform Measures Fail*, CLEVELAND PLAIN DEALER, Nov. 9, 2005, at A1, available at 2005 WLNR 18138697.

26. See *infra* Part IV.A.

whether it deserves to be considered as a viable commission model by redistricting reformers. First, it presents several factors contributing to Proposition 77's defeat, which collectively indicate that the proposition probably was not rejected based on the merits of the three-judge panel. Second, it assesses the panel's viability as a tool of the redistricting reform movement, comparing the potential benefits of the panel's membership and structure to those of other commissions currently in use. Part V concludes.

II. THE REDISTRICTING REFORM MOVEMENT

This part provides a background of the redistricting reform movement. It begins by recounting the recent political gerrymanders in Texas and California that inspired the current drive for reform and summarizes why reformers object to both partisan and bipartisan gerrymandering. It then reviews the reform movement's contention that state legislatures are the wrong bodies to control the redistricting process.

A. LIGHTING THE FIRES OF REFORM: RECENT PARTISAN MANIPULATIONS OF THE REDISTRICTING PROCESS

Recent political gerrymanders masterminded by state legislators in Texas and California instigated the partnership between Governor Schwarzenegger and Common Cause and the ensuing revival of the redistricting reform movement.²⁷ While political gerrymandering is certainly not a new innovation,²⁸ the Texas and California gerrymanders were among the most effective and injurious in history.²⁹ Additionally, lack of legislative turnover in other states and in the U.S. House of

27. See Nagourney, *supra* note 8.

28. The term "gerrymander" originated in 1812 when the Jeffersonian majority of the Massachusetts legislature drew, under the approval of then-governor Elbridge Gerry, a serpent-shaped district to reduce the strength of the Federalist Party. After printing an illustration of the district with horns, wings, and claws, a local newspaper anointed the district a "gerrymander" in reference to both Gerry and the district's resemblance to a mythical salamander. MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? 2 (1993); Darin R. Doak, *Miller v. Johnson: Drawing the Line on Racial Gerrymandering*, 17 N. ILL. U. L. REV. 155, 155 n.1 (1996) (citing ROBERT R. DIXON JR., DEMOCRATIC REPRESENTATION, REAPPORTIONMENT IN LAW AND POLITICS 459 (1968)). The phrase's novelty notwithstanding, the practice of gerrymandering was not new, even in 1812. See *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (noting that the practice of gerrymandering has been traced back to the colony of Pennsylvania at the beginning of the eighteenth century, and to the province of North Carolina in 1732). In fact, Patrick Henry allegedly attempted a gerrymander to keep James Madison out of the first U.S. Congress. *Id.*

29. See JoAnn D. Kamuf, Note, "Should I Stay or Should I Go?": *The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 FORDHAM L. REV. 163, 163 (2005); Nancy Vogel, *Looking to Design a Fairer Map*, L.A. TIMES, Feb. 13, 2005, at B1.

Representatives gave rise to the sentiment that the system is broken and in need of fixing.³⁰

1. Texas's Partisan Gerrymander

In 2003, the Republican Party gained majority control of the Texas state legislature for the first time in 130 years. Following their victory, Texas Republican legislators promptly assumed the task of redrawing the state's thirty-two congressional districts, with the goal of erasing the Democrats' two-seat advantage.³¹ The Republican effort made national headlines when Texas Democrats fled the state two separate times in order to prevent a quorum vote in the legislature.³² Notwithstanding the Democrats' quorum-busting efforts, the blockade eventually disintegrated, and the Republican districting plan passed.

Immediately following the Republican power-play, several Democrat-led state legislatures threatened to use similar tactics against the Republican Party in other states.³³ Democratic outrage increased exponentially when the plan succeeded in 2004, resulting in the defeat of four incumbent Democrats, a gain of four Republican seats, and a Republican majority in Texas's congressional delegation.³⁴ This redistricting battle generated litigation,³⁵ inflamed partisan rhetoric,³⁶ and inspired calls for change.³⁷

30. Common Cause, Redistricting, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=196481> (last visited Dec. 3, 2005).

31. See David M. Halbfinger, *Across U.S., Redistricting as a Never-ending Battle*, N.Y. TIMES, Jul. 1, 2003 at A1, available at 2003 WLNR 5218065.

32. See Nick Madigan, *On the Road Again; In California They Run. In Texas They Run Away.*, N.Y. TIMES, Aug. 31, 2003, § 4, at 5, available at 2003 WLNR 5646225; Andrew Reding, Op-Ed., *Beyond Gerrymandering and Texas Posses: U.S. Electoral Reform*, CHRISTIAN SCI. MONITOR, May 29, 2003, at 9, available at 2003 WLNR 2278971; Judge Lee Yeakel, *The Killer D's and Texas 11*, Presentation at the Robert W. Calvert Am. Inn Ct. (Jan. 20, 2004), available at <http://www.lorjw.com/id10.html>. The first of these headline-grabbing escapes involved fifty-one house members evading Texas Rangers and federal agents to conceal themselves in a Holiday Inn in Ardmore, Oklahoma. See Yeakel, *supra*. The second time, eleven state senators absconded to Albuquerque, New Mexico to block a special legislative session called by Texas's governor. See Madigan, *supra*. For detailed accounts of these quorum-busting travails, see Jake Bernstein, *Remember the Holiday Inn! Democrats Make a Run Across the Border to Save the State from Tom DeLay*, TEX. OBSERVER, Jun. 6, 2003, at 4, available at <http://www.texasobserver.org/showArticle.asp?ArticleID=1364>; Molly Ivins, Op-Ed., *Contiguous Cojones*, TEX. OBSERVER, May 23, 2003, at 14, available at <http://www.texasobserver.org/showArticle.asp?ArticleID=1356>.

33. See Halbfinger, *supra* note 31. See also Lauren W. Whittington & Erin P. Billings, *Democrats Nix Illinois Remap*, ROLL CALL, Mar. 10, 2005, available at 2005 WLNR 3707106 (discussing Illinois's decision not to act on its threat to retaliate against Republicans for Texas's anti-Democrat redistricting plan).

34. Ronald Keith Gaddie, *The Texas Redistricting, Measure for Measure*, EXTENSIONS, Fall 2004, available at <http://www.ou.edu/special/albertctr/extensions/fall2004/Gaddie.html>.

35. See *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004), vacated, 125 S. Ct. 351 (2004).

2. California's Bipartisan Gerrymander

In 2001, California state legislators from both parties entered into a mutual agreement to ensure election victories for all of the state's incumbent congressional representatives and state legislators. In 2004, this pact became "the most complete . . . bipartisan gerrymander in history," when it resulted in the complete absence of legislative turnover.³⁸ Not one of the state's fifty-three congressional seats and one hundred legislative seats up for election switched parties.³⁹ Reacting to his state's election performance and calling for reform, Governor Schwarzenegger queried, "What kind of democracy is that?"⁴⁰

3. A Stagnant Nation

In 2004, the entire country was ensconced in legislative gridlock. Out of 435 races for the U.S. House of Representatives, only thirteen seats changed hands, and merely seven incumbents lost their reelection bids.⁴¹ Strikingly, more than half of the congressional incumbents who lost hailed from Texas's freshly manipulated Republican districts.⁴² Although uncompetitive elections are not a new phenomenon, this decade's elections will likely be considered among the least competitive in history.⁴³

36. See Halbfinger, *supra* note 31; Whittington & Billings, *supra* note 33.

37. See, e.g., Editorial, *Ending the Gerrymander Wars*, N.Y. TIMES, May 30, 2005, at A14, available at 2005 WLNR 8545618; Jeff Jacoby, Op-Ed., *The Gerrymandering Scandal*, BOSTON GLOBE, Aug. 5, 2004, at A17, available at 2004 WLNR 3562764; Editorial, *Prop. 1: Democracy*, ROLL CALL, Nov. 8, 2004, available at 2004 WLNR 9488579.

38. Vogel, *supra* note 29 (quoting Alan Heslop, a founder of the Rose Institute at Claremont McKenna College).

39. *Id.* The 2002 elections resulted in only three legislative seats switching parties. *Id.* Ironically, the initial response to this districting plan was positive, if only because the legislature had failed to approve a plan in the 1970 and 1990 redistricting cycles, forcing a court-appointed panel to redraw California's districts. See Lisa Vorderbrueggen, *Safe Seats Rile Author of Recall, Push for Redistricting Surfaces After Election Results Show Little Change*, CONTRA COSTA TIMES, Nov. 12, 2004, at A1, available at 2004 WLNR 15749209.

40. Wesley Pruden, Op-Ed., *Breaking Bones with the Terminator*, WASH. TIMES, Feb. 15, 2005, at A4, available at 2005 WLNR 2151668.

41. Steve Chapman, Op-Ed., *Can Arnold Help to Restore True Democracy?*, BALT. SUN, Jan. 11, 2005, at 11A, available at 2005 WLNR 364737.

42. See John M. Broder, *Schwarzenegger Proposes Overhaul of Redistricting*, N.Y. TIMES, Jan. 6, 2005, at A16, available at 2005 WLNR 154618. Notably, only eight congressional incumbents lost their reelection bids in the 2002 general elections. Chapman, *supra* note 41. For a discussion of the incumbent-friendly and uncompetitive 2002 elections, see Hirsch, *supra* note 3, at 179; Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 62-63 (2004).

43. See Hirsch, *supra* note 3, at 184.

B. THE CONTROVERSY AND PERCEIVED HARMS OF POLITICAL GERRYMANDERING

The Texas and California gerrymanders stand as prime examples of state legislators' ability to manipulate the redistricting process, but *all* political gerrymanders have serious implications for the American concept of democracy. This section explains why redistricting reformers object to both partisan and bipartisan gerrymandering.

1. Partisan Gerrymanders

Partisan gerrymanders, like the 2003 plan passed by the Texas Republicans, are viewed as “especially pernicious” because they allow “a party with only a minority of the popular vote [to] assert control over a majority of seats in the state assembly [or] . . . the national House of Representatives.”⁴⁴ Public objection to electoral manipulation comes as no surprise, as partisan gerrymandering violates one of the basic tenets of democracy—that voters choose their representatives, not the other way around.⁴⁵ Thus, a gerrymandered district fails to fairly and effectively represent those citizens living within its boundaries.⁴⁶

2. Bipartisan Gerrymanders

Bipartisan gerrymanders have previously generated less controversy than partisan gerrymanders.⁴⁷ This may be so because the effects of a

44. Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 407 (1993) (first alteration in original) (quoting Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 302 (1991)). Despite the uproar partisan gerrymanders cause, some view them as a “self-limiting enterprise.” *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring). See JEREMY BUCHMAN, *DRAWING LINES IN QUICKSAND: COURTS, LEGISLATURES, AND REDISTRICTING* 194–95 (2003). First, to create more winnable seats, “the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat.” *Id.* at 152. See also CAIN, *supra* note 4, at 148–49 (illustrating this principle by example). Second, successfully implementing a partisan gerrymander is difficult because of potentially inaccurate census data and population shifts over the course of a decade, which can result in partisan gerrymanders backfiring. See BUCHMAN, *supra*, at 195; BUTLER & CAIN, *supra* note 4, at 9–10 (noting two partisan gerrymanders attempted in the 1970s by Republican legislative majorities in New York and Indiana, both of which resulted in a net gain of Democratic seats).

45. See *Vieth v. Jubelirer*, 541 U.S. 267, 332 (2004) (citing *Session v. Perry*, 298 F. Supp. 2d 451, 516 (E.D. Tex. 2004) (Ward, J., concurring in part and dissenting in part)) (“[E]xtreme partisan gerrymandering leads to a system in which the representatives [are] choosing their constituents, rather than vice-versa.”).

46. See Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 546 (2003).

47. See BUCHMAN, *supra* note 44, at 194.

bipartisan gerrymander are consistent with the generally held conception that fair political representation may be achieved by awarding the political parties with seats in the legislature according to each party's proportional share of the statewide popular vote.⁴⁸ Bipartisan gerrymanders may have also engendered little opposition because they are characterized by compromise,⁴⁹ as the 2001 agreement by California legislators demonstrated.⁵⁰

Despite the tolerant public stance, bipartisan gerrymanders present the same problem as partisan gerrymanders: incumbents are choosing their constituents.⁵¹ Recent scholarship has recognized that the sanguine outlook toward bipartisan gerrymanders is misguided because they, too, restrict electoral competition.⁵² Legislators using a bipartisan gerrymander have been compared to two manufacturers of interchangeable products who violate federal antitrust laws by dividing the product market between them.⁵³ Like a cartelization of product markets that results in fewer choices, higher prices, long-term stagnation of the market, fewer incentives for innovation, and consumer alienation, bipartisan gerrymanders result in

48. See Dixon, *supra* note 16, at 8–9. To the surprise of many, proportional outcomes do not occur naturally in U.S. elections because of the American practice of the plurality rule, or winner-take-all approach. See *id.* In a government using the plurality rule, “even under ideal circumstances a district system of electing legislative representatives always tends to overrepresent the dominant party in a given election year.” *Id.*

49. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 598 (2002).

50. See *supra* Part II.A.

51. See *Gaffney v. Cummings*, 412 U.S. 735, 752 (1974) (detailing the way in which Connecticut state legislators effectuated a bipartisan gerrymander).

52. See Issacharoff, *supra* note 49, at 600 (“[T]he risk in [bipartisan] gerrymandering is . . . that of constriction of the competitive processes by which voters can express choice.”); Pildes, *supra* note 42, at 62 (“Bipartisan gerrymandering is emerging as a new, equally serious but different kind of threat to American democracy.”). For discussions on the importance of competition in American democracy, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999).

Proponents of bipartisan gerrymanders argue that incumbent entrenchment should actually be viewed as beneficial to governmental effectiveness because of the states' interests in sending experienced congressional delegates to Washington and keeping seasoned representatives in the state legislature. See, e.g., Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002). Nathaniel Persily also argues that packing districts is beneficial because most voters would prefer to “be placed in a district in which the majority of people share their political beliefs” and “where they vote for the winner rather than the loser,” and because elections that force candidates to appeal to moderate voters “undermine[] political diversity at the legislative level, homogenize[] the two parties, and misrepresent[] the underlying population.” *Id.* at 669, 679.

53. See Issacharoff, *supra* note 49, at 599–600.

fewer choices for voters and government stagnation because legislators have entrenched themselves in the government.⁵⁴

3. Collective Harms

Allowing legislators to choose their constituents causes political entrenchment and a number of other detrimental effects on democracy, such as reduced government responsiveness and accountability, polarized political parties, and undermined public confidence in elected officials.⁵⁵ In a representative democracy based on the principle of majority rule, the government is expected to be responsive to the popular will of the people.⁵⁶ Gerrymandering impairs this responsiveness by allowing incumbents to secure electoral victories with strategically drawn district lines, rather than by earning the popular support of the voters.⁵⁷ Because legislators depend on the mapmaker for power,⁵⁸ they have little incentive to advocate for the preferences of their constituents,⁵⁹ and consequently become less responsive to the public.⁶⁰

Ideally, the electoral process allows voters to “express satisfaction or dissatisfaction with the political status quo”⁶¹ and hold elected officials accountable for their successes and failures.⁶² The Supreme Court has consistently recognized the importance of the ability to “throw the rascals out” of government office.⁶³ Through gerrymandering, incumbents deprive citizens of this right.⁶⁴

54. See *id.* at 620–30.

55. See Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 490 (2004); Timothy P. Brennan, Note, *Cleaning Out the Augean Stables: Pennsylvania’s Most Recent Redistricting and a Call to Clean up This Messy Process*, 13 WIDENER L. REV. 235, 327 (2003).

56. See *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). This is especially true of the House of Representatives, which the Framers intended to be the body closest to the people and most “reflective of popular consent.” Lisa O. Monaco, Comment, *Give the People What They Want: The Failure of “Responsive” Lawmaking*, 3 U. CHI. L. SCH. ROUNDTABLE 735, 740 (1996).

57. See Brennan, *supra* note 55, at 327–28.

58. See *Vieth v. Jubelirer*, 541 U.S. 267, 330 (2004).

59. See Grofman, *supra* note 16, at 112; Issacharoff, *supra* note 49, at 600.

60. Issacharoff, *supra* note 49, at 615–16 (“Representatives remain faithful to the preferences of the electorate and responsive to shifts in preferences so long as they remain accountable electorally.”).

61. See *Vieth*, 541 U.S. at 356–57 (Breyer, J., dissenting) (citing *McConnell v. FEC*, 540 U.S. 93, 188 (2003)); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615–16 (1996).

62. See Issacharoff, *supra* note 49, at 616.

63. See *Vieth*, 541 U.S. at 356.

64. See Issacharoff, *supra* note 49, at 615.

Heavily partisan districts also minimize incumbents' incentives to consider the median voter, thereby further polarizing the political parties.⁶⁵ In primary elections, highly partisan candidates tend to fare better than centrists because they arouse the support of the party-faithful.⁶⁶ Then, in competitive districts, those same candidates typically nudge their stances toward the center, prior to the ensuing general elections, in order to appeal to the median voter and create a larger base of support.⁶⁷ But in bipartisan-gerrymandered districts, the opposite occurs, because the single-party supermajorities in each district virtually ensure victory for the majority party.⁶⁸ Without the incentive to compete for median voters, candidates retain their highly partisan platforms, and thereby polarize the political arena.⁶⁹ The end result is ideologically divided legislatures composed of politicians who hew closely to partisan agendas and refuse to compromise.⁷⁰

Moreover, because redistricting is an "area in which appearances do matter,"⁷¹ the appearance of impropriety by incumbents damages public confidence in the electoral process. Many voters, believing their votes do not matter, become apathetic and decline to participate in elections.⁷² Gerrymandering thus damages democratic legitimacy, as the right of elected officials to govern is based on the presumption that election results accurately reflect the will of the people.⁷³

4. Conclusion

The recent Texas and California gerrymanders fueled the current redistricting reform movement, but the fundamental reasons for combating manipulations of the redistricting process lie in the longstanding damage gerrymandering does to democracy. Gerrymandering is perceived as

65. See Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 423-31 (2004).

66. American elections consist of a primary race and a general election. See *id.* at 423. During the primary race, candidates of the same party compete to receive the party's nomination, while in the general election, the different parties square off against one another. See *id.*

67. See Issacharoff, *supra* note 49, at 628.

68. See *id.*

69. See *id.*

70. See Issacharoff, *supra* note 65, at 423-27.

71. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

72. See Confer, *supra* note 1, at 129.

73. See Brennan, *supra* note 55, at 327 ("[T]he only legitimate government is one derived from the consent of the governed . . ."). See also Issacharoff, *supra* note 49, at 645 ("I can think of nothing that could undermine the authority of Parliament more than that people outside should feel that the constitutional mechanism by which the House of Commons is elected has been framed so as to favour one party in the State." (quoting British politician Aneurin Bevan)).

harmful because allowing politicians to choose their constituents arguably results in entrenched representatives. This preservation of the status quo ultimately contributes to an unaccountable government, polarized political parties, and a lack of public confidence in elected officials and the democratic system.

C. THE WRONG REDISTRICTING BODY: THE PROBLEMS WITH LEAVING
THE PROCESS IN THE HANDS OF STATE LEGISLATORS

The reform movement's goal of establishing independent redistricting commissions was motivated by the conviction that state legislators are not the proper individuals—and legislatures are not the right political bodies—to control the redistricting process and protect it from gerrymandering. This belief is rooted in basic political theory, the recognition of state legislators' proclivity to manipulate the redistricting process, and the current inability of states either to prospectively constrain legislators from gerrymandering or to retroactively correct the effects of political gerrymanders.

1. Incentivizing Bad Behavior

Basic political theory dictates that a democratic government should not have the power to “determine its membership” because such a practice will inevitably result in self-dealing and entrenchment.⁷⁴ The relationship between redistricting and politics was perhaps best articulated by the Supreme Court:

Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely.

74. See DENNIS F. THOMPSON, *JUST ELECTIONS* 179 (2002). In other words, “[p]oliticians and their supporters should not completely control the means of access to the institutions of which they are members.” *Id.* at 189.

Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator.⁷⁵

In a system in which “control of the legislature facilitates the majority party’s legislative agenda, and brings a greater share of the perks, staff, and power,”⁷⁶ state legislators will predictably choose to preserve or further their own incumbencies and their party’s political power when forced to choose between creating “fair and effective” districts⁷⁷ and manipulating the redistricting process.⁷⁸ As the Texas and California gerrymanders demonstrate, this theory has been borne out in practice.⁷⁹

2. Inability to Control

Redistricting reformers also oppose giving redistricting authority to state legislators on the grounds that doing so renders citizens defenseless against legislators’ inevitable partisan wrangling and scheming. Specifically, states and their citizens lack adequate means to constrain state legislators prospectively through either traditional redistricting criteria or the threat of litigation, and are unable to mitigate the effects of gerrymanders retroactively through litigation.

a. Federal- and State-Imposed Constraints: Complying with the Letter, Circumventing the Spirit

The redistricting process is subject to a number of federal and state constraints. First, redistricting itself is compelled by the Constitution’s requirement that congressional districts be apportioned to the states based on their populations, as determined by the decennial census.⁸⁰ Furthermore, each state’s separate congressional and legislative districts must be approximately equal in population under the principle of “one person, one vote.”⁸¹ Additionally, both congressional and legislative districts must be

75. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1974). *See also* Dixon, *supra* note 16, at 7–8 (“[T]here are no neutral lines for legislative districts [E]very line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place.”).

76. Bruce E. Cain & Janet C. Campagna, *Predicting Partisan Redistricting Disputes* 2 (Cal. Inst. of Tech. Div. of the Humanities & Soc. Scis., Working Paper No. 639, 1987) (on file with the University of Southern California Law School Library).

77. *See* Bruce Adams, *A Model State Reapportionment Process: The Continuing Quest for “Fair and Effective Representation”*, 14 HARV. J. ON LEGIS. 825, 845 (1977).

78. *See* Issacharoff, *supra* note 17, at 1661.

79. *See supra* Part II.A.

80. *See* U.S. CONST. art. I, § 2, cl. 3.

81. *See Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964) (requiring the same for state legislative districts); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (requiring congressional districts to be close to equal population “as nearly as is practicable”). The equal population requirement is stricter for

redrawn at least every ten years to account for population shifts within a state and satisfy the equal population mandate.⁸² Because of population movement among states, a state may gain or lose seats in the House of Representatives, and therefore must account for this change by adding or subtracting voting districts.⁸³

In addition to the Constitution's equal population requirement, districts must pass muster under the Fourteenth Amendment's Equal Protection Clause,⁸⁴ and under sections 2 and 5 of the Voting Rights Act.⁸⁵ While Congress has the authority to further regulate the redistricting process under Article I, Section 4 of the Constitution,⁸⁶ it has not used this power to impose "any redistricting rules on state legislatures" in approximately thirty years, choosing instead to defer to the states.⁸⁷

As long as districts follow the aforementioned federal requirements, states have considerable discretion to impose further constraints on the

congressional districts than for state legislative districts. See J. GERALD HEBERT ET AL., *THE REALISTS' GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS* 1 (2000). Generally speaking, congressional districts may not have a total population deviation above one percent in order to withstand a constitutional challenge. *Id.* at 5–8. State legislative districts, on the other hand, may customarily deviate between ten percent and sixteen percent. *Id.* at 9–11.

82. AM. BAR ASS'N SPECIAL COMM. ON ELECTION LAW & VOTER PARTICIPATION, *CONGRESSIONAL REDISTRICTING* 1 (1981) [hereinafter AM. BAR ASS'N]. Prior to the 1962 Supreme Court holding in *Baker v. Carr*, 369 U.S. 186 (1962), which requires states to redistrict every ten years under the Constitution, many states consistently failed to follow their own constitutions' requirements to redistrict on a regular basis. See *id.* at 192–93. See also BUTLER & CAIN, *supra* note 4, at 25 (noting that the district boundaries of Alabama, Tennessee, and Delaware went "unchanged for the first sixty years of [the twentieth] century and nine other states made no alterations between 1930 and 1960").

83. See AM. BAR ASS'N, *supra* note 82, at 1. The 435 seats in the House of Representatives are apportioned under the Huntingdon system, which guarantees every state at least one seat and allocates the remaining 385 seats based on state population. See BUTLER & CAIN, *supra* note 4, at 18–20.

84. See U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

85. See Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973–1973bb-1 (2000).

86. See U.S. CONST. art. I, § 4, cl. 1 ("The 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.").

87. AM. BAR ASS'N, *supra* note 82, at 2. See also *Vieth v. Jubelirer*, 541 U.S. 267, 276–77 (2004) (noting that since 1980, Congress has rarely exercised its power to regulate redistricting); BUTLER & CAIN, *supra* note 4, at 24 (noting Congress's general unwillingness to "interfere" in state control of the redistricting process). Congress's last redistricting legislation, enacted in 1967, mandated single-member districts and thereby banned at-large elections. See Pub. L. No. 90-196, 81 Stat. 581 (1967) (codified as amended at 2 U.S.C. § 2c (2000)). Since 1980, Congress has considered several bills to increase its regulation of the redistricting process, but none have passed. See *Vieth*, 541 U.S. at 276–77 (listing congressional bills introduced to regulate congressional districting).

redistricting process.⁸⁸ Such additional constraints include compactness,⁸⁹ contiguity,⁹⁰ respect for communities of interest,⁹¹ and respect for political subdivisions.⁹² The Supreme Court has upheld the constitutionality of these so-called traditional redistricting principles.⁹³

In theory, by forcing legislators to abide by a greater number of criteria, the state prevents line-drawers from bestowing advantages on themselves or imposing disadvantages on any group.⁹⁴ Unfortunately, in practice, these principles are limited in their capacity to thwart legislators' self-interested actions.⁹⁵ Regardless of the manner in which a state attempts to limit legislators' redistricting power,⁹⁶ legislators inevitably find ways to

88. See Kubin, *supra* note 1, at 853. States impose these additional requirements through their constitutions, laws, or legislative resolutions. See, e.g., PETER S. WATTSON, OFFICE OF SENATE COUNSEL & RESEARCH FOR THE MINN. SENATE, HOW TO DRAW REDISTRICTING PLANS THAT WILL STAND UP IN COURT 25 (2000), <http://www.senate.leg.state.mn.us/departments/scr/REDIST/Draw/draw203.pdf>.

89. A compact district has the minimum distance between all of its sides. BUTLER & CAIN, *supra* note 4, at 157. For example, a district in the shape of a circle or hexagon would be the most compact district. *Id.*

90. A district is generally considered contiguous "if one can reach any part of the district from any other part without crossing the district boundary—in other words, if the district is not divided into two or more discrete pieces." HEBERT ET AL., *supra* note 81, at 60.

91. Generally, requiring respect for communities of interest directs the line-drawer to create districts that preserve groups of individuals with similar ethnic, cultural, and economic backgrounds, as well as preserve areas with similar geographic and demographic characteristics. See Grofman, *supra* note 16, at 87.

92. Respect for political subdivisions requires that a districting plan keep counties, cities, and towns intact rather than creating boundary lines that divide or cross county or municipal borders. HEBERT ET AL., *supra* note 81, at 61. See, e.g., *Bush v. Vera*, 517 U.S. 952, 974 (1996); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

93. See M. Elaine Hammond, *Toward a More Colorblind Society?: Congressional Redistricting After Shaw v. Hunt and Bush v. Vera*, 75 N.C. L. REV. 2151, 2153–54 (1997) ("The Supreme Court has held that . . . compactness, preserving communities of interest . . . and adherence to political boundaries, do not conflict with the Fourteenth Amendment."). While the Supreme Court has upheld the constitutionality of traditional redistricting principles, the use of these principles is not constitutionally mandated. See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (noting that "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" are not constitutionally required); *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973) ("[C]ompactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts.>").

94. See AM. BAR ASS'N, *supra* note 82, at 9. The practice of constraining legislators by requiring districts to conform to particular criteria dates back to the beginnings of the nation. See ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 275–475 (1965). See also *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (noting past congressional acts from the early nineteenth and twentieth centuries that required districts to abide by contiguity and compactness requirements).

95. See Grofman, *supra* note 16, at 88 ("The commonly held view that reliance on formal criteria such as compactness or equal population can prevent gerrymandering is simply wrong.>").

96. See BUTLER & CAIN, *supra* note 4, at 148.

introduce partisan motivation into the process⁹⁷—for example, using advanced computer software to create hundreds of plans that satisfy the state-imposed criteria and choosing the plan that best suits their interests.⁹⁸

The advent of better census data and improved computer technology has increased the effectiveness of gerrymanders. Map drawers can now view voter demographic data down to “the precinct level” and “arrange districts block-by-block,”⁹⁹ thereby making partisan gerrymandering less risky than it was in the past.¹⁰⁰ For example, the 2003 partisan gerrymander in Texas turned a two-seat Democratic advantage into a four-seat Republican advantage.¹⁰¹ A partisan gerrymander in Pennsylvania resulted in a 12-7 Republican majority in the state’s congressional delegation, even though Democrats outnumbered Republicans in total voter registration.¹⁰² And the California district plan resulted in complete legislative stasis, as not one congressional or legislative district changed hands.¹⁰³

Additionally, in many cases, state-imposed redistricting criteria are very flexible, or directly conflict with each other when applied, thereby allowing incumbent legislators to selectively abide by constraints based on their own preferences.¹⁰⁴ For example, a requirement for compact or contiguous districts may conflict with the principle of preserving

97. See Kubin, *supra* note 1, at 853 n.90 (“[W]ith regard to the specific issue of redistricting the stakes are simply too high and too personal for nonincumbency criteria to prevail.”).

98. See Issacharoff, *supra* note 17, at 1702; Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 736 (1998) (“Finer-grained census data, better predictive methods, and more powerful computers allow for increasingly sophisticated equipopulous gerrymanders.”); Kubin, *supra* note 1, at 854. For examples of highly precise computer-generated gerrymanders, see MONMONIER, *supra* note 16.

99. Kristen Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913, 924 (1996).

100. See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2553–54 (1997) (noting the precision with which the consequences of redistricting decisions can be projected). For the argument that partisan gerrymanders are inherently risky and prone to failure, see *supra* note 40 and accompanying text.

101. See *supra* Part II.A.

102. See Steve Chapman, Op-Ed., *Partisan Redistricting Turns Democracy into a Mirage*, BALTIMORE SUN, May 7, 2004, at 19A, available at 2004 WLNR 1468572.

103. See *supra* Part II.A.

104. See Arend Lijphart, *Comparative Perspectives on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements*, in REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 16, at 143, 147–52; Kubin, *supra* note 1, at 853. See also MONMONIER, *supra* note 16, at 38 (describing an incident in which a compactness requirement was ignored for the sake of protecting incumbents); Confer, *supra* note 1, at 117 (describing an incident in which testimony regarding communities of interest was ignored for the sake of protecting incumbents). For examples of incumbent legislators ignoring traditional districting criteria, see *Cox v. Larios*, 542 U.S. 947, 951–52 (2004) (Scalia, J., dissenting); *Vieth v. Jubelirer*, 541 U.S. 267, 339–40 (2004) (describing the Pennsylvania legislature’s disregard for traditional districting principles).

communities of interest in cases where specific racial, ethnic, or economic communities are geographically disparate.¹⁰⁵ In such circumstances, legislators can follow the rule that best suits their own political agendas.¹⁰⁶

b. Litigation: Knocking on Closed Courthouse Doors

Since the Supreme Court's first foray into the "political thicket" of redistricting,¹⁰⁷ litigation has become a standard tactic for public interest organizations, political parties, and state governments to block objectionable redistricting plans from going into effect.¹⁰⁸ While the Supreme Court has been especially hostile to racial gerrymandering,¹⁰⁹ it has been decidedly less so to political gerrymandering.¹¹⁰ This section sets forth Supreme Court precedents concerning partisan and bipartisan gerrymandering to show that the courthouse doors have, for the moment, been effectively closed to political gerrymandering claims, thus leaving states with neither the threat of litigation to constrain legislators, nor the ability to correct egregious district plans once imposed.

i. Partisan Gerrymandering

In *Davis v. Bandemer*, the Supreme Court, confronted with a claim by Indiana Democrats that the state's 1981 redistricting plan was intentionally drawn to disadvantage the Democratic Party, found that "districting that would 'operate to minimize or cancel out the voting strength

105. See BUTLER & CAIN, *supra* note 4, at 150. See also Ken Gormley, *Racial Mind-games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735, 780 (2002) ("As a practical matter, it is rare that a reapportionment body is able . . . to wholly capture a 'community of interest' and draw lines around it, in a fashion that perfectly isolates it into a circle or square. In reality, communities of interest are elusive, imprecise entities."). Traditional redistricting requirements even run contrary to constitutional requirements. Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 SOC. SCI. HIST. 159, 188 (1998) ("[Redistricting] plans have become less compact since the Court's requirements of equal population . . .").

106. See Altman, *supra* note 105, at 188.

107. *Veith*, 541 U.S. at 320 (discussing *Baker v. Carr*, 369 U.S. 186 (1962)).

108. See J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 433 (2000); Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. (forthcoming 2005) (manuscript at 1701, available at http://www.law.upenn.edu/fac/npersily/workinprogress/NEWEST%20DRAFTS/Persily_gw.pdf).

109. The Supreme Court has been especially hostile to racial gerrymandering, subjecting it to strict scrutiny analysis and declaring it unconstitutional as a violation of the Fourteenth Amendment's Equal Protection Clause. See *Shaw v. Reno*, 509 U.S. 630, 650 (1993) (striking down a redistricting plan under strict scrutiny). For a racially motivated redistricting plan to survive strict scrutiny analysis, the plan must be narrowly tailored to achieve a compelling state interest. *Id.* at 658.

110. See *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) ("Race is an impermissible classification. Politics is quite a different matter." (internal citation omitted)); *Shaw*, 509 U.S. at 650 ("Nothing . . . compels the conclusion that racial and political gerrymanders are subject to precisely the same . . . scrutiny.").

of . . . *political* elements of the voting population' . . . raise[s] a constitutional question" under the Fourteenth Amendment.¹¹¹ The Court found a justiciable issue under the Equal Protection Clause, recognized the similarities between partisan and racial gerrymandering, and noted that Democrats were elected to only forty-three out of one hundred available state House seats despite receiving 51.9% of the statewide vote. Nevertheless, the Court found insufficient evidence of unconstitutional vote dilution to strike down the redistricting scheme.¹¹²

The Court required a showing of "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process," in order to prove unconstitutionality.¹¹³ Under *Davis*, for redistricting to be unconstitutional, plaintiffs must be "essentially . . . shut out of the political process"¹¹⁴ for more than one election cycle.¹¹⁵ Admittedly a "difficult" standard,¹¹⁶ the Court added that a districting plan that made "winning elections more difficult" or failed to result in "proportional representation" would not suffice for unconstitutional vote dilution.¹¹⁷

Applying the "difficult" *Davis* standard, not a single lower court struck down a congressional or legislative redistricting plan in the eighteen years between *Davis* and the Supreme Court's next partisan gerrymandering case, *Vieth v. Jubelirer*.¹¹⁸ In *Vieth*, a divided Supreme Court held that the Pennsylvania state legislature's 2002 redistricting plan was not an unconstitutional partisan gerrymander under the Fourteenth Amendment.¹¹⁹ In doing so, the Court affirmed the justiciability of partisan gerrymandering claims¹²⁰ and rejected the *Davis* test as unmanageable, but failed to replace the test with a new standard for adjudicating partisan

111. *Davis v. Bandemer*, 478 U.S. 109, 119 (1986) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)). Prior to *Davis*, the Court had summarily affirmed lower court decisions rejecting partisan gerrymandering claims for lack of justiciability or want of a substantial federal question. *Id.* at 120.

112. *See id.* at 113.

113. *Id.* at 133.

114. *Id.* at 139.

115. *See id.* at 135.

116. *Id.* at 142.

117. *Id.* at 132.

118. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 n.6 (2004) (listing cases in which courts rejected claims of partisan gerrymandering under *Davis*).

119. *Id.* at 267.

120. *See id.* at 306–27 (Kennedy, J., concurring); *id.* at 327–42 (Stevens, J., dissenting); *id.* at 342–55 (Souter & Ginsburg, JJ., dissenting); *id.* at 355–68 (Breyer, J., dissenting).

gerrymandering claims.¹²¹ Instead, the Court merely suggested several potential tests and left the matter for the lower courts to decide.¹²²

The *Vieth* decision left claims of partisan gerrymandering in the same state in which it found them: they are still technically justiciable under the Equal Protection Clause, but no court has ever invalidated an alleged partisan gerrymander on equal protection grounds.¹²³ In response to *Vieth*, a consensus has arisen that, for the time being, the courts are effectively closed to partisan gerrymandering claims.¹²⁴

ii. Bipartisan Gerrymandering

In the only reported case addressing a bipartisan gerrymander, *Gaffney v. Cummings*, the Supreme Court upheld a redistricting map that proportionally divided Connecticut between the Republican and Democratic parties based on each party's statewide vote share in the three previous elections.¹²⁵ The Court sanctioned the 1971 plan because the

121. See *id.* at 271–306 (plurality opinion); *id.* at 306–27 (Kennedy, J., concurring).

122. See *id.* at 327 (Kennedy, J., concurring) (suggesting that a future manageable standard might be articulated from First Amendment jurisprudence); *id.* at 339 (Stevens, J., dissenting) (proposing a standard based on *Shaw v. Reno*, 509 U.S. 630 (1993), that asks “whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles”); *id.* at 347–51 (Souter & Ginsburg, JJ., dissenting) (proposing a five-part test at the district level that would require plaintiffs to (1) be members of a “cohesive political group,” (2) show that they reside in an allegedly gerrymandered district that paid no attention to the traditional districting principles, (3) establish “specific correlations between the district’s deviations from traditional districting principles and the [population] distribution of [the plaintiff’s political] group,” (4) provide the court with a hypothetical district that would provide a fairer proportion of the political group’s members and less deviation from traditional districting principles than the actual district, and (5) prove that the defendants intentionally manipulated the redistricting process to disadvantage the plaintiff’s political group); *id.* at 360–62 (Breyer, J., dissenting) (proposing a statewide test that identifies “unjustified entrenchment” by the presence of suspect circumstances, including the following: the district map departs “radically from previous or traditional criteria,” “the legislature has redrawn . . . boundaries more than once within the traditional 10-year census-related period,” and “strong, objective, unrefuted statistical evidence demonstrates that a party with a minority of the popular vote within the State in all likelihood will obtain a majority of the seats in the relevant representative delegation”).

123. James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 643 (2004). Notwithstanding this fact, the *Vieth* Court cautioned, “That no . . . standard has emerged in this case should not be taken to prove that none will emerge in the future.” *Vieth*, 541 U.S. at 327 (Kennedy, J., concurring).

124. See Michael A. Carvin & Louis K. Fisher, “A Legislative Task”: *Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2, 3 (2005) (detailing the “demise of political gerrymandering claims”); Richard L. Hasen, *The Supreme Court and Election Law: A Reply to Three Commentators*, 31 J. LEGIS. 1, 9 (2004); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 567 (2004) (noting that “*Vieth* essentially cuts off . . . political gerrymandering claims”). *But see* Gardner, *supra* note 123, at 643 (2004) (discussing the potential for state court adjudication of partisan gerrymandering claims).

125. See *Gaffney v. Cummings*, 412 U.S. 735, 752–54 (1973).

design's purpose was consistent with the general goal of redistricting—to create “a more ‘politically fair’ . . . result than would be reached with elections at large.”¹²⁶ Ultimately, the plan withstood the plaintiff's equal protection claim because it lacked any discriminatory intent or purpose.¹²⁷ The Court went so far as to proclaim that “judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength.”¹²⁸

The courts, while arguably open to partisan gerrymandering claims, are essentially prevented from adjudicating claims of bipartisan gerrymandering under the Supreme Court's current equal protection standard.¹²⁹ Because bipartisan gerrymanders arise from mutual compromise and guarantee representation for each party, they are effectively immune to judicial challenge.¹³⁰

3. Conclusion

Reformers argue against allowing state legislatures to continue controlling the redistricting process for several reasons. State legislators are notoriously incapable of resisting the temptation to manipulate the line-drawing process, as their own political destinies and the fate of their parties are closely tied to redistricting decisions. Furthermore, states are unable to stop incumbent legislators from gerrymandering, as new technology has arguably rendered redistricting criteria meaningless. Moreover, Supreme Court precedent has made litigating political gerrymanders an empty threat. Recognizing the flaws of the state legislature as a redistricting body, the reform movement has centered its efforts on establishing independent redistricting commissions.

III. INDEPENDENT REDISTRICTING COMMISSIONS

In order to stop the harms of political gerrymandering, the redistricting reform movement has advocated removing control of the process from state legislators and establishing independent redistricting commissions. The following part provides an overview of the essential features of redistricting commissions and highlights the advantages of commissions

126. *Id.* at 753.

127. *See id.* at 751–54.

128. *Id.* at 754.

129. *See* Issacharoff, *supra* note 49, at 598.

130. *See id.* at 612–13.

with a nonpolitical membership and the tie-breaking structure, both in theory and in practice.

A. OVERVIEW OF REDISTRICTING COMMISSIONS

1. Enacting Redistricting Commissions

A redistricting commission is “a small group of political or nonpolitical actors who craft new boundary lines outside of the legislative process according to specified redistricting criteria.”¹³¹ States adopt redistricting commissions by one of two means. First, the legislature may cede redistricting authority to a commission by passing a referendum.¹³² Second, in states that employ the initiative process, the citizens may directly establish the commission through a voter initiative.¹³³ Although most commissions currently in use were established by referendum, the initiative process may be a determining factor for whether additional states establish redistricting commissions.¹³⁴

Because the redistricting process is a matter of “political survival,”¹³⁵ legislators are reluctant to voluntarily relinquish their power over the redistricting process.¹³⁶ While citizens in noninitiative states are forced to rely on heavy lobbying efforts, citizens in initiative states are able to pressure legislators to enact reform by threatening an initiative that would detract from their power.¹³⁷ If the threat is credible, meaning that the initiative will probably receive a majority of voter support,¹³⁸ incumbents are likely to respond by establishing a commission on their own in order to “retain some influence” over the process.¹³⁹ Notably, a majority of states

131. Kubin, *supra* note 1, at 838.

132. A referendum is a proposed law “initiated by the legislature and then ratified or rejected by the voters.” ELIZABETH R. GERBER, *THE POPULIST PARADOX* 3–4 (1999).

133. An initiative is a proposed law “initiated by citizens and then put to a popular vote.” *Id.* at 3.

134. See Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997, 1009 (2005).

135. ROBERT MCKAY, *REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION* 52 (1965) (“[T]o the affected legislators [redistricting] involves no less an issue than political survival.”).

136. See *Vieth v. Jubelirer*, 541 U.S. 267, 363 (2004) (“The party that controls the process has no incentive to change it.”); CAIN, *supra* note 4, at 1 (“[D]istrict lines . . . determine the strength of an incumbent’s position and the chances of his or her political survival. They can also influence who runs against an incumbent and how much money will have to be spent on both sides.”).

137. See GERBER, *supra* note 132, at 73.

138. *Id.*

139. GARRETT, *supra* note 10, at 5. See Persily & Anderson, *supra* note 134, at 1009–11.

with the initiative process already have redistricting commissions that were established by legislative referendum.¹⁴⁰

When establishing or attempting to establish a redistricting commission, states and redistricting reformers must decide on several key features regarding the nature and role of the prospective commission. Commissions primarily vary in scope of authority, the district-drawing criteria they must follow, members' identities, and structure.¹⁴¹ Ultimately, these features may determine the commission's ability to meet the goals of redistricting reform.

2. Scope of Authority

The authority of redistricting commissions varies as to "the stage of the redistricting process at which a commission acts," and "what bodies a commission redistricts."¹⁴² The stage at which a particular commission redistricts depends on whether the commission has primary redistricting authority, or is merely used in an advisory or backup capacity.¹⁴³ The bodies a commission redistricts vary in scope, as states may empower them to draw congressional districts, state legislative districts, or both.¹⁴⁴

Commissions with primary redistricting authority are the initial bodies to draw a state's new district maps.¹⁴⁵ The maps these commissions draw usually have the force of law but are sometimes subject to oversight by a state's legislature.¹⁴⁶ On the other hand, the district proposals that advisory commissions submit do not have any legal authority, as state legislatures may choose to accept or reject the plans.¹⁴⁷ Backup commissions are only

140. Seven of the thirteen commission states with the initiative process established commissions through the legislature. *See* GARRETT, *supra* note 10, at 5; Persily & Anderson, *supra* note 134, at 1013.

141. Kubin, *supra* note 1, at 843.

142. *Id.* at 844.

143. GARRETT, *supra* note 10, at 3.

144. *See, e.g.*, ARK. CONST. art. VIII (granting its commission the authority to draw only legislative districts); HAW. CONST. art. IV, § 2 (granting its commission the authority to draw both legislative and congressional districts).

145. GARRETT, *supra* note 10, at 3.

146. States that give their commissions primary redistricting authority include Arkansas, Hawaii, and Montana. ARK. CONST. art. VIII, § 4; HAW. CONST. art. IV, § 2; MONT. CONST. art. V, § 14(3)–(4). Washington's commission is subject to oversight by the state legislature, which can amend the commission's final plans via a supermajority vote. WASH. CONST. art. II, § 43(7).

147. *See, e.g.*, IOWA CODE ANN. § 42.3(1) (West Supp. 2005); ME. REV. STAT. ANN. tit. 21, § 1206 (Supp. 2004); VT. STAT. ANN. tit. 17, § 1906 (2002). Iowa's unique redistricting model merits extra discussion because of the considerable attention it has received from election law scholars. *See* Issacharoff, *supra* note 49, at 644. Iowa grants power over redistricting to a legislative services agency—a nonpartisan, administrative agency—that initially draws the districting maps and submits them to Iowa's legislature for approval. *See* IOWA CODE ANN. § 42.2 (West Supp. 2005). During the

empowered to act in the event that the state legislature fails to reach an agreement.¹⁴⁸ The courts, although not technically backup commissions, are often required to draw redistricting plans when a state's legislature or commission fails to produce a plan, or when a plan is declared unconstitutional.¹⁴⁹

Twelve states currently grant their commissions primary redistricting authority: Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington.¹⁵⁰ Because the current reform movement endeavors to establish commissions with

map-drawing process, the commission is denied all access to any political or election data, including information about incumbency or voter registration. *Id.* The resulting district maps have made Iowa's congressional elections among the most competitive in the country, thereby making the state's model a favorite of redistricting reformers. *See* Issacharoff, *supra* note 49, at 644.

This praise, however, may be misdirected, for the primary reason that the commission is merely advisory. *See* Bruce E. Cain & Davis A. Hopkins, *Mapmaking at the Grassroots: The Legal and Political Issues of Local Redistricting*, 1 ELECTION L.J. 515, 523 (2002) (describing advisory commissions as "merely surrogates" for the party that will review their redistricting plans because the "commission members know that their proposed lines must conform to the [controlling party's] wishes or they will likely not be approved"). Because the panel's plans must be approved by the legislature, the real credit for Iowa's redistricting success should probably go to the legislature for enacting plans that result in competitive districts. *See* BUTLER & CAIN, *supra* note 4, at 102–03 (noting that the plans submitted to the Iowa legislature do not always pass smoothly). In 1981, the legislature rejected the commission's plans twice. *Id.* The first time, the plan matched two Republican incumbents against each other in one district. *Id.* The second time, a heavily Democratic county was included in a Republican's district. *Id.* Iowa's redistricting success may be attributed to its progressive "political culture," rather than its redistricting commission. *See* Persily, *supra* note 52, at 675. Furthermore, despite Iowa's success, its method has not attracted *any* converts among the other commission states. *See* Kubin, *supra* note 1, at 848.

148. Connecticut, Illinois, Indiana, Mississippi, Oklahoma, and Texas use backup commissions. *See* Nat'l Conference of State Legislatures, Appendix E, Redistricting Commissions: Legislative Plans, <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/apecomsn.htm> (last visited Dec. 3, 2005) [hereinafter NCSL, Legislative Plans] (listing states with backup commissions); Nat'l Conference of State Legislatures, Appendix F, Redistricting Commissions: Congressional Plans, <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/apfcomco.htm> (last visited Dec. 3, 2005) [hereinafter NCSL, Congressional Plans] (same).

149. *See* Persily, *supra* note 52, at 1704. In each of the last four redistricting cycles, at least six redistricting plans were court-drawn. *See* Jamie Carson & Michael H. Crespín, *Comparing the Effects of Legislative, Commission, and Judicial Redistricting Plans on U.S. House Elections, 1972–2002*, at 27 tbl.1 (Mar. 13, 2004) (unpublished manuscript, available at <http://www.msu.edu/~crespinn/Carson%20and%20Crespín%20WPSA%202004.pdf>) (listing a number of court-drawn plans for the last four redistricting cycles).

150. GARRETT, *supra* note 10, at 3. Within this group of twelve, the extent of primary power varies. Some commissions' plans become law without any legislative action. *E.g.*, ARK. CONST. art. VIII, § 4; HAW. CONST. art. IV, § 2; MONT. CONST. art. V, § 14(3)–(4). Others are subject to oversight by state legislatures, which can amend the commission's final plans via a supermajority vote. *E.g.*, WASH. CONST. art. II, § 43(7).

primary authority,¹⁵¹ this Note focuses *only* on these twelve states. Among them, six states—Arizona, Hawaii, Idaho, Montana, New Jersey, and Washington—grant their commissions the ability to draw both congressional and legislative districts.¹⁵² The other six—Alaska, Arkansas, Colorado, Missouri, Ohio, and Pennsylvania—grant their commissions the power to draw only legislative districts.¹⁵³

3. Redistricting Criteria

Commissions generally must adhere to redistricting criteria.¹⁵⁴ These usually include “traditional redistricting principles” such as compactness, contiguity, respect for communities of interest, and respect for political subdivisions.¹⁵⁵ Recently, some states have introduced a requirement that commission-drawn districts meet a measure of competitiveness.¹⁵⁶ Requiring a commission to follow redistricting criteria moves the redistricting process even closer to “a result that better meets the people’s definition of a fair redistricting plan.”¹⁵⁷ While state legislators have made an art of circumventing redistricting criteria, part of the value of independent redistricting commissions lies in the assumption that they are more likely than legislators to adhere faithfully to the criteria.¹⁵⁸

4. Membership

A commission’s members are generally either nominated or appointed by the state’s legislative leadership,¹⁵⁹ or predetermined by each member’s position in the state government.¹⁶⁰ The individuals who serve on independent redistricting commissions can be divided into two categories: political and nonpolitical. Political members are individuals who hold office in the legislative or executive branches of the state’s government.¹⁶¹

151. See Common Cause, Redistricting Takes Center Stage (Mar. 2, 2005), http://www.commoncause.org/site/apps/nl/content3.asp?c=dKLNK1MQIwG&b=395891&content_id={232F2A8A-3771-4E14-B75A-ABD229FD1937}¬oc=1.

152. See NCSL, Legislative Plans, *supra* note 148; NCSL, Congressional Plans, *supra* note 148.

153. See NCSL, Congressional Plans, *supra* note 148.

154. See Kubin, *supra* note 1, at 851. *E.g.*, ARIZ. CONST. art. IV, pt. 2, § 1(14).

155. See Kubin, *supra* note 1, at 851.

156. See, *e.g.*, ARIZ. CONST. art. IV, pt. 2, § 1(14); Issue 4 Petition, *supra* note 16.

157. See Kubin, *supra* note 1, at 852.

158. See *id.* at 853. The issue of which criteria are the most effective is beyond the scope of this Note.

159. See WASH. CONST. art. II, § 43(3).

160. See, *e.g.*, ARK. CONST. art. VIII, § 1.

161. See, *e.g.*, *id.* (setting forth a commission consisting of the state’s Governor, Secretary of State, and Attorney General); OHIO CONST. art. XI, § 1 (setting forth a commission consisting of the

Nonpolitical members are individuals who do not currently hold political office.¹⁶² Oftentimes, nonpolitical members are only allowed to sit on commissions if they have not held partisan office in the years immediately preceding appointment.¹⁶³ Some commissions also forbid their members to hold political office after serving on the commission.¹⁶⁴

5. Structure

States use several different forms of commission structures, including the perfectly bipartisan commission,¹⁶⁵ the bipartisan commission with a tie-breaking vote (“tie-breaking commission”),¹⁶⁶ and the commission with an unbalanced number of partisan members (“unbalanced partisan commission”).¹⁶⁷ Perfectly bipartisan commissions have an equal number of members from or appointed by each of the major political parties.¹⁶⁸ Tie-breaking commissions are “composed of equal members from [or appointed by] a state’s two major political parties plus a tie-breaking chairman.”¹⁶⁹ An unbalanced partisan commission has an unequal number of partisan members, meaning that one of the major parties will outnumber the other.¹⁷⁰ A commission incorporating these structures can enact a districting plan by a simple majority vote.¹⁷¹

B. THE ARGUMENTS FOR NONPOLITICAL MEMBERSHIP AND A TIE-BREAKING STRUCTURE

As the redistricting reform movement spreads across the country, a consensus seems to be forming as to the ideal characteristics of a

state’s Governor, State Auditor, Secretary of State, and two members appointed by the majority and minority party leaders).

162. See, e.g., PA. CONST. art. II, § 17(b); WASH. CONST. art. II, § 43(3).

163. See ARIZ. CONST. art. IV, pt. 2, § 1(3); WASH. CONST. art. II, § 43(3).

164. See ALASKA CONST. art. VI, § 8; ARIZ. CONST. art. IV, pt. 2, § 1(13); HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2(6); MO. CONST. art. III, § 2.

165. Kubin, *supra* note 1, at 847. See, e.g., IDAHO CONST. art. III, § 2.

166. Kubin, *supra* note 1, at 845. See, e.g., ARIZ. CONST. art. IV, pt. 2, § 1.

167. Kubin, *supra* note 1, at 845. See, e.g., ALASKA CONST. art. VI, § 8. Alaska’s five-member commission is created as follows: two members are appointed by the Governor, and the presiding officer of the Senate, the presiding officer of the House of Representatives, and the Chief Justice of the Supreme Court each appoint one member. *Id.* § 8(b).

168. Kubin, *supra* note 1, at 847.

169. *Id.* at 845. See, e.g., ARIZ. CONST. art. IV, pt. 2, § 1.

170. See, e.g., COLO. CONST. art. V, § 48. Colorado’s eleven-member commission is composed of four legislative leaders, three executive department appointees, and three judiciary appointees. *Id.* § 48(a)–(b). Only six of the eleven—a bare majority—may be from the same party. *Id.* § 48(c).

171. See, e.g., ALASKA CONST. art. VI, § 10(b); ARIZ. CONST. art. IV, pt. 2, § 1(12); IDAHO CONST. art. III, § 2(2), (4).

redistricting commission. Commissions with nonpolitical members and a tie-breaking structure have become the focus of reform efforts in the U.S. Congress and numerous states, as well as in scholarly literature,¹⁷² because of their ability to meet the major goals of redistricting reform: preventing partisan manipulation of the process and improving public confidence in the redistricting system.¹⁷³ This section discusses the advantages of nonpolitical membership and the tie-breaking structure in theory and practice.

1. Nonpolitical Membership

The impetus for creating independent commissions is the reality that incumbents often choose to manipulate the districting process for their own partisan interests.¹⁷⁴ Accordingly, reformers strive to form commissions that are shielded from the conflict of interest inherent in legislative redistricting. This is achieved in part by controlling commission membership.¹⁷⁵ Thus, appointing nonincumbents to the panel is an important step toward creating an insulated redistricting commission.¹⁷⁶

Admittedly, a redistricting commission does not and cannot remove politics from the redistricting process entirely.¹⁷⁷ The major political parties typically appoint commission members, who are then constantly lobbied by politicians and various interest groups.¹⁷⁸ Commission members should, however, be able to withstand the influence of politics more impartially than legislators.¹⁷⁹ Although most states with independent commissions still provide for party participation by allowing the major

172. See *supra* note 16 and accompanying text.

173. Adams, *supra* note 77, at 845; Confer, *supra* note 1, at 123–33; Kubin, *supra* note 1, at 839.

174. See *supra* Part II.C.

175. See Kubin, *supra* note 1, at 849.

176. See *id.*

177. See *id.* at 857. See also *White v. Weiser*, 412 U.S. 783, 795–96 (1973) (“Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task.”).

178. See Kubin, *supra* note 1, at 857.

179. See *id.* at 857–58. See also Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 U. COLO. L. REV. 1029, 1030–31 (2001) (noting the highly partisan nature of the selection process for Colorado’s commission).

parties to select commission members,¹⁸⁰ depriving legislators of any direct decisionmaking power mitigates political influence.¹⁸¹

The shortcomings of commissions with political membership demonstrate why nonpolitical membership is so important. Two overturned plans serve as telling examples: Arkansas's plan in 1980¹⁸² and Ohio's plan in 1990.¹⁸³ These commissions' failures have been attributed to the highly partisan nature of their members—Arkansas's commission included the state's governor, secretary of state, and attorney general, while Ohio's was composed of its governor, state auditor, secretary of state, a member chosen jointly by the speaker of the house and the senate leader, and a member chosen by the minority party leaders of the house and senate.¹⁸⁴

2. Tie-breaking Structure

A tie-breaking structure consists of an equal number of members from and appointed by each major political party,¹⁸⁵ and a single tie-breaking chairman,¹⁸⁶ who is typically selected by a compromise vote among the commission's members.¹⁸⁷ Because the tie-breaking member is chosen collaboratively, this final voter is "a candidate chosen surely because of his relative nonpartisanship and fair-mindedness."¹⁸⁸ If the members cannot agree, the state's highest court typically appoints the tie-breaking member.¹⁸⁹

180. Some commissions provide for an equal number of appointments by each party, while others guarantee at least some representation for each party. *See, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 1(3); COLO. CONST. art. V, § 48; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2(2); MO. CONST. art. III, § 2; MONT. CONST. art. V, § 14(2); N.J. CONST. art. IV, § 3(1); OHIO CONST. art. XI, § 1; PA. CONST. art. II, § 17; WASH. CONST. art. II, § 43(2).

181. Simply put, the fact that legislators do not have a vote increases a commission's "prospects of acting in a moderate and fair manner." Kubin, *supra* note 1, at 858.

182. *See* *Jeffers v. Clinton*, 730 F. Supp. 196, 198 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991).

183. *See* *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992).

184. Kubin, *supra* note 1, at 865.

185. *Id.* at 845–46.

186. *Id.* at 845.

187. *Id.*

188. *Id.* As is apparent, the success of a tie-breaking commission hinges on the tie-breaking member's neutrality. While the potential for abuse exists, this section will demonstrate that the tie-breaking commission offers more advantages than alternate models and has the most potential for reforming the redistricting process. *See id.* at 850 n.71.

189. *Id.* Recently, Arizona has placed a further constraint on the identity of its commission's tie-breaking member, requiring that the member "shall not be registered with any party already represented on the . . . commission." ARIZ. CONST. art. IV, pt. 2, § 1(8).

Five of the twelve states that give their commissions primary redistricting authority use tie-breaking structures of varying sizes.¹⁹⁰ The commissions of Arizona, Montana, and Pennsylvania have five members,¹⁹¹ Hawaii's commission has nine members,¹⁹² and New Jersey's commission for redrawing congressional districts has thirteen members.¹⁹³

The states with tie-breaking commissions have differing membership criteria for the partisan commission appointees. In each state, legislative leaders from both parties have the power to nominate or appoint an equal number of members to the commission, within certain limits.¹⁹⁴ Arizona denies membership to individuals who have held political office within the three years preceding appointment and does not allow commissioners to hold office during, or three years after, their terms of office.¹⁹⁵ Hawaii forbids commissioners to run for the state legislature or U.S. House of Representatives for the two elections following the enactment of the commission's redistricting plan.¹⁹⁶ Montana and Pennsylvania deny membership to any public official.¹⁹⁷ New Jersey forbids any "member or employee of the Congress of the United States" to serve on its commission.¹⁹⁸

Notwithstanding variance in size and partisan-member selection criteria, all of these commissions adhere to the principle of equal representation between political parties and include a neutral tie-breaking member.¹⁹⁹

Eight of the twelve states that cede primary authority to redistricting commissions do not use a tie-breaking structure. The commissions of Idaho, Missouri, Washington, and New Jersey currently use perfectly

190. *Id.* § 1(3), (8); HAW. CONST. art. IV, § 2; MONT. CONST. art. V, § 14(2); N.J. CONST. art. II, § 2(1); PA. CONST. art. II, § 17(b).

191. ARIZ. CONST. art. IV, pt. 2, § 1(3); MONT. CONST. art. V, § 14(2); PA. CONST. art. II, § 17(b).

192. HAW. CONST. art. IV, § 2.

193. N.J. CONST. art. II, § 2(1). For a discussion on the classification of New Jersey's commission for drawing legislative districts as an equally bipartisan commission, see *infra* note 200 and accompanying text.

194. ARIZ. CONST. art. IV, pt. 2, § 1(3), (8); HAW. CONST. art. IV, § 2; MONT. CONST. art. V, § 14(2); N.J. CONST. art. II, § 2(1); PA. CONST. art. II, § 17(b).

195. ARIZ. CONST. art. IV, pt. 2, § 1(3), (13). Arizona's commission members must be registered voters, and no two commission members may reside in the same county. *Id.* § 1(3).

196. HAW. CONST. art. IV, § 2.

197. MONT. CONST. art. V, § 14(2); PA. CONST. art. II, § 17.

198. N.J. CONST. art. II, § 2(1)(a).

199. ARIZ. CONST. art. IV, pt. 2, § 1(3), (8); HAW. CONST. art. IV, § 2; MONT. CONST. art. V, § 14(2); N.J. CONST. art. IV, § 3(1), (2); PA. CONST. art. II, § 17(b).

bipartisan commissions.²⁰⁰ Alaska, Colorado, Arkansas, and Ohio each employ structures that allow or guarantee an unbalanced number of partisan members.²⁰¹

a. Theoretical Benefits of a Tie-breaking Structure

A tie-breaking structure's coupling of bipartisan representation with a neutral tie-breaking member enables this commission model to address the problems of legislature-drawn redistricting plans. First and foremost, bipartisan representation gives the minority party an equal voice in the redistricting process, thereby preventing the majority party from imposing an unreasonable plan.²⁰² An active minority influence "keeps the majority party honest" and guarantees representation for the minority party's constituents, who are often drowned out in heavily partisan states.²⁰³ Furthermore, the presence of a tie-breaking vote "encourages commissioners to act in a spirit of moderation and compromise,"²⁰⁴ as both parties must temper their views in an effort to win the neutral member's deciding vote.²⁰⁵

While a tie-breaking structure discourages partisan gerrymanders, there is a concern that it may actually encourage bipartisan gerrymanders.²⁰⁶ All partisan commission members may mutually agree to

200. See IDAHO CONST. art. III, § 2(2); MO. CONST. art. III, § 2; N.J. CONST. art. IV, § 3(1); WASH. CONST. art. II, § 43(2). New Jersey's commission for drawing legislative districts incorporates a model that is similar, but not identical to the tie-breaking model. N.J. CONST. art. IV, § 3(1). The state's legislative commission is initially a ten-member, equally bipartisan commission. *Id.* In the event of deadlock, however, an eleventh member is appointed to the commission by the Chief Justice of the state's Supreme Court. *Id.* Despite its obvious similarities, this commission cannot be considered a true tie-breaking commission because the eleventh member is not a compromise candidate chosen by both parties. Although Washington's commission contains a neutral fifth member, it is classified as a perfectly bipartisan commission because the neutral member is "nonvoting." WASH. CONST. art. II, § 43(2).

201. See ALASKA CONST. art. VI, § 8; ARK. CONST. art. VIII, § 1; COLO. CONST. art. V, § 48; OHIO CONST. art. XI, § 1.

202. Confer, *supra* note 1, at 148.

203. *Id.* Admittedly, the tie-breaking model protects the interests of the two major parties, while excluding the voices of all other groups. In a democracy based on the two-party system and the plurality rule, the "persistent underrepresentation of third parties" is a predictable phenomenon. Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 369. A state's choice of commission structure is not meant to reflect the desirability of the two-party system, but rather to be a practical and efficient means of drawing voting districts in a system that will inevitably "continue to be dominated by two major political parties." *Id.* at 333. For a discussion of the benefits of protecting America's two major parties, see *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-70 (1997).

204. Kubin, *supra* note 1, at 857.

205. *Id.*

206. *Id.* at 847. See BUCHMAN, *supra* note 44, at 208, 213; Issacharoff, *supra* note 17, at 1694-95.

protect their own party's interests and create safe seats, rather than subject themselves to the risk that the tie-breaking member will side with the other party in a deadlock situation.²⁰⁷ Recent studies demonstrate, however, that the effects of bipartisan commission agreements do not resemble bipartisan gerrymanders.²⁰⁸ Specifically, commission-drawn plans result in *higher* levels of electoral competition than those drawn by legislatures.²⁰⁹ No concrete reasons for this phenomenon have yet been proven, but these studies suggest that commission-produced bipartisan agreements may be more competitive because these plans adhere more closely to state-mandated constraints (such as compactness and contiguity) than those drawn by legislatures.²¹⁰

By preventing partisan gerrymandering and possibly increasing competition, tie-breaking commissions may improve the public's confidence in the legitimacy of the redistricting process.²¹¹ Instead of perpetuating the perception of redistricting as a political "bloodsport," devoid of "ideology, social purpose, or broad policy goals,"²¹² tie-breaking commissions maintain an image of fairness and balance because self-interested legislators are removed, the political parties are equally represented, and the decisionmaking process is ostensibly neutral.²¹³ Public confidence may also be buoyed as legislators' time and efforts will be directed toward substantive political matters of greater importance to their constituents.²¹⁴

Perfectly bipartisan commissions, on the other hand, which provide equal representation to the parties but lack a tie-breaking vote,²¹⁵ do not offer the same advantages as tie-breaking commissions because they fail to provide an internal mechanism for addressing a split commission.²¹⁶ Without a tie-breaking member, a perfectly bipartisan commission is prone to deadlock, which in turn burdens the state with the costly task of

207. See Issacharoff, *supra* note 17, at 1694–95. See also BUCHMAN, *supra* note 44, at 208, 213.

208. Carson & Crespín, *supra* note 149, at 28 tbl.2. See Richard Morrill, *A Geographer's Perspective*, in *POLITICAL GERRYMANDERING AND THE COURTS* 212, 227 (Bernard Grofman ed., 1990).

209. Carson & Crespín, *supra* note 149, at 6. See Morrill, *supra* note 208, at 227.

210. See Carson & Crespín, *supra* note 149, at 6.

211. See BUCHMAN, *supra* note 44, at 210; Confer, *supra* note 1, at 6, 8–9; Kubin, *supra* note 1, at 859–60.

212. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 588 (1993).

213. See Kubin, *supra* note 1, at 840, 859–60.

214. See Adams, *supra* note 77, at 855; Confer, *supra* note 1, at 128.

215. See IDAHO CONST. art. III, § 2(2); MO. CONST. art. III, § 2.

216. Kubin, *supra* note 1, at 847.

providing an alternative plan.²¹⁷ Unbalanced partisan commissions are also less attractive than tie-breaking commissions because they fail to guarantee equal representation for each party, and thus allow the party with a one-vote majority to “run roughshod over the other.”²¹⁸

Because of these drawbacks, neither the perfectly bipartisan model nor the unbalanced partisan model will engender significant public confidence. Citizens have no reason to view a reformed redistricting process in a more positive light than legislative redistricting if the reforms do nothing to control partisan manipulation, prevent deadlock, or improve on the plans drawn by the legislature.

b. Practical Benefits of a Tie-breaking Structure

The benefits of a tie-breaking structure have been borne out in practice, as commissions incorporating this structure seem to have complied with redistricting criteria better than commissions using other models.²¹⁹ The litigation records of tie-breaking commissions during the 1990 and 2000 redistricting cycles are particularly instructive of this phenomenon.²²⁰

During the 1990 cycle, not a single plan drawn by tie-breaking commissions was overturned.²²¹ Thus far, the 2000 cycle has produced similarly stellar results. No cases have been filed challenging Hawaii’s plan,²²² and all the lawsuits filed against the Montana and Pennsylvania plans either failed on the merits or were dismissed.²²³ The only tie-breaking commission that encountered difficulty was the Arizona Independent Redistricting Commission. The first plan drawn by this panel

217. *Id. See, e.g.,* Shashank Bengali, *Judicial Panel Hears Views on Legislative Redistricting*, KAN. CITY STAR, Nov. 1, 2001, at B1 (“The Missouri Supreme Court appointed the judges after Republican and Democratic commissions were unable to agree on new district lines after months of debate.”); Neil Modie, *Redistricting Reaches a Political Stalemate*, SEATTLE POST-INTELLIGENCER, Dec. 17, 2001, at A1 (“By flunking the job of redrawing Washington’s congressional and legislative district boundaries, a bipartisan commission has dumped the contentious political chore onto the state Supreme Court.”).

218. Kubin, *supra* note 1, at 846.

219. *See id.* at 853.

220. *See id.* at 862–64. Arizona did not establish its redistricting commission until November 2000. *See Navajo Nation v. Ariz. Indep. Redistricting Comm’n*, 230 F. Supp. 2d 998, 1001 (D. Ariz. 2002).

221. *See Kubin, supra* note 1, at 862–65.

222. Nat’l Conference of State Legislatures, *Redistricting Cases: The 2000s*, <http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/redsum2000.htm> (last visited Dec. 16, 2005) [hereinafter *Redistricting Cases*] (indicating that no lawsuits challenging Hawaii’s or Washington’s redistricting plans were reported to the service).

223. *Id.* (summarizing redistricting challenges and providing case names).

was challenged in court, and the commission was forced to use a revised interim plan for the 2002 elections.²²⁴ The commission's August 2002 plan, despite being briefly overturned, was upheld by an appeals court.²²⁵

Pennsylvania's litigation record provides a particularly illustrative case study because the state uses a commission to draw state legislative districts, and it uses the legislature to draw congressional districts.²²⁶ All of Pennsylvania's legislative district plans have been upheld during the last four redistricting cycles.²²⁷ On the other hand, one part of Pennsylvania's 2002 legislature-drawn congressional plan was declared unconstitutional on equal population grounds,²²⁸ while another part spawned *Vieth*, the Supreme Court's latest partisan gerrymandering holding.²²⁹

In practice, perfectly bipartisan commissions and unbalanced partisan commissions have not fared as well as tie-breaking commissions. During the 2000 redistricting cycle, three states that employ perfectly bipartisan commissions—Idaho, Missouri, and Washington²³⁰—encountered obstacles. Idaho's commission's plan was remanded once and subsequently rejected by the Idaho Supreme Court.²³¹ The commissions of Missouri and Washington both failed to produce plans, which forced the courts to draw districting maps.²³²

224. See *Navajo Nation*, 230 F. Supp. 2d at 1016.

225. See Elvia Diaz, *Court Won't Allow New Districts*, ARIZ. REPUBLIC, May 29, 2004, at B1, available at 2004 WLNR 18591441. See also Redistricting Cases, *supra* note 222 (summarizing challenges to Arizona's redistricting commission).

226. See PA. CONST. art. II, § 17 (establishing a redistricting commission to draw only state legislative districts). For a similar earlier version of this argument, see Kubin, *supra* note 1, at 867–68.

227. *In re* 1991 Pa. Legislative Reapportionment Comm'n, 609 A.2d 132, 134 (Pa. 1992) (upholding a 1991 legislative redistricting plan); *In re* Apportionment Plan for Pa. Gen. Assembly, 442 A.2d 661, 663 (Pa. 1981) (upholding a 1981 legislative redistricting plan); Commonwealth *ex rel.* Specter v. Levin, 293 A.2d 15, 17 (Pa. 1972) (upholding a 1970 legislative redistricting plan). See Redistricting Cases, *supra* note 222 (indicating that Pennsylvania's legislative districts have been upheld).

228. *Vieth v. Commonwealth*, 195 F. Supp. 2d 672 (M.D. Pa. 2002).

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

230. See IDAHO CONST. art. III, § 2(2); MO. CONST. art. III, § 2; WASH. CONST. art. II, § 43(2). Although Washington's commission contains a neutral fifth member, it is classified as a perfectly bipartisan commission because the neutral member is “nonvoting.” WASH. CONST. art. II, § 43(2).

231. See Redistricting Cases, *supra* note 222.

232. See Bengali, *supra* note 217 (discussing the failure of the Missouri commission to come up with a plan); Modie, *supra* note 217 (discussing the failure of the Washington commission to come up with a plan). Prior to its commission being declared unconstitutional under the state's constitution in *In re Apportionment of State Legislature*, 321 N.W.2d 565, 571 (Mich. 1982), Michigan employed a perfectly bipartisan commission. Kubin, *supra* note 1, at 864. During the 1980 redistricting cycle, this commission deadlocked, forcing the courts to redraw the state's districts. *Id.*

3. Conclusion

Reformers and scholars have lauded commissions with nonpolitical members and a tie-breaking structure because they remove the conflict of interest inherent in state legislative redistricting, prevent the majority party from imposing an unfair plan on the minority party, encourage compromise, and may ultimately increase public confidence in the democratic system.

IV. JUDGING THE THREE-JUDGE PANEL

This part discusses whether the three-judge panel set forth in California's Proposition 77—and touted by Governor Schwarzenegger—should be considered as an alternative to the commission models employed in other states. It begins by arguing that further scrutiny of the three-judge panel is advisable because the rejection of Proposition 77 is not necessarily reflective of the public's dissatisfaction with the panel's characteristics. It then proceeds to analyze the potential advantages and drawbacks of the three-judge panel's membership and structure.

A. CALIFORNIA'S UNTELLING REJECTION OF PROPOSITION 77

Given California's propensity for leading the nation in novel legislation and influencing the passage of similar laws across the country,²³³ reformers in other states may refuse to consider the three-judge panel as an alternative commission model, based solely on California's rejection of Proposition 77. The three-judge panel, however, should not be dismissed with such cursory consideration.

Proposition 77's defeat was probably due to a number of disparate factors, thereby making it unlikely that the voters rejected the three-judge panel on its merits. These factors include (1) California's history of resistance to redistricting reform initiatives, (2) fierce bipartisan opposition to Proposition 77, and (3) voters' perception of the special election as a

233. See, e.g., Julia A. Martin & Lisa K. Bjerknes, *The Legal and Ethical Implications of Gag Clauses in Physician Contracts*, 22 AM. J.L. & MED. 433, 470 (1996) (noting that forty-one states followed California's lead in recognizing a cause of action for retaliatory discharge); Heather M. Stearns, Comment, *Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars*, 35 SANTA CLARA L. REV. 1027, 1028 (1995) (noting that "forty-eight other states . . . followed California's lead" in enacting antistalking statutes); Jeff Chu, *California Leads, but a Pack Follows*, TIME, May 16, 2005, at 28, available at 2005 WLNR 7683126 (noting the number of states seeking to copy California's stem-cell research legislation).

referendum on Governor Schwarzenegger's leadership, rather than an evaluation of the issues presented.

1. California's History of Redistricting Reform

Initiatives proposing independent redistricting commissions have never fared well in California.²³⁴ The twenty-five years prior to Proposition 77 were particularly unsuccessful, as the state's voters rejected three propositions that would have established independent redistricting commissions. First, in 1982, the ill-fated Proposition 14 attempted to establish a ten-member, perfectly bipartisan commission appointed by representatives from the major political parties and an appellate court panel.²³⁵ Despite support from Common Cause and the Republican Party, the proposition lost by approximately ten percent of the vote.²³⁶ This failure has been attributed to the Republican Party's "modest" campaign contributions and strong opposition from popular politicians, such as San Francisco Mayor Willie Brown, Senate President Pro Tempore David Roberti, and California State Treasurer Jesse Unruh.²³⁷

In 1984, the Republican Party again sought to establish a ten-member, perfectly bipartisan redistricting commission through Proposition 39.²³⁸ The commission would have been composed of retired judges split evenly between the major parties.²³⁹ Unlike Proposition 14, Proposition 39 generated "an intense and financially costly battle,"²⁴⁰ which the Democratic opposition ultimately won with fifty-five percent of the voters opposing the initiative.²⁴¹ In addition, popular support was constricted by an extensive media campaign that inundated the public with warnings about the perils of judge-drawn districts and the commission's \$3.5 million price tag.²⁴²

234. The proclivity of California voters for rejecting redistricting commissions dates back to 1926 when voters rejected Proposition 20. See LOUIS BROWN, CAPITAL CTR. FOR GOV'T LAW & POLICY, REAPPORTIONMENT IN CALIFORNIA: WHERE WE'VE BEEN WHERE WE GO FROM HERE (2000), http://www.mcgeorge.edu/government_law_and_policy/california_initiative_review/reports/ccglp_cir_reports_Reapportionment.htm. This initiative would have established a backup commission to draw senate and assembly districts in the event that the legislature failed to submit a plan. *Id.*

235. See Gordon E. Baker, *Lessons from the 1973 California Masters' Plan*, in POLITICAL GERRYMANDERING AND THE COURTS, *supra* note 208, at 296, 310.

236. See GARRETT, *supra* note 10, at 5; Baker, *supra* note 235, at 311.

237. See GARRETT, *supra* note 10, at 5; Baker, *supra* note 235, at 309.

238. See GARRETT, *supra* note 10, at 5; Baker, *supra* note 235, at 310.

239. See GARRETT, *supra* note 10, at 5; Baker, *supra* note 235, at 310.

240. Baker, *supra* note 235, at 311.

241. See GARRETT, *supra* note 10, at 5; Baker, *supra* note 235, at 311.

242. BROWN, *supra* note 234; GARRETT, *supra* note 10, at 5; Baker, *supra* note 235, at 311.

California's next opportunity to reform redistricting came in 1990, with Republican-sponsored Proposition 119's plan to establish a twelve-member redistricting commission.²⁴³ Retired appellate judges were to select the panel's members from a list of individuals nominated by "nonpartisan, nonprofit public interest groups."²⁴⁴ Once again, the reform initiative failed, this time due to Democrat-funded opposition from consumer and labor groups that argued the "commission would be controlled by special interests and have no accountability to the voters."²⁴⁵ Proposition 119 was easily defeated with approximately thirty-six percent of the public voting for and sixty-four percent voting against the initiative.²⁴⁶

California's past refusals to establish redistricting commissions suggest that voters may not have based their decisions regarding Proposition 77 on the particular merits of the three-judge panel. The state has rejected two commissions with perfectly bipartisan structures, and one commission that had the potential to incorporate an unbalanced partisan structure. Furthermore, the commission proposed in 1982 would have had members appointed by representatives from both major political parties. The 1984 commission would have been composed of retired judges, and the 1990 commission's members would have been nominated by "nonpartisan, nonprofit public interest groups." Californians' aversion to each of these different commission models suggests that the state's voters would ostensibly refuse *any* commission they were offered.

2. Bipartisan Opposition

Similar to California's previous attempts to establish redistricting commissions, Proposition 77 faced intense political opposition. Yet for the first time, both Democrats and Republicans fought against the reform attempt. Democrats cast the Proposition as a "Republican power play,"²⁴⁷ akin to the Republicans' partisan gerrymander in Texas.²⁴⁸ Republicans

243. BUTLER & CAIN, *supra* note 4, at 146. *See also* GARRETT, *supra* note 10, at 5–6.

244. BUTLER & CAIN, *supra* note 4, at 146. *See also* GARRETT, *supra* note 10, at 5–6.

245. BROWN, *supra* note 234. *See* GARRETT, *supra* note 10, at 5; Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731, 743 (2000) (noting heavy spending against Proposition 119 by California's Democratic leaders and a national Democratic organization).

246. *See* GARRETT, *supra* note 10, at 6.

247. Lynda Gledhill & John Wildermuth, *Lockyer Asks Court to Reject Remap Initiative*, S.F. CHRONICLE, July 9, 2005, at B2, *available at* 2005 WLNR 10757524.

248. *See* Jim Sanders, *Prop. 77 Seeks Bipartisan Image, Backers of Redistricting Hope to Avoid Perception of a GOP Power Play*, SACRAMENTO BEE, Oct. 11, 2005, at A3, *available at* 2005 WLNR 16492418. Notably, not a single Democratic legislator "joined Proposition 77's front lines." *Id.*

from California's congressional delegation—afraid “they could lose seats under the measure because [California] is heavily Democratic”—campaigned against the Proposition as “bad for the Republican party” by mailing notices to registered Republicans stating that “the entire Republican leadership of the House of Representatives, and the chairman of the Republican National Committee, all think Prop. 77 is a disastrous idea.”²⁴⁹

Democratic and Republican representatives from the state's congressional delegation even joined forces to combat the initiative, lobbying the Federal Election Commission (“FEC”) “to allow [the] lawmakers to raise unlimited ‘soft money’ contributions” against Proposition 77.²⁵⁰ Somewhat surprisingly, the FEC granted the legislators' request,²⁵¹ and the “No on 77” campaign raised approximately \$13 million to advertise against the initiative.²⁵² Other groups opposing all of the measures backed by Governor Schwarzenegger raised more than \$35 million.²⁵³ Over \$8.8 million of the opposition's funds were spent campaigning against Proposition 77,²⁵⁴ including the placement of television advertisements aimed at confusing and scaring voters.²⁵⁵

The aggressive bipartisan opposition to Proposition 77 exposes the reticence of incumbents to give up their power over redistricting,²⁵⁶ and likely diverted voter attention away from any potential value of the three-judge panel. Additionally, voters may have been unwilling to explore any potential benefits of the three-judge panel because it was opposed by both parties. Finally, the multimillion dollar advertising campaign construing Proposition 77 as part of a political agenda may have intimidated or frightened Californians into voting against it, regardless of the merits of the three-judge panel's features.

249. Evan Halper & Jordan Rau, *The Special Election; Political Ads Often Aim to Confuse*, L.A. TIMES, Nov. 6, 2005, at B1, available at <http://www.latimes.com/news/local/la-me-ads6nov06,1,6158054.story?ctrack=1&cset=true>.

250. Glen Justice, *Lawmakers Win Bid to Raise Soft Money in California Case*, N.Y. TIMES, Aug. 19, 2005, at A14, available at 2005 WLNR 13054106.

251. *Id.*

252. *A Weekly Update on Proposed State Ballot Measures for a Special Election*, SACRAMENTO BEE, Oct. 29, 2005, at A3, available at 2005 WLNR 17533949. In comparison, the “Yes on 77” campaign raised a relatively modest \$8 million. *Id.*

253. *Id.*

254. *Id.*

255. See Halper & Rau, *supra* note 249. See also Steve Lawrence, *‘People’s Court’ Judge Attacks Donors of Redistricting Measure*, S.F. CHRON., Oct. 26, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/10/26/state/n163129D02.DTL>.

256. See GARRETT, *supra* note 10, at 3 (“Lawmakers jealously guard their ability to shape electoral politics in ways that benefit incumbents and the majority party.”).

3. The Governor's Sinking Approval Ratings and Damaging Association

The defeat of Proposition 77 (and every other initiative Schwarzenegger endorsed in the 2005 special election) was a marked reversal for the once-popular Governor.²⁵⁷ Shortly after his ascension to power after Governor Gray Davis was recalled, Schwarzenegger demonstrated an uncanny ability to gather support for his reform agenda from voters of all political affiliations. Prior to the 2005 special election, Schwarzenegger had taken positions on sixteen ballot measures; the voters agreed with him on thirteen of them.²⁵⁸ Perhaps most impressive were Schwarzenegger's triumphs on the March 2004 ballot, when his endorsement of two initially unpopular budget-related measures reversed public sentiment and resulted in their passage.²⁵⁹

The Governor's knack for achieving broad support had previously translated into political leverage, as legislators bowed to his past requests for change after being pressured with initiatives. For example, in January 2004, Schwarzenegger called on the legislature to enact workers' compensation reform.²⁶⁰ When met with resistance, he threatened to put his own reform initiative on the November ballot and began to collect signatures.²⁶¹ The legislature passed workers' compensation reform four months later.²⁶²

While Schwarzenegger's initial approval ratings and successes were undeniably impressive,²⁶³ his popularity began to sink in 2005, following

257. See Michael Finnegan & Robert Salladay, *Voters Reject Schwarzenegger's Bid to Remake State Government*, L.A. TIMES, Nov. 9, 2005, at A1, available at <http://www.latimes.com/news/local/la-me-election9nov09,0,3181440.story?coll=la-home-headlines>.

258. See Robert Salladay, *Scene Set for Ballot Battles*, L.A. TIMES, Jan. 8, 2005, available at http://www.arnoldwatch.org/articles/articles_000552.php3 (noting the Governor's success on eleven of the fourteen measures on the November 2004 ballot on which he took positions); Vincent J. Schodolski, *Governor Powered by Charm Offensive*, CHI. TRIB., July 1, 2004, at C14 (noting the Governor's success in supporting two budget-related ballot measures on the March 2004 ballot).

259. Schodolski, *supra* note 258.

260. CMTA Capitol Archive, *Governor Sets Deadline for Worker's Compensation Reform* (Jan. 9, 2004), http://www.cmta.net/legupdate.php?topic_id=workcomp&phpSID=993f63a81df5a408da2d7cf9f7256cfe ("The Governor demanded lawmakers pass his workers' compensation proposal by March 1, 2004 or he would seek to place it on the November ballot.")

261. See *id.*; Schodolski, *supra* note 258 (noting Governor Schwarzenegger's efforts to collect signatures for a worker's compensation initiative).

262. California Passes Wide-ranging Workers Compensation Reform, <http://www.systoc.com/newscomments/news/april2004/041604ca.htm> (last visited Dec. 16, 2005).

263. As one journalist has noted,

In little more than three months in office, despite no experience in politics . . . [Governor Schwarzenegger] managed to repeal the car tax increase and have rescinded the law that would allow illegal aliens to hold drivers licenses. A Republican, he persuaded the

his announcement of the special election and his efforts to curb union power.²⁶⁴ The majority of Californians objected to the \$50–\$70 million cost of the special election.²⁶⁵ Additionally, public workers’ unions painted an increasingly negative picture of Schwarzenegger in the media, as educators, nurses, firemen, and policemen vociferously opposed several of his high profile measures.²⁶⁶

Surveys conducted by the Field Poll illustrate Schwarzenegger’s dramatic fall in approval ratings. In February 2005, the Field Poll found that 56% of California voters were inclined to support Schwarzenegger for another term as Governor.²⁶⁷ By June 2005, Schwarzenegger’s ratings had plummeted to a mere 37% approval of the Governor’s performance.²⁶⁸ In November 2005, days before the special election, only 36% of those polled approved of Governor Schwarzenegger.²⁶⁹ The same poll found that voters were more likely to oppose (46%) than support (29%) the Governor because of his call for a special election.²⁷⁰ Those polled cited the cost of the special election and the belief that the Governor’s call for the special election had “more to do with his desire to strengthen his own political position than to bring about needed reforms to state government.”²⁷¹

The decline in popular support for the Governor may also be evidenced by the California legislature’s refusal to enact redistricting

Democratically controlled Legislature to put the \$15 billion bond measure on the March ballot along with a balanced-budget initiative.

Charlie LeDuff, *Budget Woes to the Wind as Schwarzenegger Takes to the Road*, N.Y. TIMES, Feb. 13, 2004, at A16, available at 2004 WLNR 4787947.

264. See John Pomfret & David S. Broder, *Prospects Appear Dim for Initiatives in California Race*, WASH. POST, Nov. 6, 2005, at A4.

265. FIELD RESEARCH CORP., THE FIELD POLL, RELEASE NO. 2158, SCHWARZENEGGER’S JOB RATINGS HIT A NEW LOW 3–4 (2005), available at <http://field.com/fieldpollonline/subscribers/RLS2158.pdf> [hereinafter FIELD POLL NO. 2158] (stating that “[m]ore voters oppose (52%) than favor (37%) the Governor’s call for a November special election, even when the additional costs of holding the election are not listed in the question” and “when voters are informed of the special election’s estimated costs, voters reject the idea overwhelmingly [M]ore than twice as many voters disapprove (61%) as approve (28%) of the special election when told of its estimated \$45 to \$80 million cost.”).

266. John Marelus, *Governor Addresses San Diego Pension Plight*, COPLEYS NEWS SERV., Oct. 14, 2005 (noting the Governor’s “angry disputes with nurses unions over hospital staffing requirements and teachers unions over education funding,” and his “earn[ing] the full wrath of organized labor, especially police and firefighter unions”).

267. See FIELD RESEARCH CORP., THE FIELD POLL, RELEASE NO. 2176, SPECIAL ELECTION HURTING GOVERNOR’S CHANCES FOR RE-ELECTION 2 (2005), available at <http://field.com/fieldpollonline/subscribers/RLS2176.pdf> [hereinafter FIELD POLL NO. 2176].

268. See FIELD POLL NO. 2158, *supra* note 265, at 1.

269. See FIELD POLL NO. 2176, *supra* note 267, at 2.

270. See *id.* at 1.

271. See *id.*

reform on its own when faced with the Governor's initiative threat. Rather than bow to the Governor's demand as it did for workers' compensation reform, the legislature in 2005 presumably believed that the Governor's threat of a redistricting initiative lacked credibility due to his plummeting public support.²⁷²

Angered by the cost of the election and lacking confidence in Schwarzenegger, many Californians cast protest votes against all of the measures supported by the Governor—including Proposition 77.²⁷³ Poll data supports the observation that the public's response to Proposition 77 had a great deal to do with its disapproval of Schwarzenegger. When the proposal to establish an independent redistricting commission was first announced, the public narrowly supported the idea,²⁷⁴ but as Governor Schwarzenegger's popularity declined, so did support for Proposition 77.²⁷⁵ Furthermore, “[d]espite the lack of majority support for [Proposition 77], many likely voters (69%) believe[d] that the way the governor and legislature go about the redistricting process needs change.”²⁷⁶

4. Conclusion

Proposition 77's defeat was due, at least in part, to a confluence of historical factors, strong campaigns by bipartisan opposition, and the citizenry's expression of dissatisfaction with the initiative's primary advocate. Thus, California's failure to enact redistricting reform must be considered in context, and should not be presumed to speak for the merits of the three-judge panel.

B. THE THREE-JUDGE PANEL UNDER REVIEW

This section analyzes the three-judge panel's membership and structure to determine whether it is a viable commission model for redistricting reform.

272. See *supra* Part III.A.

273. See Laura Kurtzman, *Schwarzenegger's Special Election Threatens to Turn Off Voters*, SAN JOSE MERCURY NEWS, Nov. 6, 2005, at 1A; *Arnold Schwarzenegger: Samson Shorn?*, ECONOMIST, Oct. 1, 2005, at 69, available at 2005 WLNR 15443139.

274. See FIELD RESEARCH CORP., THE FIELD POLL, RELEASE NO. 2153, VOTERS NARROWLY BACK GOVERNOR'S LEGISLATIVE REDISTRICTING PLAN 1 (2005), available at <http://field.com/fieldpollonline/subscribers/RLS2153.pdf>.

275. See *id.*; FIELD RESEARCH CORP., THE FIELD POLL, RELEASE NO. 2167, SCHWARZENEGGER'S AND STATE LEGISLATURE'S APPROVAL RATINGS REMAIN LOW (2005), available at <http://field.com/fieldpollonline/subscribers/RLS2167.pdf>; FIELD POLL NO. 2158, *supra* note 265.

276. PUB. POLICY INST. OF CAL., SPECIAL SURVEY ON CALIFORNIANS AND THE INITIATIVE PROCESS vi (2005).

1. Overview

The redistricting commission proffered in Proposition 77 is a three-member panel of retired federal or state judges, authorized to draw California's congressional and legislative districts.²⁷⁷ The panel's membership is pulled from a pool of twenty-four retired judges created by the state's Judiciary Council.²⁷⁸ Judges who have held elected partisan public office, changed their party affiliation since their appointment or election to judicial office, or received income from political bodies or partisan individuals during the twelve months prior to the creation of the pool are not eligible to be on the commission.²⁷⁹ Additionally, no more than twelve of the twenty-four judges in the pool may come from the same political party.²⁸⁰

The state's legislative leaders—the Speaker of the State Assembly, the Minority Leader of the Assembly, the President Pro Tempore of the Senate, and the Minority Leader of the Senate—each nominate three judges from the pool for a position on the panel.²⁸¹ None of the nominated judges may be a member “of the same political party as that of the legislator making the nomination.”²⁸² From among the twelve nominees, three names are randomly drawn.²⁸³ These judges will make up the panel, so long as there is at least one member from each of the state's two largest political parties among those selected.²⁸⁴ If selected for the panel, a judge cannot run for any state or federal office in any district drawn by the panel on which he or she serves.²⁸⁵

277. PROPOSITION 77, *supra* note 20, § 1(a)–(b). Had the initiative passed, the panel would have been constituted immediately to redraw California's current state and congressional districts. *Id.* § 1(a). Following this one-time, mid-decade redistricting, the three-judge panel would then only be reconstituted in the year following each decennial census to draw the state's districts for the next election. *Id.* § 1(a).

278. *Id.* § 1(c)(2)(A).

279. *Id.* Specifically, a judge may not receive any payment from the California State Legislature, the U.S. Congress, a political party, or a partisan candidate.

280. *Id.*

281. *Id.* § 1(c)(2)(C).

282. *Id.* No judge may be nominated more than once and, if the legislators fail to nominate the required number of judges, the Chief Clerk of the Assembly shall choose the remaining nominee(s). *Id.* § 1(c)(2)(C)–(D).

283. *Id.* § 1(c)(2)(F).

284. *Id.*

285. *Id.* § 1(c)(2)(B). The panel's members also may not accept any California state public employment or public office, other than judicial employment or a teaching position, for at least five years following their appointment to the panel. *Id.*

Districts drawn by the three-judge panel must adhere to a number of constraints, in addition to complying with constitutional equal population mandates and the federal Voting Rights Act.²⁸⁶ All districts must be contiguous, respect political subdivisions to the “greatest extent practicable,” and be as “compact as practicable except to the extent necessary to comply with the [contiguity and respect for political subdivisions] requirements.”²⁸⁷ Additionally, no “census blocks shall be fragmented unless necessary to satisfy the requirements of the United States Constitution,” and “no consideration shall be given as to the potential effects on incumbents or political parties.”²⁸⁸ Furthermore, the panel is forbidden from using any data regarding the residency of candidates or concerning the party affiliation and voting history of electors.²⁸⁹ Lastly, the panel must adopt its final plan by unanimous agreement.²⁹⁰

2. Analysis

This section analyzes the viability of the three-judge panel by examining its membership and structure.²⁹¹ Because nonpolitical membership and a tie-breaking structure are regarded as advantageous commission characteristics and are often incorporated by redistricting reformers, the evaluation of the three-judge panel is based on its ability to approximate the benefits of these commended features.

a. Membership

The identities of a commission model’s members are essential to the commission’s viability as a redistricting reform tool because membership is

286. *Id.* § 2(a)–(b).

287. *Id.* § 2(a)–(g).

288. *Id.* § 2(h)–(i).

289. *Id.* § 2(i). The panel’s decisions are subject to some public scrutiny. The panel must record all meetings and sessions between the three judges and hold at least three hearings where the citizenry and members of the Legislature may give them input and comments. *Id.* § 1(f)(1)–(2). Additionally, the panel must submit a draft of its plan to the Legislature for comment. *Id.* § 1(f)(3).

290. *Id.* § 1(g). During the next election, the voters have the opportunity to approve or disapprove the initial plan’s use in subsequent elections—the Proposition requires the Secretary of State to place the plan on the ballot as if it were an initiative. *Id.* § 1(h). If the voters approve the plan, it is used in all subsequent elections until the next decennial census. *Id.* § 1(g)–(h). In the event that the voters reject the plan, a new three-judge panel is created by the same selection process to draw a redistricting plan for the next statewide and general election. *Id.* § 1(i).

291. The effectiveness of the specific redistricting criteria imposed on the three-judge panel is beyond the scope of this Note. For an analysis of these criteria and their potential for creating more competitive districts in California, see DOUGLAS JOHNSON ET AL., THE ROSE INST. OF STATE & LOCAL GOV’T, RESTORING THE COMPETITIVE EDGE 25–32 (2005).

the means by which a redistricting commission can distance itself from the inevitably self-interested decisionmaking of state legislators.²⁹² The membership of the three-judge panel adheres to this principle by removing control of redistricting from state legislators and giving it to retired state or federal judges.²⁹³ But the experiences of existing redistricting commissions—especially those commissions with predetermined memberships of state politicians—have shown that merely placing control outside the legislature is insufficient. Thus, the real issue surrounding the three-judge panel’s membership is whether judges are *far enough* removed from the consequences of redistricting decisions to be impartial.

Since the introduction of Proposition 77’s three-judge panel, many commentators have questioned the ability of retired judges to serve as impartial members of a redistricting commission. Some have argued that the three-judge panel is akin to the politician-dominated panels of Arkansas and Ohio, which include the states’ governors and secretaries of state.²⁹⁴ Some studies indicate that active judges are highly partisan when it comes to redistricting decisions—federal judges were twice as likely to vote against redistricting plans drawn by the opposite political party as they were to vote against plans drawn by their own political party.²⁹⁵ In practice, state judges are potentially even more partisan because unlike federal judges, who have lifetime appointments, state judges are political actors constantly fighting for reelection.²⁹⁶ While these arguments against the involvement of *active* state and federal judges may be valid, Proposition 77’s three-judge panel circumvents this point of contention by appointing only *retired* state and federal judges who have not received any income from political bodies for at least one year prior to their nominations.²⁹⁷

292. See *supra* Part II.C.1.

293. PROPOSITION 77, *supra* note 20, § 1(a).

294. See George Skelton, *Loosening Term Limits: Key Lies in Honest Remapping*, L.A. TIMES, Jan. 13, 2005, at B4 (“[J]udges are not immune from politics; they’re creatures of it.”). See also Janet Stidman Eveleth, *Preserving Our Judicial Independence*, MD. B.J., July–Aug. 2004, at 58, 60 (describing the “shadows of impropriety” cast over judges and the diminishing public confidence in the judiciary because of the growing number of contentious judicial campaigns and the negative rhetoric, special interest involvement, and cost that they entail).

295. See Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413, 417 (1995). See generally COX & KATZ, *supra* note 3.

296. See Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 887–88 (2001).

297. PROPOSITION 77, *supra* note 20, § 1(c)(2)(A).

Retired judges are probably sufficiently insulated from politics because, unlike the members of the Ohio and Arkansas commissions, they are no longer employed in any branch of the government. Additionally, California's past experiences with districts drawn by retired judges are encouraging.²⁹⁸ Retired-judge-drawn districts were successfully used during the 1970 and 1990 redistricting cycles when the California legislature could not agree on a plan.²⁹⁹ In both instances, the California Supreme Court appointed three retired judges to draw new district lines.³⁰⁰ The resulting districts withstood litigation³⁰¹ and fostered competitive elections.³⁰² Nationwide studies have shown comparable results for districts produced by ad hoc panels of judges.³⁰³

Moreover, the panel's nomination procedures may further buffer the retired judges from politics. A state's majority and minority leaders may not nominate judges from "the same political party as that of the legislator making the nomination,"³⁰⁴ presumably motivating the legislative leaders to choose the most moderate judges from outside of their own parties. As a result, the panel's three members will likely be drawn from a pool of the most nonpartisan judges available, and the panel's members will be among the least likely to engage in partisan tactics. Retired judges may also bring an image of equity and balance to the redistricting process, as studies have shown that the courts receive the highest public approval ratings of any government institution.³⁰⁵ Thus, the involvement of judges has the potential to restore public confidence in the electoral process.

b. Structure

298. See Javier Aguilar, *Congressional Redistricting in Texas: Time for a Change*, 27 STETSON L. REV. 781, 807-08 (1998) (noting the success of California's post-1990 districts); Baker, *supra* note 235, at 296 (detailing the success of California's post-1970 districts).

299. See Aguilar, *supra* note 298, at 807; Baker, *supra* note 235, at 296.

300. Patrick Basham, *Guarding the Democratic Henhouse*, CATO INST., Jan. 13, 2005, <http://www.cato.org/dailys/01-13-05.html> (noting that there was a competitive election following the 1990 redistricting plan).

301. See *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd*, 515 U.S. 1170 (1995) (upholding California's judge-drawn districts for the 1990 redistricting cycle); *Legislature v. Reinecke*, 516 P.2d 6 (Cal. 1973) (upholding California's judge-drawn districts for the 1970 redistricting cycle).

302. Basham, *supra* note 300 (noting that there was a competitive election following the 1990 redistricting by the special masters).

303. Carson & Crespín, *supra* note 149, at 1, 22; Morrill, *supra* note 208, at 227-28.

304. PROPOSITION 77, *supra* note 20, § 1(c)(2)(C).

305. See generally JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICA'S BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 99 (2002) (indicating that the Supreme Court is "consistently . . . the most favored institution of government").

The three-judge panel in Proposition 77 deviates from the popular tie-breaking structure in three significant ways. First, the panel does not guarantee equal bipartisan representation for the major political parties, although it does provide for each of the state's major parties to have at least one panel member.³⁰⁶ Thus, one party on the commission will outnumber the other by a two-to-one margin. Second, there is no provision for a neutral tie-breaking member chosen by the panel's partisan members.³⁰⁷ Finally, the three-judge commission can enact a plan only with a unanimous vote, as opposed to a simple majority vote.³⁰⁸

At first glance, the three-judge panel's failure to guarantee equal representation of the parties would appear to give the party that has a majority of commissioners the ability to impose its will on the minority party.³⁰⁹ But the three-judge panel does not allow this result because its structure requires a unanimous vote to enact any redistricting plan.³¹⁰ While this feature prevents one party from "running roughshod" over the other, it may approximate the perfectly bipartisan commission's "invitation to deadlock" because of the absence of a tie-breaking vote.³¹¹ The single member from the minority party may have no incentive to compromise or work with the two members from the opposite party because the minority member has veto power over every proposed plan. Additionally, the members of the commission are not compelled to work together at the beginning of the process to select a tie-breaking member, or temper their views in an effort to win the tie-breaking vote of a neutral member.

Notwithstanding the lack of a tie-breaking member, the three-judge panel may achieve moderation and compromise via the panel's selection procedures. With a state's legislative leaders restricted to nominating judges from the opposite political party,³¹² the panel's three members will likely be among the most nonpartisan judges available. Thus, rather than forcing the panel to compromise in order to gain the support of the tie-breaking member, the individual members of the three-judge panel might be naturally disposed to such cooperative behavior.

306. PROPOSITION 77, *supra* note 20, § 1(c)(2)(F).

307. *Id.*

308. *Id.* § 1(g).

309. Confer, *supra* note 1, at 148.

310. PROPOSITION 77, *supra* note 20, § 1(g).

311. Kubin, *supra* note 1, at 846.

312. PROPOSITION 77, *supra* note 20, § 1(c)(2)(C).

C. THE THREE-JUDGE PANEL: AN IMPERFECT BUT VIABLE MODEL

The three-judge panel's membership and structure offer advantages similar to, and potentially superior to, the redistricting commissions currently in use. A panel of retired judges is likely adequately insulated from political pressures and has demonstrated its ability to draw successful districts in the past. Furthermore, the previous successes of the three-judge panel and the public's favorable perception of the courts may engender greater public support. Additionally, forcing a state's legislators to nominate judges from outside their own parties will probably result in a moderate panel with less partisan views and greater willingness to compromise.

The three-judge panel's structure, while not providing equal representation for the major parties or a tie-breaking vote, prevents partisan manipulation through its unanimous vote requirement. By giving each member veto power over every plan, the three-judge panel, unlike an unbalanced partisan commission, guarantees that the minority party cannot be dominated by the majority party. Furthermore, any fears of deadlock are reduced by the panel's presumptively moderate membership. These potential benefits of the three-judge panel make it a commission model worthy of consideration by redistricting reformers.

V. CONCLUSION

Due to the recent prevalence and increasing success of political gerrymanders, as well as growing dissatisfaction with the results of state legislator-drawn districts, calls to create independent redistricting commissions have escalated throughout the United States. In attempting to answer these calls, reformers and scholars have largely focused on establishing commissions that incorporate nonpolitical membership and tie-breaking structure. Commissions with these characteristics have garnered support because members from outside of a state's political branches are less likely than state legislators to manipulate the redistricting process for partisan interests. Also, the tie-breaking structure prevents one party from imposing an unfair plan on the other, while encouraging moderation and compromise through the presence of a neutral member. Additional support for these characteristics stems from their ability to withstand litigation and create competitive districts when used in practice.

Notwithstanding the benefits of the established nonpolitical, tie-breaking model, California Governor Arnold Schwarzenegger supported Proposition 77, a proposal for a redistricting commission unlike any ever

created. The panel's novelty and the subsequent defeat of Proposition 77—due in no small part to a combination of California's history of redistricting reform, the intense opposition to the initiative by leaders of both major parties, and the electorate's dissatisfaction with Governor Schwarzenegger—threaten to obscure the three-judge panel's capacity to meet the goals of redistricting reform.

Notably, the three-judge panel's characteristics may share some of the benefits of a commission with nonpolitical membership and the tie-breaking structure. Retired judges are sufficiently insulated from the partisan interests of the state legislature, and the panel's selection criteria likely encourage moderation and compromise. Further, the three-judge panel prevents partisan manipulation of the redistricting process through its unanimous vote requirement. In a redistricting reform movement that seeks to prevent gerrymandering and increase public confidence in the electoral process, these qualities make the three-judge panel a viable alternative to other independent redistricting commission models. Despite Proposition 77's defeat, reformers should consider the three-judge panel as a possible means of answering the call for redistricting reform.

