ARIZONA STATE LEGISLATURE V. ARIZONA INDEPENDENT REDISTRICTING COMMISSION AND THE FUTURE OF REDISTRICTING REFORM

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INTRODUCTION

In 2018, voters in five different states passed successful initiatives that made it harder for politicians to choose their own districts and easier for independent voices to shape the redistricting process.[1] This unprecedented transformation in the redistricting process would not have happened without the Supreme Court's decision in *Arizona Legislature v. Arizona Independent Redistricting Commission*.[2] That decision confirmed the constitutionality of Arizona's own Independent Redistricting Commission and created an outlet for citizens frustrated with dysfunctional governance and unresponsive legislators to initiate reforms through the initiative process. All of these 2018 initiatives created or expanded state redistricting commissions which are to some degree insulated from the direct sway of the majority party in their respective legislatures.[3]

The Arizona Independent Redistricting Commission has proven to be a model for some states and an inspiration for many more with respect to

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1. Brett Neely & Sean McMinn, *Voters Rejected Gerrymandering in 2018, but Some Lawmakers Try to Hold Power*, NRP (Dec. 28, 2018, 5:00 AM), https://www.npr.org/2018/12/28/675763553/voters-rejected-gerrymandering-in-2018-but-some-lawmakers-try-to-hold-power [https://perma.cc/3RJH-39P9] (noting voters in Ohio, Colorado, Michigan, Missouri, and Utah approved initiatives to limit partisan redistricting).

2. 135 S. Ct. 2652 (2015).

3. Neely & McMinn, *supra* note 1; *see Colorado 2018 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Colorado_2018_ballot_measures [https://perma.cc/45A6-WK4W] (last visited June 2, 2019); *Missouri 2018 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Missouri_2018_ballot_measures [https://perma.cc/W9D9-7HBE] (last visited June 2, 2019); *Michigan 2018 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Michigan_2018_ballot_measures [https://perma.cc/CFH2-7TWZ] (last visited June 2, 2019); *Ohio 2018 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Ohio_2018_ballot_measures [https://perma.cc/ZB8W-HVGM] (last visited June 2, 2019); *Utah 2018 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Utah_2018_ballot_measures [https://perma.cc/FSS5-F9P5] (last visited June 2, 2019).

reforming the political process. The Arizona Independent Redistricting Commission is one of a relatively few commissions that is both relatively autonomous from the legislature and also makes competitive districts an explicit objective within its criteria.[4] These two dimensions—in terms of independence for the legislature and the specific criteria which guides these commissions—are both central to their ultimate impact on the redistricting process.

While these diverse redistricting commissions vary significantly in their level of independence from the political branches and in terms of the objectives which the commissions must comply with, together they represent a turning point in how legislative districts are created. In many states, politicians—usually in the form of the legislature and occasionally with input from the Governor of the state—still make these determinations.[5] In other states, judges step in, either as part of the formal redistricting process or as a result of litigation which throws the question into the hands of the judiciary.[6] However, in a growing number of states, voters have taken the initiative to insulate the mapmaking process from both the political branches and the legislature.[7] In order to prevent outcomes shaped exclusively by dominant political parties, these states have given the power over redistricting to independent commissions.[8]

The framers of the United States Constitution were concerned that state legislatures might seek to thwart their plan for representation in the United States Congress by manipulating the voting procedures for federal office.[9] For this reason, the Elections Clause explicitly empowers the Congress to step in and "make or alter" state rules as they relate to the "Times, Places, and Manner" of elections to Congress.[10] While states in practice remain the drivers of elections rules even for federal office, the Elections Clause granted Congress a very broad power to overrule state laws related to federal elections if it chose to exercise that prerogative. The importance of the Clause is highlighted by the fact that the framers considered and rejected giving a

4. *See* ARIZ. INDEP. REDISTRICTING COMMISSION, https://www.azredistricting.org/ [https://perma.cc/8HR2-9MU3] (last visited June 2, 2019).
5. *See, e.g.*, ARK. CONST. art. 8, § 4; ALA. CODE § 29-1-2.5 (2019).
6. *See, e.g.*, N.C. GEN. STAT. §§ 1-267.1, 120-2.4 (2019).
7. *See, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 1(3)–(8).
8. *See, e.g.*, *id.*
9. THE FEDERALIST NO. 68 (Alexander Hamilton).
10. U.S. CONST. art. I, § 4, cl. 1.

similarly broad power to Congress to alter state laws more generally.[11] As outlined in the *Arizona State Legislature v. Arizona Independent Redistricting Commission* decision, the Elections Clause is a "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate."[12]

Congress has used its power to create a uniform national election day for congressional elections and to require broad standards for the creation of congressional districts.[13] While at-large or statewide congressional districts were once possible and used in some states, Congress has subsequently required that all states with more than one member of the House of Representatives to divide themselves into congressional districts.[14] Until Congress acted in 1842 to make districts "composed of contiguous territory" mandatory, there was tremendous variation in state practices.[15] In 1872, Congress required that congressional districts have as nearly equal numbers of inhabitants as practicable.[16] In 1901, Congress, required districts of compact territory.[17] In 1929, Congress left the district system up to the states to determine.[18] At-large and multi-member congressional districts were somewhat common in the late nineteenth and early twentieth centuries but were later banned by Congress in 1967 with the requirement of single-member districts.[19]

In recent years, some litigators and judges have argued that the Elections Clause provides a constraint on partisan gerrymandering. For example, a three-judge panel in North Carolina ruled that the gerrymandering done by

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11. *See generally* THE FEDERALIST NO. 45 (James Madison) ("The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former.").

12. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2672 (2015).

13. *See* Michael T. Morley & Franita Tolson, *Elections Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/articles/article-i/elections-clause-morley-tolson/clause/23 [https://perma.cc/H9NM-2882] (last visited June 2, 2019).

14. 2 U.S.C. § 2c (2018).

15. Act of June 25, 1842, § 2, 5 Stat. 491.

16. Act of Feb. 2, 1872, ch 11, 17 Stat. 28.

17. Act of Jan. 16, 1901, ch. 101, 31 Stat. 733.

18. Act of June 18, 1929, ch. 28, 46 Stat. 21. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 550 (1954).

19. Anne Kim, *More At-Large Districts*, DEMOCRACY: NO. 39 (Winter 2016), https://democracyjournal.org/magazine/39/more-at-large-districts/ [https://perma.cc/Q3Q9-HG22].

the legislature in that state violated the Elections Clause.[20] The Supreme Court has explained the significance of the Elections Clause as being "a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[21]

However, the Supreme Court has consistently been reluctant to date to rule that any particular legislative map represents a constitutional violation based on partisan gerrymandering. The Court seemed to be moving toward this approach in its *Bandemer* case, but the subsequent *Vieth* case nearly closed the door on such claims of partisan gerrymandering.[22] Justice Anthony Kennedy's concurrence suggested that it remained possible that a future court might find a standard for adjudicating such cases.[23] However, in the recent *Gill v. Whitford* case, the Supreme Court again stepped back from finding a constitutional violation even as the techniques and impact of gerrymandering have become much more sophisticated and pronounced over time.[24] In 2019, the Supreme Court will hear at least three more partisan gerrymandering cases and may well shut the door for good on these type of claims in the future.[25]

These recent developments in the Supreme Court's gerrymandering cases substantially increases the significance of the *Arizona State Legislature v. Arizona Independent Redistricting Commission* decision. With the likelihood of federal court intervention shrinking and the incentives for state legislators to use new technologies to maximize their electoral self-interest are growing, there are few paths to reform in most states that do not involve the initiative process. While not all states allow for this exercise in direct citizen governance, the 2018 wave of redistricting reform initiatives appears to be catalyzing reform even in states without these tools of direct democracy.

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20. *See* Richard Pildes, *Symposium: The Elections Clause as a Structural Constraint on Partisan Gerrymandering of Congress*, SCOTUSBLOG (June 19, 2018, 5:38 PM), https://www.scotusblog.com/2018/06/symposium-the-elections-clause-as-a-structural-constraint-on-partisan-gerrymandering-of-congress/ [https://perma.cc/Q5M2-33W4].

21. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995).

22. *Compare* Davis v. Bandemer, 478 U.S. 109 (1986) (holding political gerrymandering cases are justiciable under the equal protection clause), *with* Vieth v. Jubelirer, 541 U.S. 267 (2004) (holding political jerrymandering claims were nonjusticiable).

23. *See Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

24. *See* Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018).

25. In January 2019, the Supreme Court granted certiorari to a case that consolidated two cases challenging North Carolina's congressional map. Rucho v. Common Cause, 139 S. Ct. 782 (2019) (mem.). The Supreme Court also granted certiorari to a case challenging Maryland's congressional map. Lamone v. Benisek, 139 S. Ct. 783 (2019) (mem.).

I. DIRECT DEMOCRACY AND REDISTRICTING COMMISSIONS

From Ancient Greece to small New England town meetings, direct democratic participation has long been viewed as an alternative or complement to representative government.[26] The initiative, through which citizens initiate lawmaking, and the referendum, through which citizens ratify or reject action by the legislature, are the most prevalent forms of direct democracy in the United States.[27] Although the United States is one of only five established democracies that have never held a national referendum, seventy-one percent of Americans live in a state or city that allows popular initiatives.[28] Using initiatives, voters may write statutes and, in some states, even amend the constitution provided supporters collect enough signatures and the voters ultimately approve. Citizens in many states may use also popular referenda to place laws previously enacted by local or state legislative bodies before the voters for approval or rejection. Direct democracy significantly shaped the allocation of the budget in a number of states and cities.[29] Voter initiatives have also driven significant political reform within a diverse and growing range of states.[30]

Arizona was born in the Progressive Era, and Arizona's constitution included direct democracy as a core part of its legislative process and constitutional structure.[31] In response to perceived corruption on the part of political parties that distorted the will of the people, the Progressives launched a multi-track approach to make the citizenry more central to the governing process.[32] The tools of initiative, referendum and the recall of

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26. *See* MOGENS HERMAN HANSEN, THE TRADITION OF ANCIENT GREEK DEMOCRACY AND ITS IMPORTANCE FOR MODERN DEMOCRACY 23 (2005).

27. *See Initiative, Referendum and Recall*, NAT'L CONF. ST. LEGISLATURES (Sept. 20, 2012), http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx [https://perma.cc/G3H5-QEXH].

28. Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1096 (2005).

29. *See* John G. Matsusaka, *A Case Study on Direct Democracy: Have Voter Initiatives Paralyzed the California Budget?*, *in* THE BOOK OF THE STATES 337, 337, 339 (The Council of State Gov'ts ed., 2010) (noting that "33 percent of California's 2009–2010 state spending was locked in by [voter] initiatives" and that a ballot initiative imposed a "requirement of a two-thirds vote of the legislature to increase any state tax"); Elizabeth Garrett & Mathew D. McCubbins, *When Voters Make Laws: How Direct Democracy Is Shaping American Cities*, 13 PUB. WORKS MGMT. & POL'Y 39 (May 5, 2008) ("City, county and municipal ballot propositions are often used to raise funds for new infrastructure projects.").

30. *See* Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 15 (1997).

31. *See* JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 8–9 (2d ed. 2013).

32. *See* Persily, *supra* note 30, at 13–14, 18 (1997); *see* Daniel A. Smith et al., *The Educative Effects of Direct Democracy: A Research Primer for Legal Scholars*, 78 U. COLO. L. REV. 1371,

elected officials became key features of state constitutions during this era even as they never became part of national lawmaking.[33] Twenty-two of the twenty-five states which allow for referenda enacted it between 1898 and 1918.[34] Direct democracy is also particularly associated with the American West. Nearly three-quarters of the states which allow for direct citizen initiatives are located West of the Mississippi River.[35] In recent decades, initiatives were also more likely to emerge from within Western states. In fact, in the 1980s California and Oregon accounted for nearly one-third of all statewide initiatives.[36]

Direct democracy under certain conditions can overcome the challenge posed by legislative entrenchment. This is more likely in policy domains which directly affect the self-interest of legislators such as term limits, campaign finance regulation, and redistricting.[37] Yet some scholars view direct democracy as a threat to disadvantaged minorities and highlight the lack of deliberative process involved in this form of lawmaking.[38] In response, they recommend that courts apply a stricter level of scrutiny in reviewing citizen initiatives.[39] Other scholars reject the idea that "differential standards of review" should be applied to citizen initiatives because they do

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1376 (2007); *Election Central: The Progressives and Direct Democracy*, CONST. RTS. FOUND., http://www.crf-usa.org/election-central/the-progressives.html [https://perma.cc/82Z9-BFX5] (last visited June 2, 2019).

33. *See Initiative, Referendum and Recall*, *supra* note 27.

34. Persily, *supra* note 30, at 15; *History of Initiative and Referendum in the U.S.*, BALLOTPEDIA, https://ballotpedia.org/History_of_initiative_and_referendum_in_the_U.S. [https://perma.cc/G5V3-HQLX] (last visited June 2, 2019).

35. *See* Persily, *supra* note 30, at 13.

36. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE 1 (2002), http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/IandR_report.pdf [https://perma.cc/X2GQ-PTTL].

37. *See* Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 420 (2004).

38. *See id.* at 417.

39. *See* Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 305–06; *see also* Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. Rev. 1366, 1445 n.344 (2005) ("[I]t is far from clear that the initiative is *reliably* useful as a means for effecting consensus-improvement reforms opposed by political insiders."); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1549 (1990) (arguing that "direct democracy bypasses . . . safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest"); Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949 (2005).

not believe that the lack of legislative bargaining and formal legislative hearings by themselves require greater judicial scrutiny.[40]

Direct democracy in the United States remains a work in progress. Twenty-four states and the District of Columbia as well as many local governments allow direct initiatives.[41] There is evidence of an increase in the use of direct democracy in recent decades due largely to the use of direct constitutional initiatives.[42] In at least sixteen states that allow for direct constitutional initiatives, this expansion of direct democracy builds on Thomas Jefferson's suggestion that each generation should play a role in shaping its constitution.[43] However, many state legislatures and city councils fail to fully implement the results of citizen initiatives and sometimes reverse the outcome through the legislative process.[44] Successful initiative implementation generally requires detailed policy language, easily observable compliance, and penalties for non-compliance.[45]

In recent years, many states have expanded efforts to make it more difficult for initiatives to succeed. In some states, broad areas of policy are insulated from potential initiatives.[46] The threshold number of signatures is a key barrier for any initiative campaign, and this threshold is generally set by the legislature. In a number of states super-majority requirements make it more difficult for initiatives supported by simple-majorities to prevail.[47] The single-subject rule blocks many initiatives from making the ballot because it disallows those which encompass more than one policy matter which is often a subjective judgment ultimately made by state courts.[48] This rule is a feature of nearly all states with direct initiatives and prevents citizens from combining different initiatives into an omnibus effort.[49] More recent

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40. Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373, 374–75.

41. *See* Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 695 (2010); Logan T. Mohs, *Alaska's Initiative Process: The Benefits of Advance Oversight and a Recommendation for Change*, 31 ALASKA L. REV. 295, 302 (2014).

42. *See* Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 299 (2008).

43. *Id.* at 299; Darrell D. Jackson, *Teaching Tomorrow's Citizens: The Law's Role in Educational Disproportionality*, 5 ALA. C.R. & C.L. L. REV. 215, 218–19 (2014).

44. *See* ELISABETH R. GERBER ET AL., STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY 4–6 (2001).

45. *See id.* at 6.

46. *See* Jessica A. Levinson, *Taking the Initiative: How To Save Direct Democracy*, 18 LEWIS & CLARK L. REV. 1019, 1023 (2014).

47. *See id.* at 1023–1024.

48. *See* Cooter & Gilbert, *supra* note 41, at 690–91.

49. *See id.* at 689.

legislative efforts to rein in new initiatives have included limiting those who can circulate petitions or limiting how those petition circulators can be compensated.[50] Other recent reforms in some states include requiring a certain threshold or percentage of signatures from each congressional district within the state to make it more challenging to collect enough signatures to get on the ballot.[51]

In some cases, legislators seek to challenge the outcome of initiatives in the courts. This is more likely in states, such as Arizona, where there is a higher bar for overruling citizen initiatives. The Voter Protection Act adopted through initiative in 1998 prohibits outright legislative repeal of successful initiatives in Arizona and requires three-quarters of the legislature to amend such laws.[52] The Voter Protection Act largely explains why the *Arizona State Legislature v. Arizona Independent Redistricting Commission* case was brought to the United States Supreme Court rather than resolved through ordinary state legislative processes.[53]

Independent redistricting commissions have generally been a creation of citizen initiative and a product of direct democracy either directly or indirectly. However, early efforts to reform redistricting via initiative were largely unsuccessful. Of the first twelve efforts to pass redistricting initiatives, three-quarters failed and only four passed.[54] In the twentieth century, only Arkansas in 1936,[55] Oklahoma in 1962,[56] and Colorado in 1974[57] successfully passed redistricting initiatives. In the year 2000, Arizona passed its own initiative to create the Arizona Independent Redistricting Commission.[58] These early failures over many decades make the four redistricting reform initiatives passed in 2018 all the more remarkable.[59] In

50. Levinson, *supra* note 46, at 1037–38; *see, e.g.*, Howard Fischer, *Arizona House OKs More Hurdles to Intiative Process*, ARIZ. DAILY STAR (May 9, 2019), https://tucson.com/news/local/arizona-house-oks-more-hurdles-to-initiative-process/article_50a79ffc-7b75-50b1-96fb-21b23e23196d.html [https://perma.cc/V4ZE-869K] (citing S.B. 1451, 54th Leg., 1st Reg. Sess. (Ariz. 2019)).

51. *See id.* at 1037.

52. *See* ARIZ. CONST. art. IV, pt. 1, § 1; *see also* Paul Bender, *The Arizona Supreme Court and the Arizona Constitution: The First Hundred Years*, 44 ARIZ. ST. L.J. 439, 445–46 (2012).

53. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015).

54. Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 377 (2007).

55. *Id.* at 346–47.

56. *Id.* at 350–52.

57. *Id.* at 355–57.

58. *Id.* at 368–71.

59. Lee Drutman, *One Big Winner Last Night: Political Reform*, VOX (Nov. 7, 2018, 4:57 PM), https://www.vox.com/polyarchy/2018/11/7/18072204/2018-midterms-political-reform-winner [https://perma.cc/7WVF-89MZ].

general, redistricting initiatives prevailed only when they were not strongly opposed by the major party in the legislature, especially when this party was unified, and only succeeded when the prevailing winds from national developments or support from leading media organs proved significant.[60]

Of the twelve states which initially used redistricting commissions as the primary mechanism for mapmaking, three-quarters were also states that allowed for the initiative.[61] Of those states with some type of redistricting commission, such as an advisory or back-up commission, sixty-five percent were states that allowed for the initiative.[62] Although most of the early adoption of redistricting commissions was not directly through citizen initiative, a number of scholars have concluded that the threat of an initiative was central to the adoption in the vast majority of commission states.[63] Of the twenty states which used commissions before the last decade, redistricting commissions were nearly twice as common in states with a constitutional or statutory initiative.[64]

In Arizona, the redistricting cycle before Proposition 106—creating the redistricting commission—was passed demonstrated a stalemate in the existing legislative process of mapmaking. The Arizona House of Representatives and the Arizona Senate were deadlocked in the early 1990s and could not find agreement in drawing new lines which resulted in extensive litigation over redistricting.[65] Since the parties could not agree, the federal courts were forced to impose lines.[66] When the legislature drew a new plan it was rejected by the United States Department of Justice so that a final

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60. *See* Stephanopoulos, *supra* note 54, at 378–79.

61. ELIZABETH GARRETT, IRI REPORT: REDISTRICTING: ANOTHER CALIFORNIA REVOLUTION? 4 (2005), http://www.iandrinstitute.org/docs/REPORT%202005-1%20Redistricting.pdf [https://perma.cc/J2X5-BF94].

62. *Id*.

63. *See id.* at 4–5; *see, e.g.*, Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99 (1996).

64. *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, 1004–05 (2005) (finding that states with ballot initiatives are more likely to adopt independent districting commissions and term-limit laws, but that with respect to many other political process questions, differences between initiative and non-initiative states are small); *see also* Caroline J. Tolbert, *Changing Rules for State Legislatures: Direct Democracy and Governance Policies*, *in* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 171, 179–182 (Shaun Bowler et al. eds., 1998); John Pippen et al., *Election Reform and Direct Democracy: Campaign Finance Regulation in the American States*, 30 AM. POL. RES. 559, 562 (2002) (finding that ballot initiative facilitates political process reforms).

65. *See* Kristina Betts, *Redistricting: Who Should Draw the Lines? The Arizona Independent Redistricting Commission as a Model for Change*, 48 ARIZ. L. REV. 171, 191 (2006).

66. *See id.*

plan was only in place in time for the 1994 elections.[67] Arizona's redistricting initiative was noteworthy for its broad bi-partisan support and its strong endorsement from some reform groups, such as Common Cause and the League of Women Voters.[68] Endorsements from the Mayor of Phoenix, the lack of opposition on the part of the Governor, and support from other executive branch officials contributed to high levels of voter support despite opposition from all five of the state's members of Congress.[69] The state's leading newspaper, the *Arizona Republic*, galvanized significant attention for the initiative and strongly criticized those Republicans in the legislature who opposed the initiative.[70] Ultimately, the citizens of Arizona passed the initiative with a strong majority of fifty-six percent to forty-four percent.[71]

Between 1912 and 2000, the Arizona Legislature had the full authority under the Arizona Constitution to draw congressional districts and state legislative districts subject only to possible gubernatorial veto.[72] Proposition 106 in 2000 shifted much of this authority to the Arizona Independent Redistricting Commission.[73] Under the Arizona Independent Redistricting Commission, the leadership from both parties in both houses of the legislature together select four of the five Commissioners.[74] These Commissioners must be selected from among the final pool of those screened to be qualified by the Arizona Commission on Appellate Court Appointments. The fifth member, who serves as Chair of the Commission, is selected by the other four members after similar screening by the Arizona Commission on Appellate Court Appointments and must be a registered independent.[75]

In Arizona, the Commission must begin its work with a grid map that reflects only equal population, compactness, and contiguousness.[76] In modifying the baseline grid map, the commissioners are required to account for four additional criteria: compliance with the United States Constitution and Voting Rights Act, respect for communities of interest, incorporation of

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

68. *See* Stephanopoulos, *supra* note 54, at 368–69.

69. *Id.* at 369–70.

70. *See id.*

71. *Id.* at 371.

72. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 997 F.Supp.2d 1047, 1048 (D. Ariz. 2014).

73. *See id.*

74. Betts, *supra* note 65, at 191.

75. *Id.*

76. *See id.* at 192; *Frequently Asked Questions*, ARIZ. INDEP. REDISTRICTING COMMISSION, https://azredistricting.org/about-irc/FAQ.asp [https://perma.cc/A4SS-6EGM] (last visited Mar. 13, 2019).

visible geographic features and existing political boundaries, and finally "creation of competitive districts where there is no significant detriment to other goals."[77]

Arizona's successful initiative did not immediately lead to a rush to redistricting reform in other states. Efforts in Ohio failed several years later in 2005 by a margin of more than two to one.[78] In California, that same year, a redistricting reform initiative was defeated with nearly sixty percent of the electorate voting in opposition.[79] Nonetheless, Arizona's model proved to be an ongoing inspiration to redistricting reformers in other states. In 2008, Californians used the initiative process to successfully create the Citizen Redistricting Commission.[80] In 2010, voters in California rejected a subsequent ballot initiative which would have eliminated the Citizens Redistricting Commission before it began its work.[81] In other states, successful citizen initiatives sought to clarify the rules that govern the redistricting process without creating independent commissions. For example, Florida passed constitutional initiatives in 2010 which sought to establish "fairness" in redistricting by using "city, county, and geographical boundaries" and by requiring geographic contiguity, compactness, and that "legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party."[82]

In California, the Citizen Redistricting Commission borrowed some elements from Arizona's model but tried to even further insulate the commission structure from the legislature of the state. In California, the Commission includes fourteen members from varied ethnic backgrounds and geographic locations and must include five Democrats, five Republicans, and

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77. *Frequently Asked Questions*, *supra* note 76.

78. LEAGUE OF WOMEN VOTERS OF OHIO & COMMON CAUSE OHIO, OHIO'S GERRYMANDERING PROBLEM: WHY HAVEN'T WE FIXED THIS YET? 1, 5 (n.d), https://my.lwv.org/sites/default/files/leagues/wysiwyg/%5Bcurrent-user%3Aog-user-node%3A1%3Atitle%5D/ohios_gerrymanding_problem.pdf [https://perma.cc/6YA9-TJRV].

79. RAPHAEL J. SONENSHEIN, LEAGUE OF WOMEN VOTERS OF CAL., WHEN THE PEOPLE DRAW THE LINES: AN EXAMINATION OF THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION 10 (2013), https://cavotes.org/sites/default/files/jobs/RedistrictingCommission%20Report6122013.pdf [https://perma.cc/CX6C-SPSC].

80. Richard L. Hasen, *Assessing California's Hybrid Democracy*, 97 CALIF. L. REV. 1501, 1504 (2009) (describing that voters supported redistricting reform only when governor teamed up with good government groups such as Common Cause).

81. SONENSHEIN, *supra* note 79, at 9.

82. FLA. CONST. art. III, § 21; *Florida Legislative District Boundaries, Amendment 5 (2010)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Legislative_District_Boundaries,_Amendment_5_(2010) [https://perma.cc/32TD-4EAY] (last visited Mar. 13, 2019).

four independents.[83] The initial screening process in California requires applications to be reviewed by three independent auditors from the Bureau of State Audits to select the 120 most qualified applicants for interviews. The interview process reduces this pool to a total of sixty finalists which must include twenty Democrats, twenty Republicans, and twenty independents. Although the legislative leadership does not select the members of the Commission they are entitled to remove up to twenty four of the sixty finalists from the pool. At that point, the State Auditor randomly draws the names of three Democrats, three Republicans, and two independents from among the finalists. The initial eight commissioners then select the remaining six commissioners which must consist of two Democrats, two Republicans, and two independents. The Commission is guided by criteria established by voters through the initiative, including that districts must be contiguous, compact and regular in shape, and must respect local political boundaries and communities of interest to the extent possible.[84] Significantly the Commission mandate states that: "Districts shall not be drawn to favor or discriminate against an incumbent, candidate, or political party."[85]

A number of scholars have pointed to weaknesses in both the Arizona and California models of independent redistricting commissions.[86] While both commissions are explicit in requiring a balance in terms of membership, neither is quite so specific in offering guidelines for the necessary legal and technical support of the commission. Both commissions are overly dependent on the legislature of their respective states for funding their efforts.[87] Finally, in Arizona, the Commission is also subject to potential political interference in term of the removal of its members through joint action of the Governor and a super-majority within the legislature.[88] The Governor, with the support of two-thirds of the Arizona Senate may remove any member of the Commission for cause.[89] Some scholars are skeptical that legislators should play any role in mapmaking and endorse the citizen model which California mostly adopted.[90] Others go a step further and suggest a model more along

83. CAL. CONST. art. XXI, § 2(c)(2); *FAQ*, ST. CAL.: WE DRAW LINES, https://wedrawthelines.ca.gov/faq/ [https://perma.cc/GQ4E-X4M3] (last visited May 14, 2019).

84. *See FAQ*, *supra* note 83.

85. *Id.*

86. *See, e.g.*, Cain, *supra* note 67, at 1834–37.

87. *See id.*

88. *See* ARIZ. CONST. art. IV, pt. 2, § 1(10).

89. *Id.*

90. *See* Steven Huefner, *Don't Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. CONST. L. & PUB. POL'Y 37, 56 (2010).

the lines of juries which California does not fully approximate in which randomly selected citizens exercise authority over redistricting.[91]

The impact of independent redistricting commissions was evident even before the Supreme Court ruled on the constitutionality of using citizen initiatives to create them in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[92] An analysis of the five states which redistricted using relatively independent systems for the first time in the twenty-first century found statistically significant impact.[93] Specifically, perceived partisanship in voting behavior of congressional representatives was reduced according to the most widely used measures of this indicator.[94] While redistricting commissions have significantly reduced the likelihood of conflict of interest within the process, they have not entirely eliminated partisan suspicions associated with the mapmaking process.[95] Yet these commissions vary tremendously in their degree of separation from legislators and in their authority to act independently to create the boundaries of legislative districts.[96]

While the early data on independent redistricting commissions highlighted their potential to reduce partisan polarization and increase competitiveness, later studies raised questions about these findings. In California, legislators strayed further from their district's average voter in 2012 in terms of their voting record.[97] These findings led some scholars to conclude that in California, at least, "polarization has increased and the quality of representation has declined."[98] However, in Iowa—which uses a unique form of redistricting that involves an independent government agency drawing the maps—decennial redistricting appears to lower partisan bias in districts and

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91. *See* J.H. Snider, The Case for Redistricting Juries: Lessons from British Columbia's Revolutionary Experiment in Democratic Reform 2 (May 4, 2009) (unpublished manuscript), https://www.ssrn.com/abstract=1405605 [https://perma.cc/H5DF-2ZZD].

92. 135 U.S. 2652 (2015).

93. David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 VILL. L. REV. 57, 87 (2009).

94. *Id.* at 83–84.

95. *See* Cain, *supra* note 67, at 1812.

96. *See id.* at 1813–14.

97. *See* Thad Kousser, Justin Phillips & Boris Shor, *Reform and Representation: A New Method Applied to Recent Electoral Changes*, 6 POL. SCI. RES. & METHODS 809, 810 (2018).

98. Micah Altman & Michael McDonald, *Redistricting and Polarization*, *in* AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION 45, 57 (James A. Thurber & Antoine Yoshinaka eds., 2015).

led to one of the lowest margins of victories for incumbents among the forty three states analyzed.[99]

One of the biggest questions about redistricting commissions is whether they increase the competitiveness within districts in future elections. Competitiveness in elections can be measured in different ways.[100] While the margin of victory or success rates of incumbents are significant indicators, the likelihood of electoral challengers in the first places is in and of itself significant to the possibility of competition.[101] One major study of the impact of redistricting commissions found that these institutions did encourage strong, well-financed challengers to run for election and decreased the chance that incumbents would run unopposed.[102] However, it did not find that commissions either reduced the typical margin of victory of incumbents or increased the likelihood incumbents would lose re-election.[103]

In practice very few redistricting processes are truly independent from political interference and very few redistricting commissions make competitive districts a priority in their mapmaking process.[104] In fact, very few states outside of Arizona even include competitiveness as an explicit criteria guiding the work of these redistricting commissions, and in some states, the commissioners are actually barred from examining data related to partisan performance as part of the mapmaking process.[105] To the degree that redistricting commissions are not generating districts as competitive as many reformers initially hoped, one competing hypothesis is that geography—rather than partisan gerrymandering—remains the biggest constraint that keeps mapmakers from drawing more competitive districts remains significant.[106] Nonetheless, independent redistricting commissions, on balance, appear to offer greater potential for increasing electoral competition

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99. *See* Phillip Burgoyne-Allen, Effects of Redistricting Methods on Election Outcomes and Congressional Polarization, 2002–2010, at 28–29 (July 2013) (unpublished honors research thesis, Ohio State University), https://kb.osu.edu/handle/1811/55695 [https://perma.cc/C774-FQAM].

100. *See* James B. Cottrill, *The Effects of Non-Legislative Approaches to Redistricting on Competition in Congressional Elections*, 44 POLITY 32, 40 (2012).

101. *See id.* at 49.

102. *See id.* at 32.

103. *See id.* at 46.

104. *See* Michael P. McDonald, *Drawing the Line on District Competition*, 39 PS: POL. SCI. & POL. 91, 92 (2006).

105. *See Redistricting Criteria*, NAT'L CONF. ST. LEGISLATURES (Apr. 23, 2019), http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx [https://perma.cc/Y3RX-6GDC].

106. *See* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 256 (2013).

in at least some districts especially when compared to traditional redistricting processes governed by the dominant party in a given state.[107]

II. THE SUPREME COURT AND GERRYMANDERING

Since Congress has historically been unwilling to intervene when it comes to gerrymandering by state legislatures and since most states do not currently have independent redistricting commissions, the only way for many citizens to challenge these practices is in the courts. The Supreme Court was, for most of our constitutional history, reluctant to involve itself in the longstanding practice of gerrymandering by state legislatures.[108] The "redistricting revolution" of the 1960s transformed the way state legislatures drew maps but its initial focus was on ensuring equal population across districts.[109] Partisan gerrymandering has been recognized by members of the Supreme Court as a challenge that may rise to a constitutional violation but the Court itself has yet to strike down a single district map on this basis and appears unlikely to meaningfully step into the breach to tackle the issue of partisan gerrymandering.[110]

In the case of *Colegrove v. Green*, Justice Felix Frankfurter writing for the Court reasoned that it was not the proper role for the Court to correct even extreme examples of gerrymandering.[111] In Illinois, three voters in districts with much larger populations than other congressional districts brought suit under Article I and the Equal Protection Clause of the Fourteenth Amendment.[112] The Supreme Court rejected the case on political question grounds, concluding that: "We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. . . . [D]ue regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination."[113]

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107. *See* ERIC MCGHEE, ASSESSING CALIFORNIA'S REDISTRICTING COMMISSION 3, 6 (2018), https://www.ppic.org/wp-content/uploads/r-0317emr.pdf [https://perma.cc/9QW3-Q579].

108. *See* Russell Wheeler, *The Supreme Court and Partisan Gerrymandering Cases*, BROOKINGS (Feb. 28, 2018), https://www.brookings.edu/blog/unpacked/2018/02/28/the-supreme-court-and-partisan-gerrymandering-cases/ [https://perma.cc/SB96-43ZJ].

109. *See* Thomas L. Brunell, *The One Person, One Vote Standard in Redistricting: The Uses and Abuses of Population Deviations in Legislative Redistricting*, 62 CASE W. RES. L. REV. 1057, 1059–61 (2012).

110. *See* Adam Liptak, *Supreme Court Takes Up New Cases on Partisan Gerrymandering*, N.Y. TIMES (Jan. 4, 2019), https://www.nytimes.com/2019/01/04/us/politics/gerrymandering-supreme-court.html [https://perma.cc/5V4V-ZY4W].

111. *See* Colegrove v. Green, 328 U.S. 549, 554 (1946).

112. *Id.* at 550.

113. *Id.* at 552.

Justice Frankfurter elaborated that he thought it would be improper for the courts to enter what he called the "political thicket."[114] The Court recognized that until 1842, when Congress stepped in, there was

> the greatest diversity among the States in the manner of choosing Representatives because Congress had made no requirement for districting. Congress then provided for the election of Representatives by districts. . . . The Reapportionment Act of 1862 required that the districts be of contiguous territory. In 1872 Congress added the requirement of substantial equality of inhabitants. . . . But the 1929 Act . . . dropped these requirements.[115]

Given this history of congressional action and inaction, Justice Frankfurter argued that for the Supreme Court to intervene would be to "cut very deep into the very being of Congress."[116]

Within sixteen years of the *Colegrove* decision, the Supreme Court reversed itself in *Baker v. Carr* over Justice Frankfurter's forceful objections.[117] In *Baker*, the issue was that the Tennessee state legislature had failed for more than sixty years to reapportion the state legislature.[118] As a result, the distribution of population across state legislative districts was dramatically malapportioned.[119] The Supreme Court in *Baker* highlighted that there was no question to be decided by a coequal branch of the federal government as the facts were limited to action with respect to state legislative districts.[120] It similarly distinguished the *Colegrove* case for its reliance on the Guarantee Clause of the Constitution while the appellants in *Baker* relied upon the Equal Protection Clause.[121] The Supreme Court held in *Baker* that "the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled

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114. *Id.* at 556.

115. *Id.* at 555.

116. *Id.* at 556. *But see id.* at 570 (Black, J., dissenting) ("While the Constitution contains no express provision requiring that Congressional election districts established by the states must contain approximately equal populations, the Constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast.").

117. Baker v. Carr, 369 U.S. 186, 208–09, 266–349 (1962).

118. *Id.* at 191.

119. *Id.* at 192.

120. *Id.* at 226.

121. *Id.* at 228–29.

to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."[122]

The *Baker* decision launched the so-called "redistricting revolution" of the 1960s, which resulted in challenges to state apportionment schemes across the country.[123] Within nine months, litigation was underway in thirty-four states challenging the constitutionality of state redistricting.[124] In *Reynolds v. Sims*, the Supreme Court extended its ruling in a case involving the malapportionment of the Alabama legislature.[125] The Court reasoned that

> Since the achieving of fair and effective representation for all citizens is concededly the best aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. . . . [A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.[126]

In *Reynolds*, the Court established the principle of one person one vote with its strong rejection of geographic discrimination of any kind in terms of the population of various districts: "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause."[127] In

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122. *Id.* at 237. *But see id.* at 266–67 (Frankfurter, J., dissenting) ("The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. . . . Disregard of inherent limits in the effective exercise of the Court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."). See also Michael McConnell arguing that in applying the Equal Protection Clause, the Supreme Court "adopted a legal theory for addressing the issue that was wrong in principle and mischievous in its consequences." Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 104 (2000).

123. Jeffrey C. Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 841 (1997).

124. Devon Galloway, *The Numbers Matter: An Update to the Implementation of New York's Prison Gerrymandering Law*, 4 COLUM. J. RACE & L. 205, 210 (2014).

125. Reynolds v. Sims, 377 U.S. 533, 566 (1964).

126. *Id.* at 565–66.

127. *Id.* at 568.

subsequent cases, the Supreme Court reaffirmed that the population distribution across districts must be as nearly equal as practicable.[128]

Chief Justice Earl Warren reflecting on his tenure on the Supreme Court as he neared retirement suggested that redistricting

> is perhaps the most important issue we have had before the Supreme Court. If everyone in this country has an opportunity to participate on . . . equal terms with everyone else and can share in electing representatives who will be truly representative of the entire community and not some special interest, then most of these problems that we are now confronted with would be solved through the political process rather than through the courts.[129]

While the Supreme Court's "redistricting revolution" eliminated the diversity in population among districts across the country, the legislative intervention by Congress in 1967 was significant in eliminating the use of at-large electoral districts. At the time, only Hawaii and New Mexico used at-large election districts to fill more than a single statewide seat in the House of Representatives.[130] Congress was concerned that the judiciary might require at-large elections for the House in certain states and believed that only a single-member district mandate could ensure that "the majority can provide for the protection of the minority voice in the councils of government."[131] Senator Howard Baker, who introduced legislation to abolish at-large multi-member districts explained: "I think it is high time that we look to the principles and requirements that maximum protection of the rights of all people and maximum responsiveness to their needs will be attained in the House of Representatives only by guaranteeing the principle of single-member districts."[132] In addition, Congress created an additional set of

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128. *E.g.*, Wesberry v. Sanders, 376 U.S. 1, 18 (1964) ("While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal . . . ."); *see Reynolds*, 377 U.S. at 579–80 ("Whatever the means of accomplishment, the overriding objective, must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State. . . . So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment . . . . But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population based representation.").

129. *Excerpts from Interview with Warren on His Court's Decisions*, N.Y. TIMES, June 27, 1969, at 17.

130. *See* 113 CONG. REC. 34,365 (1967) (statement of Sen. Baker).

131. *Id.*

132. *Id.* at 34,366.

requirements for some states to finalize their congressional maps due to the Voting Rights Act requirement that covered jurisdictions have their final maps approved by the Department of Justice.[133]

Just as the Supreme Court was imposing more uniformity in the population of state and federal legislative districts, the Congress was imposing more uniformity in the form of federal districts. Over time, the courts increasingly held congressional districts to a zero deviation standard for population deviations even as larger deviations in state legislative plans were considered presumptively valid.[134] Yet with relatively few constraints, party strategists using increasingly sophisticated technology became ever more effective in ensuring that the legislative driven mapmaking process secured optimal results for their preferred political party. Thus, in the wake of the Voting Rights Act and the "redistricting revolution," partisan gerrymandering came to be one of the most significant distortions within the redistricting process for Congress. In the *Davis v. Bandemer* case, the Supreme Court considered a case from the state of Indiana in which litigants claimed that the partisan gerrymander in that state "unconstitutionally diluted" their votes in important districts, violating their rights.[135] The Supreme Court held in *Bandemer* that claims of partisan gerrymandering were justiciable but could not agree on an appropriate standard of judicial review for this type of claim.[136] The *Bandemer* court therefore left it to future cases before the Supreme Court to give greater clarity on the nature and limits of partisan gerrymandering.

In *Vieth v. Jubelirer*,[137] the Supreme Court appeared to close the door on its core holding in *Bandemer* but a concurrence by Justice Kennedy left open the possibility of a future Court taking up the issue again.[138] After the 2000 round of redistricting, lower courts were more receptive to claims based on *Bandemer* than in the previous decade. In part, this is because of the extreme partisan gerrymanders utilized by some state legislatures. For example, in

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133. Leah R. Sauter, *"Hispanic in Everything but Its Voting Patterns": Redistricting in Texas and Competing Definitions of Minority Representation*, 46 COLUM. J.L. & SOC. PROBS. 251, 254 (2012).

134. *See* Karcher v. Daggett, 462 U.S. 725, 734 (1983); *see also* Cox v. Larios, 542 U.S. 947, 949 (2004) (striking down a state legislative plan with a deviation of 9.9%); Brown v. Thomson, 462 U.S. 835, 846–48 (1983) (upholding the legislative redistricting of state with maximum deviation of 89%); Burns v. Richardson, 384 U.S. 73, 97 (1966) (upholding a Hawaii districting plan based on registered voters).

135. Davis v. Bandemer, 478 U.S. 109, 113 (1986).

136. *See id.*

137. 541 U.S. 267 (2004).

138. *See id.* at 306 (Kennedy, J., concurring) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.").

Michigan a party line vote paired six incumbent members of Congress to compete in just three districts.[139] In Pennsylvania, after the 2000 census the state lost two congressional seats.[140] A party line vote in the Pennsylvania legislature created a map that maximized partisan advantage in future congressional elections.[141] The plaintiffs claimed that they were denied full participation in the political process under the one person one vote standard requirement and equal protection of the laws under the Fourteenth Amendment because the new districts were "meandering and irregular" and "ignor[ed] all traditional redistricting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage."[142]

Justices Antonin Scalia, William Rehnquist, Sandra Day O'Connor, and Clarence Thomas argued that the Framers provided a solution to partisan gerrymandering by state legislatures in Article I by permitting Congress to "make or alter" those districts if it wished.[143] These Justices claimed that the search for a standard after *Bandemer* had failed:

> Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate. . . . Eighteen years of judicial effort with virtually nothing to show for it justifies revisiting the question whether the standard promised by *Bandemer* exists.[144]

The plurality concluded that: "[The Constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups."[145] These four members of the Court voted to overrule *Bandemer* and find all future political gerrymandering claims non-justiciable.[146]

However, Justice Kennedy in his concurrence was not ready to give up the search for a manageable standard for courts to assess political gerrymandering. Like the plurality, he feared that judicial intervention over partisan redistricting "would commit federal and state courts to unprecedented intervention in the American political process."[147] Justice

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139. *See* Note, *Political Gerrymandering 2000–2008: "A Self-Limiting Enterprise"?*, 122 HARV. L. REV. 1467, 1475–77 (2009).

140. *Id.* at 1477.

141. *See id.* at 1477–78.

142. *Vieth*, 541 U.S. at 272–73 (plurality opinion) (alteration in original) (quoting Complaint).

143. *Id.* at 275.

144. *Id.* at 279, 281.

145. *Id.* at 288.

146. *Id.* at 306.

147. *Id.* (Kennedy, J., concurring).

Kennedy was concerned about the lack of "neutral principles" for creating district boundaries and the "absence of rules to limit and confine" the role of courts.[148] Yet he clearly rejected the plurality's conclusion that *Bandemer* must be overruled absent an "easily administrable standard."[149] Instead, Justice Kennedy held out hope that a standard would emerge in the future and suggested that the:

> First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.[150]

Justice Kennedy's search for such a manageable standard ended fourteen years later with the Supreme Court's decision in *Gill v. Whitford*[151] in 2018. In the *Gill* case, the plaintiffs brought claims under both the First and Fourteenth Amendments of the Constitution against the state of Wisconsin after an extreme partisan gerrymander by the state legislature there.[152] In oral argument, Justice Kennedy returned to the themes of his *Vieth* opinion highlighting the First Amendment concerns raised by the redistricting process.[153] Justice Stephen Breyer highlighted the significance of persistent partisan asymmetry, or the ways in which the map treats political parties differently over time.[154] Yet Chief Justice John Roberts returned to the same concerns raised by the court in *Vieth*: "We will have to decide in every case whether the Democrats win or the Republicans win. . . . [T]he whole point is you're taking these issues away from democracy and you're throwing them into the courts."[155]

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148. *Id.* at 306–07.

149. *See id.* at 310.

150. *Id.* at 314. *But see id.* at 333, 336, 341 (Stevens, J., dissenting) ("Thus, the Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose. . . . The racial gerrymandering cases therefore supply a judicially manageable standard for determining when partisanship, like race, has played too great a role in the districting process. . . . What is clear is that it is not the unavailability of judicially manageable standards that drives today's decision. It is, instead, a failure of judicial will to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially.").

151. 138 S. Ct. 1916 (2018).

152. *Id.* at 1922–23.

153. *See* Transcript of Oral Argument at 4, 26–27, 63, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161).

154. *Id.* at 11–13.

155. *Id.* at 37, 40.

Writing for the Court, Chief Justice Roberts contrasted the statewide remedies required in cases such as *Baker* and *Reynolds* with the more limited remedies that he argued could resolve the individual harms posed by political gerrymandering:

> Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted. That harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter's harm . . . requires revising only such districts as are necessary to reshape the voter's district.[156]

The majority clearly limited potential standing in future cases to the harm suffered by an individual voter in a given district rather than any possible statewide harm related to the collective representation of voters in the statehouse. Chief Justice Roberts concluded that the court lacked jurisdiction to decide the case before it because insufficient harm was alleged in terms of the burden on the plaintiffs' own votes arising through the "voter's placement in a 'cracked' or 'packed' district."[157] The Court in *Gill* rejected future claims based on shared partisan interest: "It is a case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan preferences."[158] After *Gill*, it became clearer that the Supreme Court would not step in to remedy partisan gerrymandering and that any substantial reform of these practices would have to come from elsewhere.

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156. *Gill*, 138 S. Ct. at 1930–31.

157. *Gill*, 138 S. Ct. at 1931.

158. *Id.* at 1933. *But see id.* at 1938–39, 1941 (Kagan, J., dissenting) ("It is because the Court views the harm alleged as vote dilution that it (rightly) insists that each plaintiff show packing or cracking in her own district to establish her standing. But when the harm alleged is not district specific, the proof needed for standing should not be district specific either. And the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines. The complaint in such a case is instead that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects. . . . Courts have a critical role to play in curbing partisan gerrymandering. . . . Indeed, the need for judicial review is at its most urgent in these cases. For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms.").

III. THE SUPREME COURT AND DIRECT DEMOCRACY

With neither Congress nor the Supreme Court willing to intervene to challenge partisan gerrymandering by state legislatures, citizen initiatives are among the few options for those seeking reform. Yet the Elections Clause of the Constitution formally says that in the first instance the power over the rules that govern elections "shall be prescribed in each State by the Legislature thereof."[159] With the rise of the initiative and referendum during the Progressive Era and the growing incorporation of these mechanism into diverse state constitutions, the Supreme Court was repeatedly confronted by the question of who really is the legislature within these states and what legitimate authority could be exercised through direct democracy.[160] Over more than a century, the Supreme Court has developed an extensive jurisprudence with respect to direct democracy and its limits.[161] The Court's earliest cases defined the boundaries of citizen lawmaking relatively expansively.[162] More recent cases have established sharp limits on initiatives which touch on representation in Congress or affect the rights of targeted groups of citizens.[163] Yet before the *Arizona State Legislature v. Arizona Independent Redistricting Commission* case, the Supreme Court had never before clarified the power of citizens themselves to re-write the redistricting process and insulate it from the direct control of the state legislature.

In *Pacific States Telephone and Telegraph Co. v. Oregon*, the Supreme Court reviewed a challenge to the Oregon Constitution's provision for direct constitutional initiative brought under the Guarantee Clause of the United States Constitution.[164] The claim by the Pacific States Telephone and Telegraph Company was that a successful initiative which taxed the company violated Article IV, Section 4 of the United States Constitution under which "[t]he United States shall guarantee every State in this Union a Republican Form of Government."[165] Sixty years earlier, the Supreme Court sharply limited the reach of the Guarantee Clause in *Luther v. Borden*, where it held that the enforcement of the republican form of government clause belonged to the political department making that case non-justiciable.[166] In the *Oregon*

159. U.S. CONST. art. I, § 4.

160. *See* Douglas H. Hsiao, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 DUKE L.J. 1267, 1267 (1992).

161. *See id.* at 1291–96.

162. *See id.* at 1291–93.

163. *See id.* at 1294–96.

164. Pac. States Tel. & Tel. Co. v. Oregon., 223 U.S. 118, 137 (1912).

165. U.S. CONST. art. IV, § 4.

166. *See* Luther v. Borden, 48 U.S. 1 (7 How.), 46–47 (1849).

case, the Supreme Court ruled that a challenge to direct lawmaking can only take place through representative institutions and not through the federal courts.[167]

Nonetheless, the Supreme Court has rejected citizen initiatives which sought to reshape representation in Congress through term limits. In *U.S. Term Limits, Inc. v. Thornton*, the Court rejected an Arkansas initiative which amended that state's constitution to impose lifetime term limits for members of Congress.[168] The Court ruled that such a restriction is contrary to the "fundamental principle of our representative democracy" embodied in the Constitution that "the people should choose whom they please to govern them" based on its earlier decision in *Powell v. McCormack*.[169] *Powell* reviewed the Qualifications Clause of the Constitution and ruled that there were two fundamental ideas embodied within that Clause: that the opportunity to be elected was open to all; and that sovereignty is vested in the people confers right to choose freely their representatives.[170] In *Thornton*, the Supreme Court argued that "permitting individual states to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining . . . the national character that the Framers envisioned and sought to ensure."[171] Although the Court ruled that term limits "unquestionably restrict the ability of voters to vote for whom they wish" it did not directly constrain the use of initiatives as opposed to ordinary legislative lawmaking as the mechanism for political reforms within a given state.[172]

The Supreme Court has also struck down citizen initiatives on equal protection grounds as was the case in *Romer v. Evans*.[173] Voters in Colorado adopted Amendment 2 to preclude any judicial, legislative, or executive action designed to protect against discrimination based on sexual orientation. The Supreme Court ruled that: "Amendment 2 classifies homosexuals not to

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167. *See Pac. States Tel. & Tel. Co.*, 223 U.S. at 150–51.

168. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837–38 (1995).

169. *Id.* at 780.

170. *See* Powell v. McCormack, 395 U.S. 486, 547–48 (1969).

171. *U.S. Term Limits, Inc.*, 514 U.S. at 822.

172. *Id.* at 837. *But see id.* at 845 (Thomas, J., dissenting) ("Nothing in the Constitution deprives the people . . . of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress."). "The fact that the Framers did not grant a qualification-setting power to Congress does not imply that they wanted to bar its exercise at the state level." *Id.* at 877. "[T]he majority is wrong to suggest that [democratic principles] must have also led the Framers to deny this [qualification-setting] power to the people of the States and the state legislatures." *Id.*

173. 517 U.S. 620 (1996).

further a proper legislative end but to make them unequal to everyone else . . . Amendment 2 violates the Equal Protection Clause."[174]

Despite these clear limits on citizen initiatives, the question of the scope of authority for citizens with respect to redistricting remained an open question until the Arizona Legislature brought its case against the Arizona Independent Redistricting Commission. In the century since direct democracy became a prominent feature of state constitutions in the United States, state and federal courts sought to interpret the scope of authority of different actors in the redistricting process.[175] In 1910, a state court held that the word legislature in the Elections Clause does not mean simply the members who compose the Legislature acting in some ministerial capacity, but refers to and means the lawmaking body or power of the state, as established by the state Constitution, "which includes the whole constitutional lawmaking machinery of the state."[176] Under this interpretation of the term, the court held that citizen referenda were included in the redistricting process.[177]

The strongest precedent against the idea that initiatives can be a source of redistricting authority for congressional elections comes from *Hawke v. Smith*.[178] In *Hawke*, the Supreme Court held that a referendum in Ohio could not serve as the mechanism for ratification of an amendment to the Constitution.[179] The Court explained that the term "legislature" had a specific meaning which referred to a "representative body which made the laws of the people."[180] In *Hawke*, the Court concluded that the Framers understood the difference between the term "legislature" and meant to exclude the possibility of a referendum when it came to the power to ratify a proposed amendment to the Constitution under Article V.[181]

However, even strong critics of direct democracy, such as William Howard Taft, distinguished between the use of referenda for ratification of an amendment to the Constitution and its use in redistricting.[182] As Taft

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174. *Id.* at 635.

175. *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 997 F. Supp. 2d 1047, 1050 (D. Ariz. 2014); League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 392 (Fla. 2015).

176. State v. Polley, 127 N.W. 848, 850 (S.D. 1910).

177. *See id.*

178. Hawke v. Smith, 253 U.S. 221 (1920).

179. *See id.* at 229.

180. *Id.* at 227.

181. *Id.* at 228.

182. *See* William Howard Taft, *Can Ratification of an Amendment to the Constitution Be Made to Depend on a Referendum?*, 29 YALE L.J. 821, 825 (1920).

explained, "[t]he function given to the legislature in Article I, Section 4, is plainly that of making a law of Ohio just like any other state. . . . Under Article V, however, the state legislatures have no discretion to exercise general legislative power."[183]

However, in *Davis v. Hildebrant*, the Supreme Court determined that the term legislature did include the "legislative authority" of a given state.[184] The Court concluded that a statute authorizing redistricting by referendum was constitutional when a state constitution included referendums as legislative power.[185] Similarly, in *Smiley v. Holm*, the Supreme Court held that the Minnesota legislature could not finalize a congressional redistricting plan without the signature of the Governor of the state.[186] The Court distinguished between different uses of the term legislature in the Constitution and concluded that: Under Article I, Section 4, the legislature was acting as a lawmaking body.[187] The Court reasoned that the use of the term "such regulations" reflects that legislature acting in lawmaking capacity in regulating time place and manner of elections.[188]

In *Davis v. Hildebrant*, the Court held that the Clause "in the manner provided by the laws thereof" was designed to recognize the legitimacy of referenda in creating congressional districts when incorporated into the state constitution.[189] The Ohio Supreme Court held that "the provisions as to referendum were a part of the legislative power of the state . . . and that nothing . . . in the constitutional provision, operated to the contrary, and that therefore the disapproved law had no existence."[190] The United States Supreme Court affirmed this judgment and reasoned that:

> To the extent that the contention urges that to include the referendum within state legislative power for the purpose of apportionment is repugnant to § 4 of article 1 . . . we again think the contention is plainly without substance, for the following reasons: It must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power . . . . But the proposition and argument disregard the settled rule that the question of whether that guaranty of the Constitution has been disregarded presents no justiciable

183. *Id.*
184. Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569–70 (1916).
185. *See id.*
186. *See* Smiley v. Holm, 285 U.S. 355, 368–69 (1932).
187. *Id.* at 366.
188. *Id.*
189. *Hildebrant*, 241 U.S. at 568–69.
190. *Id.* at 567 (paraphrasing the rationale and holding of the Ohio Supreme Court).

> controversy, but involves the exercise by Congress of the authority vested in it by the Constitution.[191]

The Arizona Legislature brought suit claiming that Proposition 106 which created the Arizona Redistricting Commission violated the Elections Clause of the Constitution by removing congressional redistricting authority from the legislature.[192] In the case brought by the Arizona State Legislature challenging the constitutionality of the Arizona Redistricting Commission, the threshold issue was whether the legislature had standing.[193] In this case, the lower court highlighted its willingness to entertain similar challenges under the Elections Clause brought by state officials in two prior cases: *Smiley* and *Hildebrant*.[194] The lower court concluded that the "Arizona Constitution allows multiple avenues for lawmaking and one of those avenues is the ballot initiative . . . the Arizona Constitution specifies that the initiative power is legislative."[195]

Before the Supreme Court, Justice Ruth Bader Ginsburg, writing for the majority, began her opinion by pointing to the *Vieth* decision and the reluctance of the courts to directly enter the fray in responding to partisan gerrymandering.[196] The majority followed the lower court in finding standing as the entire body of the legislature authorized votes before commencing the action.[197] In analyzing the relevant Supreme Court precedent, Justice Ginsburg determined that based on the precedent in *Davis* that the term "the legislature" did not mean only the representative body of a given state but also "encompassed a veto power lodged in the people."[198] Citing the precedent in *Smiley*, the majority concluded that the legislative authority includes not just two houses of a state legislature and that prior cases had distinguished the lawmaking function from the Article V powers vested in state legislatures.[199] Justice Ginsburg also pointed to a shift in federal law, as Congress adopted language referring to "the manner provided by the laws thereof" rather than simply use the term legislature in describing redistricting

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191. *Id.* at 569.

192. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658–59 (2015).

193. *See id.* at 2663.

194. *See id.* at 2666–67.

195. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 997 F. Supp. 2d 1047, 1054–55 (D. Ariz. 2014).

196. *See Ariz. State Legislature*, 135 S. Ct. at 2658.

197. *See d.* at 2655–56.

198. *Id.* at 2666.

199. *See id.* at 2667–68.

requirements binding each state.[200] The majority recognized that in Arizona "initiatives adopted by the voters legislate for the State, just as measures passed by the representative body do."[201]

In dissent, Chief Justice Roberts challenged the majority's interpretation of the term "legislature" in the Elections Clause of the United States Constitution.[202] Since the Elections Clause uses the term, the "Legislature thereof," Chief Justice Roberts found the majority's understanding that it includes the initiative process unconvincing.[203] Chief Justice Roberts also read the relevant Supreme Court precedent very differently. He cited *Hawke* for the proposition that the term "legislature" was "not a term of uncertain meaning when incorporated into the Constitution."[204] Chief Justice Roberts cited *Smiley* as reaffirming *Hawke* in determining that "[a] Legislature was then the representative body which made the laws of the people."[205] He also looked to the use of the term "legislature" in other parts of the Constitution to confirm his interpretation.[206] Finally, Roberts argued that the majority's statutory interpretation was implausible because the relevant law merely established a default rule and that its reading of the statute would likely violate the Constitution and conflict with the Elections Clause: "The majority today shows greater concern about redistricting practices than about the meaning of the Constitution . . . [b]ut our inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area."[207]

Even as the Supreme Court appeared to open the door to citizen initiatives designed to foster redistricting reform, it was also closing the door even further to federal judicial intervention to prevent extreme partisan gerrymandering. The Supreme Court's redistricting cases began with a clear reluctance to enter the "political thicket."[208] However, the "redistricting revolution" of the 1960s saw the courts play a transformational role in overcoming long-standing malapportionment of legislative districts across many states.[209] Just as the Supreme Court had asserted itself in reviewing alleged racial gerrymandering cases, it first appeared that it would also open

200. *Id.* at 2669.
201. *Id.* at 2671.
202. *Id.* at 2677 (Roberts, C.J., dissenting).
203. *Id.* at 2678.
204. *Id.* at 2680.
205. *Id.* at 2683.
206. *Id.* at 2680–82.
207. *Id.* at 2690.
208. *See* Reynolds v. Sims, 377 U.S. 533, 566 (1964).
209. Luis Fuentes-Rohwer, *Baker's Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353, 1362–63 (2002).

up a role for the federal courts to tackle partisan gerrymandering. The development of cases before the Supreme Court left little space for the courts to intervene, and pending cases before the current Court in March of 2019 may well shut the door altogether to future partisan gerrymandering cases.

IV. THE FUTURE OF REDISTRICTING COMMISSIONS

One of the most significant legacies of *Arizona Legislature v. Arizona Independent Redistricting Commission* is that it empowers citizens in roughly half of all states to exercise power directly to catalyze reform in state redistricting at a time when few other avenues for reform seem plausible. Since the Supreme Court's decisions, many states have experimented with initiatives creating new commissions. In the wake of the Supreme Court's decision in *Gill v. Whitford*, many more citizens are succeeding in reforming redistricting through the initiative process. Voters in Wisconsin, the state at issue in *Gill*, have demonstrated a clear preference for a nonpartisan commission to assume the work of redistricting in that state.[210] In fact, seventy-two percent of voters prefer that redistricting for both legislative and congressional districts be entrusted to a nonpartisan commission while only eighteen percent prefer that redistricting be done by the legislature and the governor.[211] Strong supermajorities are in support of such a commission across partisan groups and independent voters with very weak support for the current system.[212] Voters in states beyond Wisconsin— which has no statewide initiative or referendum—have sought to assume leadership in responding to partisan gerrymandering.

In South Dakota, a 2016 initiative that would have created an independent redistricting commission failed by a 57–42 margin.[213] The South Dakota proposal was somewhat similar to other independent commissions in that it would have created a pool of candidates from both major parties and independents and then given the power of selection to the board that oversees state elections.[214] However, the specific initiative would have also

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210. *See* Charles Franklin, *New Marquette Law School Poll Finds Some Issues Less Divisive amid Continuing Partisan Divide*, MARQ. U. L. SCH. POLL (Jan. 24, 2019), https://law.marquette.edu/poll/2019/01/24/mlsp51release/ [https://perma.cc/T3KN-W263].

211. *Id.*

212. *See id.*

213. *South Dakota Redistricting Commission, Constitutional Amendment T (2016)*, BALLOTPEDIA, https://ballotpedia.org/South_Dakota_Redistricting_Commission,_Constitutional_Amendment_T_(2016) [https://perma.cc/Z93D-8LKT] (last visited Mar. 17, 2019).

214. *See id.*

empowered the commission to engage in mid-decade redistricting in 2017, something which has not been a feature of other independent commissions and might have introduced substantial uncertainty into voters' minds about the stability of the usually once a decade process.[215]

With this failed initiative in South Dakota, the landscape of post-Arizona initiatives looked pretty bleak with California's unique experiment succeeding only on its second recent attempt. However, in the wake of *Gill v. Whitford*, 2018 would prove to be an unprecedented moment to date in the adoption of independent redistricting commissions. Four different successful redistricting proposals would emerge directly from citizen initiatives that prevailed on the November 2018 ballot in Colorado, Missouri, Utah, and Michigan.[216] Another legislatively referred initiative prevailed in Ohio earlier in 2018 and a citizen initiative on redistricting will be considered by Arkansas voters as part of the ballot in the 2020 election.[217] While there is significant diversity in the approaches of each of these states, most share the aspiration to insulate the decennial redistricting process from partisan influence.

In Ohio, voters approved a constitutional amendment which refined its bipartisan legislative redistricting commission and extended its work to

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215. *See id.*

216. *Colorado Amendment Y, Independent Commission for Congressional Redistricting Amendment (2018)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Amendment_Y,_Independent_Commission_for_Congressional_Redistricting_Amendment_(2018) [https://perma.cc/5NKM-8NLY] (last visited Mar. 17, 2019) [hereinafter *Colorado Amendment Y*]; *Michigan Proposal 2, Independent Redistricting Commission Initiative (2018)*, BALLOTPEDIA, https://ballotpedia.org/Michigan_Proposal_2,_Independent_Redistricting_Commission_Initiative_(2018) [https://perma.cc/J8FQ-H8QR] (last visited Mar. 17, 2019) [hereinafter *Michigan Proposal 2*]; *Missouri Amendment 1, Lobbying, Campaign Finance, and Redistricting Initiative (2018)*, BALLOTPEDIA, https://ballotpedia.org/Missouri_Amendment_1,_Lobbying,_Campaign_Finance,_and_Redistricting_Initiative_(2018) [https://perma.cc/Z9E2-RX7H] (last visited Mar. 17, 2019) [hereinafter *Missouri Amendment 1*]; *Utah Proposition 4, Independent Advisory Commission on Redistricting Initiative (2018)*, BALLOTPEDIA, https://ballotpedia.org/Utah_Proposition_4,_Independent_Advisory_Commission_on_Redistricting_Initiative_(2018) [https://perma.cc/KFR7-ZD9A] (last visited Mar. 17, 2019) [hereinafter *Utah Proposition 4*].

217. *Ohio Issue 1, Congressional Redistricting Procedures Amendment (May 2018)*, BALLOTPEDIA, https://ballotpedia.org/Ohio_Issue_1,_Congressional_Redistricting_Procedures_Amendment_(May_2018) [https://perma.cc/3AUG-7Q75] (last visited Mar. 17, 2019) [hereinafter *Ohio Issue 1*]; *Arkansas Independent Redistricting Commission Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/Arkansas_Independent_Redistricting_Commission_Initiative_(2020) [https://perma.cc/8VWM-J3MC] (last visited Mar. 17, 2019).

congressional districts.[218] The legislature retains the opportunity to create a new congressional map so long as three-fifths of its membership, including one half of the minority party, agree on a plan.[219] Under this amendment, commission-drawn maps are only valid for ten years if at least two commissioners from each political party vote for them.[220] Maps which are passed along strictly partisan lines are only valid for a period of four years.[221] In addition, the amendment required compact and contiguous districts and established limits on splitting most of Ohio's counties into different congressional districts.[222]

In Michigan, an organic movement of citizens across party lines spawned from a Facebook post after the 2016 election led to a dramatic reform in the redistricting process.[223] The Voters Not Politicians Committee created an independent citizen redistricting commission model which secured the support of approximately sixty percent of voters in that state.[224] The power to draw both congressional districts and state legislative districts was transferred to a thirteen-member independent redistricting commission.[225] These members were to be randomly selected by the Secretary of State, and to be evenly distributed with four each from the major political parties and five who self-identify as unaffiliated with any major political parties.[226] In order to approve a map, the support of at least seven members, including a minimum of two from each party and two independents, is required.[227] In terms of the criteria to guide the commission, the mandate includes compliance with federal laws; equal population sizes; geographic contiguousness; preserving communities of similar historical, cultural, or economic interests; no advantages to political parties; no advantages to incumbents; respecting municipal boundaries; and compactness.[228]

In Missouri, where a bipartisan commission already has responsibility for redistricting, voters approved a dramatic change in the criteria that would be

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218. *Ohio Issue 1*, *supra* note 217.
219. OHIO CONST. art. XIX, § 1; *see also Ohio Issue 1*, *supra* note 217.
220. OHIO CONST. art. XIX, § 1; *see also Ohio Issue 1*, *supra* note 217.
221. OHIO CONST. art. XIX, § 1; *see also Ohio Issue 1*, *supra* note 217.
222. OHIO CONST. art. XIX, § 2; *see also Ohio Issue 1*, *supra* note 217.
223. Erick Trickey, *A Grassroots Call to Ban Gerrymandering*, ATLANTIC (Sept. 23, 2018), https://www.theatlantic.com/politics/archive/2018/09/a-grassroots-movement-in-michigan-has-gerrymandering-in-the-crosshairs/570949/ [https://perma.cc/MR5N-MSUR].
224. *Id.*; *Michigan Proposal 2*, *supra* note 216.
225. MICH. CONST. art. IV, § 6, cl. 1; *see also Michigan Proposal 2*, *supra* note 216.
226. MICH. CONST. art. IV, § 6, cl. 2; *see also Michigan Proposal 2*, *supra* note 216.
227. MICH. CONST. art. IV, § 6, cl. 14; *see also Michigan Proposal 2*, *supra* note 216.
228. MICH. CONST. art. IV, § 6, cl. 13; *see also Michigan Proposal 2*, *supra* note 216.

applied to future mapmaking.[229] A coalition in Missouri secured sixty-two percent of the vote for Amendment 1 to create a new position of nonpartisan state demographer.[230] The state demographer would be responsible for proposing maps to the commissioners that reflect the parties' respective share of the statewide vote in previous elections for President, Governor and United States Senator.[231] The criteria of "partisan fairness" and "competitiveness" would take priority over more traditional redistricting criteria such as geographically compact districts, contiguousness, and respecting the boundaries of political subdivisions.[232] The amendment sets Missouri apart from all other states in its focus on "partisan fairness" and puts it among a small group of states that incorporate "competitiveness" as a priority criteria.[233] The demographer's maps would be the final word in redistricting unless seventy percent of the commissioners voted to make changes within two months.[234]

In Utah, voters established an independent redistricting commission for both congressional districts and state legislative districts.[235] Among the 2018 initiatives, this proposal passed with the narrowest margin of just a bare majority.[236] The seven members of Utah's independent redistricting commission would be appointed by members of both parties.[237] They would be bound by traditional criteria including keeping cities and counties intact, creating districts that are contiguous and follow natural boundaries, and preserving communities of interest.[238] The plan developed by the Commission would be forwarded to the legislature for approval and the legislature would be required to offer a detailed explanation of why it chose to adopt another plan if it did so.[239]

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229. *Missouri Amendment 1*, *supra* note 216.

230. *Id.*; *see About the Missouri Census Data Center*, MO. CENSUS DATA CTR., http://mcdc.missouri.edu/about-MCDC.html [https://perma.cc/UW9G-JV3Y] (last visited May 15, 2019) (identifying Matt Hesser as Missouri State Demographer).

231. *Missouri Amendment 1*, *supra* note 216.

232. *Id.*

233. *Id.*

234. *Id.*

235. UTAH CODE ANN. § 20A-19-203 (LexisNexis 2019); *see also Utah Proposition 4*, *supra* note 216.

236. Drutman, *supra* note 59; *Utah Proposition 4*, *supra* note 216 (512,218 "yes" votes; 505,274 "no" votes).

237. UTAH CODE ANN. § 20A-19-201 (LexisNexis 2019); *see also Utah Proposition 4*, *supra* note 216.

238. UTAH CODE ANN. § 20A-19-103 (LexisNexis 2019); *see also Utah Proposition 4*, *supra* note 216.

239. UTAH CODE ANN. § 20A-19-204 (LexisNexis 2019).

In Colorado, a voter initiative established a twelve-member independent redistricting commission.[240] The balance of the commission members requires four from each major political party and four members not registered with any political party.[241] The Colorado Commission is constituted by a panel formed by the Chief Justice of the state that consists of the most recently retired judges from the Colorado Supreme Court and Colorado Court of Appeals and ensures that no more than one member is affiliated with the same political party.[242] The initiative also provides for non-partisan staff to be provided to the Commission by the Director of Research at the Legislative Council, the Director of the Office of Legislative Legal Services, and the Directors of Successor Nonpartisan offices of the General Assembly.[243] Adoption of maps by the Commission requires the support of at least eight commissioners, including two who are unaffiliated with any political party.[244] The Commission must follow traditional criteria including preserving communities of interest, compactness, equal population, and contiguous geographic areas.[245] Only "[t]hereafter" shall the Commission, "to the extent possible, maximize the number of politically competitive districts."[246] Finally, the amendment requires that the Colorado Supreme Court review the redistricting plan to ensure that it complies with the listed criteria and the Court shall approve it unless it finds the Commission abused its discretion or failed to apply the appropriate criteria.[247]

The unprecedented success of redistricting initiatives in 2018 demonstrates the wide public support for independent redistricting commissions across the country. Each of these commissions reflect a desire to insulate mapmaking from partisan political actors. However, not all of the commissions effectively accomplish the express goal of non-partisan redistricting and relatively few ensure more competitive elections or attempt to assess questions of partisan fairness. The Commission in Ohio is really a bipartisan commission rather than an independent commission. In Utah, the recent initiative created a truly independent redistricting commission, but its work can be amended or rejected by that state's legislature with the only binding requirement being that the legislature give a detailed explanation.

Although Missouri also has a bipartisan rather than an independent redistricting commission, its new initiative creates the powerful position of

240. COLO. CONST. art. V, § 44.1; *see also Colorado Amendment Y*, *supra* note 216.
241. COLO. CONST. art. V, § 44.1, cl. 10; *see also Colorado Amendment Y*, *supra* note 216.
242. COLO. CONST. art. V, § 44.1, cl. 5(a); *see also Colorado Amendment Y*, *supra* note 216.
243. COLO. CONST. art. V, § 44.2, cl. 1(b); *see also Colorado Amendment Y*, *supra* note 216.
244. COLO. CONST. art. V, § 44.2, cl. 2; *see also Colorado Amendment Y*, *supra* note 216.
245. COLO. CONST. art. V, § 44.3; *see also Colorado Amendment Y*, *supra* note 216.
246. COLO. CONST. art. V § 44.3, cl. 3(a).
247. *Id.* § 44.5.

nonpartisan state demographer. It also goes the farthest of any state in requiring some form of partisan symmetry, adopting many of the contentions advanced by the plaintiffs in the *Gill v. Whitford* case. It remains to be seen how, in practice, districts could be drawn in Missouri that will meet this criteria, but it may require districts which radiate out from urban areas into more far-reaching rural areas. Both Michigan and Colorado have created strong mechanisms to ensure that the independent redistricting commissions in those states are insulated from partisan pressures and also have some representation from independents. However, in terms of redistricting criteria, both are fairly traditional, with Michigan not even including competitiveness and Colorado putting competitiveness last in terms of priority after other traditional redistricting criteria have been met.

In almost every one of these states, there has been significant push back from the legislature and the possibility of outright repeal or significant changes looms in 2019. In Missouri, the Senate Majority Leader and the Governor have sharply criticized the new redistricting system and some in the legislature want to send it back to voters before it is even launched.[248] Although the initiative in Missouri secured more than sixty percent of the vote, legislative leaders are committed to preventing its full implementation.[249] In Utah, several members of the legislature are aiming to challenge the redistricting system in court and claim that it is unconstitutional.[250] Significantly, this strong response is in a state where the ultimate power to approve new maps remains with the legislature.[251] In Michigan, the lame-duck members of the legislature passed new laws limiting the discretion of the Secretary of State in selecting members of the independent redistricting commission.[252] Even in states with a long history of bipartisan redistricting commissions, legislators are seeking to exert more

248. Summer Ballentine, *Missouri Lawmakers To Consider Sports Betting, Redistricting*, ASSOCIATED PRESS (Jan. 6, 2019), https://www.apnews.com/a90f1bc358544198b229585cbb27db29 [https://perma.cc/6FUA-3PS9].

249. Jason Rosenbaum, *Missouri Voters Backed an Anti-Gerrymandering Measure; Lawmakers Want to Undo It*, ST. LOUIS PUB. RADIO (Jan. 8, 2019), http://news.stlpublicradio.org/post/missouri-voters-backed-anti-gerrymandering-measure-lawmakers-want-undo-it#stream/0 [https://perma.cc/2WQH-32G9].

250. *Independent Redistricting Supporters Bracing for Challenge*, ASSOCIATED PRESS (Jan. 21, 2019), https://www.apnews.com/0b16c99f8653481a80ce453257748c74 [https://perma.cc/E8PJ-PBU].

251. UTAH CODE ANN. § 20A-19-201 (LexisNexis 2019).

252. *The Latest: Michigan House Votes to Extend Legislative Power*, ASSOCIATED PRESS (Dec. 5, 2018), https://www.apnews.com/781c2f5244d34c3abee9f955d9a3a9e8 [https://perma.cc/252K-UPQR].

influence in advance of the 2020 cycle of redistricting. In New Jersey, for example, legislators came close to putting a constitutional amendment on the ballot in order to bypass the existing redistricting commission but ultimately backed down in the face of criticism from reformers across the board.[253]

CONCLUSION

A growing number of states in recent decades have established diverse and innovative redistricting institutions. Many of these institutions have become models for independent redistricting that limit the role of legislators in shaping their own districts and the congressional districts of their respective states. Yet relatively few states have redistricting commissions which are truly independent from the legislature. Even fewer of these states have commissions with mandates that go beyond the traditional redistricting criteria to reach some of the concerns about competitiveness that drove the formation of the commissions in the first place. The dramatic success of redistricting initiatives in 2018 suggests that the wave of redistricting reform is unlikely to break any time soon. Yet it remains to be seen how consequential such reforms will ultimately be for transforming the political process.

In states across the country, governors, legislators, and citizens are considering adopting new approaches to redistricting. In some states in which the legislatures have been slower to embrace independent redistricting mechanisms, governors in Pennsylvania and Maryland have established their own commissions to study the best approach to independent redistricting or to propose maps on their own.[254] In Virginia, even longtime opponents of independent redistricting have come out in favor of a new House proposal to create a twelve-member commission that would be evenly balanced between the two major political parties and give the legislature only an up or down

253. Brent Johnson, *Jersey Democrats Cancel Vote on Controversial Redistricting Plan*, NJ.COM (Dec. 28, 2018), https://www.nj.com/politics/2018/12/jersey-democrats-cancel-vote-on-controversial-redistricting-plan.html [https://perma.cc/N9Y2-4A6S].

254. Michael Dresser, *'Fed Up with Politics as Usual,' Maryland Governor Creates 'Emergency' Redistricting Commission*, GOVERNING (Nov. 27, 2018, 5:55 PM), http://www.governing.com/topics/politics/tns-hogan-maryland-redistricting-panel-commission-frosh-gerrymandering.html [https://perma.cc/Y2RK-M73Y]; Rachel McDevitt, *Gov. Wolf Creates Commission To Study Redistricting*, PHILA. BUS. J. (Nov. 30, 2018, 7:42 AM), https://www.bizjournals.com/philadelphia/news/2018/11/30/tom-wolf-redistricting-reform-commission-gop-democ.html [https://perma.cc/8T4L-UMKL].

vote.[255] A competing Senate proposal in Virginia already passed the Senate, which would create a sixteen-member commission including and requiring support from twelve members to create new maps.[256] However, this Senate map made political subdivisions the primary factor in redrawing districts and does not include competitiveness within its redistricting criteria.[257] As the wave of redistricting reform grows, questions about the best approach to ensure independence and to achieve other redistricting objectives remain.

Currently, there are just a handful of examples of truly independent redistricting commissions and even these are not without their challenges. Among the most independent current commissions that shape congressional districts are Arizona, Washington, and California. Some other states with a single representative also use independent redistricting but these states need not engage in congressional districting.[258] Among these states, California is arguably the most aggressive in limiting the role of politicians in the process by giving them only a veto of some members of the final pool of commission candidates and by utilizing random selection from the final pool.[259] In both Arizona and Washington, the leadership of the legislature actually appoints four of the five members of the commission.[260] In both cases these four members select the fifth member as an independent chair.[261] Unlike in Arizona, where the commission alone adopts the final plans, in Washington two-thirds of the legislature can change up to two percent of the districts in adopting the final maps.[262] While Arizona requires that the chair of the commission be an independent, Washington has no such requirement for its

255. H.J.R. 615, 2019 Sess. (Va. 2019); *see* Graham Moomaw, *Va. House Republicans Advance Plan for Independent Redistricting Commission*, RICH. TIMES-DISPATCH (Jan. 28, 2019), https://www.richmond.com/news/virginia/government-politics/general-assembly/va-house-republicans-advance-plan-for-independent-redistricting-commission/article_c6e814e2-4249-53e9-8e67-6b34706352f5.html [https://perma.cc/73CB-A9GG].

256. Editorial, *Redistricting Reform Alive and Well in Virginia*, NEWS & ADVANCE (Jan. 31, 2019), https://www.newsadvance.com/opinion/editorials/redistricting-reform-alive-and-well-in-virginia/article_8c000be8-24d4-11e9-99bb-5f300e1f0769.html [https://perma.cc/5BTA-5CVP].

257. *See* S.J.R. 274, 2019 Sess. (Va. 2019) (as offered Jan. 9, 2019) (proposing an amendment to VA. CONST. art. II, § 6, including "[l]egislative and congressional districts shall be drawn to respect existing political boundaries of 43 counties, cities, and towns").

258. *See Redistricting Commissions: Congressional Plans*, NAT'L CONF. ST. LEGISLATURES (last updated Apr. 18, 2019), http://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx [https://perma.cc/J6ZA-B4JK].

259. *Background on Commission*, ST. CAL.: WE DRAW LINES, https://wedrawthelines.ca.gov/commission/ [https://perma.cc/VS3D-N4JA] (last visited May 15, 2019).

260. ARIZ. CONST. art. IV, pt. II, § 1, cl. 6; WASH. CONST. art. II, § 43, cl. 2.

261. ARIZ. CONST. art. IV, pt. II, § 1, cl. 8; WASH. CONST. art. II, § 43, cl. 2.

262. ARIZ. CONST. art. IV, pt. II, § 1, cl. 17; WASH. REV. CODE § 44.05.100(2) (2019).

non-voting chair, and California requires that a substantial if not equal number of commission members be selected from among independent voters.[263]

In terms of redistricting criteria, California is in many ways the most conservative of the three states, with Washington still relatively traditional, and Arizona establishing competitiveness as a more central dimension of its redistricting. California requires only traditional redistricting criteria such as contiguity, compactness, and respect for local political boundaries and communities of interest.[264] Significantly, California includes no explicit provision or requirement for fostering competitive districts despite a clause that rejects favoring or discriminating against a candidate or party.[265] In addition, the commissioners in California are not allowed to consider where incumbents live and they further agreed not to look at data on partisan performance which would inform whether districts would likely be competitive.[266]

In Washington, the state constitution requires only traditional redistricting criteria in terms of compactness, respecting political subdivisions, and contiguity.[267] Like California, Washington prohibits districts which favor or discriminate against any party or group.[268] However, Washington state statute also requires that the "commission shall exercise its powers to provide fair and effective representation and to encourage electoral competition."[269] Despite this statutory language, competitiveness is not a top priority for the commission and very few incumbent members of Congress lost re-election in Washington between 1998 and 2016.[270]

Among these states, Arizona stands apart in terms of the priority placed on competitiveness in its approach to redistricting. According to a statistical analysis by the Associated Press, Arizona was the fourth lowest state in terms of the distorting effect of gerrymandering on congressional districts in the 2016 election using the efficiency gap approach.[271] The efficiency gap, which

263. ARIZ. CONST. art. IV, pt. II, § 1, cl. 8; CAL. CONST. art. XXI, § 2, cl. c(2); WASH. CONST. art. II, § 43, cl. 2.

264. CAL. CONST. art. XXI, § 2, cl. d.

265. *Id.* art. XXI, § 2, cl. e.

266. *Id.*

267. WASH. CONST. art. II, § 43(5).

268. WASH. REV. CODE § 44.05.090(5) (2019).

269. *Id.*

270. *See* Justin Mark Levitt, Introducing "Clustering:" Redistricting in Geographic Perspective 95 (2016) (unpublished Ph.D. dissertation, University of California, San Diego), https://escholarship.org/content/qt4689t4s6/qt4689t4s6.pdf [https://perma.cc/65YD-GSB4].

271. Dustin Gardiner, *Gerrymandering: Arizona Is a National Model for Fairness, but Still Faces Criticism*, AZCENTRAL (Apr. 24, 2018, 12:53 PM),

was raised in the *Gill v. Whitford* case, analyses the statewide percentage of the vote for a given party against the percentage of seats won by that party.[272] Arizona is also among the few states where multiple seats for Congress have changed between different parties multiple times since the last redistricting cycle.[273] Despite these signs of strong competitiveness relative to most other states, most of Arizona's congressional districts remain essentially uncompetitive in contests between the major parties.

Given the limited experience with truly independent redistricting commissions and the even more limited experience with commissions which make competitiveness a key criterion for redistricting, it is not surprising that much of the data is not yet convincing about the impact of redistricting commissions on electoral competitiveness. If a redistricting commission is less than independent in practice, it is not surprising to find outcomes which are favorable to the dominant party in the legislature. If a redistricting commission does not include competitiveness in its core criteria or if commissioners cannot consider past election performance data, it is much less likely to lead to competitive districts.

While many of the newest redistricting commissions adopt important lessons from earlier models about how to structure independence, they draw less upon the experience of using different types of redistricting criteria. Neither Michigan nor Utah require competitiveness to be part of the redistricting goals and Colorado includes competitiveness only as a final goal once all other goals are met.[274] Only Missouri makes competitiveness and "partisan fairness" central to its redistricting approach but partisan actors are still in charge of selecting the state's chief demographer.[275] Yet Missouri has a bipartisan commission rather than an independent one and partisan actors will ultimately select the state's demographer to implement this unprecedented approach.[276]

Thus, while some of the recent initiatives focused on the independence of the commission and others focused on the goal of competitiveness, none of

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https://www.azcentral.com/story/news/politics/elections/2018/04/24/gerrymandering-arizona-national-model-maps-among-least-skewed-united-states/463496002/ [https://perma.cc/B9SN-KJXJ].

272. Gill v. Whitford, 138 S. Ct. 1916, 1920 (2018).

273. *See, e.g.*, *Full List: 2018 Midterm Election Seats That Flipped*, AXIOS (Nov. 20, 2018), https://www.axios.com/full-list-2018-midterm-election-seats-flipped-34d99826-0929-41c6-a1f0-e4d02861c835.html [https://perma.cc/25ZZ-8AKR].

274. COLO. CONST. art. V, § 44.3(3)(a); *Redistricting Criteria*, *supra* note 105.

275. *Missouri Amendment 1*, supra note 216.

276. Debra Leiter, *The Sweeping Changes of Clean Missouri: Issues of Redistricting Reform in Missouri*, 7 MO. POL'Y J. 38, 44–45 (2018).

those passed in 2018 made both independence and competitiveness central to their approach. The Arizona experience with redistricting suggests that both the independence of mapmakers and explicit competitiveness criteria are necessary for expanding the number of districts in which either major party can prevail. Yet, geography continues to play a substantial role in limiting the number of potentially competitive seats in Arizona[277] and in the rest of the country.[278]

The geographic sorting of population related to partisan lean means that even the most independent commission with the strongest competitiveness mandate will have a ceiling on the number of districts that can correspond with traditional redistricting criteria. The Missouri experiment could potentially break through that ceiling because its single-minded focus on "partisan fairness", and competitiveness may lead the demographer in that state to minimize traditional criteria of compactness and thereby create a greater number of competitive districts.[279] Of course, such an outcome will depend on the independence of the demographer assuming the state does not repeal or significantly amend its redistricting approach altogether.

The ceiling on creating competitive districts within a single-member district model has led some reformers to call for Congress to end its requirement of single-member congressional districts.[280] A number of states, including Illinois, Hawaii, and New Mexico utilized at-large or multi-member congressional districts before Congress banned them.[281] Such a proposal raises important concerns related to the representation of minority groups as well as the significance of smaller geographic districts which would need to be addressed. Of course, states are currently free to experiment with multi-member districts if they wish in shaper representation at the state level. In fact, Arizona, New Jersey, South Dakota, and Washington already utilize multi-member districts electing all of their state House members.[282]

As many scholars and citizens are increasingly focused on increasing electoral competition within districts, direct democracy holds some potential

277. Levitt, *supra* note 270, at 59–66.

278. Chen & Rodden, *supra* note 106, at 265–67.

279. MO. CONST. art. III, § 3(c)(1)(b).

280. *E.g.*, Lee Drutman, *The Best Way to Fix Gerrymandering Is to Make It Useless*, N.Y. TIMES (June 19, 2018), https://www.nytimes.com/2018/06/19/opinion/gerrymandering-districts-multimember.html [https://perma.cc/TS8G-ZPKJ].

281. Tory Mast, *The History of Single Member Districts for Congress*, FAIRVOTE, http://archive.fairvote.org/?page=526 [https://perma.cc/R97E-3PB5] (last visited Mar. 11, 2019).

282. Justin Levitt, *Where Are the Lines Drawn?*, LOY. L. SCH.: ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/where-state.php [https://perma.cc/47X2-CGS8] (last visited Mar. 11, 2019).

promise. Sometime critics of independent commissions have suggested that direct democratic approval of redistricting plans could force legislators to compete for the median voter's approval rather than seek maximum political advantage.[283] However, recent evidence might suggest otherwise. In Maryland, for example, voters overwhelmingly ratified legislative redistricting efforts which have subsequently been found to be unconstitutional in the lower courts and will be re-considered soon at the United States Supreme Court.[284] Some thoughtful scholarly critics of direct democracy have also highlighted the fact that fewer voters participate in balloting on initiatives as a general matter than do on questions of representation.[285] Others have pointed to the challenge that voters are often overly dependent on campaign participants for information about how to vote.[286]

Finally, some scholars and veterans of past redistricting wars suggest that inviting the parties into the process is a better approach.[287] In New Jersey, two party delegations are invited to offer competing plans in iterative fashion and the winning plan is the one that performs the best on the relevant redistricting criteria including maximizing competitive seats and minimizing party bias.[288] Of course, the recent efforts in New Jersey to circumvent this system by the state legislature suggest both the impact of the bipartisan redistricting institutions in that state and also perhaps their fragility.

Ultimately, the *Arizona State Legislature v. Arizona Independent Redistricting Commission* precedent itself may prove vulnerable in the future. The current Chief Justice was a strong dissenter in that case and the deciding vote cast by Justice Kennedy has been replaced by another justice. It is not impossible or perhaps even implausible that the current Supreme Court will seek to reconsider this relatively recent precedent. If the Court decided to do so, the future of independent redistricting commission would surely be on the line. The rapid expansion of the number of states embracing these

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283. Michael S. Kang, *De-Rigging Elections: Direct Democracy and The Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 668–69 (2006).

284. *Maryland Redistricting Referendum, Question 5 (2012)*, BALLOTPEDIA, https://ballotpedia.org/Maryland_Redistricting_Referendum,_Question_5_(2012) [https://perma.cc/7E67-AWRV] (last visited Mar. 11, 2019); *see also* Lamone v. Benisek, 139 S. Ct. 1316 (2019) (mem.); Jacqueline Thomsen, *Five Big Supreme Court Decisions To Watch*, HILL (May 13, 2019), https://thehill.com/regulation/court-battles/443169-five-big-supreme-court-decisions-to-watch [https://perma.cc/XY47-6KFP].

285. Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596, 1607 (2013).

286. Richard Briffault, *Ballot Propositions and Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 413, 424.

287. Cain, *supra* note 67, at 1838–39.

288. *Id.*

redistricting commissions through voter initiatives may ultimately be significant in the Court's willingness to upset existing precedent and overturn the settled expectations of many states across the county. In the coming months, the Supreme Court will re-visit its own jurisprudence on extreme partisan gerrymandering. If, as expected, the Court again fails to intervene in these most dramatically skewed examples of gerrymandering and Congress fails to pass legislation that would require independent redistricting mechanisms, it means that only citizen initiatives will stand in the way of self-interested legislators drawing their own districts once again. Therefore, the lasting legacy of the *Arizona State Legislature v. Arizona Independent Redistricting Commission* decision will likely be significant in terms of galvanizing state redistricting reform even if the conditions which made the decision possible no longer exist.