REDISTRICTING: WHO SHOULD DRAW THE LINES? THE ARIZONA INDEPENDENT REDISTRICTING COMMISSION AS A MODEL FOR CHANGE

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"The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." ~ Reynolds v. Sims[1]

INTRODUCTION

In November of 2000, Arizona voters approved Proposition 106, which created the Arizona Independent Redistricting Commission ("IRC")[2] to administer the fair and balanced redistricting[3] of the state's congressional and legislative districts. The following year, the newly formed IRC submitted its first districting map to the Arizona Secretary of State, who in turn certified the map for the 2002

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1. 377 U.S. 533, 568 (1964).

2. The IRC is made up of five members who each serve ten-year terms. Each major political party is represented by two IRC members, yet the chairperson of the IRC must not be a member of any major political party. ARIZ. CONST. art. 4, pt. 2, § 1(3), (8).

3. Redistricting, or reapportionment, is the "[r]ealignment of a legislative district's boundaries to reflect changes in population." BLACK'S LAW DICTIONARY 1293, 1304 (8th ed. 2004). The U.S. Constitution requires states to engage in redistricting for federal office every ten years. U.S. CONST. art. I, § 2, cl. 3. Congressional lines refer to districts deciding offices for the federal government, as in the U.S. House of Representatives. Legislative lines, on the other hand, refer to the lines determining state offices, such as the Arizona House of Representatives and the Arizona State Senate. While federal laws such as the Voting Rights Act pertain to redistricting for both, state law is given a great deal of deference in determining how redistricting is conducted, especially for state offices.

elections and submitted the updated plan to the Department of Justice ("DOJ") for preclearance,[4] as required by section 5 of the Voting Rights Act ("VRA").[5]

The DOJ precleared the congressional lines but found that the IRC needed to increase effective Hispanic voting in three legislative districts.[6] The IRC amended the plan with respect to the three affected districts and successfully brought suit in federal district court to use the amended plan for the 2002 election.[7] However in 2002, because this court-approved plan was only intended as an interim map, the IRC developed another redistricting plan for the elections in 2004–2010.[8]

Yet in the spring of 2004, potential candidates for the Arizona House of Representatives and Arizona Senate anxiously waited to hear which district they

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4. The Voting Rights Act of 1965 requires specified states or other political subdivisions that wish to enact "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" to have the voting procedure or change "precleared." 42 U.S.C. § 1973c (2000). In the case of redistricting, a political subdivision or state may have a new district map precleared by:

> an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section.

Id.

5. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (2000)).

6. Ariz. Minority Coal. for Fair Redist. v. Ariz. Indep. Redist. Comm'n, 121 P.3d 843, 848 n.5 (Ariz. Ct. App. 2005).

7. *Id.*

8. *Id.*

would be running in for the September primary and November general elections.[9] The candidates' uncertainty stemmed from a 2004 Arizona Superior Court decision holding the district lines used in the 2002 Arizona elections unconstitutional.[10] The decision was the result of a lawsuit brought by the Arizona Minority Coalition for Fair Redistricting,[11] which objected to the lines drawn by the IRC.[12] The Coalition argued that the 2002 map only considered equal population and, in turn, reduced the number of competitive districts.[13] After the court declared the 2002 lines unconstitutional, the IRC redrew the districts for the 2004 election and submitted the plan to the DOJ.[14] However, in Spring 2004, just months before the primary and general elections were to take place, the DOJ had still not precleared the newly drafted 2004 district lines for the state legislature, and the case that held the 2002 lines unconstitutional was on appeal.[15] Therefore, state candidates, Arizona voters, and even election officials were not sure which district lines should be used if the 2004 districting map was not approved by the DOJ in time for the election.

On May 17, 2004, with elections five-and-a-half months away and candidates without a concrete district in which to campaign, the Arizona Secretary of State's Office requested a stay of the superior court's order that declared the 2002 lines unconstitutional.[16] The stay would effectively allow candidates to begin collecting signatures from their district in the original 2002 map so they could be eligible to run for office.[17] Two weeks before the filing deadline for candidates, the

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9. *See* Paul Davenport, *Redistricting Turmoil Puts Damper on Legislative Races*, ARIZ. REPUBLIC, June 13, 2004, at B8.

10. Findings of Fact and Conclusions of Law and Order at ¶ 61, *Ariz. Minority Coal.*, 121 P.3d 843 (No. CV2002-004882) [hereinafter *Ariz. Minority Coal.* Order], *available at* http://www.superiorcourt.maricopa.gov/publicInfo/rulings/rulingsReaditem.asp?autonumb=175.

11. The Minority Coalition is a group of Hispanic elected officials, community-based organizations, and individuals from various groups throughout Arizona. News Release, Senator Peter Rios, Minority Coalition Sues State Redistricting Commission over Lack of Competitive Districts (Mar. 7, 2002), *available at* http://www.azleg.state.az.us/press/senate/minority%20suit.doc.htm.

12. *Ariz. Minority Coal.*, 121 P.3d at 848–49. Arizonans for Fair and Legal Redistricting, which represents Republican party interests; Mohave County; Navajo Nation; the Hopi Tribe; and the cities of Lake Havasu, Flagstaff, and Kingman all intervened in the suit. *See id.* at 847.

13. According to the Chairman of the Commission, a competitive district is one in which "either party or other parties would have an opportunity to prevail in such an election." *Ariz. Minority Coal.* Order, *supra* note 10, ¶ 16.

14. Robbie Sherwood, *Revised Redistricting Plan for Legislature Approved*, ARIZ. REPUBLIC, Apr. 17, 2004, http://www.azcentral.com/specials/special12/articles/0417redistricting17.html.

15. *Id.*

16. Davenport, *supra* note 9, at B8.

17. *Id.*; *see also* ARIZ. REV. STAT. ANN. § 16-322(D) (2006) ("If new [district] boundaries . . . are established and effective subsequent to March 1 of the year of a general election and prior to the date of filing of nomination petitions, the basis for determining the number of required number of nomination petition signatures is the number of registered

Arizona Court of Appeals set aside the alternative map to the 2002 districting lines that supposedly had more competitive districts in which Republicans or Democrats could be victorious.[18] The Secretary of State's Office sent a letter to candidates to make sure that they collected and turned in signatures from the original 2002 districts, not from those districts in the alternative map.[19] However, because of the confusion and uncertainty regarding whether candidates would have to face a tough incumbent or have the opportunity at grabbing an open seat, some potential candidates had already abandoned their plans to run.[20] Other candidates gave up their political aspirations after the appellate court set aside the alternative map, which had seven competitive districts (three more than in the original 2002 map).[21] According to Arizona State Representative Steve Gallardo, a Phoenix Democrat, "[When candidates] know that they'll be running in a district that perhaps will be in favor of someone of a different party . . . they get discouraged."[22] In fact, after the appellate court determined which redistricting map should be used, so many candidates opted not to run for one reason or another that, in almost one-third (nine out of thirty) of the state senate races, candidates ran unopposed.[23]

Arizona was not the only state that faced redistricting challenges in the 2004 election. In fact, several states across the country have addressed redistricting issues since the 2000 census. In New Hampshire, the state's supreme court held that because the court, not the legislature, engaged in redistricting, the legislature could amend the redistricting map based on the 2000 census but could not create an entirely new redistricting plan until the next national census.[24] In 2002, a Colorado court implemented its own redistricting plan after the 2000 census, which governed the 2002 elections.[25] In 2003, the state's general assembly devised a new redistricting plan for future elections.[26] However, the state's supreme court held that the general assembly's 2003 redistricting plan violated the state's constitution because the Colorado Constitution provides that redistricting may only take place once per decade.[27]

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voters in the designated party of the candidate in the [district] on the day the new districts . . . are effective.").

18. Davenport, *supra* note 9, at B8.

19. *See* Draft Letter from Janice K. Brewer, Ariz. Sec'y of State, to Arizona Legislative Candidates (Mar. 1, 2004) (on file with author); *cf.* Paul Davenport, *Time Now a Factor in Redistricting: Dems Urge Haste; Some Say It's too Late*, ASSOC. PRESS, May 1, 2004, *available at* http://www.fairvote.org/redistricting/reports/remanual/aznews.htm #dems.

20. Davenport, *supra* note 9, at B8.

21. *Id.*

22. *Id*.

23. Ariz. Sec'y of State, Full Listing (Sept. 7, 2004), http://azsos.gov/election/2004/Primary/FullListing.htm.

24. *In re* Below, 855 A.2d 459, 473 (N.H. 2004) (per curiam).

25. People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1224 (Colo. 2003) (en banc), *cert. denied*, Colo. Gen. Assembly v. Salazar, 541 U.S. 1093 (2004).

26. *Id*.

27. *Id*. at 1231.

Furthermore, in April 2004, the U.S. Supreme Court's plurality opinion in *Vieth v. Jubelirer* suggested that political gerrymandering[28] claims are not justiciable because discrimination based on partisan politics could never be so extreme as to violate the standard of "one person, one vote."[29] In light of its decision in *Vieth*, the Court vacated and remanded a set of related cases decided by a Texas federal district court regarding political gerrymandering.[30] The Texas court had held that there was no evidence of purposeful racial discrimination in violation of the Equal Protection Clause.[31] The court further stated that "under current law, this court cannot strike down [the redistricting plan] on the basis that it is an illegal partisan gerrymander."[32] Although the Court initially vacated and remanded the cases, they have been appealed again, and the Supreme Court heard oral arguments on the cases in March 2006.[33]

This Note discusses the background and development of redistricting law as well as current issues facing redistricting. Redistricting, or reapportioning boundary lines of districts for voting practices, is a convoluted process. There are several issues confronting legislatures, courts, the DOJ, and independent commissions given responsibility to ensure that all voters' rights are protected and no citizen is disenfranchised. Because of the standards and guidelines outlined by the U.S. Constitution, Congress, state legislatures, and case law, many of the issues that arise concern: the means by or terms under which redistricting maps are drawn; the intent of the drafters; and the effect the new lines have on the voting process with regard to minority populations. Citizens most often bring redistricting claims of political or racial gerrymandering or claim that their rights have been

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28. Gerrymandering is "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." BLACK'S LAW DICTIONARY 708–09 (8th ed. 2004). The term was coined in 1812 and referred to the shape of a district drawn to benefit the party of Massachusetts's governor, Elbridge Gerry. Someone suggested that the shape of the district resembled a salamander, and another person replied that the district looked more like a "Gerrymander." Gerrymandering is defined as the act of dividing "election districts to give one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible." *Id.* There are three ways to engage in gerrymandering by varying the district's shape: (1) cracking, in which a geographically concentrated political or racial group that is large enough to constitute a district's dominant force is broken up by district lines and dispersed throughout two or more districts; (2) packing, in which a dominant political or racial group minimizes minority representation by concentrating the minority into as few districts as possible; and (3) stacking, in which a large political or racial group is combined in the same district with a larger opposition group. Shaw v. Reno, 509 U.S. 630, 670 (1993) (White, J., dissenting).

29. 541 U.S. 267, 290 (2004) (plurality opinion).

30. Session v. Perry, 298 F. Supp. 2d 451, 457 (E.D. Tex. 2004), *vacated and remanded sub nom.* Henderson v. Perry, 543 U.S. 941 (2004).

31. *Id.* at 473.

32. *Id*. at 474.

33. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 827 (2005) (noting probable jurisdiction).

violated under the Equal Protection Clause.[34] However, there are several other issues and unanswered questions that arise from the redistricting process.

One issue that has been adjudicated is whether courts have the authority to create a redistricting plan when either the legislature fails to do so or when another court finds that the legislature's plan does not meet the requirements of the VRA.[35] Although redistricting is intended to be a legislative power, when the legislature is deadlocked or a redistricting plan is challenged, some people believe it is proper for the judiciary to engage in reapportioning by writing or rewriting a redistricting map and essentially overriding the legislature to whom reapportionment responsibility is delegated.[36] In addition, there is controversy as to whether a legislature, another independent commission, or a court may amend or redraft a redistricting plan within the decade before the next census. Such amendments or redrafts are especially controversial if the first plan was created by the judiciary.[37]

Another important issue is whether political gerrymandering is a possible claim.[38] Finally, there are several issues regarding racial gerrymandering claims. For instance, some groups argue that it is better to have minority safe districts, which are districts with a large population of minority voters that ensure those minorities have representation.[39] The other strategy, which many minority groups advocate, is to create competitive districts: this does not guarantee that a candidate of one particular race or political party will win the election but rather makes the election more "competitive" because more than one candidate has a viable chance of winning.[40] Courts have long debated whether it is better to have safe districts or more competitive districts, and it is an issue that is still at the forefront of redistricting concerns.[41] Many of the issues regarding redistricting, such as political and racial gerrymandering and safe versus competitive districts, stem from the same concern—the political nature of redistricting. For instance, another major issue the Court has recently addressed is whether legislators may engage in

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34. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

35. Carol Schultz Vento, Annotation, *State Court Jurisdiction over Congressional Redistricting Disputes*, 114 A.L.R.5TH 387 (2004).

36. People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1232 (Colo. 2003) (en banc), *cert. denied*, Colo. Gen. Assembly v. Salazar, 541 U.S. 1093 (2004).

37. *See infra* Part III.

38. The Supreme Court's plurality opinion in *Vieth* stated that political gerrymandering was a political question and not justiciable because there was no workable standard to determine whether a political party was effectively excluded from the election process. Vieth v. Jubelirer, 541 U.S. 267, 281–82 (2004) (plurality opinion).

39. "Safe" districts are those "in which it is highly likely that minority voters will be able to elect the candidate of their choice." Georgia v. Ashcroft, 539 U.S. 461, 480 (2003).

40. *See, e.g.*, Navajo Nation v. Ariz. Indep. Redist. Comm'n, 230 F. Supp. 2d 998, 1002 (D. Ariz. 2002).

41. *See, e.g.*, Rodriguez v. Pataki, 308 F. Supp. 2d 346, 432 (S.D.N.Y. 2004); Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004), *vacated and remanded sub nom.* Henderson v. Perry, 543 U.S. 941 (2004).

redistricting with their primary focus being protecting the majority party incumbents while ousting elected members of the opposing party.[42]

Under the theory of separation of powers, redistricting falls within the power of the legislature, which creates yet another political issue.[43] Although many state statutes bar legislators from drawing maps to protect incumbents,[44] the U.S. Constitution does not prohibit this practice.[45] The problem with allowing legislators or legislative committees to draw their own maps to protect incumbents is that legislators have an inherent vested interest in the redistricting process because they want to retain their seats. Under certain circumstances, it is inevitable that the majority party will strive to protect its advantage.[46] For instance, political bias is inevitable when a state's legislature has the sole power to redraft district boundaries and approve the redistricting map, or when a state's Speaker of the House is authorized to appoint people to a redistricting committee.

The other problem with allowing the legislature to draft districts is that, due to the conflict of political parties' interests, it is difficult for legislators to come to a consensus on redistricting plans. This indecision leads to a delay in the process, which punishes candidates and voters alike. Candidates may not know until the last minute which district they are running in and who their potential constituents are. Consequently, voters may not be able to make fully informed decisions about the candidates. In addition, in the case of a legislative impasse, the legislature's responsibility to redraw districting lines may pass to a local trial court, which is controversial because redistricting is a power of the legislative branch.[47]

This Note suggests that the redistricting process across the country is flawed and that states still have major obstacles to overcome in order to grant *all* voters their constitutional right of fair representation. However, several states, including Arizona, have addressed the challenges states face in redistricting by establishing independent commissions to balance state interests and fairly draw district lines protecting both majority and minority interests.[48] Unfortunately, although many of the current redistricting commissions in place are independent in theory, many of them are actually still governed by partisan politics because commissioners are often political officials, appointed directly by political officials, or directly affected by the decisions of the commission and by where the lines are drawn.[49] This Note also discusses the negative effect partisan politics has on many

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42. Cox v. Larios, 542 U.S. 947, 947 (2004) (Stevens, J., concurring); *Vieth*, 541 U.S. at 291.

43. U.S. CONST. art. I, § 2, cl. 1, § 4, cl. 1; *see also Vieth*, 541 U.S. at 275.

44. ARIZ. CONST. art. IV, pt. 2, § 1(3); IDAHO CODE ANN. § 72-1506(8) (2005); IOWA CODE § 42.4(5) (2004); MONT. CODE ANN. § 5-1-115(3) (2005).

45. *See generally* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

46. Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 295 (D. Mass. 2004).

47. *See* Vento, *supra* note 35.

48. *See infra* Part IV.

49. *See infra* Part IV.

independent commissions and suggests solutions that states may adopt to make the redistricting process more transparent, to make districts more fair, and to mitigate the partisan politics inherent in drawing district lines. Ultimately, by creating legitimately independent redistricting commissions, states may have a better chance at developing a fair redistricting plan the first time, thereby increasing efficiency, avoiding lengthy litigation, and legitimizing the redistricting process.

I. THE HISTORY AND DEVELOPMENT OF REDISTRICTING LAW

The U.S. Constitution and state and federal common and statutory law all function to create redistricting guidelines for states. The Constitution provides states with the responsibility to apportion districts for both federal and state elections.[50] The Constitution also requires the federal government and the states to protect the rights of voters from discrimination.[51]

The VRA is one of the most important pieces of federal legislation with respect to voting practices and redistricting in particular. The VRA protects voters' rights by prohibiting a state from engaging in any voting practice or imposing any procedure that could disenfranchise eligible voters.[52] In addition, the legislation compels specific states named under the VRA to submit their redistricting plans for preclearance by the DOJ.[53] After a state submits its plan for preclearance, the

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50. U.S. CONST. art. I, § 4, cl. 1.

51. *Id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

52. 42 U.S.C. § 1973 (2000). The statute specifically provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees . . . as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id.

53. 28 C.F.R. § 51.4 (2006). The preclearance requirement of section 5 of the Voting Rights Act applies to the following states: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. In addition, the requirement to submit redistricting plans to the DOJ applies to parts of seven other states: California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. *Id.* § 51 app.; J. GERALD HEBERT ET AL., AM. BAR ASS'N SECTION OF ADMIN. LAW AND REGULATORY PRACTICE, THE REALIST'S GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS 14 (2000). In addition, it is relevant to note that the preclearance requirements sunset in 2007, and it is unclear whether Congress may reinstate them. However, House Judiciary Chairman F. James Sensenbrenner Jr. (R-Wis.) and House Speaker Dennis Hastert (R-Ill.) both pledged to make the extension of the VRA a top priority. Mike Allen, *A Push to Extend*

Attorney General must determine whether the new map has a discriminatory effect and disenfranchises voters.[54] The Attorney General may consider several factors including whether the plan is inconsistent with the submitting jurisdiction's own redistricting standards and the extent to which malapportioned districts disenfranchise the voting rights of minority citizens, dilute minority strength, fragment minority groups among districts, and pack minority groups into certain districts.[55]

In addition to the protection provided by the VRA, state legislatures may enact legislation and voters may propose initiatives that will create stricter voting laws as long as they do not contravene any of the guidelines put forth in the VRA.[56] State and federal court decisions have also had the effect of creating redistricting law; however, in theory the extent to which the judiciary has authority in the area of redistricting law should be "interpretive." Nonetheless, courts are often compelled to conduct redistricting and develop plans themselves, thus pushing the boundaries of separation of powers.

Although the U.S. Constitution and federal legislation provide guidelines and standards for voting practices within states for both federal and state elections, the law is relatively broad. Therefore, the means by which states attempt to achieve those standards vary widely. In turn, conflicts over whether state statutes or redistricting plans meet Constitutional and federal guidelines, such as the "one person, one vote" standard or the requirements in the VRA, have generated a great deal of case law that may prove instructive to states.

A. Constitutional Standard of "One Person, One Vote"

One of the most fundamental rights in the U.S. Constitution is the right to vote. The purpose of redistricting is essentially to make sure that each person is afforded the right to vote and that every citizen is represented in both the state and federal legislative bodies. Therefore, every ten years, after the government conducts a census, states must go through the procedure of redistricting, or reexamining district lines to ensure that districts are equal in population and are representative of the populace.[57] Redistricting must afford the basic right of the

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Voting Rights Act: Rep. Sensenbrenner Tells NAACP He Will Work to Renew Provisions of Law, WASH. POST, July 10, 2005, at A5, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/09/AR2005070901285.html?nav=rss_politics.

54. The Attorney General has sixty days to make an objection to the submission for preclearance, and if further information is provided by the submitting jurisdiction or requested by the Attorney General before the end of the sixty-day deadline, the sixty-day period within which to make an objection begins anew upon receipt of the additional information. 42 U.S.C. § 1973c (2000); Branch v. Smith, 538 U.S. 254, 263–64 (2003); 28 C.F.R. § 51.37; *see also* 28 C.F.R. § 51.52. However, any subsequent request for additional information by the Attorney General will not toll the sixty-day deadline. 28 C.F.R. § 51.37.

55. 28 C.F.R. § 51.59; *see also id.* § 51.58.

56. *See* 42 U.S.C. § 1973.

57. *See* U.S. CONST. art. I, § 2, cl. 3 (providing for a decennial census); *id.* amend. XIV, §§ 1, 2 (providing for equal protection of the laws and apportionment of representatives by population); Reynolds v. Sims, 377 U.S. 533, 583 (1964).

"one person, one vote" standard, which requires "equal representation for equal numbers of people."[58]

Generally, there are two standards used for determining population equality. The first and most common standard is the "total population deviation."[59] Under this standard, the ideal population of a district is expressed as a percentage, and the goal is to make sure that each district in a given city, town, or state represents the same number of people.[60] The other standard is the "average population deviation," which examines each district's deviation from the ideal number in terms of percentages.[61]

In the U.S. Supreme Court case *Karcher v. Daggett*, the Court rejected a state redistricting plan.[62] Although the population deviations between districts were small, the Court held that New Jersey did not make a good faith effort to ensure population equality among all districts.[63] In that case, the average district differed from the "ideal" figure by about 0.1384%, and the difference between the largest and smallest district was about 0.6984% of the average district.[64] The Court determined that there are two basic questions regarding population deviations in state legislation: (1) whether the redistricting committee could reduce the population differences between districts by a good faith effort, and (2) whether the differences between the districts were necessary due to some state interest or legislative goal.[65]

As to the first question, the challengers to the districts bear the burden of proof to show that the creators of the redistricting lines could have reduced or eliminated the differences.[66] If the challengers succeed on this threshold question, then a court should consider the second question.[67] Regarding the second question,

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58. *Reynolds*, 377 U.S. at 558, 577 ("By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."); Westberry v. Sanders, 376 U.S. 1, 18 (1964) (holding that congressional representation must be based on population as nearly as is practicable).

59. HEBERT ET AL., *supra* note 53, at 1.

60. *Id.* at 1–2. According to the "total population deviation" standard, if "there is a State with 1,000 people and five districts . . . . [p]erfect population equality would result if each of the five districts contained precisely 200 people." *Id.* at 1. However, if there was deviation between the districts, and the most heavily populated contained 220 people while the least contained 180, then there would be a total population deviation of 20% (*220 – 180 = 40*. Then, 40 divided by 200). *Id.* at 1–2.

61. *Id.* at 2. Using the example above and under the "average population deviation," if there were 5 districts and 1000 people, and the districts deviated from the ideal of 200 by 0, 10, 10, 20, and 20, then "the average deviation would be 12 (the average of [the five numbers]), which can also be expressed as 6% of the ideal population (12 divided by 200)." *Id.*

62. 462 U.S. 725, 727 (1983).

63. *Id*. at 731–32, 738.

64. *Id*. at 728.

65. *Id*. at 730–31.

66. HEBERT ET AL., *supra* note 53, at 3–5.

67. *Karcher*, 462 U.S. at 731.

the state has the burden of proof as to whether there was a specific state interest.[68] However, because the redistricting provisions in the U.S. Constitution only apply to redistricting for the U.S. Congress, these specific requirements are only mandated for congressional districting plans within each respective state.[69] States have latitude to make their own requirements for state legislative apportionment as long as the state's practice does not conflict with the requirements of the VRA or the "one person, one vote" requirement.[70]

However, while not subject to the same redistricting standards for federal congressional elections in drafting district lines for state offices, states are still required to meet standards for population deviation under the Equal Protection Clause.[71] In *Brown v. Thomson*, the Court upheld as constitutional Wyoming's redistricting plan, which had an average deviation from population equality between districts of 16% and a maximum of 89%.[72] The Court recognized, however, that "some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives" and that, generally, a maximum deviation of 10% falls under the category of a minor deviation.[73] According to the Court, the most important question in determining whether there is a justified deviation in the population of districts is whether the legislature's plan reasonably advances a rational state interest and, if so, whether the disparities in population numbers are unconstitutional.[74] Ultimately, courts will look to whether there is more than a nominal difference in population between districts; if there happens to be more than a 10% difference in the number of registered voters, then the courts look to whether the difference is in furtherance of a rational state interest or disenfranchises particular voters.

B. The Voting Rights Act and Gerrymandering

The VRA was enacted in response to state acts of discrimination and gerrymandering and sets forth basic requirements that attempt to ensure that states avoid political and racial gerrymandering so no voter is disenfranchised, especially on the basis of race. Section 2(a) of the VRA applies to all states and prohibits all redistricting plans from denying the rights of any citizen "to vote on account of race or color [or membership in a language minority group]."[75] Subsection (b) further states that a citizen's right to vote is denied or abridged if members of a minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[76]

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68. *Id*.

69. U.S. CONST. amend. XIV, § 2.

70. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1857 n.116 (1992).

71. U.S. CONST. amend. XIV, § 1; *see also* HEBERT ET AL., *supra* note 53, at 9.

72. 462 U.S. 835, 838–39 (1983).

73. *Id*. at 842 (holding that some of the legitimate state interests include maintaining the integrity of other political bodies and providing for compact districts of neighboring territory).

74. *Id*.

75. 42 U.S.C. § 1973(a) (2000).

76. *Id.* § 1973(b).

Section 5 ensures that specific states with a history of discrimination in redistricting or voting practices comply with the guidelines of the VRA, and the DOJ examines any changes or amendments in those states' laws that may affect voters.

1. Section 2 Claims Under the VRA

In 1986, the U.S. Supreme Court addressed a claim under section 2 of the VRA in the watershed case *Thornburg v. Gingles*.[77] According to the Court, a section 2 claim can succeed when a state implements a voting practice, procedure, or law that, in light of the state's background and history, causes unequal opportunities for minority voters to elect their preferred representatives.[78] The Court addressed the practice of creating multimember districts,[79] noting that such districts may work to dilute the voting strength of minority populations.[80] However, the Court said that multimember districts "are not *per se* violative of minority voters' rights."[81] For minority voters to show that multimember districts are, in fact, in violation of their section 2 rights, they must prove that the use of those districts minimizes or diminishes their ability to elect their choice of representatives.[82] The challenger to the districts "must prove three threshold conditions" to establish that there is in effect voter dilution: "first, 'that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district'; second, 'that it is politically cohesive'; and third, 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'"[83] The Court held that a trial court must consider the totality of circumstances in light of the past and present social conditions in evaluating a statutory, vote-dilution claim through redistricting to determine whether minority groups have equal access to the political process.[84] Therefore, after acknowledging that the district court made its decision based on the totality of the circumstances present, the Court affirmed the lower court's judgment, in all except one district, which held that the use of multimember

77. 478 U.S. 30 (1986).

78. *Id*. at 47.

79. A single-member district is "the smallest political unit from which representatives are elected." *Id.* at 50 n.17. The main difference between a single-member and a multimember district is that in single-member districts, one candidate is chosen to represent all constituents in a district. In multimember districts, on the other hand, two or more representatives are elected at large to represent all voters in a district. Whitcomb v. Chavis, 403 U.S. 124, 127–28 (1971). Because multimember districts are typically much larger, a minority group "may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts." Rogers v. Lodge, 458 U.S. 613, 616 (1982).

80. *Gingles*, 478 U.S. at 46 n.11.

81. *Id*. at 48.

82. *Id*.

83. Growe v. Emison, 507 U.S. 25, 40 (1993) (quoting *Gingles*, 478 U.S. at 50–51).

84. *Gingles*, 478 U.S. at 79.

districts gave black voters less of an opportunity than white voters to elect their preferred representatives.[85]

In *Johnson v. De Grandy*, the Court interpreted the meaning of voter dilution and analyzed the requirements needed to prove voter dilution under section 2 of the Voting Rights Act when applied to single-member districts.[86] The Court held that there was no violation of section 2 because although there was continued discrimination and bloc voting,[87] minority voters in a number of districts were roughly proportional to the voting majorities in those districts.[88] While the Court held that such proportionality was not dispositive of a challenge to single-member redistricting, it was a relevant factor to consider under the circumstances when deciding whether a minority group has less of an opportunity to elect representatives of their choice.[89]

2. Section 5 Claims Under the VRA and Racial Gerrymandering

Section 5 of the VRA creates more stringent guidelines for specific states and requires those states to preclear any redistricting maps with the DOJ or the U.S. District Court for the District of Columbia.[90] In *Beer v. United States*, the Court explained that section 5 of the Act was drafted to prevent changes in districting that could lead to a worsening, or retrogression, of minority members' positions.[91]

To bring a prima facie racial gerrymandering claim, a plaintiff "must show at a minimum that the [redistricting body] subordinated traditional race-neutral districting principles . . . to racial considerations. Race must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the [redistricting body's] districting decision."[92] Furthermore, when considering a challenge to a racial discrimination case in redistricting, a court must acknowledge that a redistricting body "[had] discretion to exercise the political judgment necessary to balance competing interests, and . . .

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85. *Id.* at 80.

86. 512 U.S. 997, 1000 (1994).

87. "[T]he use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. . . . [A] bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Gingles*, 478 U.S. at 48–49 (footnote omitted). By determining whether there is racial bloc voting, a court may determine whether minority citizens constitute a politically cohesive unit and whether the majority's votes act as a bloc to usually defeat the minority's preferred candidate. *Id.* at 51. Looking at historical voting practices is important because a showing that "racial bloc voting . . . extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Id.* at 57.

88. *Johnson*, 512 U.S. at 1000.

89. *Id.*

90. 42 U.S.C. § 1973c (2000) (codifying as amended the Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437); HEBERT ET AL., *supra* note 53, at 15.

91. 425 U.S. 130, 141 (1976).

92. Easley v. Cromartie, 532 U.S. 234, 241 (2001) (internal quotation marks and citations omitted).

exercise[d] *extraordinary caution* in adjudicating claims that [it drew] district lines on the basis of race."[93]

There are two common arguments central to making a prima facie case for a racial gerrymandering claim that the districts cause retrogression or have a discriminatory effect.[94] The first argument is that the map results in a fragmentation of minority districts.[95] Fragmentation occurs when members of minority groups are spread out between districts to get representation in more than one district.[96] The second argument is that the redistricting plan results in minority "packing" of districts.[97] Although some minority groups advocate for "safe areas" where a group is assured that it will elect a certain candidate to represent its interests, "packing" takes this practice a step further.[98] "Packing" occurs when the lines are drawn to ensure that minority groups will have a strong representation in one district and be underpopulated and underrepresented in other districts in which they previously had representation.[99] Under either argument, race is a predominant factor, and the purpose of the districting lines may be to disenfranchise minority populations.

According to the VRA, a state may not change any of its voting practices, such as redrawing district lines, if those changes have the purpose and effect of "denying or abridging the right to vote on account of race or color."[100] But, in *Reno v. Bossier Parish School Board* ("*Bossier Parish II*"), the Supreme Court held otherwise, stating that "[i]n light of the language of § 5 and our prior holding in *Beer*, . . . § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose."[101] In *Bossier Parish I*, the Court provided that to determine whether there was a discriminatory purpose with a retrogressive intent, several factors may be considered, including the state's history in redistricting, the events leading up to the redistricting plan, a change in the state's normal redistricting procedures, any legislative intent or history as evidenced by statements made by legislators, any retrogressive effects of the plan on minority groups, and the likelihood of minority votes being diluted.[102]

II. THE EVOLVING POLITICAL GERRYMANDERING CLAIM

Another claim frequently argued before the courts is the political gerrymandering claim, or a claim asserting that districts were over- or

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93. *Id*. (quotation marks and internal citation omitted).
94. HEBERT ET AL., *supra* note 53, at 16–17.
95. *Id*. at 17.
96. *Id*.
97. *Id.*
98. *Id.*
99. BLACK'S LAW DICTIONARY (8th ed. 2004).
100. 42 U.S.C. § 1973c (2000); HEBERT ET AL., *supra* note 53, at 18.
101. 528 U.S. 320, 341 (2000); HEBERT ET AL., *supra* note 53, at 18.
102. Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 488–89 (1997) (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977)); HEBERT ET AL., *supra* note 53, at 19.

underpopulated with one political party to favor the majority party.[103] However, after the Supreme Court's decision in *Vieth v. Jubelirer*, it is questionable whether a claim of political gerrymandering is justiciable. The plurality opinion in *Vieth* suggested that such a claim was a political question and thus could not be heard by a court. However, claims brought after this important decision demonstrate that this issue will not simply go away.[104] Furthermore, the Court's decision to hear oral arguments in March 2006 on a set of political gerrymandering cases from Texas suggests that the Supreme Court may still try to determine a standard by which to judge whether political gerrymandering has occurred.[105]

In *Davis v. Bandemer*, the Court held that a challenge to Illinois's redistricting plan was a justiciable political gerrymandering claim.[106] However, the Court reversed the district court's holding because the lower court applied a standard that was insufficiently demanding in finding voter dilution unconstitutional.[107] The Court held that for plaintiffs to bring a prima facie claim, they must prove both a discriminatory intent against an identifiable group and a discriminatory effect on that group.[108]

The Court noted that when redistricting is conducted by the legislature, which is an inherently political body, it should be relatively easy to show that the legislature intended the political consequences that resulted from its districting plan.[109] However, the Court also recognized that although intent may have been easy to prove in that case, a person does not necessarily have to prove intent to discriminate on the basis of his or her political party to succeed on a political gerrymandering claim.[110] For a court to determine intent, it should look at evidence of exclusive legislative process and deliberate drawing of district lines in accord with gerrymandering principles.[111] According to the Court, a claim of unconstitutional discrimination can only be upheld when the redistricting is conducted in such a way that would "consistently degrade a voter's or a group of voters' influence on the political process as a whole."[112]

Finally, the Court in *Davis* outlined how a court should analyze a claim regarding the Equal Protection Clause and political gerrymandering: if a court finds that there was a discriminatory effect and a discriminatory intent, then the court should look at the state legislation for "valid underpinnings."[113] In other words, "evidence of exclusive legislative process and deliberate drawing of district lines in accordance with accepted gerrymandering principles would be relevant to

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103. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 271 & n.1 (2004) (plurality opinion) (citing BLACK'S LAW DICTIONARY 696 (7th ed. 1999)).
104. *See infra* Part IV.C.
105. *See infra* Part IV.C.
106. 478 U.S. 109, 113 (1986).
107. *Id.*
108. *Id.* at 127.
109. *Id.* at 129.
110. *Id.* at 129 n.11.
111. *Id.* at 141.
112. *Id.* at 132.
113. *Id.* at 141.

intent . . . ."[114] In addition, a court could look to evidence of "valid and invalid configuration" of districts to determine whether a redistricting plan was important to particular state interests.[115] In *Davis*, the Court followed this process, but stated:

> We assumed that there was discriminatory intent, found that there was insufficient discriminatory effect to constitute an equal protection violation, and therefore did not reach the question of the state interests (legitimate or otherwise) served by the particular districts as they were created by the legislature. Consequently, the valid or invalid configuration of the districts was an issue we did not need to consider.[116]

The recent Supreme Court plurality opinion in *Vieth v. Jubelirer* has two important implications.[117] On the one hand, the Court rejected the ambiguous and rigorous standards in *Davis* by saying that there was no manageable standard with which to examine a political gerrymandering claim.[118] The Court's decision in *Vieth*, in turn, could signal the end of such claims. One supporting piece of evidence for this conclusion is that very few political gerrymandering claims have been upheld since the Court decided *Davis*.[119] This could be because *Davis* had impossibly high standards to prove disenfranchisement, or the *Vieth* plurality may be right that such claims cannot be successful because it is a political question, and thus, there is no valid standard by which to analyze such a claim.[120]

The second possible implication of the *Vieth* decision, as some of the Justices suggest in their concurring and dissenting opinions, is that a standard rendering a political gerrymandering case justiciable could potentially be developed at some point.[121] However, for the standard to work in practice, it would have to be easily applicable to show that a *political party* is indeed capable of being discriminated against.[122]

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114. *Id.*
115. *Id.*
116. *Id.* at 142.
117. Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion).
118. *Id.* at 271.
119. *See id.* at 279.
120. *See id.* at 277 ("Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."); *id.* at 305–06 ("The [*Bandemer*] majority's inability to enunciate a judicially discernible and manageable standard that it thought existed (or did not think did not exist) presaged the need for reconsideration in light of subsequent experience.").
121. *Id.* at 309 (Kennedy, J., concurring) ("In my view, however, the arguments are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander."); *id.* at 317 (Stevens, J., dissenting) ("The central question presented by this case is whether political gerrymandering claims are justiciable. . . . [F]ive members of the Court are convinced that the plurality's [negative] answer to that question is erroneous."); *id.* at 346 (Souter, J., dissenting) ("I would therefore preserve *Davis*'s holding that political gerrymandering is a justiciable issue, but otherwise start anew.").
122. *See id.* at 287 (plurality opinion). According to Richard Hasen, a professor and election law specialist at Loyola Law School, *Vieth* "was a monumental non-decision, a case in which five justices said partisan gerrymandering cases can go forward, but also said

Since *Vieth*, there have been other cases brought in state courts claiming discrimination against political groups. One such case, *Cox v. Larios*, was affirmed by the Supreme Court without opinion, but the concurrence by Justice Stevens provides insight into the Court's decision.[123] In *Cox*, the Court affirmed the district court's finding that Georgia's redistricting plan violated the "one-person, one-vote" principle for two reasons.[124] First, the district court found that there was a deliberate policy of favoring inner-city interests over those of citizens in the suburbs.[125] Second, the district court found that there was a policy of overpopulating Republican districts and underpopulating Democratic districts held by incumbents, as well as pitting Republican opponents against each other.[126] One of the factors that informed the district court's decision was the shape of the newly created districts.[127] This provided evidence supporting the plaintiff's challenge that the drafters were not only trying to protect the majority-party incumbents but were also actively trying to oust Republican opponents.[128] In his concurring opinion, Justice Stevens stated that "'the unavailability of judicially manageable standards' cannot justify a refusal 'to condemn even the most blatant violation of a state legislature's fundamental duty to govern impartially.'"[129]

However, if a court interprets *Vieth* as stating that there is no manageable standard for a political gerrymandering claim, then the political situation in states where incumbents are able to redistrict to protect themselves will never change unless states develop another source of reform. In such states, the majority party will always be in power. Without a manageable standard, political gerrymandering claims will have even less chance of success in court, and partisan politics will continue to control the redistricting process.

III. WHO SHOULD DRAW THE LINES? THE SEPARATION OF POWERS

Due to the issues that arise when redistricting occurs, it is not uncommon for the inherently interested political parties in the legislature to come to a standstill when trying to reapportion districts. When this happens, the main question is who should take over the responsibility of drawing the lines. Because redistricting is necessary, courts often take over the task. However, redistricting by its nature is a legislative, not judicial, responsibility, and many critics argue that,

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there is no standard by which to judge them." He went further to call *Vieth* "a placeholder decision" and argued that the case is "a way of delaying things. Maybe it makes sense in an election year, and maybe it makes sense where Justice Kennedy doesn't know what he wants to do." Charles Lane, *Justices Order New Look at Tex. Redistricting Case*, WASH. POST, Oct. 19, 2004, at A21, *available at* http://www.washingtonpost.com/wp-dyn/articles/A41782-2004Oct18.html.

123. Cox v. Larios, 542 U.S. 947 (2004), *aff'g* 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

124. *Id.* at 947 (Stevens, J., concurring).

125. *Id.*

126. *Id.* at 948.

127. *Id.* at 948–49.

128. *Id.* at 949.

129. *Id.* at 950–51 (quoting Vieth v. Jubilirer, 541 U.S. 267, 341 (2004) (Stevens, J., dissenting)).

while a court may be able to decide if a plan is constitutional, a court should not redraft district lines.

In the Supreme Court case of *Reynolds v. Sims*, the Court commended an Alabama district court for deferring to the Alabama legislature to develop a redistricting plan in the state's reapportionment process.[130] The Court noted the principle that legislative reapportionment is a concern for the legislature.[131] However, the Court also stated that when a legislature has the opportunity to reapportion districts in a timely fashion as required by the U.S. Constitution, but fails to do so, a federal court may have the duty to intervene.[132] The Court also commended the district court for acting with judicial restraint when it finally did intervene and ordered its own reapportionment plan temporary so as not to "usurp the primary responsibility for reapportionment which rests with the legislature."[133]

In *Growe v. Emison*¸ the Supreme Court held that the federal district court erred in refusing to abstain or defer to state court redistricting proceedings.[134] The Court explained that the U.S. Constitution leaves the primary responsibility to apportion federal and state legislative districts with the states.[135] The Court further explained that it was the duty of the state to develop a redistricting plan through its legislature or another government body, not the federal courts.[136] Furthermore, the Court held that "[a]bsent evidence that these state branches will fail timely to perform that duty," a federal court must not interfere with the process.[137]

In 2003, the Supreme Court decided another case, *Branch v. Smith*, regarding the issue of whether a court may devise a redistricting plan when the legislature is unable to fulfill its duty to do so.[138] The Court differentiated its decision in *Branch* from *Growe* because, in *Branch*, the district court granted the state court adequate time to develop a redistricting plan, and the state-court plan was subject to section 5 of the Voting Rights Act.[139] In *Branch*, the state legislature failed to devise a redistricting plan after the census was published, and the plaintiffs filed suit in state court to create a districting map for the next election.[140] Other citizens filed suit in federal court asking for the same.[141] Initially, the district court did not interfere with the state court's redistricting plan, recognizing that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional . . . districts . . . ."[142] However, it also concluded that if the state court could not have a redistricting plan precleared and

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130. 377 U.S. 533, 586 (1964).
131. *Id.* at 576.
132. *Id.* at 586.
133. *Id.*
134. 507 U.S. 25, 42 (1993).
135. *Id.* at 34.
136. *Id.*
137. *Id.*
138. 538 U.S. 254, 258 (2003).
139. *Id.* at 262.
140. *Id.* at 258.
141. *Id.* at 258–59.
142. *Id.* at 259 (internal quotation marks omitted) (quoting Smith v. Clark, 189 F. Supp. 2d 502, 503 (S.D. Miss. 2001) (quoting Growe v. Emison, 507 U.S. 25, 34 (1993))).

in place by its deadline, then the court would assert jurisdiction.[143] Finally, the district court held that "'if necessary, [the court] will draft and implement a plan for reapportioning the state congressional districts.'"[144] After finding that the state court would not have a redistricting plan in time, the district court developed its own map and enjoined the state court from implementing its plan.[145]

The *Branch* Court stated that while section 2(c) of the Voting Rights Act required districts to be established "by law," it included "action by state and federal courts when the prescribed legislative action has not been forthcoming."[146] A plurality of the Court further noted that when a court does engage in redistricting, "[i]t must follow 'the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature . . . .'"[147] Finally, the plurality noted that section 2a(c) of the Voting Rights Act, which calls for an at-large election, should only apply when a redistricting plan has not been implemented in the state and the state lacks the time necessary to develop a plan before a congressional election.[148]

Branch was remanded, and in *Mauldin v. Branch*, the Mississippi Supreme Court held that under Mississippi state law state courts are not authorized to engage in redistricting.[149] The dissent, however, argued that *Branch* and *Growe* clearly stated that courts did have proper authority when legislatures fail to act in the redistricting process.[150]

In 2004, the Colorado Supreme Court held similarly to the *Mauldin* dissent. In *People ex rel. Salazar v. Davidson*, the Colorado Supreme Court held that when a Colorado court redrew lines for the 2002 election, it fulfilled the state's obligation to engage in redistricting.[151] The court further held that the legislature could not redraw the lines after the court had done so.[152] In June 2004, the U.S. Supreme Court denied certiorari in the case.[153] The Colorado General Assembly had asked the Court to review the Colorado Supreme Court's ruling that "'judicially-created districts are just as binding and permanent as districts created by the General Assembly.'"[154] The General Assembly argued that the permanent use of a court-ordered plan, despite the legislature's proposal of a valid alternative, violated Article I, Section 4 of the U.S. Constitution.[155] Although the Court

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143. *Id.*
144. *Id.* (quoting *Smith*, 189 F. Supp. 2d at 503).
145. *Id.* at 260–61.
146. *Id.* at 272.
147. *Id.* at 274 (plurality opinion) (quoting White v. Weiser, 412 U.S. 783, 795 (1973)).
148. *See id.* at 275.
149. 866 So. 2d 429, 431 (Miss. 2003) (en banc).
150. *Id.* at 442 (McRae, Presiding J., dissenting).
151. People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1231 (Colo. 2003) (en banc), *cert. denied*, Colo. Gen. Assembly v. Salazar, 541 U.S. 1093 (2004).
152. *Id.* at 1243.
153. *Colo. Gen. Assembly*, 541 U.S. 1093.
154. *Id.* at 1094 (Rehnquist, C.J., dissenting) (citing *Davidson*, 79 P.3d at 1231).
155. *Id.*; *see also* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the

declined to hear the case, Chief Justice Rehnquist and Justices Scalia and Thomas dissented from the denial of certiorari and stated that the Court construes the term "legislature" not as a "'body[,]' but the function to be performed. . . . which is defined by state law."[156] However, the dissent also noted that "to be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature in favor of the courts."[157]

The New Hampshire Supreme Court also addressed the issue of whether the legislature could develop a new redistricting plan after the court devised and implemented a reapportionment plan. However, the New Hampshire court held that the legislature had the authority to pass two resolutions, which partially redistricted both the House and the Senate based on the 2000 census.[158] The court reasoned that when the legislature failed to act, it was the judiciary's responsibility to create a constitutional plan.[159] However, the court also stated that any plan developed by a court should be temporary in nature.[160]

The U.S. Supreme Court has refrained from giving a definitive answer on the issue of whether courts may engage in redistricting and has essentially left the decision up to individual state legislatures and courts. However, if a state does allow a court to intervene in redistricting, it could potentially have a negative effect and jeopardize the redistricting process. For instance, if the court drafts the original plan, and redistricting is only intended to be conducted once every decade, the legislature may be precluded from drafting a second plan, and the court's ad hoc map may establish the district lines for the following ten years. Yet, even if the legislature or other authorized body fails to meet its deadline, the court's redistricting map should not have to be permanent if it is not best for the state.

IV. SOLVING THE "POLITICAL PROBLEM"

Some states have found alternatives to directly involving state legislatures and avoiding the involvement of the judiciary in the redistricting process. One way states may circumvent the problem of inherent bias in the redistricting process and protect the rights of their voters is by establishing a redistricting commission made up of members who are independent of the legislature. In theory, such a commission does not answer to and cannot be influenced by the legislature and, therefore, is relatively neutral.

A. The Arizona Independent Redistricting Commission

In Arizona and in several other states that have implemented similar commissions or anticipate doing so in the near future, independent commissions work to remove the political process from redistricting. Generally, independent

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Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

156. *Colo. Gen. Assembly*, 541 U.S. at 1095 (Rehnquist, C.J., dissenting).

157. *Id.*

158. *In re* Below, 855 A.2d 459, 473 (N.H. 2004) (per curiam).

159. *Id.* at 472–73.

160. *Id.* at 473; *see also* Johnson v. Mortham, 915 F. Supp. 1529, 1544 (N.D. Fla. 1995).

commissions replace legislative commissions or committees and reassign the redistricting responsibility to other citizens who are not politically biased or influenced by special-interest groups.

Eight years before Arizona's Proposition 106 established the IRC[161] and after the 1990 census, the Arizona House of Representatives and Senate were deadlocked as to how to reapportion the district lines.[162] When it appeared that the stalemate would not end, Arizonans for Fair Representation brought suit in federal district court.[163] The court allowed three groups to intervene, and each was required to submit a new redistricting plan.[164] The district court took the responsibility of adopting a plan based on three standards: the U.S. Constitution, the VRA, and the neutral principles of redistricting.[165] The court ordered that its plan would remain in effect for all congressional elections through the year 2000 unless the Arizona Legislature enacted its own plan that met the requirements of law and was precleared by the DOJ.[166]

To avoid the impasse that occurred after the 1990 census, in the 2000 general election, voters approved Proposition 106, which amended the Arizona Constitution by creating the IRC and assigning to it the task of redistricting.[167] The IRC was thus made responsible for realigning district maps to allow political parties and minority groups to gain adequate and fair representation.[168] Under the Arizona Constitution, the IRC must consist of five members, no more than two of whom may belong to the same political party.[169] Four of the commission members are chosen by the highest ranking members of the state House of Representatives and Senate of both the majority party and minority party after the Commission on Appellate Court Appointments selects a group of candidates.[170] The four selected members then select the last member, who serves as the chairperson and who may not be a member of either major political party.[171] Membership rules such as these exist to prevent the majority party from showing favoritism in drawing district lines to protect incumbents or otherwise ensure that its members are given special treatment.[172]

In addition, the Arizona Constitution provides that, in redistricting, the IRC shall accommodate specified goals, including:

> A. Districts shall comply with the United States Constitution and the United States voting rights act;

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161. *See supra* note 2.
162. Arizonans for Fair Representation v. Symington, 828 F. Supp. 684, 686 (D. Ariz. 1992).
163. *Id*.
164. *Id*. at 687.
165. *Id*.
166. *Id*. at 694.
167. *See supra* note 2 and accompanying text.
168. *Id*.
169. ARIZ. CONST. art. 4, pt. 2, § 1(3).
170. *Id.* § 1(4)–(6).
171. *Id.* § 1(8).
172. *Cf. id.* § 1(3).

> B. Congressional districts . . . and state legislative districts shall have equal population to the extent practicable;
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> C. Districts shall be geographically compact and contiguous to the extent practicable;
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> D. District boundaries shall respect communities of interest to the extent practicable;
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> . . . .
>
> F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.[173]

The Arizona Constitution also requires the IRC to follow a four-phase method in drawing district lines. The first phase requires the IRC to create "districts of equal population in a grid-like pattern across the state," at which time they may not consider voter registration, voting history, or the residences of candidates.[174] Secondly, the IRC is required to consider specified goals in order to adjust the grid created in the first phase, at which time the IRC members *may* consider voter registration and history to comply with these goals, but they are still not allowed to consider the addresses of candidates.[175] Thirdly, the IRC advertises the maps they have drafted and allows public comment for thirty days before reaching phase four, which is certifying the final map to the Secretary of State.[176]

In its first redistricting attempt, the IRC hired the National Demographics Corporation to act as a consultant and aid in creating the equal-population grid, drafting congressional and legislative maps, testing alternatives, soliciting public input, and preparing final congressional and legislative redistricting plans for submission to the DOJ.[177] After several public hearings, the IRC devised a redistricting plan, which it submitted for preclearance by the DOJ.[178] In March 2002, the DOJ approved part of the plan but asked for more information regarding the remaining portion.[179] However, in 2002, the Arizona Minority Coalition for Fair Redistricting filed a complaint against the IRC claiming "that the IRC violated the Arizona Constitution by failing to make the legislative districts sufficiently competitive."[180] The superior court, applying a strict scrutiny standard, held that the district lines were unconstitutional because they were not competitive.[181] The IRC then asked for approval for an interim plan to be used in the upcoming elections and devised a new plan for use in elections during 2004–2010.[182]

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173. *Id.* § 1(14).
174. *Id.* § 1(14)–(15).
175. *See id.*
176. *Id.* § 1(16)–(17).
177. *Ariz. Minority Coal.* Order, *supra* note 10, ¶ 17.
178. Ariz. Indep. Redist. Comm'n v. Fields, 75 P.3d 1088, 1093 (Ariz. Ct. App. 2003).
179. *Id*.
180. *Id*.; *see also* ARIZ. CONST. art. 4, pt. 2, § 1(14)(F).
181. Ariz. Minority Coal. for Fair Redist. v. Ariz. Indep. Redist. Comm'n, 121 P.3d 843, 849, 851 (Ariz. Ct. App. 2005) (per curiam).
182. *Fields*, 75 P.3d at 1093.

However, the 2004 alternative plan was withdrawn after the Arizona Court of Appeals ordered a stay allowing the 2004 elections to be held according to the districts from 2002.[183]

The IRC appealed the superior court's 2002 ruling that its plan was unconstitutional, and the Arizona Court of Appeals reversed in part the superior court's decision.[184] The appellate court held that the strict scrutiny standard should not have applied because the redistricting plan did not impose "severe restrictions" or "substantially burden the right to vote."[185] Furthermore, the court found that the plan was not so "'extremely irregular' that segregation for voting purposes is the only reasonable explanation."[186] Therefore, the court reversed the portion of the trial court order that invalidated the plan and ordered the IRC to take action in constructing a new plan.[187] The court further remanded to the trial court to decide if the original 2002 plan was "rationally related to a legitimate government purpose."[188]

The Arizona Court of Appeals also addressed whether the IRC violated the Equal Protection Clause when it did not define the standards and terms outlined in the goals set forth in the Arizona Constitution, such as "community of interest," "extent practicable," "competitive," and "significant detriment." The trial court found that there was such a violation.[189] However, the court of appeals reasoned: "At present, it is not possible to produce a perfect map by feeding data into a computer. Instead, the people of Arizona have entrusted a politically balanced group of five individuals with discretion to reach reasonable conclusions on how to draw district lines."[190] With respect to this issue, the court found that the Equal Protection Clause did not require definitive interpretations of these terms but suggested that IRC members apply them rationally.[191]

In addition, the court found that the members of the IRC must consider the goals set forth in the Arizona Constitution.[192] However, if focusing on one goal would lead to the detriment of achieving the other goals, that goal may be disregarded.[193] More specifically, with the subject of competitiveness, which is listed as one of the goals the IRC should strive to attain for each district, the court held that "if drawing competitive or more competitive districts would not be practicable or would cause significant detriment to the goals listed . . . , the Commission must refrain from establishing such districts."[194] Therefore, the court

183. *See Ariz. Minority Coal.*, 121 P.3d at 849 n.9.
184. *Id.* at 872.
185. *Id*. at 853–54.
186. *Id*. at 855.
187. *Id*. at 872.
188. *Id*. at 855.
189. *Id.* at 855–56.
190. *Id.* at 857.
191. *Id*. at 857–58, 870.
192. *Id*. at 848, 857.
193. *Id.* at 860.
194. *Id.*

of appeals vacated the superior court's ruling and remanded for the trial court to determine whether a new trial was required.[195]

The court of appeals' decision has upset many Democrats, who argue that they have once again been discriminated against in Arizona. Currently, Republicans "have an edge of 18-12 in the Senate and 39-21 in the House."[196] According to critics, the "effort called independent redistricting, which was spearheaded by Democrats" to create more "competitive state legislative boundaries" may have backfired because it "is once again favoring Republicans."[197] Whether or not this is true, unfortunately, it may be impossible with any redistricting scheme to avoid favoring one political party over another.

The purpose of redistricting is to ensure that each voter is fairly represented in the federal and state governments. In Arizona, the IRC is fairly divided by party lines, with both major parties having input as to who should be appointed to the IRC.[198] Furthermore, its chairperson must not be registered with either of the major political parties, and therefore, he or she is theoretically free from the influence of special interests or political interests.[199] However, whether the "independence" of the chairperson is legitimate is also questionable because although the Arizona Constitution requires that the chairperson be registered as an Independent, it does not restrict someone from a major political party from changing his or her voter registration to Independent to meet the requirement.[200] The IRC has the responsibility to reasonably weigh and balance goals and guidelines as set forth and approved by voters.[201] In addition, as provided in the first and second phases, the IRC is prohibited from considering incumbents and other candidates and their residences when drawing lines.[202] Finally, as stated in the third phase, the public is given an opportunity for comment after the lines are drawn, giving the district lines legitimacy and the procedure transparency.[203]

B. Other States Following Suit?

In addition to Arizona's IRC, at least twelve other states have developed or are considering creating similar bodies charged with the responsibility of

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195. *Id.* at 872. On January 4, 2006, the Arizona Supreme Court declined to review the October 2005 court of appeals decision upholding the congressional lines and remanding the legislative lines to an Arizona Superior Court. Although the case is on remand, because of the complexity of the redistricting and preclearance process, it appears that the legislative map used in 2004 will be used again in 2006 and perhaps for the rest of the decade. Paul Davenport, *High Court Kills Redistricting Suit*, CASA GRANDE DISPATCH, Jan. 5, 2006, *available at* http://www.zwire.com/site/news.cfm?newsid=15880313&BRD=1817&PAG=461&dept_id=68561&rfi=6.

196. Jahna Berry & Chip Scutari, *Court Axes Democrats' Dreams of Redistricting*, ARIZ. REPUBLIC, Oct. 19, 2005, at 1A.

197. *Id.*

198. ARIZ. CONST. art. 4, pt. 2, § 1(4)–(6).

199. *Id.* § 1(8).

200. *Id.*

201. *Id.* § 1(14).

202. *Id.* § 1(14)–(15).

203. *Id.* § 1(16)–(17).

redrawing district lines every ten years.[204] Some of these states have commissions similar to Arizona's in which members are appointed by the legislature. Other states, however, have established commissions where members are automatically appointed to participate in the redistricting process based upon the political office that they hold.

Idaho's commission has members appointed by the state legislature; the leaders of the two largest political parties of both the Senate and the House appoint one member and the state chairmen of the two largest political parties also appoint one member.[205] Washington State's commission is made up of four voting members and a nonvoting chairman who are also appointed by the legislature.[206] Every ten years, the commission is re-formed and then dissolved after the commission completes the redistricting process.[207] The commissions of Hawaii and Montana are also structured similarly.[208] However, both states prohibit any commission member from running for the legislature for a specified time after completing the new districting plans.[209] Arkansas also has a commission that acts independently of the legislature. Its members, however, are still elected officials.[210] The Arkansas "Board of Apportionment" consists of the Governor, who acts as Chairman, the Secretary of State, and the Attorney General.[211]

Although other states have developed independent commissions before and after Arizona created the IRC, none have gone to the same lengths as Arizona in making such explicit and stringent requirements and guidelines for its IRC members to follow. Recently, many states' legislatures, voters, and courts have had to face many different redistricting challenges, some of which are unique due to a state's own problems, history, and minority populations. Therefore, many states are beginning to look at the possibility of creating their own redistricting commissions to meet their own distinct and changing needs.

C. The Future of Independent Redistricting

To address this trend for developing redistricting commissions, several state legislatures around the country debated the redistricting issue in 2005. Both Republicans and Democrats respectively brought bills to the legislative floors in states where they hold majorities to establish an independent redistricting commission and take the redistricting process out of the hands of their states' legislatures.

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204. Mary Madewell, *Homer Wants Redistricting Revamped*, PARIS NEWS, Mar. 21, 2005, *available at* http://web.theparisnews.com/story.lasso?wcd=19361. The other states with redistricting commissions are: Alaska, Arkansas, Colorado, Hawaii, Idaho, Iowa, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington. *Id.*

205. IDAHO CONST. art. III, § 2(2).

206. WASH. CONST. art. II, § 43(2).

207. *See id.* § 43(1).

208. *See* HAW. CONST. art. IV, § 2, cl. 1, 2; MONT. CONST. art. V, § 14(2).

209. HAW. CONST. art. IV, § 2, cl. 6; MONT. CODE ANN. § 5-1-105 (2005).

210. ARK. CONST. art. VIII, § 1.

211. *Id.*

In his State of the State address in 2005, Republican California Governor Arnold Schwarzenegger called for the Democrat-controlled state legislature to change the way redistricting is conducted in the State.[212] In California, after the 2000 census, Republicans made a "sweetheart deal" with Democrats. Republicans ceded to the Democratic Party's plan, drafted to protect incumbents, because the Republican Party was nervous that, if they did not adhere to the proposed plan, the Democrat-controlled legislature would create a map that could be more detrimental to the GOP.[213] In the district plan following the 1990 census, 151 seats in California were considered competitive, while after the 2000 census, only 45 seats were still considered competitive.[214] In fact, in 2004, only seven incumbents lost and only thirteen seats changed party hands.[215] Schwarzenegger proposed that the lines should be drawn by retired judges and threatened that if the legislature did not act to change the redistricting process, he would take the choice directly to the voters.[216] His vision was manifested in the form of Proposition 77, which was defeated on November 8, 2005.[217] On the same day, voters in Ohio rejected a similar proposition to establish a more independent redistricting commission in their state.[218]

Texas has also considered legislation to implement an independent redistricting commission.[219] In 2003, then U.S. House Majority Leader Tom DeLay led the Republican Party in a controversial move to redraw the Texas lines.[220] In response, Democratic state legislators fled Texas to deprive the GOP of a quorum to approve the new districts.[221] Several citizens and groups opposed the new plan and brought suit to enjoin the Texas Secretary of State from holding the 2004 elections using the 2003 plan.[222] A three-judge panel overruled the claims in January 2004.[223] The Supreme Court heard and remanded the case, *Session v. Perry*, and its companion cases in light of the Court's decision in *Vieth*.[224] In *Session* and its companion cases, voters and interest groups brought suit alleging that the State's redistricting plan violated the Equal Protection Clause of the

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212. John M. Broder, *Schwarzenegger Proposes Overhaul of Redistricting*, N.Y. TIMES, Jan. 6, 2005, at A13, *available at* http://query.nytimes.com/gst/abstract.html?res=F00E10F83B5D0C758CDDA80894DD404482&incamp=archive:search.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *See* Sam Hirsch & Thomas E. Mann, Op-Ed., *For Election Reform, A Heartening Defeat*, N.Y. TIMES, Nov. 11, 2005, at A23, *available at* http://www.brookings.edu/views/op-ed/mann/20051111.htm.

218. *Id.*

219. Scott Hochberg, *Bipartisan Proposal for Independent Redistricting Commission*, REP. HOCHBERG'S DIST. 137 ELEC. NEWSL., Aug. 13, 2003, http://scotthochberg.com/newsletter-arc/0005.html.

220. Lane, *supra* note 122, at A21.

221. *Id.*

222. *Id.*

223. *Id.*

224. 298 F. Supp. 2d 451 (E.D. Tex. 2004), *vacated and remanded sub nom.* Henderson v. Perry, 543 U.S. 941 (2004).

Constitution and the VRA.[225] The Texas district court in that case stated that, because the Supreme Court in *Davis* was unable to establish a manageable standard for political gerrymandering claims, the standard to show both discriminatory effect and discriminatory purpose was difficult to find.[226] The court further presented the question of "how much of a role the judiciary ought to play in policing the political give-and-take of redistricting."[227] Although the Supreme Court vacated and remanded the cases after deciding *Vieth*, the cases were appealed after remand, and the Court will hear oral arguments in March 2006.[228]

To avoid redistricting issues in the future, Democrats in Texas introduced a bill to create the Texas Congressional Redistricting Commission.[229] The Commission would consist of nine members—four Republicans, four Democrats, and a nonvoting officer selected by the other members.[230] Both parties would select two members from each party, and no member could have been an elected public official, political party official, or lobbyist during the previous two years.[231]

In Massachusetts, Democrats and Common Cause[232] cosponsored a bill to create a nine-member independent commission to conduct redistricting.[233] The bill would require the commission to group together towns and citizens of common interests or race.[234] In addition, the commission would be open to the public and allow input from citizens at all stages of the redistricting process.[235]

Finally, in January 2006, a bill to create an independent redistricting commission in Indiana advanced to the floor of the Indiana House of Representatives.[236] Like Arizona's IRC, Indiana's commission would also have five members, all of whom would be independent from the legislature.[237] Four members would be chosen by the party leaders of the General Assembly, and the Chief Justice of the Indiana Supreme Court would appoint the chairman.[238] The commission would be required to consider factors such as population and compactness.[239] While the Republican-dominated House of Representatives

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225. *Id.* at 469.
226. *Id.* at 474.
227. *Id.*
228. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 827 (2005) (noting probable jurisdiction).
229. Madewell, *supra* note 204.
230. *Id.*
231. *Id.*
232. Common Cause is a national nonprofit organization that advocates for voters' rights and civil liberties. *See* Common Cause: About Us, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=189955#mission (last visited Feb. 23, 2006).
233. Proposal for a Legislative Amendment to the Constitution Establishing an Independent Redistricting Commission and Criteria for Redistricting, S.B. 12, 184th Gen. Ct., Reg. Sess. (Mass. 2005); Common Cause: Massachusetts, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=192849 (last visited Feb. 23, 2006).
234. Mass. S.B. 12, § 5.
235. *Id.* § 10.
236. H.B. 1009, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006).
237. *Id.*
238. *Id.*
239. *Id.*

approved the legislation, Democrats mostly voted against the bill and voiced many of the concerns discussed above.[240] For instance, Democrats argued that the districting plan would violate the separation of powers and that it would be a problem if redistricting issues wound up in court.[241]

D. Learning From Experience

Although Arizona's IRC has been tied up in litigation involving the constitutionality of the districting plan it devised, and California's and Ohio's propositions to establish independent commissions were defeated, this does not mean that independent redistricting commissions do not work or that voters do not want them. There are underlying reasons to explain why these initiatives have not been approved by voters and why the IRC has not necessarily been as successful yet in effect as it appeared it would be on paper.

With the exception of a few states, such as Arizona, independent commissions are not necessarily "independent" of the legislature and influence from other politicians and special interest groups. Instead, the commissioners are either elected officials or are directly appointed by high ranking officials.[242] The problem here is obvious—elected officials will not want to redraw lines to their detriment or to harm their party. Many of the commissions are "independent" in name only; the members may still have political interests or be influenced by the legislators who appoint them. Although it may be true that a person chosen to serve on any redistricting commission would naturally have political affiliations, having a direct political relationship with someone who may benefit or be disadvantaged by the commission's work is a separate issue.

The act of redistricting is intrinsically political; therefore, to reform the system, some of the political influence or interests must be removed from the process. It makes more sense to appoint people to a redistricting commission who have been educated in or have practiced in areas of election or civil rights law or who may have had experiences that could inform their decisions as board members. At the very least, people appointed to draw redistricting lines should not have a direct interest in the designation of districts.

Governor Schwarzenegger's proposed solution to the problem of unfair redistricting practices may have been an effective means of resolving the problem of inherent bias in the political process, which is typical when politicians are given the responsibility to draw district lines which will affect their own political futures.[243] Ideally, judges have spent their careers as neutral decisionmakers or arbiters, honed their negotiating skills, and developed a keen sense of fairness. It would be difficult to argue that a person of any other profession or position would

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240. Mary Beth Schneider, *It's Tough to Separate Politics, Redistricting; Plan for Bipartisan Panel to Draw Boundaries Gets 1st OK on—Surprise!—a Party-line Vote*, INDIANAPOLIS STAR, Jan. 20, 2006, at 1B; *see also supra* Parts II–III.

241. Mary Beth Schneider, *House OKs Redistricting Change; Bipartisan Commission Would Draw Maps Beginning in 2011*, INDIANAPOLIS STAR, Jan. 27, 2006, at 1B.

242. *See supra* Part IV.B.

243. *See supra* notes 212–18 and accompanying text.

be more apt to conduct redistricting than judges. Therefore, it seems surprising that voters would not want to approve such a proposition, which would have the effect of making all voters more equal when district lines are redrawn.

However, there may be several underlying reasons for the defeat of propositions in Ohio and California.[244] One plausible reason California voters rejected propositions for an independent commission is that most registered voters in California are Democrats, and the proposition was sponsored by a Republican Governor, which raised the red flag to voters that it may be a Republican power grab. However, at least one commentator suggests that such proposals in Ohio and California were not merely attempts by the minority party to usurp control of the legislature.[245] Instead, the editorial suggests that both proposals "would have improved the way their states draw lines for congressional seats and legislative districts."[246] However, because the proposals were made midcycle of the census, "it was too clear which party they would help: the California proposal was pushed by Republican Governor Arnold Schwarzenegger, the Ohio initiative by Democrats. Both were easy for the opposing party to paint as precisely the sort of political machinations reform is meant to prevent."[247]

CONCLUSION

The reapportionment process has been plagued by political and racial discrimination for years. In *Vieth*, Justice Scalia commented that "[p]olitical gerrymanders are not new to the American scene."[248] Justice Scalia wrote that "[t]here were allegations that Patrick Henry attempted (unsuccessfully) to gerrymander James Madison out of the First Congress."[249] Over time, case law and federal and state statutes have given states guidelines to ensure that in the redistricting process every person is represented in both the federal and state legislatures. However, because of the political nature of the process, every ten years and even in between each census, lawsuits arise across the country. Some of the concerns are new, but most of them are essentially the same issues rooted in the legislators' political interests in drawing the lines to protect themselves or their respective parties.

Arizona and other states have devised plans or commissions to circumvent the problems and issues that typically arise with redistricting. Most of these commissions are relatively new and, therefore, still have their problems. However, the reforms show that states are realizing the problems with authorizing

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244. For a detailed discussion and research as to why voters did not approve the propositions for redistricting reform in California and Ohio, see Election Updates: Why Did Redistricting Reform Fail in California and Ohio in 2005? New Survey, http://electionupdates.caltech.edu/2006/02/why-did-redistricting-reform-fail-in.html (last visited Feb. 25, 2006).

245. Editorial, *Redistricting Defeats*, WASH. POST, Nov. 14, 2005, at A20, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/13/AR2005111300956_pf.html.

246. *Id*.

247. *Id*.

248. Vieth v. Jubelirer, 541 U.S. 267, 274 (2004) (plurality opinion).

249. *Id*.

legislators to draw district lines, and thus, states are more frequently attempting to resolve the problem with independent commissions. The ideal solution would be to learn from what other states have done—their successes and their failures. Then state legislators, voters, or courts should look at the unique needs and population of their own states to apply these lessons. Finally, the entity or group of people developing the new commission should determine the best way to appoint commissioners who will be neutral and unbiased in drawing lines and who will do their best to ensure that each person in the state gets fair representation in both the federal and state legislatures.

Some of the ways in which states have attempted to ensure neutrality is to implement commissions where members are appointed by both parties, not appointed because of their political party; where the public is invited to keep track of the redistricting plans, and citizens are welcome to give their opinions; where members are prohibited from running for elected office within a specified time span; and where the state constitution or laws provide for specific terms for the redistricting map, such as competitive or safe districts, depending upon the best interests for the state. By looking at these factors and attempting to decide what is best for all voters in the state, states may try to protect their citizens from unfair politics and mitigate many of the historic problems inherent to the redistricting process.

While Arizona's IRC is a model for change in theory, there are further steps that states may take to avoid the challenges the IRC has faced. For instance, in creating independent commissions, it may be advisable for states to create guidelines that are balanced between state's interests and efficiency. States should know who their voters are and act to protect the voting minority by reaching out to those communities before and after the commission is established. In addition, states should create guidelines that are specific enough to ensure that the commission adopts standards for competitiveness or safe districts that will protect the people they are intended to protect; however, the guidelines should remain flexible enough to allow for efficiency and avoid red tape. Specific commission guidelines upon establishment will add legitimacy to the commission's decisions as well as be more efficient in the long run by avoiding lengthy litigation and interim maps as was the case in Arizona. In addition, states should allow the public to give input before the commission is established, as well as during and after the commission conducts redistricting, which will provide for legitimacy in the decision and transparency in the process. Finally, states should attempt to legitimize redistricting reforms by pursuing them at the end or beginning of a census cycle, not in the middle which implies to voters that it is still a political grab at power for the opposing, minority party. Ultimately, if states want true reform in the political process that will ensure fairness not just in the short-term, but in the long-term, for both major parties as well as minority voters, they must provide protection from partisan politics.