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# Redistricting Commissions in the Western United States

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# Redistricting Commissions in the Western United States

Peter Miller and Bernard Grofman\*

*Congressional and state-level redistricting in the United States is predominately done by state legislatures, usually subject to a gubernatorial veto. However, some states—especially in the West—use a commission to draw new congressional or legislative districts. These redistricting commissions, which take a variety of institutional forms, are guided by redistricting criteria that they are mandated to follow. We identify the institutional arrangements used in the western states during the 2011–2012 redistricting cycles and briefly consider the nature of public input in these states across types of redistricting processes, and we indicate whether or not the state was able reach a timely agreement on a congressional plan that was not subsequently overturned in court. We then compare congressional districts in the western states drawn by state legislatures, commissions, and the courts from 1992 to 2012, with a focus on three criteria: the integrity of political subdivisions, the compactness of the districts, and the competitiveness of the districts. We find only very limited evidence that commissions, on balance, are better able than legislatures to produce compact, competitive districts that respect the boundaries of counties and places in the states, and we find considerable variance across states and across types of commissions in the degree to which good government criteria are satisfied.*

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## INTRODUCTION

Over the past several decades, reformers have sought to take districting out of the hands of the legislature so as to avoid the kinds of problems commonly associated with legislatively drawn plans, such as partisan gerrymanders, incumbency protection plans, and oddly configured districts that fail to respect standard districting principles.<sup>1</sup> In this Article, we will focus on congressional districting in the western states.<sup>2</sup> Seven western states now give primary authority for congressional line drawing to a commission: Alaska, Arizona, California, Hawai'i, Idaho, Montana, and Washington. The combination of population growth, direct democracy, and experimentation with redistricting commissions distinguish the West from other regions.<sup>3</sup> First, western states tend to be geographically large, but with small state legislatures. Second, eleven of the twenty-two states that provide for direct democracy (in the form of the initiative or referendum),<sup>4</sup> and eight of the thirteen states that use redistricting commissions to redraw district lines for either Congress or the state legislature, are in the West.<sup>5</sup>

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1. Jeffrey Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 841–44, 852–55 (1996).

2. Legislative redistricting is beyond the scope of this Article.

3. See generally MICAH ALTMAN ET AL., REAPPORTIONMENT AND REDISTRICTING IN THE WEST (Gary F. Moncrief ed., 2011) (describing and comparing the redistricting processes of western states).

4. See *State I&R*, IRI INITIATIVE & REFERENDUM INST. U.S. CAL., [http://www.iandrinstitute.org/statewide\\_i%26r.htm](http://www.iandrinstitute.org/statewide_i%26r.htm) (last visited Jan. 30, 2013).

5. See *State I&R*, *supra* note 4; *Redistricting Commissions: Legislative Plans*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/redist/2009-redistricting-commissions-Table.aspx> (last visited Jan. 30, 2013).

Third, this region of the country has experienced dramatic population growth; only Montana (following the 1990 reapportionment) has lost representation since the redistricting revolution of the 1960s. In the 2010 reapportionment cycle, four of the eight states that gained a seat were in the West.<sup>6</sup> As Justin Levitt has noted, “redistricting in the West has a complexion largely different from that in the rest of the nation . . . .”<sup>7</sup>

The characteristics of the redistricting commissions in the West vary across the region. We identify three types of redistricting commissions in the West, and consider how specific features of the commission (e.g., the size, appointment procedure, and voting rule) can influence the redistricting process itself. We will compare congressional districting processes and outcomes in Arizona, California, Idaho, and Washington to those in five other western states where legislatures have primary authority to draw district maps: Colorado,<sup>8</sup> Oregon, Nevada, New Mexico, and Utah.<sup>9</sup> Alaska, Montana,<sup>10</sup> and Wyoming have only one at-large representative and so are excluded from our analyses. There are several questions we will investigate.

First, how well do commissions function? Do these commissions speedily reach consensus on membership, limit the degree of internal dissent, and produce a plan that satisfies constitutionally and statutorily mandated criteria (e.g., population equality and respect for the Voting Rights Act requirements)?

Second, what is the role of public input in the commission as opposed to the noncommission states? In particular, do the commissions act more vigorously to solicit input from the public?

Third, how do commission-drawn plans compare with legislative- and court-drawn plans? We examine district maps and electoral data from 1992 to 2012 to measure to what extent commissions (1) respect boundaries of political subdivisions, such as counties and places; (2) produce compact districts; and (3) draw competitive districts.

We begin with a brief overview of the redistricting process.

6. See *infra* Table 7.

7. Justin Levitt, *Redistricting and the West: The Legal Context*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* note 3, at 15, 32–33.

8. In Colorado, while the state legislature is charged with congressional redistricting, legislative redistricting is done by a commission. *Id.* at 18.

9. We limit our consideration to states identified by the Census Bureau as in either the Mountain West or Pacific West divisions of the United States. As a consequence, we—in the main—do not address redistricting in other states outside this region. We also limit our discussion of the Hawai‘i commission, as we were unable to attend any of the public comment hearings in Hawai‘i or review transcripts of those hearings.

10. The redistricting commission in Montana is also used to redraw legislative districts. Levitt, *supra* note 7, at 33.

## I. REDISTRICTING IN THE UNITED STATES

In U.S. elections, as in virtually all elections in democracies, constituencies are geographically defined and normally consist of contiguous territory. However, in the United States, unlike in virtually every other democratic country in the world,<sup>11</sup> redistricting—the decennial redrawing of constituency boundaries for city, county, state, and national legislatures—is largely done directly by the politicians who will be seeking reelection rather than by neutral administrative bodies. In the United States, it has been not so jokingly said that it is the legislators choosing their voters at least as much as it is the voters choosing their representatives.

Sometimes a plan will reflect an attempt by the dominant party to enjoy partisan advantage by diminishing the value of the votes of supporters of the other party by “packing” those supporters into a handful of districts that are won overwhelmingly by candidates of that party or by fragmenting the opposition vote so that the dominant party may be able to win a seat by a relatively bare margin;<sup>12</sup> but a plan may also reflect a “sweetheart deal,” a so-called “bipartisan gerrymander” in which the existing balance of party seat share in the legislature (or in a state’s congressional delegation) is “glued” into place by creating districts that are “safe” for the incumbents of both parties. Such an outcome is especially likely if there is not unified control of both chambers of the legislature and of the governorship.<sup>13</sup> A special case of such a sweetheart deal is when each of the two chambers of a legislature are controlled by a different party, and a deal is cut between the chambers that allows each branch to draw its own map.<sup>14</sup> However, where the two branches of the legislature are controlled by a different party from

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11. LISA HANDLEY & BERNARD GROFMAN, REDISTRICTING IN COMPARATIVE PERSPECTIVE 60 (2008); see also David Butler & Bruce Cain, *Reapportionment: A Study in Comparative Government*, 4 ELECTORAL STUD. 197, 200 (1985).

12. Guillermo Owen & Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 POL. GEOGRAPHY Q. 5, 6 (1988).

13. Sweetheart deals can also result from situations in which one party is dominant. In such situations, rather than seek to increase its seat share, with the potential cost of weakening the reelection chances of some incumbents of its own party, the dominant party offers both the incumbents of the other party and its own incumbents a safe seat, or something very close to it. Consider, for example, the 2002 map in California, where “[t]he smallest margin of victory for any California incumbent was 18 percentage points, and the average incumbent received a 68 percent vote share” Richard Forgette and Glenn Platt, *Redistricting Principles and Incumbency Protection in the U.S. Congress*, 24 POL. GEOGRAPHY 942 (2005).

14. New York is often a paradigmatic case of this phenomenon, due to the long-standing Democratic dominance of the state assembly—a result of the population dominance of New York City in the state—and Republican control of the state senate—a product of complex reapportionment procedures established in the 1894 state constitution. See N.Y. CONST. art. 3, §§ 4, 5. In their discussion of the 1950s and 1960s redistricting cycles in New York state, with reference to the state assembly and senate apportionment formulae, Gust Tyler and David Wells observe, “Republican control [is] built into the very constitution of the state. Gov. Alfred E. Smith used to refer to the New York Legislature as ‘constitutionally Republican.’” Gus Tyler & David Wells, *New York: Constitutionally Republican*, in THE POLITICS OF REAPPORTIONMENT 221, 221 (Malcolm Jewell ed., 1962).

that of the governor, another common outcome in the states where a gubernatorial veto applies to redistricting legislation is a stalemate, which puts redistricting into the hands of federal (or sometimes, state) courts.<sup>15</sup>

By carefully drawing boundaries to ensure particular concentrations of voters of a given type, such as strong Democrats or strong Republicans, or members of a given racial or ethnic minority, those drawing a plan can ensure that outcomes at the district level can be largely anticipated well in advance of any actual election. And since those who draw the lines will be the same people who either wish to run as an incumbent in a redrawn new district, or who think they might run in one of the districts in the future (for the upper chamber in the legislature, or for the U.S. House) when the present incumbent retires or dies, there is a strong tendency for plans to be drawn so as to minimize future political competition. Indeed, regardless of whether we are looking at a partisan gerrymander or a bipartisan gerrymander, the vast majority of districts drawn in legislature-drawn maps will be safe for one party or the other.<sup>16</sup> The absence of partisan turnover in more than three-fourths of the districts over the course of an entire redistricting decade has been one of the hallmarks of elections to the U.S. House; and similar, sometimes even more extreme, patterns are found in many state legislatures.<sup>17</sup>

Thus, the consequences of allowing legislators to draw their own lines often have been (1) plans with most districts safe for candidates of a given party, thus partly insulating legislators from the need to be responsive to public sentiments; and (2) boundary lines that are drawn to the convenience of politicians, which satisfy equal-population constraints and are sensitive to minority-vote dilution voting rights issues, but still violate other good-government criteria for districting, such as geographic compactness and respect for municipal and county

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15. Courts play a role in U.S. redistricting that is unlike that in any other country. See HANDLEY & GROFMAN, *supra* note 11, at 61. In particular, one person, one vote considerations, section 5 of the Voting Rights Act (which applies to jurisdictions within sixteen states, either in the state as a whole or in some part of the state), and section 2 of the Voting Rights Act, which applies to all jurisdictions, operate to set severe critical constraints on line drawing. See Levitt, *supra* note 7, at 21–23. Court challenges based on these or other issues face the vast majority of redistricting plans for state legislatures or the House of Representatives. In general, a three-judge panel consisting of two district judges and one circuit court judge has original jurisdiction for challenges to congressional or legislative district maps, while the Supreme Court holds appellate jurisdiction. See 28 U.S.C. § 2284 (2012). In Idaho, for instance, there is an automatic review by the state supreme court of the maps drawn by that state's redistricting commission to ensure compliance with redistricting criteria mandated at either the federal or the state level. See Mathew May & Gary Moncrief, *Reapportionment and Redistricting in the West*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* note 3, at 39, 49. Relatedly, the Washington State Supreme Court has original jurisdiction to hear redistricting litigation. See 1983 Wash. Sess. Laws 244 (codified as amended at WASH. REV. CODE § 44.05.130 (2012)). In other states, courts may be involved in drawing lines when the state (or a redistricting commission) has failed to reach agreement. See Michael McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, 4 ST. POL. & POL'Y Q. 371, 377 (2004).

16. Owen & Grofman, *supra* note 12, at 14.

17. Todd Makse, *Strategic Constituency Manipulation in State Legislative Redistricting*, 37 LEGIS. STUD. Q. 225, 240 (2012).

boundaries,<sup>18</sup> and which are often downright ugly. When it comes to drawing new lines, the set of sitting legislators have a strong bias in favor of plans that will make their own reelection more likely, and the majority party in the legislature has a strong bias in favor of maintaining or strengthening its own position. Thus, we expect there to be various heavy thumbs on the scales when it comes to weighing considerations of good governance against instincts of self-preservation and partisan gain if we allow the legislature (in conjunction with a governor acting out of partisan motives) to decide on new boundary plans.

Concern for these problems has led to three types of proposals for change. First and foremost, there have been repeated attempts by reformers in some states to take redistricting out of the hands of the elected officeholders and create commissions (bipartisan, or a mix of partisan and nonpartisan appointees) to draw the lines.<sup>19</sup> Such attempts have been most successful in the twenty-two states that allow their constitutions to be amended by a voter-sponsored initiative. Two of the four western states we investigate (Arizona and California) have commissions that were put in place via citizen initiative. Supporters of California Proposition 20 (which expanded the remit of the redistricting commission to include congressional districts) claimed that passage of the proposition would “[put] an end to backroom deals by ensuring redistricting is completely open to the public and transparent. Proposition 20 means no secret meetings or payments are allowed and politicians can't divide communities just to get the political outcome they want.”<sup>20</sup> Likewise, those in Arizona advocating for passage of Proposition 106 in 2000 argued, in part, that passage of the proposition would allow citizens “to have a voice in drawing the boundaries for your legislative and congressional districts. Through open meetings throughout the State—not backroom dealing—we will have a process run by the public.”<sup>21</sup> Other advocates in Arizona mentioned that a commission would create more competitive districts, and prevent cities from being split into multiple districts.

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18. Bernard Grofman, *Criteria for Redistricting: A Social Science Perspective*, 33 UCLA L. REV. 77, 122 (1985).

19. See generally McDonald, *supra* note 15 (identifying and discussing the institutional rules for redistricting and identification of the then-twelve states where districting for one or more chambers of the state legislature or for the U.S. House of Representatives is not done directly by legislators and/or the governor). In most of these states, there are commissions charged with line drawing. Although California has been added to the list of commission states since McDonald's article, it is still the case that most commissions have members selected in a partisan fashion (e.g., by state legislative leaders and/or the governor) and others (perhaps only a tiebreaker) who are intended to be nonpartisan, usually selected from voters registered as independent and/or chosen by a super-majoritarian consensus procedure within the commission. For a discussion of procedures in the western states, see *infra* pp. 652–54.

20. *Proposition 20: Voter Information Guide*, CAL. SECY STATE, <http://voterguide.sos.ca.gov/past/2010/general/propositions/20/arguments-rebuttals.htm> (last visited Sept. 19, 2013).

21. *Proposition 106*, AZ. SECY STATE, <http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.htm#pgfld-1> (last visited Sept. 19, 2013) (quoting Arizona Attorney General Janet Napolitano's statements in support of Proposition 106).

The Alaska, Idaho, Montana, and Washington commissions were created through referendum.<sup>22</sup> The Hawai'i commission was created in the course of the 1968 State Constitutional Convention, which was inspired in part by a 1965 U.S. district court order invalidating the state senate apportionment scheme as a violation of equal protection.<sup>23</sup>

A second reform proposal has been to impose very specific criteria on redistricting in such a fashion as to attempt to constrain the process and prevent at least the more egregious forms of partisan or incumbent protection gerrymanders.<sup>24</sup> Most western states where the legislature is responsible for redistricting impose few requirements on the drawing of districts. At the extreme, Nevada has no formal requirements for drawing districts above and beyond the federal laws (i.e., population equality and compliance with section 2 of the Voting Rights Act).<sup>25</sup>

States using a commission to draw districts tend, in contrast, to have relatively elaborate criteria for the redistricting authorities to follow. For example, in Arizona the establishing legislation for the commission requires it to be attentive to geographic features and local government boundaries and respect communities of interest, and requires that politically competitive districts be drawn to the extent that doing so is compatible with achievement of the other criteria.<sup>26</sup> Moreover, incumbents' and candidates' residences are not to be considered. The California commission's mandate also includes explicit redistricting criteria, including drawing compact, contiguous districts, preserving communities of interest, and not considering political data or incumbents'

22. Todd Donovan, *Direct Democracy and Redistricting*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* note 3, at 111, 119–20. California voters, after having rejected four different redistricting initiatives over the course of several decades, passed a ballot initiative in 2008 that created a commission to draw state legislative districts and then, in 2010, expanded the remit of the California commission to include congressional line drawing. See Vladimir Kogan & Thad Kousser, *Great Expectations and the California Redistricting Commission*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* note 3, at 219, 223–24.

23. 2 CRAIG KUGIASKI, LEGIS. REFERENCE BUREAU, HAWAII CONSTITUTIONAL CONVENTION STUDIES, ARTICLE III: REAPPORTIONMENT IN HAWAII 37 (1978); see also Norman Meller & Harold S. Roberts, *Hawaii*, in IMPACT OF REAPPORTIONMENT ON THE THIRTEEN WESTERN STATES 113, 113–35 (Eleanore Bushnell ed., 1970).

24. The passage in 2010 of Amendment 6 to the Florida State Constitution established additional criteria to the congressional redistricting process, including drawing compact, contiguous districts, with equal population, that respect existing political and geographic boundaries, and do not favor or disfavor any political party, or diminish the opportunity for racial or language minorities to elect representatives of their choice. See FLA. CONST. art. III, § 20.

25. State statutes in Oregon, as an example of a legislative-drawn map with strict criteria, require the legislature to draw districts that are contiguous, of equal population, use existing geographic or political boundaries, keep communities of interest together, are connected by roads, do not favor a political party or incumbent, and do not dilute the voting strength of language or ethnic minority groups. See OR. REV. STAT. §188.010 (2011).

26. See ARIZ. CONST. art IV, pt. 2, § 1.



addresses.<sup>27</sup> The criteria in Washington are similar to those in Arizona and California.<sup>28</sup> The Idaho commission has similar criteria, with the further requirement that pieces of districts be connected by a state or federal highway if the district contains more than one county.<sup>29</sup>

A third proposal of reformers has been to require more than a simple legislative majority to pass redistricting plans.<sup>30</sup> Requiring a legislative supermajority in each house to pass a plan is based in large part on the notion that the parties will be forced to reach agreement on a fair and reasonable plan, since few politicians want the uncertainty and potential chaos of having a court-drawn plan that would disrupt all the existing districts—and that is what would happen if the legislature (and the governor) failed to reach agreement. However, requiring a supermajoritarian agreement on a plan is analogous in many ways to the situation where there is not unified partisan control of a state. Such situations tend to either result in “sweetheart” incumbency protection deals, or in a deadlock that puts redistricting decisions into the hands of a court, as was the case in the 1970 and 1990 redistricting rounds in California.

The supermajoritarian idea has, however, also been applied to commissions. One of the states we examine, California, operates with a supermajoritarian voting rule.<sup>31</sup> Of course, the price paid for supermajoritarianism is, *ceteris paribus*, a lower likelihood of agreement, because of the need for more actors to agree on a plan in order for that plan to pass.

## II. INSTITUTIONAL FORMS OF REDISTRICTING COMMISSIONS

The first and most obvious (but still often neglected) point about commissions is that there are no nonpartisan commissions in the United States,<sup>32</sup> although there is one example of what we are calling a tripartite commission that has sometimes been mistakenly called nonpartisan. Most commissions are

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27. See CAL. CONST. art. XXI, § 2(d).

28. See WASH. CONST. art. II, § 43.

29. See IDAHO CODE ANN. § 72-1506 (2013).

30. Professor Bruce Cain, former director of the Institute of Government Studies at UC Berkeley, who had been skeptical of taking redistricting out of the hands of the legislature, was the most prominent advocate of this idea, but his more recent work has opted for a variant of the New Jersey commission “tiebreaker” model, but with explicit instructions to the “independent” commissioner as to a sequential process to use to provide strong incentives to the parties to move closer to one another in the plans that each proposes. See Bruce Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1817 (2012).

31. The Idaho commission requires a two-thirds majority vote to pass a map. IDAHO CONST. art. 3, § 2. However, as the commission has six members, a two-thirds majority and a bare majority are mathematically equivalent.

32. Iowa’s legislative reference bureau does operate in a nonpartisan fashion, but it does not have final power to pass a plan; it merely gives advice to the legislature, albeit advice that is normally given great weight. See *Legislative Guide to Redistricting in Iowa*, IOWA LEGISLATURE, <https://www.legis.iowa.gov/DOCS/Central/Guides/redist.pdf> (last visited Feb. 24, 2013).

bipartisan, but the results of the commission process in some states may look to have a partisan cast, although it is relatively well established from academic analyses of previous rounds of redistricting that, on average, commission states have lower partisan bias (and greater average responsiveness to changes in voter preferences) than do states where the legislature is the primary instrument of line drawing.<sup>33</sup>

#### *A. Bipartisan Commission Variants*

We may subdivide bipartisan commissions into four types, distinguished by the use of a neutral chair, the partisan balance of the commission, the voting rule to pass the map, and the appointment procedure used to name commissioners. We summarize the main features of redistricting commissions in the western states in Tables 1a through 1c.

**Table 1a:** Characteristics of Redistricting Commissions in the Western States

State	Year Commission Was Established	Number of Congressional Districts (Change Since 2000)	Republican House Seat Share (in %)	Republican Senate Seat Share (in %)
Alaska**	1998	1 (-)	60	20
Arizona*	2000	9 (+1)	67	70
California	2010	53 (-)	34	38
Colorado**	1974	7 (-)	42	40
Hawai'i	1968	2 (-)	16	4
Idaho*	1994	2 (-)	81	79
Montana**	1972	1 (-)	68	56
Washington*	1983	10 (+1)	43	45

Notes: \* The Arizona, Idaho, and Washington state house is composed of districts that each elects two representatives. \*\* The Colorado commission only redraws legislative districts. Montana and Alaska elect one at-large representative.

33. Jamie Carson & Michael Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 4 ST. POL. & POL'Y Q. 455, 458 (2004).

**Table 1b:** Characteristics of Redistricting Commissions in the Western States

State	Governor's Party Affiliation	Number of Commissioners	Party Affiliation of Commissioners
Alaska**	Republican	5	Appointments are made without regard to political affiliation
Arizona*	Republican	5	2 Democratic, 2 Republican, 1 unaffiliated chair
California	Democrat	14	5 Democratic, 5 Republican, 4 unaffiliated
Colorado**	Democrat	11	5 Democratic, 5 Republican, 1 unaffiliated
Hawai'i	Democrat	9	4 Democratic, 4 Republican, 1 unaffiliated chair
Idaho*	Republican	6	3 Democratic, 3 Republican
Montana**	Democrat	5	2 Democratic, 2 Republican, 1 unaffiliated chair
Washington*	Democrat	5	2 Democratic, 2 Republican, 1 unaffiliated chair†

Notes: \* The Arizona, Idaho, and Washington state House is composed of districts that each elects two representatives. \*\* The Colorado commission only redraws legislative districts. Montana and Alaska elect one at-large representative. † The chair of the Washington commission is a nonvoting member of the commission.

**Table 1c:** Characteristics of Redistricting Commissions in the Western States

State	Selection Process for Commissioners	Voting Rule for Passage	Subject to Section 5 of the Voting Rights Act?
Alaska**	Appointment by governor, legislative leadership, and chief justice	Majority	Yes
Arizona*	Appointment by legislative leadership, chair selected by commission	Majority	Yes
California	Bureaucratic application review and random draw	Supermajority, with majority of each partisan bloc	Yes, for four counties
Colorado**	Appointed by governor, legislative leadership and chief justice	Majority	No
Hawai'i	Appointed by legislative leadership, chair selected by state supreme court	Majority	No
Idaho*	Appointment by legislative and party leadership	Supermajority	No
Montana**	Appointment by legislative leadership, chair selection by commission	Majority	No
Washington*	Appointment by legislative leadership, chair selected by commission	Majority	No

Notes: \* The Arizona, Idaho, and Washington state house is composed of districts that each elects two representatives. \*\* The Colorado commission only redraws legislative districts. Montana and Alaska elect one at-large representative.

The first type of redistricting commissions is what we will call, following common usage, a “tiebreaker” process. Here all but one member of the commission is chosen through partisan mechanisms that are intended to equalize the number of members chosen by representatives of the two leading parties in the state. The remaining members of the commission are chosen by majority agreement among the already appointed partisans, which would require at least one member of the opposite party to join a coalition with the other party’s members.<sup>34</sup> Usually, this tiebreaker becomes the chair of the commission. The commissions in Arizona, Montana, and Colorado fall into this category. While it is possible, in theory, for an agreement to be reached in commissions of this type that did not include the tiebreaker, in practice this never occurs, and usually the tiebreaker ends up in agreement with a plan proposed by just one of the two parties. The decisions of such commissions may generate partisan rancor comparable to what we see from states where one party entirely controls the redistricting process and engages in a partisan gerrymander.<sup>35</sup>

A second, closely related form of bipartisanship results when the commission membership is exactly evenly split between the parties in terms of appointing power, and a majority of members is needed to pass a plan. This form of bipartisanship, agreement across party lines, is found in the Idaho commission. The Washington commission is a variation on this type of commission, even though it has an odd number of members, because the chair of the Washington commission (who may not be a member of a major political party) is a nonvoting member of the commission.<sup>36</sup>

The third type of bipartisan process can have either an even or an odd number of members, but it requires that a supermajority reach agreement before a plan be enacted. Inevitably, this supermajority will be such as to require agreement that crosses party lines. California’s redistricting scheme is sometimes described in the press as nonpartisan, and it is true that it has some nonpartisan elements, such

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34. There are various rules in the different commissions about what happens when no agreement on a tiebreaker can be reached, but usually the failure of the commission to reach agreement on its own membership triggers some form of state-court intervention, either to select a tiebreaker or to create a court-drawn plan.

35. For example, in the 2000 redistricting cycle in Oregon, when the legislature was unable to create legislative maps, the duty fell to Democratic Secretary of State Bill Bradbury. *See, e.g.* Priscilla L. Southwell, *Controversies in Electoral Redistricting in Oregon*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* note 3, at 199, 207–08. Though, after litigation challenges, these maps were put into place with only minimal changes, Republicans claimed Bradbury inflated the share of seats the Democrats could win by extending the city of Portland into multiple legislative districts. *Id.* During the hearings in Oregon that one of us attended in 2011, many witnesses registered their discontent with the old “Bradbury map.” Similarly, Larry Bartels, New Jersey tiebreaker in the 2000 redistricting round, was accused by some Republicans of insuring pro-Democratic legislative plans. *See, e.g.*, Barbara Fitzgerald, *In Control, but Losing a Grip*, N.Y. TIMES, June 3, 2001, at NJ1; Joseph Gambardello et al., *GOP Sues Over Legislative Redistricting*, PHILA. INQUIRER, Apr. 13, 2001, at B1; Suzette Parmley, *Nonvoter Held Sway in Redistricting State Districts*, PHILA. INQUIRER, May 21, 2001, at B1.

36. *See* Washington State Redistricting Act, WASH. REV. CODE § 44.05.030 (2013).

as the initial role of state auditors in picking members of the commission, the fact that public officials are ineligible for membership, and some lottery elements of the selection process.<sup>37</sup> It also has bipartisan elements, such as the *voir dire* role for leaders of both parties in vetoing potential commission members, and the need for agreement that includes a majority of the members of each party.<sup>38</sup> However, the requirement for concurrence of a majority of the “independent/decline to state” members of the commission in the final plan suggests that it is better characterized as what we might call a tripartite commission, though the redistricting process in California is unique.<sup>39</sup>

The fourth type of redistricting commission acts as a backup when the state legislature is unwilling or unable to create district maps in a timely manner. These “partisan commissions,” so-called because they are composed of elected officials, virtually guarantees that one party will be able to effectively control outcomes. The Indiana redistricting commission, for instance, is composed of the speaker of the state house, president pro tempore of the senate, chairwomen of the house and senate redistricting committees, and a fifth member of the general assembly appointed by the governor.<sup>40</sup> The nine-member backup commission in Connecticut, by contrast, resembles the Arizona commission in appointment procedure.<sup>41</sup> Partisan commissions are more often used to create legislative districts, as is the case in seven states, including Oregon, and Texas.<sup>42</sup>

### III. ABILITY TO REACH CONSENSUS IN A TIMELY FASHION

As noted earlier, in states under divided partisan control, the chances for deadlock are high. The courts were called upon to draw congressional maps in Colorado (when the legislature failed to pass a map), Nevada (where the Republican governor twice vetoed a plan passed by Democrats in the legislature), and New Mexico (where the Republican governor vetoed a plan passed by the Democrat-controlled legislature). By contrast, the legislatures in Oregon<sup>43</sup> and

37. CAL. GOV'T CODE § 8252(a)(1)–(b) (2012).

38. CAL. GOV'T CODE § 8253(c), (g) (2012).

39. Issue 2 in Ohio, defeated in the 2012 election, sought to establish a twelve-member redistricting commission based on the structure of the California commission. Commissioners in Ohio would be drawn equally from the two major parties and unaffiliated voters, that would use a simple majority voting rule to produce district maps. See *State Issue 2 Rejected by Wide Margin*, DAYTON DAILY NEWS (Nov. 6, 2012, 4:48 PM), <http://www.daytondailynews.com/news/news/national-govt-politics/state-Issue-2-plan-to-redraw-boundaries/nSygx>.

40. IND. CODE § 3-3-2-2 (2013).

41. CONN. CONST. art. III, § 6(b).

42. The passage of State Question 748 in Oklahoma, in 2010, expanded the size of the backup commission used in that state for redistricting in the event the legislature fails to act, and changed the membership of the commission from statewide public officials (attorney general, superintendent of public instruction, and state treasurer) to appointees of the legislative leadership and the governor. See Donovan, *supra* note 22, at 111, 119–20.

43. The Oregon state house was split 30–30 and the state senate had a bare Democratic majority of one, 16–14. *Statistical Summary 76th Legislative Assembly*, OR. BLUE BOOK, <http://bluebook>

Utah (under unified Republican control) successfully created district maps without court challenges.

**Table 2:** Days Between Delivery of Census Data and Map Enactment<sup>44</sup>

State	1992	2002	2012
Arizona	<i>431</i>	<b>227</b>	<b>313</b>
California	<i>336</i>	181	<b>160</b>
Colorado	384	312	<i>285</i>
Hawai'i	<b>152</b>	256	214
Idaho	328	<b>152</b>	<b>221</b>
Nevada	133	94	<i>245</i>
New Mexico	213	<i>285</i>	<i>289</i>
Oregon	<i>307</i>	<i>219</i>	127
Utah	248	204	238
Washington	<b>301</b>	<b>285</b>	<b>343</b>

Notes: Bold type indicates commission-drawn maps. Italic type indicates court-drawn maps. Plain text indicates maps drawn by the state legislature.

Table 2 lists the days elapsed between the delivery of the census data necessary to begin the redistricting process, and the date a final congressional map is enacted for the three redistricting cycles in 1991, 2001, and 2011.<sup>45</sup> The 1990s round of redistricting was exceptionally long, the average western state took 289

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.state.or.us/state/legis/legis18.htm (last visited July 3, 2013). The congressional map passed in 2011 was the first time since 1911 that the legislature was able to pass a district map without involvement from the courts. *Lines that Don't Divide: A City Club of Portland Report on Improving Oregon's Redistricting Process*, CITY CLUB OF PORTLAND BULL. (City Club of Portland, Portland, Or.), Feb. 2012, at 4.

44. Census delivery dates are sourced from the Census Bureau. Congressional map enactment dates are sourced from (for all states in 2012, and all states in 2002 except Arizona) from Justin Levitt's website All About Redistricting (<http://redistricting.lls.edu>). The Arizona 2002 enactment date is sourced from the minutes of the November 9, 2001 commission hearing (<http://az.redistricting.org/dates/2001Meetings.asp>). 1992 enactment dates are sourced from: *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684 (D. Ariz. 1992), *Wilson v. Eu*, 823 P. 2d 545 (Cal. 1992), *Berkman v. Roberts*, No. 91-775 RE (D. Or. 1991), the effective dates of SB 92-198 (Colo. 2nd Reg. Sess., 1992), SB 1254 (Idaho 2nd Reg. Sess., 1992), AB 772 (Nevada Reg. Sess., 1991), and SB 25 (New Mex. 1st Spec. Sess., 1991). Enactment dates for the Hawai'i and Washington commissions are sourced from Lory Marie Chipps, *Dividing Political Space: Commissions and the Congressional Redistricting Process*, National Science Foundation Research Paper 9608 (1996).

45. Note that this measure of time excludes appeals or other litigation challenging a plan once it is in place. In the case of successful litigation, such as the series of *Wilson v. Eu* judgments in California in the early 1990s, the enactment date is the date of the ultimate judicial decision. See *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992); *Wilson v. Eu*, 816 P.2d 1306 (Cal. 1991); *Wilson v. Eu*, 817 P.2d 890 (Cal. 1991).

days to complete a congressional map. The 2000s round was considerably shorter, while the 2010s round was roughly in between the 1990s and the 2000s rounds.

In 1991, the Hawai'i and Washington commissions delivered final congressional maps forty-six days before the average legislature in the West, and 132 days before the average court-drawn map in that cycle. Legislatures produced maps faster in 2001 and 2011, but also became the less popular institution for drawing districts over the same period, declining from half of the western states in 1991 to one-fifth of the states drawing congressional maps in 2011. Courts are consistently the slowest institution to create congressional maps, but this should not be too surprising, as courts only become involved in the process when a legislature is unable or unwilling to create a district map. As yet, a court has not stepped into the process to draw maps when a commission is responsible for creating congressional maps.

Commissions consistently deliver district maps on time, and largely without litigation. In 2012, the commissions in Arizona, California, Hawai'i, and Washington each delivered congressional maps on time. While the process in each of these states was marked with controversy and contention, the maps drawn by the commissions appear to be unchallenged and will, most likely, remain in place for the remainder of the decade. Granted, the first Idaho commission was unable to meet its strict deadline, but this commission also has structural qualities, discussed below, that make a supermajority vote unlikely to occur. By contrast, the legislatures in Colorado, Nevada, and New Mexico could not pass a districting plan and, thus, had to engage in lengthy (on average, a court-drawn plan was put in place twenty-three days after the average commission-drawn plan) and costly legal battles to produce congressional districts in time for the 2012 primary elections. The Oregon and Utah legislatures were able to pass congressional maps, though doing so was exceptional over the last century of experience in Oregon, and most likely a forgone conclusion in Utah, given the unified control of the state by the Republicans. Taking a step back from the various criteria in place in the western states and instead looking at if a map was produced without involving the courts, it is clear that commissions accomplish this objective more often than legislatures.

But there are also conditions that may foster deadlock or other problems within a commission. In this section we briefly discuss the experiences of the Arizona, California, Idaho, and Washington commissions in the 2011–2012 redistricting cycle. Our discussion suggests two design flaws that may impede the ability of a commission to function effectively: absence of an independent member (or members), and the ability of the legislature or governor to remove a member (or members) of the commission. The personalities of the people involved may also contribute to the ability of the commissions to create district maps in a timely manner.



*A. The Arizona Commission in 2011*

In Arizona all the potential candidates for commission membership come from a previously delimited pool, excluding present officeholders, and the tiebreaker in Arizona must be someone who is not affiliated with a major party. In a tiebreaker type of commission, such as Arizona's, the independent chair usually casts the deciding vote. Because the independent member of a commission may be seen as siding with the minority party in the state, the potential for the removal of independent commissioners by a legislature (or governor) of the majority party can operate to challenge that independence. In the case of Arizona, the commission chair became in 2011 the subject of ire from the governor, who claimed the chair was acting in a biased manner.<sup>46</sup> Alleging that deficiencies in the draft maps, the selection of the mapping consulting firm, and possible violations of state open-meeting laws constituted "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office,"<sup>47</sup> the Arizona governor asked the state senate to concur in the removal of the chair of the commission. The senate did concur, but an appeal to the state supreme court overturned the governor's removal of the commission chair.<sup>48</sup> The commission resumed its work after the reinstatement of its chair and produced congressional and legislative maps in February of 2012, which were precleared by the Department of Justice in April of 2012.

*B. The California Commission in 2011*

The presence of "independent" members of a bipartisan or tripartite commission, especially if one of them is the chair,<sup>49</sup> may facilitate interparty bargaining, and thus may reduce the high risk of deadlock in commissions that require "defection" across party lines for a plan to pass. In the 2010 redistricting round, the California commission was able to reach the necessary agreement of at least nine of its fourteen members to pass the congressional map, with approving votes from five out of five Democrats, three out of five Republicans, and four out of four independents.<sup>50</sup>

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46. As Bruce Cain observes, Tensions flared up in Arizona's case because the majority party was not happy with the commission's work. The prospect of a minority party winning the redistricting sweepstakes under a commission system reverses the time-honored political logic of "to the winner go the spoils" and tests the political majority's tolerance for outcomes it does not favor.

Cain, *supra* note 30, at 1836.

47. ARIZ. CONST. art. IV, pt. 2, § 1(10).

48. *Ariz. Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1278 (Ariz. 2012).

49. The California commission adopted a rotating-chair system for business meetings and public-comment hearings.

50. The state assembly and senate maps were approved with unanimous support from the Democratic and decline-to-state members of the commission, and with the support of four of the five Republican commissioners. See Timm Herdt, *Tension Rises over Political Maps as Redistricting Commission*

Coverage of the California process gave it extremely high marks on good-government criteria and attributed much of that success to the fact that California commissioners are not appointed by partisan officials, but are instead selected from a pool of applicants who, though members of a political party (or, in the case of the decline-to-state members of the commission, identified as not a Democrat and not a Republican), are not beholden to partisan officials for their appointment. However, we would express a note of considerable caution about the California process. There is still an element of chance that contributed to the success of California's first redistricting commission. The ability of the commissioners to work together and collaborate is arguably due to the personalities involved as much as to the structures of the commission. Furthermore, the commission members were not exactly a random cross section of the public. In addition to a number of county planning specialists, the commission included a former head of the U.S. Census Bureau. With the 2011–2012 experience now one for the history books, the political parties may discover how to better “game” the California redistricting commission selection process, and it is not unlikely, in our view, that the 2020 redistricting commission in California may contain enough polarized partisans, that compromise on the maps will be stymied.<sup>51</sup>

### C. The Idaho Commission in 2011

The Idaho commission has an even number of members, evenly divided along party lines.<sup>52</sup> The voting rule used in Idaho requires four of the six commissioners to approve a map.<sup>53</sup> The absence of a “neutral” chair means that at least one of the partisan-appointed commissioners must “defect” and vote with the other party’s commissioners. Although the commission held public-comment hearings around the state, it was unable to settle on a final map for Congress or for either chamber of the state legislature before the ninety-day deadline.<sup>54</sup> A legal challenge to force the commission to reconvene and approve a map was turned aside by the state supreme court, as the court found it had no power to intervene in the event of no map being approved by the commission.<sup>55</sup> On September 13, 2011, the Idaho secretary of state called for the creation of a second commission to be charged with creating district maps. A second commission was put into

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*Gives Final Approval*, VENTURA COUNTY STAR (Aug. 15, 2011, 11:34 AM), <http://www.vcstar.com/news/2011/aug/15/redistricting-commission-gives-final-approval-to>.

51. See Karin Mac Donald, *Adventures in Redistricting: A Look at the California Redistricting Commission*, 11 ELECTION L.J. 472, 473 (2012) (describing the factors leading to the success of California’s FIRST Act, California Proposition 11: Voters First Act (2008)).

52. IDAHO CODE ANN. § 72-1502 (2013).

53. *Id.* § 72-1505(5) (2013).

54. *Id.* § 72-1508 (2013).

55. See *In re* Constitutionality of Idaho Legislative Reapportionment Plan of 2002, No. 39127-2011 (Idaho 2011).

place and, after a truncated series of public-comment hearings and only sixteen days, this second commission adopted a congressional map. One Democratic commissioner joined the three Republican commissioners to approve the map.

#### *D. The Washington Commission in 2011*

Like Idaho's commission, the Washington commission is comprised of an equal number of partisan-appointed commissioners.<sup>56</sup> The nonpartisan chair is a nonvoting member.<sup>57</sup> The Washington commission, however, has considerably more time to complete the congressional and legislative maps. Census data was delivered to Washington on February 23, 2011; the commission had to deliver congressional and legislative maps to the legislature by January 1, 2012, or else the state supreme court would have assumed responsibility for the maps and would have had to produce them by March 1, 2012.<sup>58</sup>

After a lengthy series of public hearings (from May 17, 2011 to January 1, 2012) the commission unanimously approved congressional and legislative maps, which were then approved by the legislature on February 1, 2012.<sup>59</sup> A concerned citizen of Washington then challenged the maps on the grounds that they violated the redistricting criteria.<sup>60</sup> This challenge to the maps was dismissed by the state supreme court on November 2, 2012.<sup>61</sup>

### IV. REDISTRICTING INPUT AND OUTPUT

For each of the western states during the 2011 redistricting cycle, we first examine the most visible mechanism for public comment on redistricting—namely public hearings—and then turn to data from the 1992–2012 congressional elections to examine three consequences of redistricting: the degree to which political subdivisions within the state (i.e., counties and cities) are split across two or more districts, the compactness of the districts, and the competitiveness of congressional seats.

#### *A. Public Comment and Redistricting*

The growth in public hearings on redistricting is part of a broader trend that stretches back to the Economic Opportunity Act of 1964 and its emphasis on

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56. WASH. ADMIN CODE § 417-01-105 (2013).

57. *Id.*

58. WASH. SEC'Y OF ST., GUIDE TO REDISTRICTING – IN 3 PHASES, app. A at 2 (2011), [http://www.sos.wa.gov/\\_assets/elections/RedistrictingGuide.pdf](http://www.sos.wa.gov/_assets/elections/RedistrictingGuide.pdf) (last visited Feb. 8, 2013).

59. WASH. ST. REDISTRICTING COMM'N, <http://redistricting.wa.gov> (last visited Feb. 8, 2013).

60. Brief of Petitioner on Interim Plan at 1, *In re* 2012 Wash. State Redistricting Plan, No. 86976-6 (Wash. Mar. 1, 2012).

61. *See In re* 2012 Wash. State Redistricting Plan, No. 86976-6.

“maximum feasible participation.”<sup>62</sup> As Arnstein observes, “The idea of citizen participation is a little like eating spinach: no one is against it in principle, because it is good for you.”<sup>63</sup> Proponents point out that consultation with the public can increase the information and range of perspectives available to policymakers.<sup>64</sup> Public comment is also one way in which redistricting authorities can determine the boundaries of a community of interest.<sup>65</sup>

Public hearings took place in each of the western states during the mapmaking process in 2011. Many state statutes require redistricting authorities to schedule a number of public meetings to gain comment, suggestions, and feedback from the public related to redistricting.<sup>66</sup> Under this broad framework of public hearings, however, the western states exhibited diversity in the public-involvement aspect of redistricting. For instance, the California commission, as well as the Oregon legislative committee and the Arizona and Washington commissions, held a lengthy process of hearings before creating any draft maps and held a second round of hearings to solicit feedback from the public on the draft maps. By contrast, the Idaho commission and the Utah and New Mexico

62. Lillian B. Rubin, *Maximum Feasible Participation: The Origins, Implications, and Present Status*, 385 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 15 (1969); see also Diane Day, *Citizen Participation in the Planning Process: An Essentially Contested Concept?*, 11 J. PLAN. LITERATURE 421, 432–33 (1997) (suggesting that all planners should be at least somewhat acquainted with the idea of citizen participation in planning).

63. Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216, 216 (1969).

64. Helena Catt & Michael Murphy, *What Voice for the People? Categorising Methods of Public Consultation*, 38 AUSTL. J. POL. SCI. 407, 407–08 (2003).

65. Karin Mac Donald & Bruce Cain, *Community of Interest Methodology and Public Testimony*, 3 U.C. IRVINE L. REV. 609 (2013). Due to space limitations, we do not directly address the degree to which suggestions made by the public on draft or final plans at the hearings are adopted, or the relative impact of ordinary citizens and organized groups, or whether some types of input (whole plans, plans for particular districts, or suggestions about smaller units of geography) are likely to be influential in the process to create final district maps. These issues are discussed in detail in a conference paper that is still in the process of final revision. Peter Miller & Bernard Grofman, *Evaluating Public Comment into the Redistricting Process in the American States*, Paper Presented at the International Political Science Association Madrid, 2012 XXII World Congress of Political Science (July 8–July 12, 2012), available at <http://www.ipsa.org/myipsa/events/madrid2012/paper/evaluating-public-comment-redistricting-process-american-states>.

66. See, e.g., ARIZ. CONST. art. IV, pt. II, § 1(17) (describing the requirements for redistricting); CAL. CONST. art. 21, § 2(b) (same); HAW. REV. STAT. § 25-2(b)(6) (same); IDAHO CODE ANN. § 72-1505(4) (1996) (same); WASH. REV. CODE § 44.05.080(4) (2011) (same); 2011 Nev. Stat. 3761 (2011) (same). The Oregon redistricting statutes do not require hearings on proposed district maps, however the Oregon statute does require any meeting of the governing body to be open to the public. See OR. REV. STAT. § 192.630 (2011). The Colorado Constitution does not require the congressional redistricting process to include public comment hearings, but the 2011 cycle did include such hearings. Likewise, the rules in effect in New Mexico and Utah did not explicitly require public hearings, but such hearings were held in the course of the process to create congressional and legislative district maps. See *New Mexico Legislative Redistricting*, N. M. LEGISLATURE, <http://www.nmlegis.gov/lcs/redcensus> (last visited Feb. 25, 2013); *Redistricting Documents Online*, REDISTRICT UTAH, <http://www.redistrictutah.com/perspective/grama> (last visited Feb. 25, 2013).

committees held only one round of hearings, and did not solicit feedback from the public on draft maps. By contrast, the first and second Idaho commissions held one round of comment hearings before creating district maps. The legislative committees in Utah and New Mexico also held one round of hearings, but dedicated time during hearings to discuss maps created by legislative staff or submitted by the public.

**Table 3:** Congressional Redistricting Public Comment Hearings

State	Pre-Draft Hearings in the Capital	Field Pre-Draft Hearings	Draft Hearings in the Capital	Field Draft Hearings
Arizona	1	14	3	26
California	1	25	0	10
Colorado	4	9	3	0
Hawai'i	21	11	0	0
Idaho	1/3	13/12	21/12	0
Nevada	4	2	1*	1*
New Mexico	2	9	0	0
Oregon	5	11	4	0
Utah	1	16	0	0
Washington	1	18	27	3

Notes: The first and second commission in Idaho are separated by a slash. Numbers on the left indicate the first commission. \* indicates public comment hearings held by the special masters in Nevada after the governor vetoed the second redistricting bill passed by the legislature and the courts assumed responsibility for drawing congressional districts.

The number and location of public-comment hearings in each state is presented in Table 3. With the exception of Nevada's, each redistricting authority held initial planning meetings in the state capital, and then subsequent hearings around the state. Once the draft maps were complete, however, the redistricting authorities tended to remain in the state capital for further hearings. Only the commissions in Arizona, California, and Washington held field hearings after the draft maps were completed.

Peter Miller directly observed hearings in nine of the western states.<sup>67</sup> A typical course for one of these public hearings included an introduction by the redistricting authority and some remarks on the redistricting process followed by

67. That author also attended a hearing in Denver of the Colorado Reapportionment Commission on legislative redistricting, two hearings of the Montana Districting and Apportionment Commission, and two public meetings of the Wyoming legislative committee in charge of legislative redistricting.

comment from members of the public. There were some variations on specific features of the hearings, such as the authorities asking questions of the person providing testimony, the length of time afforded to each person (or even if time limits were imposed), and the time of day for a hearing (whether in midmorning, afternoon, or evening). A cartographer's observation of one hearing in the course of the 1990 process in New York could just as easily have been an observation of a hearing in the 2010 round, and gives a flavor of how these public-comment hearings proceeded.

On the raised platform at the front of the room sat a half-dozen men and one woman, all in weekday business dress. In front of the dais, two easels holding large maps faced the spectators. A balding, slightly overweight man with a raspy voice faced the people on the platform and spoke into the microphone. He was upset about both the map and the state legislature, which had appointed the people on the dais—the people who had drawn the map. The young woman who testified after him was no less indignant. . . .

If this event had been a movie, we would have missed the beginning and much of the plot. But although a dozen people had spoken since 11 A.M., what they said was probably no different from what we heard later: everyone denounced a small part of the map, some particular boundary. Anyone who might have been pleased with the map and its boundary lines kept silent or stayed home.<sup>68</sup>

### *B. Integrity of Political Subdivisions*

Keeping political subdivisions of a state in the same district to the greatest extent feasible is one way to support a claim that the districting is based on neutral principles.<sup>69</sup> Moreover, unnecessarily splitting a city or county can lead to confusion about district boundaries, which in turn leads to lower rates of recalling the incumbent's name and higher rates of voter roll-off.<sup>70</sup> A consistently applied policy of preserving city and county lines where feasible leads to greater continuity in the district configurations across redistricting cycles, allowing for representatives to develop long-term relationships with particular constituencies.<sup>71</sup> Furthermore, as evidenced by our observations of public-comment hearings in the

68. MARK MONMONIER, *DRAWING THE LINE: TALES OF MAPS AND CARTOCONTROVERSY* 190–91 (1995).

69. Richard L. Morrill, *Redistricting, Region, and Representation*, 6 *POL. GEOGRAPHY Q.* 241, 251 (1987).

70. Danny Hayes & Seth C. McKee, *The Participatory Effects of Redistricting*, 53 *AM. J. POL. SCI.* 1006, 1006 (2009); Jonathan Winburn & Michael W. Wagner, *Carving Voters Out: Redistricting's Influence on Political Information, Turnout, and Voting Behavior*, 63 *POL. RES. Q.* 373, 373 (2010).

71. As we would expect, there is some alteration in a representative's behavior when redistricting changes affect the demographic and ideological characteristics of the constituency. But the magnitude of this shift does not appear to be that great. Michael H. Crespin, *Serving Two Masters: Redistricting and Voting in the U.S. House of Representatives*, 63 *POL. RES. Q.* 850, 855 (2010).

course of the 2011 redistricting cycle, slicing a city into multiple districts motivates members of the public from that city to voice their dislike with the existing district maps and to advocate keeping cities together whenever possible.<sup>72</sup>

**Table 4:** City and County Splits in Western Congressional Redistricting Maps

	Number of Split Cities (in %)			Number of Split Counties (in %)		
	1992	2002	2012	1992	2002	2012
Arizona	<i>13</i>	<b>13</b>	<b>18</b>	<i>38</i>	<b>62</b>	<b>38</b>
California	<i>18</i>	41	<b>8</b>	<i>49</i>	57	<b>25</b>
Colorado	6	<i>6</i>	<i>4</i>	9	<i>11</i>	<i>9</i>
Hawai'i	<b>4</b>	<b>2</b>	<b>2</b>	<b>20</b>	<b>20</b>	<b>20</b>
Idaho	1	<b>1</b>	<b>1</b>	2	<b>2</b>	<b>2</b>
Nevada	11	16	<i>16</i>	7	13	7
New Mexico	4	<i>6</i>	<i>6</i>	15	<i>15</i>	<i>18</i>
Oregon	<i>6</i>	<i>6</i>	5	<i>11</i>	<i>11</i>	11
Utah	1	6	6	4	11	14
Washington	<b>6</b>	<b>9</b>	<b>2</b>	<b>21</b>	<b>18</b>	<b>23</b>

Notes: Bold type indicates commission-drawn maps. Italic type indicates court-drawn maps. Plain text indicates maps drawn by the state legislature. The count of cities in each state is based on the number of villages, towns, and cities (as identified by the census) and excludes census-designated places, except in Hawai'i where the only division below the county level is a census-designated place. The number of cities and counties in each state excludes those units larger than the ideal congressional district.

We examine the district maps as they were drawn in 1992, 2002, and 2012, and count the number of cities and counties that are split among more than one congressional district. Table 4 shows the results.<sup>73</sup>

72. A notable exception to this rule appears to be Redmond, Washington. The city itself is split between the first and eighth congressional districts. The mayor of the city testified at the June 13, 2011 public comment hearing in Seattle that the residents of the city approve of being split between two districts. *Washington State Redistricting Commission*, TVW (June 13, 2011, 6:30 PM), [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2011060012](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2011060012) (recording the statements of John Marchione, Mayor of Redmond, Washington).

73. We used ArcGIS version 10 to identify the counties and places divided into two or more districts. We encountered an error with tabulating the number of split places and counties. Overlaying the maps of congressional districts, counties, and places resulted in a large number of slivers that are, as far as we can determine, artifacts of small differences in the maps we used. These slivers tended to be long and narrow shapes proximate to county or place boundary lines and, as a result, very small relative to counties or places. This error initially led to a greatly inflated count of divided counties and places. We sought to eliminate the slivers by sorting in order of increasing area and then manually deleting them from our dataset. We are indebted to Doug Johnson of the Rose Institute in Claremont, California (personal communication, September 2012) for pointing out that our split-county counts for Arizona were erroneous, which led us to identify this problem.

Major urban centers in a state often cannot avoid being split. The Idaho commission in 2011, for example, managed to draw two equipopulous congressional districts while only splitting Ada County (the county containing the capital city of Boise). Similarly, the only cities split in 2011 by the Nevada legislature were Las Vegas, North Las Vegas, and Henderson (an adjoining city southeast of Las Vegas proper). The Hawai'i commission has consistently split only Honolulu County, including the city of Honolulu and its surrounding suburbs, to create two congressional districts with equal population. By contrast, cities like Phoenix, Los Angeles, San Diego, and San Francisco are so large as to necessitate dividing the cities and their surroundings into multiple districts.

The western states exhibit a high degree of institutional variation in redistricting authority since the 1990 redistricting cycle. Only Hawai'i, Utah, and Washington have used the same institution to draw congressional districts. These three states also indicate a respect for political subdivisions, though the Utah legislature has split an increasing proportion of counties over time. Three other states—Colorado, Nevada, and New Mexico—transitioned from legislature- to court-drawn district maps, with no clear trend associated with the shift in redistricting authority. Oregon—which transitioned in the opposite direction—also shows no change between the 2002 and 2012 maps. The remaining commission states—Arizona, California, and Idaho—present a mixed set unified subdivisions. There is no change over time in Idaho. The Arizona commission has split an increasing proportion of cities, and clearly never fewer counties than the court-drawn map of the 1990s, despite the claims of supporters of Proposition 106. The California commission did a better job of keeping cities and counties together than either the legislature or courts. In sum, we find only limited evidence that commissions in the western states are better than legislatures or courts in the region in terms of respecting the boundaries of political subdivisions.

### C. District Compactness

Compactness refers to the extent to which a district's shape differs from the perfect regularity of a circle or a regular polygon such as a square. Niemi and his co-authors note that “we think of circles and squares as compact and long, narrow forms, areas with protruding arms or fingers, and ‘odd’ shapes like salamanders, as not compact.”<sup>74</sup> District compactness is a very common criterion for redistricting authorities to wish to implement.<sup>75</sup>

There is, however, no present-day scholarly consensus when it comes to the political importance of district compactness. Some scholars conclude compactness

74. Richard G. Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155, 1158 (1990).

75. Grofman, *supra* note 18, at 85; *see also* Levitt, *supra* note 7, at 25 (reporting that seventeen states nationwide, and seven of the western states—excluding Colorado, Nevada, and Oregon—include compactness in the criteria for congressional districts).



is a safeguard against most sorts of intended foul play with district lines. “The diagnostic mark of the gerrymander is the noncompact district.”<sup>76</sup> The noted political geographer Richard Morrill concurs: “[W]hat is suspect are extreme, egregious and convoluted irregularities which are not justified and probably cannot be. Why is extreme irregularity *prima facie* suspect? Why else would anyone go to the considerable effort?”<sup>77</sup> Lowenstein and Steinberg, on the other hand, assert in no uncertain terms that “there is no basis for the assumption that oddly shaped districts are signs of ‘gerrymandering’ . . . [so] what basis can there be for the a priori assertion that the purposes of those who drew the lines were necessarily improper?”<sup>78</sup> And Stephanopoulos goes even further in arguing that compactness may have undesired consequences.<sup>79</sup> He asserts that too much of a focus on compactness tends to produce districts with a high degree of heterogeneity in terms of demography, socioeconomic status, and ideology, which, in turn—in his view—reduces participation, reduces effective representation, and increases polarization.<sup>80</sup>

We do not need to take a position in this debate. Rather we will simply report one standard measure of compactness and then compare compactness scores over time and across different redistricting regimes.<sup>81</sup> The simplest way to think about compactness is in terms of the irregularity of a district’s perimeter. One standard way to measure compactness is in terms of how large an area a district encompasses relative to what we would find if that perimeter were the perimeter of a regularly shaped figure, such as a circle. Following Polsby and Popper,<sup>82</sup> we calculate compactness in the following manner:

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76. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL’Y REV. 301, 302 (1991).

77. Morrill, *supra* note 69, at 249.

78. Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 22 (1986).

79. Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 821–22 (2013).

80. *Id.*

81. Non-compact districts have long tended to be highlighted in the popular media, usually in the context of ‘name and shame’ going back to the original ostensibly salamander-like ‘gerrymander.’ For example, commentators remarked that the Louisiana fourth district, as it was drawn in 1992, resembled the mark of Zorro. MARK MONMONIER, BUSHMANDERS AND BULLWINKLES: HOW POLITICIANS MANIPULATE ELECTRONIC MAPS AND CENSUS DATA TO WIN ELECTIONS 56 (2001). But, even when found as a criterion mandated by a state statute or even the state constitution, the legal status of non-compactness is hard to pin down, at least for federal courts. While non-compact districts have been struck down by the Supreme Court, it has always been in the context of other constitutional violations, such as use of race as the preponderant criterion for districting. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 957 (1996) (holding that strict scrutiny is used to determine the constitutional validity of redistricting when race is used as the criteria). And federal courts have vigorously resisted using non-compactness alone as sufficient evidence of partisan gerrymandering to strike down a plan as an unconstitutional partisan gerrymander. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986).

82. Polsby & Popper, *supra* note 76, at 348–49.

$$\text{Compactness} = \frac{4\pi * \text{area}}{\text{perimeter}^2}$$

In effect we are normalizing the area of the district relative to that of a circle of the same perimeter. Increasing values indicate a lower degree of contortion present in the district's shape, to a maximum value of one, when the district is a circle.<sup>83</sup>

**Table 5:** Average Compactness for Western Congressional Districts

	1992	2002	2012
Arizona	<i>0.24</i>	<b>0.32</b>	<b>0.29</b>
California	<i>0.28</i>	0.18	<b>0.22</b>
Colorado	0.23	<i>0.28</i>	<i>0.23</i>
Hawai'i	<b>0.19</b>	<b>0.22</b>	<b>0.09</b>
Idaho	0.24	<b>0.26</b>	<b>0.23</b>
Nevada	0.38	0.30	<i>0.52</i>
New Mexico	0.32	<i>0.35</i>	<i>0.33</i>
Oregon	<i>0.24</i>	<i>0.26</i>	0.27
Utah	0.32	0.33	0.25
Washington	<b>0.23</b>	<b>0.23</b>	<b>0.19</b>

Notes: See text for formula used to calculate compactness. Bold type indicates commission-drawn maps. Italic type indicates court-drawn maps. Plain text indicates maps drawn by the state legislature.

Table 5 reports the average Schwartzberg compactness for each of the western states over the previous three redistricting cycles. The western states exhibit a variety of patterns when examining district compactness. First, commissions can produce more compact districts than court-drawn districts, such as in Arizona. Commissions can also produce roughly similar levels of compactness to the maps drawn by legislatures, as in Idaho. The Washington commission has produced similar levels of compactness since 1992. The California commission map is marginally more compact than the 2002 map drawn by the legislature, but less so than the 1992 court-drawn map. The low levels of compactness in Hawai'i are more likely due to the unique challenges of drawing island-based districts than to the use of a commission.

Legislatures, to their credit, do not appear to draw wildly non-compact

83. This is a variant of the Schwartzberg index. Joseph E. Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of 'Compactness,'* 50 MINN. L. REV. 443, 444 (1966); see also Niemi et al., *supra* note 74, at 1155 (identifying dispersion and perimeter length as necessary components to compactness).

districts (with the exception of California in 2002), and appear to be consistent across cycles, as in Nevada and Utah from 1992 to 2002. By contrast, courts tend to draw, on average, more compact districts in rounds subsequent to legislatively drawn maps.

The four cases where the same authority draws the district lines and the number of districts following reapportionment increases all show a marginal decrease in average compactness over time.<sup>84</sup>

In short, we find no uniform relationship between the structure of the state redistricting authority and the average compactness of the districts drawn.

#### *D. Competitive Seats*

In many of the western states' redistricting commissions, fostering competition is one of the factors the commission is required to pay attention to, though it usually plays only a secondary role. It is commonly thought that, on the one hand, creating competitive districts will result in more moderate members of Congress and, on the other hand, that state legislatures are less likely to draw competitive districts than commissions, as legislators tend to be risk-averse and would not needlessly draw districts where their party has only a slight advantage, unless compelled to by, say, the opposite chamber or governor's office being held by the other party.<sup>85</sup> Although there is evidence from previous redistricting rounds in support of the second proposition,<sup>86</sup> there is no real evidence for the proposition that that competitive districts produce more moderate representatives than representatives in safe districts.<sup>87</sup> Relatedly, Brunell and Grofman<sup>88</sup> and McCarty, Poole, and Rosenthal,<sup>89</sup> among others, find little or no evidence to support the claim that gerrymandering contributes to polarization in the United States House.

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84. See the 2002 round in Nevada compared to the 1992 round, and the 2012 rounds in Arizona, Utah, and Washington compared to the 2002 rounds in those states. See *supra* Table 5.

85. Owen & Grofman, *supra* note 12, at 5.

86. See, e.g., Carson & Crespin, *supra* note 33, at 455 (arguing that more competitive elections occur when courts and commissions are actively involved in the redistricting process); see also *id.* at 455 (finding evidence for greater responsiveness which implies more competitiveness in districts drawn by courts); cf. Jonathan Winburn, *Does it Matter if Legislatures or Commissions Draw the Lines?*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* note 3, at 137, 145–156.

87. James Adams et al., *Why Candidate Divergence Should Be Expected to Be Just as Great (or Even Greater) in Competitive Seats as in Non-Competitive Ones*, 145 PUB. CHOICE 417, 418–19 (2010).

88. Thomas Brunell & Bernard Grofman, *Evaluating the Impact of Redistricting on District Homogeneity, Political Competition, and Political Extremism in the U.S. House of Representatives, 1962-2006*, in DESIGNING DEMOCRATIC GOVERNMENT 117, 118 (Margaret Levi et al. eds., 2008).

89. Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666, 666 (2009).

**Table 6:** Proportion of Competitive House Districts in the West

State (Districts)	1992	1994	1996	1998	2000
Arizona (6)	<i>17</i>	<i>0</i>	<i>17</i>	<i>33</i>	<i>0</i>
California (52)	<i>21</i>	<i>15</i>	<i>17</i>	<i>10</i>	<i>13</i>
Colorado (6)	0	0	0	17	0
Hawai'i (2)	<b>0</b>	<b>0</b>	<b>50</b>	<b>0</b>	<b>0</b>
Idaho (2)	0	0	50	50	0
Nevada (2)	50	50	0	50	50
New Mexico (3)	0	0	0	67	33
Oregon (5)	<i>20</i>	<i>40</i>	<i>40</i>	<i>20</i>	<i>0</i>
Utah (3)	33	33	33	33	0
Washington (9)	<b>22</b>	<b>67</b>	<b>56</b>	<b>33</b>	<b>11</b>

  

State (Districts)	2002	2004	2006	2008	2010
Arizona (8)	<b>13</b>	<b>0</b>	<b>25</b>	<b>13</b>	<b>50</b>
California (53)	2	2	6	9	8
Colorado (7)	<i>14</i>	<i>29</i>	<i>14</i>	<i>0</i>	<i>14</i>
Hawai'i (2)	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>50</b>
Idaho (2)	<b>0</b>	<b>0</b>	<b>50</b>	<b>50</b>	<b>50</b>
Nevada (3)	0	0	33	33	33
New Mexico (3)	<i>0</i>	<i>33</i>	<i>33</i>	<i>0</i>	<i>0</i>
Oregon (5)	<i>20</i>	<i>20</i>	<i>0</i>	<i>0</i>	<i>20</i>
Utah (3)	33	0	0	0	33
Washington (9)	<b>11</b>	<b>11</b>	<b>11</b>	<b>11</b>	<b>44</b>

Notes: Bold type indicates commission-drawn maps. Italic type indicates court-drawn maps. Plain text indicates maps drawn by the state legislature.

Table 6 shows the proportion of competitive seats (operationalized as seats won with a vote margin of ten percentage points or less) in the western states between 1992 and 2010. A number of patterns are apparent. Competition is fairly stable within states, but there are election-specific effects involving especially competitive or especially uncompetitive environments in some states. A natural basis of comparison is the within-state comparison between when a state had legislatively drawn districts and when it adopted a commission. The transition to a redistricting commission in Arizona and Idaho appears to be associated with a modest increase in competitive seats in Arizona, and no clear change in Idaho. California has been a particularly uncompetitive state since 1992, with a marked decrease in competitive seats after the 2000 redistricting cycle. Only one U.S. House seat switched parties in California between 2002 and 2010.

**Table 7:** Proportion of Competitive Seats in 2012

State (Districts)	2012
Arizona (9)	<b>33</b>
California (53)	<b>15</b>
Colorado (7)	<i>14</i>
Hawai'i (2)	<b>50</b>
Idaho (2)	<b>0</b>
Nevada (4)	<i>50</i>
New Mexico (3)	<i>0</i>
Oregon (5)	<i>0</i>
Utah (4)	25
Washington (10)	<b>10</b>

Notes: Bold type indicates commission-drawn maps. Italic type indicates court-drawn maps. Plain text indicates maps drawn by the state legislature.

The 2012 elections illustrate two stories about competition and redistricting. The first interpretation, based on the evidence from California, leads to the claim that the newly instituted commission succeeded in drawing more competitive districts than at any time since the 1996 elections, and that seven incumbents in California were voted out of office.<sup>90</sup>

A second interpretation leads to a more mundane conclusion: the elections of 2012 were business as usual. In the western states, other than California, the 2012 elections were unremarkable compared to past electoral cycles. The recent past in Arizona suggests three to four of the congressional seats will be competitive, and the 2012 election was within that range, even when the size of the delegation from Arizona increased after 2010. The other commission states show no change in competition. The court-drawn districts in Colorado and New Mexico show no increase in competition. The proportion of competitive seats increased from one to two in Nevada, but the size of the delegation also increased from three to four seats. Even in California it appears that eighty-five percent of the seats are solidly held by one of the parties, regardless of who draws the districts.<sup>91</sup>

90. Drawing two or more incumbents into the same district is one way in which incumbents can be sure to be removed from office. However, in the 2012 redistricting cycle in the western states, we found only two districts in California that featured two incumbents contesting a congressional seat.

91. We would also note that the evidence from previous rounds of redistricting nationwide suggests that the first election after reapportionment is the high-water mark of the decade in terms of competition, absent special circumstances such as those present in 1994.

Attributing an increase in competition in congressional elections solely to the redistricting practices disregards the use of different electoral rules that can directly affect electoral competition. In particular, the “top two primary”—where the winner and runner-up in an open-primary election, who may be members of the same party, compete in the general election—is used in Washington (since 2008) and California (since 2012).<sup>92</sup> In no case since 2008 in Washington have two members of the same party competed in a congressional general election. The 2012 elections in California, by contrast, included eight such congressional races, two districts where Republicans competed in the general election and six races contested by Democrats. Five of the seven defeated incumbents were ousted by members of their own political party as a result of this new primary system. Thus, evidence from California suggests that the commission succeeded in drawing a larger proportion of competitive seats, but turnover in the members of the congressional delegation is a result of changes to the primary election system.

Finally, we would observe great variation in the proportion of competitive seats in both commission and noncommission states. For example, the parity between Democrats and Republicans in the Oregon legislature likely contributed to a sweetheart deal for the incumbents there. The final congressional maps were passed in bipartisan votes in the state house (58–2) and in the state senate (24–6). None of the congressional races in 2012 in Oregon were competitive. In Utah, where the Republican Party firmly controls the legislature and holds the governor’s seat, we had limited competition for a different reason. This is an apparent partisan gerrymander. The congressional maps were passed by party line votes in the state house (50–19) and in the state senate (20–5). There was only one competitive congressional race in Utah in 2012, in the area around Salt Lake City (involving the lone Democratic representative from Utah). In Arizona, where advocates for redistricting reform claimed a commission would produce more competitive districts, we observe some supporting evidence for that claim. One-third of the seats in 2012 were competitive, a rate which is less than the highest rate observed in these data (2006, when half of the seats were within ten percentage points), but still more competitive than all of the remaining electoral cycles, excluding 1998.

#### CONCLUSIONS

Justice Louis Brandeis in 1932 famously declared states to be laboratories, free to pursue social experiments that can serve as an example for other states. Redistricting is one such area of experimentation, with some western states opting to use an appointed commission rather than the state legislature to draw

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92. Washington Initiative 872 was approved in 2004 and became effective in 2008. WASH. INITIATIVE MEASURE NO. 872 (2004). California Proposition 14 was approved in 2008 and became effective in 2012. CAL. CONST. art. 2, § 5 (amended in 2009 by Proposition 14).

congressional and legislative districts. As we have seen, the evidence for the success of commissions in the western states is mixed when comparing the commission-drawn maps to maps created through the legislative process. But as we have argued, with respect to commissions, the devil is in the details. Not all commissions are alike. Indeed, quite the contrary; they differ in their organizational structures and in the criteria they pay greatest attention to. Most importantly, in no state is there nonpartisan line drawing in the way that line drawing is handled administratively (and effectively) in other first-past-the-post systems in English-speaking countries such as the United Kingdom and Canada.<sup>93</sup>

There is, however, one clear area in which commissions perform above and beyond the noncommission states in the West: commissions deliver district maps on time, and largely without legal contestation. The commissions in Arizona, California, Hawai'i, and Washington each delivered congressional maps on time. While the process in each of these states was marked with controversy and contention, the maps drawn by the commissions do not appear to be altered or overturned for the remainder of the decade. Granted, the first Idaho commission was unable to meet its strict deadline, but this commission also has structural qualities that make a supermajority vote unlikely to occur. By contrast, the legislatures in Colorado, Nevada, and New Mexico could not pass a districting plan and, thus, had to engage in lengthy and costly legal battles to produce congressional districts in time for the 2012 elections. The Oregon and Utah legislatures were able to pass congressional maps, though doing so was exceptional over the last century of experience in Oregon, and most likely a forgone conclusion in Utah, given the unified control of the state by Republicans. Taking a step back from the various criteria in place in the western states and instead looking at if a map was produced without involving the courts, it is clear that commissions accomplish this objective more often than legislatures.

The advocates who supported redistricting reform in California and Arizona sought to, first, eliminate the possibility of legislators colluding to produce districts which were created without input from the public. Commissions were thought to be an instrument that could open up the redistricting process. In this regard, the advocates are supported by the data we have collected. California and Arizona held a considerable number of hearings to solicit input from the public.

When we consider other aspects of the redistricting process, however, it becomes harder to determine if the aims of the reformers are supported by these data. The California commission successfully kept more cities and counties together in a single district than either the courts or the legislature, but that goal has—thus far—proved unobtainable for the Arizona commission. We observe a historically high rate of competitive races in Arizona in 2012, but attributing that

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93. See generally HANDLEY & GROFMAN, *supra* note 11 (describing and comparing the voting rules in various countries).

solely to the commission is complicated by the 2002 data, which show fewer competitive races than the court-drawn map of 1992. The simultaneous introduction of a redistricting commission and the “top two primary” in California in 2012 frustrate any claims that the commission alone increased the number of competitive congressional races.

In the United States, there have not been attempts to emulate redistricting practices in the United Kingdom or Canada. Instead, California<sup>94</sup> and New Jersey<sup>95</sup> have been put forward as models for best practices. We have previously noted our caveats about the California commission’s complex Rube Goldberg–like design and our fears that the requirement for agreement across partisan lines may, the next time around, lead to deadlock in that commission. But we would also add that commissions require politically skilled and highly knowledgeable leadership. The members of the California commission in 2011 included a past director of the U.S. Census Bureau, and they were mostly highly educated professionals. The New Jersey commissions in recent decades had the benefit of being chaired by leading academics, including two past deans of the Woodrow Wilson School at Princeton, Donald Stokes and Larry Bartels.<sup>96</sup> The tiebreaker in 2011 in the New Jersey redistricting commission was Alan Rosenthal, professor of public policy at the Eagleton Institute at Rutgers University and a distinguished expert on the state’s politics who is highly respected by both parties for his public service.<sup>97</sup>

These important caveats aside, we are sympathetic to the view that processes can be chosen that make “good redistricting” more likely. In particular, we share Cain’s view<sup>98</sup> that a process that explicitly tries to foster the kind of back-and-forth bargaining that seems to be the modus operandus of tiebreakers in New Jersey, with the independent member serving both as a facilitator of compromise and as an ultimate arbiter, can work well. In this context, a quote from Professor Rosenthal, after he finished his commission service, is informative: “I think the major role of the independent member . . . is to negotiate constantly and try to bring (the parties) closer together. And then when the time runs out, and they’re

94. Kogan & Kousser, *supra* note 22, at 219–20; Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizen Commission Final Plans*, 4 CALIF. J. POL. & POL’Y 1, 1 (2012); *Supreme Court Cites IGS Research in Redistricting Decision*, 53 INST. OF GOVERNMENTAL STUD. PUB. AFF. REP. 3, 3 (2012).

95. Cain, *supra* note 30, at 1808; *see also* Donald Stokes, *Is There a Better Way to Redistrict?*, in RACE AND REDISTRICTING IN THE 1990S 345, 364–65 (Bernard Grofman ed., 1998) (evaluating New Jersey’s process for redistricting).

96. *See* Eric Pace, *Donald E. Stokes, 69, Leading Political Scientist*, N.Y. TIMES (Jan. 29, 1997), <http://www.nytimes.com/1997/01/29/nyregion/donald-e-stokes-69-leading-political-scientist.html>; Larry E. Bartels, *Curriculum Vitae*, PRINCETON U. (Aug. 2011), <http://www.princeton.edu/~bartels/vitae.pdf>.

97. Alan Rosenthal, *Profile*, RUTGERS EDWARD J. BLOUSTEIN SCH. PLAN. & PUB. POL’Y, <http://policy.rutgers.edu/faculty/rosenthal> (last visited Feb. 2, 2003).

98. Cain, *supra* note 30, at 1838.



as close as they're going to come, you have to choose which one you think meets your criteria.”<sup>99</sup>

In this institutional design, politics is not removed from the process, but the parties' incentives to propose plans that satisfy the criteria put forward in the commission design and enforced by the arbiter are strong, according to the maxim from *Federalist No. 51* “ambition is being made to counter ambition.”<sup>100</sup> We would emphasize, however, that this is a model of redistricting very far from the “let (ordinary) citizens come together and draw a good map” that appears to be the California dream, however far it may be from the reality of California's actual commission process.

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99. Matt Feldman, *Rutgers Professor Appointed to Redistricting Commission Downplays Newfound Power*, NJ.COM (Mar. 5, 2011), [http://www.nj.com/news/index.ssf/2011/03/rutgers\\_professor\\_appointed\\_ti.html](http://www.nj.com/news/index.ssf/2011/03/rutgers_professor_appointed_ti.html).

100. However, in this politicized bargaining process, as the redistricting process has operated in New Jersey in the past, there is little role for public input.