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Redistricting Reform: What is Desirable? Possible?

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I. Introduction.

The legitimacy of the American electoral system requires some minimal level of fairness, responsiveness, and accountability. Recent elections to the U.S. House of Representatives threaten these principles, as the contests suffer from unusually high levels of incumbent safety, a precipitous decline in competitiveness, and a fierce struggle between the parties to manipulate the rules of the game to achieve, maintain or enlarge majority control of the chamber. The sorry spectacle of the Texas Republicans' successful mid-decade partisan gerrymander, which violated a century-long norm against more than one round of redistricting after each decennial census, drew public attention to the processes of congressional redistricting and has reinforced the view of many analysts that the U.S. political system is seriously flawed.

The morning sessions of this conference were designed to weigh the evidence supporting and refuting this broad critique. Has redistricting contributed importantly to the advantage of incumbents, the decline of competition, partisan bias, and the ideological polarization of the parties in Congress? Are the relationships between redistricting and these outcomes now more pronounced than before? Have new technology and increased party-line voting enhanced the capacity of those redrawing district lines to achieve their political objectives? Has the Court's almost exclusive focus on equal population and racial gerrymandering constrained or liberated the self-interested behavior of politicians and parties? Our goal in the afternoon's discussion is to consider the desirability and possibility of reducing the dominance in the redistricting process of those self-interested political actors.

Many practitioners and scholars are deeply skeptical of the whole idea of redistricting reform. Some of that skepticism is based on what they see as relatively weak evidence of the impact of redistricting on competition and partisanship. Other forces, these critics argue, are more powerful. Redistricting ambitions of political actors have a muted effect, as they are constrained by geography, conflicting values and principles, competing interests, uncertain outcomes, and self-policing mechanisms. But mostly the skepticism is a consequence of an overwhelming sense that any efforts to replace the dominant American style of redistricting by legislative bodies with more neutral procedures and principles are unlikely to be successful and, even if adopted, are doomed to fail.

The United States is clearly an outlier in the democratic world when it comes to the role politicians play in shaping the rules that affect their electoral future.¹ This particular manifestation of American exceptionalism extends well beyond the realm of legislative redistricting. Elections are administered and campaign finance laws enforced in highly partisan environments, with relatively little delegation to professional bureaucrats or nonpartisan bodies. The design of our Madisonian system is predicated on the assumption that political actors will inevitably act in their own interests. Rather than denying that self-interested behavior, the system is designed to employ the proper set of political institutions and a pluralistic interest group environment to channel it in ways that serve broader public goals. A suspicion of authority, political control of bureaucrats, decentralization, parochialism, and a highly contentious and political judicial process are all deeply-embedded features of that system. The electoral rules of the game are subject

¹ David Butler and Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* (New York: Macmillan Publishing Company, 1992) Chap. 6.

to the same pluralistic struggle for power as elections and public policies.² Attempts to alter this reality are futile.

This *realpolitik* perspective on American politics has not been a consensual one. Recoiling from the self-dealing of politicians, the Progressives championed a broad reform agenda ranging from initiatives, party primaries and nonpartisan elections to regulation of corporations and civil service reform. While much of their agenda was adopted and survives to this day, it has been criticized by historians and political scientists for strengthening the middle class at the expense of the working class and for promising more ethical behavior than it could deliver. This fault line between Madisonians and Progressives or, in the parlance of party politics, between regulars and reformers, has reemerged in contemporary debates about political reform. For example, critics of campaign finance regulation wax eloquent about the futility of restricting the flow of money in politics and the infamous “law of unintended consequences.” Supporters of such regulation, on the other hand, often invoke the values and rhetoric of their Progressive predecessors.

Unfortunately, the contentious debate about the efficacy of political reform fits all too well our own era of American politics, which is characterized by intense partisanship and ideologically polarized parties. We appear to have an unbounded capacity to speak past one another, pursuing with conviction and passion what E. J. Dionne Jr. has called “a politics dominated by false choices and phony issues.”³ Yet, in reality, regulars and

² As Dennis Thompson points out, however, James Madison would not approve. He distinguished ordinary legislation from electoral regulation. On the latter, the normal process of representation served to preserve the privileges of incumbents and perpetuate the practices of the institution [Dennis F. Thompson, “Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States,” *American Political Science Review* 98:1 (Feb. 2004): 51-64].

³ E. J. Dionne Jr., *Why Americans Hate Politics* (New York: Simon & Schuster, 1992): 357.

reformers need not and sometimes are not in sharply opposing camps. One need not be a naïf in order to pursue political reform. *Realpolitik* considerations are appropriately central to calculations of the costs and benefits of reform proposals and of the feasibility of their adoption. A largely unregulated political marketplace can suffer from failures and underinvestment in valued goods analogous to those in an economic market. Self-dealing by corporate executives is subject to aggressive, if not always successful, preventative and punitive legal measures; it is not unreasonable to consider comparable steps in the political arena.

During the most recent round of campaign finance reform, a number of political scientists who long considered themselves party regulars became strong advocates of legislation to restrict party soft money and regulate electioneering communications.⁴ They argued that carefully-crafted regulation of money in politics could achieve limited objectives and that strong parties are not incompatible with limits on the sources of party financing. To be sure, not all political scientists agreed.⁵ It will take some time to assess the consequences of the new campaign finance law, but early indicators suggest that the political parties are adapting well.⁶

Redistricting reform, then, should not be dismissed out of hand as incompatible with the American way of politics. Powerful theoretical arguments, rooted in the principles and values of the American system, have been advanced for alternatives to legislative control of redistricting. Dennis Thompson demonstrates how a proper

⁴ Thomas E. Mann, "Linking Knowledge and Action: Political Science and Campaign Finance Reform" *Perspectives on Politics* 1:1 (Mar. 2003): 69-83.

⁵ Anthony Corrado, Thomas E. Mann, and Trevor Potter, eds., *Inside the Campaign Finance Battle: Court Testimony on the New Reforms* (Washington, D.C.: The Brookings Institution, 2003); Daniel H. Lowenstein and Richard L. Hasen, eds., "Symposium: *McConnell v. Federal Election Commission*" *Election Law Journal* 3:2 (2004): 115-369.

⁶ Anthony Corrado, "Political Party Finance under BCRA: An Initial Assessment" <<http://www.brookings.edu/views/papers/20040311corrado.htm>>, 11 Mar. 2004.

understanding of popular sovereignty provides a compelling basis for independent judgment on redistricting decisions. In his view, legislative control prevents present majorities from escaping the “dead hand of past majorities.”⁷ Others make a more empirically-based argument: that traditional redistricting practices are producing (or contributing significantly to) harmful consequences for our electoral system.⁸ Moreover, some states have departed from traditional redistricting practices, providing both a *prima facie* case that alternatives are not merely fanciful conceptions of naïve reformers and a basis for drawing appropriate lessons.

This paper will consider a range of alternatives to state legislative control of congressional redistricting. Conceptually, they can be classified in terms of what aspect of the redistricting process is altered and the means by which those alterations are achieved.⁹ The former include the structure of the electoral system, the standards by which new maps are to be drawn, and the procedures used to draw and approve new district boundaries. The latter might entail constitutional, statutory, or judicial actions at the federal or state level.

II. Electoral System

Redrawing district boundaries is particularly problematic in an electoral system with single-member districts. Multi-member districts would reduce the importance of boundaries and, therefore, the incentive for political actors to manipulate the line-drawing

⁷ Thompson “Election Time,” 54.

⁸ Sam Hirsch, “The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting,” *Election Law Journal* 2:2 (2003): 179-216; Michael McDonald, “Comparative United States Redistricting Institutions,” *State Politics and Policy Quarterly* 4:4 (forthcoming, 2004).

⁹ I have found two sources especially helpful in conceptualizing the objectives and alternatives in redistricting reform: Butler and Cain, *Congressional Redistricting*, Chap. 7 and Michael McDonald, “Enhancing Competitiveness in Redistricting” <<http://elections.gmu.edu/enhancing.htm>>, accessed 12 Apr. 2004.

process to serve their own interests.¹⁰ Nevertheless, some residual importance for redistricting could remain in these districts, depending on their size, the number of representatives in each district, and the rules under which they are elected.¹¹ Moving to an explicitly proportional representation system – with party lists or German-style compensation schemes for district outcomes that depart from proportionality – would effectively remove redistricting as a political issue.

No constitutional impediment prevents the adoption of alternatives to the single-member district, first-past-the-post system for electing members to the U.S. House of Representatives (assuming such alternatives worked within the decennial apportionment of House seats to the states). Until 1842, Congress left to the states the means by which they elected their U.S. Representatives. Some states used multi-member districts and at-large elections, although most followed the practice of electing one member per district.¹² Then in 1842 Congress enacted a law that required contiguous single-member congressional districts.¹³ While that single-member standard was effectively repealed by the 1929 Congressional Reapportionment Act,¹⁴ which omitted all uniform standards states were to follow in redrawing House district lines, Congress in 1967 again passed a law requiring single-member congressional districts.¹⁵ This statute remains in effect today.

¹⁰ Butler and Cain, *Congressional Redistricting*, 125; Center for Voting and Democracy <<http://www.fairvote.org/redistricting/index.html>>, accessed 12 Apr. 2004.

¹¹ Ruth C. Silva, “Compared Values of the Single- and the Multi-Member Legislative District,” *Western Political Quarterly* 17:3 (Sept. 1964): 504-16.

¹² Andrew Hacker, *Congressional Districting: The Issue of Equal Representation* (Washington, D.C.: The Brookings Institution, 1963) 6-7; Laurence F. Schmeckebier, *Congressional Apportionment* (Westport, CN: Greenwood Press, Publishers, 1941) 132.

¹³ 5 Stat. 491.

¹⁴ 46 Stat. 13.

¹⁵ 81 Stat. 581, codified at 2 USC 2c.

Are the alleged problems associated with redistricting – incumbent protection, noncompetitive elections, unresponsiveness, and polarization – of sufficient severity that we should entertain adopting some form of proportional representation for House elections (or giving states the option of enacting PR systems)? Since the strengths and weaknesses of PR systems extend well beyond the issues associated with redistricting, any consideration of this alternative must perforce include such topics as governmental stability, minority representation, the role of minor parties, and presidential selection rules.¹⁶ I suspect we are some time away from beginning, much less resolving, a serious conversation about proportional representation at the federal level. New initiatives at the state and local level, however, may provide useful experience and familiarity with this alternative.

III. Redistricting Standards

There is a long history at the federal and state levels of efforts to constrain the choices of congressional district mapmakers by imposing redistricting standards. Between 1842 and 1929, Congress established various national standards for congressional redistricting, including contiguity, compactness, and equality of population.¹⁷ Out of this experience came the widely accepted view that Congress has the constitutional authority to impose on the states national standards governing congressional redistricting. That experience also demonstrated that states could ignore those standards with impunity. Congress had no means of enforcing the standards, short

¹⁶ Gary W. Cox, *Making Votes Count: Strategic Coordination in the World's Electoral Systems* (New York: Cambridge University Press, 1997); Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process*, 2nd ed. (Westbury, NY: The Foundation Press, 2001) 1160-67; Douglas W. Rae, *The Political Consequences of Electoral Laws* (New Haven: Yale University Press, 1967).

¹⁷ 5 Stat. 491 (1842); 9 Stat. 433 (1850); 12 Stat. 572 (1862); 17 Stat. 28 (1872); 22 Stat. 5 (1882); 26 Stat. 735 (1891); 31 Stat. 733 (1901); 37 Stat. 13 (1911).

of refusing to seat members elected in districts drawn in violation of them, a major step that no Congress took.¹⁸

Since 1929, many proposals setting national redistricting standards have been offered, but, with the voting rights exception discussed below, none have survived the legislative process. Proposed standards have ranged from contiguity, compactness, equal population, adherence to local political boundaries, and respect for communities of interest to neutrality with regard to any political party or candidate.¹⁹ The latter was of course designed to counter partisan and incumbent-protection gerrymandering. Today, the one national standard that has attracted attention in Congress would prohibit more than a single round of congressional redistricting after the decennial apportionment. A bill introduced by Representative Green and other Democratic members of the Texas delegation in the U.S. House, whose ranks will likely be decimated by the recent Republican gerrymander, would formalize what had been a longstanding norm.²⁰ Of course, as long as Rep. Tom DeLay, the chief architect of the Texas redistricting plan, remains Republican leader, that bill will go nowhere. The more interesting question is how a Democratic majority in Congress might react to it.

One federal mandate on redistricting by states – prohibiting minority vote dilution – has its roots in the Voting Rights Act of 1965 and subsequent amendments, but the courts have taken the lead in fleshing out its application in the redistricting arena. Over time that jurisprudence has evolved from maximizing the number of majority-minority

¹⁸ Joel Francis Paschal, “The House of Representatives: ‘Grand Depository of the Democratic Principle’?” *Law and Contemporary Problems* 17 (1952): 276-89; Schmeckebier, *Congressional Apportionment*, 135-38.

¹⁹ Thomas M. Durbin and L. Paige Whitaker, “Congressional and State Reapportionment and Redistricting: A Legal Analysis,” CRS Report for Congress, 4 Sept. 1996: 5-6.

²⁰ H. R. 3856 (2004).

districts to prohibiting race as the predominant factor in redistricting to sanctioning the creation of minority-influence districts.²¹

Another federal mandate – equal population districts – is entirely a creature of the courts. In a series of decisions from *Wesberry v. Sanders* (1964) to *Karcher v. Daggett* (1983), the Supreme Court developed a standard of absolute population equality in determining whether a congressional redistricting plan is constitutional. Any departure from precise mathematical equality of district populations within states must be justified by some compelling state interest. While the equal population standard has eliminated gross disparities associated with malapportioned districts and has constrained somewhat the ability of politicians to rig electoral outcomes, it has also provided an excuse and a cover for mapmakers seeking to extract every possible benefit from partisan and bipartisan gerrymanders. Easing somewhat the equal population standard (which is unlikely to do much damage to any reasonable conception of representation) might actually reduce the level of mischief by allowing more stability in district composition and respect for local political and social boundaries.²²

In *Davis v. Bandemer* (1986) the Court appeared to be moving toward the imposition of another standard when it ruled that partisan gerrymandering is justiciable and reviewable under the Equal Protection Clause. Yet by setting a high threshold for successful challenges – “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political

²¹ Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (New York: New York University Press, 2003); Sam Hirsch, “The United States House of Unrepresentatives.”

²² Alan Ehrenhalt, “Frankfurter’s Curse,” *Governing* 17:4 (Jan. 2004): 4-7.

process”²³ – the Court rendered this standard ineffectual; only one successful partisan gerrymandering claim – in a judicial election – has been litigated under *Bandemer*.²⁴ The Court’s upcoming decision in *Vieth v. Jubelirer* will signal whether the direction taken on partisan gerrymandering in 1986 leads to a dead end or whether the Court decides to open a new path into the “political thicket.” Plaintiffs argue for court intervention in only the most egregious partisan gerrymanders, those that prevent the public’s clear expression of support for a majority party from being realized in the legislature. Questions raised by the justices at oral argument suggest the Court is wary of proceeding along this line. While *Vieth* deals exclusively with partisan gerrymandering, some legal scholars look to the courts to constrain what they see as the more problematic bipartisan, incumbent-protection gerrymanders.²⁵ Others argue against any further judicial intervention to counter bipartisan as well as partisan gerrymanders.²⁶ In the past the Court has sanctioned the protection of incumbency as a legitimate redistricting objective.²⁷ It is not easy to see how the Court might reverse itself and develop a workable standard to mitigate against incumbent-protecting gerrymanders.²⁸

On the state level, redistricting standards for congressional and state legislative mapmaking are written into constitutions and codified by statute. The most common are contiguity, compactness, adherence to existing political and geographical boundaries, and

²³ 478 U.S. 109, 133 (1986).

²⁴ Issacharoff, Pildes, and Karlan, *The Law of Democracy*, 886.

²⁵ Samuel Issacharoff, “Gerrymandering and Political Cartels,” *Harvard Law Review* 116 (Dec. 2002): 593-648.

²⁶ Hasen, *The Supreme Court and Election Law*; Nathaniel Persily, “In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders,” *Harvard Law Review* 116 (Dec. 2002): 649-683.

²⁷ *Burns v. Richardson*, 384 U.S. 73, 89 (1966); *White v. Weiser*, 412 U.S. 783, 791, 797 (1973).

²⁸ For another perspective, see Hirsch, “The United States House of Unrepresentatives.”

respect for communities of interest.²⁹ The logic of these largely aesthetic criteria is that they are both desirable in their own right and likely to constrain partisan and incumbent gerrymandering. Contiguity is the only standard that is almost universally applied (assuming one accepts two land masses joined by a body of water as contiguous). The others more nearly approach general values to be sought rather than strict tests to be met. They often suffer from ambiguity (e.g. how to define compactness) and from conflict with other standards. Compactness can work against natural communities of interest, especially racial minorities, and existing political boundaries; it can also have a disparate partisan effect. The equal population standard often requires mapmakers to split existing political and geographical communities.

Some states, typically those using nontraditional redistricting processes, have adopted more explicitly political standards for redistricting. Mapmakers might be instructed to avoid favoring incumbent officeholders or one political party over another. This might be done by blind procedures—denying them certain information (the location of incumbents’ homes or election data)—or by requiring them to draw districts that are demonstrably competitive or treat both parties “fairly.” Each of these approaches has its own set of complications, and they too can lead to conflict among standards.³⁰ Protecting racial and ethnic minorities, an overriding federal requirement, can reduce the number of competitive seats and diminish the responsiveness of legislative elections to shifts in public sentiment.

IV. Redistricting Procedures.

Congressional redistricting plans are typically drawn and approved through the

²⁹ McDonald, “Enhancing Competitiveness in Redistricting.”

³⁰ Butler and Cain, *Congressional Redistricting*; McDonald, “Enhancing Competitiveness in Redistricting.”

normal state legislative process. Controlling both chambers of the legislature (or one in the unicameral Nebraska) and the governorship gives a political party an enormous advantage in crafting a plan that advances its partisan interests. Split-party control, on the other hand, tends to reduce opportunities for partisan gains within states and to facilitate bipartisan gerrymanders.³¹ It is no surprise that the national parties invest substantial resources in state legislative and gubernatorial elections leading up to each decennial reapportionment. This investment is no longer limited to the elections prior to reapportionment. Under the direction of Tom DeLay, Republicans mounted a full-scale campaign to gain control of the Texas House in the 2002 elections. Their success gave the party unified control of the state government and, therefore, the means for crafting a partisan gerrymander of congressional districts that replaced the maps drawn by the courts two years earlier.

To be sure, unified party control of a state government is no guarantee of partisan gains.³² Many states are too small and/or too homogeneous to produce such opportunities. Parties in other states are constrained by intra-party differences, the perceived risks to majority party incumbents from maximizing partisan gains, and the geographical distribution of state residents. For example, although Democrats dominated California government at the time of the post-2000 congressional redistricting, they chose to consolidate their gains in the previous election and engage in a bipartisan incumbent gerrymander with the minority Republicans.

Some states require supermajority approval of redistricting plans by the legislature, thus producing in most cases a political dynamic similar to split-party control

³¹ McDonald, "Comparative United States Redistricting Institutions."

³² Bruce E. Cain, *The Reapportionment Puzzle* (Berkeley: University of California Press, 1984).

of state government. Partisan plans are avoided but not without a cost to competition. Under these conditions, both parties have as their highest priority protecting their incumbents.

Since the reapportionment revolution of the 1960s, the courts have played an increasingly important role in the redistricting process. Before the courts imposed the “one person, one vote” standard on redistricting, failure to produce a new redistricting plan usually resulted in the old map remaining in place. If a state gained one or more seats, it could choose to elect its new allotment of members at-large. If it lost any seats, it could elect all of its members at-large (a much less attractive and infrequently utilized option). In recent decades, states have faced a very different default position, one defined by the courts.³³ Moreover, quite apart from failure to produce a plan, virtually all redistricting maps were now subject to challenge in the courts by aggrieved parties. The strategic behavior of politicians redrawing district lines has been increasingly shaped by the prospect of judicial intervention.³⁴

A number of states subsequently enacted provisions that provide for a specific role for the courts. Some require the courts to draw up plans if the legislature and governor reach a political impasse.³⁵ At least one state--Colorado--calls for immediate judicial review of redistricting plans as soon as they are enacted, obviating the need for others to file suit in court.³⁶

Rather than looking to the courts, some states remove authority and responsibility from the legislature and place it in the hands of another group of actors, a panel usually

³³ Gary W. Cox and Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* (Cambridge, UK: Cambridge University Press, 2002).

³⁴ Cox and Katz, *Elbridge Gerry's Salamander*.

³⁵ Butler and Cain, *Congressional Redistricting*, 110-15, 147-48.

³⁶ Jeffrey C. Kubin, “The Case for Redistricting Commissions,” *Texas Law Review* 75 (March 1997): 850.

referred to as an independent redistricting commission. Commissions--the most ambitious and potentially most effective reform of redistricting procedures--are invested with a primary role in congressional redistricting by seven states (Arizona, Hawaii, Idaho, Maine, Montana, New Jersey, and Washington) and in state legislative redistricting by twelve states. They are used as backups if the legislative process fails in drawing congressional plans in two states (Connecticut and Indiana) and state legislative plans in seven states.³⁷ Additional states employ advisory commissions as inputs to the legislative process. And one state – Iowa – delegates authority for drafting congressional and state legislative redistricting plans to a nonpartisan legislative support staff. As discussed below, however, the Iowa legislature retains the authority to put its own mark on the ultimate plans.

Commissions presently in use for congressional and state legislative redistricting vary in their size, appointment of an even or odd number of members, criteria and method used to appoint members, state redistricting standards they must follow, limits on information used in drawing plans, degree of independence from the legislature and governor, approval of plans by majority or supermajority rule, provisions for judicial review, timetable for action, staff, funding, and backup provision if the commission fails to approve a plan.³⁸ Not surprisingly, commissions usually produce redistricting plans that reflect their structure and rules.³⁹ Those with partisan majorities and simple majority rules tend to produce partisan plans. Those with evenly-divided bipartisan memberships

³⁷ McDonald, "Comparative United States Redistricting Institutions."

³⁸ Butler and Cain, *Congressional Redistricting*; Bruce E. Cain and David A. Hopkins, "Mapmaking at the Grassroots: The Legal and Political Issues of Local Redistricting," *Election Law Journal* 1:4 (2002); Hirsch, "The United States House of Unrepresentatives; Sam Hirsch, "Unpacking *Page v. Bartels*: A Fresh Redistricting Paradigm Emerges in New Jersey," *Election Law Journal* 1:1 (2002); Kubin, "The Case for Redistricting Commissions"; McDonald, "Enhancing Competitiveness in Redistricting"; Persily, "In Defense of Foxes Guarding Henhouses."

³⁹ McDonald, "Comparative United States Redistricting Institutions."

and/or supermajority rules are more likely to produce plans that protect both parties and their incumbents. Designing a commission that is neutral toward or that dampens the influence of both incumbents and parties is a challenge with which few states have successfully grappled.

Iowa. Based on its reputation for using an “independent redistricting commission” that produces strikingly competitive legislative districts, Iowa is more frequently offered as a model for redistricting reform than any other state. The underlying reality is a good deal more complicated. The Hawkeye State embraces a uniquely nonpartisan redistricting process, but one in which responsibility for drawing maps is delegated to a legislative support staff office, the Legislative Services Agency (LSA; formerly the Legislative Service Bureau), and in which ultimate redistricting authority is retained by the legislature. A five-member commission is responsible for advising the agency, but only upon an LSA request. The LSA is charged with submitting up to three plans to the legislature, any of which can be approved by majority vote and signed into law by the governor. The legislature may make only technical adjustments in the first two plans, but it is free, after rejecting the first two, to make substantive changes in the third, effectively drawing its own map.

The LSA must draw up its plans following four criteria (population equality, contiguity, unity of counties and cities, and compactness) and without regard to political affiliation, previous election results, the addresses of incumbents, or any demographic information other than population not otherwise required by law. In this respect, the process requires redistricting blind to incumbency and party. But such a neutral process need not produce neutral results. In 1991 the Democratically-controlled legislature

approved a plan that led to major Republican gains in the subsequent election, gains they have never relinquished. The congressional redistricting plan approved in 2001 by the Republican legislature (subject to a veto by the Democratic governor) led to competitive races in four of the five districts, all of which nonetheless reelected incumbents. The legislature has never chosen to exercise its authority to draw its own maps, even when a majority believed that the neutral process had produced a partisan outcome. It appears that the “good government” norms in the state, and the popularity of the nonpartisan redistricting process, has constrained the self-interested behavior of incumbents and parties. It bears noting, however, that in 1981, when Republican leaders complained that two of their House incumbents were thrown together in a Democratic-leaning district, these “problems” were ameliorated in the second and ultimately successful third plan.⁴⁰

Is Iowa a model for other states? Its historical record certainly suggests many strengths: timely completion of redistricting, no court challenges, mostly competitive seats, and no blatant incumbent or partisan gerrymandering. On the other hand, Iowa is an outlier among states. Its mix of social and geographical characteristics and close partisan balance naturally support more competitive legislative districts. The absence of racial minorities removes all of the complicated considerations of the Voting Rights Act. Iowa’s strong tradition of progressive nonpartisanship supports the unusual delegation of responsibility to a professional staff (unusual for the U.S., not for other countries accustomed to using civil service boundary commissions) and the legislature’s restraint from using its full authority to control redistricting. Finally, blind redistricting performed

⁴⁰ Alan Ehrenhalt, “Reapportionment and Redistricting,” in Thomas E. Mann and Norman J. Ornstein, eds., *The American Elections of 1982* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1983) 55.

by nonpartisan bodies can produce undesired outcomes, even more so in states with more diverse populations and geography.

Washington. After an especially contentious post-1980 round of redistricting, the legislature adopted a constitutional amendment, subsequently approved by the electorate, establishing a state redistricting commission to open its doors in 1991.⁴¹ (A temporary commission was used in 1983 to resolve conflict over the post-1980 maps.) The amendment called for a four-member commission, divided evenly between the two parties, with a fifth nonvoting member chosen by the appointees to serve as chair. Voting members are appointed by legislative party leaders but cannot be drawn from recent, current, or prospective lobbyists or elected officials. The commission must approve its plan by supermajority vote (at least three of four votes). The proposal then goes to the legislature, which may amend within limits (but not kill) the plan by a two-thirds vote. The governor has no veto power. If the commission fails to produce a plan, the task falls to the state Supreme Court.

The commission operates under a number of familiar standards: equal population, contiguity, compactness, convenience, and respect for political subdivisions, communities of interest, and geographic barriers. In addition, the plan cannot favor or discriminate purposely against a party or group and should encourage electoral competition.⁴²

The Washington state commission seems to be structured to avoid partisan gerrymanders and protect the interests of incumbents. The evenly-divided membership and supermajority votes required to approve or amend a plan encourages bipartisan

⁴¹ Washington Secretary of State <<http://www.secstate.wa.gov/oralhistory/redistricting/1980s/>>, accessed 12 Apr. 2004.

⁴² Washington State Constitution, Section 43, Part 5.

negotiations and accommodates incumbents. Butler and Cain characterize this structure as consensual, one likely to produce bipartisan or incumbent-oriented plans.⁴³ Yet Washington congressional elections were among the nation's most competitive in the decade following the post-1990 commission redistricting plan. By one measure of district partisanship, neither party was projected to win more than 52% in six of the state's nine congressional districts.⁴⁴ District boundaries permitted an unusually high level of responsiveness to the strong Republican tide of 1994. The delegation switched from a seven-seat Democratic advantage to a five-seat Republican margin, and seven of the nine House races were won with less than 60 percent of the vote. A less dramatic but strikingly competitive pattern continued in the subsequent three elections. In contrast, the post-2000 plan approved by the commission was followed by a pattern of House election results in Washington state that mirrored those in the country; every incumbent in the delegation was reelected, as were all but four House incumbents facing challengers nationwide. Yet the underlying partisan structure of the Washington congressional districts remained competitive. Four of the nine districts reelected House incumbents with less than 60 percent of the vote. More tellingly, six of the nine districts were highly competitive when measured by the 2000 presidential vote under the new district boundaries.

It is not obvious what features of the Washington redistricting process encouraged such a high level of responsiveness and competitiveness, in spite of the bipartisan commission membership and supermajority rules. Explicit standards encouraging electoral competition and prohibiting favorable or discriminatory treatment of a political

⁴³ Butler and Cain, *Congressional Redistricting*, 151.

⁴⁴ Center for Voting and Democracy, "Washington's Redistricting Information" <<http://www.fairvote.org/redistricting/reports/remanual/frames.htm>>, accessed 12 Apr. 2004.

party might be important. So too might be the somewhat nonpolitical nature of commission members and the practice of extensive public hearings. It is also possible that the political and social makeup of the state – including the small percentage of racial minorities and the closely divided parties statewide -- facilitates the use of redistricting commissions and the drawing of more competitive legislative districts.

New Jersey. The highly partisan state of New Jersey has used a commission to redraw its state legislative districts since 1966 and its congressional districts since 1991. The state legislative redistricting process involves the appointment of a partisan but evenly-divided ten-member commission, with half of the members chosen by each of the state party chairmen.⁴⁵ Current members of the legislature are eligible for appointment. If the commission fails to reach agreement (by majority vote) within a month, the chief justice of the State Supreme Court appoints an eleventh, public member, who then has one additional month to forge a majority on behalf of a plan. Based on his experience as the public, “tiebreaking” member in 1981 and 1991, Donald Stokes has recounted how this system largely succeeded in producing maps low in partisan bias and high in responsiveness to shifts in voter preferences.⁴⁶ A similar outcome was achieved in 2001 under public member Larry Bartels.⁴⁷

The commission system in place for congressional mapmaking, adopted in 1991 by a lame duck Democratic legislature that rushed to avoid allowing redistricting authority to be exercised by the incoming Republican majority, differs from the state district process in several important respects. Each party appoints six members, who in

⁴⁵ Donald E. Stokes, “Is There a Better Way to Redistrict?” in *Race and Redistricting in the 1990s*, Bernard Grofman, ed. (New York: Agathon Press, 1998) 345-66.

⁴⁶ Stokes, “Is There a Better Way to Redistrict?”

⁴⁷ Hirsch, “Unpacking *Page v. Bartels*,” 7-23.

turn by majority vote elect a thirteenth, independent member to serve as a neutral, tiebreaking chairman of the commission. The timetable and process appear to limit the public member to choosing between the two plans with the widest support, a contrast with Stokes who enjoyed the ability to fashion an independent plan and encourage the parties to move toward it. In 1991 public member Alan Rosenthal judged the Republican plan to be fairer and cast his tie-breaking vote with it. In 2001 Rosenthal endorsed a bipartisan map proposed by the state's congressional delegation.⁴⁸ The New Jersey commission for congressional redistricting has avoided a blatant post-1980 style partisan gerrymander both rounds it has been in effect, but it has done little to increase competitiveness and responsiveness. The state's congressional delegation has remained stable and roughly balanced between the parties, with only two or three of its thirteen incumbents facing any semblance of competition.

Do procedural differences alone account for the relative success of state legislative over congressional redistricting in New Jersey? Both commissions were dominated by politicians and operated in a political culture that takes as a given that redistricting is an inherently political process. Neither were constrained by redistricting standards promoting competition or partisan fairness nor by requirements for public hearings. Both had tie-breaking members and decided by simple majority vote. Alan Rosenthal, a discussant for this paper at the conference, will no doubt shed some additional light on the New Jersey experience.

Arizona. The latest and most ambitious exercise in redistricting reform was authorized by popular initiative in 2000. Proposition 106 amended the Arizona constitution to vest authority for redrawing the state's congressional and legislative

⁴⁸ McDonald, Comparative United States Redistricting Institutions.”

districts in a five-member commission.⁴⁹ Four members (two from each party) are appointed by legislative leaders from a pool of nominees approved by the Commission on Appellate Court Appointments. These nominees must be registered Arizona voters who have not recently been elected or appointed to public or party office. The four appointees then choose a fifth member from a comparable pool of nominees not affiliated with one of the two major parties. Commission maps approved by majority vote are not subject to review by the legislature or veto by the governor.

The Arizona constitution is explicit about the standards and procedures the commission shall follow in creating redistricting plans:

The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below:

- A. Districts shall comply with the United States Constitution and the United States voting rights act;
- B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;
- C. Districts shall be geographically compact and contiguous to the extent practicable;
- D. District boundaries shall respect communities of interest to the extent practicable;
- E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;
- F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.⁵⁰

The commission's initial experience in drawing congressional and legislative maps under these procedures and standards reveal the difficulty if not impossibility of achieving all of the desired objectives. Arizona has a rapidly growing population, which,

⁴⁹ Arizona Secretary of State, 2000 Voter's Pamphlet <www.sosaz.com/election/2000/Info/pubpamphlet/english/prop106.pdf>, accessed 12 Apr. 2004.

⁵⁰ Arizona State Constitution, Article IV.

with an even more explosive growth of Latinos, is producing an increasingly competitive statewide political environment. Creating additional competitive districts (which in this case means more opportunities for Democrats to compete) is constrained by the need to adhere to VRA requirements and to respect communities of interest. Given the geographical distribution of Democratic and Republican voters, drawing compact districts in a grid-like pattern can frustrate the achievement of other important redistricting objectives.

Elections returns in 2002 suggest a modest gain in competitiveness, one that is more apparent when the presidential vote is used to control the advantages of House incumbency. But the result fell well short of what many commission proponents and Democrats had hoped, leading to court challenges, which at the congressional level were decided in favor of the commission.

Arizona's experience begs a number of other questions. How did the incumbent-blind provision affect the work of the commission and its product? Was the commission constrained by restrictions on the use of party registration and voting data? Did the commission have a satisfactory mix of appropriate political representation and knowledge, on the one hand, and independent resources and judgment, on the other? Fortunately, Steven Lynn, chair of the Arizona redistricting commission, will be at the conference to share his experiences and help develop lessons for other states.

Lessons from Commissions. Lessons from these brief case studies and from other analyses of the structure and outcome of redistricting commissions suggest both the limits and possibilities of this reform genre. A commission can be used as efficiently as the normal legislative process to achieve partisan or incumbent-protection gerrymanders.

A commission controlled through appointment by the majority party in the legislature and operating under simple majority rule will find it very difficult if not impossible to exercise independent judgment. Partisan plans are their likely product. On the other hand, a commission whose membership is evenly divided between the parties and/or whose maps must be adopted by a supermajority vote is naturally drawn toward bipartisan compromise, which usually works to the advantage of incumbents and to the detriment of competition. Independent, tie-breaking members under majority rule dampen partisan gerrymandering, but their impact on competition is uncertain.

As we have seen from the experiences recounted above, these are not inviolate relationships. Other aspects of state political geography and culture and of the rules under which commissions operate can make a significant difference. Commissions instructed to produce plans that are fair to both parties and that promote competition are likely to operate differently than those under no such command. States requiring public hearings and a more transparent process of mapmaking will find their commissions avoiding some of the more obvious redistricting traps. Specific provisions balancing partisan representation and insulation from undue political influence will be critical in shaping the work of the commission. The political circumstances under which a redistricting commission is authorized – by popular initiative, a court mandate, a lame duck state legislative majority, or a bipartisan agreement – will matter as well. We have only begun to identify the critical design issues that should be addressed in formulating this alternative redistricting procedure.

V. Conclusion

It would be a serious mistake to assume or infer that legislative redistricting is primarily responsible for the ills associated with contemporary congressional elections, from a decline of competitive seats to a growing ideological polarization between the parties. Evidence presented at this conference and elsewhere⁵¹ confirms the view that many factors – including the geographical movement of voters and the regional realignment of the parties -- contribute to these maladies. Redistricting reform, therefore, is no panacea for making national politics more competitive and less polarized.

On the other hand, it is equally foolish to deny the reality that changing incentives and resources have combined to produce ever more egregious manifestations of self dealing in the redistricting process by parties and elected officials. The redistricting world of weak parties and decentralized politics described by Butler and Cain⁵² has been replaced by one with strong and aggressive national parties choreographing developments in the states. The self-regulating zero-sum game between partisan and incumbent-protection gerrymandering that limited the damage from self-interested behavior has become a largely positive-sum game. James Madison would be appalled to see how those in power are able to perpetuate their standing by manipulating the electoral rules of the game, and to see how openly and blatantly they engage in this conflict of interest.

As Donald Stokes has argued persuasively, there are methods of redistricting which lie somewhere between an entirely neutral, apolitical process, one “notably short on practical wisdom and the American practice of leaving the drawing of boundaries to

⁵¹ See, for example, a fascinating article demonstrating how a striking partisan divide has developed at the country level, which is not subject to the mapmaking manipulation of politicians. Bill Bishop, “The Schism in U.S. Politics Begins at Home,” *Austin American-Statesman*, 4 Apr. 2004.

⁵² Butler and Cain, *Congressional Redistricting*.

the ordinary political process, with results that are notably short on public interest.”⁵³

This paper has suggested some of the levers for change in the redistricting process – Congress, the courts, state legislatures, and the popular initiative – and alternative redistricting standards and processes that might encourage a constructive mix of practical wisdom and public interest.

⁵³ Stokes, “Is There a Better Way to Redistrict?” 345.