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## COMMENT

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# THE AFTERMATH OF *IN RE 2001 REDISTRICTING CASES*: THE NEED FOR A NEW CONSTITUTIONAL SCHEME FOR LEGISLATIVE REDISTRICTING IN ALASKA

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*In this Comment, the former executive director of the Alaska Redistricting Board argues that the proper forum for redistricting in Alaska is the state legislature, with procedural safeguards to ensure the minority party a voice. This Comment describes the history of redistricting and the process by which the 2000 districts were formulated. This Comment analyzes the process and critiques its shortfalls; it concludes that a change in redistricting policy is needed to avoid litigation and provide for more equitable redistricting to occur.*

### I. INTRODUCTION

Redistricting of the Alaska State Legislature after the 2000 census proceeded under the terms of a 1998 state constitutional

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amendment that placed full authority for the task in the hands of an independent, five-member public body—the Alaska Redistricting Board. A three-member majority of the Board adopted a redistricting plan prepared by a group closely associated with the Democratic Party. Litigation ensued. Though the Alaska Superior Court and the Alaska Supreme Court found several constitutional defects in the plan and remanded it to the Board for further work, neither court faulted the procedures by which the plan was adopted. On remand, the Board unanimously adopted a revision of the plan that was negotiated between a board member, plaintiffs in the suits, and key legislators. The courts found that this revision satisfied their objections to the first plan.

New legislative districts were in place for the 2002 elections, but from a public policy perspective, Alaska's experiment with an independent redistricting commission cannot be considered a success. The Alaska Redistricting Board perpetuates the objectionable feature of the system it replaced: redistricting by a single party. If one-party redistricting is to be avoided, another approach must be found. This Comment proposes that the task be returned to the legislature, the body commonly empowered in other states to redraw legislative district lines. However, if the objective is (as it should be) a bipartisan plan, both major parties must be assured a role. Bipartisan participation in the process can be achieved by requiring a supermajority vote to adopt a redistricting bill. To assure effective participation by the minority legislative faction, there must be a constitutional guarantee of equal access to staff and other resources necessary to prepare redistricting proposals. Finally, there must be a deadline for the legislature to pass a redistricting bill similar to the deadline that was imposed on the Board by the recent constitutional amendment.

## II. BACKGROUND

### A. The Problem of Partisan Gerrymanders

The call to abandon the 1998 constitutional amendment that created the Alaska Redistricting Board is premised on the notion that one political party should not have full authority for redistricting. A party that draws election district boundaries does so with the principal objective of enhancing its own electoral prospects. Manipulating election district boundaries for partisan advantage

has a name—gerrymandering—and it is a tradition in American politics.<sup>1</sup>

Partisan gerrymandering is tolerated by some who consider it an inevitable fact of political life,<sup>2</sup> a non-problem,<sup>3</sup> a non-serious problem,<sup>4</sup> or a problem that, however regrettable, is so complex there is no feasible way for judges to police it.<sup>5</sup> Toleration of partisan gerrymandering is unfortunate because gerrymandering is election fraud,<sup>6</sup> no less pernicious than stuffing the ballot box or intimi-

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1. BLACK'S LAW DICTIONARY 708 (8th ed. 2004) (defining gerrymandering as “[t]he practice of dividing a geographical area into electoral districts . . . to give one political party an unfair advantage by diluting the opposition’s voting strength”). The term “gerrymander” was coined in 1812 to describe a set of districts that resembled a salamander drawn by Massachusetts Governor Elbridge Gerry. *Id.* at 709. However, the practice goes further back into American political history, and there is ample literature on the subject. See, e.g., BACKSTROM ET AL., POLITICAL GERRYMANDERING AND THE COURTS (Bernard Grofman ed., 1990).

2. See, e.g., Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 4 (1985) (“[T]here are no coherent public interest criteria for legislative districting independent of substantive conceptions of the public interest, disputes about which constitute the very stuff of politics.”).

3. See, e.g., Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002) (arguing that state and federal elections are sufficiently competitive and that factors other than partisan redistricting account for problems perceived by those who seek reform of the redistricting process).

4. Michael A. Carvin & Louis K. Fisher, “A Legislative Task”: *Why Four Types of Districting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2 (2005) (arguing that gerrymandering causes little long-term political harm).

5. See Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and the Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1330 (1987) (“I do not wish to defend partisan gerrymandering. That practice, motivated as it is by narrow, self-interested ends, offends the ideal of public-regarding politics toward which our polity should strive. But the Constitution does not demand human, much less political, perfection; its tolerance for much that is repugnant to fastidious citizens is a price that we pay for a robust, relatively open-ended political life. Judicial regulation of partisan gerrymandering would be a cure worse than the disease . . .”).

6. Gerrymandering has been characterized as polite political fraud. See Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL’Y REV. 301, 309–13 (1991). It has also been asserted that an incumbent gerrymander “perverts the democratic system, undermines legitimacy and accountability, encourages voter apathy, and institutionalizes a racial bias.” Kristen Silverberg,

dating or bribing voters.<sup>7</sup> The gerrymandered district is designed to squander the votes of the opposition party by “packing” large majorities of opposition voters into a few districts or by “cracking” districts controlled by opposition voters into numerous districts that can be won by a small margin of voters of the dominant party.<sup>8</sup> The practice dilutes the votes of the disadvantaged party members, making it harder for that party to translate its voting strength into legislative seats.<sup>9</sup> A gerrymandered political system is unresponsive to changes in the will of the electorate.<sup>10</sup> Partisan gerrymandering, in short, is an affront to constitutional democracy.<sup>11</sup> It is hostile to the notion of “fair and effective representation for all

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Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913, 913 (1996). See also Brian O’Neill, Note, *The Case for Federal Anti-Gerrymandering Legislation*, 38 U. MICH. J.L. REFORM 683 (2005).

7. Gerrymanders designed to disadvantage racial minorities are acknowledged to be effective and constitutionally abhorrent. Partisan gerrymanders are equally so. The U.S. Supreme Court has acknowledged that partisan gerrymanders can be constitutionally offensive. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986). But the justices are hopelessly divided over what, if anything, they can or should do about it. See Michael Weaver, Note, *Uncertainty Maintained: The Split Decision over Partisan Gerrymanders in Vieth v. Jubelirer*, 36 LOY. U. CHI. L.J. 1273 (2005).

8. A gerrymandered district may also simply remove a legislator from his constituency or place two or more minority party incumbents in the same district (thus eliminating all but one) and open a new district to candidates lacking the advantages of incumbency. Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 552 (2004) (defining the technique of “shacking”).

9. There are several reasons why the percentage of seats obtained by a party in a legislative body is not equal to the percentage of total votes cast for that party, but the main reason is the U.S. system of single-member district, plurality elections. Because of this, deviation from strict proportional representation is not necessarily evidence of gerrymandering. The issue is the responsiveness of the electoral system to changes in voter preferences. Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 765 (2004); Richard G. Niemi, *The Swing Ratio as a Measure of Partisan Gerrymandering*, in *POLITICAL GERRYMANDERING AND THE COURTS* 171 (Bernard Grofman ed., 1990).

10. This is the crux of the gerrymander problem. See Cox, *supra* note 9, at 765.

11. “[I]t is a fundamental tenet of American democracy that a representative government be responsive to the changing will of the electorate. To create a districting plan which would be largely insensitive to electoral changes that may occur over the course of a decade, because a particular partisan imbalance is ‘locked in’ through the use of dispersal and concentration techniques of gerrymandering, violates this fundamental tenet.” Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 112 (1985).

citizens,”<sup>12</sup> and the public policy of the state of Alaska should seek to prevent it.

### B. Original Alaska Constitutional Provisions for Redistricting

The delegates drafting the new Alaska Constitution in Fairbanks during the winter of 1955–1956 almost certainly sought to prevent gerrymandering in Alaska.<sup>13</sup> They adopted a novel mechanism designed both to thwart partisan redistricting and to ensure timely redistricting—avoidance of the task was a major political problem of the day, as many legislatures around the country had a history of dilatory behavior perpetuating unequal legislative districts.<sup>14</sup> Possibly to counter the inclination of legislatures to procrastinate about redistricting, the delegates gave the governor responsibility for the task.<sup>15</sup> It seems likely that the delegates created

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12. *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) (“achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment”).

13. The term “reapportionment” is used interchangeably with the term “redistricting” in the Alaska Constitution. “Reapportionment” refers to the reallocation of seats to fixed districts, as for example the process by which Congress reallocates its 435 seats to each of the fifty states. “Redistricting” refers to the redrawing of election districts so that each district has an equal number of citizens. Thus, the states must redraw their internal congressional districts after a congressional reapportionment (Alaska does not because it has only one congressional seat), and they must periodically redraw state legislative districts to comply with state and federal law requiring numerical equality. At the time of Alaska’s constitutional convention, the process for state legislatures involved elements of both reapportionment and redistricting, but it was generally called reapportionment. Today there are few fixed legislative district boundaries in the United States, and the preferred term is redistricting.

14. A 1952 observer noted, “between 1940 and 1950 only 18 states bothered to reapportion. Ten did not reapportion between 1930 and 1940. Mississippi’s last reapportionment was made in 1890, Delaware’s in 1897, and in Illinois and Alabama the last was in 1901. Connecticut established its present apportionment for the lower chamber in 1818 and for the senate in 1903.” Lashley G. Harvey, *Reapportionments of State Legislatures—Legal Requirements*, 17 LAW & CONTEMP. PROBS. 364, 371–72 (1952). This was the backdrop to deliberations at the Alaska Constitutional Convention and to the landmark federal reapportionment rulings of the 1960s. The first court decision was *Baker v. Carr*, 369 U.S. 186 (1962), which established the justiciability of constitutional challenges to mis-apportioned districts. Another was *Reynolds v. Sims*, 377 U.S. 533 (1964), which required both houses of state bicameral legislatures to be apportioned exclusively on the basis of population.

15. ALASKA CONST. art. VI, § 3 (amended 1999).

a Redistricting Board<sup>16</sup> to advise the governor so as to counter the universal inclination of politicians to gerrymander. The Board was to prepare in public a plan for the governor, who could make changes to the plan only if he provided an explanation of why the changes were needed.<sup>17</sup> As a safeguard for the whole system, the delegates authorized citizens to compel the governor to correct any lapses in the procedure or “errors” in the redistricting plan.<sup>18</sup>

It is clear that the delegates intended the advisory board to be politically impartial and intended redistricting plans to be politically unbiased because of the limitations set on its composition. For instance, the governor appointed the five-person Board, but members had to come from around the state.<sup>19</sup> Members could not be public officials; moreover, they were to be appointed “without regard for political affiliation.”<sup>20</sup> Discussion on the floor of the convention about the reapportionment article was unambiguous in demonstrating the delegates’ intent to provide a politically neutral process. Delegate John Hellenthal, chairman of the Committee on Suffrage, Elections, and Apportionment, declared that “the whole purpose of this article is to de-emphasize politics.”<sup>21</sup> He explained that public officials were barred from serving on the Board because these people would be “too politically inclined” and “apt to live in too much of a political atmosphere.”<sup>22</sup> He characterized the advisory body as “this objective, studious board.”<sup>23</sup> Delegate Steve McCutcheon spoke against an amendment to allow public officials to serve on the Board, saying the Board “is only one small board that sits once every ten years and certainly we should be able to find five or six people out of the whole of Alaska that would qualify for this thing and who will be objective in their consideration.”<sup>24</sup>

The draft article used the term “nonpartisan” to describe the citizen advisory board, but it was subsequently dropped by the Committee on Style and Drafting in favor of the requirement that appointments be made “without regard to political affiliation.”<sup>25</sup> Members of the Apportionment Committee objected to the

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16. ALASKA CONST. art. VI, § 8 (amended 1999).

17. ALASKA CONST. art. VI, § 10 (amended 1999).

18. ALASKA CONST. art. VI, § 11 (amended 1999).

19. ALASKA CONST. art. VI, § 8(b) (amended 1999).

20. ALASKA CONST. art. VI, § 8(a) (amended 1999).

21. MINUTES OF THE DAILY PROCEEDINGS, ALASKA CONSTITUTIONAL CONVENTION 1958 (Alaska Legislative Council, 1965).

22. *Id.*, at 1955.

23. *Id.*

24. *Id.*

25. *Id.* at 3448.

change, complaining that the new language failed to express the full intent of “nonpartisan”; instead, they insisted on adding a new sentence: “Deliberations and decisions of the board shall be free from political considerations.”<sup>26</sup> The term “political” was later changed to “partisan,” but on reflection the delegates decided to strike the entire sentence from the final document on the grounds that such an admonition was unlikely to be effective.<sup>27</sup>

In an ebullient article describing the new constitution, Convention Chair and later-Governor William Egan wrote: “Members of the legislature will have nothing to do with reapportionment. Because of this provision so-called ‘gerrymandering’ will be impossible.”<sup>28</sup> Delegate Hellenthal also published an article about the new constitution.<sup>29</sup> Among several “modern and progressive” features dealing with the legislature, he included “[a]utomatic reapportionment every ten years by the governor acting on the advice of an independent board.”<sup>30</sup> Others were equally enthusiastic about the innovative redistricting provisions of Alaska’s new constitution. The National Municipal League adopted the scheme for the sixth edition of the *Model State Constitution*, expressing confidence that the advisory board and judicial review would restrain the governor from partisan gerrymandering.<sup>31</sup>

### C. History of Alaska Redistricting Prior to 2000

The original redistricting procedures of Article VI of the Alaska Constitution were used following the 1970, 1980, and 1990

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26. *Id.* Delegate Edward Davis explained to the convention that the committee on apportionment “intended that the board should actually in all respects act as a nonpolitical body, and accordingly asked us to add another sentence which would make it clear that the board was to act without regard to partisan politics.” *Id.*

27. *Id.* at 3479–80. Delegate McCutcheon sought to have the provision eliminated, arguing “it is difficult to police the mind, and, if the intention of politics enters into a person’s mind and they are so swayed, you certainly can’t rule it out with a simple sentence of this nature. I think it is a frivolous inclusion.” *Id.* at 3479.

28. William A. Egan, *The Constitution of the New State of Alaska*, 31 STATE GOVERNMENT 209, 212 (1958).

29. John S. Hellenthal, *Alaska’s Heralded Constitution: The Forty-Ninth State Sets an Example*, 44 A.B.A. J. 1147 (1958).

30. *Id.* at 1149.

31. See NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (6th ed. 1963); see also GORDON E. BAKER, STATE CONSTITUTIONS: REAPPORTIONMENT (1960).

decennial censuses.<sup>32</sup> Every redistricting plan initially adopted by the governor was taken to court, and the ensuing litigation was often contentious, lengthy, and partisan.

Following the 1970 census, Governor Egan, a Democrat, convened an advisory board and proclaimed a redistricting plan on December 30, 1971.<sup>33</sup> Jay Hammond, a Republican, and fourteen other legislators sued, culminating in a decision by the Alaska Supreme Court.<sup>34</sup> The court found the plan unconstitutional because of excessive variation in the population of the legislative districts and remanded the plan to the governor.<sup>35</sup> However, because the filing deadline for legislative seats was not far off, the court appointed two masters to draw up an interim plan for the 1972 elections.<sup>36</sup> The court considered and rejected objections to the interim plan on June 19, 1972, and ordered its adoption.<sup>37</sup> Governor Egan started again with a new advisory board and proclaimed a second plan on December 11, 1973.<sup>38</sup> Cliff Groh, a Republican state senator, headlined the suit. The superior court upheld the plan, but in *Groh v. Egan*,<sup>39</sup> the Alaska Supreme Court found impermissible population disparities in several districts and sent the plan back to the governor.<sup>40</sup> Egan submitted a revised plan, and the court approved it on June 14, 1974.<sup>41</sup>

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32. In 1964, Governor Egan initiated a redistricting of the Senate to bring Alaska into compliance with *Reynolds v. Sims* (as eight of the twenty Senate seats were apportioned on the basis of geography rather than population). He used the constitutional procedures for redistricting the House, as there were none for the State Senate. See *Wade v. Nolan*, 414 P.2d 689, 690–93 (Alaska 1966). The plan reallocated several seats from rural to urban areas, and it required all Senate seats to be filled at the upcoming primary and general elections, thus truncating terms of half of the incumbent Senators. Fifteen Senators, all Democrats, challenged the governor's power to redistrict the Senate in the absence of a constitutional amendment to Article VI. The superior court ruled for the plaintiffs. The state appealed, and the Alaska Supreme Court upheld the governor's action, pending an amendment that updated Article VI. See *id.* at 706.

33. See *Egan v. Hammond*, 502 P.2d 856, 859 (Alaska 1972) (citing Proclamation of Reapportionment and Redistricting, Dec. 30, 1971).

34. *Id.*

35. *Id.* at 864–65.

36. *Id.* at 859.

37. *Id.* at 874.

38. See *Groh v. Egan*, 526 P.2d 863, 865 (Alaska 1974).

39. 526 P.2d 863 (Alaska 1974).

40. *Id.* at 882. The court found inadequate justification for variations of certain House district populations from plus 10.9% (Bristol Bay) and plus 7.4% (Fairbanks) to minus 5.9%, 6.5%, and 8.6% in the Anchorage area. *Id.* at 878.

41. See *id.* at 888–89.

Jay Hammond succeeded William Egan as governor in 1974 and was reelected in 1978. It was Hammond's turn to proclaim a redistricting plan following the 1980 census, which he did on July 24, 1981.<sup>42</sup> Marilyn Carpenter, vice-chair of the Alaska Democratic Party, brought suit against the state. The superior court upheld the plan and she appealed. In *Carpenter v. Hammond*,<sup>43</sup> the supreme court held that inclusion of the City of Cordova in a district within southeast Alaska violated the state constitutional requirement that districts should contain (as nearly as practicable) a relatively integrated socioeconomic area; the supreme court remanded the matter to the superior court.<sup>44</sup>

The task of revising Hammond's plan fell to Governor William Sheffield, a Democrat, who succeeded Hammond in the general election of 1982. Sheffield issued an executive proclamation of redistricting on February 16, 1984.<sup>45</sup> The Kenai Peninsula Borough and seven residents of House District 7 filed suit over the bizarrely configured District 7 (the "doughnut district"). In *Kenai Peninsula Borough v. State*,<sup>46</sup> the Alaska Supreme Court agreed with the plaintiffs that the district was unconstitutional but found the flaw's effect to be de minimis and did not require the governor to reconfigure the district.<sup>47</sup> It may have been that the court recognized that it was now 1987 and there would be only one more general election before the next round of redistricting began.

After the 1990 census, the task of redistricting fell to the administration of Governor Walter Hickel. The governor proclaimed a redistricting plan on September 5, 1991.<sup>48</sup> The Southeast Conference (an alliance of municipalities in Alaska's southeast panhandle), several individuals, and the Democratic Party sued. The superior court found numerous constitutional problems with the plan, and the supreme court agreed with most of the lower court's assessment in deciding *Hickel v. Southeast Conference*.<sup>49</sup> That decision came on May 28, 1992, and as in the 1970s redistricting litigation, the deadline for filing for the next general election was at

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42. See *Carpenter v. Hammond*, 667 P.2d 1204, 1206 (Alaska 1983) (citing Proclamation of Reapportionment and Redistricting, July 24, 1981).

43. 667 P.2d 1204 (Alaska 1983).

44. *Id.* at 1215.

45. See *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1355 (Alaska 1987) (citing Proclamation of Reapportionment and Redistricting, Feb. 16, 1984).

46. 743 P.2d 1352 (Alaska 1987).

47. *Id.* at 1373.

48. See *Hickel v. Southeast Conference*, 846 P.2d 38, 66 (Alaska 1992) (citing Proclamation of Reapportionment and Redistricting, Sept. 5, 1991).

49. 846 P.2d 38, 56–57 (Alaska 1992).

hand. Thus, the court directed the governor to revise the plan, but for the 1992 elections the court ordered an interim plan prepared by court-appointed masters.<sup>50</sup>

Governor Hickel's Reapportionment Board reconvened in November 1992 and delivered a new plan to the governor, who formally adopted it on May 27, 1993.<sup>51</sup> An alleged violation of the Federal Voting Rights Act required yet another revision to the plan,<sup>52</sup> which was proclaimed on March 25, 1994.<sup>53</sup> There were no further court challenges at this time, most likely because there was little to be gained by another round of litigation, and everyone was exhausted.

Following the legal battles after the 1990 redistricting cycle, many Alaskans were convinced that the original constitutional scheme was not working. Safeguards against biased redistricting appeared to be ineffective, and the drawing of election districts after each federal census was the sole prerogative of the governor's party.

#### D. 1998 Constitutional Amendment

During the decade of the 1990s, Alaska's legislators considered multiple proposals to amend the redistricting procedures of Article VI of the state constitution.<sup>54</sup> These efforts were not surprising in view of the widespread disillusionment with the existing procedures. The amendment, eventually adopted in 1998, created an independent board with two members appointed by the governor, one by the President of the Senate, one by the Speaker of the House, and one (the fifth member) by the Chief Justice of the Alaska Supreme Court.<sup>55</sup> Republicans had substantial majorities in

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50. See App. C, *Alaska Supreme Ct. Corrected Order of Remand*, June 8, 1992; App. F, *Mem. and Order of the Superior Ct.*, June 19, 1992.

51. Proclamation of Permanent Reapportionment and Redistricting, May 27, 1993.

52. Alaska is covered by Section 5 of the Federal Voting Rights Act, 42 U.S.C. § 1973(c) (2000), which requires all political jurisdictions in the state to seek prior approval from the Department of Justice ("DOJ") for any change in electoral laws and procedures. The DOJ objected to the reduction of the Native voting age population from 55.5% to 50.6% in House District 36.

53. Proclamation of Reapportionment and Redistricting, March 25, 1994.

54. H. Con. Res. 35, 20th Leg., 2nd Sess. (Alaska 1998); H.J. Res. 44, 20th Leg., 2nd Sess. (Alaska 1998); S.J. Res. 36, 20th Leg., 2nd Sess. (Alaska 1998); H.J. Res. 36, 20th Leg., 1st Sess. (Alaska 1997); H.J. Res. 16, 18th Leg., 1st Sess. (Alaska 1993); S.J. Res. 10, 18th Leg., 1st Sess. (Alaska 1993); S.J. Res. 47, 17th Leg., 2nd Sess. (Alaska 1992); H.J. Res. 45, 17th Leg., 1st Sess. (Alaska 1991).

55. ALASKA CONST. art. VI, § 8.

both houses of the legislature,<sup>56</sup> and 1998 was a gubernatorial election year. If a Republican was elected governor, the party would control the redistricting process under either the existing procedures or the proposed amendment. But if the incumbent Democratic Governor, Tony Knowles, was reelected, the Democrats would control redistricting after the 2000 federal census under the existing procedures. However, under the proposed amendment, depending upon the loyalties of the Board's fifth member, the Democrats might not control redistricting. Thus, a consideration of the Republican legislative majority may have been that they would still be able to control redistricting under the proposed amendment if the fifth member were sympathetic to their interests, even if their party lost the governor's race.

The legislature adopted Legislative Resolve 74 on May 12, 1998.<sup>57</sup> The Democratic Party campaigned against the measure,<sup>58</sup> but it was ratified by voters at the general election of November 3, 1998, by a margin of 110,768 votes to 101,686.<sup>59</sup>

As amended, Article VI, Section 3 of the Alaska Constitution directs the Alaska Redistricting Board to reapportion the State House of Representatives and Senate.<sup>60</sup> The Board has five members.<sup>61</sup> The members must have been residents of the state for at least one year, may not be public officials, and may not run for legislative office in the election following their service on the Board.<sup>62</sup>

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56. Republicans outnumbered Democrats twenty-five to fifteen in the House and fourteen to seven in the Senate. Alaska Legislature, Committee/Member Information on the 20th Legislature, [http://www.legis.state.ak.us/basis/commbr\\_info.asp?session=20](http://www.legis.state.ak.us/basis/commbr_info.asp?session=20) (last visited Feb. 24, 2006).

57. H.J. Res. 44, 20th Leg., 2nd Sess. (Alaska 1998).

58. For instance, the chair of the Alaska Democratic Party, Deborah Bonito, wrote the statement in opposition to the measure that was published in the official state election pamphlet distributed prior to the election. See STATE OF ALASKA, DIV. OF ELECTIONS, 1998 OFFICIAL ELECTION PAMPHLET, STATEMENT IN OPPOSITION TO CONSTITUTIONAL AMENDMENT TO REORGANIZE REAPPORTIONMENT BOARD (1998), available at <http://www.ltgov.state.ak.us/elections/1998oep/98ba3.htm>.

59. STATE OF ALASKA, DIV. OF ELECTIONS, ELECTION SUMMARY REPORT 6 (1998), available at <http://www.ltgov.state.ak.us/elections/elect98/general/results.pdf>. Article XIII, Section 1 of the Alaska Constitution allows the legislature to propose constitutional amendments by a two-thirds majority vote of each house. Proposals are to be put on the ballot at the next general election, where they must garner a majority of the votes cast in order to be adopted. ALASKA CONST. art. XIII, § 1.

60. ALASKA CONST. art. VI, § 3.

61. ALASKA CONST. art. VI, § 8(a).

62. *Id.*

The governor appoints two members, the presiding officers of the Alaska Senate and House each appoint one member, and the Chief Justice of the Alaska Supreme Court appoints the final member, in that order.<sup>63</sup> Each of the four judicial districts of the state must be represented by at least one member.<sup>64</sup>

Section 10 sets an ambitious timetable for the Board to do its work: thirty days after the Board receives the block-level census data from the U.S. Census Bureau, it must adopt a proposed redistricting plan or plans.<sup>65</sup> Ninety days after receipt of the data, the Board must adopt a final plan.<sup>66</sup> There must be three affirmative votes to adopt a plan.<sup>67</sup> This accelerated schedule, together with the provisions for dealing with litigation in Section 11 (discussed *infra*), is designed to get an approved redistricting plan in place before the filing deadline for the first legislative elections following the decennial census, and thus avoid the necessity of a court-ordered interim plan.

Section 11 permits any “qualified voter” to sue the Board in superior court to compel it to act or to “correct any error in redistricting,” but such a suit must be brought within thirty days of the adoption of a final plan by the Board.<sup>68</sup> On appeal, the case shall be reviewed by the Alaska Supreme Court on the law and the facts.<sup>69</sup> At both levels, the courts must hear the matter on an expedited basis.

If the supreme court finds the plan “invalid,” it must return the plan to the Board for corrective action.<sup>70</sup> If it finds fault with a second plan, “the matter may be referred again to the board.”<sup>71</sup>

Section 4 specifies that there must be forty House districts and twenty Senate districts, the latter each composed of two House districts.<sup>72</sup> As there are forty representatives and twenty senators in

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63. ALASKA CONST. art. VI, § 8(b).

64. *Id.* Four judicial districts existed on Jan. 1, 1999.

65. ALASKA CONST. art. VI, § 10(a).

66. *Id.*

67. ALASKA CONST. art. VI, § 10(b).

68. ALASKA CONST. art. VI, § 11. In litigation over the Board’s plan in 2001 the courts granted municipal governments standing to sue under this clause. *See* Memorandum and Order at 22, *In re* 2001 Redistricting Cases v. Redistricting Bd., No. 3AN-01-8914 CI (Alaska Super. Ct. Feb. 1, 2002), *available at* [http://www.state.ak.us/redistricting/litigation/Memorandum\\_and\\_Opinion.pdf](http://www.state.ak.us/redistricting/litigation/Memorandum_and_Opinion.pdf).

69. ALASKA CONST. art VI, § 11.

70. *Id.*

71. *Id.* Alternatives to another remand are not specified. *See id.*

72. ALASKA CONST. art. VI, § 4.

the Alaska Legislature,<sup>73</sup> the amendment requires the use of single-member districts (as opposed to multi-member districts used elsewhere).<sup>74</sup>

Section 6 specifies that all districts shall, as nearly as practicable, contain equal population numbers, be composed of contiguous and compact territory, and contain a relatively integrated socioeconomic area.<sup>75</sup> The Board is directed to give consideration to local government boundaries, and “drainage and other geographic features” must be used in “describing boundaries whenever possible.”<sup>76</sup> These guidelines are not new—the old Section 6 required the governor to follow them as well.<sup>77</sup>

In 1999, the legislature passed Senate Bill 99, which set in motion certain preparations for the impending redistricting prior to the appointment of the Board.<sup>78</sup> This measure also defined the phrase “decennial census of the United States” used in Article VI to mean enumeration figures unadjusted by either the federal Census Bureau or the Alaska Redistricting Board.<sup>79</sup> The Census Bureau was contemplating use of sampling data and statistical techniques to adjust enumeration results for over-count and under-count of certain segments of the population, and previous Redistricting Boards in Alaska had used surveys to eliminate non-resident military personnel from the state’s population base.<sup>80</sup> Both sets of adjustments were commonly thought to benefit Democrats.<sup>81</sup>

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73. ALASKA CONST. art. II, § 1.

74. ALASKA CONST. art. VI, § 4.

75. ALASKA CONST. art. VI, § 6.

76. *Id.*

77. *Id.*

78. Act of Apr. 23, 1999, S.B. 99, 21st Leg., 1st Sess. (Alaska 1999).

79. *Id.* at § 3 (codified at ALASKA STAT. § 15.10.200 (2004)).

80. The elimination of non-resident military personnel from the population base in previous redistricting is discussed at length in *Carpenter v. Hammond*, 667 P.2d 1204, 1210–13 (Alaska 1983), and *Groh v. Egan*, 526 P.2d 863, 869–74 (Alaska 1974).

81. Observation of the author. The U.S. Bureau of the Census decided not to adjust the enumeration figures. *U.S. Will Not Adjust 2000 Census Figures*, N.Y. TIMES, Mar. 7, 2001, at A16. Likewise, the Alaska Redistricting Board decided not to adjust Alaska population figures by eliminating non-resident military personnel. See ALASKA REDISTRICTING BD., REP. TO ACCOMPANY REDISTRICTING PROCLAMATION OF JUNE 18, 2001 at 3, available at <http://www.state.ak.us/redistricting/proclamation/report.pdf> [hereinafter 2001 REPORT].

E. Redistricting After the 2000 Census by the Alaska Redistricting Board

1. *Appointment of the Board.* Members of the Alaska Redistricting Board were appointed in August 2000. Governor Tony Knowles named Vicki Otte and Julian Mason, both of Anchorage. The Speaker of the House, Brian Porter, appointed Michael Lessmeier of Juneau. Senate President Drue Pearce appointed Bert Sharp of Fairbanks. Alaska Supreme Court Chief Justice Dana Fabe appointed Leona Okakok of Barrow.<sup>82</sup> On many measures before the Board, and on the critical division over adoption of a final plan, Board members Lessmeier and Sharp, the appointees of the Republican legislative leadership, formed a voting coalition. Members Mason and Otte, appointed by the Democratic governor, were joined by member Okakok to form a voting coalition that comprised a majority of the Board.

In October 2000, the Board hired an executive director,<sup>83</sup> who hired four other permanent employees and opened an office in Juneau.<sup>84</sup> The U.S. Bureau of the Census delivered block-level population data to the Board's office on March 19, 2001.<sup>85</sup> Accordingly, the constitutional amendment required the Board to adopt a draft plan by April 18, 2001, and a final plan by June 18, 2001.<sup>86</sup>

2. *Adoption of Draft Plans.* Between March 30 and April 6, 2000, the Board held hearings in the cities of Anchorage, Palmer, Fairbanks, Juneau (teleconferenced statewide), Ketchikan, and Bethel to take public testimony on existing election district boundaries and to receive general advice, ideas, and comments from the public about redistricting, before the Board began to develop draft plans.<sup>87</sup> At these hearings the Board invited submission of proposed plans by interested groups and individuals.<sup>88</sup>

The Board began deliberating draft plans on April 10, 2001. Board members worked in pairs with each other and with staff. The product of the work sessions was reported and discussed at periodic public meetings. This pattern continued until approximately noon on April 18.<sup>89</sup> By then, the Board had received proposed re-

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82. 2001 REPORT, *supra* note 81, at 1.

83. The author was the executive director of the Alaska Redistricting Board.

84. 2001 REPORT, *supra* note 81, at 1-2.

85. *Id.* at 2.

86. *Id.*

87. *Id.* at 3.

88. *Id.*

89. *Id.* at 4.

districting plans from several groups, and it had provided an opportunity for a proponent of each plan to describe and discuss it with the Board.<sup>90</sup> During the meeting of April 18, 2001, the Board adopted four plans and an alternative for Anchorage as draft plans, in compliance with its constitutional obligations.<sup>91</sup>

The Board and its staff prepared two of the draft plans. These were designated Plan 1 and Plan 2. They included an alternative regional plan for Anchorage that could be used with either alternative.<sup>92</sup> Plan 1 remained essentially unchanged from the draft prepared by staff, but Plan 2 incorporated numerous changes made by the Board as a result of the work sessions and public meetings between April 10 and April 18.<sup>93</sup>

The third plan was prepared by a citizens' group, Alaskans for Fair Redistricting ("AFFR").<sup>94</sup> This was a statewide coalition of Native corporations, individuals, labor unions, and environmental organizations.<sup>95</sup> Juneau attorney Myra Munson, who spearheaded the litigation against Governor Hickel's redistricting plan in 1991,<sup>96</sup> served as AFFR's legal counsel.<sup>97</sup> The Democratic Party was not formally affiliated with the group, but the party's chair was instrumental in its formation.<sup>98</sup> Personal staff of Democratic Governor Tony Knowles was deeply and openly involved in AFFR's work, and the Department of Law provided support.<sup>99</sup>

The fourth potential plan was a regional plan for southwest Alaska that was prepared by Calista Corporation, a regional Native corporation with headquarters in Bethel. This plan sought to create two rural districts of predominantly Native communities.<sup>100</sup>

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90. *Id.*

91. *Id.*

92. *Id.*

93. Observation of the author.

94. 2001 REPORT, *supra* note 81, at 4.

95. Sheila Toomey, *Opponents of Redistricting Plan Charge Improper Influence*, ANCHORAGE DAILY NEWS, Jan. 16, 2002, at B1. AFFR described itself as "a broad coalition of progressive Alaskans working for an equitable redistricting plan that will serve to provide the best representation to Alaskan voters." ALASKANS FOR FAIR REDISTRICTING, REP. TO THE ALASKA REDISTRICTING BD. AND PROPOSED PLAN 1 (Apr. 3, 2001), [http://www.state.ak.us/redistricting/maps/affr/affr\\_report.pdf](http://www.state.ak.us/redistricting/maps/affr/affr_report.pdf).

96. Ms. Munson represented the Southeast Conference and Mut-Su Borough. *See Hickel v. Southeast Conference*, 846 P.2d 38, 41 (Alaska 1992).

97. Toomey, *supra* note 95, at B1.

98. Observation of the author.

99. Observation of the author.

100. The plan linked the Inupiat communities of Seward Peninsula with the upriver Yukon Athabaskan communities to form one district and linked the Yupik

3. *Proclamation of a Final Plan.*<sup>101</sup> Between May 4 and May 19, public hearings were held in Anchorage (on two days), Fairbanks, Healy, Dillingham, Delta Junction, Glennallen, Valdez, Cordova, Wasilla, Kenai, Homer, Galena, Bethel, Juneau, Sitka, Wrangell, Petersburg, Ketchikan, Angoon, and Hoonah. Also, the executive director addressed a meeting of the Southwest Alaska Municipal Conference in Unalaska on May 11. One of the two hearings in Anchorage and the hearing in Juneau were held on the legislature's teleconference system to give people an opportunity to testify from places not visited by the Board. The full Board attended the teleconferenced hearings, and there were at least two board members at all of the other hearings. The hearings were recorded with transcripts posted on the Board's website. Audio tapes were made available for purchase.<sup>102</sup>

In addition to the public hearings, the Board received extensive written comment on proposed plans. Also, new and revised plans were submitted to the Board, including a revised plan from AFFR with modified districts for Anchorage and Fairbanks, two alternate plans for the Anchorage area submitted by the Mayor of Anchorage, and amendments to a plan previously submitted to the Board by the Matanuska-Susitna Borough Assembly.<sup>103</sup>

The Board convened in Juneau on May 21, 2001 to begin deliberations over a final plan. The meeting recessed from time to time so the staff could prepare material for the Board. The Board also recessed from Friday, May 25, until Wednesday, June 6. The meeting continued, with recesses from time to time, until approximately 5:40 on the evening of Saturday, June 9. During this time, the Board allowed proponents of the various plans to explain their proposals. Board member Julian Mason proposed additional revisions to the revised AFFR plan, which he now called the "full representation plan." The Board voted to modify two small blocks in the Juneau area and then adopted this as its "final" plan on June 9, by a vote of 3 to 2.<sup>104</sup> The Board directed the staff to make any

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communities on the lower Yukon River with Athabaskan communities on the Kuskokwim River to form another. ALASKA REDISTRICTING BD., SUMMARY OF DRAFT REDISTRICTING PLANS 2 (2001), available at [http://www.state.ak.us/redistricting/maps/draft\\_summary.pdf](http://www.state.ak.us/redistricting/maps/draft_summary.pdf).

101. The following account of the Board's adoption of a final plan is summarized from 2001 REPORT, *supra* note 81, at 4-5.

102. *Id.* at 4.

103. *Id.*

104. Taking a cursory look at the "full representation" plan on her computer shortly before it was adopted, a Board staff member focused on her own Juneau District and discovered two herniated appendages along an otherwise straight

necessary technical corrections to the district boundary descriptions, to produce a full set of maps, and to prepare written descriptions of the districts for a formal proclamation of the plan on June 18, 2001, in the Board's Juneau office.<sup>105</sup>

4. *Litigation.* Within the thirty-day limit,<sup>106</sup> nine lawsuits challenging the Board's final plan were filed in superior courts around the state; these complaints were consolidated in Anchorage before Judge Mark Rindner under the caption *In re 2001 Redistricting Cases v. Redistricting Board*.<sup>107</sup> The plaintiffs were municipalities (the Aleutians East Borough and the cities of Valdez, Craig, Cordova, and Delta Junction) and three individuals.<sup>108</sup> A three-week trial began on January 7, 2002 and concluded on January 25, 2002. Judge Rindner declared House Districts 12 and 16 in the final plan to be unconstitutional and dismissed all other claims.<sup>109</sup>

The Alaska Supreme Court entertained petitions for review of the superior court order. Parties to the litigation presented oral arguments in mid-March, and the court ruled on March 21, 2002.<sup>110</sup> The supreme court affirmed Judge Rindner's orders that were not inconsistent with its own decision and remanded the plan to the Board with rulings that went well beyond those of the superior court.<sup>111</sup> It affirmed the unconstitutionality of District 16 because it contained a bizarrely shaped appendage and was insufficiently compact.<sup>112</sup> It also declared District 5 to be non-compact, and ordered the Board to redraw it or to expressly find that the Voting Rights Act required such a configuration in the Board's plan.<sup>113</sup> The court ordered the Board to reconsider Districts 12 and 32, be-

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boundary that suggested they were intended to include a particular residence and exclude another from House District 4. These were called to the attention of board members and all agreed that they should be deleted. There was no time for the staff to examine any other district boundaries at this level of detail. Observation of the author.

105. 2001 REPORT, *supra* note 81, at 5.

106. See ALASKA CONST. art. VI, § 11.

107. Mem. and Order at 22 n.13, *In re 2001 Redistricting Cases v. Redistricting Bd.*, No. 3AN-01-8914 CI (Alaska Super. Ct. Feb. 1, 2002), available at [http://www.state.ak.us/redistricting/litigation/Memorandum\\_and\\_Opinion.pdf](http://www.state.ak.us/redistricting/litigation/Memorandum_and_Opinion.pdf).

108. *Id.* Several of the suits also named board members and the executive director, but these named defendants were subsequently dropped.

109. *Id.* at 121.

110. *In re 2001 Redistricting Cases v. Redistricting Bd.*, 44 P.3d 141 (Alaska 2002).

111. *Id.* at 143–47.

112. *Id.* at 143.

113. *Id.*

cause the Board was mistaken in its interpretation of the court's doctrine of proportionality enunciated in a prior redistricting case and was therefore unduly constrained in its view of the permissible range of options for these areas.<sup>114</sup> The court directed the Board to take a "hard look" at alternatives for Delta Junction, with a view to preserving areas of socioeconomic integration.<sup>115</sup> It also ruled that the population deviations from the ideal House district size in the Anchorage area were unconstitutionally large, and directed the Board to redraw these districts making a good faith effort to reduce the population deviations.<sup>116</sup> Finally, the court ruled that the Board did not adequately justify the population deviation (of minus 6.9%) in rural District 40.<sup>117</sup> Following the supreme court's order, the superior court remanded the plan to the Board for corrective action.<sup>118</sup>

5. *Adoption of Amended Final Plan.*<sup>119</sup> On April 12, 2002 the Board met to begin work on an amended final plan.<sup>120</sup> It had previously announced that it would receive proposed plans, both statewide and regional, from outside groups, provided they were submitted by close-of-business on April 9.<sup>121</sup> In response, several groups and individuals submitted plans. The Matanuska-Susitna Borough Assembly submitted a plan for its borough.<sup>122</sup> The Calista Corporation and an individual (Randy Ruedrich, chair of the Alaska Republican Party) submitted statewide plans.<sup>123</sup> The Mayor of Anchorage submitted two alternative plans for the Anchorage

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114. *Id.* at 143–44.

115. *Id.* at 144–45.

116. *Id.* at 145–46.

117. *Id.* at 146.

118. *See* Mem. and Order Regarding Amended Final Redistricting Plan, *In re* 2001 Redistricting Cases v. Redistricting Bd., No. 3AN-01-8914 CI (Alaska Super. Ct. May 9, 2002), *reprinted in In re* 2001 Redistricting Cases, 47 P.3d 1089, app. at 1092–95 (Alaska 2002).

119. The following account of the work of the Board in adopting an amended final plan is summarized from ALASKA REDISTRICTING BD., REP. TO ACCOMPANY REDISTRICTING PROCLAMATION OF APR. 25, 2002 (2002) [hereinafter 2002 REPORT]. For clarity and precision, this summary reproduces the key aspects of the report as closely as possible. The term "amended final plan" was used by the Board with the aim of discouraging the claim that it was adopting a new final plan which would require a new round of public hearings. Observation of the author.

120. 2002 REPORT, *supra* note 119, at 2.

121. *Id.*

122. *Id.*

123. *Id.*

Bowl.<sup>124</sup> AFFR submitted three alternatives.<sup>125</sup> Board member Mason also prepared a proposal and submitted it to the Board by the April 9 deadline.<sup>126</sup> Mason developed this proposal in negotiations with representatives of several plaintiffs in the consolidated lawsuit against the Board, and with various legislators.<sup>127</sup> This plan revised the districts that the supreme court had directed the Board to change or reconsider and re-drew the Anchorage districts to reduce the maximum population deviation to 1.35 percent.<sup>128</sup> Board staff posted all these proposals on the Board's website on April 10.<sup>129</sup>

At the meeting of April 12, the Board considered a total of nineteen redistricting scenarios, ten of which were prepared by the Board's staff.<sup>130</sup> The staff scenarios were both statewide and regional, and the scenarios included various revisions of draft Plans 1 and 2, as well as new conceptual redistricting solutions in compliance with the court orders.<sup>131</sup> Deliberations came to focus on Mason's draft plan.<sup>132</sup> Attorneys for a number of plaintiffs and interveners in the redistricting litigation said either that the plan was satisfactory to their clients or that they would recommend that their clients accept it. The Board's attorney opined that the plan satisfied the orders of the supreme court.<sup>133</sup> On April 13, the Board unanimously adopted this plan, pending technical review by staff.<sup>134</sup> A formal proclamation was made to the general public on April 25, 2002.

On May 9, Superior Court Judge Rindner upheld the amended plan in its entirety, against objections from two of the original nine plaintiffs and from a few individuals new to the litigation who complained about their districts in north Anchorage.<sup>135</sup> The judge found that the Board had justified the non-compact shape of House District 5 on the grounds of necessity under the Voting

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124. *Id.*

125. *Id.*

126. *Id.*

127. Observation of the author.

128. Observation of the author.

129. 2002 REPORT, *supra* note 119, at 2.

130. *Id.*

131. *Id.*

132. *Id.*

133. Observation of the author.

134. 2002 REPORT, *supra* note 119, at 2.

135. *In re* 2001 Redistricting Cases v. Alaska Redistricting Bd., No. 3AN-01-8914 CI, at 3, 12 (Alaska Super. Ct. May 9, 2002), <http://www.state.ak.us/redistricting/litigation/FinalJudgment050902.pdf>.

Rights Act.<sup>136</sup> The judge further found that no evidentiary hearing was necessary to resolve any of the objections to the plan, holding that it fully complied with the order of the supreme court and was constitutional in all respects.<sup>137</sup> The Alaska Supreme Court heard oral argument on May 24, 2002, and issued an order the same day affirming the superior court ruling.<sup>138</sup>

The United States Department of Justice granted pre-clearance to the amended final plan on June 10, 2002.<sup>139</sup> The Alaska Redistricting Board held its last meeting and officially disbanded on December 13, 2002.<sup>140</sup>

### III. A NEW APPROACH TO LEGISLATIVE REDISTRICTING

#### A. The 1998 Amendment Facilitates Partisan Redistricting

The courts' acceptance of the Alaska Redistricting Board's procedures, together with the method specified in Section 8 for appointing members to the Board, all but guarantee that future redistricting maps will be drawn by one party behind closed doors.

The nine plaintiffs who sued over the final plan complained to the courts about the procedures used by the Board to adopt the plan, alleging a denial of due process.<sup>141</sup> The judges rejected these claims.<sup>142</sup> The Board went through a public process: it held numerous public hearings; it invited the submission of plans; it viewed the plans and heard presentations from every individual and group that asked to make one; and it conducted all of its business in public.<sup>143</sup> At the end of the ninety-day deadline, it adopted without signifi-

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136. *Id.* at 9.

137. *Id.* at 2.

138. *See In re* 2001 Redistricting Cases, 47 P.3d 1089, 1090 (Alaska 2002).

139. Joseph D. Rich, Acting Chief, Voting Section, U.S. Dep't of Justice, Notice of Preclearance Activity under the Voting Rights Act of 1965 (June 14, 2002), <http://www.usdoj.gov/crt/voting/notices/vnote061402.html>.

140. Transcript of Final Meeting, Alaska Redistricting Bd. (Dec. 13, 2002), [http://www.state.ak.us/redistricting/minutes/m\\_12\\_13\\_02\\_finalmeeting.htm](http://www.state.ak.us/redistricting/minutes/m_12_13_02_finalmeeting.htm).

141. Mem. and Order at 41–51, *In re* 2001 Redistricting Cases v. Redistricting Bd., No. 3AN-01-8914 CI (Alaska Super. Ct. Feb. 1, 2002), available at [http://www.state.ak.us/redistricting/litigation/Memorandum\\_and\\_Opinion.pdf](http://www.state.ak.us/redistricting/litigation/Memorandum_and_Opinion.pdf).

142. *Id.* at 49–64. There was one exception: Judge Rindner ruled that the Board violated the state's Open Meetings Act by arranging the dates and locations of its public hearings by email among board members and staff, rather than in a public meeting. But because the subject matter was procedural and not substantive, he found the transgression insufficiently serious to void the work of the Board. *Id.* at 47–48.

143. *Id.* at 49–56.

cant amendment a plan that was crafted by AFFR, a group with ties to the Democrats, but everyone had had a chance to speak.<sup>144</sup>

Nonetheless, that one party will have at least a three-member majority on the Board to give the nod to its side's proposal is virtually assured by the method of appointing Board members. As previously described, this method has the Speaker of the House and the President of the Senate each appointing a member, and the governor appointing two.<sup>145</sup> The Chief Justice of the Alaska Supreme Court appoints the fifth.<sup>146</sup> If at the time of appointment the leader of one chamber is of the same party as the governor, that party would have a three-member majority regardless of the party allegiance of the supreme court's appointee. If, at the time appointments are made, both legislative leaders are of the same party as the governor (as they are at the time of this writing), that party would have a four-member majority without the judicial appointee. Given Alaska's past political landscape, both Republicans and Democrats have had the opportunity to appoint two members of the first Alaska Redistricting Board; however, there is no assurance in the future that these appointments will continue to be politically balanced. Furthermore, the fifth member is not selected by the others, but is appointed by the Chief Justice, and is under no legal or moral obligation to function as a neutral referee on the Board. The fifth member may align himself or herself with any of the other appointees. Thus, the appointment rules are not designed to produce a bipartisan Redistricting Board with a tie-breaking fifth member, which is the preferred arrangement for redistricting commissions.<sup>147</sup> Rather, members are named by elected officials who have a vital interest in the outcome of the panel's work, and they should not be expected to be impartial. Indeed, it is likely im-

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144. *Id.* at 57–58.

145. ALASKA CONST. art. VI, § 8.

146. *Id.*

147. See Jeffrey C. Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 839–40 (1997); Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND DISTRICTING ISSUES 7, 10–11 (Bernard Grofman et al. eds., 1982). There is a common misunderstanding that bipartisan commissions with a tie-breaking fifth member are removed from the political fray and act in an independent and politically disinterested manner. See generally, Bruce Adams, *A Model State Reapportionment Process: The Continuing Quest for 'Fair and Effective Representation'*, 14 HARV. J. ON LEGIS. 825 (1977).

possible to create a genuinely and reliably neutral commission to deal with redistricting issues.<sup>148</sup>

Presumably the Alaska electorate ratified Ballot Measure 3 in 1998 with the expectation of getting a redistricting mechanism less susceptible to partisan manipulation than the one it was replacing. The statement in favor of the proposed amendment published in the state's election pamphlet declared that the new Board was "intended to produce balanced, professionally-drawn redistricting plans," and would replace a procedure that "has produced redistricting plans which have been subject to criticism of being partisan and gerrymandered rather than creating redistricting plans based on bipartisan fairness and objectivity."<sup>149</sup> It is in the general public's interest to avoid having redistricting maps that were drawn by only one party.

#### B. Redistricting Should be a Legislative Responsibility, with a Requirement for Supermajority Vote

Consequently, a new approach must be found to the decennial task of legislative redistricting in Alaska. Redistricting by the governor and redistricting by an appointed Board have both resulted in one-party plans and prolonged litigation. It is time to think the unthinkable: return redistricting to the legislature itself.

This proposal runs counter to the advice of many redistricting reformers who favor the use of an independent commission.<sup>150</sup> However, legislatures are the usual and traditional forum for redistricting.

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148. "There is a sort of vague impression in many quarters . . . that something called nonpartisanship can be built into the districting process. My own experience tells me that although I may find nonpartisanship in heaven, in the real world . . . there are no nonpartisans, although there may be noncombatants." Dixon, *supra* note 147, at 8.

149. Alaska 1998 Official Election Pamphlet—Ballot Measure 3, <http://www.gov.state.ak.us/lsgov/elections/1998oep/98bal3.htm> (last visited Mar. 27, 2006). The statement was signed by Republicans Eldon Mulder, a Representative, and Brian Porter, Speaker of the House; both were co-sponsors of the measure.

150. See generally Adams, *supra* note 147 (recommending an independent commission with judicial review); Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115 (2004) (arguing for the adoption of such an independent bipartisan commission in Kansas); Kubin, *supra* note 147 (arguing for a bipartisan commission with a tie-breaking chairman); O'Neill, *supra* note 6, at 683–85 (recommending that Congress require all states to use redistricting commissions).

tricting.<sup>151</sup> State legislatures have the ultimate authority for both congressional and legislative redistricting in all but twelve states.<sup>152</sup>

Delegates to Alaska's Constitutional Convention vested redistricting authority in the office of the governor because legislatures were notorious for evading the responsibility. But that was then, before *Baker v. Carr* and its progeny. Now the state constitution and federal law require reapportionment every ten years, and courts are willing to hear complaints about tardiness in the matter.

Redistricting plans emanating from legislatures have at times been famously and bitterly contentious,<sup>153</sup> but this conflict most often occurs when one of the major parties has exclusive control over the process. When both parties play a role, they are forced to negotiate and compromise in order to pass a reapportionment bill.<sup>154</sup> Thus, for the Alaska legislature to assume the authority for its own redistricting, both major parties must be assured of participating in the drafting and passage of a plan. This can be accomplished by requiring a three-fourths supermajority vote in each chamber to pass a redistricting bill.<sup>155</sup>

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151. The U.S. Supreme Court has said that reapportionment planning is a legislative task. *Wise v. Lipscomb*, 437 U.S. 535, 539–40 (1978). “We have repeatedly emphasized that ‘legislative reapportionment is primarily a matter for legislative consideration and determination,’ for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.” *Connor v. Finch*, 431 U.S. 407, 414–15 (1977) (citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)).

152. Redistricting Comm'ns, Nat'l Conf. of State Leg., <http://www.ncsl.org/programs/legman/redistrict/com&alter.htm> (last visited Mar. 27, 2006). This overview of the subject says the record of redistricting commissions is “inconsistent.” *Id.*

153. The most recent partisan gerrymandering to reach national attention occurred in 2003 when the Texas legislature redrew state congressional districts. The governor and the majority of both houses of the legislature were Republican. See Vasan Kesavan and Michael Stokes Paulsen, *Let's Mess with Texas*, 82 TEX. L. REV. 1587, 1587–88 (2004).

154. Political scientists David Butler and Bruce Cain say that bipartisan consensus is more common than partisan gerrymandering in the United States because typically neither party has complete control of the redistricting process in the legislature. “If at least one of the state legislative houses or the governorship is in different hands, the effect will be similar to a two-thirds vote requirement or to an evenly balanced commission.” DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 152–53 (1992).

155. This supermajority vote would be comparable to the three-fourths supermajority vote required by Section 17(c) of Article IX to exceed the restrictions on

Furthermore, if the parties are going to negotiate a redistricting plan, the negotiations must be fair. The minority party must have the resources necessary to design redistricting proposals and analyze those of the opposition. This means adequate staff, modern computers and software, and access to data. A constitutional amendment to vest authority for redistricting in the legislature should require passage of the bill by a supermajority vote in each chamber, and it should specify equality of resources for preparing redistricting plans.<sup>156</sup>

Finally, the constitutional amendment must specify a deadline for the legislature to act. The current ninety-day deadline for adoption of a final plan after the U.S. Bureau of the Census delivers redistricting data to the state might well be extended another thirty days. However, the timeline must be condensed enough to allow judicial challenges to the plan to be resolved before the filing deadline for legislative seats on June 1 of the following year.

This approach to redistricting recognizes the process for what it is: a bruising bout of bare-knuckle politics in which the players fight for their political survival and for control of the legislative machinery. Removing responsibility for redistricting from the legislature does not remove legislative politics from the process.<sup>157</sup> Assigning the task to a commission does not mute the clash of partisan interests; it merely shifts the locus of battle. The best place for a legislative fight is in the legislature, and legislators are the best fighters because they know best their own personal and partisan interests.<sup>158</sup>

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appropriating from the Budget Reserve Fund. See ALASKA CONST. art. IX, § 17. The supermajority vote requirement in Article IX has made the budgeting process in recent years far more bipartisan than it would otherwise have been.

156. Because a bill requires the governor's signature, the governor would be involved in the process. However, the governor would not be a major player because the legislature could easily override a veto of a redistricting bill it had just passed with a three-fourths majority in each house.

157. "The view held by Common Cause and other civic groups that politics can be taken out of districting by shifting districting responsibility to nonpartisan or bipartisan commissions is, in my view, misguided. First, it cannot be done; second, even if it could be done, it should not be done." Grofman, *supra* note 11, at 124.

158. Nathaniel Persily argues that the legislature is preferable to a commission for redistricting for a number of reasons. Among them, "redistricting can be a part of substantive policymaking and administration. Legislative bargains in the redistricting process are not completely detached from others that occur throughout a legislative session. Through redistricting, legislatures not only make the tough value-laden decisions as to how communities should be represented, but they create service relationships between representatives and constituents that fit

In other words, the legislature is superior to a commission for thrashing out a redistricting plan because it is structured to handle political conflict. Its rules do not constrain it to operate in public. Alaska's Open Meetings Act prohibits the members of a public board from discussing the substantive business of the board privately.<sup>159</sup> The politics that drive the design of a redistricting plan are not a subject for public discussion, and therefore a commission must allow others, including its own staff or outside groups, to do the real work of redistricting. Thus, it is not surprising that the Alaska Redistricting Board adopted a final plan ready-made by AFFR, and later an amended final plan that was negotiated privately by one board member and key stakeholders.

Unfortunately, the public is confused about the commission's work. The popular impression is that a commission is insulated from politics and its members strive in good faith to write their own plan that is free of partisan bias. Few Alaskans today realize that the members of the Alaska Redistricting Board and its staff did not participate in drafting the plans the Board adopted. A redistricting plan from the legislature would not be shielded by an aura of impartiality; it would be looked at squarely by the public as the product of the legislative process, like any other legislative act.

### C. Rebuttal of Objections to Legislative Districting

A criticism of allowing legislators to create bipartisan redistricting plans is that they collude to perpetuate the political status quo by creating safe seats for both parties and individual incumbents. These collusive agreements, or bipartisan gerrymanders, have been described as analogous to market-sharing agreements among corporate cartels that stifle competition, and they are the subject of much academic hand-wringing.<sup>160</sup>

However, any bipartisan plan will be a collusive agreement to protect the status quo—even those produced by a bipartisan commission that operates as designed to operate (that is, with a neutral, tie-breaking member who effectively forces the partisan members to compromise and cooperate in designing a plan).<sup>161</sup> The virtue of bipartisan plans, whether produced by a commission or the legisla-

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into larger public policy programs. The removal of politics from redistricting seeks to break these relationships." Persily, *supra* note 3, at 679.

159. Open Meetings Act, ALASKA STAT. §§ 44.62.310–.312 (2004).

160. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

161. See Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547, 1574–76 (2005)(critiquing bipartisan commissions).

ture, is that they reflect the relative electoral strength of the two major parties.<sup>162</sup> The Supreme Court approved just such a plan, finding no fault with a bipartisan gerrymander that provided a rough approximation of the proportional representation of the two major parties in the halls of the legislature.<sup>163</sup> While they are not ideal, bipartisan redistricting plans are the best that can be hoped for in the real world. They are manifestly superior to gerrymanders by a single party that unduly distort the strength of the dominant party, making the electoral system even less responsive to the shifting preferences of voters.

The main risk of returning the task of redistricting to the legislature under a supermajority rule is the risk of deadlock. It could happen that the two major parties cannot come to terms on a plan by the constitutional deadline. In this case, any qualified voter could bring suit against the legislature under Section 11 to compel the body to perform its duties.<sup>164</sup> This sort of suit would inevitably occur, and the courts would be forced to impose an interim plan in the absence of redistricting legislation. This prospect is an unhappy one for the judiciary, which has no explicit constitutional authority for creating interim redistricting plans. However, twice the courts have imposed a set of interim election districts for Alaska (in 1972 and 1992).<sup>165</sup> The uncertainty associated with judicial preemption should provide sufficient incentive for the legislators to patch up their differences.<sup>166</sup>

Another risk of saddling the legislature with the task of redistricting is that it might totally preoccupy the body during its 120-day session, to the detriment of other legislative business. But there are steps the legislature could take to streamline its handling

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162. The legitimacy of the status quo is weakened to the extent it is based on a previous partisan gerrymander. However, bipartisan plans consistently result in higher fidelity to the ideal vote-seat relationship than do partisan plans. See Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 445 (1993) (proposing that judges evaluate claims of illegal partisan gerrymandering by comparing the differences between a likely bipartisan plan and the one being scrutinized).

163. See *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

164. Section 11, the enforcement provision of Article VI, would not be changed substantively by the constitutional amendment proposed here. The word "legislature" would be substituted for "Alaska Redistricting Board." See ALASKA CONST. art. VI, § 11.

165. See discussion *supra* Part II.C.

166. This Comment does not recommend a "back up" commission or set of designated officials to develop a redistricting plan if the legislature fails to act. The court-imposed interim plan would remain in effect until the legislature passed a redistricting bill.

of this complicated, time-consuming task. For example, the legislature could (and doubtless would) appoint a special joint committee that would initiate preparations for redistricting well ahead of the release of federal census data (e.g., purchasing computer systems and redistricting software, and/or contracting for studies necessary to show compliance with the Voting Rights Act). The legislature could hire a specialized staff to negotiate a draft plan.<sup>167</sup> In any case, the matter of redistricting is sufficiently complex and technical such that specialized structures and procedures would have to be devised to make it manageable by the legislature. As another means of avoiding preoccupation with redistricting, the legislature could choose to deal with the matter in a special session following the close of the regular session in early May.

An objection to another constitutional amendment to Article VI is that the current guidelines for drawing election districts—equal population, contiguity, compactness, respect for local government boundaries, and socio-economic integration—provide a sufficient barrier to partisan gerrymandering.<sup>168</sup> These guidelines impose important constraints on the drawing of election district boundaries. Their diligent enforcement by the Alaska Supreme Court in *In re 2001 Redistricting Cases* led the Alaska Redistricting Board to amend its final plan significantly enough to attract a unanimous vote for adoption. The substantive requirements of Section 6 would remain unchanged by the amendment being proposed here. To pass constitutional muster, the legislature's plan would have to respect these requirements. However, only a person who has never worked with modern redistricting computer programs would argue that the constitutional guidelines are a bulwark against gerrymandering.<sup>169</sup> There is ample opportunity for mischief

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167. The legislature should not create a public advisory board, because the board would be prohibited by the Open Meetings Act from engaging in the type of negotiation that is essential to preparing a viable bipartisan plan. Open Meetings Act, ALASKA STAT. §§ 44.62.310–312 (2004). Also, the legislature should not simply seek to amend the constitution to require legislative ratification by a supermajority vote of a plan adopted by the Alaska Redistricting Board. The only way a board plan would be readily ratified is if legislators were directly or indirectly involved in its preparation. It would be more efficient for the legislature to create a mechanism using legislative staff to prepare a draft plan.

168. See ALASKA CONST. art. VI, § 6.

169. “The commonly held view that reliance on formal criteria such as compactness or equal population can prevent gerrymandering is simply wrong.” Grofman, *supra* note 11, at 88.

within the bounds of these standards.<sup>170</sup> For example, in urban areas the requirement for compactness may coincide nicely with the less reputable aim of “packing” districts with voters of a particular stripe.<sup>171</sup> In modern rural Alaska, House districts necessarily encompass vast areas and the concepts of compactness and socio-economic integration are meaningless. It is not possible to draft a statewide redistricting plan for Alaska that comports with all of the constitutional guidelines of Section 6, but if it were, the plan could nonetheless be abusively biased.

#### IV. CONCLUSION

In the recent redistricting cycle in Alaska, the newly created Alaska Redistricting Board did not function as a bipartisan redistricting commission. There is no reason to expect it to do so in the future. Thus, the new Board is no improvement over the method of gubernatorial redistricting that it replaced. By both methods, one party may partition the state into election districts of its choice, constrained only by constitutional standards that are by no means a complete barrier to gerrymandering.

Partisan gerrymandering insults the democratic values of fair and equal representation for all citizens. Harm to the public interest from partisan gerrymanders can be avoided by giving both major parties a role in the redistricting process. Bipartisan participation can be accomplished by assigning the task to the legislature and requiring a supermajority vote to pass a redistricting bill. Public commissions such as the Alaska Redistricting Board are ill-suited to the rough-and-tumble politics of redistricting. Conflicts over redistricting are best resolved in the legislature.

A legislatively drawn redistricting plan will be self-serving, to be sure, but it should reasonably reflect the relative electoral strength of the two major parties. This outcome may not be an

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170. “With the recent advent of sophisticated computer redistricting software . . . it must be admitted that the gerrymanderer’s ability to craft a plan around any set of redistricting standards is virtually limitless.” Kubin, *supra* note 147, at 854.

171. All of the area encompassed by a municipal boundary is considered to be integrated from a social and economic point of view, so any compact district is legal if it meets the population criterion. The Alaska Supreme Court has stated: “Anchorage is by definition socio-economically integrated, and its population is sufficiently dense and evenly spread to allow multiple combinations of compact, contiguous districts with minimal population deviations.” *In re 2001 Redistricting Cases*, 44 P.3d 141, 146 (Alaska 2002). In fact, the population of Anchorage is not evenly spread, so the court’s emphasis on population equality elevated that standard above compactness.

ideal one, but it is an improvement over a redistricting plan that gives a disproportionately large electoral advantage to the major party. A bipartisan redistricting plan is the best that can be hoped for in the real political world.