

DON'T JUST MAKE REDISTRICTERS *MORE ACCOUNTABLE TO THE* PEOPLE, MAKE *THEM* THE PEOPLE

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I. INTRODUCTION

The title of this panel, “Is There a Way to Design an Apolitical Redistricting Process?,” invites a focus on the question of possibility. Of course, a threshold and related question is the desirability of having an apolitical redistricting process. Indeed, a rich and expanding literature exists about whether or not “independent” redistricting is desirable.¹ This essay, however, will offer some thoughts primarily about the practical possibility of designing an apolitical redistricting process, intertwined as that question may be with the question of its desirability.

At the outset it is important to define what “apolitical” redistricting means, because in common usage it can signify at least two quite different things in this context: (1) redistricting that is not allowed to intentionally promote the broader partisan political interests of those controlling the redistricting; or (2) redistricting done without any awareness of or concern for the partisan political balance of the electorate of the resulting districts.² The first meaning entails a

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1. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 600–01 (2002); JUSTIN LEVITT, BRENNAN CENTER FOR JUSTICE, A CITIZEN’S GUIDE TO REDISTRICTING 20–22 (2008) (July 1, 2008), http://www.brennancenter.org/content/resource/a_citizens_guide_to_redistricting/; Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002).

2. It also could take on a third, much broader meaning, describing a redistricting process that makes no substantive or policy choices at all. But this essay tracks a common and somewhat narrower parlance in which the term is used to connote independence from self-interested

sense of neutrality and partisan fairness, in which control over the redistricting process is not awarded as a political spoil to a dominant party. The second meaning in essence involves redistricting done blindly, indifferent to its impact on party strength.

Almost by definition, the second type of apolitical redistricting, done without awareness of partisan demographics, would seem to be a subset of the first type of apolitical redistricting, done not deliberately to favor partisan interests. But other variants of the first type of apolitical redistricting might well take into account in some fair way the partisan composition of the resulting districts. Given the tendency of Democratic voters to concentrate in urban areas,³ any politically “blind” redistricting process that draws districts using some traditional redistricting criteria such as compactness in fact may produce a set of district maps that is not politically “fair” (depending, of course, on what “fair” means).⁴

This essay explores possibilities for the first type of apolitical, or politically independent, redistricting. In doing so it will also note that the second type of apolitical, or politically blind, redistricting, though facially attractive to some reformers, is more likely to both generate opposition and prove ineffective. In focusing on the prospects for apolitical or independent redistricting, this essay addresses the substance (or the criteria) and the procedure (or the institution) of an apolitical redistricting system. It also addresses the primary implementation challenges associated with bringing to fruition hypothetical models for an independent redistricting system. This “here to there”⁵ discussion draws lessons from recent ballot measure reform efforts in both California and Ohio, now that prospects for a judicial approach to taking self-interested partisanship out of redistricting seem increasingly remote.⁶

politicians.

3. See Jeanne C. Fromer, *An Exercise in Line Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L. J. 1547, 1575 (2005) (noting general correlation between urban communities and Democratic Party).

4. Jowei Chen & Jonathan Rodden, *Tobler’s Law, Urbanization, and Electoral Bias: Why Compact, Contiguous Districts are Bad for the Democrats* (Nov. 4, 2009) (unpublished working paper), available at <http://www.stanford.edu/~jowei/identified.pdf>; Daniel H. Lowenstein & Jonathan Steinberg, *The Quest For Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 U.C.L.A. L. REV. 1, 26–27 (1985).

5. Heather Gerken, *Getting From Here to There in Election Reform*, 34 OK. C. U. L. REV. 33, 33 (2009).

6. Not everyone has given up this fight, even after *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006).

The central claim of the essay, running throughout its separate discussions of the criteria, processes, and prospects for apolitical redistricting, is that the electorate as a whole must feel and possess more of an ownership interest in the redistricting system. Indeed, recent proposals for redistricting reform have typically foundered because opponents have successfully argued that an independent redistricting body was, by definition, not accountable to the public. This argument needs to be turned on its head.

Part II of this essay summarizes the recent case studies of California and Ohio. In Part III, this essay discusses substantive criteria potentially appropriate for independent redistricting, followed in Part IV by the most promising institutional processes for independent redistricting. Part V then discusses the practical challenges of reshaping how most states conduct legislative redistricting, in light of the historical difficulties reformers have had in promoting politically independent redistricting, both in court and through popular initiative and legislative reforms.

II. TWO CASE STUDIES: RECENT REDISTRICTING REFORM EFFORTS IN CALIFORNIA AND OHIO

California and Ohio offer vivid case studies of the struggle between politicians, good government groups, and voters over efforts to create a redistricting process not dominated by partisan politics. In two high-profile campaigns in 2005, both states saw their voters reject similar redistricting reform proposals, and both states thereafter have explored alternative proposals aggressively. But while in 2008 California voters narrowly approved a reform measure calling for the creation of a fourteen-member citizen redistricting commission,⁷ so far Ohio has remained unable to reform its redistricting process, despite repeated additional attempts.⁸ In 2006, Democrats in the minority in the Ohio legislature balked at a Republican offer to put before the voters a proposal for an independent redistricting commission.⁹ In 2009, leaders of both parties offered competing

7. The reform measure was on the statewide ballot as Proposition 11. It was enacted with about 51% of the vote. California Secretary of State Debra Bowen, *Statement of Vote: November 4, 2008, General Election*, Dec. 13, 2008, at 65, available at http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf. Proposition 11 amended Article 21 of the California Constitution to create the fourteen-member redistricting commission.

8. See *infra* notes 37–45 and accompanying text.

9. See *infra* notes 38–42 and accompanying text.

proposals, but could not find a common approach.¹⁰ Versions of these proposals remain under consideration in early 2010, but the window of opportunity is quickly closing. It therefore is worth thinking about whether differences in the details or presentations of the California and Ohio proposals may have affected their varying receptions.

A. California

In California, as in most states, state legislators traditionally have been responsible for drawing legislative and congressional districts. Since the 1960s, California Democrats effectively have held power over the redistricting process.¹¹ Between 1982 and 1990, Republicans thrice failed in efforts to place redistricting in the hands of a bipartisan commission.¹² Then, in a bit of a shift, the legislative redistricting following the 2000 census involved a bipartisan effort to entrench both incumbent Democrats and incumbent Republicans.¹³ Arguably as evidence of its success, of the 153 congressional and state legislative races occurring in November 2004, not a single incumbent was defeated and not a single seat changed parties.¹⁴

Against this backdrop, in 2005 California voters considered a redistricting reform proposal known as Proposition 77.¹⁵ This Proposition would have created a redistricting commission composed of three retired California state or federal judges, and would have required immediate redistricting in time for the 2006 elections according to specified criteria, including a prohibition against considering political demographics.¹⁶ Proponents of Proposition 77,

10. See *infra* notes 44–45 and accompanying text.

11. Leroy C. Hardy & Charles P. Sohner, *Constitutional Challenge and Political Response: California Reapportionment, 1965*, 23 WEST. POL. Q. 733, 733–51 (1970).

12. Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 360–68 (2007); see also Office for Strategic Information Services, *Redistricting Measures That Have Qualified For Statewide Ballot*, available at <http://republican.assembly.ca.gov/flashpoint/RedistrictingMeasures0105.pdf>; Jessica Oliver, *California Initiatives in Perspective 1966-2002* (2003) (research paper on file with Claremont McKenna College), available at <http://ccdlib.libraries.claremont.edu/cdm4/document.php?CISOROOT=/ric&CISOPTR=14476&REC=1>.

13. See Michael Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 667, 667 n.1 (2006).

14. John Wildermuth, *Some Suspect Governor's Plan to Redraw District Lines*, S.F. CHRON., Jan. 2, 2005, at A17, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/01/02/BAGM6AK1OD1.DTL>.

15. *Official Voter Information Guide, Text of Proposed Laws (Proposition 77)* at 66, available at http://www.sos.ca.gov/elections/bp_nov05/voter_info_pdf/text77.pdf.

16. *Id.*

including Governor Arnold Schwarzenegger, argued that the initiative would create significantly more competitive districts, increase minority representation, and remove self-interested incumbents from the redistricting process.¹⁷ However, well-financed opponents of Proposition 77, which included Democrats, Republicans, and minority interest groups alike,¹⁸ argued that the plan was a “power grab,” that retired judges were not representative of the state’s diversity, and that the measure left redistricting to a trio of people who were not accountable to the voters.¹⁹ The proposition was soundly defeated, receiving only 40.2% of the vote.²⁰

In 2008, good government groups including the League of Women Voters, Common Cause of California, and AARP took another shot, crafting a new reform to address directly the flaws of the 2005 proposal and of earlier redistricting initiatives. Under this measure, dubbed Proposition 11, California would place the power of drawing state legislative districts in the hands of its voters in the form of a Citizens Redistricting Commission. The Commission would be relatively isolated from self-interested politicians and would reflect the diversity of California.²¹ The fourteen-member Commission would be selected through an application process open to anyone who had been a registered California voter for the previous five years and had voted in two of the past three statewide elections, subject to meeting additional qualifications. The role of the Citizens Redistricting

17. Douglas Johnson, *Restoring the Competitive Edge: Full Report*, Sept. 26, 2005, (report on file with Claremont McKenna College), available at <http://ccdlib.libraries.claremont.edu/cdm4/document.php?CISOROOT=/ric&CISOPTR=2814&REC=2>; see also Join Arnold Fact Sheet, available at http://digital.library.ucla.edu/websites/2005_997_008/www.joinarnold.com/site/c.itJU9MTIuE/b.695343/k.19E6/Proposition_77__The_Voter_Empowerment_Act.htm.

18. See, e.g., Christian Berthelson, *Group Backing Remap Initiative Caught Up in Donations Dispute*, S.F. CHRON., Oct. 7, 2005, at B3 (then-House Minority Leader Nancy Pelosi asking Democrats to help raise money against Prop. 77); Nancy Vogel & Michael Finnegan, *Stage Set for Fundraising Free-For-All*, L.A. TIMES, Aug. 19, 2005, at A1, available at <http://articles.latimes.com/2005/aug/19/local/me-redistrict19/3> (request by Reps. Howard Berman, D-Calif., and John Doolittle, R-Calif., to raise soft money to defeat Prop. 77); John Wildermuth, *Debate on Prop. 77 Over Retired Judges*, S.F. CHRON., Oct. 17, 2005, at B1 (Senior Vice President for Mexican American Legal Defense and Education Fund stating that three people cannot represent diversity of California).

19. Jill Stewart, Op-Ed, *Terminator vs. Gerrymander*, N.Y. TIMES, Nov. 7, 2005, at A23, available at <http://query.nytimes.com/gst/fullpage.html?res=9902E2D9143EF934A35752C1A9639C8B63&sec=&spon=&pagewanted=all>.

20. California Secretary of State Bruce McPherson, *State Ballot Measures: Proposition No. 73–80*, Nov. 8, 2005, at 6, available at http://www.sos.ca.gov/elections/sov/2005_special/detail_props_formatted_pg1_7.pdf.

21. See CAL. CONST. art 21, §§ 1–3; see also CA GOVT. CODE §§ 8251–8253.6 (2008).

Commission was to “draw new districts in conformity with strict, nonpartisan rules designed to create districts of reasonably equal population that will provide fair representation for all Californians.”²²

Support for Proposition 11 gained momentum when the state legislature failed to enact a budget by the constitutional deadline.²³ Partisan gridlock in the legislature was blamed for much of the delay in passing the budget, and supporters of Proposition 11 argued that the establishment of a redistricting commission independent from the legislature would render legislators more accountable to voters.²⁴ This time, despite opposition once again from Democrats, Republicans, and minority interest groups, Proposition 11 passed by a narrow margin of 1.8% of the total vote.²⁵ The process of forming the fourteen-member Citizens Redistricting Commission is now underway, and as of the February 2010 application deadline, the California State Auditor had received over 30,000 initial applications for the fourteen positions on the commission.²⁶

B. Ohio

While the Ohio legislature retains authority to draw the state’s congressional districts, since 1967 the redistricting process for both houses of the state legislature has resided not in the legislature itself but in the hands of a five-member apportionment board composed of the Governor, the Secretary of State, the State Auditor, and two members respectively appointed by the Republican and Democratic legislative leadership. The political party constituting the apportionment board majority has reliably seen gains in state

22. Citizens Redistricting Commission, *Background of the California Redistricting Commission: A New Experiment in Direct Democracy*, <http://www.wedrawthelines.ca.gov/downloads/backgrounder.pdf>.

23. See Matthew Yi, *Governor Cuts \$510 Million Before Signing Long-Overdue State Budget*, S.F. CHRON., Sept. 24, 2008, at A1 (noting that Governor Schwarzenegger went to a rally for Proposition 11 after signing the late budget and chastising lawmakers).

24. Steven Harmon, *First Ad in Redistricting Battle Promises to “Clean Up Mess” in Sacramento*, CONTRA COSTA TIMES, Oct. 6, 2008.

25. The measure affects the redistricting of only the California Senate, Assembly, and Board of Equalization districts. Responsibility for drawing California’s congressional districts remains with the state legislature.

26. Citizens Redistricting Commission Statistics, Citizens Redistricting Commission, <https://application.wedrawthelines.ca.gov/statistics> (last visited May 5, 2010). However, the small proportion of women and minority applicants apparently is worrisome to some. See George Skelton, *Reform Takes a Tough Road*, L.A. TIMES, Jan. 18, 2010, at A2, available at <http://articles.latimes.com/2010/jan/18/local/la-me-cap18-2010jan18>.

legislative seats following each decennial redistricting.²⁷ In 1981, Ohio Republicans and the League of Women Voters of Ohio proposed a ballot measure to create a bipartisan commission that would have created districts based upon a mathematical formula designed to achieve optimal compactness.²⁸ Democrats, who then controlled the apportionment board, opposed the measure, arguing that it would dilute minority representation.²⁹ The measure failed, receiving only 42% of the vote.³⁰

By 1990, Republicans controlled a majority of the apportionment board. By 1994 Republicans had taken control of both the state House and the state Senate. Another League of Women Voters reform proposal failed to make it to the ballot in 1999, and Republicans maintained control of the apportionment board for the post-2001 census redistricting.

In 2005, a group called Reform Ohio Now (RON) sponsored a redistricting reform measure known as Issue 4 that sought to remove redistricting from the hands of the apportionment board.³¹ The proposal would have created a bipartisan commission, chosen by state court judges, responsible for adopting redistricting plans based on a mathematical formula that most rewarded “competitive” electoral districts.³² Issue 4 was part of a slate of four constitutional amendments designed to reform Ohio’s electoral process more generally, in response to noticeable deficiencies in the 2004 elections and perceived corruption within Ohio government.³³ These ballot measures were promoted by several left-of-center interest groups,

27. Democrats have not held control of both the Ohio House and Senate since several legislatures in the late 1970s and early 1980s, when Democrats controlled the apportionment board. See *Political Composition of the Ohio General Assembly—1900 to 2006*, Gongwer News Service, Inc., available at <http://www.gongwer-oh.com/public/gahis.html>.

28. David Shutt, *Amendments Put to Ohioans*, TOLEDO BLADE, Nov. 1, 1981, at B9, available at <http://news.google.com/newspapers?id=KHgUAAAAIABAJ&sjid=pQIEAAAAIBAJ&pg=5540,2617983&dq=ohio+issue-2+1981&hl=en>.

29. *Id.*

30. Ohio Secretary of State, *General Election Overview: November 3, 1981*, available at <http://www.sos.state.oh.us/SOS/elections/electResultsMain/1980-1989OfficialElectionResults/GenElectOverview11031981.aspx>.

31. Dale A. Oesterle, *Ohio’s Dramatic Citizen Initiative: “Reform Ohio Now”*, ELECTION LAW @ MORITZ, Oct. 11, 2005, <http://moritzlaw.osu.edu/electionlaw/comments/2005/051011.php>.

32. Ohio Ballot Board, *Ohio Issues Report*, Nov. 8, 2005, at 10–11, available at <http://www.sos.state.oh.us/sos/upload/elections/2005/OIR2005.pdf>.

33. See William Hershey, *Voters Link Issues with Trust; Dissatisfaction with Politicians Will Color Tuesday’s Election Outcome*, DAYTON DAILY NEWS, Nov. 6, 2005, at A1.

some from out-of-state.³⁴ Opponents of Issue 4, including Republican legislative leaders, conducted a high-profile campaign that convincingly argued that the measure was an out-of-state power grab that would place redistricting in the hands of unaccountable bureaucrats, and would still generate horribly disfigured districts, now in the name of promoting competition.³⁵ The measure failed badly on Election Day 2005, receiving only 30% of the vote.³⁶

Since the defeat of Issue 4, various state legislators have introduced at least ten joint resolutions in the Ohio legislature in an attempt to get other redistricting reform proposals before the voters.³⁷ Of particular note, in 2006, Ohio House Speaker Jon Husted and Representative Kevin DeWine, former Republican opponents of Issue 4, led a bipartisan reform effort with some supporters of the RON movement.³⁸ Their proposal would have created a seven-member redistricting commission composed of four members appointed by the legislative leaders of both major parties, and three others chosen by the four appointed members.³⁹ The proposal allowed members of the public to submit redistricting plans to the commission for consideration. Each plan was required to protect existing political subdivisions as much as possible, and within that constraint, to maximize competitive districts.

However, in the wake of scandals that shook the Ohio Republican Party in 2006, legislative Democrats opposed redistricting reform, even voting against the same measure they had proposed a year earlier⁴⁰ and opting to take their chances on capturing an

34. See Stephanopoulos, *supra* note 12, at 375.

35. See *id.* at 376.

36. Ohio Secretary of State, *2005 Election Results: General Election—November 8, 2005*, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2005ElectionsResults/051108Issue4.a.spx>.

37. See, e.g., S.J. Res. 5, 128th Gen. Assem. (Ohio 2009–10); S.J. Res. 4, 128th Gen. Assem. (Ohio 2009–10); H.J. Res. 15, 128th Gen. Assem. (Ohio 2009–10); S.J. Res. 6, 127th Gen. Assem. (Ohio 2007–08); H.J. Res. 4, 127th Gen. Assembly (Ohio 2007–08); H.J. Res. 1, 127th Gen. Assem. (Ohio 2007–08); S.J. Res. 5, 126th Gen. Assem. (Ohio 2005–06); H.J. Res. 13, 126th Gen. Assem. (Ohio 2005–06); H.J. Res. 9, 126th Gen. Assem. (Ohio 2005–06); H.J. Res. 6, 126th Gen. Assem. (Ohio 2005–06).

38. William Hershey, *Legislative Districts May Be Fall Ballot Issue; Kevin DeWine Introducing Measure to Allow Ohio Voters to Change How Redistricting Is Done*, DAYTON DAILY NEWS, May 5, 2006, at A6.

39. H.J. Res. 13 (Ohio 2005–06).

40. Jim Siegel, *Redistricting Plans Rejected; Democrats Vote Down GOP Plan, Then Their Own*, COLUMBUS DISPATCH, May 26, 2006, at 1D.

apportionment board majority in November 2006 (which they did).⁴¹ They anticipated that the party that captured the three open apportionment board seats in the 2006 election would, four years later, reelect these same statewide office holders as incumbents, and thus retain control of the board for the 2011 redistricting cycle.⁴²

In both 2007 and 2008, legislative Republicans again introduced joint resolutions to reform Ohio's redistricting process, with various combinations of a bipartisan board or substantive constraints on map drawing, to no effect.⁴³ In 2009, the Republican-controlled Ohio Senate passed a joint resolution proposing to amend the state constitution to establish an augmented apportionment board, consisting of four legislative branch members instead of two. The amendment would have required the board to select, by a supermajority voting rule, a redistricting plan that promoted district compactness by protecting existing political subdivisions, and then to maximize competitiveness where possible.⁴⁴ Meanwhile, in the now Democrat-controlled Ohio House, a joint resolution is pending that would force the existing apportionment board to choose from among plans submitted by Ohio residents the one that conforms most closely with a predetermined partisan index number.⁴⁵ Ohio Democrats, who once felt confident about retaining control of the apportionment board after the 2010 election, today see their prospects as much cloudier, leaving both parties potentially more willing to take the risk-averse route of supporting a redistricting reform ballot measure in the November 2010 elections.

III. SUBSTANTIVE REDISTRICTING CRITERIA AND CONSTRAINTS

Many of the recent Ohio proposals described above have offered to reform redistricting not by restructuring the state apportionment board, but by imposing additional constraints on the plans that the board (or, in the case of congressional districts, the state legislature) may consider. The fact that these proposals have not attracted much

41. Joe Hallett, *Democrats Might Not Be Up to Doing the Right Thing on Redistricting*, COLUMBUS DISPATCH, May 14, 2006, at 5B.

42. *See id.*; Jonathan Riskind, *OHIO'S GOP-dominated Congressional Delegation Faces a New Tide*, COLUMBUS DISPATCH, Oct. 21, 2007, at 5G.

43. S.J. Res. 6, 127th Ohio Gen. Assem. (Ohio 2007-08); H.J. Res. 4, 127th Gen. Assem. (Ohio 2007-08); H.J. Res. 1, 127th Gen. Assem. (Ohio 2007-08).

44. Sub. S.J. Res. 5, 128th Gen. Assem. (Ohio 2009-10).

45. H.J. Res. 15, 128th Gen. Assem. (Ohio 2009-10).

bipartisan support may say more about the need to couple criteria reform with process reform than about whether efforts to specify stronger redistricting criteria are themselves misguided. In addition, there is little uniform agreement on what balance of redistricting criteria is most appropriate, beyond the truism that federal law requires districts with equal population drawn in compliance with the Voting Rights Act, and an overwhelming (though not universally codified) preference for contiguous districts. This Part briefly identifies the key redistricting criteria, and concludes by suggesting that a flexible, participatory approach to choosing among these options may be appropriate.

A. Consideration of Party Affiliation or Support

As the film *Gerrymandering*⁴⁶ points out, redistricting has transformed dramatically over the years largely because of the ever-increasing sophistication of mapping tools and the use of exceedingly precise demographic data. When political partisans control redistricting, it can be, and generally is, manipulated to self-interested ends. One reform therefore would be to prohibit the use of party registration data and precinct voting records in the drawing of district boundaries. This is the “blind” version of apolitical redistricting identified in the Introduction.

This type of constraint, though supported in some quarters,⁴⁷ has two main problems. The first is that other data can readily, if somewhat erratically, be used as a proxy for party affiliation. When partisan redistricting commissions or legislatures draw maps, the mapmakers are sure to be aware of where their supporters and opponents are strongest, even without looking at precise voting patterns. By looking instead at neighborhood socio-economic levels or racial composition—which Voting Rights Act compliance may even mandate considering—districts may still be drawn with a deliberate partisan effect.⁴⁸ Admittedly, mapmakers will be taking greater risks in attempting to predict the partisan composition of districts without

46. GERRYMANDERING (Green Film Company 2010).

47. See, e.g., Issacharoff, *supra* note 1, at 600–01; Illinois Reform Commission, *100 Day Report*, at 56–57 (Apr. 2009), available at <http://www.reformillinoisnow.org/press%20releases/IRC%20100-Day%20Report%20-%20Final.pdf>; Proposition 77, (2)(i), available at http://www.sos.ca.gov/elections/bp_nov05/voter_info_pdf/text77.pdf.

48. In fact, in some jurisdictions the Voting Rights Act may even require the direct consideration of partisan electoral data, in order to determine whether minority-voting patterns are polarized and whether a remedial district is effective.

access to detailed party affiliation data, and that heightened risk could dampen the enthusiasm for partisan excess in the process. But there are more effective ways of constraining the partisan excesses than to redirect mapmakers into using secondary data to accomplish partisan gerrymanders.

This is especially true in light of the second problem of blind redistricting, which is that it may be in fact less fair. This is most obviously true if blind redistricting occurs according to other criteria that favor compact districts or protect existing political subdivisions and other communities of interest. According to prevailing demographic trends of the early twenty-first century, this type of redistricting may more often naturally pack heavily Democratic urban voters into fewer districts overall, while dispersing a majority of Republicans more evenly throughout a greater number of suburban and rural districts.⁴⁹ Accordingly, as next discussed, relying on party affiliation data may be required in order to achieve some versions of fairness in drawing district maps. An independent redistricting scheme therefore need not prohibit the use of data concerning citizens' party affiliation, but should instead look for other ways to control the use of this data for self-interested partisan manipulation.

B. Partisan Fairness

Juxtaposed against the notion of partisan manipulation might be the ideal of partisan fairness. In a plurality-based electoral system, partisan fairness does not mean that the proportion of legislative seats won by a specific political party must match the proportion of total votes cast for legislative candidates who are members of that party. Instead, partisan fairness can be thought of in terms of whether a change in vote share of a specific amount in either direction would produce a symmetrical, rather than proportional, change in seats won by either party.⁵⁰ For instance, if a 1% increase in vote share for party A would result in party A capturing 5% more legislative seats, then a 1% increase in vote share for party B should result in party B capturing 5% more seats. This type of system is not proportional,

49. See, e.g., Stephen Ansolabehere & James M. Snyder, Jr., *Reapportionment and Party Alignment in the American States*, 153 U. PA. L. REV. 433, 436–37 (2004); Lowenstein & Steinberg, *supra* note 4, at 23–24 (noting malapportionment across regions largely benefitted political party of rural areas).

50. Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 ELEC. L.J. 2, 8–9 (2006).

because a given change in vote share may legitimately generate a disproportionate seat bonus, but nonetheless the system is fair as long as corresponding changes affect parties symmetrically.

Among political scientists, symmetry is widely accepted as the best measure of fairness.⁵¹ It can be easily incorporated into a redistricting framework, and fairness, as thus conceptualized, could serve as an objective tool for measuring or evaluating the absence of partisan bias in a redistricting scheme. Indeed, symmetry may be worthy of primary attention as a redistricting criterion, certainly as much as the typical three “C”s of redistricting reform—competitiveness, compactness, and communities of interest—to which we now turn.

C. Competitiveness

Competitiveness has been a driving force behind many recent redistricting reform efforts, and was the centerpiece of the rejected 2005 Ohio proposal. Although a variety of methods for measuring competitiveness exist, the general approach is to look district-by-district at the closeness of the margin of victory of the top statewide race in the average of several recent elections. The more districts in which this margin is close, however “close” is defined, the more competitive the overall map.

The primary argument for using competitiveness as a redistricting touchstone is that competitive elections will enhance electoral accountability and produce representatives more in step with the median voter. If this premise is accepted, then it is natural to prefer district maps that produce a greater number of competitive elections. If competitiveness is to be used as a redistricting criterion, several choices will need to be made concerning which elections to use for the baseline calculation of victory margin, what victory margin to deem competitive, and whether to penalize a redistricting scheme that includes highly noncompetitive, or even simply noncompetitive, districts.

More recently, however, competitiveness has lost some of its luster. Although it still maintains a strong following in the reform

51. See, e.g., *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 465–66 (2006) (Stevens, J., concurring in part and dissenting in part) (noting that the symmetry standard “is widely accepted by scholars as providing a measure of partisan fairness in electoral systems”); Grofman & King, *supra* note 50, at 9 (“Most scholars therefore regard electoral systems with higher levels of electoral responsiveness as better.”);

community, it has come under criticism both with respect to the validity of the premise that it enhances electoral accountability, and because one of its results may be to maximize the number of voters disaffected because their candidate loses.⁵² Justin Buchler is among those making careful arguments against competitiveness along these lines.⁵³ Prioritizing competitiveness may also require its own version of distorted map drawing, as opponents of Ohio's 2005 reform proposal effectively argued, because voters tend to reside in non-competitive patterns.⁵⁴

Nonetheless, competitiveness may still deserve a place at the redistricting table. Arguments for it can be made for reasons independent of electoral accountability, including the impact of competitive elections on the quality of campaign debate, and the resultant shaping of public understanding and preferences on matters of public policy. Competitive districts also may affect the prospects for attracting and grooming quality candidates. Moreover, using competitiveness as a redistricting factor may temper the redistricting body's ability to selectively disadvantage one party's incumbents or candidates. But as a general rule, it is difficult to identify how much value to place on the overall competitiveness of a redistricting scheme. It therefore may be important to place greater emphasis on partisan fairness, discussed above, while also providing ways, discussed below, for the voters themselves to retain some flexibility in deciding whether to seek greater competitiveness.

D. Compactness

Compactness, whether measured by comparing the area of a district with its perimeter, the ratio of district length to width, or in several other possible ways (or merely eyeballed rather than measured), is attractive as a redistricting criterion for both symbolic and practical reasons. Symbolically, non-compactness is almost a synonym for gerrymandering, and the bizarre configuration of many districts is often taken as evidence of partisan distortion. Indeed,

52. See Justin Buchler, *Competition, Representation and Redistricting: The Case Against Competitive Congressional Districts*, 17 J. THEORETICAL POLITICS 431 (2005); see also THOMAS L. BRUNELL, *REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA* (2008).

53. E.g., Justin Buchler, *The Inevitability of Gerrymandering: Winners and Losers Under Alternative Approaches to Redistricting*, 5 DUKE J. CONST. L. & PUB. POL'Y 17 (2010).

54. See *supra* note 49 and accompanying text.

without compactness, the requirement of district contiguity has become almost a caricature, and may not be worth having at all when not supported by some additional sensibility like compactness. Requiring compact districts therefore constrains mapmakers from too much manipulation. Yet distorted shapes may serve unbiased or neutral ends, too, such as keeping the overall map fairer or ameliorating some of the bias that may result from protecting communities of interest.

Nevertheless, there are practical reasons to prefer compact districts. Compact districts may enhance representation because representatives and candidates can more easily know and traverse their district. A compact district also may promote the development of a new community of interest—consisting of the district itself—to the extent that the compactness facilitates a sense of shared community among its residents.

E. Communities of Interest and Political Subdivisions

There is widespread agreement that, all other things being equal, a redistricting plan should not split into separate districts voters who are part of some pre-existing political subdivision or other community of interest. But, because all other things are not equal, the difficulty is in determining for what purposes the splitting of such communities is permissible. In many locales, voters tend to reside near those who are politically like-minded, so preserving communities of interest, like preferring compact districts, may have the direct result of reducing the overall competitiveness of a redistricting plan. Yet, valorizing competitiveness may be particularly misguided when it would disaggregate voters whose natural residential patterns have given rise to strong geographic political preferences. It is hard to say definitively when existing communities of interest should and should not remain sacrosanct, but easy to say that the concern merits attention in the redistricting process.

F. Flexibility and Accountability in Prioritizing Among Possible Criteria

The preceding reflections on potential criteria for constraining a redistricting process demonstrate the complexity of establishing a specific framework. Indeed, there is little agreement on what are truly

neutral and fair redistricting principles.⁵⁵ Although many different models have been proposed,⁵⁶ it is difficult to know ahead of time, and for the circumstances of a particular state, how best to weight and aggregate potential criteria such as partisan fairness, competitiveness, compactness, and communities of interest. Furthermore, because different citizens and interest groups may prioritize these criteria differently, some trade-offs or compromises may be required.

That is not to say that settling on a best set of neutral redistricting criteria for a particular state will be problematic, only that it will take additional work in each state. But one easily made generalization is that the process by which a state seeks to specify its criteria can make a huge difference to the acceptability of these criteria. When redistricting criteria are presented prepackaged by a particular reform community, they can be easy targets for opponents to attack, given that, as noted above, most potential criteria have some vulnerabilities to be exploited. Accordingly, in many reform efforts, proposed constraints have been rejected as “elite” meddling.

An alternative approach would be to give the public more of a role in the specification of redistricting criteria than a simple up-or-down vote on a ballot measure (or than a legislative *fait accompli* in states without the initiative process). This becomes a meta-level point about how to implement an apolitical redistricting system, discussed further in Part V. In addition, the lack of clear agreement on the right set of redistricting criteria also suggests that efforts to achieve apolitical redistricting through criteria reform alone may be insufficient, and that institutional and process reform therefore may be an essential element.

IV. REDISTRICTING PROCESSES AND INSTITUTIONS

Typical redistricting reform efforts have proposed establishing independent commissions to draw legislative maps, in place of the

55. See Fromer, *supra* note 3, at 1550 (describing the question of what constitutes a fair redistricting scheme as “bedeviling and pressing”).

56. See, e.g., Sam Hirsch, A Proposal for Redistricting Reform: A Model State Constitutional Amendment, delivered at the American Mathematical Society’s Special Session on the Redistricting Problem (Jan. 8, 2009), available at <http://www.americansforredistrictingreform.org/html/documents/HirschRedistrictingPaperforAmerMathSociety.pdf>; *Building a National Redistricting Reform Movement*, Report of the April 2006 Redistricting Conference hosted by the Campaign Legal Center, League of Women Voters, and The Council for Excellence in Government, available at <http://www.campaignlegalcenter.org/attachments/1641.pdf>.

state legislatures that historically have been responsible for redistricting. Although today close to half of the states already assign an entity other than the legislature some role in the redistricting process,⁵⁷ in most of these cases either the non-legislative institution is itself partisan in design, as with Ohio's apportionment board, or the legislature retains substantial partisan control and influence over the process, as with New York's advisory redistricting commission.⁵⁸ Notable exceptions include Arizona, which established an independent redistricting commission in 2000, and Iowa, where, although the legislature retains final authority, a nonpartisan staff agency, the Legislative Service Bureau, has produced the maps in each of the past three decennial redistricting cycles.⁵⁹

Some reform proposals that seek only to constrain an existing redistricting institution through criteria reform⁶⁰ have encountered skepticism because they would leave the institution's partisan structure intact.⁶¹ In part this skepticism may result from lack of agreement about what are truly neutral redistricting principles, which may heighten concerns that it is unrealistic to expect to constrain an inherently biased redistricting body. It may also reflect the difficulty of drafting redistricting rules so tightly as to eliminate all room for human judgment, because of concerns about unintended

57. JUSTIN LEVITT, *A CITIZEN'S GUIDE TO REDISTRICTING 20–22* (2008).

58. N.Y. LEGIS. LAW § 83-m.

59. ARIZ. CONST. art. 8, §§ 1–5 (Arizona Redistricting Commission); IOWA CODE §§ 42.1–42.6 (2009).

60. For example, the Indiana State legislature currently redraws the state's districts subject only to the requirement that districts be contiguous. The Indiana State Senate recently approved a redistricting reform bill, Indiana Senate Bill 80, that would require the state legislature to follow additional criteria including compactness, preserving communities of interest, protecting minority rights, and respecting county boundaries. S.B. 80, 116th Leg., 2d Reg. Sess. (Ind. 2010); *see also Community Comment: Redistricting Deserves Independent Look*, EVANSVILLE COURIER & PRESS, Feb. 21, 2010, available at <http://www.courierpress.com/news/2010/feb/21/redistricting-deserves-independent-look/> (containing joint statement by AARP Indiana, Common Cause/Indiana, and the League of Women Voters of Indiana criticizing S.B. 80 for failing to prohibit the use of partisan political data). Proposals now under consideration in Florida, if adopted, would require the legislature to draw districts without any "intent to favor or disfavor" a political party. *See* FairDistrictsFlorida.org, Our Reforms, http://www.fairdistrictsflorida.org/our_reforms.php (discussing Amendments 5 and 6 on an upcoming ballot).

61. *See, e.g.,* Jim Siegel, *Ohio House Democrats Have Plan to Redistrict*, COLUMBUS DISPATCH, Feb. 2, 2010, at 1B (quoting OSU political scientist Richard Gunther to say that proposed criteria reform alone is "inadequate" to prevent worst partisan abuses, and should be melded with institutional reform); *cf.* Fromer, *supra* note 3, at 1570–86 (discussing vulnerabilities of various redistricting criteria); Issacharoff, *supra* note 1, at 644–45 (describing inherent conflict of interest in letting legislators conduct redistricting).

consequences. In other words, the more that a redistricting institution is independent of those seeking to represent the districts, the more room there may be to allow some flexibility in the criteria that institution must employ. Furthermore, it is always easy to condemn the outcome of any process perceived to be controlled by a biased group, particularly given the lack of agreement on what criteria should constrain the process. Therefore, regardless of the substantive constraints adopted, independent redistricting may also require reforming who is in charge of the process, and how that institution functions.

This Part addresses two key points related to the prospect of institutional reform of the redistricting process. The first point, which Michael Kang, Daniel Lowenstein, Heather Gerken, and others have previously made, is that the redistricting process in fact may need more politics, properly defined, not less.⁶² The second point is related. In redistricting, as in matters of governance generally, citizens gravitate towards the principle of accountability. This Part seeks to extend both of these insights toward promoting greater citizen participation in redistricting institutions, rather than giving the redistricting task to independent experts or bipartisan commissions.

A. Could Infusing Additional Politics Lead to a More “Apolitical” Redistricting?

Though sympathetic with the effort to rid the redistricting process of partisan manipulation, Michael Kang has argued that

[d]elegation of redistricting to apolitical institutions, such as courts and independent commissions, comes with heavy costs [It] ensures that redistricting is far removed from the necessary degree of public engagement, scrutiny, and accountability [R]eformers would eradicate from redistricting the positive values of the political process as well.⁶³

He continues: “Redistricting is an inherently political question that ultimately requires political answers.”⁶⁴

In labeling redistricting as “inherently political,” Kang contemplates a version of the notion described earlier that different citizens may prioritize possible redistricting criteria differently.

62. See *infra* notes 63–69 and accompanying text.

63. Kang, *supra* note 13, at 668.

64. *Id.* at 686.

Because there is no clear answer about which criteria to favor, choosing among these possibilities is a political question in the sense that it requires making a policy choice among contested options. It need not, however, be a partisan issue.

Of course, one way to handle this political question would be to propose to the voters a particular algorithm or arrangement of reform criteria for redistricters to use to draw the maps, and let the voters, or their representatives, approve that set of criteria. But what Kang has in mind instead is to let existing redistricting institutions continue to have primary responsibility for preparing district maps, using whatever criteria may (or may not) already be in place, and then to require the resulting maps to be submitted to the voters for approval.⁶⁵ This act of direct democracy is what Kang describes as the infusion of additional politics into the redistricting process.⁶⁶

Professor Daniel Lowenstein has followed this suggestion in a challenge to California's recent reform. Lowenstein is the primary sponsor of a constitutional initiative that would repeal Proposition 11, thereby disbanding the Citizens Redistricting Commission and returning redistricting responsibility to the state legislature, while also making the legislature's adoption of redistricting maps subject to the referendum process (as is also now the case under Proposition 11).⁶⁷ Lowenstein agrees with Kang that redistricting is inherently political, and argues that "when you try to take a political process and put it in the hands of bureaucrats who are supposed to be non-partisan, it's a fraud and it's not going to work."⁶⁸ The ballot measure, called the Financial Accountability in Redistricting Act, will be before the voters in November 2010.

Although many observers view the Financial Accountability in Redistricting Act as an effort by California Democrats to regain control of the redistricting process,⁶⁹ Lowenstein and Kang argue that

65. *Id.* at 699–713.

66. *Id.* at 668–70.

67. Financial Accountability in Redistricting Act, *available at* <http://www.lao.ca.gov/ballot/2009/090861.aspx>.

68. James Koren, *Some Democrats Seek to Roll Back Citizen Control of Redistricting*, DAILY BULLETIN, Feb. 17, 2010, *available at* http://www.dailybulletin.com/ci_14421716. Political scientist Thomas Brunell, after arguing that increased competitiveness should not be a redistricting objective, similarly urges that the redistricting task be given to a group of individuals from a diverse cross-section of the state, popularly elected to perform this duty, namely, the state legislature. BRUNELL, *supra* note 52, at 116.

69. Lowenstein himself has indicated that Democratic congressman Howard Berman is behind the initiative. *See* Kevin Modesti, *New Redistricting Process is Giving Power to the*

the referendum process is sufficient to inject a healthy dose of public involvement into redistricting. This act of direct democracy, they suggest, should curb both the inclination and the ability of the legislative mapmakers to gerrymander to excessive partisan ends. Although a referendum-based redistricting process would in a sense be more political, the aspiration is that it would be less manipulated by partisan elites. The broader public politics of the process thus should produce a redistricting map that has less of partisan bias, and in that sense produce an outcome that is more “apolitical.”

B. Citizens Want Their Redistricting Institution to be “Accountable”

A related point is how much citizens crave the principle of accountability. Regardless of how well voters take advantage of this principle, they understandably want the ability to hold anyone involved in the political process accountable. This extends to the redistricting process, a central component of our political system. Accordingly, one of the more effective arguments against an independent redistricting commission often has been that it would render the redistricters unaccountable to the voters: once they are appointed, the public loses control over them. For instance, precisely this argument figured prominently in the campaigns to defeat the 2005 Ohio and California ballot measures.

Although accountability can take various forms, it typically means the ability to defeat an untrustworthy or incompetent public servant at the polls. Yet there is an obvious irony (as my law students are quick to point out) in wanting those who draw the maps to be accountable to the voters, while at the same time letting them draw their own maps even in self-interested ways that often deliberately reduce voters’ abilities to defeat them on Election Day! Furthermore, in some states, crucial aspects of the redistricting process occur behind closed doors, leaving voters little opportunity to understand how particular redistricting choices were made and when to blame their specific legislator for complicity in a redistricting abuse.

In states with the popular referendum,⁷⁰ the option to override the

People, DAILY NEWS OF L.A., Feb. 22, 2010, at A1 (“The repeal effort is officially headed by UCLA law professor Daniel Lowenstein but backed by Democratic members of Congress led by Rep. Howard Berman, D-Van Nuys.”).

70. Twenty-four states currently provide for a popular referendum. Initiative & Referendum Institute, *What Are Ballot Propositions, Initiatives, and Referendums?*, <http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm>.

actions of the redistricting institution can provide another type of accountability. But the extent to which voters can meaningfully exercise this option is limited if the redistricting processes are conducted in secret. Although the resulting maps themselves are public, knowledge of why the districts take the form they do also would be relevant to a meaningful decision of whether to accept the map. Accordingly, another aspect of the proposed Financial Accountability in Redistricting Act would be to require the California legislature to conduct redistricting in an open fashion, with many opportunities for public participation.

Yet even when the redistricting process occurs openly, the shibboleth of electoral “accountability” may be more illusion than reality. It is an example of what political scientist J.H. Snider has called “electoral fundamentalism,” the misplaced belief “that unfettered competition for voter support among candidates for an elected office is adequate to maximize social welfare.”⁷¹ Specifically with respect to redistricting in which legislators are in charge of the mapmaking, in Madisonian terms there simply may be no competing ambition sufficient to counteract the ambition of the mapmakers. Legislators rarely will pay a price for drawing their districts in self-interested, rather than public-interested, ways.

Nevertheless, accountability is still what the public wants, even though it results in rejecting methods of redistricting that likely would make legislators more accountable. Regardless of how misplaced this desire for accountability may be in connection with redistricting reform, it is a reality that needs to be accepted rather than resisted in seeking to design an independent redistricting process. The next section therefore considers how to design a redistricting institution that satisfies the urge for accountability while also promoting partisan independence.

C. Prospects for Greater Citizen Involvement in Redistricting Institutions

The most promising approach to ridding much of the partisan excesses from the redistricting process, while also providing the public

71. J.H. Snider, *If Men Were Angels . . . : Should the Checks & Balances System Include Electoral Reform Juries?*, delivered at the 2009 Annual Meeting & Exhibition of the American Political Science Association (Sept. 3–6, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451155.

with a much more meaningful version of accountability than exists when legislators draw their own lines, would be to substantially increase direct public participation in the process of creating and choosing legislative maps. In contrast to the approaches of Lowenstein and Kang, in which legislatures still would craft the map but then have to submit it for popular approval, this approach calls for heavy citizen input in all stages of crafting the map. Furthermore, as suggested above it also could allow the possibility of similar citizen input in refining the substantive criteria to be used for comparing and evaluating potential maps.

Heather Gerken has previously written about the risk that, in the pursuit of independence from partisan politics, electoral reform projects, including redistricting reform efforts, can become disconnected with political reality.⁷² Political reforms are often elite-driven and can evince an ivory tower quality, which the public may resent and politicians easily can ridicule. While Gerken's caution may apply most forcefully to the issue of how to build sufficient political and popular support to get a reform measure adopted (the focus of Part V of this essay), it also has implications for the related issue of how to design the best redistricting institution. Her suggestion is that reform efforts seek to "inoculate" themselves against politics, rather than insulate themselves from politics entirely.⁷³ Just how much inoculation is ideal, or what weakened virus to put in the vaccine, will depend on the type of reform.⁷⁴

Ohio recently experimented with an approach to redistricting that provides an interesting variation on the idea of political inoculation. In April and May of 2009, a group composed of Ohio Secretary of State Jennifer Brunner, several current and former state legislators, the League of Women Voters of Ohio, Common Cause, and other non-partisan advocacy organizations sponsored a redistricting competition that invited public participation in the map drawing process.⁷⁵ The group, called Ohio Redistricting Competition Partners, held the competition to show that an open process based on objective

72. Heather Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L.J. 184, 191 (2007).

73. *Id.* at 185.

74. *Id.* at 194.

75. Ohio Secretary of State, Ohio Redistricting Competition, Competition Facts, <http://www.sos.state.oh.us/SOS/redistrictInfoComp/redistrictFacts.aspx> (last visited Apr. 14, 2010).

criteria can generate fair legislative districts.⁷⁶

Any member of the public was allowed to register and submit a redistricting plan for Ohio's congressional districts, using 2000 census data and free software and training provided for the competition.⁷⁷ To qualify for consideration, submissions had to meet three requirements, in compliance with federal law: contiguous districts, equal population across districts, and adherence to Voting Rights Act requirements.⁷⁸ The competition then scored qualifying plans under a pre-determined formula relying on four quantifiable factors: (1) communities of interest (including counties and municipalities); (2) compactness; (3) competitiveness; and (4) representational fairness.⁷⁹ Using this evaluation methodology, the three "winning" plans scored dramatically higher than the actual 2001 congressional redistricting plan, and even the worst scoring submission scored substantially higher than the existing map in terms of the greater number of competitive districts, the reduced number of fragmented communities of interest, and district compactness.⁸⁰

This example, though conducted as only a hypothetical exercise, exemplifies another kind of infusion into the redistricting process of more "politics," again in the sense of public deliberation about a significant policy choice. One of the initiative proposals under serious consideration in the 2010 Ohio legislature⁸¹ draws heavily from the Ohio Redistricting Competition model. Similarly, Micah Altman and Michael McDonald have collaborated on the development of an open source mapmaking software tool, which could allow widespread public participation in the design of district maps.⁸²

This kind of public politicking has the potential to displace the

76. *Id.*

77. Much of the training and administration was provided by Mark Salling, *see* Ohio Secretary of State, Ohio Redistricting Competition: Software training, <http://www.sos.state.oh.us/SOS/redistrictInfoComp/softwareTraining.aspx> (last visited Apr. 14, 2010), another contributor to this symposium, *see* Mark J. Salling, *Ohio's Use of Geographic Information Systems to Demonstrate Public Participation in the Redistricting Process*, 5 DUKE J. CONST. L. & PUB. POL'Y 113 (2010).

78. *Id.* at <http://www.sos.state.oh.us/SOS/redistrictInfoComp/redistrictFacts.aspx>.

79. *Id.*

80. *Id.*

81. *See* H.J. Res. 15, 128th Gen. Assem. (Ohio 2009–10).

82. *See generally* Micah Altman & Michael P. McDonald, *BARD: Better Automated Redistricting*, 34 J. STATISTICAL SOFTWARE (forthcoming 2010); *cf.* Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL'Y 69 (2010).

partisan politicking that has traditionally characterized most redistricting in the United States. Again, any number of variants on this idea can be imagined, whether open public competitions, or citizen assemblies, or electoral reform juries.⁸³ Furthermore, depending on local conditions in various states, this type of broadly participatory approach might occur as an official government process, as some sort of state-sanctioned decennial citizen assembly, or as a private sector, self-appointed effort to create a public consensus.

Many other details of a citizen assembly or jury, such as the size, selection process, and governing rules, or of the structure and administration of a public competition, would of course also need to be settled, as would the substantive criteria for the resulting mapmaking. These details can be especially important to civil rights groups, which understandably may worry that poorly constituted citizen assemblies will result in majority interests swamping minority concerns. The key, therefore, is to structure a meta-level process that will enable states to foster widespread agreement upon these details when they adopt their own version of a transparent, citizen-led (rather than elite-dominated) redistricting institution and accompanying redistricting criteria.

V. OVERCOMING OBSTACLES TO IMPLEMENTATION

On its face, the idea of giving redistricting responsibility to a citizen assembly, or of conducting a public mapmaking competition as more than just a hypothetical exercise, may seem a hopelessly unrealistic and ivory tower endeavor. Especially given how little this essay has spelled out the actual details either of such a process or of the substantive criteria that should constrain it, the idea understandably may provoke the response: “How can this possibly work? What we really need is something like Sam Hirsch’s fully formed model constitutional amendment!”⁸⁴ A citizen-directed reform, however, including one that also entrusts the specification of many of these details to the citizens, may hold greater promise of

83. See generally Snider, *supra* note 71 (discussing electoral reform juries); Chris Elmendorf, *Election Commissions & Electoral Reform: An Overview*, 5 ELECTORAL L.J. 425 (2006). Elmendorf and Ethan Leib have a joint effort underway to develop a more specific design of a citizen assembly. Ethan Leib, *Leib v. Gerken/Elmendorf on Electoral Reform Design: 4 Years Later*, PROFSBLAWG, July 10, 2009, <http://prawfsblawg.blogs.com/prawfsblawg/2009/07/leib-v-gerkenelmendorf-on-electoral-reform-design-4-years-later.html>.

84. See generally Hirsch, *supra* note 56.

actual implementation than any other approach.

For starters, a juriscentric approach to redistricting reform under the federal constitution is a clear long shot.⁸⁵ Also unlikely to succeed, given the current partisan gridlock in Congress, are efforts to impose a federal mandate that states redistrict their congressional seats in a particular way.⁸⁶ Nor do calls for a constitutional amendment seem likely to go very far.⁸⁷ And despite an effort currently underway in Minnesota,⁸⁸ few state legislatures are likely to support legislative efforts to give away their redistricting authority, at least not until a bandwagon effect is underway from other states' reforms. Instead, as in California in 2008 and Arizona in 2000,⁸⁹ redistricting reform is most likely to come through the popular initiative.

Unfortunately, redistricting reform initiatives have usually failed, often by wide margins. One careful study of all twelve redistricting reform ballot measures to face the electorate between 1936 and 2008 concluded that the most important variable affecting the success or failure of such a measure, much more than the specific content of a reform proposal or any recent history of partisan gerrymandering in the state, was the strength of the majority party's opposition to the reform.⁹⁰

The strength (and funding) of the opposition effort may not tell

85. In the wake of *Vieth v. Jubelirer*, 541 U.S. 267 (2004), some scholars have attempted to articulate a justiciable standard for identifying unconstitutional gerrymandering, *see, e.g.*, Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. LEGIS. 243 (2009); Grofman & King, *supra* note 50, at 5 (holding out hope that a *Reynolds v. Sims*, 377 U.S. 533 (1954), moment for political gerrymandering will arrive to usher in a judicially triggered redistricting revolution). To be sure, a juriscentric approach to redistricting reform will not happen before the 2011 round of redistricting, and it also seems doubtful that it will happen in the wake of this round. A handful of *state* constitutions do have as-yet untested provisions that would prohibit undue favoritism of party or candidate.

86. *See* David Schultz, *Regulating the Political Thicket: Congress the Courts, and State Reapportionment Commissions*, 3 CHARLESTON L. REV. 107, 140–43 (2008) (proposing that Congress mandate use of redistricting commissions); *see also* Fairness and Independence in Redistricting Act of 2009, S. 1332, 111th Cong. (2009); Fairness and Independence in Redistricting Act of 2009, H.R. 3025, 111th Cong. (2009) (proposing to prohibit States from carrying out more than one congressional redistricting after a decennial census, and to require States to conduct redistricting through independent commissions).

87. *See* David Brooks, *What's Next, Mr. President?*, N.Y. TIMES, Feb. 12, 2010, at A31.

88. *See* H.F. 198, 86th Legis. Sess. (Minn. 2009–2010) (proposing a four-member temporary redistricting advisory committee selected by the legislative leadership of the State House and State Senate).

89. Arizona Independent Redistricting Commission, Proposition 106, *available at* <http://www.azredistricting.org/?page=prop106> (last visited Apr. 14, 2010).

90. Stephanopoulos, *supra* note 12, at 380.

the complete story, however. In the prototypical reform effort, the majority party's aggressive opposition campaign also has been able to capitalize on two distinct vulnerabilities: (1) the relatively low salience of redistricting reform among the general public and (2) public skepticism towards elite and unaccountable commissions. Both of these vulnerabilities could be neutralized, or at least meaningfully reduced, with a substantially more participatory reform process focusing on citizen control rather than independent commissions.

A. *Overcoming Low Salience*

Professors Joshua Fougere, Stephen Ansolabehere, and Nathaniel Persily recently completed an empirical study of voters' attitudes towards redistricting reform.⁹¹ They concluded that "one of the primary takeaways from our study is that Americans are not well-informed or strongly opinionated when it comes to drawing election districts."⁹² Even recent reform organization polling, after priming respondents about their level of distrust of government, finds that respondents rank redistricting reform below most other reform proposals in terms of how much impact it would have.⁹³ This suggests an obvious disconnect between the general public, on the one hand, and the advocacy and reform communities, on the other, who in contrast to the general public are greatly exercised about redistricting reform, perhaps seeing it as more important than campaign finance reform.⁹⁴

It says almost nothing to suggest that the best way to overcome public apathy is to convert disinterest into interest. But in the redistricting context, what this conversion requires is something other than just a typical information campaign intended to capture public attention and sway public opinion to get voters to support a reform

91. Joshua Fougere, Stephen Ansolabehere & Nathaniel Persily, *Partisanship, Public Opinion and Redistricting* (January 2010) (manuscript on file with Duke Journal of Constitutional Law & Public Policy).

92. *Id.* at 33. Their study included a Pew Research Center survey in which a majority of respondents knew nothing about the redistricting issue. *Id.* at 6 (citing Press Release, Pew Research Center for the People and the Press, Most Have Heard Little or Nothing About Redistricting Debate: Lack of Competition in Elections Fails to Stir Public (Oct. 27, 2006), available at <http://people-press.org/reports/pdf/294.pdf>).

93. See Midwest Democracy Network, *Midwestern Attitudes on Political Reform, June 2008*, http://midwestdemocracynetwork.org/files/pdf/Five_State_2008_PollReport.pdf.

94. See Danny Yadron, *Heart of Reform is in Drawing Political Maps, Not Finance, Some Say*, MEDILL REPORTS - CHICAGO, Oct. 14, 2009, available at news.medill.northwestern.edu/chicago/news.aspx?id=142273 (discussing public response to redistricting in Springfield, Ill.).

measure on Election Day. Instead, the development of public concern about redistricting should occur through a grass-roots mobilization that, long before an initiative measure is on the ballot, invites voters to consider how redistricting ideally should occur, and to play an active part in developing that process. Even if it involves only a tiny sample of the general public, as for instance with a citizen jury or assembly, the opportunity for public participation in the design, rather than just the approval, of a redistricting institution could substantially increase the salience of the issue to the public at large. This early public engagement then could help to energize and inform other citizens as a subsequent initiative campaign unfolds.

Something like the Ohio Redistricting Competition, or the similar open source mapmaking software project that Micah Altman and others have been developing for application nationwide,⁹⁵ could offer one option to meaningfully increase public participation in the redistricting process. Open source mapmaking could prove especially useful if public participation is encouraged and fostered in the design of the competition and the choice of substantive criteria by which proposed maps are judged. Another variant of a more participatory redistricting reform project is outlined below, this one involving a citizen-based mediation among interested stakeholders at the design stage of the reform process. But first one additional note is in order, about the ripeness of this moment for a grassroots, high-salience rethinking of the redistricting process.

Today there is no shortage of public cynicism and distrust about government generally. Even if very little of this cynicism currently is directed specifically at the redistricting process, it is there to be harnessed by the right confluence of mobilizing strategies. The past two decades have witnessed a continuing battle over the structure of the American political system, involving such issues as legislative term limits, lobbying reform, campaign finance regulation, and matters of election administration. In all cases, even though at stake are fundamental issues about representative government and distortions thereto, the public has primarily been involved only by either voting up or down on a state ballot measure, or spectating as reform proposals move through self-interested state legislatures and Congress. Redistricting reform now offers the public an opportunity to take a different and much more active role in leading this

95. Altman & McDonald, *supra* note 82.

continuing battle over the essence of representative democracy.

B. Overcoming Public Skepticism: California and Ohio Revisited

Although currently apathetic about redistricting reform generally, the public has a much stronger position on accountability. Opponents of redistricting reform therefore have had an easy target when the centerpiece of a reform proposal has been an independent commission. As previously described, a majority party's well-funded opposition campaign can easily exploit this public skepticism about elite institutional solutions.

Here, then, the challenge is to structure a reform that removes the partisan gamesmanship from redistricting yet still satisfies the voters' demand for accountability. But accountability does not have to require a partisan institution with members subject to electoral control. Instead, a reform measure can offer the public a form of direct accountability, by putting voters, rather than perceived elites, in charge. A redistricting reform process structured to serve this end could substantially undercut opponents' abilities to poison public support for it by labeling it unaccountable.

In significant part, this may help explain the success of California's 2008 initiative, and the failure of the 2005 efforts in both California and Ohio. As previously observed, in both states the 2005 opposition campaigns drove stakes through the reform efforts with heavy advertising campaigns warning against transferring redistricting authority to unaccountable panels of experts.⁹⁶ Moreover, public fears of unaccountable institutions are only heightened when the coalition proposing the reform is not sufficiently broad-based, as was certainly true in 2005 of both Reform Ohio Now and Proposition 77. Each of these coalitions lacked minority support and, consequently, faced opposition from a variety of groups and organizations.

In 2008, in contrast, Proposition 11 called for the creation of a citizens' commission, consisting of fourteen members selected through an application process open to California voters generally. While admittedly not the only factor that may explain the success of Proposition 11 (the state budget crisis obviously played a substantial role), capitalizing on public participation in this fashion undoubtedly shifted the terrain on which opponents of the measure had to try to

96. *Supra* notes 15–20, 31–36 and accompanying text.

fight. Although this unelected commission is not electorally accountable, it is a citizen panel, rather than an elite panel, intended to be broadly representative of and responsive to California's diverse citizenry.

C. Another Model: The Joyce Foundation Campaign for Accountable Redistricting

The prospects of bringing a redistricting reform effort to fruition are dramatically enhanced when the accountability issue is defused and the public is energized. Both goals can be accomplished through a broadly participatory, citizen-based reform process. The Joyce Foundation is now in the midst of a two-year campaign for "Accountable Redistricting," intended to advance a version of just this approach by developing the "most democratic and participatory" redistricting reform movement yet.⁹⁷ Though this project also encompasses media engagement and public education efforts intended to pave the way for reform, at its core are citizen redistricting commissions and an open source mapping project.

Partnering with Professor Gerken and several members of the *Election Law @ Moritz* team at The Ohio State University (not including the author of this essay), the campaign is developing the citizen commission component of the project with several unique features. One feature is to fully create in one or two states, before the 2011 redistricting cycle is underway, some version of a purely advisory citizen commission to act as a model redistricting body.⁹⁸ This body would produce its own hypothetical legislative maps for public comparison with the official maps to be created by the state's existing redistricting institution. Both the process by which this unofficial body produces its maps, and the resulting maps themselves, could have a substantial impact on the work of the official redistricting body in the 2011 cycle. Moreover, in the long term this "model commission" experiment could offer an attractive alternative for states to adopt as

97. The Joyce Foundation, *Campaign for Accountable Redistricting: A Strategic Blueprint for Midwest States*, at 2 (Nov. 2009).

98. In 2008, Ned Foley and *Election Law @ Moritz*, in partnership with the AEI-Brookings Election Reform Project and Georgetown Law School's Supreme Court Institute, undertook a similar model project, to explore how to minimize partisan influences in a different aspect of the American election system, namely the resolution of post-election disputes. The project involved a special tribunal's resolution of a simulated election contest. For more details, see *McCain v. Obama: A U.S. Supreme Court Hypothetical (One Hopes)*, <http://moritzlaw.osu.edu/electionlaw/electioncourt/index> (last visited Apr. 14, 2010).

their official redistricting process for the 2021 redistricting cycle.

Broad participation is key to the success of this approach. To that end, another unique feature of the Joyce campaign is a “public mediation” process for creating the citizen commission. Participants are now at work in planning for the creation of a model commission in Ohio and Illinois by identifying a diverse and extensive set of stakeholders, and developing a consensus-based process for these stakeholders collaboratively to design a citizen commission. Engaging stakeholders and the public in this process serves to “inoculate”⁹⁹ the effort against the risk that it will be too detached from political realities.

Furthermore, a collaborative citizen commission like that under development through the Joyce campaign could build into it some ongoing flexibility to revisit the criteria deemed important to an “apolitical” redistricting process. For instance, if a preference for competitive districts in one round of redistricting proves in fact to leave too many voters disaffected, as some have cautioned it will,¹⁰⁰ the citizen commission could return to the conference table in advance of the next decade’s round of redistricting to reflect upon whether to adjust the set of mapmaking criteria. In some instances, states might allow the commission to make only an advisory recommendation that the legislature alter a set of statutory criteria. Alternatively, some measure of discretion could be lodged in the citizen commission to itself make such a change, perhaps with a supermajority voting requirement, or simply to decide round-by-round which criteria to favor or how to weight them.

VI. CONCLUSION

The current partisan excesses in redistricting in the United States may partially be the result of the historical blind spot about how completely two parties would dominate American politics. Absent this feature, redistricting by legislative bodies might not be so distorted. Had this development been anticipated, an alternative redistricting process might have been implemented from the outset, as has been done in most other democracies around the globe.¹⁰¹ But the

99. Gerken, *supra* note 72, at 185.

100. *See supra* notes 52–53 and accompanying text.

101. *See* ACE Project, Structure and Rules for Delimiting Electoral Districts, <http://aceproject.org/ace-en/topics/bd/bdb> (last visited Apr. 28, 2010).

unanticipated rise and entrenchment of the two-party system does not need to leave citizens at the mercy of legislators who effectively choose who their constituents will be.

Recent reform developments in both California and Ohio are but a small part of the movement to separate control of the redistricting process from self-interested legislators and political parties. But this movement continually runs up against the problem of mobilizing sufficient support among a public wary of turning over a core function of our democracy to unaccountable elites. There is, nevertheless, reason to hope that in coming decades both substantive and procedural reforms can take root that will provide the redistricting process with greater independence from partisan politics.

These reforms will almost certainly begin in states with a popular initiative, where a broadly participatory, citizen-focused approach will maximize their prospects for success. In one sense it is hard to say that such a citizen effort would be “apolitical”—indeed, one of its advantages is that it involves the public at large in core policy questions. But this process would be distinctly different from the partisan manipulation that so obviously affects most redistricting today.

Thus, although redistricting may be an inherently political affair, gerrymandering need not be a part of it.¹⁰² Rather, with increased public involvement in a redistricting process that the people themselves design and desire, we could replace the non-representation-reinforcing gerrymander endemic today with a benign act of line-drawing, intended to promote whatever “political” ends the citizens have chosen, be it intra-district competition, overall political fairness, or even blind redistricting. While this essay has not attempted to design the details of a broadly participatory redistricting reform process, in describing why such a process has the best chance of success it seeks to encourage efforts to increase public involvement in redistricting. Although it is still too early to assess the impact of California’s Citizen Redistricting Commission, the Ohio Redistricting Competition, or The Joyce Foundation’s Campaign for Accountable Redistricting, these efforts are only three of many possible ways to

102. Here again, the term “gerrymandering” (a term potentially as ambiguous as “apolitical”) is defined to mean manipulation of district lines for partisan or incumbent-protection ends, and not just any line drawing that deliberately advances the policy preferences of those responsible.

jointly increase voter salience about redistricting reform while satisfying the popular demand for public accountability in redistricting.