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Redistricting Commissions in the Western United States

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REDISTRICTING COMMISSIONS IN THE WESTERN UNITED STATES

By Peter Miller and Bernard Grofman*

Abstract

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

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Over the past several decades reformers have sought to take districting out of the hands of the legislature so as to avoid the kinds of problems commonly associated with legislatively drawn plans, such as partisan gerrymanders, incumbency protection plans, and oddly configured districts that fail to respect standard districting principles.¹ In this essay we will focus on congressional districting in the western states.² Seven western states now give primary authority for congressional line drawing to a commission: Alaska, Arizona, California, Hawaii, Idaho, Montana, and Washington. The combination of population growth, direct democracy, and experimentation with redistricting commissions distinguish the West from other regions.³ First, western states tend to be geographically large, but with small state legislatures. Second, eleven of the twenty-two states that provide for direct democracy (in the form of the initiative or referendum),⁴ and eight of the thirteen states that use redistricting commissions to redraw district lines for either Congress or the state legislature, are in the West.⁵ Third, this region of the country has experienced dramatic population growth; only Montana (following the 1990 reapportionment) has lost representation since the redistricting revolution of the 1960s. In the 2010 reapportionment cycle, four of the eight states that gained a seat were in the West.⁶

The characteristics of the redistricting commissions in the West vary across the region. We identify three types of redistricting commissions in the West, and consider how specific features of the commission (e.g., the size, appointment procedure, and voting rule) can influence the redistricting process itself. We will compare congressional districting processes and outcomes in Arizona, California, Idaho, and Washington to those in five other western states

¹ Jeffrey Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 841–844, 852–855 (1996).

² Legislative redistricting is beyond the scope of this paper.

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

⁴ See data collected by the Initiative and Referendum Institute, INST.U. S. CAL., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Jan. 30, 2013).

⁵ See data collected by the Nat'l Conference of State Legislatures, *Redistricting Commissions: Legislative Plans*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/redist/2009-redistricting-commissions-table.aspx> (last visited Jan. 30, 2013).

⁶ JUSTIN LEVITT, *Redistricting and the West: the Legal Context*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* NOTE 3, AT 15, 32–33.

where legislatures have primary authority to draw district maps: Colorado,⁷ Oregon, Nevada, New Mexico, and Utah.⁸ Alaska, Montana,⁹ and Wyoming have only one at-large representative and so are excluded from our analyses. There are several questions we will investigate.

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

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

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

We begin with a brief overview of the redistricting process.

Redistricting in the United States

In U.S. elections, as in virtually all elections in democracies, constituencies are geographically defined and normally consist of contiguous territory.¹⁰ However, in the United States, unlike in virtually every other democratic country in the world,¹¹ redistricting—the decennial redrawing of constituency boundaries for

⁷ In Colorado, while the state legislature is charged with congressional redistricting, legislative redistricting is done by a commission. *Id.* at 18.

⁸ We limit our consideration to states identified by the Census Bureau as in either the Mountain West or Pacific West divisions of the United States. As a consequence, we—in the main—do not address redistricting in other states outside this region.

⁹ The redistricting commission in Montana is also used to redraw legislative districts. *Id.*

¹⁰ In the United States, when a political jurisdiction such as a city is itself comprised of noncontiguous territory (maybe a distant area that was incorporated into the city because it contained a cemetery or a garbage dump or an airport), keeping the city intact within some larger constituency such as a legislative or congressional district is sometimes allowed to override the usual contiguity restriction on constituency boundaries.

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

city, county, state, and national legislatures—is largely done directly by the politicians who will be seeking reelection rather than by neutral administrative bodies. In the United States, it has been not so jokingly said that it is the legislators choosing their voters at least as much as it is the voters choosing their representatives.

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

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

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

¹⁴ New York is often a paradigmatic case of this phenomenon, due to the long-standing Democratic dominance of the state Assembly---a result of the population dominance of New York City in the state---and Republican control of the state Senate---a product of complex reapportionment procedures established in the 1894 state constitution. In their discussion of the 1950s and 1960s redistricting cycles in New York state, with reference to the state Assembly and Senate apportionment formulae, Gus Tyler and David Wells observe, “Republican control [is] built into the very constitution of the state. Gov. Alfred E. Smith used to refer to the New York Legislature as ‘constitutionally Republican.’” See Gus Tyler and David Wells, *New York: Constitutionally Republican*, in THE POLITICS OF REAPPORTIONMENT 221-248 (MALCOLM JEWELL, ED., 1962).

gubernatorial veto applies to redistricting legislation is a stalemate, which puts redistricting into the hands of federal (or sometimes, state) courts.¹⁵

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

¹⁵ Courts play a role in U.S. redistricting that is unlike that in any other country. See HANDLEY & GROFMAN, *supra* note 11, at 61. In particular, one person, one vote considerations, Section 5 of the Voting Rights Act (which applies to jurisdictions within sixteen states, either in the state as a whole or in some part of the state), and Section 2 of the Voting Rights Act, which applies to all jurisdictions, operate to set severe critical constraints on line drawing. See Justin Levitt, *Redistricting and the West: the Legal Context*, in **REAPPORTIONMENT AND REDISTRICTING IN THE WEST**, *SUPRA* NOTE 3, AT 21–23. Court challenges based on these or other issues face the vast majority of redistricting plans for state legislatures or the House of Representatives. In general, a three-judge panel consisting of two district judges and one circuit court judge has original jurisdiction for challenges to congressional or legislative district maps, while the Supreme Court holds appellate jurisdiction. See 28 U.S.C. § 2284 (2011). In Idaho, for instance, there is an automatic review by the state supreme court of the maps drawn by that state’s redistricting commission to ensure compliance with redistricting criteria mandated at either the federal or the state level. See Mathew May & Gary Moncrief, *Redistricting and the West: the Legal Context*, in **REAPPORTIONMENT AND REDISTRICTING IN THE WEST**, *SUPRA* NOTE 3, AT 39, 49. Relatedly, the Washington State Supreme Court has original jurisdiction to hear redistricting litigation. See WASH. STATE REDISTRICTING ACT, RCWA 44.05.130 (2012). In other states, courts may be involved in drawing lines when the state (or a redistricting commission) has failed to reach agreement. See Michael McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001-02*, 4 ST. POL. & POL’Y Q. 371, 377 (2004).

¹⁶ Owen & Grofman, *supra* note 13, at 14.

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

Thus, the consequences of allowing legislators to draw their own lines often have been (1) plans with most districts safe for candidates of a given party, thus partly insulating legislators from the need to be responsive to public sentiments;¹⁸ and (2) boundary lines that are drawn to the convenience of politicians, which satisfy equal-population constraints and are sensitive to minority-vote dilution voting rights issues, but still violate other good-government criteria for districting, such as geographic compactness and respect for municipal and county boundaries,¹⁹ and which are often downright ugly. When it comes to drawing new lines, the set of sitting legislators have a strong bias in favor of plans that will make their own reelection more likely, and the majority party in the legislature has a strong bias in favor of maintaining or strengthening its own position. Thus, we expect there to be various heavy thumbs on the scales when it comes to weighing considerations of good governance against instincts of self-preservation and partisan gain if we allow the legislature (in conjunction with a governor acting out of partisan motives) to decide on new boundary plans.

Concern for these problems has led to three types of proposals for change. First and foremost, there have been repeated attempts by reformers in some states to take redistricting out of the hands of the elected officeholders and create commissions (bipartisan, or a mix of partisan and non-partisan appointees) to draw the lines.²⁰ Such attempts have been most successful in the twenty-two states that allow their constitutions to be amended by a voter-sponsored

¹⁸ Because only a relatively small number of seats in any chamber changes hands in any single election, it is often realigning electoral tides, such as in 1994, 2006, or 2010 in some states (e.g., pro-Republican in the South; pro-Democratic in the New England states) that lead to long term changes in partisan control at the state legislative level.

¹⁹ Bernard Grofman, *Criteria for Redistricting: A Social Science Perspective*, 33 UCLA L. REV. 77, 122 (1985).

²⁰ See generally McDonald, *supra* note 16, for the institutional rules for redistricting and identification of the then twelve states where districting for one or more chambers of the U.S. legislature or for the U.S. House of Representatives is not done directly by legislators and/or the governor. In most of these states, there are commissions charged with line drawing. Although California has been added to the list of commission states since McDonald's article, it is still the case that most commissions have members selected in a partisan fashion (e.g., by state legislative leaders and/or the governor) and others (perhaps only a tiebreaker) who are intended to be nonpartisan, usually selected from voters registered as independent and/or chosen by a super-majoritarian consensus procedure within the commission. See discussion of procedures in the western states below.

initiative. Two of the four western states we investigate (Arizona and California) have commissions that were put in place via citizen initiative. The Alaska, Idaho, Montana, and Washington commissions were created through referendum.²¹ The Hawaii commission was created in the course of the 1968 State Constitutional Convention, which was inspired in part by a 1965 U.S. district court order invalidating the state Senate apportionment scheme as a violation of equal protection.²²

A second reform proposal has been to impose very specific criteria on redistricting in such a fashion as to attempt to constrain the process and prevent at least the more egregious forms of partisan or incumbent protection gerrymanders.²³ Most western states where the legislature is responsible for redistricting impose few requirements on the drawing of districts. At the extreme, Nevada has no formal requirements for drawing districts above and beyond the

²¹ Todd Donovan, *Direct Democracy and Redistricting*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* NOTE 3, AT 111, 119–120. California, after having rejected four different redistricting initiatives over the course of several decades, in 2008 voters passed a ballot initiative that created a commission to draw state legislative districts and then, in 2010, expanded the remit of the California commission to include Congressional line-drawing. See Vladimir Kogan & Thad Kousser, *Great Expectations and the California Redistricting Commission*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* note 3, at 219, 223–24. The passage of a ballot measure in Oklahoma in 2010, State Question 748, expanded the size of the backup commission used in that state for redistricting in the event the legislature fails to act, and changed the membership of the commission from statewide public officials (attorney general, superintendent of public instruction, and state treasurer) to appointees of the legislative leadership and the governor. See Todd Donovan, *Direct Democracy and Redistricting*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* NOTE 3, AT 111, 119–120. Ohio's Issue 2, defeated in the 2012 election, sought to establish a twelve-member redistricting commission, drawn equally from the two major parties and unaffiliated voters, that would use a simple majority voting rule to produce district maps. See *State Issue 2 Rejected by Wide Margin*, DAYTON DAILY NEWS (last visited Feb. 24, 2013), <http://www.daytondailynews.com/news/news/national-govt-politics/state-Issue-2-plan-to-redraw-boundaries/nSygx/>.

²² CRAIG KUGIASKI, HONOLULU: LEGIS. REFERENCE BUREAU, ARTICLE III: REAPPORTIONMENT IN HAWAII, VOL. II OF HAWAII CONSTITUTIONAL CONVENTION STUDIES 37 (1978). See also Norman Meller and Harold S. Roberts, *Hawaii*, in IMPACT OF REAPPORTIONMENT ON THE THIRTEEN WESTERN STATES 113-136 (ELEANORE BUSHNELL, ED., 1970).

²³ The passage in 2010 of Amendment 6 to the Florida State Constitution established additional criteria to the Congressional redistricting process, including drawing compact, contiguous districts that respect existing political and geographic boundaries, with equal population, and that do not favor or disfavor any political party, or diminish the opportunity for racial or language minorities to elect representatives of their choice. See FLA. CONST. art. III, § 20.

federal laws (i.e., population equality and compliance with Section 2 of the Voting Rights Act).²⁴

States using a commission to draw districts tend, in contrast, to have relatively elaborate criteria for the redistricting authorities to follow. For example, in Arizona the establishing legislation for the commission requires it to be attentive to geographic features and local government boundaries and respect communities of interest, and requires that politically competitive districts be drawn to the extent that doing so is compatible with achievement of the other criteria.²⁵ Moreover, incumbents' and candidates' residences are not to be considered. The California commission's mandate also includes explicit redistricting criteria, including drawing compact, contiguous districts, preserving communities of interest, and not considering political data or incumbents' addresses.²⁶ The criteria in Washington are similar to those in Arizona and California.²⁷ The Idaho commission has similar criteria, with the further requirement that pieces of districts be connected by a state or federal highway if the district contains more than one county.²⁸

A third proposal of reformers has been to require more than a simple legislative majority to pass redistricting plans.²⁹ Requiring a legislative supermajority in each house to pass a plan is based in large part on the notion that the parties will be forced to reach agreement on a fair and reasonable plan, since few politicians want the uncertainty and potential chaos of having a court-drawn plan that would disrupt all the existing districts—and that is what would

²⁴ State statutes in Oregon, as an example of a legislative-drawn map with strict criteria, requires the legislature to draw districts that are contiguous, of equal population, use existing geographic or political boundaries, keep communities of interest together, be connected by roads, do not favor a political party or incumbent, and do not dilute the voting strength of language or ethnic minority groups. *See* OR. STAT. §188.010 (2011).

²⁵ *See* ARIZ. CONST. art IV, pt. 2, § 1.

²⁶ *See* CAL. CONST. art. XXI, § 2(d).

²⁷ *See* WASH. CONST. art. II, § 43.

²⁸ *See* IDAHO CODE § 72-1506 (1996).

²⁹ Professor Bruce Cain, former director of the Institute of Government Studies at UC Berkeley, who had been skeptical of taking redistricting out of the hands of the legislature, had been the most prominent advocate of this idea, but his more recent work has opted for a variant of the New Jersey commission “tiebreaker” model, but with explicit instructions to the “independent” commissioner as to a sequential process to use to provide strong incentives to the parties to move closer to one another in the plans that each proposes. *See* Bruce Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L. J. 1808, 1817 (2012).

happen if the legislature (and the governor) failed to reach agreement. However, requiring a supermajoritarian agreement on a plan is analogous in many ways to the situation where there is not unified partisan control of a state. Such situations tend to either result in “sweetheart” incumbency protection deals, or in a deadlock that puts redistricting decisions into the hands of a court, as was the case in the 1970 and 1990 redistricting rounds in California.

The supermajoritarian idea has, however, also been applied to commissions. One of the states we examine, California, operates with a supermajoritarian voting rule requirement.³⁰ Of course, the price paid for supermajoritarianism is, *ceteris paribus*, a lower likelihood of agreement, because of the need for more actors to agree on a plan in order for that plan to pass.

Institutional Forms of Redistricting Commissions

The first and most obvious (but still often neglected) point about commissions is that there are no nonpartisan commissions in the United States,³¹ although there is one example of what we are calling a tripartite commission that has sometimes been mistakenly called nonpartisan. Most commissions are bipartisan, but the results of the commission process in some states may look to have a partisan cast, although it is relatively well established from academic analyses of previous rounds of redistricting that, on average, commission states have lower partisan bias (and greater average responsiveness to changes in voter preferences) than do states where the legislature is the primary instrument of line drawing.³²

³⁰ The Idaho commission requires a two-thirds majority vote to pass a map. IDAHO CONST. art. 3, §2. However, as the commission has six members, a two-thirds majority and a bare majority are mathematically equivalent.

³¹ Iowa’s legislative reference bureau does operate in a nonpartisan fashion, but it does not have final power to pass a plan; it merely gives advice to the legislature, albeit advice that is normally given great weight. See *Legislative Guide to Redistricting in Iowa*, IOWA GOV, <https://www.legis.iowa.gov/DOCS/Central/Guides/redist.pdf> (last visited Feb. 24, 2013).

³² Jamie Carson & Michael Crespín, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 4 ST. POL. & POL’Y Q. 455, 458 (2004).

Bipartisan commission variants

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

Characteristics of Redistricting Commissions in the Western States

State	Year Commission was Established	Number of Congressional Districts (Change since 2000)	Republican House Seat Share	Republican Senate Seat Share	Governor's Party Affiliation	Number of Commissioners	Partisan Affiliation of Commissioners	Selection Process for Commissioners	Voting Rule for Passage	Subject to Section 5 of the Voting Rights Act?
Alaska**	1998	1 (-)	60%	20%	Republican	5	Appointments are made without regard to political affiliation	Appointment by governor, legislative leadership and Chief Justice	Majority	Yes
Arizona*	2000	9 (+1)	67%	70%	Republican	5	2 Democratic, 2 Republican, 1 Unaffiliated Chair	Appointment by legislative leadership, chair selected by commission	Majority	Yes
California	2010	53 (-)	34%	38%	Democratic	14	5 Democratic, 5 Republican, 4 Unaffiliated	Bureaucratic application review and random draw	Supermajority, with majority of each partisan bloc	Yes, for four counties
Colorado**	1974	7 (-)	42%	40%	Democratic	11	5 Democratic, 5 Republican, 1 Unaffiliated	Appointment by governor, legislative leadership and Chief Justice	Majority	No
Hawaii	1968	2 (-)	16%	4%	Democratic	9	4 Democratic, 4 Republican, 1 Unaffiliated Chair	Appointment by legislative leadership, chair selected by State Supreme Court	Majority	No
Idaho*	1994	2 (-)	81%	79%	Republican	6	3 Democratic, 3 Republican	Appointment by legislative and party leadership	Supermajority	No
Montana**	1972	1 (-)	68%	56%	Democratic	5	2 Democratic, 2 Republican, 1 Unaffiliated Chair	Appointment by legislative leadership, chair selected by commission	Majority	No
Washington*	1983	10 (+1)	43%	45%	Democratic	5	2 Democratic, 2 Republican, 1 Unaffiliated Chair†	Appointment by legislative leadership, chair selected by commission	Majority	No

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

The first type of redistricting commissions is what we will call, following common usage, a “tiebreaker” process. Here all but one member of the commission is chosen through partisan mechanisms that are intended to equalize the number of members chosen by representatives of the two leading parties in the state. The remaining members of the commission are chosen by majority agreement among the already appointed partisans, which would require at least one member of the opposite party to join a coalition with the other party’s members.³³ Usually, this tiebreaker becomes the chair of the commission. The commissions in Arizona, Montana, and Colorado fall into this category. While it is possible, in theory, for an agreement to be reached in commissions of this type that did not include the tiebreaker, in practice this never occurs, and usually the tiebreaker ends up in agreement with a plan proposed by just one of the two parties. The decisions of such commissions may generate partisan rancor comparable to what we see from states where one party entirely controls the redistricting process and engages in a partisan gerrymander.³⁴

A second, closely related form of bipartisanship results when the commission membership is exactly evenly split between the parties in terms of appointing power, and a majority of members is needed to pass a plan. This form of bipartisanship, agreement across party lines, is found in the Idaho commission. The Washington commission is a variation on this type of commission, even though it has an odd number of members, because the chair of

³³ There are various rules in the different commissions about what happens when no agreement on a tiebreaker can be reached, but usually the failure of the commission to reach agreement on its own membership triggers some form of state-court intervention, either to select a tiebreaker or to create a court-drawn plan.

³⁴ For example, in the 2000 redistricting cycle in Oregon, when the legislature was unable to create legislative maps, the duty fell to Democratic Secretary of State Bill Bradbury. *See, e.g.* Priscilla L. Southwell, *Controversies in Electoral Redistricting in Oregon*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, **supra** NOTE 3, AT 199, 207–08. Though, after litigation challenges, these maps were put into place with only minimal changes, Republicans claimed Bradbury inflated the share of seats the Democrats could win by extending the city of Portland into multiple legislative districts. *Id.* During the hearings in Oregon that one of us attended in 2011, many witnesses registered their discontent with the old “Bradbury map.” Similarly, Larry Bartels, New Jersey tiebreaker in the 2000 redistricting round, was accused by some Republicans of insuring pro-Democratic legislative plans (see, inter alia, Joseph Gambardello, Tom Avril, and Suzette Parmley, *GOP Sues Over Legislative Redistricting*, Philadelphia Inquirer, April 13, 2001, at B01, Barbara Fitzgerald, *In Control, but Losing a Grip*, New York Times, June 3, 2001, at Section 14NJ ; Column 4; New Jersey Weekly Desk; Pg. 1, Suzette Parmley, *Nonvoter held Sway in Redistricting State Districts*, Philadelphia Inquirer, May 21, 2001, at Jersey Edition page B01.

the Washington commission (who may not be a member of a major political party) is a nonvoting member of the commission.

The third type of bipartisan process can have either an even or an odd number of members, but it requires that a supermajority reach agreement before a plan be enacted. Inevitably, this supermajority will be such as to require agreement that crosses party lines. California's redistricting scheme is sometimes described in the press as nonpartisan, and it is true that it has some nonpartisan elements, such as the initial role of state auditors in picking members of the commission, the fact that public officials are ineligible for membership, and some lottery elements of the selection process.³⁵ It also has bipartisan elements, such as the *voir dire* role for leaders of both parties in vetoing potential commission members, and the need for agreement that includes a majority of the members of each party.³⁶ However, the requirement for concurrence of a majority of the "independent/decline to state" members of the commission in the final plan suggests that it is better characterized as what we might call tripartite.³⁷ The fourth type of bipartisan commission is characterized by an ostensibly bipartisan process, but the composition of the bipartisan commission virtually guarantees that one party will be able to effectively control outcomes. There are a number of legislative commissions that fall into the partisan category, including Connecticut, Maryland (for legislative seats only), Mississippi, and Texas.

Ability to Reach Consensus in a Timely Fashion

As noted earlier, in states under divided partisan control, the chances for deadlock are high. The courts were called upon to draw congressional maps in Colorado (when the legislature failed to pass a map), Nevada (where the Republican governor twice vetoed a plan passed by Democrats in the legislature),

³⁵ CAL. GOV. CODE § 8252(a) (1)–(b) (2013).

³⁶ CAL. GOV. CODE § 8253(e), (g) (2013).

³⁷ Of course, it is at least equally accurate to describe California's Rube Goldberg-like approach to redistricting as essentially *sui generis*.

and New Mexico (where the Republican governor vetoed a plan passed by the Democratic-controlled legislature).³⁸

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

The Arizona Commission in 2011

In Arizona all the potential candidates for commission membership come from a previously delimited pool, excluding present officeholders, and the tiebreaker in Arizona must be someone who is not affiliated with a major party. In a tiebreaker type of commission, such as Arizona's, the independent chair usually casts the deciding vote. Because the independent member of a commission may be seen as siding with the minority party in the state, the potential for the removal of independent commissioners by a legislature (or governor) of the majority party can operate to challenge that independence. In the case of Arizona, the commission chair became in 2011 the subject of ire from the governor, who claimed the chair was acting in a biased manner.³⁹ Alleging that deficiencies in the draft maps, the selection of the mapping consulting firm, and possible violations of state open-meeting laws constituted "substantial neglect of duty,

³⁸ In Oregon, the lower chamber was split 30–30 and the state Senate had a bare Democratic majority of one, 16–14 (see Oregon Legislative Counsel, *Statistical Summary 76th Legislative Assembly*, available at <http://bluebook.state.or.us/state/legis/legis18.htm>). The legislature, however, was able to pass a congressional map.

³⁹ As Bruce Cain observes, "Tensions flared up in Arizona's case because the majority party was not happy with the commission's work. The prospect of a minority party winning the redistricting sweepstakes under a commission system reverses the time-honored political logic of 'to the winner go the spoils' and tests the political majority's tolerance for outcomes it does not favor." See Cain, *supra* note 30, at 1836.

gross misconduct in office, or inability to discharge the duties of office,”⁴⁰ the Arizona governor asked the state Senate to concur in the removal of the chair of the commission. The Senate did concur, but an appeal to the state supreme court overturned the governor’s removal of the commission chair.⁴¹ The commission resumed its work after the reinstatement of its chair and produced congressional and legislative maps in February of 2012, which were precleared by the Department of Justice in April of 2012.

The California Commission in 2011

The presence of “independent” members of a bipartisan or tripartite commission, especially if one of them is the chair,⁴² may facilitate interparty bargaining, and thus may reduce the high risk of deadlock in commissions that require “defection” across party lines for a plan to pass. In the 2010 redistricting round, the California commission was able to reach the necessary agreement of at least nine of its fourteen members to pass the congressional map, with approving votes from five of five Democrats, three of five Republicans, and four of four independents.⁴³

Coverage of the California process gave it extremely high marks on good-government criteria and attributed much of that success to the fact that California commissioners are not appointed by partisan officials, but are instead selected from a pool of applicants who, though members of a political party (or, in the case of the decline-to-state members of the commission, identified as not a Democrat and not a Republican), are not beholden to partisan officials for their appointment. However, we would express a note of considerable caution about the California process. There is still an element of chance that contributed to the success of California’s first redistricting commission. The ability of the

⁴⁰ See ARIZ. CONST. art. IV, pt. 2, § 1.

⁴¹ See *Ariz. Indep. Redistricting Comm’n v. Brewer*, 275 P.3d 1267, 1278 (Ariz. 2012).

⁴² The California commission adopted a rotating-chair system for business meetings and public-comment hearings.

⁴³ The state Assembly and Senate maps were approved with unanimous support from the Democratic and Decline-to-State members of the commission, and with the support of four of the five Republican commissioners (see Timm Herdt, *Tension Rises over Political Maps as Redistricting Commission gives Final Approval*, *Ventura County Star*, August 15, 2011, available at <http://www.vcstar.com/news/2011/aug/15/redistricting-commission-gives-final-approval-to/>).

commissioners to work together and collaborate is arguably due to the personalities involved as much as to the structures of the commission. Furthermore, the commission members were not exactly a random cross section of the public, unless you count the former head of the U.S. Census as a grass root. With the 2011–2012 experience now one for the history books, the political parties may discover how to better “game” the California redistricting commission selection process, and it is not unlikely, in our view, that the 2020 redistricting commission in California may contain enough polarized partisans, that compromise on the maps will be stymied.⁴⁴

The Idaho Commission in 2011

The Idaho commission has an even number of members, evenly divided along party lines.⁴⁵ The voting rule used in Idaho requires four of the six commissioners to approve a map.⁴⁶ The absence of a “neutral” chair means that at least one of the partisan-appointed commissioners must “defect” and vote with the other party's commissioners. Although the commission held public-comment hearings around the state, it was unable to settle on a final map for Congress or for either chamber of the state legislature before the ninety-day deadline. A legal challenge to force the commission to reconvene and approve a map was turned aside by the state supreme court, as the court found it had no power to intervene in the event of no map being approved by the commission. On September 13, 2011, the Idaho Secretary of State called for the creation of a second commission to be charged with creating district maps. A second commission was put into place and, after a truncated series of public-comment hearings and only sixteen days, this second commission adopted a congressional map. One Democratic commissioner joined the three Republican commissioners to approve the map.

⁴⁴ See also Karin MacDonald, *Adventures in Redistricting: A Look at the California Redistricting Commission*, 11 *Election Law Journal*. 473 (2012).

⁴⁵ IDAHO CODE § 72-1502 (2009).

⁴⁶ IDAHO CODE § 72-1505(5) (1996).

The Washington Commission in 2011

Like Idaho's commission, the Washington commission is comprised of an equal number of partisan-appointed commissioners.⁴⁷ The nonpartisan chair is a nonvoting member.⁴⁸ The Washington commission, however, has considerably more time to complete the congressional and legislative maps. Census data was delivered to Washington on February 23, 2011; the commission had to deliver congressional and legislative maps to the legislature by January 1, 2012, or else the state supreme court would have assumed responsibility for the maps and would have had to produce them by March 1, 2012.⁴⁹

After a lengthy series of public hearings (from May 17, 2011 to January 1, 2012) the commission unanimously approved congressional and legislative maps, which were then approved by the legislature on February 1.⁵⁰ A concerned citizen of Washington then challenged the maps on the grounds that they violated the redistricting criteria.⁵¹ It appears the lawsuit has been abandoned.⁵²

Redistricting Input and Output

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

⁴⁷ WASH. ADMIN CODE § 417-01-105 (2013).

⁴⁸ *Id.*

⁴⁹ *Guide to Redistricting*, SOS.WA.GOV, http://www.sos.wa.gov/_assets/elections/RedistrictingGuide.pdf (last visited Feb. 8, 2013).

⁵⁰ WASH. ST. REDISTRICTING COMM'N, <http://redistricting.wa.gov/> (last visited Feb. 8, 2013).

⁵¹ Brief of Petitioner on Interim Plan at 1, *In re 2012 Wash. State Redistricting Plan*, No. 86976-6 (Wash. Mar. 1, 2012).

⁵² See Stevie Mathieu, *Redistricting Champion Halts Fight*, COLUMBIAN (October 27, 2012), <http://www.columbian.com/news/2012/oct/27/redistricting-champion-halts-fight> (describing how ill health caused petitioner to abandon case).

Public Comment and Redistricting

The growth in public hearings on redistricting is part of a broader trend that stretches back to the Economic Opportunity Act of 1964 and its emphasis on “maximum feasible participation.”⁵³ As Arnstein observes, “The idea of citizen participation is a little like eating spinach: no one is against it in principle, because it is good for you.”⁵⁴ Proponents point out that consultation with the public can increase the information and range of perspectives available to policymakers.⁵⁵ Public comment is also one way in which redistricting authorities can determine the boundaries of a community of interest.⁵⁶

Public hearings took place in each of the western states during the mapmaking process in 2011. Many state statutes require redistricting authorities to schedule a number of public meetings to gain comment, suggestions, and feedback from the public related to redistricting.⁵⁷ Under this broad framework of public hearings, however, the western states exhibited diversity in the public-involvement aspect of redistricting. For instance, the California commission, as

⁵³ Lillian B. Rubin, *Maximum Feasible Participation: The Origins, Implications, and Present Status*, 385 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 15 (1969).

⁵⁴ A Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216, 216 (1969).

⁵⁵ Helena Catt & Michael Murphy, *What Voice for the People? Categorising Methods of Public Consultation*, 38 AUSTL. J. POL. SCI. 407, 407–08 (2003).

⁵⁶ Karin MacDonald & Bruce Cain, *Community of Interest Methodology and Public Testimony*, 3 U.C. IRVINE L. REV. (forthcoming 2013). Due to space limitations, we do not directly address the degree to which suggestions made by the public on draft or final plans at the hearings are adopted, or the relative impact of ordinary citizens and organized groups, or whether some types of input (whole plans, plans for particular districts, or suggestions about smaller units of geography) are likely to be influential in the process to create final district maps. These issues are discussed in detail in a conference paper that is still in the process of final revision. Peter Miller & Bernard Grofman, *Evaluating Public Comment into the Redistricting Process in the American States*, Paper Presented at the International Political Science Association Madrid, 2012 XXII World Congress of Political Science (July 8–July 12, 2012), available at <http://www.ipsa.org/my-ipsa/events/madrid2012/paper/evaluating-public-comment-redistricting-process-american-states..>

⁵⁷ See, e.g., ARIZ. CONST. art. IV, pt. II, § 1(17) (describing the requirements for redistricting); CALIF. CONST. art. 21, § 2(b) (same); COLO. CONST. art. V, § 48(1)(e); IDAHO CODE §72-1505(4) (1996) (same); Nev. Joint Standing Rule 13.6 (2011) (same); WASH. REVISED CODE § 44.05.080(4) (2011) (same). The Colorado Constitution does not require the Congressional Redistricting process to include public comment hearings, but the 2011 cycle did include such hearings. Likewise the rules in effect in New Mexico and Utah did not explicitly require public hearings, but such hearings were held in the course of the process to create Congressional and legislative district maps. See NEW MEXICO LEGISLATURE: 2011 NEW MEXICO REDISTRICTING, <http://www.nmlegis.gov/lcs/redcensus> (last visited Feb. 25, 2013); REDISTRICT UTAH, <http://www.redistrictutah.com/perspective/grama> (last visited Feb. 25, 2013).

well as the Oregon legislative committee and the Arizona and Washington commissions, held a lengthy process of hearings before creating any draft maps and held a second round of hearings to solicit feedback from the public on the draft maps. By contrast, the Idaho commission and Utah and New Mexico committees held only one round of hearings, and did not solicit feedback from the public on draft maps.

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

Notes: The Nevada draft hearings indicate public-comment hearings conducted by the special masters. The 1st and 2nd Commissions in Idaho are separated by a slash. Numbers on the left indicate the 1st Commission, the right the 2nd Commission

The number and location of public-comment hearings in each state is presented in table 2. With the exception of Nevada’s, each redistricting authority held initial planning meetings in the state capital, and then subsequent hearings around the state. Once the draft maps were complete, however, the redistricting authorities tended to remain in the state capital for further hearings. Only the commissions

in Arizona, California, and Washington held field hearings after the draft maps were completed.

The first-named author directly observed hearings in nine of the western states.⁵⁸ A typical course for one of these public hearings included an introduction by the redistricting authority and some remarks on the redistricting process followed by comment from members of the public. There were some variations on specific features of the hearings, such as the authorities asking questions of the person providing testimony, the length of time afforded to each person (or even if time limits were imposed), and the time of day for a hearing (whether in midmorning, afternoon, or evening). A cartographer's observation of one hearing in the course of the 1990 process in New York could just as easily have been an observation of a hearing in the 2010 round, and gives a flavor of how these public-comment hearings proceeded.

On the raised platform at the front of the room sat a half-dozen men and one woman, all in weekday business dress. In front of the dais, two easels holding large maps faced the spectators. A balding, slightly overweight man with a raspy voice faced the people on the platform and spoke into the microphone. He was upset about both the map and the state legislature, which had appointed the people on the dais—the people who had drawn the map. The young woman who testified after him was no less indignant. . . . If this event had been a movie, we would have missed the beginning and much of the plot. But although a dozen people had spoken since 11 A.M., what they said was probably no different from what we heard later: everyone denounced a small part of the map, some particular boundary. Anyone who might have been pleased with the map and its boundary lines kept silent or stayed home.⁵⁹

Integrity of Political Subdivisions

Keeping political subdivisions of a state in the same district to the greatest extent feasible is one way to support a claim that the districting is based on neutral

⁵⁸ That author also attended a hearing in Denver of the Colorado Reapportionment Commission on legislative redistricting, two hearings of the Montana Districting and Apportionment Commission, and two public meetings of the Wyoming legislative committee in charge of legislative redistricting.

⁵⁹ MARK MONMONIER, *DRAWING THE LINE: TALES OF MAPS AND CARTOCONTROVERSY* 190–91 (1995).

principles.⁶⁰ Moreover, unnecessarily splitting a city or county can lead to confusion about district boundaries, which in turn leads to lower rates of recalling the incumbent's name and higher rates of voter roll-off.⁶¹ A consistently applied policy of preserving city and county lines where feasible leads to greater continuity in the district configurations across redistricting cycles, allowing for representatives to develop long-term relationships with particular constituencies.⁶² Furthermore, as evidenced by our observations of public-comment hearings in the course of the 2011 redistricting cycle, slicing a city into multiple districts motivates members of the public from that city to voice their dislike with the existing district maps and to advocate keeping cities together whenever possible.

We examine the district maps as they were drawn in 1992, 2002, and 2012, and count the number of cities and counties that are split among more than one congressional district.⁶³ The table below shows the results.⁶⁴

⁶⁰Richard L. Morrill, *Redistricting, Region, and Representation*, 6 POL. GEOGRAPHY Q. 241, 251 (1987).

⁶¹Danny Hayes & Seth C. McKee, *The Participatory Effects of Redistricting*, 53 AM. J. POL. SCI. 1006, 1006 (2009); Jonathan Winburn & Michael W. Wagner, *Carving Voters Out: Redistricting's Influence on Political Information, Turnout, and Voting Behavior*, 63 POL. RESEARCH Q. 373, 373 (2010).

⁶²As we would expect, there is some alteration in a representative's behavior when redistricting changes affect the demographic and ideological characteristics of the constituency. But the magnitude of this shift does not appear to be that great. Michael H. Crespin, *Serving Two Masters: Redistricting and Voting in the U.S. House of Representatives*, 63 POL. RESEARCH Q. 850, 855 (2010).

⁶³The California Redistricting Commission, as part of its final report, mentions the cities and counties it splits in its maps. The numbers we report are higher than the commission's because the commission only counted excluded cities (or counties) too large to fit into a single district. We, by contrast, count all split cities and counties. For example, the County of San Francisco is split into two congressional districts (the twelfth and fourteenth). The commission does not consider San Francisco county split, as the population of the county is too large to fit into a single congressional district, but our analysis includes cases like San Francisco County as a split political subdivision. We opt for this coding scheme to be consistent through time and across states, while the redistricting authorities elsewhere may not be as detailed in their reports. STATE OF CAL. CITIZENS REDISTRICTING COMM'N, FINAL REPORT ON 2011 (2011).

⁶⁴We encountered an error with tabulating the number of split places and counties. Overlaying the maps of congressional districts, counties, and places resulted in a large number of slivers that are, as far as we can determine, artifacts of small differences in the maps we used. These slivers tended to be long and narrow shapes proximate to county or place boundary lines and, as a result, very small relative to counties or places. This error initially led to a greatly inflated count of divided counties and places. We sought to eliminate the slivers by sorting in order of increasing area and then manually deleting them from our dataset. We are indebted to Doug Johnson of the Rose Institute in Claremont, California (personal communication, September 2012) for pointing out that our split-county counts for Arizona were erroneous, which led us to identify this problem.

City and County Splits in Western Congressional Redistricting Maps

	Number of Split Cities (in %)			Number of Split Counties (in %)		
	1992	2002	2012	1992	2002	2012
Arizona	13	14	19	33	53	47
California	18	41	9	38	43	43
Colorado	6	6	4	9	11	9
Hawaii	4	2	2	20	20	20
Idaho	1	1	1	2	2	2
Nevada	11	16	16	6	13	13
New Mexico	4	6	6	15	15	18
Oregon	6	6	5	11	11	11
Utah	1	6	6	3	10	17
Washington	6	9	2	21	18	23

Notes: Bold type indicates commission-drawn maps. Italic type indicates court-drawn maps. Plain text indicates maps drawn by the state legislature. The count of cities in each state is based on the number of villages, towns, and cities (as identified by the Census) and excludes Census-designated places, except in Hawaii where the only division below the county level is a Census-designated place.

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

We have only four cases of a natural experiment where we can compare redistricting in the same state under two different types of redistricting authorities. Looking at the data from California, we see that the transition from a legislatively drawn plan to a commission-drawn plan is associated with a sharp decrease in the number of cities being split into multiple congressional districts. On the other hand, in Arizona the commission has, in each of the two past decades, drawn a map with more city and county splits than was true for the

court-drawn plan in the 1990s. Idaho, with only two districts, does the best in terms of keeping cities and counties together, but there is no change corresponding with the adoption of a commission. In Oregon we cannot really distinguish legislative and court-drawn plans in terms of city and county cuts; they are all low.

The Washington and Hawaii commissions have been consistently able to keep most cities and counties together in a single congressional district. If we compare the five commission states to the two states with legislatively drawn maps, we get statistically indistinguishable values for mean city and county splits, but given the differences in size and governmental geography, we do not pay much attention to this finding. Still, on balance, the claim that commissions are better for preserving political geography than legislatures does not seem especially strong, especially if we remove California. And, even for California, the improvement is only for cities, not counties.

District Compactness

Compactness refers to the extent to which a district's shape differs from the perfect regularity of a circle or a regular polygon such as a square. Niemi et al. note that "we think of circles and squares as compact and long, narrow forms; areas with protruding arms or fingers, and 'odd' shapes like salamanders, as not compact."⁶⁵ District compactness is a very common criterion for redistricting authorities to wish to implement.⁶⁶

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

Some scholars conclude compactness is a safeguard against most sorts of intended foul play with district lines. "The diagnostic mark of the gerrymander is the noncompact district."⁶⁷ The noted political geographer Richard Morrill concurs: "What is suspect are extreme, egregious and convoluted irregularities which are not justified and probably cannot be. Why is extreme irregularity

⁶⁵ Richard G. Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155, 1158 (1990).

⁶⁶ Grofman, *supra* note 20, at 85.

⁶⁷ Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 302 (1991).

prima facie suspect? Why else would anyone go to the considerable effort?”⁶⁸ Lowenstein and Steinberg, on the other hand, assert in no uncertain terms that “[t]here is no basis for the assumption that oddly shaped districts are signs of ‘gerrymandering’ . . . [so] what basis can there be for the *a priori* assertion that the purposes of those who drew the lines were necessarily improper?”⁶⁹ And Stephanopoulos goes even further in arguing that compactness may have undesired consequences.⁷⁰ He asserts that too much of a focus on compactness tends to produce districts with a high degree of heterogeneity in terms of demography, socioeconomic status, and ideology, which, in turn—in his view—reduces participation, reduces effective representation, and increases polarization.⁷¹

We do not need to take a position in this debate. Rather we will simply report one standard measure of compactness and then compare compactness scores over time and across different redistricting regimes.⁷² The simplest way to think about compactness is in terms of the irregularity of a district’s perimeter. One standard way to measure compactness is in terms of how large an area a district encompasses relative to what we would find if that perimeter were the perimeter of a regularly shaped figure, such as a circle. Following Polsby and Popper,⁷³ we calculate compactness in the following manner:

⁶⁸ Morrill, *supra* note 60, at 249.

⁶⁹ Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 22 (1986).

⁷⁰ Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 79 U. CHI. L. REV. 1, 40–41 (forthcoming 2013).

⁷¹ *Id.*

⁷² Ill-compact districts have long tended to be highlighted in the popular media, usually in the context of ‘name and shame’ going back to the original ostensibly salamander-like ‘gerrymander.’ For example, commentators remarked that the Louisiana fourth district, as it was drawn in 1992, resembled the mark of Zorro. MARK MONMONIER, *BUSHMANDERS AND BULLWINKLES: HOW POLITICIANS MANIPULATE ELECTRONIC MAPS AND CENSUS DATA TO WIN ELECTIONS* 56 (2001). But, even when found as a criterion mandated by a state statute or even the state constitution, the legal status of ill-compactness is hard to pin down, at least for federal courts. While ill-compact districts have been struck down by the Supreme Court, it has always been in the context of other constitutional violations, such as use of race as the preponderant criterion for districting. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 957 (1996) (holding that strict scrutiny is used to determine the constitutional validity of redistricting when race is used as the criteria). And federal courts have vigorously resisted using ill-compactness as sufficient evidence of partisan gerrymandering to strike down a plan as an unconstitutional partisan gerrymander.

⁷³ Polsby & Popper, *supra* note 67, at 348–49.

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

In effect we are normalizing the area of the district relative to that of a circle of the same perimeter. Increasing values indicate a lower degree of contortion present in the district's shape, to a maximum value of 1, when the district is a circle.⁷⁴

Average Compactness for Western Congressional Districts

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

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

Table 4 reports the average Schwartzberg compactness for each of the western states over the previous three redistricting cycles.

The western states exhibit a variety of patterns when examining district compactness. First, commissions can produce more compact districts than court-drawn districts, such as in Arizona. Commissions can also produce roughly similar levels of compactness to the maps drawn by legislatures, as in Idaho. The Washington commission has produced similar levels of compactness since 1992. The California commission map is marginally more compact than the 2002 map

⁷⁴This is a variant of the Schwartzberg index. Joseph E. Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of 'Compactness'*, 50 MINN. L. REV. 443, 444 (1966). See also Niemi et al., *supra* note 65, at 1155 (identifying dispersion and perimeter length as necessary components to compactness).

drawn by the legislature, but less so than the 1992 court-drawn map. The low levels of compactness in Hawaii are more likely due to the unique challenges of drawing island-based districts than to the use of a commission.

Legislatures, to their credit, do not appear to draw wildly uncompact districts (with the exception of California in 2002), and appear to be consistent across cycles, as in Nevada and Utah from 1992 to 2002.

The four cases where the same authority draws the district lines and the number of districts increases all show a marginal decrease in average compactness over time.⁷⁵ By contrast, courts tend to draw, on average, more compact districts in rounds subsequent to legislatively drawn maps.

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

Competitive Seats

In many of the western states' redistricting commissions, fostering competition is one of the factors the commission is required to pay attention to, though it usually plays only a secondary role. It is commonly thought that, on the one hand, creating competitive districts will result in more moderate members of Congress and, on the other hand, that state legislatures are less likely to draw competitive districts than commissions, since drawing districts where your party has only a slight advantage is a risky strategy if there is electoral volatility.⁷⁶ Although there is evidence from previous redistricting rounds in support of the second proposition,⁷⁷ there is no real evidence for the proposition that, *ceteris*

⁷⁵ See the 2002 round in Nevada compared to 2000 round, and the 2012 rounds in Arizona, Utah, and Washington compared to the 2002 rounds in those states. Table 4, *infra*, at 42.

⁷⁶ Owen & Grofman, *supra* note 13, at 5.

⁷⁷ See, e.g., Carson & Crespin, *supra* note 33, at 455 (arguing that more competitive elections occur when courts and commissions are actively involved in the redistricting process); see also *id.* at 455 (finding evidence for greater responsiveness which implies more competitiveness in districts drawn by courts).; cf. JONATHAN WINBURN, *Does it Matter if Legislatures or Commissions Draw the Lines?*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* note 3, 137,145–156.

paribus, more moderate representatives will be elected from competitive districts.⁷⁸

Rather, what is known is that while there is some tendency for representatives to drift from the national party position in the direction of the median voter in their own district, party is far and away the best predictor of a representative's roll-call behavior. Indeed, there is both supportive theory and some evidence that, controlling for the location of the median voter along a ideologically continuum in the district, the difference in roll-call voting scores between members of Congress from opposite parties elected as a result of competitive contests will be as large or larger than the difference in roll-call scores between members of Congress from opposite parties elected in the course of less competitive campaigns.⁷⁹ Relatedly, Brunell and Grofman⁸⁰ and McCarty, Poole, and Rosenthal,⁸¹ among others, find little or no evidence to support the claim that gerrymandering contributes to polarization in the United States House.

⁷⁸ James Adams, Thomas Brunell, Bernard Grofman, and Samuel Merrill. *Why Candidate Divergence Should be Expected to be Just as Great (or even Greater) in Competitive Seats as in Non-Competitive Ones*, 145 Public Choice 417-433 (2010).

⁷⁹ James Adams et al., *Do Competitive Districts Produce Centrists*, in NEW DEVELOPMENTS IN PARTY COMPETITION MODELS (TITLE TENTATIVE) (Daniel Kselman & Norman Schofield eds.) (forthcoming).

⁸⁰ Thomas Brunell & Bernard Grofman, *Evaluating the Impact of Redistricting on District Homogeneity, Political Competition, and Political Extremism in the U.S. House of Representatives, 1962-2006*, in DESIGNING DEMOCRATIC GOVERNMENT 117, 118 (Margaret Levi et al. eds., 2008).

⁸¹ Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666, 666 (2009).

Proportion of Competitive House Districts in the West

State (Districts)	1992	1994	1996	1998	2000
Arizona (6)	17	0	17	33	0
California (52)	21	15	17	10	13
Colorado (6)	0	0	0	17	0
Hawaii (2)	0	0	50	0	0
Idaho (2)	0	0	50	50	0
Nevada (2)	50	50	0	50	50
New Mexico (3)	0	0	0	67	33
Oregon (5)	20	40	40	20	0
Utah (3)	33	33	33	33	0
Washington (9)	22	67	56	33	11
State (Districts)	2002	2004	2006	2008	2010
Arizona (8)	13	0	25	13	50
California (53)	2	2	6	9	8
Colorado (7)	14	29	14	0	14
Hawaii (2)	0	0	0	0	50
Idaho (2)	0	0	50	50	50
Nevada (3)	0	0	33	33	33
New Mexico (3)	0	33	33	0	0
Oregon (5)	20	20	0	0	20
Utah (3)	33	0	0	0	33
Washington (9)	11	11	11	11	44

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

Table 5 shows the proportion of competitive seats (operationalized as seats won with a vote margin of ten percentage points or less) in the western states between 1992 and 2010. A number of patterns are apparent. Competition is fairly stable within states, but there are election-specific effects involving especially competitive or especially uncompetitive environments in some states. A natural basis of comparison is the within-state comparison between when a state had legislatively drawn districts and when it adopted a commission. The transition to a redistricting commission in Arizona and Idaho appears to be associated with a modest increase in competitive seats in Arizona, and a decrease in Idaho. California has been a particularly uncompetitive state since 1992, with a marked decrease in competitive seats after the 2000 redistricting cycle. Only one U.S. House seat switched parties in California between 2002 and 2010.

Proportion of Competitive Seats in 2012

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

Notes: Bold type indicates commission-drawn maps. Italic type indicates court-drawn maps. Plain text indicates maps drawn by the state legislature. These results are based on unofficial election tabulations, as official election results were not available as this article went to press.

The 2012 elections illustrate two stories about competition and redistricting. The first interpretation, based on the evidence from California, leads to the claim that the newly instituted commission succeeded in drawing more competitive districts than any time since the 1996 elections, and that seven incumbents in California were voted out of office.⁸²

A second interpretation leads to a more mundane conclusion: the elections of 2012 were business as usual. In the western states, other than California, the 2012 elections were unremarkable compared to past electoral cycles. The recent past in Arizona suggests three to four of the congressional seats will be competitive, and the 2012 election is within that range. The other commission states show no change in competition. The court-drawn districts in Colorado and New Mexico show no increase in competition. The proportion of competitive seats increased from one to two in Nevada, but the size of the delegation also increased from three to four seats. Even in California it appears that eighty-five

⁸² Drawing two or more incumbents into the same district is one way in which incumbents can be sure to be removed from office. However, in the 2012 redistricting cycle in the western states, we find only two districts in California that featured two incumbents contesting a congressional seat.

percent of the seats are solidly held by one of the parties, regardless of who draws the districts.⁸³

Attributing an increase in competition in congressional elections solely to the redistricting practices disregards the use of different electoral rules that can directly affect electoral competition. In particular, the “top two primary”—where the winner and runner-up in an open-primary election, who may be members of the same party, compete in the general election—is used in Washington (since 2008) and California (since 2012).⁸⁴ In no case since 2008 in Washington have two members of the same party competed in a congressional general election. The 2012 elections in California, by contrast, included eight such congressional races, two districts where Republicans competed in the general election and six contested Democratic races. Five of the seven defeated incumbents were ousted by members of their own political party as a result of this new primary system. Thus, evidence from California suggests that the commission succeeded in drawing a larger proportion of competitive seats, but turnover in the members of the congressional delegation is a result of changes to the primary election system.

Finally, we would observe great variation in the proportion of competitive seats in both commission and noncommission states. For example, the parity between Democrats and Republicans in the Oregon legislature contributed to a sweetheart deal for the incumbents there. The final congressional maps were passed 58–2 in the state House and 24–6 in the state Senate. None of the congressional races in 2012 in Oregon were competitive. In Utah, where the Republican Party firmly controls the legislature and holds the governor’s seat, we had limited competition for a different reason. This is an apparent partisan gerrymander. The congressional maps were passed 50–19 in the state House and 20–5 in the state Senate. There was only one competitive congressional race in

⁸³ We would also note that the evidence from previous rounds of redistricting nationwide suggests that the first election after reapportionment is the high-water mark of the decade in terms of competition, absent special circumstances such as those present in 1994.

⁸⁴ Washington Initiative 872 was approved in 2004 and became effective in 2008. WASH. INITIATIVE MEASURE NO. 872 (2004). California Proposition 14 was approved in 2008 and became effective in 2012. CALIF. CONST. art. 2, § 5 (amended in 2009 by Proposition 14).

Utah in 2012, in the area around Salt Lake City (involving the lone Democratic representative from Utah).

Conclusions

Justice Louis Brandeis in 1932 famously declared states to be laboratories, free to pursue social experiments that can serve as an example for other states. Redistricting is one such area of experimentation, with some western states opting to use an appointed commission rather than the state legislature to draw congressional and legislative districts. As we have seen, the evidence for the success of commissions in the western states is mixed, with only acceptance of public input clearly better, on average, in the commission states. But as we have argued, with respect to commissions, the devil is in the details. Not all commissions are alike. Indeed, quite the contrary; they differ in their organizational structures and in the criteria they pay greatest attention to. Most importantly, in no state is there nonpartisan line drawing in the way that line drawing is handled administratively (and effectively) in other first-past-the-post systems in English-speaking countries such as The United Kingdom and Canada.⁸⁵

In the United States, there have not been attempts to emulate redistricting practices in The United Kingdom or Canada. Instead, California⁸⁶ and New Jersey⁸⁷ have been put forward as models for best practices. We have previously noted our caveats about the California commission's complex Rube Goldberg-like design and our fears that the requirement for agreement across partisan lines may, the next time around, lead to deadlock in that commission. But we would also add that commissions require politically skilled and highly knowledgeable

⁸⁵ See generally HANDLEY & GROFMAN, *supra* note 11 (describing and comparing the voting rules in various countries).

⁸⁶ Vladimir Kogan & Thad Kousser, *Great Expectations and the California Redistricting Commission*, in REAPPORTIONMENT AND REDISTRICTING IN THE WEST, *supra* note 22, at 219, 219-220; Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizen Commission Final Plans*, 4 CALIF. J. POL. & POL'Y 1, 1 (2012); INST. FOR GOVERNMENTAL STUDIES, *Supreme Court Cites IGS Research in Redistricting Decision*, CAL. PUB. AFF. REP. 3 (2012).

⁸⁷ Cain, *supra* note 30, at 1808. See also Donald Stokes, *Is There a Better Way to Redistrict?*, in RACE AND REDISTRICTING IN THE 1990S 345, 364-365 (Bernard Grofman ed., 1998) (evaluating New Jersey's process for redistricting).

leadership. The members of the California commission in 2011 included a past director of the U.S. Census, and they were mostly highly educated professionals. The New Jersey commissions in recent decades had the benefit of being chaired by leading academics, including two past deans of the Woodrow Wilson School at Princeton, Donald Stokes and Larry Bartels.⁸⁸ The tiebreaker in 2011 in the New Jersey redistricting commission was Alan Rosenthal, professor of public policy at the Eagleton Institute at Rutgers University and a distinguished expert on the state's politics who is highly respected by both parties for his public service.⁸⁹

These important caveats aside, we are sympathetic to the view that processes can be chosen that make “good redistricting” more likely. In particular, we share Cain's view⁹⁰ that a process that explicitly tries to foster the kind of back-and-forth bargaining that seems to be the modus operandus of tiebreakers in New Jersey, with the independent member serving both as a facilitator of compromise and as an ultimate arbiter, can work well. In this context, a quote from Professor Rosenthal, after he finished his commission service, is informative:

I think the major role of the independent member . . . is to negotiate constantly and try to bring (the parties) closer together. And then when the time runs out, and they're as close as they're going to come, you have to choose which one you think meets your criteria.⁹¹

In this institutional design, politics is not removed from the process, but the parties' incentives to propose plans that satisfy the criteria put forward in the commission design and enforced by the arbiter are strong, according to the maxim from *Federalist* 51 “ambition is being made to counter ambition.”⁹² We

⁸⁸Eric Pace, *Donald E. Stokes, 69, Leading Political Scientist*, N.Y. TIMES (Jan. 29, 1997), <http://www.nytimes.com/1997/01/29/nyregion/donald-e-stokes-69-leading-political-scientist.html>; Larry E. Bartels, *Curricula Vitae* (August 2011), PRINCETON U., <http://www.princeton.edu/~bartels/vitae.pdf>.

⁸⁹Alan Rosenthal, *Profile*, RUTGERS EDWARD J. BLOUSTEIN SCH. PLAN. & PUB. POL'Y, <http://policy.rutgers.edu/faculty/rosenthal> (last visited Feb. 2, 2003).

⁹⁰Cain, *supra* note 30, at 1838.

⁹¹ Matt Feldman, *Rutgers Professor Appointed to Redistricting Commission Downplays Newfound Power*, N.J.COM (Mar. 5, 2011), http://www.nj.com/news/index.ssf/2011/03/rutgers_professor_appointed_ti.html.

⁹²However, in this politicized bargaining process, as the redistricting process it has operated in New Jersey in the past, there is little role for public input.

would emphasize, however, that this is a model of redistricting very far from the “let (ordinary) citizens come together and draw a good map” that appears to be the California dream, however far it may be from the reality of California’s actual commission process.