

TO DIVIDE AND NOT CONQUER

Preventing Partisan Gerrymandering with Independent Nonpartisan Commissions

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NOTE

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On November 2, 2010, California voters were asked to decide on Proposition 20, which would remove elected representatives from the process of determining the boundaries of California's districts in the U. S. House of Representatives and transfer that authority to the Citizens Redistricting Commission, which would be comprised of Democrats, Republicans, and representatives of neither party (Redistricting of Congressional Districts). The proposition was passed with 61.4% voting "yes" (Statewide Ballot Measures). California is one of twenty-one states that have adopted the use of an independent commission to draw congressional district lines (Redistricting Commissions). These states have realized that the reorganization of voting districts can be misused in order to cause a single political party to gain an advantage over other parties. The responsibility of appropriating United States legislative districts, rather than being the responsibility of state legislatures or courts, would be best placed in the hands of independent nonpartisan commissions, and these commissions must be given certain principles to which they must adhere.

When states are apportioning United States congressional districts and subsequently redrawing district lines, they must deal with the possible occurrence of partisan gerrymandering. Gerrymandering is the process of one population—in the case of this paper, a political party—to gain an advantage over others by changing district lines. The risk of gerrymander occurs when state legislators exploit the process of reapportioning federal legislative district lines for partisan political gains (Drachman and Langran 2008, 135). Legislators belonging to the political party in power may attempt to create "safe seats" for their candidates, or the party may force incumbents of other parties to run against each other (Drachman and Langran, 132-3). Bipartisan and, to a lesser extent, partisan plans for redistricting have been known to effectively preserve incumbency advantage (Lyons and Galderisi 1995, 868), thus preventing an opposing party from gaining the representative seat.

Party influence makes it difficult to prevent bias from affecting the redistricting process, even when a lawsuit against a state legislative body is brought to the courts. In the case of *Vieth v. Jubelirer* (2004), Pennsylvania Democrats brought suit in federal district court against the State after the Republican-controlled General Assembly passed a redistricting plan that allegedly violated both Article I Section 2 of the United States Constitution (the "one person, one vote" requirement) and Article I and the Equal Protection Clause of the Fourteenth Amendment, which prevents gerrymandering (*Vieth v. Jubelirer*, sec. 1, para. 1-2.). The court found that "no judicially discernible and manageable standards for adjudicating claims of gerrymandering exist" (*Vieth v. Jubelirer*, sec. 2, para. 1). This means that, not only can state legislators corrupt the process of apportionment, but the courts have an extremely difficult time attempting to police them.

Because of the issues that come with allowing legislators and courts to take charge of reapportionment, many states began giving this duty to independent agencies, some of which are

nonpartisan commissions. The ideals of an independent nonpartisan commission are that it would be objective in drawing boundary lines, creating competitive districts that would increase voter turnout by giving voters more confidence that their votes counted (Drachman and Langran 2008, 134). The result would be fewer cases contesting these redistricting plans, like *Vieth v. Jubelirer*, coming to court. Heather K. Gerken (2004) explained that independent commissions would not only generate new scholarship regarding district planning as a way of serving America's democratic aims but it would also “help extricate the Court from making such first-order judgments. And one can easily imagine that the beleaguered members of this Court would appreciate such a guide at this point” (539).

Once a redistricting commission has been established, it is important to develop standards to which these commissions should follow in order to consistently create reasonable districts. The National Conference of State Legislatures (NCSL) developed seven principles of fair representation (NCLS 1999):

1. Protecting political subdivisions, such as counties and precincts
2. Protecting communities of interest
3. Compactness
4. Contiguity (that the district is a single area rather than being comprised of separate areas)
5. Protecting the district core
6. Using incumbency data
7. Applying Section 5 of the Voting Right Act, which states that any change to voting in a jurisdiction cannot legally be enforced “until the jurisdiction first obtains the requisite determination by the United States District Court for the District of Columbia or makes a submission to the Attorney General” (Department of Justice, sec. 1, para. 3)

By following these guidelines, redistricting organizations should be able to uphold the standard of “one person, one vote,” thus providing a non-discriminatory representation of the population. Comparing the aforementioned ideals and principles created for independent nonpartisan commissions to the commissions’ actions shows that these agencies do, in fact, live up to their expectations. This evaluation involves answering three questions: Is an independent commission more likely to follow guidelines than any other redistricting agency? Would a nonpartisan agency follow guidelines more closely than a bipartisan agency? Do predetermined guidelines truly improve the redistricting process?

First, there is the matter of whether or not a commission is more likely to follow the NCSL’s principles than legislatures or courts. In his study on observing the principle of protecting political subdivisions, Jonathan Winburn (2006) found that commissions were most likely to

adhere to the principle, with 83.01% of partisan commissions and 80.41% of neutral commissions in his study following this guideline. Divided legislatures adhered to the principle 75.29% of the time, and unified legislatures did so 75.12% of the time. The lowest occurrence of adherence was in the courts, with a rate of only 64.04% (22); the implication is that “once judges get control of drawing the maps they ignore the rules they enforce upon others” (16).

Now that it has been established that independent commissions will follow NCSL principles, the second question is whether or not a nonpartisan agency would be a better choice than a bipartisan agency. Another principle, the use of incumbency data, was studied by Michael Lyons and Peter F. Galderisi (1995). Their hypothesis was that, because bipartisan plans were more likely than nonpartisan plans to attempt to preserve incumbent safety (most likely because the incumbent belonged to a preferred political party), incumbent displacement rates would be lower under the bipartisan plans than under the nonpartisan plans (861). While studying the redistricting of U. S. House of Representatives seats in 1991 and 1992 and the effect on incumbents in the 1992 election, Lyons and Galderisi found that, while the displacement of incumbents varied massively among bipartisan organizations due to whether or not a state had gained or lost seats in the House of Representatives, the percent of displacements among nonpartisan organizations stayed consistent. Twenty to 31.3% of nonpartisan plans experienced incumbent displacement in 1992, whereas this displacement occurred in 6.5 to 25.6% of bipartisan plans (865). This shows that an independent nonpartisan commission would most likely adhere to the principle of using incumbency data because they would not have an allegiance to an incumbent party.

After confirming that independent nonpartisan commissions will follow NCSL principles more closely than other organizations, including bipartisan ones, the final question is whether or not predetermined rules for these commissions are beneficial for the cause of redistricting. Fortunately, when the NCSL’s principles are put in place as guidelines for independent commissions, a visible adherence to integrity occurs. Although Winburn (2006) described his research as “clearly not conclusive” as he did not include New England states that organize around communities or townships rather than county lines (15-16), he found a nearly 20% drop in adherence in plans that were not constrained by the rule of protecting political subdivisions, suggesting that redistricting organizations do take the principles into consideration and attempt to follow these guidelines (15). This indicates that an organization that is expected to fully abide by rules will be more likely to follow them than those organizations that are merely offered suggestions.

As the above findings show, redrawing United States legislative district lines would be a process best performed if the responsibility lies with independent nonpartisan commissions. Because state legislators run the risk of exploiting the process of reapportioning federal legislative district, and because the Supreme Court has no judicially discernible and manageable standards for judging claims of gerrymandering, this leaves commissions to objectively draw district lines. Furthermore, redistricting commissions should follow the principles put in place by the National Conference of State Legislatures. An independent nonpartisan commission is more likely to

follow NCSL principles than other redistricting organizations, including bipartisan ones. These principles, when enforced, improve the redistricting process for the commissions.

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