

DE-RIGGING ELECTIONS: DIRECT DEMOCRACY AND THE FUTURE OF REDISTRICTING REFORM

MICHAEL S. KANG*

I. INTRODUCTION

After California Republicans and Democrats agreed in 2001 on a “sweetheart” bipartisan gerrymander that ensured virtually no congressional or state legislative seats would change hands, a Republican consultant boasted that the “new [redistricting] plan basically does away with the need for elections.”¹ Such is the state of self-dealing in redistricting conducted by incumbent elected officials. As one North Carolina state senator admitted, when it comes to redistricting, “We are in the business of rigging elections.”²

Alarmed critics naturally see redistricting today as polluted by a corrosive excess of politics.³ They look to apolitical institutions as possible sources of restraint on gerrymandering—namely courts and independent commissions. In the fall 2005 elections, reformers in California and Ohio proposed ballot initiatives to strip control of redistricting from state legislatures and entrust redistricting to independent commissions. Redistricting reform appeared to suffer a pair of devastating defeats when voters rejected both initiatives.⁴ But these highly publicized election setbacks were not the end of redistricting reform—far from it.

* Assistant Professor, Emory University School of Law. Sincere thanks to Bobby Ahdieh, Bill Buzbee, Julie Cho, Beth Garrett, Heather Gerken, Rick Hasen, Ben Norris, Rick Pildes, Mike Pitts, Robert Schapiro, and Liam Schwartz for their comments on earlier drafts. Thanks also to Naeha Dixit, Matt Gewolb, and Shelley Thomas for their terrific research assistance.

1. John Wildermuth, *Lawmakers Use Creative License in Redistricting: Oddly Shaped Congressional Maps Would Largely Benefit Incumbents*, S.F. CHRON., Sept. 2, 2001, at A6 (quoting Tony Quinn). Indeed, every congressional incumbent who ran for re-election in California won by a landslide in 2002, and not a single congressional or state legislative seat, out of 153 districts, changed partisan control in 2004. See Nancy Vogel, *Looking to Design a Fairer Map*, L.A. TIMES, Feb. 13, 2005, at B1.

2. John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1 (quoting Mark McDaniel).

3. Samuel Issacharoff goes so far as to argue that the U.S. Supreme Court should strike down as unconstitutional per se any redistricting conducted by elected officials. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 641–45 (2002).

4. See, e.g., Stuart Rothenberg, *On Redistricting, Voters Have Spoken Up for the Status Quo*, ROLL CALL, Nov. 10, 2005 (“Voters simply don’t care enough about the process of drawing legislative and Congressional districts.”).

They were merely opening volleys in the long and continuing battle over redistricting to come. Advocates of redistricting reform recovered and mobilized aggressively on multiple fronts, driven by the conviction that, in Heather Gerken's words, "we cannot leave the regulation of politics *to* politics."⁵

Delegation of redistricting to apolitical institutions, such as courts and independent commissions, comes with heavy costs. Insulation helps ensure that redistricting is not driven by political self-interest, but it also ensures that redistricting is far removed from the necessary degree of public engagement, scrutiny, and accountability. Indeed, courts and independent commissions, at least those commissions proposed by current reforms, are specifically designed as an institutional matter to be politically inaccessible. In understandable zeal to root out political self-dealing in redistricting, reformers would eradicate from redistricting the positive values of the political process as well.

Rather than trying to stamp out politics, redistricting reform must seek a new and healthier framework in which redistricting can be conducted as part of an open political process incorporating the important elements of democratic decisionmaking. Ironically, the problem with redistricting today is not that it is too political, but instead that it is not political enough. Redistricting is insufficiently "political" in the sense that it occurs too isolated from public engagement, too distant from public scrutiny, and too insulated from popular accountability.

This Article challenges the understandable impulse to retreat from the political process in reforming redistricting. By so arguing, I reveal profound weaknesses in current reform proposals and demonstrate the need for a sharp readjustment in the direction of redistricting reform. What all the anger about gerrymandering overlooks is the forgotten value of the political process. Redistricting implicates central normative questions of governance and representation that govern how a democracy should operate. These are complicated questions that require democratic input and civic debate on what are fundamentally contestable value judgments that a democracy must make democratically.

I propose direct democracy as the best solution, a distinctly political solution, to the problems of contemporary gerrymandering. By requiring direct democratic approval by the general electorate for passage of any statewide redistricting plan, direct democracy invites the public into civic

5. Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 39 U. BRIT. COLUM. L. REV. (forthcoming 2006).

engagement about the fundamental issues of democratic governance that a democracy ought to embrace. As I will explain, direct democracy can be designed to induce the major parties to forsake the maximization of political advantage and to compete instead for the median voter's approval. Direct democracy thus encourages healthy moderation in redistricting by forcing the public to decide directly for itself and by institutionalizing political oversight of the redistricting process. Within the contest of a direct democratic election, the public must decide these central issues, and there is special value in having it do so. Direct democracy lies at the heart of reviving a viable, healthy new process—a vibrant political process—for redistricting state legislatures and the U.S. Congress.

Direct democracy offers a viable third way, between skeptics who would leave redistricting completely to the legislature despite the costs, and reformers who would sequester redistricting completely from the political process. This Article acknowledges the need for redistricting reform but reorients reform toward proper recognition of legitimate decisionmaking through a political process. This reorientation is badly needed as reform efforts continue to advance. On the legal front, the U.S. Supreme Court last term decided *League of United Latin American Citizens v. Perry*,⁶ its third partisan-gerrymandering case in two years.⁷ The Court's decision left the law of partisan gerrymandering essentially unchanged and open to continued petitioning by advocates of judicially imposed limitations. On the political front, activists in California and Ohio regrouped immediately after their 2005 election setbacks and are developing new reform proposals. Reformers promise continued efforts there and similar ballot measures in several other states.

In Part II, I briefly describe redistricting reform efforts to transfer greater responsibility for redistricting to apolitical institutions, namely courts and independent commissions.⁸ In Part III, I argue that these efforts to insulate redistricting from politics are badly misguided.⁹ I contend that redistricting, as a fundamental political matter, requires popular participation and a process of democratic debate and compromise to strike the basic value tradeoffs tied up in redistricting. I conclude that redistricting reform is needed but requires a middle path between skeptics of reform and the shape of current reform efforts. In Part IV, I propose

6. 126 S. Ct. 2594 (2006).

7. The others are *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *Cox v. Larios*, 542 U.S. 947 (2004).

8. See *infra* Part II.

9. See *infra* Part III.

new use of direct democracy as the viable third way for redistricting reform.¹⁰ I describe how a basic requirement of direct democratic approval for redistricting legislation would moderate partisan gerrymandering, induce the major parties to compete for public approval, and draw the public into a healthier political process.

II. CURRENT REFORM APPROACHES AND THE SEARCH FOR APOLITICAL SOLUTIONS

Current redistricting reform approaches propose shifting greater responsibility for redistricting to politically neutral institutions: (1) courts and (2) independent commissions. In this Part, I describe these efforts and argue that the push for political neutrality in redistricting is misguided.

A. Courts and Partisan Gerrymandering

The first approach to redistricting reform is to seek judicial limitation of political gerrymandering. Many hope that courts will limit how far elected officials can exploit the redistricting process for political advantage.¹¹ Courts are asked to decide, in Justice Scalia's words, "How much political motivation and effect is too much?"¹² Beyond some judicially determined limit, courts would intervene and overturn a legislative redistricting plan. Courts could serve as neutral referees that might permit politicians to redistrict with political considerations in mind, but they would block redistricting proposals that press too far, that simply push gerrymandering beyond reasonable limits. The U.S. Supreme Court revisited political gerrymandering recently in *LULAC v. Perry*, but at least temporarily turned away from the prospect of more vigorous judicial intervention against partisan gerrymandering.¹³

Leading up to *LULAC v. Perry*, the Court had not responded in a meaningful fashion to calls for judicially imposed limits on gerrymandering. The Court declared in *Davis v. Bandemer* that a constitutional claim for partisan gerrymandering was justiciable.¹⁴

10. See *infra* Part IV.

11. See, e.g., Linda P. Campbell, *Congress, Voters, Justices and Lines in the Sand*, DALLAS STAR-TELEGRAM, Dec. 15, 2005, at B13; Editorial, *Supreme Court Hearing on Texas Redistricting Will Provide a Barometer to Measure Partisanship on the High Court*, HOUS. CHRON., Dec. 14, 2005, at B8; Editorial, *Redistricting Tom DeLay*, N.Y. TIMES, Dec. 14, 2005, at A34.

12. *Vieth*, 541 U.S. at 297.

13. 126 S. Ct. 2594 (2006).

14. 478 U.S. 109 (1986).

However, a plurality of the Court announced what proved to be an impossibly difficult standard for establishing an unconstitutional partisan gerrymander under *Bandemer*. Justice White's plurality opinion insisted that partisan gerrymandering was unconstitutional only when the plaintiff's party had "essentially been shut out of the political process."¹⁵ The Court itself found that the gerrymander in *Bandemer* did not meet this standard, and lower courts applying *Bandemer* interpreted it to provide no check on gerrymandering in practice.¹⁶ No redistricting scheme had been struck down under the *Bandemer* standard in almost twenty years.¹⁷

Two years ago in *Vieth v. Jubelirer*, the Court again disappointed reformers by leaving *Bandemer* effectively in place.¹⁸ Only four Justices, led by Justice Scalia, voted to declare gerrymandering claims under *Bandemer* nonjusticiable per se.¹⁹ Despite the ultimate judgment in *Vieth* to uphold the challenged congressional redistricting of Pennsylvania, a five-Justice majority actually affirmed the justiciability of partisan gerrymandering as a constitutional claim.²⁰ However, the majority voting to uphold the justiciability of partisan gerrymandering claims divided over what legal standard should be applied to adjudicate such claims. Justice Kennedy's controlling opinion, as the narrowest opinion in the majority, concluded that no currently proposed standard, including *Bandemer*'s and the tests proposed in the dissents, appeared judicially manageable.²¹ Nonetheless, *Vieth* raised hopes for stronger judicial intervention in the future because Justice Kennedy insisted that the fact "no such standard has emerged in this case should not be taken to prove that none will emerge in the future."²² In other words, Justice Kennedy's opinion for the Court left

15. *Id.* at 139; see also Daniel H. Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING AND THE COURTS* 64 (Bernard Grofman ed., 1990).

16. See *Vieth*, 541 U.S. at 345 (Souter, J., dissenting) ("[T]he *Davis* plurality required a demonstration of such pervasive devaluation over such a period of time as to raise real doubt that a case could ever be made out.").

17. A district court struck down a districting map for superior court judgeships in North Carolina in 1996 under *Bandemer*, but the ruling was promptly reversed by the Fourth Circuit after Republican candidates, the gerrymandered plaintiffs below, won every contested seat in elections held just five days after the district court's decision. See *Republican Party of N.C. v. Hunt*, 77 F.3d 470 (4th Cir. 1996) (per curiam) (unpublished decision).

18. 541 U.S. 267; see also Daniel Hays Lowenstein, *Vieth's Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 *CORNELL J.L. & PUB. POL'Y* 367 (2005).

19. 541 U.S. at 305–06.

20. *Id.* at 309–13 (Kennedy, J., concurring in judgment).

21. *Id.* at 311–17 (Kennedy, J., concurring in judgment).

22. *Id.* at 311 (Kennedy, J., concurring in judgment). Justice Kennedy argued that further study or advances in computer technology may "facilitate court efforts to identify and remedy the burdens [of partisan gerrymandering], with judicial intervention limited by the derived standards." *Id.* at 313 (Kennedy, J., concurring in judgment). State constitutional requirements regarding redistricting may

open opportunities for, and indeed encouraged, lower courts to experiment with new approaches to gerrymandering that the Court might entertain soon.

In *LULAC v. Perry*, however, the Court again failed to reach agreement on a new standard for judging unconstitutional partisan gerrymandering. Only two years after *Vieth*, *LULAC v. Perry* consolidated appeals for four lawsuits challenging on different grounds the Texas mid-decade congressional redistricting in 2003.²³ Texas Republicans, having won control of the Texas legislature the year before, decided to redraw the state's congressional districts even though a valid redistricting plan was already in place following the 2000 Census and no new redistricting was required by law.²⁴ Democrats argued that the 2003 redistricting was motivated solely by partisan purposes and brought multiple challenges alleging unconstitutional partisan gerrymandering under *Bandemer*. They also alleged, among other things, a novel claim that Texas could not redistrict mid-decade, based on outdated Census data, purely for partisan advantage.²⁵ As in *Vieth*, a majority of the Court voted to dismiss the plaintiffs' partisan gerrymandering claims and upheld the redistricting at bar under the Equal Protection Clause.²⁶ A majority of the Court continued to agree that partisan gerrymandering remained justiciable and failed again to agree upon a "workable test for judging partisan gerrymanders."²⁷ Just as in *Vieth*, the Court appeared to have changed the law of partisan gerrymandering almost not at all.

In *LULAC v. Perry*, Justice Kennedy again authored the controlling opinion. Justice Kennedy joined in judgment with Chief Justice Roberts and Justices Scalia, Thomas, and Alito in dismissing the plaintiffs' partisan gerrymandering claims. While leaving settled the issue of justiciability from *Vieth*, Justice Kennedy explained that the plaintiffs

provide a clearer basis for judicial intervention. See James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 648–50 (2004).

23. The three-judge district court initially rejected every claim. See *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (per curiam). After its initial decision was vacated by the U.S. Supreme Court for further proceedings in light of the Court's decision in *Vieth*, *Henderson v. Perry*, 543 U.S. 941 (2004); *Jackson v. Perry*, 543 U.S. 941 (2004); *Travis County, Tex. v. Perry*, 543 U.S. 941 (2004); *Lee v. Perry*, 543 U.S. 941 (2004); *Am. GI Forum of Tex. v. Perry*, 543 U.S. 941 (2004), the district court simply reinstated its earlier rejection of the partisan gerrymandering claims on remand. See *Henderson v. Perry*, 399 F.2d 756 (E.D. Tex. 2005). The Supreme Court heard oral arguments on March 1, 2006.

24. See Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 443 (2005) (describing events leading to the 2003 redistricting).

25. See *LULAC v. Perry*, 126 S. Ct. 2594 (2006).

26. *Id.* at 2612.

27. *Id.* at 2611.

were required in a partisan gerrymandering case to “offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.”²⁸ Regardless whether a redistricting was motivated in part or solely by partisanship,²⁹ a successful gerrymandering claim must demonstrate that the political effect of the redistricting would violate a reliable standard “for deciding how much partisan dominance is too much.”³⁰ Justice Kennedy rejected a symmetry standard for measuring partisan bias proposed by amici³¹ and concluded that the *LULAC* plaintiffs failed otherwise to provide a workable test for finding the 2003 redistricting unconstitutional. He affirmed dismissal of their claims for failure to state a claim.³²

What is more, the Court rejected the novel claim that the mid-decade Texas redistricting was unconstitutional under the one person, one vote rule.³³ Just two months after it decided *Vieth*, the Court had taken a measured step to rein in gerrymandering in *Cox v. Larios*.³⁴ In that case, the plaintiffs failed to establish their partisan gerrymandering claim, but they successfully argued that the redistricting of the Georgia legislature violated the one person, one vote requirement of interdistrict equipopulousness under the Fourteenth Amendment. The district court concluded that the population deviation from the one person, one vote rule in the Georgia reapportionment resulted impermissibly from “the systematic favoring of Democratic incumbents and the corresponding attempts to eliminate as many Republicans as possible.”³⁵ In a summary affirmance, the Supreme Court upheld the lower court’s rejection of partisan considerations as a government justification for deviation from the one person, one vote rule.³⁶ The Court thus signaled support for indirect judicial intervention against partisan gerrymandering through one

28. *Id.* at 2607.

29. In any event, Justice Kennedy elided the state’s admission that the 2003 redistricting occurred for solely partisan purposes by noting that “partisan aims did not guide every line [the legislature] drew.” *Id.* at 2609.

30. *Id.* at 2611.

31. *Id.*

32. *Id.*

33. *Id.* at 2612.

34. 542 U.S. 947 (2004).

35. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1341 (N.D. Ga. 2004). These motivations did not constitute “legitimate considerations incident to the effectuation of a rational state policy” that would justify deviation from the constitutional standard of equal population from district to district. *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)).

36. *Cox v. Larios*, 542 U.S. 947 (2004).

person, one vote challenges.³⁷ The *LULAC* plaintiffs argued that the discretionary mid-decade redistricting could not constitute a requisite good-faith attempt to comply with the one person, one vote rule because the redistricting was based on outdated and then-inaccurate Census population data. However, two Justices, at most, were willing to give any weight to these one person, one vote claims in *LULAC v. Perry*.³⁸

The Court's general reluctance to restrict partisan gerrymandering appeared motivated by a lack of judicial confidence. Judicial restriction of gerrymandering would draw courts, which are putatively nonpartisan and apolitical institutions,³⁹ into the untenable position of managing what is fundamentally a political exercise. Justice Kennedy emphasized the difficulty for courts of "acting without a legislature's expertise" and the unwelcome task of removing from the democratic process "one of the most significant acts a State can perform to ensure citizen participation in republican self-governance."⁴⁰ Indeed, challenges to gerrymanders demand more of courts than simply striking down excessively partisan plans.

Today, judicial intervention against gerrymandering almost necessarily brings with it active judicial management of the redistricting process. A court that strikes down a redistricting plan, for whatever reason,⁴¹ invariably is drawn into authorship of a new redistricting plan to replace it, or a close interaction with legislators working to formulate a new plan (or both).⁴² Courts "become active players often placed in the uncomfortable role of determining winners and losers in redistricting, and, therefore, elections."⁴³ When courts have involved themselves in redistricting matters, namely in racial gerrymandering and one person, one vote cases,

37. Samuel Issacharoff and Pamela Karlan describe this indirect intervention as a "second-order judicial review of political gerrymanders." Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 567 (2004). Justice Stevens's concurring opinion in *Larios* emphasized that a second-order regulation of gerrymandering is made more urgent by the Court's inability to agree upon a standard for partisan gerrymandering in *Vieth. Larios*, 542 U.S. at 950–51 (Stevens, J., concurring).

38. *LULAC v. Perry*, 126 S. Ct. 2594 (2006).

39. Obviously, courts might be characterized in practice as partisan and political institutions, even if they do not intend to act as such. See generally Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005).

40. *LULAC v. Perry*, 126 S. Ct. at 2608.

41. Judicial management of legislative redistricting often arises after successful challenges to redistricting plans under the one person, one vote doctrine and the Voting Rights Act, among other claims. See generally Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131 (2005).

42. See *id.*

43. *Id.* at 1131.

the courts have drawn heavy criticism.⁴⁴ Even so, Justice Stevens predicted that “the present ‘failure of judicial will’ will be replaced by stern condemnation of partisan gerrymandering.”⁴⁵ Greater judicial direction of the redistricting process is a price that Justice Stevens and reformers seem happy to pay. They are more than willing to trade the costs of judicial entanglement for the perceived benefits of judicial oversight in redistricting. I further discuss the costs of this approach in Part III.

B. Independent Commissions

The second reform approach to attacking partisan gerrymandering is a call for independent commissions.⁴⁶ Thirteen states appoint commissions with some redistricting capacity, whether for congressional or state redistricting.⁴⁷ Seven of the thirteen states entrust primary authority for both congressional and state redistricting to their commissions;⁴⁸ the other six give commissions authority over only state redistricting and only in an advisory capacity.⁴⁹ In all but one of these states, the commissions are staffed by either political appointees or elected officials with familiar partisan affiliations.⁵⁰ Only one state today—Iowa—delegates redistricting

44. See generally T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588 (1993); Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993); Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. REV. 1411 (2002); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001); Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589 (2004); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287 (1996).

45. *Cox v. Larios*, 542 U.S. 947, 951 (2004) (Stevens, J., concurring) (internal citations omitted).

46. See, e.g., Gregory L. Giroux, *For Redistricting Control, the Future Is Now*, CONG. Q. WKLY., Sept. 19, 2005, at 2470; Thomas E. Mann, *Redistricting Reform*, NAT’L VOTER, June 2005, at 5–6; see also Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1693–94 (1993) (discussing the proposed use of blue-ribbon or bipartisan commissions).

47. See *Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1169 n.27 (2006) [hereinafter *Developments in the Law*]; Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 843–44 (1997); Note, *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2320 & nn.37–39.

48. These states are Arizona, Hawaii, Idaho, Iowa, Montana, New Jersey, and Washington. *Developments in the Law*, *supra* note 47, at 1169 n.30.

49. These states are Alaska, Arkansas, Colorado, Missouri, Ohio, and Pennsylvania. *Developments in the Law*, *supra* note 47, at 1169 n.31; Nicholas D. Mosich, Note, *Judging the Three-Judge Panel: An Evaluation of California’s Proposed Redistricting Commission*, 79 S. CAL. L. REV. 165, 189 (2005).

50. For example, elected officials choose or serve as members of the commission in six of seven states that place responsibility for both congressional and state redistricting in a commission. See *Developments in the Law*, *supra* note 47, at 1169.

authority almost exclusively to an independent, nonpartisan agency. In Iowa, the Legislative Services Agency (LSA) develops district maps for the state's legislature and congressional delegation,⁵¹ consistent with neutral principles of contiguity, unity of political subdivisions, compactness, and equal population.⁵² Iowa law explicitly prohibits the LSA from considering incumbency, partisanship, and political advantage in its work.⁵³

Reformers increasingly view the establishment of independent commissions, similar to Iowa's LSA that would redistrict on the basis of neutral principles rather than political ones, as the solution to today's problems of political gerrymandering. Reformers generally claim that these redistricting commissions produce plans that are fairer and more competitive than plans crafted entirely through the normal legislative process.⁵⁴ However, where independent commissions have been established, they actually have been less successful than promised.⁵⁵ The commission in Arizona, established in 2000, produced a plan that has been beset by legal challenges and provided only a marginal gain in competitiveness.⁵⁶ Iowa is an exceptional case, with an unusually homogenous population, balanced partisanship, and uniform geography that should make it easier for the LSA to redistrict on the basis of contiguity and compactness, while also complying with voting rights law and producing partisan competitiveness.⁵⁷ However, even in Iowa under the LSA, ninety-eight percent of U.S. House incumbents have won re-election.⁵⁸ Every U.S. House incumbent was re-elected in 2004 with an average margin of eighteen percent.⁵⁹

51. See Iowa Code Ann. § 42.6 (West Supp. 2005).

52. See Iowa Code Ann. § 42.4 (West Supp. 2005).

53. See *id.* The director of the LSA, however, is appointed by a bipartisan legislative council. See Iowa Code Ann. §§ 2.41–2.42 (West 2001 & Supp. 2005). The Iowa legislature maintains a right to reject the LSA's redistricting proposals, but it has never done so. See Thomas E. Mann, *Redistricting Reform: What Is Desirable? Possible?*, in *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING* 92, 102 (Bruce E. Cain & Thomas E. Mann eds., 2005).

54. *But see* Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 U. COLO. L. REV. 1029, 1030 (2001) (concluding that if redistricting by the legislature is "100 percent political," redistricting by bipartisan commission is "98 percent political").

55. See Mann, *supra* note 53, at 103–08; *Developments in the Law*, *supra* note 47, at 1169–70.

56. See *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 284 F. Supp. 2d 1240 (D. Ariz. 2003); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843 (Ariz. Ct. App. 2005); Mann, *supra* note 53, at 106–07; *Developments in the Law*, *supra* note 47, at 1170.

57. See Mann, *supra* note 53, at 102.

58. See *Developments in the Law*, *supra* note 47, at 1170.

59. See *id.*

Nonetheless, reform measures to establish redistricting commissions appeared on the ballot for the 2005 fall elections in California and Ohio.⁶⁰ Both measures called for the removal of redistricting authority from the state legislatures and the creation of independent redistricting bodies to draft new redistricting plans for the states legislatures and congressional delegations.

Of the two ballot measures, Proposition 77 in California, sponsored by Governor Arnold Schwarzenegger, received more national publicity. It called for the California legislature to appoint an independent three-member panel to draft redistricting plans for California's congressional and state legislative districts.⁶¹ The three-member panel would have been selected from a pool of retired California judges who had not previously held political office.⁶² Proposition 77 left considerable discretion to the three-member panel to redistrict as it saw fit. Proposition 77 instructed the panel only to redistrict in accordance with constitutional and Voting Rights Act requirements, to conform to county and city boundaries to the "greatest extent practicable," and to refrain from considering any effect on "incumbents and political parties."⁶³ The panel would have been required to decide unanimously upon a redistricting plan that would immediately go into legal effect for the subsequent statewide election cycle.⁶⁴ In the same election during which the commission's redistricting map would be used, California voters would vote separately on whether to ratify the commission's map for use in future elections.⁶⁵ If the voters of California rejected the new plan, the panel would be required to recommence the entire process of drawing another redistricting plan as a replacement, subject again to a statewide vote.⁶⁶

Issue 4 in Ohio also proposed the creation of an independent commission to draft Ohio's congressional and state legislative districts.⁶⁷ The five-member commission would have included two senior state

60. CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE, TEXT OF PROPOSED LAWS, PROPOSITION 77 (2005 SPECIAL STATEWIDE ELECTION), available at <http://abclocal.go.com/kgo/story?section=elections&id=3454379> [hereinafter "Proposition 77"]; OHIO SEC'Y OF STATE, FULL TEXT OF PROPOSED AMENDMENTS, STATE ISSUE 4 (NOV. 8, 2005), available at <http://www.sos.state.oh.us/sos/ElectionsVoter/results2005.aspx?section=1042> (last visited Mar. 28, 2007) [hereinafter "Issue 4"]; see also Nancy Vogel, *Several States May Revisit Redistricting*, L.A. TIMES, Sept. 26, 2005, at B1.

61. Proposition 77, *supra* note 60, § 2; see generally Mosich, *supra* note 49.

62. Proposition 77, *supra* note 60, § 2.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Issue 4, *supra* note 60.

judges, one from each major party, who would have in turn selected the other three members of the commission, none of whom could have served in elected office during the previous ten years.⁶⁸ In contrast to Proposition 77, however, Issue 4 charged the commission with the overriding priority of “maximiz[ing] the number of competitive districts in Ohio.”⁶⁹ Issue 4 defined a mathematical formula for calculating intradistrict electoral competitiveness.⁷⁰ Issue 4 then directed the commission to solicit redistricting plans from the public and select the plan with the highest competitiveness score, irrespective of almost all other considerations.⁷¹ Unlike Proposition 77, Issue 4 did not provide for popular ratification or for judicial review by state courts.⁷² In short, both Proposition 77 and Issue 4 proposed independent commissions that would have assumed redistricting duties in place of the legislature, but Issue 4 placed far less discretion in the hands of the Ohio redistricting commission than Proposition 77 placed in the hands of the California panel.

Both Proposition 77 and Issue 4, however, were rejected by statewide votes in the November 2005 elections. Only forty-one percent of California voters voted in favor of Proposition 77.⁷³ Issue 4 was even less successful with Ohio voters, winning only thirty percent of the vote.⁷⁴ Voters sniffed out partisan motivations underlying the push for reform.⁷⁵ Among other things, the ballot measures called for mid-decade redistricting that might have upset the partisan composition of the state legislatures. These provisions left the measures vulnerable to allegations that Proposition 77 and Issue 4 were partisan politics disguised as

68. *Id.*

69. OHIO SEC'Y OF STATE, STATE ISSUE 4—EXPLANATION AND ARGUMENT FOR (NOV. 8, 2005), available at www.sos.state.oh.us/ElectionsVoter/results2005.aspx?Section=1062; see also Issue 4, *supra* note 60.

70. See Issue 4, *supra* note 60.

71. *Id.* Issue 4 did make a minimal allowance for the commission to consider adjustments to a plan to preserve communities of interests, provided that any adjustment did not affect electoral competitiveness by designated margins. *Id.*

72. See Joe Hallett, *Schwarzenegger Wants Ohio's Issue 4 to Pass*, COLUMBUS DISPATCH, Nov. 6, 2005, at 4A (quoting John McClelland, Republican spokesperson, as arguing that “[t]he fundamental difference between the redistricting proposal in California and Issue 4 in Ohio is that voters in California have the final say over the districts”).

73. Juliet Eilperin, *You Can't Have a Great Election Without Any Races*, WASH. POST, Nov. 13, 2005, at B03.

74. *Id.*

75. *Two Setbacks in Fair Districting*, THE LEDGER (Lakeland, Fla.), Nov. 13, 2005; Sam Hirsch & Thomas E. Mann, Op-ed, *For Election Reform, a Heartening Defeat*, N.Y. TIMES, Nov. 11, 2005, § A, at 23.

redistricting reform, which undercut their bases of public support.⁷⁶ Governor Schwarzenegger's flagging popularity during the course of 2005 damaged Proposition 77's prospects, as many voters voted against Proposition 77 and several other ballot measures in disapproval of Schwarzenegger.⁷⁷

More importantly, the fall campaigns raised concerns about how well the independent commissions would account for the diverse political interests in each state. For instance, in California, Proposition 77 invested all responsibility for redistricting in a three-member panel of retired judges. It provided no institutional assurances of transparency or popular input into redistricting decisions. Indeed, the operative premise of Proposition 77 was the panel's insulation from political influences. The Mexican American Legal Defense and Educational Fund (MALDEF) argued that political insulation was a major failing of the independent commission, because it "cannot be held accountable for [its] actions."⁷⁸ A consortium including the League of Women Voters, the Asian Pacific American Legal Center, and MALDEF called for "redistricting reform that implements an open, transparent redistricting process" rather than "creat[ing] more barriers to public participation."⁷⁹

Critics of Proposition 77 argued that a three-member panel of retired judges could not reflect the diversity of California's citizenry or properly account for the diverse interests with a great deal at stake in redistricting. The National Association of Latino Elected and Appointed Officials (NALEO) argued prominently that the independent commission mandated by Proposition 77 would likely fail to incorporate public input and fail to understand the political dynamics of the Latino community.⁸⁰ Asian-American groups opposed Proposition 77, arguing that "Proposition 77 is a misguided attempt at reform that will make a bad process even worse."⁸¹

76. See, e.g., Hirsch & Mann, *supra* note 75; *District Drawing Still Ripe for Reform*, THE ADVERTISER-TRIB. (Tiffin, Ohio), Nov. 27, 2005; *Two Setbacks in Fair Districting*, *supra* note 75.

77. See generally Mosich, *supra* note 49 (citing polling results).

78. Press Release, Mexican Am. Legal Def. and Educ. Fund, Leading Civil Rights Groups Denounce Proposition 77 (Sept. 7, 2005), <http://www.maldef.org/news/press.cfm?ID=276>.

79. *Id.*

80. See Press Release, Nat'l Ass'n of Latino Elected and Appointed Officials, NALEO Opposes Proposition 77's Proposed Unrepresentative and Flawed Redistricting Process (Oct. 17, 2005), <http://releases.usnewswire.com/printing.asp?id=55137>; cf. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843, 851-52 (Ariz. Ct. App. 2005) (addressing similar complaints about the Arizona redistricting commission).

81. Steve Lawrence, *Minority Communities Fear They Will Lose Political Clout*, CONTRA COSTA TIMES, Oct. 30, 2005, available at http://www.ncvaonline.org/archive/reporter110105.shtml#MINORITY_COMMUNITIES_FEAR_THEY_WILL_LOSE_POLITICAL_CLOUT (quoting Eugene Lee, attorney with the Asian Pacific American Legal Center).

Critics claimed that “Proposition 77 unwisely entrusts the task of drawing legislative boundaries for 36 million Californians with three retired judges who cannot reflect the racial/ethnic and gender diversity in this state.”⁸² California voters took cues from these trusted groups and voted down Proposition 77.

Issue 4 raised related concerns about the Ohio independent commission. As in California, some reform critics argued that the political insulation of independent commissions was a critical failing. A spokesman for Ohio First, the main opposition group against Issue 4, argued that “[g]overnment is improved by accountability to voters, not to bureaucrats appointed to boards.”⁸³ However, Issue 4’s strict directive that the commission mechanically apply its competitiveness formula and choose the most competitive plan made the commission’s composition and political insulation less salient.⁸⁴ Issue 4 ensured that the Ohio commission would have almost no discretion in redistricting decisions, as it was legally bound to choose the most competitive plan by formula.

As a result, opponents attacked Issue 4’s failure to permit any consideration of other relevant political considerations in redistricting. Although opponents of Issue 4 acknowledged the need for redistricting reform, they campaigned against Issue 4’s formulaic focus on competitiveness as the sole criterion for redistricting.⁸⁵ Ohio House Speaker Jon Husted argued that Issue 4 was “too rigid” as a result and “d[id]n’t allow for any human judgment.”⁸⁶ To illustrate the point, Ohio First publicly displayed maps featuring bizarrely shaped congressional districts, criss-crossing the entire state.⁸⁷ Ohio First alleged that Issue 4’s strict prioritization of competitiveness and failure to allow consideration of

82. *Id.* John Trasvina, a MALDEF official, explained that the commissioners would need a crash course in geography and diversity to really understand communities of interest. Californians don’t necessarily follow geographic lines.” *Id.*

83. Joe Hallett, *State Issues Stir Both Sides of Aisle*, COLUMBUS DISPATCH, Oct. 23, 2005, at News 01A (quoting David Hopcraft); see also Jean Schmidt, Editorial, *Why Ohio Voters Should Run from RON*, PEOPLE’S DEFENDER (West Union, Ohio), Nov. 3, 2005 (arguing that Issue 4 offers “no oversight by voters, elected officials, or the state legislature”).

84. One Ohio newspaper editorialized that, as a consequence, “[i]t wouldn’t matter if Dopey, Sneezy, Daffy, Goofy and Bugs were on [the commission].” Editorial, *Issues: Yes on 2, No on 3, 4, 5*, CINCINNATI ENQUIRER, Nov. 5, 2005, at 10B.

85. See Jim Siegel, Joe Hallett & Mark Niquette, *GOP Asks for Help Drawing Districts*, COLUMBUS DISPATCH, Nov. 10, 2005, at 1E; Mark D. Tucker, *Does Ohio Need Issue 4?*, COLUMBUS DISPATCH, Nov. 4, 2005, at 13A.

86. Sandy Theis, *Opposition Gracious After Election Reforms Fail*, CLEVELAND PLAIN DEALER, Nov. 10, 2005, at B1 (quoting Republican Ohio House Speaker Jon Husted).

87. See Editorial, *supra* note 84; Hallett, *supra* note 83; Martin Gottlieb, *Issue 4 Is the One That Counts*, DAYTON DAILY NEWS, Oct. 16, 2005, at B8.

geographic compactness or political subdivision lines would ensure enactment of crazy-quilt redistricting schemes with little sensibility beyond competitiveness.⁸⁸ A number of prominent Ohio Democrats publicly opposed Issue 4,⁸⁹ and even advocates criticized it as “poorly drafted” and “unworkable.”⁹⁰ Compared to Californians, Ohio voters were never convinced of the need for redistricting reform, but Issue 4’s weaknesses helped convince them to defeat it overwhelmingly on election day.⁹¹

Direct democracy provided redistricting reform with a public hearing that otherwise might have been impossible through the legislature. Moreover, voters did not simply vote reflexively for reform, which polls showed the public supported as a general matter.⁹² Voters seemed to discern politics at work and rejected the ballot measures as exactly the type of partisan politicking that reform was supposed to dampen. However, the public debate over the ballot measures revealed important deficiencies in the reform trend toward independent commissions and court intervention. The public displayed serious reservations about deferring to independent institutions on matters of redistricting. In both California and Ohio, the public was uncomfortable with taking politics completely out of redistricting, at least when doing so meant putting too much confidence in politically inaccessible commissions.⁹³ In California, concerns centered on the unrepresentativeness of the commission’s probable composition. In Ohio, concerns centered on the narrow mechanical focus on electoral competitiveness to the exclusion of all other considerations. In both states, as a result, voters were troubled by the

88. Hallett, *supra* note 83.

89. See, e.g., Julie Carr Smyth & Reginald Fields, *Not Everyone Wants to Reform Ohio*, CLEVELAND PLAIN DEALER, Oct. 28, 2005, at B1; *Some Democrats Don’t Want Changes*, AKRON BEACON J., Nov. 7, 2005.

90. Joe Hallett, *Much-Needed Redistricting Reform Isn’t in the Cards for Ohio*, COLUMBUS DISPATCH, Nov. 13, 2005, at 5B; see also Hallett, *supra* note 72 (quoting Arnold Schwarzenegger endorsing Issue 4, despite its defects, because “perfection shouldn’t be the enemy of good”).

91. See Jon Craig, *Poll: Most of Us Know zilch About Issues 1-5*, CINCINNATI ENQUIRER, Oct. 27, 2005, at 1C.

92. See Michael S. Kang, *Counting on Initiatives?: An Empirical Assessment*, 4 ELECTION L.J. 217, 219 (2005) (reviewing JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* (2004); and DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* (2004)) (distinguishing between public support for general propositions and specific policy).

93. Even advocates harbored concern about Issue 4’s focus on electoral competitiveness as the lone redistricting criterion. See Edward B. Foley, *If Not Issue 4, Then What?*, DAYTON DAILY NEWS, Nov. 1, 2005, available at <http://www.daytondailynews.com> (search all dates for “if not issue 4”).

absence of an open political process that would balance the many relevant interests in redistricting.

The defeat at the polls of both ballot measures did not slow the push for independent commissions for redistricting. Advocates of redistricting reform gathered petition signatures and lobbied for redistricting legislation in several states.⁹⁴ Representative John Tanner introduced a bill in the U.S. House of Representatives mandating independent redistricting commissions throughout the fifty states.⁹⁵ Even in Ohio and California, reformers are vowing to continue their work, while acknowledging mistakes and attempting to reach broader bipartisan support for redistricting by independent commission.⁹⁶

C. *The Search for Apolitical Solutions*

The two popular reform approaches to political gerrymandering, described above, have a common and striking feature—they delegate authority over redistricting to putatively nonpartisan, apolitical institutions, either courts or independent commissions. Courts, especially federal courts, are nominally apolitical. Federal judges, for instance, are protected by life tenure and insulated from political punishment. Similarly, independent commissions would be designed to shield their deliberations from political influence and public pressures. Iowa's LSA—nonpartisan, objective, and guided by technocratic expertise—is the popular model.

The basic logic is straightforward. The premise is that the political motivations of self-interested elected officials, those in charge of redistricting, are the problem. The obvious risk is that these elected

94. See Joshua Brusteint, *Drawing the Line: Redistricting Reform*, GOTHAM GAZETTE (New York), May 8, 2006; Editorial, *Senate Must Draw Line on Partisanship*, INDIANAPOLIS STAR, Jan. 30, 2006, at 10A; Giroux, *supra* note 46, at 2470; Steven Harmon, *Redistricting Measure Back Before Law Makers*, CONTRA COSTA TIMES, June 26, 2006, at A1; Stephen Majors, *District Boundaries Spark Debate*, BRADENTON HERALD, Feb. 7, 2006, at 1C, Local & State; Mann, *supra* note 46, at 4, 7; Vogel, *supra* note 60; see also Dave Williams, *Georgia Considers Redistricting Reform*, GWINNETT DAILY POST, Apr. 30, 2006, available at <http://www.gwinettdaily.com> (search for "Georgia Considers").

95. See Josephine Hearn, *Tanner Redistricting Bill Gains Senate Sponsor*, THE HILL (Wash., D.C.), Mar. 1, 2006, available at <http://www.fairvote.org/index.php?page=9&articlemode=showspecific&showarticle=1251>.

96. See William Hershey, *DeWine to Work on Proposals for Redistricting*, DAYTON DAILY NEWS, NOV. 10, 2005, at B1; *Redistricting Reform May Yet Emerge from Legislature*, SAN JOSE MERCURY NEWS, Jan. 31, 2006; Jim Siegel, *Redistricting Reform, Round 2*, COLUMBUS DISPATCH, May 5, 2006, at 01E; Jim Siegel, *Speaker Returns to Redistricting Issue*, COLUMBUS DISPATCH, Jan. 20, 2006, at D1; Lisa Vorderbrueggen, *Legislators Reviving Boundary Proposals*, CONTRA COSTA TIMES, Feb. 17, 2006, at A1; Daniel Weintraub, *Redistricting Reform Might Live to See Another Day*, SACRAMENTO BEE, Nov. 29, 2005, at B7.

officials in state government will perform their redistricting duties with their personal and partisan self-interest foremost in mind.⁹⁷ Self-dealing incumbents can and do substitute their political interests as the overriding priority for redistricting in place of any broader sense of the public good. A deep distrust of politicians' involvement in their own redistricting is understandable. Although political scientists debate whether gerrymandering is responsible,⁹⁸ incumbents win re-election to Congress and state legislatures with staggering regularity.⁹⁹ Politics are the problem, under this account, allowing political actors to act in their self-interest rather than for the general welfare.

Samuel Issacharoff, the foremost academic commentator in favor of insulating redistricting from politics, argues for the unconstitutionality per se of redistricting conducted by elected officials. He proposes that "the Court should forbid ex ante the participation of self-interested insiders in the redistricting process, instead of trying to police redistricting outcomes ex post."¹⁰⁰ All redistricting by elected officials should be struck down, regardless of the redistricting outcome, as a prophylactic measure against the risks of gerrymandering.¹⁰¹ For Issacharoff, and many others in agreement, there are no sufficient justifications for giving political insiders the opportunity to engage in self-interested redistricting.

Reformers thus attempt to remove politics from redistricting by removing redistricting from politics. As Issacharoff recommends, redistricting "must be conducted at a safe distance from the immediate demands of the political process."¹⁰² Reformers like Issacharoff are certain that neutral arbiters, such as courts and independent commissions, are more likely to reorient the redistricting process toward an objective sense of the public interest.¹⁰³ Issacharoff argues that "[v]arious approaches to nonpartisan redistricting, such as blue-ribbon commissions, panels of retired judges, and Iowa's computer-based models, recommend

97. See Kang, *supra* note 24.

98. See Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION L.J. 315 (2002). Compare Alan Abramowitz, Brad Alexander & Matthew Gunning, *Don't Blame Redistricting for Uncompetitive Elections*, 39 PS: POL. SCI. & POL. 87 (2006), with Michael P. McDonald, *Drawing the Line on District Competition*, 39 PS: POL. SCI. & POL. 91 (2006).

99. See generally Ansolabehere & Snyder, *supra* note 98, at 319, fig. 1.

100. Issacharoff, *supra* note 3, at 643.

101. *Id.* at 642.

102. Issacharoff, *supra* note 47, at 1691.

103. See Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 500 (2004) (observing that "Issacharoff tries to remove direct incumbency and partisan concerns from the process as much as possible so that other more legitimate values may flourish").

themselves as viable alternatives to the pro-incumbent status quo.”¹⁰⁴ By turning to apolitical institutions, operating at a remove from political influence, reformers intend to root out political self-interest as a defining motivation for redistricting. By depoliticizing redistricting, reformers hope that redistricting reform delegates judgments to neutral decisionmakers insulated from political influence and motivation, liberated to carry out redistricting in the public interest.

An initial objection, however, is that nominally apolitical institutions do not necessarily produce fairer outcomes.¹⁰⁵ Political scientists Jonathan Katz and Gary Cox have shown empirically, for instance, a strong tendency by judges to decide redistricting cases in favor of the party that appointed them.¹⁰⁶ Courts may not ultimately serve as trustworthy watchdogs over partisan gerrymandering. Redistricting commissions, depending on their composition, too often produce plans that entrench incumbents from both parties and raise Voting Rights Act concerns.¹⁰⁷ Scholars have discovered that even truly independent methods of redistricting may produce quite biased results.¹⁰⁸

More importantly, and more central to the Article, I argue that the removal of political self-interest from redistricting is only the first half of

104. Issacharoff, *supra* note 3, at 644.

105. See Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 180 (2003); Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002); see also Issacharoff, *supra* note 46, at 1694–95 (suggesting that independent commissions may simply mask partisan motivations and effects).

106. See GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY’S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 129 (2002) (finding that partisanship influenced judicial decisions about whether an invalid redistricting map could be used in a pending election); see also Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413 (1995) (finding that federal judges appointed by one party were more likely to strike down redistricting conducted by the other party).

107. See JEREMY BUCHMAN, *3 DRAWING LINES IN QUICKSAND: COURTS, LEGISLATURES, & REDISTRICTING* 207–20 (2003); Mann, *supra* note 53, at 102; *Developments in the Law, supra* note 47, at 1168–70; see also D. J. Rossiter, R. J. Johnston & C. J. Pattie, *The Partisan Impacts of Non-partisan Redistricting: Northern Ireland 1993–95*, 23 TRANSACTIONS INST. BRIT. GEOGRAPHERS 455 (1998); cf. Kang, *supra* note 24 (noting the tension between “offensive” and “defensive” gerrymandering).

108. See, e.g., R. J. Johnson, *Redistricting by Independent Commissions: A Perspective from Britain*, 72 ANNALS ASS’N AM. GEOGRAPHERS 457 (1982); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 69–73 (1985) (describing systematically biased redistricting in the United Kingdom, Australia, and New Zealand, despite the use of nonpartisan commissions); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 88–89 (1990) (explaining how Robert Bork, a conservative Republican serving as special master, authored a redistricting of Connecticut that unintentionally but dramatically benefited Democrats).

the two-part challenge of redistricting reform. Discussion of partisan self-interest in redistricting receives almost all the media attention in the political debate over redistricting reform, but the second half of the reform challenge is just as critical. If not political self-interest, reform must address what should replace political self-interest as a normative compass in redistricting. What are the normative goals that should affirmatively guide neutral redistricting? Reformers are clear that the political self-interest of elected officials does not qualify, but identification of political self-interest as the enemy extends only so far. How do we decide what constitutes redistricting for the public interest?

Reform must articulate, or develop a process for deciding, the political values that will replace self-interest as the guiding principles for redistricting going forward. If partisan gerrymandering “frustrates . . . the will of the People” in redistricting,¹⁰⁹ then reform of gerrymandering must decide what actually represents the will of the people in redistricting. The task of redistricting necessarily requires decisionmakers to shape and structure politics actively toward their normative vision of how politics ought to operate. Once we have neutral, apolitical decisionmakers handling redistricting, how should they draw district lines? The answers are not obvious in any sense. Should electoral competition be paramount, as many suggest? Should partisan and group representation in the legislature be more important? Justice Frankfurter vexed in *Baker v. Carr* over the flood of important considerations to be weighed and balanced in redistricting—“geography, demography, electoral convenience, economic and social cohesions or divergences among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage . . . and a host of others.”¹¹⁰ Heather Gerken likewise sympathizes with the redistricter over difficult questions: “Are the preferences of rural voters and urban voters different, and should the Court recognize this fact? To what extent ought a majoritarian system recognize minority voices? How does one gauge the social meaning of an apportionment plan?”¹¹¹

109. Robert A. Koch, *A Wolf in Sheep's Clothing: Gaffney and the Improper Role of Politics in the Districting Process*, 39 U. MICH. J.L. REFORM 99, 113 (2005).

110. *Baker v. Carr*, 369 U.S. 186, 323–24 (1962) (Frankfurter, J., dissenting).

111. Gerken, *supra* note 44, at 1443. Even once democratic values are prioritized, implementation of democratic values is far from clear. Choosing among values, such as equality, is only the beginning of the theoretical work in many respects. *See, e.g.*, DOUGLAS RAE ET AL., *EQUALITIES* 133 (1981) (distinguishing 108 distinct theoretical conceptions of political equality); Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375 (1981) (arguing that equality is indeterminate for practically specifying democratic government).

These questions are enormously complex and contentious. Academic commentators have proposed an array of putatively objective approaches to redistricting,¹¹² some of which contradict one another outright and all of which conflict at the margin.¹¹³ Neither political neutrality nor impartial expertise alone provides clear answers. It is on this question—how a democratic polity can arrive at affirmative answers about how to redistrict representative institutions—that I next focus my attention.

III. POLITICAL ANSWERS FOR POLITICAL QUESTIONS

By seeking objective neutrality and abandoning political solutions to partisan gerrymandering, current reform efforts move in precisely the wrong direction—one that is fundamentally undemocratic and disrespectful to the public's democratic prerogatives. Redistricting is an inherently political question that ultimately requires political answers.

By “political,”¹¹⁴ I refer to the legislative character of an issue that offers no objectively correct answers, but only contestable ones based on judgments of policy and values. The types of decisions inherent in redistricting require tradeoffs among competing democratic principles, each important in its own right. Balancing important values such as representation, electoral competition, and responsiveness is a quintessentially political task which must be handled through public channels.

A. *Redistricting as a Political Question*

There is deep dissensus about the fundamental goals to be achieved in redistricting. The Supreme Court's clearest mandate in the area of redistricting is close adherence to its one person, one vote rule.¹¹⁵ Although equipopulous districting enjoys solid support, many critics have challenged it persuasively as derogating other important priorities,

112. See, e.g., BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE*, 52–80 (1984) (discussing “good government criteria” for redistricting); Lowenstein & Steinberg, *supra* note 108, at 11–12 (listing a number of proposals).

113. See CAIN, *supra* note 112, at 68–77 (concluding that “good government” criteria for redistricting clash at the margin).

114. As explained above, I mean to say more than that redistricting has political consequences, which is obvious. Nor do I mean to invoke the jurisprudential doctrine of political questions. See generally Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

115. The one person, one vote rule dictates a principle of equal population across districts for legislative apportionment. See generally Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213 (2003).

including minority representation and preservation of political communities.¹¹⁶ James Gardner, for one, claims that the one person, one vote rule is deeply in tension with the preservation of established local communities, which itself should be the priority of redistricting.¹¹⁷ California's Proposition 77 reflects to a degree Gardner's values in its dictate that "district boundaries shall conform to the geographic boundaries of a county, city, or city and county to the greatest extent possible."¹¹⁸ But Proposition 77 came under political attack precisely for excessive attention to preserving pre-existing political subdivisions and inadequate attention to the interests of minority groups that do not necessarily coincide with political subdivisional lines.¹¹⁹

From an entirely different direction, a growing number of commentators, including Richard Posner, Richard Pildes, and Samuel Issacharoff, argue forcefully that maximization of intradistrict electoral competition should be the priority in redistricting.¹²⁰ Issue 4 in Ohio itself embodied this strategy in its command that the redistricting proposal with the score for highest competitiveness be enacted.¹²¹ Nonetheless, Nathaniel Persily responds that the protection of incumbents and proportional partisan representation in redistricting—in other words, reduction of intradistrict competition—might be more valuable.¹²² Incumbents bring seniority, institutional memory, and technical expertise, while being known to their constituents and having represented their districts well.¹²³ In fact, the Court has come closest to adopting Persily's view and repeatedly has declared the legitimacy of protecting incumbents as a legitimate state objective of redistricting.¹²⁴ In short, as Justice

116. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 137 (1994); Hayden, *supra* note 44.

117. James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237 (2002).

118. Proposition 77, *supra* note 60, § 2(f).

119. See *infra* Part II.B for discussion of Proposition 77.

120. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649 (1998); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 102 (2004) [hereinafter Pildes, *Democratic Politics*]; Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999).

121. Issue 4, *supra* note 60.

122. See Persily, *supra* note 105.

123. See *id.*

124. See *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *Bush v. Vera*, 517 U.S. 952, 964 (1996); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *Connor v. Finch*, 431 U.S. 407, 414–15 (1977); *White v. Weiser*, 412 U.S. 783, 795–97 (1973). In fact, in *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), the Court held that judicial scrutiny should be at its "lowest ebb" when a redistricting divides political power in proportion to the parties' respective voting strength in the electorate, such that incumbents of

Frankfurter once complained, “[a]pportionment, by its character, is a subject of extraordinary complexity, . . . even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised.”¹²⁵ There is serious disagreement about the normative goals to be achieved through redistricting.

Redistricting is therefore fundamentally different than election administration, for which neutral, nonpartisan control makes more sense. Following the 2000 and 2004 presidential elections, a consensus among reformers and academic commentators increasingly favors nonpartisan election administration, as opposed to administration by an elected secretary of state.¹²⁶ The reason is simple—there is relatively broad agreement on neutral *ex ante* principles for election administration.¹²⁷ Although there is nothing close to consensus on the core goals for redistricting, there is consensus about proper election administration; political impartiality in election administration is uncontroversial.¹²⁸ There are no serious arguments, for instance, that government should administer elections purposefully toward favoring certain groups or interests, as it often does in redistricting. Richard Hasen, an advocate of nonpartisan election administration, concludes that “the fundamental principles of neutral election administration are not subject to serious debate.”¹²⁹ Political discretion in election administration is thus more harmful than helpful.

By contrast, nonpartisan control over redistricting inevitably would confront “fundamental disagreements on goals to be achieved.”¹³⁰ Choices in redistricting that cannot fall back on established normative consensus

both parties are assigned to electorally safe legislative districts. The Court deemed the result as “politically fair,” because the redistricting sought “not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.” *Id.* at 753–54.

125. *Baker v. Carr*, 369 U.S. 186, 323–24 (1962) (Frankfurter, J., dissenting).

126. See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974, 988–91 (2005) (reporting that thirty-three states elect their chief election administrator, whether secretary of state or other title, by partisan election, while the remaining states select their administrators by political appointment).

127. I do not mean to say that there is never disagreement on matters of election administration, as the current controversies over voter-identification requirements demonstrate. See, e.g., *Developments in the Law*, *supra* note 46, at 1144–54 (discussing the partisan controversy over voter fraud). Nevertheless, the basic point is that there is far greater consensus on the core goals of proper election administration than of redistricting.

128. Hasen, *supra* note 126, at 988.

129. *Id.*

130. *Id.*

must be made on the basis of contested political values and require judgments that are distinctly political in character. For these matters, which are usually decided by political institutions through a political process, ultimate resolutions are often controversial and contestable. Reasonable, public-spirited people disagree sharply about the relative importance of different redistricting goals. They are without any value-free method for deciding which goals are objectively superior.¹³¹ The only way to prioritize certain redistricting criteria above others, when they inevitably conflict, is with reference to the relative value ascribed to the many democratic interests such as competition, representation, diversity, and minority voice, among others.

In redistricting, there are thus only political answers contingent on value judgments that cannot be reduced manageably to objective logic or technocratic expertise. As Justice Breyer argues in his *Vieth* dissent, redistricting embodies a “series of compromises of principle—among the virtues of, for example, close representation of voter views, ease of identifying ‘government’ and ‘opposition’ parties, and stability in government.”¹³² Redistricting is not a policy matter that can be satisfactorily resolved by expert fiat or neutral adjudication. Indeed, expert scholars have proposed an incredible array of redistricting criteria without arriving at any consensus.¹³³ No “‘neutral’ or ‘pre-political’ public interest criteria” exist.¹³⁴ Redistricting ought not to be “politics free.”¹³⁵

131. See CAIN, *supra* note 112, at 73–74; Pamela S. Karlan, *Congressional Power to Extend Preclearance Under the Voting Rights Act*, AM. CONST. SOC’Y L. & POL’Y, June 2006, at 12, available at <http://www.acslaw.org/node/2964> (click “Karlan Preclearance Paper 6-14-06.pdf” link) (“Part of the reason the Supreme Court has grappled with the justiciability of political gerrymandering claims for nearly forty years is precisely because the issue calls on courts to decide among hotly contested theories of effective representation.”); Lowenstein & Steinberg, *supra* note 108, at 37 (“The difficulty is that although the goals established may be plausible, there are usually equally plausible reasons for seeking the opposite goals.”); Persily, *supra* note 105, at 678 (“[C]oncerns about representation and governance are of equal weight to concerns about electoral competition, and there is no philosophically uncontested reason why judges should force one set of values rather than another down the throat of state governments.”).

132. *Vieth v. Jubelirer*, 541 U.S. 267, 360 (2004) (Breyer, J., dissenting).

133. See, e.g., Bruce Adams, *A Model State Reapportionment Statute Process: The Continuing Quest for “Fair and Effective Representation,”* 14 HARV. J. LEGIS. 825 (1977); Gordon E. Baker, *Judicial Determination of Political Gerrymandering: A “Totality of Circumstances” Approach*, 3 J.L. & POL. 1 (1986); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77 (1985).

134. Lowenstein & Steinberg, *supra* note 108, at 4.

135. *Id.*

Political questions deserve, even require, political answers.¹³⁶ Redistricting implicates deep questions of politics and democratic values that demand popular involvement—indeed more popular involvement rather than less. The search for neutrality as the solution to gerrymandering tries to avoid, rather than confront and embrace, the larger value questions inherent in redistricting. Turning to apolitical institutions, and away from legislatures and other political venues, seeks to depoliticize what should be put to the people through the democratic process. This is, to put it squarely, offensive to a democracy.

B. The Costs of Political Insulation

The apolitical character of courts and independent commissions brings profound costs to redistricting. The same virtue of political insulation that ensures courts and independent commissions will not be guided by political motivations also makes them particularly ill-suited in a different sense to the task of redistricting. Their political insulation renders them decidedly unaccountable to the electorate and isolated from popular sentiment. As we remove legislatures and elected officials from the redistricting process, we also remove legitimate democratic bodies from deciding what defining goals ought to replace self-interest in redistricting. We move toward allowing nonpolitical institutions to decide fundamental value questions nearly by fiat without institutional guarantees of popular oversight and input.¹³⁷

The political insulation of courts makes them particularly ill suited for deciding the value questions underlying redistricting.¹³⁸ Judicial independence from popular influence is designed to insulate courts from majoritarian pressures, but this familiar insulation from politics also leaves

136. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980) (observing that “substantive decisions are generally to be made democratically in our society”).

137. To address this concern in the context of administrative law, Congress and the courts impose on administrative agencies a heavy layer of procedural requirements under the Administrative Procedure Act that helps promote political accountability, interest representation, and public accessibility. See generally Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689 (2000); Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

138. Richard Pildes objects that the question is not whether independent institutions are ideal, but whether they will handle redistricting better than “self-interested partisan actors inevitably seeking entrenchment.” Pildes, *Democratic Politics*, *supra* note 120, at 80–81. However, Pildes assumes that one must choose between independent institutions and the political process. I view this as a false choice. In the next Part, I argue that reform should opt for a middle path between these two alternatives that combines the strengths of both. See *infra* Part IV.

courts poorly equipped to serve as institutions of democratic policymaking.¹³⁹ Courts, designed as they are to be politically insensitive and unaccountable, are inept at weighing the complex political considerations that should influence the redistricting process.¹⁴⁰ It is an immense legislative challenge for the judicial branch to muster the necessary expertise and skill to supervise the redrawing of district maps, much less ultimately produce a redistricting map that adequately considers and integrates the many political concerns that redistricting inevitably raises.¹⁴¹ Whatever the result, the redistricting process produces winners and losers and strikes controversial tradeoffs that courts, democratically unaccountable and unrepresentative, cannot defend as the product of popular lawmaking.¹⁴² Redistricting is simply a legislative task for which courts lack the necessary democratic pedigree and institutional resources.

The Court demonstrated its ineffectiveness at measuring public sentiment in *Georgia v. Ashcroft*.¹⁴³ In the case, the Court placed great importance on what it viewed as African-American support for the redistricting plan at issue.¹⁴⁴ The redistricting of Georgia's state legislature, in *Ashcroft*, was controversial and potentially subject to vehement African-American objection.¹⁴⁵ Democrats, at risk of losing control of the legislature, decided to disperse African-American voters across districts, instead of concentrating them in fewer districts, and thus

139. This classic objection is, of course, the basis of the "countermajoritarian difficulty." See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); RONALD DWORKIN, *FREEDOM'S LAW* (1996); CHRISTOPHER EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002); Larry D. Kramer, *The Supreme Court 2000 Term, Foreword: We the Court*, 115 *HARV. L. REV.* 4 (2001).

140. See, e.g., *Connor v. Finch*, 431 U.S. 407, 415 (1977) ("[Courts] possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name."); ELY, *supra* note 136, at 103 (noting that the political insulation of courts "does not give them some special pipeline to the genuine values of the American people: in fact it goes far to ensure that they won't have one").

141. See Persily, *supra* note 41; see also *LULAC v. Perry*, 126 S. Ct. 2594, 2608 (2006) ("Quite apart from the risk of acting without a legislature's expertise, and quite apart from the difficulties a court faces in drawing a map that is fair and rational, the obligation placed upon the Federal Judiciary is unwelcome because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." (citations omitted)).

142. See *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in judgment) ("Courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.").

143. 539 U.S. 461 (2003).

144. *Id.* at 469–73, 484, 489–90; see also *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 102 (D.D.C. 2002) (Oberdorfer, J., dissenting) ("I give great[] credence to the political expertise and motivation of Georgia's African-American political leaders . . .").

145. See *Ashcroft*, 539 U.S. at 469–71 (describing the Democratic plan to "unpack" African-American districts).

increase the chances of holding more districts across the state with the help of these loyal Democratic voters.¹⁴⁶ The question for the Court was the permissibility under the Voting Rights Act of the reduced assurances of descriptive representation for the African-American community.

The Court held that the state could trade stronger guarantees for descriptive representation of African Americans, in favor of a greater chance for continued control of the state legislature by the Democrats, the favored party of African Americans.¹⁴⁷ The Court explained that the Voting Rights Act permitted the state a “political choice of whether substantive or descriptive representation is preferable.”¹⁴⁸ In this case, the state of Georgia could “choose, consistent with [section] 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters.”¹⁴⁹ This tradeoff, built into the *Ashcroft* redistricting, faithful to the purposes of the Voting Rights Act, might increase the political influence of the African-American community. In the end, the Court deferred to what it saw as the political preference of the African-American community in favor of the *Ashcroft* tradeoff. Richard Pildes applauds the Court for its political assumptions in *Ashcroft*, in light of “the nearly unanimous support of a large black political delegation.”¹⁵⁰ Indeed, legislative approval of the *Ashcroft* redistricting depended on the swing votes of those African-American elected officials for passage.¹⁵¹ Based upon this evidence, the Court ruled that the Georgia redistricting was nonretrogressive under section 5 of the Voting Rights Act.¹⁵²

But the Court’s conclusion of African-American support for the *Ashcroft* tradeoff was far from safe. The Court’s inference about the

146. *Id.*

147. *Id.* at 483.

148. *Id.*

149. *Id.*

150. Pildes, *Democratic Politics*, *supra* note 120, at 96. One of the justices speculated during oral argument that it would be “hard to believe that [African-American officials] didn’t have . . . the best interest of their—of their race in—mind.” See Transcript of Oral Argument at 47, *Ashcroft*, 539 U.S. 461 (No. 02-182). Heather Gerken concludes that “it obviously mattered a great deal to the Court that there was relative unanimity among African-American representatives about the wisdom of the plan.” Heather K. Gerken, *A Third Way for the Voting Rights Act?*, 106 COLUM. L. REV. 708, 733 (2006).

151. See Jim Galloway & David Pendered, *Lack of Democratic Support Delays Redistricting Vote*, ATLANTA J. CONST., Aug. 9, 2001, at 4E. Ten of eleven African-American state senators and thirty-three of thirty-four African-American state representatives voted for the plan. *Ashcroft*, 539 U.S. at 471. The Court also emphasized repeatedly that Congressman John Lewis, a civil rights hero and Atlanta congressional representative, championed and testified in favor of the plan. *Id.* at 472, 489–90.

152. *Id.* at 488.

attitudes of the African-American community at large was based entirely on the support of African-American elected officials.¹⁵³ Given the conflict of interest for elected officials in redistricting, the Court's inference was unsound. On one hand, African-American officials in Georgia seemed not to be entrenching themselves into office.¹⁵⁴ The *Ashcroft* redistricting made their re-election less secure by removing reliable African-American voters from their districts. On the other hand, the Court appeared to dismiss the possibility of *any* conflict of interest between African-American elected representatives and the greater community.¹⁵⁵ The Court noted only, without acknowledging contradiction, that one of the motivations for the *Ashcroft* redistricting was to retain chairmanships and leadership posts for these African-American officials.¹⁵⁶

The Court ignored that a telling array of organizations from the African-American community opposed the *Ashcroft* plan. The coalition represented everything from local community groups to national civil-rights groups, almost all of whom boasted well-established pedigrees flowing from the Civil Rights Movement. The NAACP, Southern Christian Leadership Conference (SCLC), RAINBOW/PUSH, and Georgia Association of Black Elected Officials filed an amicus brief with the Court opposing the *Ashcroft* plan.¹⁵⁷ Prominent organizations from Atlanta's African-American community also opposed pre-clearance, including a roster of Baptist churches with proud histories of civil-rights advocacy—Martin Luther King, Jr.'s Ebenezer Baptist Church among them.¹⁵⁸ A wide range of civil-rights groups joined them in opposition, including the ACLU, Lawyers' Committee for Civil Rights, and AFL-CIO.¹⁵⁹ Nonetheless, the political insulation of the judiciary made it acutely difficult for courts to measure the political considerations that necessarily are part of the complicated calculus underlying legislative redistricting. Even when the Court purported to give agency to the African-American community, it ignored the telling opposition of grass-

153. *Id.* at 479–85; see Pildes, *Democratic Politics*, *supra* note 120, at 92–93.

154. See Pildes, *Democratic Politics*, *supra* note 120, at 92 (noting that black legislators were “not demanding safer sinecures for themselves, as officeholders typically do, but taking risks to forge a winning coalition”).

155. See Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 33 (2004).

156. *Ashcroft*, 439 U.S. at 483–84.

157. See Brief for the Georgia Coalition for The Peoples' Agenda as Amicus Curiae Supporting Appellees, *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (No. 02-182).

158. *Id.*

159. *Id.*

roots organizations in the community, indeed almost every group except the incumbents in the legislature.

Just as the political insulation of courts limits judicial effectiveness on redistricting matters, the political insulation of independent commissions limits their usefulness as well. In fact, the failure of Proposition 77 in California reflected the public's dissatisfaction with relinquishing control over these types of decisions. Insulation from political influence in redistricting guards against self-entrenchment, but only by distancing the process from the political give-and-take that undergirds democratic legitimacy and popular support. By trying to strip away all political influences from redistricting, Proposition 77 raised the specter of an unrepresentative, unaccountable three-person commission striking the critical choices of democratic governance for the diverse state of California—a proposition that the California electorate rejected.

California voters were not against removing redistricting power from the state legislature. Indeed, voters of all partisan stripes were strongly in favor of it—hence Proposition 77's early popularity. More than seventy percent of Democrats, Republicans, and Independents agreed that “it is a conflict of interest for legislators to draw their own election districts.”¹⁶⁰ Seventy percent of Democrats and Republicans, and sixty-one percent of Independents, felt “it is better for California's election districts to be drawn by . . . an independent commission.”¹⁶¹ Although voters favored the notion of a neutral, independent commission for redistricting, voters soured on the particulars of Proposition 77 once they realized the downside of political insulation and neutrality.¹⁶²

Voters learned that the political insulation of the proposed commission would necessarily limit political access and accountability.¹⁶³ Proposition

160. *Id.*

161. ROSE INSTITUTE OF STATE AND LOCAL GOVERNMENT, CALIFORNIA STATEWIDE SURVEY ON REDISTRICTING—APRIL 2005 4 (2005).

162. Democratic voters, while quite favorable toward independent commissions in theory, were suspicious about the underlying political motivations of Governor Arnold Schwarzenegger in sponsoring Proposition 77. When asked about Proposition 77 in April 2005, fifty-six percent of Democratic voters felt that Proposition 77 was a “Republican power grab,” compared to only ten percent of Republicans and thirty-two percent of Independents. *Id.* at 6. Proposition 77 ultimately lost at the polls because Schwarzenegger's sagging popularity dragged Proposition 77 down with him, and Independents came to oppose Proposition 77 by November. In October 2005, fifty-seven percent of Independents opposed Proposition 77, compared to sixty-six percent of Democrats and twenty-six percent of Republicans in opposition. Press Release, Pub. Pol'y Inst. of Cal., Special Survey on Californians and the Initiative Process, *If You Call It, Will They Come? Voter Interest in Special Election Surges*, at 6 (Oct. 28, 2005).

163. A similar concern strengthened opposition to Issue 4 in Ohio. See Joe Hallett, *State Issues Stir Both Sides of Aisle*, COLUMBUS DISPATCH, Oct. 23, 2005, at 01A; see also Jean Schmidt,

77's lack of guarantees of representation and access in redistricting doomed it to electoral defeat. Proposition 77's directives to its independent commission were necessarily vague, given the incredibly detailed and nuanced decisions that must be made in redistricting, to a degree that California voters found discomfiting.

When an independent commission decides to redraw district lines across a town boundary or around an ethnic community, it must decide for itself how to weigh the multitude of political considerations in play.¹⁶⁴ In Arizona, the state court of appeals defended the Arizona independent commission by explaining "the overriding fact that districting decisions require judgment."¹⁶⁵ Because the applicable directives are unavoidably inexact in practice, and because it is "not possible to produce a perfect map by feeding data into a computer," establishment of an independent commission necessarily means that it must have flexibility and discretion "to reach reasonable conclusions on how to draw district lines."¹⁶⁶ For the same reasons, the California commission under Proposition 77 could not have ensured voters influence over the final shape of the redistricting the commission would have produced. The commission, insulated from public access and accountability, would necessarily have retained ultimate discretion for itself.

Issue 4 in Ohio took a different path to reach the same disappointing result. To limit political influence on the independent commission, Issue 4 commanded the commission to do nothing more than select the plan with the highest competitiveness score by designated formula.¹⁶⁷ Issue 4 thus attempted to de-politicize redistricting by radically restricting the discretion of the Ohio independent commission. It blocked the unaccountable and unrepresentative policy discretion that California voters worried their independent commission would exercise. But in doing so, Issue 4 would have similarly precluded public deliberation and political influence regarding the proper balancing of socio-political interests. The mathematical computation of competitiveness scores would have

Editorial, *Why Ohio Voters Should Run from RON*, PEOPLE'S DEFENDER (West Union, Ohio), Nov. 2, 2005.

164. See *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843, 857–58 (Ariz. Ct. App. 2005) (charging the Independent Commission to use flexibility and judgment to "reach reasonable conclusions" in determining district lines without ignoring constitutional considerations); see also *Mayor of Cambridge v. Sec'y of Commonwealth*, 765 N.E.2d 749, 755 (Mass. 2002) (concluding that redistricting "necessarily involves the use of discretion"); *State ex rel. S. St. Paul v. Hetherington*, 61 N.W.2d 737, 742 (Minn. 1953) (same).

165. See *Ariz. Minority Coal. for Fair Redistricting*, 121 P.3d at 857.

166. *Id.*

167. Issue 4, *supra* note 60.

dominated all other considerations. Issue 4 tried to solve the troubling problem of politically unaccountable policymaking by independent commissions by legislating away virtually all the necessary complexity of the political questions inherent in redistricting.

C. The Need for a Third Way in Redistricting

The proper approach for resolving the political questions inherent in redistricting is not to assume them away or delegate them to a court or commission, but to address them forthrightly through a political process. Contestable questions promise no indisputably “correct” solutions with which everyone will agree.¹⁶⁸ The polity can arrive at difficult, controversial determinations, not by guaranteeing correct outcomes, but by guaranteeing a legitimate democratic process through which all interests have an opportunity to fight for their position.¹⁶⁹ Like an election contest between candidates, the resulting resolution of the process cannot be proved objectively correct. Instead, political institutions simply deliberate, weigh competing interests, and arrive at a decision—a discretionary one accountable to the electoral process. The resulting resolution is legitimately and fairly decided, provided that the process by which it was reached was legitimate and fair.

Pluralist politics through the legislative process, not through insulated courts or committees, usually offer the best venue for this articulation and aggregation of societal interests into the compromise of public policy. Redistricting must be conducted through a process that “allows a vast number of groups and individuals to participate plausibly in the process of compromise, allowing their voices to be heard.”¹⁷⁰ The legislative process offers the appropriate democratic venue for this “pull, haul, and trade”¹⁷¹ of pluralist politics. The legislative process is an open, public forum in which all constituencies can advocate for their interests, develop alliances, and negotiate workable compromises. It hosts deliberation and debate about the public good before a popular audience, subject to the familiar check of electoral accountability.

168. See, e.g., Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 73 (1962) (arguing that redistricting cannot be reduced to anything even resembling “an exercise of reason”).

169. See generally ELY, *supra* note 136, at 101–04; see also ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967).

170. Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547, 1622 (2005).

171. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

Indeed, the usual method of deciding political questions is to submit them to political institutions. “In a representative democracy,” John Hart Ely argued, “value determinations are to be made by our elected representatives.”¹⁷² Just so, the political branches handle legislative redistricting in most states. Redistricting entails the legislative work of “accommodating the incommensurable factors of policy.”¹⁷³ Legislatures, as democratically elected bodies, possess the popular pedigree to make the complicated, value-laden policy judgments intrinsic to structuring the electoral system. In accordance, the Supreme Court has repeatedly indicated that redistricting is the special responsibility of the state legislature.¹⁷⁴ Redistricting should be conducted with the accessibility and accountability of the political process.

For this reason, one camp of commentators argues that reform is counterproductive and redistricting ought to remain in the hands of legislatures.¹⁷⁵ Nathaniel Persily contends that the contestability of value judgments militates toward leaving “the ultimate decision to the admittedly self-interested but more accountable political bodies.”¹⁷⁶ Elected bodies are better suited to “strike the balance between the competing political values central to democratic government.”¹⁷⁷ Likewise, Daniel Lowenstein and Jonathan Steinberg argue that, like almost any other issue, redistricting is “one of the objects of the political struggle, not one of its ground rules.”¹⁷⁸ As a consequence, “we expect the legislators of our party to draw district lines in a manner consistent with the overall conception of the public interest embodied by our party.”¹⁷⁹

Nonetheless, institutional reform is necessary because maintaining redistricting by elected officials and political bodies leaves unaddressed the original problem—political institutions are populated by elected

172. ELY, *supra* note 136, at 103.

173. *Baker v. Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting).

174. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) (“The task of redistricting is best left to state legislatures . . .”); *White v. Weiser*, 412 U.S. 783, 794–95 (1973) (“We have adhered to the view that state legislatures have ‘primary jurisdiction’ over legislative reapportionment.”); *see also* *Miller v. Johnson*, 515 U.S. 900, 935 (1995) (Ginsburg, J., dissenting) (“[T]he task should remain within the domain of state legislatures.”).

175. Daniel Ortiz describes this position as the “got theory” argument. *See* Ortiz, *supra* note 103, at 460.

176. Persily, *supra* note 105, at 680–81.

177. *Id.* at 680.

178. Lowenstein & Steinberg, *supra* note 108, at 75.

179. *Id.*; *see also* Jim Siegel, *State Issue 4; GOP Isn’t Pushing to Make Changes in Redistricting*, COLUMBUS DISPATCH, Oct. 19, 2005, at 5D (quoting a Republican leader who reasons that “the people who are involved with [redistricting] are elected, and if people don’t think they do a good job, they don’t re-elect them”).

officials with an overriding conflict of interest on redistricting and other rules of electoral competition. Redistricting presents a fundamental conundrum to the traditional formula. Incumbents, while blessed with democratic authority, also are tempted to exercise that authority for their own self-interest with respect to legislating the rules of the game. Legislators and other elected officials, when they redraw the lines of their own districts, have tremendous incentive to ensure themselves continued service in office.¹⁸⁰ Indeed, they do precisely this in practice.¹⁸¹

Redistricting differs from many other policy issues because it directly structures elected officials' prospects for re-election.¹⁸² An elected official or political party hurts its chances of re-election if it takes an unpopular position on tax cuts. An elected official or political party that entrenches itself through redistricting, on the other hand, increases its chances of re-election regardless whether the redistricting is popular with the public. It is insufficient to expect the threat of the next election to restrain elected officials and political parties from using redistricting to entrench themselves, because redistricting helps ensure their re-election and thus makes the next election less threatening in the first place. The problem of incumbent lockup thus complicates the usual delegation of redistricting authority with elected officials whose electoral accountability typically provides a popular safeguard.

The current redistricting debate therefore occurs between camps that appear diametrically opposed. One camp believes that redistricting must be decided by legislatures and other politically accountable institutions.¹⁸³ It views the risk of incumbent entrenchment as a necessary cost of securing political answers from political institutions. The other camp believes that redistricting must be withdrawn from legislatures and given to courts or independent commissions.¹⁸⁴ It views the risk of incumbent entrenchment to be prohibitive and is willing to compromise political

180. See, e.g., ELY, *supra* note 136, at 121 (commenting that the incentive of elected officials is to maintain whatever districting arrangement that "got and keeps them where they are"); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1661-69 (1993); Kang, *supra* note 24.

181. Kang, *supra* note 24, at 446 (discussing incumbent tendency to "rig their re-election prospects by packing their own districts with friendly voters, which scares off or trounces challengers attempting to take their seats").

182. See generally Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

183. See, e.g., Hirsch, *supra* note 105, at 180; Lowenstein & Steinberg, *supra* note 108; Persily, *supra* note 105.

184. See, e.g., Issacharoff, *supra* note 182; Pildes, *Democratic Politics*, *supra* note 120, at 44-47.

accountability as a necessary cost of preventing self-interested redistricting.

However, both sides find themselves confronting what is, in fact, a false dilemma.¹⁸⁵ The need for political answers in redistricting ought to guide reform toward new institutional approaches, rather than present a dead end. Political accountability and self-interested entrenchment need not run together inextricably in redistricting. The special challenge for redistricting is designing a policymaking process that provides democratic accountability and popular input, but does not implicate the same risks of self-interested entrenchment inherent in the political branches of government. The goal is to find political channels for answering political questions, but to do so without allowing political self-interest to dominate the process.

IV. DEMOCRATIZING REDISTRICTING

I propose the use of direct democracy in legislative redistricting as a middle path, a third way, between total acquiescence to political gerrymandering on one hand and unconditional rejection of politics, under any form, in redistricting on the other hand. Direct democracy provides a means to restructure the incentives within the legislative process of redistricting and revive the benefits of pluralist politics, without permitting political self-interest to subsume the public interest. Contrary to current reform trends, redistricting would be channeled in healthier directions through *more* politics, not less.

Direct democracy helps construct a distinctly political process of redistricting that empowers the general public itself to guard the public interest. A basic requirement that legislative redistricting plans be subject to statewide popular approval for enactment would allow a democratic process to decide and strike the critical value choices required in redistricting. Direct democracy places ultimate power for redistricting in the hands of the proper decisionmaker with democratic authority—the people whom governing institutions should be designed to serve and represent.

185. See, e.g., Pildes, *Democratic Politics*, *supra* note 120, at 80–81 (“The question is whether intermediate institutions, designed in particular ways, are likely to handle these tasks better than self-interested partisan actors inevitably seeking entrenchment of both themselves and their parties.”); Ryan P. Bates, Note, *Congressional Authority to Require State Adoption of Independent Commissions*, 55 DUKE L.J. 333, 339 (2005) (arguing that independent commissions are not ideal but “may represent the best solution available under the current legal framework”).

A. *Direct Democracy and Incumbent Entrenchment*

The dilemma of redistricting is that important structural matters like redistricting must be handled through a political process, but the regular political process perverts redistricting into an exercise in self-dealing and incumbent protection by self-interested insiders. In most matters of public policy, “[t]he mechanism for resolving political contests in our society is the election.”¹⁸⁶ However, in the circumstances of redistricting, it is the direct democratic election that best serves the public’s interests. Direct democracy enables the people, the real stakeholders in democratic design, to bypass their elected officials on this particular issue. This familiar virtue of direct democracy makes it peculiarly well-suited for matters of democratic design.

Progressive reformers at the turn of the twentieth century intended direct democracy as a remedy for exactly the type of self-dealing by self-interested elected officials that occurs in redistricting through the normal legislative process.¹⁸⁷ Direct democracy bypasses the legislature and makes law directly without the interference of self-interested elected officials. “[D]irect democracy allows for an end-run around incumbents, allowing the median voter in a jurisdiction to enact institutional reforms seen as against the interests of political insiders.”¹⁸⁸ Submitting redistricting to direct democracy thus plays to direct democracy’s defining strength.

Requiring new redistricting plans to win statewide popular approval through direct democracy would allow the public a veto over excessively partisan or otherwise excessively self-interested proposals. A requirement that voters must vote on and approve the specific redistricting scheme itself, the actual map, for the redistricting to take legal effect in subsequent elections, would invest the general public with ultimate authority over redistricting. Direct democracy provides a popular check against attempts

186. Lowenstein & Steinberg, *supra* note 108, at 74.

187. See DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11 (1997). Even today, groups turn to direct democracy when the normal legislative channels prove unsympathetic to their appeals.

188. Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997, 998 (2005); see also Caroline J. Tolbert, *Changing Rules for State Legislatures: Direct Democracy and Governance Policies*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 171 (Shaun Bowler, Todd Donovan & Caroline J. Tolbert eds., 1998) (finding a relationship between initiative usage and passage of governance reforms).

by incumbents to skew the competitive rules of election law that govern them and opens a powerful channel through which to ensure a healthy political process. Direct democracy offers what Adrian Vermeule and Jacob Gerson call a “hard” solution:¹⁸⁹ it changes the institutional rules that govern the redistricting process to introduce a new, better set of incentives for elected officials and new, better opportunities for voters to defend their interests.

By requiring popular approval for enactment, direct democracy properly places decisionmaking authority with the people to design their representative institutions. Direct democracy allows the public a direct choice in the necessary tradeoffs among competing democratic values in redistricting in a manner that best achieves its normative commitments and governance interests. The public can help decide directly whether its legislative districts will be designed to maximize electoral competition, protect incumbents, or preserve existing political subdivisions. The public can help decide whether any of these goals deserves overriding priority, or whether any ought to be discarded. On one hand, direct democracy provides a mechanism for moving the redistricting process toward more public-spirited outcomes by giving the electorate a veto against excessive partisan gerrymandering and incumbent lockup. On the other hand, the electorate may decide that it actually wishes to protect incumbents and ensure their re-election. In either case, the decision would be made by the general public, rather than through narrow self-dealing by those very incumbents whose jobs are at stake.

Voters effectively use direct democracy, or the threat of direct democracy,¹⁹⁰ to enact policy that constrains self-entrenchment by elected officials. Regardless how well, or how poorly, direct democracy performs in other policy domains, it is particularly useful as a potential bypass of incumbents in the legislature and avenue for structural reforms that elected officials might oppose. Nine of the thirteen states that currently have a redistricting commission also happen to be states that provide for popular

189. Jacob E. Gersen & Adrian Vermeule, *Chevron as Voting Rules*, 116 YALE L.J. (forthcoming 2006).

190. The possibility that reformers may use the initiative to bypass the state legislature increases the likelihood that the legislature will accede, at least to some degree, to popular demands. *See, e.g.*, Elisabeth R. Gerber, *Pressuring Legislatures Through the Use of Initiatives: Two Forms of Indirect Influence*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 191 (Shaun Bowler, Todd Donovan & Caroline J. Tolbert eds., 1998); Nolan McCarty, *Commentary on “Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform”*, 78 S. CAL. L. REV. 1035 (2005).

initiatives.¹⁹¹ Proposition 77 in California and Issue 4 in Ohio, obviously, also were initiatives that stood little chance in the state legislature but received a hearing in the November statewide election. Legislative term limits are another example. Twenty-two of the twenty-four states that enacted term limits on their congressional representatives acted through direct democracy.¹⁹² Among the states that had no provision for direct democracy, only one enacted congressional term limits.¹⁹³ Likewise, fifteen of twenty-four states that have a provision for popular initiatives have enacted term limits on state legislators, while only one of twenty-six states without the initiative has passed legislative term limits.¹⁹⁴

Even before *Baker v. Carr*, voters managed to exercise direct democracy on occasion to reapportion their state legislatures. Voters in states with the initiative were able to require reapportionment of state legislatures that were not required legally to reapportion themselves before the U.S. Supreme Court instituted the one person, one vote rule in 1964. From 1918 to 1962, the voters of eight states voted at least ten times to update the apportionment of their legislatures.¹⁹⁵ In other words, the voting majority in a number of states used the chance to vote on redistricting matters to defend its democratic prerogatives and update state apportionment to reflect changes in the electorate.

California's Proposition 77 offered statewide popular ratification of the independent commission's redistricting plan, but only after the commission had done its work without the necessary political process in advance. The problem with ex post ratification, and the reason that this feature went largely ignored, was that it offered a public vote without any antecedent opportunity for the public and interested groups to engage in the lawmaking process and influence the shape of the redistricting plan before it went into effect. As a practical matter, Proposition 77's provision of direct democratic approval served mainly as a fail-safe, an opportunity for the public to veto unacceptable plans, rather than to influence directly or choose among different plans in an affirmative vote. Direct democratic

191. See also Tolbert, *supra* note 188 (finding similar results in 1998); Initiative & Referendum Institute, State I & R, http://www.iandrinstute.org/statewide_i&r.htm (last visited Mar. 28, 2007).

192. See Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 111 (1997); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 510 (1997). The statistic applies only through 1995, when the U.S. Supreme Court struck down as unconstitutional congressional term limits, at least when enacted by individual states, in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

193. See Elhauge, *supra* note 192, at 111.

194. Persily & Anderson, *supra* note 188, at 1006.

195. See data available at Initiative & Referendum Institute, www.iandrinstute.org (last visited Mar. 28, 2007).

ratification, only after the commission's chosen plan is given legal effect in an election, offered a hollow promise of popular involvement. As a result, the campaign debate focused mainly on the absence of Proposition 77 guarantees of political representation and access in redistricting, rather than ex post popular ratification. However, as explained in the following section, when coupled with an open legislative process for redistricting that invites the public to participate, direct democracy transforms the incentives of elected officials and reinvigorates the pluralist politics of redistricting.

If direct democracy works so well, why does it not already prevent gerrymandering in states where it is available? Theoretically, unhappy voters in a gerrymandered state already should be able to use the initiative process to enact a ballot measure that would abrogate any unwanted gerrymander. However, a problem with direct democracy is the high cost of agenda setting.¹⁹⁶ The general electorate might vote for a ballot measure to abrogate a gerrymander, but the necessary initial step of qualifying a ballot measure for the ballot in the first place is expensive and burdensome. Gathering the thousands of signatures required for ballot qualification requires tremendous resources.¹⁹⁷ As a consequence, for better or worse, wealthier interests disproportionately set the agenda for direct democracy and decide what measures appear on the ballot. Ballot measures that restructure the electoral system, thus, are most likely to qualify for the ballot when the effect of election reform would coincide closely with the political interests of some resourceful group of political insiders, as in the cases of Proposition 77¹⁹⁸ and also Proposition 198¹⁹⁹ in California. As a result, ballot qualification for reform measures provides an unreliable check on legislative redistricting. The current costs of exercising direct democracy, specifically ballot qualification, are simply too high to be used on a regular basis.

196. See generally Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17 (1997).

197. See Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of its Effects and Prospects for Reform*, in *THE BATTLE OVER CITIZEN LAWMAKING: A COLLECTION OF ESSAYS* 73 (M. Dane Waters ed., 2001); Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 240–42 (2004).

198. See Kang, *supra* note 24 (discussing Governor Schwarzenegger's motivations for championing Proposition 77).

199. Proposition 198 proposed a blanket primary system in which voters could vote in any party's primary election, regardless of their own party registration, on an office-by-office basis, all on a single ballot. See Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 140, 164–66 (2005) (discussing Proposition 198 and Tom Campbell's reasons for sponsoring it).

An institutional requirement that a redistricting plan must win popular approval for enactment would guarantee the general electorate a chance to veto any gerrymander. An institutional requirement of popular approval reduces the costs of direct democracy in the area of redistricting. Ballot qualification, in essence, would be free. And here, once given the chance to vote directly on redistricting matters, voters can effectively defend the public interest from the self-interest of political insiders. In short, direct democracy allows for popular voice, necessary and valuable in making the difficult value tradeoffs in redistricting, while empowering the general electorate to guard against excessive gerrymandering and rent-seeking by the political insiders who currently control redistricting.

B. Transforming the Legislative Process, Transforming Partisanship in Redistricting

I propose the following reform procedures for redistricting: (1) any redistricting plan would be subject to the requirement of statewide popular approval as a condition of enactment; and (2) the redistricting plans themselves, two in my proposal, to be presented for a public vote, would be developed through the legislature. That is, redistricting plans offered to the public for a vote should be drafted through the regular political channels. State legislators would deliberate, draft, and vote for redistricting proposals, subject to public hearing and discussion, but under a modified limited-vote regime designed to induce competition toward the median. Although there may be many proposals under consideration, each legislator would be entitled to only a single vote and could cast that vote for only one proposal, among the several on the table, to endorse for ballot placement. The two proposals yielding the greatest number of votes in the legislature would advance to the ballot for popular decision. The legislative process would thus yield two alternative redistricting maps, each placed on the ballot for a statewide direct democratic election with the winning proposal to be enacted for subsequent elections.

The objective of this arrangement is to create institutional incentives in redistricting toward the median preference in the general electorate.²⁰⁰ First, proponents of any proposal would need to broaden the appeal of

200. However, I do not purport to designate a single optimal set of institutional arrangements. The optimal arrangement is an institutional flexibility across states and representative bodies that allows them to experiment with processes and outcomes. The critical element in this account is the necessity of rejecting courts and independent commissions, insulated from the political process, as ultimate solutions.

their proposals sufficiently to finish with the most or second-most votes in the legislature. Each major party would organize and develop support in the legislature for its own redistricting plan.²⁰¹ Second, each party then would need to anticipate the prospective electoral response of the general electorate once its proposal is on the ballot. Any proposal too narrowly focused on the interests of party incumbents who proffered it risks defeat at the hands of the general electorate. As a result, the requirement of a statewide popular vote re-creates the pressure toward the preferences of the median voter in the general electorate, just as the major parties gravitate toward the political middle in candidate elections.

A straightforward application of the Median Voter Theorem illustrates this dynamic.²⁰² Assume a unidimensional policy space R , representing the degree to which a redistricting plan is biased toward Republican candidates at the expense of Democratic candidates.²⁰³ The Democrats offer a redistricting plan, d , and the Republicans offer a plan, r , such that $d < r$ along R . Each voter, i , has an ideal preference, x_i , along R that expresses i 's Euclidean preferences on redistricting, represented by the function, $u_i(p) = -(x_i - p)^2$, where $p = [d, r]$.²⁰⁴ Voter i is therefore indifferent between d and r when x_i is located exactly halfway between d and r along the unidimensional space R as follows:

$$(1) \quad u_i(d) = u_i(r)$$

$$(2) \quad -(x_i - d)^2 = -(x_i - r)^2$$

$$(3) \quad -((x_i - d)/2)^2 = -((d - r)/2)^2$$

201. See generally JOHN H. ALDRICH, *WHY PARTIES?* (1995); GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993).

202. See generally Duncan Black, *On the Rationale of Group Decision-making*, 56 J. POL. ECON. 23 (1948); see also JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (2d prtg. 1967); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

203. In other words, R represents a spectrum with maximum partisan bias favoring Democratic candidates on one extreme, and maximum partisan bias favoring Republicans on the other extreme, with no partisan bias for either party at its midpoint. Of course, redistricting policy is more nuanced than this stylization, but the assumption correctly captures the unavoidable tradeoff at the margin between the goals of incumbent entrenchment and other goals valued by the public in redistricting. Given an assumption that the median voter favors incumbent entrenchment of the majority party *less* than the incumbents of the majority party, the results under my proposal produce less entrenchment, and redistricting policy closer to the median voter's ideal, than the results under simple majority rule in the legislature without direct democracy.

204. That is, assuming single-peaked preferences, a voter's utility increases as the plan in question approaches the voter's ideal preference, as I explain above. As is standard, I also assume that the parties are motivated in part by policy interests and have imperfect information about the exact position of the median voter.

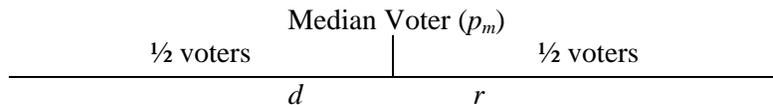
Voter x_i is indifferent between d and r , because the difference between d and r is squared. However, if one party creeps closer to voter i 's ideal point, it will win voter i 's vote. For instance, assume that the Democrats, instead of proposing d , offers d^* , closer to x_i (such that $(d + r)/2 > d^* > d$); then the following results:

$$(4) \quad -(x_i - d^*)^2 < -(x_i - d)^2$$

Voter i thus prefers and votes for d^* over both d and r . The same argument holds with respect to the Republicans when $r^* < r$. Voter i prefers and votes for r when r moves closer to p_i as follows:

$$(5) \quad -(x_i - r^*)^2 < -(x_i - r)^2$$

Substitute the median voter, m , for voter i . By definition, median voter m 's ideal preference sits at the midpoint of all voters' preferences such that d , or r , will win majority approval only if it wins the median voter m 's vote:



Put simply, the Democrats will be defeated and their redistricting proposal will not be enacted into law unless they can produce a redistricting proposal that more closely matches the median voter's ideal than the Republicans' proposal. The party that best caters to the median voter's preference will win; the party that fails will lose and receive no payoff at all.

For this reason, the coupling of a requirement of direct democratic approval would transform the legislative process leading to the public vote. Institutional incentives in redistricting would change, from exclusive focus on maximizing the interests of majority-party incumbents, to winning the median voter in the general electorate. My proposal enlists the familiar tools of electoral competition and accountability to induce political insiders to serve the public interest.

By submitting redistricting ultimately to direct democracy, my proposal transfers the politics of redistricting from the backroom to the public forum. In the backroom, fairness, justice, community interest, equal representation, and equality become "so many words in a dictionary [that] have little or no relationship to where the lines are drawn."²⁰⁵ Politicians

205. CAIN, *supra* note 112, at 2 (quoting California state senator H.L. Richardson).

under any conditions would press for redistricting concessions that serve their self-interest. But when redistricting is left exclusively to the legislative process, politicians are asked to do nothing more than that. They are almost never asked to justify their preferences in these private backroom negotiations. As a former Speaker of the California Assembly once put it, redistricting is “the most political, most crass, most selfish act that any legislator ever engages in.”²⁰⁶ Public opinion is almost entirely irrelevant and inconsequential.²⁰⁷ Indeed, it is no surprise that some of the most infamous partisan gerrymanders occurred with almost no public hearings or debate.²⁰⁸ The practical irrelevance of public opinion in contemporary redistricting is illustrated by the fact that I have been unable to find in the public record any polling results surveying public opinion about the *Ashcroft* redistricting. In contrast, a requirement of statewide approval would make public opinion central to redistricting. Legislators would be forced to construct a redistricting proposal that could survive public scrutiny and attract the median voter’s vote.

In the public forum, politicians would be forced to defend and campaign in favor of their preferred proposal to win the public’s vote. This process of public deliberation and debate would invite interest groups of all sorts to participate and leverage their public endorsement for influence on the redistricting process.²⁰⁹ A requirement of popular approval gives value in the battle for public opinion to the endorsements of trusted groups and leaders who can vouch for the public-spiritedness of a particular redistricting plan. Social science research demonstrates that voters effectively use heuristic cues, such as the endorsements of trusted civic groups and public advocates, to reach sensible voting decisions in direct democracy.²¹⁰ The endorsement of political reform groups like Common

206. *Id.* at 1 (quoting Bob Moretti).

207. *See, e.g.*, Chandler Brown, *Redrawn Districts a Mixed Bag*, ATL. J.-CONST., Dec. 26, 2005, at 1C (“The changes [from the 2004 congressional redistricting in Georgia] have drawn little publicity or controversy, to the point that political pundits—forget the average voter—aren’t familiar with the new boundaries.”).

208. *See, e.g.*, Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1332 (1987) (noting that the *Davis v. Bandemer* gerrymander was made public only two days before the end of the legislative session, without significant public participation or any public hearings).

209. *See, e.g.*, Gerken, *supra* note 150, at 718–43 (advocating interest-group involvement in a reformed preclearance process under section 5 of the Voting Rights Act); Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 GEO. WASH. L. REV. 1070, 1089–95 (2005) (discussing potential benefits from interest-group involvement and grass roots campaigning).

210. *See* Mark Forehand, John Gastil & Mark A. Smith, *Endorsements as Voting Cues: Heuristic and Systematic Processing in Initiative Elections*, 34 J. APPLIED SOC. PSYCHOL. 2215 (2004); Michael

Cause, for example, that might be willing to advocate in favor of a redistricting plan as fairer or more competitive, would be particularly valuable as a positive signal to voters. The desire to attract the support of popular interests or public-interest groups would encourage the major parties to look past narrow partisan self-interest and incorporate concerns that would resonate with the public. Only through this full political process can the redistricting process offer the necessary opportunities for interested constituencies to press for their priorities and thereby produce redistricting plans that balance out the weighty political considerations running in every direction.

Subjecting redistricting plans to a statewide popular vote through direct democracy offers a real chance not to eliminate partisanship in redistricting, but to transform its meaning and usage. Currently, in states where redistricting is left to the legislative process, partisanship is a currency in which party politicians privately deal to extract the best possible arrangement for themselves. Wielded by voters rather than politicians, partisanship admittedly would influence voting decisions about redistricting. But partisan identification of voters would matter only to the degree that party politicians can convince voters to trust their recommendations. Politicians would need to justify and advocate for their preferred proposals, as against competing proposals, with reference to the public interest.²¹¹

Deciding redistricting through direct democracy, as a consequence, would “launder” the political discourse and force politicians to justify their preferences in public-sounding terms.²¹² Direct democracy would introduce to the public the fundamental structural decisions that redistricting requires. Politicians would be forced to engage in a political debate about how best to structure the state electoral system and articulate why any favored proposal would better serve the polity’s best interests. Democratizing redistricting thus both gives birth to a public discourse about redistricting and launders the purposes of redistricting in a way that

S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence through Heuristic Cues and “Disclosure Plus”*, 50 UCLA L. REV. 1141 (2003); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994).

211. Cf. CAIN, *supra* note 112, at 190 (arguing in favor of public disclosure during redistricting); Issacharoff, *supra* note 180, at 1697 (arguing in favor of bringing the redistricting process out in the open where it would be subject to “the sanitizing effect of public scrutiny”).

212. See generally Robert E. Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75, 75–77 (Jon Elster & Aanund Hylland eds., 1986); see also BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 8–10 (1980).

educates and pushes its politics in healthier directions.²¹³ This is a political conversation in which a democracy ought to be engaged, but generally is not. Redistricting, one of the most important events in structuring the state's electoral institutions, occurs without much public notice or awareness. Direct democracy brings opportunity for public deliberation and debate on redistricting, through a political campaign leading up to the direct democratic election, about the shape and priorities for democratic restructuring.

Political parties and their elected officials would have every incentive to act responsibly on redistricting precisely because the democratization of redistricting would place their political reputations at stake. The popular vote would serve as a check to excessively self-interested or irresponsible partisan behavior in redistricting. The public could hold the parties accountable for their positions on redistricting, to the degree that the parties and their representatives fail to act responsibly.²¹⁴ Justice Scalia asked, "How much partisanship is too much?"²¹⁵ Democratizing the redistricting process, and highlighting the question for public decision, allows the public to answer the question for itself. The major parties and elected officials would be held accountable for their redistricting positions and proposals on redistricting. To the degree that the public feels that elected officials and the political parties go too far, subsequent elections offer a political check.

The fact that one party has won a majority in the previous election does not guarantee that it will win what it wants in redistricting through direct democracy. A numerical advantage of one party over another does not guarantee victories in direct democracy any more so than it guarantees successive victories in candidate elections. Just as in candidate elections, both parties compete for the large mass of uncommitted voters in the middle who swing the election one way or the other. To win those votes, the major parties are forced to articulate appeals for their favored redistricting plan in terms that extend beyond mere partisanship and self-interest. The major parties cannot look only to their base constituencies to win a general election; they also must develop a public agenda that is attractive to centrist independents as well. The parties are accustomed to

213. See Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHL.-KENT L. REV. 707, 740–44 (1991); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545 (1988) ("The requirement of appeal to public-regarding reasons may make it more likely that public-regarding legislation will actually be enacted.").

214. See Barkow, *supra* note 114, at 325–28 (contending that the democratic process can police irresponsible activity by elected officials).

215. *Vieth v. Jubelirer*, 541 U.S. 267, 297 (2004).

aggregating political preferences within their coalition and advocating those choices before the general electorate.²¹⁶ They perform exactly this function in candidate elections by striking pragmatic compromises among their constituents that bear a chance of attracting the median voter's approval. Redistricting by direct democracy thus encourages the major parties to restructure the system in ways that appeal to independent voters and curb their own self-entrenching tendencies.

The recent experiences with Proposition 77 and Issue 4 offer additional hope in this regard. Independent voters were critical in defeating both ballot measures.²¹⁷ Of course, partisanship mattered in voting on both ballot measures. Democrats were more likely to vote against Proposition 77 and for Issue 4, and vice-versa for Republicans.²¹⁸ But it is unsurprising that partisan identification influenced voting because research in political science finds that partisan identification serves as the average voter's structuring framework for virtually every aspect of political understanding.²¹⁹ Voters in California and Ohio relied in part on partisan identification to help figure out their positions on Proposition 77 and Issue 4, but they eventually reached sensible conclusions about the ballot measures. In both states, voters sniffed out what seemed like partisan opportunism by the proponents and identified substantive concerns about the proposals for independent commissions.²²⁰ Indeed, in both states, large majorities rejected the ballot measures. Roughly sixty percent of Californians rejected Proposition 77, which carried a majority in only five of fifty-eight counties.²²¹ Almost seventy percent of Ohioans rejected

216. See generally ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967); Kang, *supra* note 199; Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750 (2001); Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813 (2000).

217. See JEHT FOUNDATION, *REDISTRICTING IN CA AND OH: SUMMARY OF FINDINGS FROM RESEARCH AMONG VOTERS IN OHIO AND CALIFORNIA* (Nov. 2005), http://electionupdates.caltech.edu/JEHT_redistricting.pdf.

218. *Id.* (finding that ninety percent of Democrats voted against Proposition 77 and forty-nine percent of Democrats voted in favor of Issue 4, while seventy-one percent of Republicans voted for Proposition 77 and eighty-eight percent of Republicans voted against Issue 4); see also Todd Donovan & Joseph R. Snipp, *Support for Legislative Term Limits in California: Group Representation, Partisanship, and Campaign Information*, 56 J. POL. 492 (1994) (finding greater support among minority-party voters for term limits).

219. See generally BERNARD R. BERELSON ET AL., *VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN* 14–34 (1954); ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER UNABRIDGED EDITION* 120–45 (1980); SAMUEL L. POPKIN, *THE REASONING VOTER* (1991); Kang, *supra* note 210.

220. See Hirsch & Mann, *supra* note 75 (arguing that voters viewed the ballot measures as a “power grab by the ‘out’ party”).

221. Cal. Sec’y of State, *Special Statewide Election, Proposition 77, Map*, <http://vote2005.ss>.

Issue 4, which failed to win even one of Ohio's eighty-eight counties.²²² A decisive factor in both states was that Independent voters, after learning more about the ballot measures, voted strongly in opposition.²²³

In any event, when it comes to issues of government process, popular dissatisfaction is strikingly nonpartisan.²²⁴ Empirical research by political scientists John Hibbing and Elizabeth Theiss-Morse distinguishes political preferences over government policy from political preferences over government process.²²⁵ Although preferences over policy correlate tightly with partisan identification, preferences over process do so only loosely.²²⁶ Hibbing and Theiss-Morse find that partisan identification does not influence people's support for structural reforms like campaign finance and increased use of direct democracy, finding similar approval among Democrats and Republicans.²²⁷ For instance, voters bonded across party lines and overwhelmingly rejected the guidance of the major parties in deciding on the most prominent ballot measure during the past decade dealing with structural electoral reform, Proposition 198 in California.²²⁸ Featured in the U.S. Supreme Court case *California Democratic Party v. Jones*,²²⁹ solid majorities of Republican, Democratic, and Independent voters voted in favor of the blanket primary proposed by Proposition 198, despite the opposition of the major parties.²³⁰ Voters responded as nonpartisans with the public's best interests in mind.

Direct democracy empowers voters to make affirmative, sometimes unexpected choices about how to structure the electoral system. On a

ca.gov>Returns/prop/mapR077.htm.

222. Ohio Sec'y of State, Breakdown By County, State Issue 4 (Nov. 8, 2005), <http://www.sos.state.oh.us/SOS/Elections/Voter/results2005.aspx?Section=1168> (last visited Mar. 28, 2007).

223. See JEHT FOUNDATION, *supra* note 217 (finding that fifty-six percent of Independents voted against Proposition 77 and seventy-three percent of Independents voted against Issue 4).

224. There is certainly no reason to believe that voters would tend to vote purely on narrowly partisan grounds *more so* than elected representatives in the legislature. *Cf.* Baker, *supra* note 213, at 748.

225. See generally JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* (2002); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* (1995).

226. See HIBBING & THEISS-MORSE, *STEALTH DEMOCRACY*, *supra* note 225, at 49–54 (arguing that what people want government to do, and how they want government to do it, are different things).

227. *Id.* at 75–77.

228. Debra J. Saunders, *Rancor and Gridlock*, S.F. CHRON., July 25, 2004, at E5.

229. 530 U.S. 567 (2000).

230. See *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1291 (E.D. Cal. 1997) (reporting that sixty-one percent of Democrats, fifty-seven percent of Republicans, and sixty-nine percent of Independents voted for Proposition 198), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000).

ballot measure made famous by the Supreme Court's decision in *Lucas v. Forty-Fourth General Assembly of Colorado*,²³¹ the voting majority of Colorado clearly voted against the maximization of its political power. Colorado voters voted on two competing ballot measures in 1962. Amendment No. 7 proposed a redistricting of the state legislature that would have retained a state senate deviating from the rule of one person, one vote, along the lines of the federal analogy, with effective overrepresentation for rural regions of the state.²³² Amendment No. 7 passed by a landslide²³³ and won a majority vote of every county in the state.²³⁴ Voters simultaneously rejected a competing proposal on the same ballot, Amendment No. 8, that proposed a three-person independent commission to redistrict both houses of the state legislature on a strict basis of one person, one vote.²³⁵ By choosing Amendment No. 7, a popular majority effectively consented to a diminution in its representation by choosing deviation from the rule of one person, one vote.²³⁶ In other words, direct democracy permitted Colorado voters to control the redistricting process (and defend against self-entrenchment by political insiders if need be), but the voters nonetheless made a deliberate choice for minority voice.²³⁷

231. 337 U.S. 713 (1964).

232. *Id.* at 717–19.

233. *Id.* at 717 (describing the vote of 305,700 in favor to 172,725 against).

234. *See id.* at 731.

235. *Id.* at 717–18 n.4.

236. Of course, the majority still retained the ability to rescind, through a subsequent statewide vote, Amendment No. 7's deviation from one person, one vote. The voting majority in Colorado clearly consented to a deviation from a principle of one person, one vote rule that would have expanded its voting influence, but it also retained democratic control through statewide direct democracy. Compare *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 759 (1964) (Stewart, J., dissenting) (noting that the popular majority in Colorado retained the power to reverse its decision by initiative), with *McCloskey*, *supra* note 168, at 71–72 (noting the absence of any provision for popular initiative in *Baker v. Carr*).

237. The Court's decision in *Lucas* to strike down Amendment No. 7 and impose strict application of the one person, one vote doctrine, therefore, attempted to protect the majority from itself. The Court rejected the state's claim that popular approval of Amendment No. 7 saved it from unconstitutionality. The Court explained that “[o]ne’s right to life, liberty, and property and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.” *Lucas*, 377 U.S. at 736 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). The majority, the Court reasoned, cannot assent to the infringement of constitutional rights. Approval by the majority thus holds no “constitutional significance.” *Id.* at 737.

Except, of course, it should, at least as applied to the constitutional rights of the majority rather than the minority. Constitutional rights typically guard against tyranny of the majority upon the minority. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 261, 262 (1991) (arguing the one person, one vote doctrine was intended to redress minority subjugation of the majority—the rotten boroughs problem); Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1334 (2005) (“[O]ne person,

Admittedly, the democratic deliberation to be expected from direct democracy will fall short of the loftiest ideals.²³⁸ Democracy in action is always a messy process, and direct democracy even more so. It regularly fails to realize the grandest hopes of deliberative democrats and civic republicans. The public debate about Proposition 77 and Issue 4 was no different. However, direct democracy does not need to be perfect to constitute a valuable and legitimizing improvement over today's redistricting process. A growing body of empirical research suggests that the use of direct democracy boosts civic engagement, voters' sense of political efficacy, and voters' general political knowledge.²³⁹ California and Ohio voters learned from the public debates about Proposition 77 and Issue 4, even if not as much as we would hope. The campaigning of political insiders and endorsements of public-interest groups collectively helped educate the electorate about the relevant choices, motivations, and tradeoffs to be faced in redistricting. As a result, direct democracy exposed redistricting to public oversight and forced political insiders to provide public-sounding justifications for those decisions. Indeed, the public debate over actual redistricting maps should motivate political elites much more so than Proposition 77 and Issue 4, and would be even more robust and engaging.

C. Creative Use of Direct Democracy in Redistricting

Successful use of direct democracy in redistricting reform depends on a robust political process to develop proposals from which the public can choose through a statewide vote. Direct democracy empowers voters when a competitive, vibrant political process provides a public forum for debate, compromise, and production of redistricting options. Development of redistricting proposals through the normal legislative process, for ultimate presentation to the voters, invites interested constituencies and political

one vote—which is really a majoritarian principle dressed in individual rights rhetoric—doesn't necessarily protect minorities against majority oppression.”). In *Lucas*, however, there was no rotten boroughs problem. Instead, the Court blocked the majority from *voluntarily* (but provisionally) ceding a degree of legislative power and imposed upon the residents of Colorado a political system that they did not want.

238. See, e.g., Vikram David Amar, Essay, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927, 950 (2004) (lamenting the absence of a deliberative dialogue during the 2003 California recall election).

239. See generally DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES (2004); Fredrick Boehmke, *The Effect of Direct Democracy on the Size and Diversity of State Interest Group Populations*, 64 J. POL. 827 (2002).

leaders to engage in the familiar process of legislative and political advocacy. The major parties would actively compete to develop a proposal that balances the needs of their wide-ranging coalitions and to win party-wide support, while also producing a proposal that is publicly defensible and likely to win popular approval in a statewide vote. The process thus enables the parties to serve their traditional role as the central builders of coalitions around which American politics organize and revolve.²⁴⁰ The combination of party involvement and direct democracy encourages a political debate among elites in a competition for public approval that promises to educate and guide voters on redistricting.

Current proposals for a “people’s assembly” to decide redistricting are promising in certain respects but limited in other important ways. Christopher Elmendorf and Heather Gerken advocate the use of an unelected popular body, drawn from the electorate at large, to deliberate and draft redistricting proposals.²⁴¹ A people’s assembly avoids incumbent self-interest and produces an element of direct popular involvement. However, the popular involvement offered by a people’s assembly is quite circumscribed. Although involvement is profound for the hundred or so people chosen to participate in the assembly, popular involvement is almost completely absent for the rest of the electorate. Only the assembly participants have direct influence on the process. A people’s assembly thus blocks outside political access and accountability in similar ways to courts and independent commissions.

Nonetheless, I do not claim that my proposal is the only method of successfully using direct democracy or popular involvement in redistricting. A people’s assembly can be used in tandem with, or parallel to, a legislative process to develop redistricting plans in ways outlined by Elmendorf and Gerken. Issue 4, though fatally troubled in several respects, also specified a process of public hearings before the proposed independent commission for collecting redistricting plans from the general public. Although Issue 4 contemplated an absurdly narrow focus on electoral competitiveness as the sole criterion for deciding among plans, public hearings as a venue for interested groups to offer redistricting proposals may be productive as a supplement to the legislative process or

240. See generally Kang, *supra* note 199 (describing the central importance of political parties in American politics).

241. See Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005); Gerken, *supra* note 5; see also Jim Sanders, *New Bid to Carve Districts Survives*, SACRAMENTO BEE, Mar. 16, 2006, at A3 (reporting on California legislative consideration of a proposal for a people’s assembly).

a people's assembly. In other words, creative use of new institutional processes in redistricting is a good thing, provided it offers greater opportunities for political accessibility and accountability.

In fact, creative use of direct democracy in redistricting could provide new tools to protect minority rights as well. Election results provide valuable information about the preferences of citizens across the jurisdiction and would generate precinct-level data on support for the various redistricting proposals. By examining the geographic distribution of support, the government can determine whether there was widespread or divided approval of a particular proposal. The winning ballot measures in *Jones* and *Lucas*, for instance, each received majority support in every county of their respective state.²⁴² Geographic dispersion of support in these cases signaled wider consensus in favor of the approved proposals than usually identifiable by examining only the aggregate election totals. Indeed, jurisdictions may choose to require geographic dispersion of support as a condition of any proposal's enactment, in effect requiring a form of supermajority to ensure consensus.

Precinct-level data also provide a means by which the government and courts can gauge the preferences of affected minorities. Although direct democracy safeguards majority preferences,²⁴³ there is a risk that the electoral majority can tyrannize the minority and entrench its favored arrangements into law.²⁴⁴ By examining precinct-level results and registration data, the government and courts can determine whether affected minorities supported or opposed the enacted proposal. For instance, the government and courts can look to returns in precincts where affected minorities reside for reliable data on minority preferences. Actual voting data on the redistricting proposals offer credible, reliable, and legally cognizable evidence of minority preferences with respect to the various redistricting options on the table. The data provide a way to determine whether minority preferences are being overridden in direct democracy, or whether minority preferences align with the majority in support of whatever proposal wins out.

Evidence of minority support for various redistricting proposals bears significant legal consequence. In cases like *Ashcroft*, where legal questions

242. *Lucas*, 377 U.S. at 731; *Cal. Dem. Party v. Jones*, 984 F. Supp. 1288, 1291 (1997).

243. See generally JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* (2004).

244. See Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

hinge on minority sentiment, courts and commentators have little reliable information about African-American community sentiment regarding the tradeoffs inherent in the *Ashcroft* redistricting. As in *Ashcroft*, courts and commentators may be quick to impute community support based on the reaction of its elected officials. But this is nothing more than a guess, perhaps an incorrect one if the nearly unanimous opposition of community and civil-rights groups is any guide. In the absence of direct democracy, the larger point is that we simply cannot know definitely one way or the other.

V. CONCLUSION

The future of redistricting reform depends on finding political solutions. Reform is currently headed in the wrong direction, in search of apolitical solutions to what is quintessentially a political problem. By trying to insulate redistricting from the political process, redistricting reform disempowers the democratic public from involvement and agency in deciding a fundamental question of democratic governance. The election defeats of Proposition 77 and Issue 4 helped reveal the troubles of this approach.

The Article instead proposes the use of direct democracy as an institutional solution. Reform should democratize redistricting by directly involving the public in decisions about how lines should be redrawn. The main contribution of the Article is to re-focus redistricting reform on the importance of democratic decision through the political process and to begin the search for creative new ways to transform the political process of redistricting, rather than trying to hide from it.

Direct democracy provides a means by which the community can express its wishes clearly and directly, with legal effect. Election results would reveal unmistakable public support for whatever tradeoffs are offered in various redistricting proposals. Everyone, including courts, could reliably assess voting by any affected minority to see whether it had accepted the tradeoffs inherent in any redistricting. Direct democracy provides the only mechanism by which voters themselves can take ownership of the value judgments and compromises built into the redistricting process.