

# **To Be About The People's Business: An Examination of the Utility of Nonpolitical / Bipartisan Legislative Redistricting Commissions**

**Christopher C. Confer\***

## **I. INTRODUCTION**

Legislative redistricting can be an exceedingly dirty business to which the 2002 legislative redistricting cycle in Kansas testifies. For this article, congressional redistricting refers to the apportionment of a state's congressional seats by that state's legislature and legislative redistricting means that state's redistricting of its legislature. In order to better understand how legislatures redistrict and why state legislators view their redistricting power as almost sacred, it is important first to know exactly how legislators protect their personal and their party's interests through the partisan gerrymander. Despite evidence that political gains from partisan gerrymandering are short-term, legislators are loath to give up their right to do it. There is, however, an alternative to allowing the legislature to redistrict both its congressional seats and the state legislature. The state's adoption of a nonpolitical or bipartisan legislative redistricting commission provides that alternative. To understand the nature and framework of the nonpolitical or bipartisan legislative redistricting commission, it is important to examine its composition. Among the elements of a redistricting commission that need to be inspected to allow an observer to comprehend it are these: how members are appointed, the number of members appointed to commissions, the varying degrees of redistricting authority held by the commissions currently in use, and the date by which the commissions used today must submit their final redistricting plans.

In order for a state to determine if it should adopt a nonpolitical or bipartisan legislative redistricting commission, it must weigh a commission's attendant advantages and disadvantages. There are easily identifiable advantages of a state adopting a commission: 1) a less partisan biased outcome, 2) increases in legislative legitimacy in the eyes of the public, and 3) the freeing up of the judicial system's dockets. Just as there are advantages, there are also possible disadvantages: 1) less political party cohesion and 2) a decrease in the "safety" of electoral districts for incumbents seeking reelection. Upon weighing the advantages and disadvantages, the scale seems to tip in favor of a state adopting a commission system. Therefore, a primary recommendation is that states should create and adopt a commission system.

Another issue to be explored is whether a nonpolitical or bipartisan legislative

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redistricting commission system can work in reality. The following are some questions that need to be addressed. What results can be expected from using commissions? Will commissions work in heavily partisan or equally politically-divided states? Can they be tailored to fit into a particular state's political climate? What are some reasons that a commission does work or does not work?

The Schmidt-Downey Redistricting Reform Proposal (Senate Concurrent Resolution 1607), which is currently before the Kansas Senate, would create a redistricting commission in Kansas.<sup>1</sup> Several of the elements of the plan are taken from plans currently in use in other states that have redistricting commissions. Some of the key elements in the Schmidt-Downey plan follow. The Governor, the Chief Justice of the Kansas Supreme Court, the Chief Judge of the Kansas Court of Appeals, the Speaker of the Kansas House of Representatives, the President of the Kansas Senate, and the minority leaders of the Kansas House and Kansas Senate shall each make one appointment to the proposed commission, with no more than four commissioners coming from the same political party.<sup>2</sup> There must be at least one commissioner from each congressional district.<sup>3</sup> No member of the commission shall be eligible for election to the legislature or board of education for two years after serving on the commission.<sup>4</sup> In addition, the commission cannot consider as factors voter registration, party affiliation, or historic voting patterns.<sup>5</sup>

**A. Thesis**

By state governments replacing current wasteful and often detrimental legislative redistricting practices with nonpolitical or bipartisan redistricting commissions, states create an institutional framework that supports positive change in terms of less self-interest, less wasted legislative time, less overt partisan politics, and more governing, consequently enhancing and improving democracy at the state and national levels.

**II. BACKGROUND ON NONPOLITICAL / BIPARTISAN LEGISLATIVE REDISTRICTING COMMISSIONS****A. Description of 2002 Legislative Redistricting in Kansas**

The 2002 legislative redistricting cycle in Kansas can best be quickly described by the grade of "D" given it by Kansans polled by the Topeka Capitol-Journal.<sup>6</sup> The majority of states, including Kansas, a traditionally Republican leaning state,<sup>7</sup> follow a method of reapportionment that allows the legislature to draw the district boundary lines.<sup>8</sup> The redistricting process used by Kansas contributed to a legislative session of

107 days, the longest in state history.<sup>9</sup> The primary date was thrown into flux while waiting for the district maps to be finalized, and the congressional filing date had to be pushed back two weeks.<sup>10</sup> Kansans from both political parties expressed frustration at the mess. Their sentiment “What a mess,” was echoed in an editorial, *Redistricting Ruling: Find a Better Way*, that appeared in the Topeka Capital-Journal.<sup>11</sup>

In *Davis v. Bandemer*, the U.S. Supreme Court allowed legislatures to keep communities of interest together.<sup>12</sup> Thus, drawing legislative maps that keep “communities of interest” together must be an important consideration for state lawmakers. According to Republican State Senator Derek Schmidt, member of the Senate Redistricting Committee, the legislature’s redistricting committees took communities of interest testimony from members of communities throughout Kansas, and then virtually disregarded it in order to protect incumbents.<sup>13</sup> His assessment was echoed by Democrat Troy Findley, Kansas House of Representatives member, and member of the House Redistricting Committee.<sup>14</sup> An example of the splitting of a “community of interest” is evidenced by the division of Lawrence, Kansas, for congressional redistricting purposes, down a major street. One half of Lawrence is in the second congressional district and the other half is in the third congressional district.<sup>15</sup> However, not all incumbents were protected. In the Kansas House of Representatives, the Republican majority party redistricted so that several incumbent members of the Democratic minority party had to run against each other, when, according to Findley and other Democrats, there were other options for that chamber.<sup>16</sup> The openly partisan maneuvers just described seem to exhibit an unabashed unfairness in the redistricting system, which is the method that a majority of states use to reapportion legislative seats.

Another element that further complicated the legislative redistricting process for Kansas in 2002 was the fact that redistricting can now be done with the aid of personal computers. It is possible, due to advances in computer software and with the availability of comprehensive information provided by the U.S. Census, for individual legislators to be able to draw districts block by block.<sup>17</sup> Twenty-three State Senate maps, 21 State House of Representatives maps, 89 U.S. House of Representatives maps, and one State Board of Education map were presented for technical review to the Kansas Legislative Research Department (KLRD), a nonpartisan research tool for the legislature.<sup>18</sup> Additionally, party caucuses and many individual legislators drew up more computer maps that were passed around among legislators, but were never submitted to KLRD for technical review.<sup>19</sup> The legislative redistricting process created by the Kansas Constitution was selected before the U.S. Supreme Court announced “one person, one vote” in *Baker v. Carr*,<sup>20</sup> and before legislators, as map drawers, were able to draw district lines by computers enabling them to place individual voters in one district or another and predict that decision’s political impact. The end result is that the

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Kansas Constitution prescribes a system that was not so much chosen by the people, as it was a viable option selected by the Constitution's drafters in 1859.<sup>21</sup>

A further possible problem stems from the new ability of the legislature to partisan gerrymander legislative districts by computer. This development creates the potential for legislators to ensure that electoral winners will be decided, not in the general election, but rather, in the primary.<sup>22</sup> Without making some sort of change, there is a great possibility that the power of technology and the partisan gerrymandering capability that stems from it will cause an increase in the drawing of less than politically-balanced legislative districts.<sup>23</sup>

### **B. How Legislatures Partisan Gerrymander**

Legislatures have two primary options to choose from when attempting to draw districts that produce a particular result. Those two options are "packing" and "cracking."<sup>24</sup> Packing is characterized by the drawing of districts that over-concentrate the party not controlling redistricting into super majorities in a few districts.<sup>25</sup> The results of packing are that the party not controlling redistricting is assured of winning only those few districts that its members are packed into, while virtually assuring that the party controlling redistricting will win the rest, and consequently a majority of the total number of districts.<sup>26</sup> Conversely, "[c]racking 'cracks' or splits the opposing party's votes so that it 'has large but inefficacious minorities in most or all of the districts.'"<sup>27</sup> The results of cracking are that the party controlling redistricting has so divided the minority party that the controlling party's votes will almost always outnumber the minority's vote's in almost all legislative districts.<sup>28</sup> Packing and cracking are not mutually exclusive, but rather are often used in combinations<sup>29</sup> by the majority party when reapportioning legislative districts in their search for incumbent and/or permanent party majority protection.

### **C. Viable Options Other Than Legislative Redistricting Used By States**

An alternative to legislative redistricting chosen by some states to combat the openly partisan maneuvering of members of the state legislature is the enactment by statute or through constitutional amendment of legislative redistricting commissions. Nineteen states have created redistricting commissions to handle the responsibility of dividing into districts that state's congressional representation and the seats of the state legislature.<sup>30</sup> Of those 19, 13 states have created nonpartisan or bipartisan legislative redistricting commissions.<sup>31</sup> Though each commission operates differently due to the needs of the individual state, they provide evidence that there are viable options for reapportionment other than allowing the legislature to redistrict itself. The states that

have opted to use redistricting systems different from the traditional method are doing exactly what Justice Louis Brandeis encouraged them to do in his dissenting opinion in *New State Ice v. Liebmann*; that is, act as “laboratories of democracy.”<sup>32</sup> The nonpolitical or bipartisan legislative redistricting commissions acting as “laboratories of democracy” are the result of states realizing that having legislatures redistrict themselves is not the best or only way to handle reapportionment. The creation of redistricting commissions by states, as a deviation from the norm, is not surprising because, “politics has traditionally been viewed as producing pressures toward experimentation . . . .”<sup>33</sup>

### **III. THE COMPOSITION OF NONPARTISAN / BIPARTISAN LEGISLATIVE REDISTRICTING SYSTEMS**

Nonpolitical or bipartisan legislative redistricting commissions vary widely from state to state in their composition. They differ on how members are chosen, the number of members, the powers granted to the redistricting commission, and the dates by which the commission’s work must be completed. Some elements of the commission’s make-up are common to almost all commissions, while others are peculiar to one or two states. This section will examine in greater detail the composition of nonpolitical or bipartisan legislative redistricting commissions currently used in the United States.

#### **A. Appointment of Members to the Nonpartisan / Bipartisan Commissions**

There is no one common method used by the states to determine how the members of the nonpartisan or bipartisan legislative redistricting commissions are to be appointed. However, there are two membership systems that predominate. The system adhered to by six commission states is the tie-breaking system.<sup>34</sup> The tie-breaking system generally consists of equal numbers of majority and minority party members and a tie-breaking commission chairperson.<sup>35</sup> The majority and minority party members are usually chosen by the speaker and minority leader of the state house of representatives and the majority and minority leaders of the state senate.<sup>36</sup> The majority and minority party members, as a general rule, must pick a tie-breaking chairperson that is agreeable to all,<sup>37</sup> and it can be surmised that the requirement that he or she be agreeable to all ensures that the chairperson will be “relative[ly] nonpartisan and fair-minded.”<sup>38</sup> Additionally, to guarantee that the tie-breaking chairperson is not overly partisan, some states have a statute or constitutional amendment that requires the state supreme court to appoint the chairperson, relying on the presumed ability of the judiciary to be above politics.<sup>39</sup> A slight variation on that

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theme is that some states require the state supreme court to appoint a chairperson, only if no candidate can be agreed upon by the appointed members of the redistricting commission.<sup>40</sup>

The other most commonly used system that states have employed for legislative redistricting is that persons holding certain high offices will be the members of the commission.<sup>41</sup> Five states currently staff their redistricting commission in such a manner.<sup>42</sup> The most likely high office holders that will, because of their office, sit on the commission are: the state's governor or lieutenant governor, the state's secretary of state, the state's attorney general, and the state's speaker of the house of representatives.<sup>43</sup> The opportunity for these partisan members to bring party politics into the redistricting commission process and allow it to run rampant is facially obvious. Therefore, redistricting commissions of this persuasion will not be considered again. They were simply mentioned to give the reader an idea about the range of commission appointment methods.

Finally, rounding out the most commonly used types of systems for determining commission membership is the type used by the smallest number of states. Missouri and Washington use a system with equal numbers of bipartisan representation, with no tie-breaking chairperson.<sup>44</sup> It is also important to note that although Michigan used this kind of system, Michigan's commission was held to be invalid, and its formula for reapportionment was held unconstitutional by the Michigan Supreme Court.<sup>45</sup> The reason cited by the Michigan Supreme Court when it struck down the reapportionment formula created under the Michigan Constitution was that it violated the Equal Protection Clause of the U.S. Constitution because it allowed both land area and population to be considered as factors in the drawing of the reapportionment map.<sup>46</sup> The court additionally determined that because the land area/population formula and the rules creating Michigan's commission were "inextricably interdependent and therefore not severable," the rules upon which the commission was based were tainted with the formula's Equal Protection Clause violation and therefore the entire commission system was struck down.<sup>47</sup>

The system used by Missouri and Washington also has a structural flaw. The problem is that the "perfect partisan parity...is potentially an invitation to deadlock."<sup>48</sup> Bipartisanship, which can be a strong motivating factor for compromise in order to avoid redistricting conducted by the courts, serves no purpose if it encourages both sides to dig in along partisan lines.<sup>49</sup>

Two states' systems deserve some special attention; one based on its uniqueness and the other based on its similarity to the plan proposed for Kansas.

## **1. Iowa's Plan**

Iowa's plan is unique because Iowa has turned redistricting over to a completely politically-neutral body.<sup>50</sup> The Legislative Services Bureau (LSB) usually operates to draft legislation for Iowa legislators.<sup>51</sup> However, after every decennial census, it becomes the redistricting body for the state.<sup>52</sup> The map that the LSB creates is supposed to be politically neutral, and to ensure neutrality, the LSB has no access to incumbency, voter registration, or election information.<sup>53</sup> The end result is a map that, at least facially, does not take into consideration the interests usually protected by partisans, including members of more typical nonpolitical or bipartisan legislative redistricting commissions.

## **2. Colorado's Plan**

Colorado's plan utilizes an 11-member commission.<sup>54</sup> The membership appointment allocation is divided between the governor, the state judiciary, and the state legislative party leaders.<sup>55</sup> The governor appoints three members, the judiciary appoints four members, and legislative party leaders appoint four members.<sup>56</sup> However, the partisan balance is regulated by a constitutional amendment that demands that no more than six members be from one political party.<sup>57</sup> Additionally, at least one member must be from each of the state's congressional districts.<sup>58</sup> Unlike the other commissions that provide for equal representation from both parties and a tie-breaking chairperson from outside the commission chosen by the commission's members, Colorado's tie-breaking member is not selected based on his or her bipartisanship, but is rather just one of the commission members appointed by one of the state's high office holders.<sup>59</sup> Under Colorado's plan, the governor appoints, as a temporary chairperson, one of the 11 members until the members meet to elect a "tie-breaking" chairperson from within their ranks.<sup>60</sup> Therefore, there will always be a 6-5 majority of one party on the commission. Of all the commission systems currently in use, the Colorado system most closely resembles the one introduced in the Kansas legislature for the 2003 legislative session.

## **B. Membership Numbers of the Nonpartisan / Bipartisan Legislative Redistricting Commissions in States that Currently Have Commissions**

The number of members that sit on nonpartisan or bipartisan redistricting commissions varies from state to state. There does not seem to be any particular rhyme or reason to the number of commissioners provided for in the statutes or constitutional amendments that created the various states' commissions.<sup>61</sup> Of the 19

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states that have one or another form of a redistricting commission, all but four provide for an odd number of members.<sup>62</sup> Idaho, New Jersey, Illinois, and Missouri are the four states that have an even number of commission members.<sup>63</sup> The total number of sitting members on the several states' commissions range from Arkansas' three, to the largest commission, which numbers 28 in Missouri.<sup>64</sup> Missouri has two redistricting committees, causing it to have an extremely high number of commission members. Missouri's commission is composed of a ten-member committee in the state senate and an 18-member committee in the state house of representatives.<sup>65</sup> The most widely used number of members on redistricting commissions is five, with nine of the 19 states choosing that number.<sup>66</sup>

### C. Redistricting Powers Held by Commissions

The redistricting powers held by the commissions in the 19 states that have redistricting commissions differ from state to state. “[T]he redistricting authority of commissions differs primarily with regard to (1) what bodies a commission redistricts, (2) the stage of the redistricting process at which a commission acts, and (3) the extent to which the legislature can amend a commission’s work.”<sup>67</sup> The three main groups into which states’ redistricting commissions fall can provide insight into how a state can create a redistricting commission that fits its needs.

Four states give almost complete unilateral reapportionment authority to their redistricting commissions. The redistricting commissions in Iowa, Hawaii, Montana, and Washington are granted the initial redistricting power over both state legislative and U.S. House of Representatives districts.<sup>68</sup> The commission’s plan in Hawaii and Montana becomes law without further legislative action, as can Washington’s legislative redistricting map, except that in Washington, the state legislature, with a two-thirds vote of both chambers, can amend the redistricting map.<sup>69</sup> The two-thirds vote requirement allows the legislature to correct vast redistricting injustices or oversights of the redistricting commission.<sup>70</sup> Iowa’s redistricting plan requires direct legislative approval of the commission’s map.<sup>71</sup> Should the Iowa legislature not pass the first plan by a majority vote, the commission must submit a second plan for another majority vote.<sup>72</sup> Again, should the Iowa legislature not pass the commission’s plan by a majority vote, the commission must create a third map.<sup>73</sup> The third map prepared by the commission that comes before the Iowa legislature, as opposed to the first, may be amended until the legislature passes it by a majority vote.<sup>74</sup> The feature just mentioned found in Iowa’s commission system is also present in the proposed redistricting commission for Kansas.<sup>75</sup>

The redistricting commissions of Arkansas, Colorado, Michigan, Missouri, New Jersey, Ohio, and Pennsylvania are only granted the power to draw redistricting

maps for the state legislature.<sup>76</sup> Rounding out the 19 states with redistricting commissions are Connecticut, Illinois, Mississippi, Oklahoma, Oregon, and Texas. The commissions of these six states are conferred only the power to redistrict should their respective state legislatures not be able to pass a redistricting plan.<sup>77</sup> These kinds of commissions are referred to as “back-up commissions”<sup>78</sup> because they act as a last resort or a fallback position for states if the legislature is unable to pass a redistricting map.

#### **D. Date By Which the Commission Must Submit Its Final Redistricting Plan**

The time frame for redistricting plan submission varies from state to state. States differ greatly in the amount of time that the state’s constitution or state legislatures have given to their commissions to complete their maps. Arizona and Oklahoma have no fixed date by which to finish. Some states place an initial deadline of 30 days on their commissions after both the commission is appointed and the legislature’s first session convenes.<sup>79</sup> The most common method used by an overwhelming majority of commission states is having the redistricting map’s final deadline be between six months and a year after the formation of the state’s redistricting commission.<sup>80</sup>

The elements just mentioned vary in usage from state to state. The key point is that states can pick and choose which elements or variations of them to use that will fit with that state’s needs. There are plenty of different models, as previously mentioned, for a state to follow in order to find and create a commission system that will work, should a state determine that the advantages of using nonpolitical or bipartisan legislative redistricting commissions outweigh the disadvantages. An elaboration of the advantages and disadvantages for a state using a commission system follows in the next section.

### **IV. ADVANTAGES AND DISADVANTAGES OF NONPARTISAN / BIPARTISAN LEGISLATIVE REDISTRICTING**

#### **A. Advantages of Bipartisan / Nonpartisan Legislative Redistricting**

Many advantages arise from a state’s use of a nonpolitical or bipartisan legislative redistricting commission. Commissions can create districts with far less partisan bias than the redistricting system used in most states. They can help increase legislative legitimacy in the eyes of the public. Commissions can free up legislative time for other governing responsibilities. They can help remove some overt politics from government. Finally, they can free up the judicial system. The states that have

implemented commissions have benefited from many if not all of the advantages listed and can serve as ongoing political experiments to determine the long-term effects of commissions on the political sphere. This subsection will examine in greater detail the five previously mentioned advantages.

### **1. Fewer Partisan-Biased Outcomes**

It should be expected that the party in power in the legislature at the time when legislative redistricting is required would be motivated to secure the party's power by manipulating the drawing of legislative district lines.<sup>81</sup> A party will desire to draw the lines in a manner that will create districts based on voter registration to give it an electoral advantage immediately and well into the future.<sup>82</sup> The drawing of lines to favor one party over the other has as its goal the creation of partisan bias. "Partisan bias is the degree to which an electoral system favors one political party in the translation of statewide (or nationwide) votes into the partisan division of the legislature."<sup>83</sup> There is some reason for the party in power to want to control the drawing of district lines to make the districts biased in their favor beyond simple common sense. It has been proven through studies that, on average, the party that draws the district lines during legislative redistricting is favored more than the party that does not.<sup>84</sup> The changing of the partisan composition of a district by either increasing or decreasing that district's incumbent's partisan base can change the odds that a particular incumbent will either win or lose his or her bid for re-election.<sup>85</sup> However, it has also been shown that any redistricting, regardless of who is in control of the process, leads to less partisan-biased districts.<sup>86</sup> It would be expected that the party in charge of redistricting would take exception to this, but partisan redistricting does not really provide the electoral advantage that partisans think it provides.

The effect created by the changing of the partisan composition of a district is most strongly felt in the election immediately following redistricting and will not be long lasting.<sup>87</sup> Basehart's and Comer's research shows that after the first post-redistricting election, the ability to control the fate of incumbents and their challengers, which is the goal of partisan gerrymandering, is greatly reduced.<sup>88</sup> The empirical study conducted by Basehart and Comer involved the examination of the electoral success of political parties and state legislative incumbents in 15 states between 1972 and 1986.<sup>89</sup> The results were then coded and plugged into a regression equation that yielded a numerical representation of the electoral change that occurred in those states.<sup>90</sup> Contrary to the desires of the political party that controls redistricting, research thus indicates that it is not able to sustain an advantage past the first electoral cycle. Additionally, according to Gelman and King, redistricting actually "makes the typical state's electoral system fairer (closer to zero bias) than it would be if redistricting had not occurred."<sup>91</sup> The two-pronged reason for this result, contrary to the intentions of

the political parties that draw the lines, is that: 1) redistricting inherently plays “upset the apple cart” causing a shake-up of the political system, and 2) there are many constraints placed upon the makers of the district maps.<sup>92</sup> The Gelman and King study involved the examination of the electoral results of 164 elections in 16 states between 1968 and 1988. They based their findings on the actual electoral results of those sixteen states over time and their “deviation from partisan symmetry when the average district vote is between  $v = .45$  and  $v = .55$ .”<sup>93</sup> The conclusion reached is that even a district which at the time of redistricting has a high level of bias in favor of one political party from the last period of redistricting, has a higher probability of becoming more equitable simply because there is more room to move in a non-biased direction.<sup>94</sup>

Since the favorable political bias desired by the party in power actually is decreased by any form of redistricting and is only short-lived if it is ever actually achieved, then the purpose and utility of partisan redistricting must be questioned. If the ultimate results are districts with reduced partisan bias, and thus, the long-term electoral advantage desired by parties is not created, then parties are actually wasting their legislative time trying to create partisan-gerrymandered districts. Consequently, there is really no disadvantage to bipartisan or nonpartisan legislative redistricting commissions doing the redistricting. Despite the political party’s most earnest endeavors otherwise, bipartisan or nonpartisan redistricting not only produces low levels of partisan bias, but also reduces the number of partisan gerrymanders that inherently produce unfair electoral representation.<sup>95</sup> Though bipartisan or nonpartisan redistricting commissions are often credited with increasing partisan bias, based on their assumed pro-incumbent natures, research shows that those claims are unfounded.<sup>96</sup>

The advantage gained by reducing partisan bias must be qualified by the fact that commissions cannot completely eliminate party politics from the redistricting process. If one of the goals of creating nonpartisan or bipartisan legislative redistricting commissions is to eliminate party politics from legislative redistricting, then that goal is a pipedream not likely realizable. Redistricting of any kind will always involve a certain amount of partisanship, which is not inherently a bad thing. Tim Storey, the National Conference on State Legislature’s expert on redistricting, noted that using nonpolitical or bipartisan legislative redistricting commissions does not necessarily ensure that politics will be eliminated from the redistricting process.<sup>97</sup> That sentiment is echoed by John Weingart, associate director of the Eagleton Institute of Politics, who, when discussing redistricting commissions, said, “[i]t doesn’t make sense to try to take politics out of a political process.”<sup>98</sup> Indeed, as Alfred Balitzer, an early chronicler of the redistricting experience of the early 1970s points out, “the very structures and modes of appointing the [c]ommission[s] were open invitations to partisan influence.”<sup>99</sup>

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Ultimately, except in the case of a “commission” system like Iowa’s, somebody has to do the appointing of the members to the commission. The people doing the appointing are often the political party leadership in the legislature, the state’s governor, the state’s chief justice, or other high ranking elected officials.<sup>100</sup> The appointers are going to want to have their political interests and ideologies represented by their nominee to the commission, which consequently makes the nomination process highly political because party leaders are doing the nominating.<sup>101</sup> It would be incredibly difficult to think of, and even harder to find persons who are sufficiently politically neutral to whom the state and the electorate could entrust the redistricting process.<sup>102</sup> “While we can surely agree that some persons are less partisan than others, the appointment of a truly nonpartisan individual to a redistricting commission would require us to locate Plato’s philosopher-king[s].”<sup>103</sup> However, assuming that Plato’s philosopher-kings do exist, they are indeed few and far between. In reality, commissions will be filled with persons who bring to the redistricting table their personal political motivations and desires.

### 2. Increases Legislative Legitimacy

Bipartisan or nonpartisan legislative redistricting commissions increase the legitimacy of the entire redistricting process by removing the most self-interested group, the political parties, from control over the process. Social choice theory states: “. . . those who control the process by which choices are offered also have the potential to manipulate the outcome.”<sup>104</sup> Following the teaching of social choice theory, giving incumbents control over the redistricting process ensures that the redistricting process will be manipulated to favor incumbents in an attempt to guarantee themselves electoral success.<sup>105</sup> Thus, the choices for the voters “. . . will not be a system for divining the will of the majority, but will be a type of electoral musical chairs, with the agenda committee controlling the music.”<sup>106</sup>

The result of incumbents controlling the redistricting process is that the districts are gerrymandered into shapes that help incumbent members of the redistricting commission and other incumbent members of their party.<sup>107</sup> Gerrymandering can be defined as the “intentional manipulation of districting lines for political advantage.”<sup>108</sup> With the advent of modern technology, members of legislative redistricting committees have the ability to know exactly how the redrawing of district lines will affect district socio-economic and racial make-up, and even more importantly to the incumbents, how the redrawing of district lines will affect their own re-election chances.<sup>109</sup> Beyond just the pure self-interest that pervades legislative redistricting, there are two more reasons that legislative redistricting is especially pernicious:

First, a partisan gerrymander may allow ‘a party with only a minority of the popular vote [to] assert control over a majority of seats in the state

assembly and over its state's delegation to the National House of Representatives.' Second, a partisan gerrymander may allow 'a party that enjoys a small majority in popular support over its principal competitor . . . [to] translate this popular edge into preemptive institutional dominance.' Whether a gerrymander creates a majority party or merely increases the majority's power, it may 'lock in' a partisan imbalance so skillfully that the legislature is not 'responsive to the changing will of the electorate.'<sup>110</sup>

The power of incumbents sitting on the legislative redistricting committee to ensure their own self-interest and avoid the exercise of the ballot subverts one of the most important elements of our American political system.<sup>111</sup> "Manipulation of voting systems by the government raises the question of whether that consent has been validly obtained. Failure to secure valid consent through robust elections is delegitimizing."<sup>112</sup> The kind of manipulation that results from legislative redistricting and the illegitimacy that attends it runs completely counter to the Lockean principle that the people are sovereign and should ultimately have control of the government. This creates a system in which legislators are able to perpetuate and to protect their positions by the drawing of district lines, contrary to the Founder's intent. Kristen Silverberg, in her article called *The Illegitimacy of the Incumbent Gerrymander*, quotes a Republican National Committee consultant as saying, "Anyone who says gerrymandering can only play a small role in reducing political competition should let me draw their state's districts...There would not be another real race for the House in that state for ten years."<sup>113</sup> That kind of comment is a prime example of the erroneous understanding some political operatives believe about redistricting. While it is true that districts can be somewhat influenced by partisan gerrymandering in the election immediately following redistricting, the influence quickly dissipates in later elections. Irrespective of the contradictory empirical evidence gathered by political scientists, partisans think that they can control electoral outcomes for a long time simply by the partisan gerrymandering of legislative districts.

Nonpolitical or bipartisan redistricting commissions would be able to increase legislative legitimacy because legislative districts would be created by a group that is not drawing lines solely for their personal or their party's benefit. Members of a redistricting commission, unlike legislators, are not seeking re-election. Although commission members are likely to have some political tendencies or leanings, and politics would not be completely removed from what is inherently a "highly political business,"<sup>114</sup> the end result would be a map, whether approved by the legislature or not, in which the members of the legislature who have the most to gain or lose by its creation are removed from its drawing.

### **3. Increases Time for the Legislature to Work to Benefit its Citizens**

Many states have constitutional limitations on the amount of time that their legislatures can be in session.<sup>115</sup> Usually, those limitations can be extended by order of the governor,<sup>116</sup> but even then it would be a safe assumption that legislatures try not to go over the allotted time for each session. The process through which bills (or in the case of redistricting, maps) move toward becoming law serves as a natural drag on the passage of other important pieces of legislation, such as the annual budget. Thirty-nine states have constitutional requirements that demand that the legislature pass a budget before adjourning so that the time taken up by legislative redistricting detracts from time spent moving the budget or other important legislation forward.<sup>117</sup> Maps must be drawn up by individuals or by the caucuses of the political parties, discussed in party caucuses, introduced on the floor of both houses, introduced and passed in both chambers' redistricting committees, passed by both houses, and signed or vetoed by the governor.<sup>118</sup> If vetoed, the whole process has to start over.<sup>119</sup> If signed, the law is then subject to judicial review.<sup>120</sup> If a court strikes down the proposed map, the whole process starts over again, which adds to the time that the state legislature must dedicate to legislative redistricting and consequently not to governing the state. The 2002 Kansas legislative redistricting debacle is a prime example of the above-mentioned scenario.

The time and resources that the legislature ties up on legislative redistricting can be virtually eliminated by using nonpolitical or bipartisan redistricting commissions, thus freeing up the state legislature to deal with its other legislative responsibilities. Jim Black, the sitting Speaker of the House of North Carolina in 2001, noted in an interview concerning the possibility of a nonpartisan or bipartisan legislative redistricting commission being created in North Carolina, "I just don't see legislators giving up their right to vote on the redistricting plan, [redistricting] is an issue very near and dear to their hearts. I'd be real surprised if there are very many people who will support that."<sup>121</sup> That statement conflicts with the fact that, "Americans expect their elected representatives to be responsive to *their* public policy desires."<sup>122</sup> How legislative districts are drawn up is not one of the primary public policy interests about which citizens are highly concerned.<sup>123</sup> The time spent by legislatures drawing and redrawing legislative districts, and thereby vying for political advantage, is exactly opposite of the expectations of their constituents. The primary advantage gained by allowing redistricting to be done by nonpolitical or bipartisan redistricting commissions is that the legislature can take the time previously spent on redistricting and spend it in pursuit of its primary responsibility -- being about the people's business.

The fact that time devoted to one project deprives the legislature of attention to another is true, *a priori*. Legislatures face many obligations, both constitutional and

non-constitutional, and they must complete those obligations each legislative year in a limited time, so that budgeting legislative time becomes a necessity. It would therefore, by extension, be true that any time not spent doing one legislative task can be spent completing another. It is granted that there is not enormous evidence supporting these assertions, but one advantage of using nonpolitical or bipartisan commissions to handle legislative redistricting is that it frees up legislative time to tackle the far more important problems of governing on behalf of the electorate. The use of commissions minimizes the legislature's entanglement in redistricting "battles that are rife with naked self-interest and partisanship,"<sup>124</sup> which prove fruitless for their constituency.

#### **4. The Public is Annoyed By Politics and Political Legislative Redistricting**

The public's dissatisfaction with the way that legislative districts are redistricted is not confined to the states that have addressed the problem by developing some sort of bipartisan or nonpartisan legislative redistricting commission. A simple computer natural language search of newspapers uncovered stories considering the possibility of establishing, in the state or region in which the paper operated, a nonpolitical or bipartisan legislative redistricting commission.<sup>125</sup> The stories that resulted from the search ran in regional newspapers in eight states during the period between February 28, 2001, and July 17, 2002.<sup>126</sup> Those states and the newspapers covering them were: the *Richmond Times-Dispatch* in Virginia,<sup>127</sup> the *Deseret News* in Utah,<sup>128</sup> the *San Antonio Express-News* in Texas,<sup>129</sup> *The News & Observer* in North Carolina,<sup>130</sup> the *Deseret News* (covering both Utah and Idaho),<sup>131</sup> the *Charleston Gazette and Daily Mail* in West Virginia,<sup>132</sup> *The Tampa Tribune* in Florida,<sup>133</sup> and *The Florida Times-Union*, reporting on Georgia politics.<sup>134</sup> As just illustrated, the regional and local newspapers, outside of the states that have enacted redistricting commissions across the nation have articles with a central theme. The theme is a simple one; a change is needed in the way redistricting is done.

Rob Richie and Steven Hill in their article for the *Charleston Gazette & Daily Mail* seem to have caught the essence of how citizens feel about political legislative redistricting. They refer to redistricting as the "incumbent protection process."<sup>135</sup> That sentiment is echoed in an article that ran in the *Grand Forks Herald*, by the same authors, which stated that voters don't even need to go to the polls anymore because most districts are partisan gerrymandered in such a way as to be noncompetitive, with the only real choice being whether or not to vote to ratify the incumbent.<sup>136</sup>

States are reacting to what many members of society see as an "incumbent protection process." After every decennial redistricting cycle the list of states that have bipartisan or nonpolitical legislative redistricting commissions gets longer by another two or three states.<sup>137</sup> There seems to be a dichotomy between the personal self-

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interest of politicians and the creation of nonpolitical or bipartisan redistricting commissions, which, at the very least, reduce the direct power that legislators have over the drawing of legislative districts. It is an incontrovertible fact that legislative redistricting is a highly self-interested business in which politicians strive to secure their incumbencies and secure their own political party's power.<sup>138</sup> The most likely reason that legislators would give up the power to control their political futures through drawing their own district lines is that citizens are fed up with partisan legislative redistricting and the power struggles that surround them, and legislators do not want to seem unresponsive to the desires of their constituencies. Phil Kabler's article quotes the executive director of Maryland's Department of Legislative Services concerning the public's sentiment about Maryland's implementation of a redistricting advisory panel, "[political redistricting] was seen as a big mess legislatively. This was seen as a good government move."<sup>139</sup> One can only assume that the articles are a reflection of the feelings of the populous. Having politicians in control of their own legislative districts and consequently their political futures is not sound public policy.

### 5. Commissions Prevent Clogging Up of the Judicial System

In *Colegrove v. Green*, Justice Frankfurter "famously explained [that] redistricting litigation is not a typical legal field, but a 'political thicket,' which courts 'ought not to enter.'"<sup>140</sup> However, the problem of sorting out and cleaning up the damage done in legislative redistricting inevitably falls to the courts. In the 1990s legislative redistricting litigation occurred at levels never before seen in the history of the Union.<sup>141</sup> Consequently, court-drawn maps had to be implemented<sup>142</sup> to fix inequities that the legislatures had created through partisan redistricting in which "self-interest reign[ed] supreme."<sup>143</sup>

The U.S. Supreme Court widened the scope of legislative redistricting cases it would entertain by its stating explicitly in the plurality opinion of *Davis v. Bandemer* what it had implied in *Gaffey v. Cummings*.<sup>144</sup> The Court in *Davis* held that partisan gerrymandering claims were justiciable by deciding that the Equal Protection Clause of the U.S. Constitution applied to partisan cases.<sup>145</sup> The result of the *Davis* decision is that we have "today a circumstance in which almost anyone has standing to sue and a multiplicity of grounds may be alleged."<sup>146</sup>

The high stakes partisan electoral game and partisan make-up of state legislatures compounded with the elimination of standing barriers and the decision that partisan gerrymandering issues are justiciable has made the field ripe for a litigation explosion. In 1980, 44 states had to redistrict because they had two or more congressional districts.<sup>147</sup> From the 1980 round of Congressional redistricting for those 44 states, 22 of them featured split or divided control of state government (i.e., at least one chamber or the governor's office was controlled by opposing political

parties). Of the 22 states that had state governments under split or divided government control, 13 or 59.1 percent spawned redistricting litigation. In that same year, nine of the other 22 states or 40.9 percent of the states facing redistricting that were under one-party control (i.e., all chambers were under one party's control) had their legislative redistricting plans litigated.<sup>148</sup> The 1990s were not very different, except that there was an expanded amount of judicial activity.<sup>149</sup>

If there is litigation of a redistricting plan, the state's political make-up could be the best indicator of the reason for the litigation. In states where neither party has control of state government, the most likely reason for litigation is that a political impasse either existed or was likely to exist.<sup>150</sup> In states that were controlled by a single party, the most likely reason for the litigation was a challenge concerning partisan gerrymandering.<sup>151</sup> The same reasons for litigation discussed above for congressional redistricting held true for legislative redistricting of both state houses of representatives and state senates. States with split-party control had legislative redistricting impasses and single-party controlled states had legislative redistricting plans that contained partisan gerrymanders.<sup>152</sup> The ultimate result of all the state legislative redistricting litigation is that the courts, both state and federal, get their resources tied up fixing the problems that political legislative redistricting causes.

Nonpolitical or bipartisan legislative redistricting commissions provide a viable solution to the tying up of valuable court docket time and judicial resources. The non-litigation track records of states that use nonpolitical or bipartisan redistricting commissions speak for themselves. Hawaii, Iowa, Montana, and Washington use commissions to redistrict both at the congressional and state legislature levels. The 1980 round of congressional redistricting saw only Hawaii's reapportionment map struck down, but for reasons not related to Hawaii's Commission's work on the plan.<sup>153</sup> In 1990, those four states, and their commissions' work on congressional redistricting, avoided any litigation.<sup>154</sup> The success of commissions in two of these states must be tempered with the fact that Montana has only one congressional seat and Hawaii has only two seats and is heavily Democratic.<sup>155</sup> However, in sharp contrast, Iowa and Washington have five and nine politically competitive congressional seats respectively, which is evidence that nonpolitical and bipartisan redistricting commissions can work in complex political environments.<sup>156</sup> A similar story unfolds for Hawaii, Iowa, Montana, and Washington concerning the redistricting of their state legislatures. In 1980, only Hawaii's state legislative redistricting plan was rejected in federal court, and the 1990 plans for all four state legislatures, drawn up by commissions, were litigation-free.<sup>157</sup> "The Hawaii, Iowa, Montana, and Washington experiences indicate that a commission can pierce through the self-interested factionalism of a state legislature and arrive at a balanced redistricting plan capable of avoiding judicial intervention."<sup>158</sup>

A story similar to Hawaii, Iowa, Montana, and Washington's can be told when

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examining the redistricting track records of the following states: Arkansas, Colorado, Michigan, Missouri, New Jersey, Ohio, and Pennsylvania. These states use commissions to redistrict their state legislatures, while the state legislature retains control over congressional redistricting. It is therefore illustrative to examine the redistricting litigation of plans drawn up by commissions and the plans drawn up by the legislatures. In 1980, five of the seven states had their congressional plans, which were drawn by the legislatures, rejected in federal court. Only two of the same seven states had their state's legislative plans, which were drawn by commissions, litigated -- and both were upheld.<sup>159</sup> In 1990, a similar pattern concerning legislative plans was reflected in six of the previously mentioned seven states, with Michigan's Commission being declared unconstitutional prior to 1990.<sup>160</sup> Two congressional plans drawn by state legislatures were overturned, with four redistricting plans being upheld or not litigated. On the state legislature level only one commission-drawn plan was overturned while the other five were either upheld or not litigated.<sup>161</sup> The failures of the Arkansas and Michigan Commissions' plans in 1980 and the Ohio Commission's plan in 1990 were the result of a flaw in the crafting of the Commissions themselves, and not of the commission concept.<sup>162</sup> All three reapportionment Commissions were heavily partisan so it is not surprising that the Commissions were unable to escape the partisan gerrymandering that commissions usually avoid.<sup>163</sup> In Arkansas, the members of the Commission were the State's Governor, the Secretary of State, and the Attorney General, and in Ohio, the members were the Governor, the Auditor, the Secretary of State, and two other members appointed by the Governor. Michigan's plan had bipartisan elements, but had no tie-breaking vote, which led to endless deadlock, and caused the Michigan Supreme Court to have to redistrict the state.<sup>164</sup>

The general point is that bipartisan or nonpolitical redistricting commissions are judicially efficient. While not completely impervious to litigation, they are more effective than legislatures at devising maps that are not conducive to litigation, especially in the post-*Bandemer* era of few standing requirements, many grounds upon which to sue, and the decision that partisan gerrymandering is a justiciable issue. The evidence above shows that commission-drawn maps have two strong selling points: 1) they are less partisan-gerrymandered than the alternatives available from the partisan-controlled process, and 2) they are less subject to political impasse. Those two reasons allow bipartisan or nonpolitical legislative redistricting commission plans to be upheld by courts and avoid continuous judicial review of legislative plan after plan thus freeing up the courts and their resources.

The five areas of advantages listed above -- a decrease in partisan bias, an increase in legislative legitimacy, the freeing up of legislative time for other legislative tasks, the removal of some politics from an inherently political process, and a freeing up of the judicial system from redistricting litigation are not to be taken as an exhaustive but rather a partial list of the advantages of commissions. The mentioned

advantages help to show why states should consider the implementation of a nonpolitical or bipartisan legislative redistricting commission. However, just as there are advantages to commissions, there are also possible disadvantages that must be discussed and examined.

## **B. Disadvantages of Bipartisan / Nonpartisan Legislative Redistricting**

There are at least two significant possible disadvantages from using nonpolitical or bipartisan legislative redistricting commissions. The first main disadvantage is that political party cohesion may suffer because parties will not have access to or control over some of the “carrots” they currently dangle in front of potential candidates like they do when the legislature controls redistricting. The other main disadvantage of the use of commissions concerns the risks associated with lower rates of incumbency. Affected are three highly intertwined and interrelated parts: the stability of the legislature, the quality of candidates parties can find to run for office, and the potential for a party’s candidate to win re-election enough times to gain seniority advantage. Legislative stability, candidate quality, and seniority advantage all possibly stand to be lessened by a state’s use of a commission because electoral districts drawn by a commission are generally more electorally competitive than those drawn by legislatures. A consequence of more competitive districts is a greater likelihood of electoral defeat for incumbents. The following subsection examines in greater detail the possible disadvantages mentioned above.

### **1. Less Political Party Cohesion within State Legislatures**

V. O. Key, in his book *Politics, Parties, and Pressure Groups*, probably best captured the importance of party cohesion when he penned the phrase, “[t]o win the campaign it is necessary to unite.”<sup>165</sup> However, the importance of party cohesion reaches far beyond the mere winning of elections. “The level of cohesion on matters of policy speaks not only to the role of parties during elections but after them as well, when governing rather than electing becomes the central task.”<sup>166</sup> Political parties within state governments, especially in states that have competitive parties, have historically had a fairly high level of political party cohesion by American political standards.<sup>167</sup>

One of the benefits of strong party cohesion is that cohesive parties are able to provide to the citizenry programmatically clear alternatives to those choices given voters by the opposition.<sup>168</sup> It would seem to follow then that because state political parties have a fairly high level of party cohesion, they can, if they desire, create the programmatically clear alternatives mentioned above. The voters would thus be given

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clear choices on state policy as opposed to picking one party over another based on slight differences, which equate to political shades of gray. However, even though state party cohesion is important because it improves the possibility of the legislature getting things done through responsible party government,<sup>169</sup> it also cannot be overlooked that state political parties must still contend with large numbers of unlike-minded party members.<sup>170</sup> The large numbers of unlike-minded members of the political parties decrease the possibility that a strong central programmatic message would emanate from the state party so as not to offend any group's activists.<sup>171</sup> Since there is a wide variety of members with different schools of thought within the political parties and because re-election rates of incumbents are high, incumbents can afford occasionally to break away from the party line and not follow Benjamin Franklin's famous maxim: "We must all hang together or most assuredly we shall all hang separately."<sup>172</sup>

In a typical legislatively-controlled redistricting system, individual legislators are trying to ensure not only their personal best interest but also the best interests of their political party allies. The truth of that political reality is best articulated by the words of Phil Burton, the "architect of the infamous California congressional districts in 1981 and 1982, 'The most important thing you do, before anything else, is you get yourself in a position to draw lines for [your own] district. Then you draw them for all your friends . . . .'"<sup>173</sup> The nonpolitical or bipartisan redistricting commission by its very nature puts the power over redistricting in the hands of persons that are not directly electorally accountable.<sup>174</sup> The legislatively-controlled redistricting system championed by Burton causes members of the political parties to band together to protect each other. In this scenario, members of the party in the legislative majority rally together in order to draw as many electorally safe districts favorable to their political party as they can.<sup>175</sup> Conversely, the minority party reacts, by pulling together to protect their party member's districts and trying to keep from having district lines drawn which would cause their seats to be squeezed out of the legislature.<sup>176</sup> Every ten years the two political parties face off over legislative redistricting in a gladiatorial battle, which is among the fiercest in American politics. That gladiatorial battle features legislators, fighting for . . . their party, just as surely as in an election, but with more durable results. Depending on how districts' lines are drawn, a party with only a minority of the popular vote can assert control over a majority of seats in the state assembly and over its state's delegation to the national House of Representatives.<sup>177</sup>

The nature of legislative redistricting causes state legislators to work together as party members in order to protect as many seats as possible, and thereby creating party cohesion. Personal political gain is not the only consideration that party incumbents have. The health and strength of their political party, upon which party cohesion depends, is also a major consideration in what the ultimate redistricting map will look like.<sup>178</sup> Those party incumbents who are sometimes adversaries have a vested interest in the gains or losses made by their political party. Therefore, often, when the ultimate compromise is reached in drawing legislative districts, party seat advantage, which is generally weighed most heavily of all considerations, will trump individual incumbent advantage.<sup>179</sup>

The cohesion of the political party, and the redistricting map that results from the party's cohesive compromise, does breed political gain for the party. The party controlling the redistricting process can expect that the seat proportion for that party will increase 2 percent as compared to a bipartisan-controlled system.<sup>180</sup> Additionally, when partisan bias in legislative districts, even when lessened by any form of redistricting,<sup>181</sup> is figured into the equation, the party controlling redistricting can expect, on average, to control 6 percent of the seats that the other party would have won had it controlled redistricting.<sup>182</sup> The ability of the party to increase its seat proportion in its favor also has an effect on the caliber of candidates it will be able to convince to run for office. By being able to increase the number of districts the party is likely to win, the "party finds it easier to field better candidates, producing more votes for those candidates."<sup>183</sup>

Legislative political party cohesion, which is bolstered by the redistricting process and the gains that can be made from controlling redistricting, likely suffers at the hands of nonpolitical or bipartisan redistricting commissions. The personal political interest forces that pull the members of the same political party together into united blocks, either to increase their legislative majority<sup>184</sup> or to protect themselves from being partisan gerrymandered out of the political process,<sup>185</sup> can be severely lessened by the use of commissions.

## **2. Incumbents' Districts Could be Less Safe Leading to Less Continuity in Legislatures**

Several reasons have been expounded supporting continuity in the House of Representatives as well as in state legislatures. Some of those reasons are: stability in the legislatures, quality candidates, and seniority advantages.<sup>186</sup> Nonpartisan or bipartisan legislative redistricting commissions threaten continuity in legislatures because the maps drawn by commissions are more likely to include competitive legislative districts.<sup>187</sup>

**i. Stability in the Legislature**

Redistricting inherently creates instability in the legislative process.<sup>188</sup> By its very nature, redistricting changes the political make-up of districts by either increasing or decreasing the number of registered members of a political party residing within one voting district.<sup>189</sup> During any one particular redistricting cycle some incumbents will benefit from the resulting district that is drawn on the map, but many incumbents do not benefit either because the boundaries of their district are not affected by the new districts drawn, or partisan voters that supported them in the last election are moved into another district for a myriad of political reasons. As one might suppose, many members of the party not in control of redistricting will lose support, but surprisingly, due to geographic constraints, many incumbents in the party in control will lose support as well.<sup>190</sup> As Bruce Cain notes in his article, *Assessing the Partisan Effects of Redistricting*, one of the ways redistricting effects electoral competition is by keeping or removing an incumbent from his or her old territory.<sup>191</sup>

Inter-party competition is not the only competition that incumbents have to worry about during each decennial redistricting process. “[R]edistricting frequently creates intra-party competition among rational officeholders seeking to maximize their probability for re-election: ‘[the] scrambling of incumbents can have momentous importance for the election that follows the redistricting.’”<sup>192</sup> Therefore, it would seem that any redistricting, whether done by the legislature itself or by nonpolitical or bipartisan legislative redistricting commissions, is going to cause a certain level of uncertainty and create instability. However, when legislators are allowed to control the redistricting, they are able to minimize the risks because they are able to put “the brake[s] on major departures from the status quo and hand over the ultimate decision of district lines to individuals with vested interest[s] in district continuity.”<sup>193</sup> Arthur Miller, a political scientist at the University of Iowa, asserts, “legislators’ partisan instincts are not intrinsically bad for democracy.”<sup>194</sup> “There’s nothing wrong with preserving boundaries that maintain the political landscape across the state as it existed prior to redistricting,” notes Miller.<sup>195</sup> Incumbents, when in control of the redistricting process, can ensure the creation of less competitive seats and limit the effect that swings in voting patterns will have on the composition of the legislature; thus, the legislature is able to remain stable.<sup>196</sup> Nonpolitical or bipartisan legislative redistricting commissions threaten the legislature’s ability to control swings in voting patterns, and as a result, the stability of the legislature becomes threatened. There is clear evidence that maps drawn by commissions create “heightened competition [that] can put influential, long-standing incumbents at considerably greater risk of defeat . . .”<sup>197</sup>

## **ii. Quality Candidates**

The political party that is in control of the process of legislative redistricting is in a far better position than the party not in control of the process to recruit better quality candidates because the party in control can draw additional districts that would favor a member running under their party's umbrella.<sup>198</sup> Partisan redistricting, or maybe a better characterization would be partisan gerrymandering, attracts quality candidates to the political arena. Under the rationale used above, the best candidates will not be willing to throw their hat into the political fray unless it "affords the opportunity of a career."<sup>199</sup> If the parties are unable to exercise power over district boundaries, those persons that otherwise might seek a political office would be deterred because the office tenure would seem insecure.<sup>200</sup> If nonpolitical or bipartisan legislative redistricting commissions were granted the power to redistrict, taking away an incumbent's ability to protect his or her own district, then many quality candidates might not enter the political ring and society might lose the benefit of many talented candidates.

## **iii. Seniority Advantage**

In state legislatures, and to an even greater extent in the U.S. Congress, seniority is the name of the game. Members that have been in the legislature for long periods of time are in position for state legislative or congressional offices of authority. Seniority is a major factor in selecting the chairpersons of congressional standing committees.<sup>201</sup> Chairpersonships are highly coveted positions because a chairperson can control the committee's agenda, schedule committee meetings, delay or speed up the movement of legislation, and preside over the committee's meetings, determining which committee members get to talk and when.<sup>202</sup>

However, the seniority system does not only affect the assignment of leadership positions in committees. Rather, "it pervades the whole life of the Congress . . . . Seniority confers status upon members which affects much of their legislative life and especially the perquisites available to them." For example, seniority also affects who will be rewarded their choice of committee assignments, who will be assigned to what office space, and who will receive recognition both on the floor and in committee hearings. Thus, more than just a rule for deciding committee leadership, "seniority is a norm of central importance to a legislature."<sup>203</sup>

Giving the power to redistrict to nonpolitical or bipartisan legislative

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redistricting commissions could be a threat to that very important power of seniority. Commissions' district lines are often more competitive than the ones that would be drawn by partisans.<sup>204</sup> The "heightened competition can put influential, long-serving incumbents at a considerably greater risk of defeat, which typically weakens a state's clout in Congress."<sup>205</sup> On the state legislative level, heightened competition can weaken a geographic location's clout in the state legislature.

The possible disadvantages to political parties and their candidates must be examined by states before deciding to implement a nonpolitical or bipartisan legislative redistricting commission system. The loss of a little party cohesion and a higher chance of electoral turnover are significant disadvantages to the adoption of a commission system. However, the advantages when weighed against disadvantages clearly tip the scale in the favor of states creating nonpolitical or bipartisan legislative redistricting commissions. The advantages of a commission especially outweigh the disadvantages when viewed as an example of government legislating expressly in the people's best interest and carrying out a "good government" initiative.

## **V. RECOMMENDATIONS**

States should create redistricting commissions because there are more advantages for them than there are disadvantages. The weight of the possible disadvantages, which are abstract, is lessened when examined in the already existing framework of politics. The disadvantages mentioned above are lessened by the natural result of any kind of redistricting, the already existing lack of American political party cohesion, and political instability safeguards put in place both institutionally by the Founders in the Constitution, which were copied by the states, and in a de facto manner by the proven electoral bonuses of incumbency. The following subsection involves a deeper exploration into the balancing of the advantages and disadvantages of nonpolitical or bipartisan legislative redistricting commissions.

### **A. States Should Create Nonpartisan / Bipartisan Legislative Redistricting Commissions**

The advantages gained by states using nonpolitical or bipartisan legislative redistricting commissions far outweigh the disadvantages. The idea that the people should be sovereign and in control of the democratic state was one of the most deeply held convictions of the Founding Fathers.<sup>206</sup> Also, as Alexis de Tocqueville observed, the citizenry in a democratic society must be politically active in order to prevent the tyranny of the majority.<sup>207</sup> The use of commissions provides a means for overcoming the inherent self-interest and partisan bias that pervade the legislative redistricting

system used in a majority of states.<sup>208</sup> While not directly placing the masses in control of the drawing of legislative districts, the commission system prevents partisans in the legislature from shielding themselves from defeat at the ballot box by the gerrymandering of district lines.<sup>209</sup> Even the most politically active citizenry cannot cause change in government if the system, controlled by the party in the majority, gerrymanders the district lines in their favor and foreordains the winners. When political party members in the legislature are able to control the redistricting process for their own districts and thereby to gerrymander district lines to avoid serious challenges at the ballot box, they are working directly against the Founders' idea of fair and democratic government by the people.

It is inherent in the nature of redistricting that many, if not most incumbents will have their political base weakened.<sup>210</sup> Therefore, following any decennial redistricting process, there is an increased possibility that a particular region within a state, at the state legislative level, or the entire state, at the congressional level, will have its political pull diminished by the district drawing and attendant squeezing out of a state or region's influential incumbent.<sup>211</sup> The advantage of a state's implementation of nonpolitical or bipartisan legislative redistricting commissions for legislative district drawing is that members of political parties within the state legislature are not the ones determining which of their incumbent colleagues are going to be squeezed out and which are going to be protected. Whether the nonpolitical or bipartisan legislative redistricting commission members are partisan or not, unlike legislators, they will have little immediate political stake in the drawing of district lines. Some states even go so far as to bar commission members from running for office within a set time period after sitting on the state's redistricting commission.<sup>212</sup> The advantage just mentioned is greater than any disadvantage that redistricting commissions could cause to the stability of legislatures, quality of candidates, or seniority advantage that comes with long-term incumbency. The electoral process, by its very nature, is a constant threat to partisan legislative stability and consequently to seniority advantage because "the government is operated under the expectation that the party may be held accountable at the next election for its stewardship."<sup>213</sup>

The disadvantage discussed above concerning loss of political party cohesion is not greatly affected by the use of nonpolitical or bipartisan redistricting commissions because "party cohesion" in the usual use of the term is not very strong in American political systems.<sup>214</sup> Members of political parties generally do not toe the party line in the parliamentary sense of party cohesion.<sup>215</sup> Rather, the "party line" cohesions that develop do so around issues.<sup>216</sup> The issue groups that develop and formulate around certain topics create voting blocks within political parties.<sup>217</sup> The political parties themselves do not "crack the political party whip," but shepherd the factions together. The parties act as umbrella organizations that attempt to get as many interest groups as possible to support party issues.<sup>218</sup> The effect on party cohesion through redistricting

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done by nonpolitical or bipartisan commissions is therefore minimal. The party itself does not guarantee all its members that it will attempt to protect their seats; rather, those doing the redistricting try first to protect their own seats and political interests, and then protect their friends' seats and political interests.<sup>219</sup> It is possible that some party members, even of the majority party, do not have anyone looking after their seats or political interests. It would be a very safe assumption that the "friends" that the partisan legislative redistricting committee members are trying to protect are fellow legislators who are ideologically aligned with the redistricting committee members' interest groups. Since political parties, under the current system of redistricting, cannot demand party cohesion because they do not provide party members seats, there would be little change in the level of party cohesion if redistricting were conducted by commissions.

The American public has historically viewed government with distrust, so any and all overtly political acts seem at least mildly self-motivated and consequently suspicious.<sup>220</sup> Nonpolitical or bipartisan legislative redistricting commissions are a method to remove, to some degree, politics from redistricting. No system yet attempted has tried to remove politics completely from the process,<sup>221</sup> because redistricting is inherently a "highly political business."<sup>222</sup> Redistricting commissions by contrast, just attempt to place a limit on the political chess match that tires much of the populous.

Any disadvantage created by the use of nonpolitical or bipartisan legislative redistricting commissions concerning attracting quality candidates to political office or creating lower levels of legislative stability does not hold up to scrutiny. At the congressional level, the Founding Fathers provided for stability even in the event that the entire incumbent mass of members of the House of Representatives was defeated.<sup>223</sup> The U.S. Senate was designed to combat that exact problem.

[T]o respond to the fear of instability, the Senate was added, creating a separate house of the legislature with members whose qualifications were different and whose terms of office were longer. One of the objectives of the Senate was to temper 'the propensity of all single and numerous assemblies to yield to . . . sudden and violent passions' and provide stability in the face of 'rapid succession of new members, however qualified they may be.'<sup>224</sup>

Additionally, re-election rates are so high that concerns about entrenchment are far more prevalent than are concerns about instability. Even in house-cleaning years such as the Republican House takeover in 1992, more than three-fourths of incumbent members of the House of Representatives won re-election.<sup>225</sup> Many state legislatures have cycles similar to Congress' term cycles because those states' constitutions prevent all incumbents from being up for re-election in any election cycle.<sup>226</sup> In the 42 states

holding state senate elections in 1994, 874 candidates were incumbents seeking re-election and of those incumbents 806 or 92 percent retained their seats.<sup>227</sup> The same situation was present in the 45 states holding state house of representative elections in 1994; a total of 4,235 candidates for office were incumbents, and of those incumbents 3,804, or 90 percent, won re-election.<sup>228</sup> It would therefore be safe to assume that approximately 90 percent of incumbents can expect to retain their seats in a typical state legislative election cycle.

Congressional elections reflect more of the same. In 1994, 91 percent of incumbent members of the U.S. House of Representatives won re-election,<sup>229</sup> and in 1998, 98.3 percent of House incumbents were re-elected.<sup>230</sup> It would therefore, once again, be a safe assumption that in any given Congressional election year, approximately 95 percent of House incumbents can expect to win re-election. The percentages suggest, “that one would have to do more than just remove protection through redistricting before instability would be a concern; [they] also suggest[] that potential [qualified] candidates are unlikely to be discouraged by the limited potential for a career.”<sup>231</sup> Any perceived disadvantage stemming from increased legislative turnover resulting from the use of nonpolitical or bipartisan legislative redistricting commissions would be minimized based on the preceding examples of the importance of incumbency to attract quality candidates and on the provisions taken by the Founders of the U.S. Constitution to prevent complete legislative instability. State constitutions are based on the same provisions.

Two final advantages that stem from the use of nonpolitical or bipartisan legislative redistricting commissions are that they free up both judicial resources and legislative time. The courts always have dockets full of pending cases, and at redistricting time they are faced with increased litigation concerning cases where parties are challenging partisan gerrymanders.<sup>232</sup> The track record of redistricting commissions for reducing litigation, when compared to traditional redistricting, is a definite advantage in favor of states adopting legislative redistricting commissions.<sup>233</sup> Similarly, during each session, state legislatures are required to complete tasks such as passing a balanced budget, which is constitutionally required in 39 states.<sup>234</sup> Any time that state legislatures do not have to spend redistricting is time that they can spend taking care of other tasks they must complete during a legislative session. Freeing up time for the state legislatures to work on legislating for the benefit of the electorate is a definite advantage in favor of nonpolitical or bipartisan legislative redistricting.

Often, the natural rules of American politics help to lessen the effects that a possible disadvantage attendant to a commission would have on a political group. If it is accepted that the advantages of commissions outweigh the disadvantages, the question then becomes what are the best ways for states to go about implementing nonpolitical or bipartisan legislative redistricting commission systems?

**B. Implementation**

Once a state has determined that it wants to partake in the benefits offered by nonpolitical or bipartisan legislative redistricting commissions, some important questions arise about how best to implement a commission in that state. Questions to be answered include: how should commissioners be selected? How many members of the commission should there be? How should the commission be divided for political party purposes? To answer these questions, a state can look to already existing commissions to see what options are available in order to tailor a commission system that will fit the state's needs. The following subsections contain some recommendations for how states could set up their commissions based on the most commonly used methods by states with commissions.

**1. How Should Members of the Nonpolitical / Bipartisan Commission Be Selected?**

Both the majority and minority party leaders in both houses of the state legislature, some member of the executive branch, and a member or some members of the judicial branch should appoint the commissioners for a state's redistricting commission. A majority of the states that have commissions use a system similar to the one just described.<sup>235</sup> Many states allow the majority and minority leaders in each chamber of the legislature to appoint one member for a total of four appointees from the legislative branch.<sup>236</sup> Some states allow the governor to pick one or more members of the commission.<sup>237</sup> Similarly, some states allow their highest court's presiding officer, individually or with a majority vote of the state's highest court, to select one or more members of the commission.<sup>238</sup> By allowing all branches to make appointments, the responsibility of redistricting is spread over the coordinate branches of state government. Additionally, because the majority and minority parties in the legislature are involved in the appointment process, the minority party cannot be completely cut out of the redistricting process, as sometimes happens in partisan redistricting. Furthermore, appointment to the commission by these leaders in government is the most practical method available, because they are going to be in the best position to know the kind of people who will best be able to fulfill the commission's intent.

**2. How Many Members Should Be on the Nonpolitical / Bipartisan Legislative Redistricting Commission?**

There is no set number of members that should be on a nonpolitical or bipartisan legislative redistricting commission. The range is typically between five and

11 members.<sup>239</sup> A membership number problem that should be avoided is having a commission that by its number make-up creates partisan gridlock. Three states have bipartisan commissions that do not feature a tie-breaking vote; therefore, those states' commission systems create perfect partisan equality.<sup>240</sup> As mentioned above, if the partisan members of a perfect party parity commission are simply encouraged by the commission's structure to dig into their partisan positions, then nothing is gained by using a nonpartisan or bipartisan commission.<sup>241</sup> Commissions should have an uneven number of voting members, whether that is by a tie-breaking commission format or by a bare-majority partisan commission plan. The decision about the composition of the commission should be determined by each individual state's political composition.

### **3. How Should Partisan Membership on the Nonpolitical / Bipartisan Legislative Redistricting Commission Be Divided?**

The partisan division of membership on the nonpolitical or bipartisan legislative redistricting commissions could be an issue of contention during the formulation of legislation to enact the commission and make it a governmental institution. Partisan division, however, does not need to be a deal breaker. There are two very feasible methods that state legislatures can follow when setting up the commission framework to minimize political allegiances and ensure that no one party completely dominates the commission's redistricting.

To ensure that no one political party completely dominates the commission, there needs to be a provision in the constitutional amendment or statute creating the commission that disallows complete one-party dominance of the redistricting process. An example would be a provision similar to the one used in the amendment that created Pennsylvania's commission. Pennsylvania's provision required that the partisan appointments be equal in number (i.e., three Republicans and three Democrats) and thus create a bipartisan commission.<sup>242</sup> To prevent deadlock, the newly appointed members select a tie-breaking chairperson.<sup>243</sup>

A different situation exists in states where, historically, one party dominates. It is very likely, in these heavily partisan states, like Kansas, that legislators in the majority party would rather not have the benefits of a commission system, because of the loss of control over redistricting.<sup>244</sup> For states with a definite majority party, the possibility of getting the benefits of a commission system is not completely a lost cause. A provision similar to the one proposed in the Kansas Senate, Concurrent Resolution 1607, allows no more than a bare majority of members to be from one political party, such as four Republicans and three Democrats.<sup>245</sup> The suggested provision would virtually ensure that the majority party would always have a bare majority on the commission, but would allow the minority party significant representation on the commission and consequently the ability to influence the

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reapportionment map. “By shaping a change to make it more consistent with existing procedures and practices, institutions maintain stability in the face of pressure to change.”<sup>246</sup> Making changes that do not overtly “rock the boat” can be an important positive step for changing the current system. A provision like the one mentioned could very likely be that “important step in the right direction” needed to reform the way Kansas and other states like it conduct decennial reapportionment.

While there is no one best model for a state to follow when setting up its commission, the preceding recommendations were based on what many states that currently have commission systems have done. Additionally, recommendations were made for states that have peculiar partisan compositions as examples of the flexibility of a nonpolitical or bipartisan legislative redistricting commission. The recommendations show that even heavily partisan states can enjoy the benefits of using a commission system to redistrict. The only remaining question is: do nonpolitical or bipartisan legislative redistricting commissions really work?

## **VI. DOES IT WORK?**

To determine whether nonpolitical or bipartisan legislative redistricting commissions really work, it may be useful to pursue several preliminary questions. One is whether commissions, like the one proposed in Kansas, would create political business as usual. Two related questions may help address the issue. What light, if any, can Kenneth Arrow’s Social Choice Theory shed on the possible effects of states creating nonpolitical or bipartisan legislative redistricting commissions? Also, what can the effects of institutions in state government tell us about the likely results states can expect when they create and institutionalize a commission system?

The answers to several additional questions will be helpful in determining if nonpolitical or bipartisan legislative commission systems will work: 1) what are the likely results of commissions in politically evenly divided and heavily partisan leaning states, 2) what makes it possible for commissions to work in all political cultures, and 3) what are some reasons that nonpolitical or bipartisan legislative redistricting commissions might work well? The following subsections explore the questions just posited to help determine if redistricting commissions do in fact work well.

### **A. Query: In States Like Kansas, Which Are Heavily Partisan, Is It Possible That Commissions Like the One Proposed Will Create Political Business As Usual?**

The short answer is Yes and No. Yes, there is a definite possibility that a commission system like the one proposed would allow the majority party in a state that is heavily partisan, one that continually elects into a majority one party over the other,

to maintain perpetual control of the redistricting process. No, however, is more likely the answer because that same state by creating a commission would get the benefit of having the minority party guaranteed a seat at the negotiation table and the attendant benefits of legitimacy that having both parties' interests represented would afford. There is also the possibility that the majority party on the commission would simply ram through its reapportionment maps. The counter-argument is that the commission is created for the purpose of finding nonpolitical or bipartisan answers to redistricting problems. Because the commission members do not have a personal interest in the drawing of district lines, it has a better chance than does the legislature of redistricting fairly. Senate Concurrent Resolution 1607, currently before the Kansas Legislature, is not the only solution to the problem created by redistricting, but it does create a viable option for Kansas, while taking into account the predominance of the Republican party within the state.

## **B. What Are the Possible Results of Using a Nonpolitical / Bipartisan Redistricting Commission?**

### **1. Social Choice Theory**

Social Choice Theory can be of considerable help in determining some possible results from using commissions. The work of Kenneth Arrow on Social Choice Theory is related to a scientific paper written by the Marquis de Condorcet in 1785.<sup>247</sup> The most basic ideas behind Arrow's Social Choice Theory are that whoever controls the means by which decisions are made controls the entire process,<sup>248</sup> and that "social welfare judgments can usually be made when there is . . . a widespread agreement on the decision process . . ."<sup>249</sup> The difficulty with legislative redistricting is that there is a problem with the choice of the decision process used. Arrow mentions explicitly in his book *Social Choice and Individual Values* that, "some care has to be taken in defining the decision process since the choice of [a] decision process in any given case is made by a decision process."<sup>250</sup> The inherent problem with the legislature determining the decision process by which it is going to be reapportioned is that the decision process is controlled by the group whose interests are most at stake -- the state legislature itself.

By selecting an agenda designed to produce a desired result, the agenda-setter can make the election less about majority will than about his ability to manipulate it. Social choice theory, therefore, provides a powerful insight into the potential of the agenda-setter to manipulate the popular will by defining the agenda, a potential dramatically realized in the drawing of electoral district lines.<sup>251</sup>

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Social Choice Theory therefore shows that by taking the legislature directly or at least indirectly out of the decision process for how district lines are going to be drawn, commissions can remove the ability of the legislature to act as an agenda-setter that predetermines the winners and losers. Thus, a probable result is that, because the most self-interested actors would no longer be in control of determining the decision process which controls what decisions the electorate ultimately will have, the true will of the majority is more likely to be determined, rather than the will of partisans, passed on to the majority for “ratification.”

### **2. Nonpolitical / Bipartisan Legislative Redistricting Commissions as Governmental Institutions**

The creation of political institutions within government is generally good for the overall political system. Political institutions work to produce rules, routines, and standard operating procedures that reduce the possibility for chaos in unrestrained political competition and bring order to the political world.<sup>252</sup> It would seem to follow then that the rules, routines, and standard operating procedures would provide an umbrella mechanism under which groups can work to further their interests, and a relatively equal position from which to start. “Political democracy depends not only on economic and social conditions but also on the design of political institutions.”<sup>253</sup> Therefore, the ultimate result that the group realizes is influenced by, among other things, the institutional structure that the group encounters.<sup>254</sup>

If the purpose of representative government is to find better ways to do things, then the creation of nonpolitical or bipartisan legislative redistricting commissions as political institutions is definitely a step in the right direction. The rules, routines, and standard operating procedures created by the use of commissions for reapportionment will take some of the chaos and inequality out of redistricting.

Standard procedures . . . are part of the social language by which organizations [e.g., the legislature], comprehend what they are doing, why they are doing it, and how they might do it better. New institutional instruments stimulate interest in new dimensions of description and redefine decision alternatives. Information that is generated for decision-irrelevant reasons becomes a topic of conversation, and ultimately contributes to . . . developing ideas of what is ‘productive’ and instruments for achieving it.<sup>255</sup>

Political scientists have long held that no system of government can function without the consent of the governed to the rules of the game. In the United States, this translates to an acceptance of the legitimacy of the decisions that officially elected rulers make.<sup>256</sup> The problem with legislatures controlling the redistricting process, and

not turning it over to another political institution, is that the legitimacy of the decisions that the legislature makes become tainted by the inherent political self-interest in legislative redistricting.<sup>257</sup> Because “integrative institutions,” which place importance on rights and the search for the common good,<sup>258</sup> are “designed to foster such legitimacy [and] are an important part of democratic governance,”<sup>259</sup> legislation creating nonpolitical or bipartisan legislative redistricting commissions should be enacted by states.

Even if the creation of a political institution does not accomplish its intended goal, institutional processes foster discussion about the targeted area and make future change possible.<sup>260</sup> However, the current system of redistricting used by a majority of states provides a large incentive for legislators to resist and play down the merits of commissions so as not to have any kind of possible institutional change stimulate interest among the public. The reason for that resistance is primarily that reapportionment is inherently a self-interested area, and legislators can best control their political future by retaining direct control over the redistricting process.<sup>261</sup> Resistance to a change in a political institution is to be expected because “[i]nstitutions preserve themselves, partly by being resistant to many forms of change . . . .”<sup>262</sup>

As shown above, “political institutions define the framework within which politics takes place.”<sup>263</sup> It cannot be denied that political institutions, which are themselves integrative institutions, carry attendant risks. The risks consist of corruption of the institution itself, the danger that the institution will be perverted by self-motivated actors, and the danger that the natural dynamism of institutional structures will tear it apart. However, in the final analysis, especially in the realm of reapportionment, the benefits of commissions as political institutions far outweigh the risks.<sup>264</sup>

### **3. Results in States that Are Evenly Divided Politically**

In states that are evenly divided politically, the eventual result of using a nonpolitical or bipartisan redistricting commission is that both parties get a seat at the decision-making table regardless of who is in the majority. Under the current majority method of redistricting, the party that happens to have finished well in the last election before the census gets to attempt to reward itself for the next ten years by trying to draw districts that favor itself more than the party in opposition.<sup>265</sup> However, under the institutional framework of a nonpolitical or bipartisan legislative redistricting commission, assuming either the use of a tie-breaking system or bare majority system, the state can create a system that ensures that the minority party is guaranteed a seat at the decision-making table. A bare majority system operates under a provision included in the statute or constitutional amendment that creates the commission, limiting the number of members from any one political party on the commission (e.g., four

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Democrats to three Republicans). Four of the 19 states with commissions are states that are closely divided politically, as determined by consistently having a gap of 12 or fewer seats between the political parties in the state's lower chamber and a gap of ten or fewer seats in the state's upper chamber between 1994 and 2000.<sup>266</sup> All four states utilize systems that ensure that both major political parties will have a seat at the redistricting decision-making table.<sup>267</sup> In states that are evenly divided, the tie-breaking system for commissions would seem to make the most sense. An even number of party appointments are made, and a chairperson, chosen for his or her nonpartisanship, is elected to exercise tie-breaking power.<sup>268</sup> The commission therefore would be able to protect the interests of both political parties because the possibility for either party taking control of the legislature in the next election is always present.

### **4. Results in States that Are Not Evenly Divided Politically**

States that are closely divided politically incur results similar to states that are heavily partisan toward one party. Assuming the use of a tie-breaker system or a bare majority system, the minority party will be ensured a seat at the decision-making table. Five states of the 19 that use commissions lean heavily in favor of one party, as determined by consistently having a gap of 11 or greater seats between the political parties in the state's lower chamber and a gap of ten or greater seats in the state's upper chamber between 1994 and 2000.<sup>269</sup> Of those five states, three guarantee that the minority party will have representation on the redistricting commission.<sup>270</sup> Nonpolitical or bipartisan redistricting commissions by their very nature follow the example of the three states that ensure that the minority party will be represented on the commission. Kansas State Senator Derek Schmidt points out that it is important to keep a minority party actively involved in politics, especially in states like Kansas with one-party dominance, not only to keep the majority party honest, but also because those legislators were elected by the people and for that reason must have their voice placed in a position where it can be heard.<sup>271</sup> In the best of all possible worlds, a state that is vastly partisan would opt for the tie-breaker commission system where both parties get automatic equal representation on the commission. However, in states that are heavily partisan it would seem to be more likely to have the commission operate in a system where the party favored by the electorate could have a bare majority with partisan membership restrictions on the number of that party's appointments (e.g., four Republicans to three Democrats) in the decision-making process. The bare majority system provides three major "good government" incentives for state legislatures to turn over redistricting to commissions. The first, as previously mentioned in this article, is that it frees up legislative time formerly devoted to legislative redistricting. Second, it prevents the accession of highly strident politicians who do not have to listen to any

minority interests because the majority party has partisan gerrymandered the minority party into virtual political non-existence.<sup>272</sup> Third, even in a minority capacity on the commission, the minority party, following Arrow's Social Choice Theory, would have a seat at the table, rather than being virtually shut out of the redistricting process, and have some control over the decision-making process<sup>273</sup> by influencing what the ultimate reapportionment map looks like.

**C. Nonpartisan / Bipartisan Legislative Redistricting Commissions Can Be Tailored to Meet the Needs of the State's Different Political Cultures and Can Work Well**

Probably the most attractive feature for state legislatures considering whether or not to implement a commission system is that the commission can be created to fit into that state's particular political culture. While no two states' commission systems are exactly alike,<sup>274</sup> there is one commonality in almost every commission: an attempt to "restore[] an element of fairness and balance to a task that is and always will be a matter of survival for politicians and a struggle for legislative power for political parties."<sup>275</sup>

In states that are closely divided politically and in states that are heavily partisan toward one political party, a "tie-breaker" system provides a very workable commission possibility. The "tie-breaker" system works well because it puts the political parties on an even footing.<sup>276</sup> For states that are closely divided politically, the party that happened not to be in the majority after the election just preceding reapportionment would not be punished as it would be under the typical redistricting system because it has guaranteed seats at the redistricting table. Additionally, in "tie-breaker" states, the commissioners must select the commission's chairperson<sup>277</sup> before starting the reapportionment process, which could help set a positive tone for working together throughout the rest of the redistricting process.

In states that are heavily partisan toward one political party, the "bare majority" system provides a viable option. The requirement that no more than a bare majority of members (e.g., four Democrats to three Republicans) can be from one political party helps keep a fairer balance of power, based on the reasoning above. The party that is favored under the "bare majority" system most likely will retain control of redistricting, but the maps that come out of the commission quite possibly, based on Arrow's Social Choice Theory and the power of institutions, will be far less partisan than maps that came out of the legislature under the old system. Further, because the judiciary is the least overtly political branch of government, it would seem important that the state's judiciary be involved in the appointment process to keep it as nonpolitical and as bipartisan as possible.<sup>278</sup>

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There exists an adequate list of possibilities from which state legislatures can choose when setting up a nonpolitical or bipartisan legislative redistricting commission. As long as a state's legislature attempts to keep politics and political party affiliation as limited as possible within the commission, it has a good chance of drawing fairer maps than the ones drawn under the typical legislative redistricting system. Jeffrey Kubin, in his article *The Case for Redistricting Commissions*, probably best states the bottom line for state legislatures creating commissions when he writes:

[t]he scope of the redistricting authority of a commission is largely a matter of public policy which relates only tangentially to the ability of a commission to succeed in its task of redistricting effectively. As a result, a state should empower its commission according to its specific, internal needs. What and when a commission redistricts does not significantly affect how a commission redistricts. Whether a commission is capable of producing a fairer and more balanced redistricting plan depends upon its internal structure, not upon its external constitutional or statutory mandate. In contrast, the method of selecting a commission's members directly affects a commission's internal mechanics and, therefore, its ability to draw better maps than the legislature.<sup>279</sup>

### **D. Some Reasons That Nonpolitical/Bipartisan Redistricting Commissions Work Well**

The general operating features of commissions help to make them a viable alternative to legislatively drawn reapportionment systems. One element that helps the workability of a commission is that it is a small group, especially when compared to a state's legislature as a whole. It is much easier for a small group of persons to work together and get things done than it is to allow the entire body to be involved in the whole process. A second reason that "tie-breaker" or "bare majority" commissions work well is that both the minority and majority parties are guaranteed representation. Even if the minority party is in the minority on the commission, and there is conflict from their presence, minority party members can still play integral roles in the formulation of the ultimate reapportionment map based on the dynamics of small group interaction.<sup>280</sup> It must be pointed out, however, that "studies of small group interaction suggest that minority or dissenting views often are ignored, especially where the decisional rules do not require members of the majority to obtain minority support."<sup>281</sup> A third reason that nonpolitical or bipartisan legislative redistricting commissions work well is that unlike individual legislators, the members of nonpolitical or bipartisan legislative redistricting commissions do not have a direct stake in drawing reapportionment maps. The freedom from personal direct self-

interest usually allows commission members to draw maps that are far less partisan than maps drawn by legislators. A fourth and final reason that nonpolitical or bipartisan legislative redistricting commissions work well is that if the majority party on the commission, assuming a bare majority system, tries to ram through a partisan agenda, the minority party can blow the whistle on the majority, by exposing the majority's actions to the press. The ability to blow the whistle on the majority gives some extra power to the minority party because it opens up the majority party to at least some political embarrassment and the possibility that in the next election voters will not look favorably on the majority party's members' overtly partisan maneuvers on the commission.

## VII. CONCLUSION

The 2002 legislative redistricting cycle left a very sour taste in the mouths of many Kansans, as likely did the 2002 legislative redistricting cycle in many other states that use a system of reapportionment controlled by the individual members of the state legislature. The citizens had to stand by and watch their legislators fight amongst themselves about where lines were going to be drawn while many other more important problems were neglected. A nonpolitical or bipartisan legislative redistricting commission system provides a better option for states. As can be evidenced by the states that have adopted them, redistricting commissions provide the possibility of taking an inherently political process and making it less political. The number of members and the general framework of the commissions can be created to fit the specific needs and political culture of the individual state. Commission systems decrease partisan bias in redistricting, increase legislative legitimacy, increase the amount of time legislators can work toward benefiting the state's citizens, and reduce the likelihood that litigation will result from the ultimate map created. A nonpolitical or bipartisan legislative redistricting commission is not a magic remedy that will cure all of a state's ailments that occur after a decennial census. Any redistricting involves politics in one form or another, and because politics involves self-interest, redistricting will always have some partisan interest problems attendant to it. "Tie-breaker" or "bare majority" commission systems can simply attempt to reduce overt partisanship and the redistricting litigation that follows it, consequently making the reapportionment process more equitable than the legislatively-controlled redistricting system used by a majority of states. Jeffery Kubin summed up the whole redistricting commission issue commenting, "[t]o paraphrase Winston Churchill, commissions are the worst method of redistricting except for all those other methods that have been tried from time to time."<sup>282</sup>

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### Notes

- \* It would be highly remiss of me indeed were I not to thank all the people that helped me see this project through to fruition. Thus, this article is affectionately dedicated to the following: To my parents for all their love, support, and grammatical assistance during the formation of this article; to my grandparents for all their love, and encouragement in all my pursuits, both academic and non; to Professor Sidney A. Shapiro for helping me turn a vague and amorphous idea for a topic into an article; to Professor Robert Mead for all his guidance and assistance with my research; to my roommate, friend, and personal thesaurus, J. Curtis Sloan, for his constant indulgence of this and all my other political ramblings throughout our Law School years at KU; to Kansas State Senator Derek Schmidt, and Kansas State House of Representatives member Troy Findley, for their insights, without which I never would have been able to gain any kind of handle on the redistricting process in Kansas in 2002; and last but not least, to the Editors and Staff of the Kansas Journal of Law & Public Policy for their encouragement, camaraderie, and commiseration. It has been a pleasure working with you all throughout the writing process.
1. Kan. S. Con. Res. 1607, 2003 Reg. Legis. Sess. (Kan. 2003), *available at* <http://www.kslegislature.org/bills/2004/1607.pdf>.
  2. *Id.*
  3. *Id.*
  4. *Id.*
  5. *Id.*
  6. *Legislative Grade Card*, TOPEKA CAP.-J., Aug. 2, 2002, at A1, *available at* <http://www.cjonline.com/stories/080202/legisgradecard.shtml>.
  7. *See* STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, 248 (121st ed. 2001).
  8. *See Appendix E – Redistricting Commissions: Legislative Plans*, at <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/apecomsn.htm> (last visited Feb. 7, 2003); (As a general proposition, the state legislature redistricts in states that do not have a redistricting commission)..
  9. E-mail from Mary K. Galligan, Principal Analyst, Kan. Legis. Res. Dept., to Christopher C. Confer, author, University of Kansas School of Law (Oct. 2, 2002, 14:22:13) (on file with author).
  10. *Redistricting Ruling: Find a Better Way*, TOPEKA CAP.-J., July 7, 2002, at A4, *available at* [http://www.cjonline.com/stories/070702/opi\\_ebredist.shtml](http://www.cjonline.com/stories/070702/opi_ebredist.shtml).
  11. *Id.*
  12. *See* Davis v. Bandemer, 478 U.S. 109, 116 (1986); Karcher v. Daggett, 462 U.S. 725, 734 n.6 (1983).
  13. Interview with Sen. Derek Schmidt, Kan. S. 15th Dist., Member Kan. S. Redistricting Comm., in Independence, Kan. (Oct. 6, 2002).
  14. Interview with Rep. Troy Findley, Kan. H.R., Member Kan. H.R. Redistricting Comm., in Lawrence, Kan. (Oct. 26, 2002).
  15. Kan. Legis. Res. Dept., *Kansas Redistricting Information*, (2002), at [http://skyways.lib.ks.us/ksleg/KLRD/Redistrict/CongressPlans/m2\\_iowajcgwne/consolidate\\_m2iowajcgwne.pdf](http://skyways.lib.ks.us/ksleg/KLRD/Redistrict/CongressPlans/m2_iowajcgwne/consolidate_m2iowajcgwne.pdf) (last visited Jan. 11, 2003).
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  19. Interview with Sen. Derek Schmidt, Kan. S. 15th Dist., Member Kan. S. Redistricting Comm., in Independence, Kan. (Oct. 6, 2002); Interview with Rep. Troy Findley, Kan. H.R., Member Kan. H.R. Redistricting Comm., in Lawrence, Kan. (Oct. 26, 2002).
  20. *See Baker v. Carr*, 369 U.S. 186 (1962) (establishing the judicial rule of one-person, one-vote).
  21. Interview with Sen. Derek Schmidt, Kan. S. 15th Dist., Member Kan. S. Redistricting Comm., in Independence, Kan. (Oct. 6, 2002).
  22. *Id.*; V. O. KEY, JR., *POLITICS, PARTIES & PRESSURE GROUPS* 290 (5th ed., 1967).
  23. Interview with Rep. Troy Findley, Kan. H.R., Member Kan. H.R. Redistricting Comm., in Lawrence, Kan. (Oct. 26, 2002).
  24. Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 406 (1993).
  25. Sally Dworak-Fisher, Note, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131, 156 (1996)
  26. *Id.*; Lewyn, *supra* note 24, at 406.
  27. Lewyn, *supra* note 24, at 406.
  28. *Id.*
  29. *Id.*
  30. *See Appendix E – Redistricting Commissions: Legislative Plans, supra* note 8.
  31. *Id.*
  32. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932).
  33. JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* 169 (1989).
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  41. *Id.* at 846.
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  43. *Id.*
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  45. *See In re Apportionment of State Legislature*, 321 N.W.2d 565, 582 (1982).
  46. *See id.* at 571.
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49. *See Id.*
50. Kubin, *supra* note 34, at 848.
51. *Id.*
52. *Id.*
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56. *Id.*
57. Kubin, *supra* note 34, at 847.
58. *See Appendix E – Redistricting Commissions: Legislative Plans, supra* note 8.
59. Kubin, *supra* note 34, at 848.
60. *See* COLO. CONST. art. V § 48(d).
61. *See Appendix E – Redistricting Commissions: Legislative Plans, supra* note 8.
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63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. Kubin, *supra* note 34, at 844.
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69. *Id.*
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71. *Id.*
72. *Id.*
73. *Id.* at 843-44.
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102. Kubin, *supra* note 34, at 848.
103. *Id.* at 848-49.
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116. See, e.g., KAN. CONST. art. I, § 5; N.Y. CONST. art. IV, § 3; FLA. CONST. art. III, §3(c)(1); MICH. CONST. art. V, § 15; CAL. CONST. art. V, § 9; TEX. CONST. art. IV, §8(a).
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209. Silverberg, *supra* note 17, at 927.
210. Gelman & King, *supra* note 83, at 541.
211. *See id.* at 551; *see also* KEY, *supra* note 22, at 451 (electoral competition creates political instability which increases the possibility of incumbents being defeated and when an incumbent is defeated the state or region within a state loses that incumbent's legislative seniority); Dworak-Fisher, *supra* note 25, at 142.
212. Kubin, *supra* note 34, at 849.
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221. *See generally* Kubin, *supra* note 34 (examining nonpolitical/bipartisan legislative redistricting commissions and determining that politics inherently play a role in reapportionment); *see generally also* Appendix E – *Redistricting Commissions: Legislative Plans*, *supra* note 8 (showing

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222. Notes, *Federal Court Involvement in Redistricting Litigation*, *supra* note 114, at 878.
223. Dworak-Fisher, *supra* note 25, at 138.
224. *Id.*
225. *Id.* at 139.
226. *See, e.g.*, KAN. CONST. art. II, § 2; N.Y. CONST. art. III, § 2; FLA. CONST. art. III, § 15(a) & (b); MICH. CONST. art. IV, §§ 2-3; CAL. CONST. art. IV, §§ 3-6; TEX. CONST. art. III, §§ 3-4.
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241. *See id.*
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243. *See id.*
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247. Silverberg, *supra* note 17, at 917.
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250. *Id.* at 90.
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