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Essay: Weighing the Potential of Citizen Redistricting

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ESSAY: WEIGHING THE POTENTIAL OF CITIZEN REDISTRICTING

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As they do every ten years, this year state legislatures across the country are redrawing legislative district lines to reflect population shifts and ensure equal representation for each district. In 2010, California voters passed a proposition granting the California Citizens Redistricting Commission control over the drawing of congressional lines. This Symposium Essay examines the potential for redistricting by an independent group of citizens such as the Citizens Redistricting Commission. First, it explores the nature of the redistricting process, a process often explained as fundamentally political, and argues, instead, that the process is both political and pre-political. This Essay then examines incumbent legislators' roles in the redistricting process in light of this insight, and challenges the presumption that incumbents are more accountable to members of their districts because of redistricting. Finally, this Essay reviews various alternatives to incumbent control of the redistricting process, and both the positive and negative potential of citizen redistricting.

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I. INTRODUCTION

Redistricting—the act of drawing and redrawing legislative districts as population shifts, to ensure roughly equal representation for each district—is once again upon the nation. In 2011, jurisdictions across the country will again redraw the lines that determine the representation they will receive. And with each new redistricting cycle, the debate arises anew about whether the procedures used are well suited to effectuate the public's interest in the process.

The 2010 California elections offered a particularly salient opportunity to reflect on the manner in which redistricting is conducted. In 2008, Californians narrowly passed Proposition 11, which removed the state legislature's control over the lines of its members' own districts, and delivered that control instead to a commission of citizens without direct ties to officials whose jobs depend on the way the lines are drawn.[1] Two years later, two new propositions appeared on the general-election ballot. One measure granted the new citizens' commission control over drawing congressional lines as well.[2] The other would have eliminated the commission entirely.[3]

This Essay takes California's choice as inspiration to examine more generally the potential for redistricting by an independent group of citizens. In Part II, it explores the nature of the redistricting process. Often, this process is explained as fundamentally political,

1. CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 70–73, 137–40 (2008) [hereinafter 2008 OFFICIAL VOTER GUIDE], *available at* http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf; CAL. SEC'Y OF STATE, STATEMENT OF VOTE, NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf (providing votes for and against state ballot measures in California's 2008 general election).

2. CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 2, 2010: OFFICIAL VOTER INFORMATION GUIDE 18–23, 95–97 (2010) [hereinafter 2010 VOTER INFORMATION GUIDE], *available at* http://voterguide.sos.ca.gov/pdf/english/complete-vig.pdf. This measure (Proposition 20) passed, by a final vote count of approximately 60 percent to 40 percent. CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION: STATEMENT OF VOTE 90 (2010) [hereinafter 2010 STATEMENT OF VOTE], *available at* http://www.sos.ca.gov/elections/sov/2010-general/complete-sov.pdf.

3. 2010 VOTER INFORMATION GUIDE, *supra* note 2, at 62–67, 115–21. This measure (Proposition 27) failed, also by approximately 60 percent to 40 percent. 2010 STATEMENT OF VOTE, *supra* note 2, at 96.

and therefore particularly suited to execution by politicians. I argue, instead, that the process is both political and pre-political; it not only flows from, but also defines, the jurisdiction's relevant political cleavages. Part III then examines incumbent legislators' role in the redistricting process in light of this insight, including a normative assessment of skills and predilections that incumbents may bring to bear. Part IV follows with a brief review of various alternatives to incumbent control of the redistricting process, capped by a more thorough review of the potential—both positive and negative—for citizen redistricting.

II. THE NATURE OF THE REDISTRICTING PROCESS

Every ten years, after the U.S. Census Bureau releases its demographic portrait of the country, jurisdictions throughout the nation reallocate political power among their constituents. In most jurisdictions, districts define the groups of individuals represented in legislative assemblies by federal, state, and local officials. By constitutional command, those districts must be of roughly equal size, preserving equality of representation.[4] And so, to keep up with an itinerant public, jurisdictions redraw the lines of their representatives' districts after every census to ensure population equality.

This redistricting is commonly said to be a fundamentally political enterprise. It is political in the colloquial partisan sense, in that this is the arena in which competing Republican and Democratic partisans have conducted their most pitched battles, jousting with each other to divvy electoral turf in the most advantageous manner. And it is political in a more inherent sense, in that multiple complex tradeoffs are required among multiple goals, with no outcome that clearly serves all of the population equally. Those who redistrict may weigh raw population count, racial and ethnic representation, partisan composition, municipal and geographic boundaries, sprawl and concentration, and communities of shared interests among the factors determining where district lines should fall. Each factor may have a legitimate role in determining a district's bounds, depending

4. *See* Avery v. Midland Cnty., Tex., 390 U.S. 474, 478 (1968) (discussing local government districts); Reynolds v. Sims, 377 U.S. 533, 539 (1964) (discussing state legislative districts); Wesberry v. Sanders, 376 U.S. 1, 13 (1964) (discussing congressional districts).

on different contested conceptions about what representation should accomplish. Each factor will also be applied in ways yielding partisan or personal repercussions for incumbents seeking reelection from these new districts. And all of these factors cannot sensibly be reconciled with each other in the same way or to the same degree throughout the sprawl of a diverse state. Choosing which interests to prioritize in which locations involves a complicated negotiation among competing factions with plausible claims that their preferences best represent public welfare.[5]

From one vantage point, therefore, this process looks political in much the same way that all other public policy decisions are political. Citizens entrust representatives[6] to negotiate complicated and multifaceted decisions about providing and distributing a public good. In the redistricting context, the good in question is legislative representation; in other contexts, it might be public defense or health care or environmental protection. In this view, redistricting decisions are normal political outputs: translations of public preferences about representation, subject to all of the recurring epistemological quandaries and imperfections of the regular translation process.[7]

From another vantage point, however, the redistricting process looks "pre-political" in a way that most other public acts are not.[8] That is, redistricting decisions are not only outputs of a translation process but also part of the translation algorithm itself. Redistricting

5. *See, e.g.*, Steven Huefner, *Don't Just Make Redistricters* More Accountable *to the People, Make* Them *the People*, 5 DUKE J. CONST. L. & PUB. POL'Y 37, 53–54 (2010).

6. In most American jurisdictions, the group entrusted with this choice is defined by a majority of legislators (subject to executive veto), themselves chosen by pluralities of voters in electoral districts established during prior cycles.

7. *See, e.g.*, PHILIP P. FRICKEY & DANIEL A. FARBER, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

8. This Essay borrows the term from Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 4 (1985). Professors Lowenstein and Steinberg, however, use the term to define common "principles [that] are generally accepted as constituting the ground rules of the political struggle," and that have broad consensus among the governed. *Id.* at 75. Here, I expand the term to embrace ground rules that shape the nature and products of representation, even when the choice of any particular system is vigorously contested. For example, the choice of legislative procedures (e.g., a majority or supermajority requirement) or voting systems (not the machinery for recording votes, but rather the method of aggregating preferences, like single-member plurality voting or multi-member ranked-choice voting) may be among the rules that qualify as pre-political, with or without more general consensus. It is not necessary to claim that the categories of political and pre-political are mutually exclusive to recognize that acts with a pre-political quality may deserve distinct treatment. In a future article, I hope to further explore the nature and bounds of pre-political acts and the implications of entrusting different institutions with such actions.

reorders how citizens are grouped for representational purposes. If, as is the case in most American jurisdictions, a bare plurality of the voters within a given district selects a single representative, slight changes in a district's composition may generate substantial changes in that district's choice of representative—and therefore in the interests most vigorously represented for that district.[9] In the aggregate, changes in the district lines can result in significant shifts in the policy preferences of a legislative majority. Redistricting is a single public act with the ability to shift the terrain on which all future political activity is negotiated. It does so by shifting political power among the groups within a jurisdiction that have the capacity to see their preferences translated into policy.[10] Redistricting changes the aggregation of political preferences and the way that those preferences play out through the remainder of the political process, even when no individual constituent's interests have changed. And as such, redistricting is pre-political.

III. THE ROLE OF EXISTING LEGISLATORS

In the system described above, existing legislators have at best a conflicted role in determining where district lines are to be drawn. To the extent that redistricting is a political act like any other, of course, the default presumption is that the legislature is best equipped to make the necessary decisions. In this vein, we are frequently told that redistricting is best left to the political bodies otherwise tasked with resolving similarly complex public policy matters.[11] And so it is that most American jurisdictions allow their legislatures to control this fundamental process.

9. Alternatively, incumbents may shift the policies they promote, in order to reflect the developing composition of the districts in which they reside. In either case, a change in the grouping of constituents has the capacity to drive significant change in the interests primarily represented in the legislature.

10. The stakes involved in redistricting are magnified when a single legislator is chosen from each district; under these conditions, each incremental decision to include or exclude citizens when drawing the district lines may drive changes in the only representation that the district's citizens receive. Conversely, when districts are larger, and used to elect multiple representatives using a voting system responsive to multiple constituencies within the district, the representational stakes of the redistricting decision decrease.

11. *See, e.g.*, John Marelius, *Thousands Apply for State Redistricting Panel*, SAN DIEGO UNION-TRIB., Jan. 25, 2010, *available at* http://www.signonsandiego.com/news/2010/jan/25/thousands-apply-redistricting-panel/.

To the extent that redistricting is pre-political, however, the process presents an intriguing conundrum. By grouping different voters together in different ways, redistricting resets the political baseline. In some ways, the redistricting process can be seen as an Etch-a-Sketch for politics, vigorously shaken every ten years, erasing the existing district map before new lines are drawn.[12] With the slate clean, it is not clear why legislators elected by obsolete groups of voters should have presumptive authority to represent the present public will.

Still, some process is necessary to determine how voters will be grouped anew into districts. That process, in turn, must either be conducted or governed by rules set by an entity with representational legitimacy. Such an entity could be popularly elected. But if the redistricting entity comprises any significant number of representatives, the number of choices would quickly become overwhelming. It would be possible to narrow the selection pool by some mechanism—like, for example, districts. However, this would require an entity to draw those district lines . . . , and so on.

Casting about for another representationally legitimate mechanism to draw district lines quickly leads back to the legislature. Even if the pre-political nature of the process deprives the legislature of an *inherently* privileged redistricting role, the legislature remains the most obvious existing representative institution to represent the public in this process. Legislators tend to know the areas that they represent quite well and will likely understand the relevant local cleavages better than most other citizens. If they have been in office for the decade since the last redrawing of the maps, they may well have expertise in the technical requirements of the redistricting process, which can be quite complex. If representational stability is its own substantive benefit, incumbent legislators have very natural incentives to keep their own existing districts' cores intact.[13] And most important for the

12. There may well be legitimate value in preserving the bulk of a district from redistricting cycle to redistricting cycle, but that is a substantive value to be weighed against others (such as population equality, racial and ethnic representation, or partisan composition) and dependent on different theories about what representation should best attempt to achieve. There is no reason inherent to the redistricting process why it should begin from the status quo rather than from a clean slate.

13. Of course, just as each incumbent legislator has a natural incentive to preserve her own district, she may also have natural incentives to dismantle the districts of competitors or

argument above, the members of the legislature have been elected and thereby seem to have legitimacy to act on behalf of the public.

Yet upon closer examination, this legitimacy has limits in the redistricting process that are not present in other contexts. Legislators are elected by members of their districts but are not accountable to them—at least, not to the same group of them—for their redistricting decisions. First, it strains credulity to believe that any legislator would in practice be removed from office because of the way in which she conducted redistricting. But more fundamentally, even if the public actually voted on the basis of redistricting performance, the public to which any legislator is ostensibly accountable for her redistricting decision disappears *by virtue of* the redistricting process. That is, redistricting performed by a representative on behalf of a particular group of constituents is necessarily an act that those constituents cannot review, because redistricting reshapes the represented group before the next election. The group of citizens who elect a legislator in 2020 to perform redistricting is necessarily different from the group that would, in 2022, evaluate that legislator's redistricting performance.[14] When the question at hand is whether new citizen groupings have been created in the public interest, asking a plurality of the *new* citizen grouping to evaluate its own merit as a representative unit is an inherently problematic path to accountability for the process.

Moreover, legislative control of the districting Etch-a-Sketch creates a uniquely robust risk of self-dealing. The placement of district lines—*any* placement of district lines—will have an impact on the likelihood that a given legislator is reelected. The underlying composition of a district is not itself destiny: candidates have won races in districts heavily weighted toward a different political party, socioeconomic status, or race. But redistricting can make a candidate's path significantly easier—or significantly more difficult.

When incumbent legislators control the redistricting process, their own jobs are at stake more immediately than in other legislation

opponents. *See* Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 756 (2007) (describing the Republican targeting of the district of Representative Martin Frost, one of the "architects" of the previous Democratic gerrymander).

14. Most states will conduct redistricting in the year after the U.S. Census delivers population data and before the following elections (in this upcoming cycle, redistricting will usually occur at some point in 2011 or early 2012). NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010, at 155 (2009) (reviewing redistricting deadlines).

impacting the election process.[15] That is, legislators who are placed in charge of trading off various competing redistricting considerations are also the same individuals who stand to gain the most, personally and directly, by including certain residents and excluding others—whether those residents are voters, supporters, or rivals. These same individuals also feel most keenly the impact of belonging to a legislative majority or minority and have an incentive to ensure, above all considerations other than the politically favorable composition of their own districts, that other districts are designed to yield maximum favorable control of the chamber.[16] Moreover, legislative leaders have the opportunity to use the redistricting process to make reelection exceedingly difficult for other legislators, either to avenge slights or to remove potential opponents or competitors. It should not be surprising that legislators who are permitted to use that power in their self-interest often do so, even at the expense of that which they perceive to be in the public interest.[17] Districts drawn within this system are commonly shaped to reward or punish individual candidates and to promote partisan fortunes—rather than to foster the most meaningful representation, by any measure of that concept.

For example, as I have elsewhere recounted:

> In 2001, . . . a federal judge described the redistricting process for Madison County, Illinois, as full of "threats,

15. Flexible candidates are often able to adapt campaign practices strategically to changes affecting campaign finance rules or election administration procedures. It is much more difficult, however, to adapt a campaign to a new set of voters with fundamentally different concerns or a fundamentally different philosophy of government.

16. The incentives to maximize partisan control at the expense of other considerations are present whether or not the party controlling the legislature reflects the statewide partisan preference. These incentives may be particularly alarming, however, when a statewide minority has achieved legislative control for the redistricting cycle. For example, in 2000, Georgians cast 53 percent of their total state legislative votes for Republican candidates and cast 55 percent of their votes statewide for the Republican presidential candidate, but Democrats controlled the redistricting process—and the incumbents used the process substantially to further personal and partisan goals. *See, e.g.*, Larios v. Cox, 300 F. Supp. 2d 1320, 1325–31 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004); *Official Results of the November 7, 2000 General Election*, GA. SEC'Y OF STATE, http://sos.georgia.gov/elections/election_results/2000_1107/summary.htm (last visited Feb. 28, 2011).

17. In most states, state legislators draw not only state legislative district lines but also the lines for congressional districts. JUSTIN LEVITT, A CITIZEN'S GUIDE TO REDISTRICTING 20, 34–36 (2010). To the extent that, based on partisan or personal ties, state legislators prioritize the desires of individual members of Congress over the public interest in this process, the limitations of legislative redistricting apply to congressional districts just as they do to state legislative districts.

> coercion, bullying, and a skewed view of the law," with the process "so far short of representing the electorate that it seems the citizens of Madison County were not so much as an afterthought." Said the redistricting committee chairman to one of his committee colleagues: "We are going to shove [the map] up your f------ a-- and you are going to like it, and I'll f--- any Republican I can."[18]

With processes like these, it is perhaps little wonder that the United States is unique among industrialized democracies in putting an inherent conflict of interest directly at the heart of the redistricting system.[19]

IV. ALTERNATIVES

Scholars, advocates, and even some elected officials have proposed many alternatives to the standard status quo in which sitting incumbents redraw their own districts and those of their competitors, more or less as they please.[20]

A. Automation

One proposal that seems to attract recurring attention, particularly when juxtaposed with existing incumbents' conflicts of

18. *Id.* at 13 (footnote omitted) (quoting Hulme v. Madison Cnty., 188 F. Supp. 2d 1041, 1044, 1051 (S.D. Ill. 2001)).

19. Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 78–79 (2004).

20. Professor Chris Elmendorf and Professor Michael Kang have each offered extremely thoughtful proposals to append democracy-enhancing processes to the legislative status quo, rather than displacing it entirely. Elmendorf suggests an advisory body to provide anchor legislation, forcing the legislature to react to a default offer that is presumably more squarely in the public interest than the map the legislature would draw on its own, and cites evidence that legislatures abroad actually tend to defer to these bodies. Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1385–90 (2005). Kang suggests an adjustment on the other end of the legislative process, holding legislative maps subject to public referendum. Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667 (2006). Either has the potential to blunt the exercise of legislative self-interest. Yet given the exceedingly low salience of discrete redistricting decisions for the American general public, Huefner, *supra* note 5, at 61 & n.92, and the exceedingly high salience of discrete redistricting decisions for individual legislators, it is not clear how much legislative restraint either mechanism would generate if implemented domestically. Still, I hope to consider in future work a promising combination of the two ideas: offering the public a choice between the redistricting map of an advisory citizens' body and the product of the familiar legislative process.

interest, is automation:[21] the Magical Redistricting Machine that draws lines, ostensibly without the messy mixed motives of human involvement. However, there are several reasons to believe that automation is less adequate in this respect than it may superficially appear.

The most immediate limitation is computational capacity. Micah Altman has demonstrated that even if it were possible to prioritize, reconcile, quantify, and measure each desired input to the redistricting process, present computing technology might not have the capacity to generate an optimal redistricting "solution" for most jurisdictions—and certainly not for a state of California's size and complexity.[22] If redistricting is designed to achieve multiple objectives—and most commentators believe that there are several worthwhile goals to be achieved in drawing any redistricting plan—it turns out that the calculations required to identify a single "winning" plan for a geography of any substantial size are so computationally complex that they become practically unsolvable by computers under common conditions.[23]

Even if the technological limitation could be solved, however, automation confronts a deeper philosophical problem. There is no "neutral" rule for drawing district lines. Each rule implies some vision of representation or accountability, or some precursor conception of the actor who should resolve conflicts among different visions of representation when those conflicts arise. For example, a rule requiring districts above all else to follow the lines of county boundaries presumes that it is advantageous for representational purposes to group citizens by their county residency. Indeed, such a rule presumes that it is representationally superior to group citizens by county than to group them by municipality or mathematical proximity or race or purely at random.

21. For a useful review of proposals that computers be used to conduct or facilitate redistricting, see generally Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL'Y 69 (2010).

22. Micah Altman, *The Computational Complexity of Automated Redistricting: Is Automation the Answer?*, 23 RUTGERS COMPUTER & TECH L.J. 81 (1997).

23. *Id.* at 101. In response, some have proposed automated solutions that do not seek to optimize multiple objectives, but instead select at random plans that meet various threshold conditions. Such a solution is more computationally feasible with present technology but is still subject to the additional drawbacks discussed below. *See* Altman & McDonald, *supra* note 21, at 82–83.

There is ample debate among scholars, activists, and practitioners about the role in redistricting of—alone and in context—the continuity of political representation, the nature of protection for minority rights, the degree of partisan competition or partisan inequity, physical proximity or accessibility, and the ability and desirability of representing homogenous or heterogeneous communities. Redistricting rules represent different approaches to working through that debate; some reveal more introspection than others. Even a hypothetical rule that subjugated all of these concerns to abstract mathematical principles or geometric shapes would embrace the non-neutral normative view that each of these concerns *should* be subjugated to the abstract mathematical principle or geometric shape in question because that principle or shape is assumed to produce representation superior to that achieved by other means.

Moreover, most potential rules for drawing district lines have predictable political consequences that may favor a particular party or set of parties, or a particular candidate or set of candidates, as compared to some alternative rule. That is, most redistricting laws not only imply some vision of representation, or theory about whom should be entrusted to make representational decisions, but will also likely have a tangible impact on a particular set of actors' electoral fortunes.[24] That impact neither makes the choice improper nor vitiates normative evaluation of the choice. It does, however, render suspect claims about the normative superiority of certain readily automated laws or principles based solely on the fact that they may appear facially to be apolitical.

The desire to strive simultaneously toward multiple objectives complicates matters further. Local goals with respect to the composition of individual districts may conflict with statewide goals pertaining to the nature of, say, the California delegation as a whole. Goals for individual districts will conflict with each other as well, as when the desire to present voters with multiple viable options in a general election confronts the desire to assemble voters with similar interests in order to encourage representation of an identifiable character. Resolving these conflicts requires either prioritization or

24. *See, e.g.*, LEVITT, *supra* note 17, at 55; Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 677 (2002).

compromise, or both—or both to different degrees, in different portions of a map.

As a consequence, there is no neutral way to program an automated machine to draw the district lines. The rules governing such a machine would represent very real choices about the nature of representation, including what factors to consider in designing representation and what factors to forego considering. Positing a redistricting machine simply moves those choices—currently resolved most often by incumbents in the shadow of state and federal legal constraints—to the stage of programming the machine. It does not remove the need to make the choices in the first place.

Finally, automation poses an additional problem of measurability. Even if it were possible to achieve consensus on the multiple and interactive goals of the redistricting process, on their relative importance, and on the degree to which that relative importance might vary in different regions of a redistricting map, translating that consensus to a machine-operable algorithm will involve some noise. Some of the representational goals may be translated with comparative precision to standard measures; for example, if a goal of representation is equalizing representational access, it is relatively straightforward to find a uniform metric for measuring the number of individuals within a district, even if there is inevitably error in the measure.[25] But some goals (e.g., keeping voters who live close together in the same district) will depend on approximate proxies (e.g., mathematical measures of geometric "compactness"). And others (e.g., keeping voters with similar interests in the same district) will strongly resist ready quantification even by proxy. Some factors (e.g., determining whether a racial minority's votes have, in the totality of the circumstances, been diluted) may have both quantifiable elements and elements that are exceedingly difficult to quantify. Weighting the relative priorities of these restrictions may also require quantifying assessments in a manner that entails imprecision, because relative priorities are necessarily imprecise.

In addition, with a drive to quantify for purposes of automated processing, there will inevitably be a temptation to focus on readily

25. *See* NAT'L RESEARCH COUNCIL, RESEARCH AND PLANS FOR COVERAGE MEASUREMENT IN THE 2010 CENSUS: INTERIM ASSESSMENT 5 (Robert Bell & Michael L. Cohen eds., 2007).

measured factors (e.g., population count) or readily evaluated measures of those factors (e.g., precisely equal numbers of individuals), to a degree that may not reflect the factors' actual importance. In some circumstances, for example, it may be more important that districts be only approximately equal in population in order to ensure flexibility to achieve other important objectives. The drive to quantify and evaluate for the automation process will likely exaggerate the importance of mathematical precision even where such precision is unwarranted.

In these respects, the quest to "solve" the redistricting puzzle for automation purposes is akin to the quest for the "best" supermarket produce. Analysts would want to take into account size, shelf life, cost, color, texture, and taste, among many other factors. Even assuming that it were possible to reach some agreement on the relative weights and priorities of these factors, there remains the thorny measurement issue. Size, shelf life, and cost can be easily measured and scored. There are quantitative scales for color, but normative opinions on the "best" color likely vary, and it will be difficult to score color blends. And while measurements for various component elements of taste are improving in sophistication,[26] quantification of the whole is still approximate at best—and again, subject to enormous normative disagreement. If the chosen measurements and their relative weight are imperfect proxies for our actual preferences, squeezing the pursuit of the "best" supermarket produce into a machine-operable model may end up yielding something other than what we would collectively adjudge the best produce available. The same is true with redistricting.

B. Strictly Binding Rules

As an alternative to feeding the redistricting process to a computer, it may seem tempting to confront incumbents' conflicts of interest by binding their hands. Such a proposal would define the redistricting process and substantive criteria so tightly that those with the pen essentially fill only a ministerial function, carrying out a result effectively predetermined by the governing rules. In other

26. *See, e.g.*, Andrey Legin et al., *Electronic Tongue for Pharmaceutical Analytics*, 380 ANALYTICAL & BIOANALYTICAL CHEMISTRY 36 (2004); U. Roy et al., *Quantifying Taste Using a Hydrodynamic Oscillator*, 31 INSTRUMENTATION SCI. & TECH. 425 (2003); Kiyoshi Toko, *Taste Sensor*, 64 SENSORS AND ACTUATORS B: CHEMICAL 205 (2000).

words, this proposal would not seek to replace incumbents as the executors of the process, but would remove so much discretion that incumbency incentives would become irrelevant.

Converting the redistricting task to a procedure of mechanical implementation, however, is little different from feeding it to a literal machine. If discretion is drained from the primary redistricting body, all of the difficult negotiations to weight objectives and determine how conflicts among objectives should be resolved in different portions of the jurisdiction will just be pushed forward into the rules that the body applies. And if objectives or instructions are articulated with sufficient specificity to remove all ambiguity—for in any ambiguity there lies decision-making discretion—there is a substantial risk that the articulable set of proxies for a multifaceted particular theory of representation fails to accomplish the intended objectives as well as would be the case if decision makers were permitted to tweak around the edges.

Consider, for example, an approach to representation that generally favored districts comprising individuals living close to each other, but also attempted to avoid districts fragmenting the voting power of otherwise cohesive populations with discrete political interests. If it were possible to come to global agreement on which objective should prevail, and to what degree, in the event of a conflict (which would require hard choices about "how close" and "how cohesive," among others), it might be possible to devise a set of strict, discretion-free rules to approximately accomplish the goal. But even so, in any local geographic area, a slight deviation from the given general rules might better accomplish *both* aims. The more objectives there are, the more likely that the global mechanical implementing rules have local exceptions that all would prefer. Reducing discretion to a bare minimum is quite likely to yield undesired, unintended consequences.[27]

C. Redistricting Contests

Another suggested alternative to incumbent-driven redistricting was proposed recently in Ohio: a redistricting "contest." This competition would have offered any member of the public the opportunity to draw and submit a map to be scored based on

27. *See* Huefner, *supra* note 5, at 52–53.

compliance with several prearranged criteria. The winning map would have been adopted as the official governing plan.[28]

Superficially, such proposals seem to have the virtue of transparency lacking in a plan simply spit out by a computer or implemented in a mechanical fashion by incumbents: everyone is able to see every map submitted and can assess each plan's score. Yet in truth, this sort of contest setup essentially duplicates the automation notion in both of the ideas above and is subject to the same principal objections.

For example, any objective scoring protocol will recreate the measurability concerns above: some standards will reflect the particular goal sought with far more precision than others, and that fact alone may drive greater prioritization of the more precise measures than is otherwise warranted. Moreover, the compilation of the scoring process itself reflects precisely the same choices necessary to program the Magical Redistricting Machine: if the scoring process rewards some choices and does not reward others, that score reflects a decision by some body of individuals about what should or should not be considered more important in the redistricting process. As with the machine, the decision process is simply moved to the stage of determining the scoring formula. There still remains the question of who makes that decision.

This is not to say that contests have no redeeming features. As I have written elsewhere, if the population shares a commitment to certain representational goals, contests that encourage members of the public to submit plans fulfilling those goals in different ways provide transparent means to flesh out policy options.[29] If proxies for measuring those goals can be found with some relative precision, then individuals can be encouraged to one-up each other en route to a range of solutions more closely approaching a Pareto-optimal decision set.[30] And if there is a commitment to establish a pool of "winners," rather than a single winning plan, that flexibility may

28. H.R.J. Res. 15, 128th Gen. Assemb., Reg. Sess. (Ohio 2010).

29. *See* Justin Levitt, *Drawing the Lines in Ohio: A Big Step Forward*, BRENNAN CTR. FOR JUSTICE BLOG (June 24, 2009), http://www.brennancenter.org/blog/archives/drawing_the_lines_in_ohio_a_big_step_forward/; Justin Levitt, *Drawing the Lines in Ohio: The Structure of the Competition*, BRENNAN CTR. FOR JUSTICE BLOG (June 22, 2009), http://www.brennancenter.org/blog/archives/drawing_the_lines_in_ohio_the_structure_of_the_competition [hereinafter Levitt, *Drawing the Lines in Ohio: The Structure of Competition*].

30. *See* Levitt, *Drawing the Lines in Ohio: The Structure of the Competition*, *supra* note 29.

adequately accommodate inevitable imperfections in the proxies or weighting process necessary for scoring contest results. These are all significant caveats. And they do not resolve the lingering issue at the end of such a contest: how to determine which body should decide, among the pool of winners, which plan will govern district lines for the next decade.

D. Temporal Shift

The approaches above attempt to resolve the potential for abused discretion in the redistricting process by removing the discretion. As shown, however, squeezing the discretionary latitude from those who execute a redistricting plan simply redirects the exercise of discretion to an earlier point in the process: important decisions must be made in order to fashion the inputs to a computer program, the rules strictly binding legislators, or the scoring system for a contest. Those who favor these solutions must still decide who decides.

A different approach to the redistricting conflict might attempt to resolve the potential for abused discretion by retaining the discretion but removing the abuse. Professor Adam Cox has proposed one intriguing approach: retain districting authority by legislative actors but design the districts for a future date, using projected demographic estimates and deferring the implementation of the new map.[31] That is, legislators in 2011 would draw districts using, say, 2016 population projections, with the resulting districts to take effect in 2016. In theory, the projected data and deferred implementation would reduce incumbent legislators' ability to self-deal effectively. In designing one's own optimal district, it is a relatively trivial matter to tailor the district lines to demographic and political trends of the moment; it may be more difficult to anticipate such trends with precision several years down the road. Moreover, beyond the general composition of a district's population, incumbents would find it far more difficult to identify and target promising candidates who threaten a challenge years from now than it is to target challengers on the immediate horizon.

31. Adam B. Cox, *Designing Redistricting Institutions*, 5 ELECTION L.J. 412, 412 (2006).

Cox also notes that the decreased capacity for self-dealing may accompany decreased motivation for self-dealing.[32] For example, the redistricting payoff may be less viscerally compelling when the rewards of implementation are somewhat deferred. In addition, legislators—particularly state legislators currently vested with redistricting authority—may have their sights on different political offices and may thus have less desire to run for office in five years from the particular districts they are drawing.

Nevertheless, though Cox's temporal veil may usefully reduce incumbents' incentive and capacity for self-dealing, it does not eliminate either. Deferring implementation for more than a few years renders demographic projections little more than guesswork and undermines the ability to adjust district lines in a way that reflects real population changes—which is, after all, the original rationale for redistricting. And deferring for only a few years still allows savvy incumbents to further personal or partisan interests at the expense of the public interest, albeit with a blunted tool. This is particularly true with respect to redistricting aimed not at improving one's own fortunes but at worsening the opposition's lot. Even when designing districts for the future, it is not difficult to fragment an opposing legislator's existing constituents or pair two existing incumbents in the same district, for no reason other than to impact the opposing incumbents' political fortunes.

E. Nonpartisan Bodies

Another proposed version of a system intended to retain discretion but remove abuse would assign the redistricting process to an existing nonpartisan body of experienced technocrats.[33] This

32. *Id.* at 420–21.

33. Many believe that Iowa's redistricting process fits this model. In truth, the structure in Iowa is substantially more complex. In Iowa, the body at the center of the process is the Legislative Services Agency (LSA), a body of civil servants committed to nonpartisanship and charged with, *inter alia*, legal and fiscal analysis of state legislation and state government oversight. IOWA CODE ANN. § 2A.1 (2010). The LSA prepares draft redistricting plans under criteria set almost entirely by statute; where the statutory criteria leave discretionary latitude, the LSA looks for guidance to a five-person citizens' commission appointed by the legislative leadership and charged with holding hearings to seek public input. *Id.* §§ 42.4–.6. When the first set of plans is presented, the legislature may accept or reject them without modification; if they are rejected, the LSA will prepare another set using the legislature's feedback. *Id.* § 42.3. Those plans may also be accepted or rejected without modification; if they are rejected, the LSA will prepare a third and final set of plans, which may be modified at the legislature's discretion. *Id.*

neutral body would be given several broad objectives and would create priorities and resolve conflicts as it saw fit.

The technocratic solution is familiar but, in this context, flawed. First, this approach assumes that neutral nonpartisan stewards could be identified and that they would retain their nonpartisanship throughout the redistricting enterprise—an assumption that many question.[34] Second, even if Platonic nonpartisan stewards could be found, technocratic decision procedures are most appropriate when there exists widespread consensus about the goals of the process in question and few thorny redistributive tangles, and when the primary difficulty is in the application of these agreed-upon principles.[35] In redistricting, this latter criterion is likely met, if at all, only in the abstract. All else equal, there is likely little disagreement that districts should optimally be of roughly equal size; reflect legitimate cohesive communities, including communities of racial and ethnic minorities; maximize the representation that voters perceive they have; establish fair partisan opportunity; reflect geographic areas that are relatively close together; track existing political boundaries; and provide meaningful choices in primary and general elections.[36] Dig deeper, and disagreement soon emerges within any general category about the more specific aim: as just one example, in considering districts of roughly equal size, analysts take notably different approaches to tolerance for population disparity[37] and the

That is, Iowa's process is in many ways only structurally nonpartisan in the most ministerial aspects of the redistricting exercise. Overall policy choices have been made by the legislature, discretion within those choices is informed by the decisions of a partisan-selected independent citizen body, and the outcome is subject to substantial legislative review.

Historically, this structure has been applied in a manner revealing substantial legislative self-restraint that may well be unique to Iowa's political culture. For example, although the Iowa legislature has the ability under this scheme to reject three LSA plans and then entirely substitute its own, it has thus far not chosen to do so. Furthermore, the entire procedure described above is statutory and subject to repeal or revision by the legislature at any time. Again, since the procedure's inception in 1980, the legislature has left the structure in place.

34. *See, e.g.*, Persily, *supra* note 24, at 674–76.

35. *See, e.g.*, Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1211–16 (2008).

36. LEVITT, *supra* note 17, at 44.

37. *See* ASS'N OF THE BAR OF THE CITY OF N.Y., COMM. ON ELECTION LAW, A PROPOSED NEW YORK STATE CONSTITUTIONAL AMENDMENT TO EMANCIPATE REDISTRICTING FROM PARTISAN GERRYMANDERS 9, app. at C-1-3, app. at D (2007), *available at* http://www.nycbar.org/pdf/report/redistricting_report03071.pdf.

composition of the population base.[38] Prioritizing among these aims when they conflict—indeed, several of these goals *necessarily* conflict—is the subject of vigorous and widespread disagreement among those who analyze or participate in the redistricting process, and the choice of priorities has serious redistributive consequences. Here, the political aspect of redistricting is most prominent. A body to resolve these political battles must have not only decision-making power but also, given the contested nature of the choices, decision-making legitimacy.[39]

F. Citizens' Commissions

Thus, we arrive at a final alternative to legislative control of the redistricting apparatus: citizens' redistricting bodies. This approach attempts to address both the concern with self-interest and the need for a legitimate but flexible decision-making structure. It does so by assigning the redistricting pen to a set of potentially partisan citizens not directly beholden to incumbent elected officials.[40] Given the pragmatic concerns with separately electing such a citizens' redistricting body,[41] analysts have attempted to devise other means by which citizen redistricters might be chosen with sufficient legitimacy to validate the political choices inherent in the redistricting exercise.

1. Legitimacy and Diversity

Some such proposals would rely on a random selection of citizens registered to vote, much like a jury. In theory, such a selection has the potential to mirror the relevant cleavages in the jurisdiction as a whole. This ability to reflect the jurisdiction's composition is, in turn, important in lending legitimacy to the body's deliberations since the pre-political choices it makes will determine the nature of the political representation that the jurisdiction receives, at least until the next redistricting.[42]

38. *See* Garza v. Cnty. of Los Angeles, 918 F.2d 763, 773–76 (9th Cir. 1990); *id.* at 778–88 (Kozinski, J., concurring and dissenting in part).

39. *See* Kang, *supra* note 20, at 688–89.

40. LEVITT, *supra* note 17, at 22, 73.

41. *See supra* text accompanying note 12.

42. *See infra* note 49.

In practice, however, truly random selection is unlikely to produce any individual single redistricting body that looks much like the jurisdiction to be redistricted. Selecting a large number of individuals at random from a broader pool will likely yield a representative sample. But redistricting bodies must be relatively small, in order to ensure their ability to deliberate effectively. And the random choice of just a few members from a larger pool creates the substantial potential for a redistricting body that looks little like the jurisdiction as a whole. Accounting for the time and technical capacity required of redistricting bodies further reduces the pool of available individuals—and the likelihood that a random pool of qualified and available redistricters would be representative. Particularly for large and diverse states like California, choosing a small number of available individuals at random is far more likely, in any given draw, to yield a group that does *not* reflect the population of the state as a whole than to yield a group that happens to do so.

In the jury system, there are arguments for accepting the capacity of a single random draw to produce a nonrepresentative petit jury panel; many of these arguments find solace in the aggregate diversity of juries produced by random draw.[43] Redistricting, however, takes place in most areas only once every ten years. This yields a remarkably small set of redistricting entities with which to achieve diversity approximating the population as a whole solely through repetition of a random draw.

Moreover, the jury system attempts to compensate for individual nonrepresentative jury panels with tools designed for a different measure of legitimacy: the degree to which the direct participants in the system, the litigants, perceive the jury panel as fair. Each side is given the opportunity to use voir dire and peremptory strikes to increase the perceived fairness—or, at least, to decrease the perceived unfairness—of any given jury panel with respect to the

43. These arguments include practical difficulties in assembling a representative petit jury, *see* Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 142–44 (1996), and a normative commitment to the various benefits of second-order diversity over the benefits of more representative individual panels. *See* Heather Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005). In practice, commentators note that exemptions from jury service may skew the composition not only of the petit jury but also of the jury pool itself, perhaps reducing the solace provided by the presumption that jury draws, in the aggregate, reproduce the diversity of the total population. *See, e.g.*, JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 272–80 (1977).

panel's ability to deliberate on that side's own interests.[44] Similar procedures to promote legitimacy are thornier in the redistricting context. Jury-based litigation is designed to distill disputes to a single decisional axis (e.g., results favoring the defendant more than the plaintiff, or vice versa); the two primary adversarial stakeholders on this axis are the parties using strikes to shape the fairness of the jury. In contrast, redistricting decisions have many potential axes (e.g., political, racial, regional) and many direct stakeholders whose interests may not be aligned. Even if it were possible to mitigate the legitimacy gap of a randomly selected but unrepresentative redistricting panel through procedures analogous to a jury-selection strike, it is not clear who should be granted the power to wield such strike authority.

Perhaps for these reasons, when citizens' redistricting panels have actually been convened in American jurisdictions, the procedures for populating the panels have involved either significant modifications of—or complete departures from—the random-draw jury model.[45] In 2010, six states each placed primary responsibility for drawing state district lines in the hands of a citizens' group not beholden to particular elected officials; all but Alaska did the same for congressional district lines.[46]

These six states' redistricting bodies follow two primary models. California has opted for the approach most like jury selection, albeit with important modifications. A panel of independent state auditors reviews would-be volunteers for California's commission in a process much like voir dire, screening applicants for conflicts of

44. Scholars vigorously dispute the degree to which peremptory strikes *actually* increase the fair composition of a jury panel. *See, e.g.*, Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005). To the extent that this tool does not increase the perceived legitimacy of the petit jury, that deficiency merely highlights the need to seek alternative selection procedures for a fair redistricting body.

45. *See* BRENNAN CTR. FOR JUSTICE, WHO DRAWS THE LINES (2009), *available at* http://www.brennancenter.org/page/-/Democracy/redistricting/20100908.Redistricting.04WhoDrawstheLines.pdf (reviewing the selection mechanisms for states' independent commissions).

46. *See* ALASKA CONST. art. VI, §§ 3–4, 8; ARIZ. CONST. art. IV, pt. 2, § 1; CAL. CONST. art. XXI, § 1; IDAHO CONST. art. III, § 2; MONT. CONST. art. V, § 14(2); WASH. CONST. art. II, § 43; CAL. GOV'T CODE §§ 8251–53.6 (West 2010); IDAHO CODE ANN. § 72-1502 (2006); MONT. CODE ANN. §§ 5-1-101, 102, 105 (2010); WASH. REV. §§ 44.05.030–.100 (2005). Several local jurisdictions also rely on citizen redistricting bodies not beholden to particular legislative officials. *See, e.g.*, N.Y. CITY CHARTER §§ 50–52.

interest and technical qualifications.[47] In addition to asking this panel to gauge commissioner capacity, California explicitly requests that the panel of auditors assemble its "venire" with partisan balance and "appreciation for California's diverse demographics and geography."[48] This "venire" is then subject to several peremptory strikes by the majority and minority party leadership from each of the two legislative chambers. From the remaining pool, eight commissioners are selected at random from subpools divided by partisanship, to ensure partisan balance even as the individuals are randomly selected. Those eight then select six additional commissioners, again from partisan subpools to preserve partisan balance; as with the "venire," the law expressly states that this choice is to be exercised in a manner such that the final commission reflects the racial, ethnic, geographic, and gender diversity of the state.[49] With careful attention to partisanship and demographic diversity at each stage, California's selection procedures depart from the jury model in an attempt to foster representative diversity in the particular body convened to perform redistricting.[50]

47. CAL. GOV'T CODE § 8252(a)(2), (d).

48. *Id.* § 8252(d).

49. *Id.* § 8252(g). Like most other states with a citizens' redistricting body, California has a commission that aims for partisan balance (equal numbers of Republicans and Democrats, plus additional members from neither party) rather than a partisan composition that mirrors the partisan makeup of the state. By contrast, in evaluating other demographic criteria, California asks that its commission reflect the diversity of the state, rather than numerical balance. As a consequence, partisanship is the only characteristic that is protected structurally on the commission, such that a majority will not be able to impose its preferences on a dissenting minority.

In part, this distinction may represent an assessment that substantive criteria to be applied by the redistricting body—like the Voting Rights Act—adequately protect other interests in the redistricting process. But the distinction may also reflect a presumption about the comparative strength of partisanship as a motivating factor in redistricting, even among individuals who are not themselves partisan elected officials. When partisanship is singled out as the lone trait requiring balance, it presumes that commissioners would allow their partisan allegiance to drive jurisdiction-wide redistricting decisions, to a greater extent than their allegiance to any other group. In a future work, I anticipate exploring this singular designation of partisanship as the lone trait with a built-in veto in the citizens' redistricting context.

50. In this respect, California apparently hopes to derive legitimacy through the presumption that individuals with various demographic characteristics will represent shared concerns of communities with similar characteristics, even if not selected specifically by those communities—a function known as "descriptive representation." *See* HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 60–63 (1967). Scholars have noted the tendency of this descriptive representation to provide legitimacy in political institutions, *see, e.g.*, Michael Rabinder James, *Descriptive Representation in the British Columbia Citizens' Assembly*, *in* DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS' ASSEMBLY 107–09 (Mark E. Warren & Hilary Pearse eds., 2008), though the comparative merits of descriptive

The other states with citizens' redistricting bodies employ a different approach, turning away from the jury model entirely and relying more heavily on derivative legitimacy gleaned from senior elected officials. In all but Alaska, the legislative majority and minority leaders of each house each choose a citizen to form the core of the redistricting commission.[51] In Alaska, the two legislative majority leaders, the governor, and the state supreme court's chief justice select the redistricting commissioners.[52] In the commissions of these five states, any legitimacy flows (as with any appointed office) from the appointing officials' accountability. These officials, in turn, presumably face interest-group pressure to appoint commissioners responsive to the various organized voter blocs within the state.[53]

2. Independence

Despite legislative leaders' role in the initial selection of commissioners for the states above, each such state has taken steps to ensure that the members of its citizens' redistricting body are not structurally beholden either to legislative leadership or to other incumbents. So, for example, each of these states prohibits legislators or other public officials from themselves serving on redistricting commissions.[54] Each also prohibits commissioners from running for office in the districts that they draw, at least for a few years.[55]

representation as a means to further the interests of represented communities are hotly debated, and beyond the scope of this Essay.

51. In Arizona, Montana, and Washington, these four commissioners then select a tiebreaker, though Washington's fifth member serves as the body's chairperson but does not vote on substantive redistricting proposals. ARIZ. CONST. art. IV, pt. 2, § 1; MONT. CONST. art. V, § 14(2); WASH. CONST. art. II, § 43(2). In Idaho, the chairpersons of the two largest political parties in the state each select a commissioner to join the initial four, for a total of six members of the redistricting body. IDAHO CONST. art. III, § 2.

52. ALASKA CONST. art. VI, § 8.

53. These bodies' limited size (Alaska, Arizona, Montana, and Washington have five-person commissions; Idaho's commission has six members) may make it difficult to find commissioners who adequately represent the various interest groups of the state. Moderately larger bodies may increase the capacity for broader representation without substantially sacrificing the efficacy of decision-making.

54. ALASKA CONST. art. VI, § 8(a); ARIZ. CONST. art. IV, pt. 2, § 1(3); CAL. CONST. art. XXI, § 2(c)(6); IDAHO CONST. art. III, § 2(2); MONT. CONST. art. V, § 14(2); WASH. CONST. art. II, § 43(3).

55. ALASKA CONST. art. VI, § 8(c); ARIZ. CONST. art. IV, pt. 2, § 1(13); CAL. CONST. art. XXI, § 2(c)(6); IDAHO CONST. art. III, § 2(6); MONT. CODE ANN. § 5-1-105; WASH. REV. CODE § 44.05.060(3) (2005).

Arizona and California further bar legislative staff from serving on their commissions.[56]

These restrictions are not intended to screen every informed political observer from participating in redistricting. Rather, they are designed to ensure that a citizens' redistricting body does not become an exercise actually conducted by legislators with citizen stand-ins. Although legislative leaders with the ability to choose commissioners will certainly select like-minded citizens, including citizens with similar partisan objectives, if commissioners do not further depend on those who select them, there is little reason to believe that these commissioners will feel obligated to act as the leaders' proxies in pursuing districts drawn to suit incumbents' personal inclinations.[57]

3. Potential Benefits

Placing the redistricting power primarily in the hands of private citizens' commissions has substantial upside potential in one primary respect: it may avoid the direct conflict of interest created by legislators' personal stake in the redistricting outcome. Removing this conflict of interest is not the same as removing "politics" from the process or creating a "nonpartisan" decision structure. On the contrary, it is to be expected that a redistricting commission will engage in the substantially political task of reconciling competing values—and that in doing so, the commissioners will incorporate, among many other preferences and concerns, partisan aims either explicitly or *sub silentio*. The power of the partisan impulse, for example, may explain why partisan balance is built directly into the structure of the statewide citizen redistricting commissions implemented in practice.[58] Indeed, the decision to forego a "nonpartisan" procedure is an acknowledgment that, because virtually every redistricting decision has a predictable partisan

56. California, Idaho, and Washington also bar recent legislative lobbyists from serving on their redistricting commissions. CAL. GOV'T CODE § 8252(a)(2)(A)(iv) (West 2005); IDAHO CODE ANN. § 72-1502 (2006); WASH. REV. CODE § 44.05.050(2) (2005).

57. Washington adds an intriguing role for the legislature once its citizens' commission has drawn a map. The legislature may tweak the lines proposed by a citizens' commission—but a two-thirds vote is required to do so, the changes may affect only 2 percent of the population in any given district, and the changes may not intentionally favor a particular party or group. WASH. CONST. art. II, § 43(7); WASH. REV. CODE § 44.05.100(2) (2005). The extent to which such changes have, in the past, been deployed specifically to benefit particular incumbents is not clear.

58. *See supra* note 49.

impact, it is preferable to recognize and balance partisan preferences than to allow a predictable skew to take shape in an unintentional or underhanded fashion.[59]

Instead of striving for nonpartisanship or freedom from politics, the principal value of a citizens' commission is its ability to remove, or blunt, purely personal interests that incumbent legislators are largely free to indulge. That is, citizens whose job security is not affected by the outcome of a redistricting process will feel far less compulsion to distort otherwise coherent districts in the service of punishing a competitor, ensuring access to a particular funder, or capturing a personally salient landmark or facility that has little to do with the remainder of the district's representation. As a result, the process fosters not only improved procedural fairness, but also improved substantive fairness in the resulting districts.

Crucially, this vision of improved substantive fairness is based only on the premise that districts drawn by an effective citizens' commission will be drawn in a manner that does not allow the self-interest of particular incumbents to dominate other legitimate values. This Essay does *not* claim that citizens' commissions will always create districts that better achieve any other preferred substantive goal, independent of the jurisdiction's political geography and its shared commitment to representational objectives.[60] For example, it may be that in a given jurisdiction, districts would be more balanced between Democrats and Republicans if incumbents did not draw them—but this is not the necessary result of a citizens' redistricting process. The substantive outcome of any particular districting scheme depends on both the goals that those drawing the lines pursue and the political distribution of voters who live in the jurisdiction.[61]

59. Even in Iowa, for example, where an agency whose nonpartisanship is rarely questioned is primarily responsible for the drafting of redistricting plans, that agency's role is—at least formally—largely administrative. The criteria that it applies are politically established. And where applying those criteria requires the exercise of discretion or decisions among competing value choices, the nonpartisan agency looks to a citizens' commission of balanced partisan composition for guidance. *See supra* note 33.

60. Put differently, the choice of a citizens' commission removes a barrier to representation in the public interest, but does not itself establish representation in the public interest.

61. This Essay therefore does not purport to confront recent studies examining whether citizens' redistricting commissions have accomplished (or could theoretically accomplish) various substantive objectives, prominently including district competitiveness or legislator polarization. *See, e.g.*, Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House Races*, 4 ST. POL. & POL'Y Q. 455 (2004); David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional*

What citizens' commissions instead guarantee is the assurance that the overriding value that districts represent is not particular legislators' self-interest.

4. Potential Detriments

Even with the capacity to avoid incumbents' self-interest, citizens' redistricting commissions do not represent an unvarnished benefit. Placing the redistricting power primarily in the hands of private citizens' commissions has potential downsides as well. While careful design may mitigate some of these limitations, and careful training others, it is important to recognize the potential downsides in order to avoid them. At least four such limitations are relevant here.

First, any substitute for a legislative decision maker—particularly when tasked with a process as fundamental as determining the representative structure for the community as a whole—risks a nontrivial challenge to its legitimacy.[62] That may be mitigated somewhat if the body is itself elected, although beyond the significant pragmatic difficulties with such an election, plurality election processes might well lead to a body that represents only a small portion of the jurisdiction to be redistricted. The legitimacy concern might also be mitigated if the citizens' redistricting body is selected by trusted governmental officials or former governmental officials who may draw on their own representative legitimacy. And even with an unobjectionable selection process, the redistricting body will draw legitimate objections that the people's will has not been represented in the redistricting process if the citizen commissioners do not substantially reflect the diversity of the

Partisanship?, 54 VILL. L. REV. 57 (2009); Anthony E. Chavez, The Red and Blue Golden State: Why California's Proposition 11 Will Not Produce More Competitive Elections 58–75 (Aug. 2010) (unpublished manuscript), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=anthony_chavez. Substantive prioritization of these objectives is a choice independent of the use of a citizens' commission, and without prioritizing these objectives, it is not clear why citizens' commissions should more readily achieve them on average. Indeed, it may be that citizens' commissions are structurally designed to improve competitiveness in only one primary respect: by limiting self-interest, they prevent incumbents from drawing districts specifically to exclude particular promising competitors. *See* Justin Levitt, *Redistricting Reform, for the Right Reasons*, BRENNAN CTR. FOR JUSTICE BLOG (Nov. 12, 2009), http://www.brennancenter.org/blog/archives/redistricting_reform_for_the_right_reasons/ (discussing districts drawn to exclude particular challengers, in both primary and general elections).

62. *See supra* Part IV.F.1.

political community to be subdivided.[63] This diversity is difficult to achieve randomly. And even with careful attention, it will be easier to meet in some states than others.[64]

Second, a commission of citizens poorly trained in the redistricting process may fail to execute its task appropriately. The principal responsibility of a redistricting body—any redistricting body—is to apply various criteria reflecting principles of representation or their proxies: drawing districts with roughly equal population, in compliance with the Voting Rights Act, in ways that may, for example, reflect various communities, roughly follow political boundaries, or track areas that are more or less compact. The redistricting body will also have to resolve conflicts among those criteria when necessary, by deciding to apply criteria more or less flexibly, or with greater or lesser priority, sometimes with state statutes or case law as a guide. Some of these principles may be complex, requiring substantial collection of data and nuanced analysis of both that data and the applicable legal standards. A commission of citizens poorly trained for the task may fail to abide by legal mandates.[65] Alternatively, a commission of poorly trained citizens, or those who lack confidence in the task, may simply defer to staff for substantive judgments; if staff members are beholden to particular incumbent legislators, such deference would merely replicate the conflict of interest discussed extensively above.[66]

The third potential downside relates to the second: rather than creating legal error or exhibiting undue deference, a commission of citizens unfamiliar with the redistricting process may end up defaulting on difficult political judgments, prioritizing certain criteria for the wrong reasons. People often reveal general preferences for certainty over uncertainty, objectivity over subjectivity, and neatness

63. *See, e.g.*, Kang, *supra* note 20, at 679–80 (describing objections to a 2005 California proposal built around three retired judges); *see also* NAACP LEGAL DEF. & EDUC. FUND, INC., POLITICAL PARTICIPATION GROUP, INDEPENDENT REDISTRICTING COMMISSIONS: REFORMING REDISTRICTING WITHOUT REVERSING PROGRESS TOWARD RACIAL EQUALITY 4 (2010), *available at* http://naacpldf.org/files/publications/IRC_Report.pdf.

64. For example, in a state with substantial diversity, it may be necessary to deploy a substantially larger redistricting body to have an opportunity to reflect the diversity of the jurisdiction itself. *See supra* note 53.

65. Poorly trained legislators, of course, may also fail to abide by legal mandates, but there is also a substantial likelihood that some legislators with experience in the redistricting process—or experienced legislative staff—would be available to limit at least unintentional failure.

66. *See supra* Part III.

over complexity. These preferences may lead individuals with redistricting authority to prioritize criteria with straightforward mathematical or geometric consequences, even if those criteria are deemed less important than their more qualitative alternatives or seem counterproductive in terms of the representational philosophy they support. Commissioners may decide, for example, that it is legally or representationally preferable to draw districts reflecting communities of shared political interest than to draw districts tracing county lines; yet because it is straightforward to trace county lines and more complicated to discern communities of shared political interest, redistricting bodies may find themselves drawn to the former at the expense of the latter. These preferences are not absolute, nor are they unique to citizens who are not incumbent legislators. But it may be more difficult for citizen commissioners who are unaccustomed to the redistricting process to set these natural proclivities aside.

The final detrimental potential of citizens' redistricting bodies discussed in this Essay is that expectations for an independent, citizen-led process may be set too high, creating rather than reducing public disillusionment with the political process. To the extent that there is perceived political dysfunction—an empirical question with a series of answers more complex than commonly assumed—changes to the redistricting system cannot possibly solve all of the perceived problems at once. Redistricting is but one element of a process of electing representatives, operating within particular voting systems and alongside campaign finance rules, ballot access provisions, electoral procedures, candidate-recruitment structures, term limits, general political trends, and a host of other factors contributing to the selection of particular individuals to represent the public. Those representatives then enter a legislative system with its own structures and procedures, and perhaps its own structural and procedural pathologies. If there are broader political ills impacting satisfaction with government, changes in redistricting procedures alone cannot possibly hope to correct them all.

Indeed, expectations for changes in the redistricting process may be set too high even if they are set lower than wholesale political

reform.[67] Some redistricting objectives, for example, are fundamentally incompatible. Though it may be possible to draw districts around whole cohesive communities or draw districts with approximately the same number of Republicans and Democrats, it is extremely unlikely that any map-drawer could accomplish both goals in the same district, in districts throughout a state with California's political geography. This incompatibility is inherent in the political task and would persist no matter what process were used to draw the lines. Selling redistricting process change as a utopia of harmonized objectives is selling a prelude to disappointment.

None of these potential downsides need be fatal to a citizens' redistricting project. Citizen redistricters can be chosen in a manner designed to reflect the diversity of the jurisdiction they will subdivide.[68] Citizen commissioners can be trained to understand legal and practical responsibilities and to exercise their human capacity for qualitative judgment and complex problem solving. And the benefits of a citizens' redistricting process can be focused on its capacity for eliminating a serious, and often overriding, conflict of interest, rather than eliminating all of the political process's perceived ills. All of these elements, however, require concerted attention to ensure that the potential of a citizens' commission is more positive than negative.

V. CONCLUSION

This Essay has discussed alternatives to legislative redistricting, including the substantial potential in allowing citizens who are not beholden to particular legislators to draw the lines. This includes potential upsides: though the process will still be political, in the sense that citizen redistricters will need to weigh and balance various

67. *See supra* text accompanying note 61 (noting the limited objectives that citizen redistricting commissions are designed to achieve).

68. California's nascent citizens' commission appears to be well on the way. Sixty members of the initial pool reflected the diversity of the state in a number of different respects. *See California Citizens Redistricting Commission: Frequently Asked Questions*, WE DRAW THE LINES, http://wedrawthelines.ca.gov/faq.html (last visited Feb. 28, 2011). Though the final fourteen members of the commission were selected from this pool in part through a random process, the commission ultimately empanelled also reflected the state's diversity, albeit in some respects more than others. *See California Citizens Redistricting Commission: Commissioner Biographies*, WE DRAW THE LINES, http://wedrawthelines.ca.gov/bios.html (last visited Apr. 24, 2011). Only time will reveal whether the commission is actually perceived to legitimately represent the redistricting priorities of the people of the state as a whole.

conflicting representational values, it is unlikely to be driven by particular politicians' narrow interests in retaining their seats or punishing their opponents. And if the selection process is designed to foster balance and diversity, the resulting districts may well do a better job at representing the preferences of the whole than does the status quo. A citizens' redistricting body also includes potential downsides: citizen redistricters who are new to the process may be drawn to easily maximized, quantitative criteria for where the lines should fall or rely excessively on staff with similar concerns, at the expense of more complex qualitative judgments that better reflect normative judgments about representation. Navigating these straits will be difficult, and the route traveled by California's new citizens' commission may prove an example—or a warning—about the potential of further similar enterprises around the country.