

Redistricting Reform and the California Citizens Redistricting Commission

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Redistricting is an essential but inescapably controversial element of the political process. The redrawing of district boundaries has profound effects on the landscape of electoral politics, whether those boundaries involve congressional districts for the House of Representatives, legislative districts for state chambers and houses, or the array of districts drawn for cities, counties, and other local governmental bodies. District lines can determine who decides to run for office, who is more likely than not to win a legislative seat, how the balance of power is divided among elected officials, and, consequently, how public policy is developed within a legislative body. District lines also delimit the political strength of voters within those districts, and lines that dilute the power of minority voting blocs can infringe upon rights guaranteed by the Federal Constitution and statutes such as the Voting Rights Act of 1965. The infrequency of redistricting—a process that typically occurs within one or two years of each decennial census—means that the stakes are even higher because boundaries are locked in place for a decade.¹

Given the political importance of redistricting, there are both strong proponents and strong opponents of redistricting reform. Most redistricting processes are controlled by the same legislative bodies whose district lines must be redrawn every ten years, and legislators acting out of self-interest have an incentive to create “safe” seats that can ensure their reelection. Legislators are unlikely to cede control of a process that is so pivotal in defining membership within an institution. Partisanship in redistricting is also commonplace, and majority parties are not inclined to alter a process that helps keep their party in power. At the same time, decision making by legislators can be opaque and subject to behind-the-scenes dealmaking. And, as much as partisans in the majority may seek to retain power by maintaining the status quo, partisans in the minority have an interest in resetting the balance of power, even if it means changing the rules of the game.

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¹ Reapportionment of each state’s seats for the U.S. House of Representatives and the redistricting of legislative districts at all levels of government must occur soon after each decennial census in order to comply with the one-person, one-vote requirements of the U.S. Constitution; districts must be redrawn to assure population equality among the districts. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Thus it should not be surprising that major redistricting reforms are often sought, but only rarely seen. When they are enacted, reforms are often developed in states and localities where the mechanisms of direct democracy allow voters to bypass normal legislative procedures and to enact reforms via ballot propositions. California's recent redistricting reforms, the product of two ballot initiatives that were approved by the state's voters in 2008 and 2010, represent some of the most extensive attempts to shift redistricting powers from a legislature to an independent "citizen commission"—a deliberative body composed of voters whose backgrounds and qualifications are designed to control partisanship and to limit legislators' self-interest.

As a member of California's first Citizens Redistricting Commission (hereinafter "the Commission"), I had the opportunity to participate directly in the implementation of a major experiment in redistricting reform. Over the course of two years, I went through a lengthy and often convoluted selection process to become a member of the Commission; I participated in the Commission's organizational development; I was involved in the Commission's extensive process of public hearings and information gathering; and I played key roles in the Commission's line-drawing process, which included applying a new set of state redistricting criteria and creating maps for the state's congressional delegation, the two houses of the state legislature, and the Board of Equalization, which is California's major tax policy-making body. As one of two commissioners charged with overseeing the legal defense of the Commission's maps, I also played a part in ensuring that the maps withstood litigation challenges in the state and federal courts. And as a member whose term will continue until the beginning of the post-2020 cycle, I will be involved in steps to improve California's redistricting process over the next several years.

By several measures, the Commission's work was a success: legislative self-interest was taken out of the equation, partisanship was constrained by the structure of the Commission's membership and voting procedures, the process was opened up to greater public scrutiny and participation, and the Commission created maps that complied with a myriad of federal and state legal requirements. This does not, however, mean that the process was apolitical. Nor does it mean that everyone was satisfied with the Commission's lines or its process of line drawing. Redistricting is a classic zero-sum problem: legal and geographic constraints with fixed numbers of single-member districts mean that there are inevitable trade-offs. Dissatisfied interest groups and partisan interests can be expected to argue that the lines could have been drawn differently to empower their particular voters. Not unexpectedly, there were multiple lawsuits contesting the maps, and opponents qualified a referendum to require voter approval of the Commission's map for the state Senate. None of the challenges was successful.

California is likely to retain its independent commission process for the next several redistricting cycles, but is the California experiment worth replicating in other states and localities? In this Essay, I discuss the merits of redistricting reform in the context of the first California Citizens Redistrict-

ing Commission.² As a current member of the Commission, I have an obvious interest in defending the state's most recent maps, but this does not mean that my opinions are unalloyed. The Commission's redistricting process was far from perfect, and there is no guarantee that what worked—and did not work—in California would necessarily operate in the same way in other jurisdictions. However, the seeds of several potential redistricting reforms can be found in California's new laws, and many are worth considering in any future efforts at reform.

In Part I, I discuss the context of redistricting reform in California, focusing on criticisms of the former legislative system, prior attempts to revise the redistricting system through the ballot initiative process, and the voters' approval of Proposition 11 in 2008 and Proposition 20 in 2010. In Part II, I analyze the implementation of the California redistricting reforms, which included both shifting redistricting responsibilities from the legislature to an independent commission and revising the state's redistricting criteria. In Part III, I discuss the adaptability of the California model and weigh the prospects for reform in other states and localities.

I. CHANGING THE RULES OF THE GAME

A. *California's History of Redistricting*

A major assumption underlying most proposals for redistricting reform is that legislature-controlled redistricting is rife with conflicts of interest and prone to misuses of power. Legislators who are in office usually want to stay in office, and the expectation is that legislators want districts that contain optimal numbers of voters who support their re-election. Safe districts are typically ones that contain enough voters of the same political party as a legislator but not so many that the votes are wasted. There may also be alignments along other dimensions, such as political attitudes and ideologies, race or ethnicity, or common policy interests.

Incumbency protection is thus a leading driver under a legislative model, and can compromise other redistricting goals such as creating geographically compact districts or maintaining cities and local communities within the same district. Legislature-controlled redistricting is also highly susceptible to partisanship, with majorities seeking to maintain or strengthen their hold on seats and limiting the capacity of minority parties to gain addi-

² The work of the Citizens Redistricting Commission has been well chronicled in both non-governmental reports and academic literature. See generally RAPHAEL J. SONENSHEIN, WHEN THE PEOPLE DRAW THE LINES: AN EXAMINATION OF THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION (2013), available at <http://www.cavotes.org/sites/default/files/jobs/RedistrictingCommission%20Report6122013.pdf>; Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012); Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 CAL. J. POL. & POL'Y 1 (2012); Karin Mac Donald, *Adventures in Redistricting: A Look at the California Citizens Redistricting Commission*, 11 ELECTION L.J. 472 (2012).

tional seats. And, like any process that is subject to legislative approval, redistricting can be susceptible to deals that involve other legislation; safe seats can be used as rewards or can be traded for votes on other bills, while unsafe seats can be used as threats or punishment.

There are, of course, arguments that support legislature-controlled redistricting. A legislature is a policy-making body elected by popular vote and that draws its legitimacy from the consent of the governed; redistricting policy should thus be treated like any other law developed by duly elected representatives. Legislatures also carry important advantages over other agencies of government: legislatures have a strong institutional history and identity; they exist prior to redistricting, and they will exist after redistricting has been completed. Legislatures have well-developed mechanisms for conducting fact finding and for moving legislation through a structured process. Legislatures have the resources to develop and maintain expertise in many policy areas, including election law and redistricting. Legislatures can also be cost-effective: even though there are always added expenses attached to redistricting because of the consultants and technology needed to conduct the process, the legislators and their staff are already paid for.

Until its post-2010 cycle, California employed a traditional legislative model of redistricting in which redistricting legislation was introduced, reviewed in committee and discussed in capitol-based public hearings, negotiated among legislators, passed by both houses of the legislature, and eventually sent to the Governor's office for signature. However, the state's history of redistricting during the previous four decades has been complex, and it reflects both legislative and judicial participation in the line-drawing process, as well as the influence of direct democracy checks by the state's voters. This history is central to understanding the recent reforms in California because they reflect an interplay of the legislature, the courts, the major parties, and the voters that ultimately led to the Commission structure adopted in 2008.

In both the 1970s and the 1990s, there was an impasse between the Democrat-controlled legislature and the Republican governor, and the California Supreme Court was required to produce the state's maps. Each time, the state supreme court appointed a panel of Special Masters, composed of three retired state court judges who engaged in basic fact finding and produced maps for the court's final approval.³ In the 1980s, Democrats controlled both the legislature and the governor's seat, but the Democrat-drawn plans were challenged through a series of ballot referenda and the voters rejected the plans, which were labeled partisan gerrymanders by opponents.⁴ The legislature later redrew the maps to stave off additional challenges.

³ See *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992); *Legislature v. Reinecke*, 516 P.2d 6 (Cal. 1973).

⁴ See J. Morgan Kousser, *Reapportionment Wars: Party, Race, and Redistricting in California, 1971-1992*, in *RACE AND REDISTRICTING IN THE 1990'S* 134 (Bernard Grofman ed., 1998).

In the 2000s, Democrats again controlled the legislature and the governor's office, and there was no involvement of the state supreme court, nor was there a referendum challenge to the redistricting plans. However, the maps generated significant controversies because of the agreements between the major parties to create safe seats that clearly favored one party or another in various districts. The maps were criticized for being "bipartisan gerrymanders," maps that were designed outside the public eye primarily to protect incumbents and to maintain the existing partisan balance.⁵

Efforts at redistricting reform reflect the idiosyncrasies of California's politics and redistricting history. As a minority party, Republicans have supported reforms that would shift the balance of power away from the Democrat-dominated legislature; good-government groups have advocated for greater transparency and limitations on legislative dealmaking, particularly incumbency protections. And with ballot initiatives available as a method to bypass the legislature altogether, various reform packages have been placed before the California voters to create structures paralleling prior cycles (e.g., using retired judges as the redistricting body) or to redistribute districting powers to limit legislative control.⁶ None of these proposals was successful, however, until the passage of Proposition 11 in 2008.

In 1982, the voters rejected Proposition 14, a proposal for a redistricting commission that would have included four members selected by the judiciary and six selected by the two major parties.⁷ In 1984, the voters rejected Proposition 39, which would have created a ten-member commission composed entirely of retired judges appointed by the major parties and the governor.⁸ In 1990, the voters defeated Proposition 119, which would have created a twelve-member bipartisan commission, with candidates nominated by nonprofit, nonpartisan organizations and the final commission selected by a panel of retired appellate court judges.⁹

⁵ See *id.*; James Sterngold, *New Map Helps Democrats Tighten Grip on California*, N.Y. TIMES (Sept. 1, 2001), <http://www.nytimes.com/2001/09/01/us/new-map-helps-democrats-tighten-grip-on-california.html>; Margaret Talev, *New Districts to Solidify Position for Incumbents*, L.A. TIMES (Sept. 1, 2001), <http://articles.latimes.com/2001/sep/01/local/me-40962>. In the 2004 general elections, for example, there were no changes in the party balance of the California congressional delegation, nor did any seats change parties in the state assembly or the state senate. See DOUGLAS JOHNSON ET AL., RESTORING THE COMPETITIVE EDGE: CALIFORNIA'S NEED FOR REDISTRICTING REFORM AND THE LIKELY IMPACT OF PROPOSITION 77, 16 (2005), available at <http://www.claremontmckenna.edu/rose/publications/pdf/Rose%20Report%20on%20Redistricting%20and%20Prop%2077%20v%2013%20report.pdf>.

⁶ Many states in recent cycles have employed alternative models of redistricting, including mixed models in which responsibilities are divided between the legislature and a separate body such as a task force or advisory board, as well as commission systems that vest full powers in a non-legislative body. See generally JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, A CITIZEN'S GUIDE TO REDISTRICTING (2010); NAT'L CONFERENCE OF STATE LEGISLATORS, REDISTRICTING LAW 2010 (2009).

⁷ See CAL. SEC'Y OF STATE, CALIFORNIA BALLOT PAMPHLET GENERAL ELECTION NOVEMBER 2, 1982, 54-57 (1982), available at http://librarysource.uchastings.edu/ballot_pdf/1982g.pdf.

⁸ See *id.*

⁹ See *id.* Proposition 119 was one of two initiatives that were placed on the 1990 ballot to reform the state's redistricting system. Proposition 118 would have kept redistricting in the

In 2005, in the wake of the legislature's incumbency-protective "bipartisan gerrymander," reformers sponsored Proposition 77, a ballot initiative that would have shifted redistricting from the legislature to a panel of three retired judges, a system similar to the Special Masters panels employed during the 1970s and the 1990s. Although the Special Masters' maps had not created large controversies in prior cycles, Proposition 77 generated significant opposition. The selection process was not fully independent of the legislature, since the panel would have been selected by legislative leaders, and the redistricting would have been scheduled mid-decade rather than post-census, which drew criticism for its costs and for its constraints on data gathering and public participation. The use of retired judges was also roundly criticized for restricting the diversity of the redistricting body, since the candidate pool would likely be limited by age, gender, and race, and therefore misaligned with the more diverse demographics of the state. Over \$30 million was spent on the Proposition 77 campaign, with over \$12 million by its supporters and over \$18 million by its opponents.¹⁰ Proposition 77 was eventually defeated by a nearly twenty-point margin: 59.8% to 40.2%.¹¹

B. Voters FIRST Acts: Proposition 11 and Proposition 20

Prior efforts to reform redistricting in California were thus marked by a series of defeats at the polls. But advocates persisted and made significant changes in their strategies and proposals, which ultimately led to the passage of Proposition 11 in 2008 and Proposition 20 in 2010. Known as the Voters FIRST Act, Proposition 11 contained two key differences that helped lead to its passage. First, Proposition 11 did not include the state's congressional districts and left control of those plans with the state legislature. This strategy helped limit opposition from many members of Congress, whose supporters had actively campaigned in 2005 to defeat Proposition 77. Second, Proposition 11 replaced the panel of retired judges with a fourteen-member citizen commission, which was expected to be more diverse than a three-member panel. Selection of the Commission would be highly rigorous in order to limit conflicts of interest, and multiple screens would be employed to eliminate applicants with strong partisan backgrounds or close connections to the legislature. The commission membership structure also appealed to Republican interests, since it neutralized the minority status of Republi-

hands of the state legislature, but it would have created detailed redistricting criteria that were subject to strict oversight by an ethics committee, and all plans would have been automatically subject to voter approval via referendum. This proposition was also defeated by a large margin. *See id.*

¹⁰ *PROPOSITION 77: Re-districting*, FOLLOWTHEMONEY.ORG, <http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=260> (last visited Nov. 17, 2013).

¹¹ BRUCE MCPHERSON, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 8, 2005, SPECIAL STATEWIDE ELECTION 6 (2005), available at <http://www.sos.ca.gov/elections/sov/2005-special/sov-complete.pdf>.

cans in the voter registration rolls by guaranteeing them the same number of seats on the Commission as Democrats.

Supporters of Proposition 11 included good-government groups such as California Common Cause and the League of Women Voters of California, as well as the state Republican Party. Among the opponents of the initiative were the state Democratic Party, major labor unions, and civil rights and minority advocacy organizations that raised serious concerns about the diversity and representativeness of the commission structure. Supporters of the initiative raised over \$16 million during the campaign, which was approximately ten times the amount raised by opponents of the initiative.¹² Proposition 11 ultimately passed, but by a narrow margin: 50.9% to 49.1%.¹³

Two years later, Proposition 20 was placed before the California voters. Known as the Voters FIRST Act for Congress, Proposition 20 added the state's congressional districts to the Commission's line-drawing responsibilities.¹⁴ Although opposed by many members of Congress, Proposition 20 passed by a wide margin: 63.1% to 38.7%.¹⁵ A competing initiative, Proposition 27, also appeared on the November 2010 ballot, and that initiative would have repealed Proposition 11 altogether. Proposition 27 was defeated by a sizable margin: 59.5% to 40.5%.¹⁶ The defeat of the repeal initiative and the addition of the congressional districts meant that the state's voters had approved a full transfer of redistricting responsibilities from the legislative process to an independent commission system.¹⁷

¹² *PROPOSITION 011: Changes Authority For Establishing Assembly, Senate And Board Of Equalization District Boundaries From Elected Representatives To 14 Member Commission*, FOLLOWTHEMONEY.ORG, <http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=488> (last visited Nov. 17, 2013).

¹³ DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 65 (2008), available at http://www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf.

¹⁴ Proposition 20 also made changes in the deadline to produce the final maps (advancing it by one month to August 15), and clarified elements of the redistricting criteria related to communities of interest. See DEBRA BOWEN, CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE, CALIFORNIA GENERAL ELECTION: TUESDAY, NOVEMBER 2, 2010, 95–97, available at <http://vig.cdn.sos.ca.gov/2010/general/pdf/english/complete-vig.pdf>.

¹⁵ DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 2, 2010, GENERAL ELECTION 90 (2011), available at <http://www.sos.ca.gov/elections/sov/2010-general/complete-sov.pdf>.

¹⁶ *Id.* at 96.

¹⁷ It may be instructive to note my personal voting history in the Proposition 11 and 20 campaigns. In 2008, I voted “no” on Proposition 11. Although I agreed that a commission system could lead to significant improvements in the process, like many opponents of the measure I was concerned about the structure of the commission and whether racial and ethnic minority populations would have adequate access to the commission's work. I also had reservations about the fixed partisan allocations on the commission, which did not take into account the realities of party registration within the state—a significant gap between Democrats and Republicans, as well as increasing numbers of independent voters that might eventually overtake one or both parties. In 2010, I voted “yes” on Proposition 20. Although I had initially opposed Proposition 11, once the commission system had become law, I believed that the congressional districts should be included within the commission's work. Notwithstanding my vote in 2008, my support for the new law was strong enough to justify my applying for a seat on the Commission in 2010.

II. THE CALIFORNIA EXPERIMENT

The task of redistricting the most populous state in the Union, regardless of who holds the power, is a big job. According to the Census Bureau, California's population in 2010 was 37,253,956 and racial and ethnic minority groups formed a majority of its population.¹⁸ California has the largest delegation to the U.S. House of Representatives, and the post-2010 apportionment allocated fifty-three House seats to the state. The state legislature is composed of an eighty-member Assembly and a forty-member Senate.¹⁹ In addition, the Board of Equalization, a body charged with setting and administering state tax policies, requires that four of its five members be elected from state-level districts.²⁰ Redistricting California in the post-2010 cycle thus required the creation of four statewide maps containing a total of 177 districts.

Rather than attempt a comprehensive discussion of California's post-2010 redistricting cycle, I focus here on what I consider the three most important elements of the Citizens Redistricting Commission reforms: (1) the structure of the Commission and the process for selecting the commissioners, a process that took approximately two years from start to finish and cost more than the actual line-drawing process itself; (2) the application of the state's redistricting criteria, which had been revised, clarified, and ranked by Propositions 11 and 20; and (3) the implementation of the law's public input and transparency requirements, which greatly opened up the redistricting process to public participation, but also created data management problems for the Commission. For each of these elements, I include some of my personal experiences and reflections.

A. *Commission Structure and Selection*

Proposition 11 mandates the creation of a fourteen-member Commission composed of five members of the state's largest political party (Democrat), five members of the next largest political party (Republican), and four members from neither party (minor party member or no party affiliation).²¹ The Commission's voting structure further requires multi-partisan agreement among its members: to approve a major matter, including approving the final maps, the Commission must obtain "yes" votes from at least three Demo-

¹⁸ U.S. CENSUS BUREAU, CALIFORNIA QUICKFACTS, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Nov. 17, 2013).

¹⁹ See CAL. STATE LEGISLATURE, <http://www.legislature.ca.gov/> (last visited Dec. 25, 2013).

²⁰ See *Board Members*, CAL. STATE BD. OF EQUALIZATION, <http://www.boe.ca.gov/members/board.htm> (last visited Dec. 25, 2013).

²¹ CAL. CONST. art. XXI, § 2(c)(2).

cratic commissioners, three Republican commissioners, and three commissioners who are not affiliated with either major party.²²

Seating the fourteen members became the largest and most expensive element of the overall redistricting process. According to the state constitution, “[t]he selection process is designed to produce a commission that is independent from legislative influence and reasonably representative of [California’s] diversity.”²³ To attain those ends, the constitutional and statutory provisions of Proposition 11, along with the implementing regulations of the law, contain a labyrinth of requirements designed to root out potential conflicts of interest and to promote a diverse membership on the Commission.

To ensure basic experience with the electoral system and to prevent party jumping,²⁴ applicants must have voted in two of the past three statewide elections and must have been registered to vote as a member of the same party (or unaffiliated with any party) for at least five years.²⁵ Proposition 11 also requires careful checks on applicants’ prior political involvement, including disqualification because of holding federal or state office, having employment in an institution subject to the state redistricting, having a significant role in a party or campaign committee, working as a registered lobbyist, or being a major contributor to a political campaign.²⁶ To prevent future conflicts of interest, Proposition 11 also prohibits commissioners from seeking office, working as paid staff or as a paid consultant to state or federal legislators, or registering as a lobbyist for a period of time after serving on the Redistricting Commission.²⁷

²² *Id.* § 2(c)(5) (requiring special voting majority for approval of final maps); see CAL. GOV. CODE § 8253(a)(5) (West 2013) (requiring special voting majority for hiring, removal, or contracting decisions on staff, legal counsel, and consultants). At the same time, the voting structure does create the potential for gridlock: for example, if just two out of the four commissioners who are not aligned with the major parties dissent, then a proposed action cannot move forward.

²³ CAL. CONST. art. XXI, § 2(c)(1).

²⁴ Without a sufficient time requirement for party membership (or no party membership), a member of one political party could re-register as a member of another grouping in order to qualify for a different applicant pool and set of Commission seats, thus stacking the Commission with members whose true party alignments belie their most recent registration.

²⁵ These requirements had the effect of limiting participation of the state’s youngest voters, who could not fulfill either the minimum five-year voter registration period or the voting history prerequisites.

²⁶ See CAL. GOV’T CODE § 8252(a)(2)(A) (West 2013). Applicants to the Commission are automatically disqualified if they—or any of their immediate family members—fall into any of the following categories during the ten years prior to applying: the applicant or family member was appointed or elected to federal or state office, or was a candidate for such an office; was an officer, employee, or paid consultant of a political party or a campaign committee for a federal or state office; was an elected or appointed member of a party central committee; was a registered lobbyist; was a congressional, legislative, or Board of Equalization staff member; or was a contributor of \$2000 or more to a congressional, state, or local campaign. *Id.*

²⁷ See CAL. CONST. art. XXI, § 2(c)(6). Commissioners are ineligible for a period of ten years after their appointment to hold elective public office at the federal, state, county, or city level in California, and they are ineligible for a period of five years to hold appointive federal, state, or local public office. In addition, commissioners are banned for five years from serving

The selection process for the Commission is also carefully structured to limit partisanship and to check institutional power. The process requires the creation of an independent Applicant Review Panel composed of staff from the Bureau of State Audits, a state agency that serves as an independent auditor of the state's financial and operational activities.²⁸ The Panel, which must be composed of one Democrat, one Republican, and one member of neither party, must screen applications in order to reduce the applicant pool down to sixty candidates (twenty Democrats, twenty Republicans, and twenty of neither party). These sixty individuals are the most qualified applicants based on "relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography."²⁹

Once the pool is reduced to sixty candidates, the four legislative leaders—the Speaker of the Assembly, the Assembly Minority Floor Leader, the Senate President Pro Tempore, and the Senate Minority Floor Leader—can remove up to two applicants from each of the three subpools.³⁰ This means that the leaders can eliminate a total of up to twenty-four candidates, which translates to as much as forty percent of the pool. The legislative leaders are not required to provide their reasons for eliminating candidates—and they chose not to do so in the post-2010 cycle—so the strikes are comparable to peremptory challenges within a jury selection system. The strikes are the only formal role that the state legislature has in California's redistricting process, and the legislative leaders chose to exercise all of their available strikes in 2010.

The remaining candidates are then placed into a lottery, where three Democrats, three Republicans, and two from neither party are chosen from a randomized selection process.³¹ This group comprises the first eight members of the Commission. The eight then choose the remaining six to form the full fourteen-member commission.³² Because it is possible within a random selection process to have results that are skewed (for instance, a high percentage of the first set might come from only one part of the state), the law requires that the remaining commissioners be chosen with a goal of creating a body whose full membership is diverse among multiple dimensions, including skills, geography, and various demographic characteristics.³³

This is how the system works on paper. Actual implementation was even more complicated because of the high volume of applications and ongoing concerns over the diversity of the Commission—both of which contributed to a longer and more expensive process than expected. From beginning to end, selecting the commissioners took approximately two years to

either as paid staff or as a paid consultant to the Board of Equalization, Congress, the state legislature, or any individual legislator; they are also banned for the same period from registering as a federal, state, or local lobbyist in California. *Id.*

²⁸ CAL. GOV'T CODE § 8252(b) (West 2013).

²⁹ *Id.* § 8252(d).

³⁰ *Id.* § 8252(e).

³¹ *Id.* § 8252(f).

³² *Id.* § 8252(g).

³³ *Id.*

complete and cost a total of over \$4 million, including over \$1 million for consultant costs to conduct a statewide outreach campaign.³⁴

The selection process to seat the Commission began with agency meetings and the drafting of regulations in early 2009, and eventually led to a statewide outreach campaign to encourage applications from throughout California. Initial applications were accepted beginning in December 2009, approximately one year before the full commission needed to be seated. Over 36,000 voters filed initial applications, and potential candidates were later required to submit an extensive supplemental application, which included essay questions, reference letters, and financial disclosure statements. Because many initial applicants chose not to complete the full application, the supplemental process narrowed the pool, but still left a high volume of candidates for the Applicant Review Panel: nearly 5000 individuals submitted full applications.³⁵

The Panel then engaged in several weeks of application reviews and a series of meetings, all of which were open to the public and live-streamed over the Internet. The Panel eventually narrowed the pool to 120 candidates who would be invited to the state capitol for ninety-minute interviews with the Panel and legal counsel. The Panel subsequently selected the remaining sixty candidates, and the legislative leaders exercised all twenty-four of their strikes to reduce the pool to thirty-six finalists. The lottery to select the first eight commissioners was held in mid-November 2010. The first eight were seated at the end of the November and met to review applications to fill the remaining seats. The final six were selected in mid-December and were sworn in a few weeks later.

The selection process, however lengthy or convoluted it may have been, produced a diverse and well-qualified Commission.³⁶ The commissioners, who serve approximately ten-year terms, are highly educated; all have post-

³⁴ CAL. CITIZENS REDISTRICTING COMM'N, ACTUAL AND ESTIMATED COSTS OF SELECTING THE FIRST COMMISSION AND REDRAWING THE STATE'S CONGRESSIONAL, SENATE, ASSEMBLY AND BOARD OF EQUALIZATION DISTRICTS 2 (2012), available at http://wedrawthelines.ca.gov/downloads/meeting_handouts_062012/handouts_20120605_crc_costreport.pdf [hereinafter COST REPORT]; SONENSHEIN, *supra* note 2, at 18–20.

³⁵ CAL. CITIZENS REDISTRICTING COMM'N, FINAL REPORT ON 2011 REDISTRICTING (2011), available at http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf [hereinafter FINAL REPORT]; *Application and Selection Process*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/selection.html> (last visited Jan. 8, 2014).

³⁶ The following is a list of the commissioners and their backgrounds:

<u>Name</u>	<u>Party Affiliation</u>	<u>Seat Selection</u>	<u>Residence</u>	<u>Occupation</u>
Gabino Aguirre	Democrat	Slate	Santa Paula	Retired Teacher/Principal
Angelo Ancheta	Democrat	Lottery	San Francisco	Law School Professor
Vincent Barabba	Republican	Lottery	Capitola	Retired Exec.; Former Dir., U.S. Census Bureau
Maria Blanco	Democrat	Slate	Los Angeles	Nonprofit Foundation Executive
Cynthia Dai	Democrat	Lottery	San Francisco	CEO/Management Consultant
Michelle DiGuilio	Decline-To-State	Slate	Stockton	Community Planner; Stay-at-Home Mother
Jodie Filkins Webber	Republican	Lottery	Norco	Attorney
Stanley Forbes	Decline-To-State	Lottery	Esparto	Bookstore Owner; Farmer
Connie Galambos Malloy	Decline-To-State	Lottery	Oakland	Urban Planning and Policy Development
Lilbert "Gil" Ontai	Republican	Slate	San Diego	Architect
M. Andre Parvenu	Decline-To-State	Slate	Culver City	Geographer and Urban Planner
Jeanne Raya	Democrat	Lottery	San Gabriel	Lawyer; Business Owner
Michael Ward	Republican	Slate	Anaheim	Chiropractor
Peter Yao	Republican	Lottery	Claremont	Retired Engineer; Former Mayor

baccalaureate degrees, and some have multiple advanced degrees. The Commission's members also have extensive backgrounds in numerous fields, such as law, urban planning, local elected or appointed office, and business and management. The commissioners' income levels are higher than the typical Californian's, but several come from modest backgrounds and all have an appreciation of the economic diversity within the state. Along dimensions of race and ethnicity, the Commission is also highly diverse and its membership is majority-minority. And based on my personal experiences working with the Commission members, they are all hard-working and effective team players and communicators.

Although the commissioners brought strong analytical and organizational skills to the task, only a few of the commissioners, including myself, had prior experience working on state or local redistricting. This lack of direct experience was not a serious handicap, but it no doubt led many commissioners to underestimate the amount of time and resources needed to initiate the process and to conduct redistricting at the state level. In addition, none of the commissioners had a history of working closely with state government, which made creating the infrastructure of a new agency and navigating the intricacies of state rules on hiring and contracting particularly challenging. There were other gaps in knowledge as well: direct experience with geographic information systems and software, technical knowledge related to demographics and applicable laws, and firsthand understanding of communities in several parts of the state. But trainings and public participation, combined with hiring an experienced and knowledgeable set of staff and consultants, helped make up for many of these limitations.³⁷

With seat assignments based on political party affiliation, there were also ideological and policy-preference differences among the commissioners. Indeed, on issues outside of redistricting, one might expect a lively debate or major differences of opinion among the commissioners. But partisan divisions were only occasionally an issue in the day-to-day work of the Commission. The voting structure requiring supermajority support from each of the party subgroups was designed to encourage support across party lines, and whenever possible commissioners attempted to generate compromise and consensus, which were reflected in the many unanimous and near-unanimous votes of the full commission during the post-2010 cycle.

Still, there was the potential for gridlock. For instance, when the Commission's legal committee split over the hiring of a firm to serve as the Com-

See Commissioner Biographies, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/bios.html> (last visited Nov. 24, 2013). Elaine Kuo, a Democrat from Mountain View in Santa Clara County, was chosen in the lottery phase of the selection process, but resigned in January 2011.

³⁷ Staff were drawn primarily from current or former government employees who had extensive experience in state government. The key position of line drawing consultant was awarded to the Oakland-based firm of Q2 Data & Research. Q2 had extensive experience in local redistricting, and one of its principals, Karin MacDonald, is also the longtime director of the Statewide Database, the nonpartisan organization that serves as California's official source of redistricting data.

mission's primary advisor on the Voting Rights Act, support for two candidate firms divided along party lines, with Republicans on the committee supporting a firm known for its defense work on the Voting Rights Act and Democrats (including myself) supporting a firm that had experience with plaintiff-side work.³⁸ The impasse was only resolved because the defense-side firm withdrew its application, having realized that it lacked sufficient support to move ahead in the competition. Fortunately, these splits were a rarity—largely because all of the commissioners understood the limits of the voting structure and the need for compromise to gain the necessary votes to take action.

My personal path to becoming a commissioner is unique, because I was not chosen among the original fourteen members. I was voted onto the Commission as a replacement after one of the commissioners resigned in January 2011, only a few weeks after the full Commission had been seated. During the selection period, I was fortunate to have passed all of the screens and continued in the process until the final stages. But, when the first eight commissioners were selected in the lottery, I was not among them. I was later considered during the deliberations to fill the remaining two Democratic seats. However, the metrics of my file were not favorable, particularly when the goal was to seat a commission that reflected the geography and demographics of the state. The lottery had already produced two Asian American Democrats from the San Francisco Bay Area, including one from San Francisco (my residence), and three of the first eight commissioners were attorneys. Given the diversity goals, particularly the geographic ones, other Democratic candidates were selected over me.³⁹

But when one of the Democrats from the Bay Area announced her resignation, I was back in consideration. The Commissioners deliberated over the remaining Democrats in the pool and discussed my particular assets, which included having a background in redistricting advocacy and Voting Rights Act enforcement, as well as experience working with various low-income and rural populations in both Northern and Southern California.⁴⁰ I

³⁸ The two finalists that the committee reviewed were Nielsen Merksamer Parrinello Gross & Leoni and Gibson, Dunn & Crutcher. Gibson, Dunn & Crutcher was awarded the contract after the attorneys from Nielsen Merksamer withdrew their firm from the competition.

³⁹ Not surprisingly, all of the remaining six commissioners were from either Southern California or California's Central Valley, areas of the state that were underrepresented in the random drawings.

⁴⁰ My professional experience prior to becoming an academic lawyer was primarily in nonprofit management and legal services. In the post-1990 redistricting cycle, I was a staff attorney with the Asian Pacific American Legal Center of Southern California, and I represented a statewide collaborative known as the Coalition of Asian Pacific Americans for Fair Reapportionment (CAPAFR) before the Special Masters and before the California Supreme Court. CAPAFR's primary goals were to maintain the integrity of Asian American and Pacific Islander communities within key districts and to ensure state compliance with the federal Voting Rights Act. In the post-2000 cycle, I did not participate in any California redistricting activities because I was working in an academic position in Cambridge, Massachusetts; I did, however, maintain a research interest in redistricting and minority voting rights. These experiences proved to be assets in my being selected as a commissioner, and my 1990s role as an advocate was distant enough in time that it was not a disqualifier.

was ultimately selected to fill the empty seat, and in February 2011, I was officially sworn in as a commissioner.

B. *Redistricting Criteria*

Much of the attention on the new California redistricting system has been on the commission structure itself, but Propositions 11 and 20 instituted a significant reworking of the formal criteria in the California Constitution. Most of the criteria are not significantly different from the criteria used in previous redistricting cycles in California, nor do they differ in major ways from criteria that can be found in other states. However, the criteria are now rank-ordered to establish priorities and to help resolve conflicts among competing factors. In addition, there are significant prohibitions on the consideration of political factors such as incumbency and candidacies, which have clear effects on the types of districts that can be drawn.

1. *Ranked Criteria*

Article 21 of the California Constitution lists the following redistricting criteria in order of priority:⁴¹

- (1) Districts shall comply with the United States Constitution.⁴² . . .
- (2) Districts shall comply with the federal Voting Rights Act (42 U.S.C. Sec. 1971 and following).
- (3) Districts shall be geographically contiguous.
- (4) The geographic integrity of any city, county, city and county, local neighborhood, or local community of interest shall be respected in a manner that minimizes their division to the extent possible without violating the requirements of any of the preceding subdivisions.⁴³ . . .
- (5) To the extent practicable, and where this does not conflict with the criteria above, districts shall be drawn to encourage geo-

⁴¹ CAL. CONST. art. XXI, § 2(d).

⁴² The federal constitutional requirements focus on the equal population requirements for districts. U.S. CONST. art. I, § 2. Article XXI of the California Constitution further states: "Congressional districts shall achieve population equality as nearly as is practicable, and Senatorial, Assembly, and State Board of Equalization districts shall have reasonably equal population with other districts for the same office, except where deviation is required to comply with the federal Voting Rights Act or allowable by law." CAL. CONST. art. XXI, § 2(d)(1).

⁴³ Article XXI defines a community of interest as "contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation." CAL. CONST. art. XXI, § 2(d)(4). The law also offers a number of examples of potential communities of interest: "Examples of such shared interests are those common to an urban area, a rural area, an industrial area, or an agricultural area, and those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the election process. Communities of interest shall not include relationships with political parties, incumbents, or political candidates." *Id.*

graphical compactness such that nearby areas of population are not bypassed for more distant population.

(6) To the extent practicable, and where this does not conflict with the criteria above, each Senate district shall be comprised of two whole, complete, and adjacent Assembly districts, and each Board of Equalization district shall be comprised of 10 whole, complete, and adjacent Senate districts.

Rankings between the criteria are clear: for example, equal population requirements under the Federal Constitution (Level 1) can justify the division of a city or county (Level 4); maintaining a minority voting bloc in a district to comply with the Voting Rights Act (Level 2) takes precedence over maintaining the integrity of a neighborhood (Level 4); and the compactness of a district (Level 5) can be compromised to ensure that any of the preceding levels are satisfied.⁴⁴ However, ranking within the same level is not required: in the fourth level of criteria, cities, counties, local neighborhoods, and local communities of interest have equal rank relative to each other.

During the post-2010 cycle, four California counties—Kings, Merced, Monterey, and Yuba—were subject to the preclearance requirements of Section 5 of the Voting Rights Act, and all of the statewide maps created in 2011 were required to be precleared by the federal government before going into effect.⁴⁵ In addition, Section 2 of the Act prohibits unlawful minority vote dilution in any redistricting plan.⁴⁶ The preventative measure employed in California, as in other states, has been the creation of majority-minority districts that contain a large and geographically compact racial or ethnic minority population that forms a majority within a district.⁴⁷

The remaining criteria reflect the priorities of state law in constructing districts. First, districts must be contiguous, a requirement that all portions of the district be connected or adjacent. Second, as much as possible, cities,

⁴⁴ The first two levels require the Commission to comply with the Federal Constitution and statutory mandates under the federal Voting Rights Act. Even if the state constitution were silent on these requirements, the Commission would still be required to follow federal law. Nonetheless, including the federal mandates ensured that the commission would employ the correct line-drawing priorities. The law also sent clear signals to the public that potentially controversial decisions—splitting neighborhoods or communities to ensure compliance with the Constitution and the Voting Rights Act—were rooted in the law rather than Commission fiat.

⁴⁵ 42 U.S.C. § 1973(c) (2006). Merced County was later removed from the list of covered counties through the “bail out” provision of the Voting Rights Act, but the state districts affecting the county are still in effect. See Press Release, U.S. Dep’t of Justice, Justice Department Reaches Agreement with Merced County, Calif., on Bailout from the Voting Rights Act (July 30, 2012), available at <http://www.justice.gov/opa/pr/2012/July/12-crt-945.html>. Although the U.S. Supreme Court, in *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013), rendered Section 5 inoperative by declaring the coverage formulas under Section 4 of the Act to be unconstitutional, the districts created prior to *Shelby County* remain in effect.

⁴⁶ 42 U.S.C. § 1973(a) (2006).

⁴⁷ See *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986). See generally Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. DAVIS L. REV. 1041, 1080–82 (2013).

counties, neighborhoods, and communities of interest must be kept intact within districts. Because the law does not rank-order the Level 4 units relative to each other, there is an inherent challenge in reconciling competing claims between these different entities. For example, maintaining the integrity of a small city might have to be weighed against maintaining a local community of interest, and the Commission must exercise its judgment in deciding which one to favor in drawing a particular district.

California districts should also be geographically compact, so that “nearby areas of population are not bypassed for more distant population.”⁴⁸ Compactness is, however, ranked notably lower than other formal criteria, which implies that less compact districts are permissible as long as higher-ranked criteria can be used to justify the district shapes. The final criterion is commonly known as “nesting,” which is the use of multiple districts from one legislative body to create a district in another body. Because the State Assembly has exactly twice as many seats as the State Senate, two assembly districts can be used to create one senate district. However, since nesting is last in the rankings, perfectly nested districts are largely missing from the 2011 California maps because of the Commission’s application of higher-ranked criteria.⁴⁹

Although the criteria establish clear priorities and rankings, they do contain definitional problems. Cities and counties have well-settled boundaries, but neighborhoods and communities of interest usually do not have obvious demarcation points. While some cities employ neighborhood boundaries for planning or zoning purposes, these lines may be inconsistent with how residents see their neighborhoods and communities. In the post-2010 cycle, the Commission relied on official neighborhood boundaries for some of the cities that maintained them (a recommendation that I had made), but the Commission relied largely on public comments to help it determine most neighborhoods and communities of interest. Public input was helpful in most instances, but it could also be incomplete or inconsistent. Employing detailed census data or other demographic analyses might have been a supplement to using public testimony to define neighborhoods or communities of interest or could have served as an alternative source of redistricting information in the absence of public testimony. However, the Commission did not rely extensively on these types of information, largely because of the limited amount of time available to garner additional data analyses and to incorporate those analyses into the line drawing.⁵⁰

⁴⁸ CAL. CONST. art. XXI, § 2(d)(5). Compactness is the redistricting criterion most closely aligned with the public’s perception of district geometry and aesthetics. The lack of compactness may be an indicator of gerrymandering, because odd or contorted shapes can indicate that districts are designed to favor one voting group over others; far-away populations can be included in districts to increase a particular voting bloc’s power, yielding a less compact district.

⁴⁹ However, the Commission did seek to create many “blended” districts—larger districts that contain high percentages of smaller districts. FINAL REPORT, *supra* note 35, at 24–25.

⁵⁰ Whether redistricting bodies should rely primarily on public testimony versus demographic data to determine communities of interest has generated significant academic and policy debates. Compare Karin Mac Donald & Bruce E. Cain, *Community of Interest*

It is also important to note that the ranked criteria do not require districts that are “fair” or “competitive” between the major parties. Creating more competitive districts is often touted as a goal of redistricting reform, and commission-based reforms such as the Arizona system have included competitiveness criteria.⁵¹ The California law contains no such requirement. The omission of competitiveness may reflect the fact that other criteria such as compliance with the Voting Rights Act or maintaining communities of interest can be in tension with competitiveness. It also reflects some of the realities of California’s political geography: Democrats and Republicans tend to be concentrated in different areas of the state—generally, Democrats are concentrated in the largest urban areas and in coastal areas, while Republicans are concentrated in suburban areas and in interior areas of the state—so creating districts that are both competitive and compact can be very difficult in many parts of California.⁵² Competitive districts can still be a product of redistricting based on other criteria, however, and analyses of the post-2010 maps have documented an increase in the overall number of competitive districts compared to the post-2000 maps.⁵³

2. *Prohibited Factors*

In addition to enumerating the ranked criteria, the California Constitution contains specific language prohibiting the use of political factors often considered in drawing districts. The law states that “[c]ommunities of interest shall not include relationships with political parties, incumbents, or political candidates”⁵⁴ and that “[t]he place of residence of any incumbent or political candidate shall not be considered in the creation of a map.”⁵⁵ The law also states that “[d]istricts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.”⁵⁶

The practical effects of these prohibitions are that incumbency protection and partisan districting are formally eliminated from the equation, and the district boundaries must be predicated on the ranked criteria. Limiting the use of incumbency information is not necessarily anti-incumbent, however. The state constitution is clear that purposefully favoring an incumbent,

Methodology and Public Testimony, 3 U.C. IRVINE L. REV. (forthcoming 2014) (communities of interest should be based largely on public testimony), with Nicholas O. Stephanopoulos, *Communities and the California Commission*, 23 STAN. L. & POL’Y REV. 281, 314 (2012) (communities definable by census data and statistical analyses).

⁵¹ ARIZ. CONST. art. 4, pt. 2, § 1(14).

⁵² See Bruce E. Cain, Karin Mac Donald & Iris Hui, *Sorting or Self-Sorting: Competition and Redistricting in California*, in NEW POLITICAL GEOGRAPHY OF CALIFORNIA 247, 261–62 (Frederick Douzet et al. eds., 2008); BRUCE E. CAIN, KARIN MAC DONALD & IRIS HUI, INSTITUTE OF GOVERNMENTAL STUDIES AT UNIVERSITY OF CALIFORNIA, BERKELEY, COMPETITION AND REDISTRICTING IN CALIFORNIA: LESSONS FOR REFORM, 26, 31 (2006), available at http://statewidedatabase.org/resources/redistricting_research/Competition_&_Redistricting.pdf.

⁵³ See Kogan & McGhee, *supra* note 2, at 17–18, 25.

⁵⁴ CAL. CONST. art. XXI, § 2(d)(4).

⁵⁵ *Id.* § 2(e).

⁵⁶ *Id.*

a candidate, or a party is not allowable in the line drawing, but neither is discriminating against incumbents, candidates, or parties. The prohibitions also have an important legal effect: they undermine federal constitutional claims against the Commission based on partisan gerrymandering, because such claims require proof of intentional discrimination against a party by the redistricting body.⁵⁷

Still, prohibiting the use of political factors does not mean that the California process is immune from incumbent influence or partisan politics. Other redistricting goals, such as preserving a neighborhood or a community of interest, might also be used as a basis for creating district lines that favor candidates or have partisan implications. Even though there are specific bans on incumbency- or party-based communities of interest in the law, it is possible to advocate for a district that protects a neighborhood or a socioeconomic community, while also protecting an incumbent or favoring a party. Indeed, given the state's political geography, many of these alignments are bound to occur, even when they are not intended.

Employing a lawful criterion to advance a political end does not necessarily mean that there has been deception or overt manipulation of data, but it does mean that the process is susceptible to political influence and that incumbency or partisan politics could still be injected into the system. Many of these efforts became obvious to me and other commissioners in 2011: newly sprung organizations or coalitions with limited histories advanced districts that were facially nonpartisan but had implications for protecting incumbents or favoring parties;⁵⁸ individuals en masse repeated a message in hearings or in written comments that would ask to keep neighborhoods or communities intact—or, even more directly, to keep existing district lines—but the recommendations would also help prominent incumbents.⁵⁹ This did not necessarily mean that the suggested lines were bad or that they should be automatically rejected; information on an area, regardless of the intent or

⁵⁷ See *Vieth v. Jubilerer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment) (“A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.”).

⁵⁸ For example, a group known as “The California Institute for Jobs, Economy and Education” submitted statewide plans to the Commission. See *Public Mapping Plan Submissions*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/map-submissions.html> (last visited Dec. 25, 2013). Internet searches, however, revealed no prior history of the Institute and it appeared to have no status as an organization prior to the 2011 redistricting cycle. The representative for the Institute was Thomas W. Hiltachk, an election law specialist who had previously served as legal counsel to Governor Arnold Schwarzenegger. See *Attorneys, BELL, McANDREWS & HILTACHK, LLP*, <http://bmhlaw.com/attorneys.php> (last visited Dec. 25, 2013).

⁵⁹ For instance, numerous speakers at the Commission's public hearing on April 28, 2011 testified in favor of maintaining districts in central Los Angeles that would help protect Democratic incumbent members of Congress. See *Video Archive: April 28, 2011, Los Angeles*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/video-archive-april-28-2011-los-angeles.html> (last visited Dec. 25, 2013).

source, might still have some utility when taken with a grain of salt and used in combination with other sources.⁶⁰

Notwithstanding some of the ambiguities of the criteria and the potential for partisanship to slip into the process, the combination of the ranked criteria and the prohibited factors were enormously influential in the Commission's decision making. The Commission consistently returned to the federal mandates and the state criteria as the core of its line drawing, and it made clear to the public that the criteria bound the Commission in ways that might produce oddly shaped or unpopular districts. For example, compliance with Section 5 of the Voting Rights Act meant that some of the districts containing counties subject to preclearance were similar in shape to the districts developed in previous decades. The legal standards prohibited the retrogression of minority voting power in the covered counties, which meant that some of the contortions previously necessary to maintain minority voting blocs needed to be repeated in the post-2010 lines.⁶¹ The Commission treated these districts as largely fixed and immovable pieces of the puzzle, which of course affected the design of the surrounding districts. Given the constraints of the Voting Rights Act, it is highly unlikely that a different entity would have done it much differently; regardless of whether it was a commission or a legislative committee who drew the lines, they would have been bound by the law and would have drawn comparable districts to protect minority voters.

C. *Public Participation and Transparency*

Two core goals underlying the reforms in Propositions 11 and 20 are public participation and governmental transparency. Legislatures are ultimately accountable to the voters, but their internal workings are not always open to public input and scrutiny. The Commission system is designed to open up the process, not only by empowering citizens to make the redistricting decisions, but by creating structures that ensure participation and that limit decision making outside of the public eye. Indeed, one of the constitutional mandates listed in Proposition 11 is that the Commission must "conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines."⁶² Transparency and broad

⁶⁰ Some media sources have suggested that the redistricting process was manipulated by Democrats who posed as community members in order to propose communities of interest that favored partisan interests. See Olga Pierce & Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, PROPUBLICA (Dec. 11, 2011, 2:38 PM), <http://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission>. Even if allegations of deception were accurate, it would not mean that the commissioners were not aware of the partisan implications, nor would it necessarily mean that the Commission relied on the information to draw the lines. Moreover, if the communities of interest boundaries, regardless of partisan effects, had an actual basis in fact and other testimony, they could still be useful in drawing lines.

⁶¹ See Levitt, *supra* note 47, at 1060.

⁶² CAL. CONST. art. XXI, § 2(b), cl. 1. Even the name of the Commission's official website reflects this fundamental emphasis on citizen involvement: www.wedrawthelines.ca.gov.

participation advance an open democratic process, and they can also help produce better maps; they help provide a check on self-interest and the dominance of special interests, and they can yield information about areas and communities that might otherwise be unavailable.

By any measure, California's post-2010 redistricting cycle was highly participatory and transparent. From April to July 2011, the Commission conducted an input process that included thirty-four public hearings, located in thirty-two cities throughout the state, with a total of over 2700 speakers (including many whose comments were translated into English from other languages).⁶³ An even greater number of people submitted written comments: over 20,000 individuals and groups offered comments or maps.⁶⁴ In addition, over seventy business meetings of the full Commission and its committees were open to the public, live-streamed over the Internet, and fully taped and transcribed.⁶⁵

The high levels of public participation and transparency can be traced to several sources. First, the redistricting law itself contains requirements that mandate openness and that limit deliberations away from the public. The law requires that the Commission hold public hearings and display maps before the final plans can be issued;⁶⁶ moreover, the Commission's records must be made fully accessible to the public.⁶⁷ The law also contains strict limitations on communications related to redistricting between commissioners outside of public meetings.⁶⁸ Commissioners were free to discuss other subjects outside of meetings—we typically talked about food and wine choices, travel schedules, family matters, and complaints about the length or noisiness of hearings at lunches and dinners—but actual line-drawing discussions were off-limits.

Second, the Commission is required to conform to California's open meeting law, popularly known as the Bagley-Keene Act,⁶⁹ which adds an extra layer of obligations that ensure transparency and accountability on state boards and commissions (but not the legislature).⁷⁰ Among the key mandates of the law are that almost all meetings containing three or more commissioners must occur in public, the meetings must be fully accessible to the members of the public, and the public must receive adequate and timely notice in advance of the meetings. The few exceptions allowing for closed meetings include meetings to discuss personnel matters and meetings to discuss pending litigation, which were used rarely by the Commission.⁷¹

⁶³ FINAL REPORT, *supra* note 35, at 1, 4.

⁶⁴ *Id.*

⁶⁵ *See id.* at 4–5.

⁶⁶ CAL. GOV'T CODE § 8253(a)(7) (West 2013).

⁶⁷ *Id.* § 8253(a)(2).

⁶⁸ *Id.* § 8253(a)(3).

⁶⁹ *Id.*

⁷⁰ *Id.* §§ 11120–11132.

⁷¹ *Id.* § 11125.4. The requirements of the Bagley-Keene Act also led the Commission to delegate tasks to teams of two commissioners. Since pairs of commissioners were not required under the open meeting law to meet in public, work by the two-person teams could be conducted between formal meetings. For instance, because of the high volume of comments re-

Third, the commissioners themselves injected a strong set of personal values to implement policies supporting transparency and public participation. The ambitious public hearing schedule adopted by the Commission was self-initiated, and if it were not for the limits of time and dollars, many of the commissioners might have voted for even more hearings and input on draft maps. My own opinion, which was shared by a few others, including some of our staff and consultants, was that more was not necessarily better, since conducting a high volume of public hearings would inevitably compete against the time and resources needed to engage in actual line drawing. But I was in the minority. In any case, the commissioners' personal dedication to upholding the public hearing process was clear: all fourteen commissioners were expected to attend all of the public hearings and meetings in all parts of the state, and any absences were rare.⁷²

Fourth, the prominence of an open and participatory redistricting process created a heightened interest among the public. Many advocacy and civil rights groups that had participated in prior redistricting cycles not only submitted statewide or regional maps, they mobilized members and constituents to attend and testify at individual hearings. Newer groups, including Tea Party members, and neighborhood activists of all sorts engaged in mobilization efforts and generated high attendance at meetings. Most of the meetings epitomized some of the ideals of participatory democracy: individuals from local areas came out in large numbers to talk about their neighborhoods and communities; some lived close by while others traveled great distances because the hearing was the only one within that region of the state. Participants ranged in age from youth in their early teens to octogenarians; many were immigrants who used translators to assert their place in the local communities. Some meetings, however, were less encouraging: for instance, an evening meeting that I chaired in the city of San Jose had to be temporarily halted and the police had to be summoned in order to calm a vocal and disruptive crowd of Tea Party members who saw the hearing more as a mobilization and protest opportunity than as a vehicle for offering useful testimony. However, the openness of the public meetings remained a constant.

The input process also benefited from a high degree of involvement by philanthropic efforts and the work of nonprofit organizations that were engaged in public education, outreach efforts, and technical support—all of

ceived via U.S. postal mail and e-mail, the Commission assigned responsibilities to read public comments from particular geographic regions to two-commissioner teams, and these teams would provide reports back to the full Commission. Commissioners were always highly sensitive, however, to maintaining the correct balance between providing transparency to the public and completing tasks within a highly limited time frame, so work accomplished outside full public review was the exception rather than the rule.

⁷² Notwithstanding my opinion that fewer hearings would have yielded a better balance of time, attending these hearings was among the high points of the redistricting experience. Traveling throughout the state and listening to the public (particularly those from many towns and areas that I had never heard of) was tremendously educational and illuminating: I probably learned more about California's geography in the space of a few months than I had in a lifetime of state residency.

which greatly supplemented the Commission's official activities. The California-based James Irvine Foundation, for example, made grant making for the new redistricting process a high priority, and the foundation offered over \$3 million in redistricting-related grants during the post-2010 cycle.⁷³ Although the Commission took care to maintain a sufficient distance between itself and these organizations to ensure the Commission's independence, there was no question that the non-governmental efforts were essential in increasing public awareness and involvement.

Nevertheless, there was also a serious downside to the high levels of public participation: the Commission became overloaded with information. Although the commissioners, the Commission's staff, and its line-drawing team created efficient processes and employed up-to-date redistricting technologies and software, no one expected that there would be testimony from over 2700 members of the public and over 20,000 written submissions, including fully developed statewide and regional maps. There were methods for streamlining the information, and the line-drawing team carefully catalogued the data. Much of the testimony was also repetitive—having been the product of mobilization efforts by various groups and offices—but it was all counted.

Still, the Commission was ill-equipped to deal with what evolved into a redistricting “big data” problem. Free or low-cost geographic information systems and user-friendly redistricting programs became available through various sources on the Internet, and technical assistance centers sponsored by the Statewide Database, the official nonpartisan source for California's redistricting data, made mapping software easily accessible to members of the public. But the data came in a wide range of formats, and much of the information provided by the public was simply narrative: “Keep _____ together” was a common refrain, where the blank might be filled in by the name of a neighborhood or a city; conversely, voters who wanted to keep areas apart and in separate districts might be inclined to state, “We have absolutely nothing in common with _____.” Sorting through the data and separating the signal from the noise became challenging because of the sheer volume of testimony, and converting imprecise and sometimes conflicting proposals into geospatial information became problematic.

Many of the difficulties were caused by the Commission's own shortcomings in clarifying the redistricting criteria and in regulating the testimony so that it could be most useful in line-drawing deliberations. The goal of maintaining communities of interest became a particular problem because of the subjectivity of public opinions regarding “communities.” Members of the public and even some commissioners employed communities of interest loosely, with opinions on communities ranging from areas covering a few neighborhood blocks to expansive regions such as large coastal communities or areas bound by miles of mountain ranges that would be impossible to fit within a single congressional or legislative district. And without strong

⁷³ COST REPORT, *supra* note 34, at 4.

guidelines for identifying communities of interest and for resolving conflicts, the Commissioners could pick and choose from several variations in district lines because there was usually *some* basis for a community of interest or neighborhood that could be found in the public testimony.⁷⁴

Moreover, public input alone could not portray a complete picture of what was needed to draw the lines. Many communities—particularly those in rural areas and those with smaller populations, such as Native Americans—did not offer significant amounts of public testimony or comments. The lack of public input did not mean that there were no neighborhoods or communities of interest in a particular area; it simply meant that the Commission had not received information from different sectors of the public, and the Commission needed either to try to solicit the information or to look at other data sources as a substitute. Unfortunately, looming deadlines limited the Commission’s ability to garner missing information and to process the high volume of information that had already been submitted.

A significant weakness in the Commission’s implementation of the process was thus its miscalibration of many core tasks: the Commission underestimated the amount of time that it would take to process the public information and to fill in the gaps, it overestimated the usability of that information, and then it ran short on time for deliberating and drawing the final lines. The result was a highly compressed schedule in the final weeks, with the cancellation of a set of public hearings, several sessions going late into the night (and even longer for the line-drawing consultant’s team), and the Commission’s employing “visualizations” of districts during live line-drawing sessions rather than circulating a second draft map for public comment. Even with these challenges, however, the Commission’s line-drawing meetings always remained fully open to the public, and the Commission was able to complete the maps and issue its final report on schedule.

D. Challenges in Line Drawing

By highlighting the commissioner selection process, the state criteria, and the participatory elements of the California reforms, I do not mean to understate other key aspects of the Commission’s work. As the first body of its kind in California, the Commission completed an enormous number of

⁷⁴ These problems are not unique to a commission system; they inhere with the use of criteria such as “communities of interest” that are inexact and rarely used outside of the context of redistricting. Nonetheless, the Commission took only a few steps to address some of these problems, and it could have gone much further in refining the criteria, developing alternative data sources, and creating clear guidelines for resolving conflicts. Instead, pressed for time and relying heavily on public testimony, the commissioners used their personal knowledge of the state and exercised their best judgment in balancing testimony and multiple interests, even when the predicates for those decisions might have been imprecise or conflicting. This is not to say that every decision could have been made through some algorithm or mechanical measure—inevitably, judgment calls do have to be made to resolve the dozens, even hundreds, of potential conflicts that arise. But the Commission could have done a much better job in creating systems to help guide its decision making.

tasks in an exceptionally short amount of time. In the space of a few months, the Commission hired staff, established an office and an agency infrastructure, retained technical consultants and attorneys, developed and implemented a broad multilingual media and outreach strategy, conducted several weeks of hearings, and even created a draft set of maps for public review two months ahead of the final deadline of August 15, 2011.⁷⁵ The Commission developed an effective set of committees and working groups, and employed a system that rotated the chair and vice-chair positions to ensure parity among the political parties and a broader basis for leadership.⁷⁶

But the Commission had no instruction manual to follow, and there were challenges and controversies along the way. State hiring and contracting rules that emphasized careful and detailed selection processes were in tension with the tight timelines needed to complete the maps; the Commission fell behind and had to abbreviate or forgo many of the analyses that would have better informed the line drawing. The Commission underestimated the time and resources needed to accomplish many tasks, and schedules had to be revisited repeatedly during the process; this even required the assignment of two commissioners—myself and Commissioner Michelle DiGuilio—to serve as the project planning “czars” to coordinate assignments in the final weeks and to ensure that the maps were completed by the deadline.

Various staff, consultants, and outside attorneys were brought on to assist the Commissioners, but a number of these appointments and contracts generated critiques accusing the Commission of partisan bias. For instance, when the Commission disqualified one of the applicants for the position of technical line-drawing consultant (the team who would work with the Commission in compiling data and utilizing mapping software to produce the district lines), the Commission was accused of favoring Democrats over Republicans. The application of the Rose Institute of State and Local Government at Claremont McKenna College was found to be incomplete because it could not provide a listing of donors that would be needed to determine any potential conflicts of interests.⁷⁷ The Rose Institute is widely known to be Republican-leaning, although that fact alone was not a basis for disqualification, since the Commission itself would have ultimate responsibility for the district lines.

When the contract was awarded to another applicant, Q2 Data & Research, the Commission was accused by Republicans of changing rules and rigging the process, particularly since one of Q2’s co-owners was Dr. Bruce Cain, a professor of political science who had worked with Democrats dur-

⁷⁵ See FINAL REPORT, *supra* note 35; SONENSHEIN, *supra* note 2, chs. 3–5.

⁷⁶ There were also disadvantages to the rotational leadership system: turnover in the chair and vice-chair positions created discontinuities that were challenging for staff and consultants, and information and momentum could be lost in transferring duties between outgoing and incoming chairs.

⁷⁷ See CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF FULL COMMISSION BUSINESS MEETING 217–19 (Mar. 19, 2011), available at http://wedrawthelines.ca.gov/downloads/transcripts/201103/fullcommission_20110319.pdf.

ing the 1980s redistricting cycle. Republicans lambasted the Commission for being biased and partisan, and even though Professor Cain's work had been conducted decades earlier, he voluntarily removed himself from any work or contact with the team on the contract. The other Q2 principal, Karin MacDonald, and her team leadership had no affiliations with either major party. The partisan critiques were misplaced, especially since the Commission would be directing the consultant on how to draw the lines, not the reverse.

There were some missteps by the Commission as well. For example, in the rush to publish initial draft maps in early June, the Commission drew fire from many critics, including civil rights advocates and minority community groups, because it released maps that were products of incomplete information gathering. One of the missing pieces was an analysis of racially polarized voting in key areas of the state that contain sizable populations of African Americans, Latinos, or Asian Americans. A racially polarized voting report requires in-depth statistical analyses and is an essential element in determining whether a majority-minority district should be drawn to comply with the Voting Rights Act.⁷⁸ Hiring a consultant to prepare the report had been delayed, and a full report would not become available until later in the summer; thus several potential majority-minority districts could not be drawn in time for the initial drafts.⁷⁹

The first drafts would be revised in later weeks and the immediate lack of data did not bind the Commission in any way, but the drafts still engendered vocal critiques.⁸⁰ Omitting key racial data meant that information related to lower-ranking criteria involving cities, neighborhoods, and communities of interest were given priority in the drafts. The final versions of the maps eventually reflected a full array of data, including information needed to create majority-minority districts. However, because racial polarization data are essential to determining compliance with the Voting Rights Act, they should have been incorporated into any maps produced for public comment. Releasing maps, even preliminary ones, without the requisite analysis left the impression that the Commission had misapplied the priorities of the state constitution.

The Commission's road to completing the maps was thus bumpy at times, and it had its share of disruptions and emotional moments, including unruly speakers and protests at public hearings, as well as several commissioners' highly personal reflections on the topic of race during debates over districts in Los Angeles County.⁸¹ But the thousands of hours of combined commissioner, staff, consultant, and attorney time ultimately led to a suc-

⁷⁸ See LEVITT, *supra* note 6, at 1080–82.

⁷⁹ The Commission retained Dr. Matt A. Barreto, a political science professor from the University of Washington, to conduct the racially polarized voting analyses.

⁸⁰ See Gillian Flaccus & Don Thompson, *Hispanic Groups Dispute New California Political Maps*, ASSOCIATED PRESS, Jun. 22, 2011.

⁸¹ See CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF FULL COMMISSION BUSINESS MEETING 356–93 (July 24, 2011), available at http://wedrawthelines.ca.gov/downloads/transcripts/201103/fullcommission_20110319.pdf.

successful set of final maps that was published on schedule. The final maps also contained some important firsts: the Commission created the first state-level district with an Asian American majority population, as well as a number of state districts that recognized gay and lesbian neighborhoods for the first time. And approval of the maps was nearly unanimous: the commissioners voted 13–1 to approve the state legislative maps and the Board of Equalization map, and 12–2 to approve the congressional map.⁸² The maps were later precleared by the U.S. Department of Justice, making them fully compliant with Section 5 of the Voting Rights Act.

The Commission also had to defend its maps in court.⁸³ Two separate lawsuits were filed in the California Supreme Court by Republicans who challenged the state senate and the congressional maps.⁸⁴ Both lawsuits were unanimously dismissed.⁸⁵ A parallel lawsuit filed in federal court challenged the congressional maps under the Federal Constitution and the Voting Rights Act, and it was also dismissed.⁸⁶ Another state court action attempted to put the senate map on hold while a Republican-sponsored referendum was in the process of being qualified for the ballot;⁸⁷ the Supreme Court unanimously dismissed this action as well, and the Commission's senate districts were employed for the 2012 elections.⁸⁸ The referendum on the senate plan

⁸² See CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF FULL COMMISSION BUSINESS MEETING 21, 28 (Aug. 15, 2011), available at http://wedrawthelines.ca.gov/downloads/transcripts/201108/transcripts_20110815_sacto.pdf. Commissioner Michael Ward, a Republican from Anaheim in Orange County, voted no on all four of the maps; Commissioner Jodie Filkins Webber, a Republican from Norco in Riverside County, voted no on the congressional map.

⁸³ Commissioner Stanley Forbes, a Decline-to-State commissioner from Esparto in Yolo County, and I were appointed to oversee the Commission's legal defense. The legal team included the law firm of Gibson, Dunn & Crutcher, which had also served as the commission's Voting Rights Act counsel, and the law firm of Morrison & Foerster.

⁸⁴ *Vandermost v. Bowen*, No. S196493, 2011 Cal. LEXIS 11036 (Cal. Oct. 26, 2011) (challenge to state senate plan); *Radanovich v. Bowen*, No. S196852, 2011 Cal. LEXIS 10691 (Cal. Oct. 12, 2011) (challenge to congressional plan). Under the California Constitution, the Supreme Court has original jurisdiction in legal challenges to any of the Commission's plans. CAL. CONST. art. XXI, § 3(b)(1). A state constitutional limitation is not binding on the jurisdiction of federal courts, however, and claims under federal law could also be litigated against the Commission in federal court.

⁸⁵ See *Vandermost*, 2011 Cal. LEXIS 11036, at *1; *Radanovich*, 2011 Cal. LEXIS 10691, at *1.

⁸⁶ *Radanovich v. Bowen*, No. 2:11-cv-09786-SVW-PJW (C.D. Cal. Feb. 9, 2012), available at http://wedrawthelines.ca.gov/downloads/meeting_handouts_022012/handouts_20120210_fsc_dismissal.pdf (ruling against plaintiffs on res judicata grounds and earlier litigation of claims in state court).

⁸⁷ See Patrick McGreevy & Richard Simon, *Voting Districts Finalized and Face Immediate Challenges*, L.A. TIMES (Aug. 15, 2011), <http://articles.latimes.com/2011/aug/15/local/la-me-redistricting-20110816>; Jim Sanders, *GOP Ends Effort to Kill California Senate Districts, Won't Push Prop. 40*, SACRAMENTO BEE, Jul. 13, 2012, at 4A.

⁸⁸ *Vandermost v. Bowen*, 269 P.3d 446 (Cal. 2012). At the time of this writing, there are no lawsuits challenging the Commission's redistricting plans. The only pending lawsuit against the Commission is a constitutional challenge in state court to the use of race and gender in the selection process of the commissioners. The trial court dismissed the case in late 2012, *Connerly v. California*, No. 34-2011-80000966-CU-WM-GDS (Cal. Super. Ct. Dec. 21, 2012), available at <http://redistricting.ills.edu/files/CA%20connerly%2020121221%20opinion.pdf>, but it has been appealed.

did gather enough signatures to qualify for the ballot, and it appeared before the voters in the November 2012 election as Proposition 40. However, once it had become clear that the Commission's districts would be used in the 2012 elections, the effort to rescind the senate plan lost momentum, and there was no active campaigning against the plan. The voters approved the Commission's state senate map by a 71.9% to 28.1% vote.⁸⁹

The bottom-line cost to the California taxpayers of the post-2010 redistricting cycle—from selecting commissioners through the actual line drawing and the successful legal defense of the Commission's maps—totaled over \$10 million.⁹⁰ Of this total, the commissioner selection process was the most expensive element, costing over \$4 million. Direct line-drawing expenses, including establishing and running the agency, commissioner per diems and travel costs, fees for consultants and legal counsel, and the costs of meetings and hearings, added up to approximately \$3 million. The bills for the legal defense of the maps—which were elevated because outside law firms had to be retained after the California Attorney General declined to represent the Commission—were approximately \$2 million.⁹¹

The Commission also took steps to improve the redistricting process. During 2012, the commissioners worked cooperatively with the state legislature to develop important amendments to the statutory sections of the redistricting law so that many elements of the process such as organizational transitions and meeting schedules would be streamlined and more efficient.⁹² The amendments also changed the timetable for the selection and seating process for the Commission so that it would start four and one-half months earlier, allowing additional opportunities for education and outreach and creating more time for the new commissioners to establish the agency's infrastructure, to hire staff and consultants, and to prepare for the next cycle of line drawing.

California's post-2010 redistricting cycle thus differed in fundamental ways from the state's previous cycles: it was independent of the legislature, far more process-driven, more expensive, and replete with unprecedented levels of citizen involvement. Did the Commission ultimately produce the "best maps"? Redistricting reflects a wide variety of choices and judgments on how multiple districts might be drawn to fit together, and there is no one right answer. With more time and resources, the Commission might have obtained more data, explored more options, and refined the boundaries to keep more local communities together or to make the districts even more

⁸⁹ See CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 6, 2012, GENERAL ELECTION 72 (2012), available at <http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf>.

⁹⁰ COST REPORT, *supra* note 34, at 1.

⁹¹ Budgeting projections for the Commission have also calculated potential education and outreach costs that were not expended in the post-2010 cycle because of the James Irvine Foundation's grant making, which totaled over \$3 million. Including these costs puts the total costs for the post-2010 cycle at over \$13.7 million. *Id.* at 4.

⁹² See S.B. 1096, 2011–2012 Reg. Sess. §§ 2–4 (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1051-1100/sb_1096_bill_20120907_chaptered.html.

compact. But the overall process of constructing the maps complied with federal and state law and reflected the norms of transparency and participation inherent in Proposition 11. Comparisons of the Commission's post-2010 maps and the legislature's post-2000 maps have shown that the Commission's districts were generally more compact, more competitive, better at advancing minority voting rights, and more successful in maintaining cities, counties, and communities of interest.⁹³

III. MODELS AND PROSPECTS FOR REFORM

California's experience with commission-based redistricting offers important lessons for the citizens of states and localities who may seek to change their redistricting systems. However, is the California Citizens Redistricting Commission an ideal model for other states and local governments to follow? I believe that some or all of the elements of the system can be successfully implemented elsewhere—and improved upon. A commissioner system, if properly insulated from legislative influence, has clear advantages in limiting incumbents' self-interest. Ranked redistricting criteria, including prohibitions on factors such as incumbencies and candidacies, can offer important constraints on redistricting decisions, regardless of who draws the lines. Open meeting requirements can ensure higher levels of accountability and encourage participation by members of the public.

However, any reforms must be adapted to meet the particular priorities of a jurisdiction, as well as its politics. It is impossible to create a redistricting system that is fully isolated from politics, whether the politics revolve around protecting incumbents, advantaging or disadvantaging parties, or reconciling a host of competing interests. But there can be degrees of politics, and important values and trade-offs need to be considered in advancing any reform that attempts to impose limits on the politics of redistricting. Planning for reform is thus a function of two key processes: (1) defining the goals and mechanisms of reform, and (2) assessing the legal and political landscape to determine the ideal path to reform.

As I noted in Part II, the California reforms contain three important and closely interrelated elements: the commission structure, the ranked criteria, and the transparency and participation mandates. These work in tandem in the California law, but in reform packages developed for other states and local jurisdictions, the elements could be severed or combined in different ways, depending on the goals of the reform and the political viability of the packages. For instance, in areas where the legislative body is unlikely to cede control of the process—and there are no direct democracy mechanisms to work around the legislative body—it may be difficult or impossible to move toward an independent commission system. However, the goal of cre-

⁹³ See Kogan & McGhee, *supra* note 2, at 5–16; Stephanopoulos, *supra* note 50, at 293–300.

ating greater transparency and public input in the redistricting process could be accomplished through changes in the law to require an open meeting process and to mandate a minimum number of public hearings and other vehicles for public input. Such a reform would be more incremental and likely more viable for a legislature to adopt than a switch to an independent commission system.

Similarly, redistricting criteria can have powerful effects on the outcomes of a redistricting process, and could be the subject of intermediate reforms that are less directly threatening to legislative powers, but nevertheless institute significant checks on incumbency and gerrymandering. Indeed, in my opinion, the reforms to the California redistricting criteria are just as important—perhaps even more important—than the Commission structure itself in shaping the actual lines. This is not to say that a legislature or a panel of judges would produce the same districts as a commission, given identical redistricting criteria and comparable public information. Candidates and party politics would probably still manage to creep into a process controlled by the legislature, even if incumbency and party affiliation were excluded from consideration as criteria. But by rank-ordering criteria and establishing clear priorities and prohibitions, basic constraints would be established to limit the redistricting body's justifications for its lines.

If the goal is more extensive structural change, then the California model represents a particularly strong version of an independent commission model.⁹⁴ A hallmark of the California system is the extraordinarily limited involvement of the legislature in the process—the legislature has no control over line drawing and only has a veto-power role in the commissioner selection process. How important, then, is the goal of a creating a body independent of the legislature? And how strict and multilayered should the screening and vetting process be? California spent more time and money in the post-2010 cycle selecting its commissioners than it took for the Commission to draw the lines; however, the outcome—a diverse and well-qualified commission that would adhere to the law and maintain its independence—was successful. There are variations on California's selection process that could be more efficient or less costly, but would still maintain the independence of the process and promote goals such as geographic and demographic diversity in the Commission's membership. For example, employing different outreach strategies or streamlining steps in the application review process might create greater efficiencies without sacrificing the quality or representativeness of the applicant pool. But if other values and preferences

⁹⁴ Commission models that allow greater participation by the legislature exist in other states. For instance, since the post-2000 redistricting cycle, Arizona has employed a five-member citizen commission to draw its state and congressional lines. A panel of state appellate judges first creates a pool of twenty-five nominees, and from this pool four commissioners are chosen by the majority and minority leaders of the state legislature. The four commissioners later choose a fifth member, who cannot be a member of either major party and who also serves as the chair of the commission. ARIZ. CONST. art. VI, pt. 2, § 1.

predominate—for example, maintaining a stronger balance of legislative involvement in the process or requiring high levels of redistricting experience and expertise among the redistricting body’s members—then the California model may not be ideal.⁹⁵

Other questions of ideal structure and policy can be answered through an examination of values, goals, and priorities. For instance, is fourteen the best size for a redistricting commission? The question of size is separate from the question of independence, but it has important effects on a commission’s representativeness and workability. The size of the California Commission is a function of several factors: maintaining a particular balance among the two major parties and other groups of voters; implementing a voting structure that promotes agreement across party lines; having a body that reflects the diversity of the state along multiple dimensions, including geographic regions and race/ethnicity; and promoting workable and efficient group dynamics. In the post-2010 cycle, the fourteen-member Commission, despite the inevitable differences that might arise in making dozens of policy decisions, worked very well together. The Commission was not so large that discussions could not be managed efficiently, and many tasks were divided among committees and smaller working groups. The larger size also enabled the Commission to take advantage of the individual strengths of many commissioners, such as having in-depth knowledge of specific parts of the state and possessing technical expertise in subjects such as law, urban planning, or management. A commission with significantly fewer members would no doubt have been less diverse and collectively less knowledgeable about the state; a larger commission, while likely to be more representative of the state’s overall population, might have been less efficient and more prone to decisional gridlock.

Other jurisdictions may need to tailor their reforms to their particular contexts and goals. For example, a small county that employs nonpartisan elections to elect its Board of Supervisors does not need to have partisan balance on its commission, and concerns about diversity may be lessened because of the size and geography of the county. A smaller-sized commission might be more appropriate. On the other hand, the representativeness of particular districts or neighborhoods may be highly valued. For instance, a large city with a city council elected from twenty-one single-member districts might want to guarantee representation on the Commission to each of the districts. Again, there may be trade-offs that affect efficiency or raise the potential for impasses, but the underlying values have to be reflected in the structure and implementation of the redistricting body.

Adaptability over time might be another goal that engenders differences from the California model. For example, the partisan balance on the California Commission is enshrined in the state’s constitution and can only be

⁹⁵ See *supra* note 6 (discussing alternative models of redistricting available in other states).

changed through another constitutional amendment. The largest political party and the next largest party always receive five seats each, and the minor parties and no-party-preference voters together always receive four seats.⁹⁶ But recent party registration statistics in California suggest that the balance among all voters may soon be misaligned with the state constitution. The breakdown of seats on the Commission translates to 35.7% Democrat, 35.7% Republican, and 28.6% Other (minor parties and no party preference), but the 2013 statistics show the state at 43.9% Democrat, 28.9% Republican, and 27.2% Other, and the Others are quickly catching up.⁹⁷

These statistics reflect declining trends in the party registration among the major parties, as well as gains in registration among no-party-preference voters, suggesting that the misalignment is likely to grow in the coming years. But the assignment of commissioner seats is locked into the state constitution, and there is no mechanism for accommodating changes in voter registration occurring over time. If representativeness and voter proportionality are sufficiently strong goals within a reform package, then an allocation of seats for each redistricting cycle based on party registration data at a designated time (or an average of some years) might offer a more principled and flexible system than the Proposition 11 system. A proportional system, when combined with voting requirements for supermajorities or bipartisan agreement on key matters, could provide a more representative structure, while still protecting minority-party interests.

Of course, simply initiating a reform similar to the California commission system might be problematic in many states or localities. Only about half of the states are hybrid democracies like California that employ ballot initiatives, which allow citizens to bypass the normal legislative process. Without the ability to go around the legislative body, voters' only avenue for reform might be the legislature itself, and there are few scenarios in which members of a legislature could be expected to pass a major reform designed to curtail their own powers. Modest, incremental changes, such as the creation or extension of open meeting laws to create greater legislative accountability in redistricting, might be the only politically viable alternatives.

Even within those states and localities containing direct democracy mechanisms, reform efforts could be challenging because redistricting is not a high-salience issue for most voters, and the relative infrequency of the redistricting cycle means that it can fall off the radar screen of even those who closely follow politics. Mounting a ballot initiative campaign is also expensive, entailing high financial costs for signature gathering, advertising, and campaign activities. The Proposition 11 campaign—on both the pro and

⁹⁶ The political reality, of course, is that Proposition 11 needed significant Republican support in order to pass, so equal seats between the two major parties was a necessary part of the package. Transplanting Proposition 11 to another state might also require a similar system of parity in order to gain passage of the law.

⁹⁷ CAL. SEC'Y OF STATE, ODD-NUMBERED YEAR REPORT OF REGISTRATION I (2013), available at <http://www.sos.ca.gov/elections/tor/tor-pages/tor-odd-year-2013/hist-reg-stats.pdf>.

con sides—benefited from having major contributions from the political parties and individual officeholders, as well as from labor and private-sector contributors; redistricting became a prominent issue for the public because of the injection of large campaign dollars.

Still, reforms paralleling the California experience are certainly possible. Following a spirited and often contentious campaign in the fall of 2012 that pitted reformers against incumbent officials, voters in the city of Austin, Texas, enacted numerous charter reform amendments to update its city council system and to convert the council elections from at-large to district elections. One of the reforms approved by the voters was the creation of a citizens' redistricting commission patterned after the California model.⁹⁸ The new Austin Commission, which was formed during the summer of 2013 through a system comparable to California's selection process, has been charged with creating districts for the first time in Austin. Following an extensive public hearing process and the approval of final plans, the Commission's district lines go into effect in the city's 2014 elections.

IV. CONCLUSION

Major reforms in redistricting are a rarity, but the work of the California Citizens Redistricting Commission has shone more light on the nature of these reforms, and it has demonstrated that redistricting models designed to limit legislative self-interest and to increase citizen involvement can be successful. Like any new process, California's post-2010 redistricting cycle was imperfect, but it created high levels of transparency, greatly increased public participation, and produced districts that reflected the priorities of federal and state law. Whether other states and local governments will embrace California's model remains to be seen, but the successes and shortcomings of the most recent cycle demonstrate that true reform is indeed possible.

⁹⁸ Austin voters approved the charter reform measure in November 2012. See Austin, Tex. Ordinance No. 20120802-015 (Nov. 6, 2012); *Citizens Redistricting Process*, OFFICE OF THE AUSTIN CITY AUDITOR, <http://austintexas.gov/page/10-1-citizens-redistricting-process> (last visited Nov. 25, 2013). The charter reform expanded the city council from seven to eleven members, with one member (the mayor) elected at large and ten members elected from single-member districts. The charter reform also created an independent redistricting commission system.