

How Independent is Too Independent?: Redistricting Commissions and the Growth of the Unaccountable Administrative State

JASON TORCHINSKY* AND DENNIS W. POLIO**

ABSTRACT

Redistricting commissions are quickly proliferating across the country. These commissions are intended to alleviate concerns about how redistricting is conducted in an era of powerful computing technology, widely available data, and advanced mapping software. However, as with all things connected to public administration, the “devil is in the details.” The proliferation of redistricting commissions raises numerous questions: Are these commissions accountable institutions that increase public trust in the redistricting process? Or are they simply another symptom of an ever-expanding administrative state that removes key decision-making from public officials accountable to voters? Will responsive public officials make redistricting decisions? Or will such determinations fall to bureaucrats or politically connected consultants who are completely insulated from the public will? With the stakes of redistricting so high, and when entrusting that process to an unelected commission, it is essential that redistricting commissions are accountable to the public for their decisions.

This Article summarizes the varieties of state redistricting commissions and provides a lens through which to evaluate their accountability to the public. Ultimately, this article concludes that, if redistricting commissions continue to proliferate, states must carefully study how to properly structure them to maximize accountability.

* Jason Torchinsky is a partner at Holtzman Vogel Baran Torchinsky Josefiak PLLC, specializing in campaign finance, election law, lobbying disclosure and issue advocacy groups. He holds a B.A. in Government and Public Policy from the College of William and Mary and a J.D. from the College of William and Mary School of Law, where he also serves as an adjunct professor. This Article is written in his personal capacity and not on behalf of any client of his law firm.

** Dennis W. Polio is a senior associate with Holtzman Vogel Baran Torchinsky Josefiak PLLC, specializing in constitutional law, campaign finance and election law, appellate advocacy, and tax-exempt organizations. He graduated *cum laude* from Fairfield University with a B.A. in Politics, *magna cum laude* from Syracuse University College of Law with a J.D., and from the Maxwell School of Citizenship and Public Affairs at Syracuse University with a Master of Public Administration degree. Dennis previously served as a law clerk to the Honorable Carmen E. Espinosa, Associate Justice of the Connecticut Supreme Court. This Article is written in his personal capacity and not on behalf of any client of his law firm.

The Authors wish to thank Matthew Peterson and Andrew Pardue for their assistance; the Georgetown Journal of Law & Public Policy for the wonderful opportunity to publish this article; and the Authors' family, friends, and co-workers for their patience and support that enabled the Authors to complete this Article. © 2022, Jason Torchinsky & Dennis W. Polio.

TABLE OF CONTENTS

INTRODUCTION	534
I. A BACKGROUND OF INDEPENDENT REDISTRICTING COMMISSIONS . .	536
II. NOTABLE EXAMPLES OF REDISTRICTING COMMISSIONS AMONG THE STATES	541
A. <i>Redistricting Commissions Especially Lacking in Accountability</i>	543
1. Michigan	543
2. California	547
3. Arizona	550
4. New Jersey	554
5. Washington	556
B. <i>Accountable Redistricting Commissions</i>	558
1. Virginia	559
2. Arkansas	561
3. Pennsylvania	563
4. Mississippi	564
5. Oklahoma	565
6. Iowa	567
7. Rhode Island	568
III. PROBLEMS WITH LESS ACCOUNTABLE REDISTRICTING COMMISSIONS	569
IV. HOW CAN REDISTRICTING COMMISSIONS BE MORE ACCOUNTABLE?	572

INTRODUCTION

In recent decades, redistricting commissions have grown in popularity across the country. Indeed, recent political trends as well as changes in jurisprudence at the federal and state levels will likely fuel the creation of even more redistricting commissions in additional states in the near future.

With their expansion, it is imperative that the structure, authority, and characteristics of redistricting commissions are examined closely—because not all

commissions are created equal. These differences implicate not only how redistricting commissions function, but also whether such commissions will lead to further expansions of the administrative state or function in a publicly accountable manner. As Alexander Hamilton appropriately reminded us in *Federalist No. 27*: “I believe it may be laid down as a general rule, that [the people’s] confidence in and obedience to a government, will commonly be proportioned to the goodness or badness of its administration.”¹ Of course, there are many factors that affect the “goodness or badness” of government; but one of the most important, especially in the context of administrative agencies, is whether public officials are held accountable for their decisions² After all, the legitimacy of governmental actions in a democracy depends upon the consent of the governed.³

The most basic form of political accountability, and therefore democratic consent, is achieved through periodic elections in which voters may accept or reject officials based on their performance in office.⁴ However, in the context of redistricting commissions, such public accountability is elusive because commission members are not publicly elected to their positions. The public’s inability to approve or disapprove of commission decisions erodes the essential constitutional check on governmental overreach that the Founders envisioned.⁵ Despite presenting accountability issues of their own, at least federal agencies consist of political appointees who can be fired by the President and are subject to federal law imposing additional procedural requirements.⁶ Most state redistricting commissions, on the other hand, lack similar checks. Accordingly, it is only the form and characteristics of state redistricting commissions that impose any semblance of accountability.

Indeed, redistricting commissions come in many shapes and sizes. Some possess complete authority to redistrict; others hold conditional authority over redistricting in the event the legislature fails to act; still others act in an adversarial

1. THE FEDERALIST NO. 27, at 177 (Alexander Hamilton) (Central Law Journal Co. ed. 1914).

2. Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1254 (2009).

3. See *id.* (citing Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 442 (1998)) (explaining that under theories of popular sovereignty “a regime is legitimate if people are made to follow only those rules to which they have consented”); see also THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed”); George Mason, VIRGINIA DECLARATION OF RIGHTS § 6 (Va. 1776) (“[A]ll men . . . have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected”).

4. See generally Staszewski, *supra* note 2.

5. See Timothy P. Brennan, Note, *Cleaning Out the Augean Stables: Pennsylvania’s Most Recent Redistricting and a Call to Clean Up This Messy Process*, 13 WIDENER L.J. 235, 337 (2003) (asserting that the founders believed that legislators should be accountable to the people, which was the most essential constitutional check on the government).

6. See Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 690 (2006) (citing Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689 (2000)); see also Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975)).

capacity to the legislature during the redistricting process. A redistricting commission's structure determines the extent of its initial control over the redistricting process, above and beyond the legislature's authority. In addition to form, characteristics such as commission membership, how the membership is selected, the ability (or inability) to remove commission members, and other internal processes have profound effects on a commission's accountability or lack thereof.

Why should anyone care about the accountability of redistricting commissions? Aside from the fact that especially unaccountable commissions are just another brick in the wall of the administrative state, redistricting itself is "an essential but inescapably controversial element of the political process."⁷ Redistricting—the drawing of boundaries of political subdivisions—can have a significant effect on the landscape of electoral politics.⁸ "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."⁹ The size of a district can also delineate the political strength of its voters; if redistricting dilutes the power of minority voting blocs, this can result in violations of constitutional rights and other laws, including the Voting Rights Act of 1965.¹⁰ The fact that redistricting typically only occurs once a decade means that boundaries tend to be locked in place for quite some time. Moreover, public interest in redistricting is growing by leaps and bounds. For instance, during redistricting following the 2010 census, many states saw an unprecedented level of public participation in the process, likely due to the proliferation of computer technology.¹¹ Redistricting following the 2020 census is generating even more public interest, motivated by the results of recent elections, a competitive climate in Congress, and recent high-profile partisan gerrymandering cases in state and federal court. In short, because the political stakes are so high in redistricting, unelected commissions must be held accountable to the public for their decisions.

I. A BACKGROUND OF INDEPENDENT REDISTRICTING COMMISSIONS

Redistricting commissions take on many different forms and have evolved in their own unique ways. These commissions have arisen out of an immeasurable variety of concerns, some legitimate and laudable, some less so. It is worth understanding the historical background of redistricting commissions prior to examining the impact they have on government accountability.

7. Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL'Y REV. 109, 109 (2014).

8. *See id.*

9. *Id.*

10. *See id.*

11. Rebecca Green, *Redistricting Transparency*, 59 WM. & MARY L. REV. 1787, 1790 (2018).

Redistricting¹² is the process of revising the geographic boundaries of political districts to account for population shifts between decennial censuses.¹³ This process is bounded by certain legal principles on both the federal and state levels. First, and perhaps most fundamentally, the states must comply with the principle of one-person, one-vote, which requires states to “draw congressional districts with populations as close to perfect equality as possible,”¹⁴ thereby ensuring equal political power among voters. However, “one-person, one-vote” is relaxed slightly in the context of state and local legislative districting, where “jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness.”¹⁵ The United States Supreme Court has held that population deviations of less than 10% between the largest and smallest state legislative districts presumptively comply with one-person, one vote, but population deviations over 10% are presumptively unconstitutional.¹⁶ The redistricting process is further circumscribed by the Fourteenth and Fifteenth Amendments, which prohibit intentional racial gerrymandering, as well as federal laws such as Section 2 of the Voting Rights Act of 1965, which prohibits the dilution of minority voting strength.¹⁷ For congressional redistricting, the only other federal requirement is that “no district [may] elect more than one Representative.”¹⁸

Some states also impose their own requirements on the redistricting process. For example, Florida’s state constitution requires the legislature to design congressional and legislative districts that are contiguous and compact, and where feasible, utilize existing political and geographic boundaries—so long as doing so does not conflict with minority rights.¹⁹ The Florida Constitution further prohibits the legislature from drawing districts in ways that “favor or disfavor a political party or an incumbent.”²⁰

12. Although the terms “redistricting” and “reapportionment” are sometimes used interchangeably including in some state statutes, redistricting is technically distinct from reapportionment. Reapportionment for the purposes of this Article refers to the process of determining the number of seats each state is entitled to in the United States House of Representatives. See Anthony E. Chavez, *The Red and Blue Golden State: Why California’s Proposition 11 Will Not Produce More Competitive Elections*, 14 CHAP. L. REV. 311, 312 (2011) (citing U.S. CENSUS BUREAU, WHAT YOU SHOULD KNOW ABOUT THE APPORTIONMENT COUNTS: 2000 (2000), <https://www2.census.gov/library/publications/2000/communications/pio00-ac.pdf> [<https://perma.cc/4QKM-J3EE>]).

13. *Id.*

14. *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969)).

15. *Id.* at 60 (citing *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983)).

16. *Id.*

17. 52 U.S.C. § 10301; see also *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986); *Johnson v. De Grandy*, 512 U.S. 997, 1011–12 (1994).

18. 2 U.S.C. § 2c.

19. FLA. CONST. art. III, §§ 20–21.

20. *Id.* at § 20.

Every state must redistrict in order to comply with the principle of one-person, one-vote. Even states comprised of only one congressional district contain multi-seat state legislatures, which are elected from legislative districts. Accordingly, every ten years, following the decennial census, each state must redraw the district lines of its respective political subdivisions—whether congressional or legislative. The authority to draw congressional district lines derives from Article I, Section 4 of the United States Constitution (the Elections Clause) which grants state legislatures the right to prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives” while reserving for Congress the ability to “at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”²¹ Likewise, the authority of the states to draw legislative district lines derives from each respective state’s constitution or statutes.²²

While a majority of state legislatures still possess primary responsibility for redistricting, there has been a gradual trend over the past few decades toward creating Independent Redistricting Commissions²³ tasked with primary responsibility for redistricting. The first such commission with primary responsibility for drawing district maps was established in Arkansas in 1956 by constitutional amendment²⁴—Amendment 45, which was proposed by initiative petition.²⁵ It was placed on the ballot during the general election on November 6, 1956, and was adopted by a vote of 197,602 for and 143,100 against.²⁶ Amendment 45 created an Independent Redistricting Commission called “the Board of Apportionment,” which is responsible for legislative redistricting.²⁷ Arkansas’s Board of Apportionment is made up of the Governor (who sits as Chairman), the Secretary of State, and the Attorney General. Since Amendment 45 was adopted in 1956, other states have sporadically adopted

21. U.S. CONST. art. I, § 4.

22. See, e.g., ARK. CONST. art. XIII, § 1; FLA. CONST. art. III, § 16(a); MASS. CONST. amend. art. XII; NEB. CONST. art. III, § 5; NEV. CONST. art. III, § 5. Additionally, those municipal governments that are elected on a district basis, rather than on an at-large basis, also redistrict. See, e.g., GA. MUN. ASSOC., GEORGIA MUNICIPAL REDISTRICTING GUIDE (2014), <https://www.gacities.com/GMASite/media/PDF/publications/redistricting.pdf> [<https://perma.cc/6ZLG-ZK9L>]. Municipal redistricting is beyond the scope of this Article, but it can present accountability concerns similar to congressional or legislative redistricting when accomplished by independent commissions.

23. For the purposes of this article, and for ease of reference, the term “Independent Redistricting Commission” will refer to those commissions independent of the traditional legislative process with primary responsibility over redistricting—either for legislative or congressional districting plans or both—including both Independent Citizens Commissions and Politician Commissions. Non-primary commissions, such as advisory commissions or backup commissions will not be referred to as Independent Redistricting Commissions because they are not truly “independent.”

24. *Creation of Redistricting Commissions*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 10, 2021), <http://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx> [<https://perma.cc/6R3Y-TTH5>]; Nancy Martorano Miller, Keith E. Hamm, Maria Aroca & Ronald D. Hedlund, *An Alternative Route to Voting Reform: the Right to Vote, Voter Registration, Redistricting and U.S. State Constitutions*, 49 PUBLIS: J. FEDERALISM 465, 479 (2019).

25. ARK. CONST. amend. 45.

26. ARK. CONST. amend. 45 publisher’s notes.

27. ARK. CONST. amend. 45.

Independent Redistricting Commissions, with proliferation rapidly increasing in recent years.

Since the establishment of Arkansas's Board of Apportionment, twenty-eight states have established redistricting commissions or committees of some kind as of the writing of this Article. These commissions generally fall into one of four main categories: advisory commissions; backup commissions that act if the legislature fails to enact a plan; Politician Commissions; and so-called "Independent" Citizen Commissions. Advisory commissions assist the Governor or legislature during redistricting,²⁸ including drafting redistricting plans that the legislature ultimately retains the power to approve, reject, or modify.²⁹ Backup commissions generally lack initial redistricting authority; but if the legislature fails to pass a map, the backup commission steps in and has sole line-drawing responsibility.³⁰ Politician Commissions are redistricting commissions that are made up of elected officials or their designees.³¹ Generally, Politician Commissions are independent in the sense that their plans do not need to be submitted to the legislature; neither must they wait until there is a legislative breakdown or impasse in the redistricting process like non-primary commissions.³² Finally, Independent Citizens Commissions consist of persons who are neither directly elected nor appointed by elected officials.³³ Independent Citizens Commissions have the authority to draw district lines and adopt those maps without legislative approval.³⁴ Accordingly, Independent Citizens Commissions are almost entirely insulated from any kind of legislative or executive control or influence.³⁵ While such independence is a supposed benefit, it also creates grave implications for accountability and the growth of the administrative state.

Nearly every Independent Redistricting Commission was created purportedly³⁶ to counter "partisan" influence on the redistricting process—so-called "partisan gerrymandering"—or to reduce the need for courts to review partisan gerrymandering litigation.³⁷ "Partisan gerrymandering" means different things to different

28. Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1813 (2012).

29. *See id.*

30. *Id.* at 1815.

31. *Id.* at 1816.

32. *See id.*

33. *See id.* at 1817.

34. *Id.*

35. *See id.* at 1817–18.

36. In the context of Independent Redistricting Commissions created by ballot initiative, it is only possible to ascertain the effect of the proposal, not the intent of voters who approved them. This is because any number of reasons, or no reason at all, may inform a citizen's vote on ballot initiatives and referenda. It is not possible to attribute those votes to any specific purpose or intent. *See In re Apportionment of State Legislature-1982*, 321 N.W.2d 565, 582 (Mich. 1982); *cf. Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (noting the difficulty of "foresee[ing] which of many different possible ways [a] legislature might respond to . . . constitutional objections" the Supreme Court may find in a law).

37. *See Miller et al., supra* note 24, at 467; Chavez, *supra* note 12, at 320–22; Barry Edwards et al., *Can Independent Redistricting Commissions Lead Us Out of the Political Thicket?*, 9 ALB. GOV'T L. REV. 288, 289–90, 303 (2016); Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*,

people, but it generally refers to a political body drawing district lines that electorally advantage one political party and disadvantage another party.³⁸ This is supposedly accomplished through diluting the voting strength of the non-dominant party's supporters through (1) "cracking"—i.e., "dispersing members or supporters of a disfavored party or group across a number of districts so that they are relegated to minority status in each of those districts"—and (2) "packing"—i.e., "concentrating members or supporters of the disfavored party or group in a particular district or limited number of districts so as to dilute the voting strength of supporters of the disfavored party or group in the remaining districts."³⁹ The animating idea behind Independent Redistricting Commissions is that removing an inherently political task (redistricting) from a political body (the legislature) and instead lodging authority in a supposedly non-partisan or politically "balanced" body (the redistricting commission) will reduce partisan jockeying during the redistricting process, resulting in "fairer," more competitive political maps.⁴⁰

On June 27, 2019, the Supreme Court, after thirty-three years of litigation over the issue of partisan gerrymandering in federal court, held in *Rucho v. Common Cause* that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."⁴¹ In short, the Court concluded that:

Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. '[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements.⁴²

The Court's decision in *Rucho* followed decades of partisan gerrymandering claims that "proved . . . difficult to adjudicate."⁴³ Despite this non-justiciability on the federal level, the Court noted that its decision did not "condemn[] complaints about districting to echo into a void," but instead left open other avenues such as state legislation, state court actions, and the creation of redistricting commissions.⁴⁴

3 U.C. IRVINE L. REV. 637, 638 (2013). Some Independent Redistricting Commissions have also been formed, in part, for the stated purpose of reducing incumbency protection during redistricting. See Jeffrey Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 841, 848, 858, 860–61 (1996).

38. See generally *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

39. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 811 (M.D. N.C. 2018), *rev'd* *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

40. See Miller & Grofman, *supra* note 37, at 638 (citing Jeffrey Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 841–44, 852–55 (1996)); but see *infra* Section III.

41. *Rucho*, 139 S. Ct. at 2506–07.

42. *Id.* at 2507 (internal citations omitted) (citing *Vieth v. Jubelirer*, 541 U. S. 267, 278, 279 (2004) (plurality opinion)).

43. *Id.* at 2497.

44. *Id.* at 2507.

Now that reform activists are foreclosed from challenging redistricting plans in federal court as unconstitutional partisan gerrymanders, they will undoubtedly adopt a two-pronged approach by 1) bringing partisan gerrymandering claims in state court⁴⁵ and 2) doubling down on their efforts to expand the number of Independent Redistricting Commissions. Further, the country recently underwent a new census, which has already been the subject of contentious litigation and political chest-thumping.⁴⁶ *Rucho* and the 2020 census have already led to a reinvigorated push for creating new, and reactivating existing, redistricting commissions. It is more important than ever to understand redistricting commissions' effect on accountability and expansion of the administrative state.

II. NOTABLE EXAMPLES OF REDISTRICTING COMMISSIONS AMONG THE STATES

Before examining different state redistricting commissions, it is necessary to establish the metrics by which to judge their accountability. The first metric is membership selection and composition. The way commission members are selected and the makeup and identity of those members are the most basic measures of accountability. The membership of any commission membership is the foundational component of that commission. A commission will lack accountability if commission membership is chosen by, or is made up of, individuals who are not politically answerable to voters. Further, accountability is undermined if the elected officials selecting or serving as commission members predominantly hail from a single party, a single chamber of the legislature, or a single branch of state government.

The second metric by which to examine redistricting commissions—one related to membership selection and composition—is the power (or lack thereof) to remove commission members. Removal may be warranted if a commission member has a conflict of interest, oversteps his or her authority, or has some other ethical, political, or legal conflict.

The third accountability metric pertains to the funding mechanisms for redistricting commissions. Especially if commission members cannot be removed or checked in other ways, the legislature's ability to remove or reduce funding to the commission serves not only as a deterrent, but also a cure, to any potential overreach by the commission.

45. As of the date of this writing, the courts of at least four states have rejected partisan gerrymandering claims or declined to take partisan considerations into account when adjudicating gerrymandering claims. E.g., Oregon (*Clarno v. Fagan*, No. 21-CV-40180, 2021 WL 5632370 (Or. Cir. Ct. Nov. 24, 2021)); Wisconsin (*Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623); North Carolina (N.C. League of Conservation Voters, Inc. v. Hall, No. 21-CVS-15426 (N.C. Super. Ct. Jan. 11, 2022)); Kansas (*Rivera v. Schwab*, No. 125,092, 2022 Kan. LEXIS 49 (May 18, 2022) (full opinion forthcoming)).

46. See *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019); see also Brief of Amici Curiae the Republican National Committee and the National Republican Congressional Committee in Support of Petitioners, *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966), 2018 WL 7573020 (discussing the 2020 Census's implications on redistricting).

The fourth accountability metric is the legislative and executive involvement in the map-drawing process. Each state legislature consists of people elected directly by the voters of that state. Therefore, the legislature is, by definition, the most politically and popularly accountable body in each state. Its authority over any initial draft map or approval of any final map is an appropriate measure of accountability, along with the Governor's role in the process. Indeed, the Supreme Court recognized this in *Evenwel v. Abbott* when it concluded that “[t]he remedy for unfairness in districting . . . is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”⁴⁷

Lastly, accountability is also impacted by the redistricting commissions' internal procedures and the availability of judicial review. For example, commissions that require a supermajority vote to approve redistricting plans present less potential for abuse than those that require a simple majority. Additionally, commissions subject to robust judicial review are more accountable than those that are not.

In his article, *Redistricting Commissions: A Better Political Buffer?*, Bruce E. Cain sets forth a methodology by which the various commissions can be classified “according to the degree of separation that the commissioners have with respect to legislative control and influence.”⁴⁸ According to Cain, redistricting commissions fall in a “theoretical continuum of increasing separation from a legislative conflict of interest, spanning from legislative redistricting at one end to independent citizen commissions at the other.”⁴⁹ On this continuum, Cain divines a measure of degrees of legislative conflict of interest (“LCOI”): the zero degree of separation being pure legislative redistricting, and the fifth degree of separation, complete insulation from legislative control.⁵⁰

The first degree of LCOI separation (separation by dilution) merely adds citizens or statewide elected officials to a commission mix that already includes legislators. The second degree (separation by office) excludes legislators from the commission entirely in favor of statewide elected officials. The third degree (separation from office) removes elected officials in favor of citizens appointed by legislative leaders. The fourth degree of separation (separation by independent pool selection) forces legislative leaders to make citizen appointments from a pool chosen by a politically balanced body And the fifth, and so far ultimate degree of LCOI separation, is the . . . model in which legislators only get to strike some of the names from a pool chosen by the state auditor (separation from legislative designation), and the citizens themselves are carefully vetted to exclude many normal forms of political involvement.⁵¹

47. *Evenwel v. Abbott*, 578 U.S. 54, 58 (2016) (internal quotation marks omitted) (citing *Colegrove v. Green*, 328 U.S. 549, 556 (1946)).

48. Cain, *supra* note 28, at 1817–18.

49. *Id.* at 1818.

50. *Id.*

51. *Id.* (emphasis omitted).

While Cain advocates in favor of redistricting commissions having more degrees of separation (i.e., more independence) from legislative control, we argue in this article that more degrees of separation from the legislature undermine political accountability, almost by definition. In other words, less legislative oversight of the redistricting process leads to less accountability to voters, which in turn results in the growth of unaccountable administrative government.

A. *Redistricting Commissions Especially Lacking in Accountability*

While there are numerous examples of redistricting commissions, those sampled below, given the metrics discussed above, are especially lacking in accountability and result in the growth of the administrative state. These less-than-accountable redistricting commissions tend to take the form of Independent Redistricting Commissions in which elected officials only play a role in selecting members but otherwise have little say in the redistricting process. Examples of such accountability-deficient redistricting commissions exist in Michigan, California, Arizona, New Jersey, and Washington state.

1. Michigan

Michigan possesses an especially unaccountable commission. On November 6, 2018, Michigan voters approved Ballot Proposal 18-2, amending the state's constitution to establish the Michigan Citizens Redistricting Commission ("MCRC").⁵² Prior to the establishment of this commission, the Michigan State Legislature was tasked with redrawing Michigan's congressional and state legislative district boundaries. The MCRC, an Independent Citizens Commission, was meant to replace the existing legislative process of redistricting and eliminate any legislative oversight of the redistricting process.⁵³

The MCRC is made up of thirteen citizens. Registered voters apply to serve on the commission through an open application process in which the legislature exercises no initial control.⁵⁴ In addition to open applications, the Michigan Secretary of State is required to mail applications to at least 10,000 randomly selected registered voters, encouraging them to apply.⁵⁵ The Secretary of State's office will randomly select two hundred finalists from among the qualified applicants: sixty who self-identify as Republicans, sixty who self-identify as Democrats, and eighty who self-identify as not affiliated with either major political party.⁵⁶ The selection process must be statistically weighted so that the pool of 200 finalists mirrors the geographic and demographic makeup of

52. Paul Egan, *Michigan's Anti-Gerrymandering Proposal Is Approved. Now What?*, DET. FREE PRESS: ELECTIONS (Nov. 7, 2018), <https://www.freep.com/story/news/politics/elections/2018/11/07/proposal-2-anti-gerrymandering-michigan/1847402002/> [https://perma.cc/RU48-Y4QP].

53. *Id.*

54. MICH. CONST. art. IV, § 6(1).

55. *Id.* art. IV, § 6(2)(a)(i).

56. *Id.* art. IV, § 6(2)(d)(ii).

Michigan as closely as possible.⁵⁷ However, it is unclear how the selection process can be both “random” and “statistically weighted.” It is only at this point that any legislator has a say in membership selection—or rather rejection. The majority and minority leaders in the Michigan House and Senate may reject up to five applicants each (twenty total) before the final thirteen commission members are randomly selected from among the finalists.⁵⁸

To be eligible to serve on the commission, a person must be registered and eligible to vote in Michigan.⁵⁹ Further, each commissioner shall not currently be or in the past six years have been a candidate or elected official of a partisan federal, state, or local office; an officer or member of the leadership of a political party; a paid consultant or employee of an elected official, candidate, or political action committee; an employee of the legislature; registered as a lobbyist or an employee of a registered lobbyist; a political appointee who is not subject to civil service classification; or a parent, stepparent, child, stepchild, or spouse of any of the preceding individuals.⁶⁰ In addition, “for five years after the date of appointment, a commissioner is ineligible to hold a partisan elective office at the state, county, city, village, or township level in Michigan.”⁶¹

Each commissioner holds office until the commission has completed its obligations for the census cycle.⁶² Commission members can only be removed by a vote of ten of their fellow members upon a determination of “substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.”⁶³ There is no provision to permit executive, legislative, or judicial branch removal of a commissioner. Seats can also become vacant upon death, resignation, or disqualification on the “political activity” grounds listed above, but under no circumstances does the legislature get to create or fill a vacancy.⁶⁴ The Secretary of State fills all vacancies by random selection from the list of remaining applicants.⁶⁵

Beginning on December 1 of the year preceding the federal census and continuing every year in which the commission operates, the state legislature has a statutory duty to “appropriate funds sufficient to compensate the commissioners and to enable the commission to carry out its functions, operations and activities.”⁶⁶ The amount appropriated cannot be less than 25 percent of that fiscal year’s general budget for the Secretary of State, and commissioners must be paid no less than 25 percent of the Governor’s salary.⁶⁷ The State will also reimburse

57. *Id.*

58. *Id.* art. IV, § 6(2)(e).

59. *Id.* art. IV, § 6(1)(a).

60. *Id.* art. IV, § 6(1)(b)–(c).

61. *Id.* art. IV, § 6(1)(e).

62. *Id.* art. IV, § 6(18).

63. *Id.* art. IV, § 6(3)(e).

64. *Id.* art. IV, § 6(3)(a)–(c).

65. *Id.* art. IV, § 6(3).

66. *Id.* art. IV, § 6(5).

67. *Id.*

commissioners for costs incurred if the legislature does not appropriate sufficient funds to cover such costs.⁶⁸

The Michigan legislature has no opportunity at any point in the process to assist in the MCRC's development of a redistricting plan, whether at the beginning or end of the process. The Governor also plays no role. This means no elected official has any direct oversight of the MCRC's map-drawing process. Instead, a commission-adopted map automatically becomes law 60 days after publication.⁶⁹

The MCRC has a number of internal procedures relevant to examining its accountability. In order to pass a redistricting plan, the MCRC must vote to do so by simple majority—at least seven members—which must include a minimum of two Democratic members, two Republican members, and two members not affiliated with the major parties.⁷⁰ Further, commissioners are required to prioritize specific criteria when developing redistricting plans, including compliance with federal laws; equal population sizes; geographic contiguousness; demographics and communities of similar historical, cultural, or economic interests; no advantages to political parties; no advantages to incumbents; municipal boundaries; and compactness.⁷¹ While no officeholder can serve on the commission, the Secretary of State serves as commission secretary. Though the Secretary has no vote, the Secretary does have a significant role in administering the MCRC, including furnishing it with all necessary technical services.⁷² This could well include the Secretary selecting the vendors or consultants with the necessary skills and technical expertise to actually draw maps and suggest options for the commissioners.

The Michigan Supreme Court has original jurisdiction over all challenges filed against plans adopted by the commission.⁷³ That court can direct members to perform their duties and remand a plan for further action in the event it “fails to comply with the requirements of [the Michigan] constitution, the Constitution of the United States or superseding federal law.”⁷⁴ The Michigan Supreme Court consists of seven justices, who are elected to eight-year terms.⁷⁵ Candidates for the Michigan Supreme Court are nominated by political parties, but elected on a non-partisan ballot, with vacancies filled by appointment of the Governor until the next general election.⁷⁶

Cain's article predates the MCRC's creation in 2019, but using his model, the commission is considered in the fifth degree of LCOI separation.⁷⁷ This is the

68. *Id.*

69. *Id.* art. IV, § 6(17).

70. *Id.* art. IV, § 6(14)(c).

71. *Id.* art. IV, § 6(13)(a)–(g).

72. *Id.* art. IV, § 6(4).

73. *Id.* art. IV, § 6(19).

74. *Id.*

75. *Id.* art. VI, § 2.

76. *Id.*

77. Cain, *supra* note 28, at 1817.

degree most insulated from legislative control because “legislators only get to strike some of the names from a pool . . . and the citizens themselves are carefully vetted to exclude many normal forms of political involvement.”⁷⁸ In this way, Michigan mimics the California model (discussed below) from an accountability standpoint.⁷⁹ Therefore, because the MCRC represents one of the more extreme examples of independence from legislative and executive control, it is also one of the least politically accountable.

Even though it is only on its freshman redistricting cycle, the MCRC has already received criticism for its lack of transparency.⁸⁰ The MCRC has held closed sessions and refused to release documents that provide insight into the commission’s decisions, including memoranda pertaining to the Voting Rights Act and the History of Discrimination in the State of Michigan and its Influence on Voting.⁸¹ Although some state senators and citizens called to release these documents and increase transparency in the MCRC, these efforts have been fruitless.⁸² It was not until several Michigan media outlets filed suit for access to the private memos that the MCRC released the private memos and a recording of the closed door session.⁸³ These came only after the Michigan Supreme Court ruled 4-3 in the media outlets’ favor.⁸⁴ This outcome is due to one simple reason: the MCRC is almost completely insulated and unaccountable. Because of their unaccountability, the members of the MCRC have absolutely no incentive to provide

78. *Id.*

79. *See infra* Section II.A.2.

80. Michigan Press Association Board of Directors, *Opinion: Michiganders Should Demand Transparency from Michigan’s Redistricting Commission*, DET. FREE PRESS (Dec. 2, 2021), <https://www.freep.com/story/opinion/contributors/2021/12/02/michigan-redistricting-commission-voting-rights-act-memos/8822326002/> [<https://perma.cc/QV4Z-6NDQ>]; Sergio Martínez-Beltrán, *Michigan Redistricting Panel Opts for Secrecy, Won’t Release Voting Memos*, BRIDGE MICH. (Dec. 2, 2021), <https://www.bridgemi.com/michigan-government/michigan-redistricting-panel-opts-secrecy-wont-release-voting-memos> [<https://perma.cc/R8SW-UHUU>]; Craig Mauger & Beth LeBlanc, *Michigan Redistricting Commission Refuses to Release Legal Memos*, DET. NEWS (Dec. 2, 2021), <https://www.detroitnews.com/story/news/politics/2021/12/02/michigan-redistricting-commission-refuses-release-legal-memos/8835117002/> [<https://perma.cc/RVB6-J7Q2>]; Lauren Gibbons & Samuel J. Robinson, *Michigan Redistricting Commission Votes Against Releasing Memos from Controversial Closed Meeting*, MLIVE (Dec. 2, 2021), <https://www.mlive.com/public-interest/2021/12/michigan-redistricting-commission-votes-against-releasing-memos-from-controversial-closed-meeting.html> [<https://perma.cc/6NGX-V9EW>]; Michigan Press Association Board of Directors, *Our Take: Demand Transparency from the Michigan Independent Citizens Redistricting Commission*, HOLLAND SENTINEL (Nov. 25, 2021), <https://www.hollandsentinel.com/story/opinion/columns/2021/11/25/our-take-demand-transparency-michigan-independent-citizens-redistricting-commission/8686502002/> [<https://perma.cc/FY26-ASDA>].

81. *Id.*

82. *Id.*

83. *Det. News, Inc. v. Indep. Citizens Redistricting Comm’n*, No. 163823, 2021 WL 6058031, at *4 (Mich. Dec. 20, 2021); Jake Neher, *Michigan Supreme Court Rules Against Redistricting Commission in First Major Lawsuit*, WDET 101.9FM (Dec. 21, 2021), <https://wdet.org/posts/2021/12/21/91855-michigan-supreme-court-rules-against-redistricting-commission-in-first-major-lawsuit/> [<https://perma.cc/P97E-B6VA>].

84. *Id.*

transparency or necessary information to the public or press, creating a troubling precedent.

2. California

California also possesses an especially unaccountable commission. On November 4, 2008, California voters approved Proposition 11, also known as the “Voters First Act”—a combined initiated constitutional amendment and state statute that authorized the creation of the California Citizens Redistricting Commission (“CCRC”).⁸⁵ Proposition 11 shifted responsibility for redrawing state legislative lines from the state legislature to the CCRC, an Independent Citizens Commission.⁸⁶ Then, during the 2010 general election, California voters approved Proposition 20, which extended the reach of Proposition 11 to also encompass the redrawing of congressional districts, while rejecting Proposition 27, which would have repealed the commission.⁸⁷

The first step in choosing the fourteen CCRC members is the establishment of an “Applicant Review Panel.”⁸⁸ The Applicant Review Panel, which screens applicants to serve on the commission, is established by the State Auditor, which is a quasi-executive office, appointed by the Governor with the approval of the Joint Legislative Audit Committee, but is otherwise independent of both the executive and legislative branches.⁸⁹ The State Auditor establishes the Applicant Review Panel by randomly drawing the names of three qualified independent auditors from a pool consisting of all auditors employed by the state and licensed by the California Board of Accountancy at the time of the drawing.⁹⁰ These three auditors must include “one who is registered with the largest political party in California based on party registration, one who is registered with the second largest political party in California based on party registration, and one who is not registered with either of the two largest political parties in California.”⁹¹

The state auditor then initiates an application process open to all registered California voters.⁹² The Applicant Review Panel screens all applicants and strikes the applications of people who do not meet a series of requirements.⁹³ Commission members must: (1) be continuously registered to vote in California and not have changed parties for at least five years; and (2) have voted in two of the last three statewide general elections.⁹⁴ Moreover, neither CCRC members nor any immediate family member thereof may, within ten years of applying,

85. Chavez, *supra* note 12.

86. *Id.*

87. *Id.* at n.3.

88. *Id.* at 329 (citing CAL. GOV'T CODE § 8252(b) (West Supp. 2010), *added* by Prop. 11, § 4.1).

89. California State Auditor, BALLOTPEdia, https://ballotpedia.org/California_State_Auditor [<https://perma.cc/Q2BH-72B5>].

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

91. *Id.*

92. § 8252(a)(1).

93. Chavez, *supra* note 12, at n.121.

94. CAL. CONST. art. XXI, § 2(c)(3).

have served as a candidate for federal or state office; served as an officer, employee, or consultant of a political party; served as a member of a political party central committee; been a registered lobbyist; served as paid congressional, legislative or Board of Equalization staff; or contributed \$2,000 or more to any candidate for elective office in any year.⁹⁵

The pool of otherwise qualified commission applicants is then reduced further. The Applicant Review Panel narrows the three partisan applicant groups—Republican, Democrat, and Independent/third-party—to twenty members each.⁹⁶ The majority and minority leaders of the State Assembly and State Senate then have the ability to strike up to two applicants each,⁹⁷ after which the state auditor randomly draws three Democrats, three Republicans, and two persons not registered with either party to serve as CCRC members.⁹⁸ Finally, these eight commission members select two additional members from each of the three partisan pools of qualified applicants.⁹⁹ In the end, the CCRC consists of fourteen total members: five registered Democrats, five registered Republicans, and four persons not registered with either party.¹⁰⁰

Once a member is selected to serve on the CCRC, the Governor can initiate the removal of the member only “in the event of substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.”¹⁰¹ However, such removal requires two-thirds of the members of the California Senate to agree.¹⁰² All vacancies, whether resulting from removal, resignation, or absence, are filled by the CCRC itself from the remaining names in the same partisan subgroup as the departing member.¹⁰³

The Governor holds the statutory responsibility to propose a budget for the CCRC “sufficient to meet the estimated expenses . . . for a three-year period.”¹⁰⁴ The state legislature has a corresponding statutory duty to make an appropriation for the Commission “equal to the greater of three million dollars (\$3,000,000), or the amount expended . . . in the immediately proceeding redistricting process” as adjusted by the California Consumer Price Index.¹⁰⁵ Members must be compensated at a rate of \$300 per day for each day they are engaged in commission business, adjusted in each year ending in nine by the change in the California Consumer Price Index.¹⁰⁶

95. CAL. GOV'T CODE § 8252(a)(2)(A) (West Supp. 2013); *see also* Chavez, *supra* note 12, at 329 n.121 (2011).

96. CAL. GOV'T CODE § 8252(d) (West Supp. 2013).

97. *Id.* § 8252(e).

98. *Id.* § 8252(f).

99. *Id.* § 8252(g).

100. Chavez, *supra* note 12, at 329.

101. CAL. GOV'T CODE § 8252.5(a) (West Supp. 2013), *added by* Prop. 11, § 4.1.

102. *Id.*

103. *Id.* § 8252.5(b)(1).

104. *Id.* § 8253.6(a).

105. *Id.*

106. *Id.* § 8253.5.

By August 15 of every year ending in one, the members must adopt four separate plans (one each for congressional, state senate, state assembly, and State Board of Equalization districts) by a supermajority. This supermajority must include three unaffiliated members and three from each major party.¹⁰⁷ These four plans are forwarded to the secretary of state for certification and then submitted to a voter referendum.¹⁰⁸ In the event that the CCRC fails to approve a plan, or an approved map is rejected by the voters, the California Supreme Court has the authority to appoint “special masters [i.e. judges or experts] to adjust the boundary lines of that map in accordance with the redistricting criteria.”¹⁰⁹

Neither the legislature nor the Governor has any opportunity to assist in the development of the CCRC’s redistricting plans besides striking initial applicants. The legislature does not even have the authority to amend the statutes governing the CCRC unless commission members themselves propose such an amendment first and it is then passed by two-thirds of each chamber and signed by the Governor.¹¹⁰

Using the model of “degrees of separation” from LCOI developed by Cain, the CCRC constitutes the “fifth degree of separation.”¹¹¹ In fact, the CCRC serves as Cain’s prime example of the fifth degree of separation since it is most insulated from legislative control or oversight; “legislators only get to strike some of the names from a pool[,] . . . and citizens themselves are carefully vetted to exclude many normal forms of political involvement.”¹¹² In the case of the CCRC, the legislature only gets three extremely limited opportunities to have any say in the redistricting process: a restricted ability to strike applicants, the limited ability to remove a member from the Commission *if first proposed by the Governor*, and the ability to alter the rules governing the Commission *only if first proposed by the members*.¹¹³

Scholars have recognized the inherent accountability issues present in the CCRC. Anthony E. Chavez, for instance, notes that California legislators, as elected representatives, possess both the experience and the accountability needed to undertake redistricting.¹¹⁴ In contrast, Chavez notes that the CCRC commissioners not only lack this expertise but, more importantly, “the accountability for their actions that legislators must confront with each election.”¹¹⁵

The 2021 redistricting cycle has exposed many concerns about the work of the CCRC directly traceable to the CCRC’s extreme lack of accountability. The CCRC has held closed meetings during which its members and advisors allegedly

107. CAL. CONST. art. XXI § 2(c)(5); CAL. CONST. art. XXI § 2(g).

108. *Id.* § 2(i).

109. *Id.* § 2(j).

110. CAL. GOV’T CODE § 8251(c) (West Supp. 2013).

111. Cain, *supra* note 28, at 1818.

112. *Id.*

113. CAL. GOV’T CODE §§ 8253(g), 8252.5, 8251(c) (West Supp. 2013).

114. Chavez, *supra* note 12, at 368–69.

115. *Id.* at 369.

discussed race-based voting.¹¹⁶ This has led to at least one legal challenge before the California Supreme Court, asking the Court to fire the CCRC's legal advisors and force disclosure of its private meetings and research.¹¹⁷ The challengers assert that the CCRC is failing to disclose communications "about redistricting matters with interested parties outside of noticed public [CCRC] meetings" and that its outside attorneys have "a vested interest in the voting district boundaries" being created.¹¹⁸ Just as with Michigan's commission discussed *supra*, the CCRC has no incentive to be open and transparent because it lacks any public accountability whatsoever. The lack of public accountability has also led to questions over the CCRC's: (1) decisions to group uncommon communities together and split common communities apart;¹¹⁹ (2) failure to provide adequate Spanish-language redistricting information to the public;¹²⁰ and, (3) failure to draw maps that reflect the makeup of California.¹²¹

3. Arizona

Arizona is another state with a notorious commission. During the November 2000 general election, Arizona voters adopted a citizen initiative, Proposition 106, amending the state Constitution by removing the power to draw congressional and state legislative districts from the legislature and reassigning this task to the newly created Arizona Independent Redistricting Commission ("AIRC"), which meets the criteria of an Independent Citizens Commission.¹²²

The AIRC is comprised of five citizen volunteers constitutionally charged with drawing Arizona's congressional and state legislative districts every ten years.¹²³ Arizona's Commission on Appellate Court Appointments ("ACACA"),¹²⁴ which is itself made up of sixteen members, initially nominates twenty-five individuals. The chief justice of the Arizona Supreme Court serves as chairman of ACACA.

116. John Myers, *Legal Challenge to California Redistricting Seeks Document Disclosure, New Advisors*, L.A. TIMES (Dec. 2, 2021, 11:44 AM), <https://www.latimes.com/california/story/2021-12-02/legal-challenge-to-california-redistricting-effort-seeks-document-disclosure-new-advisers> [<https://perma.cc/6KAC-SCE5>].

117. *Id.*

118. *Id.*

119. Sam Morgen, *Central Valley Advocates Puzzled by Proposed Congressional District Maps*, TEHACHAPI NEWS (Dec 4, 2021), https://www.tehachapinews.com/news/central-valley-advocates-puzzled-by-proposed-congressional-district-maps/article_357162c6-5579-11ec-9161-4b8a5d44ba3e.html [<https://perma.cc/2475-ZPRX>].

120. Marciela De La Cruz, *Advocates Worry Lack of Spanish Redistricting Information Might Hurt Communities*, KCRA (Nov 18, 2021), <https://www.kcra.com/article/advocates-worry-lack-spanish-redistricting-information-communities/38296762> [<https://perma.cc/5JHB-85DK>].

121. Kim Bojórquez, *Latino Voting Rights Groups Say Proposed District Maps Don't Reflect California*, SACRAMENTO BEE (Nov 16, 2021), <https://www.sacbee.com/news/politics-government/capitol-alert/article255833556.html>.

122. *Arizona Independent Redistricting Commission*, AZ.GOV, <https://azredistricting.org/About-IRC/default.asp> [<https://perma.cc/N66M-ZCCK>]; *see also* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015).

123. ARIZ. CONST. art. IV, pt. 2, § 1(3).

124. *Id.* §§ 1(4), (5).

The other ACACA seats are filled by five attorney members who are nominated by the Board of Governors of the State Bar of Arizona and appointed by the Governor with the advice and consent of the state senate, and ten non-attorney members appointed by the Governor with the advice and consent of the state senate.¹²⁵ From the nominations made by ACACA, leaders of the Arizona House of Representatives and Senate make the first four appointments to the AIRC.¹²⁶ Those four redistricting commissioners then select a chairperson, the fifth and final commissioner, from a pool of nominees who are not registered with any party already represented on the AIRC.¹²⁷

No more than two AIRC members may be members of the same political party.¹²⁸ Of the first four partisan members appointed, no more than two may reside in the same county.¹²⁹ Each member must be registered to vote in Arizona and must have been continuously registered with the same political party, or registered as unaffiliated with a political party, for three or more years immediately preceding appointment to the commission.¹³⁰ Within three years prior to their appointment, members must not have been appointed to, elected to, or been a candidate for any public office. Additionally, they must not have served as an officer of a political party, a registered paid lobbyist, or an officer of a candidate's campaign committee.¹³¹

The Governor can initiate the removal of a member “for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.”¹³² This removal requires the concurrence of two-thirds of the Arizona Senate.¹³³ In the event of any vacancy, the ACACA nominates three individuals from the same political party as the departing member, and the official who made the original appointment chooses the replacement.¹³⁴

In 2011, Arizona Governor Jan Brewer, citing impropriety and constitutional concerns over the AIRC's redistricting of congressional and legislative districts in the state, proposed the removal of the AIRC chair under A.R.S. Const. Art. IV,

125. ARIZ. CONST. art. VI, § 36(A). Of these, not more than five are non-attorneys from the same political party, not more than two are non-attorneys from the same county, not more than three attorneys from the same political party, and not more than two attorneys from any of the same county. See *Commission on Appellate Court Appointments*, AZCOURTS.GOV (Jan. 18, 2022), <https://perma.cc/HDX3-LSHK>; ARIZ. CONST. art. 6, § 36(A).

126. ARIZ. CONST. art. VI, § 1(6).

127. *Id.* § 1(8).

128. ARIZ. CONST. art. IV, pt. 2, § 1(3).

129. *Id.*

130. *Id.*

131. *Id.*

132. ARIZ. CONST. art. IV, pt. 2, § 1(10).

133. *Id.*

134. *Id.* § 1(11).

Pt. 2, § 1(10).¹³⁵ Specifically, Governor Brewer accused the chairwoman of improperly conducting commission business out of public view and of skewing the redistricting process to favor Democratic candidates.¹³⁶ The Arizona Senate voted twenty-one to six to remove the chairwoman.¹³⁷ The AIRC then petitioned the Arizona Supreme Court for special action relief, claiming that Governor Brewer exceeded her limited removal authority and that the Governor and the Senate violated separation-of-powers principles by usurping powers of the commission and the judiciary.¹³⁸ The Arizona Supreme Court accepted special action jurisdiction and (1) concluded, as a matter of law, that neither of the Governor's two stated grounds for removing the AIRC chair constituted substantial neglect of duty or gross misconduct in office, as required by the Arizona Constitution; and (2) ordered that the chair be reinstated.¹³⁹

The Arizona Department of Administration has the statutory responsibility to propose, in years ending in eight or nine, a budget for the AIRC that provides for "adequate redistricting expenses."¹⁴⁰ The state legislature then must pass the budget by majority vote.¹⁴¹ The AIRC has procurement and contracting authority over its own needs, but the Department of Administration provides "fiscal oversight" of its decisions.¹⁴² The leadership of the Arizona Department of Administration is appointed by the Governor with the advice and consent of the Senate.¹⁴³

The Arizona legislature has a very limited opportunity to assist in the development of a redistricting plan, while simultaneously having no actual authority to develop its own plan or reject plans proposed by the commission. The commission develops congressional and legislative redistricting plans in accordance with statutory guidelines and adopts a draft map by a simple majority vote of three members.¹⁴⁴ There is no requirement that at least one member affiliated with each political party support the map. This draft is then submitted for public comment for a period of at least thirty days.¹⁴⁵ During this limited window the legislature can offer feedback on the redistricting proposal, although the commission is not obligated to adopt any changes proposed by the legislature or public.¹⁴⁶ The AIRC then adopts its final plan by simple majority vote (with or without the

135. Marc Lacey, *Arizona Governor and Senate Oust Redistricting Leader*, N.Y. TIMES (Nov. 2, 2011), <https://www.nytimes.com/2011/11/02/us/chairwoman-of-arizona-redistricting-commission-ousted.html> [<https://perma.cc/V4E6-LD64>].

136. *Id.*

137. *Id.*

138. *Mathis v. Brewer*, 229 Ariz. 347 (Ariz. 2011).

139. *Id.*

140. ARIZ. CONST. art. IV, pt. 2, § 1(18).

141. *Id.*

142. *Id.* at § 1(19).

143. *Arizona Department of Administration*, AZ.GOV (Sept. 8, 2021), https://azlibrary.gov/sla/agency_histories/arizona-department-administration-adoa [<https://perma.cc/38HH-GGFY>].

144. ARIZ. CONST. art. IV, pt. 2, §§ 1(12), (14).

145. *Id.* § 1(16).

146. *Id.*

legislature's recommendations), and the plan becomes final upon certification to the Secretary of State.¹⁴⁷

Using the model of "degrees of separation" from LCOI developed by Cain, the Arizona Independent Redistricting Commission falls into the "fourth degree of separation," and indeed serves as Cain's prime example.¹⁴⁸ Specifically, the Arizona system "gives the state Commission on Appellate Court Appointments the job of creating a pool of potential citizen commissioners that the state legislature must choose from and gives its citizen commission autonomous power."¹⁴⁹ This format allows for greater accountability than the California or Michigan systems because the "legislative leaders . . . make citizen appointments from a pool chosen by a politically balanced body."¹⁵⁰ In Arizona, the legislature gets three primary opportunities to influence the redistricting process: first, when legislators confirm the Governor's appointments to the ACACA; second, when legislative leaders select the members of the AIRC from a pre-screened pool of nominees; and third, when they offer feedback on the proposed redistricting plan. They also have the opportunity to remove a member of the commission "for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office,"¹⁵¹ but the Governor must initiate such removal and those powers have been substantially narrowed by the 2011 litigation.

The AIRC was challenged by the state legislature in a landmark case that was eventually decided by the United States Supreme Court.¹⁵² The legislature claimed that the commission violated the Elections Clause of the United States Constitution because it removed authority over redistricting from the legislature, where it properly belonged, and placed it in an independent commission.¹⁵³ In an opinion by Justice Ginsburg, the Court affirmed the constitutionality of Arizona's redistricting scheme by holding that the word "Legislature" in the Elections Clause of the United States Constitution encompasses the power of the people to make laws for themselves, because all lawmaking authority possessed by the state legislature flows originally from a grant by the people.¹⁵⁴ This case drew a vigorous dissent from four Justices, authored by Chief Justice Roberts, which concluded that the term "Legislature" in the Elections Clause unambiguously refers to a representative body as "confirmed by other provisions of the Constitution that use the same term in the same way." The dissenters continued: "When seeking to discern the meaning of a word in the Constitution, there is no better dictionary

147. *Id.* §§ 1(12), (16), (17).

148. Cain, *supra* note 28, at 1818–19.

149. *Id.*

150. *Id.* at 1818.

151. ARIZ. CONST. art. IV, pt. 2, § 1(10).

152. *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015).

153. *Id.* at 792–93.

154. *Id.* at 813 ("The history and purpose of the Clause weigh heavily against [precluding the existence of a commission], as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.")

than the rest of the Constitution itself.”¹⁵⁵ This landmark case now serves as the basis for the creation of Independent Redistricting Commissions through ballot initiatives and is one reason for the recent increase in the creation of state commissions.

4. New Jersey

New Jersey possesses a Politician Commission, which falls somewhere in the middle of the accountability spectrum. In anticipation of impending Republican control over both the New Jersey Senate and the Assembly after the elections in 1991,¹⁵⁶ and because reapportionment after the 1990 census resulted in New Jersey losing one congressional seat,¹⁵⁷ the lame-duck Democratic legislature adopted a statute creating the New Jersey Redistricting Commission (“NJRC”).¹⁵⁸ The NJRC was a thirteen-member temporary bipartisan body tasked with reconfiguring congressional districts for the 1990s.¹⁵⁹ The NJRC certified the establishment of congressional districts pursuant to a majority vote of its members.¹⁶⁰ If a majority could not agree on one plan, the NJRC submitted the two plans receiving the greatest number of votes—provided each received no fewer than five votes—to the New Jersey Supreme Court, which would then select a plan.¹⁶¹ After completing its redistricting assignment, the temporary commission was set to expire on January 1, 2001, thereafter transferring responsibility for congressional redistricting back to the state legislature.¹⁶²

With this reversion in mind, “the legislature proposed a constitutional amendment to create a permanent bipartisan redistricting commission for future congressional redistricting after each decennial census.”¹⁶³ The proposed amendment was approved by voters during the general election held on November 7, 1995.¹⁶⁴ The now-permanent NJRC is modeled after the original temporary commission with some minor changes.¹⁶⁵

155. *Id.* at 829.

156. ERNEST REOCK, JR., REDISTRICTING NEW JERSEY AFTER THE CENSUS OF 2000, at 9 (Ctr. for Gov’t Servs. Rutgers Univ. 1998) (footnote omitted).

157. Donald Scarinci & Nomi Lowy, *Congressional Redistricting in New Jersey*, 32 SETON HALL L. REV. 821, 825 (2003).

158. 1991 N.J. LAWS 2668.

159. Scarinci & Lowy, *supra* note 157, at 825–26; DONALD E. STOKES, LEGISLATIVE REDISTRICTING BY THE NEW JERSEY PLAN: A REPORT FOR THE FUND FOR NEW JERSEY 28 (1993).

160. 1991 N.J. LAWS 2670–71.

161. *Id.*

162. Scarinci & Lowy, *supra* note 157, at 826–27; *see also Party Control of New Jersey State Government*, BALLOTEDIA, https://ballotpedia.org/Party_control_of_New_Jersey_state_government [<https://perma.cc/V553-S3QA>].

163. Scarinci & Lowy, *supra* note 157, at 827.

164. *Id.*

165. *Id.*

The NJRC constitutes a hybrid Politician Commission,¹⁶⁶ whereby legislative leaders are given substantial control over the initial selection of commission members. The majority and minority leaders in each chamber select two members each, for a total of eight, subject to certain qualifications.¹⁶⁷ The chairs of New Jersey's two major political parties also select two commission members each, bringing the total to twelve.¹⁶⁸ These twelve selected members then elect a thirteenth member as chair.¹⁶⁹ In order to serve as the NJRC chair, a person must have been a New Jersey resident for the preceding five years and cannot be a member of either major party.¹⁷⁰ No NJRC member may work in the United States Congress.¹⁷¹ Commission membership must reflect the "geographic, ethnic and racial diversity" of the state.¹⁷² As far as funding is concerned, the legislature is constitutionally *obligated* to "appropriate the funds necessary for the efficient operation" of the NJRC.¹⁷³

New Jersey law does not outline any procedure for the removal of NJRC members. However, vacancies are filled within five days by the individual who originally appointed the departing member.¹⁷⁴ In the event of a departing chair, the remaining commission members have five days to name a replacement.¹⁷⁵ If they are unable to reach an agreement in time, the New Jersey Supreme Court appoints a replacement.¹⁷⁶

Beyond the legislature's initial selection of NJRC members, the legislature has no opportunity to affect the outcome of the commission's deliberations. Draft congressional redistricting plans developed by the NJRC need only be approved by a simple majority (seven) of the members. The NJRC then submits the plan to the Secretary of State.¹⁷⁷ In the event the NJRC fails to approve a final plan by majority vote, the NJRC submits the two plans with the highest number of votes to the New Jersey Supreme Court, which chooses "whichever of the two plans . . . conforms most closely to the requirements of the Constitution and laws of the United States."¹⁷⁸ The New Jersey Supreme Court is also granted original jurisdiction over any challenge to NJRC appointments or to the final plan it

166. New Jersey has a similarly structured New Jersey Reapportionment Commission, consisting of five members from each party and an eleventh member chosen by the Chief Justice of the New Jersey Supreme Court. The New Jersey Constitution was recently amended to provide for an initial appointment of the eleventh member, rather than delaying that appointment until a deadlock by the partisan commissioners.

167. N.J. CONST., art. II, § 2, ¶ 1(b)(1)–(4).

168. *Id.* ¶ 1(b)(5).

169. *Id.* ¶ 1(c).

170. *Id.*

171. *Id.* ¶ 1(a).

172. *Id.*

173. *Id.* ¶ 6.

174. *Id.* ¶ 1(d).

175. *Id.*

176. *Id.*

177. *Id.* ¶ 3.

178. *Id.*

produces.¹⁷⁹ Beyond initial member selection, the legislature has no additional opportunities to impact the redistricting process, regardless of whether the commission reaches an agreement or the New Jersey Supreme Court must step in.

Using the “degrees of separation” from legislative conflict-of-interest model developed by Cain, the NJRC constitutes the “third degree of separation.” This system still falls on the less accountable side of the spectrum but is more accountable than those in California, Michigan, and Arizona because it allows legislative leaders to appoint commission members without pre-screening from another body. But, as noted above, the legislature has no further role in developing a redistricting plan once the commission is organized. In short, as a Politician Commission, the NJRC falls closer to the middle of the accountability spectrum because legislative leaders may select commission members while not directly controlling redistricting outcomes. However, the NJRC still leaves much to be desired in developing a truly accountable redistricting commission.

The NJRC’s 2021 map selection has already stirred legal trouble and raised allegations of impropriety, which the New Jersey Supreme Court is examining. Specifically, the NJRC’s Chair reported that both the Republican and Democrat delegations “adequately applied [the proper] standards to their map,” but that, “[i]n the end, [he] decided to vote for the Democratic map simply because the last redistricting map was drawn by the Republicans.”¹⁸⁰ New Jersey Republicans have asked the New Jersey Supreme Court to affirm the logic of the Chair—who also happened to be the tiebreaking vote on the NJRC—or to order him to go back and reconsider the decision.¹⁸¹

5. Washington

Like New Jersey’s, Washington’s commission is a Politician Commission that falls in the middle of the accountability spectrum. On November 8, 1983, Washington state passed the 74th amendment to its constitution via Senate Joint Resolution 103, establishing the Washington Redistricting Commission (“WRC”), a hybrid Politician Commission. The WRC is charged with redrawing congressional and legislative districts in the state after each census.¹⁸² The WRC, like the NJRC, falls closer to the middle of the accountability spectrum, but still remains in many respects unaccountable. Meanwhile, Washington’s legislature is excluded from meaningfully participating in the redistricting process.

The WRC consists of four voting members with a fifth member serving as a non-voting chair.¹⁸³ Legislative leaders are given substantial control over the

179. *Id.* ¶ 7.

180. David Wildstein, *Republicans Ask Top Court to Affirm Wallace’s Logic on Congressional Map, or Tell Him to Look at it Again*, N.J. GLOBE (Dec. 30, 2021), <https://newjerseyglobe.com/fr/republicans-as-top-court-to-affirm-wallaces-logic-on-congressional-map-or-tell-him-to-look-at-it-again/> [https://perma.cc/76KG-CSU8].

181. *Id.*

182. REV. CODE WASH. § 44.05.030.

183. *Id.*

initial selection of members, with the majority and minority leaders in each chamber selecting one member, each subject to certain qualifications.¹⁸⁴ The selected members then elect a fifth member as a non-voting chair.¹⁸⁵ WRC members must be registered voters and cannot have worked as a lobbyist within the prior year or as an elected official within the prior two years.¹⁸⁶ They also cannot donate to or participate in any political campaign while serving and are subsequently barred for two years from running for any office for which they have participated in shaping the district lines.¹⁸⁷ While the WRC is considered a Politician Commission because legislative leaders select commission members, the restrictions on who may be selected as a commissioner limit the legislative leaders' discretion in making this decision.

WRC vacancies must be filled within fifteen days by the individual who originally appointed the departing member.¹⁸⁸ However, there appears to be no procedure for removal of WRC members.

WRC funding is primarily accomplished by the legislature, which is constitutionally *obligated* to provide "appropriate funds to enable the commission to carry out its duties."¹⁸⁹ However, the chief election officer, treasurer, and attorney general are also tasked with ensuring that the WRC has adequate resources to operate effectively.¹⁹⁰

After initial membership selection, the Washington legislature has a single additional opportunity to impact the WRC's proposals. Draft plans developed by the WRC must be approved by a simple majority of the voting members (i.e., three) before November 15 of any year ending in one, after which the plan is submitted to the legislature.¹⁹¹ The legislature then has a 30-day window to amend the WRC's proposed plan, but it must do so by a two-thirds supermajority in each chamber.¹⁹² The legislature's ability to amend a redistricting plan is fairly limited, however, and a legislative amendment cannot alter the population of any district by more than two percent.¹⁹³

If the WRC fails to approve a plan by the statutory deadline, the Washington Supreme Court must adopt a plan by April 30 of any year ending in two.¹⁹⁴ That Court is also granted original jurisdiction over any citizen challenge to the WRC's final plan.¹⁹⁵

184. *Id.* § 44.05.030(1).

185. *Id.* § 44.05.030(3).

186. *Id.* § 44.05.050.

187. *Id.* § 44.05.060.

188. *Id.* § 44.05.030(3).

189. REV. CODE WASH. § 44.05.070.

190. *Id.*

191. *Id.* § 44.05.100(1).

192. *Id.* § 44.05.100(2).

193. *Id.*

194. *Id.* § 44.05.100(4).

195. *Id.* § 44.05.130.

Using the “degrees of separation” from legislative conflict-of-interest model developed by Cain,¹⁹⁶ the WRC falls into the “third degree of separation.” While it still falls on the less accountable side of the spectrum, the Washington system is more accountable than those in California, Michigan, or Arizona because it allows legislative leaders to appoint commission members without any pre-screening by another body.¹⁹⁷ More importantly, in Washington, the legislature may offer input, albeit limited, on any redistricting map. Nonetheless, Washington should be applauded for providing some opportunity for its legislature to enforce public accountability over the commission.

Like New Jersey, the Washington Redistricting Commission, as a Politician Commission, falls in the middle of the accountability spectrum. It permits legislative leaders to choose commission members and gives the legislature some say in the redistricting map if it can muster supermajority support among legislators. While this power is quite limited, giving an elected body that is accountable to voters a check on the commission’s redistricting authority is a boost in accountability and a limit on the administrative state.

Like some of the other less accountable redistricting commissions discussed above, the WRC has been criticized as lacking transparency and even failing to meet certain deadlines during the 2021 redistricting cycle.¹⁹⁸ The WRC released its maps only after holding secret negotiations and allowing the final deadline to pass.¹⁹⁹ The Washington Supreme Court eventually had to take over the redistricting process, but not before ordering the WRC Chair to file a sworn declaration outlining in detail the exact timeline of the secret negotiations.²⁰⁰ These events perfectly highlight the WRC’s lack of accountability.

B. Accountable Redistricting Commissions

While there are many examples of redistricting commissions that lack accountability, there are a number that, according to the metrics discussed in this article, possess greater public accountability. These more accountable redistricting commissions tend to be non-primary redistricting commissions, such as backup commissions and advisory commissions, as well as Politician Commissions in which elected officials serve. Virginia, Arkansas, Pennsylvania, Mississippi, Oklahoma, Iowa, and Rhode Island all feature examples of such redistricting commissions.

196. Cain, *supra* note 28, at 1817–19.

197. *Id.*

198. Daniel Walters, *11 Reasons the Washington State Redistricting Commission Turned into a Deadline-Botching Fiasco*, INLANDER (Nov. 19, 2021), <https://www.inlander.com/spokane/11-reasons-the-washington-state-redistricting-commission-turned-into-a-deadline-botching-fiasco/Content?oid=22737920> [https://perma.cc/XYS2-LA7T].

199. *Id.*

200. *Id.*

1. Virginia

On November 3, 2020, following a proposal by the Virginia General Assembly, Virginia residents voted to amend the state's constitution to authorize the establishment of the Virginia Redistricting Commission ("VRC").²⁰¹ The VRC was established for the sole purpose of developing maps for Virginia's state legislative districts and districts for the United States House of Representatives. Prior to the establishment of the VRC, the state accomplished redistricting through the regular state legislative process. With the 2020 change to Virginia's Constitution, the Commission will now draw the maps for the General Assembly to approve. The VRC therefore constitutes an Advisory Commission—except when the Commission fails and the Virginia Supreme Court is tasked with the responsibility of map-drawing, as it was in 2021.

The VRC is composed of sixteen commissioners, including eight legislative commissioners and eight citizen commissioners.²⁰² Two commissioners must be members of the state Senate, affiliated with the political party having the highest number of members in the Senate.²⁰³ The President pro tempore of the Senate appoints these members. Two commissioners must be members of the Senate, affiliated with the political party with the next highest number of members in the Senate. They must be appointed by the leader of that political party.²⁰⁴ Two commissioners must be members of the House of Delegates who are affiliated with the majority political party in the House of Delegates. The Speaker of the House of Delegates appoints these commissioners.²⁰⁵ Two commissioners must be members of the House of Delegates, affiliated with the political party having the next highest number of members in the House of Delegates. They are appointed by the leader of that political party.²⁰⁶ Finally, the Redistricting Commission Selection Committee selects eight citizens to serve as commissioners.²⁰⁷ No appointing authority may appoint him or herself to serve as a commissioner.²⁰⁸

There are several eligibility requirements for citizen commissioners. To be eligible, a person needs to have been a resident and registered voter in Virginia for the three years immediately preceding the application period.²⁰⁹ Potential

201. Graham Moomaw, *Virginia Democratic Party Urges Voters to Defeat Redistricting Reform Amendment*, VA. MERCURY (June 24, 2020), <https://www.virginiamercury.com/2020/06/24/virginia-democratic-party-urges-voters-to-defeat-redistricting-reform-amendment/> [https://perma.cc/N3SN-XJU8]. Despite endorsements from the Virginia AARP and ACLU, the creation of the VRC was opposed by the Virginia Democratic Party and some elected Democrats because they held majorities in the legislature and the governorship at the time.

202. VA. CODE ANN. § 30-392 (2021).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* § 30-394.

commissioners must have voted in at least two of the previous three general elections.²¹⁰ Further,

No person shall be eligible for service on the Commission who: 1. Holds, has held, or has sought partisan public office or political party office; 2. Is employed by or has been employed by a member of the Congress of the United States or of the General Assembly or is employed directly by or has been employed directly by the United States Congress or by the General Assembly; 3. Is employed by or has been employed by any federal, state, or local campaign; 4. Is employed by or has been employed by any political party or is a member of a political party central committee; 5. Is a lobbyist . . . or has been such a lobbyist or a lobbyist's principal in the previous five years; or 6. Is a parent, spouse, child, sibling, parent-in-law, child-in-law, or sibling-in-law of a person described in subdivisions 1 through 5, or is a cohabitating member of a household with such a person.²¹¹

There is no set procedure for removing commissioners. Vacancies of legislative commissioners are filled in the same manner as the original appointment. Citizen commissioner vacancies are filled by the VRC selecting a replacement from a list submitted by the Division of Legislative Services, and the replacement receiving an affirmative vote from the majority of the commissioners, including at least one commissioner representing or affiliated with each political party.²¹²

All commissioners on the VRC are compensated for their work. Legislative commissioners are compensated in the same manner they are compensated for their other legislative duties.²¹³ Citizen commissioners are compensated at a daily rate of \$50.²¹⁴ Commissioners are reimbursed expenses incurred in the performance of their duties and these payments come from existing appropriations to the Commission.²¹⁵

By statute, all meetings and records of the VRC are subject to the Virginia Freedom of Information Act,²¹⁶ with limited exceptions.²¹⁷ All records and documents of the VRC or any individual or group performing delegated functions or advising the VRC, including internal communications and communications from outside parties, is considered public information.²¹⁸ The Chairs of the VRC also must keep the Senate President Pro Tempore, the Senate Minority Leader, the Speaker of the House of Delegates, the House Minority Leader, and the Governor informed about the timing of availability of Census data as it relates to the

210. *Id.*

211. *Id.*

212. *Id.* § 30-392.

213. *Id.*

214. *Id.* § 2.2-2813.

215. *Id.* § 30-392.

216. *Id.*

217. *Id.* §§ 2.2-3700.

218. *Id.* § 30-392.

tabulation of the population for reapportionment purposes and options for redistricting and its impact on elections for the House of Delegates.²¹⁹

The VRC must submit plans for legislative districts to the General Assembly no later than forty-five days following the receipt of census data.²²⁰ To be submitted as a proposed state senate plan, a plan must receive affirmative votes from at least six of the eight legislative commissioners, including at least three of the four legislative commissioners who are members of the Senate, and at least six of the eight citizen commissioners.²²¹ To be submitted as a proposed House of Delegates plan, the plan must receive affirmative votes from at least six of the eight legislative commissioners, including at least three of the four legislative commissioners who are members of the House of Delegates, and at least six of the eight citizen commissioners.²²² The VRC must submit to the General Assembly plans for districts of the United States House of Representatives no later than sixty days following the receipt of census data or by the first day of July of that year, whichever occurs first.²²³ To be submitted as a proposed congressional plan, a plan must receive affirmative votes from at least six of the eight legislative commissioners and at least six of the eight citizen commissioners.²²⁴ If the Commission fails to submit a plan for districts within fourteen days after a respective deadline, the Supreme Court of Virginia will draw the maps.²²⁵ If the Commission submits a plan to the General Assembly, the General Assembly has three chances to vote on the plan.²²⁶ If the General Assembly fails to adopt the plan, the Supreme Court of Virginia draws the districts. The Supreme Court comprises seven judges appointed by the General Assembly.²²⁷

Cain's article predates the VRC's creation in 2020, but using his model, the VRC falls somewhere between the first and third degree of LCOI separation as it is fairly insulated from legislative control. Despite this, Virginia's redistricting system is very accountable. The Legislature has a number of opportunities to select commissioners, serve as commissioners, and then approve or disapprove of maps. These opportunities for outside participation include backup redistricting by the Supreme Court of Virginia that—while not elected—is appointed by the General Assembly, which is elected by the public.

2. Arkansas

The Arkansas Board of Apportionment (“ABA”)—the first primary redistricting commission in the country—is only responsible for state legislative

219. *Id.*

220. *Id.* § 30-397.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

redistricting, while the legislature maintains authority over congressional redistricting.²²⁸ State legislators do not serve on the ABA; instead, the board is populated by the Governor, Secretary of State, and Attorney General,²²⁹ making the ABA a Politician Commission, though only members of the executive branch serve on the board.

The Arkansas state constitution does not outline any procedures for removing ABA members nor for appointing replacement members, likely because only the Governor, Secretary of State, and Attorney General are constitutionally permitted to serve on the board.²³⁰ Furthermore, there are no provisions concerning commission funding, presumably because the three members are obligated to perform this additional role in conjunction with their other constitutional duties.

The ABA can approve a final redistricting plan with a majority vote of two members, and the plan becomes effective thirty days after it is filed with the Secretary of State “unless proceedings for revision [are] instituted in the Supreme Court.”²³¹ The Arkansas Supreme Court is the only institution granted authority to reject a final plan.²³² The Court has original jurisdiction within the thirty days after the filing of a plan to compel the ABA to perform its assigned duties or to revise a submitted plan for arbitrariness or abuse of discretion.²³³ However, the Arkansas Supreme Court’s power cannot be invoked without a challenge from “any citizens [or] taxpayers” to the finished plan.²³⁴ In Arkansas’s case, its Supreme Court is an elected non-partisan body.²³⁵

Though the Arkansas state legislature does not exercise any influence over the final ABA plans, the ABA is not completely unaccountable. All three members are statewide elected officials, which means they are accountable to the statewide electorate at the next election. Further, the fact that the Arkansas Supreme Court is an elected body also provides some public accountability.

Using Cain’s model of “degrees of separation” from legislative conflict-of-interest,²³⁶ the ABA constitutes the “second degree of separation.” This system exhibits strong accountability features because the ABA consists solely of elected officials, though it fails to invest full redistricting authority in the legislature.²³⁷ Nevertheless, the ABA suffers from some accountability deficiencies in that all of its members are from the same branch of government—Arkansas’s executive branch. Still, in terms of accountability, the system is a significant improvement compared with the redistricting commissions in Michigan, California, Arizona, New Jersey, and Washington discussed *supra*.

228. ARK. CONST. art. 8, § 1–3.

229. ARK. CONST. art. 8, § 1.

230. *Id.*

231. ARK. CONST. art. 8, § 4.

232. *See* ARK. CONST. art. 8, § 5.

233. *Id.*

234. *Id.*

235. ARK. CONST. amend. 80, § 18(A).

236. Cain, *supra* note 28, at 1817–18.

237. *See id.* at 1818.

3. Pennsylvania

Established in 1968, the Pennsylvania Legislative Reapportionment Commission (“PLRC”), holds the statutory authority to draw Pennsylvania’s legislative districts, while the legislature retains control over congressional redistricting.²³⁸ The PLRC is a pure Politician Commission. The legislative leaders in each chamber (or deputies appointed by them) hold four seats on the PLRC.²³⁹ After their certification, members elect a fifth member to serve as chair,²⁴⁰ who must be a Pennsylvania resident who does not hold federal, state, or local office.²⁴¹ If the PLRC members fail to elect a chair by the constitutional deadline, the Pennsylvania Supreme Court appoints one by majority vote.²⁴²

Because PLRC membership is set by statute, Pennsylvania does not outline any procedure for the removal of commission members. However, any PLRC vacancy on the Commission must be filled within fifteen days “in the same manner in which such position was originally filled.”²⁴³

As far as funding is concerned, the legislature is constitutionally *obligated* to “appropriate sufficient funds for the compensation and expenses” of the PLRC, but unlike some other states, Pennsylvania’s constitution does not stipulate any particular compensation rate for commission members.²⁴⁴ Because four of the five commission members are state legislators, legislative leadership exercises a powerful role over the final plan produced by the PLRC.

The PLRC is required to file a preliminary plan with the state elections officer within ninety days of the plan’s certification by all five commission members.²⁴⁵ The PLRC then has a thirty-day window to make changes to their plan. The full legislature, however, has no opportunity to amend it.²⁴⁶ Members of the public can also submit grievances regarding the proposed plan during the same thirty-day window.²⁴⁷ If no complaints are filed during this timeframe, or if complaints are filed and acted upon within an additional thirty days, the PLRC’s plan automatically becomes law.²⁴⁸

Individuals may file appeals regarding the final redistricting plan directly to the Pennsylvania Supreme Court.²⁴⁹ If the appellant successfully establishes that the

238. PA. CONST. art. II, § 17(a). However, in *League of Women Voters v. Commonwealth*, 644 Pa. 287, 289 (2018), the Pennsylvania Supreme Court substantially curtailed the legislature’s freedom to draw under the Pennsylvania constitution. The Court essentially declared that the provisions of the state constitution which expressly apply to the state legislative mapping requirements for the commission are also applicable to the congressional line drawing by the legislature.

239. PA. CONST. art. II, § 17(b).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* § 17(g).

245. *Id.* § 17(c).

246. *See id.*

247. *Id.*

248. *Id.*

249. *Id.* § 17(d).

final plan is contrary to law, the Court has the power to order the PLRC to draw lines in a manner consistent with the order.²⁵⁰ The seven Pennsylvania Supreme Court justices are elected to ten-year terms and are permitted to run on partisan lines.²⁵¹

Using Cain’s “degrees of separation” from legislative conflict-of-interest model,²⁵² the PLRC constitutes the “first degree of separation.” This model is one of the most accountable—short of investing full redistricting authority in the legislature—because legislative leaders constitute most commission votes and their power is only partially “diluted” by the presence of the fifth member.²⁵³ Therefore, Pennsylvania’s commission provides an example of one of the most accountable types of primary redistricting committees outside of full legislative control and contrasts sharply with less accountable commissions, such as those adopted by Michigan, California, Arizona, New Jersey, and Washington.

4. Mississippi

Mississippi possesses a backup redistricting commission. Mississippi’s legislature draws the state legislative lines and passes them as a joint resolution not subject to gubernatorial veto.²⁵⁴ If the legislature fails to pass a redistricting plan, Mississippi’s backup redistricting commission, which was established in 1977, drafts the plan.²⁵⁵ Any plan adopted by the Mississippi legislature must accord with “the Constitution of the state and of the United States” and must be passed “by majority vote of all members of each house.”²⁵⁶ If the legislature fails to agree on a map at their regular session, they are given a second opportunity; the Governor must reconvene the legislature within thirty days, during which time “no other business shall be transacted.”²⁵⁷ The special session cannot last longer than thirty days.²⁵⁸ If the legislature once again fails to adopt a redistricting plan by joint resolution, only then is the backup redistricting commission constituted.²⁵⁹

Mississippi’s backup redistricting commission consists of five members, all incumbent officials designated by the state constitution.²⁶⁰ The Chief Justice of the

250. *Id.*

251. But, these terms can be reduced by impeachment. *See, e.g.,* Patrick Cloonan, *Dush Introduces Legislation to Impeach Supreme Court Justices*, IND. GAZETTE (Mar. 20, 2018), https://www.indianagazette.com/news/dush-introduces-legislation-to-impeach-supreme-court-justices/article_cdc53c90-2c57-11e8-bb5c-63516338bb3a.html [https://perma.cc/QE86-2CRK].

252. Cain, *supra* note 28, at 1817–18.

253. *Id.* at 1818.

254. MISS. CONST. art. XIII, § 254. Mississippi’s congressional lines are drawn by the legislature, as a regular statute, subject to gubernatorial veto. The Mississippi Legislature retains complete control over congressional redistricting.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

Mississippi Supreme Court serves as Chairman and is accompanied by the Attorney General, the Secretary of State, the Speaker of the Mississippi House, and the President Pro Tempore of the Mississippi Senate as members.²⁶¹ In Mississippi, members of the Supreme Court are all popularly elected from districts defined by the legislature.²⁶² Accordingly, Mississippi's non-primary backup commission consists exclusively of elected officials.

The backup commission is constitutionally required to approve a final redistricting plan within 180 days of the adjournment of the special apportionment session, and their approved plan becomes final when it is filed with the Secretary of State.²⁶³ Although no quorum rule is defined for official action, presumably any plan can be approved by a majority vote of three members. Further, no funding mechanism is outlined, rather the five designated officials perform necessary redistricting duties alongside their other constitutionally defined roles.

Using Cain's "degrees of separation" from legislative conflict-of-interest model,²⁶⁴ Mississippi's redistricting method initially constitutes the "zero degree of separation," followed by the "first degree." The legislature gets the first two opportunities to adopt a redistricting plan—which constitute "zero degree"—and only if they fail twice does the relatively less accountable backup commission take over.²⁶⁵ Nevertheless, Mississippi's backup commission remains more accountable than many other redistricting commissions because it includes both legislative leaders and other statewide elected officials over whom voters can exercise influence. Further, it gives the legislature the opportunity to complete redistricting plans before the commission must step in. Overall, Mississippi's system provides for robust accountability.

5. Oklahoma

Similar to Mississippi's backup commission, the Oklahoma Bipartisan Commission on Legislative Apportionment ("OBCLA"), which was established in 2010, operates as a backup commission for legislative redistricting.

The Oklahoma legislature has the first redistricting opportunity during its first regular session following any decennial census.²⁶⁶ The legislature is constitutionally required to act "within ninety (90) legislative days after . . . convening," and only if it fails to adopt a final plan within that timeframe does the authority to redistrict vest within a backup commission.²⁶⁷ However, unlike Mississippi, the Oklahoma legislature does not get a second opportunity to redistrict in a special session. Once the legislature fails to redistrict, a seven-member Commission is automatically formed, led by the Lieutenant Governor as a

261. *Id.*

262. MISS. CONST. art. VI, § 145.

263. *Id.* art. XIII, § 254.

264. Cain, *supra* note 28, at 1817–18.

265. *See id.*

266. OKLA. CONST. art. V, § 11A.

267. *Id.*

nonvoting chair.²⁶⁸ The Speaker of the Oklahoma House, the President Pro Tempore of the Oklahoma Senate, and the Governor each get to appoint two members apiece to round out the Commission.²⁶⁹ The only qualification imposed on these selections is that each official must appoint one individual belonging to each major political party.²⁷⁰ Accordingly, Oklahoma's backup commission constitutes a non-primary backup commission, which is also a Politician Commission. No funding mechanisms or provisions for removal of members are defined in the state constitution.

A simple majority of the voting members of the commission (at least four) must adopt a final commission plan and file it with the Secretary of State.²⁷¹ Registered voters then have a sixty-day window during which they can challenge any apportionment order of the commission. The Oklahoma Supreme Court is granted exclusive jurisdiction over citizen challenges to redistricting plans by the commission.²⁷² If no challenge is brought within the sixty-day window, the filed plan automatically becomes final.²⁷³ If a citizen challenge is brought, however, the Supreme Court has authority to review the plan for compliance with state and federal law.²⁷⁴ If it identifies a legal flaw, it can "remand the matter to the [OBCLA] with directions to modify . . . to achieve conformity with the provisions of" law.²⁷⁵ Justices of the Oklahoma Supreme Court are themselves politically accountable in some respects. Although justices are initially nominated by the Oklahoma Judicial Nominating Commission and appointed by the Governor,²⁷⁶ after appointment justices serve only until the next general state election.²⁷⁷ They must then face a non-partisan retention election.²⁷⁸ If retained, they begin a six-year term. After their first term, justices must file for direct election by the people of Oklahoma to retain their position.²⁷⁹

Using the Cain's "degrees of separation" from legislative conflict-of-interest model,²⁸⁰ Oklahoma's backup redistricting system constitutes the "zero degree of separation," followed by the "third degree" (and potentially, as described below, even "first degree"). The legislature gets the first opportunity to adopt a redistricting plan (which constitutes the "zero

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* § 11B.

272. *Id.* § 11C.

273. *Id.*

274. *Id.* § 11D.

275. *Id.*

276. OKLA. CONST. art. VII-B, § 3.

277. *Id.*

278. *Id.*

279. *Id.*

280. Cain, *supra* note 28, at 1817–18.

degree”). Only after they have failed does the less accountable OBCLA gain authority to redistrict.²⁸¹

Although less publicly accountable than the legislature, the OBCLA is still relatively more accountable than some other commission formats because the voting members are all appointed by elected officials who themselves are accountable to voters. Furthermore, beyond the requirement for partisan balance, Oklahoma imposes no other qualifications on the individuals who can be chosen to serve. Therefore, the voting OBCLA members could conceivably be composed entirely of incumbent members of the legislature, thereby resulting in the Commission looking less like a “third degree” and more like a “first degree” model in which legislators are given direct influence over outcomes.

6. Iowa

The Iowa redistricting system is unique among bureaucratized models because it does not actually involve an appointed board, but a state agency acting as an advisory commission to the legislature. The Legislative Services Agency (“LSA”), a body of nonpartisan civil servants, is charged with gathering necessary information from the United States Census Bureau in order to draw the maps.²⁸² The LSA is statutorily obligated to adhere to the redistricting standards outlined in statute, but otherwise has broad discretion in crafting redistricting proposals.²⁸³ By April 1 of each year ending in one, the LSA must submit copies of its proposed maps to both chambers of the state legislature for review.²⁸⁴ The legislature is not allowed to make amendments to the proposal at that time, but is merely allowed to approve or reject the submitted plan by a simple majority vote.²⁸⁵ If the plan is rejected, the legislature must explain to the LSA within seven days the reasons why the bill was not approved.²⁸⁶

Afterwards, the LSA has a second opportunity to craft a redistricting plan that meets the approval of the legislature. While still adhering to the statutory redistricting standards, the LSA is required to address the reasons for rejection provided by the legislature.²⁸⁷ A second plan must be transmitted to the legislature within thirty-five days of the first vote, and if the revised bill also fails to muster a majority in both chambers, the legislature must again offer reasons for its rejection.²⁸⁸ The LSA repeats the process described above and must resubmit a third

281. OKLA. CONST. art. V, § 11D.

282. IOWA CODE § 42.2 (2021).

283. *See id.* § 42.4.

284. *Id.* § 42.3(1)(a).

285. *Id.*

286. *Id.*

287. *Id.* § 42.3(2).

288. *Id.*

plan to the legislature within thirty-five days of the second vote.²⁸⁹ On the third review, the legislature may make any amendments it desires to the proposed plan in order to ensure passage by both chambers.²⁹⁰ Hence, if the legislature rejects two plans developed by the LSA (and offers its reasons for doing so), the legislature is effectively allowed to draw their own maps.

Under Cain’s model of “degrees of separation” from legislative conflict-of-interest,²⁹¹ Iowa’s redistricting constitutes the “zero degree of separation”—the most accountable redistricting system—because the power to approve maps ultimately resides in the state legislature.²⁹² Furthermore, if the legislature rejects two proposed maps, the power to redistrict resides in the legislature alone. At that point, the legislature is allowed to amend the maps as they would any other bill, ensuring that the finished product reflects the public’s preferences.

The 2021 redistricting cycle has proven successful for Iowa’s redistricting model.²⁹³

7. Rhode Island

The Rhode Island state legislature first established the Rhode Island Reapportionment Commission (“RIRC”) in 2011 to provide recommendations during the redistricting that followed the 2010 census. The RIRC begins drafting congressional and legislative plans as soon as census data is received; the legislature, however, has the ultimate responsibility for approving any plan.²⁹⁴ Consequently, the RIRC constitutes an advisory commission.

State legislative leadership has total responsibility for appointing the eighteen commission members.²⁹⁵ The Speaker of the Rhode Island House appoints four members of the House and three members of the general public, the President of the Rhode Island Senate appoints four senators and three members of the public, and the minority leaders of each chamber appoint two of their colleagues apiece.²⁹⁶ Hence, a majority of the Commission is composed of legislators. Accordingly, the RIRC constitutes an advisory Politician Commission.

There is no process for removing members, although any vacancy must be filled by the individual who originally appointed the departing member.²⁹⁷ No RIRC member receives compensation for his or her services on the commission (with the exception of travel and other necessary expenses), but members are

289. *Id.* § 42.3(3).

290. *Id.*

291. Cain, *supra* note 28, at 1817–18.

292. *Id.* at 1818.

293. James Q. Lynch, *From Cocktail Napkins to the ‘Gold Standard,’ Iowa Plan for Redistricting Stands Test of Time*, GAZETTE (Nov. 29, 2021), <https://www.thegazette.com/state-government/from-cocktail-napkins-to-the-gold-standard-iowa-plan-for-redistricting-stands-test-of-time/> [<https://perma.cc/ZUV3-JJ68>].

294. 2011 R.I. LAWS ch. 106, § 1(b).

295. *See id.* § 1(a).

296. *See id.*

297. *See id.* § 1(c).

permitted to “spend such . . . funds as may be necessary to accomplish [the Commission’s] purposes” and accept grants in money or services from federal, state, and local agencies.²⁹⁸ No other funding mechanism is defined by law.

The RIRC’s redistricting proposal is only a recommendation and hence non-binding on the legislature, which has the authority to accept or reject the proposal as it sees fit.²⁹⁹

Under Cain’s “degrees of separation” from legislative conflict-of-interest model,³⁰⁰ Rhode Island’s redistricting system ultimately constitutes the “zero degree of separation.”³⁰¹ Under a “zero degree” system, the legislature has the ultimate responsibility for devising a redistricting plan, and thus, can reject the commission’s proposal if the proposal does not suit its preferences.³⁰² The RIRC itself is highly accountable—every member is either a state legislator or appointed by one.³⁰³ But the fact that the commission has no real authority beyond its delegated advisory role moves the Rhode Island system from the “first degree” to “zero.” Functionally, the outcome is identical to that in Iowa, where the legislature receives complete control over the redistricting process if it rejects two plans presented by Iowa’s LSA.

III. PROBLEMS WITH LESS ACCOUNTABLE REDISTRICTING COMMISSIONS

When examining the sample of redistricting commissions discussed above, there is a clear correlation between a commission’s authority and autonomy and its public accountability that results in expansion of the administrative state. That is, the more the commissions are removed from elected officials (which is indeed the very point of those systems’ existence), the less they can be held to account for producing maps that may be detrimental to the populations of their respective states. This results not only in a growing administrative state but also may produce maps that are not “independent” at all. Look no further than the attempts of the Arizona Governor and legislature in 2011 for an example of the problems these kinds of unaccountable redistricting commissions can create.³⁰⁴

Redistricting commissions function for a relatively short amount of time; they are generally made up of part-time or temporary members, and those members generally do not go on to serve on redistricting commissions for multiple cycles. If commissions draw maps in an incoherent, unfair, or worse yet, malicious manner, their memberships are subject to little to no public accountability. By contrast, if legislators draw problematic maps that upset their constituents, they can be voted out of office. Legislative voting records are publicly accessible in all states, and there is ample media coverage of most redistricting debate and

298. *Id.* §§ 1(d), 1(g).

299. *See id.* § 1(b).

300. Cain, *supra* note 28, at 1817–18.

301. *Id.* at 1818.

302. *Id.*

303. 2011 R.I. LAWS ch. 106, § 1(a).

304. *See supra* Section II.A.3.

legislation. Indeed, even people who cannot vote for or against a legislator who supports an unpopular map or opposes a popular one can support that legislator's opponents via donation, volunteerism, or word of mouth.

Scholars have recognized the accountability problems associated with certain types of redistricting commissions. Anthony E. Chavez, for example, notes that legislators are much more accountable for their part in the redistricting process than are redistricting commissions.³⁰⁵ According to Chavez, it is the “elected nature of legislators” that actually makes them better suited to the task of redistricting.³⁰⁶ Chavez continues: “In contrast to legislatively-controlled redistricting, an appointed commission not only empowers less experienced persons to make these tradeoffs, but the commissioners also lack the accountability for their actions that legislators must confront with each election.”³⁰⁷ This problem is exacerbated by the fact that relatively small appointed bodies, such as redistricting commissions, cannot truly be representative of states' diverse populations.³⁰⁸

Michael S. Kang suggests that “[d]irect democracy” offers a “third” option between leaving redistricting “completely to the legislature” and “sequester[ing] redistricting completely from the political process.”³⁰⁹ While an examination of direct democracy in redistricting is beyond the scope of this article, Kang posits that “redistricting, as a fundamental political matter, requires popular participation and a process of democratic debate and compromise to strike the basic value tradeoffs tied up in redistricting[,]” which cannot meaningfully occur with unaccountable redistricting commissions.³¹⁰ Kang correctly identifies that “[b]y seeking objective neutrality and abandoning political solutions to partisan gerrymandering, current reform efforts move in precisely the wrong direction—one that is fundamentally undemocratic and disrespectful to the public's democratic prerogatives. Redistricting is an inherently political question that ultimately requires political answers.”³¹¹ Kang continues:

Political questions deserve, even require, political answers. Redistricting implicates deep questions of politics and democratic values that demand popular involvement—indeed more popular involvement rather than less. The search for neutrality as the solution to gerrymandering tries to avoid, rather than confront and embrace, the larger value questions inherent in redistricting.

305. Chavez, *supra* note 12, at 367–72.

306. *Id.* at 368.

307. *Id.* at 369 (citing Kang, *supra* note 6, at 690).

308. *See id.* at 369, n.345; *see also* Kang, *supra* note 6, at 679.

309. Kang, *supra* note 6, at 669.

310. *Id.*

311. *Id.* at 686. By “political” Kang refers to “the legislative character of an issue that offers no objectively correct answers, but only contestable ones based on judgments of policy and values. The types of decisions inherent in redistricting require tradeoffs among competing democratic principles, each important in its own right. Balancing important values such as representation, electoral competition, and responsiveness is a quintessentially political task which must be handled through public channels.” *Id.*

Turning to apolitical institutions, and away from legislatures and other political venues, seeks to depoliticize what should be put to the people through the democratic process. This is, to put it squarely, offensive to a democracy.³¹²

...

The same [apolitical] virtue of political insulation that ensures courts and independent commissions will not be guided by political motivations also makes them particularly ill-suited in a different sense to the task of redistricting. Their political insulation renders them decidedly unaccountable to the electorate and isolated from popular sentiment. As we remove legislatures and elected officials from the redistricting process, we also remove legitimate democratic bodies from deciding what defining goals ought to replace self-interest in redistricting. We move toward allowing nonpolitical institutions to decide fundamental value questions nearly by fiat without institutional guarantees of popular oversight and input.³¹³

Indeed, the insulation from accountability enjoyed by some redistricting commissions is akin to that enjoyed by federal administrative agencies. But at least administrative agencies are made up of either permanent staff who, if they act contrary to law or policy, risk their jobs, or political appointees who can be removed by the President—who, in turn, is accountable to voters. Further, the Administrative Procedure Act imposes numerous procedural requirements on administrative agencies that promote greater public accessibility and political accountability.³¹⁴ The least accountable redistricting commissions lack this heavy layer of procedural requirements.³¹⁵ Accordingly, it can be said that many redistricting commissions are even more insulated from public accountability than federal administrative agencies.

But to some activists, and to proponents of redistricting commissions, the lack of accountability is a small price to pay for achieving supposedly greater competitiveness and partisan balance. However, redistricting commissions are not as effective at achieving their purported goals as reformers often claim,³¹⁶ primarily because “there are no nonpartisan commissions in the United States Most commissions are bipartisan, but the results of the commission process in some states may look to have a partisan cast” due to the manner in which negotiations between members play out in practice.³¹⁷ Requirements of the Voting Rights Act

312. *Id.* at 690 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980) (observing that “substantive decisions are generally to be made democratically in our society”).

313. *Id.*; see also Kang, *supra* note 6, at 690–96.

314. See Kang, *supra* note 6, at 690 (citing Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689 (2000); Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975)).

315. See *supra* Section II.

316. See generally Miller & Grofman, *supra* note 37; Chavez, *supra* note 12, at 368–69.

317. Miller & Grofman, *supra* note 37, at 644–45.

and other federal laws force commissions to draw noncompetitive districts.³¹⁸ Many commissions are not even statutorily required to draw “competitive” districts.³¹⁹ Geographic sorting only adds to the difficulty of drawing competitive districts that also adhere to traditional districting criteria.³²⁰ Further, the inclusion of “neutral” or “independent” tiebreakers does not guarantee an independent outcome because while “it is possible, in theory, for an agreement to be reached . . . that did not include the tiebreaker, in practice this never occurs, and usually the tiebreaker ends up in agreement with a plan proposed by just one of the two parties,” thereby creating partisan controversy equal to or greater than a legislature-controlled process.³²¹ Scholars have found “only limited evidence that commissions in the western states are better than legislatures or courts in the region in terms of respecting the boundaries of political subdivisions,” and identified “no uniform relationship between the structure of the state redistricting authority and the average compactness of the districts drawn.”³²² In sum, redistricting commissions often do not act neutrally, increase electoral competitiveness, or respect traditional districting criteria any more than their legislative counterparts. Accordingly, the tradeoff between redistricting commissions, especially those particularly lacking in accountability, and the legislative process must be viewed with these limitations in mind.

IV. HOW CAN REDISTRICTING COMMISSIONS BE MORE ACCOUNTABLE?

Given recent trends, and the United States Supreme Court’s decision in *Rucho*, redistricting commissions are clearly here to stay, and will likely expand into other states in the near future. However, the nature and structure of these commissions will determine whether accountability will be preserved and the administrative state will be reined in. Therefore, it is essential for policymakers and voters in states considering adopting redistricting commissions to ensure that the most publicly accountable commission be created if one must be created at all.

After examining the various state redistricting commissions, it is clear that non-primary commissions offer the most accountability and transparency. They permit the public to view the full scope of legislative deliberations over redistricting, including the alternatives, reasoning, and public comment opportunities. This allows the public access to the process and also the opportunity to hold their legislators, who are ultimately responsible for adopting redistricting maps, accountable for their actions during the process. As Chavez states, “[a]n independent commission is better suited to *review* a redistricting plan, rather than to *create* it.”³²³

318. Chavez, *supra* note 12, at 367–68.

319. *Id.*

320. *Id.*

321. Miller & Grofman, *supra* note 37, at 648.

322. *Id.* at 659, 662.

323. Chavez, *supra* note 12, at 369 (emphasis added).

Accordingly, states set on adopting a redistricting commission should carefully examine the structure of the commission being proposed or considered. The evaluation of any commission proposal should examine relevant accountability mechanisms and the precise contours of the commission's position in the administrative state. Enacting a commission without considering accountability furthers the rapid expansion of the administrative state in a manner damaging to the fundamental principles of our constitutional republic.