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One Person, One Vote: Gerrymandering and the Independent Commission, A Global Perspective

JAMES RULEY*

In 1863, on the hallowed fields at Gettysburg, Abraham Lincoln encapsulated a core principle of democracy by describing our system as a “government of the people, by the people, [and] for the people.”¹ This definition accurately depicts the ideal of democracy—that supreme power is vested in the citizenry, not in the government itself. Since the American model is based on representative democracy instead of direct democracy,² extreme scrutiny must be placed upon the system of choosing representatives if government is to accurately represent the will of the people.

One of the greatest abuses of a citizen’s voting rights is gerrymandering. While scholars have written extensively advocating the need for restraints on legislative abuses of the redistricting process, little has been written about gerrymandering from an international perspective.³ This Note seeks to bridge that gap. Part I of this Note provides more context on the history and dangers of gerrymandering. Part II examines the state of redistricting commissions within the United States. Part III examines global practices for independent commissions. Finally, this Note concludes by recommending practices that could be implemented in the United States.⁴

I. GERRYMANDERING AND REDISTRICTING: AN OVERVIEW

The boundary lines that define voting districts provide an essential framework in a representative democracy. In the United States, each district elects one individual to serve as its representative in the legislature. The state legislature draws districts based on the results of a national census, conducted every ten years.⁵ Problems arose, however, as states refused to redraw boundary lines in response to changes in the population of each district, resulting in some districts having many more constituents

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1. ABRAHAM LINCOLN, *Address at Gettysburg, Pennsylvania, November 19, 1863*, in SPEECHES AND WRITINGS: 1859–1865, at 536 (Don E. Fehrenbacher ed., 1989) (the text of the Gettysburg Address).

2. BUREAU OF INT’L INFO. PROGRAMS, U.S. DEP’T OF STATE, DEMOCRACY IN BRIEF 5–7, <http://photos.state.gov/libraries/amgov/30145/publications-english/democracy-in-brief.pdf> [<https://perma.cc/H8GU-WYYS>].

3. See, e.g., Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012); Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769 (2013) (looking briefly at global alternatives but mostly focusing on American redistricting solutions); Ryan P. Bates, Note, *Congressional Authority To Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333 (2005).

4. See *infra* Conclusion.

5. U.S. CONST. art I, § 2 (establishing the decennial census).

than other districts.⁶ In *Reynolds v. Sims*, the Supreme Court held that failing to update boundary lines in response to changing population numbers violates the Equal Protection Clause, which guarantees that each person's vote will be counted equally.⁷ This principle has been encapsulated by the phrase "one person, one vote."⁸ In effect, following *Reynolds*, states must draw electoral districts in a way that ensures that a roughly proportional number of citizens are contained in each district.⁹

However, *Reynolds* has done little to counter another problem endemic to the district-drawing process: gerrymandering.¹⁰ The process of gerrymandering involves "dividing political units in ways that deliberately create advantages for incumbents or their political allies, by placing voters based on their predicted behavior at the polls in districts that dilute the vote of some voters and consolidate the votes of others."¹¹

To add some clarity to that definition, imagine four districts, W, X, Y, and Z. Districts W, X, and Y each have nine members from the Pink Party and one member from the Orange Party. District Z has three members from the Pink Party and seven members from the Orange Party. Thus, before redistricting, the Pink Party will have three seats in the legislature and the Orange Party will have one. This is a fair result, since the Pink Party has thirty supporters (or seventy-five percent of the vote) and the Orange Party has ten supporters (or twenty-five percent of the vote). However, because the Pink Party controls the legislature, it could redraw the districting map,

6. The Court found this to be the case in *Reynolds v. Sims*, finding that the Alabama state legislature specifically, and presumptively other states as well, had not properly redistricted for over sixty years. 377 U.S. 533, 568–70 (1964).

7. The Court applied this standard to both the upper house and the lower house in states with bicameral legislatures. *Id.* It is useful to note that the district-drawing process does not apply to those elected to the U.S. Senate, as they are elected by the popular vote of all citizens of a state. For an argument that U.S. Senators should be elected on the basis of state districts like members of the House of Representatives, see Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1 (1996). It is also an interesting practical note that the U.S. Senate, by design, violates the principle of one person, one vote, since California (population 37,254,503) and Wyoming (population 563,736) each have two representatives. *California*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/06> [https://perma.cc/BTS5-L9R8] (2010 census data); *Wyoming*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/56> [https://perma.cc/UB6B-TQ5L] (2010 Census data). This violation of (or exception to) the one-person, one-vote principle is supported by the formulation of the Senate in Article I of the Constitution and by the Seventeenth Amendment. U.S. CONST. art. I, § 3; *id.* amend. XVII.

8. *Reynolds*, 377 U.S. at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)). This principle has also been encapsulated in the word "equipopulous," simply meaning equally populated. See Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1333 n.14 (2005).

9. See, e.g., *Reynolds*, 377 U.S. at 558; *Baker v. Carr*, 369 U.S. 186 (1962) (establishing for the first time the principle of one person, one vote); see also Harvard Law Review Association, *Congressional Redistricting*, 97 HARV. L. REV. 1, 135 (1983).

10. "The term 'gerrymander' is a portmanteau of the last name of Elbridge Gerry, the eighth governor of Massachusetts, and the shape of the electoral map he famously contorted for partisan gain, which included one district shaped like a salamander." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 n.1 (2015).

11. *Gerrymandering*, BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed., 2012).

spreading its supporters more evenly among the four districts so as to gain complete control of the legislature. Thus, the redrawn districting map might have seven or eight Pink Party supporters in each district and only two or three Orange Party supporters. The Pink Party would still only have seventy-five percent of the people supporting it, but it could capture one hundred percent of the legislature.¹²

Political gerrymandering is dangerous for a number of reasons. First, gerrymandering may create districts that are confusing in size and shape, leading to misunderstandings of where constituents are to vote.¹³ Second, gerrymandering encourages elections to be more polarizing; if the legislature gerrymanders districts according to ideology, then politicians are forced to run on platforms that are ideologically similar to the constituents placed in those districts.¹⁴ Finally, the fact that a vast majority of these district elections are predetermined by gerrymanders often removes real voter choice in the election and furthermore is likely to result in voter apathy.¹⁵

Although a plurality of the Supreme Court determined in *Vieth v. Jubelirer* that “[p]artisan gerrymanders . . . [are incompatible] with democratic principles,”¹⁶ the Court has, as of yet, refused to find gerrymandering justiciable.¹⁷ The Court cited the difficulty in finding a workable standard as its reason for refusing to delve into the political thicket surrounding partisan gerrymanders.¹⁸

States have responded to the problems created by gerrymanders in divergent ways, ranging from altering the balance of legislative votes needed to confirm district lines;¹⁹ to requiring judicial oversight of districting lines;²⁰ to creating advisory commissions,²¹ backup commissions,²² politician commissions,²³ and independent

12. This example is based on class notes and personal discussions with Professor David Williams. Unpublished materials on file with the *Indiana Law Journal*. See also Christopher Ingraham, *This Is the Best Explanation of Gerrymandering You Will Ever See*, WASH. POST: WONKBLOG (Mar. 1, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/> [https://perma.cc/Z25W-UVF9].

13. Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 323, 338–39 (2014).

14. *Id.* at 339–40.

15. *Id.* at 340–41.

16. *Ariz. State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (last bracketed alteration in original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)).

17. Justice Kennedy, in a concurrence, failed to find a workable standard but seemed to remain open to the possibility of hearing matters in the future. *Vieth*, 541 U.S. at 306–17 (Kennedy, J., concurring in judgment). Justices Stevens, Souter, Ginsburg, and Breyer dissented. *Id.* at 317–68 (dissenting opinions). While the Court has heard two other cases on the matter in recent years, it has still failed to elucidate a clear standard for hearing cases, although theoretically a standard might exist. *Perry v. Perez*, 132 S. Ct. 934 (2012); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

18. *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring in judgment).

19. See *infra* Part II.A.

20. See *infra* Part II.A.

21. See *infra* Part II.B.

22. See *infra* Part II.B.

23. See *infra* Part II.C.

commissions.²⁴ As this Note will examine in Part II, these commissions have had varying degrees of success in blunting the problems created by partisan gerrymanders.²⁵

II. THE ROLE OF REDISTRICTING COMMISSIONS IN THE UNITED STATES

The vast majority of states have not aggressively combatted the problems presented by gerrymandering.²⁶ In those that have, reforms have occurred in three ways. The first type of reform alters the legislative balance of power, primarily by requiring a supermajority for action, so that the majority party will not dominate the redistricting process.²⁷ The second type of reform creates supplemental commissions to either recommend boundary changes to the legislature or resolve boundary conflicts when the legislature is unable to reach a solution.²⁸ The third type of reform creates a commission to draw boundaries independent of legislative control.²⁹ Many states have adopted a conglomeration of these reforms; so, for instance, some states may have enacted both legislative reforms and a supplemental commission.

A. Legislative Reform

States have employed several different methods of legislative reform to ensure that lines are drawn fairly. The first method, utilized by Connecticut and Maine, requires the legislature to approve redistricting plans by a two-thirds majority vote.³⁰ The primary benefit of this plan is that, since it is incredibly difficult for a party to gain control of two-thirds of the legislature, it becomes much more difficult for one party to draw the district lines in its favor, thereby skewing the results of elections in the majority party's favor.

However, there are two downsides with this approach. First, it requires the legislature to compromise and come to a consensus, often a difficult process that could potentially lead to gridlock.³¹ Second, if one party does manage to gain two-thirds of the legislature, a difficult, but not inconceivable, outcome, then that party would still be able to manipulate the lines. This problem is compounded by the difficulty the legislature already faces fixing bad plans: even if a majority party becomes a legislative minority, the minority party cannot adjust the plan unless it achieves a two-thirds majority. In effect, this almost ensures that if a party has a two-thirds majority,

24. See *infra* Part II.C.

25. See *infra* Part II.

26. See Cain, *supra* note 3, at 1844 (noting that in the vast majority of states, legislatures still control the redistricting process); Justin Levitt, *Who Draws the Lines?*, ALL ABOUT REDISTRICTING (2015), <http://redistricting.ils.edu/who.php> [<https://perma.cc/X755-Z7XQ>].

27. See *infra* Part II.A.

28. See *infra* Part II.B.

29. See *infra* Part II.C.

30. CONN. CONST. art. XXX; ME. REV. STAT. tit. 21-A, § 1206(1) (Supp. 2015).

31. This difficulty in getting these plans approved by a two-thirds majority is one of the primary reasons that many of these states have a backup commission, as discussed below. An additional concern is that legislators often oppose plans because it will make it harder for them to be reelected.

its plan will be nearly impossible to modify until the next census when the lines could be redrawn.

The second method used by states to check legislative districting power grants the state's highest court explicit power to become involved with districting disputes. Some states give the state supreme court the explicit power to review redistricting plans if they are challenged.³² This explicit grant of power is particularly significant in light of the U.S. Supreme Court's struggle to determine whether the issue of gerrymandering is justiciable; while the Supreme Court has been slow to review these cases, several states are encouraging judicial review to ensure that plans are impartial.³³ Other states mandate that the state supreme court create a districting plan if the legislature is unable to reach a consensus.³⁴ While this approach may create questions of judicial economy, it at least provides an alternative to gridlock and provides an incentive for the legislature to formulate a plan. An additional concern is whether granting the judiciary power over redistricting plans will result in a more balanced outcome, particularly if the members of the state supreme court share a political ideology with the state legislators. This could be especially troubling if the bench were ideologically skewed and the justices had life tenure. While there are concerns over the impartiality of the judiciary,³⁵ the judiciary would still perhaps be better suited to this task than legislators who would stand to reap immediate political rewards from their district drawing.

32. These states include Colorado, COLO. CONST. art. V, § 48(e); Connecticut, CONN. CONST. art. XXVI(d); Iowa, IOWA CONST. art. III, § 36; Maine, ME. REV. STAT. ANN. tit. 21-A, § 1206(2)–(3) (Supp. 2015); Florida, FLA. CONST. art. III, § 16(c) (requiring the attorney general to petition the supreme court to enter declaratory judgment as to the validity of the state—but not congressional—redistricting plan); Hawaii, HAW. CONST. art. IV, § 10; Maryland, MD. CONST. art. III, § 5 (enabling review by the state's highest court to review state district lines); North Carolina, N.C. GEN. STAT. § 1-267.1 (West Supp. 2016) (requiring challenges to be heard by a three judge panel composed of judges from different parts of the state); Ohio, OHIO CONST. art. XI, § 9 (allowing state plans to be challenged under the jurisdiction of the state supreme court; if struck down, a new plan may be made by the politician commission), Oklahoma, OKLA. CONST. art. V, § 11C; Oregon, OR. CONST. art. IV, § 6(2); and Vermont, VT. STAT. ANN. tit. 17, § 1909 (2015).

33. See *supra* note 3.

34. These states include Connecticut, CONN. CONST. art. XXVI(d); Maine, ME. REV. STAT. ANN. tit. 21-A, § 1206(2)–(3) (Supp. 2015); Florida, FLA. CONST. art. III, § 16(b) (requiring the attorney general to petition the state supreme court to adopt a plan if the legislature fails to do so); and Missouri, MO. CONST. art. III, §§ 2, 7.

35. A concern here with tenure is that justices who serve for life might consistently pass skewed plans, while the legislature might fluctuate more dramatically due to the short term length. For information about judicial impartiality, see, for example, Debra Lyn Bassett & Rex R. Perschbacher, *Perceptions of Justice: An International Perspective on Judges and Appearances*, 36 *FORDHAM INT'L L.J.* 136 (2013) (emphasizing the need for judicial independence, in addition to the major problem with judicial independence, recusal); Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 *FLA. L. REV.* 493 (2014) (emphasizing the many facets behind our conception of judicial independence).

B. Supplemental Commissions

Several states have adopted supplemental commissions designed to help their legislatures make informed decisions as to how boundary lines should be drawn between districts. These supplemental commissions fall into two major categories: advisory commissions organized to help the legislature make informed redistricting decisions and backup commissions designed to step in and create a redistricting plan if the legislature fails to do so.

Currently, eight states utilize advisory commissions for redistricting commissions.³⁶ While these commissions have no authority to draw lines, their recommendations can have significant weight on the redistricting decisions of the legislature.³⁷ Further, members of these commissions are generally nonlegislators, so in theory they provide objective, apolitical advice on the boundary-drawing process. Yet, advisory commissions only serve as a partial solution to gerrymanders because the

36. In Iowa, the advisory commission is formed from the legislative services agency (LSA). The LSA is composed of nonpartisan members who draft districting plans from criteria clearly delineated by statute. IOWA CODE ANN. § 2A.1 (West 2012). This input comes from a five-member independent commission, two members of which are appointed by the congressional leaders from the majority and minority parties. The final member is chosen by consensus of the four other members. The commission can propose three plans to the legislature. The first two must be approved or rejected without modification; the third plan may be approved with modifications. *Id.* at §§ 42.3, .5, .6. In Maine, the advisory commission is staffed by fifteen members, chosen equally by both parties with the final member chosen by commissioners. ME. CONST. art. IV, pt. 3, § 1-A. Decisions of the commission may be adopted, modified, or ignored by the legislature. ID. § 3; ME. REV. STAT. ANN. tit. 21-A, § 1206. In New York, plans are proposed by a six-member commission, some of whom are political and some of whom are not. N.Y. LEGIS. LAW § 83-m (McKinney, Westlaw through 2016 legislation). The legislature may adopt, modify, or ignore proposals. *Id.* In Ohio, a six-member advisory committee is appointed by the state House and Senate majority leaders; two must be from opposing parties, and two must not be legislators. OHIO REV. CODE ANN. § 103.51 (LexisNexis 2014). The findings of the advisory committee are only used for recommendation purposes. *Id.* In Rhode Island, an eighteen-member commission consisting of legislative and non-legislative members provides assistance in developing districting plans and also “issue[s] an annual report” to state officials. R.I. GEN. LAWS § 17-9.1-31(a) (2016). In Vermont, a seven-member commission is composed of nonlegislative members chosen by the governor, the chief justice, and parties’ state committee chairs. VT. STAT. ANN. tit. 17, § 1904 (2015). The Legislature may adopt, modify, or ignore proposals. *Id.* In Virginia, an eleven-member commission is formed from five members from each major party and one commissioner who is to be not associated with any party. ROBERT F. McDONNELL, OFFICE OF THE GOVERNOR, COMMONWEALTH OF VA., EXEC. ORDER NO. 31, ESTABLISHING THE INDEPENDENT BIPARTISAN ADVISORY COMMISSION ON REDISTRICTING (2011). The legislature may adopt, modify, or ignore proposals. *Id.*

37. *See supra* note 36. The weight varies state to state. A good example of an advisory commission holding substantial weight is Iowa. The commission can present two plans for approval that must receive an up or down vote before a plan may be approved with modifications. Edith Munro, *Gerrymandering? Not in Iowa*, TIMES UNION (Apr. 14, 2011, 12:01 AM), <http://www.timesunion.com/opinion/article/Gerrymandering-Not-in-Iowa-1336319.php> [<https://perma.cc/6UE2-AKSQ>]. The time required to prepare these plans, and the effort required to vote down two of them, seems to provide a good check on arbitrary modifications. *Id.*

legislature can accept or ignore the commission's recommendations, giving it influence only relative to the respect the legislature has for its opinions.

A second type of supplemental commission is the backup commission. These bodies are designed to serve as a failsafe if the legislature is unable to approve a redistricting plan. Backup plans vary greatly from state to state, including using the governor's preferred plan,³⁸ using the secretary of state's preferred plan,³⁹ delegating the authority to specific legislative actors,⁴⁰ delegating the authority to specific non-legislative elected officials,⁴¹ or a mixture of these approaches.⁴² The greatest benefits of an approach that incorporates a backup commission are that these commissions serve both as an incentive for the legislature to reach consensus and as a means of ensuring that the redistricting process does not end in gridlock.

C. Independent Commissions

The final method states have used to combat gerrymanders is the independent commission. States using independent commissions delegate redistricting to a body other than the legislature as a whole. Unlike advisory commissions, these bodies have the power to determine boundary lines, not merely to make suggestions to the legislature. Currently, there are two types of independent commissions: the politician commission and the (truly) independent commission.

Seven states currently use politician commissions to determine state district boundaries, and two of those states also use those commissions to determine federal congressional districts.⁴³ Politician commissions are, in a very real sense, independent—these commissions are composed of elected officials who approve a

38. In Maryland, if the legislature fails to approve a plan, the governor's plan becomes law. MD. CONST. art. III, § 5.

39. In Oregon, if the legislature fails to approve a plan, the secretary of state has the authority to draw district lines. OR. CONST. art. IV, § 6(3)(a).

40. In Connecticut and Illinois, commissioners are chosen by legislative leadership. CONN. CONST. art. XXVI(b); ILL. CONST. art. IV, § 3. Indiana provides a unique twist on this formula. While legislative leadership chooses some candidates, the Governor chooses one additional commissioner. IND. CODE ANN. § 3-3-2-2 (West 2006).

41. In Mississippi, a commission composed of the chief justice, attorney general, secretary of state, and the majority leaders of the House and Senate draws the lines. MISS. CONST. art. XIII, § 254. In Texas, the backup commission is staffed by the lieutenant governor, the Speaker of the House, the attorney general, the comptroller, and the commissioner of the General Land Office. TEX. CONST. art. III, § 28.

42. In Oklahoma, a citizen initiative passed in 2010 created a seven-member backup commission staffed by the lieutenant governor (nonvoting chair), three Republicans, and three Democrats. OKLA. CONST. art. V, § 11A. The governor, state House majority leader, and state Senate majority leader each gets to choose one Republican and one Democrat for the commission. *Id.*

43. These seven states include Arkansas, ARK. CONST. art. 8, § 1 (requiring the governor, secretary of state, and attorney general to serve on the commission); Colorado, COLO. CONST. art. V, § 48 (requiring the appointment of an eleven-member commission chosen by majority and minority leaders, the governor, and the chief justice); Hawaii, HAW. CONST. art. IV, § 2 (requiring a nine-member commission, four members chosen each by majority and minority leaders with the tiebreaker chosen by the eight commissioners; Hawaii's commission draws

redistricting plan completely separate from the legislature. A useful role is served by these commissions because they often seek to balance the political affiliation of commissioners to achieve a more representational result.⁴⁴ However, if improperly constructed, these commissions can fall into the same pitfalls as legislative redistricting due to the political incentives inherently attached to the job.⁴⁵

Six states currently utilize independent commissions, which means that members are not allowed to simultaneously serve in the legislature.⁴⁶ The idea behind these commissions is that since legislators are inherently biased in favor of themselves and their parties, the task of line drawing must be delegated to a neutral body.⁴⁷ Usually, the majority of commissioners are chosen equally by the state political parties, with the deciding vote delegated to a member chosen by the other commissioners or by some other criteria.⁴⁸

lines for state and congressional districts); Missouri, MO. CONST. art. III, §§ 2, 7 (requiring two commissions, appointed respectively by the House and Senate, with some members chosen by the governor); New Jersey, N.J. CONST. art. II, § 2, ¶ 1 (requiring a thirteen-member politician commission for drawing congressional lines; twelve members to be chosen by the majority/minority and party leaders, the deciding member to be chosen by the commissioners); N.J. CONST. art. IV, § 3 (requiring a ten- or eleven-member commission for state districting lines; parties appoint an equal number of members; if they cannot approve a plan, the chief justice appoints a tiebreaker); Ohio, OHIO CONST. art. XI, § 1 (requiring a seven-member politician commission staffed by the governor, state auditor, secretary of state, one appointee from the Speaker of the House, one appointee from the president of the senate, and one commissioner each from the minority leaders in the House and Senate); and Pennsylvania, PA. CONST. art. II, § 17(b) (requiring a five-member commission, one member each chosen by the majority and minority leaders in both the House and Senate, and the final member to be chosen by consensus of the other members).

44. See, e.g., Cain, *supra* note 3, at 1817; Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 1 (2002) (arguing that politician commissions force cooperation among politically motivated members).

45. See, e.g., Cain, *supra* note 3 at 1817; Hirsch, *supra* note 44. Both argue that politician commissions can be contained by good design. However, it is important to note that poor design will lead to the same problems as states that rely solely on the legislature for redistricting.

46. Both Alaska and Montana have commissions, ALASKA CONST. art. VI, § 8; MONT. CONST. art. V, § 14, but these only have an impact on the state level since neither state currently has more than one federal congressional district. Kristin D. Burnett, *Congressional Apportionment: 2010 Census Briefs*, U.S. CENSUS BUREAU (Nov. 2011) <https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> [<https://perma.cc/WT43-QJZQ>]. The other four states are Arizona, ARIZ. CONST. art. IV, pt. 2, § 1(3)–(8); California, CAL. GOV'T CODE § 8252 (West Supp. 2016); Idaho, IDAHO CONST. art. III, § 2(2); and Washington, WASH. CONST. art. II, § 43(2).

47. Cain, *supra* note 3 at 1818–20; Robinson O. Everett, *Redistricting in North Carolina—A Personal Perspective*, 79 N.C. L. Rev. 1301, 1327–31 (2001).

48. This is the case in Arizona, ARIZ. CONST. art. IV, pt. 2, § 1(3)–(8) (requiring the member chosen by political parties to be chosen from a pool picked by appellate judges); Idaho, IDAHO CONST. art. III, § 2(2) (requiring majority/minority leaders and political parties to choose a six-member panel); Montana, MONT. CONST. art. V, § 14 (requiring the members chosen by majority/minority leaders to choose the fifth member); and Washington, WASH. CONST. art. II, § 43(2) (same as Montana). In Alaska, two members are chosen by the governor,

Instituting independent redistricting commissions (IRCs) has been difficult for a number of reasons, but primarily because legislators have little incentive to delegate their own power when keeping it has substantial political benefits.⁴⁹ Thus, the process of institutionalizing IRCs has been largely attempted by ballot initiative,⁵⁰ a practice that has recently been approved by the Supreme Court.⁵¹ There has been much argument over whether IRCs truly achieve the goal of drawing impartial boundary lines.⁵² While the purpose of this Note is not to wade into that argument, it seems that, on sum, IRCs have a greater likelihood of achieving impartial lines than leaving the process entirely up to the legislature.⁵³

III. INDEPENDENT COMMISSIONS: A GLOBAL PERSPECTIVE

Although independent commissions within the United States have undergone scholastic scrutiny,⁵⁴ little research has been done examining global practices for the creation and maintenance of IRCs.⁵⁵ This Note seeks to bridge the gap in current research by examining the practices employed by IRCs around the world. To facilitate the navigation of this large body of research, this Note analyzes global practices based on factors of independence: who chooses the IRCs, what criteria determine how members are chosen, who has the power of removal, and what powers the commissions have.⁵⁶ All of these factors stem from the author's personal research and

one each by the House and Senate presiding officers, and one by the chief justice. ALASKA CONST. art. VI, § 8. Members are to be chosen without regard to party affiliation. *Id.* In California, members are nominated by a panel of state auditors, six commissioners are chosen by the parties, and the other eight are chosen randomly. CAL. GOV'T CODE § 8252.

49. For instance, the IRC in California faced serious opposition before being approved by ballot initiative, in part due to its chief proponent being Governor Schwarzenegger, and in part due to fears as to how it would reshape the legislature. Cain, *supra* note 3, at 1821–24; Nicholas D. Mosich, Note, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. CAL. L. REV. 165 (2005).

50. This was the case in Arizona and California. Cain, *supra* note 3, at 1823, 1830.

51. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court held that the referendum and initiative, while not tools used at the time of the Founding, were consistent with the principle of popular representation and power being vested with the people. 135 S. Ct. 2652, 2672 (2015).

52. See, e.g., Cain, *supra* note 3; Steven F. Huefner, *Don't Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. CONST. L. & PUB. POL'Y 37 (2010); David G. Oedel, Allen K. Lynch, Sean E. Mulholland & Neil T. Edwards, *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 VILL. L. REV. 57 (2009); Bates, *supra* note 3.

53. For the debate, see, for example Cain, *supra* note 3; Huefner, *supra* note 52; Oedel et al., *supra* note 52; , Bates, *supra* note 3.

54. See, e.g., Cain, *supra* note 3; Huefner, *supra* note 52; Oedel et al., *supra* note 52.

55. Only a few articles providing an international perspective have been published. Anthony J. Gaughan, *To End Gerrymandering: The Canadian Model for Reforming the Congressional Redistricting Process in the United States*, 41 CAP. U. L. REV. 999 (2013) (analyzing the benefits of Canada's IRCs); Stephanopoulos, *supra* note 3 (providing an insightful, but summary, analysis of other countries' redistricting commissions);

56. The development of these factors stemmed, in part, from useful talks with Professor David Williams, as well as fellow students Alex Avtgis, Rafael Macia, Brittany Shelmon,

analysis of existing global IRCs. This section will explain alternative practices around the world and provide a brief analysis for the effectiveness of each approach. After looking at how practices work, this Note will analyze whether these practices might be effective for states within the United States to adopt.

The reader should note that these analysis sections contain two levels of analysis. Some systems the author contends are inherently bad because they provide little oversight or protection of minority interests in the districting process. Other practices the author contends are bad for the United States, for a variety of reasons unique to the structure and history of the nation. These assertions stem from the author's success conditions for an independent commission: that the commission should be designed to protect minority parties and should be functionally as impartial as possible.

A. Bodies Choosing the Commission

The first factor impacting the independence of commissions is the method by which commissioners are chosen. Typically, members are chosen in one of five ways: by the legislature, by the executive, by the judiciary, by a combination of multiple branches, or by popular election.

1. Legislative Branch

Commissioners appointed solely by the legislative branch are chosen either in a partisan or multipartisan manner. By allowing commissioners to be chosen in a partisan manner, I mean that a simple majority is all that is required to approve candidates. Thus, the party with control of the legislature can approve whichever candidates it wants to sit on the commission. Currently, only Rwanda and Japan choose commissioners in this manner.⁵⁷

Alternatively, other countries structure commissions in a bipartisan manner, where multiple parties are represented. Countries have tried to build in requirements for bipartisan agreement in three ways. First, as in Venezuela, bipartisan support can be mandated through a statutory (or constitutional) supermajority requirement.⁵⁸ Second, as in Albania, the law can grant majority and minority parties equal seats on the

Ashley Lenderman, and Sam Von Ende. However, the factors and the research to support them are solely the work of the author. Research notes are on file with the author.

57. In Rwanda, the commissioners are put forth to the Senate by the "government," an undefined term within the law. Law No. 31/2005 of 24/12/2005 (Rwanda), <https://repositories.lib.utexas.edu/bitstream/handle/2152/5078/4170.pdf> [https://perma.cc/C4CR-F99E]. The Constitution establishes the Commission in Article 180. CONST. OF RWANDA art. 180. In Japan, the Diet chooses members for a Central Election Management Council, and the Prime Minister formally appoints them. FREE CHOICE FOUND., ELECTION SYSTEM IN JAPAN 5 (2007), <http://www.freechoice.jp/electionsystem.pdf> [https://perma.cc/C25F-WY7W].

58. In Venezuela, individuals must apply or be nominated to be considered by the legislature. The legislature, while sitting in a joint session, chooses members. A two-thirds majority is required for approval. LEY ORGÁNICA DEL SUFRAGIO Y PARTICIPACIÓN POLÍTICA art. 53 (1997), <http://pdba.georgetown.edu/Parties/Venezuela/Leyes/LeySufragio.pdf> [https://perma.cc/SFU6-26QQ].

commission but give the tiebreaker seat to the Speaker of the House.⁵⁹ Finally, as in Azerbaijan, some countries require that a certain number of seats belong to either an independent party⁶⁰ or, as in Mexico, to members deemed to be impartial by both parties.⁶¹

These approaches would likely have varying degrees of success in the United States. First, allowing a simple majority of the legislature to approve commissioners does little to alleviate the fear of the political parties influencing redistricting, since appointees can easily serve as proxies of the political party that appointed them. While this problem may not be as severe in a country that rules the government by party coalitions (because members appointed by different parties within a coalition will sit on the committee), a majority party will likely control the commission due to the incentives within the American voting system for only two parties.⁶²

Requiring a two-thirds vote by commissioners to approve redistricting plans is problematic for two reasons. First, it is likely that this approach would result in legislative gridlock within the commissions due to the difficulty of obtaining a supermajority. Second, even though the process may grant the minority party more seats

59. Obviously, this system would still grant control of the committee to the majority party in the United States. However, this system at least recognizes the need for all parties to be represented on the Commission. This system is used in Albania, where the majority and minority parties elect two members each, and the “minority” majority parties and “minority” minority parties each get to elect one. The final member must be approved by a majority vote in the legislature. Thus, while in the United States it would give control of the committee to the majority party, this problem is avoided due to the parliamentary structure of government in Albania. ALBANIAN ELECTORAL CODE art. 14 (Org. for Sec. & Cooperation in Europe ed. & trans., 2015), <http://www.osce.org/albania/159501?download=true> [<https://perma.cc/R98Q-CQ4B>].

60. Azerbaijan elects its committee members in this way. The majority and minority party each get to elect six candidates, and the independent representatives also get to choose six seats. CENTRAL ELECTION COMM’N, REPUBLIC OF AZER., ELECTION CODE OF THE REPUBLIC OF AZERBAIJAN art. 24 (2003), http://www.msk.gov.az/uploads/qanunvericilik/election_code_eng.pdf [<https://perma.cc/WCU9-TVFR>].

61. In Mexico, ten members of the commission are chosen by parties. The eleventh member, the “President Councilor,” is chosen by the full legislature and must receive two-thirds approval. Ley General de Instituciones y Procedimientos Electorales [LGIPE] art. 36, Diario Oficial de la Federación [DOF] 23-05-2014, http://www.diputados.gob.mx/LeyesBiblio/pdf/LGIPE_130815.pdf [<https://perma.cc/9VZX-ZEQK>], translated in ELECTORAL TRIBUNAL OF THE FED. JUDICIARY, GENERAL LAW ON ELECTORAL INSTITUTIONS AND PROCEDURES OF MEXICO art. 36 (Mikaela Christiansson trans., 2014), <http://portales.te.gob.mx/ccje/sites/default/files/GENERAL%20LAW%20ON%20ELECTORAL%20INSTITUTIONS%20AND%20PROCEDURES.pdf> [<https://perma.cc/FB3G-5DB8>].

62. This conclusion rests strongly upon Duverger’s Hypothesis, which postulated that countries with a simple majority/plurality voting system and single-member districts would likely result in two dominant parties. While his theory has been challenged, it has largely been validated in American politics. MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE (Barbara & Robert North trans., Harper & Row Publishers 3d ed. 1964) (1951); see also Kenneth Benoit, *Duverger’s Law and the Study of Electoral Systems*, 4 FRENCH POL. 69, 76 (2006), http://www.kenbenoit.net/pdfs/Benoit_FrenchPolitics_2006.pdf [<https://perma.cc/RE7X-2T93>] (challenging Duverger’s conclusions as a “law” but still finding some general applicability).

on the commission, it still seems likely that the majority party will dominate the commission and thus have the power to draw district lines in a skewed, partisan manner. Allowing the tiebreaker seat to be occupied by the Speaker of the House is a poor solution for the same reason—the majority party can drive the agenda of the commission.

The final option—requiring seats to be designated for an independent party or for a person deemed impartial by both parties—is the most viable option. While designating seats to an independent party does not seem viable in most parts of America due to the dominant two-party system,⁶³ requiring the commissioner with the tie-breaking vote to be impartial is a good solution, since it forces the parties to agree on an impartial member who will have the final say in disputes. In fact, this is very similar to the approaches adopted by Arizona and Washington.⁶⁴

2. Executive Branch

When the power of choosing commissioners is delegated to the executive branch, the process is generally carried out in one of three ways. First, a number of small countries (Antigua and Barbuda,⁶⁵ Barbados,⁶⁶ Belize,⁶⁷ Malta,⁶⁸ Mauritius,⁶⁹ St. Kitts and Nevis,⁷⁰ and Trinidad and Tobago⁷¹) require the executive to appoint commissioners in consultation with the legislature.⁷² Thus, while the executive is not bound by the legislature's recommendation, the executive is required to get its input

63. For a brief historical evolution of the American two-party system, see generally MARK A. LAUSE, *THE TWO-PARTY SYSTEM IN THE UNITED STATES: ITS ORIGINS AND EVOLUTION IN THE SERVICE OF POWER, PRIVILEGE AND CAPITAL* (2015), <http://www.solidarity-us.org/files/The%20Two-Party%20System%20in%20the%20United%20States.pdf> [<https://perma.cc/F9LZ-WA5W>]. For an argument that a stable presidential system must only have two strong parties to be effective, see Scott Mainwaring, *Presidentialism, Multiparty Systems, and Democracy: The Difficult Equation* (Helen Kellogg Inst. for Int'l Studies, Working Paper No. 144, 1990), <https://www3.nd.edu/~kellogg/publications/workingpapers/WPS/144.pdf> [<https://perma.cc/97LZ-LKNU>].

64. ARIZ. CONST. art. IV, pt. 2, § 1(3)–(8) (requiring the fifth commissioner to be an Independent and to be chosen by the other four commissioners); WASH. CONST. art. II, § 43(2) (requiring the members chosen by majority/minority leaders to choose the fifth member).

65. CONST. OF ANT. & BARB. § 63(1).

66. CONST. OF BARB. § 41A(3).

67. CONST. OF BELIZE § 88(1)–(2).

68. CONST. OF MALTA art. 60(3).

69. CONST. OF MAURITIUS § 38(1).

70. CONST. OF ST. KITTS & NEVIS § 49(1) (St. Kitts & Nevis).

71. CONST. OF TRIN. & TOBAGO § 71(3).

72. The weight of the recommendations of the majority and minority leaders probably vary contextually. Each of the constitutions for these countries seems to be geared at giving these recommendations as much weight as possible. See *supra* notes 65–71.

before making a decision. Second, some countries, such as the Gambia,⁷³ Lesotho,⁷⁴ Seychelles,⁷⁵ the Solomon Islands,⁷⁶ Swaziland,⁷⁷ and Vanuatu,⁷⁸ require the executive to appoint commissioners after consulting with an independent commission, although, once again, the executive is not bound by the commission's recommendations.⁷⁹ A final option, utilized by Bangladesh,⁸⁰ Germany,⁸¹ Hong Kong,⁸² Sri Lanka,⁸³ and Tonga,⁸⁴ is direct appointment, where the executive is not required to consult with any other branch of government or independent commission.⁸⁵ While this option may appear ripe for abuse, appointments are generally subject to other

73. In the Gambia, the executive chooses candidates on the advice of both the Judicial Service Commission and the Public Service Commission. CONST. OF GAM. § 42(3). While the Public Service Commission is entirely composed of candidates appointed by the executive, *id.* § 172, the Judicial Service Commission is much more balanced: its membership includes the chief justice, a judge from a superior court, the solicitor general, a legal practitioner appointed by the attorney general, one member appointed by the president, and one member appointed by the National Assembly, *id.* § 145.

74. In Lesotho, members are recommended by the Judicial Service Commission, an advisory body of the executive that is not generally designed to be independent. CONST. OF LESOTHO §§ 66(1), 132. This body still serves the function of recommending to the executive a set of qualified candidates to hold these committee seats. *Id.* § 66(1).

75. In Seychelles, the president chooses the members of the committee on the advice of the Constitutional Appointment Authority, a three-person body. CONST. OF SEY. art. 115.A; *id.* art. 140, § 1. One member of this body is chosen by the president, and one is chosen by the Leader of the Opposition. *Id.* art. 140, § 2. Together, these members are supposed to choose a third member to sit on the committee with them. *Id.* Uniquely, this body then chooses seven members, of which the president serves five to sit on the Electoral Commission. *Id.* art. 115.A.

76. In the Solomon Islands, members are recommended by the Judicial and Legal Service Commission, an advisory body of the executive that is not generally designed to be independent. CONST. OF THE SOLOM IS. §§ 53(1)(a), 117. This body still serves the function of recommending to the executive a set of qualified candidates to hold these committee seats. *Id.* § 53(1)(a).

77. In Swaziland, members are recommended by the Judicial Service Commission, an advisory body of the executive that is not generally designed to be independent. CONST. OF SWAZ. §§ 90(2), 159(1). This body still serves the function of recommending to the executive a set of qualified candidates to hold these committee seats. *Id.* § 90(2).

78. In Vanuatu, members are recommended by the Judicial Service Commission, an executive advisory body. CONST. OF VANUATU art. 18, § 1; *id.* art. 48, § 1.

79. *See supra* notes 73–78.

80. CONST. OF BANGL. § 118, cl. 1.

81. Bundeswahlgesetz [BWG] [Federal Elections Act], July 23, 1993, BUNDESGESETZBLATT, Teil I [BGBl I] at 1288, as amended, § 3(2), *translation at* http://aceproject.org/ero-en/regions/europe/DE/germany-federal-elections-act-1993/at_download/file [<https://perma.cc/UJ4X-VJ7Z>].

82. Electoral Affairs Commission Ordinance, (2012) Cap. 541, 2, § 3(2), [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/B1CF624C2B6AA815482575EF0016AA19/\\$FILE/CAP_541_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/B1CF624C2B6AA815482575EF0016AA19/$FILE/CAP_541_e_b5.pdf) [<https://perma.cc/3VXA-YMEV>].

83. CONST. OF SRI LANKA art. 95, para. 1.

84. Electoral Boundaries Commission Act 2010 (Act No. 15/2010) § 4(1), http://www.tongaelections.com/images/stories/TECdocuments/ENG/ElectoralBoundariesAct/electoralboundariescommissionact2010_1.pdf [<https://perma.cc/8UY6-U7MG>].

85. *See supra* notes 80–84.

constitutional or statutory requirements, so while appointees may have political affiliations similar to the executive, they must at least meet certain minimum requirements. Thus, even if the commissioners have a partisan bias, they still must be qualified.⁸⁶

These options are not well suited for the United States because all of them place too much power in the hands of the executive. In these options, the executive has discretion to appoint commissioners that are members of his political party and stack the commission in much the same way that a partisan legislature could. While this may work in a country like Germany run by a coalition executive who can be voted out by the Parliament, it is unlikely to work in a country like the United States where the executive is not directly responsible to the people.

3. Judicial Branch

Only two countries delegate the sole power of choosing commissioners to their judicial branches. Costa Rica requires a two-thirds majority vote from the Supreme Court of Justice⁸⁷ to approve commissioners.⁸⁸ Meanwhile, Turkey's system utilizes both an appellate and an administrative court, with each court choosing a set number of commissioners.⁸⁹

While the idea of granting the judiciary the sole power of choosing commissioners has some appeal, it should be rejected in the United States for three reasons. First, even though judges are chosen to impartially apply the law, a large body of recent social-science research indicates that judges are prone to rely heavily on their personal feelings and ideological leanings.⁹⁰ This does not mean that the judiciary would choose commissioners in a more biased manner than the legislature, but it does indicate a need for caution before delegating this task solely to the judiciary. Similarly,

86. In some countries, these qualifications limit the individuals that may be selected for the Commission (for example, in some countries an individual must be the surveyor general or chief statistician); other meaningful checks include requiring that the appointee is not politically involved. *See infra* Part III.B.

87. The Supreme Court of Justice of Costa Rica comprises four subcourts, including three Cassation Courts and a Constitutional Court. The members of the court are elected for eight-year terms by the legislature. Thus, committee members are certainly not chosen by the legislature, but since the term limits of the justices are short, the legislature presumptively has some degree of influence since they appoint the justices who appoint commissioners. For a brief overview of the court, see DESCRIPTION OF THE JUDICIAL SYSTEM OF COSTA RICA, ORGANIZATION OF AMERICAN STATES, https://www.oas.org/juridico/mla/en/cri/en_cri-int-des-gen.pdf [<https://perma.cc/R3HJ-ZKKK>].

88. Costa Rica is the only country to choose commissioners in this manner. Código Electoral [Electoral Code], Ley No. 8765, art. 13, <https://www.tse.go.cr/pdf/normativa/codigoelectoral.pdf> [<https://perma.cc/4DJP-3CMU>].

89. This system is utilized in Turkey. While eleven members are appointed, only seven serve. The other four are alternates. Law on Basic Provisions on Elections and Voter Registration, Law No. 298, Apr. 26, 1961, as amended, art. 11 (Turk.), https://www.ecoi.net/file_upload/1504_1220346141_law-on-basic-provisions-on-elections-and-voter-registers.pdf [<https://perma.cc/H43Z-BELK>].

90. *See supra* note 355.

the second concern is that the public would notice the effect that the judiciary's ideological leanings have on its decisions, a result that would compromise the public's perception of the impartiality of the judiciary. A final concern is judicial economy and expertise, as many judges would not possess knowledge regarding how to draft redistricting plans.

4. Multiple Branches

A majority of countries structure their commissions so that multiple branches have a substantial say in choosing commissioners. Countries that involve more than one branch in the process generally utilize a combination of approaches stemming from six different methodological families.⁹¹

The first family of options requires the legislative and executive branches to work together in a partisan way. Once again, "partisan" here means that there is no affirmative check on the majority party. Countries operationalize this method in three ways. First, some countries such as Eritrea,⁹² Kiribati,⁹³ Liberia,⁹⁴ Sierra Leone,⁹⁵ Tajikistan,⁹⁶ Tanzania,⁹⁷ Turkmenistan,⁹⁸ Uganda,⁹⁹ and Zambia¹⁰⁰ require majority legislative approval of candidates chosen by the executive.¹⁰¹ A second option, utilized by the Maldives,¹⁰² New Zealand,¹⁰³ and Ukraine,¹⁰⁴ requires the executive to

91. Once again, this framework has been created by the author simply as an analytical tool to understand the distinctions between various countries.

92. ERITREAN ELECTORAL LAW, art. 4, <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/ERITREA-ELECTION-LAWS.pdf> [<https://perma.cc/Q54D-LHPV>].

93. In Kiribati, the executive chooses candidates after consultation with his cabinet. CONST. OF KIRIBATI § 62(2). The decisions are laid before the legislature, but are assumed accepted unless they are affirmatively rejected. *Id.* § 62(3).

94. Liberian electoral law requires the president to choose candidates "with the advice and consent of the senate." REPUBLIC OF LIBER., THE NEW ELECTIONS LAW s. 2.1 (2011), http://www.necliberia.org/admin/pg_img/Election%20Law%20Incorporated%202011final.pdf [<https://perma.cc/V3ZZ-L445>].

95. CONST. OF SIERRA LEONE § 32(3).

96. Tajikistan requires candidates to be approved by the lower house. On Elections to the Majlisi Oli of the Republic of Tajikistan, Dec. 10, 1999, as amended, art. 11, <http://www.legislationline.org/documents/action/popup/id/6930> [<https://perma.cc/NH4T-5R4S>].

97. CONST. OF TANZ. art. 74(1).

98. ELECTORAL CODE OF TURK., art. 21, http://www.legislationline.org/download/action/download/id/5097/file/Turkmenistan_law_approval_Electoral%20Code_2013_en.pdf [<https://perma.cc/JJR4-WNDS>].

99. CONST. OF UGANDA art. 60, cl. 1.

100. Electoral Commission Act, Cap. 17 (1996) § 4(3), <http://www.parliament.gov.zm/sites/default/files/documents/acts/Electoral%20Commission%20Act.pdf> [<https://perma.cc/DFY8-R6F8>].

101. *See supra* notes 92–100.

102. CONST. OF MALDIVES art. 168.

103. In New Zealand, approved candidates specifically come from the lower house. Electoral Act 1993, s 4D.

104. LAW OF UKRAINE ON THE CENTRAL ELECTION COMMISSION, art. 6, <http://www.legislationline.org/documents/action/popup/id/7148> [<https://perma.cc/6PNB-5YSB>].

choose candidates from a list of nominees chosen by the legislature.¹⁰⁵ Finally, Belarus¹⁰⁶ and Zimbabwe¹⁰⁷ allow the executive and legislative branches each to choose a set number of commissioners.¹⁰⁸

None of these options are good for state commissions in the United States because they can place too much power in the hands of the majority. This is especially dangerous because it keeps the majority party in power and marginalizes competing ideas, undermining the democratic process. While the executive could serve as a powerful check on the legislature if the executive is from an opposing party, if the executive is from the same party there is likely to be collusion (deliberate or not) between the branches, and the resulting commission will likely be highly biased. While this sort of commission might be effective when a state legislative majority has a different party affiliation than the governor, this method fails to account for situations where a party controls the legislative and executive branches. Thus, this method fails to account for certain electoral outcomes and should be discarded because of the risk of biased results.

Second, some countries require the legislative and executive branches to work together in a bipartisan manner, thus seeking to validate concerns from majority and minority parties. This option is bipartisan because it seeks to accommodate both majority and minority parties, instead of leaving commissioner appointment solely in the hands of the majority party. The first option, utilized only in St. Vincent, allows both the majority and minority party (or theoretically a percentage of each party in a country with a coalition government) to choose an equal number of commissioners, while allowing the executive to choose the tiebreaker.¹⁰⁹ A second method, utilized in Dominica,¹¹⁰ Grenada,¹¹¹ and St. Lucia,¹¹² allows the executive to choose an equal number of members from the majority and minority parties while granting the tiebreaker seat to the Speaker of the House.¹¹³ A third method, utilized in Pakistan¹¹⁴

105. *See supra* notes 102–04.

106. In Belarus, six members of the commission are chosen by the president, and six are chosen by the legislature (Council of the Republic). These individuals are recommended to the national branches by regional committees. Electoral Code of the Republic of Belarus, No. 370-Z, Feb. 11, 2000, as amended, art. 32, http://www.sze.hu/~smuk/Nyilvanossag_torvenyek_east_south_eur/Jogforr%C3%A1sok/V%C3%A1laszt%C3%A1si/BEL%20-%20Electoral%20Code.pdf [<https://perma.cc/AQV5-ZSG5>].

107. In Zimbabwe, the president chooses the committee chair “after consultation with the Judicial Service Commission” and the legislature. CONST. OF ZIM. § 238(1)(a) The other eight members are chosen from a list proposed by the legislature. *Id.* at § 238(1)(b).

108. *See supra* notes 106–07.

109. CONST. OF ST. VINCENT § 32(1).

110. CONST. OF DOMINICA § 56(2).

111. CONST. OF GREN. § 55(1).

112. CONST. OF ST. LUCIA § 57(2).

113. *See supra* notes 109–12.

114. In Pakistan, the prime minister and Leader of the Opposition present a list of names to the president; from that list, he can nominate whom he will. CONST. OF PAK., art. 213, cl. 2A (authorizing the committee). A description of the electoral process can be found on the Electoral Commission of Pakistan’s website. *Overview of ECP*, ELECTION COMM’N OF PAK., <http://ecp.gov.pk/frmGenericPage.aspx?PageID=21> [<https://perma.cc/RM9Y-L2H7>].

and Yemen,¹¹⁵ requires legislators from both (or all) parties to approve a list of candidates from which the executive can choose.¹¹⁶ A fourth method, utilized only in Sudan¹¹⁷ and South Sudan,¹¹⁸ allows the executive to nominate commissioners subject to a two-thirds majority approval vote in the legislature.¹¹⁹ A final method, utilized in both Georgia¹²⁰ and Guyana,¹²¹ allows the executive to choose slightly less than half of the commissioners, while the majority and minority parties equally choose the other commissioners.¹²²

These global alternatives are likely to have varying degrees of success in the United States. First, allowing majority and minority parties to choose an equal number of commissioners while delegating the tiebreaker vote to the executive seems to do little to fix the problem of a party controlling a majority of seats on the commission. Since the governor is usually a member of the majority or minority party, one party will still have direct control of the commission. Granting the tiebreaking vote to the state Speaker of the House fails for the same reason, since it grants the majority party unchecked control of the commission.

Allowing the executive to choose commissioners from a list approved by the legislature as a whole may have more success at balancing the interests at stake. Since the legislature as a whole must agree on the candidates, presumably they will be more moderate in order to receive the nomination. However, it seems likely that this will result in the executive cherry-picking candidates identified by the legislature that are most ideologically similar to the executive's party. Allowing the executive to choose candidates subject to a two-thirds approval vote in the legislature, is, in many ways, similar to the current judicial nominations process in the United States.¹²³ While this

115. In Yemen, the legislature must nominate fifteen members to the executive for consideration; those fifteen must receive approval from at least two-thirds of the legislature. GENERAL ELECTIONS AND REFERENDUM LAW art. 19 (2001), http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Yemen_General%20Elections%20and%20Referendum%20Law_2001_en.pdf [https://perma.cc/7KTF-AN5A].

116. See *supra* notes 114–15.

117. National Elections Act 2008 § 6(1) (Sudan), <http://nec.org.sd/en/wp-content/uploads/sites/2/2013/09/THE-NATIONAL-ELECTIONS-ACT-2008.pdf> [https://perma.cc/7NDW-3K9R] (requiring approval of the vice president as well).

118. National Elections Act, 2012, § 10(1) (S. Sudan), <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/ELECTION-ACT-SOUTH-SUDAN.pdf> [https://perma.cc/5TAR-HA6C].

119. See *supra* notes 117–18.

120. In Georgia, five members are chosen by the president, while the remaining seven members are chosen by various legislative parties. The committee chairman is nominated by the president, subject to approval by the legislature. ORGANIC LAW OF GEORGIA: ELECTION CODE OF GEORGIA art. 10, paras. 1–2 (2012), http://www.transparency.ge/sites/default/files/August%202012,%20Election_Code_of_Georgia_EN_-_codified.pdf [https://perma.cc/W4NY-GPPJ].

121. In Guyana, the Leader of the Opposition nominates six candidates to the president, one of whom is chosen as the chairman of the committee. “[A]cting in his or her deliberative judgment,” the president chooses three more committee members, and the Leader of the Opposition chooses the other three. CONST. OF GUY. § 161, paras. 2–3.

122. See *supra* notes 120–21.

123. For an explanation of the current process, see Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal To Put Trial Bench Confirmations on Track*,

process has generally worked for the federal judiciary, it has been widely criticized for its political nature and the slow speed of confirmation by the legislature.¹²⁴ Thus, this option may not be efficient due to the difficulty of gaining a supermajority of votes. Furthermore, if this process went through a legislative committee, similar to the U.S. Senate, there would likely be delays in the nominating process, a potentially grueling hearings process, and the potential of a delayed floor vote.¹²⁵ In short, partisanship could grind the appointments process to a halt.¹²⁶

Finally, allowing the majority and minority parties, as well as the executive, to choose candidates is not a good option. The reason for this is that the composition of the committee would ultimately be determined by the party affiliation of the executive, resulting in similar problems to delegating the process solely to a majority of the legislature. Once again, the commission could be dominated by a majority group that is not required to account for the interests of the minority party.

Third, some countries require input from the legislative and judicial branches to staff commissions. Botswana,¹²⁷ Canada,¹²⁸ Honduras,¹²⁹ Malawi,¹³⁰ and the United

65 ARK. L. REV. 217, 248–81 (2012).

124. The death of Justice Scalia and nomination by President Obama of Chief Judge Merrick Garland hurled this issue into the spotlight as a Republican-controlled Senate has refused, as of yet, to hold any hearings on Garland. Joan Biskupic, *Why Merrick Garland Should Keep Hoping*, CNN (Oct. 23, 2016) <http://www.cnn.com/2016/10/23/politics/hillary-clinton-merrick-garland-supreme-court/> [https://perma.cc/V562-DVUE]; Michael D. Shear, Julie Hirschfeld Davis, & Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (March 16, 2016) <http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html> [https://perma.cc/227T-ZJQV]. For a more academic perspective, see, e.g., Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L. J. 287 (2012); Carl Tobias, *Filling the Judicial Vacancies in a Presidential Election Year*, 46 U. RICH. L. REV. 985 (2012).

125. Shenkman, *supra* note 123, at 248–97.

126. For an argument that partisanship is still slowing down the confirmation process, see Editorial, *Confirm President Obama's Judges*, N.Y. TIMES (Nov. 13, 2015), <http://www.nytimes.com/2015/11/13/opinion/confirm-president-obamas-judges.html> [https://perma.cc/6UXG-EFXU].

127. In Botswana, judges are appointed to serve on the committee by the Judicial Service Commission, and the remaining members are chosen by the legislature. CONST. OF BOTS. § 65A(1).

128. In Canada, boundaries commission members are chosen in each province. Electoral Boundaries Readjustment Act, R.S.C. 1985, c. E-3, § 4, <http://laws.justice.gc.ca/PDF/E-3.pdf> [https://perma.cc/S2C2-T66J]. Therefore, in each province, the chief justice chooses one judge to serve on the committee, and the other two are chosen by the speaker of the legislature. *Id.* §§ 5–6.

129. In Honduras, the Supreme Court of Justice chooses a candidate and an alternate, as does each registered party. CONST. OF HOND. art. 52. If there is an even number of commissioners, then the executive appoints an extra member. *Id.*

130. In Malawi, judges are appointed to serve on the committee by the Judicial Service Commission, and the remaining members are chosen by the legislature. CONST. OF MALAWI § 75(1).

Kingdom¹³¹ require these branches to pick a specific number of candidates, but usually the judiciary chooses the tiebreaking member.¹³²

Requiring input from both the legislature and the judiciary may be a viable approach in the United States. While it may not be prudent to grant sole appointment power to the judiciary,¹³³ the same concerns are not implicated when the judiciary is tasked with choosing one impartial member. Although the judiciary certainly is a political branch to some extent, its concern with being perceived as impartial should psychologically push the judiciary to choose more impartial candidates than the legislature. While judges may be influenced by their ideology when choosing candidates, this concern is minimized due to the ideally neutral goal of their choice—a commissioner who can fairly facilitate the redistricting process. Finally, the process of choosing commissioners could be made fairer by requiring a supermajority of justices to approve a commissioner.

A fourth method requires the judicial and executive branches to work together when choosing commissioners. South Africa is the only country that uses this method, which calls for judges to sit on selection panels to nominate candidates that the executive eventually approves.¹³⁴

This method seems unlikely to succeed in the United States for two reasons. First, there may be concerns over delegating sole nomination power to the judiciary since it is, to some degree, political and likely to choose candidates somewhat in agreement with its ideological leanings.¹³⁵ However, even if this concern were alleviated, there would still be cause for concern if the executive or the legislature had the sole power of choosing candidates.

A fifth method, utilized in Kenya¹³⁶ and Namibia,¹³⁷ requires the executive and legislative branches to work in concert with an independent selection commission to

131. The situation in the United Kingdom is similar to the one in Canada. The Speaker of the House serves as the chair of each of the four committees. The deputy chair is a judge of the high court of that region. Parliamentary Constituencies Act 1986, c. 56, sch. 1, http://www.legislation.gov.uk/ukpga/1986/56/pdfs/ukpga_19860056_en.pdf [https://perma.cc/4ZE9-HNY6]. The other two members are chosen by the secretary of state. *Id.*

132. *See supra* notes 127–31.

133. *See supra* Part III.A.3.

134. In South Africa, the selection panel must include a member of the Constitutional Court, a judge designated by the chief justice, one member of the Commission for Gender Equality, two persons with specific knowledge of boundary demarcation, and the chair of the Select Committee of the National Council of Provinces. Local Government: Municipal Demarcation Act 27 of 1998 § 8(1), <http://www.gov.za/sites/www.gov.za/files/a27-98.pdf> [https://perma.cc/3WAR-8GZY].

135. *See supra* Part III.A.3.

136. In Kenya, the Selection Commission consists of two persons (one male and one female) nominated by the president, two persons (one male and one female) nominated by the prime minister, one member from the Judicial Service Commission, one member from Kenya's Anti-Corruption Advisory Board, and one person from the Association of Professional Societies of East Africa. Independent Electoral and Boundaries Commission Act (Act No. 9/2011), as amended, sched. 1, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/IndependentElectoralandBoundariesCommissionNo9of2011.pdf> [https://perma.cc/P468-Z454].

137. In Namibia, the Selection Commission must include the Chairperson of the Public Service Commission, the Chairperson of the Council of the Law Society of Namibia, the

choose commissioners for the IRC. In these countries, a selection committee nominates a set number of candidates, from which the executive appoints commissioners. The legislature then votes on approval of these candidates.¹³⁸

With slight modifications, this system may work in the United States. Operationalizing a selection commission may be difficult; however, it is possible that a commission could be composed of electoral and statistical experts. Bias could be minimized because the executive and legislative branches would have to approve the candidates. Finally, it would be important to require a supermajority of votes from a selection commission to nominate commissioners in order to avoid partisan appointments by a simple majority of commissioners.

The sixth option requires all three branches of government working together to approve nominees. This is accomplished in two ways. First, in the Bahamas¹³⁹ and Puerto Rico,¹⁴⁰ members of (or appointees from) the legislative, executive, and judicial branches sit on a commission.¹⁴¹ Second, in Bhutan¹⁴² and Thailand,¹⁴³ members of the legislative and judicial branches sit on a selection commission, and the executive must ratify their nominations.¹⁴⁴

Either option may work in the United States. The first option has potential if members are chosen equally from majority and minority parties with a judge serving as the tiebreaker. However, partisanship could easily slip in because the executive would likely choose a judge that shares his or her ideology. While this would require

Chairman of the Public Accountants' and Auditors' Board, the Registrar of the High Court, and the Director of the Namibian Qualifications Authority. The law also provides for alternates. Electoral Act, 2014 (Act No. 5/2014), §6, <http://www.ecn.na/documents/27857/193258/Electoral+Act+5+of+2014.pdf/1bd1c3e3-bdd1-4183-a2fa-2ae6e397180e> [https://perma.cc/HU3N-NMSK].

138. *See supra* notes 136–37.

139. In the Bahamas, the Speaker of the House serves as the chair of the commission. The other committee members include a justice (chosen by the governor-general and the chief justice), two members of the majority party, and one member of the opposition (chosen by the governor-general in consultation with the prime minister and leader of the opposition, respectively). CONST. OF BAH. art. 69, para. 2.

140. In Puerto Rico, the chief justice always serves as the chair of the Commission, while the governor and senate choose the other two members, who cannot be from the same party. P.R. CONST. art. III, § 4.

141. *See supra* notes 139–40.

142. In Bhutan, a Selection Commission consisting of the prime minister, chief justice, Speaker, Chairperson of the National Council, and Leader of the Opposition nominates members to the executive. The executive then must appoint three nominees. ELECTION ACT OF THE KINGDOM OF BHUTAN, 2008, § 22 (2008), http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Bhutan_Election%20Act_2008_en.pdf [https://perma.cc/88Z8-EBHW].

143. In Thailand, under the 2007 constitution (superseded by an interim constitution in 2014 and a new constitution in 2016), the Selection Commission contains the president of the Constitutional Court, the president of the Supreme Court of Justice, the president of the Supreme Administrative Court, the president of the House of Representatives, the opposition leader of the House, and a member appointed by a committee from the Supreme Administrative Court. These nominees must then be approved by the executive. CONST. OF THAI. (2007) § 231(1).

144. *See supra* notes 142–43.

participation from all branches of government and may create a good tiebreaker, the degree of executive control shadows this proposition.

Requiring members of the legislature and the judiciary to select candidates subject to executive approval would once again fail to build in protection for minority parties. Even if members of the judiciary were functionally neutral, there would still be a high probability that the executive would choose nominees that align with his or her predilections.

A third option, not currently utilized by any country, would require judges of the highest court to serve as a selection commission, with the ability to nominate candidates by a two-thirds majority. The executive would then be required to officially nominate candidates from this list, subject to final legislative approval. Two potential problems here would be gridlock in the legislature if a supermajority of votes is required for confirmation and potential concerns of overburdening the judiciary.

5. Popular Elections

A final alternative for choosing commissioners is electing them by popular vote. Currently, this method is utilized only in the Virgin Islands.¹⁴⁵ Despite how appealing the citizenry would find popular election of commissions, this solution is untenable for two reasons. First, since the concept of gerrymandering and the need for an independent commission is a subject the population is generally uninformed about, commissioners would likely be chosen based on popularity instead of impartiality. The second reason directly connects to the first—if commissioners are generally chosen based on popularity and party affiliation, the commission will likely face the same problems presented by one party controlling a majority of the seats on the commission. Thus, popular election seems like it would only work in situations where the public is well informed about the need for a commission and understands the need for commissioners to represent different ideologies, perhaps disparate from the citizens' perspectives.

B. Commissioner Requirements

Various requirements placed on the composition of the committee as a whole, and on individual commissioners, also contribute to the independence of commissions. These factors include the number of sitting commissioners, the political (or apolitical) nature of commissioners, the creation of specialized positions on the commission, and educational or experiential requirements for membership.

1. Number of Commissioners

Three approaches are used by countries for establishing the number of commissioners. The first approach, utilized by the vast majority of countries, requires commissions to always have a set number of commissioners.¹⁴⁶ The second approach,

145. V.I. CODE ANN. tit. 18, §§ 41, 47 (1998 & Supp. 2016).

146. The vast majority of countries elect this route. For the sake of example, I will only list six countries, but there are many more. CONST. OF GUY. § 161; CONST. OF UGANDA, art. 60,

utilized by Kiribati,¹⁴⁷ Mauritius,¹⁴⁸ Trinidad,¹⁴⁹ and Zambia,¹⁵⁰ requires the appointing body to discretionarily appoint a number of members within a possible range.¹⁵¹ The final approach, used in Malawi¹⁵² and Malta,¹⁵³ requires a minimum number of commissioners, but creates no maximum number.¹⁵⁴

Of these options, requiring a set number of commissioners is the only viable option in the United States because the other two options are ripe for abuse. The latter two options allow the appointing groups to choose the number of commissioners—effectively allowing them to pack the commission. Having an uncapped number of commissioners is particularly dangerous because it would allow the appointing body to add members to the commission and skew its political composition.

Whether the commission should have an even or odd number of commissioners is also significant.¹⁵⁵ While in many countries this analysis is complicated by the number of parties, in the United States the analysis is simpler due to the prevalence

cl. 1; CENTRAL ELECTION COMM'N, REPUBLIC OF AZER., ELECTION CODE OF THE REPUBLIC OF AZERBAIJAN art. 24 (2003), http://www.msk.gov.az/uploads/qanunvericilik/election_code_eng.pdf [<https://perma.cc/Z2X3-GW9C>]; ERITREAN ELECTORAL LAW, art. 4, <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/ERITREA-ELECTION-LAWS.pdf> [<https://perma.cc/R7UQ-3G22>]; Organic Law on National and Local-Level Government Elections (Act No. 3/1997), as amended, § 26 (Papua N.G.), http://aceproject.org/ero-en/regions/pacific/PG/papua-new-guinea-1997-organic-law-on-national-and/at_download/file [<https://perma.cc/7HKC-YR24>]; Parliamentary Constituencies Act 1986, c. 56, sch. 1 (U.K.), http://www.legislation.gov.uk/ukpga/1986/56/pdfs/ukpga_19860056_en.pdf [<https://perma.cc/JV7G-FRB4>].

147. CONST. OF KIRIBATI § 62(1) (requiring a minimum of three and a maximum of five commissioners).

148. CONST. OF MAURITIUS § 38(1) (requiring a minimum of three and a maximum of eight commissioners).

149. CONST. OF TRIN. & TOBAGO § 71(2) (requiring a minimum of three and a maximum of five commissioners).

150. Electoral Commission Act, Cap. 17 (1996) § 4(2), <http://www.parliament.gov.zm/sites/default/files/documents/acts/Electoral%20Commission%20Act.pdf> [<https://perma.cc/9WDW-FQJG>](allowing a maximum of five commissioners).

151. *See supra* notes 147–50.

152. CONST. OF MALAWI § 75(1) (requiring a minimum of seven commissioners).

153. CONST. OF MALTA art. 60(2) (requiring a minimum of five commissioners).

154. *See supra* notes 152–53.

155. There are many examples of commissions with odd and even numbered constituencies. For a few examples of odd numbered commissions, see CONST. OF GUY. § 161; CONST. OF UGANDA, art. 60, cl. 1; and ERITREAN ELECTORAL LAW, art. 4, <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/ERITREA-ELECTION-LAWS.pdf> [<https://perma.cc/JJP2-654A>]. For a few examples of even numbered commissions, see CENTRAL ELECTION COMM'N, REPUBLIC OF AZER., ELECTION CODE OF THE REPUBLIC OF AZERBAIJAN art. 24.1 (2003), http://www.msk.gov.az/uploads/qanunvericilik/election_code_eng.pdf [<https://perma.cc/TY8H-XD8P>] (requiring roughly a two-thirds majority vote to approve decrees of the commission); Organic Law on National and Local-Level Government Elections (Act No. 3/1997), as amended, § 26 (Papua N.G.), http://aceproject.org/ero-en/regions/pacific/PG/papua-new-guinea-1997-organic-law-on-national-and/at_download/file [<https://perma.cc/SK6W-T953>]; and Parliamentary Constituencies Act 1986, c. 56, sch. 1 (U.K.), http://www.legislation.gov.uk/ukpga/1986/56/pdfs/ukpga_19860056_en.pdf [<https://perma.cc/L3LM-XLQW>].

of only two major parties.¹⁵⁶ A system designed with an odd number of commissioners is useful for efficiency reasons, but it also raises questions concerning who should have the deciding vote. Even-numbered commissions, on the other hand, allow for equal representation of majority and minority parties, and ideally this composition forces members to compromise. However, gridlock is also a possibility, which could undermine the commission's work. Neither of these practices is inherently better than the other; however, an odd-numbered commission with the most impartial tiebreaker possible is likely the most efficient option. The current frustration at gridlock within the American system is likely to discourage designers from utilizing a commission with an even number of members.¹⁵⁷

2. Political Nature of Commissioners

In Georgia,¹⁵⁸ Namibia,¹⁵⁹ Seychelles,¹⁶⁰ Sri Lanka,¹⁶¹ and Sudan,¹⁶² commissioners are required to be “nonpartisan,” or to have no major involvement in a political party for a period of time prior to serving on a commission.¹⁶³ Other countries, such as Barbados,¹⁶⁴ Canada,¹⁶⁵ and Dominica,¹⁶⁶ place no serious restrictions on the political affiliation of members; rather, they seek to balance the number of seats designated to appointees of majority and minority parties.¹⁶⁷

156. See LAUSE, *supra* note 63.

157. Although gridlock was part of the American system when adopted (and deliberately so), in recent years there has been severe backlash at the gridlock within government. See THE FEDERALIST NO. 51 (James Madison); Danna Morgan Seligman, *The Origins of Political Gridlock in the United States: Modeling Institutional Gridlock as Moral Hazard in the United States Congress* (May 2, 2014) (unpublished undergraduate thesis, Stanford University) (on file with Center on Democracy, Development, and Rule of Law, Stanford University).

158. ORGANIC LAW OF GEORGIA: ELECTION CODE OF GEOR. art. 12, para. 4 (2012), http://www.transparency.ge/sites/default/files/August%202012,%20Election_Code_of_Georgia_EN_-_codified.pdf [<https://perma.cc/C6KX-EKHP>].

159. Electoral Act, 2014 (Act No. 5/2014), § 7(1)(b)(ii), <http://www.ecn.na/documents/27857/193258/Electoral+Act+5+of+2014.pdf/1bd1c3e3-bdd1-4183-a2fa-2ae6e397180e> [<https://perma.cc/249D-62RG>] (requiring a commissioner to not be an “active politician”).

160. CONST. OF SEY. art. 115.B (requiring candidates to not be holding office within a political party).

161. CONST. OF SRI LANKA art. 95, para. 1 (allowing the president to appoint anyone that he is convinced is not political).

162. National Elections Act 2008 § 6(2), <http://nec.org.sd/en/wp-content/uploads/sites/2/2013/09/THE-NATIONAL-ELECTIONS-ACT-2008.pdf> [<https://perma.cc/R3AA-ATLT>] (stating candidates must be “independent, competent, non-partisan and impartial”).

163. See *supra* notes 158–62.

164. CONST. OF BARB. § 41A.

165. Electoral Boundaries Readjustment Act, R.S.C. 1985, c. E-3, §§ 6, 10, <http://laws.justice.gc.ca/PDF/E-3.pdf> [<https://perma.cc/KR73-56TU>].

166. CONST. OF DOMINICA § 56(4).

167. A large number of countries place no restriction on political affiliation of candidates (except that they cannot hold or run for political office while a commissioner). For a few examples, see *supra* notes 164–66.

While both of these approaches could be effective in the United States, limiting political affiliation for all commission members seems to be an unlikely outcome. Americans tend to be highly political, particularly amongst those with the qualifications to be in the public service.¹⁶⁸ Limiting an individual's ability to have political affiliations would make it difficult to find qualified, competent individuals to serve on the independent commissions.¹⁶⁹ Rather, allowing commissioners to maintain party affiliations in a balanced manner would best facilitate the work of IRCs. Thus, instead of trying to ignore the political leanings of commissioners, we would seek to use them to give the commission more perspective. For instance, if a commission is composed of an even number of commissioners, one-half each could come from the majority and minority parties. However, if a commission requires an odd number of commissioners, a tiebreaker seat may be delegated either to an individual with no party affiliation or an individual deemed by the other members of the commission to be impartial.¹⁷⁰ This decreases the administrative concerns of requiring all commissioners to be impartial but still honors the role of an impartial arbiter helping to guide the competing interests of political parties.

3. Specialized Positions

Another method of limiting who can sit on the commissions requires an individual to obtain special qualifications before sitting on the commission. While countries require many different specialized requirements to hold office, three may be of particular interest for the United States. These qualifications include either requiring one

168. Avi Tuschman, *Why Americans Are So Polarized: Education and Evolution*, THE ATLANTIC (Feb. 28, 2014), <http://www.theatlantic.com/politics/archive/2014/02/why-americans-are-so-polarized-education-and-evolution/284098/> [https://perma.cc/9QRN-B2M3] (arguing that Americans are polarized due to the community groups they sort themselves into).

169. It is unclear whether this would also raise First Amendment concerns. Generally, restrictions upon political speech are highly suspect. While it seems likely that political speech could not be regulated, the case of *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), may indicate this could be permissible. In *Williams-Yulee*, the Supreme Court deemed that certain content-based restrictions upon candidates running for judicial office were justified because the government had a compelling interest in the independence of the judiciary and the restrictions were narrowly tailored. *Id.* at 1658–60. While it could be argued that there is a “compelling interest” in the independence of an IRC commissioner, it seems likely that not allowing any political affiliation could potentially not be a narrowly tailored restriction. This sort of restriction would certainly raise a complex and novel First Amendment concern.

170. This is the way that the process is done in Arizona's IRC. *Frequently Asked Questions*, ARIZ. INDEP. REDISTRICTING COMMISSION (2011), <http://azredistricting.org/About-IRC/FAQ.asp> [https://perma.cc/Y8HR-X6TW].

commissioner to be the head statistician,¹⁷¹ one to be the surveyor general,¹⁷² or one to be a current or former judge.¹⁷³

Requiring the tiebreaker commissioner in the United States to hold one of these offices might be particularly useful because, in the case of the surveyor general and head statistician, these people are experts at parts of the redistricting process. A judge might be beneficial for the perception of neutrality that he or she would bring to the position. However, such an approach fails to account for the inherent biases these individuals would bring to the commission. Nevertheless, these biases may be slightly less pronounced than others—since these officeholders are technical experts, they may be more prone to see districting as part of their job rather than an opportunity for partisan advancement. Due to their inherent bias, it seems these officials would only be slightly less biased than other commissioners, and thus they are probably not the best solution.

171. In the United States, the head statistician is responsible for providing coordination, guidance, and oversight for U.S. federal statistical agencies. KATHERINE K. WALLMAN, U.S. OFFICE OF MGMT. & BUDGET, ENSURING THE QUALITY OF INFORMATION UPON WHICH PUBLIC POLICY IS BASED, <https://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-wallman.pdf> [<https://perma.cc/97UM-YV3R>]. Essentially, this individual is a statistical expert. This would be useful for an IRC because a statistician would have useful skills for making sure districts are equally populated. Countries requiring the head statistician to serve as a commissioner include Germany, Bundeswahlgesetz [BWG] [Federal Elections Act], July 23, 1993, BUNDESGESETZBLATT, Teil I [BGBL I] at 1288, as amended, § 3(2) (requiring the president of the Federal Statistical Office to serve), *translation at* http://aceproject.org/ero-en/regions/europe/DE/germany-federal-elections-act-1993/at_download/file [<https://perma.cc/UJ4X-VJ7Z>]; Papua New Guinea, Organic Law on National and Local-Level Government Elections (Act No. 3/1997), as amended, § 26(1)(c) (Papua N.G.), http://aceproject.org/ero-en/regions/pacific/PG/papua-new-guinea-1997-organic-law-on-national-and-at_download/file [<https://perma.cc/VV7X-ALUY>]; and Tonga, Electoral Boundaries Commission Act 2010 (Act No. 15/2010) § 4(1)(b), http://www.tongaelections.com/images/stories/TECdocuments/ENG/ElectoralBoundariesAct/electoralboundariescommissionact2010_1.pdf [<https://perma.cc/Y265-MHRT>] (requiring a “person with skill and experience as a statistician”).

172. A surveyor general is responsible for mapping boundaries and, particularly, laying out city sites. Requiring an individual holding this office to sit on the commission would be useful because they are used to drawing local boundaries and would understand logical cutoff points. Countries requiring the surveyor general to serve as a commissioner include Australia, *Commonwealth Electoral Act 1918* (Cth) s 60(2)(c); Papua New Guinea, Organic Law on National and Local-Level Government Elections § 26(1)(b); and Tonga, Electoral Boundaries Commission Act § 4(1)(c) (requiring a “qualified surveyor”).

173. Many countries require a judge to serve as a commissioner. A few of these include the Bahamas, CONST. OF BAH. art. 69, para. 2(b); Germany, Federal Elections Act § 3(2), (requiring a judge from the Federal Administrative Court to be a commissioner); Ireland, Electoral Act, 1997 (Act No. 25/1997) § 7(a), <http://www.irishstatutebook.ie/eli/1997/act/25/enacted/en/pdf> [<https://perma.cc/8LHV-32FP>] (requiring a judge of the Supreme Court or the High Court); Puerto Rico, P.R. CONST. art. III, § 4 (requiring the chief justice to serve); Tanzania, CONST. OF TANZ. art. 74(1)(a) (requiring a judge of the High Court or a justice of the Court of Appeals to serve); and Tonga, Electoral Boundaries Commission Act § 4(1)(a) (requiring a “person who holds or has held judicial office”).

4. Educational and Experiential Requirements

Finally, most countries place educational and experiential requirements on commissioners. Generally, commissioners are required to either specifically hold a degree in law or are more generally allowed to hold any bachelor's degree.¹⁷⁴ Experiential requirements are slightly more varied, as some countries require as little as three years of any work experience,¹⁷⁵ while others demand "experience organizing and holding elections and referendums"¹⁷⁶ or experience in management, finance, governance, public administration, or law.¹⁷⁷

As a general rule, educational and experiential requirements are likely to have a positive effect on the process of choosing commissioners. While the presence of unnecessarily burdensome requirements could prohibit qualified candidates from serving, requiring advanced education and a range of possible work experiences will ensure commissions have members with seasoned and varied perspectives that will aid in the difficult process of redistricting.

C. Removal of Commissioners

Another significant factor impacting the independence of a commission is what body may remove a commissioner and for what reasons. Two methods of removal are common: commissioners are either removed by the appointing branch on the recommendation of a tribunal or directly by the appointing branch. This section will examine the reasons for removal and then the removal methods.

174. A few examples of these countries include Armenia, ELECTORAL CODE OF THE REPUBLIC OF ARM. art. 40, pt. 2 (2011), http://res.elections.am/images/doc/_ecode.pdf [<https://perma.cc/8946-2F2S>] (requiring at least one of the members to have "legal education or a scientific degree in law"); Belarus, Electoral Code of the Republic of Belr., No. 370-Z, Feb. 11, 2000, as amended, art. 32, http://www.sze.hu/~smuk/Nyilvanossag_torvenyek_east_south_eur/Jogforr%C3%A1sok/V%C3%A1laszt%C3%A1si/BEL%20-%20Electoral%20Code.pdf [<https://perma.cc/866P-7KDP>] (requiring "higher juridical education and experience"); the Maldives, CONST. OF MALDIVES art. 169 (requiring commissioners to "possess the educational qualifications . . . necessary to discharge the functions of the Elections Commission"); Ley General de Instituciones y Procedimientos Electorales [LGIPE] art. 36, para. 1(d), Diario Oficial de la Federación [DOF] 23-05-2014, http://www.diputados.gob.mx/LeyesBiblio/pdf/LGIPE_130815.pdf [<https://perma.cc/5CFG-ZTNB>] (requiring candidates to have held a bachelor's degree for five years prior to appointment), *translated in* ELECTORAL TRIBUNAL OF THE FED. JUDICIARY, *supra* note 611; and Thailand, CONST. OF THAI. (2007) § 230(2) (requiring at least a bachelor's degree).

175. *E.g.*, ORGANIC LAW OF GEOR.: ELECTION CODE OF GEOR. art. 12, para. 4 (2012), http://www.transparency.ge/sites/default/files/August%202012,%20Election_Code_of_Georgia_EN_-_codified.pdf [<https://perma.cc/CW56-JUW4>].

176. Electoral Code of the Republic of Belr. art. 32.

177. Independent Electoral and Boundaries Commission Act (Act No. 9/2011), as amended, § 6(2)(c), <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/IndependentElectoralalandBoundariesCommissionNo9of2011.pdf> [<https://perma.cc/EN99-SV4V>] (allowing members who hold any of these qualifications in Kenya).

1. Removal Causes

Currently, three major reasons exist to remove commissioners from office: a standard of misconduct (generally undefined by the enabling statutory or constitutional language),¹⁷⁸ inability to discharge duties as a commissioner,¹⁷⁹ and absenteeism from commission meetings.¹⁸⁰

In the United States, one main concern should be preventing arbitrary application of the standards for misconduct. Accordingly, those standards must be well defined and guilt must be subject to the findings of a tribunal. For example, there should be concrete examples of misconduct embedded within the law defining what actions constitute misconduct. Removal standards provide an important check on commissioners: they ensure that commissioners do their job and maintain a healthy respect for their position and for the law. However, removal standards must be concrete and coupled with a procedurally sound mechanism for removal, or the commission could easily be cowed by an aggressive legislature.

2. Removal by Tribunal

Before allowing the appointing branch to remove a commissioner, many countries require a tribunal to find that the commissioner should be removed. Countries utilize three different types of panels to achieve this function. First, Armenia,¹⁸¹

178. There are obvious concerns over the generalized nature of the misconduct standard. While in one sense it is useful as a catch-all category (as opposed to defining each crime that could lead to removal), it could easily lead to commissioners being dismissed for petty crimes. Example countries with a misconduct standard include Antigua & Barbuda, CONST. OF ANT. & BARB. § 63(5); Kenya, Independent Electoral and Boundaries Commission Act § 10(8)(b) (referring to removal of the committee secretary); Liberia, REPUBLIC OF LIBER., THE NEW ELECTIONS LAW s. 2.2 (2011), http://www.necliberia.org/admin/pg_img/Election%20Law%20Incorporated%202011final.pdf [<https://perma.cc/U7CE-V3ME>]; New Zealand, Electoral Act 1993, s 4G, (allowing removal for “just cause”); and Uganda, CONST. OF UGANDA art. 60, cl. 8, para. b.

179. Example countries include Dominica, CONST. OF DOMINICA § 56(6); Lesotho, CONST. OF LESOTHO § 66(4); Malta, CONST. OF MALTA art. 60(7); Tonga, Electoral Boundaries Commission Act 2010 (Act No. 15/2010) § 4(1)(c)(ii), http://www.tongaelections.com/images/stories/TECdocuments/ENG/ElectoralBoundariesAct/electoralboundariescommissio nact2010_1.pdf [<https://perma.cc/D827-RG4Y>]; Ukraine, LAW OF UKR. ON THE CENTRAL ELECTION COMMISSION art. 30, § 4(9), <http://www.legislationline.org/documents/action/popup/id/7148> [<https://perma.cc/6PNB-5YSB>]; and Zambia, Electoral Commission Act, Cap. 17 (1996) § 5(3)(a), <http://www.parliament.gov.zm/sites/default/files/documents/acts/Electoral%20Commission%20Act.pdf> [<https://perma.cc/7KS6-8DRJ>].

180. Countries including this requirement are Albania, ALBANIAN ELECTORAL CODE art. 18 (Org. for Sec. & Cooperation in Europe ed. & trans., 2015), <http://www.osce.org/albania/159501?download=true> [<https://perma.cc/D3AM-4T84>]; Sudan, National Elections Act 2008 § 8(1)(a), <http://nec.org.sd/en/wp-content/uploads/sites/2/2013/09/THE-NATIONAL-ELECTIONS-ACT-2008.pdf> [<https://perma.cc/BAF2-XWET>]; and South Sudan, National Elections Act, 2012, § 12(1)(a), <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/ELECTION-ACT-SOUTH-SUDAN.pdf> [<https://perma.cc/MV2N-LDBX>].

181. ELECTORAL CODE OF THE REPUBLIC OF ARM. art. 43, pt. 5 (2011), <http://res.elections>

Dominica,¹⁸² the Gambia,¹⁸³ Sudan,¹⁸⁴ and Yemen¹⁸⁵ require that a panel of judges determine whether a commissioner should continue sitting.¹⁸⁶ A second type of tribunal, used in Belize,¹⁸⁷ Malawi,¹⁸⁸ and Namibia,¹⁸⁹ is composed of the initial candidate selection commission.¹⁹⁰ Third, Armenia,¹⁹¹ Bosnia and Herzegovina,¹⁹² and South Sudan¹⁹³ require the other commissioners to recommend that their fellow commissioner be removed.¹⁹⁴

In the United States, requiring a panel of state judges (perhaps from the state's highest court) to rule on commissioner competence or conduct is an appropriate forum because judges are already qualified to rule on judicial matters.¹⁹⁵ The idea of a selection commission seems less likely to work, unless a well-established, permanent selection commission is in place to hear these complaints. The main concern is that reconvening the selection commission may be quite difficult, especially if judges, legislators, or other government officials staffed the selection commission. Requiring other commissioners to remove their compatriots may be efficient, but there are two potential issues. The first concern is that opposing commissioners may try to get each other booted off the commission; however, this concern could likely be mitigated by requiring a supermajority of commissioners for removal. The second concern is that commissioners will be reticent to remove their compatriots, either because they are

.am/images/doc/_ecode.pdf [https://perma.cc/E8NL-QG8T] (allowing termination by the Administrative Court).

182. CONST. OF DOMINICA § 56(7)–(8) (allowing removal by president after a tribunal appointed by the chief justice has determined this is the proper course of action).

183. CONST. OF GAM. § 42(6) (requiring a tribunal of superior-court judges to find guilt).

184. National Elections Act of 2008 § 8(2) (requiring commissioners to appoint judges to serve on the tribunal).

185. GENERAL ELECTIONS AND REFERENDUM LAW art. 22, cl. c (2001), http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Yemen_General%20Elections%20and%20Referendum%20Law_2001_en.pdf [https://perma.cc/978Z-5CG4] (allowing removal by executive after an “irrevocable court order” is given).

186. *See supra* notes 181–85.

187. CONST. OF BELIZE § 88(7)–(8).

188. CONST. OF MALAWI § 75(4).

189. Electoral Act, 2014 (Act No. 5/2014), § 11(4)–(5), <http://www.ecn.na/documents/27857/193258/Electoral+Act+5+of+2014.pdf/1bd1c3e3-bdd1-4183-a2fa-2ae6e397180e> [https://perma.cc/5842-KNHM] (requiring the Selection Committee to investigate, followed by removal on the order of the executive with the approval of the National Assembly).

190. *See supra* notes 187–89.

191. ELECTORAL CODE OF THE REPUBLIC OF ARM. art. 43, pt. 3 (2011), http://res.elections.am/images/doc/_ecode.pdf [https://perma.cc/E8NL-QG8T] (allowing termination by a two-thirds vote of fellow commissioners).

192. ELECTION LAW OF BOSN. AND HERZ. art. 2.5 (2002), <http://www.constitutionnet.org/files/BiH%20Election%20Law.pdf> [https://perma.cc/M4T5-7PM5] (requiring the committee to notify the legislature for removal).

193. National Elections Act, 2012, § 12(2), <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/ELECTION-ACT-SOUTH-SUDAN.pdf> [https://perma.cc/K77B-PZVT] (allowing removal upon recommendation of two-thirds of the commissioners).

194. *See supra* notes 191–93.

195. It doesn't really matter what level of court hears these issues, although perhaps for the purposes of judicial authority a higher-level court would make more sense.

friends or because they fear the damage that removal could do to the perception of the commission.¹⁹⁶

3. Direct Removal

The alternate option is allowing the appointing branch or branches to directly remove commissioners. This occurs in four permutations. In Sri Lanka,¹⁹⁷ Tonga,¹⁹⁸ and Zimbabwe,¹⁹⁹ the executive branch has the sole power of removal.²⁰⁰ In Albania²⁰¹ and Tajikistan,²⁰² the legislative branch has this power.²⁰³ The executive and legislative branches are required to work together in Malta²⁰⁴ and St. Kitts and Nevis²⁰⁵ to remove commissioners.²⁰⁶ Finally, in Thailand, the legislative and judicial branches are required to work in concert to remove commissioners.²⁰⁷ The biggest problem is that the provisions enabling direct removal are often vague and thus could grant the appointing body significant discretion in removal. Without clear standards, removal is far more likely to be arbitrary.

In the United States, most of these options do not seem consistent with the goals of an independent commission unless the standards for removal are clear. Allowing either the executive or legislative branches to remove members at their discretion risks commissioners being removed for political reasons. For example, if members

196. Various concerns are implicated here, from peer pressure to favoritism. Due to these concerns, this seems like a bad answer for the removal process.

197. CONST. OF SRI LANKA art. 95, para. 2.

198. Electoral Boundaries Commission Act 2010 (Act No. 15/2010) § 4(1)(c)(ii), http://www.tongaelections.com/images/stories/TECdocuments/ENG/ElectoralBoundariesAct/electoralboundariescommissionact2010_1.pdf [<https://perma.cc/7JKN-FBV9>].

199. CONST. OF ZIM. § 237(3) (referring to the process of removing judges, which, pursuant to § 187(2), (4), requires the executive to appoint a panel at the discretion of the executive. The only limitation on the panel members is that one members must be a former judge.)

200. *See supra* notes 196–99.

201. ALBANIAN ELECTORAL CODE art. 18(2) (Org. for Sec. & Cooperation in Europe ed. & trans., 2015), <http://www.osce.org/albania/159501?download=true> [<https://perma.cc/G3UW-A2BQ>] (requiring a motion by the Central Election Commission and then legislative approval).

202. On Elections to the Majlisi Oli of the Republic of Tajikistan, Dec. 10, 1999, as amended, art. 18, <http://www.legislationline.org/documents/action/popup/id/6930> [<https://perma.cc/H849-ZAFP>] (allowing removal by the organ that chose them—the legislature).

203. *See supra* notes 201–02.

204. CONST. OF MALTA art. 60(6) (The Maltese Constitution provides that “a member of the Electoral Commission may be removed from office by the President acting in accordance with the advice of the Prime Minister.” While the prime minister could accurately be considered an executive (along with the president), the prime minister is also the head of the legislative branch. In that sense, this provision is akin to granting advisory power to the Speaker of the House or president of the senate. Thus, the executive must weigh in, as must the prime minister, who is the de facto representative of the legislative branch).

205. CONST. OF ST. KITTS & NEVIS § 49(2)(d) (St. Kitts & Nevis).

206. *See supra* notes 204–05.

207. The only example of this sort of removal is Thailand. CONST. OF THAI. (2007) § 233 (requiring one-tenth of the members of the legislature to call for removal, prompting an investigation by the Constitutional Court).

of the commission made decisions that hurt the party with a majority in the legislature, that party could vote to remove the commissioner. This could potentially poison the decisions of the commissioners, since removal would effectively be a veto on commission decisions. While requiring the executive and legislative branches to work together in removal might mitigate this if the executive and the majority of the legislature are from different parties, there is no check if they are from the same party. As mentioned before, this concern could be mitigated by clear standards, requiring the appointing parties to go through well-defined procedures before removing commissioners.

Requiring the judiciary and legislature to work together to remove commissioners seems to be a viable option when used in conjunction with concrete removal standards. This approach allows the judiciary, a branch whose goal is objectivity, to work together with one of the political branches. In effect, this method of removal could function similarly to removal through a tribunal: the judiciary could determine whether a violation of the law occurred, and the legislature could remove an offending commissioner.

D. Powers of the Commission

Independent commissions around the world can serve two functions. Some commissions issue binding decrees, while others issue nonbinding recommendations, subject to the approval of the legislature.

1. Binding Decrees

In some countries, such as Armenia,²⁰⁸ Lesotho,²⁰⁹ Thailand,²¹⁰ and Turkey,²¹¹ commissions issue binding decrees, subject to no explicit appeals process.²¹² Yet, other countries, including Kenya,²¹³ Malawi,²¹⁴ Palau,²¹⁵ South Sudan,²¹⁶ and

208. ELECTORAL CODE OF THE REPUBLIC OF ARM. art. 36, pt. 2 (2011), http://res.elections.am/images/doc/_ecode.pdf [<https://perma.cc/E86U-N7SU>] (making all acts within the scope of the commission's power binding).

209. CONST. OF LESOTHO § 67(4) (making all acts of the commission binding upon the dissolution of the legislature).

210. CONST. OF THAI. (2007) § 236.

211. Law on Basic Provisions on Elections and Voter Registration, Law No. 298, Apr. 26, 1961, as amended, art. 13, https://www.ecoi.net/file_upload/1504_1220346141_law-on-basic-provisions-on-elections-and-voter-registers.pdf [<https://perma.cc/3YUZ-584J>].

212. In all countries, matters can at least theoretically be appealed if the committee acts contrary to its mandate. For example countries, see *supra* notes 208–11.

213. Independent Electoral and Boundaries Commission Act (Act No. 9/2011), as amended, sched. 5, §§ 4–5, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/IndependentElectoralandBoundariesCommissionNo9of2011.pdf> [<https://perma.cc/E3HU-XB72>] (requiring appeals to the High Court to be made within thirty days).

214. CONST. OF MALAWI § 76(3).

215. CONST. OF PALAU art. IX, § 4(c) (allowing appeal by the Supreme Court).

216. National Elections Act, 2012, § 43, <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/ELECTION-ACT-SOUTH-SUDAN.pdf> [<https://perma.cc/FP7E-APLD>] (allowing appeal within fourteen days to the High Court).

Uganda,²¹⁷ allow for the commission's decisions to be challenged in the nation's highest court within a narrow time window before going into effect.²¹⁸ Decisions are generally appealable by any member of the public for a districting plan that violates the principles the commission is required by constitution or statute to follow.²¹⁹

Allowing for limited judicial review of binding decisions by a commission would be an effective way to implement commissions while still providing oversight for partisan districting plans. If the commission is properly composed,²²⁰ the minutiae of the redistricting plan should be impartially administered. However, courts should have some power to review for abuse of discretion or bias in the districting plan, if only to place a check on the power of the commission by allowing another body to review its decisions.

2. Recommendations

Many nations grant commissions only the power to recommend redistricting plans, subject to approval by the legislature. The majority of these nations, including Canada,²²¹ Kiribati,²²² and Swaziland,²²³ require the legislature to either approve or reject the plan in its entirety, without any modifications.²²⁴ However, others, such as Antigua,²²⁵ Belize,²²⁶ Grenada,²²⁷ and the United Kingdom,²²⁸ grant the legislature the ability to modify the plan before approving it, although the legislature is supposed to show a degree of deference to decisions by the commission.²²⁹

Granting a commission power solely to recommend plans is beneficial because it provides an extra layer of review before plans are put into action. This framework acts as a check on the commission, keeping it accountable to one of the political branches. However, this framework will only act as a meaningful check when the commission is not merely a proxy of the majority of the legislature. If the commis-

217. CONST. OF UGANDA art. 64 (allowing appeal to the High Court).

218. *See supra* notes 213–17.

219. The seven factors used by the Arizona Independent Redistricting Commission fairly represent the factors generally used for redistricting: equal population, compactness, contiguity, compliance with the Constitution and the Voting Rights Act, respect for communities of interest, incorporation of visible geographic units, and creation of competitive districts that are not at odds with the other factors. *Frequently Asked Questions*, *supra* note 1700.

220. *See supra* Part III.A.

221. Electoral Boundaries Readjustment Act, R.S.C. 1985, c. E-3, §§ 21–22, <http://laws.justice.gc.ca/PDF/E-3.pdf> [<https://perma.cc/BK93-DHUA>] (allowing legislative members opportunity to make objections and request the commission to change the report).

222. CONST. OF KIRIBATI § 63(4)–(5).

223. CONST. OF SWAZ. § 92(4) (requiring the king to examine and approve before publication).

224. *See supra* notes 221–23.

225. CONST. OF ANT. & BARB. § 65.

226. CONST. OF BELIZE § 90(3)–(4).

227. CONST. OF GREN. § 56.

228. Parliamentary Constituencies Act 1986, c. 56, §§ 3–4, http://www.legislation.gov.uk/ukpga/1986/56/pdfs/ukpga_19860056_en.pdf [<https://perma.cc/EVL6-3WG5>].

229. *See supra* notes 225–28.

sion is merely a proxy, then it is likely to rubberstamp the preferences of the legislature. Thus, if a commission is structured well (perhaps determined by inclusion of members from multiple parties on the commission), then this could provide a meaningful check on the commission by requiring the plan to pass the scrutiny of legislators. However, there is a concern that if the redistricting plan hurts the interests of the majority in the legislature, the legislature will strike down the plan for political, self-interested motives. This concern could be mitigated by a requirement that the legislature create a report showing any reasons for rejection if the redistricting plan is not approved.

However, allowing the legislature to modify the commission's plan undermines the purpose of having an independent commission. If a majority of the legislators can discretionarily change a plan, the redistricting process would be subject to the tyranny of the majority. In this case, the situation might be even worse because the people would believe that the commission was in place to check the biases of the legislature, while the legislature could still subtly alter the plan at the last moment.

CONCLUSION

Examining IRCs through an international lens provides unique and interesting alternatives to structuring redistricting commissions. Instead of the largely single-branch approach used by many states in America, there are several multibranch approaches available that may be more effective than current commissions.²³⁰ Other approaches demonstrate that the number of commissioners sitting on a commission and the qualifications of those commissioners can play a substantial role in shaping the expertise and accountability of the IRC's mission.²³¹ Additionally, they illustrate both the need for proper and procedurally fair removal processes²³² and delegation of powers to commissioners.²³³

A number of well-structured commissions both already exist and also could be crafted from the analysis of the above factors. However, a commission that is chosen by multiple branches with an eye toward proportional representation and an impartial, talented tiebreaking commissioner would be a good starting point for a state considering an IRC. In some ways, this process is similar to the one established in both Arizona and California, although modifications could be made to either based on alternatives.²³⁴ Additionally, the commission must be made functionally independent by granting it power to issue decrees, subject solely to judicial review.

230. *See supra* Part III.A.

231. *See supra* Part III.B.

232. *See supra* Part III.C.

233. *See supra* Part III.D.

234. The commission in Arizona requires a selection commission (the State Commission on Appellate Court Appointments) to nominate twenty-five individuals: ten Republicans, ten Democrats, and five Independents. Of these, two Republicans and two Democrats sit on the commission; amongst themselves they choose the fifth member, an Independent. *Frequently Asked Questions*, *supra* note 170. In California, applicants submit their information to the Bureau of State Audits; this Bureau chooses forty Republicans, Democrats, and Independents. *Frequently Asked Questions*, CALIFORNIA CITIZENS REDISTRICTING COMMISSION (2014), <http://wedrawthelines.ca.gov/faq.html> [<https://perma.cc/2HWS-NYEF>]. The candidates are

An example of a five-member commission that complies with the criteria described above might look as follows. A panel of randomly assigned judges from the state appellate and supreme courts might vet candidates from applications and recommendations from citizens of the state. The panel would recommend, by supermajority, between four and ten candidates to the governor. The governor would then appoint two members each from the majority and minority parties, subject to approval by a majority of that candidate's party. This process would ensure that candidates are competent, of good character, and representative of the party.²³⁵

The final member of the commission could either be an Independent or someone with no party affiliation. This person could either go through the same process as other candidates, subject to a supermajority vote of approval by the whole legislature, or could be chosen by a unanimous vote from the four commissioners sitting on the commission. This process, identical to the one used in Arizona, ensures that the candidate will be as impartial as possible (since members of both parties must approve) and additionally ensures that the candidate will be someone that both parties feel like they can work with to get a plan approved. If the commissioners are unable to choose their fifth member, then the multibranch approach mentioned above might be utilized as a failsafe to ensure the commission will get its job done.²³⁶

Of utmost importance is that commissioners only be removed for concrete, well-defined causes that are delineated in the constitutional provision or statutes enabling the commission. Requiring guilt to be found by a tribunal (such as the state supreme court) would ensure that members are not removed solely for political reasons.²³⁷

Finally, it is imperative that the plans of the commission be binding, while subject to limited judicial review in the state supreme court. This ensures that the commission can draw redistricting plans that will not be subject to legislative veto if the plans hurt the majority party. However, this provides an appropriate and procedurally fair forum for complaints that the redistricting plan is skewed or fundamentally unfair.²³⁸

America stands at a pivotal point in its electoral history. The recent ruling in *Arizona State Legislature v. Arizona Independent Redistricting Commission* and the success of a similar ballot initiative in California have illustrated the ability of concerned citizens to implement electoral reform that will keep the legislatures accountable and widely representative of the public, enforcing the principle of one person, one vote.²³⁹

Independent redistricting commissions are important because they can help “restore ‘the core principle of republican government,’ namely, ‘that the voters should

reduced by that Bureau to twenty of each political affiliation. *Id.* Leadership of the California State Assembly is allowed to then strike twenty-four of the applicants. *Id.* After this, eight members are chosen at random to serve—three Republicans, three Democrats, and two Independents. *Id.* These commissioners choose the other six members. *Id.*

235. *See supra* Part III.A.

236. *See supra* Part III.A.

237. *See supra* Part III.C.

238. *See supra* Part III.D.

239. *See* Cain, *supra* note 3, at 1823, 1830.

choose their representatives, not the other way around.”²⁴⁰ As scholars and citizens alike recognize the need for restraints on abuses of the districting process by legislators, it is essential that they find a well-established strategy for solving the problem of gerrymanders and respond by structuring accountable, effective, and independent commissions.

240. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677 (2015) (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005)).