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# Arizona and Anti-Reform

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*The Supreme Court is on the cusp of rejecting one of the best ideas for reforming American elections: independent commissions for congressional redistricting. According to the plaintiffs in a pending case, a commission is not "the Legislature" of a state. And under the Elections Clause, it is only "the Legislature" that may set congressional district boundaries.*

*There are good reasons, grounded in text and precedent, for the Court to rebuff this challenge. And these reasons are being aired effectively in the case's briefing. In this symposium contribution, then, I develop three other kinds of arguments for redistricting commissions. Together, they illuminate the high theoretical, empirical, and policy stakes of this debate.*

*First, commissions are supported by the political process theory that underlies many Court decisions. Process theory contends that judicial intervention is most justified when the political process has broken down in some way. Gerrymandering, of course, is a quintessential case of democratic breakdown. The Court itself thus could (and should) begin policing gerrymanders. And the Court should welcome the transfer of redistricting authority from the elected branches to commissions. Then the risk of breakdown declines without the Court even needing to enter this particular thicket.*

*Second, commission usage leads to demonstrable improvements in key democratic values. The existing literature links commissions to greater partisan fairness, higher competitiveness, and better representation. And in a rigorous new study, spanning federal and state elections over the last forty years, I find that commissions, courts, and divided governments all increase partisan fairness relative to unified governments. At the federal level, in particular, commissions increase partisan fairness by up to* fifty percent.

*And third, the implications of the plaintiffs' position are more sweeping than even they may realize. If only "the Legislature" may draw congressional district lines, then governors should not be able to veto plans, nor should state courts be able to assess their legality. And beyond redistricting, intrusions into any other aspect of federal elections by governors, courts, agencies, or voters should be invalid as well. In short, a victory for the plaintiffs could amount to an unnecessary election law revolution.*

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TABLE OF CONTENTS

INTRODUCTION

The problem of gerrymandering is not ultimately a hard one. Just take away the legislature's power to design districts, and transfer it to a properly designed commission. Then self-interest is removed from the line drawing, and the commission can set boundaries based on criteria that are not (intentionally) biased in any party or candidate's favor.[1] This reasoning explains why thirteen states have switched to commission control over redistricting—including, most recently, behemoths like California and New York.[2] It also explains why just about every foreign country that uses single-member districts has entrusted their crafting to a commission.[3]

The Supreme Court, though, has agreed to hear a case that may turn this logic on its head. The case, *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[4] stems from Arizona voters' decision, in a 2000 initiative, to establish a commission with final say over redistricting.[5] The Arizona legislature now claims that the commission is unconstitutional under the Elections Clause. This provision states that "[t]he Times, Places and Manner" of federal elections "shall be prescribed in each State *by the Legislature thereof*."[6] The commission, obviously enough, is not the legislature. Thus, the argument goes, the commission's power over redistricting violates the Constitution's exclusive grant of electoral authority to the legislature.

There are good textual and precedential reasons to reject this challenge. As a textual matter, a phrase as procedural as "Times, Places and Manner" may not cover an activity as substantive as redistricting.[7] The Clause also may use "Legislature" as shorthand for a state's entire lawmaking process, including whatever institutions are specified by the state's

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[1] For a fully developed argument in favor of redistricting commissions, see Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 795-806 (2013).

[2] *See* NAT'L CONF. OF STATE LEGIS., REDISTRICTING LAW 2010, at 187-88 (2009) [hereinafter NCSL REPORT]. Since the publication of this report, New York also has switched to commission control. *See New York State Unofficial Election Night Results*, N.Y. STATE BD. OF ELEC. (Nov. 13, 2014), http://nyenr.elections.state.ny.us/home.aspx (showing victory of Proposition 1 in statewide vote).

[3] *See* Stephanopoulos, *supra* note 1, at 780-86 (describing institutions used in redistricting abroad).

[4] The lower court's decision is at 997 F. Supp. 2d 1047 (D. Ariz. 2014).

[5] *See id.* at 1048-49.

[6] U.S. CONST., art. I, § 4 (emphasis added).

[7] *Id.*

constitution.[8] And as a matter of precedent, the Supreme Court twice has allowed entities other than the legislature to play a role in congressional redistricting. In 1916, the Court upheld an Ohio referendum in which voters turned down a district plan passed by the legislature.[9] And in 1932, the Court validated a Minnesota governor's veto of a legislatively enacted plan.[10]

In this Article, though, I do not stress text and precedent—considerations at the heart of the case's briefing. Instead, my focus is on the theoretical and empirical arguments for redistricting commissions. These arguments often are overlooked by lawyers (and judges) more comfortable with conventional modes of constitutional reasoning. But, in my view, they are essential to the legal case for commissions. They explain why commissions *should* be valued in a democracy, and also what their benefits actually *are*.

The theoretical foundation for commissions is political process theory. Originating in *Carolene Products*'s famous fourth footnote,[11] and finding its most influential exposition in the work of John Hart Ely,[12] it contends that courts should strike down laws only when the political process has broken down in some way. Gerrymandering, of course, is a quintessential example of democratic breakdown. When politicians gerrymander, they pursue their own advantage rather than the public interest, and they distort the conversion of public opinion into legislative power. Courts thus would be entitled to review district plans rigorously to ensure that they are not gerrymanders.[13] But it is even better, from the theory's perspective, if commissions enact the plans in the first place. Then the risk of gerrymandering is eliminated ex ante rather than policed ex post. And courts are able to avoid the difficult (and politically fraught) question of whether gerrymandering in fact has occurred.

Conversely, it would amount to a wholesale repudiation of process theory if the Court were to rule in favor of the Arizona legislature. It would mean that the body that can be trusted *least* to redistrict fairly is the *only* body that can be responsible for the activity. It would mean that the fox must be returned to the henhouse even after voters have chosen to kick it out. Process theory, it is true, is only one of several interpretive approaches that guide the Court's constitutional decisions. But it is hard to see what would be left of it if the Arizona legislature were to prevail here.

Shifting from theory to empirics, the existing literature has reached largely (though not entirely) positive conclusions about commissions' implications for key democratic values. Partisan fairness is higher in states that use commissions—and even higher in foreign countries whose commissions are more insulated and technocratic. Competitiveness follows the same pattern, rising as jurisdictions adopt better designed commissions. And representation, in the

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[8] *Id.*

[9] *See* Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569-70 (1916).

[10] *See* Smiley v. Holm, 285 U.S. 355, 366-69 (1932).

[11] *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938).

[12] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[13] In earlier work, I have proposed tests that courts could use to review district plans. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. (forthcoming 2015) (manuscript at 40-50) (proposing test based on magnitude of plan's efficiency gap); Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1428-42 (2012) (proposing test based on districts' congruence with geographic communities).

sense of congruence with the preferences of the median voter, is better in states possessing commissions than in states lacking them.

Unfortunately, none of the existing studies of partisan fairness have controlled sufficiently for state-specific factors and time trends, or considered enough elections and electoral levels. I therefore carry out a new empirical analysis of how commission usage is related to the *efficiency gap*, a measure of partisan gerrymandering that I have introduced in previous work with Eric McGhee.[14] This analysis covers elections over the entire modern redistricting era (1972 to 2012), at both the congressional and state house levels. It also considers the full range of institutions that may be responsible for redistricting: commissions, courts, and divided or unified state governments. And it includes fixed effects for states and years, giving rise to a full difference-in-differences design that allows judgments about causality to be made.

I find, first, that commissions have not helped much at the state house level. While commission-drawn plans feature lower efficiency gaps than plans drawn by other actors, these benefits evaporate once controls for states and years are added. However, plans enacted by *courts*, which also are appealing bodies from a process theory standpoint, are linked to a statistically significant improvement in partisan fairness. So too are plans passed by divided state governments, which have no incentive to try to favor a particular party.

At the congressional level, my results vary somewhat based on whether I calculate plans' efficiency gaps using congressional or presidential election results. Using congressional data, the presence of divided government improves partisan fairness, and neither commission nor court usage attains statistical significance. But using presidential data (which, arguably, is better suited to the task), the presence of divided government again improves partisan fairness, and commission usage is tied to a statistically significant and substantively large reduction in the efficiency gap. Specifically, it produces a 6% reduction, which represents about *half* of the 12% gap of the median plan.

These findings bolster the case for congressional redistricting commissions (the only kind at issue in the pending litigation). Not only does process theory predict that these commissions should be less prone to gerrymandering than legislatures, but its prediction is borne out by a thorough empirical examination. But what happens if the Court ignores these arguments? If the Arizona legislature wins, what then?

An obvious consequence is that all commissions with responsibility for congressional redistricting may be unconstitutional. Such commissions now exist in eleven states, and all of them may have to be discarded since they are non-legislative bodies with authority over federal elections. But this is just the beginning of the potential ramifications. If only the legislature may be involved in redistricting, then it may be impermissible for a governor to veto a legislative plan, or for a state court to assess its validity. Governors and state courts also may need to be excluded from all *other* aspects of federal elections: franchise access, party primaries, campaign finance, minority representation, and so on. Voter initiatives that touch on these areas may be unlawful as well. If the Elections Clause really means that the legislature is the only state actor that may regulate federal elections, much of modern election law may be void.

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[14] *See* Stephanopoulos & McGhee, *supra* note 13 (manuscript at 14-28).

On the other hand, commissions responsible for *state legislative* redistricting would be unscathed by an adverse decision. The Clause applies only to federal elections, and so is irrelevant to how states choose to design districts for their own legislatures. In addition, *Congress* would remain free to authorize (or even compel) the use of commissions for congressional redistricting. The Clause's second half states that Congress "may at any time by law make or alter such regulations."[15] Congress could invoke this power to mandate commissions, or to adjust any other aspect of federal elections. Indeed, an adverse decision might boost the odds of federal intervention by frustrating the states' own efforts at experimentation. If reform can come only from Washington, pressure might build for Washington to act.

The Article proceeds as follows. In Part I, I briefly summarize the Arizona case and the key arguments from text and precedent. In Part II, I explain why process theory supports commissions and opposes redistricting by legislatures. In Part III, I describe the existing literature on commissions' implications for partisan fairness, competitiveness, and representation. In Part IV, I conduct my own empirical analysis of commissions' impact on the size of the efficiency gap. And in Part V, I comment on what developments may follow from a decision by the Court in favor of the Arizona legislature.

## I. THE ARIZONA CASE

For almost a century after statehood, Arizona redrew its state legislative and congressional districts like most states. The legislature passed ordinary statutes, and the governor then signed them into law. In 2000, though, Arizona voters approved Proposition 106 by a margin of 56% to 44%.[16] Proposition 106 withdrew the elected branches' authority over redistricting, and transferred it to an independent commission.[17]

The commission is staffed as follows: First, a different commission responsible for appellate court appointments selects a pool of twenty-five candidates, including ten from each major party and five independents.[18] Second, the majority and minority leaders of the Arizona House and Senate each appoint one commissioner.[19] And third, these four commissioners choose an independent from the pool to serve as the body's chair and tie-breaking vote.[20] The commission then crafts districts based on the following criteria: (1) compliance with federal law; (2) equal population; (3) compactness and contiguity; (4) respect for communities of interest; (5)

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[15] U.S. CONST., art. I, § 4.

[16] *See State of Arizona Official Canvass*, ARIZ. SEC'Y OF STATE (Nov. 7, 2000), http://www.azsos.gov/election/2000/General/Canvass2000GE.pdf. For a discussion of why Proposition 106 succeeded, while most redistricting initiatives fail, see Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 368-71 (2007).

[17] *See* ARIZ. CONST. art. IV, pt. 2 § 1(3) ("[A]n independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts.").

[18] *See id.* § 1(5).

[19] *See id.* § 1(6).

[20] *See id.* § 1(8) (also noting that if commissioners cannot agree on a chair, she will be selected by commission on appellate court appointments).

respect for political subdivisions; and (6) competitiveness.[21] The commission's plans go into force without the need for any further action by the elected branches.[22]

In the 2000 cycle, the commission's maps generated a substantial volume of litigation.[23] But none of these lawsuits, which spanned issues from equal population to the Voting Rights Act to the competitiveness criterion, alleged that the commission itself was unconstitutional.[24] This claim was not made until the current cycle, during which the displeasure of the Republican-dominated state government with the commission's work reached new heights. The main objection of Republican leaders is that the commission's congressional map is not as favorable to Republican candidates as it could be.[25] The map features four heavily Republican districts, two heavily Democratic districts, and three highly competitive districts. Democrats won the three tossup districts in 2012, giving them a five-to-four advantage despite receiving fewer votes statewide.[26]

Republican legislators first struck at the commission by voting to oust its chair for "gross misconduct."[27] However, this maneuver was thwarted by the Arizona Supreme Court, which held that a valid basis for removing the chair did not exist.[28] On a party line vote, Republicans next decided to challenge the commission's constitutionality.[29] The lawsuit they authorized was dismissed by a three-judge district court,[30] but now is slated for argument before the U.S. Supreme Court.[31]

The legislature's position, as detailed in its brief to the Court, is straightforward. In its view, the Elections Clause delegates power over congressional elections to it, and to it alone.[32] "Legislature" unambiguously means the state's representative lawmaking body, and does not

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[21] *See id.* § 1(14).

[22] *See id.* § 1(17).

[23] *See, e.g.*, Ariz. Minority Coal. for Fair Redist. v. Ariz. Indep. Redist. Comm'n, 366 F. Supp. 2d 887 (D. Ariz. 2005); Navajo Nation v. Ariz. Indep. Redist. Comm'n, 230 F. Supp. 2d 998 (D. Ariz. 2002); Ariz. Minority Coal. for Fair Redist. v. Ariz. Indep. Redist. Comm'n, 208 P.3d 676 (Ariz. 2009) (en banc).

[24] *See id.*

[25] *See, e.g.*, *District Redrawing Politically Charged*, ARIZ. REPUBLIC, Aug. 13, 2011, at B1 ("Republicans are distrustful of the commission , and . . . believe the process is rigged to give Democrats the upper hand . . . ."); *New Map May Alter Races for Congress*, ARIZ. REPUBLIC, Oct. 4, 2011, at A1 ("Republicans . . . are concerned that some of their incumbents generally have gotten a raw deal . . . .").

[26] *See Election Adds to Debate Over Redistricting*, ARIZ. REPUBLIC, Nov. 24, 2012, at A1; *State of Arizona Official Canvass*, ARIZ. SEC'Y OF STATE (Nov. 6, 2012), http://www.azsos.gov/election/2012/General/Canvass2012GE.pdf. In 2014, Republicans won a five-to-four majority after prevailing in a recount in one of the tossup districts. *See Arizona's Vote Count Once Again Hits Snags*, ARIZ. REPUBLIC, JAN. 1, 2015, at A1; *State of Arizona Official Canvass*, ARIZ. SEC'Y OF STATE (Nov. 4, 2014), http://www.azsos.gov/election/2014/General/Canvass2014GE.pdf.

[27] *See Redistricting Chief Ousted*, ARIZ. REPUBLIC, Nov. 2, 2011, at A1.

[28] *See Redistrict Chief Reinstated*, ARIZ. REPUBLIC, Nov. 18, 2011, at A1.

[29] *See Legislature Challenges Redistrict Commission*, ARIZ. REPUBLIC, June 8, 2012, at B1.

[30] *See* Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n, 997 F. Supp. 2d 1047 (D. Ariz. 2014).

[31] *See* Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n, 135 S. Ct. 46 (2014).

[32] *See* Brief for Appellant at 23-24, Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n, No. 13-1314 (U.S. Dec. 2, 2014) [hereinafter Ariz. Legis. Brief] ("The plain text of this provision clearly delegates the authority . . . to one entity alone: 'the Legislature' of a State . . . ."); Brief for Appellees at 33, Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n, No. 13-1314 (U.S. Jan. 16, 2015) (discussing "narrow definition of 'Legislature' that Appellant proposes, namely that the term refers exclusively to a body of elected representatives").

encompass any other institution or process.[33] It thus violates the Clause for a non-legislative entity like the commission to be involved in redistricting, and for the legislature itself to be excluded.[34] "[W]hile the [commission] is plainly not the Legislature and is structured to look and operate nothing like the Legislature, the *actual* Legislature has been cut out of the redistricting process entirely . . . ."[35]

One textual response is that "Legislature" reasonably may be read to denote a state's lawmaking process in its entirety, including whatever methods are identified by the state's constitution. As the district court in the Arizona case put it, "the word 'Legislature' in the Elections Clause refers to the legislative process used in that state, determined by that state's own constitution and laws."[36] Under this reading, there was nothing wrong with Proposition 106's transfer of cartographic power from the legislature to the commission, because voter initiatives like Proposition 106 are authorized explicitly by the Arizona Constitution.[37]

Another textual retort is that "Times, Places and Manner" plausibly may be construed as extending only to procedural issues—and not to an activity with as many substantive consequences for candidates and parties as redistricting.[38] The Court has long interpreted the Elections Clause as "a grant of authority to issue procedural regulations, and not a source of power to dictate electoral outcomes."[39] Since the power to shape districts is, above all, the power to dictate outcomes, it may be impermissible for legislatures to redistrict on the basis of political considerations. At the very least, under this reading, it would be acceptable for a non-legislative body to draw district lines based on nonpartisan criteria. Indeed, such a redistricting process might be affirmatively compelled by the Clause.[40]

As a matter of precedent as well, a trio of cases have made clear that entities other than the legislature may play a role in congressional redistricting. In the 1916 case of *Ohio ex rel. Davis v. Hildebrant*,[41] the Court upheld an Ohio referendum in which voters rejected a district plan passed by the legislature. It did not matter that voters are distinct from the legislature, because "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power."[42] Similarly, in the 1932 case of *Smiley v. Holm*,[43] the Court sustained a Minnesota governor's veto of a legislatively enacted map. Again, the governor's

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[33] *See* Ariz. Legis. Brief, *supra* note 32, at 24-31.

[34] *See id.* at 36-42.

[35] *Id.* at 37-38.

[36] Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n, 997 F. Supp. 2d 1047, 1054 (D. Ariz. 2014); *see also* Brown v. Sec'y of State, 668 F.3d 1271, 1276 (11th Cir. 2014) ("[T]he term 'Legislature' in the Elections Clause refers not just to a state's legislative body but more broadly to the entire lawmaking process of the state.").

[37] *See Ariz. State Legis.*, 997 F. Supp. 2d at 1054-55 ("The Arizona Constitution allows multiple avenues for lawmaking and one of those avenues is the ballot initiative, as employed here through Proposition 106.").

[38] U.S. CONST., art. I, § 4.

[39] U.S. Term Limits v. Thornton, 514 U.S. 779, 833-34 (1995).

[40] For a longer argument along these lines, see Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 263-67 (2006).

[41] 241 U.S. 565 (1916).

[42] *Id.* at 567.

[43] 285 U.S. 355 (1932).

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involvement was unobjectionable because it was "in accordance with the method which the state has prescribed for legislative enactments."[44]

In the 2014 case of *Brown v. Secretary of State*,[45] lastly, the Eleventh Circuit validated a Florida voter initiative that required the legislature to comply with an array of redistricting criteria. Once more, it was immaterial that an initiative is something other than the legislature, because "the lawmaking power in Florida expressly includes the power of the people to amend their constitution, and that is exactly what the people did here."[46] *Brown* probably is the precedent most applicable to the Arizona case, since it also concerned a redistricting initiative. If the Florida amendment did not violate the Elections Clause, it is hard to see how Proposition 106 could do so.

Much more could be said, of course, about the textual and precedential arguments for and against each side. (And much more *has* been said in the case's briefing.) But my interest here is not in reiterating these relatively conventional points. Instead, I wish to focus on the theoretical and empirical aspects of the debate—aspects that the briefing mostly has missed. In the next Part, then, I assess redistricting commissions from the perspective of political process theory. In short, the theory strongly favors them because they mitigate the high risk of democratic malfunction associated with legislative redistricting.

## II. THE PROCESS THEORY PERSPECTIVE

The core claim of process theory is that courts are most justified in striking down laws that emerge from a flawed political process. In this context, courts avoid the countermajoritarian difficulty because their intervention promotes democracy instead of frustrating it. Process theory has its roots in *Carolene Products*'s legendary fourth footnote, which identified two kinds of process defects warranting "more exacting judicial scrutiny."[47] The first is "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"—that is, policies making it more likely that the majority's preferences will be thwarted.[48] The second is "prejudice against discrete and insular minorities," which may "curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[49]

Two generations after *Carolene*, John Hart Ely refashioned its dicta into perhaps the most celebrated theory of judicial review of all time. He agreed with the Court that "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about."[50] He also restated the process defects that justify judicial intervention as follows: "(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) . . . representatives . . . are systematically disadvantaging some minority out of simple

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[44] *Id.* at 367.

[45] 668 F.3d 1271 (11th Cir. 2014).

[46] *Id.* at 1279.

[47] United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938).

[48] *Id.*

[49] *Id.* For an article-length treatment of the second kind of process defect, see Nicholas O. Stephanopoulos, *Political Powerlessness* (Jan. 1, 2015).

[50] ELY, *supra* note 12, at 117.

hostility . . . ."[51] While not without its critics,[52] Ely's theory is widely viewed as explaining much of the Court's activity during the second half of the twentieth century.[53] And its appeal remains undimmed today; as David Strauss has quipped, "If you have a better idea about what courts should be doing in difficult constitutional cases, let me know."[54]

Legislative redistricting is troubling from a process theory standpoint, then, because it often produces the first kind of process defect.[55] It often makes it harder for the majority's preferences to be realized, and easier for the ins to benefit at the expense of the outs. How can lines on a map have such dramatic effects? The answer, of course, is that lines determine how votes are aggregated, and so which candidate wins or loses in each district. One district configuration helps (or harms) one set of candidates; another configuration helps (or harms) another set.[56]

And why are legislators prone to exploiting the opportunities presented by redistricting? For the obvious reasons of self-interest and partisan advantage. Legislators want to keep their jobs, and so want to make their districts safe enough that they face no serious challenge. Legislators also would like for their *party* to be as powerful as possible, which entails "packing" the opposition in a few districts that it wins by overwhelming margins, or "cracking" it across numerous districts that it narrowly loses.[57] When the aim of protecting incumbents takes priority over other factors, a plan is called a bipartisan gerrymander.[58] When the goal of helping one party (and harming its adversary) predominates, a plan is deemed a partisan gerrymander. Either way, a democratic malfunction has occurred, since boundaries have been set for the sake of distorting the translation of voters' preferences into legislative seats.

This discussion suggests that courts should review legislatively enacted plans rigorously to ensure that they are not gerrymanders (of either type). After all, gerrymandering is an archetypal case of a process defect that should be redressed through judicial intervention. This conclusion is correct, in my view, and it is why I have proposed elsewhere tests that courts could use to distinguish valid from invalid plans.[59]

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[51] *Id.* at 103.

[52] *See, e.g.*, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

[53] *See* David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251, 1259 ("*Carolene Products* was the theory of the Supreme Court of the United States under Earl Warren . . . .").

[54] *Id.* at 1269.

[55] For longer arguments along these lines, see Stephanopoulos, *supra* note 1, at 795-806, and Stephanopoulos, *supra* note 16, at 334-42.

[56] *See* Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely.").

[57] *See* Stephanopoulos & McGhee, *supra* note 13 (manuscript at 14-16) (explaining techniques of packing and cracking).

[58] For more on the harms of bipartisan gerrymanders, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

[59] *See* Stephanopoulos & McGhee, *supra* note 13 (manuscript at 40-50) (proposing test based on magnitude of plan's efficiency gap); Stephanopoulos, *supra* note 13, at 1428-42 (proposing test based on districts' congruence with geographic communities).

But it is even better, from the perspective of process theory, if commissions design maps in the first place than if courts scrutinize them after the fact. This is so for two reasons. First, courts are unlikely to catch all (or even most) gerrymanders. Gerrymanders are notoriously difficult to detect—so difficult, in fact, that courts essentially have turned the cause of action for partisan gerrymandering into a dead letter.[60] Reliance on judicial policing thus means that many process defects would go uncorrected. In contrast, properly structured commissions prevent the defects from arising at all. One cause of gerrymandering, legislators' self-interest, is absent as long as commissions are staffed by non-legislators. The other cause, partisan advantage, does not apply either if commissioners are divided evenly between the parties or (even better) are nonpartisan technocrats. In short, courts can only fix a democratic malfunction ex post, while commissions can avoid it ex ante.

Second, commission-crafted plans reduce the need for judicial involvement.[61] A perennial worry of process theory is that courts may strike down laws for reasons *other* than a process breakdown, such as the imposition of their substantive values.[62] This risk is present as long as courts are the main line of defense against gerrymandering. They may invalidate plans not because they shield incumbents or benefit a particular party, but rather because they offend the judicial sensibility in some other way.[63] But the danger diminishes if commissions draw maps that are then reviewed deferentially by courts. In this case, there is less opportunity for judicial activity unjustified by process theory, because there is less judicial activity to begin with.

A skeptic might respond that commissions are not immune from the forces that render legislatures vulnerable to process failures.[64] Staff a commission with politicians, especially with more of one party's stalwarts than the other's,[65] and it will enact a gerrymander as reliably as a legislature. There is nothing magical about the commission form. This is true enough, but its implication is not that commissions in fact are undesirable according to process theory. Rather, it means that care must be taken to structure the bodies so that they do not redistrict on the basis of improper considerations. And care often *is* taken. Most American commissions are bipartisan, with equal representation for each party,[66] while most foreign commissions are nonpartisan,

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[60] *See* Stephanopoulos & McGhee, *supra* note 13 (manuscript at 1-2) (noting that plaintiffs have lost every partisan gerrymandering challenge in last generation).

[61] For a similar argument, see Stephanopoulos, *supra* note 1, at 797.

[62] *See* ELY, *supra* note 12, at 73 (fretting about "value imposition" by a Court that has become "a council of legislative revision").

[63] *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 432–34 (2006) (striking down district because it combined overly dissimilar Hispanic populations); Shaw v. Reno, 509 U.S. 630, 639-58 (1993) (striking down district because of racial message it allegedly conveyed).

[64] *See, e.g.*, Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 73 (1985); Nathaniel Persily, *In Defense of Foxes Guarding Hen Houses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 674 (2002).

[65] Several states do precisely this. *See* NCSL REPORT, *supra* note 2, at 189-200 (2009) (describing unbalanced politician commissions used in Arkansas, Indiana, Mississippi, Ohio, Oklahoma, and Texas).

[66] *See id.* (describing bipartisan commissions used in Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Maine, Missouri, Montana, New Jersey, Pennsylvania, Vermont, and Washington).

manned by geographers, statisticians, and the like.[67] Thanks to these staffing choices, many of the latter bodies enjoy sterling reputations for independence and impartiality.[68]

A skeptic also might grumble that the case for commissions is strong in theory, but uncertain in practice. What is the evidence, the skeptic might ask, that commissions in fact draw better maps than legislatures? This charge can be answered only with data. In the next Part, then, I summarize the existing literature on commissions' effects on partisan fairness, competitiveness, and representation. And in the following Part, I carry out my own analysis of how commission usage is related to the size of the efficiency gap. Together, these Parts show that the case for commissions is empirically persuasive as well. A Court decision in favor of the Arizona legislature thus would be regrettable from the vantage of not just process theory, but also substantive outcomes.

## III. EXISTING LITERATURE

Beginning with partisan fairness, there are two metrics that political scientists use to evaluate district plans. The first is *partisan bias*, that is, the divergence in the share of seats that each party would win given the same share of the statewide vote.[69] For example, if Democrats would win 45% of the seats with 50% of the vote (in which case Republicans would win 55% of the seats), then a plan would have a pro-Republican bias of 5%. The second is the *efficiency gap*, that is, the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast.[70] Votes are "wasted" if they are cast for a losing candidate, or for a winning candidate but in excess of what she needed to prevail. So if Democrats wasted 200 votes, Republicans wasted 300 votes, and 1000 votes were cast in an election, then a plan would have a pro-Democratic gap of 10% ((300-200)/1000).

With respect to American elections, three studies have examined how partisan fairness varies by the identity of the redistricting authority. First, Bruce Cain and others calculated the partisan biases of fifty legislative chambers in twenty-six states using the results of the 2002 elections.[71] The average bias was 4.0% in states with commissions, compared to 11.7% in states where legislatures drew the lines.[72] Second, Vladimir Kogan and Eric McGhee focused on California's experience after it adopted a commission for the 2010 cycle.[73] For all three maps that the commission enacted, partisan bias dropped from about 5% to almost zero.[74] And third, in a study of redistricting criteria covering the 1992-2012 period, I found that commissions reduce

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[67] *See* Stephanopoulos, *supra* note 1, at 780-86 (describing foreign redistricting commissions).

[68] *See id.* at 802.

[69] *See* Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 545 (1994); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After* LULAC v. Perry, 6 ELECTION L.J. 2, 8 (2007).

[70] *See* Stephanopoulos & McGhee *supra* note 13 (manuscript at 14-18) (explaining computation and key properties of efficiency gap).

[71] *See* Bruce E. Cain et al., *Redistricting and Electoral Competitiveness in State Legislative Elections* 12 (Apr 13, 2007).

[72] These calculations are on file with the author. *See also id.* at 13 (finding that bias decreased in all nine states that used bipartisan commissions in 2000 cycle).

[73] *See* Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 CAL. J. POL. & POL'Y 1 (2012).

[74] *See id.* at 22-24 (presenting seat-vote curves showing these results).

the efficiency gap in state legislative elections, but have no statistically significant impact in congressional elections.[75] I also found that courts improve partisan fairness in both state legislative and congressional elections.[76]

Three more studies have scrutinized the record of foreign commissions. Simon Jackman determined that two Australian states, South Australia and Queensland, experienced dramatic drops in partisan bias after instituting commissions, respectively, in 1975 and 1992.[77] Similarly, Alan Siaroff showed that bias in Quebec fell almost in half after the province adopted a commission in 1972.[78] And in my study of redistricting criteria, I found that partisan bias and the efficiency gap both are about one-third lower in Australian district plans (all of which now are devised by commissions) than in American maps.[79] These foreign analyses confirm the mostly encouraging picture painted by the more rigorous U.S. work.

Next, political scientists assess competitiveness using several different metrics. Some are fairly self-explanatory, such as the average margin of victory and the share of districts won by less than some threshold (typically ten or twenty points).[80] But *electoral responsiveness* may be less clear; it refers to the rate at which a party gains or loses seats given changes in its statewide vote share.[81] For instance, if Democrats would win 10% more seats if they received 5% more of the vote, then a plan would have a responsiveness of 2.0.

With respect to the more familiar metrics, Cain et al. found that, in 2002, districts drawn by commissions were more likely to be contested, and to be decided by less than ten points, than districts drawn by legislatures.[82] Likewise, Jamie Carson and Michael Crespin concluded that commissions had a positive impact on the share of districts won by less than twenty points in the 1992 and 2002 congressional elections, even controlling for a range of other variables.[83] And in my study of redistricting criteria, I determined that commissions reduced the average margin of victory and increased the share of districts won by less than twenty points in congressional elections from 1992 to 2012, again controlling for other relevant factors.[84] I also found that courts improved competitiveness in state legislative elections,[85] and that plans enacted by Australian commissions generally are more competitive than their American analogues.[86]

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[75] *See* Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 U.C. IRVINE L. REV. 669, 710-11 (2013) (also finding that commissions do not significantly affect partisan bias at either level).

[76] *See id.* (showing that courts have statistically significant impact in three of four models).

[77] *See* Simon Jackman, *Measuring Electoral Bias: Australia, 1949–93*, 24 BRIT. J. POL. SCI. 319, 344-45 (1994).

[78] *See* Alan Siaroff, *Electoral Bias in Quebec Since 1936*, 4 CAN. POL. SCI. REV. 62, 66-67 (2010) (using slightly different method to calculate bias).

[79] *See* Stephanopoulos, *supra* note 75, at 704.

[80] *See id.* at 685 (discussing these metrics).

[81] *See* Gelman & King, *supra* note 69, at 542, 544; Grofman & King, *supra* note 69, at 9.

[82] *See* Cain et al., *supra* note 71, at 16.

[83] *See* Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 4 STATE POL. & POL'Y Q. 455, 461-62 (2004).

[84] *See* Stephanopoulos, *supra* note 75, at 712-15. However, commissions did not have a statistically significant impact on competitiveness in state legislative elections.

[85] *See id.* However, courts did not have a statistically significant impact on competitiveness in congressional elections.

[86] *See id.* at 704.

However, commissions did not have a statistically significant impact on incumbent vote share in congressional races between 1982 and 2008, according to a study by James Cottrill.[87] (Though they did make these races more likely to be contested by experienced challengers.[88]) Commissions also may have *reduced* the probability of state legislative races being won by less than ten points in 2002, according to a study by Seth Masket and others.[89] (Though, again, commissions were associated with lower rates of uncontested elections from 2000 to 2008.[90])

With respect to responsiveness, Cain et al. found that, in 2002, commissions' plans had an average score of 1.45, compared to 0.88 for legislatures' maps.[91] Similarly, Jackman determined that, of the ten Australian plans with the lowest responsiveness scores from 1949 to 1993, eight were in a pair of states (South Australia and Western Australia) that lacked commissions at the time.[92] And in my study of redistricting criteria, I concluded that commissions improved responsiveness in congressional elections over the 1992-2012 period, while courts improved responsiveness in state legislative elections.[93] I also showed that plans enacted by Australian commissions are nearly twice as responsive as American maps (about 2.8 versus about 1.5).[94]

Lastly, Eric McGhee, Steven Rogers, and I recently explored how different electoral reforms (including commissions) are related to *representation*.[95] We conceived of representation as the ideological distance between the median voter in a state and the median member of the state's legislature.[96] We used presidential election results to estimate voters' ideologies, and roll call votes to estimate legislators' ideologies.[97] And our analysis spanned the 1992-2012 period and included fixed effects for states and years.[98] We found that commissions are the only redistricting policy that improves representation.[99] In states where commissions draw the lines, the median voter and the median legislator are significantly more proximate than in other states.

In sum, the existing literature largely validates the predictions of process theory. Just as the theory would expect, commissions are less likely to produce democratic malfunctions than

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[87] *See* James B. Cottrill, *The Effects of Non-Legislative Approaches to Redistricting on Competition in Congressional Elections*, 44 POLITY 32, 45 (2012).

[88] *See id.* at 48.

[89] *See* Seth E. Masket et al., *The Gerrymanderers Are Coming! Legislative Redistricting Won't Affect Competition or Polarization Much, No Matter Who Does It*, 45 POL. SCI. & POL. 39, 41 (2012).

[90] *See id.* at 42.

[91] *See* Cain et al., *supra* note 71, at 12. These calculations are on file with the author.

[92] *See* Jackman, *supra* note 77, at 350.

[93] *See* Stephanopoulos, *supra* note 75, at 712-15. However, commissions did not have a significant impact on responsiveness in state legislative elections, and courts did not have a significant impact on responsiveness in congressional elections. *See id.*

[94] *See id.* at 704.

[95] *See* Nicholas O. Stephanopoulos et al., *The Realities of Electoral Reform*, 68 VAND. L. REV. (forthcoming 2015).

[96] *See id.* (manuscript at 22-26).

[97] *See id.* (manuscript at 18-22).

[98] *See id.* (manuscript at 22-26).

[99] *See id.* (manuscript at 44-46). More specifically, commissions improve *chamber-level* alignment but worsen it at the *district level*. As we explain, chamber-level results are more important for redistricting policies that are intended to have statewide consequences. *See id.* (manuscript at 57-58).

legislatures. Their district plans typically treat the major parties more symmetrically, exhibit higher levels of competitiveness, and improve voters' actual representation. To be sure, not all of the studies' findings are positive, but their overall orientation is indisputable. Gerrymandering does seem rarer when commissions are responsible for redistricting.

However, the reliability of the existing partisan fairness studies is relatively low. In contrast to the competitiveness and representation studies, most of them include no controls whatsoever, and none of them include fixed effects for states and years.[100] In addition, even the most thorough partisan fairness study covers only a twenty-year period, or half of the modern redistricting era.[101] In the next Part, I therefore conduct a new empirical analysis that rectifies these shortcomings. I examine state and federal elections from 1972 to 2012, employing a full difference-in-differences design that enables conclusions about causality to be reached.

## IV. PARTISAN FAIRNESS ANALYSIS

The dependent variable in each of my models is the absolute value of the efficiency gap. I examine the efficiency gap rather than partisan bias because, as I have argued elsewhere, the former metric is conceptually superior to the latter.[102] The efficiency gap is calculated using *actual* election results, not the outcomes of a *hypothetical* election in which the parties receive equal vote shares.[103] I also consider the absolute rather than the raw value of the efficiency gap because I am interested here in the magnitude of gerrymandering, not its orientation.[104] And I compute the efficiency gap using state legislative and congressional election results from 1972 to 2012,[105] as well as presidential election results aggregated by congressional district over the same period.[106] The advantage of endogenous (i.e., state legislative and congressional) data is that it comes from the very chambers whose distortion I am studying. The advantage of exogenous (i.e., presidential) data is that it is unaffected by candidate quality and the incumbency advantage—and so is more under the control of the redistricting authority.

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[100] Only my own previous work includes any controls. *See* Stephanopoulos, *supra* note 75, at 709-15.

[101] *See id.* at 690 n.90, 694 n.106.

[102] *See* Stephanopoulos & McGhee, *supra* note 13 (manuscript at 18-25).

[103] *See id.* (manuscript at 22). There are other problems with partisan bias as well, such as its reliance on the uniform swing assumption, its inapplicability to uncompetitive elections, and the odd results it sometimes produces. *See id.* (manuscript at 22-25).

[104] I took the same approach in my earlier studies of redistricting criteria, *see* Stephanopoulos, *supra* note 75, at 684-85 (using absolute value of partisan bias and efficiency gap), and of electoral reforms, *see* Stephanopoulos et al., *supra* note 95 (manuscript at 25) (using absolute value of regression residual).

[105] State legislative election results have been compiled by Carl Klarner in a database he shared with me. Congressional election results are available at *Election Information: Election Statistics*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov/member_info/electionInfo/index.aspx (last visited Jan. 1, 2015), and also, in a more usable format, in a database that Gary Jacobson shared with me. I only included state legislative plans made up exclusively of single-member districts (which led to the omission of the Arizona and New Jersey commissions), and congressional plans that featured at least eight districts at some point during the 1972-2012 period (which led to the omission of the Connecticut, Hawaii, Idaho, Iowa, and Montana commissions).

[106] Jacobson's database includes the aggregated presidential data. Unfortunately, presidential election results aggregated *by state legislative district* are unavailable for the majority of the 1972-2012 period.

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For each state-year entry in my database, I coded whether its district plan was drawn by a commission, a court, or a unified or divided state government.[107] I included bipartisan and nonpartisan commissions in the commission category; but not partisan commissions, advisory commissions, or backup commissions that were not triggered in a given cycle.[108] In the court category, I included plans that were largely or entirely judicially crafted, but not plans to which courts made only minor adjustments.[109] And I assessed governmental control by determining which party held the governorship and a majority in each legislative chamber at the time of redistricting. I also coded as unified control cases where a partisan commission tilted in one party's favor was used. These institutions are the key independent variables in the models.

The models include fixed effects for states and years too. These fixed effects mean that any differences among the states due to politics, economics, demography, culture, and so on are controlled for, as are any time trends. The coefficient for each institution thus indicates its impact on the size of the efficiency gap independent of developments in other states as well as the state's own prior history. This design capitalizes on the significant geographic and temporal variation of the redistricting institutions in my database. It most closely approaches the social scientific ideal of identifying policies' true causal effects.[110]

At the state legislative level, as displayed in Figure 1's first panel, the coefficients for commission usage, court usage, and divided government all are negative, and those for court usage and divided government both are statistically significant.[111] (The omitted category is unified government.) Court usage and divided government both result in a decline in the absolute

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[107] By redistricting cycle, my main sources were the following: for the 2010s, ALL ABOUT REDISTRICTING, http://redistricting.lls.edu (last visited Jan. 1, 2015), for the 2000s, *Action on Redistricting Plans: 2001-07*, NAT'L CONF. OF STATE LEGIS. (Jan. 9, 2008), http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/action2000.htm; for the 1990s, *Action on Redistricting Plans: 1991-99*, NAT'L CONF. OF STATE LEGIS. (Oct. 24, 2003), http://www.senate.leg.state.mn.us/departments/scr/redist/Redsum/Action1990.htm; for the 1980s, Janet Campagna & Bernard Grofman, *Party Control and Partisan Bias in 1980s Congressional Redistricting*, 52 J. POL. 1242 (1990), and *1980s Redistricting Case Summaries*, MINN. LEGIS. COORDINATING COMM'N, http://www.gis.leg.mn/OpenLayers/redistricting/1980/case/index.php (last visited Jan. 1, 2015); and for the 1970s, REAPPORTIONMENT POLITICS: THE HISTORY OF REDISTRICTING IN THE FIFTY STATES (Leroy Hardy et al. eds., 1981), and Amihai Glazer et al., *Partisan and Incumbency Effects of 1970s Congressional Redistricting*, 31 AM. J. POL. SCI. 680 (1987). I also obtained data on party control of state governments from another database assembled by Carl Klarner.

[108] For a summary of which states currently use each type of commission, see NCSL REPORT, *supra* note 2, at 189-200. I do not include partisan commissions because they are functionally equivalent to unified party control; advisory commissions because their recommendations often are ignored by the elected branches; or unused backup commissions because they play no role in redistricting.

[109] This required me to exercise my judgment in certain cases, especially when legislatively enacted plans were invalidated but then mostly deferred to by courts.

[110] For a good discussion (and application) of fixed effects regression, see Eric M. McGhee et al., *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology*, 58 AM. J. POL. SCI. 337, 343 (2014). Fixed effects are more appropriate here than *random* effects because the relevant clusters (years and states) are "of intrinsic interest," and not merely "examples of possible clusters." SOPHIA RABE-HESKETH & ANDERS SKRONDAL, I MULTILEVEL AND LONGITUDINAL MODELING USING STATA 97 (3d ed. 2012). Fixed effects also are a more rigorous test than random effects, and so less likely to give rise to statistically significant findings.

[111] The latter is significant at the 10% level, with a p-value of 0.055. All regression results are in the Appendix. *See infra* appx.

value of the efficiency gap of roughly 1%. This is a fairly substantial effect given that the median state legislative plan has an absolute efficiency gap of about 4%.

At the congressional level and using congressional election results, as shown in Figure 2's second panel, the coefficients for commission usage, court usage, and divided government all are negative, and that for divided government is statistically significant.[112] (The omitted category again is unified government.) Divided government produces a decline in the absolute value of the efficiency gap of roughly 2%. This too is a considerable effect given that the median congressional plan has an absolute efficiency gap of about 6% (using congressional data).

Lastly, at the congressional level and using aggregated presidential election results, as presented in Figure 3's third panel, the coefficients for commission usage, court usage, and divided government all are negative, and those for commission usage and divided government are statistically significant.[113] (Unified government once more is the omitted category.) Divided government causes a decline in the absolute value of the efficiency gap of roughly 3%, while commission usage causes a decline of roughly *6%*. The latter figure represents close to *half* of the 12% absolute efficiency gap (using presidential data) of the median congressional plan.

In combination, these results provide strong, though not overwhelming, support for the predictions of process theory. As the theory would expect, unified governments are by far the institutions most likely to engage in partisan gerrymandering. In every model, the presence of *divided* government is linked to a statistically significant (and reasonably large) decrease in the absolute value of the efficiency gap. Also as the theory would expect, the record of more neutral institutions is generally positive. Courts produce a statistically significant drop in the absolute efficiency gap at the state legislative level, while commissions do the same (but more dramatically) using presidential data at the congressional level. The coefficients for court usage and commission usage are negative in every model as well. However, they fail to rise to statistical significance in several cases, thus rendering the overall picture less than perfectly clear.

Why are courts more effective at the state legislative than at the congressional level? One possibility is that, in most states, more redistricting criteria (such as compactness, respect for political subdivisions, and respect for communities of interest) apply to state legislative than to congressional districts.[114] So courts typically have more substantive guidance when designing state legislative districts, which may make it easier for them to avoid producing plans that are skewed in one party's favor.[115] And why are commissions more effective using exogenous rather than endogenous data? The explanation might be that idiosyncratic factors like the incumbency advantage and candidate quality—which influence endogenous but not exogenous results—often

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[112] *See id.*

[113] *See id.*

[114] *See* NCSL REPORT, *supra* note 2, at 125-27.

[115] *See* Stephanopoulos et al., *supra* note 95 (manuscript at 11-12) (summarizing literature on implications of redistricting criteria for partisan fairness). Another explanation for courts' better record at the state legislative level is that they might be more deferential to the elected branches' preferences in higher-stakes federal cases. Notably, the Supreme Court has intervened several times to stop lower courts from exercising too much discretion when crafting congressional districts. *See, e.g.*, Perry v. Perez, 132 S. Ct. 934, 944 (2012); Upham v. Seamon, 456 U.S. 37, 41-44 (1982); White v. Weiser, 412 U.S. 783, 793-97 (1973).

complicate commissions' efforts to design fair plans. Plans that look balanced according to the electorate's underlying partisanship thus might seem less equitable after particular candidates have run their particular campaigns. Commissions can take into account underlying partisanship, but not (at least without great difficulty) candidates' personal peculiarities.[116]

But while there are still puzzles for future work to solve, it is clear enough that unified government increases the likelihood of democratic malfunction, while courts and commissions reduce it. This is a compelling reason for the Court not to rule in favor of the Arizona legislature. What happens, though, if the Court does so anyway? What policy consequences would follow for redistricting specifically and for election law more generally? In the Article's final Part, I offer some tentative answers.

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[116] *Cf.* Stephanopoulos & McGhee, *supra* note 13 (manuscript at 29 n.138, 30 n.146) (discussing use of endogenous versus exogenous data to calculate efficiency gap).

## State Legislative Plans
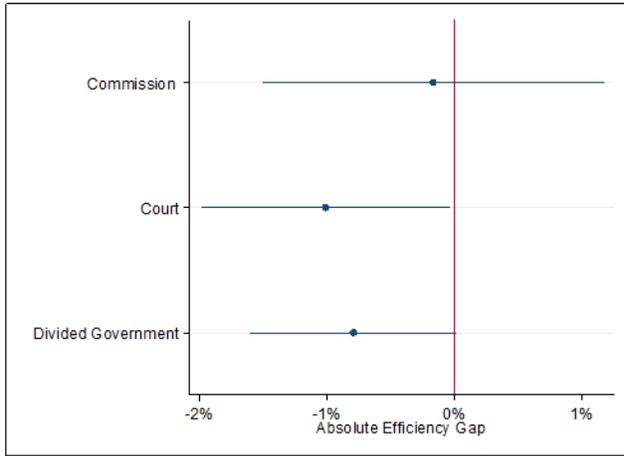


## Congressional Plans (Congressional Data)
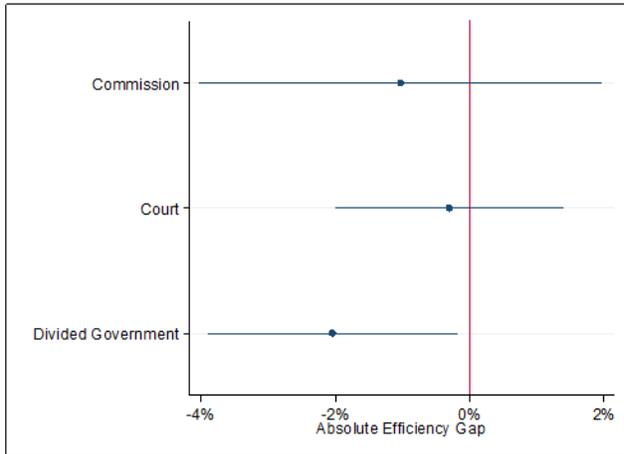


## Congressional Plans (Presidential Data)
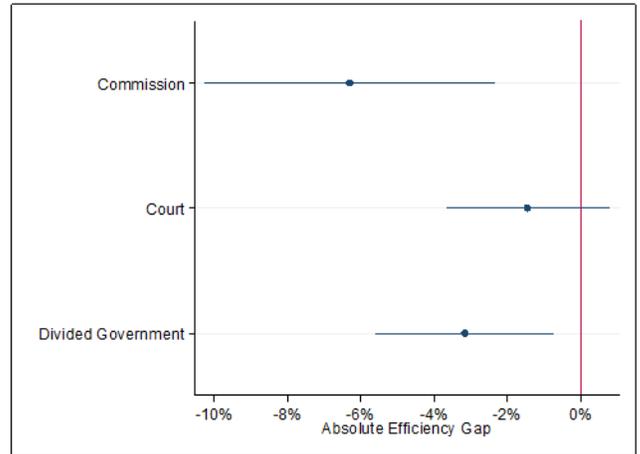
## V. POLICY IMPLICATIONS

The most obvious implication of a decision in favor of the Arizona legislature would be that congressional redistricting commissions in several *other* states likely would be unconstitutional too. Such commissions currently are used not only in Arizona but also in California, Connecticut, Hawaii, Idaho, Indiana, Iowa, Montana, New Jersey, New York, and Washington.[117] All of these bodies would be on thin legal ice if the Arizona commission is struck down. All of them plainly are not the legislature itself, yet exercise authority with respect to an aspect of federal elections.

Some of these bodies, though, would be on thinner ice than others. California's would be the most clearly unconstitutional, because its members are chosen by lottery rather than by legislative appointment.[118] Legislative leaders are permitted only to veto a number of candidates, not actually to select any of them.[119] In the next group would be the Hawaii, Idaho, Montana, New Jersey, and Washington commissions, all of which have essentially the same structure as the Arizona commission.[120] Major party leaders appoint equal numbers of commissioners, who then (except in Idaho) choose a tie-breaking chair.[121] And the most likely to survive would be the Connecticut, Indiana, Iowa, and New York commissions, all of which retain a larger role for the legislature. The Connecticut and Indiana bodies are convened only if the legislature fails to enact a congressional plan.[122] Analogously, the Iowa and New York bodies only draft advisory maps that the legislature then is free to accept, revise, or reject.[123]

But it is not just commissions that might be unconstitutional if the Arizona legislature prevails. Its claim that the Elections Clause "delegates [electoral] authority . . . to one entity alone: 'the Legislature' of a State" implies that *governors* and *courts* should not be involved in redistricting either.[124] The governor's power to veto congressional plans, which currently exists in forty-eight states, thus might be void.[125] So might be state courts' authority to evaluate

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[117] *See* NCSL REPORT, *supra* note 2, at 197-200. This report does not list California or New York's commissions because they were adopted after its publication, or Iowa's because it must be approved by the state legislature before taking effect.

[118] *See* CAL. GOV'T CODE § 8252.

[119] *See id.*; *see also* Brief of Amicus Curiae Nat'l Conf. of State Legis. at 14-17, Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n, No. 13-1314 (U.S. Dec. 9, 2014) (also linking Arizona and California commissions). Another similarity between the Arizona and California bodies is that they are the only congressional redistricting commissions to have been created by voter initiative, without any legislative involvement. This feature also may distinguish them legally from the other commissions.

[120] *See* NCSL REPORT, *supra* note 2, at 198-199.

[121] *See id.* The Idaho commission has an even number of commissioners, divided equally between the two major parties. *See id.* at 198.

[122] *See id.* at 200.

[123] *See* IOWA CODE § 42.5 (describing Iowa commission); *Proposed Ballot Propositions*, N.Y. BD. OF ELEC., http://www.elections.ny.gov/ProposedConsAmendments2.html (last visited Jan. 1, 2015) (describing New York commission).

[124] Ariz. Legis. Brief, *supra* note 32, at 23-24.

[125] The only exceptions are Connecticut and North Carolina, where the governor cannot veto congressional plans. *See Who Draws the Lines?*, ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/who.php (last visited Jan. 1, 2015).

congressional maps' validity (let alone to draw remedial maps in the event of their *in*validity).[126] It would not be hyperbolic to call these potential developments a second reapportionment revolution—a sweeping transformation of how congressional redistricting has been conducted for the past half century.

These developments are only potential ones, though, because it is possible to imagine a decision that invalidates the Arizona commission but not governors' and state courts' functions. In particular, if the Court were to hold that the Elections Clause bars only the legislature's *complete* exclusion from the redistricting process, then various arrangements that preserve roles for other institutions might be acceptable.[127] Then governors might be able to keep their vetoes, and state courts their suits, because the legislature still would get to draft plans in the first instance. This approach has the advantage of reducing institutional disruption and avoiding the overruling of *Hildebrant* and *Smiley*. But it has the disadvantage of inconsistency with the Arizona legislature's core textual argument. If the power to redistrict belongs to the legislature *alone*, then governors and state courts should not be able to block its plans.

Nor should they be able to intrude into any other aspect of federal elections. Federal elections, of course, include much more than just redistricting. They also span areas such as franchise access, party primaries, campaign finance, and minority representation. In all of these areas too, the implication of the Arizona legislature's position is that it should wield exclusive power. Electoral rules are not set by the legislature alone if governors and state courts can negate its choices, if voters can shape policy via initiative, or if state agencies play a role in regulation.[128] The gubernatorial veto, judicial adjudication, direct democracy, and agency administration all are forms of lawmaking distinct from the legislature itself. Accordingly, it is not just a *reapportionment* revolution that would ensue if the Arizona legislature's stance is accepted. The reverberations also would be felt in every other corner of the electoral landscape.

For a sense of how violent these shocks would be, consider the many reforms that have been adopted through voter initiatives. Over the years, voters have restricted the franchise through photo identification laws,[129] expanded it through right-to-vote amendments,[130] required

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[126] *Cf.* Bush v. Gore, 531 U.S. 98, 111-22 (2000) (Rehnquist, J., concurring) (arguing that excessive state court involvement violated state legislature's power to decide how to allocate presidential electors). Presumably (though not necessarily), it does not violate the Elections Clause if *federal* courts ensure that congressional plans do not violate applicable legal requirements.

[127] *Cf.* Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n, 997 F. Supp. 2d 1047, 1056-58 (D. Ariz. 2014) (Rosenblatt, J., dissenting) (advocating something like this position); Ariz. Legis. Brief, *supra* note 32, at 23 (focusing on "*complete* divestment of the Legislature's constitutionally-conferred redistricting power (emphasis added)).

[128] I did not mention state agencies in the abstract in the discussion of redistricting because commissions are the only common kind of state redistricting agency.

[129] *See, e.g.*, *Voter ID History*, NAT'L CONF. OF STATE LEGIS. (Oct. 16, 2014), http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx (noting that Mississippi adopted photo identification requirement through voter initiative).

[130] *See, e.g.*, *Official Canvass*, ILL. BD. OF ELEC. (Nov. 4, 2014), http://www.elections.il.gov/Downloads/ElectionInformation/VoteTotals/2014GEOfficialVote.pdf (showing passage of Illinois right-to-vote amendment).

parties to hold certain types of primaries,[131] imposed term limits on officeholders,[132] enacted variants of the Voting Rights Act,[133] and so on. All of these policies have extended to federal elections—and all of these extensions would be unconstitutional according to the Arizona legislature. Likewise, take the many state officials and agencies who supervise elections: the Secretary of State in thirty-nine states,[134] as well as more specialized bodies like Wisconsin's Government Accountability Board.[135] Their ambit also includes federal elections, and so cannot be reconciled with the Arizona legislature's claim of exclusive authority in this domain.

Still, it is important not to overstate the consequences of an adverse decision. For one thing, commissions responsible for *state legislative* redistricting will be entirely unaffected. The Elections Clause applies only to "Elections for [United States] Senators and Representatives."[136] It therefore has no bearing on the substantially larger number of commissions that redraw the maps for states' own legislative chambers. These bodies exist (in some form) in Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Iowa, Maine, Mississippi, Missouri, Montana, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Texas, Vermont, and Washington.[137] All of them will be able to continue on their merry way no matter how the Arizona case is resolved.

The capacity of *Congress* to regulate federal elections will be left intact as well. The second half of the Elections Clause states that "Congress may at any time make or alter such Regulations."[138] This power has been described by the Court as "broad"[139] and "comprehensive,"[140] "embrac[ing] authority to provide a complete code for congressional elections"[141] and able to be "exercised at any time, and to any extent which [Congress] deems expedient."[142] Congress could use the power to refashion federal policy on redistricting (or any other electoral matter) at its discretion. It could permit (or even mandate) the adoption of congressional redistricting commissions irrespective of the preferences of state legislatures.

In fact, a victory for the Arizona legislature could increase the odds of aggressive congressional intervention. At present, most redistricting reform activity occurs in the states, both because this is where most past successes have arisen and because an array of veto points

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[131] *See, e.g.*, Wash. State Grange v. Wash. State Rep. Party, 552 U.S. 442, 444 (2008) (noting that Washington adopted top-two primary through voter initiative).

[132] *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783-84 (1995) (noting that Arkansas adopted term limits through voter initiative).

[133] *See, e.g.*, FLA. CONST. art. III, §§ 20-21 (Florida amendments adopted via voter initiative that include very similar language to Voting Rights Act).

[134] *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 976-77 (2005).

[135] *See* Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 UC IRVINE L. REV. 575 (2013).

[136] U.S. CONST., art. I, § 4.

[137] *See* NCSL REPORT, *supra* note 2, at 189-200. This list includes advisory, backup, bipartisan, nonpartisan, and partisan commissions.

[138] U.S. CONST., art. I, § 4.

[139] Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247, 2253 (2013).

[140] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[141] *Id.*

[142] Ex parte Siebold, 100 U.S. 371, 392 (1880).

typically thwart federal action. But if it became impossible to combat gerrymandering at the state level, pressure for Congress to address the problem likely would mount. Reformers likely would shift their efforts from state capitals to Washington, because only Washington would be able to provide an effective response. Notably, every other country that has adopted redistricting commissions for its constituent subparts has done so through federal legislation.[143] In the long run, a win for the Arizona legislature might make this outcome more probable in America as well.

Given all the veto points at the federal level, though, the long run seems long indeed. Even if the odds of a congressional solution would rise with an adverse decision, they only would shift from nearly nonexistent to very poor. It thus is impossible to sugarcoat what the invalidation of the Arizona commission would mean for federal elections. *Eventually*, things could turn out all right—but, in the meantime, the institutions that should have the least authority over electoral issues would see their influence over them grow immeasurably. In the meantime, a disaster from the perspective of process theory would unfold.[144]

CONCLUSION

Richard Pildes famously has complained about the "constitutionalization of democratic politics"—the tendency of courts to invalidate electoral policies for formalist reasons, thus overly limiting other actors' discretion in matters of democratic design.[145] A decision in favor of the Arizona legislature would fit this pattern perfectly. An institution that abridges no individual rights and threatens no democratic values would be rendered unlawful simply because, semantically, it is something other than a legislature. In fact, it is even worse than that. Not only does a redistricting commission not *abridge* rights or *threaten* values, it affirmatively *promotes* one of the most vital goals of all of constitutional law: preventing insiders from enacting laws that benefit them at the expense of the public at large. One can only hope, then, that the Court will approach the Arizona case from a standpoint other than mindless literalism. It is bad enough to strike down policies that cause no great harm. It is even more perverse to ban ones that ought to be celebrated.

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[143] *See* Stephanopoulos, *supra* note 1, at 780-86 (describing histories of redistricting institutions in foreign countries).

[144] Not that *congressional* control over congressional elections is any picnic either. It would be preferable if the Constitution entrusted electoral regulation to an independent and unelected body, much as many foreign charters do. *See generally* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

[145] Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 28 (2004).

| VARIABLES | (1)<br>State Legislative<br>Plans | (2)<br>Congressional Plans<br>(Congressional Data) | (3)<br>Congressional Plans<br>(Presidential Data) |
|---|---|---|---|
| Commission | -0.00167 | -0.0102 | -0.0630*** |
| | (0.00682) | (0.0153) | (0.0201) |
| Court | -0.0101** | -0.00298 | -0.0144 |
| | (0.00497) | (0.00862) | (0.0114) |
| Divided Government | -0.00792* | -0.0204** | -0.0316** |
| | (0.00412) | (0.00942) | (0.0124) |
| Constant | 0.0538*** | 0.0779*** | 0.149*** |
| | (0.00250) | (0.00452) | (0.00596) |
| State Fixed Effects | Yes | Yes | Yes |
| Year Fixed Effects | Yes | Yes | Yes |
| | | | |
| Observations | 736 | 462 | 462 |
| R-squared | 0.010 | 0.012 | 0.031 |

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

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