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## A Citizen's Guide to Redistricting Reform Through Referendum

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# A CITIZEN’S GUIDE TO REDISTRICTING REFORM THROUGH REFERENDUM

GRAYSON KEITH SIEG\*

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### I. INTRODUCTION

“They’ve got all these perverse fantasies about what might happen with the citizens commission,” said Daniel Tokaji.<sup>1</sup> “None of them are nearly as bad as what actually happened in real life.”<sup>2</sup> A preeminent authority on election law, Tokaji was co-author of Ohio Ballot Issue 2, a referendum curbing the state legislature’s ability to gerrymander electoral maps.<sup>3</sup> Issue 2 asked Ohio voters to consider a constitutional amendment which would appoint a citizens commission to redraw congressional districts.<sup>4</sup> By the summer of 2012, Voters First Ohio, a coalition of academics, unions, and civic groups collectively sponsoring the referendum, found itself on the defensive.

Issue 2 was under attack. Conservative special interests burnt millions of dollars in opposition, characterizing Issue 2 as “[a] large new government bureaucracy [that] can demand unlimited tax dollars.”<sup>5</sup> Both the Ohio Bar Association<sup>6</sup> and the Ohio Court of Appeals Judges Association also publicly opposed the issue.<sup>7</sup> In the months leading up to the election, Voters First found themselves embroiled in a protracted ballot-language dispute which was ultimately certified to the Ohio Supreme Court.<sup>8</sup>

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<sup>1</sup> Joe Guillen, *Ohio Redistricting Plan Mirrors California Proposal That Failed to Remove Politics From the Process*, PLAIN DEALER (Aug. 26, 2012), [http://www.cleveland.com/open/index.ssf/2012/08/ohio\\_redistricting\\_plan\\_mirror.html](http://www.cleveland.com/open/index.ssf/2012/08/ohio_redistricting_plan_mirror.html).

<sup>2</sup> *Id.*

<sup>3</sup> A year prior to Issue 2’s certification, Professor Tokaji was asked to testify in front of the State Government and Elections Subcommittee on Redistricting. There he stressed that the most important factor in designing a redistricting plan “is the necessity of a fair, transparent, and open process that affords the public ample opportunity to review and comment on potential plans before they are enacted.” *Testimony Before the Ohio H.R. State Gov’t and Elections Subcomm. on Redistricting* (July 20, 2011) (statement of Daniel P. Tokaji), available at <http://www.sos.state.oh.us/sos/upload/reshape/testimony/2011-07-20-tokaji.pdf>.

<sup>4</sup> Kate Irby, *Ohio Issue 2 Supporters Say Long Ballot Summary Is Confusing Voters*, PLAIN DEALER (Nov. 1, 2012), [http://www.cleveland.com/open/index.ssf/2012/11/ohio\\_issue\\_2\\_supporters\\_say\\_lo.html](http://www.cleveland.com/open/index.ssf/2012/11/ohio_issue_2_supporters_say_lo.html).

<sup>5</sup> OHIO BALLOT BD., ARGUMENT AGAINST ISSUE 2 (2012), available at <http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2-against.pdf> [hereinafter ARGUMENTS AGAINST].

<sup>6</sup> *Statement on Ohio Redistricting Amendment*, OHIO STATE BAR ASS’N (2012), available at <https://www.ohioabar.org/NewsAndPublications/News/OSBANews/Pages/OSBA-releases-statement-on-Ohio-Redistricting-Amendment.aspx> (last visited Jan. 31 2014).

<sup>7</sup> Joe Guillen, *Appellate Court Judges Say 'No Thanks' to Inclusion in Redistricting Reform Proposal*, PLAIN DEALER (Aug. 16, 2012), [http://www.cleveland.com/open/index.ssf/2012/08/appellate\\_court\\_judges\\_say\\_no.html](http://www.cleveland.com/open/index.ssf/2012/08/appellate_court_judges_say_no.html).

<sup>8</sup> Jim Siegel, *High Court Tells Ballot Board to Rewrite Issue 2*, COLUMBUS DISPATCH (Sept. 13, 2012), <http://www.dispatch.com/content/stories/local/2012/09/13/high-court-tells-ballot-board-to-rewrite-issue-2.html>.

In the November 6<sup>th</sup> General Election, Issue 2 lost badly. Stripped of context, this might seem surprising.<sup>9</sup> Gerrymandering reform is a surprisingly bipartisan issue.<sup>10</sup> In Ohio, Issue 2 opponents publicly criticized the state's redistricting process.<sup>11</sup> Examined in isolation, Issue 2 was neither innovative nor terribly controversial. The architecture was largely borrowed from California's redistricting process, a referendum which enjoyed wide voter approval.<sup>12</sup> Still, nearly every county in Ohio, from crimson red to navy blue, squarely rejected the proposal.<sup>13</sup>

This Note proposes to explain the construction and political history of the 2012 Ohio Ballot Issue 2, extract lessons learned from its defeat, and, using those lessons, construct an alternative model referendum for congressional redistricting reform.

What events led up to the November General Election defeat? Part II explores the history of redistricting and referendum. I also include a discussion on the various models of citizens redistricting commissions, including those adopted in California and Arizona (from which Ohio Issue 2 was largely borrowed), as well as recent constitutional challenges to citizens redistricting commissions.

In Part III, I discuss the lessons learned in how Issue 2 incorporated state judges into the redistricting process. I call these the *strategic* lessons. Issue 2 required state judges to monitor the appointment process for the commissioners. I propose to remove judges from the commissioner nomination process, keeping the process in the legislative branch. The courts should only review and certify the citizens commission's electoral map.

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<sup>9</sup> However, two voters defeated two similar attempts at redistricting reform in 1981 and in 2005. Jim Provance, *Redistricting Issue Shows Sharp Ohio Divide*, TOLEDO BLADE (Aug. 10, 2012), <http://www.toledoblade.com/Politics/2012/08/10/Redistricting-issue-shows-sharp-Ohio-divide.html#4I8TRsbw8zWH7xMm.99>.

<sup>10</sup> A recent online Harris poll indicated citizens overwhelmingly preferred an independent redistricting commission "emphasizing geography over political affiliations," lines over various partisan and bi-partisan options. *Americans Across Party Lines Oppose Common Gerrymandering Practices*, HARRIS INTERACTIVE, available at <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/1311/ctl/ReadCustom%20Default/Default.aspx> (last visited Jan. 31, 2014). The split between Democrats (52% favoring the independent commission) and Republicans (50%) was slim, with 26% of the total polled not sure or having no opinion on redistricting. *Id.*

<sup>11</sup> Any criticism of Ohio's gerrymandered districts must be taken with a grain of salt; Republicans were the architects of the map and could have easily included bipartisan requirements. Still, Jon Husted, the Republican Secretary of State and respondent in the Voters First litigation, was publically critical of the state's redistricting process well after Issue 2's defeat. Jim Siegel, *Husted Says He's Ready to Help Lawmakers Find New Map Process*, COLUMBUS DISPATCH (Jan. 11, 2012), <http://dispatchpolitics.dispatch.com/content/blogs/the-daily-briefing/2012/01/11-12-husted-redistrict.html>.

<sup>12</sup> Guillen, *supra* note 1.

<sup>13</sup> Issue 2 only carried one county: Athens, a county outside of Charlestown, West Virginia, where voters approved Issue 2 by 50.83%. Athens overwhelmingly voted to reelect President Obama (65.4%), Senator Sherrod Brown (63.1%), and other Democratic candidates. *2012 General Election Results*, OHIO SEC'Y OF STATE, available at <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results.aspx> (last visited Jan. 31, 2014). Issue 2 performed worst in the rural northwest counties, Shelby (17.7%), Holmes (19.1%), Mercer (19.6%) and Putnam (19.7%), gaining less than a fifth of the voting share. *Id.*

Part IV addresses drafting mechanics that might help to solve some of Issue 2's woes at the polls. Issue 2 was hampered in part by Ohio's Secretary of State's draft of the ballot question that was legally deficient and probably politically motivated. But my larger point is that, given the state of Ohio referendum law, drafters of any future redistricting referendum should deprive the Secretary or any other actors of opportunities to oppose it, by keeping their measure simple and strategically well designed. I propose to simplify the referendum, to ensure that a future ballot question is easy to summarize.

Here, I propose three changes to a future referendum, based on public reaction to Issue 2. First, the ballot language was too long, in large part because the process for nominating citizens commissioners was convoluted. I propose to reduce the text to approximately 500 words. Second, Issue 2 contained extensive references to funding. I propose a hard cap on the citizens commission's funding, to avoid charges of unaccountable spending. Third, Issue 2 did not provide commissioner accountability. I propose that commissioners should be removable for cause by a super majority of the legislature.

With the strategic and tactical lessons in place, what does Issue 2 leave Ohio in terms of moving forward? In Part V, I marry my proposals with Issue 2. I strip away much of the text of Issue 2 in favor of a lean, simplified process. I conclude in Part V with the text of the model referendum.

## II. BACKGROUND

“Ask not for whom the line is drawn; it is drawn to avoid thee.”

- Bernard Grofman<sup>14</sup>

### A. Ohio's Redistricting Map

“This plan is the most grotesque partisan gerrymander that I, as a political scientist, had ever seen,” said Richard Gunther, a Professor at Ohio State University.<sup>15</sup> “It should either be rejected by the Ohio Senate or the courts, or overruled in a referendum by the citizens of this state, who deserve better.”<sup>16</sup>

An outspoken advocate of election reform, and future co-author of Ohio Issue 2,<sup>17</sup> Gunther was testifying in front of the Ohio Senate Government Oversight and Reform Committee. His concern was the newly-released Ohio electoral map.<sup>18</sup>

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<sup>14</sup> Quoted in *Shaw v. Reno*, 509 U.S. 630, 636 (1993) (internal citations omitted).

<sup>15</sup> *Testimony Before the Ohio S. Gov't Oversight and Reform Comm.* (Sept. 20, 2011) (statement of Richard Gunther).

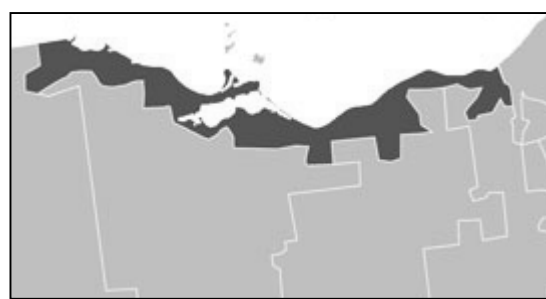
<sup>16</sup> *Id.*

<sup>17</sup> *All Sides with Ann Fisher: 11:00 AM - Pros and Cons of Ohio Issue 2*, THE OHIO CHANNEL (Oct. 31, 2012), available at <http://www.ohiochannel.org/medialibrary/Media.aspx?fileId=137379>.

<sup>18</sup> *Id.*

Gunther was not alone: Ohio's 2011 proposed electoral map was gas poured on an already fiery national discourse.<sup>19</sup>

Ohio was required to redistrict following the 2010 census.<sup>20</sup> The National Census revealed a mass exodus from the Rust Belt to the Sun Belt. Northern residents fled in record numbers, settling in the warm, affluent South and West. While the United States grew as a whole by 22 million people between 2000 and 2010 (a 9.7 percent increase), over the same period Ohio grew an anemic 1.6 percent.<sup>21</sup>



**Mistake on the Lake?** Portions of Cleveland, Sandusky, and Toledo were parceled together into the sinewy Ohio Congressional District 9. As one comedian remarked, “you pretty much have to live at a reststop on I-90 or in a [ ] lighthouse to live in this district.” Mike Polk, *Ohio's Proposed Redistricting is Shady Garbage*, YOUTUBE, <http://www.youtube.com/watch?v=qHG0N--9B9U> (last visited Feb. 5, 2014).

Based on the stagnating population, the Census Bureau reapportioned Ohio two fewer congressional seats, tying Pennsylvania for most House seats lost in the 2010 reapportionment.<sup>22</sup> Some Ohioans began to worry. The already red state was under Republican control. Conservative Governor Kasich could rely on a GOP-packed legislature to draw the new districts. Said one Democratic strategist in late 2010, “if I’m one of those Ohio Democratic incumbents, I’m worried. [Democrats] will absolutely lose a seat, period. End of story.”<sup>23</sup> Political pundits predicted that the

<sup>19</sup> See, e.g., Jamil Smith, *Ohio Gerrymandering Costs Congress a Liberal*, MSNBC (Mar. 7, 2012), <http://www.msnbc.com/melissa-harris-perry/ohio-gerrymandering-costs-congress-lib> (describing the state’s 9th District as “an overcooked noodle”).

<sup>20</sup> See U.S. CONST. art. I, § 2, cl. 3 (“[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand.”).

<sup>21</sup> U.S. CENSUS BUREAU, C2010BR-01, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010 1–2 (Mar. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

<sup>22</sup> KRISTIN D. BURNETT, U.S. CENSUS BUREAU, C2010BR-08, CONGRESSIONAL APPORTIONMENT (Nov. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf>.

<sup>23</sup> Robert Wang, *2010 Census—Ohio Population Up; Representation Down*, CANTON REP (Dec. 22, 2010), [http://www.cantonrep.com/news/x1882976261/2010-Census-Ohio-population-up-but-representation-down?zc\\_p=0](http://www.cantonrep.com/news/x1882976261/2010-Census-Ohio-population-up-but-representation-down?zc_p=0).

new electoral map would result in twelve staunchly Republican districts and four Democratic districts.<sup>24</sup>

That is exactly what happened. Following the 2012 election, Republicans won twelve of sixteen seats.<sup>25</sup> The races were hardly competitive. Only one Congressional race was within five points.<sup>26</sup> Ten of the sixteen races were won by over twenty-point margins, and two candidates ran unopposed.<sup>27</sup> This was accomplished largely through the 2011 congressional election map: sixteen district boundaries drawn to ensure perpetual competitive advantages. Gerrymandering was working for Republicans in Ohio.<sup>28</sup>

### *B. Partisan Gerrymandering: Sickness, Tradition, or Placebo?*

#### 1. Single-Member Districts and Finding “Fairness”

The Constitution provides for state legislatures to apportion representatives, subject to certain restrictions set by Congress.<sup>29</sup> Behind closed doors, party leaders are free to carve out politically appetizing districts.<sup>30</sup> These district lines rarely coincide with the natural topography of civil society. Instead, the lines are drawn to benefit a party or person at the expense of another.

Gerrymandering has many forms. For the purposes of this Note, I restrict my discussion to *partisan gerrymandering*. Partisan gerrymandering is the process of drawing an electoral district in a manner that intentionally discriminates against a

<sup>24</sup> Amanda Terkel, *Ohio Redistricting Plan Likely to Give GOP 12 Out of 16 Seats, Create New Democratic District*, THE HUFFINGTON POST (Sept. 13, 2011), [http://www.huffingtonpost.com/2011/09/13/ohio-redistricting-kucinich\\_n\\_959904.html](http://www.huffingtonpost.com/2011/09/13/ohio-redistricting-kucinich_n_959904.html).

<sup>25</sup> *2012 Election Results: Official Results for 2012 General Election Ohio*, OHIO SEC’Y OF STATE, *available at* <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results.aspx>.

<sup>26</sup> Republican Jim Renacci defeated Democrat Betty Sutton by nearly 15,000 votes, 52.05% to 47.95%. *Id.* However, Sutton was a three-term Congresswoman forced to compete against the incumbent Renacci in the newly formed 16th District. Sabrina Eaton, *Rep. Jim Renacci Defeats Rep. Betty Sutton in Redrawn Congressional District*; David Joyce, *Marcy Kaptur also Win*, PLAIN DEALER (Nov. 07, 2012), [http://www.cleveland.com/open/index.ssf/2012/11/rep\\_jim\\_renacci\\_defeats\\_rep\\_be.html](http://www.cleveland.com/open/index.ssf/2012/11/rep_jim_renacci_defeats_rep_be.html).

<sup>27</sup> *2012 Election Results*, *supra* note 25.

<sup>28</sup> The equally unappealing side-effect of gerrymandering is creating highly concentrated minority districts, as Democrats are “packed” into dark blue districts. Ohio’s Democratic races are no more competitive than the Republican districts. *Id.*

<sup>29</sup> Specifically, Article I, section 4. “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.” U.S. CONST. art. I, § 4, cl. 1.

<sup>30</sup> The Constitution does not prescribe that states are divided into districts. That requirement came from various statutes passed by Congress that required single-member districts. *See Redistricting and the United States Constitution*, THE DIANE REHM SHOW (Mar. 22, 2011) (interview with Thomas E. Mann, Sean O’Brien and Nate Persily), *available at* <http://www.brookings.edu/research/interviews/2011/03/22-redistricting-mann>.

political party.<sup>31</sup> It generally serves two distinct interests: to displace incumbents and to distribute seats to favor the gerrymandering party.<sup>32</sup> The traditional method of gerrymandering includes “packing” and “cracking” the opposing party.<sup>33</sup> “Packing” involves drawing a district so as to concentrate a high majority of the opposing party voters into a single district.<sup>34</sup> The remaining opposition is then “cracked”—dispersed across multiple districts where the gerrymandering party is sure to have a majority.<sup>35</sup>

For better or worse, partisan gerrymandering is an American tradition. It predates the republic. Our founding fathers were not immune from the temptation: Patrick Henry allegedly attempted to gerrymander James Wilson out of the First Congress.<sup>36</sup> The term “gerrymander” itself dates to the late eighteenth century, when Massachusetts Governor Elbridge Gerry stitched together a hodgepodge collection of townships north of Boston, which was lampooned in a famous political cartoon making it look like a salamander.<sup>37</sup> The name stuck.<sup>38</sup>

Gerrymandering is uniquely controversial.<sup>39</sup> Speaking empirically, it is impossible to describe the failures of gerrymandered districts, because it is equally impossible to describe an *ideally* apportioned district. In the words of one author, “it may be that capturing the essence of fair representation is as futile as trying to collect fog in a mason jar.”<sup>40</sup>

Today, the popular perception of “fair” political representation is the single-member electoral district. Single-member districts contain a set population. They are areas drawn (and periodically re-drawn) to maintain a population equal to the share of a single representative—that district then elects a single candidate to serve on its behalf.<sup>41</sup> But this was not always the case. Until the mid-1800s, county lines or other

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<sup>31</sup> THE NAT’L CONFERENCE OF STATE LEGISLATORS, REDISTRICTING LAW 2010 115 (2010), available at <http://redistrictingonline.org/uploads/Redistrictinglaw2010.pdf> [hereinafter REDISTRICTING LAW].

<sup>32</sup> Bruce E. Cain & Janet C. Campagna, *Predicting Partisan Redistricting Disputes*, 12 LEGIS. STUD. Q. 265, 268 (1987) (“Partisan fights over redistricting usually center on two issues: incumbent displacement and partisan reconstruction of the seats.”).

<sup>33</sup> Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 565 (2011).

<sup>34</sup> The effect is a tradeoff—a guaranteed opposition seat for the benefit of thinning the opposition in nearby districts. *Id.* at 561.

<sup>35</sup> *Id.* at 562.

<sup>36</sup> *Id.* at 557-58.

<sup>37</sup> GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY’S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 3 (2002).

<sup>38</sup> *Id.* With apologies to the readers: recounting the tale of Elbridge Gerry is a *sine qua non* of the modern redistricting literature.

<sup>39</sup> CHARLES S. BULLOCK III, REDISTRICTING: RACIAL AND PARTISAN CONSIDERATIONS, LAW AND ELECTION POLITICS: THE RULES OF THE GAME 230 (Matthew J. Streb ed., 2d ed. 2013).

<sup>40</sup> CHRISTOPHER BURKE, THE APPEARANCE OF EQUALITY: RACIAL GERRYMANDERING, REDISTRICTING, AND THE SUPREME COURT vii (1999).

<sup>41</sup> James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 900 (2006). Based



municipal subdivisions were the predominate boundaries for electoral districts. But these local political boundaries inadequately accounted for population growth and migration.<sup>42</sup> Ballooning urban areas either qualified for multiple representatives or were left underrepresented.<sup>43</sup> States flip-flopped between subdividing their cities into single-member districts and allowing multi-member representation for high-population counties.<sup>44</sup>

A major shift in representation occurred with the passage of the Apportionment Act of 1842.<sup>45</sup> This Act required states to establish single-member electoral districts.<sup>46</sup> Although applicable only to Congressional seats, single member districts eventually pervaded state constitutions as the standard for establishing electoral boundaries.<sup>47</sup> The U.S. Supreme Court subsequently affirmed single-member districts (or multi-member districts with the equivalent population-per-seat) as the normative standard for equal representation,<sup>48</sup> often called the “one person, one vote” requirement.<sup>49</sup> Although the use of single-member districts still attracts criticism, the winner-take-all system is entrenched in American electoral law.<sup>50</sup> But the arbitrary

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on the 2010 census, the apportionment of citizens to congressional representative is 710,767; thus, federal congressional districts will contain approximately this many people. U.S. CENSUS BUREAU, APPORTIONMENT DATA, *available* at <http://www.census.gov/2010census/data/apportionment-data-text.php> (last visited Jan. 30, 2015). The relative population per representative in state government, however, varies significantly. For instance, California’s legislature is comprised of 40 senators and 80 representatives, while New Hampshire has 24 senators and 400 representatives. CAL. CONST. art. IV, § 2; N.H. CONST. art. IX. The result is that there are 465,674 residents per state representative in California and 3,291 in New Hampshire. *Population represented by state legislatures*, BALLOTPEdia, *available* at [http://ballotpedia.org/Population\\_represented\\_by\\_state\\_legislators](http://ballotpedia.org/Population_represented_by_state_legislators) (last visited Feb.12, 2015).

<sup>42</sup> Gardner, *supra* note 41, at 905.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 912-13.

<sup>45</sup> Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Although the Court has upheld the constitutionality of multi-member districts, *see, e.g.*, *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 66 (1980), it has done so reluctantly, largely favoring single-member districts for state legislative bodies. *See Chapman v. Meier*, 420 U.S. 1, 19 (1975) (“Absent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a State.”). Justice O’Connor worried “the at-large or multimember district [had] an inherent tendency to submerge the votes of the minority.” *Thornburg v. Gingles*, 478 U.S. 30, 87 (1986) (O’Connor, J., concurring).

<sup>49</sup> J. GERALD HERBERT, PAUL M. SMITH, MARTINA E. VANDENBERG & MICHAEL B. DESANCTIS, *THE REALIST’S GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS* 1 (2d ed. 2010).

<sup>50</sup> For example, proponents of proportional representation believe that representation based on the percentage of a party’s vote share would provide minorities roughly equal representation in comparison to their demographic share. MARK MONMONIER, BUSHMANDERS & BULLWINKLES 138–41 (2001) [hereinafter MONMONIER, BUSHMANDERS]; Michael A.

boundaries of the single-member electoral district allowed legislatures to gerrymander the electorate.<sup>51</sup>

There is considerable debate, and little consensus, over the effect of gerrymandering on the composition or functionality of government. Although commonly blamed for promoting polarization, empirical proof is elusive. Political scientists have pointed out that there is a lack of evidence linking gerrymandering to political division—gerrymandering might have little to do with the perceived partisan divide.<sup>52</sup> Others have gone further, advocating that partisan gerrymandering is a traditional spoil to the victors of an election, one that provides stability and accountability in governance.<sup>53</sup> Still others claim that gerrymandering may promote federalism by advancing state interests.<sup>54</sup>

The injustice of partisan gerrymandering is hard to identify. The notion that a political party is “unfairly” securing seats disproportionate to their share of the general electorate is the most common notion of its inequality.<sup>55</sup> By operating a winner-take-all system, single-member districts give minority politics a faint voice.<sup>56</sup> Even the most sensitively designed district must lay a line *somewhere*. Of course, if gerrymandering can be said to impair a certain group’s representational opportunity,

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McCann, *A Vote Cast; A Vote Counted: Quantifying Voting Rights Through Proportional Representation in Congressional Elections*, 12-Fall KAN. J.L. & PUB. POL’Y 191, 193 (2002).

<sup>51</sup> “It is ironic that [the Apportionment Act of 1842], enacted originally at least in part to put a stop to one kind of very potent manipulation of the rules of representation, created the conditions that today enable a very different kind of manipulation.” Gardner, *supra* note 41, at 913.

<sup>52</sup> See, e.g., Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. No. 3 666 (2009); Nolan McCarty, *Hate Our Polarized Politics? Why You can’t Blame Gerrymandering*, WASH. POST (Oct. 26, 2012), [http://www.washingtonpost.com/opinions/hate-our-polarized-politics-why-you-cant-blame-gerrymandering/2012/10/26/c2794552-1d80-11e2-9cd5-b55c38388962\\_story.html](http://www.washingtonpost.com/opinions/hate-our-polarized-politics-why-you-cant-blame-gerrymandering/2012/10/26/c2794552-1d80-11e2-9cd5-b55c38388962_story.html).

<sup>53</sup> Peter H. Shuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1350 (1987) (“[A] victory bonus may be an essential technique for promoting effective governance in a markedly decentralized political system that always skirts the dangers of excessive fragmentation and destabilizing fluidity. Citizens and parties may prefer the stability, power aggregation, and accountability to voters that a victory bonus encourages.”).

<sup>54</sup> Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 862 (2010) (“[Partisan gerrymandering] has the potential to protect the states’ regulatory authority and increase their capacity for self-government in the face of expanding federal power. When states gerrymander congressional districts pursuant to their power under the Elections Clause, they are in fact furthering the federalism embodied in the Clause when the gerrymandering results in the election of congressional representatives that are responsive to state interests.”).

<sup>55</sup> See, e.g., Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251, 1251-52 (1987) (“Partisan bias introduces asymmetry into the seats-votes relationship, resulting in an unfair partisan differential in the ability to win legislative seats: the advantaged party will be able to receive a larger number of seats for a fixed number of votes than will the disadvantaged party.”).

<sup>56</sup> MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? 4 (1993).

then that presupposes strong and identifiable groups of voters exist and can be identified with a certain degree of accuracy.<sup>57</sup>

For the purpose of this Note, it is not necessary to endorse a particular view of partisan gerrymandering. Whatever the consequences of gerrymandering, there is no debate that it occurs.<sup>58</sup> Perhaps it is enough that gerrymandering offends a general idea of fairness. As one commentator said:

[T]o many, gerrymandering, aside from resulting in oddly shaped electoral districts and thus perhaps providing an aesthetic affront, also seems ethically unsavory, smacking vaguely of self-dealing. Why should legislators be able to make the rules and then have an advantage in the resulting game? In drawing district lines, legislators are stacking the deck in their favor.<sup>59</sup>

## 2. Form, Void, and Rorschach Tests: How to Draw a District<sup>60</sup>

If the notion of an ideally apportioned single-member district is, at best, ambiguous, the manageable standards for drawing such a district are equally vague. While many theories exist, the Supreme Court has recognized four traditional principles: (1) contiguity, (2) compactness, (3) respect for political subdivisions, and (4) communities defined by actual shared interests.<sup>61</sup> Ohio Issue 2 specifically called for these four factors plus (5) representational fairness and (6) competitive districts.<sup>62</sup>

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<sup>57</sup> Even a certain group's predominate party affiliation, if it can be accurately accounted, is a poor predictor of that groups' voting trends. *Id.* at 5–6, 41–42.

<sup>58</sup> In fact, the evolution of G.I.S. and other geospatial statistical modeling has arguably made gerrymandering far more “efficient” than in the past. *See generally* MONMONIER, BUSHMANDERS, *supra* note 50.

<sup>59</sup> McCarty et al., *supra* note 52, at 12.

<sup>60</sup> Opining on the odd shapes of congressional districts, Business Insider offered readers to guess whether a blackened image was an electoral districts or inkblot. “The results aren't easily distinguishable from a Rorschach inkblot.” Walter Hickey, *QUIZ: Gerrymandered GOP Congressional District or Rorschach Inkblot*, BUSINESS INSIDER (Oct. 1, 2013), <http://www.businessinsider.com/quiz-gerrymandered-gop-congressional-district-or-rorschach-inkblot-2013-10?op=1#ixzz2sHfsTzo7>.

<sup>61</sup> This is not to say that these four factors carry any precedential weight at all in any future attempts to challenge partisan gerrymandering. These factors are described in *Miller v. Johnson*, a case of racially motivated redistricting. 515 U.S. 900, 916 (1995) (O'Connor, J., concurring). In *Miller*, Justice O'Connor sought to prescribe judicially-manageable standards for “traditional, race-neutral” redistricting. *Id.* These factors are irrelevant in political gerrymandering cases, as the question remains nonjusticiable. *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (“The failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper.”). Notwithstanding, all four are “traditional” accepted standards, and therefore were natural to include in Issue 2.

<sup>62</sup> Besides continuity and adherence to political subdivisions, Issue 2 enumerated the following factors:

1. Community preservation - minimizes the number of governmental units that must be divided between different districts, by combining the areas of whole governmental

But again, as there is no need to choose among normative goals for representativeness, there also is no need to choose among guiding principles to meet it. Instead, I defer to the judgment of the drafters of Issue 2—which included a collection the nation’s preeminent election law scholars—and instead briefly discuss the six principles prescribed therein.

*a. Contiguity*

Contiguity is a nearly universal requirement for redistricting bodies.<sup>63</sup> To achieve contiguity, a district must be reachable from every other part without crossing a district boundary.<sup>64</sup> Functionally, the district should be a single, undivided tract of land.<sup>65</sup> Due to its simplicity, contiguity is typically a noncontroversial requirement.<sup>66</sup>

*b. Compactness*

Attempting to suggest a formal definition for compactness, one academic noted, “is a bit like pornography—although we know it when we see it, individual sensitivities and community standards vary widely.”<sup>67</sup> Although compactness is a

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units giving preference in the order named to counties, municipalities, contiguous townships, and city wards.

2. Competitiveness - maximizes the number of politically balanced districts. A “politically balanced district” is a district where the average political party indexes, determined using actual election results from recent representative statewide elections, does not lean toward one party by more than five percent.

3. Representational fairness - balances the number of districts leaning toward each political party so that the number of districts leaning toward each party closely corresponds to the preferences of the voters of Ohio, as determined using actual election results from recent representative statewide elections.

4. Compactness - creates districts that are compact.

2012 OHIO ISSUE 2, OHIO BALLOT BD., *available at* <http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2-fulltext.pdf> [hereinafter ISSUE 2 FULL TEXT].

<sup>63</sup> MARK E. RUSH & RICHARD L. ENGSTROM, FAIR AND EFFECTIVE REPRESENTATION? 20 (2001) [hereinafter RUSH, FAIR REPRESENTATION?].

<sup>64</sup> Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 84 (1985).

<sup>65</sup> Some leeway exists, such as connecting land separated by water. *Id.*

<sup>66</sup> *Id.* But the Court has questioned the practical conformance of some “technically” contiguous districts. In *Shaw v. Reno*, the Court invalidated a North Carolina majority-black district that was “approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods.” 509 U.S. 630, 635-36 (1993).

<sup>67</sup> MONMONIER, BUSHMANDERS, *supra* note 50, at 64.

frequent requirement for electoral districts, it is rarely articulated.<sup>68</sup> Various mathematical models exist to measure relative traits such as perimeter, dispersion, and area.<sup>69</sup> But compactness is generally the least technical of district requirements. Unlike the contours of racial or ethnic lines, which require a certain knowledge of a place, judges can “see” compactness on the map and when a district makes sense spatially.<sup>70</sup> This is not to suggest that districts are drawn in perfect circles or squares. Compactness should be balanced against the natural and social topography. Districts that follow the contours of highways, rivers, and lakes are bound to score low in mathematical models, but are certainly better designed for community inclusiveness.<sup>71</sup> Leave should be granted to stretch or skew shapes to place areas of concentrated population closer to the center of a district, instead of at the fringe.<sup>72</sup> Compactness is useful because it suggests an attempt at community inclusion, as strained boundaries suggest devious intent.<sup>73</sup>

*c. Political Subdivisions*

Political subdivisions provide nicely established lines for electoral districts to follow. First, political boundaries—incorporated cities, townships, county lines, school districts and the like—are easy to identify.<sup>74</sup> Second, local units of governments, especially counties, have historically served as the base electoral district.<sup>75</sup> In *Davis v. Bandemer*, the Court granted political subdivisions the same

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<sup>68</sup> Eighteen states require compactness. *Who Draws the Lines? ALL ABOUT REDISTRICTING*, LOYOLA LAW SCHOOL, <http://redistricting.lls.edu/who-courtfed10.php> (last visited Jan. 31, 2014).

<sup>69</sup> MONMONIER, BUSHMANDERS, *supra* note 50, at 64-65.

<sup>70</sup> This was apparent to Justice Stevens, who needed no mathematical analysis to form an opinion on three districts upheld by the plurality in *Bush v. Vera*.

The plurality offers mathematical proof that District 30 is one of the most bizarre districts in the Nation and relates the now-obligatory florid description of the district's shape. As the maps appended to this opinion demonstrate, neither District 30 nor the Houston districts have a monopoly on either of these characteristics. Three other majority-white districts are ranked along with the majority-minority districts as among the oddest in the Nation.

517 U.S. 952, 1018-19 (1996) (Stevens, J. dissenting).

<sup>71</sup> *Id.* at 72.

<sup>72</sup> *Id.* at 73-74.

<sup>73</sup> *Id.* at 70. In cases of alleged racial discrimination, a district's shape might provide strong circumstantial evidence of racially-motivated intent. *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

<sup>74</sup> RUSH, FAIR REPRESENTATION?, *supra* note 63, at 24.

<sup>75</sup> *Id.*

weight afforded to contiguity and compactness.<sup>76</sup> The crisscrossing of political boundaries was a major factor in invalidating districts in *Shaw*<sup>77</sup> and *Miller*.<sup>78</sup>

But the inclusion of political subdivisions has its problems. There is little consensus on what *type* of political subdivision to preserve.<sup>79</sup> Many political boundaries are fluid. For instance, city boundaries may grow or contract year-over-year.<sup>80</sup> When a county or city must be split, there is no normative standard on the best method to divide the pie.<sup>81</sup> The political subdivision itself might contradict other redistricting principles—the inclusion of oddly shaped municipalities could affect a district’s compactness or continuity.<sup>82</sup>

*d. Communities of Shared Interests*<sup>83</sup>

Of the four traditional principles, the requirement that communities are defined by an actual and shared interest is the hardest to quantify. It is commonly understood that “[d]istricts are preferably more than arbitrary aggregations of individuals.”<sup>84</sup> And protecting communities of shared interests might be the core, if not admittedly impossible, goal of redistricting.<sup>85</sup> But defining communities of shared interests, and

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<sup>76</sup> “The most important of these factors are the shapes of voting districts and adherence to established political subdivision boundaries.” *Davis v. Bandemer*, 478 U.S. 109, 173 (1986).

<sup>77</sup> “Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts.” *Shaw v. Reno*, 509 U.S. 630, 636 (1993).

<sup>78</sup> “Effingham and Chatham Counties were split to make way for the Savannah extension, which itself split the City of Savannah; and the plan as a whole split 26 counties.” *Miller*, 515 U.S. at 908.

<sup>79</sup> “Political subdivisions come in many forms: counties, parishes, cities, towns, school districts, judicial districts, water districts, etc.” Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1155–56 (2005).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1160. (“For example, if one is forced to choose between splitting one county into five districts or two counties each into two districts, which decision should one make?”); see also *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 581 (1997) (upholding Florida electoral district that crossed a body of water and expanded across three counties because “evidence submitted showed that both features are common characteristics of Florida legislative districts, being products of the State’s geography and the fact that 40 Senate districts are superimposed on 67 counties.”).

<sup>82</sup> *Id.*

<sup>83</sup> While the Supreme Court has never formally extended the communities of interest principle to partisan gerrymandering cases, the Supreme Court has never ruled out its inclusion. See Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1421–22 (2012).

<sup>84</sup> RUSH, FAIR REPRESENTATION?, *supra* note 63, at 25.

<sup>85</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (“A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.”).

properly identifying them, is an inherently subjective task. Asked one elections scholar, “[a]re communities of interest defined by ideology, demographic traits, economic concerns, policy priorities, or some combination thereof? The Supreme Court, for its part, has not answered this question.”<sup>86</sup> In *Miller*, the Court prohibited the “mere recital” of communal interest, but provided no more in the way of constructing judicially manageable standards.<sup>87</sup> Because the principle is so elusive, many courts afford little weight to communal interests.<sup>88</sup> Only a small minority of state legislatures has included “shared interests” as a component requirement.<sup>89</sup>

*e. Representational Fairness and Competitive Districts*

Aside from the above four considerations announced in *Miller*, Issue 2 included two more. First, Issue 2 called for politically competitive districts. Issue 2 defined “competitive” as no more than five percent disparity between political parties in a given district.<sup>90</sup> The data used to measure party affiliation was based on the average political party indexes from recent elections.<sup>91</sup> This principle of construction would prevent “stacking” of a party in a certain district. Second, Issue 2 also called for “representational fairness.” This requirement is perhaps more vague, requiring that, on “balance,” districts leaning toward one party or another “closely corresponds to the preferences of the voters of Ohio, as determined using actual election results from recent representative statewide elections.”<sup>92</sup>

These principles speak to notions of competitive fairness,<sup>93</sup> both inside a given district and statewide.<sup>94</sup> Issue 2 defined the source (the political party indexes from recent elections) and measure (5% deviation) of establishing competitiveness in a given district, eliminating the potential for courts to invalidate the requirement as judicially unmanageable.<sup>95</sup> Justice O’Connor, dissenting in *Davis v. Bandemer*,

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<sup>86</sup> Todd Makse, *Defining Communities of Interest in Redistricting Through Initiative Voting*, 11 ELECTION L.J. 503, 504 (2012).

<sup>87</sup> *Miller v. Johnson*, 515 U.S. 900, 919 (1995).

<sup>88</sup> *See, e.g., Chen v. City of Houston*, 206 F.3d 502, 517 (5th Cir. 2000) (“Because of the inherently subjective nature of the concept, it would seem that reasonable people might disagree as to what constitutes a community. We thus caution against general over-reliance on the communities of interest factor.”).

<sup>89</sup> REDISTRICTING LAW, *supra* note 31, at 106–8.

<sup>90</sup> ISSUE 2 FULL TEXT, *supra* note 62.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> However, the notion of competitive districts and proportional representation assumes that voters are easily identified. Unlike race, political identity is not an immutable characteristic. *See RUSH, supra* note 56, at 4.

<sup>94</sup> For a critique of competitive district requirements, see Justin Buchler, *Competition, Representation and Redistricting: The Case Against Competitive Congressional Districts*, 17 J. THEORETICAL POL. 431 (2005) (arguing that competitive districts widen the ideological differences between the median constituent and the representative).

<sup>95</sup> The inability to accurately ascertain the voter strengths of a given party was one reason a plurality of the Supreme Court found partisan gerrymandering was nonjusticiable. *Vieth v. Jubelirer*, 541 U.S. 267, 268 (2004) (“There is no effective way to ascertain a party’s majority

conceded that this type competitive representation requirement was manageable in some instances.<sup>96</sup> Said Justice O'Connor,

[O]f course, in one sense a requirement of proportional representation, whether loose or absolute, is judicially manageable. If this Court were to declare that the Equal Protection Clause required proportional representation within certain fixed tolerances, I have no doubt that district courts would be able to apply this edict.<sup>97</sup>

### 3. *Bandemer*, *Vieth* and the Ebb of Judicial Activism in Redistricting

The United States Constitution grants both state legislatures and Congress the authority to enact sweeping anti-gerrymandering reform.<sup>98</sup> Perhaps in large part because they reap the fruit of gerrymandered districts, legislatures have been reluctant to impose strict checks and balances on the redistricting process.<sup>99</sup> Thus, disenfranchised voters often turn to the courts for relief. But for nearly two hundred years, courts declined to tackle partisan gerrymandering challenges, holding partisan gerrymandering questions as nonjusticiable.<sup>100</sup>

In 1962, the Supreme Court first breached the issue of redistricting in *Baker v. Carr*.<sup>101</sup> Allowing a challenge to a Tennessee districting plan, the *Baker* Court found

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status, and, in any event, majority status in statewide races does not establish majority status for particular district contests.”). Further, without a normative standard to judge, a requirement for competitive districts becomes a subjective analysis in fairness, where “[f]airness is not a judicially manageable standard.” *Id.* at 268 (internal quotations omitted). It is likely courts would defer to examine fairness in any depth beyond whether the statutory statistical requirements were met. For instance, in *Gafney v. Cummings*, the Court deferred to a political fairness principle, ruling:

[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so. . . . neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

412 U.S. 735, 754 (1973).

<sup>96</sup> *Davis v. Bandemer*, 478 U.S. 109, 158 (1986) (O'Connor, J., dissenting).

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., *Ariz. v. Inter-Tribal Council of Ariz.*, 133 S. Ct. 2247, 2253 (2013) (“The Elections Clause has two functions. Upon the States it imposes the duty . . . to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether.”).

<sup>99</sup> The sole federal law remaining on the books today, 2 U.S.C. § 2c, only requires single-member-districts.

<sup>100</sup> In *Vieth*, Justice Scalia recounts two hundred years of anti-gerrymandering legislative history. Congress was surprisingly active through the early twentieth century, requiring district continuity, compactness, and equality of representation. *Vieth*, 541 U.S. at 274–77.

<sup>101</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).



that the question did not pose a purely political question,<sup>102</sup> but instead fell into the “developed and familiar” judicial standards under the Equal Protection Clause.<sup>103</sup> Two years later, the Court expanded its gerrymandering jurisprudence, establishing the “one person, one vote” standard in *Reynolds v. Sims*.<sup>104</sup> The *Reynolds* standard requires each district to have roughly the same population as every other district.<sup>105</sup> In *Karcher v. Daggett*, the Court clarified the Reynolds requirement, mandating states demonstrate a good faith effort to equally proportion voters across districts.<sup>106</sup> Under *Karcher*, a state must prove a conflicting, legitimate goal to overcome any significant population variance.<sup>107</sup> The *Karcher* standard is a high one. Today, no state has a congressional population variance exceeding 1%,<sup>108</sup> and only one state is above 0.5%.<sup>109</sup> But *Reynolds* and *Karcher* only provided for numerically proportional representation. Neither directly addressed partisan gerrymandering.

In *Davis v. Bandemer* the Court first held partisan redistricting challenges justiciable.<sup>110</sup> *Bandemer* involved a challenge to an Indiana electoral map that was heavily weighted in favor of Republican candidates.<sup>111</sup> Applying the test set forth in *Baker v. Carr*, the Court found that none of the impediments associated with political questions were present.<sup>112</sup>

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<sup>102</sup> “Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.*

<sup>103</sup> *Id.* at 226.

<sup>104</sup> 377 U.S. 533, 565–66 (1964) (“Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.”) (internal citations omitted). In *Reynolds*, the Court dealt (in part) with an act of “omission,” as the legislature created unbalanced districts through a failure to properly reapportion, rather than an affirmative act. BULLOCK III, *supra* note 39, at 231–32. For the purposes of this note, I deal only with acts of “commission,” or affirmative acts of malapportionment. *Id.* at 234.

<sup>105</sup> “One person, one vote” established a judicially-manageable standard of “equal representation for equal numbers of people.” *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)).

<sup>106</sup> *Id.* at 730–31.

<sup>107</sup> *Id.*

<sup>108</sup> HERBERT ET AL., *supra* note 49, at 6–7.

<sup>109</sup> Idaho, at 0.6 percent. *Id.*

<sup>110</sup> *Davis v. Bandemer*, 478 U.S. 109, 113 (1986).

<sup>111</sup> *Id.* at 132.

<sup>112</sup> *Id.*

For the first time, the Supreme Court addressed partisan gerrymandering. A plurality of the Court held that to qualify for Fourteenth Amendment relief, two criteria must be met. First, it was necessary to demonstrate a legislative *intent* to discriminate against a certain political group.<sup>113</sup> Second, the districting plan must be proven to have an actual discriminatory *effect*.<sup>114</sup> The plurality decision made clear that intent was far easier to prove than effect.<sup>115</sup> To demonstrate effect took more than recitals, or even proof of disproportionate representation. Instead, the discriminatory effect “occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or group of voters’ influence on the political system as a whole.”<sup>116</sup> Ultimately, based on insufficient evidence of discriminatory effect, the Court refused to overturn Indiana’s electoral map.<sup>117</sup> “A group’s electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.”<sup>118</sup>

*Bandemer* provided little in the way of guidance to lower courts. Decisions immediately following *Bandemer* suggested that the discriminatory effect test was a high, but elusive, standard. For instance, in *Badham v. Eu*, a challenge to the California electoral map failed on judicial notice that Republicans, by holding the governorship, a Senate seat, and 40% of Congressional seats, were not “shut out” of the political process.<sup>119</sup> Subsequent lower court decisions demonstrated similar difficulties applying *Bandemer*.<sup>120</sup> “The *Bandemer* plurality’s standard . . . proved unmanageable in application.”<sup>121</sup>

Two decades later, in *Vieth v. Jubelirer*, a four-member plurality of the Court held that partisan gerrymandering cases were nonjusticiable.<sup>122</sup> The plurality decision

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<sup>113</sup> *Id.* at 127.

<sup>114</sup> *Id.*

<sup>115</sup> The plurality reasoned that “[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences . . . were intended.” *Id.* at 129.

<sup>116</sup> *Id.* at 132.

<sup>117</sup> *Id.* at 113.

<sup>118</sup> *Id.*

<sup>119</sup> *Badham v. March Fong Eu*, 694 F. Supp. 664, 672 (N.D. Cal. 1988), *aff’d sub nom. Perry v. Leeke*, 488 U.S. 1024 (1989).

<sup>120</sup> *See, e.g.,* Republican Party of Va. v. Wilder, 774 F. Supp. 400, 404 (W.D. Va. 1991) (failure to prove intent); Pope v. Blue, 809 F. Supp. 392, 397 (W.D.N.C. 1992) (failure to include minority party in the redistricting process was not proof of consistent degradation in entire political process); Fund for Accurate & Informed Representation, Inc. v. Weprin, 796 F. Supp. 662, 669 (N.D.N.Y. 1992) (*per curiam*) *aff’d* 506 U.S. 1017 (1992) (mem.) (political party’s complete preclusion from one house in a bicameral legislature insufficient to prove foreclosure from whole political system).

<sup>121</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 268 (2004).

<sup>122</sup> *Id.* at 305–06.

cited the lack of judicially manageable standards.<sup>123</sup> The long-standing disagreement over a workable standard of review was among the reasons that *Baker v. Carr* precluded judicial intervention. “For the past 18 years, the lower courts have simply applied the *Bandemer* plurality’s standard, almost invariably producing the same result as would have obtained had the question been nonjusticiable: Judicial intervention has been refused.”<sup>124</sup> Justice Kennedy, concurring in the decision but wishing to preserve the future justiciability of partisan gerrymandering claims, voted to dismiss for failure to state a claim.<sup>125</sup> Three dissenting opinions claimed their own proposed standards were judicially manageable.<sup>126</sup> Of course, each of the three dissents proposed a uniquely different test, a fact that spoke to the plurality’s position that the question posed an unworkable political question.

In any case, *Vieth* actually left open the possibility of judicial intervention—a majority of the Court voted to retain the justiciability of partisan redistricting. Thus, it leaves the prospect of judicial action in gerrymandering cases very much up in the air.

Following *Vieth*, some states turned to referendum to modify their redistricting processes. Referendum is an increasingly popular method to reform gridlocked partisanship. In 2008, California voters approved a citizens commission to draw state legislative boundaries.<sup>127</sup> In 2010, voters extended the same system to Congressional boundaries.<sup>128</sup> California’s method of taking redistricting out of the state legislature’s hand was noticed.<sup>129</sup> Ohio citizens sought to achieve the same. On April 5<sup>th</sup>, 2012, the League of Women Voters, by and through Voters First Ohio, successfully

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 267–68.

<sup>125</sup> *Id.* at 306 (Kennedy, J., concurring) (“I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.”).

<sup>126</sup> Justice Stevens advocated for the court to apply the same standards to partisan gerrymandering as it did to racial gerrymandering. *Id.* at 336 (Stevens, J., dissenting). Justices Souter and Ginsberg advocated a five-part test to establish a prima facie case of partisan gerrymandering. *Id.* at 347 (Souter, J., dissenting). Justice Breyer, instead of offering a test, provided examples of “serious departures from redistricting norms,” that would lead to judicial recognition of partisan gerrymandering. *Id.* at 366–67 (Breyer, J., dissenting).

<sup>127</sup> Gerry Shih, *Tackling Redistricting With Money and Zeal*, N.Y. TIMES, Oct. 7, 2010, available at [http://www.nytimes.com/2010/10/08/us/08bcredistrict.html?\\_r=0](http://www.nytimes.com/2010/10/08/us/08bcredistrict.html?_r=0).

<sup>128</sup> *Id.* This passed with 61 percent of the vote. CALIFORNIA SECRETARY OF STATE, BALLOT MEASURES PASSED, available at <http://www.sos.ca.gov/elections/ballot-measures/pdf/approval-percentages-initiatives.pdf> (last visited Jan. 31, 2014).

<sup>129</sup> With only one map drawn so far, California’s model has been both roundly praised as the model moving forward and thoroughly denounced as providing no added value. Compare Karin Mac Donald, *Adventures in Redistricting: A Look at the California Redistricting Commission*, 11 ELECTION L.J. 472, 489 (2012), with Anthony E. Chavez, *The Red and Blue Golden State: Why California’s Proposition 11 Will Not Produce More Competitive Elections*, 14 CHAP. L. REV. 311, 312 (2011).

petitioned Issue 2, a constitutional referendum, for November 2012 ballots.<sup>130</sup> The question remained—would the Buckeye State go for it?

### *C. The Rise of Referenda and Direct Democracy*

#### 1. Referendum as a Progressive Movement

Although its traditions are rooted as far back as the town meeting of colonial New England, as a practical matter, the referendum is a modern creation.<sup>131</sup> Direct democracy grew out of the Progressive movement of the early twentieth century. The harsh economic transformation of America's industrial society left many classes feeling unrepresented.<sup>132</sup> Working-class Americans felt increasingly disenfranchised by a government catering to commercial interests.<sup>133</sup> Contemporary observers wrote of the popular democratic "revolution" occurring overseas.<sup>134</sup> Newspapers, articles, and essays opined on the benefits of popular referenda.<sup>135</sup> By the mid-1890s, the American direct democracy movement gained traction.<sup>136</sup> While New Jersey considered and rejected a referendum bill in 1894,<sup>137</sup> South Dakota adopted the first such law in 1898, and over the next two decades, twenty two states followed suit, including Ohio.<sup>138</sup> Today, a majority of the states provide their citizens some means of popular initiative.<sup>139</sup>

Constitutions, statutes, and municipal charters now authorize a wide variety of direct democratic devices.<sup>140</sup> Among the most common are initiatives and referenda.

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<sup>130</sup> Letter from the Ohio Ballot Board to Mike DeWine (Apr. 5, 2012), <http://www.sos.state.oh.us/upload/news/2012/2012-04-05Redistricting.pdf> (certifying Ohio Ballot Issue 2).

<sup>131</sup> JOSEPH F. ZIMMERMAN, *THE REFERENDUM: THE PEOPLE DECIDE PUBLIC POLICY* 2–3 (2001).

<sup>132</sup> STEVEN L. PIOTT, *GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA* 1 (2003).

<sup>133</sup> *Id.*

<sup>134</sup> Specifically in Switzerland, where referendum were gaining widespread popularity. *Id.* at 4–5.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 9–10.

<sup>137</sup> *Id.* at 15.

<sup>138</sup> THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 51 (1989).

<sup>139</sup> Twenty-eight states allow initiative or referendum. Those states are South Dakota (1898), Utah (1900), Oregon (1902), Montana (1906), Oklahoma (1907), Maine (1908), Missouri (1908), Colorado (1910), Arkansas (1910), Arizona (1911), California, (1911), New Mexico (1911 referendum only), Idaho (1912), Nebraska (1912), Nevada (1912 referendum only), Ohio (1912), Washington (1912), Michigan (1913), North Dakota (1914), Kentucky (1915 referendum only), Maryland (1915 referendum only), Massachusetts (1918), Alaska (1959), Wyoming (1968), Florida (1968 constitutional initiative only), Illinois (1970 constitutional initiative only), District of Columbia (1977), Mississippi (1992). *Id.*

<sup>140</sup> State referendum procedures vary from brief to very detailed. ZIMMERMAN, *supra* note 131, at 21–22.

*Initiatives* allow voters to introduce a bill or constitutional amendment to the state legislature. *Referenda* allow voters to either approve a proposed law or constitutional amendment or to reject an existing law.<sup>141</sup> In practice, the terms are often interchanged to suggest any ballot question tendered to voters.<sup>142</sup> For instance, in Ohio Issue 2 was called an “initiated constitutional amendment,” even though it functioned much like a referendum.<sup>143</sup>

The political theory of direct democracy is rife with controversy. The founding fathers trusted in a representational democracy, believing direct democracy impractical, undesirable, and dangerous.<sup>144</sup> But the *nature* of representation is a debate that continues today. Two predominant but competing theories of representation frame the issue of popular referenda: the trustee model and the delegate model. Under the trustee model, elected representatives are independent agents, free to act as they please with no responsibility to carry out the will of the majority.<sup>145</sup> If this is the case, direct democracy abridges the freedom of the tenant-constituent relationship, vesting legislative power to the majority. In contrast, the delegate model views representatives as proxies of the people, duty bound to carry out the will of the majority.<sup>146</sup> Referendum squares nicely with the delegate model. Delegate proponents believe popular initiative is a more efficient means of legislating, as the citizens are “representing” themselves.<sup>147</sup> As one commentator put it, “[t]he dilemma is ancient and perhaps irresolvable.”<sup>148</sup>

An enduring criticism of direct democracy is that it undermines the traditional representative democracy prescribed in the Constitution. As ratified, the Constitution hardly promoted the idea of direct democracy. The popular vote applied only to Congressional Representatives.<sup>149</sup> Some legal scholars argue that direct democracy is unconstitutional under the Guarantee Clause.<sup>150</sup> But the Supreme Court held otherwise over a century ago. In *Pacific States Telephone v. State of Oregon*, the Court ruled that the republican form of government was satisfied when the

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<sup>141</sup> CRONIN, *supra* note 138, at 2.

<sup>142</sup> Ohio statute refers to ballot measures as “propositions, issues, or questions.” OHIO REV. CODE ANN. § 3519.21 (West 2015).

<sup>143</sup> BALLOT INITIATIVES, OHIO ATTORNEY GENERAL, *available at* <http://www.ohioattorneygeneral.gov/Legal/Ballot-Initiatives> (last visited Jan. 31, 2014).

<sup>144</sup> CRONIN, *supra* note 138, at 22.

<sup>145</sup> *Id.* at 26–27.

<sup>146</sup> *Id.*

<sup>147</sup> This discounts the advantages of openness, compromise, and information sharing in the governing process. *See generally* Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representational Government, the Battle over Ballot Initiatives in America*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 33 (Larry Sabato, Bruce A. Larson & Howard R. Ernst eds., 2001).

<sup>148</sup> CRONIN, *supra* note 138, at 27.

<sup>149</sup> U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

<sup>150</sup> RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 168 (2002).

representatives and Senators were seated in Congress.<sup>151</sup> Holding the question nonjusticiable,<sup>152</sup> the Court has declined to revisit the issue, allowing states to continue to experiment with popular initiatives.<sup>153</sup>

Legality aside, the potential drawbacks of direct democracy are well-documented. Many political scientists question the competency of the electorate. For one, the average voter's source of information is often incomplete or biased; many citizens base their knowledge of a referendum on sound bites, endorsements, and advertisements.<sup>154</sup> Voters have historically performed poorly at identifying facts or substance of initiatives.<sup>155</sup> Corporations and deep-pocketed interest groups can "kidnap" a referendum, promoting narrow interests not aligned with the general public welfare.<sup>156</sup> Because ballot questions are often poorly drafted, and lack a supporting legislative record, courts are faced with the difficulty of interpreting vague, inconsistent, or contradictory laws.<sup>157</sup> Referenda might be used by majorities to limit or rollback civil rights for unpopular minorities.<sup>158</sup> Despite these shortfalls, the use of referenda has more than doubled in the past fifty years.<sup>159</sup>

## 2. Referendum in Ohio

An early leader in direct democracy, Ohio citizens have enjoyed referendum and initiative power for over a century.<sup>160</sup> A hotbed of the Progressive movement of the turn of the twentieth century,<sup>161</sup> Ohioans thought popular democracy a way to break industry's stronghold on the state political machine and expand individual liberty.<sup>162</sup>

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<sup>151</sup> The Court went on to rule that the adoption of initiative was a political outside the scope of its jurisdiction. *Pac. States Tel. & Tel. Co. v. State of Oregon*, 223 U.S. 118, 151 (1912).

<sup>152</sup> *Id.*

<sup>153</sup> CRONIN, *supra* note 138, at 34–35.

<sup>154</sup> Elisabeth R. Gerber, *The Logic of Reform: Assessing Initiative Reform Strategies*, in *DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 156–57 (Larry Sabato, Bruce A. Larson & Howard R. Ernst eds., 2001).

<sup>155</sup> *Id.*

<sup>156</sup> See generally ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (1999).

<sup>157</sup> Zachary Hudson, *Interpreting the Products of Direct Democracy*, 28 *YALE L. & POL'Y REV.* 223, 224 (Fall 2009).

<sup>158</sup> Stephen Shapiro, *The Referendum Process in Maryland: Balancing Respect for Representative Government with the Right to Direct Democracy*, 44 *U. BALT. L.F.* 1, 6–7 (2013).

<sup>159</sup> Howard R. Ernst, *The Historical Role of Narrow-Material Interests in Initiative Politics*, in *DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 21 (Larry Sabato, Bruce A. Larson & Howard R. Ernst eds., 2001).

<sup>160</sup> The Ohio constitutional amendments were incorporated in 1912. PIOTT, *supra* note 132, at 184.

<sup>161</sup> Early ballot issues included eligibility of women to hold certain offices (1913), women's suffrage (1914 and 1917), term limits (1915), and the grant of referendum to ratify Constitutional Amendments. *Id.* at 282–83.

<sup>162</sup> *Id.* at 170.

Tellingly, it was not the legislature, but the constitutional convention that proposed the referendum and initiative amendment in 1912.<sup>163</sup> As early as 1913, Ohio citizens began to certify questions ranging from prohibition laws to property taxes.<sup>164</sup>

Between 1913 and 2000, Ohio had certified 199 state-wide initiatives for the ballot, averaging 2.3 initiatives per year.<sup>165</sup> During this time, 108 passed (54%).<sup>166</sup> The rate and success of recent initiatives closely follow historical trends. Between 2001 and 2012, the state averaged 2.4 initiatives per year, certifying twenty-six initiatives, of which thirteen passed (50%).<sup>167</sup>

Although Ohio initiatives historically enjoy a slightly greater than 50/50 chance at the poll, those questions certified by direct citizen petition fair relatively poorly. Of Ohio's 225 statewide initiatives, 153 were drafted and certified to voters by the General Assembly.<sup>168</sup> Only seventy-two questions were initiated by citizen petition.<sup>169</sup> While voters have passed 67% of General Assembly initiatives, only 26% of citizen-initiated questions ever become law.<sup>170</sup> Recent trends show marginal improvement. Since 2000, voters approved five of fifteen (33%) citizen-initiated questions, compared to three of eight (38%) of General Assembly-initiated questions.<sup>171</sup>

Despite the historically low success rate of citizen-initiated referenda, referendum remains a viable—and perhaps best—option for Ohio redistricting reform. It is highly unlikely that the General Assembly would support a redistricting measure similar in scope to Issue 2, much less a constitutional amendment. A referendum measure would force permanent reform. California and Arizona successfully implemented new redistricting systems via referendum. Even in California, where the use of direct democracy is widely popular,<sup>172</sup> voters approve only a minority of questions.<sup>173</sup> Arizona, the same.<sup>174</sup> Nothing suggests that Ohio is a less-ripe environment for a successful referendum.

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<sup>163</sup> *Id.* at 183–84.

<sup>164</sup> *Id.* at 282–83.

<sup>165</sup> PROPOSED CONSTITUTIONAL AMENDMENTS, INITIATED LEGISLATION, AND LAWS CHALLENGED BY REFERENDUM, SUBMITTED TO THE ELECTORS, OHIO SEC'Y OF STATE (June 11, 2014), <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf>.

<sup>166</sup> Of those 199 initiatives, 57 were citizen initiated and 142 were submitted to voters by the General Assembly. *Id.*

<sup>167</sup> This includes Issue 2. *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See, e.g., Stephen M. Griffin, *California Constitutionalism: Trust in Government and Direct Democracy*, 11 U. PA. J. CONST. L. 551, 569 (2009).

<sup>173</sup> Between 1912 and 2012, voters approved 122 of 360 (34%) initiatives. INITIATIVES TOTAL SUMMARY, CAL. SEC'Y OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/pdf/initiative-totals-summary-year.pdf>.

<sup>174</sup> Between 1912 and 2000, Arizona passed 63 of 105 (42%) initiatives. ARIZONA STATEWIDE INITIATIVE USAGE, THE INITIATIVE AND REFERENDUM INST.,

There is one other consideration worth merit. While opinions are divided on direct democracy tools such as referendum, initiative, and recall, there is a general consensus that state constitutional amendments *should be* submitted directly to the voters.<sup>175</sup> Issue 2 packaged amendments, annulments, and changes to the Ohio Constitution. Although the Ohio Constitution provides various means for amendment,<sup>176</sup> one of those is popular referendum.<sup>177</sup>

While means exist to reform redistricting by the courts (via judicial review), the state legislature (via statute), or Congress (via the express terms of Article 1),<sup>178</sup> it can safely be argued that a state constitutional change is the most direct, efficient means of attaining the same. Given the political disincentive to reform, along with the law's unwillingness to hear citizen complaints, direct citizen action is the only feasible corrective action *now*.

#### D. A Note on Redistricting Commissions

Ohio Voters First was an initiative of the Ohio League of Women Voters as a response to the gerrymandered congressional map certified by the Ohio General Assembly in 2011. Despite conservative criticism, Voters First was neither haphazard nor idealistic. Nor was it a trivial academic exercise: the venture was supported with millions of dollars by both organized and private donations.<sup>179</sup> Its drafters were a veritable "who's-who" of election law experts and distinguished academics.

Still, creating an independent commission to draw district boundaries is no small task. Part of the difficulty is that there is no single model to follow. Seventeen states now use commissions to allocate electoral districts, and they differ widely. Redistricting commissions range from large to small: California employs a fourteen-member commission,<sup>180</sup> while Arkansas sits only three.<sup>181</sup> Partisanship requirements vary widely, with some states requiring an even split between Republicans and Democrats,<sup>182</sup> some states allowing the majority and minority party leaders to nominate an equal number of commissioners (essentially accomplishing the same

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<http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/Arizona.pdf>.

<sup>175</sup> ZIMMERMAN, *supra* note 131, at 15.

<sup>176</sup> For instance, a super majority of the legislature can pass amendments. OHIO CONST. art. XVI, §1. Or the voters can elect, via petition or periodically every other decade, to call a constitutional convention. *Id.* §§ 2–3.

<sup>177</sup> OHIO CONST. art. II, § 1a.

<sup>178</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>179</sup> Campaign expenditures in support totaled \$4,082,557.00. *Campaign Expenditures, OHIO SEC'Y OF STATE, available at* [http://www2.sos.state.oh.us/pls/cfonline/f?p=119:47:114263680974926::NO::P47\\_ENTITY\\_ID:13247](http://www2.sos.state.oh.us/pls/cfonline/f?p=119:47:114263680974926::NO::P47_ENTITY_ID:13247).

<sup>180</sup> CAL. CONST. art. XXI, § 2(c)(2).

<sup>181</sup> ARK. CONST. art. VIII, § 1.

<sup>182</sup> *See, e.g.*, MO. CONST. art. III, §§ 2, 7.



purpose),<sup>183</sup> and some states having no bipartisan requirements at all.<sup>184</sup> While many states prohibit elected officials from serving as commissioners,<sup>185</sup> a few states go even further, imposing strict limits on running for public office after serving on the commission.<sup>186</sup> Some western states include residency restrictions.<sup>187</sup>

But relatively few states use independent commissions to draw Congressional boundary lines.<sup>188</sup> Of the seven states that do, most are appointed directly by partisan officeholders.<sup>189</sup> Only California and Arizona break course.

Next, I examine the two citizen commissions enacted by voters: those in Arizona and California.

### 1. The Arizona Model

Arizona seats a five-member redistricting commission.<sup>190</sup> To choose commissioners, the state appellate court creates a pool of twenty-five applicants.<sup>191</sup> This pool consists of ten applicants from each of the two largest parties and five not from either of the two largest parties.<sup>192</sup> The highest-ranking majority and minority members of the house and senate each select a member from the pool.<sup>193</sup> The four selected applicants then select, from the remaining pool, a fifth applicant to serve as chair. This fifth member must be non-affiliated with either political party represented.<sup>194</sup> In the event the four-member commission is deadlocked in picking a

<sup>183</sup> See, e.g., IDAHO CONST. art. III, § 2.

<sup>184</sup> See, e.g., ARK. CONST. art. VIII.

<sup>185</sup> See, e.g., ALASKA CONST. art. VI, §8(a).

<sup>186</sup> Hawaii prohibits commissioners from running for public office for the following two election cycles. HAW. CONST. art. IV, §2. By contrast, all three commissions in Arkansas are elected officials. ARK. CONST. art. VIII.

<sup>187</sup> See, e.g., COLO. CONST. art. V, § 48(1)(c) (“No more than four commission members shall be residents of the same congressional district, and each congressional district shall have at least one resident as a commission member. At least one commission member shall reside west of the continental divide.”).

<sup>188</sup> These states are Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington. ARIZ. CONST. art. 4, pt. 2, § 1(3); CAL. CONST. art. XXI, § 2(d); HAW. CONST. art. IV, § 2; MONT. CONST. art. V, § 14(2); N.J. CONST. art. II, § 2 para 1(a); WASH. CONST. art. II, § 43(1). Indiana uses a “fall back” commission in cases where the legislature fails to certify a map. IND. CODE § 3-3-2-2(a). It is not clear why only a minority of states have extended the power to draw congressional districts to redistricting commissions. One possible answer is the shadow of uncertainty surrounding congressional districts and the potential unconstitutional delegation of power.

<sup>189</sup> *Supra* note 188.

<sup>190</sup> ARIZ. CONST. art. IV, pt. 2, § 1.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

chair, the Commission on Appellate Court Appointments appoints the chair.<sup>195</sup> Arizona requires a simple majority vote of the citizens commission to pass a map. After certification, commissioners are prohibited from running for public office or registering as lobbyists for three years.<sup>196</sup> Commissioners are removable by the governor, with the concurrence of two-thirds of the senate, for “substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.”<sup>197</sup>

The Arizona Constitution requires the commission to consider proportional population, compactness, contiguity, communities of interest, political subdivisions, and geographic boundaries.<sup>198</sup> Although the Arizona Constitution calls for competitive districts, commissioners are not to use party registration or voting trend data in the initial stages, relegating compactness to a tertiary requirement.<sup>199</sup>

## 2. The California Model

California seats a fourteen-member redistricting commission.<sup>200</sup> The state constitution requires that five commissioners are members of the majority party, five are from the minority party, and the remaining four are non-affiliated.<sup>201</sup> To approve an electoral map requires nine votes, including three Democratic commissioners, three Republican commissioners, and three non-affiliated commissioners.<sup>202</sup>

To appoint members to the commission, the State Auditor establishes an Applicant Review Panel.<sup>203</sup> This Applicant Review Panel evaluates all of the conforming commissioner applications and selects sixty of the most qualified applicants,<sup>204</sup> including twenty who are registered with the largest political party in California based on registration, twenty who are registered with the second largest party, and twenty who are non-affiliated with either party.<sup>205</sup> The house and senate majority and minority leaders then may strike two names each.<sup>206</sup> Eight names are

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<sup>195</sup> *Id.* The current Chair is a registered independent. She was choosing unanimously by the bi-partisan board. *Commissioners*, ARIZONA INDEPENDENT REDISTRICTING COMMISSION, available at <http://azredistricting.org/About-IRC/Commissioners.asp>.

<sup>196</sup> ARIZ. CONST. art. IV, pt. 2, § 1.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> CAL. CONST. art. XXI, § 2(c)(2). To protect against wolves in sheep’s clothing, the applicants must have been registered with that party for at least five years, and had voted in the previous two election cycles. *Id.* Any person donating more than \$2,000 to a candidate in the preceding 10 years is also barred. CAL. GOV’T CODE § 8252(a)(2)(vi) (West 2008).

<sup>202</sup> CAL. CONST. art. XXI, § 2(c)(5).

<sup>203</sup> The Audit Review Panel is selected by lot and is itself bipartisan. CAL. GOV’T CODE § 8252(b) (West 2008).

<sup>204</sup> Based on “relevant analytical skills, ability to be impartial, and appreciation for California’s diverse demographics and geography.” CAL. GOV’T CODE § 8252(d) (West 2008).

<sup>205</sup> CAL. GOV’T CODE § 8252(d) (West 2008).

<sup>206</sup> CAL. GOV’T CODE § 8252(e) (West 2008).

then selected by lottery—three Republicans, three Democrats, and two non-affiliated.<sup>207</sup> These eight commissioners then select six more from the remaining pool of applicants—two Republicans, two Democrats, and two non-affiliated.<sup>208</sup> California imposes strict restrictions on commission members. Outgoing commissioners are prohibited from running for public office for ten years and from seeking various appointments and types of employment for five.<sup>209</sup> Neither the constitution nor California statute provides terms for commissioner removal.

California ranks the various criteria for drawing districts, from highest priority to lowest priority. Those criteria are, in order: equal population,<sup>210</sup> compliance with the Voting Rights Act,<sup>211</sup> geographical contiguity,<sup>212</sup> maintenance of political subdivisions balanced against maintaining communities of interest,<sup>213</sup> and “to the extent practicable, and where this does not conflict with the criteria above,” compactness.<sup>214</sup>

### 3. The Issue 2 Model

Issue 2 described a nomination process borrowed, in part, from both Arizona and California. Issue 2 called for a twelve-member commission.<sup>215</sup> Ohio appellate judges would manage the commissioner selection process.<sup>216</sup> Under Issue 2, any person interested in serving on the citizens commission could submit an application to the Secretary of State.<sup>217</sup> To pare down the applicant pool, the Chief Justice of the Ohio Supreme Court would commission a panel of eight Ohio appellate judges.<sup>218</sup> The

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<sup>207</sup> CAL. GOV'T CODE § 8252(f) (West 2008).

<sup>208</sup> CAL. GOV'T CODE § 8252(g) (West 2008).

<sup>209</sup> This includes “paid staff for, or as a paid consultant to, the Board of Equalization, the Congress, the Legislature, or any individual legislator, or to register as a federal, state or local lobbyist in this State.” CAL. CONST. art. XXI, § 2(c)(6).

<sup>210</sup> CAL. CONST. art. XXI, § 2(d)(1).

<sup>211</sup> CAL. CONST. art. XXI, § 2(d)(2).

<sup>212</sup> CAL. CONST. art. XXI, § 2(d)(3).

<sup>213</sup> Conceding that political and community divisions do not always share the boundaries, the constitution provides examples of balancing certain communities of interest over political subdivisions. CAL. CONST. art. XXI, § 2(d)(4) (“Examples of such shared interests are those common to an urban area, a rural area, an industrial area, or an agricultural area, and those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the election process.”).

<sup>214</sup> CAL. CONST. art. XXI, § 2(d)(5). The constitutional also asked commissioners, if possible, to form state senate districts by combining two whole legislative districts. CAL. CONST. art. XXI, § 2(d)(6).

<sup>215</sup> ISSUE 2 FULL TEXT, *supra* note 62, at 1.

<sup>216</sup> *Id.* at 2.

<sup>217</sup> Issue 2 was silent on criteria for eligibility. “The Secretary of State shall make available an appropriate application form designed to help determine the eligibility and qualifications of applicants and shall publicize the application process.” *Id.*

<sup>218</sup> *Id.*

Chief Justice would assign these judges by lot, ensuring no more than four judges were members of a single political party.<sup>219</sup> This appellate panel would then fashion selection standards to narrow the pool of applicants to 42 citizens with “the relevant skills and abilities, including a capacity for impartiality, and who reflect the diversity of Ohio.”<sup>220</sup> These 42 candidates would reflect the 16 highest-qualified Republican, Democrat, and non-affiliated applicants, voted on by the appellate judges.<sup>221</sup> The Ohio Speaker of the House and minority leader would give permission to eliminate up to three candidates. Of the remaining pool, nine citizens would then be chosen by lot—three nominees from the majority party, three nominees from the minority party, and three nominees unaffiliated with either party.<sup>222</sup> The nine citizen-nominees would then select three more candidates from the pool—one Republican, one Democrat, and one non-affiliated—bringing the citizens commission to a total of twelve.<sup>223</sup> Issue 2 did not provide terms for commissioner removal, but went further, providing “[n]o member of the Commission shall be subject to removal by the general assembly or any member of the executive branch.”<sup>224</sup> Issue 2 prescribed heavy restrictions on commissioner applicants.<sup>225</sup> After serving on the commission, commissioners were time-barred from running for public office in any district they created.

Issue 2’s redistricting criteria are similar to Arizona’s. Unlike California, the criteria are not weighted to any one factor. Issue 2 listed as criteria: contiguity, maintenance of community preservation and political subdivision, competitiveness, representational fairness, and compactness.<sup>226</sup>

#### 4. An Unconstitutional Proposition?

At the time of publication, the future of the referendum-enacted citizens commissions—at least as far as their power to draw Congressional districts—is in question. On October 2, 2014, the United States Supreme Court accepted a writ of certiorari in the case of *Arizona State Legislature v. Arizona Independent Redistricting Commission, et al.*<sup>227</sup> The Court will decide if the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit the use of a citizens commission to adopt Congressional districts.<sup>228</sup>

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Within ten years of the date of application, applicants were barred from holding elected office or certain political employment, including lobbying. Within five years of the date of application, applicants were barred from running for officer, holding certain jobs, or contributing over \$5,000 to campaign over a two year period. ISSUE 2 FULL TEXT, *supra* note 62.

<sup>226</sup> *Id.*

<sup>227</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 46 (2014).

<sup>228</sup> *Id.*

The Constitution explicitly grants state legislatures the power to draw district lines.<sup>229</sup> Specifically, the Elections Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”<sup>230</sup> Meanwhile, 2 U.S.C. §2a prescribes the mechanics of how Congressional reapportionment is delegated to the states, providing “[u]ntil a State is redistricted in the manner *provided by the law thereof* after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner . . . .”<sup>231</sup>

The appeal follows a decision in the Arizona District Court finding in favor of the citizens commission.<sup>232</sup> As of the time of publication, thirteen parties had filed amicus briefs in support of the Arizona Independent Redistricting Commission. The variety of interested parties highlights the cross-party appeal of popular referendum as a matter of states’ rights and, perhaps, general support for creative, locally-crafted redistricting reform. Amici in support of the commission include a range of contrasting political agendas—for instance, the League of Women Voters and the California Chamber of Commerce both filed in support of upholding the commission.<sup>233</sup>

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<sup>229</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>230</sup> *Id.*

<sup>231</sup> 2 U.S.C. §2a(c) (2012) (emphasis added). The forerunner to 2 U.S.C. §2a, the 1911 congressional-apportionment act, eliminated a prior statutory reference to the state legislature redistricting, in favor of the broader language of “provided by the law.” Some amici have argued that the change was in direct response to the rise in referendum use at the turn of the century. *See, e.g.*, Brief for United States as Amicus Curiae Supporting Appellee Arizona Independent Redistricting Commission at 2-3, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 46 (2014) (No. 13-1314) 2015 WL 309078 (“In drafting the 1911 congressional-apportionment act, Congress recognized an emerging development in several States to supplement the traditional legislature-based model of lawmaking with a direct lawmaking role for the people, through the processes of initiative . . . and referendum . . . . The text of the 1911 law accordingly eliminated the statutory reference to redistricting by the state “legislature” and instead directed that, if a State’s apportionment of Representatives increased, the State should use the statutory default procedures “until such State shall be redistricted *in the manner provided by the laws thereof*.”) (citing Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 14).

<sup>232</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 997 F. Supp. 2d 1047, 1056 (D. Ariz. 2014).

<sup>233</sup> Brief of Former California Governors George Deukmejian, Pete Wilson, and Arnold Schwarzenegger; Charles T. Munger, Jr.; Bill Mundell; and California Chamber of Commerce as Amici Curiae as Amici Curiae Supporting Appellee Arizona Independent Redistricting Commission at 1, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 46 (2014); Brief of the Campaign Legal Center, The League of Women Voters of the United States, The American Civil Liberties Union, Common Cause, and Democracy 2 as Amici Curiae as Amici Curiae Supporting Appellee Arizona Independent Redistricting Commission at 1, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 46 (2014). Other amici include the Brennan Center, the United States, various states, and the California Independent Citizens Redistricting Commission.

The merits of the case are well outside of the scope of this Note. The question is intrinsically interlaced with deep questions of constitutional textual interpretations, direct democracy, federalism, the evolution of election law, and, of course, legislative delegation. Perhaps for the purposes here, it is reassuring that the only two cases decided regarding legislative delegation under the Election Clause upheld the laws in question.<sup>234</sup>

Until now, very little scholarship was devoted to whether an independent commission is an impermissible delegation of power.<sup>235</sup> Even during Issue 2's 2012 campaign, the constitutional argument was mentioned only sporadically in Ohio.<sup>236</sup> Still, the question has persisted. The outcome of *Arizona State Legislature v. Arizona Independent Redistricting Commission* likely will decide the scope of powers that voters can delegate by referendum. If struck down, citizen commissions will be limited to drawing state legislative boundaries—no small concession.<sup>237</sup> Whatever the outcome, the decision should lay to rest the cloud of unconstitutionality surrounding Congressional redistricting by citizens commissions. Win or lose, the decision will affirm the validity of a voter-enacted commission. This effectively removes an arrow in the quiver of the opposition—namely, claims that the commission is an illegal derogation of legislative power.

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<sup>234</sup> In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 570 (1916) the Court upheld an amendment to the Ohio state constitution reserving a referendum veto the legislative power to approve or disapprove by popular vote any law passed by the state legislature. The Court found the challenge—under both the Elections Clause and Guarantee Clause—“plainly without substance.” *Id.* at 569. In *Smiley v. Holm*, 285 U.S. 355, 375 (1932) the Court upheld the Minnesota governor's ability to veto a redistricting plan approved by the state legislature. The Court held the delegation was consistent with the Elections Clause, finding “no suggestion in [the Elections Clause] of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted.” *Id.* at 368.

<sup>235</sup> Compare C. Bryan Wilson, *What's A Federalist to Do? The Impending Clash Between Textualism and Federalism in State Congressional Redistricting Suits Under Article I, Section 4*, 53 DUKE L.J. 1367, 1384–92 (2004) (arguing a Federalist construction of article 1 section 4 provides latitude in delegating redistricting powers), with Michael T. Morley, *The Intratextual Independent “Legislature” & the Elections Clause*, 109 NW. U.L. REV. ONLINE 131, 134 (2015) (arguing that an intratextual reading of the Elections Clause requires “that the term legislature should be interpreted in accordance with its plain meaning, as referring solely and exclusively to the multimember body of representatives within each state generally responsible for enacting its laws.”).

<sup>236</sup> See, e.g., Mark R. Brown, *Proposed Independent Redistricting Commission is Unconstitutional*, PLAIN DEALER (Aug. 25, 2012), [http://www.cleveland.com/opinion/index.ssf/2012/08/proposed\\_commission\\_is\\_unconst.html](http://www.cleveland.com/opinion/index.ssf/2012/08/proposed_commission_is_unconst.html) (arguing delegation of redistricting powers is contrary to drafters' intent). Cf. Martin H. Belsky, *The Proposed Ohio Redistricting Commission—The People's Decision*, PLAIN DEALER (Sept. 13, 2012), [http://www.cleveland.com/opinion/index.ssf/2012/09/the\\_proposed\\_ohio\\_redistrictin.html](http://www.cleveland.com/opinion/index.ssf/2012/09/the_proposed_ohio_redistrictin.html) (arguing, among other things, that “manner” could indicate only technical details of the actual balloting process, and not specifically vesting the actual drawing of lines).

<sup>237</sup> This is an important distinction. Even if the Court rules citizens commissions a violation of the Elections Clause or 2 U.S.C. §2a, a future Ohio citizens commission could draw the boundaries for the 33 senate and 99 house of representative districts in the General Assembly. OHIO CONST. art. XI, § 2.

### III. STRATEGIC DECISIONS: HOW TO USE THE COURTS IN OHIO REDISTRICTING PLANS

“We cannot enter into alliances until we are acquainted with the designs of our neighbors . . . We shall be unable to turn natural advantage to account unless we make use of local guides.”

- Sun Tzu<sup>238</sup>

“We believed that judges were being drawn into a political process that was not appropriate. We wanted judges to continue to be seen as the objective, independent arbiters of disputes.”<sup>239</sup> As President of the Ohio State Bar Association (“OSBA”), Jonathan Hollingsworth found himself in uncharted waters. Comprised of more than 26,000 Ohio lawyers and judges, the OSBA rarely ripples Ohio’s political pool.<sup>240</sup> But Issue 2 directly tasked Ohio judges with managing the appointment process for a new citizen redistricting commission.<sup>241</sup> The OSBA answered with an uncharacteristically strident response. By the close of 2012, the organization spent \$241,000 in opposition.<sup>242</sup>

Issue 2 employed state judges in two ways. First, Ohio appellate judges managed the citizens commission selection process. The Chief Justice of the Ohio Supreme Court was to commission a bipartisan panel of eight Ohio appellate judges to narrow down the pool of commissioner applicants to 42 citizens with “the relevant skills and abilities, including a capacity for impartiality, and who reflect the diversity of Ohio.”<sup>243</sup>

Second, Issue 2 employed the court as a referee. The referendum required the Ohio Supreme Court to guarantee that an electoral map would be in place before the general election.<sup>244</sup> If the commission failed to agree on a map, the court would choose from the plans submitted or considered by the board and choose the one that

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<sup>238</sup> SUN TZU, *THE ART OF WAR*, VII §§ 12, 14 (Lionel Giles trans.) available at <http://classics.mit.edu/Tzu/artwar.html>.

<sup>239</sup> *An interview with new OSBA President Jonathan Hollingsworth*, OHIO STATE BAR ASS’N, <https://www.ohiobar.org/NewsAndPublications/OhioLawyer/Pages/An-interview-with-new-OSBA-President-Jonathan-Hollingsworth.aspx> (last visited Mar. 31, 2015).

<sup>240</sup> Joe Guillen, *Redistricting proposal undermines a constitutional principle*, *Ohio State Bar Association Says*, PLAIN DEALER (Aug. 08, 2012, 2:34 PM), [http://www.cleveland.com/open/index.ssf/2012/08/redistricting\\_proposal\\_undermi.html](http://www.cleveland.com/open/index.ssf/2012/08/redistricting_proposal_undermi.html).

<sup>241</sup> *Id.*

<sup>242</sup> MISC. FILINGS SCHEDULE CODE 30-B-2, OHIO SEC’Y OF STATE, available at [http://www2.sos.state.oh.us/pls/cfonline/f?p=119:111:0::NO::P111\\_SEQ:130785541](http://www2.sos.state.oh.us/pls/cfonline/f?p=119:111:0::NO::P111_SEQ:130785541).

<sup>243</sup> ISSUE 2 FULL TEXT, *supra* note 62.

<sup>244</sup> In the event the Commission is not able to determine a plan by October 1, the Ohio Supreme Court would need to adopt a plan from all the plans submitted to the Commission. *Id.*

best fits the characteristics of community preservation, politically balanced districts, representational fairness, and compactness.<sup>245</sup>

Of the two roles, the latter best suited the court's organic adjudicatory role, while the former annoyed some Ohio judges.<sup>246</sup> Given the controversy the issue raised, and the degree to which it distracted attention from the real need for reform, state judges would be better left out of the selection process. The redistricting process should only use courts to validate the results, not to manufacture the product.

#### *A. Never Expose the Judiciary to the Front Lines*

"It's just really not a function that I see in my oath," said Ohio Court of Appeals Fifth District Judge Sheila Farmer.<sup>247</sup> Judge Farmer was speaking in her capacity as Chief Justice of the Ohio Court of Appeals Judges Association, which, on the heels of the Ohio Bar Association, followed suit in opposing the citizens commission.<sup>248</sup>

Issue 2 prescribed a complex selection process; a process both initiated and managed by state judges. But in early 2012, it is unlikely any of the referendum authors considered this a weakness. On the contrary, Issue 2 proponents thought it wise to rely on judicial impartiality in selecting citizen commissioners.<sup>249</sup> The OSBA's announcement flipped the table on Voters First. Attempting to sidestep the influence of partisan politics, Issue 2 trod on judicial robes.<sup>250</sup>

Both the OSBA and the Judges Association framed their opposition in terms of protecting judicial propriety. The OSBA explained their concerns in a press release, saying "[t]he proposed amendment inappropriately involves the judiciary by blurring the clearly-delineated lines separating the branches of government and makes judges and courts more vulnerable to political influence."<sup>251</sup>

Voters First balked—Issue 2 only asked judges to select viable candidates from a pool, a function hardly as intrusive as practiced in other citizen-commission states.<sup>252</sup> Said Tokaji, "[t]he bar association clearly didn't do its homework. If I was the teacher, they would get a failing grade. I would expect better from a first-year law student."<sup>253</sup> In

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<sup>245</sup> Issue 2 is unclear where a "submitted" map might come from. The language suggests the court would pick between a limited number of completing maps. But what if *none* of the maps are in conformance? Issue 2 limits judge-made maps for one election cycle, with the commission to reconvene to try again. *Id.*

<sup>246</sup> Guillen, *supra* note 7.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Jim Siegel, *Judges Oppose Issue 2*, COLUMBUS DISPATCH (Sept. 21, 2012, 4:16 PM), <http://www.dispatch.com/content/blogs/the-daily-briefing/2012/09/9-21-12-judicial-issue-2.html>.

<sup>250</sup> *Id.*

<sup>251</sup> *OSBA Calls for Appropriate Ballot Language for Issue 2*, OHIO STATE BAR ASS'N, <https://www.ohiobar.org/NewsAndPublications/News/OSBANews/Pages/OSBA-calls-for-appropriate-ballot-language-for-Issue-2.aspx> (last visited Jan. 31, 2014).

<sup>252</sup> Arizona selects its candidates via judicial nomination. ARIZ. CONST. art. IV, pt. 2, § 1.

<sup>253</sup> Jeff Bell, *Issue 2 Opposition Splits Ohio State Bar Association Membership*, COLUMBUS BUSINESS FIRST (Sept. 7, 2012, 6:00 AM), <http://www.bizjournals.com/columbus/print-edition/2012/09/07/opposition-by-state-bar-garners.html?page=all>.



September of 2012, twelve members of the OSBA issued a public letter in defense of Issue 2.<sup>254</sup> This letter was meant to assuage the public of Issue 2's sound legal footing. Instead, it served to highlight the rift inside the state's legal community.

It is impossible to determine to what extent the OSBA opposition was politically motivated. OSBA spokesman Ken Brown said it is "simply preposterous" to assume the OSBA was exercising a political agenda.<sup>255</sup> "The OSBA has always maintained excellent relationships with legislators on both sides of the aisle . . . . Our position is a defense of a fair and impartial judiciary is clear—nothing more, nothing less."<sup>256</sup> In the endgame, it hardly mattered if the legal community's disagreements on Issue 2 were doctrinal or political. The damage was done. The opposition highlighted the disagreement, hoping to cast doubt over the viability of Issue 2.<sup>257</sup>

Voters First did not propose a radical innovation: including state judges in the citizens commission selection process was, from the point of precedent, hardly provocative. First, the practice has the weight of precedent. A number of states use their judiciaries to not only establish an applicant pool, but in Alaska, Arizona, and Colorado, state judges actually select the commissions.<sup>258</sup> Second, without expressly ruling on the issue per se, the U.S. Supreme Court has offered its tacit approval of state legislatures abdicating, either partially or fully, their redistricting powers.<sup>259</sup> Third and finally, this is the type of role judges assume all the time. Ohio judges are called to appoint Park Commissioners,<sup>260</sup> Metropolitan Housing Authority Board members,<sup>261</sup> and School District members.<sup>262</sup>

But being right and winning are two different animals. Even though a judge-led nomination process is legal, it is not desirable as policy—at least not in Ohio. I offer two critiques of Issue 2's nomination process. First, Issue 2 drafters should have

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<sup>254</sup> The open letter was signed by a dozen prominent law professors and attorneys throughout Ohio. The signees included Mary Beth Beazley, Subodh Chandra, Martha Chamallas, Ruth Colker, Joshua Dressler, Melvyn Durchslag, Arthur F. Greenbaum, Deborah Jones Merritt, Richard Saphire, Peter Shane, Lloyd Snyder, and Gary Leppla, a past president of the Ohio State Bar Association. Mary Beth Beazley et al., *Voters First, Open Letter to Ohio*, available at <http://www.lwvohio.org/assets/attachments/file/Open%20Letter%20to%20Bar%20Associations%20re%20Issue%202.pdf> [hereinafter *Voters First Open Letter*].

<sup>255</sup> Bell, *supra* note 253.

<sup>256</sup> *Id.*

<sup>257</sup> Among the official arguments against was "[l]egal experts believe the amendment ignores the separation of government powers, inappropriately moving legislative appointment authority to the judiciary." ARGUMENTS AGAINST, *supra* note 5.

<sup>258</sup> ALASKA CONST. art. IV, § 8; ARIZ. CONST. art. 4, pt. 2, § 1; COLO. CONST. art. V, § 48. New Jersey uses judges to break gridlock in selecting commissioners. N.J. CONST. art. II, § 2.

<sup>259</sup> *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("We have repeatedly recognized that state reapportionment is the task of local legislatures *or* of those organs of state government *selected to perform it.*") (emphasis added).

<sup>260</sup> OHIO REV. CODE ANN. § 1545.06 (West 2015).

<sup>261</sup> OHIO REV. CODE ANN. § 3735.27 (West 2015).

<sup>262</sup> OHIO REV. CODE ANN. § 3313.11 (West 2015). These were examples given by Voters First in a public letter to Ohio, defending judges' role in the nomination process. *Voters First Open Letter*, *supra* note 254.

vetted the nomination process with the broader legal community, including the OSBA. That Issue 2 appeared to blindsides state judges provided ammunition to opponents, who labeled the referendum an “amateur production.”<sup>263</sup> Second, the use of appellate judges provided only nominal benefit, namely the *appearance* of impartiality. Strict judicial impartiality would, at best, be speculative in Ohio, as Ohio judges are themselves elected members of a political party.<sup>264</sup>

State judges were vocal in their preference to stay above the fray. Even if Voters First had vetted Issue 2 through the OSBA,<sup>265</sup> there is no suggestion that judges would have happily endorsed their new role. The defense for this attack is relatively simple: future redistricting efforts should not include the judiciary in the appointment process. As discussed below, the judiciary is properly employed reviewing redistricting plans.<sup>266</sup>

There are practical reasons to insulate judges from the map-making process. Curiously absent from the back-and-forth was any debate on the suitability of judges to shape the commission.<sup>267</sup> Ohio judges are perhaps not as immune to political pressure as claimed.<sup>268</sup> Ohio votes for its judges.<sup>269</sup> As elected officials, their tenure is subject to the whim of the electorate. Critics have roundly criticized Ohio’s judicial selection process as among the worst in the nation.<sup>270</sup> Campaign

<sup>263</sup> Declining to endorse Issue 2 in mid-October, the *Columbus Dispatch* cited judicial disapproval. *No on State Issue 2, Redistricting Proposal Complicated, Clumsy and Full of Conflicts*, COLUMBUS DISPATCH (Oct. 14, 2012, 6:34 AM), <http://www.dispatch.com/content/stories/editorials/2012/10/14/no-on-state-issue-2.html>.

<sup>264</sup> It is unclear what standard of review courts (presumably the Ohio Supreme Court) would use to weigh a challenge to the impartiality of appellate judges during the selection process.

<sup>265</sup> A reoccurring theme throughout the campaign was the lack of communication between state judges and Voters First during the drafting process. It is not clear if the OSBA, Appeals Judges Association, or any other organization was formally consulted.

<sup>266</sup> The OSBA itself said this. “The proper role for the judiciary is not to develop any redistricting plan, but rather to review such plans should they be challenged in court.” *Statement on Ohio Redistricting Amendment*, *supra* note 6.

<sup>267</sup> Issue 2 opponents were silent on charges of potential judicial partisanship or suitability, perhaps to avoid alienating the OSBA and Ohio Court of Appeals Judges Association. However, the OSBA itself has called for judicial selection reform. David M. Benson, *OSBA Calls for Reform of Judicial Selection*, OHIO LAW WKLY., Dec. 18, 2000, at 1.

<sup>268</sup> Voters First defense of using elected judges states:

[w]e can think of no one better suited to evaluate the capacity for impartiality of potential commission members than judges. In fact, this is precisely why appellate judges were chosen to serve this role. Any suggestion that appellate judges are incapable of evaluating the capacity for impartiality, without having their own impartiality tainted, simply underestimates the fine men and women who serve in this capacity.

*Voters First Open Letter*, *supra* note 254.

<sup>269</sup> OHIO CONST. art. IV, § 6.

<sup>270</sup> “[A]lthough there may be no good method of selecting and retaining judges, there is a worst method, and Ohio is among the states to have found it . . . judges qualify for their jobs by raising very large sums of money from lawyers, litigants, and special interest groups, and

expenditures for judicial seats in Ohio are among the highest in the nation.<sup>271</sup> In 2004, Ohio Supreme Court supporters spent over seven million dollars bombarding Ohio television sets.<sup>272</sup> Between 2000 and 2009, Ohio spent more than any other state on television advertisements for judicial candidates,<sup>273</sup> and, at twenty-one million dollars, ranked second only to Alabama in total judicial campaign expenditures.<sup>274</sup> As Ohio Supreme Court Justice Paul Pfeifer famously told the *New York Times* in 2006, “I never felt so much like a hooker down by the bus station . . . as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote.”<sup>275</sup>

The bottom line is that Ohio judges want to be left out of redistricting.<sup>276</sup> It doesn’t matter that judges hire or appoint government officials every day. And it doesn’t matter whether or not society trusts them as impartial arbiters in other areas of partisan dispute, such as election law, voting rights, and campaign finance. It is enough to say that having judges and attorneys speak against Issue 2 cost the movement momentum and credibility. It is better to avoid questions of integrity and give the OSBA and Ohio judges what they want.<sup>277</sup>

#### *B. Only Include the High Court in the Adjudicatory Process*

What if the citizens commission failed to certify an electoral map? Issue 2 required the Ohio Supreme Court take over ensuring districts were set prior to the general election.<sup>278</sup> This provision was an unmistakable reaction to the abortive

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retain their offices only by continuing to raise such funds.” Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 471-72 (2002).

<sup>271</sup> JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER & LINDA CASEY, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009 12, 26 (Charles Hall ed., Brennan Center for Justice 2010), available at <http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf> [hereinafter SAMPLE, JUDICIAL ELECTIONS].

<sup>272</sup> *Id.* In comparison, the 2004 US Senate race in Ohio raised \$11.8 million. *Id.*

<sup>273</sup> SAMPLE, JUDICIAL ELECTIONS, *supra* note 271, at 27.

<sup>274</sup> *Id.* at 12.

<sup>275</sup> Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES (Oct. 1, 2006), [http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all&_r=0).

<sup>276</sup> Following Issue 2’s defeat, OSBA spokesman Ken Brown reiterated that “[the OSBA’s] problem is judges don’t belong in the middle of a political process such as redistricting—that’s a legislative function, not a judicial function . . . the court should only be involved in interpreting the law later if there’s a question or controversy raised.” Kate Irby, *Ohio State Bar Association Urges Commission to take up Redistricting Reform*, PLAIN DEALER (Nov. 14, 2012, 6:06 AM), [http://www.cleveland.com/open/index.ssf/2012/11/ohio\\_state\\_bar\\_association\\_urg.html](http://www.cleveland.com/open/index.ssf/2012/11/ohio_state_bar_association_urg.html).

<sup>277</sup> There is no evidence on the polling effects from the OSBA or Judges Association’s announcements against Issue 2. It is likely Issue 2 would have lost even with their support. However, the media cited their objections frequently in the months leading up to the election.

<sup>278</sup> “In the event the Commission is not able to determine a plan by October 1, the Ohio Supreme Court would need to adopt a plan from all the plans submitted to the Commission.”

launch of Arizona's citizens commission. More than a decade before Ohio voters considered Issue 2, Arizona voters passed Proposition 106, establishing a citizen redistricting commission.<sup>279</sup> But in Arizona, the proposed electoral map does not require legislative or judicial approval.<sup>280</sup> Rather, after a thirty-day public comment period, the plan is submitted to the Secretary of State for certification.<sup>281</sup>

The lack of *automatic* judicial review cost Arizona years of embarrassing bickering. After the Arizona citizens commission certified its first electoral map in late 2001, a citizens' coalition filed suit in state court, claiming the electoral map failed to create competitive districts as required by the Arizona Constitution.<sup>282</sup> Native American tribes also filed suit, claiming violations of the Voting Rights Act. The citizens commission lost.<sup>283</sup> Arizona politicians found themselves stuck between the Scylla and Charybdis of redistricting: both the old map and the proposed map were unconstitutional. Four years of litigious in-fighting followed. For two election cycles, courts stepped in to provide temporary or retroactive electoral maps.<sup>284</sup> Presumably to avoid a similar fiasco, Issue 2 required the Ohio Supreme Court to guarantee that an electoral map is certified well in advance of the subsequent election.<sup>285</sup>

But Issue 2 did not grant the Ohio Supreme Court a new power or responsibility. Rather, it set a statutory deadline for the court to take charge of the redistricting process. Courts are no strangers to taking the reins when legislatures (or commissions) certify flawed maps. Many courts handle the unenviable task of drawing temporary maps themselves. In 2010, eight state courts were forced to draw their states' electoral maps when the appointed bodies defaulted.<sup>286</sup> Issue 2 proponents recognized that "[w]hile there has been some criticism of the fact that the Supreme Court has the authority to draw maps if the commission cannot reach agreement, it has always been the case—in Ohio and other states—that the state courts draw plans as a last resort . . . [n]othing has changed in this respect."<sup>287</sup>

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ISSUE 2 FULL TEXT, *supra* note 62. Issue 2 is silent on *where* these submitted plans would come from, or the process to submit.

<sup>279</sup> *State of Arizona Official Canvas*, ARIZ. SEC'Y OF STATE (Nov. 27, 2000, 11:13 AM), available at <http://apps.azsos.gov/election/2000/General/Canvass2000GE.pdf>.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* § 1(16)–(17).

<sup>282</sup> *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998, 1002 (D. Ariz. 2002).

<sup>283</sup> *Ariz. Minority Coal. for Fair Redist. v. Ariz. Indep. Redist. Comm'n*, 121 P.3d 843, 849, 851 (Ariz. Ct. App. 2005) (per curiam).

<sup>284</sup> In 2002, both the proposed map and the previous map were deemed unconstitutional. The courts allowed the Secretary of State to use the 2000 map to ensure continuity. *Id.* at 849. In 2004, the citizens commission map was certified too late to allow the Secretary of State print new ballots, so the 2002 map was used. *Id.*

<sup>285</sup> ISSUE 2 FULL TEXT, *supra* note 62.

<sup>286</sup> Loyola Law Sch., *Litigation over Congressional Lines—2010 Cycle*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/who-courtfed10.php> (last visited Jan. 31, 2014).

<sup>287</sup> *Voters First Open Letter*, *supra* note 254.

The U.S. Supreme Court recognizes the duty of courts to act when legislatures fail.<sup>288</sup> In *Reynolds v. Sims*, the Court held that “judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.”<sup>289</sup> In *Branch v. Smith*, a plurality of the Court ruled that it was proper for the district court to devise a redistricting plan when the Mississippi legislature was unable to do so.<sup>290</sup> Most states agree with the plurality in *Branch*, allowing courts varying degrees of involvement in redistricting.<sup>291</sup> Courts nearly drew Ohio’s district lines in 2010 when legislators threatened to delay the approval of the 2010 district map.<sup>292</sup>

But the *ability* of a court to draw a map does not necessarily solve the Arizona problem, which was caused by post-hoc review after post-hoc review. The October 1<sup>st</sup> deadline arguably improved the reliability of the citizens commission by establishing a target date for a map. Issue 2 might have gone one step further, *mandating* the Ohio Supreme Court automatically to certify the map.

Colorado requires its redistricting commission to automatically submit its proposed map to the state supreme court.<sup>293</sup> This makes sense. Practically all electoral maps are challenged.<sup>294</sup> Every redistricting effort produces winners and losers; the vagaries of redistricting law (how one defines “compactness” or “community integrity,” for instance, or how to balance the competing factors) allow the losers to seek remedy. A mandatory, timely review by the state’s highest court will provide legitimacy and confidence. It will also expedite the correction of a rejected map, giving both the court and the commission adequate time to review and remedy any flaws.

### *C. Shifting the Role of the Judiciary Heals Perceived Flaws in Issue 2*

I propose that the Ohio legislature prescribe the minimum criteria for membership of the citizens commission. Nearly every state that utilizes an independent commission calls for the legislature, or members of the legislature, to

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<sup>288</sup> But the Court has cautioned that judicial relief is most appropriately exercised at the state level. *See* *Grove v. Emison*, 507 U.S. 25, 34 (1993).

<sup>289</sup> *Reynolds v. Sims*, 377 U.S. 533, 586 (1964).

<sup>290</sup> “We think, therefore, that while [the Voting Rights Act] assuredly envisions legislative action, it also embraces action by state and federal courts when the prescribed legislative action has not been forthcoming.” *Branch v. Smith*, 538 U.S. 254, 272 (2003).

<sup>291</sup> On remand in *Branch*, the Mississippi Supreme Court held that the state court improperly drew Mississippi’s electoral map, as the “only state governmental entity authorized to draw new congressional districts is the Legislature.” *Mauldin v. Branch*, 866 So. 2d 429, 431 (Miss. 2003).

<sup>292</sup> Jim Siegel, *State will have One Primary March 6*, COLUMBUS DISPATCH (Dec. 15, 2011, 6:21 AM), <http://www.dispatch.com/content/stories/local/2011/12/15/state-will-have-one-primary-march-6.html>. While there is no deadline for establishing congressional districts, state legislative districts must be established by October 1st. OHIO CONST. art. XI, § 1.

<sup>293</sup> COLO. CONST. art. V, § 48(1)(e).

<sup>294</sup> *Voting and Democracy v. Trends in State Self-Regulation of the Redistricting Process*, 119 HARV. L. REV. 1165, 1165 (2006).

select commissioners.<sup>295</sup> Transferring this power from the judiciary to the legislature makes sense. First and foremost, the power to redistrict is *already* invested in the General Assembly.<sup>296</sup> Here, the legislature retains at least *some* influence. Allowing the legislature to fashion general criteria also blunts the charges of unaccountability to voters.<sup>297</sup>

I do not believe this is a fatal blow to the “independence” of the commission. First, the legislature’s only responsibility would be to establish applicant qualifications. The legislature will be allowed only to recommend general qualifications related to the competence of the applicant and the ability of the applicant to carry out the duties of the commission. These qualifications might include restrictions such as minimum age, or highest level of education, but should be limited to those attributes that are critical to carrying out the duties of the commission.

The mechanics of applicant selection should be simplified as follows. The legislature will publish the minimum qualifications for applying to the commission, as well as the rules and process for application. Final membership will be determined by simple lottery, with the final commission membership consisting of four commissioners from the majority party, four from the minority, and four unaffiliated with either party.

Next, upon passing an electoral map by a majority of commissioners, that map will be immediately certified by the Ohio Supreme Court. The Court will determine whether the commission produced an electoral map that corresponds to the drafting principles required by law. If the Court determines that the map fails to substantially satisfy any or all of these principles, the Court will remand it to the commission with instructions to remedy.

These proposals share many similarities with Issue 2. The endgame is twelve commissioners in a bipartisan spread. But the trade-off is clear: instead of the judiciary managing the process, it is the legislature. In fact, the commission is more or less “born” from the legislature.<sup>298</sup> But its influence is limited. The General Assembly can establish minimum criteria for applicants, and determine the rules for the application process and the lottery. Thus legislature retains checks and balances, but has no direct substantive influence on the final makeup of the commission. Judges are free from the task of managing the commission, and instead review their products, ensuring both timeliness and a presumption of validity.

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<sup>295</sup> Although it is foreseeable (and conceded) that the legislature can influence the applicant pool through minimum qualifications and the like, this power is certainly limited when compared to the power to directly appoint an individual.

<sup>296</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>297</sup> This was a continuing theme throughout the election. *See, e.g., Protect Your Vote Ohio, The Ohio Citizens Independent Redistricting Commission: The Scheme to Silence the Power of Your Vote, THE OHIO LIBERTY COMM’N, available at* <http://www.ohiolibertycoalition.org/media/pdf/RedistrictingAmendmentHandout.pdf> (“The commission would consist of 12 members selected by judges. Voters would have no say in who serves, robbing the people of their voice in the matter.”).

<sup>298</sup> ARGUMENTS AGAINST, *supra* note 5.

There is no question, and I do not mean to assert, that a simple lottery run by the legislature is in any way comparable to the mechanics of Issue 2. Issue 2 was, perhaps, the most thoughtful, integrated approach at procedural fairness and integrity yet put on paper. The drafters knew what they were doing. I propose a simple lottery as an alternative to the status quo, as a bipartisan citizens commission is certainly more attractive than a political commission. The potential for political gamesmanship in establishing the commission is clear and abundant. The single advantage with my proposal is simplicity: both in text and in concept.

#### IV. TACTICAL DECISIONS: EMPLOYING SIMPLICITY AND ACCOUNTABILITY

“All warfare is based on deception.”

-Sun Tzu<sup>299</sup>

##### *A. Never Let the Opposition Frame Your Question*

“And so on the one hand we have these two proposals and, yes . . . they are very different,” said David Langon, speaking in front of the Ohio Ballot Board in August 2012.<sup>300</sup> Langdon was counsel for Protect Your Vote Ohio, a conservative interest group that proposed a GOP-friendly summary of Issue 2 to appear on Ohio ballots. “[W]hat you have going on is some cherry picking. We are picking things out of the proposed amendment that we like, and we’re attempting to put it into the ballot language.”<sup>301</sup>

Ballot language is among the most sensitive issues facing any referendum question. What a ballot question actually *asks* might determine its success.<sup>302</sup> As such, it is left to the courts to umpire the integrity of the vote. The Ohio Supreme Court acknowledged this in *Bailey v. Celebrezze*, explaining that the text of the ballot question is directly correlated to the integrity of the referendum process itself: it must fairly and accurately present the question in order to assure a free, intelligent, and informed vote by the citizenry.<sup>303</sup>

In general, the longer a ballot question, the more confusing it becomes.<sup>304</sup> Oftentimes, these long ballot questions are born from equally long initiatives. This is because meandering legalese is difficult to distill into questions that voters can easily understand. Requiring state election officials to summarize a complex referendum invariably leads to a question only moderately representative of the full text, as

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<sup>299</sup> SUN TZU, *THE ART OF WAR* I § 18 (Lionel Giles trans.) available at <http://classics.mit.edu/Tzu/artwar.html>.

<sup>300</sup> OHIO BALLOT BD., *AUGUST BALLOT BOARD TRANSCRIPT 29* (2012), available at <http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2012-08-15-transcript.pdf> [hereinafter *AUGUST BALLOT BOARD TRANSCRIPT*].

<sup>301</sup> *Id.*

<sup>302</sup> See, e.g., *POPULIST PARADOX*, *supra* note 156, at 144 (long or confusing ballot measures too much for voters to comprehend); *CRONIN*, *supra* note 138, at 209 (“Voters who are confused and ‘burdened’ by ballot propositions either skip over them or vote against them.”).

<sup>303</sup> *State ex rel. Bailey v. Celebrezze*, 426 N.E.2d 493, 519 (Ohio 1981); see also *Markus v. Trumbull Cnty. Bd. of Elections*, 259 N.E.2d 501, 501 (Ohio 1970).

<sup>304</sup> See *POPULIST PARADOX*, *supra* note 156.

details are omitted or technical processes are marginalized.<sup>305</sup> In Ohio, the drafters of the referendum are not responsible for drafting the summary language for voters. That duty falls into the hands of the secretary of state. The struggle to fall on neutral language is, of course, subject to judicial review. But the scope of this review is limited.

This section discusses how a future citizens commission referendum can better position itself. It should use clear language, simple processes, and nothing unnecessary—especially text or provisions easily twisted and turned by the opposition.

### 1. You Write the Law, Ohio Writes the Question

“There are only two things that need to be said about Issue 2, it could've been much briefer . . . [and it] ensure[d] representational fairness, competitiveness, compactness and adherence to community boundaries,” said Tokaji in a press conference on the eve of the general election.<sup>306</sup> “Almost everything else in there is just there to confuse the voters.”<sup>307</sup> Early exit polls in Ohio were not encouraging. The 2012 final ballot was chock full of referendum questions, municipal levies, and a gubernatorial race.<sup>308</sup> Issue 2 spanned two columns on some ballots.<sup>309</sup> The final text was over a thousand words long.<sup>310</sup> Ohio voters were confused by the complex constitutional question.

“When people get confused, the gut instinct is to say ‘no’,” said Bentley Davis, state chair of the Alliance for Retired Americans.<sup>311</sup> Davis had a stake in Issue 2—the redistricting question preceded her organization’s referendum asking Columbus voters to approve funds for senior services. Davis was afraid the rangy Issue 2 would scare off voters, and cause them to skip over her own referendum.<sup>312</sup> Voters First had similar fears: Ohio voters did not understand the question. For proponents, this was the calculated scheme of Republican Secretary of State John Husted. Voters First spent the majority of the summer of 2012 sparring with Secretary Husted’s Ballot

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<sup>305</sup> Recognizing this, some commentators have called for Secretaries of State to summarize ballot measures on one paragraph or less using word count limits. *See, e.g.,* Larry J. Sabato et al., *A Call for Change: Making the Best of Initiative Politics*, in *DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 179, 189 (Larry Sabato, et al. eds., 2001).

<sup>306</sup> Kate Irby, *Ohio Issue 2 Supporters Say Long Ballot Summary is Confusing Voters*, PLAIN DEALER (Nov. 1, 2012, 4:40 PM), [http://www.cleveland.com/open/index.ssf/2012/11/ohio\\_issue\\_2\\_supporters\\_say\\_lo.html](http://www.cleveland.com/open/index.ssf/2012/11/ohio_issue_2_supporters_say_lo.html).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> OHIO BALLOT BD., 2012 OHIO ISSUE 2 (2012), *available at* <http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2-language-a.pdf> [hereinafter *ISSUE 2 BALLOT TEXT*].

<sup>311</sup> Jackie Borchardt, *Lengthy Issue 2 Wording Worries Supporters*, DAYTON DAILY NEWS (Oct. 31, 2012, 7:00 PM), <http://www.daytondailynews.com/news/news/state-regional-govt-politics/lengthy-issue-2-wording-worries-supporters/nSsrR/>.

<sup>312</sup> This describes ballot “fall off,” or the tendency of voters to become fatigued with issues later on the ballot. *See* CRONIN, *supra* note 138, at 68–69.



Board over Issue 2, ending up before the state supreme court. Days before the election, Tokaji told reporters “I don’t think there’s any question that the goal of [Secretary] Husted’s Ballot Board, in approving this overly lengthy, cumbersome language, was to confuse people and by doing so get them to vote ‘no’ or not vote at all.”<sup>313</sup>

The battle for Issue 2 began quietly on a Monday morning in early August. As the head of the Ohio Ballot Board, it was Secretary Husted who certified the proposed constitutional referendum submitted by Voters First, the newly named Issue 2, to appear on the November 6, 2012 ballot.<sup>314</sup> Issue 2 now had a guaranteed seat at the ballot box, but what it would look like was still in the air. Secretary Husted announced that his Ohio Ballot Board would meet to decide how to describe Issue 2 to voters.

That meeting was held on August 15, 2012.<sup>315</sup> The hearing began with three competing ballot summaries. As a matter of course, Voters First introduced their proposed ballot text. But both the Ballot Board and Protect Your Vote Ohio, the latter of which was a recently organized committee in opposition to Issue 2, entered their own proposals.<sup>316</sup> Perhaps finding their interests at least tangentially aligned, Protect Your Vote Ohio dropped their proposal in favor of the Ballot Board.<sup>317</sup>

The hearing quickly turned polemic. Supported by a team of law professors and election law experts, Voters First argued vehemently against the Ballot Board’s proposed language. Among the points of contention, Voters First argued that the Ballot Board failed to explain to voters the *purpose* of the referendum (ultimately, this suggestion was loosely incorporated into the amended language).<sup>318</sup> Among its particularized grievances, Voters First objected to the Ballot Board’s description of the citizens commission, finding the phrase “remove the authority of elected representatives” to be pejorative.<sup>319</sup> Voters First claimed that the titles given the commissioners were equally prejudicial—the Ballot Board referred to the citizens

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<sup>313</sup> *Id.* Secretary Husted, a Republican, opposed Issue 2—he publically criticized the referendum prior to the general election. Reginald Fields, *Ohio Secretary of State Jon Husted, Rising GOP Star, Frustrated by Court Challenges but Confident in State’s Elections Operation*, PLAIN DEALER (Sept. 14, 2012, 2:00 PM), [http://www.cleveland.com/open/index.ssf/2012/09/ohio\\_secretary\\_of\\_state\\_jon\\_hu\\_3.html](http://www.cleveland.com/open/index.ssf/2012/09/ohio_secretary_of_state_jon_hu_3.html).

<sup>314</sup> Letter of Certification of Issue 2 from Jon Husted, Sec’y of State, to Mike DeWine, Att’y Gen. (Apr. 5, 2012), *available at* <http://www.sos.state.oh.us/upload/news/2012/2012-04-05Redistricting.pdf>.

<sup>315</sup> AUGUST BALLOT BOARD TRANSCRIPT, *supra* note 300, at 1.

<sup>316</sup> *Id.* at 20–29.

<sup>317</sup> Protect Your Vote Ohio recognized the stark differences between the Voters First proposal and the Ballot Board proposal. Spokesperson David Langdon described the Ballot Board’s proposal as “very high level.” AUGUST BALLOT BOARD TRANSCRIPT, *supra* note 300, at 29. Tellingly, Langdon did ask “Why not all of it? And, again, we come back to this tension which is the more details that we add the more arbitrary it becomes . . .” It may be assumed, as a matter of course, that opponents would be just as happy if Secretary Husted included the entire text of the referendum. *Id.* at 30.

<sup>318</sup> *Id.* at 15–29.

<sup>319</sup> *Id.* at 13.

commissioners as “appointed officials.”<sup>320</sup> Discussed below, Voters First also objected to the weight and construction given to funding the commission. Pejorative or not, argued the board (reasoning that the terms could hardly induce prejudice, as they were unbiased descriptions), the summary of the proposed language was technically correct.

In what would prove an ironic portent, Secretary Husted voiced his concern that Issue 2’s text was too long. He told Voters First he would prefer to put the whole question on the ballot, rather than to take steps to pare down the question into a summary.<sup>321</sup> This option was certainly well within his power—the Ohio Constitution allows the Secretary of State to certify the question unadulterated to the voters.<sup>322</sup> But, according to Secretary Husted, that was not a real option.<sup>323</sup> Instead, Husted asked his staff to draft “summary language that was brief and would do the best job possible of neutrally or generically describing the issue.”<sup>324</sup> Over the protests of Issue 2 proponents, the Ballot Board voted 3-to-2 to certify the following language:

**Issue 2**

[TITLE HERE]

**Proposed Constitutional Amendment**

**Proposed by Initiative Petition**

**To add and repeal language in Sections 1, 3, 4, 6, 7, 9 and 13 of Article XI, repeal Sections 8 and 14 of Article XI, and add a new Section 16 to Article XI of the Constitution of the State of Ohio**

A majority yes vote is necessary for the amendment to pass.

The proposed amendment would:

1. Remove the authority of elected representatives and grant new authority to appointed officials to establish congressional and state legislative district lines.

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<sup>320</sup> *Id.* at 13–16.

<sup>321</sup> AUGUST BALLOT BOARD TRANSCRIPT, *supra* note 300, at 66.

<sup>322</sup> OHIO CONST. art. II, § 1(g).

<sup>323</sup> Husted’s rather pragmatic concern that placing the entire text of Issue 2 “would have doubled the cost for someone to send a mail-in ballot back and it would have doubled the cost of sending the initial ballot out to the voter.” AUGUST BALLOT BOARD TRANSCRIPT, *supra* note 300, at 66.

<sup>324</sup> In truth, Husted might have saved a good deal of trouble certifying the entire text. Issue 2 modified, amended, or repealed over a dozen articles of the Ohio constitution. ISSUE 2 FULL TEXT, *supra* note 62. If voters found the generalized ballot language confusing, it is logical to assume that the raw text would completely obscure the meaning and scope of Issue 2.

2. Create a state funded commission of appointed officials from a limited pool of applicants to replace the aforementioned. The Commission will consist of 12 members as follows: four affiliated with the largest political party, four affiliated with the second largest political party and four not affiliated with either of the two largest political parties. Affirmative votes of 7 of 12 members are needed to select a plan.

3. Require new legislative and congressional districts be immediately established by the commission to replace the most recent districts adopted by elected representatives, which districts shall not be challenged except by court order until the next federal decennial census and apportionment. In the event the Commission is not able to determine a plan by October 1, the Ohio Supreme Court would need to adopt a plan from all the plans submitted to the Commission.

4. Change the standards and requirements in the Constitution for drawing legislative and congressional districts.

5. Mandate the General Assembly to appropriate all funds as determined by the Commission including, but not be limited to, compensating:

1. Staff
2. Consultants
3. Legal counsel
4. Commission members

If approved, the amendment will be effective thirty days after the election.

#### **SHALL THE AMENDMENT BE APPROVED?**<sup>325</sup>

It was a clear conservative win. The board included nearly none of the language proposed by the proponents. Voters First filed suit, petitioning the Ohio Supreme Court for a writ of mandamus ordering the Secretary of State to redraft the question.<sup>326</sup>

#### 2. Issue 2 Goes to Court

The Ohio Constitution provides that the Ballot Board will draft referendum questions in the same manner as they would summaries of constitutional amendments submitted to voters by joint resolutions of the General Assembly.<sup>327</sup> But the Ohio Constitution provides a terse description of judicial standards, requiring reviewing courts to uphold the language unless it serves to “mislead, deceive, or defraud the voters.”<sup>328</sup>

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<sup>325</sup> State *ex rel.* Voters First v. Ohio Ballot Bd., 978 N.E.2d 119, 123–24 (Ohio 2012).

<sup>326</sup> *Id.* The Ohio Supreme Court has original, exclusive jurisdiction over all referendum challenges. OHIO CONST. art. II, § 1(g).

<sup>327</sup> OHIO CONST. art. II, § 1(g).

<sup>328</sup> OHIO CONST. art. XVI, § 1.

Ohio has a straightforward jurisprudence when reviewing referendum language—one that focuses not on word choice but rather whether the voter objectively understands the question on the ballot. To evaluate the suitability of any given referendum question, Ohio uses a three-part test.<sup>329</sup> First, voters have the right to know what it is upon which they are voting.<sup>330</sup> Second, the referendum may not use language in a persuasive manner for or against the issue.<sup>331</sup> Third and finally, the court will weigh whether the cumulative effects of technical defects in the language are “harmless or fatal to the validity of the ballot.”<sup>332</sup>

A sage referendum draft will eliminate complex machinations. This is because technical, intricate, or simply long processes must, invariably, be described in enough detail on Ohio ballots to allow voters to understand on what they are voting. In *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, the Ohio Supreme Court explained how a ballot issue must be summarized.<sup>333</sup> Referendum language must “inform and protect the voter and presupposes a condensed text which is fair, honest, clear and complete, and from which no essential part of the proposed amendment is omitted.”<sup>334</sup>

Secretary Husted certified ballot language describing Issue 2 that was far from “complete.” It made only superfluous mention of the of the nomination process, omitting any description of the legal mechanics of *how* commissioners were to be appointed. On this the court agreed, ruling that the nomination process was material to the substance of Issue 2 and merited description.<sup>335</sup> The court ordered Ohio to include a description of the nomination process. The court also ruled that the Ballot Board erred in omitting the criteria the commission would follow in drawing electoral districts.<sup>336</sup>

But the court’s broad stroke on material omissions did not fill every crack and crevice. This was perhaps foreseeable, as the court is concerned with “core” function over style. In *Kilby v. Summit Cty. Bd. of Elections*, another ballot language case heard in 2012, the Ohio Supreme Court denied a petitioner’s writ of mandamus to amend a municipal ballot question when the alleged omissions were deemed unrelated to the “critical substance” of the referendum.<sup>337</sup> “Additional language may have made the summary more complete as to some aspects of the charter

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<sup>329</sup> *Voters First*, 978 N.E.2d at 126.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 977 N.E.2d 590 (Ohio 2012).

<sup>334</sup> *Id.* at 596 (quoting *State ex rel. Minus v. Brown*, 283 N.E.2d 131 (Ohio 1972)).

<sup>335</sup> *Voters First*, 978 N.E.2d at 127 (“It is axiomatic that ‘[w]ho does the appointing is just as important as who is appointed.’”) (quoting Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 545 (2006)).

<sup>336</sup> *Id.* at 129.

<sup>337</sup> In this case, realigning city council members terms so they are elected on the same year, beginning in 2017, altered the term expirations prior to 2017. The Court found the “critical substance” of the question a cost-saving measure. *Kilby*, 977 N.E.2d at 597.

amendment, but would also have defeated the purpose of the summary in providing a clear, concise description of the amendment to the voters.<sup>338</sup>

In keeping with the law's focus on substance rather than style, the court refused to dip into an evaluation of Ohio's linguistic choices. Secretary Husted was free to keep the state's preferred term "experts," rather than "consultants," to describe the commissioners as "appointed officials," and to describe legislators as "elected representatives."<sup>339</sup> Both *State ex rel. Voters First* and *Kilby* demonstrate a constant: the court is uninterested in the particulars. Rather, the court limits its review to correcting omissions or assertions which, by their nature, alter the core construction of the question.<sup>340</sup>

The Issue 2 decision left both parties in flux. Nominally, it was a win for Voters First, and proponents puffed their chests in the public. A spokesperson for Voters First told reporters that the court "pointed out exactly what we've been saying—that Jon Husted and the Ballot Board wrote manipulative language to change the outcome of an election."<sup>341</sup> But the court declined to strip away some of the more toxic terminology: commissioners were still framed as usurpers of power, unaccountable to the public, with the ability to whimsically spend taxpayer money. The ball was back in the hands of the conservatives: the writ ordered Secretary Husted to reconvene the Ballot Board to revise the ballot language "forthwith."

The Ballot Board reconvened on September 13<sup>th</sup>, 2012.<sup>342</sup> Already two days past the certification deadline, the board was at a crossroads.<sup>343</sup> Should they attempt to re-draft the referendum language themselves, or pull language directly from the full text?<sup>344</sup> Some worried that substituting a summary for raw text would cause voter confusion, as Issue 2 contained a good deal of legalese.<sup>345</sup> Said one board member, "what we're struggling with . . . is we don't want to swap misleading for

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<sup>338</sup> *Id.* (quoting *Jurcisin v. Cuyahoga Cnty. Bd. of Elections*, 519 N.E.2d 347, 352 (Ohio 1988)).

<sup>339</sup> The court did find the language describing the funding was misleading. The original language proposed by the Ballot Board read that Issue 2 would "[m]andate the General Assembly to appropriate all funds as determined by the Commission." This contradicted the text, which only called for funds "necessary to adequately fund the activities [of the commission]." The court noted that if this was the only discrepancy, it might have let the language stand. The cumulative omissions were cause for invalidity. *Voters First*, 978 N.E.2d at 130.

<sup>340</sup> "We reject relators' remaining claims of material omissions concerning the commission's name and the provisions for an open redistricting process because we are not persuaded that the omission of these items prevents voters from knowing the substance of the proposal being voted upon or misleads, deceives, or defrauds voters." *Id.* at 129.

<sup>341</sup> Jim Siegel, *High Court Tells Ballot Board to Rewrite Issue 2*, COLUMBUS DISPATCH (Sept. 13, 2012), <http://www.dispatch.com/content/stories/local/2012/09/13/high-court-tells-ballot-board-to-rewrite-issue-2.html>.

<sup>342</sup> *Meeting of the Ohio Ballot Board Pursuant to R.C. 3505.062(A)* (Sept. 13, 2012), <http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2012-09-13-transcript.pdf>.

<sup>343</sup> *Id.* at 4.

<sup>344</sup> *Id.* at 5-8

<sup>345</sup> *Id.* at 15.

confusing.”<sup>346</sup> Citing the risk of improperly summarizing the commission selection process, the board voted to adopt large portions of the exact language of Issue 2 for the finalized ballot language.

The final product was monstrous. Voters First, the prevailing party only days beforehand, saw its referendum effectively ruined. The final text might have been the worst of all solutions: the nomination process was now seven hundred words long, largely pejorative, and complex.<sup>347</sup> But it was legally sufficient. By comparison, the Ballot Board’s quashed description of the nomination process was surprisingly efficient: despite the incendiary terms, it described the bipartisan composition of the commission in 54 words.<sup>348</sup> Even this draft—written by the Republican opposition—might have fared better, or at least proven less confusing, than the final text.

### 3. Lessons Learned: Keep it Simple

One lesson learned from *State ex rel. Voters First* is an odd one, perhaps best chalked up to “be careful what you wish for.” Voters First sensibly petitioned the supreme court to correct a biased referendum summary. Voters First hoped the court would order certain deprecatory terms erased. Instead, the court ordered the Ballot Board to make the language *more* inclusive. It didn’t matter if the Ballot Board attempted to “better” summarize the process or just added more words. The conservative majority on the Ballot Board assumed the language left unturned by the court was valid. In short, it could only get worse, not better, for Voters First.

This should not suggest bias from the court.<sup>349</sup> In fact, in a concurring opinion, Justice Pfeifer, a Republican, offered his own draft of Issue 2.<sup>350</sup> Omitting the nuts and bolts of the nomination process, and rounding over some of the rougher corners hewed by the Ballot Board, Justice Pfeifer’s language was, perhaps, the ideal compromise between the competing factions. At 446 words, it was consumable for voters.<sup>351</sup> Responding to the final, bloated text, Voters First representative Ann Henkener invoked Justice Pfeifer’s summary, saying “it was very easy for the court to do that. It seemed to be very confusing for the Ballot Board to be able to do that. It would have been very easy to adopt the court’s language, it was very clear.”

Partisanship aside, the Ballot Board had pragmatic reasons to avoid a second round of issue drafting. To start, Justice Pfeifer’s draft was a single concurring opinion. Besides, the Pfeifer summary did not attempt to describe the nomination

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<sup>346</sup> *Id.*

<sup>347</sup> ISSUE 2 FULL TEXT, *supra* note 62.

<sup>348</sup> “Create a state funded commission of appointed officials from a limited pool of applicants to replace the aforementioned. The Commission will consist of 12 members as follows: four affiliated with the largest political party, four affiliated with the second largest political party and four not affiliated with either of the two largest political parties.” *State ex rel. Voters First v. Ohio Ballot Bd.*, 978 N.E.2d 119, 123 (Ohio 2012).

<sup>349</sup> Interestingly, and perhaps because Voters First was the nominal winner, there were no public charges of partisanship in the court’s decision, even though six of the seven sitting justices were affiliated with the Republican Party. *Ohio Supreme Court Justices*, OHIO BUSINESS VOTES, <http://ohiobusinessvotes.org/government/ohio-supreme-court-justices>.

<sup>350</sup> *Id.*; *Voters First*, 978 N.E.2d at 133-34.

<sup>351</sup> *Voters First*, 978 N.E.2d at 133-34.

process, a clear mandate from the majority. Already past certification deadline, board members objected to summarizing Issue 2 in their own words—an effort that got them into court in the first place. If the conservative goal was to sully the ballot while avoiding a second round of litigation, then Issue 2's thicket of legalese provided the ideal means to accomplish just that.

The takeaway for the purposes of this study is simple. To present a simple question to voters, give the Ballot Board a simple referendum. Ideally, a question should be drafted so that the raw text can appear on the ballot and still be understandable to the average voter. Issue 2 described a very complicated nomination process—similar to what passed in California. But that process translated poorly on a ballot. It would be an oversimplification to say that, in order to win, drafters should accept a flawed policy. Rather the process is about compromise. Arizona's selection process is relatively straightforward when compared to California's. This does not suggest California's is somehow better than Arizona's. Is a lottery managed by the legislature fundamentally flawed when compared to a judicially managed lottery? I would argue no. Is it critical for nine commissioners to then select another three, instead of selecting all nine by lottery? On balance, a simple nomination process, that still protects the independence of the commission through adequate safeguards, is preferable.

*B. If It Looks Like a Tax, It is a Tax*

Issue 2 left little to chance. Not only did the drafters insulate the citizens commission from political tampering through an extensive nomination process, but it included other protections to isolate the commission from political influence.<sup>352</sup> One such protection was money. Issue 2 required that the commission receive “any necessary” and “adequate” funds, ensuring, one might assume, that the legislature could not starve the commission from necessary resources.<sup>353</sup> But by leaving the amount uncapped, Voters First opened Issue 2 up for attack.

The Ohio Office of Management and Budget estimated that Issue 2 would cost taxpayers between \$10,975,000 and \$15,225,000 in the first eight years.<sup>354</sup> Fiscal

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<sup>352</sup> Among others, Issue 2 had restrictions of previous contact with elected officials (to include employment and lobbying), restricted removal (discussed below), ensured the commission held open meetings and hearings, and made all commissioner correspondence public record. ISSUE 2 FULL TEXT, *supra* note 62.

<sup>353</sup> *Id.* This is hardly unusual—many establishing statutes provide specific salaries for commission members, and some allow commissions to hire staff. *See, e.g.*, OHIO REV. CODE ANN. § 4709.04 (West 1992) (salaries and costs for barbers commission); OHIO REV. CODE ANN. § 4301.07 (West 2015) (liquor control commission salaries); OHIO REV. CODE ANN. § 3517.152 (West 2015) (establishes elections commission salaries and right to hire technical, professional, and clerical employees). Other redistricting commissions have done the same. Colorado uses nearly an identical provision in its constitution, requiring the legislature “appropriate sufficient funds for the compensation and payment of the expenses of the commission members and any staff employed by it.” COLO. CONST. art. V, § 48(f).

<sup>354</sup> *Issue 2 Expenditure Analysis*, OHIO OFFICE OF MGMT. AND BUDGET (Oct. 3, 2012), available at <http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2-fiscalanalysis.pdf>. Some liberals questioned the accuracy of the OMB analysis. “It’s just a hollow shell of numbers offered by a political flack whose job depends on John Kasich remaining in office,” said Democratic Party Chairman Chris Redfern. Joe Guillen, *Redistricting Reform Proposal Would Cost Taxpayers*

conservatives cringed—the funding provision looked like a new tax. Worse, opponents pointed out that the funding provisions were automatic—mandatory, in fact—without ceiling or stopgap. At one point, the conservative ballot language described the commissioners as “setting their own salaries.”<sup>355</sup>

California and Arizona’s redistricting referendums both included funding provisions. Arizona Proposition 106 granted a block of six million dollars for the commission in the first year, with authorization for the commission to spend the funds.<sup>356</sup> California set limits on commissioner compensation as well as a ceiling on the total funds to be allotted to the commission.<sup>357</sup>

Issue 2 wisely appropriated “any necessary” and “adequate” money, as redistricting is a complicated process requiring access to computer models, extensive community data, and expert consultants. Denying the board an array of technical and analytical resources would lead to asymmetric information and a dependency on outside assistance. To mitigate, I propose both a floor and a cap on funds. To avoid any charge of reckless spending, that cap should be based on historical costs, adjusted for inflation. California provides its commission an “amount expended . . . in the immediately preceding redistricting process” adjusted against the Consumer Price Index.<sup>358</sup>

Using the California model, a future referendum should set a baseline for the commission’s funding, and make it adjustable for inflation. This number should be stated in terms of the money spent by the legislature during the previous round of redistricting (in Ohio, this is as recent as 2011).<sup>359</sup>

### *C. Avoid Appearances of Unaccountability*

For all of Issue 2’s thoughtful construction, one provision was notably absent. Issue 2 did not provide a mechanism for commissioner removal. In fact, Issue 2 went further, mandating that “[n]o member of the Commission shall be subject to removal by the general assembly or any member of the executive branch.”<sup>360</sup> This was a

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*Millions, According to State Budget Office*, PLAIN DEALER (Oct. 3, 2012), [http://www.cleveland.com/open/index.ssf/2012/10/redistricting\\_reform\\_proposal\\_1.html](http://www.cleveland.com/open/index.ssf/2012/10/redistricting_reform_proposal_1.html).

<sup>355</sup> The salary provision was thrown out by the Ohio Supreme Court, though the majority found that, standing alone, this claim was not fatal to the ballot language. *Voters First*, 978 N.E.2d at 130.

<sup>356</sup> *Full Text of Arizona Proposition 106*, ARIZ. REDISTRICTING COMM’N, available at <http://azredistricting.org/2001/Prop-106.asp>.

<sup>357</sup> Prop 11 called for a daily compensation rate of three hundred dollars, plus certain expenses. CALIFORNIA PROPOSITION 11, § 8253.5, CAL. VOTER FOUND., available at <http://www.calvoter.org/issues/votereng/redistricting/prop11text.html>.

<sup>358</sup> *Id.* at § 8253.6.

<sup>359</sup> The “floor” amounts granted by Arizona and California were six million and three million, respectively. ARIZ. CONST. art. IV, pt. 2, § 1; CAL. GOV’T CODE § 8253.6 (West 2013). Certainly a future referendum should consider, in some detail, real financial requirements, to include actual redistricting expenditures in Ohio and like states. Of course, not setting an actual dollar amount is itself risky—the calculations of what the last round of redistricting “cost” is subject to litigation.

<sup>360</sup> ARIZ. CONST. art. IV, pt. 2, § 1; CAL. GOV’T CODE § 8253.6 (West 2013).



drastic point of departure from the California model, which allows the governor and two-thirds of the legislature to remove commission members for cause.<sup>361</sup>

Commissioners must be removable by the legislature. No matter how well designed, any nomination system is moot if a bad seed is allowed to poison the commission. The caveat is that removal must be limited to cause, and subject to a two-thirds vote by the legislature.

#### V. CONCLUSION: A MODEL REFERENDUM

“Therefore the clever combatant imposes his will on the enemy, but does not allow the enemy's will to be imposed on him.”

-Sun Tzu<sup>362</sup>

The natural starting point for a model referendum is the full text of Issue 2. Issue 2 was a combined effort, largely drafted by the election law experts at Moritz Center for Election Law at Ohio State University, along with the League of Women Voters. Although this Note sometimes takes a critical tact—based only on the benefits of hindsight—the substance of Issue 2 included the very best ideas and architecture from around the nation.

I propose changes that simplify the process while maintaining accountability to the public. My proposal replaces Issue 2's extensive nomination process with the simple lottery described in Part III, above. It also mandates automatic judicial review of every map certified by the commission, caps expenditures, and adds a provision for commission removal for cause.

But the core of Issue 2 remains untouched. I do not alter the guiding criteria commissioners are to follow in drafting boundaries. On this I defer to the experts.<sup>363</sup> I keep various provisions for public comment and open meetings. I maintain the timelines and basic structure of the commissioners. Indeed, the thrust of this referendum belongs to Voters First. However, much of the text is radically simplified to provide guidelines instead of strict goalposts. Will this inevitably lead to litigation? Probably. Perhaps it will also lead to legislative action, new judicial standards of review, public discourse, academic debate, and willingness to entertain future amendments to the constitution, more in line to the Issue 2 full text. This proposal is a beginning, not an end.

The referendum below includes certain articles of the Ohio Constitution along with proposed additions and deletions. The current and unaltered constitutional text is not formatted. My proposed amendments are in bold.

If Ohio citizens disagree with the current redistricting system, change by referendum is the quickest method of reform. As a constitutional change, it is durable, and may ensure open doors and accountability. Certainly there are many valid arguments for and against *any* method of distributing single-member districts. But as long as the single-member district remains the standard unit of

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<sup>361</sup> CAL. GOV'T CODE § 8252.5 (West 2013). California also requires its citizens commission to adopt a conflict-of-interest policy and ethics rules. *Id.*

<sup>362</sup> SUN TZU, THE ART OF WAR VI § 2 (Lionel Giles trans.), available at <http://classics.mit.edu/Tzu/artwar.html>.

<sup>363</sup> Indeed, an entire field of election reform is predicated on the best criteria to draw districts.

representational democracy, these debates will continue. I hope this proposed constitutional change allows for bipartisan, informed, and open map drawing, while providing the public accountability and oversight.

#### VI. OHIO ISSUE 2.1

Be it Resolved by the People of the State of Ohio that Article XI, Sections 1, 6, and 7 of the Ohio Constitution be amended, Article XI, Sections 8<sup>364</sup>, 10,<sup>365</sup> and 14<sup>366</sup>

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<sup>364</sup> The original text reads as follows:

A county having at least one house of representatives ratio of representation shall have as many house of representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district. The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation for the house of representatives determined under section 2 of this Article.

OHIO CONST. art. XI, § 8.

<sup>365</sup> Section 10 controlled the dividing and subdividing of counties into congressional representative districts. I have chosen to eliminate this section. Respecting county lines is certainly a common sense practice. But, this consideration is included in the six factors enumerated in Section 7, below. If a single county happened to closely match the population requirement of either a state or congressional set, it is likely that the commission might consider this simple solution, anyway. I see no reason to require certain counties as a district, especially if in so doing neighboring districts become less compact. A further problem develops in that paragraph (B)—allowing a single member district with as low as 90 percent the required population—is probably illegal under *Karcher v. Daggett*, 462 U.S. 725 (1983). The original text reads as follows:

(A) Each county containing population substantially equal to one ratio of representation in the House of Representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.

(B) Each county containing population between ninety and ninety-five percent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into House of Representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts. (C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

OHIO CONST. art. XI, § 10.

<sup>366</sup> The original text reads as follows:

of the Ohio Constitution<sup>367</sup> be repealed as follows:

**Article XI, Section 1.<sup>368</sup> Ohio Citizens Independent Redistricting Commission**

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The boundaries of house of representatives districts and senate districts from which representatives and senators were elected to the 107th general assembly shall be the boundaries of house of representatives and senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article.

OHIO CONST. art. XI, § 14.

<sup>367</sup> Notably, I did not amend Section 13. Section 13 grants the Supreme Court of Ohio original jurisdiction on redistricting matters. This section also spells out the process followed in case a map is found unconstitutional. Therein, it describes the redistricting body as “persons responsible for apportionment.” This would now refer, quite explicitly, to the citizens commission. Of note, Section 13 allows the Governor to call the commission into session on two-weeks notice, presumably to re-draft a rejected (unconstitutional) map. It is difficult to predict if the assembly-on-notice could be used anytime other than to schedule the decennial drafting or subsequent court-ordered redrafts. The original text reads as follows:

The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any section of this Constitution relating to apportionment or any plan of apportionment made by the persons responsible for apportionment, by a majority of their number, is determined to be invalid by either the supreme court of Ohio, or the supreme court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next regular apportionment in conformity with such provisions of this Constitution as are then valid. Notwithstanding any provision of this Constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election. The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section.

OHIO CONST. art. XI, § 13.

<sup>368</sup> “The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly. Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year one thousand nine hundred seventy-one and every tenth year thereafter. The governor shall give such persons two weeks advance notice of the date, time, and place of such meeting. The governor shall cause the apportionment to be published no

**(A) There is hereby created the Ohio Citizens Independent Redistricting Commission, which shall meet and establish, in the manner prescribed in this Article, the boundaries for each of Ohio's state legislative and congressional districts.**

**(B) The Commission shall be established upon the approval of this amendment to the Ohio Constitution by the voters of Ohio and again following each federal decennial census.**

**(C) The Commission shall consist of twelve members, chosen by lottery, which shall include a total of four members affiliated with the largest political party, four members affiliated with the second largest political party, and four members not affiliated with either of these parties. The General Assembly will publish eligibility criteria, collect applications, and determine a place, time, and manner for choosing members by lottery. Only citizens who are not serving, or who have not served in the preceding five years, in any municipal, state, or federal elected office may apply for membership. Members of the Commission may be removed for just cause with the concurrence of two-thirds of the Senate.**

**(D) The Commission is authorized to hire necessary staff, experts, legal counsel and use the services of existing state employees in order to fulfill the Commission's responsibilities. The appropriation made shall not exceed the amount expended in the immediately preceding redistricting process, adjusted for inflation according to the Consumer Price Index, except where the General Assembly appropriates a greater amount. Unused monies shall be returned to the general fund. Members of the Commission shall be reasonably compensated at the rate designated by the General Assembly.**

**(E) All meetings of the Commission shall be open to the public, and all records, communications, and draft plans of the Commission, its individual members, or staff related to the Commission's duties are public records.**

**(F) All proposed redistricting plans and maps shall be made available to the public for at least 30 days with opportunity for public comment, before being approved by the Commission.**

**(G) The affirmative vote of at least seven members of the Commission shall be required to adopt any plan.**

**(H) The Commission shall establish and publish the new district boundaries no later than October 1 of the year prior to the year**

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later than October 5 of the year in which it is made, in such manner as provided by law." OHIO CONST. art. XI, § 1.

**elections shall be held in the new districts. On establishing new district boundaries, the Commission shall submit the boundaries to the Ohio Supreme Court for review with requirements herein.**

Article XI, Section 6.<sup>369</sup>

**(2) Except, upon the approval of this amendment to the Ohio Constitution, new district boundaries shall be established for Ohio's state legislative and congressional districts. The new district boundaries shall be used in the next regularly scheduled federal and state elections that are held more than one year after the adoption of this amendment.**

Article XI, Section 7.<sup>370</sup>

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<sup>369</sup> This is an added paragraph, which allows immediate redistricting. This falls below, and as an exception to, the limit on decennial redistricting, following the census. The top of Section 6 reads:

District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing apportionment or as provided in section 13 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within the district may be changed during that time. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the general assembly has directed.

OHIO CONST. art. XI, § 6.

<sup>370</sup> Section 7 describes the requirements and considerations in how to draw the boundaries. The constitution requires compactness and contiguity. Here, the five factors (“continuity, community preservation, competitiveness, representational fairness, and compactness”) are inserted. The original text reads as follows:

(A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article.

OHIO CONST. art. XI, § 7.

**(C) The Commission shall adopt a redistricting plan that, in its judgment, most closely meets the following factors: continuity, compactness, community preservation, competitiveness, representational fairness, and compactness.**

**(D) The Commission shall make publicly available with each proposed redistricting plan a report that identifies the following information for each district: boundaries, population, racial and ethnic composition, compactness measure, governmental units that are divided, and political party indexes.**

**(E) No plan shall be drawn or adopted with intent to favor or disfavor a political party, incumbent, or potential candidate.**

