

**Independent Redistricting Commissions for U.S. Cities: Redistricting Need Not Be a
Quintessentially Political Process:**

By Steve Bickerstaff*

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Independent Redistricting Commissions for U.S. Cities: Redistricting Need Not Be a Quintessentially Political Process:

By Steve Bickerstaff

Much has been written about the use of redistricting commissions for redrawing state legislative and congressional district lines. By contrast, virtually nothing has been written about the use of redistricting commissions at the municipal level of government. This is particularly surprising because virtually all large and middle size U.S. cities use at least some election districts that must be redrawn every ten years, and because many of these cities are charter or home-rule jurisdictions that generally have broad legal authority to adopt their own process for drawing local election district boundaries.

A premise of this article is that the redistricting of city council districts need not be a quintessentially political process. I accept that party and faction politics are an unavoidable part of law-making even at the city level. I also accept that, once drawn, every election district line has a political effect. However, there is a difference between the inevitable effect of drawing any election district boundary and the controllable purpose behind that redrawing process. So long as redistricting remains a task performed by city councils, or the political commissions that they control or influence, the process will be mired in personal and political self-interest.

This article begins by describing how self-interest pervades the redistricting process when members of a city council are allowed to control the drawing of the boundaries of the districts from which they are elected. Part II describes the potential models for a city independent redistricting commission shown in a survey of the 50 largest cities nationwide and the states that use independent redistricting commissions.

Independence in this context has two potential meanings. The most fundamental is that the commission is autonomous and thus its redistricting product is final without any action by the city council. The second meaning of independent is that the members of the autonomous commission are selected in a manner that is intended to make them politically independent of the city council or political factions.¹ For purposes of this article, an independent redistricting commission is one that is both autonomous and politically independent.

Part III urges that a politically independent redistricting commission is the best means of taking self-interest out of the redistricting process and increasing public trust.

¹ A third definition is offered by Professor Justin Levitt In his work for the Brennan Center. <http://www.brennancenter.org/analysis/national-overview-redistricting-who-draws-lines>. He defines an independent commission to include any autonomous commission on which public officials are barred from serving and on which the members of the commission are thereafter barred from running for office in the districts they draw. However, as long as it is the politicians who choose the members of the commission, it is not independent of political self-interest. Therefore for purposes of this article, a commission is politically independent only if it is autonomous, has the limitations suggested by Professor Levitt and is not selected by politicians. .

Although there are more autonomous redistricting commissions (19) among the states than among the 50 largest cities (6), there are currently more politically independent redistricting commissions (three) in use among these cities than among the states (one). These politically independent commissions have received good grades for their effort and redistricting plans. The latest city to utilize an independent commission is Austin, Texas.²

Part IV shows options for designing a city commission independent of political influence or control. Again much has been written about the criteria to be applied in drawing a map, but little attention has been given in the legal scholarship to the options for how a commission can be designed so that such map drawing is free of political and personal self-interest. This article aims at addressing this deficiency in part by reviewing what is already present in different city charters and state constitutions.

Part I

City Redistricting and Political and Personal Self-Interest ³

Law journal articles directed at possible reform of the redistricting process at the state level are common and instructive.⁴ Most of these articles assume that personal and political

² The voters of that city through initiative and referendum on November 6, 2012 changed the city's charter to require ten single-member council districts and a politically independent redistricting commission to draw them. The Austin Commission finished its task in December, 2013. I drafted the amendment's provisions for an independent commission.

³ Many of the observations in this article are derived from my own experience during 35+ years in representing state and local governments in redistricting. I have been the attorney of record in at least 30 redistricting lawsuits, including over 15 that involved evidentiary trials or hearings. I have guided over 100 different local governments (many more than once) through the redistricting process and overseen the preparation of hundreds of official redistricting plans. Based on this experience, I now believe that redistricting should be done by a commission that is autonomous of the local governing board and independent of the self-interest that exists when elected officials, or their appointees, control the shaping of the boundaries from which the officials are elected. However, although I believe that my observations generally are indicative of municipal redistricting nationwide; my experience is limited primarily to jurisdictions in Texas.

⁴ See, e.g., Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?* 121 *Yale L.J.* 1808 (2012); Justin Levitt, *Weighing the Potential of Citizen Redistricting*, 43 *LOYOLA L.A. L. REV.* 515 (2011); Heather Gerken, *Getting from Here to There in Redistricting Reform*, 5 *Duke J. Const. L. & Policy* 1 (2010); Symposium: *Drawing Lines: The Future of Redistricting in America*, 5 *Duke J. Const. L. & Policy* (2010); Steven Huefner, *Don't Just Make Redistricters More Acceptable To The People, Make Them The People*, 5 *Duke J. Const. L. & Policy* (2010); David G. Oedel et al, *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship*, 54 *Vill. L. Rev.* 57 (2009); Justin Levitt, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Time*, 95 *Geo. L.J.* 1247 (2007); Michael Kang, *De-rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 *Wash. U.L. Rev.* 667 (2006); Adam Cox, *Designing Redistricting Institutions*, 5 *Elec. L. J.* 412 (2006); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv. L. Rev.* 593, 644 (2002); Ryan P. Bates, Note, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 *Duke L.J.* 33, 338-39 (2005); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 *Harv. L. Rev.* 649, 663 (2002); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 *Tex. L. Rev.* 837 (1997).

party self-interest are prevalent in the drawing of state and congressional districts. Even the courts have assumed that politics is inevitably a major factor in redistricting by a legislature.⁵

Are we to assume that the self-interest that is so prominent at the state level is for some reason absent when incumbent city council members draw city council districts? Local news stories show that the media thinks not. For example, in Los Angeles, the 2011 redistricting process was criticized as “ugly, dysfunctional and sad” because of city politics. Certain incumbent members of the city council, and their appointees to the city’s advisory commission, were accused of voting as a bloc during redistricting to protect those incumbents while taking revenge against other incumbents.⁶ In Chicago, the city’s recent redistricting process was described by the Chicago Tribune as “quintessential Chicago politics” that occurred “behind closed doors” with the emphasis on “incumbent protection.”⁷ The Dallas Morning News was similarly critical of that city’s 2011 process, observing “Racial politics and self-preservation got in the way of good decision-making. Deals were cut behind closed doors. And a slapped-together, gerrymandered map that protects incumbents and shortchanges Latinos was the result.”⁸ These media comments reflect a general public cynicism that exists in virtually all circumstances when elected officials draw their own election districts. More importantly for this article, I believe that such cynicism is warranted. Incumbent politicians in a city are as concerned as their counterparts at the state level about the potential effect of redistricting on their reelection or the success of their faction in government.

My observations do not arise from a mistrust of city officials. After all, I have successfully represented elected officials for 40 years.⁹ Elected officials are seldom evil. They

⁵ E.g. *Vieth v. Jubelirer*, 541 U.S. 267, 285-86, (2004) (indicating that partisanship is an “ordinary and lawful motive” in redistricting); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1297 (S.D. Fla. 2002) (indicating that the “raw exercise of majority legislative power does not seem to be the best way of conducting a critical task like redistricting, but it does seem to be an unfortunate fact of political life around this country”).

⁶ David Zahniser, Panel Passes L.A. Redistricting Plan (February 12, 2012) available at articles.latimes.com/2012/feb/24/local/la-me-redistricting-disappoint-20120224. See, Fox, “Politics is at the Heart of Redistricting” says L.A. Commission Chairman” (February 21, 2012) available at <http://blogdowntown.com/2012/02/6601-politics-is-at-the-heart-of-redistricting> indicating that one incumbent thought that the final district plan was intended to penalize her for not voting for the winning candidate for president of the city council. Part of the criticism was that city council districts were being drawn not only to punish certain incumbents, but to enhance the chance of electoral success for specific non-incumbents likely to support the majority faction of the council. Id.

⁷ Hal Dardick, Kristen Mack and John Byrne, New ward map from old politics (January 20, 2012) available at http://articles.chicagotribune.com/2012-01-20/news/ct-met-city-council-new-ward-map-20120120_1_new-ward-map-aldermen-vote-whitney-woodward.

⁸ Editorial, Council Should Learn from Flawed Redistricting (November 22, 2011) available at <http://www.dallasnews.com>. See, Dallas redistricting process tainted by politics, backroom deal-making (September 12, 2011) available at <http://www.dallasnews.com>.

⁹ The discrepancy between this number and the years (35+) of involvement in redistricting is because my first years of representing elected officials was as counsel for the Texas Constitutional Revision Commission and Texas Constitutional Convention and as Parliamentarian for the Texas Senate. None of these jobs directly involved redistricting.

are, however, human. As politicians, they generally have worked hard and raised and spent large amounts of money to win election. Few, if any, can then resist drawing a friendly district that will make reelection easier and less costly, or that will further the political objectives of a favored political faction or undermine an adversary. Witness testimony, alternative districting plans and legal advice offered during the redistricting process are inevitably viewed by these officials through the prism of their effect on the official's reelection and by the incumbent's concern for his or her ability to continue to work on the issues that won his or her election and constituent support in the past.

The presence of incumbent or political self-interest is not necessarily evident on the face of a plan. Just because a district is bizarre in appearance does not necessarily mean that its shape is explainable only by politics.¹⁰ On the other hand, a district may be aesthetically attractive, but is intended to further some self-interest. Every redistricting plan and essentially every district in any plan drawn at the local level to satisfy incumbents embody some degree of the self-interest of those officials.¹¹ Over time, the effect of redistricting by the same persons who must seek election in those city districts is to try to manage the outcome of future elections by picking friendly voters and to create virtual political fiefdoms in which an incumbent is minimally vulnerable to defeat.¹²

It is inappropriate to belabor this article with a discussion of the commonly understood concepts of "incumbent entrenchment" and "partisan gerrymandering". It is helpful, however, to consider how redistricting at the municipal level differs¹³ from the state level, and specifically to understand some of the lesser known ways in which self-interest can affect a city

¹⁰ A bizarre shape may occur because of legal requirements. As a general rule, the greater the number of districts to be drawn in a jurisdiction, the more it is likely that the final plan will show the obvious results of incumbent self-interest. This occurs because the effect of the redrawing of one district to meet the requirement of one person, one vote while preserving an incumbent may ripple across the jurisdiction, with the magnitude of the change expanding as more and more districts must be redrawn. In smaller cities with only a few districts, the redistricting is easier and the process or final plan largely escapes media or public attention.

¹¹ Districts in a final redistricting plan approved by a city council are largely built from bargains struck among the incumbents as to which small census areas, such as census blocs (roughly equivalent to the area of one or two city blocks) or voting tabulation districts (VTDs) (roughly equivalent to an election precinct) are to be placed in each district. An acceptable outcome for each incumbent member of a city council is usually one that results in a final districting plan in which the redrawn district that includes the incumbent's residence will, based on the anticipated voting tendency of the affected area, favor his or her own reelection.

¹²See, Sam Issacharoff, *supra*, note 4 at 623-24. Professor Issacharoff, along with his frequent co-authors, Pam Karlan and Richard Phildes, is one of the most insightful writers on election law issues. .

¹³ One significant difference is the number of residents in the districts. There is no established number of city council members. The number varies enormously from city to city. For example, the city of Chicago has 50 aldermen, each elected from a single-member district. New York City has 51 districts. By contrast, the city of Los Angeles has only 15 councilmembers even though it has more residents than Chicago. Most of the 50 largest cities have councils varying from seven to eleven councilmembers.

redistricting plan. Two major differences are the significant roles of factions and minority interests in city redistricting.¹⁴

Many factions exist at the city level and split the council and the electorate even in cities with partisan elections.¹⁵ These factions may be self-identified as primarily pro-business, anti-tax, progressive, pro-real estate development, pro-environment, pro-growth, anti-growth or as having some other interest. Neighborhoods, religious groups, racial or ethnic organizations, such as gay and lesbian voters, that are not large enough to control a state legislative or congressional district may organize and fight to create a city district “of our own”¹⁶ that can give it greater political clout at the city level on local issues, such as taxes, zoning, economic development, transportation, city personnel policies, city contracts, budget, etc.

Most large cities have a disproportionately large percentage of racial and ethnic minority residents. This makes compliance with the federal Voting Rights Act and U.S. Constitution of particular importance.¹⁷ Given even a modicum of polarized voting, the ability of minority voters to elect persons of their choice to a city council is affected by which census areas or VTDs are included in which election district. It is not surprising therefore that compliance with the federal law protecting the rights of these minority voters is usually the dominant legal issue in the drawing of city council district lines. However, a tension often exists

¹⁴ The role of race in local politics and dilution of minority voting rights is extensively covered in the existing literature. See, e.g. Chandler Davidson & Bernard Grofmann, QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 390 (1994). The present article is not intended to add to that discussion except as the article suggests that independent commissions avoid the conflict between minority voting rights and the personal and political self-interest of city council incumbents during redistricting.

¹⁵ There are not simply two factions as with the major political parties. L.J. Cain & Hopkins, Mapmaking at the Grassroots, 1 Elec. L. J. 515 (2002) (indicating that political parties do not matter as much at the local level). These local factions usually lack the infra-structure of the major parties, but candidates from each faction can rely on an acknowledged subset of funding sources and voters affiliated with the faction. See e.g., Raymond Hernandez, With PAC and \$10 Million, Business Leaders Push to Elect Allies for Council, N.Y. Times, A17 (May 31, 2013). If a majority on a council, a faction can control the outcome of city action on local issues important to it. Sometimes this means approving a districting plan that might undermine an opponent’s chances of reelection, or designing a district to favor the election of someone who is not currently on the council, but will support the faction if elected. See, e.g. Redistricting San Francisco; hyper-local politics (May 11, 2012) available at <http://happening-here.blogspot.com/2012/02/redistricting-san-francisco-hyper-local.html> speculating that groups were out to use redistricting to “shift the lines to make it more difficult to elect progressives.”

¹⁶ See, Simone Wilson, Gays and Asians Fight for Their Own Districts in Los Angeles Redistricting Battle (January 13, 2012) available at http://blogs.laweekly.com/informer/2012/01/gays_asians_la_redistricting.php; Simone Wilson, The Five Most Furious Reactions to the Redistricting of Los Angeles (January 31, 2012) available at http://blogs.laweekly.com/informer/2012/01/reactions_los_angeles_redistricting.php; Rene Ciria-Cruz, Redistricting Mobilizes San Francisco Filipinos (January 5, 2012) <http://newamericamedia.org/2012/01/redistricting-mobilizes-san-francisco-filipinos.php>.

¹⁷ Section 2 of the U.S. Voting Rights Act of 1965 prevents a city council line from splitting a compact, cohesive minority community that is large enough, in the absence of such a split, to elect a candidate of choice of the minority voters even in the presence of Anglo (non-Hispanic whites) polarized voting that usually defeats the minority candidate of choice. In other words, it is possible to see Section 2 in a more traditional redistricting sense as requiring the protection (under certain circumstances) of communities of interest that are based on race or ethnicity.

between what an incumbent believes is best for his or her political future and what the legal counsels say is required by a charter or federal law.¹⁸ The issue for many members of a city council becomes “how far can we go [toward achieving personal or political goals in the redistricting plan] without breaking the law.”¹⁹ Under such circumstances, legal advice is skewed and compromised.

Perhaps the foremost problem, however, is the skeptical, even cynical view of most residents about a body of politicians redistricting itself. Much of the public sees office-holders acting in their own selfish interest. This cynicism increases public distrust of elected officials and diminishes their credibility in dealing with other issues. It is not unreasonable to see the dysfunction of government at every level as a by-product of personal and political self-interest fed at least in part by self-interested redistricting.²⁰

An independent commission on which the members are competent, impartial, engaged and diverse is much better able to act in accordance with the legal and objective guidelines of redistricting than any city council in which the incumbent politicians must seek election from

¹⁸ Sometimes the task of drawing city council districts to comply with federal law is made even more difficult by the specific wishes of a minority incumbent. Two issues commonly arise. The first is whether the redistricting should protect minority incumbents or minority voters. Under the law, the issue should be the ability of minority voters to elect the person of their choice. However, in reality, this issue is often subsumed as a practical matter by the question of how a redistricting affects or is seen to affect a particular minority incumbent. Incumbent minority officials, like their colleagues, sometimes want the district containing their residence to be drawn to avoid pairing with another incumbent and to exclude one or more particular potential opponents. On other occasions, incumbent minority officers want the district to have just the right percentage of voters of a particular race or ethnicity to help in his or her election. Such requests are doubly difficult for the mapmaker to deny because the minority incumbent argues or implies that he or she is protected by federal law and that rejection of his or her request would jeopardize the legality of the plan. The second issue arises when housing patterns of minority voters (African-American, Asian and Hispanic) residents overlap and a decision to draw a district that protects one of these groups may prevent the drawing of a possible district with a voting majority of another minority group. Such inter-minority conflicts are common in cities and are made more difficult to resolve by the addition of the self-interests of minority incumbents who are tempted to support his or her minority group in the conflict and whose own personal self-interest (in reelection or otherwise) may be at stake. A minority member of an independent commission has no personal self-interest to protect, is not beholden to any political group and is selected for his or her lack of bias.

¹⁹ No office-holder wants to adopt a blatantly illegal redistricting plan. However, the office-holder often sees redistricting legal advice through a prism colored by his or her self-interest. In a large city, the major activist and political organizations, and many of the members of the city council often “lawyer up” during a consequential redistricting. Moreover, many of the council members are themselves attorneys. The result is a sea of potentially conflicting legal opinions on the controversial issues. Many of these legal opinions are affected by the political alignment of an attorney or on the potential effect of a legal issue on an attorney’s employer. Objective legal advice is often rendered ineffective in such circumstances, even when offered by legal counsel hired especially for his or her expertise in redistricting. The incumbent seizes on the legal advice most favorable to his or her own interests.

²⁰ Many writers have attributed the gridlock or extremism of Congress to the gerrymandering of congressional districts to create districts favorable to a political party. But see, Walter Shapiro, *Why Gerrymandering Doesn't Explain Congressional Extremism — and Masks the Real Problems* (October 30, 2013) available at <http://www.brennancenter.org/blog/why-gerrymandering-doesnt-explain-congressional-extremism-%E2%80%94-and-masks-real-problems>.

those districts, or a commission beholden to the council or composed of persons politically ambitious on their own part. There are other aspects of city redistricting that should be addressed by the design of the independent commission. I have considered these aspects of municipal redistricting further in Part IV of this article.

Part II

Models for City Redistricting Commissions

There apparently is no compilation of the cities that use redistricting commissions. Therefore, I surveyed the 50 largest cities through use of city websites, news stories, e-mail messages and telephone interviews to determine the cities that use a redistricting commission and the structure of those commissions. The following is based on that survey.

Some cities continue to elect their city council at-large. Four of the 50 largest cities elect all members on the city council at-large from the city as a whole.²¹ Thirteen of the 50 elect part of the council members at-large from the city as a whole or from “super districts”, but also elect part of the council members from single-member districts.²² Thirty-three of these cities use only single-member districts.²³ Therefore, 46 of the largest cities must redistrict as necessary (usually once per decade) to equalize the number of persons in each election district. Of these 46 cities, the overwhelming majority allow the city council to draw its own districts. Only six have autonomous redistricting commissions. These commissions are specifically discussed below. Several other cities have utilized advisory commissions at least during the latest redistricting cycle.

The largest cities in the country generally are charter or home-rule jurisdictions; each with its own unique charter allowing it to adopt a redistricting structure, process, or criteria different from its neighboring cities and without any need for state legislation to authorize it to do so.²⁴ As a result, whether a state has a commission is not necessarily indicative of whether a

²¹ These cities are Tucson, Columbus (Ohio), Portland and Seattle. Portland actually has a commission form of government. The City of Detroit changed from at-large to single-member districts in 2012. The voters in Austin, Texas voted in 2012 to change to single-member districts in its next election in 2014. The National League of Cities shows that in 2001 between 40%-50% of small and medium size cities used at-large systems. The report is available at <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/partisan-vs-nonpartisan-elections>.

²² These cities are Houston, Jacksonville, Indianapolis, Charlotte, Detroit, Memphis, Boston, Denver, Kansas City, Virginia Beach, Colorado Springs, Raleigh and Arlington. A combination of at-large and single-member elections of members of a city council (other than the mayor) is commonly called a “mixed” or “hybrid” election system. The National League of Cities indicates that 21% of cities nationwide use a mixed system.

²³ However, virtually all elect their mayor citywide.

²⁴This power varies by state. In some states, cities lack this home-rule authority and are general law or non-charter jurisdictions controlled specifically by state statutes. These generally are the smaller cities. This article is directed primarily at the large and middle-size cities nationwide.

city within the state uses a commission or of the structure of the city commission. Since cities are geographically smaller than states, often use nonpartisan elections²⁵ and have limited jurisdiction and authority, most state models are useable at the local level only if modified.

The following is a brief discussion of cities that now have redistricting commissions.

Advisory Commissions. Although almost all city councils retain authority over redistricting, most from time to time use a commission to propose a map.²⁶ Generally these commissions may be created without the need for any city charter amendment.

An advisory commission usually produces a map that embodies the political or personal interests of a majority of the city council since it was usually the members of the council that appointed the members of the commission²⁷ and the members of the city council interact privately with the members of the advisory commission (before and after appointment) to produce a politically satisfactory map. Such a recommendation from an advisory committee provides each council member with cover for adopting a plan that serves his or her own self-interest and neutralizes public testimony or submissions.²⁸

The reverse may also occur – i.e. members of the city council may find themselves in conflict with the members of the advisory commission. Often the reason is politics. Appointments to the commission are usually driven by political considerations and are frequently seen by the city council as a means of granting favors to individuals or groups in addition to being a means of protecting the self-interests of the incumbent. On the other hand,

²⁵ Only 10 of the 30 largest cities use partisan elections.

²⁶ See, Halberstam, Michael, Process Failure and Transparency Reform in Local Redistricting 25 available at <http://ssrn.com/abstract=21916741> (2012). Among the many cities that have used advisory commissions during the 2011-2012 redistricting cycle were Los Angeles, Dallas, Albuquerque, Sacramento, Mesa, and San Jose. Like other local commissions on a variety of issues, a redistricting advisory commission can serve a convenient function by conducting frequent public hearings that might otherwise be difficult for the city council to hold given the council's other duties. However, as indicated in Part II of this article, testimony offered at such public hearings rarely overcomes the self-interest that determines redistricting. This ineffectiveness of public hearings increases if the hearings are conducted by an advisory group rather than the city council itself and public testimony must be communicated to the council through a third party. As a result, an organization (such as a neighborhood committee) or other interest will often directly and privately lobby the council members to win approval of particular district configurations, since it is the city council, not the advisory commission, that has the final say on the redistricting plan.

²⁷ The Dallas Charter requires creation of an advisory commission. However, the Dallas Morning News was very critical of the entire 2011 process, including the work of the commission. The paper observed "The redistricting commission must be depoliticized by changing its makeup. Because each council member makes one appointment, commissioners are essentially representing particular districts — instead of considering the entire city's best interests." In regard to the council incumbents, the newspaper lamented, "Nothing in the law says incumbent politicians have a right to protect their seats. In fact, incumbency isn't even supposed to be considered." Editorial, Dallas Redistricting Process Tainted by Politics (September 12, 2011) available at <http://www.dallasnews.com>.

²⁸ . An even greater probability of council member influence exists when the city staff is utilized to draw a redistricting map. Often the city staff is given the unenviable task of balancing the personal (mostly private) requests of the council members against the requests of other members and the legal requirements for redistricting.

members of the commission are often themselves politically ambitious.²⁹ They may see membership on the commission as an opportunity for public exposure, not solely for public service. The result can be pure showmanship.

A variation of the advisory commission approach is to make the advisory commission's plan final if the city council does not adopt (perhaps with a supermajority) a different redistricting plan in a specified length of time after receiving the one proposed by the advisory commission. Such an approach is similar to the process used in Iowa and Washington. None of the 50 largest cities currently use this variation of an advisory commission, but in Baltimore the mayor proposes a redistricting plan to the city council that becomes final unless the city council adopts a different plan within 60 days of receiving the mayor's plan.³⁰

None of these variations of an advisory commission approach prevent political or personal self-interests from prevailing over the public interest. In fact, they often encourage politics. There are many avenues through which political considerations can permeate the advisory commission process, often out of public view. Ultimately, of course, the advisory commission's dominant characteristic is that it is only advisory; it may recommend a map to the city council, however, the city council is free to make changes in the recommended map or to substitute another plan entirely.

Autonomous Commissions Appointed by the City Council or Other Local Officials. The City and County of San Francisco uses an autonomous commission (i.e. The Redistricting Task Force) to redraw city council districts. The mayor, board of supervisors, and city elections commission appoint the nine members of the task force.³¹ Appointees are selected from among applicants that qualify to serve on the commission. In the views of some media, appointments to the commission are heavily influenced by "the power circles of business, politics, labor and nonprofit groups."³²

²⁹ In 2011, Mr. Domingo Garcia served on the redistricting advisory commission for the City of Dallas, Texas. He was very outspoken about how the city council was drawing districts. By doing so, he attracted media attention that he later used in his unsuccessful 2012 campaign for election to Congress in 2012. Such self-interest also is inappropriate. For this reason, it is important that a redistricting process should both avoid incumbent control and the opportunity for a commission member to use his or her position for political benefit.

³⁰ City of Baltimore Charter, Art. III, Sec. 7.

³¹ City of San Francisco Charter, Sec. 13.110 (d).

³² See, Rachel Gordon, *Redistricting Task Force Gets 3 More Nominees* (June 24, 2011) available at <http://www.caasf.org/2011/06/sf-redistricting-task-force-gets-3-more-nominees-sf-chronicle/>. However, in 2011, the appointing authorities agreed on certain minimum criteria for appointments, including that an appointee could not be currently a "direct hire" of an official of the City and County of San Francisco or a paid political consultant for the preceding five years. The 2011-2012 process was seen as smooth and transparent by the Asian Law Caucus. Carlo De La Cruz and Carolyn Hsu, *Recap on San Francisco Local Redistricting* available at <http://arcof72.com/2012/05/11/1009/>. The authors also saw the commission as diverse and knowledgeable and deferential to the public.

Bipartisan Commissions. Two cities out of the fifty largest cities have autonomous bipartisan commissions. Both also have partisan elections.³³

The City of New York charter provides for creation of an autonomous Districting Commission to draw the 51 city council districts. The members of the commission are appointed by the council delegation of the major political parties (five from the largest party; three from the second major party) and the mayor (seven appointments) so that “individuals enrolled in a single political party shall not be a majority of the total number of members of the commission.”³⁴ The City of New York has used this structure for redistricting since the 1990. It was adopted after the U.S. Supreme Court in Board of Estimate of the City of New York v. Morris held that the City’s governing board needed to represent districts of approximately equal population instead of solely political units, such as boroughs.³⁵

The council elections in the City of Tulsa, Oklahoma were partisan.³⁶ Since 1990 the city’s nine council districts have been drawn by an autonomous commission, the Electoral District Commission. The Commission consists of three members – one appointed by the mayor (with the approval of the council) and one appointed by each of the two largest political parties.³⁷ In 2011, the commission by 2-1 adopted a plan presented by the mayor’s appointee to the commission and identified with the Republican Party³⁸ after initially presenting five

³³ Twenty of the 30 largest cities have partisan elections. National League of Cities Report available at <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/partisan-vs-nonpartisan-elections>.

³⁴ City of New York Charter, Chapter 2-A, Section 50. If all of the council members are from the same political party and there is no council delegation for the second party, this second largest party submits names to the mayor for appointment. Id. The mayor is responsible for screening potential commission members to assure that racial and language minorities covered by the U.S. Voting Rights Act are represented on the commission in proportion to their population in the city. The New York Districting Commission submits its redistricting plan to the city council, which by majority vote within three weeks may object to the plan. If the city council objects to this initial commission plan, it returns the plan along with its objections to the commission. The commission prepares a revised plan. This stage is similar to the process existing in the state of Iowa. However, unlike in that state, the redrawn plan does not go again to the city council. The New York City commission remains responsible for adopting the final plan.

³⁵ 489 U.S.688 (1989). The current charter retains some of this prior representation of political subdivisions by directing that council delegation appointees must come from different boroughs. City of New York Charter, Chapter 2-A, Section 50, Paragraph 7b1 and Section 52. It also requires that neighborhoods and communities with established ties of common interest and association be kept intact.

³⁶ A charter amendment in 2011 made future city elections nonpartisan. The resulting election scheme is similar to the one used in 2012 by the state of California. Primary elections were retained, but not the party affiliation. If a candidate receives 50+% of the vote in the primary, the candidate is elected. Otherwise, the two candidates with the largest vote in each district in the primary compete for election in the fall. The change has prompted differing views. See, <http://www.krmg.com/news/news/local/nonpartisan-election-process-gets-mixed-reviews-ma/nYJtp/>.

³⁷ City of Tulsa Charter, Article VI, Sections 10.1-10.5. No elected official is eligible to serve on the commission. The presiding judge of the district court appoints the members of the commission if these appointing authorities do not do so by January 31st every ten years. Any registered voter in Tulsa may challenge the commission’s redistricting plan in the district court.

³⁸ See, Kassak, Tulsa City Council Proposed Redistricting Map Draws Criticism (05/22/2011) available at http://www.tulsaworld.com/news/article.aspx?subjectid=334&articleid=20110522_11_A19_CUTLIN877468. One

different maps for public comment.³⁹ Democrats on the city council attacked the final map as aimed at defeating the Democratic incumbents⁴⁰ and tried unsuccessfully to block use of the commission's plan before the 2012 elections. Many of the Democratic incumbents later blamed the redistricting for their loss in those elections.⁴¹

Independent Commissions. There are three city redistricting commissions that are autonomous and on which the commission members are not appointed by the city council.

In 1992, the City of San Diego adopted amendments to its charter that set up an autonomous redistricting commission. Appointments to the commission are made by municipal judges⁴² and shall include:

“women and men who will give the Redistricting Commission geographic, social and ethnic diversity, and who, in the opinion of the appointing authority, have a high degree of competency to carry out the responsibilities of the Commission. The members shall include individuals with a demonstrated capacity to serve with impartiality in a non-partisan role.”⁴³

The city council can become the appointing authority only if the municipal judges refuse to serve.⁴⁴

The City of Minneapolis has partisan elections. The city charter gives authority for the redistricting of city wards to the Minneapolis Charter Commission.⁴⁵ The 24 members of this

of the council members said, "I do believe because of the disagreements between the council and administration, the adopted redistricting map was reconfigured to try to replace all of the councilors,"

³⁹ See, Kevin Canfield, Five proposals for City Council redistricting presented (04/11/2011) available at http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20110405_16_A9_Thepro250015.

⁴⁰ See Kevin Canfield, Councilors Critical of Republican consultant for redistricting plan (6/11/2011) http://www.tulsaworld.com/news/article.aspx?subjectid=334&articleid=20110601_16_A9_Temnla975932.

⁴¹ See, Michael Bates, Redistricting Impact @ <http://www.batesline.com/archives/2011/09/tulsa-election-2011-redistrictin.html>.

⁴² The charter provides that the chief municipal judge shall make the appointments, or if the chief judge is unwilling to do so, then the municipal judges are to select one of their numbers to do so. If they refuse to do so, a panel of three members is selected at random from among retired municipal judges is to make the appointments. However, the city has done away with municipal courts and the city manager.

⁴³ San Diego, California Municipal Code, Art. 7, Sec. 27.1403.

⁴⁴ This has never happened. In 2011, however, the city confronted a problem. The city had earlier abolished the municipal justice system so by 2011 there were no active municipal judges. Two retired judges agreed to serve as the panel responsible for choosing the members of the commission. A legal challenge primarily on the basis that the panel consisted of only two judges was rejected. There was no legal challenge to the commission's final redistricting plan. See, Redistricting Process needs to be Updated (June 5, 2012) available at lajolla.patch.com/articles/redistricting-process-needs-to-be-updated.

⁴⁵ City of Minneapolis, Minnesota Charter, Chap. 1, Sec. 3. The neighboring city of St. Paul also vests its charter commission with similar authority. In 2011-2012, both charter commissions unanimously approved redistricting plans for the cities. There were no court challenges.

charter commission are appointed by the chief judge of the local judicial district.⁴⁶ Interestingly, before 2010, redistricting for the City of Minneapolis was done by a bipartisan commission with two of its members appointed by the city council and the other members selected by the charter commission from lists submitted by the two major parties.⁴⁷

On November 6, 2012, the voters of Austin, Texas adopted a charter amendment that switched the city council from an all (seven seats) at-large election system to a structure consisting of ten single-member districts and the at-large election of the mayor. This 10-1 structure was approved with over 60% of the vote and takes effect for the 2014 election. Under the charter amendment the districts are drawn by a 14 member independent commission.⁴⁸ The members of the city council were either ambivalent to the proposed charter change (Proposition 3), or, such as the mayor, openly opposed it. The commission adopted a final district map on November 28, 2013 for the November, 2014 election.

The independent redistricting commission approved by Austin voters is patterned primarily after California's state independent commission. The specific aspects of the California commission are discussed below. The Austin commission is discussed further in Part IV of this Article.

State Models. By the latest redistricting cycle, 23 states had legally formalized some mechanism (usually by constitutional amendment) for officially drawing redistricting plans outside the state legislature. Twenty-two of these states used commissions.⁴⁹ Another, Iowa,

⁴⁶ The decision in 2010 to vest redistricting authority for the City of Minneapolis in this separate board was made expressly for the purpose of reducing the effect of politics on the city's redistricting process. See, Editorial, Yes to Minneapolis Charter Question (Oct. 29, 2010) available at <http://www.startribune.com/opinion/editorials/106088578.html?refer=y>; E-mail from Barry Clegg, the chairman of the charter commission in 2012, to the author (March 19, 2012). The commission in 2011 appointed an advisory group to assist on redistricting. Id.

⁴⁷ The City of Minneapolis charter before 2010 provided that members of its redistricting commission were to be picked from lists submitted by parties that obtained 5% or more of the vote for governor. Although two members of the city council in Minneapolis in 2001 were from the Green Party, the party had no representation on the local redistricting board because the party had not run anyone for governor. The resulting redistricting was adverse to the interests of the Green Party incumbents. See, *Johnson-Lee v. City of Minneapolis*, 170 Fed. Appx 15 (8th Cir. 2006). The city subsequently changed its method of redistricting to the current independent commission in 2010.

⁴⁸ The amendment was placed on the ballot through an initiative petition that garnered approximately 30,000 voter signatures. Only the signatures of 22,000 registered voters were needed to put the proposition on the ballot. Once it was clear that this threshold had been met, the counting of signatures stopped. The amendment was proposed through Ordinance No. 20120802-015, adopted on November 6, 2012 and codified as City of Austin Charter, Article II, Section 3.

⁴⁹ The twenty-two states are Alaska (Alaska Constitution, Art 6), Arizona (Arizona Constitution, Art. 4, pt. 2, Sec. 1), Arkansas (Arkansas Constitution, Art. 8), California (California Constitution, Art. XXI), Colorado (Colorado Constitution, Art. V, Sections 47 and 48), Connecticut (Connecticut Constitution, Art III, Section 6), Hawaii (Hawaii Constitution, Art. IV), Idaho (Idaho Constitution, Art. III, Section 2), Illinois (Illinois Constitution, Art. IV, Section 3), Indiana (Indiana Code, Title 3, Art III, Sec. 2), Maine (Maine Constitution, Art. IV, pt. 3, Section 1-A), Mississippi (Mississippi Constitution, Art. 13, Section 254), Missouri (Missouri Constitution, Art. III, Sections 2 and 7), Montana (Montana Constitution, Art. V, Section 14), New Jersey (New Jersey Constitution, Art. IV, Section 3), New York

had formalized a process through which redistricting plans are drawn initially by a nonpartisan staff.⁵⁰ Several state commissions warrant specific attention as possible models for city action.

The most common form of redistricting commission at the state level is the bipartisan commission. Ten states have such commissions.⁵¹ These commissions are autonomous of the state legislature and are sometimes called independent commissions, but really are designed to be bipartisan (i.e. there is some effort to balance the membership of the commissions between the two major parties), not politically independent. The major drawback for such commissions is that in their effort to reach a compromise for fairness between the two major parties, they often freeze out other political parties⁵² and end up gerrymandering districts to satisfy the incumbents of both major parties despite criteria established to prevent such a result.⁵³ A plan

(Laws of New York, Legislative, Art 6-a, Section 83-m), Oklahoma (Oklahoma Constitution, Art. V, Sections V-11A-V-11E), Ohio (Ohio Constitution, Art. IX), Pennsylvania (Pennsylvania Constitution, Art. II, Section 17), Texas (Texas Constitution, Art. III, Section 28), Vermont (Vermont Statutes, Title 17, Section. 1904), and Washington (Washington Constitution, Art. II, Section 43). However, three of the states (New York, Maine and Vermont) used only an advisory commission in 2012, with the final authority over redistricting remaining with the state legislature. Six other states (Connecticut, Illinois, Indiana, Mississippi, Oklahoma and Texas) use back-up commissions that exist only if the state legislature fails to timely adopt redistricting plans. Two more commissions (Arkansas and Ohio) consist primarily of state officials and have no authority over redrawing congressional boundaries. All of the remaining 11 commissions are autonomous and have authority over redistricting of state legislative districts without legislative inaction or oversight, but only six have authority over the drawing of both state legislative and congressional boundaries

⁵⁰ Iowa is sometimes cited incorrectly as using a commission to draw state legislative and congressional districts. Since the 1980s, redistricting plans for the state legislative and congressional districts are prepared by nonpartisan legislative staff (Legislative Service Bureau) without consideration of certain political or election data. Iowa Code, Chapter 42. The state assembly can only vote to accept or to reject (not to amend) each staff plan. Ultimately the legislature and the governor have control of the final redistricting plan because at each stage the staff responds to the reasons for rejection by the legislature and, if the staff's proposed plans are rejected twice, the legislature can then amend or substitute for the third staff plan. The governor may exercise a veto as with any other legislation. However, the staff proposed plans have always eventually gained legislative and gubernatorial approval. The Iowa Legislature accepted the staff's third plan in 1981, its first plan in 1991, its second plan in 2001 and its first plan in 2011. The Iowa model is unlikely to work in major cities for the reasons discussed in Part III.

⁵¹ The states are Alaska, Arizona, Colorado, Hawaii, Idaho, Missouri, Montana, Pennsylvania, New Jersey, and Washington. In Washington, the state legislature reserves the right to amend its commission's plan, but only on 2/3 vote of the membership of each house. In view of this requirement for an extraordinary legislative majority, I have included Washington among the states with bipartisan commissions instead of an advisory commission. In 2012, the New York legislature passed a potential constitutional amendment that, if it wins voter approval in 2014, will replace the state's advisory commission for future redistricting with a bipartisan commission that functions like the nonpartisan staff in Iowa – preparing plans that become law unless rejected by the state legislature. See, Cuomo proposes independent redistricting commission at

<http://www.governor.ny.gov/press/03152012redistrictingamendment>; The New York Redistricting Mess at http://blog.syracuse.com/opinion/2013/01/new_yorks_redistricting_mess_n.html (January 25, 2013).

⁵² See, supra, note 47.

⁵³ In this past redistricting cycle alone, at least six state supreme courts have already invalidated redistricting plans drawn by state bipartisan commissions as violating the criteria set in the state's constitution. *Holt v. 2011 Legislative Reapportionment Commission*, 2012 WL 360584 (Pa, January 25, 2012). The Colorado Supreme Court did likewise in 2002, *In re Reapportionment of Colorado*, 45 P.3d 1237 (Colo. 2002) and again in 2011, *In re Apportionment of Colorado General Assembly*, ___ P.3d ___, 2011 WL 5830123 (Colo. Nov. 15, 2011). The Idaho Supreme Court rejected that state's commission plan in 2012, *Twin Falls City v. Idaho Commission on Redistricting*,

that emphasizes partisan compromise between Republicans and Democrats may avoid extreme partisan bias in favor of one of these parties, but at the cost of sacrificing the interest of the largest plurality of the populace that now describe themselves as being unaffiliated or independent, and furthering the legislative gridlock of the two major parties.

Some observers characterize the Arizona bipartisan commission mechanism for drawing state legislative and congressional district as independent because the state constitution provides for the selection of a five member commission from a pool of persons chosen by the state commission on appellate judicial appointments.⁵⁴ I categorize this commission as a bipartisan commission because the first four members of the commission are selected from this pool by the legislative leaders of the two parties – making the commitment to partisanship a key factor in the selection. I do not think that the Arizona commission provides a good model, even for cities with partisan elections, primarily because it is too small to facilitate compromise among the different interests, it does not require a majority of each party on the commission to approve the plan, and a majority of its membership is chosen by politicians.⁵⁵

The only truly independent state commission is the California Citizen Redistricting Commission⁵⁶ An indirect commissioner selection process is designed “to produce a commission that is independent from legislative influence and reasonably representative of this

___ P3d ___, 2012 WL 130416 (Jan. 18, 2012). The Missouri Supreme Court struck down the commission’s senate plan. *Missouri ex rel. Teichman v. Carnahan*, No. SC92237 (January 17, 2012). The Alaska Supreme Court did so as well with its state commission plan. In re: 2011 Redistricting Cases, __ P2d __, 2012 WL 1414341, _ S-14721 (May 10, 2012). Seven months later, the Alaska Supreme Court found the commission’s adjustments of its plan unacceptable. In re: 2011 Redistricting Cases, S14721 (December 28, 2012). In Hawaii, the state Supreme Court struck down the commission’s plan on the basis that it did not remove nonresident students and military from the apportionment base as required by the state constitution. *Solomon v. Abercrombie*, __ P2d __, NO. SCPW-11-0000732 (January 6, 2012). In holding the redistricting plans of the Pennsylvania Legislative Reapportionment Board invalid, the Pennsylvania Supreme Court in January, 2012 found that the commission “could have easily achieved a substantially greater fidelity to the (state constitutional) mandates of compactness, contiguity, and integrity of political subdivisions.”

⁵⁴ An additional (fifth) independent or unaffiliated member is chosen to serve as chairman by these first four commissioners or by the state commission on appellate appointments if the four commissioners cannot agree. This method of selecting a commission chair or odd-numbered member of the commission is designed to avoid partisan gridlock on a commission and to increase the likelihood that the commission will approve a plan free of extreme partisan politics by appointment of a neutral or unaffiliated person as the commission’s deciding vote. In six of the states with bipartisan commissions, an additional member or chair of the commission is selected by vote of the other members, or, if the members deadlock, the decision on the member or chair is made by an outside “unbiased” source. However, the Arizona commission has been racked by partisan controversy over the true political ideology of this ostensibly “independent” fifth and deciding vote. See, *Arizona Redistricting Commission v. Brewer*, No. CV-11-0313-SA (Ariz. 2011).

⁵⁵ Similar observations can be made about the commissions that exist in Alaska, Idaho, Montana and Washington.

⁵⁶ This commission was approved in 2008 through initiative and referendum. Proposition 11 (2008) codified as California Constitution, Art. XXI and California Government Code, Section 8252-8253.6. A subsequent initiative and referendum in 2010 (Proposition 20) extended the commission’s jurisdiction to include congressional districts. Another proposition in 2010 to do away with the commission (Proposition 27) failed.

State's diversity."⁵⁷ Critics of the California commission described the commissioner selection process as overly complex and the requirement of at least three affirmative votes from commission members affiliated with each political party to approve each plan⁵⁸ as unworkable.⁵⁹ Many predicted disaster. However, the redistricting process and redistricting plans adopted by the California Citizen Commission in 2011 generally are seen as a great success⁶⁰ with the districts in the plans apparently drawn in accordance with the constitutional criteria.⁶¹ No racial or ethnic minority organization challenged any of the plans in court.⁶²

⁵⁷ California Citizens Redistricting Commission Report on 2011 Redistricting 2 (2011). The state auditor is required to publicize the application process and to remove all applicants for service on the commission who violate any one of a long list of conflicts of interest (discussed in Part IV). A panel (Applicant Review Panel) of independent auditors reviews the remaining applicants and creates three pools of the 20 "most qualified" Republicans, Democrats and Unaffiliated applicants. The first eight members of the commission are chosen at random by the state auditor-- three from each of the pools of the major political parties and two from the third pool. These eight commissioners then select an additional six members equally (two) from each pool. Therefore, the final commission consists of five members registered in each of the two major parties and four not registered in either of the two parties. Each of the four final redistricting plans must be approved by the vote of at least nine members of the 14 member commission, including at least three of the five members registered with each party and at least three of the four members not registered with either of the two major parties.

⁵⁸ The commission is charged with drawing the election districts for the state board of equalization, the state senate, and the state assembly (house) and for the state's seats in Congress.

⁵⁹ See, e.g., Daniel Lowenstein, *Opposing View on Redistricting: Tinkering Does No Good* (Oct. 21, 2010), USA Today, available at http://www.usatoday.com/news/opinion/editorials/2010-10-22-editorial22_ST1_N.htm. Lowenstein also led the unsuccessful effort in 2010 to repeal the proposition creating the commission; calling the independent redistricting commission "untested, unnecessary, and wasteful." The outcome in 2011-2012 proved him to be wrong.

⁶⁰ See, John Wildermuth, *Californians of the Year: Redistricting Commissioners* (December 20, 2011) available at <http://www.foxandhoundsdaily.com/2011/12/californians-of-the-year-redistricting-commissioners/>; Marqueece Harris-Dawson, *California Redistricting Preserves Black Voice in State Politics*, Vol. 18 *Race and Poverty* 25 (Issue 2, 2011). The commission held over 30 public hearings across the state. The commission approved three of the redistricting plans by a vote of 13-1. A vote of 12-2 approved the congressional plan. All four statewide plans won the required approval from a majority of each category of commission members.

⁶¹ The districts have been described as visibly more compact, more clearly following geographical and communities' lines, and devoid of obvious efforts at retaliation against any particular incumbent compared to the past legislative-drawn plans. See, Cain, *supra*, note 4 at 1821-1829. See generally, the various articles in Volume 2, Issue 6 of *Race and Poverty* (2011); Vladimir Kogan and Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans* (2011) at 21 and 33. The New York Times in 2013 indicated that the commission's congressional plan resulted in the Republican and Democratic Parties winning essentially the same proportion of the state's seats in Congress as they won of the popular vote in November, 2012. In October of 2013 the same publication indicated that the drawing of state legislative districts by the state's independent redistricting commission was seen by some observers as one of the recent election reforms that was curbing partisanship and gridlock in the state. Adam Nagourney, *California Sees Gridlock Ease in Governing*, NY Times, October 19, 2013 at A1. One of the noteworthy comments by Sam Blakeslee, head of the California Reform Institute and a former Republican member of the state Assembly is "We can already see that these reforms are improving the function of the Legislature and forcing people to come out of their partisan boxes. . . We're seeing, almost against the odds, a more centrist legislature, at least when it comes to jobs and budget issues." The other reforms adopted in California were a nonpartisan primary and the lessening of stringent term limitations.

⁶² The commission's final plans were submitted and received preclearance under Section 5 of the United States Voting Rights Act. Letter from Assistant U.S. Attorney General Thomas Perez to California Attorney General Kamala Harris (January 17, 2012).

Republican court challenges to the plans were quickly rejected.⁶³ This overall success of the commission is impressive in a state with the racial, ethnic and political diversity of California and the state's reputation for partisanship.

Part III

The Argument for an Independent Redistricting Commission for Cities

Discerning with certainty the best method for lessening partisan and personal self-interest in a city's redistricting process is problematic for at least three reasons. First, redistricting occurs basically only once every ten years. There are few data points to study for each jurisdiction. Second, each experience in every state or local jurisdiction is unique. The diversity in personalities and in political, racial and ethnic make-up among jurisdictions can make an enormous difference. Third, redistricting generally occurs suddenly and simultaneously at every level of government--making a comprehensive study difficult.

Nevertheless, several lessons are clear. Redistricting by officials that must seek election in those same districts creates an obvious conflict between the official's self-interest and the public interest as established by public testimony and the express requirements of law and city charter. Advisory commissions do not overcome this conflict because they are very political and ultimately leave the final redistricting decision to the elected officials. Autonomous bipartisan commissions have, in some circumstances, reduced partisan conflict, but only by increasing incumbent protection and potentially freezing out third parties. A further search for reform is necessary.

Three recent trends are identifiable in redistricting reform and are potentially adaptable for cities. One, patterned generally after the process in Iowa, envisions a redistricting plan drawn by an outside body (e.g., a nonpolitical staff or commission) that takes effect unless rejected or changed by the city council. A second trend (e.g. Florida) is toward leaving the redistricting process to the legislature or city council, but imposing strict limitations in the state constitution or city charter on any plan adopted by that body, such as a requirement that a

⁶³ *Vandermost v. Bowen*, 269 P. 3d 446 (2012); *Radanovich v. Bowen*, S196852. See, Release, Supreme Court Denies Challenges to Redistricting Maps (Petition denied October 26, 2011) available at <http://wedrawthelines.ca.gov>. Republicans split about the commission outcome. On September 16, 2011, the California Supreme Court unanimously denied the challenges to the commission's congressional and senate plans. A similar lawsuit in federal court was dismissed by that court. *Radanovich v. Bowen*, 2:11-cv-09786-SVW-PJW (unpublished opinion) available at http://wedrawthelines.ca.gov/downloads/meeting_handouts_022012/handouts_20120210_fsc_dismissal.pdf Under the California constitution, any statewide redistricting plan can be subject to a referendum. On January 27, 2012, the California Supreme Court unanimously ruled that even if the referendum to overturn the commission's senate plan was certified for the statewide ballot, the 2012 elections would occur under the commission's plan because "The Commission's certified state Senate map is the alternative most consistent with the constitutional scheme and criteria embodied in the federal and state Constitutions." *Vandermost v. Bowen*, 269 P.3d 446 (January 27, 2012). No referendum to repeal any of the commission's plans was certified.

redistricting plan may not be drawn with the intent of favoring or disfavoring any political party or individual.⁶⁴ A third trend (e.g. the State of California and the cities of San Diego, Minneapolis and Austin) is toward an autonomous citizen commission designed to remove political and personal self-interest from the redistricting process.

The option of independent commissions is especially suited for cities. Few cities have the capacity to dedicate employees to redistricting for a decade or to guarantee the city office's independence from political influence as attempted in Iowa. Moreover, the final decision on the jurisdiction's redistricting plan remains ultimately with the governing body under the Iowa model. What seems to have worked in the essentially homogeneous state of Iowa is much more problematic in cities in which the population is racially and ethnically diverse and the drawing of districts may be much more contentious. The second option of leaving the authority for redistricting with the city council, but imposing strict charter limitations on that body, does nothing to dispel the conflict that exists on the city council between those limitations and the official's self-interest. Rather, it can be expected to drive council member self-interest even further behind the opaque curtains that disguise city council deal-making and depends on judicial enforcement. Moreover, this approach depends for effectiveness on an engaged judiciary.⁶⁵ Neither of these two options is likely to satisfy voters who are cynical about officials controlling the redrawing of the districts in which they seek reelection.

A politically independent commission is the best option. It is best positioned to choose unbiased staff (attorneys and mapping consultants) based on merit because it has no personal or political self-interest that it expects the staff to serve. Decisions by an independent commission are more likely to be made on the basis of redistricting criteria alone rather than as a result of political horse-trading over the political effect of any particular change or involving other issues pending at the council.⁶⁶ Moreover, an independent commission is more likely to react responsibly to public comment without first weighing political considerations and to do so openly (instead of trying like a city council to disguise the real reasons for the action). This better positions such a commission to be transparent in its decision-making and to hear witness

⁶⁴ E.g., Florida Constitution, Art. III, Sec. 21. Such attempts at reform "have encountered skepticism because they would leave the institution's (e.g. city council) partisan structure intact." Huefner, *supra*, note 4 at 52.

⁶⁵ See, *In re Senate Joint Resolution of Legislative Apportionment 1176*, 2012 WL 753122 at *9 (Fla.) (March 9, 2012). At least one author has suggested that the objective of redistricting reform is to lessen the role of litigation. Cain, *supra* note 4.

⁶⁶ Self-interest in city council redistricting can affect decision-making in other policy areas. Substantive decisions may languish as office-holders trade votes on important issues in return for another member's support or opposition to a particular redistricting plan or boundary change. In other words, the mere presence of redistricting as an issue before a city council can affect the outcome on local policy issues like the budget, taxes, public health, roads, zoning, economic development, etc. For example, it is claimed that during a redistricting legislative session in Texas the most common response by legislators to any request for a support of substantive legislation (e.g. the budget) favored by the legislative leadership is "First show me the (redistricting) map".. Part of the criticism of the recent redistricting in Los Angeles was that some city council districts were being drawn for specific non-incumbents at the expense of current members of the city council.

testimony and legal advice without the distorting effects of any personal or political agenda.⁶⁷ Therefore, it is not surprising that independent city commissions have generally won public plaudits.⁶⁸

No law journal article that I have found opposes the use of independent commissions at the municipal level. In fact, as seen in Part II, there are more independent commissions currently in use in American cities than at the state level. However, the opponents of the commission in Austin argued that ordinary citizens were naive and ill-equipped to handle redistricting and that an independent commission would be an additional and unnecessary expense for the city.⁶⁹ The success in Austin demonstrated that these arguments need not be correct. Although some critics suggest that “ordinary citizens” lack the same capability as politicians for understanding the complexities of redistricting, my experience in redistricting and the achievements in Austin say otherwise. City council members generally lack any meaningful expertise in redistricting and virtually always seek special assistance from experienced lawyers and mapping experts to help in redistricting. This same expert assistance can be furnished for the same or less cost to a citizen commission. Other costs of the independent commission are similar to those incurred by a city when it uses an advisory commission for conducting hearings and recommending district lines to the city council. Critics simply underestimate the ability of persons on an independent commission to make informed decisions and overestimate the additional costs, if any, that will be incurred by such a commission.

It is also useful, however, to consider why critics have generally opposed independent commissions at the state level. Aside from the general distrust of the capability of the public,⁷⁰ some critics insist that the “pluralist” process of redistricting under influence by a legislative

⁶⁷ Often when presented with an unexpected proposal for changing a tentative plan, a city council is resistant because any change from the tentative plan would reopen the political compromises or accommodations that had made the tentative plan possible. An independent commission should not have this reaction.

⁶⁸ For example, the result in the City of San Diego has been openly applauded, with the commission described in 2011 as “behaving honorably” and the city plan described as “admirable.” George Hawkins, S.D. Commissioners deserve credit for creating fair redistricting map (Dec. 6, 2011) available at www.sddt.com/Commentary/article.cfm?Commentary_ID=206&SourceCode=. In Minneapolis, the proposal for an independent commission was adopted in 2010 because the earlier bipartisan commission (adopted in 1980) “seems to invite partisan influence and cronyism in drawing district lines” and the proposed independent commission is “better insulated from influence by political persons and special interests.” Editorial: Yes to Minneapolis charter question, Minneapolis Star Tribune (October 29, 2010) at <http://www.startribune.com/opinion/editorials/106088578.html?refer=y>. The Minneapolis commission unanimously approved a redistricting plan for the city in 2011 and no legal challenge was filed.

⁶⁹ The Austin commissioners were unpaid. The total cost for operation of the commission, including separate staff, legal counsel and mapping expert was under \$200,000.

⁷⁰ Daniel Lowenstein, of UCLA, attacked the idea of an independent commission in California by arguing “when you try to take a political process and put it in the hands of bureaucrats who are supposed to be non-partisan, it’s a fraud and it’s not going to work.” James Koren, Some Democrats Seek to Roll Back Citizen Control of redistricting, Daily Bulletin (Feb. 17, 2010) available at <http://dailybulletin.com/ci-14421716>. Similar attacks marked the attempt to defeat the effort in Austin to create an independent commission.

body is preferable to redistricting by an “insulated” commission.⁷¹ Professor Justin Levitt urges that the legislature’s discretion in drawing districts is beneficial and should be maintained.⁷² Professor Bruce E. Cain offers some thoughtful analysis of an independent commission at the state level in his recent law journal article, but ultimately concludes that the best reform is through a bipartisan commission in which political parties bargain and compromise.⁷³ However, redistricting reform needs more emphasis on the express requirements of law and charter; not more incentives for partisan compromise or incumbent discretion in the drawing of districts.⁷⁴

Even jurisdictions with independent commissions, however, must be alert to the effort of politicians and others to game the process. It was reported that some Democratic witnesses tried to mislead the California commission.⁷⁵ In San Diego, a city council member suggested that the independent commission track the boundaries of the city’s land-use “community plans” for its election districts.⁷⁶ Members of an independent commission are qualified to identify and to disallow efforts to game the system, but they must be vigilant.

⁷¹ See Kang, *supra*, note 4 at 686 (“Redistricting is an inherently political question that ultimately requires political answers); Cox, *supra*, note 4. See also, Heather Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 *Election Law Journal* 184,185 (2007) (indicating “The solution to the problem of political infection, then, is not to quarantine electoral reform commissions from everyday politics, but to inoculate them”); Note, *A Federal Administrative Approach to Redistricting Reform*, 121 *Harv. L. Rev.* 1842 (2008); and Nathaniel Persily, *supra*, note 4 at 668 (indicating that redistricting by incumbents is the lesser or equal of all evils.) In his recent article, Bruce E. Cain urges that value and interest tradeoffs are “inevitable” and “implicit” in redistricting and that the goal behind proposals to reform redistricting is to “lessen court involvement.” Cain, *supra*, note 4 at 1811. .

⁷² See, Levitt, *supra*, note 4 at 529. Professor Levitt seems to believe that politicians have a special knowledge that allows them to make redistricting decisions based primarily on undisclosed public interest factors. My experience indicates otherwise. Politicians are likely to know the politics of an area better, but an independent commission is more likely to objectively consider and act on facts and public testimony..

⁷³ See, Cain, *supra*, note 4 at 1821-1829. Professor Cain specifically cited the three-person state commission in New Jersey as an example of a satisfactory bipartisan commission. It is ironic that only months later the third and “unaffiliated” member of that commission, Rutgers professor Alan Rosenthal, allegedly was “punished” (the line-item veto of almost \$200,000 for his research projects) by Governor Chris Christie (a Republican) for voting with the Democratic member of the commission for approval of the state’s final redistricting plan.

⁷⁴ This position also avoids the insoluble disputes over whether either partisan or incumbent-protection gerrymandering is a normative good or evil, whether partisan gerrymandering causes polarization among the elected representatives, and whether ideologically “pure” districts give voters a more meaningful choice at the polls. Compare, Issacharoff, *supra*, note 4 at 622-23 with Persily, *supra*, note 4 at 669. See also, Justin Buchler, *The Inevitability of Gerrymandering: Winners and Losers under Alternative Approaches to Redistricting*, 5 *Vill. J. Const. L. & Pol.* 17 (2010).

⁷⁵ See, Olga Pierce and Jeff Larson, *How Democrats Fooled the California Redistricting Commission* (December 21, 2011) available at www.ProPublica.org.

⁷⁶ These plans had been drawn by the city council and the suggestion indirectly put the council back in the election district line-drawing business. The suggestion was dropped amid claims that it ran afoul of the reason that the citizens of San Diego adopted an independent commission and “effectively leaves the fox to guard the chicken coop” . Cory Briggs, *Opinion: Redistricting Commission Risks Lawsuits* (July 13, 2011) available at http://www.voiceofsandiego.org/opinion/article_ae76fa5c-ada8-11e0-9430-001cc4c03286.html.

Part IV

Designing an Independent Redistricting Commission for Cities

For a redistricting commission to be effective both in producing redistricting plans in accordance with the approved criteria and in winning public trust, it must be independent of all of the political self-interests (incumbents, commission members and factions) that affect the integrity of the redistricting process and the final plans. Existing state and city commissions provide examples for how different jurisdictions have tried to achieve this independence.

Methods for Selecting the Members of the Commission. The initial step toward designing an independent commission for a city is to find a truly fair and apolitical means of choosing the members of the commission. If members of a city council or party officials (in cities with partisan elections) have this responsibility, their natural tendency is to select someone who is aligned with the particular incumbent or the incumbent's political faction. As a result, members selected in this matter are more likely to represent the interests of the appointing authority or faction and are less likely to be unbiased in their decisions on the commission.

In an obvious effort to ameliorate this tendency, several states use the presumed impartiality of the judiciary as a means of screening potential members of a bipartisan commission or as a check on the partisanship of these commissions. This alternative deserves attention. Several states⁷⁷ use the judiciary to select a deciding vote and chairman for a commission, especially when the other members of the commission cannot agree on the additional commission member. Arizona also gives the task of assembling pools of potential commission appointees (from which the legislative leaders make their selection) to the state commission on appellate appointments. In other states the state judiciary actually picks some members of the redistricting commission⁷⁸ or is expected to intercede to determine the legality of any redistricting enactment⁷⁹ or if the state commission cannot agree on a redistricting plan.⁸⁰

⁷⁷ These states are Arizona, Hawaii, Montana, New Jersey, Pennsylvania, and Washington. In Arizona's provision if the four members of the Arizona commission named by legislative leaders are unable to agree on a fifth, nonpartisan member to serve as chair of the commission, the choice of this fifth member is made by the state commission on appellate appointments. Arizona Constitution, Part 2, Section 1.

⁷⁸ These states are Alaska, Vermont and Colorado. In 2005, a proposal in California to create a redistricting commission panel consisting of three retired judges failed.

⁷⁹ Altogether 19 state constitutions provide exclusive state court jurisdiction to the state supreme court. In four of these states, the review is automatic. Critics of such provisions suggest that requiring or expediting state court review encourages litigation. See, Cain, *supra*, note 4 at 1837 and 1842.

⁸⁰ For example, in Missouri, a panel of six justices from the state courts of appeal is appointed by the legislature to draw a plan if the state's bipartisan commission fails to do so.

Cities usually lack the authority to include members of the state judiciary in the city's redistricting process. Nevertheless, two of the existing independent city commissions rely on the judiciary to directly or indirectly select those responsible for redistricting city council districts. The city council districts in Minneapolis are drawn by the local Charter Commission. The members of this commission are selected by the chief judge of the local district. However, this route for achieving judicial involvement is not possible by the city alone in most states and depends instead on state involvement.⁸¹ A state law authorizing cities to ask a state judge to appoint an independent commission is an option for redistricting reform. The City of San Diego attempted to use the municipal judiciary.⁸² The possibility of using municipal judges to select commission members was posed in Austin to the members of the organization that advanced the petition and amendment in that city, but viewing the judges (city employees) as too susceptible to influence by the city council, the supporters of the initiative petition decided instead to use the city auditor.⁸³ The means of selecting commission members is essentially the same in California and Austin.⁸⁴ In each, the respective state and city auditors bear responsibility for screening the applicants for the redistricting commissions to eliminate persons who are ineligible or have conflicts of interest according to the applicable criteria. A review panel of independent auditors (certified public accountants) in each jurisdiction⁸⁵ then creates pools of the most qualified applicants (in Austin, a single pool of 60 applicants) from among the screened applicants based in part on the applicants' ability to be impartial and appreciation for the jurisdiction's diverse demographics and geography.⁸⁶ The first eight members of the 14 member independent redistricting commission in each jurisdiction are selected at random from these pools. In other words, no person is directly responsible for the selection or appointment of any of these first eight commissioners. These first eight commissioners then select the additional six commissioners from the persons remaining in the preselected pools to maintain the racial, ethnic, gender and geographic diversity of the redistricting commission.

⁸¹ However, in Tulsa, the city charter provides that a state district judge is to appoint a commission if the authorized city officials fail to timely do so. Tulsa City Charter, Art. VI, Section 10.1.

⁸² However, as indicated earlier, the city subsequently eliminated its municipal court system and was therefore compelled in 2011 to use retired municipal judges to select the members of its redistricting commission. See notes 42-44, *supra*.

⁸³ The organization that obtained the signatures to put the proposition on the ballot is Austinites for Geographic Representation (AGR)

⁸⁴ City of Austin Charter, Chapter II, Section 3, Subsection I.

⁸⁵ These independent auditors too most meet certain eligibility and conflict of interest requirements to assure that the panel and its decisions are apolitical. In both California and Austin this panel is selected at random from eligible applicants.

⁸⁶ In Arizona the state commission of appellate appointments creates pools of potential commission members according to political affiliation. However, unlike the processes in California and Austin, the selection of the first four members of this five member commission in Arizona is made by the state's legislative leaders and is intended to result in two members each from the two major parties.

This indirect method of selecting commissioners now in use in California and Austin has been described by detractors in both locales as “Rube Goldberg-like.” Nevertheless, it worked well in both jurisdictions. However, in California, one Republican member of the commission split with his Republican colleagues and accused the commission of wrong-doing.⁸⁷ In Austin, the commission members worked exceptionally well together and most decisions were made by consensus, including adoption of the final plan.⁸⁸

No means of selecting members of a redistricting commission is foolproof. The alternatives available for selecting commissioners to a city commission are limited and may be different for different cities depending on state law. Some cities may have the option of using the state or city judiciary to select the members of its independent redistricting commission and find this route desirable. Other cities may not without state authorization. However, virtually every city has an auditor that is a certified professional and, by the nature of the office that he or she holds, is more or less independent of the political influence of the city council.⁸⁹ I urge consideration of this officer as a part of the selection process.

Eligibility to Serve on the Commission. Avoiding political influence means limiting membership on a city redistricting commission to competent persons interested in governance but unlikely to be driven by either their own political agenda or one set by politicians. A basic requirement is that a person must be a resident and voter of the city to be eligible for service on the commission.⁹⁰ However, the length of time that he or she must have maintained this status can vary.⁹¹

⁸⁷ One Republican commission member, Michael Ward, voted against each of the commission’s four plans and alleged that the commission “broke the law.” See, John Harbe, Mike Ward: Redistricting Panel Broke Law (May 21, 2012) available at <http://www.calwatchdog.com/2011/08/15/redistricting-commissioner-panel-broke-the-law/>. (The written statement from Mr. Ward is part of this news story). Another Republican Commissioner, Vincent P. Barabba (a former director of the Census Bureau), rejected Ward’s claims and observed “The voters’ experiment with redistricting reform proves that an engaged and enlightened electorate can make a difference. It is my hope that the commission’s work will go a long way in restoring the hope and confidence of the people of California . . .” Vincent P. Barabba, Redistricting Commission Did Its Job and Followed the Law (January 8, 2012) (originally written for the San Jose Mercury News) available at Daily News, <http://lang.yedda.com>.

⁸⁸ Before the Austin commission was selected, rumors circulated about plans by the opponents of the charter amendment to try to “stack” the applicant pool with their own persons and to sabotage the independent commission process. However, the smoothness of the selection process in that city suggests that, if the rumors of attempted sabotage were true, the plans failed.

⁸⁹The City of San Diego utilized the city clerk to publicize the commission selection process and to seek applicants. In Austin, the city auditor took his new responsibility very seriously and acted energetically to secure qualified applicants for the commission and recruited a pool of 15 qualified accountants for the applicant review panel.

⁹⁰ Even in San Francisco, where the nine commissioners are appointed directly by city and county officials, the criteria adopted by those officials in 2011 required that applicants must be a registered voter in San Francisco and have voted at least once in city elections over the preceding five years.

⁹¹ In Austin, a person is eligible for the commission only if he or she has been a registered voter in the city for the preceding five years and has voted in at least three of the past five city general elections. These requirements proved controversial in 2012 because they operated to exclude current city voters who were in areas annexed within the previous five years and because the turnout in the May city general elections had historically been so

Provisions often limit who can serve on the commission.⁹² The most common bar among states is for “public” or “elected” officials.⁹³ Recently enacted provisions in Arizona and California are more detailed both in the breadth of their exclusions and in their effort to assure the bipartisan nature of the commission by requiring that, in order to be eligible, applicants must have been registered with the same party for 3-5 years immediately preceding appointment.

The charter provisions limiting who is allowed to serve on a city’s redistricting commission are even more detailed.⁹⁴ Rather than taking each city separately, I have listed the following criteria for eligibility either utilized today by cities (or adapted from state requirements) to define the qualifications of a person who is eligible to serve on a city redistricting commission⁹⁵:

- A person must be a United States Citizen;
- A person must be a registered voter and have been registered in the city for a specified number of years;
- A person must have voted in a prescribed number of recent city elections;
- A person must have demonstrated an ability to serve with integrity and impartiality;

low that only about 7-10% of the city’s registered voters could meet the voting requirement. This ultimately was not a problem as over 450 eligible persons applied to be on the commission. The city’s elections have been moved to November of even numbered years to correspond with state and national elections. This change means that the number and percentage of eligible voters will likely increase substantially in the future.

⁹² Precedent exists outside this country for similar restrictions on eligibility for a redistricting commission. For example, a person is ineligible for appointment to the United Kingdom Electoral Commission if he or she has held office in a political party, been employed by a political party, or made a sizeable donation to a political party within ten years of the appointment. Political Parties, Elections, and Referendums Act, 2000, c.41, s 3(4).

⁹³ These states include Alaska (Alaska Constitution, Art. VI, Section 8), Arizona (Arizona Constitution, Art IV, Part 2, Section 1), California, Idaho (Idaho Constitution, Art. III, Section 2), Montana (Montana Constitution, Art V, Section 14), Pennsylvania (Pennsylvania Constitution, Art II, Section 17) (requiring that the chairman not be a public official) and Washington (Washington Constitution, Art. II, Section 43). The Colorado Constitution (Art. V, Section 48) caps the number of public officials that may serve on the commission.

⁹⁴ The New York City Charter provides that no city officials or employees, or registered lobbyists or their employees, or elected officials may serve on the commission. City of New York Charter, Chapter 2-A, Section 50, Paragraph 7b1 and Section 52. This same exclusion of lobbyists and city employees is found in the Austin charter.

⁹⁵ Although some form of all of these limits on eligibility now exist at a state or municipal level, it is possible that one or more of these exclusions could be challenged under the First or Fourteenth Amendments to the U.S. Constitution. Federal courts have frowned on such limits when used to define who may vote in federal, state or local elections (E.g. *Kramer v. Union School District*, 395 U.S. 621 [1969]). or be employed by government. On the other hand, courts have recognized that the people have the power generally to prescribe the qualifications of its elected and appointed officers and the manner in which they shall be chosen (*Sugarman v. McDougall*, 413 U.S. 634, 647 [1973]; *Boyd v. Thayer* 143 U.S. 135, 161 [1892]) and that such limits (especially when approved by a vote of the persons in a jurisdiction) “will not be overturned . . . unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people’s] actions were irrational.” *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991), quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

- A person must have a high degree of competency to carry out the responsibilities of the commission;
- A person must have a flexible schedule for attending commission meetings;
- A person must have a general knowledge of the city and its neighborhoods;
- A person is ineligible if he or she is, or has been an elected official, or a candidate for any elected office;
- A person is ineligible if he or she has served as an officer, employee, or paid consultant of a political party or of the campaign committee of a candidate for elective state, county or city office;⁹⁶
- A person is ineligible if he or she is, or has been a state or local registered lobbyist;
- A person is ineligible if he or she is being paid under a contract with the city or is a controlling person of a firm that is operating under a contract with the city;
- A person is ineligible if he or she is, or has been appointed to a city office;
- A person is ineligible if he or she has contributed (or made an independent expenditure) more than a specified amount to or on behalf of a candidate for city office;
- A person is ineligible if any member of his or her immediate family would be ineligible for one of the six reasons immediately preceding this one.

The same requirements apply to both the applicants for the Applicant Review Panel and the commission in Austin. No current city charter requires that a qualified applicant must have been in a political party long enough to assure that he or she is not a “sleeper” from another party, but such a requirement might be appropriate in cities with partisan elections.

In theory, the tougher the criteria for eligibility, the harder the potential task may be for finding persons to serve on a commission. Nevertheless, even where the requirements are most demanding (i.e. Austin), approximately 15 eligible certified public accountants applied to serve on the three person Applicant Review Panel and over 450 eligible persons applied for the 14 member commission.⁹⁷

The Criteria for Selecting Members of a Commission. One common objective for selecting members of a commission is diversity among members of the redistricting

⁹⁶ Interestingly, one of the concerns in Austin was whether the position of election precinct chairman was within this exclusion. The city auditor concluded that precinct chairmen were ineligible. Precinct “committeemen” are similarly ineligible in Arizona, but not in California.

⁹⁷Part of the reason for the success in Austin was the effectiveness of the city auditor in publicizing the selection process and organizations such as the League of Women Voters, Austinites for Geographic Representation, NAACP, and LULAC in running their outreach programs. An effective outreach program is essential for attracting potential applicants, especially those in underserved communities. In California, 4,547 applicants remained after the auditor’s screening process.

commission. Sometimes this is as simple as a general requirement for geographic diversity. On other occasions, however, a requirement for geographic diversity may be very specific.⁹⁸ In some instances a requirement for geographic diversity also serves as an indirect means of furthering the goal of racial and ethnic diversity as long as minority housing patterns are clustered within a city.

Mandating the selection of a city's commission members to assure racial, ethnic and gender diversity also is common. The cities of San Diego, Austin and New York each require such diversity for the commissions in those cities.⁹⁹ The Austin charter is unique in providing that one of the members of the independent redistricting commission must be a student who is duly enrolled in a community college or university in the City of Austin.¹⁰⁰

The most important characteristics for members of an independent commission are competency, impartiality and integrity. The Austin charter requires that the persons selected by the Applicant Review Panel for the pool of potential commissioners shall be the "most qualified applicants on the basis of relevant analytical skills, ability to be impartial, residency in various parts of the City, and appreciation for the City of Austin's diverse demographics and geography."¹⁰¹ The charters in San Diego and Minneapolis also have similar requirements as part of their selection process.

Members of an independent commission should be selected with the objective of having a diverse commission of informed and engaged persons willing to follow only the express criteria and willing to put impartiality above partisan or faction allegiance.¹⁰² The means of selecting the commissioners must be designed to achieve this goal of diversity.

⁹⁸ For example, the state of Colorado requires that at least one of the appointees must reside "west of the continental divide." In New York City, the commission must have at least one person from each borough. In San Jose, the city's advisory commission on redistricting must have one member from each existing council district. In Austin, the commission created in 2013 was required to have at least three members from each of the county's four commissioner precincts. In later decades (once the initial districts are drawn), the commission is required to have at least one member from each of the 10 city council districts.

⁹⁹ A similar requirement was adopted for the 2011 redistricting in San Francisco.

¹⁰⁰ Austin is the home of several colleges and universities, including the main campus of the University of Texas. This special provision for a student member of the commission recognizes that student voters are important to city elections and that without such a guaranteed place on the commission most students would be ineligible because few have been registered voters in Austin for five years or have voted in three of the past five city elections.

¹⁰¹ City of Austin Charter, Chapter II, Section 3, Subsection I(6). A similar requirement exists for the persons selected in Arizona and for the three pools of applicants in California.

¹⁰² The recent redistricting in Austin yielded several unexpected results. The members of the commission demonstrated a range of skills generally not found among members of a city council or not commonly used by them as members of the council. Members of the commission personally designed the commission's website, prepared many of the various materials shown on the website, and generally performed tasks that might have been assigned by a city council to its staff. Each member of the commission contributed to the united effort. Whether this effort was because of a unity of purpose, or a unique result of this particular commission's membership and leadership, is unclear. I like to believe that this result is a natural outgrowth of the independent commission process and can be replicated anywhere that smart, conscientious, unbiased persons are willing to serve on an independent redistricting commission.

Participation by the City Council. It is appropriate to consider the extent that city council input is limited and formalized. Although it is essential that the members of the commission must not be embroiled in city politics, some formal role for members of the city council may be appropriate. The Austin charter provides one alternative; each member of the city council is entitled to eliminate one person (a total of seven persons in 2013) from the pool of 60 applicants selected by the Applicant Review Panel. The council has only five days in which to exercise this option so that it cannot become a drawn-out political process.¹⁰³ In 2013, no member of the Austin city council exercised this right.

Although some limited role for the city council may be appropriate, it should not be able to affect the selection process. In Austin, the members of the Applicant Review Panel may “not communicate directly or indirectly with any elected member of the Austin City Council, or their representatives, about any matter related to the nomination process or any applicant prior to the presentation by the panel of the pool of recommended applicants to the council of the City of Austin.” A similar provision exists for the California commission.¹⁰⁴ However, most city charter and state redistricting provisions are silent on the issue of communications between the city council and the persons responsible for the selection process.

Once the commission is selected, the issue becomes the extent to which communications should be allowed with commissioners and commission staff outside of a public hearing. Most city charter and constitutional provisions are silent on this point. This issue is discussed further under transparency below.

Selecting the Commission Staff. Essentially every large local government using single-member districts (and many small ones) hires expert staff to assist during the decennial redistricting process. Legal counsel and mapping consultants hired by a city council to help on redistricting are part of the reason for incumbent and faction self-interest permeating a city’s final plan.

The competition among legal counsel and mapping experts for this work is intense at the city level. In some instances the hiring decision may actually be determined by the degree of allegiance owed by the legal counsel or redistricting expert to a member of the city council or its controlling political faction. However, even when the hiring decision is not driven by such obvious political interests, a legal counsel or redistricting expert is unlikely to be hired if he or she is not perceived by the incumbent officials as sensitive to the interests of those officials. As a result, these redistricting experts allow or even nurture incumbent self-interest by emphasizing that political considerations in redistricting alone do not violate the law¹⁰⁵ and

¹⁰³ A similar provision for the state of California allows leaders of the legislature (each party) to eliminate a total of eight persons from the subpools of qualified applicants before the initial members of the commission are selected by random from those subpools.

¹⁰⁴ California Government Code, Sec. 8252.

¹⁰⁵ E.g. LULAC v. Perry, 548 U.S.399 (2006).

that the city council can legitimately approve districts to preserve “the core of existing districts,” “continuing representation” or “member-constituent relations” (legalize for avoiding the pairing of incumbents and keeping districts intact to the extent legally possible).¹⁰⁶ Future business opportunities for the legal counsel and mapping expert with this same or another jurisdiction may depend on satisfying the city’s incumbents.

Legal counsel and mapping experts for a commission do not confront these same pressures and are better positioned to give assistance that is not skewed by their own self-interest considerations.

Although a city redistricting commission has a limited existence and ceases to function (if not to exist)¹⁰⁷ once a redistricting plan is final and in effect, it needs a staff for the period in which it is active. The charter provisions for an autonomous commission should require that the city council fund the commission and its staff. Such a provision is essential to assure the independence of the commission. The costs of the commission’s staff and operation (including multiple public hearings, correspondence, expert legal counsel, etc.) can be significant.¹⁰⁸ Nevertheless, it is essential that the charter provision creating an independent commission mandate the adequate funding of the commission during the time it draws the districting plan and defends that plan in subsequent litigation, if any.

A commission’s staff should be experienced in redistricting, unbiased and otherwise qualified.¹⁰⁹ Sometimes it may be difficult to distinguish between real expertise and puffery.¹¹⁰ The most difficult task for the commission is making objective decisions based on public testimony. A commission’s staff must be committed to assisting the commission in this task not acting to enhance its own reputation or to achieve its own goals.¹¹¹ Requiring staff decisions to be made only by an extraordinary majority of the commission is one option.¹¹²

¹⁰⁶ Even if an expert does not provide past election results or forecast future election outcomes in proposed districts directly to the incumbent city council members, he or she is generally conscious of the incumbents obtaining and using such data from other sources.

¹⁰⁷ It is possible that redistricting may become necessary later in a decade because of court rulings or annexations. Thus, it is necessary for the commission to continue to exist after agreeing to a final decennial redistricting plan. However, commissioners usually are unpaid and inactive during the decade.

¹⁰⁸ At the same time, it should be remembered that most of these costs are ones that the city council would incur if it were responsible for redistricting. Thus, the cost to a city is not necessarily greater for redistricting through an independent commission than through a city council, especially if the city council uses an advisory commission and expert counsel to assist it in redistricting.

¹⁰⁹ In 2011, both the independent commissions for San Diego and the State of California specifically recommended that future commissions should make a point of hiring expert Voting Rights Act counsel early in the redistricting process. Such expertise is critical for preparation of maps that comply with federal law. The lack of bias is even more important.

¹¹⁰ For example, the simple task of using available software to prepare maps can give an illusion of skill at redistricting when, in reality, an equally populated redistricting plan for a city can be generated with today’s technology in a matter of minutes by anyone with a simple understanding of the technology.

¹¹¹ Significant controversy surrounded the selection of staff for the California commission in 2011. Some Republicans claimed that the staff was biased toward the Democratic Party. A similar controversy struck Tulsa when Democrats claimed that the staff was biased toward the Republican Party. See, *supra*, notes 40 and 41. In

However, dependency on outside consultants for redistricting may lessen by 2012. As recognized recently by the Florida Supreme Court,¹¹³ technology now makes it possible for a court to assess redistricting plans on the basis of actual data rather than on the basis of data filtered through findings of fact or an expert witness. The same is true of a redistricting commission. Technology may make the redistricting consultant less important or even obsolete by 2021; at least it may be hoped to lessen the need for consultants selected for their political prowess.

Restrictions on the Commission Members after Serving. To prevent the influence of politics on the decision-making of the commission, it is also critical to restrict what a member can do after serving on the redistricting commission.¹¹⁴ Several states¹¹⁵ and cities¹¹⁶ impose such limitations.

Any such limitation on the future activities of a member of the commission is also likely to discourage a person with political ambitions from applying to serve on the commission. If a person thinks that he or she might want to be a candidate in the future, he or she is unlikely to risk serving on the commission. At the same time, it can be expected that current office-holders and prospective candidates will closely follow the commission's map drawing process with an eye as to how it affects their political future.

2011, the San Diego commission claimed with pride that it “took care to avoid hiring any individual too closely tied to local political parties, political officials or organizations.” See Letter from the 2011 Redistricting Commission to the 2020 Redistricting Commission Re: Recommendations for 2010 Redistricting Commission 5 (October 25, 2011). Aside from its redistricting consultants and special legal counsel, San Diego relied heavily on city employees for its staffing. This dependency on city employees raised its own potential problem, but apparently worked well for the San Diego commission. Use of city employees often saves money, but creates the potential of city council influence indirectly through those employees if they affect the preparation of maps or policy decisions. Using city employees for administrative roles does not seem to raise the same issues.

¹¹² The charter of San Diego requires that the commission staff may be hired only with the affirmative vote of five of the seven commissioners.

¹¹³ See, In re Senate Joint Resolution of Legislative Apportionment 1176, 2012 WL 753122 at *9 (Fla.) (March 9, 2012).

¹¹⁴ Such restrictions avoid allowing a member of the commission to use redistricting to further his or her own political ambitions or to be tempted with promises from affected politicians or political groups.

¹¹⁵ For example, In Missouri, the members of the state's redistricting commissions are prohibited thereafter for four years from serving in the state assembly. Similar limits on future office exist in Hawaii and Montana. The California Constitution makes a redistricting commission member ineligible for five years to be a candidate for elected office, or to serve as paid staff or a paid consultant for a party or office-holder, or to register as a lobbyist.

¹¹⁶ In Austin, a person who serves on the commission is ineligible for a period of ten years from seeking election to the city council and for a period of three years from holding appointive public office for the City of Austin, to serve as paid staff for or as a paid consultant to the City of Austin, the city council of the City of Austin or any member of the city council of the City of Austin, or to receive a non-competitively bid contract with the City of Austin. In San Diego the charter prohibits a member of the commission from seeking city public office for five years.

Legal Criteria Used in City Redistricting. The legal criteria for drawing city council districts are expressed in state or federal law; others are expressed in the city charter. These expressed criteria are the only legitimate ones for determining how districts should be drawn.¹¹⁷ They vary by jurisdiction and change with time. There is not, however, any normative interest in redistricting that somehow establishes an ideal objective.¹¹⁸

The nearest to a normative public interest for redistricting existing in this nation is the principle that election districts must be drawn on the basis of “one person, one vote.”¹¹⁹ However, this policy was ignored for decades by state and local governments.¹²⁰ Even today, no other nation adheres to or enforces this policy as strongly as the United States. Some countries ignore it completely. Although it is difficult to imagine that the U.S. federal courts will ever back away from this principle, it remains under challenge as courts wrestle with the issue

¹¹⁷ The public interest for each city should be determined strictly by reference to the express criteria applicable to that city. Although I believe that these criteria should be objectively verifiable, the key for the legitimacy of criteria imposed by the city charter is approval by the voters of the city. Even gerrymandering for the benefit of incumbents or to achieve some specific policy goal, such as those espoused by various political scientists, is in the public interest and legitimate for redistricting if adopted as law or approved by the voters of a city as redistricting criteria. If not so approved, those interests and goals have no proper role in the process. This position also avoids the insoluble disputes over whether either partisan or incumbent-protection gerrymandering is good or evil, whether partisan gerrymandering causes polarization among the elected representatives, and whether ideologically “pure” districts give voters a more meaningful choice at the polls. Compare, Issacharoff, *supra*, note 2 at 622-23 with Persily, *supra*, note 4 at 669. See also, Justin Buchler, *The Inevitability of Gerrymandering: Winners and Losers under Alternative Approaches to Redistricting*, 5 *Vill. J. Const. L. & Pol.* 17 (2010).

¹¹⁸ Political scientists are fond of conjecturing about how other policies (such as “political fairness,” or “proportionality,” or “competitiveness”) should be a goal in redistricting even if not expressly required by law. However, accepting goals other than those expressed in the applicable law merely opens the door for other subjective aims by welcoming “good” gerrymandering or district engineering and have no meaning except through the biased prism of ideological and political self-interest. The recognition of any such goal necessarily means that other competing subjective goals are also potentially allowed as long as they come with a cloak of “public interest.” There is the possibility of dueling experts during the redistricting process or later in court offering very different views as to which policy goals are important and differing interpretations of the same policy. This possibility holds no allure for anyone who must actually implement the policies during redistricting or defend the redistricting plans in court. No city charter that I examined for this article embodied these goals as criteria for a city redistricting. There may be some public good to be realized if a redistricting results in a plan that in someone’s view is fair, proportional, and has competitive districts, but only if these results are gained through redistricting on the basis of express criteria. If a final plan has these characteristics, this is a worthwhile effect, not a practical goal of proper redistricting.

¹¹⁹ It was only with the Supreme Court’s interpretation of the United States Constitution to require election districts of equal population that this policy became fundamental in this nation. See, e.g.: *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 376 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968).

¹²⁰ Neither state legislatures nor local governing boards have a good record of abiding by the express provisions governing redistricting. Despite the presence of such provisions requiring periodic redistricting or reapportionment, most state and local governments in this country went decades in the early 20th Century without doing so. Once confronted by a court-enforced standard of “one person, one vote,” many jurisdictions dragged their collective feet. Even today many local governments, especially school districts, fail to timely redistrict and avoid doing so until forced by litigation. See *Redistricting Scofflaws Among Us* available at <http://www.redistrictingonline.org/proscofflaw031113.html>.

of whether the principle requires election districts with an equal number of persons or an equal number of voters.¹²¹

A second set of noteworthy principles also has its origin at the federal level. The courts have found that the U.S. Constitution prohibits redistricting schemes that create racial gerrymanders¹²² or are invidiously discriminatory¹²³. At the same time, Section 2 of the Voting Rights Act of 1965 imposes legal constraints on the result of redistricting plans for minority voters covered by the Act.¹²⁴ As important as these principles are for redistricting in U.S. cities today, they are not recognized worldwide and, even in this country, the possibility of a change in the Voting Rights Act became very real with the decision of the United States Supreme Court in *Shelby County v. Holder*¹²⁵.

Amazingly, many of the cities that leave redistricting to the city council have very few or no criteria expressed in their charter for how the districts are to be drawn.¹²⁶ By contrast, the charters of cities that require commissions generally also have criteria for how the districts are to be drawn.

The most common requirements are for districts to be compact, contiguous and approximately equal in population.¹²⁷ These requirements are recognized as generally being aimed both at benefiting the voter and at preventing gerrymanders.¹²⁸ However, cities may provide very specific requirements based on the circumstances of the particular jurisdiction¹²⁹

¹²¹ See, Bob Heath, *The Impact of Noncitizens on Voting Rights Issues* (Ch. Two of *America Votes 2012*). The case of *Lepak v. City of Irving*, 2011 WL 6217946 (5th Cir. 2011) raises this issue and at the present time the plaintiffs' petition for writ of cert. is pending before the United States Supreme Court.,

¹²² *Shaw v. Reno*, 509 U.S. 639 (1993).

¹²³ *White v. Regester*, 412 U.S. 755 (1973).

¹²⁴ 42 U.S.C. Sections 1973 et. seq.; see *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Georgia v. Ashcroft*, 539 U.S. 461.(2003).

¹²⁵ 570 U.S. ____ (2013). The Supreme Court effectively made Section 5 of the Act inoperable by striking down the provisions of Section 4 that determined the jurisdictions covered by the preclearance requirement. Section 5 of the Voting Rights Act was always temporary. It was last extended by Congress for 25 years in 2006. In the future, Congress certainly could repeal the entirety of the Act.

¹²⁶ However, the city council often adopts criteria at the beginning of a redistricting process. However, these are subject to change by the council, are often designed in the first place to permit the self-interested result assumed by the council, and leave the city council free to use its discretion in interpreting the criteria and designing the districts. Most state constitutions have criteria to be followed in drawing state legislative districts. See, e.g. Huefner, *supra* note 2; Justin Levitt, *A Citizens Guide to Redistricting* (Brennan Center for Justice, [2010]).

¹²⁷ E.g. *San Diego City Charter*, Art. II, Sec. 5.1; *Tulsa City Charter*, Art. VI, Sec. 10.5. Traditional or neutral redistricting criteria, such as contiguity and compactness, are not legally required by the U.S. Constitution or federal law. *Shaw v. Reno*, 509 U.S. 639, 647 (1993); *Gaffney v. Cummings* 412 U.S.735, 752n.18 (1973).

¹²⁸ See, *Pearson v Koster*, 359 SW3d 35, 38 (Mo, 2012) (Indicating that the purpose of a provision requiring that districts be contiguous, compact, and nearly equal in population is "to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as 'gerrymander.'")

¹²⁹ For example, the city charters in New York and Minneapolis require that a district must be no more than twice as long as it is wide. The New York charter also specifies that whenever a part of a district is separated from the rest of the district by a body of water, there must be a connection by a bridge, a tunnel, a tramway or by regular ferry service between the parts of the district. The Austin charter requires that nearby areas of population cannot be bypassed for more distant population. The Minneapolis charter specifies that "boundary lines shall follow the

City charters also often provide for the recognition of political subdivisions or boundaries within the city.¹³⁰ A common requirement at the city level is that to the extent possible the districts should be built using existing election precincts.¹³¹ These criteria are sometimes at odds. As a result, it is useful if the charter establishes a hierarchy of these criteria to make clear which criteria is more important when a conflict exists.¹³²

Under the traditional redistricting process, the city council member must constantly weigh what is good for his or her political future against what is required by the federal or state law, or the city charter, or sought by public testimony.¹³³ In this balancing act, the council member's self-interest has an advantage. Courts defer to redistricting plans enacted by a state legislature or local governing body because, as with any legislation enacted by such an elected body, the enactment is presumed to be constitutional and embedded with public policy decisions made by the public's elected representatives.¹³⁴ The judicial inquiry into the legality of a legislature or governing board's redistricting plan starts and stops with whether the plan violates any specific legal constraint.¹³⁵ The presence in a redistricting plan of an officeholder's personal and political self-interest is not a basis for holding a redistricting plan

centerline of streets, avenues, alleys and boulevards and as nearly as practicable, shall run due East and West or North and South." Other charters specify that the district boundaries should maintain the integrity of neighborhoods and communities of interest, while also attempting to prevent abuse of this criteria by requiring that the areas have "established ties of common interest and association" or expressly preventing "relationships with political parties, incumbents, or political candidates" being classified as communities of interest.

¹³⁰ For example, the City of New York acknowledges that achieving a plan with an acceptable population deviation may require the drawing of districts that cut some borough boundaries, but provides that "If any district includes territory in two boroughs, then no other district may also include territory from the same two boroughs." City Of New York Charter, Chapter 2A, Section 50.

¹³¹ This requirement serves both administrative purposes and prevents racial gerrymandering through the use of census blocks.

¹³² Federal requirements as set by the U.S. Constitution and federal law always take precedence over any requirement set by a city charter. Sometimes these same requirements are expressly recognized and particularized in the city charter. For example, the San Francisco charter provides "Population variations between districts should be limited to 1 percent from the statistical mean unless additional variations, limited to 5 percent of the statistical mean, are necessary to prevent dividing or diluting the voting power of minorities and/or to keep recognized neighborhoods intact." San Francisco Charter Sec. 13.110 (d).

¹³³ Some writers suggest that it should be perfectly acceptable for incumbents to use redistricting for their own self-interest so long as the final redistricting plan does not violate the law. A reviewer of this article for the Election Law Journal took this position. I disagree with this perspective because in the past I have seen how personal and political self-interest can overcome public testimony and affect line-drawing in ways that are not immediately obvious on the face of a final map or subject to successful litigation. Another writer has urged that a "gerrymander" does not exist when district lines are manipulated to advance policy preferences. See, Huefner, *supra*, note 4 at 61n.102. This is a dangerous exception. Local factions usually coalesce around a policy, such as environmental protection or no new taxes. It is difficult to distinguish gerrymanders designed to advance such policies (e.g. protect an incumbent that votes consistent with the policy) from other disfavored line manipulations.

¹³⁴ See, *Perry v. Perez*, ___ U.S. ___, 132 S.Ct. 934, 941 (per curiam, 2012).

¹³⁵ See, *In re Senate Joint Resolution of Legislative Apportionment 1176*, 2012 WL 753122 at *9 (Fla.) (March 9, 2012).

invalid.¹³⁶ As a result of these presumptions, it is relatively easy to disguise a lawmaker's self-interest with some vague and imagined public interest when determining that interest is left to the same lawmaker's discretion.

On the other hand, autonomous redistricting commissions are not elected and their redistricting plans do not necessarily enjoy the same presumptions of validity or public interest that accompany a plan enacted by a legislature or city council. This can be seen as a practical matter in many of the recent court decisions striking down state bipartisan commission plans.¹³⁷ The Supreme Court of Pennsylvania expressly held that, unlike a state legislature's redistricting plan, the state's commission plan was not entitled to presumptions of validity.¹³⁸ It is reasonable to assume that a city redistricting plan too must adhere more closely to the express criteria set by federal and state law and the city charter than one enacted by the city council. If this is true, personal and political self-interests cannot so easily be disguised within other imagined public interests as can occur in a plan drawn by the city council.

Several charters or state constitutions expressly prohibit a redistricting plan being drawn to advantage or protect an incumbent. The Austin charter goes beyond an incumbent by prohibiting districts being drawn to favor or discriminate against any candidate, incumbent, or political group. A common means of furthering this goal is to also prohibit the consideration of certain data, such as incumbent residences.¹³⁹ An independent commission is an effective means of dealing with the exclusion of election data and incumbent residences because the commission members and have no personal use for such data.¹⁴⁰

Achieving Transparency in Decision-making. Historically, openness and transparency in redistricting decisions by a city council has meant little more than a routine of public hearings, with formal votes occurring in public. Testimony at these public redistricting hearings is often

¹³⁶ In *Davis v. Bandemer*, 478 U.S. 109 (1986), a majority of the United States Supreme Court found that partisan gerrymandering is justiciable in federal courts, but a failure of the members of the Court to agree on the standards of such a cause of action have prevented even a single successful federal lawsuit. See *LULAC v. Perry*, *supra*, note 105 at 413-423; *Gaffney v. Cummings*, *supra*, note 127 (Upholding a plan that created safe seats based on a theory of partisan fairness).

¹³⁷ See cases, *supra* note 53.

¹³⁸ *Holt v. 2011 Legislative Reapportionment Commission*, 2012 WL 360584 (Pa, January 25, 2012).

¹³⁹ For example, Iowa law prohibits the use of addresses of incumbent legislators or members of Congress, political affiliations of registered voters, previous election results, or demographic information, other than population head counts, except as required by the Constitution and the laws of the United States. Similar exclusions of data from consideration can be found in four other states, including California, and Austin.

¹⁴⁰ It is unwise, however, to attempt to prevent all use of election data. A determination of the functional effect of any proposed redistricting plan on racial and ethnic minorities protected under the Voting Rights Act may require an analysis of voter cohesion, the degree of racial polarization in past elections, and the ability in a redistricting plan of racial and language minority voters to elect the person of their choice. Such a functional analysis depends on the examination of endogenous and exogenous election results.

parochial or orchestrated by the political parties or factions¹⁴¹ and has little effect on the final plan. Although the city council's final votes occur in public, the final plan has generally been crafted out of sight and with attention to the political compromises necessary to secure the votes needed for final adoption.

As a result, most residents remain apathetic throughout redistricting by politicians. Many see the hearings as a charade and accept that a city council ultimately will do whatever a majority of the council wants to do (and the private lobbying permits) regardless of the testimony in the hearings. They believe cynically that if the public testimony coincides with an incumbent's self-interests, the incumbent will see it as good; if not, then some "public interest" can be imagined by the council members to explain the outcome when the final redistricting plan fails to incorporate the result suggested by the public testimony.

An essential starting point for achieving transparency in decision-making is preventing non-public communications about redistricting with the members and staff of the commission.¹⁴² In an effort to prevent private one-on-one lobbying, California and Austin forbid any member of the commission or its staff communicating "with or receiv[ing] communications about redistricting matters from anyone outside of a public hearing."¹⁴³ This prohibition applies to the members of the city council.

Technology has dramatically increased the opportunity for transparency and for public participation in the redistricting process.¹⁴⁴ A basic tool for an independent commission is the commission website. Essentially all city redistricting commissions in the 2011-2012 redistricting cycle had a website through which basic information¹⁴⁵ was available. However, the

¹⁴¹ See, e.g. Cain, *supra*, note 4 at 1840; Steve Bickerstaff, *Lines in the Sand* at 130 (University of Texas Press 2007).

¹⁴² Private communications provide a means of influencing the commission without an opportunity for the public to know what has been said, to know who is saying it, and, if appropriate, to counter the representations made in private. Such communications may contain inaccurate or inappropriate information that, if presented in public, can be refuted.

¹⁴³ On its face and in combination with the constraints of a public hearing, this prohibition is overbroad and, if strictly enforced, could infringe on the constitutional right of a person to petition his or her government. However, the California and Austin provisions also expressly anticipate written comments. The Austin independent commission encouraged both oral testimony and written comments. The oral testimony was recorded and televised. Written comments were required to be submitted to the commission through the commission's executive director or on the commission's website and Facebook page. Written comments received by the executive director were then posted on the commission's website. Thus, persons were able to communicate with the commission through these written comments, but the comments were public even though not always submitted in a public hearing.

¹⁴⁴ The basics are the same for a city council and an independent commission, such as timely notifying the public of upcoming meetings, the agenda for these meetings and the results of the meetings. It is even possible to video record these meetings, to broadcast such meetings on television, and to permit persons to participate through video-conferencing or Skype. However, these technological advancements have made a mere requirement for open meetings outdated.

¹⁴⁵ E.g. the purpose of the commission, scheduled meetings, the identity of members of the commission, the by-laws of the commission, criteria for redistricting, official redistricting plans, commissioner and staff biographies, etc. Michael Halberstam has suggested that the states establish a redistricting clearing house to maintain

independent commission in Austin went further.¹⁴⁶ Moreover, instead of voting on different redistricting plans as proposed by its members, the Austin commission in open meeting (video recorded and televised) went about assigning each city election precinct one-by-one to a district.¹⁴⁷ At least two additional possibilities for public participation exist today, but were not used in Austin.¹⁴⁸ By the next time redistricting is certain to come around again (2021), technology may allow for even greater public awareness and participation. This technology should be fully utilized.

Of equal or greater importance than mere public participation is the opportunity for the public to react meaningfully to a commission's proposed process and draft plans¹⁴⁹ and the ability of the commission to respond to public comments.¹⁵⁰ Such an opportunity must be

information for local redistricting. A statewide website to advise the public about local meetings and actions seems ripe for misinformation. On the other hand, a state depository (accessible over the Internet) containing standardized materials on redistricting could be helpful, but costly. An independent commission can obtain such information with relative ease (at least in Texas) through its staff and other sources.

¹⁴⁶ The Austin commission's website was designed by one of the commissioners (Ms. Rachel Farris) and:

- Allowed the members of the public to sign-up for e-mails about commission activities;
- Made Census data available so that a member of the public could construct maps and know the demographics of the districts in the map;
- Showed each map submitted by a member of the public at the commission's hearings (after the commission's mapping expert had converted the map to GIS format);
- Showed the commission's plans in a GIS format that permitted members of the public to zoom into the map to observe the plans at the census block level;
- Showed the commission's plans based on election precincts and the demographics for each district;
- Allowed access to the commission's Facebook page (with a record of "likes"); and
- Showed public comment to the commission on the redistricting process and maps.

Some of these characteristics of the website came directly as responses to public comment.

¹⁴⁷ It did so in two meetings over two days (approximately 14 hours) after having heard testimony in 16 public hearings about which precincts and areas constituted neighborhoods and communities of interest. Each precinct was assigned essentially by consensus after any commission member could propose or oppose the assignment of any specific precinct and after the commission's mapping expert showed the demographic effects of each assignment on a large screen visible to the commissioners and the public. I have never in 38 years seen such a transparent redistricting process. At the conclusion of the two days, the commission unanimously approved the product of this process as its preliminary plan. The audience applauded. A similar process was followed three weeks later when the commission made changes to this preliminary plan based on public comments received in the interim.

¹⁴⁸ It is possible to facilitate access by the general public to the commission's GIS system so that members of the general public may actually use commission computers to design and build redistricting plans themselves. Another possibility is for a commission to have a mapping consultant at each public hearing to show witnesses the effect of their proposals and that the witness's wishes cannot be considered in isolation. The Austin Commission essentially ran out of time and could not implement either possibility.

¹⁴⁹ Several organizations thanked the California commission in writing for its willingness to change the process in response to public input.

¹⁵⁰ The Austin commission was required to hold public hearings (at least 16) throughout the city before releasing its preliminary map, to hold additional hearings (at least four) throughout the city on this preliminary plan, and to hold at least two further hearings after release of its final plan and before final adoption. It was clear on several occasions that the Austin commission responded to public testimony with changes in its preliminary maps. Testimony by the NAACP resulted in the addition of a precinct to the black opportunity district even though the precinct contained the residence of the chair of the commission. Moreover, the commission redrew its maps after

provided many times through the repeated dissemination of maps, online and by print, as the maps are changed in response to public comment.¹⁵¹

Drawing election districts with equal population is a zero sum process. No plan pleases absolutely everyone. Under such circumstances, making the process fair, and the decision-maker responsive to public comment is as critical to winning trust from a skeptical public or activist organization as the specifics of the final plan itself. An independent commission, a transparent redistricting process, responsive decision-making¹⁵² and the smart use of technology make this possible.

Conclusion

The voters of this country are increasingly skeptical and discouraged about a political system that seems trapped in a mindless gridlock between the two major political parties. The largest plurality of voters now denies affiliation with either of these two parties. Yet, when redistricting scholars write about reform, they generally focus on how best to achieve political “fairness” between the Democrats and Republicans. This is a narrow and wrong-headed view that inspires gridlock and only further entrenches these two parties and their affiliated incumbents. Redistricting should be a periodic process that changes the boundaries of voting districts to reflect population changes and does so in accordance with express requirements that define the public interest. Nothing more! No political party or faction, individual or incumbent should be allowed to use the process to further their own self-interest.

Critics of an independent commission urge that only politicians and their partisan supporters know how best to redistrict. History has shown otherwise. Entrusting redistricting to the politicians elected from those districts, or their surrogate commissions, creates an obvious conflict of interest and has been a mistake. A politically independent commission

an outpouring of testimony on behalf of several neighborhoods that wanted to remain intact. Several organizations thanked the California commission in writing for its willingness to change the process in response to public input.

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¹⁵² One of the greatest assets of an independent commission is its ability to react responsibly to public comment without first weighing political considerations.

provides the best hope for protecting the public interest and eliminating or controlling the influence of such self-interest in redistricting.¹⁵³

Just as existing charters vary widely, each city must feel free to design its own provision for an independent redistricting commission based on local circumstances. Existing provisions only provide examples. It is critical, however, that any selection of wording from among the many options be guided by the primary objectives of making the commission independent of all self-serving personal and political interests and giving voters confidence in the fairness of the process.

¹⁵³ City councils have been reluctant to give up authority over redistricting. The changes in San Diego and Minneapolis came only after intense public and media campaigns aimed at eliminating political self-interest and “cronyism” from the redistricting process. Sometimes, when available, voters must effectively cut a self-interested city council out of the approval process through initiative and referendum amendment of the city charter as happened in Austin. This alternative must remain as a viable option for change. In Austin, Texas, provisions for the city’s independent redistricting commission were submitted to the voters in 2012 through an initiative petition after supporters of single-member districts and the commission idea lost confidence in the Austin city council acting on its own to do so. Some members of the Austin city council openly opposed this initiative and charter change. In California, the independent commission was created through a voter initiative only after its supporters had tried unsuccessfully for three years to win legislative approval of a constitutional amendment creating such a commission. Many members of the California legislature opposed adoption of the amendment in the 2008 election. See *Gerrymander: The Movie* (2010).