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MAPPING THE TREASURE STATE: WHAT STATES CAN LEARN FROM REDISTRICTING IN MONTANA

Caitlin Boland Aarab & The Honorable Jim Regnier*

I. INTRODUCTION

In 1963 the United States Supreme Court declared our “conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”¹ But surely “political equality” means more than that. Surely “political equality” also means equal access to the ballot box, protection of minority voting rights, competitive elections, and representation based on more than a mathematical formula. In fact, “political equality” means all of these things, as evidenced by the fact that every ten years each of the fifty states must undertake the monumental task of redrawing congressional and legislative district lines. The process of redrawing these lines is monumental because the lines not only must account for proportional representation—the “one person, one vote” ideal—but should also factor in geographic and political boundaries, minority voting rights, communities of interests, and the potential self-interest that may motivate those drawing the lines. Because of the interests at stake and the constitutional implications of redistricting, the body tasked by each state to carry out this duty wields a tremendous amount of power. Each state faces unique redistricting challenges, but this article argues that Montana’s method of redistricting is quantitatively and qualitatively successful and can serve as a model for other states. Montana’s latest redistricting effort is worth emulating because it nearly achieved the “one person, one vote” ideal, it was widely regarded as legitimate and bipartisan, and it resulted in competitive elections in 2014.

Section II of this article provides an overview of the constitutional requirements of redistricting and the processes available to states for carry-

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Justice Jim Regnier is a graduate of Marquette University and has been honored as a distinguished law graduate of the University of Illinois College of Law. Justice Regnier practiced law in Montana until he was elected to the Montana Supreme Court in November of 1996. He served one term on the Court and retired in January of 2005. Since retiring from the Court, Justice Regnier has mediated complex civil disputes throughout Montana and taught products liability as an adjunct professor at the University of Montana School of Law. In 2009, Justice Regnier served as an international election observer for the presidential elections in El Salvador. That same year, he was appointed by the Montana Supreme Court to serve as Presiding Officer of the Montana Districting and Apportionment Commission.

1. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

ing out this constitutional duty. Section III briefly summarizes the history and process of redistricting in Montana, with an emphasis on the 1972 Constitutional Convention and the delegates' reasons for implementing a redistricting commission. Section IV discusses Montana's 2010 redistricting commission, the goals of the commission, the challenges facing the commission, and the processes it implemented to effectuate its constitutional duties. Section V analyzes the quantitative and qualitative successes of Montana's redistricting method. Section VI concludes the article by suggesting that Montana's experience with redistricting following the 2010 census can and should be used as a blueprint for success in other states.

II. REDISTRICTING: A CONSTITUTIONAL DUTY

Striving for the "one person, one vote" ideal is a constitutional duty. Article I, section 2 of the United States Constitution requires "[t]he House of Representatives [to] be composed of Members chosen every second Year by the People of the several States."² The United States Supreme Court interpreted this constitutional mandate in *Wesberry v. Sanders*³ to mean "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."⁴ Four months later, in *Reynolds v. Simms*,⁵ the Supreme Court reaffirmed its "one person, one vote" holding from *Wesberry*: "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."⁶ In order to implement this "one person, one vote" ideal, the United States Constitution requires that the national population be determined every ten years for the purpose of equitably apportioning Congressional representation.⁷ The Fourteenth Amendment eliminated the infamous "three-fifths clause" and now states: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State."⁸ Congress delegated the administration of the national census to the Department of Commerce's Bureau of the Census.⁹ The Secretary of Commerce reports the census results to the "officers or public bodies having initial responsibility for the legisla-

2. U.S. Const. art I, § 2, cl. 1.

3. 376 U.S. 1 (1964).

4. *Id.* at 7-8.

5. 377 U.S. 533 (1964).

6. *Id.* at 560-561.

7. U.S. Const. art. I, § 2, cl. 3.

8. *Id.* at amend. XIV, § 2.

9. National Conference of State Legislatures, *Redistricting Law 2010*, at 8 (Nat'l Conf. of St. Legis. 2009) (citing 13 U.S.C. § 141(a), (b) (2006)).

tive apportionment or districting of each State.”¹⁰ Once every decade, states must redraw their legislative and congressional districts using the latest census as a guide.¹¹ The “overriding objective [of redistricting] must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.”¹² Each state has adopted redistricting principles to guide its discharge of this constitutional duty.

States redraw congressional and legislative districts under the authority of a legislative body, a nonlegislative commission, or a combination of the two.¹³ Legislator-led redistricting is widely viewed as deeply political, intensely partisan, and fundamentally undemocratic,¹⁴ but practitioners and scholars disagree about the merits of nonlegislative redistricting commissions. “The conventional wisdom is that [legislator-led] redistricting is an evil in which partisan elites and elected officials erode popular sovereignty by maliciously drawing districts in ways that increase party polarization and insulate incumbents.”¹⁵ As Senator John Cornyn of Texas once said, “[y]ou can’t take the politics out of politics, and there is nothing more political than redistricting.”¹⁶ Most reformers call for redistricting to be done by nonlegislative commissions instead of by legislators themselves.¹⁷ Some scholars, like Jeffrey Kubin and Christopher Confer, think commissions of-

10. 13 U.S.C. § 141(c) (2012).

11. National Conference of State Legislatures, *supra* n. 9, at 10. Legislative districts are districts represented by state legislators; congressional districts are districts represented by members of the United States House of Representatives. Since Montana currently has only one congressional district, “redistricting” in Montana refers only to redrawing legislative districts.

12. National Conference of State Legislatures, *supra* n. 9, at 1 (quoting *Reynolds*, 377 U.S. at 579).

13. *Id.* at 161–162. At the time of this article’s publication, the case *Arizona State Legislature v. Arizona Independent Redistricting Commission* is pending before the United States Supreme Court, on appeal from a three-judge panel of the U.S. District Court for the District of Arizona. 135 S. Ct. 46 (2014). The question on appeal is: “Do the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit Arizona’s use of a commission to adopt congressional districts?” *Id.* If the Court reaches the merits of the parties’ arguments, its ruling may determine the constitutionality of the use of nonlegislative commissions for congressional redistricting. However, the use of nonlegislative commissions for legislative redistricting is not at issue.

14. See e.g. Jeffrey Toobin, *Drawing the Line*, *New Yorker* (Mar. 6, 2006) (available at <http://perma.cc/A3ZJ-4GZ8> (http://www.newyorker.com/archive/2006/03/06/060306fa_fact?currentPage=all)); *The Texas Gerrymander*, *N.Y. Times* (Mar. 1, 2006) (available at <http://perma.cc/LR8H-FNHM> (<http://www.nytimes.com/2006/03/01/opinion/01wed2.html>)); Martin Dyckman, *In Florida, We Don’t Choose Our Legislators, They Choose Us*, *St. Petersburg Times* (Oct. 12, 2003) (available at <http://perma.cc/6HUW-QY2F> (http://www.sptimes.com/2003/10/12/Columns/In_Florida__we_don_t_.shtml)); Ted Stein, *Gerrymandering: Alive and Well in State Capitals*, *Christian Science Monitor* (Oct. 2, 1981) (available at <http://perma.cc/T5LC-M8B2> (<http://www.csmonitor.com/1981/1002/100258.html>)).

15. Jonathan Winburn, *Does It Matter if Legislatures or Commissions Draw the Lines? in Reapportionment and Redistricting in the West* 137, 138 (Gary F. Moncrief ed., Lexington Books 2011).

16. Redistricting Game, *Quotes about Mission 1*, <http://perma.cc/9KYT-U8S9> (<http://redistrictinggame.org/quotesaboutmission1.php>) (accessed Jan. 31, 2015) (quoted in Winburn, *supra* n. 15, at 138).

17. Winburn, *supra* n. 15, at 138.

fer “efficiency, fairness, and finality”¹⁸ to the redistricting process while increasing legitimacy and decreasing partisanship.¹⁹ Others, like Representative Phil Burton, think that allowing legislatures to redistrict promotes party cohesion and legislative stability,²⁰ while ensuring that those responsible for redistricting are held electorally accountable.²¹ Still others, like Jonathan Winburn, think competitive elections should be the goal of redistricting and “who draws the map does not appear to influence electoral competition.”²²

The majority of states rely on legislative redistricting. Thirteen states, including Montana, task nonlegislative commissions with redrawing legislative districts.²³ The remaining thirty-seven states rely on their own legislatures to redistrict.²⁴ Of the thirteen states that use nonlegislative commissions, Montana, Washington, and Hawaii are the only three that allow their redistricting plans to become law without a legislative vote of approval, making the commissions wholly independent.²⁵

III. MONTANA’S CHOICE: A COMMISSION

A. *Montana Chooses a Commission*

Before adopting the 1972 constitution, Montana left redistricting to the state legislature—a system that repeatedly failed. As a result, delegates to Montana’s 1972 Constitutional Convention considered a new system. During a debate about the merits of forming a nonlegislative redistricting commission, Delegate Carman Skari of Chester summarized the legislature’s track record:

The Montana experience was that in 1965 the Legislature was unable to reapportion. About a dozen bills were introduced, and not a single one was accepted. Consequently, it fell to the federal District Court to reapportion the state. In 1971 the Legislature drew up one plan which was invalid because of

18. Jeffrey C. Kubin, *The Case for Redistricting Commissions*, 75 Tex. L. Rev. 837, 838 (1997).

19. Christopher C. Confer, *To be about the People’s Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 Kan. J.L. & Pub. Policy 115, 115 (Winter 2004).

20. See Confer, *supra* n. 19, at 134 (quoting Sally Dworak-Fisher, Student Author, *Drawing the Line on Incumbency Protection*, 2 Mich. J. Race & L. 131, 134–135 (1996)).

21. *Id.* (citing Louis Jacobson & Chris Cillizza, *Taking Redistricting out of Lawmakers’ Hands*, Nat’l J. (Mar. 20, 2001)).

22. Winburn, *supra* n. 15, at 154.

23. National Conference of State Legislatures, *supra* n. 9, at 161–162.

24. *Id.*

25. Kubin, *supra* n. 18, at 843 (noting that although Washington’s redistricting map may be amended by a two-thirds vote of both legislative houses, it becomes law without legislative approval). The Montana Constitution requires the Districting and Apportionment Commission to submit its redistricting plan to the legislature for recommendations before filing it with the secretary of state. The legislature’s recommendations are nonbinding. Mont. Const. art. V, § 14, cl. 3.

a 37 percent [population] variance. After working through the regular session [and] one special session, the Legislature finally came up with the present plan in the second special session.²⁶

It was clear to the delegates that Montana needed a new system.

Delegate after delegate rose to support the formation of a nonlegislator redistricting commission. Of the many reasons to support the use of a commission, Montana's delegates were most persuaded by the importance of institutional independence and the Montana legislature's past inability to redistrict. "There is a definite conflict of interest here," Delegate Skari said.²⁷ "Each legislator tends to create his own district first. I think this is just a natural human trait. . . . There is a great difficulty in being objective here, because one man's gerrymander can be [an]other one's logical district."²⁸ "I do not think that the Legislature is psychologically fitted to reapportion itself," added Delegate Virginia Blend of Great Falls.²⁹ "I think it's too lengthy a program for them to undertake for something that should be accomplished by a nonpartisan, or at least impartial group."³⁰ Delegate John Schlitz of Billings spoke directly about the perceived conflict of interest: "[T]he Legislature is totally unable to reapportion itself. It has too many interests that are not necessarily in accord with the broad interests of the state."³¹ Delegate Jerome Cate, also of Billings, spoke frankly about the struggle he would face if he were a legislator responsible for redistricting: "I believe in the Legislature, but I also believe that there are certain things, like paying themselves [an] adequate salary and reapportioning themselves, that they cannot inherently do because I'm not going to sit here and cut my friend . . . out of a seat. I just won't do it."³² Delegate Arlyne Reichert of Great Falls stated her reasoning most vividly of all: "I agree with Mr. Cate. It's like removing your own appendix. The Legislature will never do it to itself."³³ The delegates wanted "to provide for the creation of a commission reasonably free of legislative pressure. To do this, [they] recommend[ed] that the Convention constitutionally delegate this power to [a reapportionment and redistricting] commission."³⁴

26. *Montana Constitutional Convention Verbatim Transcript* vol. IV, 682 (1981) [hereinafter *Constitutional Convention Transcript*].

27. *Id.*

28. *Id.*

29. *Id.* at 685.

30. *Id.*

31. *Id.* at 720.

32. *Constitutional Convention Transcript, supra* n. 26, at 723.

33. *Id.*

34. *Id.* at 682.

The Constitutional Convention's Legislative Committee proposed the text of what is now Article V section 14³⁵ of the Montana Constitution and appended the following comments to the text of the proposed provision:

The committee has considered many different methods of apportionment. The committee considers reapportionment and redistricting to be a troublesome and time consuming matter for a legislative body because of the legislature's difficulty in being objective. Therefore, the committee proposal provides for the creation of a reapportionment commission which has considerable independence and which will be reasonably free [from] legislative pressures. . . .

The committee recognized that redistricting and reapportionment has political repercussions, so the proposed section provides for bipartisanship in the method of selection of the first four members. The fifth member of the commission becomes the key vote and his selection by the other four members is to insure impartiality.³⁶

At the close of debate, Mr. Cate's proposal, which deviated slightly from the committee report by providing for reapportionment by a commission with nonbinding recommendations from the legislature,³⁷ passed with fifty-five delegates in favor, thirty-six opposed, and nine absent.³⁸

B. Montana's Redistricting Process

The Montana Constitution is the source of Montana's redistricting powers and objectives:

The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.³⁹

Redistricting is conducted by a Districting and Apportionment Commission⁴⁰ that is comprised of five citizens and formed immediately preceding the release of decennial census data. The majority and minority leaders of the Montana House and Senate each choose one commissioner and those four commissioners then pick a fifth commissioner to serve as chairman of the Commission. If the four legislatively appointed commissioners fail to agree on a fifth commissioner, a majority of the Justices on the Montana Supreme Court appoint the chairman. None of the commissioners may be

35. "Districting and Apportionment" was originally proposed as section 15 of Article V.

36. *Constitutional Convention Transcript*, *supra* n. 26, at vol. I, 393.

37. *Constitutional Convention Transcript*, *supra* n. 26, at vol. IV, 718.

38. *Id.* at 724.

39. Mont. Const. art. V, § 14, cl. 1.

40. Districting (or "redistricting") is the process of redrawing the physical boundaries of legislative and congressional districts. Apportionment (or "reapportionment") is the process of distributing seats in a legislative body among a fixed number of districts.

public officials.⁴¹ The Commission develops a plan for congressional and legislative districts based on the federal census data and constitutional redistricting criteria. The Commission submits its redistricting plan to the legislature for nonbinding recommendations and then files the plan with the Montana Secretary of State. The plan becomes law upon filing.⁴²

C. *The Courts Reaffirm the Commission's Independence*

Although the delegates to the Constitutional Convention desired the Districting and Apportionment Commission to be an independent body free from political pressure, the ideals underlying the development of the Commission did not discourage legislative or executive meddling. It fell to Montana's judiciary to affirm the Commission's independence.

The last two redistricting cycles, 1990 and 2000, resulted in districts that were viewed as favorable to one party or the other. Republicans appeared to control the Commission in 1990. Republicans gained 25 legislative seats in 1994, the election year that the 1990 Commission's districts took effect. Republicans maintained a majority in both houses for all ten years those districts were in effect. Democrats appeared to control the Commission in 2000. In 2004, the election year that the 2000 Commission's districts took effect, Democrats gained nine legislative seats and achieved a 27–23 majority in the Senate and a 50–50 tie in the House. Political scientist Craig Wilson of Montana State University in Billings attributes Democrats' 2004 electoral success to the population variance among the districts of more than four percent. In essence, the new districts concentrated Republican voters in fewer districts and spread Democratic voters among more districts, giving Democrats an advantage in more districts.⁴³

The 2000 Districting and Apportionment Commission submitted its redistricting plan to the legislature on January 6, 2003.⁴⁴ In response to the 2000 Commission's redistricting plan and in anticipation of Democratic electoral victories in 2004, Republicans in the Montana legislature adopted Senate Resolution No. 2 and House Resolution No. 3. Senate Resolution No. 2 rejected the redistricting plan and contended that the "population deviation . . . contained in the plan . . . is not in support of legitimate

41. Mont. Const. art. V, § 14, cl. 2.

42. *Id.* at cl. 3.

43. Mike Dennison, *Analysis: Redistricting Favors State Democrats*, Billings Gazette (Nov. 30, 2007) (available at <http://perma.cc/VXZ6-VGJZ> (http://billingsgazette.com/news/state-and-regional/montana/article_fb6eb285-6b57-5c0a-9707-246dfc49556b.html)).

44. Dec. & Or. at ¶ 2, *Brown v. Mont. Districting & Apportionment Comm'n*, <http://perma.cc/EYA7-HK3G> (http://leg.mt.gov/content/committees/interim/2003_2004/dist_apport/work_plan/BrownvMontanaDistricting.pdf) (Mont. 1st Jud. Dist. July, 2, 2003) (No. ADV 2003-72).

governmental interests, but is for partisan political gain.”⁴⁵ House Resolution No. 3 also rejected the redistricting plan, finding it was “at best wrong, blatantly unethical, and simply unfair to the electors,” and that “the plan [was] conceived in a mean-spirited, partisan fashion.”⁴⁶

The executive branch also attempted to subvert the 2000 Commission’s redistricting plan. The same day these resolutions were passed, Republican Governor Judy Martz signed House Bill 309 into law.⁴⁷ House Bill 309 required the Districting and Apportionment Commission to develop districts that are “as equal as practicable,” and defined the phrase to mean “within a plus or minus 1% relative deviation from the ideal population of a district.”⁴⁸ The act applied retroactively to the 2000 Commission’s redistricting plan.⁴⁹ The 2000 Commission met to consider the legislature’s resolutions the day after House Bill 309 was signed but ultimately adopted its original plan.⁵⁰ The Commission then submitted the plan to the Republican Secretary of State, but he refused to file it.⁵¹

Instead, the Secretary filed a request for declaratory judgment in the First Judicial District Court.⁵² In his complaint, the Secretary asked the court to determine the constitutionality of the Commission’s plan and whether the Commission’s plan was unenforceable due to House Bill 309.⁵³ District Judge Dorothy McCarter reviewed Article V, Section 14 of the Montana Constitution and determined:

A reasonable and logical reading of the constitutional provision reveals that the Commission created pursuant to that provision is charged with the responsibility to designate the legislative districts, and in doing so, to exercise its own discretion and expertise in determining the equal as practicable factor. The language of Article V, Section 14, does not indicate an intent to involve the legislature in this process, other than its selection of four commissioners pursuant to subsection (2), and its recommendations to the Commission pursuant to subsection (4).⁵⁴

The court held “[t]o the extent that [House Bill] 309 authorizes the legislature to preempt the Commission in determining the equal as practicable factor, the bill is void.”⁵⁵

45. Mont. Sen. Res. 2, 58th Legis., 2003 Reg. Sess. 1 (Jan. 27, 2003).

46. Mont. H. Res. 3, 58th Legis., 2003 Reg. Sess. 2 (Jan. 27, 2003).

47. Mont. H. 309, 58th Legis., 2003 Reg. Sess. (Jan. 13, 2003) (signed into law on February 4, 2003).

48. *Id.* at § 1.

49. *Id.* at § 6.

50. Dec. & Or. at ¶ 2, *Brown*, <http://perma.cc/EYA7-HK3G>.

51. *Id.*

52. *Id.* at ¶ 3.

53. *Id.*

54. *Id.* at ¶ 15.

55. *Id.*

In the meantime, however, the Senate passed and Governor Martz signed Senate Bill 429.⁵⁶ The law, now codified at § 5–1–115 of the Montana Code Annotated, imposed a detailed set of redistricting criteria on the Districting and Apportionment Commission. Section 5–1–115 includes the same “equal as practicable . . . within a plus or minus 1% relative deviation” criterion that appeared in House Bill 309.⁵⁷ It also requires that districts “coincide with the boundaries of political subdivisions,”⁵⁸ that they “be in one piece,”⁵⁹ and that districts “may not have an average length greater than three times the average width.”⁶⁰ Additionally, “[a] district may not be drawn for the purposes of favoring a political party or an incumbent legislator.”⁶¹ Although the constitutionality of § 5–1–115 has not been litigated, its requirements are largely ignored⁶² and the Montana Supreme Court would likely find it unconstitutional for the same reasons the First Judicial District Court found House Bill 309 unconstitutional.

In addition to the legislative resolutions, new laws, and litigation over House Bill 309, the 2000 Commission’s redistricting plan also spawned litigation over the assignment of “holdover senators”:

The term ‘holdover senator’ refers to those state senators who have served two years of their four-year terms at the time of redistricting, and are, therefore, not required to seek election at the general election held immediately following the districting plan becoming law. After each ten-year redistricting, twenty-five holdover senators must be assigned to newly-redrawn districts, where the holdover senators serve the final two years of their terms.⁶³

Like all redistricting plans, the 2000 Commission’s plan included assignments of holdover senators to new Senate districts. In response, the legislature passed Senate Bill 258. The bill, later codified at § 5–1–116, removed the power to assign holdover senators to new districts from the Districting and Apportionment Commission and granted that power to the legislature.⁶⁴ A few weeks later, Governor Martz signed Senate Bill 445, which repealed

56. Mont. Sen. 429, 58th Legis., 2003 Reg. Sess. (Feb. 17, 2003).

57. Mont. Code Ann. § 5–1–115(2)(a) (2013); Mont. H. 309, 58th Legis., 2003 Reg. Sess. at § 1.

58. Mont. Code Ann. § 5–1–115(2)(b).

59. *Id.* at § 5–1–115(2)(c).

60. *Id.* at § 5–1–115(2)(d).

61. *Id.* at § 5–1–115(3).

62. The 2010 Districting and Apportionment Commission adopted an ideal population deviation of plus or minus 3% and developed a “general appearance test” for determining the compactness of a district. The Commission cited the Montana Constitution as the source of these criteria. The Commission also cited the Voting Rights Act, 42 U.S.C. § 1973 (2006), as the source of the criterion that the Commission protect minority voting rights. The Commission did not cite or comply with § 5–1–115. Mont. Districting & Apportionment Comm’n, *Congressional and Legislative Redistricting Criteria* (May 28, 2010) (available at <http://perma.cc/LD25-NQK3> (http://leg.mt.gov/content/Committees/Interim/2009_2010/Districting/Other%20Documents/0148LJFcorrectedcriteria.pdf)).

63. *Wheat v. Brown*, 85 P.3d 765, 767 (Mont. 2004).

64. Mont. Sen. 258, 58th Legis., 2003 Reg. Sess. § 1 (Jan. 23, 2003).

the part of the 2000 redistricting plan that assigned holdover senators to new districts.⁶⁵ The legislature then filed Senate Joint Resolution 23 with the Secretary of State. The Joint Resolution assigned holdover senators to new districts.⁶⁶ The Republican legislators' assignments and the Commission's assignments differed as to six of the twenty-five holdover senators.⁶⁷

Three of those senators in limbo because of the Joint Resolution, Mike Wheat, Jon Tester, and Ken Hansen, filed a lawsuit in the First Judicial District Court.⁶⁸ District Judge Jeffrey Sherlock granted the senators summary judgment and ruled as a matter of law that Senate Bill 258, Senate Bill 445, and Senate Joint Resolution 23 were unconstitutional.⁶⁹ The Montana Supreme Court affirmed the ruling of the district court and declared § 5–1–116 unconstitutional.⁷⁰ The Court “conclude[d] that Article V, Section 14’s mandate that the Commission effect redistricting is self-executing and that, as the history of implementation illustrates, the power to assign holdover senators to districts is an inherent part of the redistricting process.”⁷¹ As a result, “[t]he legislation designed to transfer the power to assign holdover senators from the Commission to the Legislature violates Article V, Section 14, of the Montana Constitution.”⁷² In so ruling, the Montana Supreme Court unanimously reaffirmed the independence of the Districting and Apportionment Commission.⁷³

The legal and political history of Montana’s past redistricting efforts demonstrates the inherently political nature of the process, the wisdom of the delegates to the constitutional convention in recognizing that nature, and the importance of the Commission’s independence from the legislature. The rancorous response to past redistricting efforts also demonstrates the importance of appearing bipartisan, fair, and legitimate.

IV. THE 2010 DISTRICTING AND APPORTIONMENT COMMISSION

A. *A Smoother Start: Breaking the Deadlock over the Presiding Officer*

The Districting and Apportionment Commission met four times between the ratification of the 1972 constitution and the 2010 census:

65. Mont. Sen. 445, 58th Legis., 2003 Reg. Sess. (Feb. 20, 2003) (signed into law on April 9, 2003).

66. Mont. Sen. Jt. Res. 23, 58th Legis., 2003 Reg. Sess. (Feb. 20, 2003).

67. *Wheat*, 85 P.3d at 767.

68. *Id.* at 766.

69. *Id.*

70. *Id.* at 772.

71. *Id.* at 771.

72. *Id.*

73. The Presiding Officer of the 2010 Districting and Apportionment Commission, Jim Regnier, was a Justice on the Montana Supreme Court at the time. *Wheat*, 85 P.3d at 772.

1973–1974, 1979–1983, 1989–1993, and 1999–2003.⁷⁴ Although the commission approach to redistricting was more efficient than the legislative approach, the Montana Supreme Court frequently had to step in to appoint the presiding officer because the other four members of the Commission could not agree on a presiding officer and votes on redistricting plans were often split down party lines.⁷⁵ These previous Commissions struggled to develop redistricting plans with low population deviations⁷⁶ and bipartisan support.⁷⁷ It seemed that the partisan strife would continue with the Districting and Apportionment Commission following the 2010 census (“2010 Commission”) when the four Commissioners appointed by the House and Senate—Linda Vaughey, Joe Lamson, Pat Smith, and Jon Bennion—could not agree on a presiding officer.⁷⁸ But the Montana Supreme Court broke the deadlock and unanimously appointed retired Justice Jim Regnier to preside over the Commission.⁷⁹ The 2010 Commission held fourteen public meetings all over the State and developed a legislative plan based on the new census data and redistricting criteria.⁸⁰ Presiding Officer Regnier presented the plan to a Joint Session of the Montana Legislature on January 11,

74. Open Ltr. from Jon Bennion & Linda Vaughey, Comm. Members, Mont. Districting & Apportionment Comm’n, to Mont. Sup. Ct., *The Selection of a Fifth Member to the Montana Districting and Apportionment Commission* 3 (May 14, 2009) (available at <http://perma.cc/HZ6B-TYLY> (http://leg.mt.gov/content/Committees/Interim/2009_2010/Districting/Other%20Documents/Open%20Letter%20to%20the%20Montana%20Supreme%20Court%20_2_.pdf)).

75. *Id.* at 3.

76. Mont. Districting & Apportionment Comm’n, *Final Legislative Redistricting Plan Based on the 2000 Census* 19 (Feb. 5, 2003) (available at <http://perma.cc/9ZZF-FG7T> (http://leg.mt.gov/content/committees/interim/2001_2002/dist_apport/2000_rpt_sos.pdf)) [hereinafter *2003 Redistricting Plan*].

77. See Mike Dennison, *High Court Upholds Redistricting Plan*, Great Falls Tribune (Jan. 28, 2004) (available at <http://perma.cc/5BSA-SCST> (<http://archive.greatfallstribune.com/news/stories/20040128/localnews/306003.html>)); Rob Chaney, *Redistricting ‘Stirs the Pot’ in Montana*, Missoulian (Nov. 23, 2002) (available at <http://perma.cc/WM78-JMP3> (http://missoulian.com/redistricting-stirs-the-pot-in-montana/article_b0cdd005-edf5-5ad6-b89f-3ebed3125992.html)).

78. Mont. Legis., *Commissioners*, <http://perma.cc/V2XW-3U7K> (<http://leg.mt.gov/css/Committees/interim/2011-2012/districting/Members/commissioners.asp>) (accessed January 31, 2015). Pat Smith resigned on January 24, 2013, and Senate Minority Leader John Sesso appointed Carol Williams to replace him for the Commission’s final meeting. Mont. Districting & Apportionment Comm’n, *Final Legislative Redistricting Plan Based on the 2010 Census* 4 (Feb. 12, 2013), (available at <http://perma.cc/2H5X-PLGK> (<http://leg.mt.gov/content/Publications/services/2014-agency-reports/Montana-Districting-&-Apportionment-Commission-Final-Legislative-Redistricting-Plan.pdf>)) [hereinafter *2013 Redistricting Plan*].

79. Charles S. Johnson, *Ex-high Court Justice Tapped to Chair Redistricting Panel*, Helena Independent Record (May 23, 2009) (available at <http://perma.cc/65RC-LCC6> (http://helena.com/news/state-and-regional/ex-high-court-justice-tapped-to-chair-redistricting-panel/article_9cfbf4da-accf-5783-a125-2387a5a62e4b.html)).

80. *2003 Redistricting Plan*, *supra* n. 76, at 6–10.

2013.⁸¹ The print media generally viewed the plan as competitive, bipartisan, and fair.⁸²

B. Developing Redistricting Criteria

The 2010 Commission, like all previous Commissions, needed to re-district and reapportion Montana's legislative districts according to mandatory constitutional and discretionary criteria. There are four mandatory criteria for legislative districts: (1) population equality and maximum population deviation; (2) compact and contiguous districts; (3) protection of minority voting rights and compliance with the Voting Rights Act; and (4) race cannot be the predominant factor to which the traditional discretionary criteria are subordinated.⁸³

1. Constitutionally Mandated Criteria

The Montana Constitution is the source of the first two mandatory criteria: the districts must be "as nearly equal in population as is practicable" and must "consist of compact and contiguous territory."⁸⁴ Following the 2010 census, the ideal population of a legislative district in Montana is 9,894 citizens (Montana's population of 989,415 divided by 100 House Districts).⁸⁵ Because it is not possible to achieve exact population equality among districts, the Commission had to decide on a maximum acceptable population deviation. The 2010 Commission received public comment while developing an acceptable deviation and reached consensus at plus or minus 3%, even though previous Commissions had used deviations of plus or minus 5%. The 2010 Commission hoped a maximum of 3% population deviation was small enough to fulfill the constitutional requirement to make the districts as nearly equal as is practicable but large enough to leave the Commission some flexibility when determining the composition and physical size of each district.⁸⁶ The final 2010 Legislative Redistricting Plan achieved an unprecedented 0.91% population deviation in House districts and 0.76% population deviation in Senate districts.⁸⁷

81. *2013 Redistricting Plan*, *supra* n. 78, at 10.

82. See e.g. *Evenly Divided: Panel Parceling Montana into Districts*, Billings Gazette (Dec. 18, 2012) (available at <http://perma.cc/XT9T-EE7W> (http://billingsgazette.com/news/opinion/editorial/gazette-opinion/gazette-opinion-evenly-divided-panel-parceling-montana-into-districts/article_8a73c7cf-ae0e-5170-9b58-ecfc954967d.html)).

83. *2013 Redistricting Plan*, *supra* n. 78, at 13–14.

84. Mont. Const. art. V, § 14, cl. 1.

85. Jim Regnier, Oral Presentation, *Presentation to the Joint Session of the Montana Legislature 3* (Jt. Sess. Mont. Legis. Jan. 11, 2013) (copy on file with author).

86. *Id.* at 4.

87. *2013 Redistricting Plan*, *supra* n. 78, at 15.

The second criterion, compact and contiguous territory, allows the Commission to use a “general appearance test”⁸⁸—that is, does the district in question look compact and contiguous or does it instead resemble the salamander-shaped district that led to the coining of the term “gerrymander”?⁸⁹ The Commission may also consider the districts’ “functional compactness in terms of travel and transportation, communication, and geography.”⁹⁰ The 2010 Commission interpreted “functional compactness” to allow for consideration of topographical features like the Rocky Mountains and established traffic patterns in cities.⁹¹ A map of the districts drawn by the 2010 Commission illustrates the Commission’s compliance with this criterion.⁹²

The federal Voting Rights Act, which applies to all states and “political subdivision[s],”⁹³ is the source of the third mandatory criterion. The Voting Rights Act says a “political process leading to nomination or election in [a] State” may not be imposed or applied so that racial or language minorities “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁹⁴ Native Americans are Montana’s largest minority group, comprising over 6% of the state’s population.⁹⁵ Historically, enforcement of the Voting Rights Act was heavily litigated in Montana.⁹⁶ In an effort to address this litigation, the 2000 Commission created six Indian-majority House districts and three corresponding Indian-majority Senate districts. Native Americans now enjoy representation in the Montana Legislature roughly proportional to their population. The 2010 Commission largely retained these Indian-majority House and Senate districts and by doing so remained in compliance with the Voting Rights Act.⁹⁷

88. 2003 Redistricting Plan, *supra* n. 76, at 12.

89. “Originating in the *Boston Gazette* in 1812 in response to the actions of Massachusetts Governor Elbridge Gerry when creating a salamander-shaped district within the state to benefit the Democratic Party, the term [gerrymander] signifies the decision to draw district lines to directly benefit one group.” William J. Miller, *Tom and “Gerry”? The Cat and Mouse Game of Congressional Redistricting*, in *The Political Battle over Congressional Redistricting* 1, 8 (William J. Miller & Jeremy D. Walling eds., Lexington Books 2013).

90. 2003 Redistricting Plan, *supra* n. 76, at 14.

91. Regnier, *supra* n. 85, at 5.

92. Mont. Dept. Commerce: Census & Econ. Info. Ctr., Map, 2014–2023 Legislative Districts, <http://perma.cc/A6V4-HQJ2> (<http://ceic.maps.arcgis.com/home/webmap/viewer.html?webmap=5bb2760eb712466ea84aad6eb980ff55>) (accessed January 31, 2015).

93. 52 U.S.C. § 10301(a) (2012).

94. *Id.* at § 10301(b).

95. Regnier, *supra* n. 85, at 7.

96. See e.g. *U.S. v. Blaine Co.*, 363 F.3d 897 (9th Cir. 2004); *Old Person v. Brown*, 312 F.3d 1036 (9th Cir. 2002); *Old Person v. Cooney*, 230 F.3d 1113 (9th Cir. 2000); *Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083 (D. Mont. 2012); *Windy Boy v. Big Horn Co.*, 647 F. Supp. 1002 (D. Mont. 1986).

97. Regnier, *supra* n. 85, at 7.

The fourth criterion, that race cannot be the predominant factor to which the traditional discretionary criteria are subordinated, is a distillation of the United States Supreme Court's holding in *Shaw v. Reno*.⁹⁸ In *Shaw*, the Court held:

[A]ppellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.⁹⁹

In order to comply with this criterion, the 2010 Commission extensively documented the numerous communities of interests shared within these districts that *were* explainable on grounds other than race.¹⁰⁰

2. *Developing Discretionary Criteria through Public Process*

As long as the four mandatory criteria are satisfied, Commissions have some flexibility in deciding which discretionary criteria to adopt. For the first time in the history of the Districting and Apportionment Commission, the 2010 Commission held hearings throughout the state to receive public input on what discretionary criteria to adopt. The Commission held hearings in Helena with video conferencing to Great Falls and Havre, in Missoula with video conferencing to Kalispell, and in Billings with video conferencing to Miles City.¹⁰¹ On May 28, 2010 the Commission officially adopted the following discretionary criteria: (1) follow the lines of political units; (2) follow geographic boundaries; and (3) keep communities of interest intact.¹⁰² By adopting the first criterion, the Commission agreed to consider “the boundary lines of counties, cities, towns, school districts, Indian reservations, neighborhood commissions, and other political units.”¹⁰³ To comply with the second criterion, the Commission used the U.S. Bureau of the Census's TIGER/Line® Shapefiles. TIGER files—Topographically Integrated Geographic Encoding and Referencing—“are spatial extracts . . . containing features such as roads, railroads, rivers, as well as legal and statistical geographic areas.”¹⁰⁴ The third criterion is more subjective than the first two: “[c]ommunities of interest can be based on Indian reservations, urban interests, suburban interests, rural interests, neighborhoods, trade ar-

98. 509 U.S. 630 (1993).

99. *Id.* at 658.

100. Written Interview with Jim Regnier, Presiding Officer, 2009–2010 Mont. Districting & Apportionment Comm'n (Dec. 11, 2013).

101. Regnier, *supra* n. 85, at 4.

102. *Id.* at 5–6.

103. 2013 Redistricting Plan, *supra* n. 78, at 14.

104. U.S. Census Bureau, *Geography, Tiger Products*, <http://perma.cc/FU6Q-UJSR> (<https://www.census.gov/geo/maps-data/data/tiger.html>) (accessed Feb. 7, 2015).

eas, geographic location, communication and transportation networks, media markets, social, cultural, and economic interests, or occupations and lifestyles.”¹⁰⁵ Together, these discretionary criteria helped the 2010 Commission account for competing interests in reshaping Montana’s legislative districts.

C. Redrawing the Lines

Once the 2010 Commission settled on the criteria to use, it had to actually redraw the boundaries of legislative districts. Two factors made redrawing the lines a challenge: population and politics. Montana’s population grew by 87,220 people, or 9.7%, from 2000 to 2010.¹⁰⁶ As the U.S. Census Bureau map demonstrates, the change in population in some Montana counties from 2000 to 2010 was dramatic.¹⁰⁷ Flathead and Gallatin counties saw a 20–32% population increase.¹⁰⁸ Sheridan, Daniels, McCone, Treasure, Golden Valley, Judith Basin, and Carter counties sustained a population decrease of 10.1–17.6%.¹⁰⁹ A statewide trend is apparent: the population is shifting from east to west.¹¹⁰ The new legislative boundaries had to account for the population increases or decreases by county as well as the statewide population shift.

In addition to receiving public comment on which discretionary criteria to adopt, the 2010 Commission received public comment on where and how to draw the new boundaries.¹¹¹ Several areas were the subject of much public debate: Missoula, southwest Montana, Havre, Bozeman, Billings, the Flathead, Great Falls, and Helena.

Some residents of Missoula wanted to eliminate the “wagon wheel” districts within the city; others wanted to separate the Rattlesnake from Seeley Lake; and Republicans wanted to develop a more rural district in southwest Missoula County. After protracted negotiations, the Commission was able to achieve all three goals.

105. *2013 Redistricting Plan*, *supra* n. 78, at 14.

106. Paul Mackun & Steven Wilson, *Population Distribution and Change: 2000 to 2010*, at 2 (U.S. Census Bureau Rep. No. C2010BR-01, March 2011) (available at <http://perma.cc/85V9-PDU9> (<http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>)).

107. U.S. Census Bureau, Map, *Montana – 2010 Census Results* (Census Redistricting Data, Pub. L. 94-171, Summary File) (available at <http://perma.cc/B3RM-GFAV> (http://www.census.gov/2010census/news/pdf/cb11cn85_mt_perchange_2010map.pdf)).

108. *Id.*

109. *Id.*

110. *Id.*

111. The information in this section is based upon Presiding Officer Jim Regnier’s personal experience of redistricting in 2009–2010. For a map of the new districts see Mont. St. Lib., Map, *Montana Legislative Districts for Elections Held in 2014–2022* (July 1, 2013) (available at <http://perma.cc/4VKV-XRTZ> (<http://leg.mt.gov/content/Committees/Interim/2011-2012/Districting/Maps/Adopted-Plan/Maps/13leg0003-poster-size-final-map.pdf>)).

Southwest Montana was another hotly contested region. The Republican Commissioners and many members of the public wanted to keep Jefferson County together in its own district. The Democratic Commissioners and many residents of Butte wanted to keep four districts in Butte, which would require incorporating areas of Jefferson County. At a week-long meeting to adopt House districts, the presiding officer cast the tie-breaking vote for a configuration that reduced the Butte delegation to three seats and created a district solely within Jefferson County. The vote was influenced by the decrease in the population of Silverbow County as well as public comments from the residents of Jefferson County.

Another difficult decision came with regard to districts in Havre and eastern Montana. The Republican Commissioners and residents of Richland County wanted a single seat in Havre and a new district in eastern Montana that followed county lines. The Democratic Commissioners and residents of Havre fought hard to keep two seats in Havre. At the Helena meeting, the presiding officer broke the deadlock and voted in favor of the Republican position. The Democratic Commissioners then worked with the Republican Commissioners to create districts in eastern Montana that were based primarily on county lines.

The proposed districts in Bozeman, Billings, and Lake County were the result of compromise votes among the Commissioners. After much discussion, the Commission heeded public comment to keep Madison County intact. Similarly, in Billings, the Commission unanimously responded to public comment and drew a Heights district that did not extend into the downtown area, kept a distinct Lockwood district, and drew districts in western Billings that followed traditional traffic patterns. Lake County was so contested that Presiding Officer Regnier proposed a plan of his own. He proposed placing Ronan in a district separate from the majority Indian district and placing Pablo completely within the majority Indian district. This arrangement ultimately achieved compromise votes as well.

In August of 2012, the Commission met at a week-long meeting in Helena to adopt the 100 House districts. The meeting was open to the public and televised. After several long nights, the Commission voted on each region and then voted 5–0 to adopt the 100 proposed House districts, with the Republican Commissioners reserving the right to revisit the Great Falls and Helena districts. The Commission took this approach because of lessons learned from past Commissions. In previous redistricting cycles, the Commission traveled around the state and adopted districts region by region over the course of a year. This piecemeal approach decreased the Commission's flexibility as it progressed to each new region and solidified acrimony within the Commission as members criticized recently adopted regional districts. The Commission decided that the best product would be

achieved in one week-long meeting. The consensus votes reached by the 2010 Commission demonstrates that the Commission's approach was successful.

After the 100 House districts were agreed upon, the Commission had to pair House districts into Senate districts. This process was also a series of compromises and tie-breaking votes from the presiding officer. The Commission began in the northwest corner of the state in Whitefish and Columbia Falls. The Republican Commissioners successfully kept these two House seats in separate Senate districts. The Democratic Commissioners achieved their goal of splitting the Lake County House districts, pairing one with a Missoula district. This enabled the Commission to keep Sanders and Mineral counties together. The joining of Lake County and a Missoula district drove the rest of the Missoula pairings, which favored the Democrats. The northeast Montana senate seats favored the Republicans. The Republican plan for northeast Montana also favored them in Miles City but, more importantly, allowed them to keep seven Senate districts intact in Yellowstone County. The plan in Gallatin County reflected the Republicans' desire to join Livingston with Park County. This allowed the rest of Gallatin County to be paired in favor of the Democrats without much resistance from the Republicans. In Great Falls, there were four Senate districts to be paired. Two were unanimous and the presiding officer joined the Democrats on the remaining two. The Commission completed its clockwise sweep of the state with a contentious pairing of a district in Butte with the Jefferson County district. The Democrats were successful on this pairing in large part because the Commission had given Jefferson County its own House seat, to the disadvantage of Butte.

These pairings settled half of the Senate seats. The remaining twenty-five Senate seats required holdover assignments. The Republicans and Democrats on the Commission agreed to twenty-one of the twenty-five holdover Senate assignments. On the remaining four, the presiding officer voted twice with the Democrats and twice with the Republicans. He voted with the Republicans on their proposal to pair Senator Bruce Tutvedt's seat in Kalispell with a Whitefish district rather than a Columbia Falls district. He also voted with the Republicans on their assignment of Senator Elsie Arntzen's district in Billings. He then voted with the Democrats on their assignments of Senator Roger Webb's seat in Billings and Senator Christine Kauffman's seat in Helena. With these final four votes, the Commission had completed its monumental task.¹¹²

112. Written Interview, *supra* n. 100.

D. Finalizing the Plan

The Commission submitted its plan to the legislature on January 8, 2013.¹¹³ Three days later, Presiding Officer Regnier appeared before a joint session of the legislature to present the Commission's plan and explain how the Commission decided some of the controversial aspects of the plan.¹¹⁴ The House and Senate reviewed the plan and both chambers adopted resolutions providing recommendations to the Commission.¹¹⁵ The 2010 Commission met for a final time on February 12, 2013 to consider the recommendations of the legislature.¹¹⁶ At that meeting, the Republican Commissioners offered amendments to the 100 House districts, focusing especially on the Helena and Great Falls districts. The presiding officer joined the Democratic Commissioners and voted against the proposed amendments, keeping the original plan essentially in place. After months of public comments, testimony from legislators and community members, negotiations with party members and locals, and dozens of compromises and tough votes, the 2010 Commission's final plan passed with both Democrats and Presiding Officer Regnier in favor and both Republicans opposed.¹¹⁷ The Commission filed the plan with the Secretary of State on February 12, 2013, and completed the process of redistricting.¹¹⁸

E. The Plan Survives a Legal Challenge

The 2010 redistricting process in Montana was not over yet, however. On March 14, 2013, voters in Fergus and Wheatland Counties filed a challenge to a portion of the redistricting plan in the Fourteenth Judicial District, Wheatland County.¹¹⁹ In the complaint, the voters asked the court to invalidate the changes the Commission made to holdover senator assignments at the February 12, 2013 meeting.¹²⁰ The crux of the voters' complaint was the so-called "Llew Jones Amendment."¹²¹

Llew Jones was elected to Montana Senate District 14 in 2010, but his residence was redrawn into Senate District 9 by the 2010 Commission. The Commission originally assigned Senator Rick Ripley to Senate District 9,

113. *2013 Redistricting Plan*, *supra* n. 78, at 10.

114. *Id.*; *see also* Regnier, *supra* n. 85.

115. Mont. H. Res. 2, 63d Legis., 2013 Reg. Sess. (Jan. 17, 2013); Mont. Sen. Res. 3, 63d Legis., 2013 Reg. Sess. (Jan. 22, 2013).

116. *2013 Redistricting Plan*, *supra* n. 78, at 10; Written Interview, *supra* n. 100.

117. Written Interview, *supra* n. 100.

118. *2013 Redistricting Plan*, *supra* n. 78, at 10.

119. *Id.* at 24; *Willems v. State*, 325 P.3d 1204, 1205 (Mont. 2014). The case was eventually transferred to the First Judicial District, Lewis and Clark County. *Id.* at 1207.

120. *2013 Redistricting Plan*, *supra* n. 78, at 24.

121. *Willems*, 325 P.3d at 1206.

which left Senator Jones unable to run for reelection until 2016. Community leaders from north-central Montana and a bipartisan group of legislators contacted the Commission and asked it to assign Senator Jones to a Senate district where he could run for reelection in 2014. At its final meeting in February 2013, the Commission voted to reassign Senator Ripley to Senate District 10. As a result, Senate District 9 had no holdover Senator and Senator Jones was free to run in that district in 2014. The Commission provided an opportunity for public comment on this amendment and, receiving none, adopted the final redistricting plan that included the “Llew Jones Amendment.”¹²² The plan that the Commission submitted to the legislature in January 2013 did not include a holdover senator assignment for Senate District 15.¹²³ But as a result of the Llew Jones Amendment, Senator Brad Hamlett was assigned a holdover seat in Senate District 15, meaning residents of Senate District 15 would have to wait until 2016 to vote for a Senate candidate.¹²⁴ Voters in Senate District 15 initiated a lawsuit, alleging, among other things, that they had been disenfranchised and that their constitutional rights to participate had been violated.¹²⁵

Article II, section 8 of the Montana Constitution provides that “[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.”¹²⁶ “Section 8 applies only to ‘governmental agencies.’”¹²⁷ An agency is “any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except: (a) the legislature and any branch, committee, or officer thereof.”¹²⁸ Plaintiffs argued that Section 8 applies to the Commission because “the Commission is a ‘separate body’ and is not a ‘branch’ or ‘committee’ of the Legislature.”¹²⁹ They argued that the “Commission violated the public’s right to participate by failing to post any proposed holdover amendments on the Commission’s website, failing to provide the public with ‘sufficient factual detail and rationale’ for the [Llew] Jones Amendment, and effectively denying the public the right to submit written comments on the amendment.”¹³⁰ In response, the State argued that the Com-

122. *Id.*

123. Br. in Support of Pls.’ Mot. for S.J. at 7, *Willems v. State*, <http://perma.cc/4GNZ-JHWS> (<http://leg.mt.gov/content/Committees/Interim/2011-2012/Districting/Other-Documents/Litigation/DV-13-07-plaintiffs-msj-brief-in-supprt-8-1-13.pdf>) (Mont. 1st Jud. Dist. Aug. 1, 2013) (No. ADV-2013-609).

124. *Id.*

125. *Id.* at 1–2.

126. Mont. Const. art. II, § 8.

127. *Willems*, 325 P.3d at 1209 (quoting Mont. Const. art. II, § 8 and Mont. Code Ann. § 2–3–101).

128. Mont. Code Ann. § 2–3–102(1).

129. *Willems*, 325 P.3d at 1209.

130. *Id.*

mission is not a governmental agency but rather “a part of the legislative branch of government because it legislates directly by passing and submitting a final plan for legislative districts.”¹³¹ The Montana Supreme Court, like the district court, agreed with the State and found that:

“[A]lthough the Commission is independent from the legislature, it is clearly a part of the legislative branch of government” for several reasons, including that: its powers and duties are established under Article V of the Montana Constitution; the Commission operates much like an interim legislative committee; and the Legislative Services Division provides the research analysts, attorney, and secretary to staff the Commission and to maintain its website, which is found on the “Legislative Branch” homepage.¹³²

Judge Menahan interpreted Section 8 not to apply to the Districting and Apportionment Commission and granted summary judgment in favor of the State.¹³³

The Montana Supreme Court affirmed Judge Menahan on appeal, noting that although the Commission is not a “governmental agency” and thus is not subject to the requirements of Section 8, the Commission nonetheless “maximized public participation by holding multiple public meetings and by allowing the public to actively engage in the redistricting process.”¹³⁴ The Supreme Court also affirmed Judge Menahan’s determination that the Commission’s assignment of holdover Senators did not disenfranchise voters. In support of its position, the Court noted “that Plaintiffs’ requested remedy of striking the [Llew] Jones Amendment would result in voters from another district voting in only two senate elections over the ten-year period. Thus, the purported violation of the right of suffrage would not be cured at all; it would simply be shifted to another set of voters.”¹³⁵ The Supreme Court’s ruling in *Willems* again reaffirmed the independence of the Districting and Apportionment Commission. With the conclusion of this litigation, it was now time to implement the 2010 Commission’s redistricting plan.

V. MONTANA’S SUCCESSES

Redistricting in Montana following the 2010 census was quantitatively successful: it resulted in districts that are as equal as practicable and, with a population deviation of less than one percent in both House and Senate districts, it nearly achieved the “one person, one vote” ideal. But Montana had other, more normative successes that make it a model for other states

131. *Id.* (internal quotation marks omitted).

132. *Id.* at 1209–1210 (quoting the district court in the same case).

133. *Id.* at 1205.

134. *Id.* at 1210.

135. *Willems*, 325 P.3d at 1210.

seeking similar outcomes. In short, Montana set and achieved worthy goals: the 2010 redistricting process (1) was perceived as legitimate; (2) was bipartisan; and (3) resulted in competitive elections.

The delegates to Montana's Constitutional Convention preferred a commission approach to redistricting over a legislative approach largely for a single reason: the delegates wanted to limit the potential for boundaries drawn on the basis of political self-interest. The delegates intuitively understood that self-interest decreases legitimacy and that public perception of government institutions matters. Two separate mechanisms operate to ensure that public and not private interests motivate the redistricting commissioners. First, Montana's constitution requires that "none of [the members of the Districting and Apportionment Committee] may be public officials."¹³⁶ And second, Montana is one of only two states that has a redistricting commission truly independent of the state legislature.¹³⁷ Montana's redistricting plan becomes law upon filing with the Secretary of State and without legislative action.¹³⁸ The success of these mechanisms in eliminating self-interested line-drawing is borne out anecdotally. The print media that followed the work of the 2010 Commission noted that the Commission responded to public input, successfully reached an initial 5–0 consensus on the House districts, and generally created a plan that did not advantage one party over another.¹³⁹ "Longtime political hounds in Montana saw the process as much less rancorous than in decades past," the Helena Independent Record opined.¹⁴⁰ And Bob Brown, former Montana Secretary of State and State Senate president wrote, "[t]he Republicans got as fair a deal as the Democrats."¹⁴¹ Montana's recent experience makes clear that a commission approach can achieve public legitimacy. States should consider prioritizing the public perception of their redistricting processes because the perceived legitimacy of governmental institutions has wide-ranging effects on many aspects of the democratic process.¹⁴²

136. Mont. Const. art. V, § 14, cl. 2.

137. Kubin, *supra* n. 18, at 843.

138. Mont. Const. art. V, § 14, cls. 3–4.

139. See e.g. *Panel Delivers Map with 100 Equal Districts*, Billings Gazette (Feb. 18, 2013) (available at <http://perma.cc/C5ZR-K3P6> (http://billingsgazette.com/news/opinion/editorial/gazette-opinion/gazette-opinion-panel-delivers-map-with-equal-districts/article_b8ee6dff-b5ae-570b-84e2-005c689522eb.html)); Bob Brown, *Statesmanship Survives in Montana Government*, Billings Gazette (Feb. 15, 2013), <http://perma.cc/ADA9-DKLJ> (http://billingsgazette.com/news/opinion/guest/guest-opinion-statesmanship-survives-in-montana-government/article_434bc8f3-20a0-5723-a3e3-9898e2f85ba0.html); *Mapping State's Legislative Future*, Helena Independent Record (Aug. 23, 2012) (available at <http://perma.cc/EH64-Y7Q6> (http://helenair.com/news/opinion/editorial/mapping-state-s-legislative-future/article_5b5c39f4-ecea-11e1-a92c-0019bb2963f4.html)).

140. *Mapping State's Legislative Future*, *supra* n. 139.

141. Brown, *supra* n. 139.

142. For example, the perception that districts are gerrymandered decreases voter turnout. See James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True*

The second goal of Montana's redistricting system—bipartisanship—recognizes that American politics is, and for the foreseeable future will be, a two-party system. A common criticism of the commission approach is that “[d]istricting by bipartisan commission . . . does not take the politics out of redistricting. Rather, it replaces the potential for partisan gerrymandering with the potential for bipartisan, or ‘consensual’ gerrymandering, in which mapmakers design safe seats for both parties’ incumbents.”¹⁴³ The transcript of Montana's Constitutional Convention supports the view that commissions do not take the politics out of redistricting. The delegates themselves said they “recognized that redistricting and reapportionment has political repercussions” and as a result the Montana constitution “provides for bipartisanship in the method of selection of the first four members [of the commission].”¹⁴⁴ But the delegates envisioned both bipartisanship and impartiality. It is the fifth member of the commission who “becomes the key vote.”¹⁴⁵ “[H]is selection by the other four members is to insure impartiality.”¹⁴⁶

The combination of bipartisanship and impartiality is a better model for redistricting commissions than a nonpolitical or nonpartisan commission because the former accepts politics as inevitable and values fairness over equality. Fair is “just or appropriate in the circumstances,” whereas equal is “being the same in quantity, size, degree, value.”¹⁴⁷ The Supreme Court's emphasis on the “one person, one vote” ideal implies that equality should be the goal of redistricting. But valuing fairness allows decision makers to consider relevant circumstances and to support one party over another if doing so is appropriate. Valuing equality, on the other hand, leads to mathematical formulas and an objectification of the subjective. Protecting “communities of interest” cannot be reduced to a formula and political consensus cannot be achieved by a computer. Valuing nonpartisanship over bipartisanship is an attempt to depoliticize an inherently political process, an attempt to turn a human process into an automated process. The 2010 Commission is proof that a bipartisan commission with a tie-breaking presiding officer can produce political consensus as well as fair results statewide—fair to citizens, fair to communities, and fair to political parties. States should

Meaning of “Representation”? 7 Mich. J. Race & L. 357, 409 (2002) (explaining that “[v]oter turnout in the United States consistently is among the lowest of the democratic nations in large part because political results often are pre-determined in safe districts.”).

143. Jeremy Buchman, *Drawing Lines in Quicksand: Courts, Legislatures, & Redistricting* 207 (Peter Lang 2003) (citing Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 Tex. L. Rev. 1643, 1694–1695 (1993) and Bruce E. Cain, *The Reapportionment Puzzle* 159–166 (U. Cal. Press 1984)).

144. *Constitutional Convention Transcript*, *supra* n. 36, at 393.

145. *Id.*

146. *Id.*

147. *New Oxford American Dictionary* 585, 621 (3d ed., Oxford U. Press 2010).

strive for fairness and political consensus as well as constitutional equality and Montana is a model for all three.

The nearly universal distaste for gerrymandering is rooted in the public's conception of what a democratic election *should* be. Voters choose legislators; legislators do not choose voters. The political science literature is enlightening on this point:

[W]hile political scientists have noted a significant decline in party identification, anti-incumbent sentiment is prevalent. Therefore, it may be less important, from the voter's perspective, whether he is represented by a Republican or Democrat than whether he is represented by a long-term incumbent in a safe seat or an official who knows he resides in a competitive district.¹⁴⁸

Redistricting commissions should strive to enable competitive elections within legislative districts because competitive districts are the opposite of the gerrymandered "safe seats."

The 2014 elections demonstrated that the new Montana legislative districts were competitive. Despite a sweeping tide of national Republican victories, Montana Democrats increased their numbers in the House by two seats and retained their Senate numbers.¹⁴⁹ Ballotpedia, an interactive almanac of U.S. politics, has developed a "competitiveness index" by which it ranks the states according to the competitiveness of their legislative races. Their analysis ranked the 2014 Montana legislative elections as the fifth most competitive in the country.¹⁵⁰ In 2012, Montana was ranked tenth¹⁵¹ and in 2010 it was ranked twelfth.¹⁵² Thus, in the first election conducted with the 2010 Commission's new districts, Montana increased its electoral competitiveness. The 2014 elections put Montana's new legislative districts to the test and proved that a bipartisan redistricting process can produce competitive elections.

148. Kristen Silverberg, *The Illegitimacy of the Incumbent Gerrymander*, 74 Tex. L. Rev. 913, 934 (1996).

149. Ballotpedia, *Montana House of Representatives Elections, 2014*, (accessed Feb. 7, 2015) <http://perma.cc/JVD4-J5PN> (http://ballotpedia.org/Montana_House_of_Representatives_elections,_2014); Ballotpedia, *Montana State Senate Elections, 2014*, (accessed Feb. 7, 2015) <http://perma.cc/8JWC-RN5Z> (http://ballotpedia.org/Montana_State_Senate_elections,_2014).

150. Ballotpedia, *State Legislatures Compared by Extent of Electoral Competitiveness in 2014*, (accessed Feb. 7, 2015) <http://perma.cc/DHV7-7YAS> (http://ballotpedia.org/State_legislatures_compared_by_extent_of_electoral_competitiveness_in_2014).

151. Ballotpedia, *State Legislatures Compared by Extent of Electoral Competitiveness in 2012*, (accessed Feb. 7, 2015) <http://perma.cc/UB8A-6GHV> (http://ballotpedia.org/State_legislatures_compared_by_extent_of_electoral_competitiveness_in_2012).

152. Ballotpedia, *State Legislatures Compared by Extent of Electoral Competitiveness in 2010*, (accessed Feb. 7, 2015) <http://perma.cc/3GDX-6M8S> (http://ballotpedia.org/State_legislatures_compared_by_extent_of_electoral_competitiveness_in_2010).

VI. CONCLUSION

In order for a redistricting plan to pass constitutional muster, it need only adhere to the Supreme Court's "one person, one vote" conception of political equality. But if states want a fuller conception of political equality to underlie their redistricting processes, a bipartisan redistricting commission like Montana's has much to recommend it. Montana nearly achieved the "one person, one vote" ideal, developed a bipartisan plan, and held competitive elections. But the goal of this article was not to persuade other states that Montana's approach to redistricting is objectively the best. After all, as Daniel Lowenstein and Jonathan Steinberg wrote in their oft-cited article on legislative districting, "there are no coherent public interest criteria for legislative districting independent of substantive conceptions of the public interest, disputes about which constitute the very stuff of politics."¹⁵³ Rather, this article sought to illustrate Montana's redistricting goals, why the goals are worthy of pursuit, and Montana's recent success in achieving them. If other states share Montana's conception of the public interest, our redistricting model is worth exploring.

153. Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* 33 UCLA L. Rev. 1, 4 (1985).