
*Article I — Elections Clause — Legislative Control of Redistricting —
Arizona State Legislature v. Arizona Independent
Redistricting Commission*

The Elections Clause of the U.S. Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by *the Legislature* thereof” unless Congress prescribes otherwise.¹ Given the importance of congressional district boundaries to the “Elections for . . . Representatives,” such boundaries are considered part of the “Times, Places and Manner” governed by the Elections Clause.² As a result, state legislatures possess the power to redistrict, and gerrymandering — the manipulation of legislative district boundaries for political gain — often results from the exercise of that power.³ Last Term, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,⁴ the Supreme Court upheld an Arizona ballot measure that established a commission to craft district boundaries independently of the state legislature. An Arizona-type independent commission has several features that make it a particularly promising means of combating gerrymandering, and *Arizona State Legislature* preserves its viability. Even in the absence of constitutional doubt, redistricting-reform activists who attempt to implement such independent-commission systems may nonetheless encounter the claim that commissions are antidemocratic by virtue of being unelected — a charge leveled by Justice Thomas in dissent, and one that has been successfully deployed against efforts to implement similar commissions in the past. But this charge assumes that legislatures are indeed democratically accountable when conducting redistricting, and further ignores various features of these commission systems designed to advance democratic values.

Redistricting underwent several fundamental changes in the 1960s. Improvements in technology allowed cartographers to tailor districts for political advantage with increasing precision (often through analysis of partisan data),⁵ while the Supreme Court’s equal-population

¹ U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

² See, e.g., *Lance v. Coffman*, 549 U.S. 437, 437–38 (2007) (per curiam); *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964); *Smiley v. Holm*, 285 U.S. 355, 362–63 (1932).

³ See Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 405–07 (1993).

⁴ 135 S. Ct. 2652 (2015).

⁵ See, e.g., *Wells v. Rockefeller*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting) (“A computer may grind out district lines which can totally frustrate the popular will . . .”); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1654 (1993) (noting that gerrymandering “was greatly facilitated by the advent of computer technology”).

cases⁶ and the passage of the Voting Rights Act of 1965⁷ established additional criteria to be considered in the process. Redistricting became increasingly litigious,⁸ and several states established redistricting commissions in response.⁹ Arizona is one state that saw its redistricting process reformed through popular initiative. The Arizona Constitution vests legislative authority primarily in the legislature, but reserves for the people an initiative right — “the power to propose laws and amendments to the constitution.”¹⁰ In 2000, the state’s voters exercised this power and approved Proposition 106,¹¹ an initiative measure that amended the state constitution to establish the Arizona Independent Redistricting Commission (AIRC).¹² Proposition 106 took redistricting authority from the state legislature, vested it in the AIRC, and further constrained the redistricting process in two ways: First, it limited who could serve on the AIRC. Among other restrictions, members cannot have served in public office in the three years prior to appointment, and no more than two members on the five-member commission can be of the same political party.¹³ Second, it limited the criteria that the AIRC can (and cannot) consider when conducting redistricting. The Commission’s districts must comply with the U.S. Constitution and the Voting Rights Act and conform, “to the extent practicable,”¹⁴ to “traditional redistricting principles”¹⁵ such as compactness, contiguity, and respect for existing political subdivisions.¹⁶ However, party registration and voting history data, often relied upon

⁶ *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry*, 376 U.S. 1.

⁷ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at scattered sections of 52 U.S.C.).

⁸ *See* Jocelyn F. Benson, *A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act*, 88 NEB. L. REV. 124, 137–50 (2009) (documenting Voting Rights Act litigation); *Recent Case*, 128 HARV. L. REV. 1834, 1834–35 (2015) (discussing population-based challenges to redistricting plans). Further, in *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court opened the federal courts to legal challenges to redistricting that were previously considered nonjusticiable. *See id.* at 197–98.

⁹ *See, e.g.*, *Historical Timeline*, WASH. STATE REDISTRICTING COMM’N, <http://www.redistricting.wa.gov/history.asp> (last visited Sept. 27, 2015) [<http://perma.cc/3ZL7-GGLW>] (noting the Washington legislature’s “growing wear[iness] of the constant battles” over redistricting as an impetus for the Commission’s creation, the third of its kind).

¹⁰ ARIZ. CONST., art. IV, pt. 1, § 1. Twenty-four states permit some form of initiative. *See Initiative and Referendum States*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> (last updated Sept. 2012) [<http://perma.cc/996Z-ULMY>].

¹¹ *Proposition 106*, ARIZ. SEC’Y OF STATE (Sept. 2000), <https://web.archive.org/web/20150222133439/http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.htm> [<http://perma.cc/4FXL-G3ZP>] [hereinafter *Proposition 106 Voter’s Pamphlet*].

¹² *See* ARIZ. CONST. art. IV, pt. 2, § 1.

¹³ *See id.* para. 3. The public-office bar does not include service on a school board. *See id.*

¹⁴ *See id.* para. 14.

¹⁵ *E.g.*, *Bush v. Vera*, 517 U.S. 952, 959 (1996) (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1333 (S.D. Tex. 1994)).

¹⁶ *See* ARIZ. CONST. art. IV, pt. 2, § 1, para. 14; *see also Vera*, 517 U.S. at 959–60.

by state legislatures in conducting redistricting, can be used only to “test maps for compliance” with enumerated criteria, and information about incumbent and candidate residences cannot be considered at all.¹⁷

The AIRC was reconvened following the 2010 Census¹⁸ and finalized its congressional redistricting plan in January 2012.¹⁹ Shortly thereafter, the Arizona State Legislature (the Legislature) filed suit in U.S. District Court for the District of Arizona,²⁰ seeking a declaratory judgment that Proposition 106 violated the Elections Clause and an injunction against the implementation of the Commission’s congressional districting plan.²¹ A three-judge panel heard the case²² and divided on the constitutionality of the AIRC.²³ Writing for the majority, Judge Snow²⁴ held that Proposition 106 did not violate the Elections Clause.²⁵ He reasoned that Supreme Court precedent “demonstrate[d] that the word ‘Legislature’ in the Elections Clause refers to the legislative process used in that state, determined by that state’s own constitution and laws,”²⁶ and that Arizona had “multiple avenues for lawmaking and one of those avenues is the ballot initiative.”²⁷ Therefore, the Commission “was created through the legislative power,” and it “exercise[d] the state’s legislative power” — as the Elections Clause requires — in conducting its operations.²⁸

¹⁷ See ARIZ. CONST. art. IV, pt. 2, § 1, para. 15. Arizona does not require that a candidate for state legislature reside in the district she seeks to represent, see *id.* § 2 (establishing residency requirements), and *cannot* require that a candidate for Congress reside in the district she seeks to represent, cf. *Schaefer v. Townsend*, 215 F.3d 1031, 1037 (9th Cir. 2000) (noting that “[a state] does not ‘possess the power to supplement the exclusive qualifications set forth in the text of the Constitution’” through restrictions such as additional residency requirements, *id.* at 1035 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995))).

¹⁸ The Commission had implemented a redistricting plan following the 2000 Census with no challenge to its constitutionality. See *Ariz. State Legislature*, 135 S. Ct. at 2658.

¹⁹ *Id.*

²⁰ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014).

²¹ *Id.* at 1049.

²² *Ariz. State Legislature*, 135 S. Ct. at 2662. Under 28 U.S.C. § 2284(a) (2012), a three-judge panel “shall be convened when . . . an action is filed challenging the constitutionality of the apportionment of congressional districts.” The panel was comprised of Judge Schroeder of the Ninth Circuit Court of Appeals and Judges Rosenblatt and Snow of the District of Arizona.

²³ *Ariz. State Legislature*, 997 F. Supp. 2d at 1056. The panel did, however, agree unanimously that the Legislature had standing to challenge the AIRC, reasoning that the Legislature’s “loss of redistricting power constitute[d] a concrete injury” as required under standing doctrine. *Id.* at 1050; see also *id.* at 1056 (Rosenblatt, J., concurring in part and dissenting in part).

²⁴ Judge Snow was joined by Judge Schroeder.

²⁵ *Ariz. State Legislature*, 997 F. Supp. 2d at 1056.

²⁶ *Id.* at 1054.

²⁷ *Id.* at 1054–55.

²⁸ *Id.* at 1055. Judge Rosenblatt argued in dissent that, while the Elections Clause “permits a state to include some other state entity or official . . . as a limiting check on its legislature[.]” *id.* at 1057 (Rosenblatt, J., concurring in part and dissenting in part), Proposition 106 went too far by

The Supreme Court affirmed. Writing for the Court, Justice Ginsburg²⁹ first addressed the Legislature's standing. Because Proposition 106 "strips the Legislature of its alleged prerogative to initiate redistricting," the Legislature had suffered an injury that was sufficiently concrete and redressable.³⁰ Proceeding to the merits,³¹ the Court reviewed the precedent "relating to appropriate state decisionmakers for redistricting purposes,"³² which established that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking."³³ A state's legislative processes could involve actors other than the legislature, such as the Governor (through a veto) and the voters (through a referendum),³⁴ and such legislative functions should be distinguished from "instances in which the Constitution calls upon state legislatures to exercise a function other than lawmaking," such as the appointment of U.S. Senators prior to the passage of the Seventeenth Amendment.³⁵

Turning to the Elections Clause specifically, the Court reasoned that the term "Legislature" was "capaciously define[d]" to be "[t]he power that makes laws."³⁶ Because the Arizona Constitution reserved some legislative power to the people, voter-passed initiatives "legislate for the State just as measures passed by the [Legislature] do."³⁷ Therefore, the delegation of redistricting power to the AIRC, albeit accomplished through Proposition 106 and not an act of the Legislature, was nonetheless valid.³⁸ This interpretation of the Elections Clause not only was consistent with "[t]he dominant purpose of the Elections Clause" of "empower[ing] Congress to override state election rules,"³⁹

divesting the Legislature of "any outcome-defining effect on the congressional redistricting process," *id.* at 1058.

²⁹ Justice Ginsburg was joined by Justices Kennedy, Breyer, Sotomayor, and Kagan.

³⁰ *Ariz. State Legislature*, 135 S. Ct. at 2663. The Legislature was "an institutional plaintiff asserting an institutional injury," not unlike the members of the Kansas Senate who were found to have standing to challenge the Lieutenant Governor's tiebreaking vote in *Coleman v. Miller*, 307 U.S. 433 (1939). *Ariz. State Legislature*, 135 S. Ct. at 2664–65.

³¹ The Court also noted that 2 U.S.C. § 2a(c), which prescribes default procedures for Congressional redistricting if a state's districts are not "redistricted in the manner provided by [state] law," *Ariz. State Legislature*, 135 S. Ct. at 2670 (alteration in original) (quoting 2 U.S.C. § 2a(c) (2012)), supported the interpretation that a redistricting plan formulated in accordance with state law, "whether by the legislature, court decree, or a commission established by the people[]," would be presumptively valid, *id.* (citation omitted).

³² *Id.* at 2666.

³³ *Id.* at 2668.

³⁴ *Id.* (citing *Smiley v. Holm*, 285 U.S. 355, 365–66 (1932); *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 567 (1916)).

³⁵ *Id.* at 2667.

³⁶ *Id.* at 2671 (citing various Founding-era dictionaries).

³⁷ *Id.* (citing ARIZ. CONST. art. IV, pt. 1, § 1).

³⁸ *Id.* at 2671–72.

³⁹ *Id.* at 2672.

but also better preserved the “autonomy [of states] to establish their own governmental processes.”⁴⁰ The opposite interpretation, by contrast, would impede efforts to combat gerrymandering, which were exercises of “[t]he people’s ultimate sovereignty.”⁴¹

Chief Justice Roberts⁴² dissented. He criticized the majority’s holding as having “no basis in the text, structure, or history of the Constitution.”⁴³ “Legislature” meant a representative body — an interpretation confirmed by not only various Founding-era sources,⁴⁴ but also the numerous other uses of “Legislature” throughout the Constitution.⁴⁵ The majority’s interpretation of “the constitutional term ‘the Legislature’ to mean ‘the people’” was a “magic trick”⁴⁶ that rendered the effort behind the ratification of the Seventeenth Amendment “an 86-year waste of time.”⁴⁷ The majority had unsustainably stretched the Court’s precedent, which permitted the “imposing [of] some constraints on the legislature” in the redistricting process such as voter referenda and gubernatorial vetoes, mechanisms that “*supplement*[ed]” the legislature’s role but did not “*supplant*” it entirely.⁴⁸

Chief Justice Roberts further challenged the majority’s “naked appeals to public policy”⁴⁹ and its “greater concern about redistricting practices than about the meaning of the Constitution.”⁵⁰ Such concern was largely unfounded: not only would “most other redistricting commissions” be unaffected by the invalidation of Proposition 106,⁵¹ but

⁴⁰ *Id.* at 2673.

⁴¹ *Id.* at 2675. The Court reasoned that the opposite interpretation would also create an incongruity between the abilities of states to regulate federal elections as compared to state and local ones. *Id.* at 2674. For example, numerous state electoral laws, such as those governing voter identification requirements and absentee balloting procedures, would apply to state and local elections but not to federal elections. *Id.* at 2676–77.

⁴² Chief Justice Roberts was joined by Justices Scalia, Thomas, and Alito.

⁴³ *Ariz. State Legislature*, 135 S. Ct. at 2678 (Roberts, C.J., dissenting). The Chief Justice also criticized the majority’s analysis of 2 U.S.C. § 2a(c), stating his belief that the statute “does not apply to this case,” *id.* at 2687, and calling the majority’s interpretation “implausible” and “likely violat[ive of] the Constitution in multiple ways,” *id.* at 2688.

⁴⁴ *Id.* at 2679–80.

⁴⁵ The Chief Justice included an appendix to his dissent cataloguing the seventeen instances in which the term “Legislature” was used throughout the Constitution. *See id.* at 2692–94.

⁴⁶ *Id.* at 2677.

⁴⁷ *Id.* at 2682.

⁴⁸ *Id.* at 2687.

⁴⁹ *Id.* at 2678.

⁵⁰ *Id.* at 2690.

⁵¹ *Id.* at 2691. “Most other” commissions presumably does not include the California Citizens Redistricting Commission, which also fully divested the legislature of its redistricting authority. *See* CAL. CONST. art. XXI, § 2. The extent to which commission displacement of legislative prerogative is permissible in the Chief Justice’s view remains unclear. For example, under the Iowa commission system, the legislature cannot prescribe adjustments to the commission’s proposed maps until it has rejected three proposals in succession — a power that the legislature has never exercised since the establishment of the commission system in 1980. *See* Justin Levitt, *Iowa*, ALL

Proposition 106's vesting of *state legislative* redistricting power in the AIRC would also be unaffected, leaving a mechanism by which "the work of the Commission [would] continue to influence Arizona's federal representation."⁵² Finally, the Chief Justice registered his doubts about the independence of the Commission — an "unelected, unaccountable institution" — noting allegations that political bias against Republicans had influenced the Commission's decisionmaking.⁵³

Justice Scalia⁵⁴ also dissented. He noted his view that "the majority's resolution of the merits question [was] outrageously wrong,"⁵⁵ but focused on his belief that the Legislature lacked standing because its suit was a "[d]ispute[] between governmental branches or departments regarding the allocation of political power" and therefore not a "case" or "controversy" as required under Article III.⁵⁶

Justice Thomas⁵⁷ penned a third dissent agreeing with Chief Justice Roberts on the interpretation of the Elections Clause and with Justice Scalia on lack of standing,⁵⁸ but arguing primarily that the Court's attempt to be "a great defender of direct democracy" was unconvincing given its "tradition of disdain for state ballot initiatives."⁵⁹ The Court's treatment of Proposition 106 was particularly ironic, as the initiative "was unusually democracy-reducing": it took control of the redistricting process from the (elected) Legislature and handed it to the (unelected) AIRC, "thereby reducing democratic control over the process in the future."⁶⁰ Proposition 106 was not "direct democracy at its best,"⁶¹ but more closely resembled "a plebiscite in a 'banana republic' that installs a strongman as President for Life."⁶²

By upholding the constitutionality of redistricting processes that are undertaken by independent commissions free from any legislative involvement (or interference), *Arizona State Legislature* preserved the viability of a promising method of limiting gerrymandering. With independent commissions now bearing the Court's seal of constitutional approval, redistricting-reform activists may seek their implementation

ABOUT REDISTRICTING (citing IOWA CODE ANN. §42.3 (West 2012)), <http://redistricting.ils.edu/states-IA.php> (last visited Sept. 27, 2015) [<http://perma.cc/F2TV-QGNG>].

⁵² *Ariz. State Legislature*, 135 S. Ct. at 2691 (Roberts, C.J., dissenting).

⁵³ *Id.* (citing *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1046 (D. Ariz. 2014) (per curiam), *prob. juris. noted*, 135 S. Ct. 2926, *amended by* 135 S. Ct. 2946 (2015)). *Harris* involved the AIRC's state legislative redistricting plan. *See* 993 F. Supp. 2d at 1046.

⁵⁴ Justice Scalia was joined by Justice Thomas.

⁵⁵ *Ariz. State Legislature*, 135 S. Ct. at 2697 (Scalia, J., dissenting).

⁵⁶ *Id.* at 2694.

⁵⁷ Justice Thomas was joined by Justice Scalia.

⁵⁸ *Ariz. State Legislature*, 135 S. Ct. at 2699 (Thomas, J., dissenting).

⁵⁹ *Id.* at 2697.

⁶⁰ *Id.* at 2698.

⁶¹ *Id.*

⁶² *Id.* at 2699.

in additional states — especially those in which the people are delegated legislative authority by their state constitutions. These efforts will encounter the response, as made by Justice Thomas in dissent and alluded to in passing by the Chief Justice, that commissions undemocratically “take districting away from the people’s representatives and give it to an unelected committee.”⁶³ But a closer examination of independent-commission systems already in place reveals numerous features that undermine this contention. These features establish the democratic pedigree of independent commissions and can be highlighted when democratic concerns are raised by commission opponents.

The AIRC is characterized by its independence from the legislature, its membership limitations and operating procedure, and the constraints on criteria that it may consider. Indeed, the California Citizens Redistricting Commission (CCRC) — which was also established through popular initiative — incorporates these features as well;⁶⁴ both the CCRC and the AIRC have been cited by scholars as models of reform.⁶⁵ Independent-commission systems are still in their infancy — the AIRC has conducted only two rounds of redistricting, and the CCRC is but one cycle old — but studies have suggested that districts drawn by independent commissions tend to be more compact.⁶⁶ Further, independent commissions are better able to “deliver district maps on time, and largely without legal contestation.”⁶⁷ While some scholars have doubted whether commission-drawn maps are more competitive, noting the lack of increase in the number of “competitive dis-

⁶³ *Id.* at 2698.

⁶⁴ The CCRC was established by Proposition 11 in 2008 and was initially tasked only with redrawing state legislative districts. See California Proposition 11: Voters FIRST Act (2008). Proposition 20, passed in 2010, added congressional redistricting to the CCRC’s mandate. See California Proposition 20: Voters FIRST Act for Congress (2010). Proposition 11 established both membership limitations and redistricting criteria that the CCRC is to follow. See CAL. CONST. art. XXI, § 2(c)–(d).

⁶⁵ See, e.g., J. Gerald Hebert & Marina K. Jenkins, Essay, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POL’Y REV. 543, 556 (2011) (describing the AIRC’s and CCRC’s establishments as “positive movement toward redistricting reform”).

⁶⁶ AZAVEA, REDRAWING THE MAP ON REDISTRICTING 2012: ADDENDUM 10 tbl.7 (2012), http://cdn.azavea.com/com.redistrictingthenation/pdfs/Redistricting_The_Nation_Addendum.pdf [<http://perma.cc/7CET-NN2Z>]; see also *id.* at 13 (noting that the implementation of the CCRC “appears to have result[ed] in significantly more compact districts”). Compactness, the measure of a district’s irregularity, often serves as a “proxy for how gerrymandered [a] district[] is,” with lower compactness indicating a greater extent of gerrymandering. Christopher Ingraham, *America’s Most Gerrymandered Congressional Districts*, WASH. POST: WONKBLOG (May 15, 2014), <http://www.washingtonpost.com/news/wonkblog/wp/2014/05/15/americas-most-gerrymandered-congressional-districts> [<http://perma.cc/LNZ6-QKZY>].

⁶⁷ Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U.C. IRVINE L. REV. 637, 666 (2013).

tricts” that both parties could plausibly win,⁶⁸ this lack of change may have been due to increased political polarization (in the form of geographic self-sorting) within the electorate.⁶⁹ That is, without an independent commission, the number of competitive districts might have decreased; instead, the commission-drawn maps may have helped stave off such a decline.

Given these advantages, and the *Arizona State Legislature* stamp of constitutional approval, redistricting-reform activists are likely to pursue independent commissions moving forward.⁷⁰ Though commissions are a promising means of reform, there is the democracy problem that Justice Thomas noted in dissent — legislatures that would regularly conduct redistricting are popularly elected, but the independent commissions displacing them are not. Independent-commission opponents have consistently channeled this concern in their advocacy: Opponents of Proposition 106 warned (unsuccessfully) that if the initiative were approved, “unelected, unaccountable lawyers will have more power than anyone else in the redistricting process.”⁷¹ Independent-commission opponents in Ohio characterized an independent commission proposed in 2012 as “Unelected, Unaccountable and Unacceptable.”⁷² Groups opposing the establishment of the CCRC argued that the commission would “undermine[] democracy” and “give[] power to bureaucrats.”⁷³

This argument presupposes that redistricting is more democratic when left to a state legislature. But a state legislature is not necessarily more accountable than a commission,⁷⁴ or more representative than

⁶⁸ See *id.* at 664 (noting competing interpretations of recent election results: “the newly instituted commission succeeded in drawing more competitive districts than at any time since the 1996 elections,” or that “the elections of 2012 were business as usual”).

⁶⁹ See Devin McCarthy, *Did the California Citizens Redistricting Commission Really Create More Competitive Districts?*, FAIRVOTE (Nov. 26, 2013), <http://www.fairvote.org/research-and-analysis/blog/did-the-california-citizens-redistricting-commission-really-create-more-competitive-districts> [<http://perma.cc/T8FL-FYA5>] (“By the time the new districts were actually put into use in 2012, however, the nationwide trend toward more polarized districts had completely cancelled out the new map’s increased competitiveness.”).

⁷⁰ See, e.g., Juan Williams, *A First Step Against Gerrymandering*, THE HILL (July 13, 2015, 6:00 AM), <http://thehill.com/opinion/juan-williams/247598-juan-williams-a-first-step-against-gerrymandering> [<http://perma.cc/NK3C-QG7U>].

⁷¹ *Proposition 106 Voter’s Pamphlet*, *supra* note 11.

⁷² David R. Langdon, *Vote No on Issue 2*, PROTECT YOUR VOTE OHIO, <http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2-against.pdf> [<http://perma.cc/S7RQ-PT9T>].

⁷³ *Prop. 11: Arguments and Rebuttals*, CAL. SEC’y OF STATE, <http://www.voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt11.htm> [<http://perma.cc/BX3E-6YYD>].

⁷⁴ See Justin Levitt, Essay, *Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 520–22 (2011) (“[I]t strains credulity to believe that any legislator would in practice be removed from office because of the way in which she conducted redistricting.” *Id.* at 520.).

one.⁷⁵ Further, the legislature may not even be able to conduct redistricting at all. Many redistricting plans end up crafted by courts — institutions that are often deliberately insulated⁷⁶ — when legislatures are unable to fulfill their redistricting responsibilities.⁷⁷ But even accepting this presupposition, the origins, structure, and oversight of independent commissions demonstrate that such concerns about democracy and accountability, expressed by both Chief Justice Roberts and Justice Thomas, are misplaced.

Most fundamentally, the commissions' origins provide a first defense from the standpoint of democracy. As the *Arizona State Legislature* Court emphasized, the creation of an independent commission through an initiative is *itself* an exercise of democratic power.⁷⁸ Indeed, given the frequency with which democratic accountability is raised as an argument against commissions,⁷⁹ voters must be presumed to have been aware of this potential problem when voting on their implementation — and yet supported that implementation all the same.

Beyond their democratic origins, the structure of independent commissions ensures that their democratic legitimacy is not lost after their creation. As a starting point, an *independent* commission's independence removes the legislative conflict of interest, under which legislators are not so much (democratically) elected by their constituents, but (antidemocratically) select their constituents.⁸⁰ By pairing a political diversity requirement in commission membership with a supermajority requirement for any commission action, an independent commission prevents unilateral partisan control (which would be inherently unrepresentative).⁸¹ Further, the prescription of various criteria that

⁷⁵ Cf. Norton E. Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808, 814 (1952) (“[T]he bureaucracy now has a very real claim to be considered much more representative of the American people in its composition than the Congress.”). Indeed, the CCRC’s membership requirements are intended to keep the Commission “reasonably representative of this State’s diversity.” CAL. CONST. art. XXI, § 2(c)(1); see also CAL. GOV’T CODE § 8252(g) (West 2012 & Supp. 2015) (providing that commission appointees “shall be chosen to ensure the commission reflects this state’s diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity”).

⁷⁶ See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015).

⁷⁷ See AZAVEA, *supra* note 66, at 10 tbl.7 (noting that nine states comprising 98 districts had their congressional redistricting conducted by courts). See generally Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131 (2005).

⁷⁸ E.g., 135 S. Ct. at 2673, 2675.

⁷⁹ See Steven F. Huefner, *Don’t Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. CONST. L. & PUB. POL’Y 37, 55–56 (2010).

⁸⁰ See Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1817 (2012) (describing the conflict of interest in “legislators drawing district lines that they ultimately have to run in”).

⁸¹ See Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL’Y REV. 109, 120 (2014); cf. Samuel Issacharoff & Richard H.

the commission must consider limits discretion that a commission may have in mapmaking, thereby limiting the potential that such discretion may be abused.⁸² And in practice, both the AIRC and CCRC have conducted numerous public hearings and provided extensive opportunities for public participation — opportunities that legislatures may not provide.⁸³ Each of these features demonstrates a way in which commissions may better protect democratic values than legislatures do.

Finally, voters maintain considerable oversight over commissions — they are hardly the “banana republic” coronation to which Justice Thomas analogized. In Arizona, as Chief Justice Roberts noted, the Governor and state Senate may jointly remove members of the AIRC,⁸⁴ leaving means by which voters can hold commissioners accountable through more conventional institutions of representative democracy.⁸⁵ In California, this oversight power is more direct: voters may seek a referendum on any plan implemented by the CCRC,⁸⁶ and did exactly that in seeking popular review of the CCRC’s post-2010 redistricting of the state Senate.⁸⁷ And further, just as voters can establish commissions, they can abolish them. Should voters find that an independent commission is insufficiently accountable, they can restore legislative control by the same means through which change was effected — through action at the ballot box.

With the major hurdle of constitutionality cleared by *Arizona State Legislature*, the expansion of independent-commission systems as a means of curbing gerrymandering now faces the more mundane challenge of political acceptance. To the extent that the democratic-accountability concerns, as referenced by Chief Justice Roberts and emphasized by Justice Thomas, animate opposition, various features of independent-commission systems already in place could be emphasized to address those concerns — and possibly pave the way for the adoption of more independent-commission systems nationwide.

Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 674–81 (1998) (describing “anticompetitive barriers” arising out of the two-party system).

⁸² See Ancheta, *supra* note 81, at 127.

⁸³ See Miller & Grofman, *supra* note 67, at 655–56 (comparing number of public hearings held by redistricting authorities in various states); see also Ancheta, *supra* note 81, at 128.

⁸⁴ ARIZ. CONST. art. IV, pt. 2, § 1(10); see also *Ariz. State Legislature*, 135 S. Ct. at 2691 (Roberts, C.J., dissenting).

⁸⁵ This removal power is indirect, but no more so than the means through which “the work of the Commission [conducting state legislative redistricting] will continue to influence Arizona’s federal representation.” *Ariz. State Legislature*, 135 S. Ct. at 2691 (Roberts, C.J., dissenting).

⁸⁶ CAL. CONST. art. XXI, § 2(i).

⁸⁷ See California Proposition 40 (2012). The CCRC plan was ratified by a 72%-28% margin. *Statement of Vote: November 6, 2012, General Election* 13, CAL. SEC’Y OF STATE (2012), <http://elections.cdn.sos.ca.gov/sov/2012-general/sov-complete.pdf> [http://perma.cc/9MH4-L69G].