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Research Brief

TO: Representative Les Gara
FROM: Patricia Young, Manager
DATE: June 3, 2013
RE: Nonpartisan Redistricting
LRS Report 13.399

You wished to know which states redistrict through a nonpartisan procedure.

Iowa is the only state with a nonpartisan process for redistricting. In that state, the nonpartisan Legislative Services Agency draws the redistricting plan on the basis of population equality and non-population standards such as compactness, contiguity, preservation of political subdivisions and compliance with requirements of the Voting Rights Act, but without any political or election data, including the addresses of incumbents.[1] The plan is then voted upon—in a strictly up or down vote—by the legislature. Since Iowa's current process was established in 1980, the redistricting plans adopted have not been challenged in court.

In 13 other states, including Alaska, the primary responsibility for drawing district lines resides in a commission or board. The process for selecting commission members in eight—Arizona, California, Idaho, Missouri, Montana, New Jersey, Pennsylvania, and Washington—appears to be bipartisan in that initial members are selected equally from majority and minority political parties.

In the remaining 37 states, redistricting is in the hands of the legislature. Among those states, two—Maine and Vermont—use a bipartisan commission to advise the legislature in drawing the plan; and five states have a backup commission in case the legislature fails to draw up the plan within the allotted time. The backup commissions in Connecticut and Illinois appear to be selected on a bipartisan basis.

As you will recall, the process in Alaska changed with a narrowly approved constitutional amendment in 1998. That change was intended to lead to an independent public board operating "without regard to political affiliation." After the experience of redistricting and the attendant lawsuits following the 2000 census, Gordon Harrison—who served as the executive director for the redistricting board in 2000—wrote "The Aftermath of In Re 2001 Redistricting Cases: The Need for a New Constitutional Scheme for Legislative Redistricting in Alaska," which we attach.

In this thoughtful monograph, Dr. Harrison provides a thorough history of redistricting in Alaska, detailing the many related court cases, and the reasoning behind the 1998 constitutional amendment that removed the task from the governor and placed it in the hands of a five-member public board. While he speculates that it is "likely impossible to create a genuinely and reliably neutral commission," he nevertheless recommends that redistricting should be the task of the legislature—a relatively unpopular concept these days. He points out, however, that since both schemes tried in Alaska so far have resulted in "one-party plans and prolonged litigation," something needs to change in order to achieve a bipartisan plan.

Dr. Harrison suggests that bipartisan participation could be achieved by requiring a supermajority vote to adopt a plan. He further recommends that a necessary component would be a constitutional guarantee of equal access to staff and other resources needed to prepare redistricting proposals.

We hope this is helpful. If you have questions or need additional information, please let us know.

[1] Iowa's Legislative Services Bureau would roughly equate to a combination of the Alaska Legislature's Legal Services, Legislative Finance, and Research Services agencies.

COMMENT

THE AFTERMATH OF *IN RE 2001 REDISTRICTING CASES*: THE NEED FOR A NEW CONSTITUTIONAL SCHEME FOR LEGISLATIVE REDISTRICTING IN ALASKA

GORDON S. HARRISON*

In this Comment, the former executive director of the Alaska Redistricting Board argues that the proper forum for redistricting in Alaska is the state legislature, with procedural safeguards to ensure the minority party a voice. This Comment describes the history of redistricting and the process by which the 2000 districts were formulated. This Comment analyzes the process and critiques its shortfalls; it concludes that a change in redistricting policy is needed to avoid litigation and provide for more equitable redistricting to occur.

I. INTRODUCTION

Redistricting of the Alaska State Legislature after the 2000 census proceeded under the terms of a 1998 state constitutional

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has a name—gerrymandering—and it is a tradition in American politics.[1]

Partisan gerrymandering is tolerated by some who consider it an inevitable fact of political life,[2] a non-problem,[3] a non-serious problem,[4] or a problem that, however regrettable, is so complex there is no feasible way for judges to police it.[5] Toleration of partisan gerrymandering is unfortunate because gerrymandering is election fraud,[6] no less pernicious than stuffing the ballot box or intimi-

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1. BLACK'S LAW DICTIONARY 708 (8th ed. 2004) (defining gerrymandering as "[t]he practice of dividing a geographical area into electoral districts . . . to give one political party an unfair advantage by diluting the opposition's voting strength"). The term "gerrymander" was coined in 1812 to describe a set of districts that resembled a salamander drawn by Massachusetts Governor Elbridge Gerry. *Id.* at 709. However, the practice goes further back into American political history, and there is ample literature on the subject. *See, e.g.*, BACKSTROM ET AL., POLITICAL GERRYMANDERING AND THE COURTS (Bernard Grofman ed., 1990).

2. *See, e.g.*, Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 4 (1985) ("[T]here 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.").

3. *See, e.g.*, Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002) (arguing that state and federal elections are sufficiently competitive and that factors other than partisan redistricting account for problems perceived by those who seek reform of the redistricting process).

4. Michael A. Carvin & Louis K. Fisher, *"A Legislative Task": Why Four Types of Districting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2 (2005) (arguing that gerrymandering causes little long-term political harm).

5. *See* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and the Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1330 (1987) ("I do not wish to defend partisan gerrymandering. That practice, motivated as it is by narrow, self-interested ends, offends the ideal of public-regarding politics toward which our polity should strive. But the Constitution does not demand human, much less political, perfection; its tolerance for much that is repugnant to fastidious citizens is a price that we pay for a robust, relatively open-ended political life. Judicial regulation of partisan gerrymandering would be a cure worse than the disease . . . .").

6. Gerrymandering has been characterized as polite political fraud. *See* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 309–13 (1991). It has also been asserted that an incumbent gerrymander "perverts the democratic system, undermines legitimacy and accountability, encourages voter apathy, and institutionalizes a racial bias." Kristen Silverberg,

citizens,"[12] and the public policy of the state of Alaska should seek to prevent it.

B. Original Alaska Constitutional Provisions for Redistricting

The delegates drafting the new Alaska Constitution in Fairbanks during the winter of 1955–1956 almost certainly sought to prevent gerrymandering in Alaska.[13] They adopted a novel mechanism designed both to thwart partisan redistricting and to ensure timely redistricting—avoidance of the task was a major political problem of the day, as many legislatures around the country had a history of dilatory behavior perpetuating unequal legislative districts.[14] Possibly to counter the inclination of legislatures to procrastinate about redistricting, the delegates gave the governor responsibility for the task.[15] It seems likely that the delegates created

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12. Reynolds v. Sims, 377 U.S. 533, 565–66 (1964) ("achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment").

13. The term "reapportionment" is used interchangeably with the term "redistricting" in the Alaska Constitution. "Reapportionment" refers to the reallocation of seats to fixed districts, as for example the process by which Congress reallocates its 435 seats to each of the fifty states. "Redistricting" refers to the redrawing of election districts so that each district has an equal number of citizens. Thus, the states must redraw their internal congressional districts after a congressional reapportionment (Alaska does not because it has only one congressional seat), and they must periodically redraw state legislative districts to comply with state and federal law requiring numerical equality. At the time of Alaska's constitutional convention, the process for state legislatures involved elements of both reapportionment and redistricting, but it was generally called reapportionment. Today there are few fixed legislative district boundaries in the United States, and the preferred term is redistricting.

14. A 1952 observer noted, "between 1940 and 1950 only 18 states bothered to reapportion. Ten did not reapportion between 1930 and 1940. Mississippi's last reapportionment was made in 1890, Delaware's in 1897, and in Illinois and Alabama the last was in 1901. Connecticut established its present apportionment for the lower chamber in 1818 and for the senate in 1903." Lashley G. Harvey, *Reapportionments of State Legislatures—Legal Requirements*, 17 LAW & CONTEMP. PROBS. 364, 371–72 (1952). This was the backdrop to deliberations at the Alaska Constitutional Convention and to the landmark federal reapportionment rulings of the 1960s. The first court decision was *Baker v. Carr*, 369 U.S. 186 (1962), which established the justiciability of constitutional challenges to mis-apportioned districts. Another was *Reynolds v. Sims*, 377 U.S. 533 (1964), which required both houses of state bicameral legislatures to be apportioned exclusively on the basis of population.

15. ALASKA CONST. art. VI, § 3 (amended 1999).

change, complaining that the new language failed to express the full intent of "nonpartisan"; instead, they insisted on adding a new sentence: "Deliberations and decisions of the board shall be free from political considerations."[26] The term "political" was later changed to "partisan," but on reflection the delegates decided to strike the entire sentence from the final document on the grounds that such an admonition was unlikely to be effective.[27]

In an ebullient article describing the new constitution, Convention Chair and later-Governor William Egan wrote: "Members of the legislature will have nothing to do with reapportionment. Because of this provision so-called 'gerrymandering' will be impossible."[28] Delegate Hellenthal also published an article about the new constitution.[29] Among several "modern and progressive" features dealing with the legislature, he included "[a]utomatic reapportionment every ten years by the governor acting on the advice of an independent board."[30] Others were equally enthusiastic about the innovative redistricting provisions of Alaska's new constitution. The National Municipal League adopted the scheme for the sixth edition of the *Model State Constitution*, expressing confidence that the advisory board and judicial review would restrain the governor from partisan gerrymandering.[31]

C. History of Alaska Redistricting Prior to 2000

The original redistricting procedures of Article VI of the Alaska Constitution were used following the 1970, 1980, and 1990

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26. *Id.* Delegate Edward Davis explained to the convention that the committee on apportionment "intended that the board should actually in all respects act as a nonpolitical body, and accordingly asked us to add another sentence which would make it clear that the board was to act without regard to partisan politics." *Id.*

27. *Id.* at 3479–80. Delegate McCutcheon sought to have the provision eliminated, arguing "it is difficult to police the mind, and, if the intention of politics enters into a person's mind and they are so swayed, you certainly can't rule it out with a simple sentence of this nature. I think it is a frivolous inclusion." *Id.* at 3479.

28. William A. Egan, *The Constitution of the New State of Alaska*, 31 STATE GOVERNMENT 209, 212 (1958).

29. John S. Hellenthal, *Alaska's Heralded Constitution: The Forty-Ninth State Sets an Example*, 44 A.B.A. J. 1147 (1958).

30. *Id.* at 1149.

31. *See* NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (6th ed. 1963); *see also* GORDON E. BAKER, STATE CONSTITUTIONS: REAPPORTIONMENT (1960).

Jay Hammond succeeded William Egan as governor in 1974 and was reelected in 1978. It was Hammond's turn to proclaim a redistricting plan following the 1980 census, which he did on July 24, 1981.[42] Marilyn Carpenter, vice-chair of the Alaska Democratic Party, brought suit against the state. The superior court upheld the plan and she appealed. In *Carpenter v. Hammond*,[43] the supreme court held that inclusion of the City of Cordova in a district within southeast Alaska violated the state constitutional requirement that districts should contain (as nearly as practicable) a relatively integrated socioeconomic area; the supreme court remanded the matter to the superior court.[44]

The task of revising Hammond's plan fell to Governor William Sheffield, a Democrat, who succeeded Hammond in the general election of 1982. Sheffield issued an executive proclamation of redistricting on February 16, 1984.[45] The Kenai Peninsula Borough and seven residents of House District 7 filed suit over the bizarrely configured District 7 (the "doughnut district"). In *Kenai Peninsula Borough v. State*,[46] the Alaska Supreme Court agreed with the plaintiffs that the district was unconstitutional but found the flaw's effect to be de minimis and did not require the governor to reconfigure the district.[47] It may have been that the court recognized that it was now 1987 and there would be only one more general election before the next round of redistricting began.

After the 1990 census, the task of redistricting fell to the administration of Governor Walter Hickel. The governor proclaimed a redistricting plan on September 5, 1991.[48] The Southeast Conference (an alliance of municipalities in Alaska's southeast panhandle), several individuals, and the Democratic Party sued. The superior court found numerous constitutional problems with the plan, and the supreme court agreed with most of the lower court's assessment in deciding *Hickel v. Southeast Conference*.[49] That decision came on May 28, 1992, and as in the 1970s redistricting litigation, the deadline for filing for the next general election was at

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42. *See* Carpenter v. Hammond, 667 P.2d 1204, 1206 (Alaska 1983) (citing Proclamation of Reapportionment and Redistricting, July 24, 1981).

43. 667 P.2d 1204 (Alaska 1983).

44. *Id.* at 1215.

45. *See* Kenai Peninsula Borough v. State, 743 P.2d 1352, 1355 (Alaska 1987) (citing Proclamation of Reapportionment and Redistricting, Feb. 16, 1984).

46. 743 P.2d 1352 (Alaska 1987).

47. *Id.* at 1373.

48. *See* Hickel v. Southeast Conference, 846 P.2d 38, 66 (Alaska 1992) (citing Proclamation of Reapportionment and Redistricting, Sept. 5, 1991).

49. 846 P.2d 38, 56–57 (Alaska 1992).

both houses of the legislature,[56] and 1998 was a gubernatorial election year. If a Republican was elected governor, the party would control the redistricting process under either the existing procedures or the proposed amendment. But if the incumbent Democratic Governor, Tony Knowles, was reelected, the Democrats would control redistricting after the 2000 federal census under the existing procedures. However, under the proposed amendment, depending upon the loyalties of the Board's fifth member, the Democrats might not control redistricting. Thus, a consideration of the Republican legislative majority may have been that they would still be able to control redistricting under the proposed amendment if the fifth member were sympathetic to their interests, even if their party lost the governor's race.

The legislature adopted Legislative Resolve 74 on May 12, 1998.[57] The Democratic Party campaigned against the measure,[58] but it was ratified by voters at the general election of November 3, 1998, by a margin of 110,768 votes to 101,686.[59]

As amended, Article VI, Section 3 of the Alaska Constitution directs the Alaska Redistricting Board to reapportion the State House of Representatives and Senate.[60] The Board has five members.[61] The members must have been residents of the state for at least one year, may not be public officials, and may not run for legislative office in the election following their service on the Board.[62]

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56. Republicans outnumbered Democrats twenty-five to fifteen in the House and fourteen to seven in the Senate. Alaska Legislature, Committee/Member Information on the 20th Legislature, http://www.legis.state.ak.us/basis/commbr_info.asp?session=20 (last visited Feb. 24, 2006).

57. H.J. Res. 44, 20th Leg., 2nd Sess. (Alaska 1998).

58. For instance, the chair of the Alaska Democratic Party, Deborah Bonito, wrote the statement in opposition to the measure that was published in the official state election pamphlet distributed prior to the election. *See* STATE OF ALASKA, DIV. OF ELECTIONS, 1998 OFFICIAL ELECTION PAMPHLET, STATEMENT IN OPPOSITION TO CONSTITUTIONAL AMENDMENT TO REORGANIZE REAPPORTIONMENT BOARD (1998), *available at* http://www.ltgov.state.ak.us/elections/1998oep/98bal3.htm.

59. STATE OF ALASKA, DIV. OF ELECTIONS, ELECTION SUMMARY REPORT 6 (1998), *available at* http://www.ltgov.state.ak.us/elections/elect98/general/results.pdf. Article XIII, Section 1 of the Alaska Constitution allows the legislature to propose constitutional amendments by a two-thirds majority vote of each house. Proposals are to be put on the ballot at the next general election, where they must garner a majority of the votes cast in order to be adopted. ALASKA CONST. art. XIII, § 1.

60. ALASKA CONST. art. VI, § 3.

61. ALASKA CONST. art. VI, § 8(a).

62. *Id.*

the Alaska Legislature,[73] the amendment requires the use of single-member districts (as opposed to multi-member districts used elsewhere).[74]

Section 6 specifies that all districts shall, as nearly as practicable, contain equal population numbers, be composed of contiguous and compact territory, and contain a relatively integrated socio-economic area.[75] The Board is directed to give consideration to local government boundaries, and "drainage and other geographic features" must be used in "describing boundaries whenever possible."[76] These guidelines are not new—the old Section 6 required the governor to follow them as well.[77]

In 1999, the legislature passed Senate Bill 99, which set in motion certain preparations for the impending redistricting prior to the appointment of the Board.[78] This measure also defined the phrase "decennial census of the United States" used in Article VI to mean enumeration figures unadjusted by either the federal Census Bureau or the Alaska Redistricting Board.[79] The Census Bureau was contemplating use of sampling data and statistical techniques to adjust enumeration results for over-count and under-count of certain segments of the population, and previous Redistricting Boards in Alaska had used surveys to eliminate non-resident military personnel from the state's population base.[80] Both sets of adjustments were commonly thought to benefit Democrats.[81]

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73. ALASKA CONST. art. II, § 1.

74. ALASKA CONST. art. VI, § 4.

75. ALASKA CONST. art. VI, § 6.

76. *Id.*

77. *Id.*

78. Act of Apr. 23, 1999, S.B. 99, 21st Leg., 1st Sess. (Alaska 1999).

79. *Id.* at § 3 (codified at ALASKA STAT. § 15.10.200 (2004)).

80. The elimination of non-resident military personnel from the population base in previous redistricting is discussed at length in *Carpenter v. Hammond*, 667 P.2d 1204, 1210–13 (Alaska 1983), and *Groh v. Egan*, 526 P.2d 863, 869–74 (Alaska 1974).

81. Observation of the author. The U.S. Bureau of the Census decided not to adjust the enumeration figures. *U.S. Will Not Adjust 2000 Census Figures*, N.Y. TIMES, Mar. 7, 2001, at A16. Likewise, the Alaska Redistricting Board decided not to adjust Alaska population figures by eliminating non-resident military personnel. *See* ALASKA REDISTRICTING BD., REP. TO ACCOMPANY REDISTRICTING PROCLAMATION OF JUNE 18, 2001 at 3, *available at* http://www.state.ak.us/redistricting/proclamation/report.pdf [hereinafter 2001 REPORT].

districting plans from several groups, and it had provided an opportunity for a proponent of each plan to describe and discuss it with the Board.[90] During the meeting of April 18, 2001, the Board adopted four plans and an alternative for Anchorage as draft plans, in compliance with its constitutional obligations.[91]

The Board and its staff prepared two of the draft plans. These were designated Plan 1 and Plan 2. They included an alternative regional plan for Anchorage that could be used with either alternative.[92] Plan 1 remained essentially unchanged from the draft prepared by staff, but Plan 2 incorporated numerous changes made by the Board as a result of the work sessions and public meetings between April 10 and April 18.[93]

The third plan was prepared by a citizens' group, Alaskans for Fair Redistricting ("AFFR").[94] This was a statewide coalition of Native corporations, individuals, labor unions, and environmental organizations.[95] Juneau attorney Myra Munson, who spearheaded the litigation against Governor Hickel's redistricting plan in 1991,[96] served as AFFR's legal counsel.[97] The Democratic Party was not formally affiliated with the group, but the party's chair was instrumental in its formation.[98] Personal staff of Democratic Governor Tony Knowles was deeply and openly involved in AFFR's work, and the Department of Law provided support.[99]

The fourth potential plan was a regional plan for southwest Alaska that was prepared by Calista Corporation, a regional Native corporation with headquarters in Bethel. This plan sought to create two rural districts of predominantly Native communities.[100]

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90. *Id.*

91. *Id.*

92. *Id.*

93. Observation of the author.

94. 2001 REPORT, *supra* note 81, at 4.

95. Sheila Toomey, *Opponents of Redistricting Plan Charge Improper Influence*, ANCHORAGE DAILY NEWS, Jan. 16, 2002, at B1. AFFR described itself as "a broad coalition of progressive Alaskans working for an equitable redistricting plan that will serve to provide the best representation to Alaskan voters." ALASKANS FOR FAIR REDISTRICTING, REP. TO THE ALASKA REDISTRICTING BD. AND PROPOSED PLAN 1 (Apr. 3, 2001), http://www.state.ak.us/redistricting/maps/affr/affr_report.pdf.

96. Ms. Munson represented the Southeast Conference and Mut-Su Borough. *See* Hickel v. Southeast Conference, 846 P.2d 38, 41 (Alaska 1992).

97. Toomey, *supra* note 95, at B1.

98. Observation of the author.

99. Observation of the author.

100. The plan linked the Inupiat communities of Seward Peninsula with the upriver Yukon Athabaskan communities to form one district and linked the Yupik

necessary technical corrections to the district boundary descriptions, to produce a full set of maps, and to prepare written descriptions of the districts for a formal proclamation of the plan on June 18, 2001, in the Board's Juneau office.[105]

4. Litigation. Within the thirty-day limit,[106] nine lawsuits challenging the Board's final plan were filed in superior courts around the state; these complaints were consolidated in Anchorage before Judge Mark Rindner under the caption *In re 2001 Redistricting Cases v. Redistricting Board.*[107] The plaintiffs were municipalities (the Aleutians East Borough and the cities of Valdez, Craig, Cordova, and Delta Junction) and three individuals.[108] A three-week trial began on January 7, 2002 and concluded on January 25, 2002. Judge Rindner declared House Districts 12 and 16 in the final plan to be unconstitutional and dismissed all other claims.[109]

The Alaska Supreme Court entertained petitions for review of the superior court order. Parties to the litigation presented oral arguments in mid-March, and the court ruled on March 21, 2002.[110] The supreme court affirmed Judge Rindner's orders that were not inconsistent with its own decision and remanded the plan to the Board with rulings that went well beyond those of the superior court.[111] It affirmed the unconstitutionality of District 16 because it contained a bizarrely shaped appendage and was insufficiently compact.[112] It also declared District 5 to be non-compact, and ordered the Board to redraw it or to expressly find that the Voting Rights Act required such a configuration in the Board's plan.[113] The court ordered the Board to reconsider Districts 12 and 32, be-

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boundary that suggested they were intended to include a particular residence and exclude another from House District 4. These were called to the attention of board members and all agreed that they should be deleted. There was no time for the staff to examine any other district boundaries at this level of detail. Observation of the author.

105. 2001 REPORT, *supra* note 81, at 5.

106. *See* ALASKA CONST. art. VI, § 11.

107. Mem. and Order at 22 n.13, *In re* 2001 Redistricting Cases v. Redistricting Bd., No. 3AN-01-8914 CI (Alaska Super. Ct. Feb. 1, 2002), *available at* http://www.state.ak.us/redistricting/litigation/Memorandum_and_Opinion.pdf.

108. *Id.* Several of the suits also named board members and the executive director, but these named defendants were subsequently dropped.

109. *Id.* at 121.

110. *In re* 2001 Redistricting Cases v. Redistricting Bd., 44 P.3d 141 (Alaska 2002).

111. *Id.* at 143–47.

112. *Id.* at 143.

113. *Id.*

Bowl.[124] AFFR submitted three alternatives.[125] Board member Mason also prepared a proposal and submitted it to the Board by the April 9 deadline.[126] Mason developed this proposal in negotiations with representatives of several plaintiffs in the consolidated lawsuit against the Board, and with various legislators.[127] This plan revised the districts that the supreme court had directed the Board to change or reconsider and re-drew the Anchorage districts to reduce the maximum population deviation to 1.35 percent.[128] Board staff posted all these proposals on the Board's website on April 10.[129]

At the meeting of April 12, the Board considered a total of nineteen redistricting scenarios, ten of which were prepared by the Board's staff.[130] The staff scenarios were both statewide and regional, and the scenarios included various revisions of draft Plans 1 and 2, as well as new conceptual redistricting solutions in compliance with the court orders.[131] Deliberations came to focus on Mason's draft plan.[132] Attorneys for a number of plaintiffs and interveners in the redistricting litigation said either that the plan was satisfactory to their clients or that they would recommend that their clients accept it. The Board's attorney opined that the plan satisfied the orders of the supreme court.[133] On April 13, the Board unanimously adopted this plan, pending technical review by staff.[134] A formal proclamation was made to the general public on April 25, 2002.

On May 9, Superior Court Judge Rindner upheld the amended plan in its entirety, against objections from two of the original nine plaintiffs and from a few individuals new to the litigation who complained about their districts in north Anchorage.[135] The judge found that the Board had justified the non-compact shape of House District 5 on the grounds of necessity under the Voting

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124. *Id.*
125. *Id.*
126. *Id.*
127. Observation of the author.
128. Observation of the author.
129. 2002 REPORT, *supra* note 119, at 2.
130. *Id.*
131. *Id.*
132. *Id.*
133. Observation of the author.
134. 2002 REPORT, *supra* note 119, at 2.
135. *In re* 2001 Redistricting Cases v. Alaska Redistricting Bd., No. 3AN–01–8914 CI, at 3, 12 (Alaska Super. Ct. May 9, 2002), http://www.state.ak.us/redistricting/litigation/FinalJudgment050902.pdf.

cant amendment a plan that was crafted by AFFR, a group with ties to the Democrats, but everyone had had a chance to speak.[144]

Nonetheless, that one party will have at least a three-member majority on the Board to give the nod to its side's proposal is virtually assured by the method of appointing Board members. As previously described, this method has the Speaker of the House and the President of the Senate each appointing a member, and the governor appointing two.[145] The Chief Justice of the Alaska Supreme Court appoints the fifth.[146] If at the time of appointment the leader of one chamber is of the same party as the governor, that party would have a three-member majority regardless of the party allegiance of the supreme court's appointee. If, at the time appointments are made, both legislative leaders are of the same party as the governor (as they are at the time of this writing), that party would have a four-member majority without the judicial appointee. Given Alaska's past political landscape, both Republicans and Democrats have had the opportunity to appoint two members of the first Alaska Redistricting Board; however, there is no assurance in the future that these appointments will continue to be politically balanced. Furthermore, the fifth member is not selected by the others, but is appointed by the Chief Justice, and is under no legal or moral obligation to function as a neutral referee on the Board. The fifth member may align himself or herself with any of the other appointees. Thus, the appointment rules are not designed to produce a bipartisan Redistricting Board with a tie-breaking fifth member, which is the preferred arrangement for redistricting commissions.[147] Rather, members are named by elected officials who have a vital interest in the outcome of the panel's work, and they should not be expected to be impartial. Indeed, it is likely im-

144. *Id.* at 57–58.

145. ALASKA CONST. art. VI, § 8.

146. *Id.*

147. *See* Jeffrey C. Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 839–40 (1997); Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, *in* REPRESENTATION AND DISTRICTING ISSUES 7, 10–11 (Bernard Grofman et al. eds., 1982). There is a common misunderstanding that bipartisan commissions with a tie-breaking fifth member are removed from the political fray and act in an independent and politically disinterested manner. *See generally*, Bruce Adams, *A Model State Reapportionment Process: The Continuing Quest for 'Fair and Effective Representation'*, 14 HARV. J. ON LEGIS. 825 (1977).

tricting.[151] State legislatures have the ultimate authority for both congressional and legislative redistricting in all but twelve states.[152]

Delegates to Alaska's Constitutional Convention vested redistricting authority in the office of the governor because legislatures were notorious for evading the responsibility. But that was then, before *Baker v. Carr* and its progeny. Now the state constitution and federal law require reapportionment every ten years, and courts are willing to hear complaints about tardiness in the matter.

Redistricting plans emanating from legislatures have at times been famously and bitterly contentious,[153] but this conflict most often occurs when one of the major parties has exclusive control over the process. When both parties play a role, they are forced to negotiate and compromise in order to pass a reapportionment bill.[154] Thus, for the Alaska legislature to assume the authority for its own redistricting, both major parties must be assured of participating in the drafting and passage of a plan. This can be accomplished by requiring a three-fourths supermajority vote in each chamber to pass a redistricting bill.[155]

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151. The U.S. Supreme Court has said that reapportionment planning is a legislative task. Wise v. Lipscomb, 437 U.S. 535, 539–40 (1978). "We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination,' for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." Connor v. Finch, 431 U.S. 407, 414–15 (1977) (citing Reynolds v. Sims, 377 U.S. 533, 586 (1964)).

152. Redistricting Comm'ns, Nat'l Conf. of State Leg., http://www.ncsl.org/programs/legman/redistrict/com&alter.htm (last visited Mar. 27, 2006). This overview of the subject says the record of redistricting commissions is "inconsistent." *Id.*

153. The most recent partisan gerrymandering to reach national attention occurred in 2003 when the Texas legislature redrew state congressional districts. The governor and the majority of both houses of the legislature were Republican. *See* Vasan Kesavan and Michael Stokes Paulsen, *Let's Mess with Texas*, 82 TEX. L. REV. 1587, 1587–88 (2004).

154. Political scientists David Butler and Bruce Cain say that bipartisan consensus is more common than partisan gerrymandering in the United States because typically neither party has complete control of the redistricting process in the legislature. "If at least one of the state legislative houses or the governorship is in different hands, the effect will be similar to a two-thirds vote requirement or to an evenly balanced commission." DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 152–53 (1992).

155. This supermajority vote would be comparable to the three-fourths supermajority vote required by Section 17(c) of Article IX to exceed the restrictions on

In other words, the legislature is superior to a commission for thrashing out a redistricting plan because it is structured to handle political conflict. Its rules do not constrain it to operate in public. Alaska's Open Meetings Act prohibits the members of a public board from discussing the substantive business of the board privately.[159] The politics that drive the design of a redistricting plan are not a subject for public discussion, and therefore a commission must allow others, including its own staff or outside groups, to do the real work of redistricting. Thus, it is not surprising that the Alaska Redistricting Board adopted a final plan ready-made by AFFR, and later an amended final plan that was negotiated privately by one board member and key stakeholders.

Unfortunately, the public is confused about the commission's work. The popular impression is that a commission is insulated from politics and its members strive in good faith to write their own plan that is free of partisan bias. Few Alaskans today realize that the members of the Alaska Redistricting Board and its staff did not participate in drafting the plans the Board adopted. A redistricting plan from the legislature would not be shielded by an aura of impartiality; it would be looked at squarely by the public as the product of the legislative process, like any other legislative act.

C. Rebuttal of Objections to Legislative Districting

A criticism of allowing legislators to create bipartisan redistricting plans is that they collude to perpetuate the political status quo by creating safe seats for both parties and individual incumbents. These collusive agreements, or bipartisan gerrymanders, have been described as analogous to market-sharing agreements among corporate cartels that stifle competition, and they are the subject of much academic hand-wringing.[160]

However, any bipartisan plan will be a collusive agreement to protect the status quo—even those produced by a bipartisan commission that operates as designed to operate (that is, with a neutral, tie-breaking member who effectively forces the partisan members to compromise and cooperate in designing a plan).[161] The virtue of bipartisan plans, whether produced by a commission or the legisla-

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into larger public policy programs. The removal of politics from redistricting seeks to break these relationships." Persily, *supra* note 3, at 679.

159. Open Meetings Act, ALASKA STAT. §§ 44.62.310–.312 (2004).

160. *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

161. *See* Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547, 1574–76 (2005)(critiquing bipartisan commissions).

of this complicated, time-consuming task. For example, the legislature could (and doubtless would) appoint a special joint committee that would initiate preparations for redistricting well ahead of the release of federal census data (e.g., purchasing computer systems and redistricting software, and/or contracting for studies necessary to show compliance with the Voting Rights Act). The legislature could hire a specialized staff to negotiate a draft plan.[167] In any case, the matter of redistricting is sufficiently complex and technical such that specialized structures and procedures would have to be devised to make it manageable by the legislature. As another means of avoiding preoccupation with redistricting, the legislature could choose to deal with the matter in a special session following the close of the regular session in early May.

An objection to another constitutional amendment to Article VI is that the current guidelines for drawing election districts—equal population, contiguity, compactness, respect for local government boundaries, and socio-economic integration—provide a sufficient barrier to partisan gerrymandering.[168] These guidelines impose important constraints on the drawing of election district boundaries. Their diligent enforcement by the Alaska Supreme Court in *In re 2001 Redistricting Cases* led the Alaska Redistricting Board to amend its final plan significantly enough to attract a unanimous vote for adoption. The substantive requirements of Section 6 would remain unchanged by the amendment being proposed here. To pass constitutional muster, the legislature's plan would have to respect these requirements. However, only a person who has never worked with modern redistricting computer programs would argue that the constitutional guidelines are a bulwark against gerrymandering.[169] There is ample opportunity for mischief

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167. The legislature should not create a public advisory board, because the board would be prohibited by the Open Meetings Act from engaging in the type of negotiation that is essential to preparing a viable bipartisan plan. Open Meetings Act, ALASKA STAT. §§ 44.62.310–.312 (2004). Also, the legislature should not simply seek to amend the constitution to require legislative ratification by a supermajority vote of a plan adopted by the Alaska Redistricting Board. The only way a board plan would be readily ratified is if legislators were directly or indirectly involved in its preparation. It would be more efficient for the legislature to create a mechanism using legislative staff to prepare a draft plan.

168. *See* ALASKA CONST. art. VI, § 6 .

169. "The commonly held view that reliance on formal criteria such as compactness or equal population can prevent gerrymandering is simply wrong." Grofman, *supra* note 11, at 88.

ideal one, but it is an improvement over a redistricting plan that gives a disproportionately large electoral advantage to the major party. A bipartisan redistricting plan is the best that can be hoped for in the real political world.