

## Independent Redistricting Commissions<sup>1</sup>

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Gerrymandering in the United States is as old as the Republic and older than the word itself. In fact, the ink was hardly dry on the Constitution when Patrick Henry, then a member of the Virginia legislature, worked to secure passage of a congressional map that he hoped would deprive rival James Madison of a seat. (Alas for Henry, Madison won anyhow.)

In the years since, Americans have tried a variety of ways to limit gerrymandering – or at least its extreme manifestations. One of the more frequently discussed ideas has been to remove or distance elected politicians from the process by transferring primary responsibility for redistricting to a commission.

Currently 23 states use some form of redistricting commission to do either legislative or congressional redistricting. These commissions differ considerably, however, in their structure and, in particular, in the degree to which political actors remain involved in the mapdrawing process. The proposal presented for this debate is based on the model used in California, which many observers regard as the commission that goes the furthest in minimizing legislative interference.

The Brennan Center is currently undertaking qualitative and quantitative research on the performance of redistricting commissions, and we look forward to providing updates at similar conferences in the future.

### **The California Model<sup>2</sup>**

Under the California model, a 14-member independent redistricting commission draws the lines for congressional, state legislative, and Board of Equalization districts.

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<sup>1</sup> This paper does not necessarily reflect the institutional positions of the Brennan Center for Justice at NYU School of Law, and is offered for discussion purposes only.

<sup>2</sup> CAL. CONST. art. XXI, § 2.

### Selection of Commission Members

The selection process used for the California commission is by all accounts complex. Members are chosen randomly from a pool of 60 qualified applicants – assembled by the state’s independent auditor based on criteria specified in the California Constitution – that includes 20 Democrats, 20 Republicans, and 20 persons not registered with either of the two largest parties.

Before the random drawing to select the initial eight commissioners, legislative leaders from each chamber are permitted to strike two applicants from each of the three subpools. After the striking process, the State Auditor randomly draws eight names from the remaining pool of applicants – with three coming from each subpool affiliated with the major political parties and two from the subpool affiliated with neither major party. Those eight commissioners then select two additional commissioners from each of the three subpools, with a requirement that the six remaining appointees reflect the state’s “racial, ethnic, geographic, and gender diversity.”<sup>3</sup>

When it is finally assembled, the commission consists of:

- five members who are registered with the largest political party in the state;
- five members who are registered with the second largest political party in the state;
- four “independent” members who are registered with neither of the largest parties.

### Substantive Rules

One aspect of the California model that is now beginning to be introduced in other jurisdictions is the use of criteria to restrict how the commissioners can draw maps. In California, these criteria impose geographic constraints requiring that districts be contiguous and as compact as possible, and minimizing the splitting of political subdivisions. California’s criteria also include less common constraints, such as defining what constitutes a community of interest and prohibiting mapdrawers from favoring incumbents, candidates, or political parties. Another unique aspect of California’s system is that it prioritizes the relative importance of each criterion.

The full text of California’s criteria is provided below in their ranked order:

- (1) Districts shall comply with the United States Constitution. Senate, Assembly, and State Board of Equalization districts shall have reasonably equal population with other districts for the same office, except where deviation is required to comply with the federal Voting Rights Act or allowable by law.
- (2) Districts shall comply with the federal Voting Rights Act (42 U.S.C. Sec. 1971 and following).
- (3) Districts shall be geographically contiguous.
- (4) The geographic integrity of any city, county, city and county, neighborhood, or community of interest shall be respected to the extent possible without violating the

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<sup>3</sup> CAL. GOV’T CODE § 8252(g).

requirements of any of the preceding subdivisions. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

- (5) To the extent practicable, and where this does not conflict with the criteria above, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant population.
- (6) To the extent practicable, and where this does not conflict with the criteria above, each Senate district shall be comprised of two whole, complete, and adjacent Assembly districts.<sup>4</sup>

### Voting Rules

Within these constraints, the independent commission must create and approve maps for congressional, state legislative, and Board of Equalization districts. For any map to be approved, it must receive at least nine affirmative votes from the commission, with at least three commissioners from each major political party and three commissioners from neither major party voting in favor. Although the commissions' maps are final and cannot be changed by the legislature, they are still subject to a referendum organized by citizens. If the commission fails to approve a final map, or if the voters disapprove a map in a referendum, then the California Supreme Court appoints special masters to draw the final map.

### **Notes and Thoughts on the California Model and Key Democracy Criteria**

#### Voter turnout and participation: 3

Overall, turnout in California continues to be low by national measures. In 2012, California ranked 41st among states in turnout,<sup>5</sup> and in the 2014 mid-term elections, the state fared only slightly better, coming in 40th.<sup>6</sup>

However, it is worth noting that California's new congressional map contains eleven competitive congressional districts, compared with four under the pre-redistricting map, and in those 11 districts, turnout was on average 2 percentage points higher (43.8%) than the average for remaining districts (41.8%), with turnout approaching or exceeding 50% in a number of instances.<sup>7</sup>

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<sup>4</sup> CAL. CONST. art. XXI, § 2(d).

<sup>5</sup> Sean Sullivan, *The States With the Highest and Lowest Turnout in 2012, in 2 Charts*, WASH. POST, March 12, 2013, available at <http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/12/the-states-with-the-highest-and-lowest-turnout-in-2012-in-2-charts/>.

<sup>6</sup> Editorial, *The Worst Voter Turnout in 72 Years*, N.Y. TIMES, Nov. 11, 2014, available at [http://www.nytimes.com/2014/11/12/opinion/the-worst-voter-turnout-in-72-years.html?\\_r=0](http://www.nytimes.com/2014/11/12/opinion/the-worst-voter-turnout-in-72-years.html?_r=0).

<sup>7</sup> These statistics were calculated from California voter registration information and election results retrieved from the California Secretary of State. CAL. SEC'Y OF STATE, *The Statement of Vote – 2014 United States Representative in Congress by District*, available at <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/43-congress.pdf>; CAL. SEC'Y OF STATE, *Registration by Congressional District*, available at here <https://www.sos.ca.gov/elections/ror/ror-pages/15day-general-2014/congressional.pdf>.

### Fair representation of parties and political groups: 3.5

Fair partisan representation was not a goal of the California independent commission, and, indeed, the commission was expressly barred from drawing maps with political outcomes in mind.

That said, the 2014 election left Democrats holding 39 of California's 53 congressional seats, with Republicans holding the remaining 14. That compares with a 38 Democrat/15 Republican split after the 2012 election – the first election cycle under the new map – and a 34 Democrat/19 Republican split prior to redistricting.

By one measure sometimes used to evaluate redistricting, Democrats are somewhat overrepresented currently since the 73.5% of congressional seats won by Democrats in 2014 exceeds by a fair margin the 60% of the statewide vote received by Democratic gubernatorial candidate Jerry Brown.

However, by another measure, the map may be an improvement over its predecessor in that it allows for greater electoral swings. A model prepared by Vladimir Kogan and Eric McGhee predicts that in a “good Democratic year,” Democrats should win roughly 72% of seats under the map – consistent with actual results in 2012 and 2014.<sup>8</sup> Kogan and McGhee's modelling suggests that in a “good Republican year,” Democrats could win as few as 63% of the seats. By contrast, under the prior map, their model suggests that wave years would have virtually no impact on results.

### Fair representation of racial minorities and women: 4

In California, the redistricting plan adopted in 2011 saw an increase in the number of seats where Latinos form a majority. More notably, the number of such seats increased between release of the draft 2011 plans and the final plan, suggesting that advocates for minority communities, both on and outside the commission, were able to effectively use the process to advance their communities' interests.<sup>9</sup> In contrast to other states and past history in California, the creation of these additional majority-minority seats did not require litigation.

The changes to California's congressional delegation are summarized in the chart below, showing the number of majority-minority districts by CVAP:<sup>10</sup>

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<sup>8</sup> Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission's Final Plans*, 4 CALIFORNIA JOURNAL OF POLITICS AND POLICY (2012).

<sup>9</sup> RAPHAEL SONENSHEIN, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *WHEN THE PEOPLE DRAW THE LINES* 46-8 (2013), available at <https://cavotes.org/sites/default/files/jobs/RedistrictingCommission%20Report6122013.pdf>.

<sup>10</sup> Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission's Final Plans*, 4 CALIFORNIA JOURNAL OF POLITICS AND POLICY 7 (2012).

	2001 Plan	2011 Draft Plan	2011 Final Plan
Black	0	0	0
Latino	6	5	7
Asian	0	0	0

With respect to women, California’s redistricting plan was not drawn with representation of women in mind, and the plan appears to have been neutral in that regard. Over several election cycles under the state’s prior congressional map, California had between 18 to 20 women in its congressional delegation, while under the current map, the delegation has 19 women. Women may benefit, however, over the long run from the new structure to the extent that it produces districts that are more compact and that keep communities together. This is because women, in general, still often are at a disadvantage to men when it comes to fundraising, name recognition, and the other things necessary to be a viable candidate. Districts that are compact and community based can help equalize the playing field for women insofar as they are easier to organize and campaign in and that the advantages of having held a local office can carry over more easily to a congressional race.

Electoral competition: 4

The California independent commission was not allowed to consider partisan outcomes when drawing maps. However, early indications are that its congressional map has increased the number of competitive seats, with one study finding that the number of seats where a candidate would likely win by less than ten percentage points increasing from 5% under the state’s 2001 map to 18% under the 2011 map. In fact, those same models show that the percentage of competitive seats could be as high as 25% in the absence of incumbents (i.e., open seat elections).<sup>11</sup>

In 2014, the map had 11 districts that were decided by ten percentage points or less.<sup>12</sup> Thus, roughly 20 percent of 2014 House races were competitive in 2014, significantly greater than the 11 percent of competitive House races nationwide last cycle.<sup>13</sup> While this is still only a minority of seats, it would be a notable and meaningful shift if it continues to be borne out over time.

Some commentators, though, have noted that the commission-drawn map still leaves the vast majority of California’s congressional districts uncompetitive.<sup>14</sup>

<sup>11</sup> Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission’s Final Plans*, 4 CALIFORNIA JOURNAL OF POLITICS AND POLICY (2012).

<sup>12</sup> CAL. SEC’Y OF STATE, The Statement of Vote – 2014 United States Representative in Congress by District, available at <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/43-congress.pdf>.

<sup>13</sup> David Wasserman, Loren Fulton & Ashton Barry, 2014 National House Popular Vote Tracker, COOK POLITICAL REPORT, available at [https://docs.google.com/spreadsheet/ccc?key=0AjYj9mXEIO\\_QdHVsbnnNdXRoaUE5QThHc1NWaTgzB2c&usp=drive\\_web#gid=0](https://docs.google.com/spreadsheet/ccc?key=0AjYj9mXEIO_QdHVsbnnNdXRoaUE5QThHc1NWaTgzB2c&usp=drive_web#gid=0).

<sup>14</sup> Devin McCarthy & Rob Richie, *California and the Limits of Independent Redistricting Commissions with Winner-Take-All*, THE CENTER FOR VOTING AND DEMOCRACY, Feb. 15, 2013, available at <http://www.fairvote.org/>

Reduction of polarization in Congress: 4

The jury is still out on the impact of California’s redistricting commission on polarization long term.

However, since redistricting in 2011, California’s congressional delegation has become both more liberal and less conservative according to one widely used ranking of the votes of members of Congress.<sup>15</sup>

Under the state’s prior map, all of the delegation’s 18 Republican members were rated either as “conservative” or “highly conservative.” After redistricting, the delegation’s 14 Republican members were rated: 3 highly conservative, 5 conservative and 6 moderate.

On the other hand, the delegation also has gotten somewhat more liberal as a result in an increase in the Democratic-held seats. Prior to redistricting, the Democratic delegation included 9 “liberal” and 21 “highly liberal,” along with 3 moderates. Under the 2011 map, as the number of Democratic seats increased, so did the number of liberal members, with 23 Democratic members now ranked as highly liberal, 10 as liberal, and 5 as moderates.

Shifts in the ideological composition of the California congressional delegation between 2010 and 2013 are summarized in the chart below (2010 figures in parenthetical):

	Overall <sup>16</sup>	GOP	Democratic
Highly conservative	3(8)	3(8)	0 (0)
Conservative	5 (10)	5(10)	0 (0)
Moderate	11 (3)	6 (0)	5 (3)
Liberal	10 (9)	0 (0)	10 (9)
Highly Liberal	23 (21)	0 (0)	23 (21)

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[research-and-analysis/blog/california-and-the-limits-of-independent-redistricting-commissions-with-winner-take-all/](#).

<sup>15</sup> The polarization figures presented here are derived from the *National Journal’s* vote rankings for the U.S. House of Representatives in 2010, reflecting polarization before the 2011 redistricting, and 2013, the most recent year for which data is available following the 2011 redistricting. Separating the members of the House into quintiles based on their vote rankings allows us to categorize individual members as highly conservative, conservative, moderate, liberal, or highly liberal relative to the rest of the congressional delegation. *2010: Pulling Apart*, NATIONAL JOURNAL, available at [http://assets.nationaljournal.com/voteratings/historical/NJ\\_House\\_2010.xls](http://assets.nationaljournal.com/voteratings/historical/NJ_House_2010.xls); *House Ratings*, NATIONAL JOURNAL, available at <http://www.nationaljournal.com/free/document/5075>.

<sup>16</sup> The *National Journal* did not report vote rankings for two of California’s U.S. Representatives in 2010 and one Representative in 2013. As a result, this table reflects data for 51 members of California’s congressional delegation in 2010 and 52 members in 2013.